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The Limits of Natural Law: Thomas Rutherforth and the American Legal Tradition

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The history of American constitutional jurisprudence has been marked by a persistent fascination with the idea of natural law. This springs first and foremost from the fact that we understand as our constitutional foundation those "laws of Nature and of Nature's God" to which Thomas Jefferson made such eloquent appeal in the Declaration of Independence. Further, American politics since the founding of the republic has been characterized by a commitment, with more or less success, to the simple truth James Madison posited in *The Federalist*. "Justice," Madison declared, "is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."[1] Natural law has provided a convenient rhetorical framework for the moral progress of our politics.

But natural law understood in what sense? In and of itself, the term *natural law* is vague and ambiguous; its content is not immediately apparent. As a result, the history of natural law in American political life is a history marked more by the utility of the phrase than by the moral certainty of the idea. It can be claimed by either side in almost any debate. At its deepest level, the idea of natural law that has periodically percolated to the surface of American politics is a confused collection of often contradictory claims. Whether "natural law" is being invoked in the sense of St. Thomas Aquinas or in the sense of Thomas Hobbes is a very important thing to know; the philosophic differences are profound.[2] Sorting out those differences is thus essential to understanding the proper relationship of the Constitution to the sweeping historical tradition of natural law.

Implicit in the natural law foundation of the written Constitution is the question of when and how may the people recur to that

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1. James Madison, in *The Federalist* (Jacob E. Cooke, ed. 1961), No. 51, p. 352.

2. "[T]he mere fact that an identical expression recurs in different writers is no proof of the continuity of thought from one to the other." A.P. d'Entreves, *Natural Law* (1951), p. 9.

foundation, to the natural law and natural rights that undergird the constitutional edifice. How is the textual permanence of the written Constitution to be reconciled practically with the philosophic permanence of those self-evident truths of the laws of nature and of nature's God? More precisely, what role was intended for natural law in interpreting the written Constitution?

A useful guide in this inquiry is Thomas Rutherforth, whose *Institutes of Natural Law* was a work widely read and cited among those of the Founding generation and of the first generation under the Constitution of 1787.[3] But Rutherforth's influence is not merely time-bound; he has been summoned as authority on both sides of the contemporary debate in constitutional theory.[4]

I. Thomas Rutherforth and the American Tradition

Those of the current generation who find Rutherforth worthy of regard are not the first in the scholarly community this century to do so. Rutherforth and his *Institutes* were duly noted and respected by earlier generations of American scholars. Roscoe Pound, for example, was a frequent student of Rutherforth. While he was willing to confess that he found "nothing of consequence in . . . Rutherforth's *Institutes of Natural Law* which is not in Grotius," Pound was also willing to rank Rutherforth with both Grotius and Aristotle as being "no mean authorities upon natural law."[5] Pound was especially

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3. *Institutes of Natural Law* (1832). All citations are to this, the second American edition. The *Institutes* was first published in 1754-56. The *Institutes* formed the basis of a series of lectures by Rutherforth on Hugo Grotius' *De Jure Belli et Pacis* which he read in St. John's College, Cambridge. Rutherforth (1712-1771) was the Regius Professor of Divinity at Cambridge and Archdeacon of Essex. Besides the *Institutes*, most of Rutherforth's writings were more sacred than secular. He did, however, turn his attention (while professing on the physical sciences at Cambridge) to produce *A System of Natural Philosophy: Being a Course of Lectures in Mechanics, Optics, Hydrostatics, and Astronomy* (1748). In addition he wrote in 1744 *An Essay on the Nature and Obligations of Virtue*.

4. *See* for example, Thomas Grey, "Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," 30 *Stan. L. Rev.* (1978), p. 30; Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); Suzanna Sherry, "The Founders' Unwritten Constitution," 54 *U. Chi. L. Rev.* (1987), p. 1127; Helen K. Michael, "The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of 'Unwritten' Individual Rights?", 69 *N.C. L. Rev.* (1991), p. 421; Raoul Berger, *Government by Judiciary* (1977); and Walter Berns, "Judicial Review and the Rights and Laws of Nature," *The Supreme Court Review: 1982* (1983), pp. 49-83.

5. Roscoe Pound, *The Formative Era of American Law* (1938), p. 21; and *Law and Morals* (1924), p. 101. *See also* Pound's other numerous essays and articles, wherein Rutherforth is usually presented when the subject is natural law; for example:

conscious of the frequent use made of Rutherforth by the earlier American lawyers and professors such as James Wilson and Joseph Story.[6]

William W. Crosskey, despite his often eccentric inferences from the sources, was properly impressed with the work Rutherforth had provided in distilling the canons of construction that had grown up as "an ancient, long-respected part of the common law." Indeed, Crosskey found Rutherforth's rules of rational or equitable interpretation to be "a comprehensive, lucid, and systematic discussion."[7]

More recently, John Philip Reid has taken notice of Rutherforth's *Institutes of Natural Law* in his work on the ideas of representation and liberty in the age of the American Revolution.[8] Reid seems to agree, as Caroline Robbins argued before him, that Rutherforth's *Institutes* "repay reading by students of eighteenth century ideas."[9]

Ultimately, however, Rutherforth's significance lies less in what recent generations of scholars have thought of him than in how the first generations of statesmen and judges under the Constitution viewed him. And those earlier generations thought well of him, indeed. The founders found it advantageous to rely on his work during the creation and the ratification of the Constitution;[10] the

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"The Revival of Natural Law Concepts," 17 *N.D. Lawyer* (1942), pp. 287, 304, 332; "Liberty of Contract," 18 *Yale L.J.* (1909), pp. 454, 468; "The End of Law as Developed in Juristic Thought," 27 *Harv. L. Rev.* (1914), p. 605; *Interpretations of Legal History* (1946); and *Jurisprudence.*

6. *Formative Era of American Law*, p. 24.

7. William W. Crosskey, *Politics and the Constitution* (1953), I, pp. 364-65.

8. John Philip Reid, *The Concept of Representation in the Age of the American Revolution* (1989); and *The Concept of Liberty in the Age of the American Revolution* (1990).

9. Caroline Robbins, *The Eighteenth Century Commonwealthman* (1961), p. 333. *See also* Duncan Forbes, *Hume's Philosophical Politics* (1975), pp. 162-65. As Forbes notes at p. 164: "Rutherforth's moral . . . is that you cannot prove a constitution to be popular by abstract arguments 'from general reasonings upon the nature of civil government, without recourse to records and history, custom and usage.'"

