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Hadley Arkes

ESSAY

A NATURAL LAW MANIFESTO OR AN APPEAL FROM THE OLD JURISPRUDENCE TO THE NEW

*Hadley Arkes**

On June 4th, a gathering was held under the auspices of the Claremont Institute to announce the formation of a new Center for Natural Law. The purpose of the new Center is to hold seminars for students in law school, or newly sprung from law school, as well as practicing lawyers and judges, who wish to get clear again on the way that natural law forms the ground of our law and comes into play every day in the practical business of deciding cases. A new seminar, the James Wilson seminars, will bring together judges and lawyers, along with professors of philosophy and law in exploring the teaching and practice of natural law. Professor Hadley Arkes of Amherst College was named as the Director of the new Center, and offered these remarks in launching the project. In marking out the mission of the Center he sought to make the case anew for natural law, in terms that would challenge both the liberal and conservative jurists who have been most adamant in resisting the claims of natural law to be applied seriously in our jurisprudence.

We are here today to announce a new Center, in Washington and the country, a Center launched in Washington by the Claremont Institute, a Center for the jurisprudence of natural law. And in making the announcement we want to proclaim again the case for natural law, and offer a kind of Natural Law Manifesto. We announce here noth-

* Edward Ney Professor of Jurisprudence and American Institutions at Amherst College, Director of the Claremont Institute's Center for the Jurisprudence of Natural Law (Washington, D.C.). Professor Arkes would like to offer a special thanks to the members of the *Law Review* for the research they did in filling out even further some of the sources in the notes. It was a gift quite unexpected by him, and he is sure that it has the effect of presenting him as a scholar more formidable than he is.

ing new to the world, much in the way that James Wilson, at the origin of the Constitution, proclaimed that we were not, under this Constitution, inventing *new rights.* The object of the Constitution, he said, was "to acquire a new security for the possession or the recovery of those rights" we already possess by nature.[1] The great Blackstone had famously said that, on entering civil society, we give up those unqualified rights we had in the State of Nature, including the liberty of "doing mischief."[2] To which James Wilson asked, in a Talmudic question, "Is it a part of natural liberty to do mischief to any one?"[3] In other words, as Lincoln and Aquinas had it, we never had a "right to do a wrong."[4] Even in the State of Nature we did not have a right to murder or rape, and therefore as we entered civil society, the laws that barred people from murdering and raping, never barred them from anything they ever had a rightful liberty to do. And so, what rights did we give up on entering civil society? The answer given by Wilson and Alexander Hamilton was: none. As Hamilton said in *The Federalist No. 84,* "Here . . . the people surrender nothing . . . ."[5] Hence there was something not quite right in a the notion of a Bill of Rights reserving to people rights they had not surrendered to the State, for that implied that they had indeed surrendered the body of their rights to the State and that they were holding back now a few they hadn't surrendered.[6] The very purpose of the Constitution—the purpose that

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1 James Wilson, *Of the Natural Rights of Individuals, in* 2 THE WORKS OF JAMES WILSON 585, 585 (Robert Green McCloskey ed., 1967). The fuller passage runs in this way:

> What was the primary and the principal object in the institution of government? Was it . . . to acquire new rights by a human establishment? Or was it, by a human establishment, to acquire a new security for the possession or the recovery of those rights, to the enjoyment or acquisition of which we were previously entitled by the immediate gift, or by the unerring law, of our all-wise and all-beneficent Creator?

2 1 WILLIAM BLACKSTONE, COMMENTARIES *125–26 ("[T]he law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind . . . .").

3 Wilson, *supra* note 1, at 587.

4 For Lincoln, see Abraham Lincoln, Sixth Debate with Stephen Douglas, at Quincy, Illinois (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 257 (Roy P. Basler ed., 1953); Hadley Arkes, *News for the Libertarians: The Moral Tradition Already Contains the Libertarian Premises,* 29 HARV. J.L. & PUB. POL'Y 61, 63 (2005).

5 THE FEDERALIST NO. 84, at 578 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

6 For the fuller account of the original argument over the Bill of Rights, running to the root, see HADLEY ARKES, BEYOND THE CONSTITUTION 58–80 (1990).

directed all branches of the government, not merely the courts—was the securing of those "natural rights."[7]

One could deny that point, as Hamilton said, only by slipping into the teaching of Hobbes and supposing that there were no rights before the advent of a government, no morality antecedent to civil society. As Hamilton pointed out, in Hobbes's view morality was all conventional.[8] We could not expect anyone to accept any moral restraints on his conduct, for *until there were laws*, he could have no assurance that there were moral truths out there that anyone would respect.[9]

Hamilton may be taken as a telling voice here, for indeed the American Founding would not make any sense unless those doctrines of Hobbes were decisively rejected. But that is to say, again, that the Founding, and the second Constitution it brought forth, found its *telos*, its central purpose, in the securing of *natural rights*. That understanding of the regime could not be explained without the recognition of moral truths, of standards of moral judgment that had to be in place before we could even conceive a Constitution. The whole project of a constitutional government could not begin unless one understood in the first place the notion of a regime of law, a government restrained by law, of rules that bound rulers as well as those who were ruled. One had to understand, that is, in the first place the very logic

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7 *See* THE FEDERALIST NO. 84, *supra* note 5, at 578–79 (Alexander Hamilton) (quoting the preamble of the Constitution); Edward J. Erbele, *The Right to Information Self-Determination*, 2001 UTAH L. REV. 965, 1008 n.240 (citing SCOTT D. GERBER, TO SECURE THESE RIGHTS 193, 200 (1995)).

8 ALEXANDER HAMILTON, *The Farmer Refuted*, *in* 1 THE PAPERS OF ALEXANDER HAMILTON 81, 87 (Harold C. Syrett ed., 1961).

9 As Hobbes wrote, "[t]he desires and other passions of man are in themselves no sin. No more are the actions that proceed from those passions, till they know a law that forbids them; which till laws be made they cannot know . . . ." *See* THOMAS HOBBES, LEVIATHAN 65 (George Routledge & Sons 1886) (1651). That is, before the existence of law and civil society, we cannot expect men to know the difference between right and wrong, or to treat that difference as one they can afford to respect.

Hamilton's rejoinder came in that remarkable pamphlet he wrote when still a student at King's College (later Columbia):

> [T]he reason [Hobbes] run into this absurd and impious doctrine, was, that he disbelieved the existence of an intelligent superintending principle, who is the governor, and will be the final judge of the universe. . . . Good and wise men, in all ages, have embraced a very dissimilar theory. They have supposed, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensibly, obligatory upon all mankind, prior to any human institution whatever.

HAMILTON, *supra* note 8, at 87.

of "law"—of propositions that could rightly claim to be valid for everyone, not merely expressions of the private interests of those who ruled. But that brought us back instantly to the N-word: *nature.* As Aristotle taught at the beginning, the defining mark of the *polis* was the presence of law, and law sprang from the nature of only one kind of creature.[10] Only one kind of being could understand and respect a law beyond his own appetites, or grasp what it meant to bear an obligation to a contract or a law even when it no longer accorded with his interests or inclinations. It must have been the same creature referred to by Kant when he said that all of the moral principles governing our lives may be drawn from the very idea of a "rational being as such."[11]

The American Founders understood that there was nothing distinctly American then about the idea of a rule of law, or the principles that barred ex post facto laws, or established the wrongness of bills of attainder.[12] They understood that these principles would *not be brought into being* by the Constitution they were framing. Those principles had to be in place as we were guided in the framing of a legal structure. The Founders knew they could draw then on what Blackstone called the "laws of Nature and reason."[13] In that vein, Jefferson famously remarked that everything was changeable in human affairs, *except the unalienable rights of mankind.* Those were not subject to change, because they were rooted in something enduring either in the nature of man or in the principles of right themselves.

