

Natural Law Originalism for the Twenty-First Century – A Principle of Judicial Restraint, Not Invention*

Douglas W. Kmiec¹

I. INTRODUCTION: IS THERE A LAW THERE?

Is law more than a mere assertion of power? This question is often associated with controversial implied right claims such as abortion, assisted suicide, and same-sex marriage, and it has been well-described as “law’s quandary.”² We proclaim ourselves to be a “rule of law, not of men,” but are there just men and women hiding behind law’s facade, or is there really law there? Are judges on the state common-law courts just making up the law? Are federal judges doing the same in expounding “substantive” due process, or is there really something of *substance* to be discovered and applied? In philosophical terms, is there an ontology, a reality of law, or is it all contrivance?

We yearn to believe that law has an independent reality. Indeed, we colloquially talk this way all the time. In law school, we are given examinations that test not just memory, but the ability to reason in light of the application of “the law.” Discuss fully. In practice, clients seek to complete personal and business matters with their counsel on “the law.” When a client is confronted with some legal decision by an administrative agency or even a trial or appellate judge that strikes the attorney as odd, the attorney reassures the

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1. Caruso Family Chair and Professor of Constitutional Law, Pepperdine University. Professor Kmiec served as head of the Office of Legal Counsel (U.S. Assistant Attorney General) for Presidents Ronald Reagan and George H.W. Bush. Former Dean of the law school at The Catholic University of America, Professor Kmiec was a member of the law faculty for nearly two decades at the University of Notre Dame. Professor Kmiec is grateful to the Suffolk Law School community, and particularly the Law Review, for the opportunity to present an overview of this article initially as the eightieth Donahue Lecture. He is also appreciative for the research assistance of his darling daughter, Katherine Kmiec Turner, J.D. candidate 2007, Pepperdine University, and Amanda Kellar, J.D. candidate 2007, Suffolk University.

2. See generally STEVEN D. SMITH, *LAW’S QUANDARY* (2004).

client, “that really isn’t the law.” The examination and client counseling contexts may merely reflect the juxtaposition of current hypothetical or ruling with precedent, but let me suggest that it also implicitly tugs at that hopefully active corner of our mind that inquires: Is this outcome just? Certainly, the Justices of the Supreme Court have no escape from asking that higher order question, since the universe of precedent is theirs for the remaking. And if the Justices are not asking that question, they should know that the rest of us are, as the decisions from their Court are headlined in the morning paper. The general citizen readily asks: Does the law really sanction or deny same-sex marriage, racial preference, and juvenile capital punishment?³ Did the Court really apply the law correctly? Notice the inquiry is seldom, if ever: Do I like the way the Justices made up the law?

These are not merely colloquial expressions. As Professor Steven Smith has observed, we treat the law as pre-existing by the general presumption that judicial resolutions apply retroactively.⁴ This is done by indulging in the notion that dicta can be filtered from holding, and in an older tradition, still occasionally observed, that judicial decisions are mere evidence of law, not the law itself.⁵ An echo of the last point is specifically embedded in the Supremacy Clause which provides that laws and treaties made pursuant to the Constitution are the supreme law. Judicial decisions are not given that status,

3. See John S. Baker, Jr., *A Tribute to Justice Clarence Thomas: Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471, 495 (2000) (citing THE FEDERALIST NO. 78 (Alexander Hamilton) (Clint Rossiter ed., 1961)). As Professor John Baker has insightfully noted:

[A]ll can inquire skeptically: how does the Court determine limits on liberty other than arbitrarily if not from the constitutional text, history, and the common law? If from notions of natural law or justice, on what are such notions based? On reason, or on will? And does not even traditional natural law teaching require adherence to the limits of a judge’s constitutional authority?

Id.

The brief answers as detailed herein are: text, as informed by history and common law is a primary interpretative source; natural law, as understood at the time of the founding, is an indispensable background, interpretative principle, since as later explained, it is the premise of the sovereign incorporation of the United States; and of course, natural law originalism does not challenge that the Constitution is law including its separation of powers and limits thereon. Indeed, it will be argued here that natural law originalism strengthens and clarifies these limits by encouraging the judiciary to not insert its views of the human person where disputed conceptions of humanity have been resolved legislatively.

4. See Smith, *supra* note 2, at 54 (discussing idea of “judge-made law”). Justice Story, writing for the Court in *Swift v. Tyson*, 41 U.S. 1, 18 (1842), rejected the idea that decisions by the courts constituted laws:

In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often reexamined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect.

Id.

5. See *id.*

although it is sometimes claimed.⁶

II. HISTORY

A. *Modern Unenumerated Rights and Statutory Gaps – Natural Law Questions?*

It is my thesis that the founding generation of the original Constitution and the one existent in 1868, at the time of the addition of the Fourteenth Amendment, could not envision us individually or collectively answering the questions thus far examined without reference to natural law. Natural law, in a nutshell, assumes that just as there is a physical reality to the universe, there is also a moral one. This moral reality can be perceived by the reasonably functioning human mind, and when it is grasped, the mind will encourage the will to act accordingly.⁷

The general relationship between natural and positive law was outlined long ago by the respected American philosopher, Dr. Mortimer Adler.⁸ Borrowing directly from Aristotle, Adler underscored that “[o]f political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people’s thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent.”⁹ Thus, there are distinct, immutable principles of natural law, such as to seek the good, and precepts, such as not killing, not stealing, nor committing adultery. Despite these immutable principles, “many things [are left] undetermined which must be determined by the conventions of political or civil law.”¹⁰

Natural law is not a code book. It gives wide berth to the operations of positive law, and it is comprehended entirely differently by the mind. If one wanted to learn the law of a particular state, Adler commented, one would not ask someone to teach us this law by demonstrating rational conclusions from sound premises.¹¹ “The law of [a state] can only be taught by statement and it

6. See *Cooper v. Aaron*, 358 U.S. 1, 17 (1958). A unanimous Court made it plain that a racial segregationist state governor could not avoid the analogical interpretative force of *Brown v. Board of Education*, 347 U.S. 483 (1954). *Cooper*, 358 U.S. at 17.

7. JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITIONS 327-28 (1960).

8. MORTIMER ADLER, *The Doctrine of Natural Law Philosophy*, in I NATURAL LAW INSTITUTE PROCEEDINGS 65-84 (Alfred Scanlan ed., 1947) [hereinafter ADLER, *Natural Law Philosophy*].

9. *Id.* at 69.

10. *Id.* at 69-70.

11. See *id.* at 82 (discussing naturalists’ view of the law). But see ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); *infra* note 86 (bemoaning common law methodology and supporting interpretive method). Most ABA accredited law schools do not concentrate on the law of a particular state, but give emphasis to “thinking like a lawyer,” so that the law of any state can simply be added post-graduation through experience as well as some plain old rote memorization of local procedure and court rules. In this sense,

can only be learned by memory. This is due to its arbitrary character as positive law.”¹² In contrast, natural law is discovered by the individual through rational inquiry and it can be taught by others through rational instruction. Adler highlighted other differences as well. While positive law compels obedience through force and fear, there is no such temporal, external force with natural law.¹³ Positive law involves a free choice among several options, indifferent possibilities as the philosophers would say, whereas, with natural law, there is an objective answer even if it may be contested.¹⁴ Positive law is binding only within the limited sphere of temporal political authority and natural law is binding on everyone, in the sense that acting against our own nature will have ill consequence.¹⁵ These and other differences Adler highlighted between natural law and its positive counterpart should not be taken to mean that they are irrelevant to each other. Quite the contrary, as Adler instructed: “[p]ositive law without a foundation in natural law is purely arbitrary. It needs the natural law to make it rational. But natural law without positive law is ineffective for the purposes of enforcing justice and keeping peace.”¹⁶

It should be obvious that natural law does not *mandate* particular positive laws or the discovery of specific implied constitutional rights. Nevertheless, over time, lawyers have sought to further elaborate the relationship between natural law and positive law by drawing a comparison between natural-law principles and precepts on the one hand, and rules, on the other. “Principles and precepts” – like the injunction to seek the good or the proscription against killing or theft are

incapable by themselves of governing action, – for different reasons, however: in the case of principles, because they specify only the end, and action depends on specification of means; in the case of precepts, because they specify the means only generally and without reference to the contingent circumstances which are always involved in action.¹⁷

It is the contingent circumstances that make rules the usual province of positive enactment by a legislative body. Two consequences flow from the introduction of contingent circumstances, or facts: “[t]he first is that since facts are infinite in number, they cannot all be comprehended by human reason.”¹⁸

natural law may have more influence on legal curricula than meets the eye.

12. ADLER, *Natural Law Philosophy*, *supra* note 8, at 79.

13. ADLER, *Natural Law Philosophy*, *supra* note 8, at 81.

14. ADLER, *Natural Law Philosophy*, *supra* note 8, at 81.

15. *See* ADLER, *Natural Law Philosophy*, *supra* note 8, at 81-82.

16. *See* ADLER, *Natural Law Philosophy*, *supra* note 8, at 83.

17. HAROLD R. MCKINNON, *Natural Law and Positive Law*, in I NATURAL LAW INSTITUTE PROCEEDINGS 85, 97 (Alfred Scanlan ed., 1947).

18. *Id.* at 98.