10. *See*, for example, James Madison's list of books prepared (probably with the help of Thomas Jefferson) for Congress in 1783, in *The Papers of James Madison* (William T. Hutchinson, et al, eds. 1969), Vol. VI, pp. 62-115. *See* the remarks of Luther Martin in *The Records of the Federal Convention* (Max Farrand, ed. 1938), Vol. I, p. 437. Arguably of greater significance is Alexander Hamilton in *The Federalist* (Jacob Cooke, ed. 1961), No. 84, p. 583. *See The Papers of Alexander Hamilton* (Harold C. Syrett, ed. 1961-79), Vol. XV, p. 187 and Vol. XIX, p. 131. In his essay on "The Defence of the Funding System," Hamilton again called Rutherforth's *Institutes* to his argument; summing up his apparently long-standing regard for the writer, Hamilton referred to Rutherforth as "a sensible modern writer." *Ibid.*, Vol. XIX, p. 507.

Institutes was frequently included in curricula during the early years of legal education;[11] Rutherforth was routinely cited as authority in actual cases at bar, both in briefs and in opinions;[12] and finally and most importantly Rutherforth greatly influenced the early American treatise writers such as James Kent,[13] Henry Wheaton,[14] David Hoffman,[15] and especially Joseph Story.[16]

Story's uses of Rutherforth's *Institutes of Natural Law* in both his *Commentaries on the Constitution* and his *Commentaries on Equity Jurisprudence* did much to make Rutherforth a common authority in the nineteenth century. Coming as they did out of his lectures at Harvard Law School, and running to many editions each, Story's *Commentaries* were widely influential in the training of the early

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11. For the best accounts of early legal training *see* Charles Warren, *History of the Harvard Law School* (1908); Anton-Hermann Chroust, *The Rise of the Legal Profession in America* (1965); and Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (1967). For a taste of the times, *see* the law lectures at the College of Philadelphia (later the University of Pennsylvania) by James Wilson, *The Works of James Wilson* (Robert McCloskey, ed. 1967). A portion of James Kent's lectures at Columbia, *A Lecture, Introductory to a Course of Law Lectures in Columbia College, Delivered February 1, 1824*, is reprinted in *The Rise of the Legal Profession in America*, Vol. II, p. 184, n. 48.

12. *For example*, in *McDonough v. Dannery and Ship Mary Ford*, 3 Dallas 188 (1796), both Jared Ingersoll and Peter DuPonceau cited Rutherforth in support of their position before the Court, p. 196. That same year, in *Ware v. Hylton*, 3 Dallas 199 (1796), Justice Samuel Chase relied in the course of his opinion on "the celebrated and judicious Doctor Rutherforth," p. 230. *See also* Daniel Webster's argument in *Ogden v. Saunders*, 12 Wheaton 213, 240 (1827). And *see* the arguments—on both sides—in the great slavery case, *The Antelope*, 10 Wheaton 66, 99 *n.b.*; 103 *n.b.*

13. *See* Volume I, part one, pp. 1-200, *passim*; 465. James Kent, *Commentaries on American Law* (1840).

14. In his *History of the Law of Nations in Europe and America*, Wheaton noted that the "great work of Grotius . . . [was] the principal textbook for instruction in most European universities in that part of the science of morals which relates to the rules of justice. One of the best commentaries of this sort is that published in 1754 by Rutherforth under the title of *Institutes of Natural Law*," (1845), p. 197. *See also* Wheaton's *Elements of International Law* (A.C. Boyd, ed. 1880), pp. 344-45.

15. *See A Course of Legal Studies* (1830); and *Legal Outlines* (1836). It is interesting to note that Hoffman's publisher, J. Neal, was the same publisher who brought out the second American edition of Rutherforth in 1832. Reviewing Hoffman's *Course of Legal Studies* in the *North American Review*, Story hailed it as "by far, the most perfect system for the study of law which has ever been offered to the public."

16. Beginning in the 1820's, America gave rise to a treatise tradition in law. It was an effort to reduce the vagaries and varieties of the common law to some regular and systematic form in a manner similar to what had been achieved by Blackstone for the laws of England. Gary L. McDowell, *Equity and the Constitution* (1982), pp. 61-86.

American bar. In many ways, Story did for American law in the nineteenth century what Blackstone and Coke had done for American law and legal education in the eighteenth. In particular, his canons of construction, adopted as they were in large part from Rutherforth, sought to teach the American legal community the pitfalls of interpretation. But more than that: his canons of construction taught respect for the line that must be seen to exist between the law of nature and the law of the Constitution as a matter of construing the latter.

In the legal and political arguments of the American Founding and the early decades of the republic, Rutherforth's *Institutes of Natural Law* was viewed as a most serious contribution to political theory. Men such as Story, Ingersoll, Kent, Du Ponceau, Wilson, Webster, Chase, and Martin saw in Rutherforth's work ideas of law and constitutionalism worthy of their public regard; his ideas were not for closet speculators, but for statesmen.

II. Thomas Rutherforth's Canons of Construction

There are two aspects to the significance of Thomas Rutherforth's rules of interpretation offered in the *Institutes of Natural Law* that justify attention. First, by recovering why those earlier thinkers and lawyers had such an appreciation for Rutherforth's *Institutes,* we can gain a keener appreciation ourselves for how that generation understood themselves. To that degree, we will have a firmer grip on the original understanding of the Constitution and the thinking that went into its creation and ratification as well as into its earliest interpretations.

The second aspect of Rutherforth's significance has to do with what he still has to say to our generation when it comes to attempting to interpret the Constitution and to understanding the nature and extent of interpretation more generally. There is no reason to presume that Rutherforth's insights are merely archaic and doomed to the dust of ages past. Like the works of all serious thinkers, his theory of government may contain much that is timeless; by endeavoring to take his work seriously on its own terms, we may be able to glean notions of estimable contemporary value.

Rutherforth's canons of construction are best understood within the broader context of his view of civil society and law more generally.