But it seems to be widely forgotten that the tradition of natural law always made a place for positive law, the law that is "posited" or enacted in any place, and sensitive then to conditions distinctly local. We see signs on the road saying 35 mph or 70 mph, and those numbers have no moral significance. But Kant reminded us that behind the positive law is a deeper natural law that tells us why we would be justified in having a law in the first place.[14] We can grasp the principle that would justify us in restraining the freedom of people to drive in a manner that puts innocent life at hazard. But we translate that

10 *See* ARISTOTLE, POLITICS 1252a–1253a.

11 As Kant remarked, the very idea of law, or a moral principle, is present only in a rational being. And "[s]ince moral laws have to hold for every rational being as such, we ought rather to derive our principles from the general concept of a rational being as such . . . ." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 79 (H.J. Paton trans., 1964).

12 *See, e.g.*, ARKES, *supra* note 6, at 61.

13 1 BLACKSTONE, *supra* note 2, at *58 n.7.

14 "Among external laws, those to which an obligation can be recognized a priori by reason without external legislation are *natural laws,* whereas those that would neither obligate nor be laws without actual external legislation are called *positive laws.*" IMMANUEL KANT, THE METAPHYSICS OF MORALS 18 (John Ladd trans., 1999).

principle into a regulation that could *apply the principle* to the circumstances and terrain before us—70 mph on the open highway, perhaps 35 mph on this winding country road.

I. The Recoil from Natural Law

But we meet now at a time, when lawyers and judges on the conservative as well as the liberal side, have rather clearly rejected natural law, treated it with derision and contempt, as though they could give a coherent account of the law without an account of the underlying moral principles that alone could justify the making of laws on any subject. Judges on the conservative side retreat to some safe formula of positive law, a focus on the text of the Constitution, or a commitment to "originalism" and tradition.[15] But with that move they *transmute the question*; they turn jurisprudence into legislative history. They do it because they think it is the most prudent way of protecting the country from the adventures of judges soaring off, inventing new rights, all on the side of the Left, all untethered to any text or to any ground of moral judgment. But in that path there has been no safety, and therefore no prudence, and beyond that, no coherence—no jurisprudence that can give a coherent account of itself. As for the liberal side in our politics, the judges show an incurable penchant for overriding the positive laws, the laws enacted by people who are elected to make them—laws that may protect nascent human beings in their mothers' wombs,[16] or laws that confine marriage to the commitment of a man and a woman.[17] The liberal judges will offer high sentiment, overriding the laws made by majorities in the name of a higher law or principle.[18] They make some of the sounds of those who did natural law, but with one striking omission: they emphatically deny that there are moral truths, truths that hold their truth even when they run counter to the will of a majority. Professor Tribe will simply invoke convictions "powerfully held."[19] Professor Dworkin will regard instead, as the ultimate foundation of jurisprudence, "a nation's political traditions and culture."[20] Both arguments could readily have encompassed the rightness of slavery. For that institution

15 *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 862 (1989).

16 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

17 *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

18 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At 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.").

19 Lawrence H. Tribe, Constitutional Choices 8 (1985).

20 Ronald Dworkin, Law's Empire 378 (1986).

certainly reflected convictions "powerfully held" and a long-standing feature in the "political traditions and culture" of this country. The only way to evade that conclusion was to appeal to the Founders and Lincoln in recognizing the ground in natural law that told us why we may not rightly rule human beings in the way that humans must rule horses and cows.[21] But some commentators on the liberal side would rather live with that result than appeal to natural law and put in place the recognition of moral truths, truths that may be used to cast judgments on others, including themselves, and especially in their private, sexual lives.

The liberal side in our politics finds its aversion to natural law in the recognition both of moral truths and of "nature." The orthodoxies of postmodernism and relativism on the American campuses emphatically deny that there is a fixed human nature. "Natural rights" they regard as an ideology of patriarchalism that covered the rule of white males.[22] And "nature," they say, is "socially constructed" from one place to another according to the vagaries of the local culture.[23] On the conservative side, there seems to have been a critical

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21 *See, e.g.*, Lincoln, *supra* note 4, at 257.

22 There are few pieces that make this argument as sharply as it has been made by Judith Butler. *See* Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism", in* FEMINISTS THEORIZE THE POLITICAL (Judith Butler & Joan W. Scott eds., 1992). Butler's denial that there is a fixed human nature bears even, and most notably, on the question of whether there really are in nature "women," those beings who have suffered injustices in many places, and whose protection and vindication would seem to be the object of a "feminist" movement. How could the advancement of women form a cause if there are no "women" out there? Butler puts the matter in this way:

> Within feminism, it seems as if there is some political necessity to speak as and for *women,* and I would not contest that necessity . . . . So we agree that demonstrations and legislative efforts and radical movements need to *make claims in the name of women* . . . . But this necessity needs to be reconciled with another. The minute that the category of women is invoked as *describing* the constituency for which feminism speaks, an internal debate invariably begins over what the descriptive content of that term will be. There are those who claim that there is an ontological specificity to women as childbearers that forms the basis of a specific legal and political interest in representation, and then there are others who understand maternity to be a social relation that is, under current social circumstances, the specific and cross-cultural situation of women.

Id. at 15 (second emphasis added). The writer raises the query as to whether there is an "ontological specificity to women," as beings truly existing then in nature. And she shows her dexterity the rest of the way by subtly stepping around that central question.

23 *See* Hadley Arkes, *The Liberal Dance with Incoherence,* CATH. THING (Mar. 1, 2010), http://www.thecatholicthing.org/content/view/2970/2/.

forgetting that natural law found its grounds in "the laws of reason."[24] A president of Amherst College once observed that I had a "theory" of natural law. I remarked to him that when people say things of that kind, they rather imply that they are standing back, wholesomely detached, noticing the "theories" whizzing past them. And somehow they are able to make judgments about the fragments of theories that they regard as plausible or implausible, true or false. I said, "Take me back to the ground on which you are making those judgments, to the standards of judgment you are using, and you would be led back precisely to those 'laws of reason' that I take as the ground of the natural law."

The conservatives fear that judges, licensed to invoke the natural law, will be soaring off, as judges have done, but with no standards to discipline or constrain their appeal to lofty sentiment. It is not merely the liberal activists who doubt that reason has moral truths to discern. The jural conservatives apparently do not themselves have confidence that there is a discipline of reason that offers guidance and constraint on judgment. And yet, they are convinced that "activist judges" have abused the claim to invoke a higher law or natural law.[25] But if they can identify an *abuse* of natural law, that rather implies that they have standards of judgment, accessible to them, standards by which they can tell the difference between the claims of natural law, or the exertions of moral reasoning, that are defensible or spurious, true or false. In that case, we may ask, why would the conservatives take the antics of the activist judges as an excuse to abandon the natural law, and the moral ground of the law, rather than claiming the high ground for themselves? Why not take their recoil as a moment to get the liberal judges clear on the difference between a plausible appeal to the principles of natural right and an appeal to a woolly, implausible version?