The second consequence is related, but deals not with the unforeseen, but with the necessity of legal change due to changing facts.¹⁹

The first consequence, relating to factual contingency, results in any rule, which is based upon facts, must be based upon the generality of experience and will be defective to the extent that it fails to provide for the unexpected or unusual case. Part of natural law's potential contribution is using principle and precept to properly apply rules to contingent facts unforeseen by the legislature. Ironically, Justice Scalia, who disapproves of the use of natural law in adjudication, did something like this in *Kyllo v. United States*,²⁰ where he discerned that use of a thermal imaging device, a mechanism relatively new to law enforcement, would invade the reasonable expectation of privacy when pointed at a home.²¹ Perhaps Scalia pursued this avenue in *Kyllo* since the Fourth Amendment reasonableness requirement has a kind of plasticity, a precept-like quality that permits judicial application. In general, however, Justice Scalia strongly criticizes judges who attempt similar interpretative efforts with a rule or statute whose text leaves less room for judgment, even if the plain meaning of the text seems oddly contrary to legislative purpose.²² For Scalia, judges may not purport to help the legislature out by adding exemptions that a reasonable legislature would have wanted, but failed to provide.²³

The second consequence introduced by factual contingency arguably necessitates a subsequent rule or statutory application, which should reflect this better understanding and achieve a closer connection between principle or precept and rule in relation to facts. That natural-law principles and precepts are immutable should not preclude this better application, even if it makes the positive law or rule seem "relative, contingent and changeable."²⁴ Again, unless the original statutory wording was unusually loosely formulated, Justice Scalia would likely defer to the legislature to both better determine and respond to the facts with formal lawmaking. Other judges, more controversially, act to update specific and unspecific laws alike through so-called dynamic interpretation.²⁵ The Scalia and dynamic interpretation positions are at the extremes of statutory interpretation, and while the separation of powers rather than natural-law reasoning probably resolves these methodological disputes, the latter does offer a middle ground. Specifically, insofar as natural law consideration more readily helps a judge identify a constant, underlying

19. *Id.*

20. 533 U.S. 27 (2001).

21. *Id.* at 40.

22. See SCALIA, *supra* note 11, at 18.

23. See SCALIA, *supra* note 11, at 18-20 (discussing judicially interpreted legislative intent in *Holy Trinity v. U.S.*, 143 U.S. 457 (1892)).

24. MCKINNON, *supra* note 17, at 98.

25. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982); see also WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 50 (1994).

principle distinct from judicial will, it dampens some “legislating from the bench.”

Apart from its utility to judges, the distinction between principle, precept, and rule is nevertheless of great service to a responsible legislative body by reminding the lawmaker that positive laws ought not be drafted antagonistically to natural law, principle, and precept. Moreover, if the lawmaker keeps the natural law backdrop in his or her mind in order to identify the universe of behavior intended to be affected and also to anticipate, as best one can, future development, the legislative product will be likewise improved. In this way, natural law has utility both for the legislative process and as an interpretive principle for the Court at least with respect to those more grandly-worded provisions of the Constitution and similarly pliable statutes.

B. The Uneasy Relationship Between the Constitution and Natural Law

Notwithstanding what has just been argued, it must be conceded that the relation between natural law and the Constitution is much disputed. Later, we will explore more particularly four distinct approaches of modern constitutional interpretation, and we will see that only one averts directly to natural law.²⁶ This is quite odd for a nation founded on the twin sources of the “Laws of Nature and of Nature’s God.”²⁷ The American Constitution is a work of genius, largely to the extent it remains what its drafters fashioned it to be: a faithful reflection of the human person.²⁸ The checks and balances and calibrations of authority in constitutional text cast light upon the strengths of a human person created in the image of a super-natural God and also the practical, prudent realization by our founders that as human persons, each of us have weaknesses and we are not God.

Our nation has for some years been disputing the constitutional significance of natural law and much of the 5-4 sparring on the U.S. Supreme Court relates to this dispute. The centerpiece issue is abortion, but lingering somewhat in the background of public discussion is assisted suicide and same-sex marriage. Competing ideas of human nature lie behind each with abortion advocates diminishing the significance of the fetus and opponents, the reverse. The viability line which animates *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁹ is unilluminating, since the same highly dependent humanity exists before, and, for a considerable period, after that line. The debate continues with end-of-life matters, but here the divide is over a realized

26. See *infra* notes 86-113 and accompanying text.

27. DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

28. Douglas W. Kmiec, *The Human Nature of Freedom and Identity – We Hold More Than Random Thoughts*, 29 HARV. J.L. & PUB. POL’Y 33, 33 (2005) [hereinafter Kmiec, *Human Nature*].

29. 505 U.S. 833 (1992).

or imminent profound loss of life quality that some contend deprive human nature of its value. With same-sex marriage, proponents claim a natural intimacy comparable to that enjoyed by a husband and wife, with the opposition asking: But where is the potential for natural childbirth?

All of the above polarities are attempts to describe our nature. It is therefore, not surprising to find that these litigated divisions over natural law meaning are interwoven with claims of freedom of religion and speech. Certainly, a good many of the confirmation hearing questions tossed in the direction of John Roberts and Samuel Alito dwelt directly or indirectly on these basic humanity issues. Political groups favoring or disfavoring their appointments lined up accordingly and the incessant bickering over judicial filibusters and lower court vacancies is shaped by this as well. So, in the vernacular of that argument, one is led to ask: Is natural law in the mainstream or not?

The ancients would be tempted to respond that such a question is nonsense. The poet Horace once quipped that you can chase natural law out with a pitchfork but it always returns.³⁰ Not surprisingly, men and women cannot escape their own natures, and vain attempts to do so are indeed quite foolish. For example, all of us grimace when we see persons pretending to act younger than their age. We should be equally troubled when “we the people” attempt to govern in similar disregard for the human design.

Interestingly enough, both sides of the political liberal-conservative divide are resistant to natural law reasoning. Liberal thinkers and jurists insist that the Constitution must be kept fluid and dynamic and up-to-date to include new liberty claims, at least some of which may be premised on a denial of natural reality altogether. Men and women are defined and redefined by themselves to accommodate abortion or favored sexual practices.³¹ That the Constitution does not textually speak to these matters is thought inconsequential, since other rights like those of parents to direct the upbringing of children, or even the

30. HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY - PART II: PHILOSOPHY AND CONTENT OF THE NATURAL LAW* (Thomas L. Hanley trans., Russell Hitlinger ed., Liberty Fund, 1998) (1936), available at http://oll.libertyfund.org/Texts/LFBooks/Rommen0220/NaturalLaw/HTMLs/0017_Pt03_Part2.html. Or, as Horace has expressed it: *Naturam expellas furca, tamen usque recurret*, which translates “You may drive out nature with a pitchfork, yet it will always return!” *Epistles* I, x, 24.

31. *Casey*, 505 U.S. at 851. The plurality in *Casey* writes: “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* This idea of self-definition is underscored in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), where Justice Kennedy writes for the majority: “[f]reedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.” *Id.* at 562. Do these passages mean what they seem to say? Namely, that man is his own life project in disregard of the reality of his nature, and perhaps even encompassing control of the transcendent? If that is the claim, where is the proof that such capacity for redefinition has ever been successfully undertaken?

fundamental nature of traditional marriage, are nowhere found in the document either.³²

Conservatives, who by their very name express a desire to conserve or maintain tradition, seek to counter liberal invention of new rights by sticking as close to constitutional text as possible. If that means the constitutional shelter for parental rights has to be sacrificed, so be it.³³ The liberal approach to natural law is thus to hijack human nature for purposes like abortion and assisted suicide, which are anything but natural, and the conservative response is to deny judicial cognizance of natural law as a hoped-for (but often unsuccessful) way of mitigating the liberal hijacking.

In essence, conservative jurists like Antonin Scalia affirm natural law to be sound personally and philosophically, but find it judicially irrelevant. If the laws of the republic are to be kept coincident with human nature, it is up to the people to get that job done directly in legislative assembly. Show abortion or same-sex marriage to be the contradiction of humanity that it is and the people will reject it democratically. Interestingly, with regard to same-sex marriage, Justice Scalia is exactly right. The people have almost unanimously rejected the idea of marital redefinition.³⁴ Where same-sex marriage exists or has been fostered, it is the result of judicial or executive action.³⁵

As discussed immediately below, however, the founders devised not a pure democracy, but one of limited and separated power. It is cognizance of natural law, and with it the strengths and weaknesses of human nature, that more fully explains why the founders would see the separation of powers and federalism as the dominant features of the original Constitution. The founders understood a divided government of enumerated power to be a means to vindicate the “self-evident truths” of the human person; human beings that come, by divine

32. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (concluding parents have fundamental rights to raise children); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding privacy in marriage fundamental right).

33. *Troxel v. Granville*, 530 U.S. 57, 91-93 (2000) (Scalia, J., dissenting).

34. See Heritage Foundation, *Research: Marriage in the 50 States*, available at <http://www.heritage.org/Research/Family/Marriage50/Marriage50States.cfm> (last visited Mar. 30, 2006).

[M]any states moved to protect marriage in their state codes in the late 1990s prompted by the passage of the federal Defense of Marriage Act (DOMA) in 1996. While all of these states adopted language similar to the federal DOMA, there is some variation. . . . Examples of states with strong marriage statutes are Alabama, Georgia, Michigan, and Ohio. States with weaker marriage statutes include Delaware, Illinois, Iowa, Maine, South Dakota, and Vermont.

Id. States that defined “marriage in their state statutes prior to the passage of the federal DOMA [include] Maryland, New Hampshire, Utah, Wisconsin and Wyoming.” *Id.*

35. *Doyle v. Goodridge*, 444 Mass. 1006, 1007 (2005) (denying petitioner’s request to stay court’s decision until constitutional amendment process finished); *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 471-72 (Cal. 2004) (overturning renegade actions of city’s Mayor).

creation, with inalienable rights of “life, liberty, and the pursuit of happiness.”³⁶ By definition, these rights may not properly be alienated, forfeited, disregarded, or outvoted.³⁷

C. *The Founders’ Library – Replete with Natural Law Sources*

Natural law had a profound influence on the founders. Chester Antieau observed that “it would be amazing if any Revolutionary leader of the Commonwealth could be found who did not subscribe to the doctrines of natural law and right.”³⁸ Those doctrines had ancient lineage dating to pre-Christian time, and were well known to the founders in the works of Cicero. Cicero described “Law” as “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite.”³⁹ To Cicero, the answer to the multiple questions with which this article began was obvious. Of course, there is a reality to law, and any government disregards it at its own peril. While positive law, be it statute, tradition, or treaty, might slight this reality, natural law would prove doing so imprudent. Cicero writes:

[T]he most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. . . . But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace.⁴⁰

Cicero’s instruction is hardly dead letter. More than two millennia later, it is introduced to every first-year law student as the distinction drawn in criminal law between an offense that is *malum in se* (something wrong in itself, like murder), as opposed to *mala prohibita* (something wrong because it is prohibited, like making an improper left turn).