A. Rutherforth's Theory of Civil Society

While narrowly a commentary on Grotius, Rutherforth's *Institutes* is, more broadly understood, a part of the body of modern political

philosophy, at least insofar as that tradition begins with Thomas Hobbes if not Machiavelli. Yet while Lockean in his understanding of the nature and extent of rights, Rutherforth is less willing to embrace the idea of an antecedent state of nature.[17] Ever suspicious of "abstracted philosophers" and their "amusing . . . speculations," Rutherforth prefers "to read history, to collect and consider usages and customs, to search records, to examine and compare facts."[18] In fact, his discussion of the beginnings of civil society is more Biblical, taking its point of departure from the account in Genesis concerning the rise of the Jewish state. But however he sees the origin of civil society, Rutherforth is modern in his understanding of rights, both natural and civil.[19] "The natural consequence," he argues, "of men's forming a civil society is the establishment of a power, in such society, to settle or ascertain, by its joynt or common understanding, the several rights and duties of those, who are members of it, and of a power, likewise, to act with its joynt or common force for their defence and security."[20]

Rutherforth's understanding of the rise of nations is two-fold. First there comes the moment when men join together to enter into a social contract to promote their common interests and to remove themselves from the possibility of political "distress." The second step comes after the formation of that civil society and entails the creation of a form of government. The first involves the broader and more fundamental social compact; the latter the narrower and derivative constitutional compact.[21] But what legitimates both steps toward nationhood is the basic and inalienable liberty of the individual.

Echoing Hobbes and Locke, Rutherforth argues that outside of civil society and its law-making apparatus, man is at liberty "to act as he thinks fit, where no law restrains him." This is, he notes, "self-evidently true."[22] Originally, outside civil society, the only restraint over a man's liberty to act as he sees fit is his "obligation of governing himself by the law of nature, and the law of God."[23]

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17. *See* generally his discussion "Of Civil Society, Its Nature and Origin," in the second chapter of volume II of the *Institutes.*

18. *Institutes*, p. 297.

19. As Rutherforth argues: "Another division of our rights is into natural and adventitious. Those are called natural rights which belong to man by the gift of nature, those, which belong to him originally without the intervention of any human act. Adventitious rights are such as presuppose some act of man." *Institutes*, p. 19.

20. *Ibid.*, p. 270.

21. *Ibid.*, p. 583.

22. *Ibid.*, p. 74.

23. *Ibid.*

This view of freedom is liberty understood in "a moral sense"; it is liberty that springs from nature, not from convention.

The only legitimate way that man may be restrained by others is by what Rutherforth terms "some after-act of our own," a conscious delegation of the power to restrict our liberty to some external authority. As he explains it:

> Whatever right those of our species may have over us, either to direct our actions to certain purposes, or to restrain them within certain bounds, beyond what the law of nature has prescribed, arises from some after-act of our own, from some consent either express or tacit, by which we have alienated our liberty, or transferred the right of directing our actions from ourselves to them. Till this is done, they have no claim of superiority over us: nature has made no difference between one man and another: all, who are of full age, have reason of their own to direct them, and a will of their own to chuse for themselves.[24]

As with Locke, the basis of Rutherforth's understanding of liberty derives from his more fundamental belief in the natural equality of mankind. Rutherforth does not subscribe to a notion of equality that is unrealistically egalitarian; nature does, harsh as it is, make distinctions "between the parts and capacities of mankind." But, he goes on, "this difference in parts and capacities may have made it more convenient for some to be directed and for others to direct; yet it cannot possibly be looked upon as a sufficient reason, why the former should be slaves, and the latter their absolute masters."[25] Nature is not without its spots; but the defects and differences given by nature do not legitimate conventional control absent the consent of the individual. "The weak man's mind and his body," Rutherforth says, "and consequently all the faculties of his mind, such as his judgment and his will, and likewise all the powers of his body, are as much his own, as if nature had given him greater strength, and enabled him to make a more effectual struggle in his own defence."[26] Even though it may be safer to defer to the judgment of those possessed of stronger faculties of mind, Rutherforth concludes, that decision is a "matter of prudence only, not a matter of duty."[27] Thus is consent the only legitimate foundation for civil society.

Civil society is, by definition, an abridgement of the natural and inalienable liberty of the individual.[28] As a result, "it would be an

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24. *Ibid.*, p. 74.
25. *Ibid.*, p. 239.
26. *Ibid.*
27. *Ibid.*, p. 74.
28. *Ibid.*, p. 258.

injury to take any part of their natural liberty from them without their consent . . . [C]ivil societies could not be formed, consistently with natural justice, by any other means, than by the joynt consent, either express or tacit, of those who compose it."[29] Any claim society presumes to have over the individual can only derive from his prior consent; such consent is the simple reciprocal of the natural equality of mankind.

> When an individual becomes a member of civil society, the public or body politic claims a right of pointing out to him what is just and unjust, and of directing him likewise what good he is to do, and in what manner he is to do it. There is no way of making such a claim as this consistent with his natural right of thinking and chusing for himself; unless by his own consent . . . he has waived this right and has voluntarily agreed to be so guided and directed.[30]

Once given, this consent obligates those within civil society to be bound by the laws that will be fashioned by the government (to which consent must also be given) therein. The reason is that the entire notion of consent is not simply a conventional contrivance for public convenience; it is nothing less than a part of the natural law itself. Since such obligations "arising from consent are obligations of the law of nature; it follows, that the members of any civil society are obliged by the law of nature to obey the civil laws of it; because this obligation of these civil laws arises from their own consent."[31]

The formation of civil society, in Rutherforth's calculus, although itself a dictate of the law of nature, creates a system that comes to be superimposed on nature itself. As a result, those who enter into civil society find themselves both with new rights and with new obligations as regards one another.[32] Thus does civil society not merely seek to secure what nature has left insecure; it seeks also to embellish the natural order by creating institutions charged with the perfection of human safety and happiness, that is, the promotion of the common good.[33] Under a civil society, the rights of mankind, as those were known in the natural state, "are different in many

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29. *Ibid.*
30. *Ibid.*, p. 257.
31. *Ibid.*, p. 361.
32. *Ibid.*, p. 259.
33. *Ibid.*, pp. 300-01. "[A]ll civil legislative power is under an internal check of right: it is a power of restraining or altering the rights of the subjects for the purposes of advancing or securing the general good, and not of restraining or altering them for any purpose whatsoever, and much less for no purpose at all." *Institutes*, p. 370.

instances" within the civil order. Indeed, all the rights of nature "are not brought under the jurisdiction of civil society by the act of civil union."[34]

This distinction between civil rights and natural rights is essential to grasping Rutherforth's theory of interpretation. For in his view of civil society, while the law of nature suggests if not compels civil society, it does not necessarily intrude into the day-to-day administration of the civil authority once formed. There is no doubt, Rutherforth argues, that natural laws are those which mankind is "obliged to observe from their nature and constitution."[35] Indeed, that obligation to natural law does not cease when mankind enters civil society; man must still "have recourse to that law of nature, which respects mankind as they are individuals, in order to determine what is just and fit to be done in respect of one another."[36] Yet that law of nature does not become legally or politically binding as a matter of civil law unless formally adopted as such. Says Rutherforth:

> Mankind are . . . obliged to do what the law of nature commands, and to avoid what this law forbids, without the aid of civil institutions. . . . [T]hough the members of a civil society are obliged to observe the law of nature; whether its rules and precepts are transcribed into the civil law and adopted by it or not; . . . Yet till they are thus transcribed and adopted, the obligation to observe them rests only upon the conscience.[37]

Once civil society has been entered into by consenting individuals, that community must turn its attention at once to the next step in Rutherforth's sketch: the formation of a government and the institutions of civil authority. For, as indicated above, it is only by such institutions that civil society can achieve the objects for which men entered into it in the first place. Civil society without civil government is a pointless association; the original right of each to govern himself is insufficient, even when put in common league with that original right in others. The mere act of joining together for "common purpose," while surely revealing an original and inherent legislative power, does not a government make.[38]

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34. *Ibid.*, pp. 326, 332. As Rutherforth suggests: "What is naturally right or wrong is a proper matter of civil laws; but it is not the only proper matter for them." As a result: "Till the civil laws . . . have enjoyned or forbidden what in a state of nature was [left] indifferent; it continues to be so far indifferent, as to the members of a civil society, that it is no duty of strict justice to do or to avoid." *Institutes*, pp. 368, 369.

35. *Ibid.*, p. 5.

36. *Ibid.*, p. 248.

37. *Ibid.*, p. 366.

38. *Ibid.*, p. 249.

> There is indeed an original legislative power in every civil society; but some further act is necessary, besides the mere union into such a society before this power can be naturally vested in any one part of society exclusive of the rest.

Further, he notes:

> There is not naturally in any civil society, merely as a civil society, any select and standing body of men with an exclusive legislative power. Whenever a power of this sort is lodged in such a legislative body, it must, in order to be consistent with the natural rights of mankind, have been lodged there by some other act, besides the original agreement, upon which the society was formed.[39]

The need is for "some further compact"; the need is for a rationally designed "constitutional compact" whereby the powers and limits of the civil authority are assigned.[40] As civil society is superimposed upon the natural order, so the civil constitution is superimposed on the civil society. And it is not less essential to the preservation and promotion of individual liberty than the original compact; indeed, it may even be more so even though the form it may take is a matter of the discretion and choice of those who are to live under it.[41] For, ultimately, it is the civil constitution that gives form to community:

> A number of men, though they may happen to live near one another, to meet frequently, and to work or travel together, will only be a herd or company of detached and independent individuals, till they have bound themselves to one another by compact to act joyntly under the direction of their common understanding for the preservation of their rights and the advancement of their general interest.[42]

It is the deliberation over, and the choosing of, the forms of government that gives true purpose to the original social compact. For it is in the forms of the institutional arrangements that the common purpose of the people is given concrete expression; those forms, in constituting the means of achieving the ends originally sought—the safety of the individual and the security of his rights—are nothing less than "the joynt understanding of the society in directing what is proper to be done."[43] It is, in short, the fulfillment of the individuals' human potential to reason and to will acting in

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39. *Ibid.*, pp. 285, 287.
40. *Ibid.*, pp. 288, 587.
41. From their original civil state, the people "are at liberty . . . to establish any form of government that they please." *Institutes*, p. 566.
42. *Ibid.*, p. 585.
43. *Ibid.*, p. 284.

concert to conform to the dictates of the law of nature to the greatest extent possible.[44] It is in this fulfillment of man's nature that the law of nature is connected to the laws of man.

B. Rutherforth's Understanding of Law

Rutherforth's view of law is, of course, rooted in his understanding of the nature and origin of civil society. It involves, at its deepest level, the relationship between the higher law, the laws of nature and of nature's God, and the lower law, man's civil law.

"A law," Rutherforth begins his *Institutes*, "is a rule to which men are obliged to make their moral actions conformable."[45] At its most basic level, there is the law of nature; but that law is not all encompassing in Rutherforth's political scheme. What matters among the various laws of nature are not those laws governing the "instinct of brute creatures" or those related to "the motions and operations of inanimate matter."[46] What matters are those laws of nature men are "obliged to observe from their nature and constitution": those laws, which properly understood, govern man's moral actions, those actions "in which men have knowledge to guide them, and a will to chuse for themselves."[47] And when he gets down to it, the law of nature for Rutherforth is not all that mystical:

> Upon the whole, mankind are naturally desirous of making themselves as happy as they can and whatever rules are by their nature and constitution made necessary for them to observe, in order to obtain this greatest good, are the law of their nature. And these rules have been shewn to consist, first, in piety and reverence towards God; . . . secondly, in justice and benevolence toward one another, or in working for a common interest by taking care to do no harm, and by endeavoring to do good; and, thirdly, in restraining their appetites by chastity and temperance, so as neither to hurt themselves nor others, by the improper indulgence of them.[48]

Thus as the foundation for a good civil society, natural law, while a step in the right direction, is ultimately insufficient. And its insufficiency springs from its very generality. What becomes necessary

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44. As Rutherforth says: "A society is a number of men united together by mutual consent in order to deliberate, determine, and act joyntly for some common purpose." *Institutes*, p. 249. It is, in other words, in the demand for the exercise of the rational faculties that civil society elevates mankind.

45. *Institutes*, p.1.

46. *Ibid.*

47. *Ibid.*

48. *Ibid.*, p. 7.

for civil society to be worthy of the name are laws of a more particular nature, laws that will flesh out just precisely how mankind is expected to restrain his appetites; just precisely how one is expected to behave toward his fellows; and just precisely what is meant by "taking care to do no harm, and . . . endeavoring to do good." In short, civil society in the end depends more upon civil laws than the sanctionless platitudes of the laws of nature. For unless those platitudes are transcribed as law, and given the force of the state to back them up, they are no more compelling as a matter of public law than the private consciences of the people.[49]

With regard to the civil law, Rutherforth says it may be either written or unwritten. And his theoretical distinction between the two forms of civil law is a critical one for understanding his notions of interpretation as well as his idea of the relationship between natural law and positive law.