II. An Appeal from the Old Jurisprudence to the New

I come then today, perhaps in the style of Edmund Burke, to make An Appeal from the Old Jurisprudence to the New: from the old jurisprudence, which relied on natural law as a matter of course, to a new conservative jurisprudence that has not only been resistant to natural law, but contemptuous of it. At one level, some of the conserva-

24 *See* Hadley Arkes, Constitutional Illusions & Anchoring Truths 43-45, 61-68 (2010); *cf.* Cathechism of the Catholic Church § 1955, at 474 (2d ed. 2000) ("The natural law states the first and essential precepts which govern the moral life . . . . This law is called 'natural' . . . because reason which decrees it properly belongs to human nature . . . .").

25 *See* Arkes, *supra* note 6, at 13–15.

tive jurists insist that their concern is merely prudential; Justice Scalia will say that he esteems the notion of natural law but the problem is that there is no agreement on the content of natural law.[26] Far better, he argues, that we simply concentrate on the text of the Constitution, or where the text is silent, on the way in which the text was "originally understood" by the men who framed and ratified it.[27] Hence the doctrine of "originalism." But as I have had the occasion to explain many times over myself, this notion of agreement or disagreement is built upon one of those things the philosophers understand as a "self-refuting proposition." For it reduces to the claim, "that the presence of disagreement on matters of moral consequence must indicate the absence of universal truths."[28] But all I have to do is record my own disagreement with *that proposition* and that should be enough, on its own terms, to establish its falsity.[29] This country was highly divided on the matter of slavery, or on civil rights in our own time, and that didn't seem to affect people with the sense that it was impossible, under those conditions, to offer a judgment on where justice really lay in these matters.

Beyond that, we have had ample evidence by now to see the Justices fall into the most heated and polarized divisions over the meaning of words and clauses in the text of the Constitution. We need look only at the deep disagreement among the judges recently on the meaning of the Second Amendment, on the right to bear arms, to say nothing of the partisan passions that spring up over the meaning of such terms as Equal Protection of the Laws, or Due Process of Law. It should be clear that a reliance on the text of the Constitution does not deliver us from serious arguments and deep disagreements. On the other hand, one could point out that the first principles of natural law are so bound up with the laws—and are often so evident to ordinary people—that they inspire virtually no disagreement. Consider for example that proposition that Thomas Reid regarded as one of the truly "first principles" we draw from the logic of moral judgment itself, a principle I've restated in this way: that we do not hold people blameworthy or responsible for acts they were powerless to affect.[30]

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26 *See* JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA 215 (2006).

27 *Id.* at 203.

28 *See* HADLEY ARKES, FIRST THINGS 6 (1986).

29 *See id.* at 51, 139–41.

30 THOMAS REID, ESSAYS ON THE ACTIVE POWERS OF THE HUMAN MIND 361 (M.I.T. Press 1969) (noting that it was a "first principle" in morals that "what is done from unavoidable necessity . . . cannot be the object either of blame or of moral approbation").

That principle may cover a wide variety of things, such as the insanity defense, perhaps racial discrimination, and many other instances where people really had no causal powers over their condition or their acts and should not be held culpable. We may argue in different cases as to how powerless or incapable people actually were, but no one doubts the validity of the principle—or doubts that the principle would hold true in all places, public and private, at any time. Wherever we are, it is never tenable to hold someone responsible for a crime committed before he was born, or a crime he was evidently incapable of committing. Axioms of this kind have been so woven into our law that we often fail to notice them any longer. But they stand as striking evidence that the deepest principles of the law do not in fact inspire a deep division in our country. They are understood readily by ordinary people, and are not regarded as inscrutable even by lawyers.

It is at least curious then that distinguished conservative jurists profess to find something hopelessly woolly about natural law, while ordinary people as well as lawyers keep backing into its logic. A visitor from London gets off a plane in New York, and we do not think we have to look at his passport, or take note of his citizenship, before we protect him from an unjustified assault in the street. But we seem to understand that the same man may not take himself over to the City College of New York and claim admission, or claim the same, subsidized rate of tuition that the people of New York are willing to make available to citizens of New York. The latter is a claim or right that arises in a particular place, out of a particular association (like the right to use the squash courts at Amherst College). But the right to be protected against an unjustified assault is a right we would expect to be respected in all places by governments that purport to be decent and lawful governments. These distinctions were marked in the nineteenth century as differences between rights that arose from governments and rights that arise from nature.[31] And the fact that the distinctions seem universally recognized may be a mark of something enduring and necessary in the logic that informs them.

A few years ago we encountered some tumultuous demonstrations on immigration, with many illegal aliens and their sympathizers carrying banners urging the conferral of citizenship even on those who came to this country illegally (in violation of the "positive laws").[32] What the demonstrators were arguing, I take it, was the

31 *See, e.g.*, ARKES, *supra* note 28, at 134.

32 *See* Associated Press, *Immigration Issue Draws Thousands into Streets*, MSNBC.COM (Mar. 25, 2006, 11:50 PM), http://www.msnbc.msn.com/id/11442705/ns/politics/t/immigration-issue-draws-thousands-streets/.

rightfulness of conferring citizenship upon them quite apart from what the positive law had stipulated. They themselves were not citizens, but they wished to be, and they believed they had a *rightful claim* to be recognized as citizens. But again we may be surprised by the obvious: since these people are not citizens, the "rights" they are invoking cannot spring from any rights they possess now *as citizens.* They must be invoking an understanding of right and wrong that stands quite apart from the positive law, the law that is "posited," set down, enacted in any place. The demonstrators were evidently invoking a standard of right and wrong that could be posed against the positive laws in judging the rightness or wrongness of those laws. In other words, they were appealing, in effect, to an understanding of natural right or natural law. And once again, they were doing it without any particular awareness that they were doing anything distinctly philosophic or juridical.

III. How That First Generation of Jurists Did It

The first generation of our jurists and lawyers gave us remarkable examples of how they made their way, strainlessly and elegantly, to the ground of the natural law in the axioms of our reasoning. They would trace their judgments back to first principles, to the principles that were usually not mentioned in the text of the Constitution, because they were the truths that had to be in place before one could even have a constitution or a regime of law. And part of their achievement is that they did it so effortlessly and gracefully that they hardly drew much attention to themselves for doing it.

In a throwaway line at the end of his opinion in the landmark case of *Gibbons v. Ogden,*[33] John Marshall apologized to his readers for spending so much time "to demonstrate propositions which may have been thought axioms."[34] That is, he assumed that every literate reader out there would know that, before a demonstration or experiment could be offered, certain indemonstrable points had to be in place—indemonstrable because no demonstration could be understood if these points were not grasped. These were truths that had to be grasped, as the saying went, *per se nota,* as things true in themselves. That the Founders were uncommonly clear on this matter was revealed sufficiently by Alexander Hamilton in that preface he wrote to *The Federalist No. 31* on taxation. In the course of that paper, as I have the occasion to remark, he reached no conclusion different from what Bob Dole, in our own time, would have reached. But any reader

33 22 U.S. (9 Wheat.) 1 (1824).