Cicero’s natural law teaching intermixed with English common law by means of Henry of Bracton in the thirteenth century, who had studied the stoics and Roman law, as well as the canon law.⁴¹ Closer to the founding, Sir John Fortescue noted the pervasive significance of the natural law tradition to the common law of England by observing that “one may say that men establish governing power through the law of nature, but in the last analysis it is better to

36. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

37. *Id.*

38. Chester James Antieau, *Natural Rights and the Founding Fathers – The Virginians*, 17 WASH. & LEE L. REV. 43, 43 (1960).

39. Marcus Tullius Cicero, *Laws-Book I*, in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 44 (Clarence Morris ed., University of Pennsylvania Press, 1959).

40. *Id.* at 47-48.

41. 1 HENRY DE BRATTON, BRATTON ON THE LAWS AND CUSTOMS OF ENGLAND 22 (Samuel E. Thorne ed. & trans., 1968).

say that it is the law of nature that establishes the power through men”⁴² In the eighteenth century, the leading American colonists regarded Sir William Blackstone’s famous *Commentaries on the Laws of England* as the best treatise on the English common law. In the treatise, Blackstone coins the terminology “pursuit of happiness,” which later finds its way into the Declaration of Independence.⁴³ Blackstone likewise indicates that the natural law—man’s reasoned deduction of that impressed by God within the design of human nature—has become interwoven with the common law.⁴⁴ As Blackstone would put it, natural law “is branched in our systems.”⁴⁵

Blackstone is also important for the emphasis he gives to how natural law informs, but does not directly overrule, even unreasoned legislative outcome. Blackstone posits that “if the parliament will positively enact” an unreasonable thing, there is no power in the ordinary forms of the constitution that is vested with authority to “control it.”⁴⁶ While, as discussed below, our Declaration may have implied in its “revolutionary time” a broader authority for natural law, today it invites a more modest role in American constitutional interpretation. Natural law originalism, as argued here, is an interpretative background principle highlighting the divergence of positive enactment from the reality of the person, but leaving it up to legislative assembly to correct course.

42. JOHN FORTESCUE, *DE NATURA LEGIS NATURAE*, I, c. 18 (Garland Pub. 1980).

43. 1 WILLIAM BLACKSTONE, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 41 (James Dewitt Andrews ed., Callaghan Co. 4th ed. 1899) (using terminology “pursuit of happiness”); THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

44. See generally BLACKSTONE, *supra* note 43.

45. See BLACKSTONE, *supra* note 43, at 40-41. Blackstone explains:

[T]he creator is a being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, [therefore,] he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, [God] has not perplexed the law of nature with a multitude of abstracted rules and precepts . . . but has graciously reduced the rule of obedience to this one paternal precept, “*that man shall pursue his own true and substantial happiness.*” (emphasis added). This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man’s real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man’s real happiness, and therefore that the law of nature forbids it.

Id.

46. BLACKSTONE, *supra* note 43, at 91.

D. The Declaration – Justifying a Revolution then Interpretive Guidance of Written Law

When Blackstone explicitly rejects judicial review invalidating legislative enactment, it is because “that [would] set the judicial power above that of the legislature, which would be subversive of all government.”⁴⁷ As American historian Gordon Wood has noted, the founders were familiar with Dr. Bonham’s case from 1610 in which Coke opined, “if a statute should turn out to be against the reason of the common law (making a man, for example, a judge in his own cause), then the common law would control it and adjudge such an act to be void.”⁴⁸ In this sense, Blackstone’s embrace of parliamentary supremacy can be seen as failing to take the last necessary step to secure the rule of law. Dean Clarence Manion of the University of Notre Dame put it this way in the 1940s:

By pushing and pursuing the principle of parliamentary absolutism it was England and not America who abandoned the ancient traditions of English liberty. In 1776 the British Government was insisting that “the law of the land” and “the immemorial rights of English subjects” were exclusively and precisely what the British Parliament from time to time declared them to be. This claim for parliamentary absolutism was at variance with all the great traditions of the natural law and common law as recorded through the centuries from Bracton to Blackstone. By abandoning their ingrained concepts of the natural law, the colonists undoubtedly could have made a comfortable settlement of their tax and navigation difficulties with England, but they chose the alternatives so well and so logically declared in the Declaration of Independence.⁴⁹

In the context of a revolution in which the founders needed a “higher law” check to make their case for independence, Manion’s assessment is entirely correct. The Declaration of Independence becomes the incorporation document for the United States, articulating inviolate, self-evident truths of natural law that the subsequent Constitution (as the by-laws of the new corporate sovereignty, known as the United States) is intended to observe. But just as the Constitution ought not be interpreted in a manner inconsistent with the natural law “truths” of the Declaration, so too, the Declaration cannot obscure that the Constitution is a written, supreme law, well-drafted to correct the legislative “absolutism” which provoked the initial separation from England. Not to confine judicial review to the text of the Constitution would be to declare a perennial state of revolution. The Supreme Court is not so generously

47. BLACKSTONE, *supra* note 43, at 91.

48. See SCALIA, *supra* note 11, at 60 (citing Gordon Wood). Justice Scalia responds: “Dr. Bonham’s case was eccentric.” *Id.* at 130.

49. CLARENCE E. MANION, *The Natural Law Philosophy of Founding Fathers*, in 1 NATURAL LAW INSTITUTE PROCEEDINGS 3, 16 (Alfred L. Scanlan ed., 1949).

authorized. To think otherwise, and envision the Justices as empowered to add unenumerated rights to and subtract enumerated rights from the Constitution, is to subvert the rule of law, not advance it.⁵⁰

The importance of seeing the post-revolution period as governed not directly by the first principles of the Declaration, but by the written law of the Constitution, interpreted in light of the Declaration, was given emphasis by Harvard's Roscoe Pound. Dean Pound nuances the thinking of Notre Dame's Dean Manion, not by denying the American departure from Blackstone's parliamentary absolutism, but by redirecting or collapsing the higher law into the written law of the Constitution itself. Dean Pound writes:

[T]here are three points of origin of what has been called the American doctrine of the power of courts with respect to unconstitutional legislation. . . . One is the idea of the law of the land as expounded [by Coke]. A second is Coke's doctrine that statutes contrary to common right and reason and so to fundamental law were void. . . . The third is the practice . . . of appeals to the Privy Council in which statutes enacted by colonial legislatures were held void . . . because in conflict with some provision of the colonial or provincial charter or in contravention of the common law, made by the charter the measure of lawmaking authority. That statutes could be scrutinized to look into the basis of their authority and if in conflict with fundamental law must be disregarded was as much a matter of course to the American lawyer of the era of the Revolution as the doctrine of the absolute binding force of an act of Parliament is to the English lawyer of today. American lawyers were taught to believe in a fundamental law which, after the [American] Revolution, they found declared in written constitutions. After [the English Revolution of] 1688 there was no fundamental law superior to Parliament.⁵¹

Pound's statement, too, however, is somewhat infelicitous, as it suggests that the written law of the Constitution is in lieu of the natural-law principles of the Declaration. Elsewhere, I have argued at length that contrary to positions taken by Justice Scalia, the Declaration of Independence continues to inform judicial review.⁵² Those arguments will not be rehearsed at length here; this article will instead identify the aspects of the Declaration that must be held in conjunction with textual interpretation. It is, of course, patent that the Declaration recites that we, as a nation, hold some *truths* [of human nature] *to be self-evident*: that is, every proposition about that nature is not equally valid. Some opinions are right; others are wrong. The Declaration has two primary

50. See *Kelo v. New London*, 125 S. Ct. 2655, 2666 (2005) (construing Fifth Amendment "public use" requirements to include economic development); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding right of privacy encompasses woman's right to terminate pregnancy).

51. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME L. REV. 347, 367 (1945).

52. Douglas W. Kmiec, *Natural Law Originalism – Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J. L. & PUB. POL'Y 627, 640 (1997).

sources of authority for this truth: “the Laws of Nature and of Nature’s God.”⁵³ Arguably, then, these same two sources, natural law and scripture, cannot be invisible to constitutional interpretation. Whether we make reference to revelation to understand our own personal nature is a matter of complete freedom under the First Amendment. The Constitution, however, was framed with a given conception of created humanity in mind, whether we are personally reliant upon religious source or not. However, rather than misusing, in Establishment Clause cases, Jefferson’s referenced “wall of separation” (intended as a description of free exercise), it is far more sound for the Court to interpret both religion clauses with at least a glancing recognition that the founders’ first principles included a distinctly religious source.⁵⁴

The principal author of the Declaration also anticipated a continuing interpretative role for the Declaration. In correspondence, Jefferson first acknowledged that the Declaration was not intended “to invent new ideas,” but to re-state well-grounded common or natural law principles. To the notion that following the successful American Revolution, the Declaration should be set aside “to spare the feeling of our English friends,” Jefferson retorted, “it is not to wound them that we wish to keep it in mind; but to cherish the principles of the instrument in the bosoms of our own citizens. . . . I pray God that these principles may be eternal.”⁵⁵ Madison shared Jefferson’s view that the Declaration was of continuing interpretive significance. In a letter to Jefferson, for example, Madison recommended the Declaration as the first of the “best guides” to the “distinctive principles” of our government.⁵⁶ As later discussed, the founding drafters’ understanding and contemporary understanding of equality in the Fourteenth Amendment was premised upon the Declaration. As Abraham Lincoln would tell the nation just a few years before his tragic assassination, the equality principle of the Declaration is “the great fundamental principle upon which our free institutions rest.”⁵⁷

The importance of the Declaration is largely assumed in *The Federalist*, a collection of 85 letters written to the general public from October 1787 to August 1788 in an effort to win ratification in New York for the proposed Constitution. Most of these letters, printed under the pseudonym Publius, first appeared in newsprint. They were written chiefly by Alexander Hamilton, who was aided by James Madison, and to a lesser extent, by a distinguished New

53. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

54. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (invoking Jefferson’s “wall of separation” in scrutiny of tax support for parochial school busing).