The unwritten law of which Rutherforth speaks is of a decidedly lower order than the written law. Such unwritten laws are generally those "established by long and uninterrupted usage or custom."[50] The fact is, this kind of law reduces the idea of law—rules properly laid down by the civil authority—to "the precarious custody of unwritten tradition." Law in the strict sense, in the safe sense, is law that has been "authenticated" by the legitimate legislative authority in the state.[51] What lies at the core of this notion of authentication is the fact that when legislators undertake to posit true civil law they will "usually record what they have done in writing; so that the several members of the society, who are concerned in the laws of it, may know both where to find them and what they are."[52] The reason this is essential to the power of law is that "no positive law extends farther than the intention of the legislator."[53] Unless the civil law carries with it this means of its authenticity, if it is merely unwritten law, then it lacks the certainty that the rule of law demands. Unwritten law is, in the end, too amorphous to be law in the same sense as true written law:

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49. As James Madison would flesh out this thought later: "If the impulse and opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful." *The Federalist*, No. 10, p. 61.

50. *Institutes*, p. 395.

51. *Ibid.*

52. *Ibid.*, p. 396.

53. *Ibid.*, pp. 396-97.

> Unwritten laws . . . either were not made at first by a civil legislator, professedly employed in the business of legislation, but have arisen out of immemorial and uninterrupted usage and custom; or else, if they were made at first by a civil legislator professedly employed in this business, the evidence of their having been so made is lost, and they have only the authority of the like usage and custom to support them.

Further:

> There is a plain reason why it should be more difficult to find out what is prescribed by an unwritten law, than by a written one. The rules of unwritten law may, indeed, be committed to writing. But when they are, it will still be a question, whether such writing contains the law or not: because it will not appear, from the writing itself, that it is authenticated; or that the rules, which it contains, are prescribed by any legislator. The law is founded on usage and custom only: and consequently, it can only be collected from usage or custom.[54]

As a result of this infirm foundation, such unwritten law is not some higher law untouchable by the hand of man; custom and long usage are not sufficient to elevate the unwritten law above the written law. Indeed, such unwritten laws are open to reform or rejection at the will of the legislator. "The standing legislator of a civil society," Rutherforth remarks, "if he does not consent to any usage which generally obtains amongst the members of such society, might at any time interrupt or stop it, by forbidding it." Only the acquiescence of the legislator gives such customs the sanction of law.[55]

This ease of repeal of the unwritten law by expressly adopted written law is what renders it of a lower order in Rutherforth's view. Indeed, far from being the binding dictates of a higher law, such unwritten laws may even fall from force by mere disuse. As he sees it:

> The unwritten laws of a civil society are sometimes repealed or altered by an express act of the legislative body of the society; that is, though they were established at first by usage or custom, they are sometimes repealed or altered afterward by written laws. They may, likewise, be repealed or altered by long disuse or

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54. *Ibid.* This is not to say there is no formal means whereby to discern the long usage and custom in question. The usual means for establishing "authentic evidences of the unwritten law" is the determination made by "the records of what has been done from time to time in the courts of judicature." Yet this common law, even as ascertained by the courts, lacks the power to hold sway over the explicit written law that may be adopted. *Institutes*, p. 397.

55. *Ibid.*, p. 396.

> prescription: for, as the consent of the society, upon which they are established, is collected only from the presumptive evidence of usage and custom; so long and uninterrupted disuse affords the same evidence, that the society has consented to repeal or alter them.[56]

Against this relatively easy malleability of the unwritten law, the written law stands firmer. While written laws may surely be altered or repealed by other written laws, "no written law can be repealed merely by disuse."[57] The reason this is so, says Rutherforth, is that "no presumption can set aside a certainty: the record in which the written law appears, is a certain evidence of its having been established by sufficient authority; whereas, disuse affords, at most, only a presumption of its having been repealed by the like authority."[58] Even when written laws grow obsolete, "we are not to understand that they have ceased to oblige."[59] In Rutherforth's view, what gives the written law its certainty and its stability is its greater possibility of revealing the intention of the lawmaker: "all civil laws either have, or ought to have, the prevention of some evil or the attainment of some good in view."[60] And it is this purpose, this intention, that gives the written law its greater power.

Related to this understanding of law, written and unwritten, are Rutherforth's ideas pertaining to the "constitutional compact" all civil societies must have, and the nature and extent of judicial power under that constitution. The essence of the constitutional compact is the creation of various powers; for Rutherforth there were but two, legislative and executive. Of those two, it was the legislative power that was most significant. "The legislative is the joynt understanding of the society directing what is proper to be done and is therefore naturally superior to the executive, which is the joynt strength of the society exerting itself in taking care that what is so directed shall be done."[61] That is not to say, however, that the executive power is of no great consequence: "A legislative power without an executive one would be of no great use."[62]

This necessary if subordinate executive power is of two kinds; there is an external executive power and an internal executive power.

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56. *Ibid.*, p. 397.
57. *Ibid.*, p. 398.
58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*, p. 274.

The executive power is internal "when it is exercised upon objects within the society; when it is employed in securing the rights or enforcing the duties of the several members, in respect either of one another or of society itself."[63] The judicial power, rather than understood as a separate and independent power, is deemed by Rutherforth as the internal branch of the executive power. This judicial power itself is subsequently presented as consisting of two branches, one civil, the other criminal.[64] The reason Rutherforth places the judicial power under the rubric of the executive power is that for judicial determinations to have effect they must have "the joynt force of society" backing them up.[65]

What is significant in Rutherforth's analysis for understanding how his theory of interpretation applies to the judicial power is his belief that "the legislature adjusts and settles the rights of the several members of a civil society."[66] And as the executive power generally is subordinate to the legislature, so, too, is the internal, judicial branch of that executive power. The judicial power is expected to exert itself only "under such checks and controls, as the legislative power has subjected it to, in order to prevent its deviating from the purposes, for which it was formed."[67] The reason, says Rutherforth, is merely a matter of common sense:

> [A]n internal executive power, which is under no checks or controls from the legislature, would be more dangerous than useful; it must be either a brute force uninformed and unguided by any intelligent principle, or else a discretionary power in the hands of them, who are entrusted with the management of it.[68]

To Rutherforth, either alternative was unacceptable.