34 *Id.* at 221.

looking at the text would have noticed at once some strikingly different furnishings of mind. For Hamilton put it in this way:

> In disquisitions of every kind there are certain primary truths or first principles upon which all subsequent reasonings must depend. These contain an internal evidence, which antecedent to all reflection or combination commands the assent of the mind . . . . Of this nature are the maxims in geometry, that "The whole is greater than its part; that things equal to the same are equal to one another; that two straight lines cannot enclose a space; and that all right angles are equal to each other." Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose, which is itself incapable of limitation.[35]

What we grasp most notably *per se nota*, as something true in itself, is the anchoring proposition and the touchstone of the laws of reason, "two contradictory propositions cannot both be true."[36] In the same way, we grasp without much strain—and with no serious controversy—these anchoring points in moral judgment and natural law: that the language and logic of moral judgment apply only to the domain of freedom, where people are free to choose one path of conduct over another, and so we say again, in a reworking of Thomas Reid,[37] that we don't hold people blameworthy and responsible for acts they were powerless to affect. And we grasp *per se nota* the truths that stand behind that "proposition," as Lincoln called it, the anchoring proposition of the American republic, "all men are created equal."[38] For we grasp at once that, even in this age of animal liberation we do not sign labor contracts with horses or cows; nor do we seek the informed consent of our household pets before we authorize surgery upon them. But we continue to think that creatures who can give and understand reasons deserved to be ruled through a rendering of reasons or justifications by a government that is compelled to elicit their consent.

That is the ground to which Lincoln and the Founders appealed, with a public and a class of lawyers who found nothing incomprehensible in what they were saying. They did, elegantly and luminously,

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35 THE FEDERALIST NO. 31, at 193–94 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

36 *See* ARKES, *supra* note 28, at 51.

37 *See* REID, *supra* note 30, at 361 ("What is in no degree voluntary, can neither deserve moral approbation nor blame.").

38 Abraham Lincoln, U.S. President, The Gettysburg Address (Nov. 19, 1863), *in* AMERICAN DEMOCRACY FROM WASHINGTON TO WILSON 86 (John H. Finley ed., 1925).

what the spokesmen for conservative jurisprudence in our own day insist should never be done. Let me just take three examples of the kind of reasoning I have in mind, executed without strain by Hamilton and Marshall.

In *The Federalist No. 78*, Hamilton noted the rule that guided the courts in dealing with statutes in conflict: the statute passed later is presumed to have superseded the law enacted earlier.[39] The same rule does not come into play, of course, with the Constitution, for a constitution framed earlier would have to be given a logical precedence over the statute that came later. Were that not the case, the Constitution would lose its function, or its logic, as a restraint on the legislative power. But these rules for the interpretation of statutes are nowhere mentioned in the Constitution. As Hamilton remarked, they were "not derived from any positive law, but from the nature and reason of the thing."[40]

In that landmark case of *McCulloch v. Maryland*[41] Chief Justice Marshall pointed out that the Constitution gives Congress the power to "punish piracies and felonies committed on the high seas, and offences against the law of nations."[42] But the question could be raised then as to whether, in a Constitution of enumerated powers, Congress has the power to punish where that authority has not been explicitly given. "All admit," wrote Marshall, "that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress."[43] The question became the occasion for Marshall to move back to the deep axioms of moral judgment and the law. Marshall mused in that vein that the power to establish must entail the power to preserve. If the Congress can establish a system of mails, it must have the power to protect the mails against theft.[44] But then, as Marshall pointed out, the answer must be implicit in the very idea of the power to legislate.[45] A law was binding on everyone in the territory who came within its terms. If a law is not obeyed, and the law not enforced, how was the law "binding"? And if a law was not binding, if it did not entail an obligation to respect it, in what sense was it a "law"? As John Stuart Mill would later point out, we stop using the language of like and dislike and begin using the

39 THE FEDERALIST NO. 78, at 525–26 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

40 *Id.* at 526.

41 17 U.S. (4 Wheat.) 316 (1819).

42 *Id.* at 417.

43 *Id.* at 416.

44 *Id.* at 417.

45 *Id.* at 418–19.

language of "right" and "wrong" to the extent that we think that people may rightly be punished for what they are doing.[46] If we are serious when we declare a certain class of acts to be "wrong," and to bar them with the law, the notion of law itself must entail the possibility that people may be punished for doing the things that the law forbids.

I come back to John Marshall again for my third example, this one far more elegant and reaching more deeply. In the classic case of *Fletcher v. Peck*[47] in 1810, Marshall and his Court struck down a law in Georgia that rescinded an earlier grant of lands, which had been tainted by corruption, with members of the legislature bribed to make the grant. But the problem was that parcels of the land had been sold in turn to third parties, who were quite innocent of the original wrongdoing. To revoke the grant was to deprive the innocent buyers of their land, without returning the money that was spent in buying it. To rescind a grant in that way was something Marshall found to be the equivalent of reneging on a contract after people had already made commitments, paid their money, and opened themselves to serious costs if the contract were not honored.[48] With that move Marshall could have brought the case here under the coverage of the Contracts Clause of the Constitution: the law of a State had impaired the obligation of a contract.[49] But instead of doing that, Marshall did something far more elegant. He showed that the Contracts Clause of the Constitution could be drawn *deductively*—drawn, that is, with the force of a syllogism—from the deeper principle on ex post facto laws: the laws that make something punishable after the fact for something that had not been illegal, or condemned in the law, when the act was performed; or a law that increased the penalty after the fact, or made it easier, after the fact, to convict someone for the same act.[50] But the principle on ex post facto laws was recognized all around as one of those deep principles of law; a principle that would have to be honored in any regime that presumed to call itself a regime of law. With that subtle move Marshall could put himself in the position of saying something quite extraordinary. Georgia, he said, was a great state, but even if Georgia were a separate, sovereign state on its own, outside the Union—and outside the coverage then of the Contracts

46 *See* 1 JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 45 (J.M. Dent & Sons Ltd. 1910).

47 10 U.S. (6 Cranch) 87 (1810).

48 *See id.* at 137.

49 *See* U.S. CONST. art.I, § 10, cl. 1.

50 *See Fletcher*, 10 U.S. (6 Cranch) at 138–39.

Clause—this law would still be wrong.[51] For its wrongness was rooted in a proposition that did not depend for its validity on being mentioned in the text of the Constitution.[52]

Marshall, in this early period, was nothing if not a great teacher, a kind of republican schoolmaster, or teacher of the law. And what Marshall was teaching in this case was that certain parts of the Constitution had the standing for us of a "fundamental law" because they were grounded in truths that would have been there, and true in themselves, even if there were no written Constitution.

IV. THE FOUNDERS AND ORIGINALISM

The lessons taught by Hamilton and Marshall are still there to be learned. They can be recovered simply by reading again the writings they left us. And when our students encounter them, they encounter furnishings of mind strikingly different from the furnishings of mind they find among lawyers in our own day. That recognition raises, from another angle, the question of why we read the Founders. Yes, they may help us in understanding the Constitution these men crafted, but we cannot be confident that Hamilton, Wilson, and Marshall were "representative types." When we read some of these passages in Hamilton, done so luminously, with elegance and economy, we really cannot fancy that most men, even in this remarkable circle of Founders, could have picked up their quills and struck off the same passage. I would fasten here, on one telling example, in Hamilton's memorandum to President Washington on the constitutionality of a National Bank. Hamilton was locked there in an argument with Thomas Jefferson, who was then Secretary of State, and Jefferson was arguing for a national government more tightly circumscribed. The argument would touch upon the meaning of the "necessary and proper" clause of the Constitution, and Hamilton would anticipate the argument that John Marshall would later make in *McCulloch v. Maryland.* His argument would track almost precisely along the lines that Marshall would later take—except that he takes a turn, and in that turn reveals a mind in a notably different register. Jefferson was arguing that there was no strict need for the federal government to

51 *Id.* at 136 (noting that the validity of the rescinding Act, passed by the legislature, "might well be doubted, were Georgia a single sovereign power").