55. Letter from Thomas Jefferson to James Madison (Aug. 30, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 460, 463-64 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

56. Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 THE WRITINGS OF JAMES MADISON 218, 222 (Gaillard Hunt ed., 1910).

57. Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 327, 327 (Roy P. Basler ed., 1953).

York lawyer, John Jay. Political historian Clinton Rossiter ranks *The Federalist*

third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history. It has a quality of legitimacy, of authority and authenticity, that gives it the high status of a public document, one to which, as Thomas Jefferson put it, “appeal is habitually made by all, and rarely declined or denied by any” as to the “genuine meaning” of the Constitution.⁵⁸

The fundamental principles of the Declaration logically and chronologically preceded *The Federalist* argument, and it is clear that the authors of the papers repeatedly justify or explain the convention’s chosen constitutional means in light of already agreed upon governmental ends.⁵⁹ Even the opponents of the Constitution did so in terms harkening back to the ends or principles of the Declaration. In arguing that the proposed constitution did not sufficiently sustain the rights attributable to human nature, the Anti-Federalist “Brutus” appears to make direct reference to the language of the Declaration:

[T]he people of America . . . hold this truth as self evident, that all men are by nature free. No one man, therefore, or any class of men, have a right, by the law of nature, . . . to assume or exercise authority over their fellows. The origin of society then is to be sought . . . in the united consent of those who associate.⁶⁰

E. Dred Scott – Ignoring Natural Law to Honor A Dishonorable Text

It has already been discussed how the direct reliance upon the Declaration during the revolution is made an indirect or background principle of the written text thereafter. Unfortunately, there was a second revolution, the Civil War over slavery, which could have justified wider judicial latitude to elevate the human nature principle of the Declaration over constitutional text. Ironically, the Court did just the opposite; it used constitutional text uninformed by natural law originalism to defeat essential principle.

58. Clinton Rossiter, *Introduction to THE FEDERALIST* vii (Clinton Rossiter ed., 1961).

59. See generally *THE FEDERALIST* NOS. 1, 70 (Alexander Hamilton), NO. 51 (James Madison) (discussing “security of liberty” and protecting civil and religious rights), NO. 78 (Alexander Hamilton) (guarding rights of individuals with independent judiciary) (Clinton Rossiter ed., 1961). The language of the Declaration is directly referenced in *THE FEDERALIST* NO. 43, where Madison addresses the difficult issue of how a Constitution proposed to be ratified by less than the unanimity required by Article 13 of the Articles of Confederation could be binding and what the relation of any dissenting states would be to the others. *THE FEDERALIST* NO. 43 (James Madison) (Clinton Rossiter ed., 1961). Madison’s answer to both questions depends, in significant part, on his direct reference to fundamental principles of natural law or the “transcendent law of nature and of nature’s God” (the precise language of the Declaration), which delimits the object of all political institutions. *Id.* at 247.

60. Essays of Brutus, *To the Citizens of the State of New York* (Nov. 1, 1787), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 372-73 (Herbert J. Storing ed., 1981).

The *Scott v. Sanford*⁶¹ (*Dred Scott*) decision, for generations to come, would devalue the Court in the public mind as a co-equal branch. The decision was indeed a self-inflicted wound of the most tragic and obtuse kind, but its recollection should forever underscore how constitutional interpretation cannot be divorced from natural law originalism. This is a point easily made over a century later, but it was one courageously articulated and defended by Abraham Lincoln.⁶²

Some advocates of originalism are revisionist when it comes to acknowledging the significance of the slavery-protective features of the original Constitution. Fearful of ever inviting natural law to override text, these writers fail, in my judgment, to appreciate the revolutionary insult that slavery was to humanity. These strict originalists are, thus, unable to grasp or concede how natural law, normally a background principle, should have come forward at the moment when the originally incorporated union was splitting apart. Such strict originalism is unhelpful. It understates provisions of the original Constitution seemingly affirming that slaves were a form of property contrary to the natural law of the Declaration of Independence. To not candidly concede that the fugitive slave clause is at odds with the proclaimed truth that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness,” is to give all originalist effort a bad name.⁶³

In answering the specific question whether Congress had the power to exclude slavery from United States territory, in *Dred Scott* Chief Justice Taney chose the positivist course uninformed by natural law:

[I]f the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States . . . has a right to draw such a distinction [T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed . . . in every State that might desire it, for twenty years And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description.⁶⁴

Respected conservative thinkers try to rationalize this passage. For

61. 60 U.S. 393 (1856).

62. Abraham Lincoln, Speech in reply to Senator Douglas (July 10, 1858), in *THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* 35 (Paul M. Angle ed., The University of Chicago Press 1991). Lincoln said to Stephen A. Douglas in debate, “[i]f that declaration is not the truth, let us get the statute book, in which we find it, and tear it out!” *Id.*

63. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

64. *Scott v. Sandford*, 60 U.S. 393, 451-52 (1856).

example, Robert Bork declares that “there is no . . . constitutional provision that can be read with any semblance of plausibility to confer a right to own slaves.”⁶⁵ Again, this sentiment is hard to square with article IV, section 2, paragraph 3 of the original Constitution which provided:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁶⁶

It is true that article I, section 9 of the original Constitution also provided that “[t]he migration or importation of [slaves] . . . shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight . . .”⁶⁷ This provision merely permitted Congress to prohibit the migration or importation of slaves after 1808, it did not vindicate the humanity of the slave.

There is no escape from the proposition that Taney’s opinion in *Dred Scott* was contrary to the “Laws of Nature and of Nature’s God” referenced in the Declaration of Independence. As Harry Jaffa explains, “[t]he central question in *Dred Scott* was this: Which took precedence when a slaveowner entered a Territory with his slave, the Negro slave’s human personality under ‘the laws of nature and of nature’s God,’ or his chatteldom under the laws of the slave state whence he came?”⁶⁸ We know Taney’s answer and its bloody consequence. The significance of natural law originalism would be puny indeed if it did not empower the Court to directly invalidate laws perpetuating slavery. Allowing Taney to override the slavery features of the original Constitution with the Declaration at a moment of crisis does not endorse judges outside such extreme circumstance using their understanding of natural law to add, subtract, or trump constitutional text at will. Conservatives should abandon the historical revisionism that portrays what Taney actually did as illicit substantive due process.

Of course, there is plenty of error in *Dred Scott*. First, much of Taney’s opinion violates numerous judicial canons by opining largely in dicta and perhaps without jurisdiction. Second, Taney’s construction of Congress’ power over the Territories is highly questionable at best. Even without making a crisis-based use of natural law to excise slavery, both of these additional interpretive failings might have been avoided with an appreciation for natural law as a background principle. At a minimum, this background principle would have inclined the Court to defer to the legislative Missouri Compromise

65. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 30 (The Free Press 1990).

66. U.S. CONST. art. IV., § 2, cl. 3.

67. U.S. CONST. art. I, § 9, cl. 9.

68. Harry V. Jaffa, *What Were The Original Intentions of the Framers of the Constitution of the United States*, 10 U. PUGET SOUND L. REV. 351, 411 (1987).

that quite obviously was a legislative attempt to resolve a disputed question of humanity.

The continuing significance of the Declaration can also be seen in acts of Congress admitting new states into the Union. These constitutive enactments have considerable standing in the law, and

[s]ince the Civil War every enabling act has laid down the identical relationship of Constitution and Declaration. For example:

That the Constitution when formed shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence. [Nebraska, 1864]

The Constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. [1959]

The Constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. [1959]⁶⁹

A commentator sums matters nicely:

[T]he Declaration of Independence is more than a propaganda instrument or legal brief; that in fact it is fundamental to a proper understanding of the Constitution; and that abundant support for this proposition can be found in the leading writings and debates of the Founding Era. Indeed, it would hardly be an exaggeration to say that the most fundamental pronouncements made in connection with the framing and ratification of the Constitution are restatements of the principles articulated in the second sentence of the Declaration of Independence.⁷⁰

Overall, the founders established a written Constitution as law that was to be informed by natural law embodied in the Declaration. The founding generations of 1787 and 1868 had no intention of displacing the fundamental natural-law principles in the Declaration or the understanding of human nature reflected in the common law tradition that preceded the ratification of the Constitution or the Fourteenth Amendment.⁷¹ Evidence that contemporaries with these written laws expected continual reference to be made to natural law can be found in a variety of sources. These include: convention debates where the power of judicial review is discussed in not solely textual terms; the

69. Harry V. Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper*, 1995 PUB. INTEREST L. REV. 209, 218 n.20 (1995).

70. Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 170-71 (1990).

71. See Eugene V. Rostow, *The Perils of Positivism: A Response to Professor Quigley*, 2 DUKE J. COMP. & INT'L L. 229, 229 (1992) (arguing positivism jurisprudentially flawed because it detaches legal rules from historical and political background).

specific debate in the convention and during ratification over the lack of necessity (even risk) of an express bill of rights; Madison's comments introducing his draft of the Bill of Rights in the first Congress; the earliest decisions of the Supreme Court; and actions taken by the first Congresses.⁷² Given the history establishing the continuing importance of natural law to constitutional interpretation, a greater distillation of natural law is now in order. This article will examine a definition of natural law originalism, some speculation on how it might have been helpful to the Court in the controversial *Lawrence v. Texas*⁷³ decision, and finally, a brief look at three competing interpretive methods that exclude natural law from even background influence on adjudication and one method that is somewhat inclusive, but still flying largely beneath the radar.