Although it is the power that is expected necessarily to predominate, the legislative authority is never to be considered simply independent. It, too, is under the control of the constitutional compact:

> The particular form of government in any society consists in the particular sort of legislative body, by which that society is governed, or in the particular sort of body, to which the legislative power of the collective body is given. . . . If we would say anything in defence of [such a body's] right to any legislative power, we must go to a higher source of law, to a legislative power vested

63. *Ibid.*, pp. 273-74.
64. *Ibid.*, p. 275.
65. *Ibid.*
66. *Ibid.*, p. 274.
67. *Ibid.*
68. *Ibid.*

> originally in the collective body of the society, which settled in this particular legislative body, all the power they have of making laws, so as to bind the whole.[69]

Thus as the constitutional compact is based upon the consent of those who have agreed to be bound by it, so, too, is the legislative power created by it tied to that original consent. As a result it is necessary that the civil constitution be understood as "fixed and permanent," as lying beyond change by the ordinary legislative power. Such "fixed and permanent" constitutions, while they are changeable, are "not variable in their own nature."[70] As Rutherforth puts it: "The constitution . . . may indeed be changed, but it is not variable in itself: such consent, as introduced it at first, may alter it afterwards."[71] Any alteration dictated by anything less than that original consent would constitute a violation of the theory of natural rights that undergirds the constitutional compact. As the members of a civil society are obliged by the laws of nature, as a matter of their consent, to obey the civil laws, so, too, are those who wield power under the terms of the civil constitution obliged, by the laws of nature, to be bound by that original consent.[72] "[A]gents who are chosen and appointed by the people to exercise their constitutional share of the legislative power, act under the constitutional compact, and consequently are not authorized by such an appointment to change the terms of the compact."[73] The creature cannot legitimately recreate the creator. "The power of civil society . . . extends no farther than the purposes of the social compact, by which it was produced."[74]

It is this idea that the original purpose and intention of constitutional compacts bind the discretion of those who wield power under the

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69. *Ibid.*, p. 292.
70. *Ibid.*, p. 293.
71. *Ibid.*, p. 296.
72. *Ibid.*, pp. 357-58. "[T]he superiority of a civil legislator; that is, the right which a civil legislator has to prescribe laws to the members of a civil society, arises from their own consent. . . . The obligation of civil laws, as well as the obligation of compacts, arises from the consent of those who are obliged by them." *Ibid.*, p. 357.
73. *Ibid.*, p. 567.
74. *Ibid.*, p. 370. Thus is the task of the constitution makers great: "It is the business of the politician, in order to guard against such excess in the exercise of legislative power, to contrive some external checks upon the legislative body. . . . Such checks as these . . . for preventing any undue exercise of legislative power, are called constitutional checks. . . . This is the province of politics and not natural law." *Institutes*, pp. 371, 372.

terms of those compacts that lies at the heart of Rutherforth's canons of construction.

C. Rutherforth's Canons of Construction

Rutherforth's fundamental premise is a simple one:

> The end, which interpretation aims at, is to find out what was the intention of the writer; to clear up the meaning of his words, if they are obscure; to ascertain the sense of them, if they are ambiguous; to determine what his design was, where his words express it imperfectly.[75]

This quest for intention is the foundation for all efforts at interpretation for a powerful reason: law obligates people to obey it; the essence of law is language; and thus "the obligations that are produced by the civil laws . . . arises from the intention of the legislator; not merely as this intention as an act of mind; but as it is declared or expressed by some outward sign or mark, which makes it known to us." The endeavor is not to ascertain what may have been the subjective intention of any one or even many lawmakers; the objective is to discern the purpose for which the law was enacted, what wrong was it intended to right, what problem was it intended to correct.[76] It is only if this purpose or intention can be known that the people are obliged to comply with the civil law.[77]

This interpretive effort is often easier said than done, however. Language is, in and of itself, problematic: "sometimes a man's words are obscure; sometimes they are ambiguous; and sometimes they express his meaning so imperfectly, as either to fall short of his intention and not express the whole of it, or else to exceed his intention and express more than he designed." On such occasions, Rutherforth suggests, "we must have recourse to some other means of interpretation, that is, we must make some use of other signs or marks, besides the words of the speaker or the writer, in order to collect his meaning." These other marks and signs, Rutherforth agrees with Grotius, are what are properly called "probable conjectures."[78] But however difficult the task, the first duty of

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75. *Institutes*, p. 405.

76. As Rutherforth says: "The meaning of a law is the design of the lawmaker in respect to what he commands or forbids. The reason of a law is his design in respect of the end or purpose, for which he commands or forbids it." *Institutes*, p. 415.

77. *Ibid.*, p. 404.

78. *Ibid.*, p. 405.

interpretation is to discern, to the degree possible, the meaning of the writer or the speaker according to "common use and custom."[79]

Rutherforth divides his approach to interpretation into three categories, "according to the different means that it makes use of, for obtaining its end." Those categories are: literal interpretation, mixed interpretation, and rational interpretation.[80] In Rutherforth's calculus of construction, these three methods form something of a continuum.

Literal interpretation is the most basic, text-bound approach: "When the words of a man express his meaning planely, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation."[81] Yet even at this level, it is possible to take a word in either a "confined sense" or in a more "comprehensive sense."[82] The key here is to try to discern the meaning of the words used from "the common consent of those who use them."[83] Thus to opt for taking the word in question in its more comprehensive sense is not to abandon the obligatory effort to get at the sense in which the word was actually used by the writer or the speaker. On this point Rutherforth is clear:

> The principal rule to be observed in literal interpretation is to follow that sense, in respect both of the words and of the construction, which is agreeable to common use, without attending to etymological fancies or grammatical refinements. . . . By grammatical refinements . . . I mean such rules of construction, as are not justified by the common usage of the language before us, and have nothing else to support them, but some groundless conjecture or some supposed analogy between this language and others. . . . such rules or grammar, as, instead of being copied from common use, are intended to overrule its authority.[84]

But even when one conscientiously eschews such word games, and tries diligently to get at the writer's meaning through literal interpretation, there arise other problems. Not the least of the problems is the ambiguity of language. Sometimes the word used "will admit of two or more senses, and either of these . . . is equally agreeable to common usage." In such a case, when common usage will not settle the confusion, the interpreter "must have recourse to other

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79. *Ibid.*, p. 407.
80. *Ibid.*, pp. 407-08.
81. *Ibid.*, p. 405.
82. *Ibid.*, p. 420.
83. *Ibid.*, p. 407.
84. *Ibid.*, pp. 408-09.

conjectures to fix it."[85] It is at this point that literal interpretation fades into mixed interpretation, a mode "partly literal and partly rational."[86] Yet these "other conjectures" are not simply untethered to the text:

> In mixed interpretation . . . the topics from whence our conjectures are drawn, are either the subject matter of the writing, or the effect, that it will produce, according as we continue in this or in that sense, or lastly, some circumstances that are connected with it.