52 This sense of the matter was conveyed even more forcefully by Justice Johnson in his concurring opinion: "I do not hesitate to declare," he wrote, "that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity." *Id.* at 143 (Johnson, J., concurring).

create a corporation for a bank when there were banks in the separate States.[53] But there, said Hamilton, the Secretary had revealed "a *radical* source of error" in his reasoning; he had offered "an idea which alone refutes the construction."[54] The constitutional authority of the government could not depend, as he said, on the "accidental existence of certain State banks—institutions which *happen* to exist today, and, for aught that concerns the government of the United States, may disappear tomorrow."[55] He pointed out that "[t]he *expediency* of exercising a particular power, at a particular time, must indeed depend on *circumstances*; but the constitutional right of exercising it must be uniform and invariable—the same to day as to morrow."[56]

Let us say that we brought forth rules for a national government tightly circumscribed, so that whether the national government has the authority, say, to establish a bank, would be contingent on whether the States already had established such banks for the management of public finances. If the institutions were available then within the States, it would not be "necessary" for national government to establish such a corporation, and therefore, in Jefferson's construal, the move would not be constitutional for the national government.[57] And so Hamilton's argument may be condensed in this way: in Jefferson's construction, whether the federal government may undertake the activity would be *contingent* on whether one of the States is already supplying that function. *But that rule itself cannot be contingent.* The rule that the powers are contingent cannot itself be contingent. It must be, as Hamilton said, "uniform and invariable, the same to day as to morrow."[58]

We may ask people to sift out of these accounts the parts that are contingent or fixed: a father tells his son that, while studying in New York, he would prefer that he takes cabs or public transportation rather than buy a car, but he has permission to buy a car if he needs one. What is contingent is the use of cabs, buses, and subways. What remains the same is the authority or permission to buy the car. Henry Hyde came to a small dinner in the first week of the Clinton Administration, reporting on a conversation with Al Gore at the White House.

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53 Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 3 THE FOUNDERS' CONSTITUTION 245, 247 (Philip B. Kurland & Ralph Lerner eds., 1987).

54 Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 247, 249.

55 *Id.*

56 *Id.*

57 Jefferson, *supra* note 53, at 247.

58 Hamilton, *supra* note 54, at 249.

Gore said, "Henry, let us work together to make abortions less necessary."[59] Hyde grasped at once the implication that had evaded Al Gore, or that Al Gore had pretended not to see: what was contingent was whether abortions would be ordered. What would be fixed, invariable, unchanging—and not open to challenge—was the right to order an abortion for any reason.

To grasp what Hamilton grasped in that brush with Jefferson is not to be mired in a dispute long past. It is to cultivate a certain acuity, something bound up with logic, quite fundamental, and yet something often unnoticed even by people as accomplished as Thomas Jefferson. To cultivate lawyers and judges who could see at once what Hamilton saw at once, is part of the mission of this project on the natural law. It is part of that savviness or worldliness that should attend the work of those who make or shape the laws. And yet we ought to be utterly clear that, as we study again the things that Hamilton and the Founders knew, we are far from any claim that all of these things reflected the "original understanding" of the Founders. When we see, in the case of the Bank, what Hamilton saw and Jefferson did not, it becomes plain that we cannot readily impute all of these understandings to everyone in that rare class of the Founders. When we read Hamilton here and in other places, we simply consult him as someone who could give us the most luminous and clearest account of the reasoning behind any of these strands or practices in the Constitution. That does not mean he is not open to question, for there were indeed a couple of things he got wrong or anticipated wrongly. What we can say is that he supplies at least the understanding "to beat"—the understanding we are inclined to favor until we find something else that rises to the same level of clarity and force. But we should be clear—and it is worth the pause to underscore the point: we read Hamilton, Wilson, Marshall, and others, not because they are entirely representative of the class of the Founders. We do not hold them forth then under the banner of "originalism." To our friends doing "originalism" I would suggest that it is nothing less, finally, than this: that this kind of reasoning simply strikes us as so compelling in touching the deep canons of reason that it "commands the assent of the mind."[60] These men became our teachers because they did indeed take us back to the axioms that would have to underlie any regime of

59 *See* Hadley Arkes, *Obama and the Enduring Untruths*, CATH. THING (May 25, 2009), http://www.thecatholicthing.org/columns/2009/obama-and-the-enduring-untruths.html.

60 THE FEDERALIST NO. 31, *supra* note 35, at 194 (Alexander Hamilton).

law, the axioms that would have to be there even, in fact, if there had been no written Constitution.[61]

V. Different Angles: Judge Bork and Justice Scalia

That theme of judges teaching brings me to two friends, distinguished jurists and gifted teachers, and yet men who have been scathing in their aversion to natural law, Justice Antonin Scalia and Judge Robert Bork. As I have argued in the past, these jurists have given us some compelling moments in applying the canons of reason to the cases coming before them. They have given us some elegant examples of how natural law might be done even while they have been professing up and down that it cannot be done. I have argued to the Justice that he has done the work of natural law handsomely in cases like *Rapanos v. United States*,[62] which dealt with the limits on the expansive reach of the Army Corps of Engineers in trying to claim jurisdiction over wetlands, including anything essentially wet.[63] Scalia pointed out that the statutes here never meant to cover "transitory puddles or ephemeral flows of water."[64] But then in response to Justice Kennedy he delivered this telling, Talmudic question: "[W]hat possible linguistic usage would accept that whatever . . . *affects* waters of the United States *is* waters of the United States?"[65] It was an appeal to propositional logic, something not spelled out in the text of the Constitution, but something of evident relevance in helping to establish the limits to the reach of a federal statute.

Some of our friends do not seem to notice that they are doing natural law, just as they are speaking prose. And so they flex their genius at critical times for the purpose of avoiding natural law and keeping out of the hands of their adversaries the appeal to natural law or moral reasoning. In the *Heller*[66] case from the District of Columbia three years ago, the Supreme Court held that the right in the Second Amendment to keep and bear arms was indeed a right that was confirmed for persons, for individuals, not merely for militias organized by the States.[67] In the course of his opinion for the majority, Justice Scalia appealed to a deep right of self-preservation.[68] In a conversation a while back I remarked that I assumed that he was appealing to

61 *See, e.g.*, *id.* at 193–94.
62 547 U.S. 715 (2006).
63 *See id.* at 722.
64 *Id.* at 733.
65 *Id.* at 755.
66 District of Columbia v. Heller, 554 U.S. 570 (2008).
67 *See id.* at 585, 592.
68 *See id.* at 584–86.

the right of an innocent person to fend off an unjustified assault. And he confirmed that that was indeed what he had in mind. But those words on self-preservation were not in the text of the Second Amendment, and so the question arose: Was he appealing to a deep principle that did not depend for its validity on its mention in the text? Or, was he saying that Blackstone and James Wilson invoked that right of self-preservation, and that many people read them at the time?