III. ANALYSIS

A. *Natural Law Originalism for the 21st Century – Defined*

Earlier natural law was defined in its usual philosophical sense as discerning the reality of one's nature and making personal decisions consistent with it. Some of the historical materials which indicate that continued reference to the natural law of the Declaration would be made have also been surveyed. While philosophers and legal scholars can indeed "create confusion and concern" in the use of natural law phraseology, that need not blind us to the interpretive value natural law has for illuminating the subtle or sometimes overlooked aspects of public questions.⁷⁴ To avoid confusion, it is proposed that the following qualities of natural law originalism derived from America's articles of incorporation, the Declaration of Independence, may be given emphasis: (1) that the human person has a created reality; (2) that while the understanding of human nature may be disputed, that nature exists independent of what we may believe about it; (3) that as a foundational premise for forming a government, we are created equal in our political status to govern, even as we obviously differ in physical or intellectual aspects; (4) that natural law, not the government, is the source of inalienable rights; (5) that natural law guides personal behavior and is interwoven with the common law and the statutes which often codify or "restate" common-law principles; (6) that natural law is often stated at too high a level of generality to supply specific answers, but as a background principle, it can be highly relevant to legislative policy deliberation and choice; and (7) that while the same level of generality precludes natural

72. See generally John C. Eastman, *The Declaration of Independence as Viewed from the States*, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 96 (Scott D. Gerber, ed., CQ Press 2002).

73. 539 U.S. 558 (2003).

74. John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REG. U. L. REV. 471, 471 (2000).

law from being the singular basis for adjudicative outcome, it informs the meaning of the more grandly phrased constitutional provisions and should incline the Court *against* supplying its own substantive meaning where doing so would contradict the above.

As elaborated, natural law originalism acts should be understood as a principle of judicial restraint. Indeed, it is arguably a principle of restraint more powerful than the sole reliance upon either text alone or text informed by tradition and custom. Loose references to tradition can subvert constitutional text. This is why Justice Scalia insists on evaluating implied right claims at their most specific level of generality. For example, in *Michael H. v. Gerald D.*,⁷⁵ the Court rejected the claim of a natural father to have a parental relationship with the child born of an adulterous liaison.⁷⁶ Writing for the majority, Justice Scalia explained his almost complete reliance upon historical practice to define the constitutional term “liberty”:

Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally “whether parenthood is an interest that historically has received our attention and protection.” (citation omitted) There seems to us no basis for the contention that this methodology is “nove[1].”⁷⁷

Justice Scalia’s defense of the most specific level of generality solely in light of historical practice fails to win a Court majority, which asserts the appropriateness of judicial supplementation of relevant “custom.”⁷⁸ History need not have been Scalia’s only defense. At a minimum, interpretative reference to the constancy of human nature might have helped explain why judges should hesitate to have custom “evolve” as members of the Court see fit. Natural-law logic strengthens; the judicial restraint implicit in original historical meaning is more likely to be valued. Natural law, by discouraging judicial assertions of will, bolsters respect for positive law and originalism.

75. 491 U.S. 110 (1989).

76. *Id.* at 130.

77. *Id.* at 127-28 n.6.

78. *Id.* at 132. Thus, Justice O’Connor writes:

I concur in all but . . . [Justice Scalia’s highly specific] mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be “the most specific level” available *See Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Turner v. Safley*, 483 U.S. 78, 94 (1987); *cf. United States v. Stanley*, 483 U.S. 669, 709 (1987) (O’Connor, J., concurring in part and dissenting in part). I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Michael H., 491 U.S. at 132 (O’Connor, J., concurring).

Consider next how the failure to clearly make reference to natural law affected the Court's reasoning in *Lawrence*. Justice Kennedy for the majority again found no basis to defer to legislative choice based on tradition alone. Moreover, he specifically noted that it was not clear to him that the tradition was still linked to the procreative aspects of human nature. He wrote, "[t]he longstanding criminal prohibition of homosexual sodomy upon which *Bowers* placed such reliance is as consistent with a general condemnation of non-procreative sex as it is with an established tradition of prosecuting acts because of their homosexual character."⁷⁹

When the State failed to respond by defending its tradition in coherent, natural law terms, Justice Kennedy determined that he was free to substitute his own personal assessment of protected liberty in light of contemporary practice. Finding legislative development outside of Texas in the last decades to be moving in the direction of being less prohibitive of homosexual conduct, Justice Kennedy, for the Court, invalidated the Texas policy choice as a matter of substantive due process. This put the Court in the position of setting aside a choice democratically made, as well as preempting future democratic consideration of the importance the State has in maintaining unambiguous support for positive law for procreative sexual practices. At a time when western nations face difficult cultural and economic problems aggravated by birth rates often below replacement levels, it is not immediately clear that the Court's "policy choice" was superior.⁸⁰ That the question was, and is,

79. *Id.* at 570.

80. Phillip Longman, *The Global Baby Bust*, 83 FOREIGN AFFAIRS 64 (May/June 2004), based on the more comprehensive research in PHILLIP LONGMAN, *THE EMPTY CRADLE* (Basic Books, 2004). Underpopulation has multiple effects, and in America it has troubled social welfare systems such as social security and Medicare. *Id.* at 66. "[When] fertility falls beneath replacement levels, the number of productive workers drops as well . . ." *Id.* at 68. So too, countries with a low ratio of workers to retirees experience less entrepreneurship and innovation. *Id.* at 69. Elderly and pension benefits gradually consume an ever larger share of GDP, currently over 9%, but estimated to be rising to 20% by 2040. Longman, *supra*, at 73. And in these terror-ridden times, it is not only the economy that nosedives with fewer workers, but national defense. *Id.* at 71. The collapse of the birth rate in the former Soviet Union resulted in 5.2 million fewer Russians between the ages of fifteen and twenty four in comparison to twenty-five years earlier. *Id.* at 70. And while high technology may replace some of the foot-soldiers, the money for such is being diverted to pension benefits. *Id.* at 71. The Pentagon today spends eighty-four cents on pensions for every dollar it spends on basic pay. Longman, *supra* at 71. Philip Longman in *Foreign Affairs* sums this evidence nicely:

Does this mean that the future belongs to those who believe they are (or who are in fact) commanded by a higher power to procreate? Based on current trends, the answer appears to be yes. Once, demographers believed that some law of human nature would prevent fertility rates from remaining below replacement level within any healthy population for more than brief periods. After all, don't we all carry the genes of our Neolithic ancestors, who one way or another managed to produce enough babies to sustain the race? Today, however, it has become clear that no law of nature ensures that human beings, living in free, developed societies, will create enough children to reproduce themselves. Japanese fertility rates have been below replacement levels since the mid-1950s, and the last time Europeans produced enough children to reproduce themselves was the mid-

debatable on an issue of basic understanding of the human person should have cautioned against judicial intervention and invention of a new intimacy right of undefined dimensions. From a natural law perspective, there was no substantive due process claim.

The natural law inquiry, however, affects the equal protection analysis differently and would have invalidated the law on that basis. Justice O'Connor, in a concurrence, raised the equal protection concern by asking whether a classification differentiating homosexual and heterosexual persons served any rational purpose.⁸¹ The Texas law failed because the State could not explain how allowing non-procreative sexual conduct by heterosexuals, but not homosexuals, served any rational purpose.⁸² Unfortunately, Justice O'Connor was unable to persuade the Court not to rely upon the more sweeping and judicially active substantive due process basis for its decision. Even in the concurrence, the absence of express natural law reliance prompted some bewildering assertions denying that law can be premised upon morality.⁸³ Too much in the law, from the punishment of theft to public nudity, denies that assertion.⁸⁴ Thus, more overt reference to natural law would have sharpened the appropriate equal protection rationale and better explained Justice O'Connor's statement,

that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate

1970s. Yet, modern institutions have yet to adapt to this new reality.

Id. at 76-77.

81. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The majority recognizes that an evenhanded prohibition of sodomy would not pose equal protection concerns, implicitly grasping procreation as a rational basis. *Id.* at 574-75.

82. *Id.* at 582 (O'Connor, J. concurring).

83. *Id.* at 583 (O'Connor, J. concurring). Justice O'Connor argued that:

[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." (citation omitted). Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating "a classification of persons undertaken for its own sake." (citation omitted). And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."

Id. (O'Connor, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 633-35 (1996)).

84. See generally *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991). Natural law writers have been forthright in counseling prudence against the law attempting to enact every virtue or prohibit every vice. This prudential caution is the result of reflection upon the weakness of human nature. See *Lawrence*, 539 U.S. at 581.

state interest here, such as . . . the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”⁸⁵

Those “other reasons” are natural law reasons supporting procreation. A more effective opinion would have said so openly.

Defining natural law originalism as both a principle of judicial restraint and historical survey supports natural law reference in constitutional interpretation. What is happening, however, in the Court itself? Four judicial approaches are explored briefly below. The approaches are derived from members of the Court, living and deceased. Taking a page from the founding era authors, pseudonyms are employed to highlight the notable or most prominent attributes of each approach. The identities of each inspiring Justice will be obvious enough.

B. A Look at Three Interpretive Methods of Natural Law

*1. Justice Antonio Originale Comprensione Statuto*⁸⁶

Our first justice is Justice A. O. C. Statuto. Justice Statuto subscribes to plain meaning, and articulates the view that the Constitution and statutes are premised upon the fact that both are law and are to be understood in light of the original understanding at the time of ratification or enactment. He disclaims interest in the particular semantic intentions of the drafters or whether the law, as interpreted, fulfills its purpose or has good or bad consequences. Justice Statuto is not at all surprised that we speak as though law pre-exists, because of course, it does, not in a metaphysical sense, but a temporal one; that is, the ratified Constitution or enacted statute necessarily predates its construction, so, of course, an opinion about it dates from then, not the date of the opinion. Likewise, distinguishing holding from dicta is merely differentiating judicial discussion that is based on enacted words and elaborative thoughts which, in the perfect world, judges would keep to themselves. And stare decisis is merely a doctrine of convenience to avoid the necessity of repeated re-examination of the same, or similar, legal query.