This approach is bound down by certain rules of common sense:

> When any words or expressions in a writing are of doubtful meaning, the first rule in mixed interpretation is to give them such a sense, as is agreeable to the subject matter, of which the writer is treating. For we are sure, on the one hand, that this subject matter was in his mind, and can, on the other hand, have no reason for thinking that he intended anything which is different from it, and much less, that he intended anything which is inconsistent with it. . . . The second rule, in mixed interpretation, is to give all doubtful words or expressions that sense which makes them produce some effect; this effect must in general be a reasonable one; and it must likewise be the same, that a lawmaker or the testator or the contractor intended to produce. . . . [I]f we give [the lawmaker's] words such a meaning, as is agreeable to the reason of the law, to such a meaning as will make the law produce the effect, which he intended to produce by it, we give them such a meaning, as is agreeable to his intention.[87]

To go beyond these first efforts to resolve ambiguities and to seek guidance from circumstantial evidence surrounding the law is still not an invitation to ignore or abandon the primary obligation to discern the intention of the writer. A basic circumstance from which meaning might be gleaned is to examine what the same lawmaker has said or written on other occasions. Yet still, those other writings must have some connection with the language at hand: "Nothing, which is wholly unconnected with such writing, can either be made use of to explore any ambiguous words in it, or with any propriety be called a circumstance of it."[88] The presumption is that the writer will always have been of "the same mind" and thus likely to have been consistent in the meaning he presumed to convey in the language he used.[89]

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85. *Ibid.*, p. 410.
86. *Ibid.*, p. 408.
87. *Ibid.*, pp. 412, 413, 414.
88. *Ibid.*, p. 416.
89. *Ibid.*

Another means of arriving at "probable conjectures" over what the original meaning of a law might be is a reliance on what Rutherforth calls "contemporary practice."[90] This approach embraces two standards: a reliance on common practices that may have prevailed at the time the law was passed; and an account of "what was done upon the law in the times immediately after the making of it."[91] The first standard is "only a remote topic of interpretation" insofar as it can only give a sense of the probable reason the law was enacted in the first place. And the second standard is not to be confused with "contemporary construction," those interpretations given a law by the courts. Rather, for Rutherforth, contemporary practice means "the effect which the law produced in the behaviour of those, who were obliged by it, and who lived at the time of the making of it, [that] will help us to form a judgment about the meaning of the legislator, where his words have left it doubtful."[92]

This is not to say that contemporary judicial construction will not also assist in this problem of getting at the original intention of a particular law. While the adjudication of the courts of law are themselves "authentic interpretations," judges who confront the same law at a later date will no doubt find earlier judgments helpful.[93] Those first judicial determinations, those made by judges who were "contemporaries of the legislator," will show later judges "in what sense the law was understood by those, who had the best opportunity of knowing the true sense, either by advising with the legislator himself, or at least by seeing the situation of things which led him to make the law."[94] This is, to Rutherforth's way of thinking, merely a matter of good sense:

> Laws operate at a distance of time: those, who live many years, after the laws were made, are obliged to act upon them, and are therefore concerned to know their true meaning. But in length of time the meaning of a law may become doubtful, though it was clear and precise when it was just made. And since by looking back into the contemporary practice, that is, into the practice, which the law produced in the first instance, we may see in what

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90. *Ibid.*, p. 417.
91. *Ibid.*
92. *Ibid.*, p. 418.
93. *Ibid.* This is one of the many areas in which Rutherforth follows the lead of Hobbes. Like Hobbes, what makes such judicial determinations "authentic" for Rutherforth is not the judge's private notion of what is right or just, but the power granted the judge to make such a determination by the sovereign. *See* Thomas Hobbes, *Leviathan* (1909), pp. 212-13.
94. *Institutes*, p. 418.

> sense it was then understood; a view of this practice will be a means of removing any doubts about the sense of it, which are owing only to our remoteness from its original establishment.[95]

At the farther end of the continuum of modes of interpretation, past literal and mixed interpretations, lies that mode that requires the greatest caution on the part of the interpreter: rational interpretation, that mode which does not seek to confine itself to the letter of the law.[96] Indeed, the gulf that separates literal and mixed interpretations is not nearly so great as that which separates both literal and mixed from the mode of rational interpretation. Both literal and mixed keep close to the words being interpreted: "even mixed interpretation is so far literal, that it keeps strictly to the letter, without giving the words any sense, which common usage has not given them; it only ascertains the sense, in which the writer used the words, when common usage has given them more senses than one."[97] Rational interpretation, which Rutherforth prefers to call "liberal or free" interpretation, is a method in which the interpreter may very well have to deviate from the letter and not confine himself to it.[98]

Yet this "liberal or free" mode of interpretation is not an approach that simply dismisses the intention of the writer in favor of the inclinations of the interpreter; it is still *interpretation* in the most meaningful sense. Even under this more liberal mode of considering a text, the interpreter is bound by the obligation to seek the intention of the legislator; that remains the only legitimate objective of the interpreter. "[T]he business of interpretation [is] to find out the meaning or design of the writer" and rational interpretation means nothing more than endeavoring "to collect . . . intention from something else besides his words."[99] Relying solely on the "assistance of conjectures" beyond the literal import of the words used is still only a means to the higher end of determining intention.[100]

The essence of rational interpretation is not to supplant the original intention of the law but to flesh it out, to give it effect in those cases when a strictly literal or even mixed mode would not be able to do it justice. The presumption in rational interpretation is, as it also is with literal or mixed interpretations, that the lawgiver intended

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95. *Ibid.*, p. 419.
96. *Ibid.*, p. 421.
97. *Ibid.*, p. 420.
98. *Ibid.*, p. 421.
99. *Ibid.*, pp. 405, 408.
100. *Ibid.*, p. 405.

to achieve something by the law in question. Either to prohibit some action or to command another, the law, to make any sense at all, must be presumed to have had a purpose. Rational construction does not seek to alter or abolish that purpose, only to assist having that purpose fulfilled.

There are two ways in which rational interpretation is to be employed: "Sometimes the meaning of the writer is extended, so as to take in more, and sometimes it is restrained, so as to take in less, than his words import in their common acception."[101] In the first case, as Rutherforth says:

> When we know what was the reason or final cause, which the writer had in view, what end he proposed, or what effect he designed to produce; and the meaning of the law . . . if we were to adhere closely to the words of it, would not come up to this reason, or would not produce this effect; we may then conclude that his words express his meaning imperfectly, and that his meaning is to be extended beyond his words, so as to come up to this reason, or so as to produce this effect. For it is much more probable that the writer should fail in expressing his meaning, than that his meaning should fall short of his purposes, which he designed to obtain.[102]

So also does such common sense obtain in those cases where the language used must be retrained.