I do not think that the Justice has settled his answer to that question, but he seems to be tilted to the second—to the evidence in the record that this understanding was so widespread at the Founding that it could plausibly be counted as part of the "original understanding." The hazard here is precisely that this approach converts jurisprudence into legislative history. In the case of the Second Amendment, it redirects us to ask: How many of the men who framed the Second Amendment and voted to ratify it in the States had actually incorporated that understanding expressed by Blackstone, Locke, Hobbes, and others? Well, how many would be enough before we could impute the understanding to the Founders and stamp it authoritatively as part of the "original understanding"? In the nature of things, we cannot get an answer to that question. But even if we did, it would not be the answer to the question we are asking; it would not be the answer to the question of whether the laws may cast up barriers to an innocent person, trying to make use of lethal force in defending himself against an unjustified assault if that seems to be the only way of defending himself.

More recently, Robert Bork offered a criticism of President Obama for backing away from a defense of the Defense of Marriage Act (DOMA).[69] Bork was certain, as I am, that the judgment reached by Mr. Obama, on the constitutionality of DOMA, was quite wrong.[70] The President had come to the judgment that it was as wrong to withhold a marriage license from a couple of the same sex as it had been wrong, in an earlier day, to withhold a marriage license from a couple composed of members of different races.[71] Mr. Obama professed to think that the willingness to treat these couples differently from other couples allowed to marry violated the Equal Protection Clause.[72]

In that judgment, I agree emphatically with Robert Bork; I share with him the view that the President's argument is quite untenable. But we reach that judgment through paths notably different. Judge

69 Robert H. Bork, *Offense to the Constitution Act*, NAT'L REV., Mar. 21, 2011, at 16.

70 *See id.*

71 *See id.*

72 *See id.*

Bork would simply ask whether the right articulated in this case was contained in the Constitution, or whether it was originally understood, by the men who drafted and ratified the Fourteenth Amendment[73]: Had it really been understood at the time that that Amendment would make it indefensible to confine marriage to one man and one woman? Could we plausibly impute then to the authors of that Amendment a willingness to install same-sex marriage? The notion, of course, is quite bizarre. I would have to doubt that any such idea was in the head of anyone who had anything to do with the writing or passage of that Amendment. And yet, if we were to be governed on this matter by the "original understanding," the record here carries a serious embarrassment for the arguments of the "originalists." Robert Bork harbors no real doubt that it would be contrary to the principles of the Constitution to bar people, through the laws, from marrying across racial lines. But if there is anything that is clear about the original understanding of the Fourteenth Amendment, it is that Lyman Trumbull, who managed that Amendment in the Senate, assured his colleagues up and down that nothing in that proposed Amendment would call into question those laws in Illinois as well as Virginia that barred interracial marriage.[74] These were the laws on miscegenation. And it seemed to be one of those things firmly understood that the Fourteenth Amendment had no ghost of a chance to be enacted unless Trumbull could credibly offer those assurances to his colleagues and the public.

It is a nice question then for our friends committed to "originalism" as to whether the Court should have decided *Loving v. Virginia*[75] in 1967 and struck down those laws barring marriage across racial lines.[76] I seriously doubt that Justices Scalia or Thomas, strongly committed to versions of "originalism," would argue now against deciding that case the way it came out. But the recognition, surely melancholy for Justice Scalia, is that the Court could reach that decision only by going outside the text of the Fourteenth Amendment and explaining the principle that makes it deeply wrong for a legislature to conclude

73 *See id.*

74 See, in this vein, the exchange among Senators Trumbull, Fessenden, and Johnson, during the debate over the Civil Rights Act of 1866, in CONG. GLOBE, 39TH CONG., 1ST SESS. 505–06 (1866); and the exchange between Trumbull and Sen. Davis, in *id.* at 600. This understanding was also incorporated in some early cases, testing the laws on miscegenation under the Fourteenth Amendment. *See In re* Hobbs, 12 F. Cas. 262 (C.C.N.D. Ga. 1871); State v. Gibson, 36 Ind. 389 (Ind. 1871); State v. Hairston, 63 N.C. 451 (N.C. 1869); Lonas v. State, 50 Tenn. 287 (Tenn. 1871).

75 388 U.S. 1 (1967).

76 *Id.* at 12.

that the fitness of people to enter marriage could hinge in any way on their race. The question would bring us back to the wrong in principle of racial discrimination anchored in the premises of "determinism": we cannot coherently reach judgments about the worth and deserts of people on the basis of their race, as though race exerted some deterministic control over the conduct of people—as though, if we knew the race of any person, we would know anything of moral significance about him, as in whether he was a good or bad man, who deserved to be welcomed or shunned, praised or blamed.[77] Do we really have any ground, then, on the basis of race, for making guesses about the fitness of anyone to accept the obligations of marriage?

But of course the Supreme Court had never actually articulated that principle on racial discrimination. In the legendary case of *Brown v. Board of Education*,[78] the Court let the wrong of the case hinge on the prospect of injuries done to youngsters in segregated schools, though it never offered any evidence at all on any injuries actually suffered by black children in those schools in Topeka and other cities in the South.[79] Nor had the Court even shown that the black children in those schools suffered any drop in their motivation and self-esteem. But of course, if the Court had ever taken the trouble to get clear on that principle, it could have come to the clear recognition that schemes of racial preference, assigning benefits and disabilities solely, decisively, on the ground of race, were schemes that shared the same wrong in principle as racial segregation or racial discrimination.

But as I have argued in the past, it is no knock on Lyman Trumbull that he had not seen all of the implications that could spring from the principles he was planting in the law.[80] For who among us can? The life of moral experience is a life of discovering, in cases that suddenly illuminate the landscape, implications of our own principles that have heretofore gone unseen. But it would have been necessary to explain the principle here in order to explain why it was legitimate for the Court to depart from the original understanding of the Fourteenth Amendment and hold invalid that law in Virginia barring marriage between blacks and whites. And yet, that is precisely what our colleagues holding up the banner of "originalism" have been so averse to doing. For to move along that line is to move along a path that

77 For the fuller account of this argument, rooted in the logic of law itself and the matter of "racial determinism," see ARKES, *supra* note 24, at 52–55; ARKES, *supra* note 28, at 88, 92–93, 97–99.

78 347 U.S. 483 (1954).

79 *Id.* at 493–95. On the empirical evidence engaged in the Brown case, see HADLEY ARKES, THE PHILOSOPHER IN THE CITY 232–36, 240 (1981).

80 *See* ARKES, *supra* note 24, at 23.

takes us outside the text—takes us to principles that need to underlie the text in order to make the text comprehensible and compelling in the cases coming before us. Some votaries of conservative jurisprudence have been so offended by the performance of activist judges, that they would rather take the path of doing legislative history, or getting tangled in arguments over the reading of the historical record, if that will have at least the effect of diverting people from getting lured into the mirage of natural law.

But to borrow a line from Stanton Evans, the problem with this style of pragmatism is that it doesn't work.[81] We know exactly what will happen if the cases on same-sex marriage are argued mainly or decisively on the ground of the "original understanding" of the Fourteenth Amendment. We will have a replay of *Brown v. Board*, where the Court invited analyses of the historical record and found that they yielded no clear conclusion. We will find judges disagreeing about the historical record. They will hear from historians trying to show several of the politicians receding from a bigoted rejection of the homosexual life, and the conclusion will emerge that there is disagreement among the experts that the Fourteenth Amendment had to imply a rejection of homosexuality. Justice Scalia's most familiar line, in recoiling from natural law, is that it entails no agreement, that it is open to endless disagreement. One would think that the same objection should be quite sufficient and decisive in detaching our friends from their insistence on finding the answers in these cases by reading the historical record in search of rights rooted in our "traditions."