Justice Statuto would not think himself in need of anything to do his modest job of exposition. Words have conventional meaning apart from authorial

85. *Id.* at 585 (O'Connor, J., concurring).

86. *See generally* SCALIA, *supra* note 11. Justice Statuto is premised upon Justice Scalia's impressive exposition in *A Matter of Interpretation*. *See id.* The pseudonym is intended to reflect the emphasis Justice Scalia gives to the importance of giving honor to democracy over common law and in particular to the codification of law in statute or constitutional text. A fuller Italian name might be Originale Comprensione Statuto to reflect the Justice's attachment to original understanding.

intentions, and if the author chose “stop” when he meant “go,” that would be unfortunate, but the law will yield “stop” until the legislature reconvenes and amends. Statuto thus thinks judges have no warrant to rescue a communicatively-challenged legislature or to keep constitutional provisions “up-to-date,” or to have constitutional provisions guided by a set of interpretive principles, derived from the Declaration of Independence. Indeed, Justice Statuto believes that it is the beginning of difficulty and confusion when judges undertake any of these tasks. Invariably, Statuto would note, judges will fill in their preferred meaning for an inartful, legislative one or their idea of modernity as supplementation, or a conception of natural law that seems anything but natural.⁸⁷ Moreover, judges using natural law will perplex us since the implication is there is some claimed source of authority beyond the law, but its provenance is unclear, uncertain, and unadopted in a formal sense of enactment.

One consequence of the Statuto approach is that judges do not have all the answers. It is conceivable that constitutional meaning, in particular, is so vaporous (downright penumbral), as in the highly disputed meaning of the unenumerated rights in the Ninth Amendment, that nothing can fairly be said to “emanate.” In such circumstance, judges would be admonished to remit the matter to the appropriate legislative body, federal or state, depending upon whether power had been enumerated in Article I or reserved in the Tenth Amendment. A more subtle, and troubling, consequence of the Statuto approach is that while it minimizes the risk of judicial tyranny, it maximizes a like danger with respect to legislative majorities, which is what the founders feared most.

2. Justice Stephen Briar Patch⁸⁸

Justice Briar Patch is the interpretative opposite of Statuto. While the history of the Constitution or a statute is worthy of consultation, its meaning is not likely found there. Rather, law’s meaning is to be governed by a background principle of “active liberty.” Active liberty assesses enactments in light of a judicial appraisal of whether they foster or impede citizen participation. Implicit are a close examination of a provision’s purpose and a

87. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

88. See generally, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (Knopf 2005). Justice Briar Patch is loosely based on this recent thoughtful book. The Briar Patch, of course, is traced to the children’s story of Brer Rabbit and the Tar Baby. <http://www.otmfan.com/html/brertar.htm> (last visited Jan. 6, 2007). As retold, Brer Fox attracted Brer Rabbit to a baby made of tar and proposed to be done with him once and for all because, as Brer Fox saw it, Brer Rabbit “was always getting into something that was none of his business.” *Id.* Justice Breyer’s *Active Liberty* seemingly invites judicial involvement into matters of policy that are thick with all the modern complications of an intellectual briar patch. It should be remembered, however, that by inducing Brer Fox to toss him into the briar patch, Brer Rabbit regained his freedom by cunning and intelligence.

judicial evaluation of whether that purpose is being fulfilled. It may not be, either because the legislature foolishly employed the wrong words, or because unforeseen consequences emerged.

Briar Patch believes the approach to be judicially modest since all judicial evaluation is subordinate to the ideal of fostering democratic participation. Yet, quite obviously, Statuto would think it well beyond the separation of powers for judges to remedially redraft legislation to rescue missed purposes. Moreover, even more worrisome to Statuto would be that the opportunities for judicial imposition of will would be multiplied, or subject to the artificial, unenacted manipulations of conference and committee reports and floor debates.

Even the over-arching ideal of promoting democratic participation might not check undue reliance upon the judiciary, as that too would be in the eye of the judicial beholder. Briar Patch may well be in an area befitting of his name when he proposes that judges curtail even something as basic to liberty as free speech in light of whether one citizen's voice has grown too loud in relation to another. In reviewing a campaign finance limitation, for example, Briar Patch would direct the focus of the Court not to the historical understanding of freedom of speech associated with keeping the restraining hand of government away from private expression, but to a rather elaborate and indefinite judicial cost-benefit analysis. Here are some of the questions this approach entails: Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?⁸⁹

These are indeed complex questions. Moreover, such balancing favors the *judge's* conception of whether it is desirable to impose a speech limitation on some to enhance the speech of others. Unlike Statuto's insistence that the law as written be followed, Briar Patch allows for a consequentialist trump of the law.

89. See generally BREYER, *supra* note 88.

3. *The Late Chief Justice Middelwist*⁹⁰

The third examined approach embodies that of a respected jurist who is no longer with us. The late Chief Justice would lean toward Statuto in outcome. However, agreement between Statuto and Middelwist has less to do with a claim of plain or original meaning than with Middelwist's long held philosophical belief that since propositions of morality cannot be justified by means of empirical proof, their embodiment in law must be reflective of the best available demonstration of majority choice. This last aspect of Middelwist's thinking dovetails only in appearance with Justice Briar Patch, since Middelwist seeks actual majority outcomes, not merely judicial speculations regarding the relative enhancement of democratic practices.

Middelwist, in non-judicial writing, pondered the importance of having individual rights coincide with what he assumed was an objective moral reality embodied by human nature. Nevertheless, Middelwist supports the proposition that "[i]f there is no certainty which can be inter-subjectively demonstrated [with regard to disputed questions of moral correctness], we are reduced to the ultimate integer of morality—the individual. The fountainhead of morality is in the human personality."⁹¹ Middelwist does not interpret this to be a theoretical embrace of moral relativism, since he concedes that majority approval does not mean moral superiority. Yet, in terms of practical reality, if enacted law chooses to contradict moral reality, Middelwist would be without analytical means to stop it. The best Middelwist can do is to lean heavily upon federalism to maximize the number of sovereign decision makers both in the hope of satisfying greater numbers of people with different conceptions of the right, and minimizing the scope of error.

Beyond the federalist structure, Middelwist gives emphasis to the Bill of Rights understood as providing negative liberties. With negative liberties, such as free speech or the freedom to worship, Middelwist would observe it is "merely a question of the government simply limiting itself."⁹² But with positive claims, such as a right to racial preference or a given level of economic security, "the government must exercise coercive force on other individuals to secure [positive rights] to those who claim them"⁹³

90. See generally Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Right - Mostly Observed*, 58 STAN. L. REV. 1827 (2006) [hereinafter Kmiec, *Rehnquist's Theory*]. Chief Justice Middelwist is, of course, the late, and much respected, William H. Rehnquist. The name reflects the author's startling recent discovery of an extended, unpublished theory of moral right authored by Mr. Rehnquist when he was twenty-four and a graduate student in political philosophy. The pseudonym Middelwist reflects a tension between the young philosopher Rehnquist's commitment to moral and legal right premised upon human nature, and his mid-career judicial view that legal right owes its significance solely to majority adoption.

91. Kmiec, *Rehnquist's Theory*, *supra* note 90, at 1841 n.76 (referencing Arnold Brecht, *Beyond Relativism in Political Theory*, AM. POL. SCI. REV. (June 1947)).

92. Kmiec, *Rehnquist's Theory*, *supra* note 90, at 1833 (quoting Chief Justice William Rehnquist).

93. Kmiec, *Rehnquist's Theory*, *supra* note 90, at 1833 (quoting Chief Justice William Rehnquist).

Like Statuto and Briar Patch, Middletwist offers no means by which laws or constitutional interpretations in contradiction of human nature can be checked. Middletwist is aware of this majoritarian difficulty and he suggests the classic Jeffersonian answer: “a government that fails to preserve man’s moral rights is not worthy of respect for ‘the grounds for political obligation [would then be] no longer existent.’”⁹⁴ Middletwist grasps the significance of American slavery and the German Holocaust, both having been given majority approval. He therefore cautions against democracy having a false sense of moral superiority. There is very little difference between a totalitarian state and a majoritarian or totalitarian democracy.⁹⁵ “In the former, the state in a tangible, physical sense must be served; in the latter, the totalitarian icon is a transient conception of the social well-being of the majority. Both set far ‘too low a value on the individual human being.’”⁹⁶

Middletwist’s theoretical reservations about democracy, however, would not be given full application in his judicial role as Chief Justice.⁹⁷ Rather, mid-career there is a twist of thought. Middletwist’s early theory is not far from a recognition that “positive law without a foundation in natural law is purely arbitrary.”⁹⁸ He later falls back on the inter-subjective unprovability of objective (natural law) values to deny them judicial relevance, absent formal adoption. Thus, for Middletwist, such values “assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone’s idea of natural justice but instead simply because they have been incorporated in a constitution by the people.”⁹⁹ Middletwist’s later position has been criticized by Harry Jaffa, who observes that the “assertion that adoption by a people, or incorporation into a constitution, transforms ‘value judgments’ into ‘a form of moral goodness’ is a non sequitur.”¹⁰⁰ Jaffa argues that consideration must be given to both whether law is based on moral norm and whether the moral norm, itself, has been properly anchored in a created human nature.¹⁰¹

Was Middletwist right to downplay the interpretative significance of natural law? In one sense, he was simply conforming to formal definitions of law itself. In this regard, even medieval writers quite friendly to natural law define

94. Kmiec, *Rehnquist’s Theory*, *supra* note 90, at 1833 (quoting Chief Justice William Rehnquist).

95. See generally JACOB. L. TALMON, *THE RISE OF TOTALITARIAN DEMOCRACY* (1952).

96. Kmiec, *Rehnquist’s Theory*, *supra* note 90 at 1845 (quoting Chief Justice William Rehnquist).

97. See generally William Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 705-06 (1976).

98. ADLER, *Natural Law Philosophy*, *supra* note 8, at 83. See generally Kmiec, *Rehnquist’s Theory*, *supra* note 90 (detailing Chief Justice Rehnquist’s early philosophical theories).