> When we would restrain the meaning of a writer, and show that it is less comprehensive than his words, or that some particular case, which is included in his words, is not within his meaning; we must argue, either for an original or for an accidental defect in his intention; either we must argue that . . . the lawmaker . . . could not intend originally to include the case in question, however he may have so failed in his expression as to include it in his words; or else we much argue that the case is an accidental one, which probably was not foreseen originally, and that, if the writer had foreseen it . . . he would have limited his expression and have particularly excepted the case in question.[103]

Neither extending the meaning nor restraining the meaning is understood by Rutherforth to empower the interpreter to abandon the serious business of ascertaining the original intention of the lawgiver. Rational interpretation, he argues, is still aimed at the end or the purpose which the lawgiver intended: "certainly we can never argue, that his meaning ought to be extended beyond his words,

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101. *Ibid.*, p. 421.
102. *Ibid.*
103. *Ibid.*, pp. 422-23.

upon a reason which does not appear to have been in his mind."[104] Similarly, "when we argue, that a particular case could not, originally, be included in the meaning of the law; either because some absurd consequence will follow from including it, or because some consequence will follow which is inconsistent with the reason or end of the law; we plainly argue, in both instances, from the effect."[105] Rational interpretation for Rutherforth, in the end, is very similar to "equitable interpretation," especially as described by Joseph Story in his *Commentaries on Equity Jurisprudence.*[106] As Rutherforth put it: "By equity is here meant, a fair and honest correction, of a law . . . where it appears that the lawmaker . . . either would or ought to consent to such a correction, if they were to interpret their own act."[107]

Rutherforth's three types of interpretation—literal, mixed, and rational—are, in the end united in their common purpose. Each is a means, and only a means, toward one overarching end: "to find out what was the intention of the writer; to clear up the meaning of his words, if they are obscure; to ascertain the sense of them, if they are ambiguous; to determine what his design was, where his words express it imperfectly."[108] Nowhere in his discussion of interpretation does Rutherforth argue that a judge's private notions of justice may legitimately supplant the intentions of the lawgiver.[109] He most

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104. *Ibid.*, p. 421.

105. *Ibid.*, p. 423.

106. As Story succinctly put it: "[W]ords of a doubtful import may be used in a law, or words susceptible of a more enlarged or a more restricted meaning or of two meanings equally appropriate. The question, in all such cases, must be, in what sense the words were designed to be used; and it is the part of a judge to look to the objects of the legislature, and to give such a construction to the words that will best further those objects. This is an exercise of equitable interpretation." In no way, as Story pointed out, should one deem such equitable interpretation as embracing a jurisdiction "so wide and extensive, as that which arises from the principles of natural justice." *Commentaries on Equity Jurisprudence*, II, pp. 2, 7.

107. *Ibid.*, p. 427.

108. *Ibid.*, p. 405.

109. The only time Rutherforth brushes up against the wall of natural law is during his discussion of rational interpretation. "The general tenor of a law," he remarks, "may be consistent with the law of nature: and yet such cases may arise, accidentally, as will render it impossible to comply with the law . . . without transgressing the law of nature. It is necessary to except such cases as these, when they happen to arise; whether the legislator . . . originally excepted them or not." *Institutes*, p. 428. But he does not go on to weave this into a general jurisprudential maxim. What he seems to be talking about here has a good bit in common with Alexander Hamilton's discussion of equitable discretion of judges in *The Federalist*. In *The Federalist*, No. 80, Hamilton would argue that the "peculiar province" of courts of equity is to give relief from "hard bargains: these are contracts, in which,

assuredly never suggests that there is some higher, unwritten law waiting to be summoned down by judges so to make the polity conform to some abstract notion of justice; nor does he suggest that rational interpretation is a shorthand notation for a recourse to natural law. His theory of interpretation is much more modest than that; it is much safer than that.

Conclusion

Thomas Rutherforth's *Institutes of Natural Law* is, in the end, best understood as a work of republican political theory. His understanding of the nature and obligation of consent and of the freedom of a people, once assembled in a civil society, to determine the contours of their civil constitution; and his belief in the power of such constitutional compacts to limit the discretion of those whom the people are obliged to trust with power were all theories that found a welcoming audience in America. In addition, Rutherforth provided the Americans with something more than those in whose path he traveled—Thomas Hobbes and John Locke, as well as Hugo Grotius. His understanding of the nature and extent of interpretation was spelled out with great and convincing clarity. To a people committed both to the idea of man being governed by the laws of nature and of nature's God, and the belief that a written constitution is one of the greatest improvements on political institutions, Rutherforth provided sound guidance.

Few American jurists have been more closely associated with the idea of natural law than Joseph Story.[110] It is instructive that so committed an advocate of natural law as Story would take his point of departure in sketching the rules for interpreting the Constitution from Rutherforth. The reason is as simple as it is powerful: Rutherforth provided canons of construction that took seriously the claims of natural law but which also refused to allow those called upon to interpret the written law to trump that law by untethered

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though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties." And, as he summed it up in *The Federalist*, No. 83: "The great and primary use of a court of equity is to give relief in *extraordinary cases*, which are *exceptions* to general rules." pp. 539-40, 569. Given Rutherforth's own discussion of what is entailed in the law of nature, this seems the limit of his argument for rational interpretations to make certain the congruence between positive law and the law of nature.

110. *See* James McClellan, *Joseph Story and the American Constitution* (1971), pp. 61-117.

recourse to an allegedly unwritten higher law. Rutherforth understood, as did Story, that while such abstract speculations may be morally appealing as an idea, in practice they would be disastrous. For to allow the written law to be routinely altered or abolished in the name of an unwritten law deemed superior to it by the agents of the people would spell the end of any meaningful notion of the rule of law. At a minimum, it would spell the end of the idea of government that drew its legitimacy only from the consent of the governed.

For those today who seek support for their notions of interpretation that reject the demands of the Constitution as written law, Rutherforth's *Institutes* will not provide it. His theories of civil society, of law, and of interpretation go in precisely the opposite direction. For Rutherforth, the line between natural law and constitutional interpretation is one that should not be crossed; moral theory and constitutional law are not the same thing