VI. In Contrast: The Categorical Force of First Principles

In striking contrast, we encounter no disagreement on those canons of reason that truly are taken as axioms in our law. I have already mentioned that first principle, expressed in different ways by James Wilson and Immanuel Kant, that we cast judgments only in the domain of freedom, where people choose their own acts, that we do not hold people responsible for acts they were powerless to affect.[82] But consider also the logical string that begins with that anchoring moral point that we insist on punishing people *only for wrongdoing*. Any system of justice must begin by respecting the difference between innocence and guilt. We insist then on making that discrimination in the most demanding way before we visit punishment on people. We insist on testing evidence by the canons of reason, rather than having

81 *See* Stanton Evans, *The Foundations of Conservatism*, Council for Nat'l Pol'y, http://www.cfnp.org/page.aspx?pid=280 (last visited Nov. 24, 2011).

82 *See supra* note 30 and accompanying text.

defendants run over hot coals or outrun a mob in the street. With the same logic, we think that any defendant must have the right to see the evidence and witnesses arrayed against him so that he has the chance to rebut them. For we have a better chance then of producing a verdict that is substantively just, a verdict that makes an accurate discrimination between innocence and guilt and deals out punishment only to the guilty.

What I have just run through is a logical skein, and along the way I have folded in understandings that have become quite familiar under the Constitution. We have seen judges coming out with ringing conclusions of that kind as though they were just discovering grand truths. And yet, these are simply the axioms that have ever been embedded in the logic of the rule of law. In fact, they are so woven into our understanding that we are hardly even aware of them any longer, and we could hardly conceive of our law without them. But what is not widely recognized is that we have come to understand these features of the law as bearing a *categorical* truth, which comes out to us in this way: we know that, even in the best places, juries will make mistakes, evidence will be misconstrued, and even with the fairest procedures some innocent people will be punished and the guilty go free. And yet nothing in that experience could dislodge us from the conviction that, before we send a man to jail for a serious crime, he should be given the chance to address and refute the evidence and witnesses against him. Those principles will ever be in place in anything that calls itself a system of justice. They will not be dislodged by anything in the spotty record of our species in administering justice.

And so contrary to claims made by some of our friends, highly placed and highly experienced in the law, the axioms of natural law inspire far less division and controversy than the theories of "originalism" or the method of legislative history offered by conservatives as well as liberals. I think we can predict, in the litigation over same-sex marriage, that the courts facing the challenges to traditional marriage will hear the arguments over "original understanding" and quickly brush them aside. The historical record, they will briskly tell us, is not free of controversy. And so where will the argument move? It will move precisely to the point that Robert Bork found indefensible, though he did not linger with the explanation of why it was indefensible: we will be challenged to explain why race is irrelevant to the sexual relation that was central to the joining of bodies, as well as souls, in marriage. At the same time, we would have the task of arguing, in contrast, that the complementarity of the sexes is essential to the purpose, or *telos*, implicit in the very existence of men and women: that marriage finds its distinct, and most coherent, rationale as a

framework of commitment around that central purpose of sexuality, in the begetting of children. One way or another the argument will have to make its way to that point, and everyone knows it. The argument will not hinge at any point on the speeches of Lyman Trumbull and the "original understanding" of the Fourteenth Amendment.[83] But if that is the case, we earnestly press the question: What is the purpose or rationale of a mode of jurisprudence that is guaranteed to distract us from the main question in substance, a mode of argument that is bound to be a sure loser in the future as it has been for most of the past fifty years? Is there any purpose behind this ritual of evasion other than the concern that we divert judges and lawyers from the dangers of taking natural law seriously?

VII. JUDGE O'SCANNLAIN'S RESERVATIONS—AND THEIR REVELATION

Judge Diarmuid O'Scannlain, one of the true stars of the federal bench, delivered a lecture several months ago at Fordham,[84] and the mark of his rarity as a conservative judge, is that he actually made an earnest appeal to consider seriously the claims of natural law.[85] He cited Justice Scalia's opinion in the *Heller* case on the Second Amendment as a notable example of the way that natural law may be engaged in deciding cases of real consequence.[86] But he took Scalia's approach to provide the touch that rescued natural law from the claims of a hovering omnipresence, floating beyond the Constitution, in a hazy world above the clouds. As I understand Judge O'Scannlain's argument, Scalia's dip into history shows that some of these principles of the natural law were explicitly acknowledged and respected at the time of the founding, when these constitutional provisions were drafted. O'Scannlain followed the Court in holding that the core of the Second Amendment was a right to self-defense, that this was a "pre-existing right" that the Second Amendment "codified."[87] What seems critical for O'Scannlain are the signs that the Framers had intended to recognize that natural right, that "pre-existing right," in the text of the Constitution. As O'Scannlain put it, "where a constitutional provision codified a pre-existing, natural right, the historical understanding of that natural right can clarify ambigui-

83 *See supra* note 80 and accompanying text.

84 Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513 (2011).

85 *Id.* at 1515.

86 *Id.* at 1523 ("*Heller* is at least as notable for its *method* of constitutional interpretation, as it is for its actual holding.").

87 *Id.* at 1524 (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)).

ties in the constitutional text and elucidate the rationale and scope of the constitutional right."[88] It is that connection, then, between the principles of natural law and the things distinctly of the American Constitution, that establishes a kind of permission or license to make the appeal now, in our own day, to those principles of the natural law.

At the risk of a pause in the movement of the argument, I should not avoid the point that, for the most important figures at the Founding, it is arguable that the "original understanding" was closer to the reverse of O'Scannlain's view: in that classic early case of *Chisholm v. Georgia*[89] in 1793, James Wilson noted that we were at the beginning of the American law, with no precedents accumulated under the Constitution. And so before he would cite any American case, he would appeal to Thomas Reid and his remarkable work in illuminating "the original faculties of the mind."[90] Wilson would take the matter back, in other words, to the grounds on which we can claim to know anything, and know that we know—know that certain things, even in the domain of moral judgment, could not be otherwise. Without exactly putting the label on it, he was showing the awareness of the deep principles that have to be in place before we can have a system of law. In other words, that the American Constitution *began with the natural law.* It did not require then any special permission to invoke it, since it was there all the time, and would be there all the time, as the ground of what we were doing when we were "doing law."

Judge O'Scannlain's argument seems to depend on the intervention of what could be called, following Hamilton, a "rule of construction" or perhaps a "constitutive rule," a rule that can show that a principle of natural law has been absorbed into the law of the Constitution.[91] Scalia's opinion in *Heller* has, for O'Scannlain, a ring of aptness because its appeal to natural law was connected with something in our history of serious reflection on matters legal[92] (a history that included, say, the widespread reading of Blackstone).[93] The constitutive rule looks to see if there was a deliberate attempt to codify a natural right in the Constitution. That situation was apparently to be distinguished from cases in which judges would be floating free, detached from anything in our history, or even offering a filtered and

88 *Id.* at 1525.