99. Rehnquist, *supra* note 97, at 704.

100. HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* 86 (Regnery Gateway 1994) [hereinafter JAFFA, *ORIGINAL INTENT*].

101. JAFFA, *ORIGINAL INTENT*, *supra* note 100, at 85-87.

law as “an ordinance of reason, for the common good, promulgated by him who has charge of the community.”¹⁰² In light of this definition, it is fair to observe that “if natural law does not proceed in any way from the human will, as it does not, then it is not law” in a judicially enforceable sense.¹⁰³ Indeed, the late philosopher Mortimer Adler would note, seemingly in accord with Middlemist, that “natural law is law only if we look to God as its maker”¹⁰⁴ This is so because, on the human level, natural law is not an act of will at all, but a product of reason.

Yet, does admitting that natural law lacks the quality of enforceable human law make it truly irrelevant to constitutional interpretation? When Middlemist posits that “[t]here is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa,” his claim is overbroad, denying both the relationship between law and reason, and the very essence or moral grounding of reason itself.¹⁰⁵ As Jaffa writes, the authority a positivist ascribes to majoritarian consent or adoption makes sense only when consent is the product of the reciprocal idea of natural human equality.¹⁰⁶ In other words, the formation of positive law results in binding law only when, and because, the consent behind its adoption is fully respectful and mindful of human nature. Middlemist in his philosophical guise understood government to be an irreplaceable necessity to the security of human rights, and he also exhibited a clear-eyed understanding of the majoritarian fiction, referencing work that characterized the consent of the governed as a sham. Middlemist is particularly concerned with the view that individual rights are no longer a concern with the advent of positive liberty in the welfare state.¹⁰⁷ Government is always to some degree compulsion on the people, Middlemist instructs, since unanimity is not possible. A positive-liberty state does not resolve this otherwise, as it only invites the government to increase lawmaking and regulation and magnify the number of conflicts with its citizens. Nevertheless, Middlemist perplexingly seems to divorce natural law and constitutional interpretation altogether.

Perhaps one reason for Middlemist’s reluctance to employ natural law as even an interpretative resource was his intellectual sparring with another member of the Court, now deceased Justice William Brennan. Justice Brennan

102. ADLER, *Natural Law Philosophy*, *supra* note 8, at 76 (citing St. Thomas).

103. ADLER, *Natural Law Philosophy*, *supra* note 8, at 78.

104. ADLER, *Natural Law Philosophy*, *supra* note 8, at 78; *see generally* Kmiec, *Rehnquist’s Theory*, *supra* note 90 (describing Chief Justice Rehnquist’s natural law theory).

105. Rehnquist, *supra* note 97, at 704.

106. JAFFA, ORIGINAL INTENT, *supra* note 100, at 62.

107. Kmiec, *Rehnquist’s Theory*, *supra* note 90, at 1837 (citing HAROLD J. LASKI, PARLIAMENTARY GOVERNMENT IN ENGLAND (1938)).

could seem more congenial to natural law, but in the end, it may have been a misperceived congeniality. Justice Brennan located human dignity not in the created essence of the human person, but in the assertion that what constitutes personhood or human dignity is “evolving” and is most likely to be known only where each person is left free to evolve as they see fit.¹⁰⁸ Thus, the human person does not constitute moral norm, but as the philosopher Pope John Paul II commented, “his own personal life-project. Man [is] nothing more than his own freedom!”¹⁰⁹ Freedom cannot be put into conflict with the body itself. The human person has meaning and moral value; it is not a “raw datum” to be shaped by culture or preference. True, man always exists in a particular culture, but human nature transcends those cultures. “To call into question the permanent structural elements of man which are connected with his own bodily dimensions would . . . conflict with common experience”¹¹⁰ Respecting the human person as an end, and never as a means, signifies respecting that person’s nature, a necessary protection against “relativism and arbitrariness.”¹¹¹ Pope John Paul II concludes, “[t]he natural law thus understood does not allow for any division between freedom and nature.”¹¹² Freedom cannot be placed in opposition to nature without destroying both.

108. Justice William J. Brennan, Jr., Speech at Georgetown University to the Text and Teaching Symposium (Oct. 12, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 23-24 (The Federalist Society 1986). Contrary to Justice Brennan’s opinion, the distinctive feature of natural law is its applicability to all human persons, regardless of time or place. Whether or not human beings scientifically evolved from lower species of life, the present state of human existence has been constant for millennia and has a reality. This reality exists independent of whether a person understands it fully, or in faith believes it to have originated with a Creator, as most of our founders clearly did, and as was corporately affirmed as a matter of positive law in the Declaration of Independence.

It is the essence of men and women to yearn for a greater understanding of their nature, and not surprisingly, natural law concepts have from time to time been asserted as “natural rights” which vindicate or support this personhood. The natural rights derived from natural law most referenced at the time of the founding were differently expressed, but were chiefly: a right to be on equal terms as others (from which the right of self-defense and a duty to preserve human, animal, and vegetable life and a right to acquire, own, and possess property as a means of self-preservation, security, and community is derived), and a right to flourish or act consistent with one’s continued being on equal terms as others (from which the right to liberty informed by the phrase “pursuit of happiness” is derived). Fundamentally, natural law prescribes the right of self-preservation or life as well as the right to live freely and develop in community. The “equal terms” qualifier, later embodied in the affirmation of the equality in the Declaration and the Fourteenth Amendment, is, as discussed in the text, the essential support for law premised upon “the consent of the governed.” These natural rights also support the American concept of judicial review as a product of reason, rather than will. See FEDERALIST NO. 78 (Alexander Hamilton), where it is explained that the Court has no power to act by will, but only reason and judgment, whereas the political branches decide by will.

109. JOHN PAUL II, VERITATIS SPLENDOR para. 46 (June 8, 1993), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html [hereinafter VS].

110. VS, *supra* note 109, at para. 53.

111. VS, *supra* note 109, at para. 49.

112. VS, *supra* note 109, at para. 50.

4. *Never Doubtful, But Largely Silent, Justice Thomas*¹¹³

Thus far, three prominent interpretative approaches seem more the heir of Blackstone and parliamentary absolutism than American exceptionalism. Our fourth jurist is intellectually more watchful of the excesses of the legislative majority, but watchful is not necessarily forbidding. Justice Thomas needs no pseudonym since his identification with natural law is well-known. Because of qualifying statements made at his confirmation hearing, Justice Thomas might be thought doubtful of the interpretative role of natural law, but a closer examination suggests that he is not. Rather, natural law answers how he, the descendant of slaves, was first wrongfully excluded from the body politic and then restored to full citizenship.¹¹⁴ A jurisprudential perspective so personally defining cannot be ignored, but whether out of a stoic dignity or the absence of like-minded colleagues, natural law reasoning has been largely, but not entirely, silent in his work. Even this silence may not be a disregard of natural law but an illustration that as an interpretative principle, properly understood, it fosters judicial restraint.

The Senate Judiciary Committee questioned Justice Thomas aggressively at his confirmation proceeding on the relation between natural law and constitutional interpretation. For example, Senator Biden began by observing:

Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you should apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee.¹¹⁵

Before the committee found itself distracted by other matters, Justice Thomas disavowed the use of natural law to decide cases, but carefully reserved reference to it as an interpretative principle. Thomas put it this way:

I don't think that you can use natural law as a basis for constitutional adjudication, except to the extent that it is the background in our Declaration, it is a part of the history and tradition of our country, and it is certainly something that informed some of the early litigation, . . . it is certainly something that has formed our Constitution, but I don't think that it has an appropriate role directly

113. See generally Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 63 (1989). Justice Thomas' most extended treatment of natural law pre-dates his judicial service.

114. Baker, *supra* note 3, at 479.

115. *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 102d Cong. 111 (1993) (statement of Sen. Joseph R. Biden Jr., Chairman, Comm. On the Judiciary) [hereinafter *Nomination of Clarence Thomas*, statement Sen. Biden].

in constitutional adjudication.¹¹⁶

Witness testimony went further than the nominee and argued that no one should be “alarmed” by Thomas’ natural law references, since they were intended to be instances of “political, rather than legal, reasoning.”¹¹⁷ It is clear, however, that Thomas also sees natural law, especially as reflected in the Declaration, as an interpretative principle, and largely one of judicial restraint. Thomas contends that “[t]he best defense of limited government, of the separation of powers, and of the judicial restraint that flows from our commitment to limited government, is the higher law political philosophy of the Founding Fathers.”¹¹⁸ The Justice illustrates his point not by making natural law the sole basis for judicial outcome, but by suggesting how particular outcomes are more fully justified in natural law terms. Thus, he would anchor *Brown v. Board of Education*¹¹⁹ on the color-blind, natural law insight of Justice Harlan dissenting in *Plessy v. Ferguson*,¹²⁰ rather than “dubious social science.”¹²¹ On the bench, Justice Thomas followed his own advice, relying upon the natural law of the Declaration in his concurrence in *Adarand Constructors, Inc. v. Peña*,¹²² not to displace constitutional text, but to inform it. In particular, it is natural law originalism that Thomas employs to critique the dissenting views of Justices Stevens and Ginsburg who would have sustained a race preference by dividing human nature into racial classes and then further dividing those classes premised upon their judicial view of whether the racial division was helpful or hurtful. Justice Thomas writes in response:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness”). These programs not only raise grave constitutional

116. *Nomination of Clarence Thomas*, statement Sen. Biden, *supra* note 115, at 147.

117. *Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary, Pt.3*, 102 Cong. 386 (1992) (statement of Charles F. Rule (Sept. 20, 1991)).

118. Thomas, *supra* note 113, at 63.

119. 347 U.S. 483 (1954).

120. 163 U.S. 537 (1896).

121. Thomas, *supra* note 113, at 68.

122. 515 U.S. 200 (1995).

questions, they also undermine the moral basis of the equal protection principle.¹²³

Justice Thomas' reasoning matches well with the understanding of those who were contemporary with the drafting of the Fourteenth Amendment. For example, Congressman Butler, the chairman of the House Judiciary committee a few years after the amendment's ratification, explained the meaning of equality with a reference to the Declaration of Independence in a manner that could have been written by Thomas, himself. Butler stated:

I believe that "equal" in the Declaration of Independence is a political word, used in a political sense, and means equality of political rights. All men are not equal. Some are born with good constitutions, good health, strength, high mental power; others are not. Now, we cannot by legislation make them equal. God has not made them equal, with equal endowments. But this is our doctrine: Equality . . . —and I will embody it in a single phrase, as the true touch-stone of civil liberty—is *not that all men are equal, but that every man has the right to be the equal of every other man if he can.*"¹²⁴

Butler's perspective was clearly that of someone intending to provide individual opportunity, not the redistribution of benefits, to a racial group. Senator Howard elaborated, reflecting that it was Congress' intent to abolish "all class legislation" and do "away with the injustice of subjecting one caste of persons to a code not applicable to another."¹²⁵ Similarly, Senator Stevens, another legislative sponsor, commented that "no distinction would be tolerated in this purified republic but what arose from merit or conduct."¹²⁶ Finally, Senator Wilson pointedly stated: "we mean that the poorest man, be he black or white, . . . is as much entitled to the protection of the law as the richest and the proudest man in the land. . . . we have advocated the rights of the black man because the black man was the most oppressed."¹²⁷

Wilson's comment is revealing because it helps explain some arguably race-conscious behavior on the part of the thirty-ninth Congress that drafted and passed the Fourteenth Amendment, and that modern writers use to rationalize race preferences.¹²⁸ During the Civil War, a proposal was considered to establish a Bureau of Freedmen's Affairs to assist freed slaves in leasing property, entering into employment contracts, and other related matters. The bill did not pass because of strong opposition to the race-based benefits it provided, because members of Congress strongly felt that social welfare

123. *Id.* at 240 (Thomas, J., concurring).

124. 2 CONG. REC., 455-56 (1874).

125. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866).

126. *Id.* at 3148.

127. CONG. GLOBE, 39th Cong., 1st Sess., 343 (1866).

128. See, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 133 (Basic Books 2005).

schemes were the sole province of the states. One House report stated flatly:

A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would . . . be looked upon as the vagary of a diseased brain Why the freedmen of African descent should be become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fails to comprehend¹²⁹

In response, the proponents of a Freedmen's Bureau subtly changed their arguments. Proponents argued the bill was merely a temporary expedient to rectify the past mistreatment of slaves. The Bureau was needed "not because these people are negroes, but because they are men who have been for generations despoiled of their rights."¹³⁰ Thus, the Bureau was not a permanent recognition of race, but an effort to help former slaves become self-sufficient.

Given the horrendous injury to freedom that is slavery it was more than a reasonable "special case" argument, yet even it was contested. For example, the proponents of short-term assistance to the recently freed slaves attempted to analogize the Bureau legislation to that giving special benefit to Indian tribes. Few thought the analogy apt, however, insofar as tribes were effectively separate sovereign units, and the special federal efforts in their behalf reflected that fact, as well as their prior possessory claim on the territory of the United States. Modernly, the Supreme Court still recognizes Indian tribes to be the subject of special solicitude, even against equal protection challenge.

When the next Congress took the Bureau legislation up again, it passed and was signed into law by President Lincoln in March 1865. But this time, there was a difference. The 1865 legislation specifically provided that the relief was intended for the freed slaves as well as white refugees from the rebel states. This removed the racial nature of the original proposal and focused the new law on those injured. The assistance to the generation of freed slaves could be fully justified in 1865 as reparation for recent, government-fostered deprivation. So too, the limitation of the assistance to refugees *from the rebel states* tended to confirm that the Congress viewed the legislation as needed because of the specific and extraordinary devastation of the Civil War.

Thomas also grasps that natural law argumentation is not solely, or even principally, limited to judicial decision making. Consider, for example, his politically courageous criticism of the litigation strategy in the *Bob Jones v.*

129. H.R. REP. No. 2, at 343 (1866).

130. Senator Charles Sumner, CONG. GLOBE, 38th Cong. 1st Sess., 2800 (1864) (quoting Secretary of War, Edwin Stanton).

*United States*¹³¹ case. Notwithstanding his status at the time as a Reagan appointee to the Equal Employment Opportunity Commission, Thomas chastises the Reagan Justice Department for arguing on behalf of Bob Jones University in a case where the University sought to justify its racial separation of students on religious grounds. The Justice Department rationalized the intervention for Bob Jones on an arcane point dealing with the IRS' administrative authority to revoke a tax exemption. As Thomas reveals, as a matter of litigation policy, this was the wrong time and the wrong case to elevate administrative law concerns over the color-blind ideal.¹³² Thomas' illustration underscores that natural law originalism has significance, not only as an interpretative background principle, but also as an ennobling and persuasive one in the court of public opinion.¹³³

In adjudication, Justice Thomas has been faithful to the restrained judicial role he describes for natural law in his confirmation hearing. He has not employed natural law in a revisionist, radical, or legislative fashion. Rather, he has deployed natural law to preserve the judicial function and the separation of powers. In *Harper v. Virginia Department of Taxation*,¹³⁴ for example, Justice Thomas wrote for the majority and extended to civil cases the standard of retroactivity previously applied only to criminal cases. Thomas explained that, "[w]hen this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."¹³⁵ The reason: "prospective decision-making is incompatible with the judicial role."¹³⁶ Justice Scalia concurred, noting "[p]rospective decision-making is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a 'technique of judicial lawmaking' in general, and more specifically as a means of making it easier to overrule prior precedent."¹³⁷ The Thomas-Scalia perspective in *Harper* is an apt place to conclude since *Harper* nicely answers the legal quandary with which we began. Natural law originalism debunks legal realism—the notion that law is merely will or what the judges say it is—and in so doing, it helps elevate the ideal of the rule of law over the inferior substitute of the rule of men.¹³⁸

131. 461 U.S. 574 (1983).

132. Thomas, *supra* note 113, at 68.

133. Thomas, *supra* note 113, at 68. Thomas writes: "This is a political struggle, calling for us to use not only the most just and wise of arguments, but the most noble as well." *Id.*

134. 509 U.S. 86 (1993).

135. *Id.* at 97.

136. *Id.* at 96 (quoting *Am. Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 201 (1987)).

137. *Id.* at 105 (Scalia, J., concurring).

138. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996). Thomas writes:

IV. CONCLUSION

Natural law originalism, like other interpretative resources, will not always be correctly perceived. That, too, is human nature. The founders were writing a constitution as a reflection upon human nature.¹³⁹ As evidenced by divided power and checks and balances, the founding reality is that we have weaknesses, a profound and obvious one being that we rather single-mindedly seek our own autonomy. When we want something, whether it advances our nature or not, we insist upon it. Natural law, which speaks to each of us by means of conscience, inclines us to seek the good, but plenty of circumstances—poverty, unwanted pregnancy, material things beyond our means, career advancement out of balance with family, the pain of age or disease—are ever present, pushing back, inclining us toward choices that do not ennoble or make us better.

Should we expect the engines of government to save us from making unnatural choices? For the most part, no. If we disagree, as we do, over embryonic stem cell research, the licitness of homosexual conduct or assisted suicide, we should honestly and civilly admit this disagreement. This is not because natural law lacks an answer. Any other conclusion would soon lapse into pure relativism. It is, however, because the intermediaries of family, school, church, and work-place have yielded insufficient or conflicting direction, and we need to listen and persuade in those venues before we seek to permit, prohibit, or codify in public law.

This, frankly, was the framers design. The federal government had a short list of principal powers: for example, national defense, common currency, and commercial regulation to facilitate trade. The rest was left to the states or the people, respectively. The people could choose to assign their most personal questions to their state governments, but it was assumed that this would occur only where there was unquestioned natural law agreement; for example, parents raise children, men marry women, private property is protected to sustain family and stir creativity, a criminal justice system is built upon fair process, personal mobility is unfettered, and the right to work is honored. When agreement is not yet to be had (or is lost), the closer sovereigns of family and church would govern smaller community and the discussion would

[R]easonable minds can certainly differ . . . that does not mean that there is no right or correct answer; that there are no clear, eternal principles recognized and put into motion by our founding documents. This was the mistake of the legal realists, and it continues to be the mistake of the critical theorists: law is something more than merely the preferences of the power elites writ large. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.

Id.

139. See Kmiec, *Human Nature*, *supra* note 28, at 33.

continue.

Some matters, of course, are so fundamental that continued discussion seems impermissible or intolerable. The history of slavery is this story. Chief Justice Roger Taney's incomprehensible denial of the humanity of the black person cried out for not just natural law and smaller community refutation, but full-scale rejection in national, enacted, or positive law. Lincoln and others sought to foster a peaceful discussion that would lead the nation to this conclusion by reasoned deduction, but as we know, reason ultimately prevailed only at the point of a gun. Had reason been there denied, it is likely the union would have dissolved with it, for then the Constitution would have truly been employed to deny the self-evident truths of the Declaration.

The American Constitution is well-constructed to allow the voice of natural-law reason to vindicate inalienable rights, so long as its structure is not forfeited by jurists who invent right claims against nature, federal members of Congress who presume to impose national consensus where they lack authority to impose at all, state legislators who impose moral choices before they have been discerned by the body politic, and all of us, when we refuse or neglect in family, school, church, or work-place to know ourselves and our own natures.