89 2 U.S. (2 Dall.) 419 (1793).

90 *Id.* at 453–54.

91 THE FEDERALIST No. 78, *supra* note 39, at 526 (Alexander Hamilton).

92 *See* O'Scannlain, *supra* note 84, at 1523.

93 HOWARD SCHWEBER, THE CREATION OF AMERICAN COMMON LAW, 1850–1880, at 17 (2004).

quite fanciful view of the relevant history.[94] Just what the features are that mark these differences between Scalia in *Heller* and these other judges doing pseudo-history, are things that could be worked out. But once we have that "constitutive rule" framed as precisely as we can frame it to avoid abuse, that "constitutive rule," to authorize an appeal to the natural law, becomes, in effect, part of the apparatus of judicial interpretation.

Is it not worth pointing out then that this rule of construction, which O'Scannlain regards now as quite critical to the place of natural law in constitutional interpretation, is *nowhere to be found in the Constitution*? It is not part of the positive law. How then are we supposed to know it, and why are we justified in taking that proposition, or that "constitutive rule," as authoritative and governing? Would it be like Hamilton's rules of construction: that it was not contained in the positive law; that it was known to us, rather, through the "nature and reason of the thing"? Could the same thing be said now about a constitutive rule that would explain to us the contingencies under which natural law may be invoked or foreclosed? It is not part of the positive law; it simply offers a proposition thought to be sensible in itself, something containing, as Hamilton said, "an internal evidence, which antecedent to all reflection or combination commands the assent of the mind."[95] In other words, it is closer to a first principle; it is simply a rule sprung from the natural law.

Once again, we have been speaking prose all our lives; we have never left the natural law.

VIII. What Difference Would It Make?

The question has been put earnestly to us, though, by one friend who had clerked for the late Chief Justice William Rehnquist. Would you really come out, at the end, with conclusions different from those that Scalia and the conservative judges would reach? And if not, what is the point?

As it turns out, Justice Scalia has indeed spoken for me in these cases most of the time, and spoken for me grandly. In his critical

94 I think here, notably, of Justice Black in *Afroyim v. Rusk*, 387 U.S. 253 (1967), removing passages from quotes as he sought to prove that Congress had never sought to strip people of their citizenship without their consent. *See id.* at 257, 260–61, 263, 264–67. It is rare that an opinion of the Court is, as the saying goes, "blown out of the water" by a dissenting opinion; but Justice Harlan, in dissent, so refuted and discredited Black's account of the historical record that one wonders just why five members of the Court were content to leave that opinion on the books as an opinion that spoke for them. *See id.* at 268–93 (Harlan, J., dissenting).

95 The Federalist No. 31, *supra* note 35, at 193–94 (Alexander Hamilton).

views on abortion in cases like *Webster v. Reproductive Health Services*,[96] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[97] and *Stenberg v. Carhart*;[98] or even in cases touching on abortion, such as *Madsen v. Women's Health Center, Inc.*[99] and *Hill v. Colorado*;[100] in his dissents on cases dealing with sexuality and the law in *Romer v. Evans*[101] and *Lawrence v. Texas*;[102] or in his commentaries on assisted suicide in *Gonzales v. Oregon*[103]—in all of these instances, to my mind, he touched the right themes in the right way. And he touched something running deep when he remarked in a case in 1996 that, "[d]ay by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize."[104] In *Lee v. Weisman*,[105] it took his acute sense of things to bring home to us that the Court had articulated a right so refined, in resisting an invocation at a high school commencement, that it brought a right that virtually extinguished itself.[106] In *Hill v. Colorado*[107] and *Madsen v. Women's Health Center*,[108] he showed how legislators and judges, in ways subtle and unsubtle, managed to withdraw from pro-life demonstrators those rights of speech they routinely confirm for everyone else, including Nazis.

Happily, we would find ourselves agreeing with our friends on the Court most of the time. They are aimed rightly, and I am tempted to say that, like the rest of us, their sense of justice may run at times beyond the theory that acts as their vehicle in getting them there. But it cannot escape notice that even our friends on the Court fall into disagreements, some rather heated. My own friend, Antonin Scalia, has not been exactly diffident about telling me when his judgment on any matter veers from my own. He is of course disappointed, but hardly surprised, when his friends occasionally take a path notably dif-

96 492 U.S. 490, 532–37 (1989) (Scalia, J., concurring in part and concurring in the judgment).

97 505 U.S. 833, 979–1002 (1992) (Scalia, J., concurring in part and dissenting in part).

98 530 U.S. 914, 953–56 (2000) (Scalia, J., dissenting).

99 512 U.S. 753, 784–815 (1994) (Scalia, J., concurring in part and dissenting in part).

100 530 U.S. 703, 741–65 (2000) (Scalia, J., dissenting).

101 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting).

102 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting).

103 546 U.S. 243, 275–99 (2006) (Scalia, J., dissenting).

104 Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).

105 505 U.S. 577 (1992).

106 *Id.* at 631–46 (Scalia, J., dissenting).

107 530 U.S. at 741–65 (Scalia, J., dissenting).

108 512 U.S. at 784–815 (Scalia, J., dissenting).

ferent from the one he is deadly sure is the most defensible. Differences are sure, though, to arise. But the claim we are making is that the natural law, or the laws of reason, provide a much firmer ground of principle for our judgments, and if we are right in that claim, we may avoid many of the distractions that judges and lawyers are bound to encounter as they follow a design to avoid any distinct moral logic or moral ground for their judgments. And in turning away from that path of avoidance, our claim would have to be that we could offer, in some places, a more coherent account of the law we would preserve and shape, where it falls to us to shape it, under the Constitution.

In that vein, we could never have signed on as the Court, in 1971, recast the jurisprudence on speech and civility by incorporating the relativism of Justice Harlan: "[O]ne man's vulgarity is another's lyric."[109] We could not have followed our conservative judges as they began to sign on, year by the year, to the notion that ordinary people and legislators could make no plausible restrictions based on the "content" of speech. We could not then have joined a Court that cast the protections of the Constitution on the burning of crosses[110] or the burning of the American flag.[111] Nor would we join in draping the protections of the First Amendment on a band harassing a family at the funeral of a dead marine with signs saying, "Semper Fi Fags," and "Thank God for Dead Soldiers."[112]

But this is not a matter that affects only the most dramatic cases, like the burning of crosses. This shift in jurisprudence has affected life as lived in this country every day, for it has altered profoundly the conventions of civility that affect us in the most ordinary pursuits, whether in traveling to work or walking abroad in the city. For years the urbanists have spun out grand theories for the vibrancy of the city, as people encounter those they do not know in public places.[113] The urbanists enjoin us to leave our private automobiles in favor of public transport, and they urge planners to create public spaces to draw people out of their enclaves.[114] But those encounters were more engaging in the past and freighted with far less danger. For it used to be

109 Cohen v. California, 403 U.S. 15, 25 (1971).

110 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

111 Texas v. Johnson, 491 U.S. 397 (1989). The dissent in this case was joined by Justices White, Rehnquist, Stevens, and O'Connor.

112 Snyder v. Phelps, 131 S. Ct. 1207, 1216–17 (2011).

113 *See, e.g.*, PHILLIP BESS, TILL WE HAVE BUILT JERUSALEM (2006).

114 *See, e.g.*, Phillip Bess, *A Realist Philosophical Case for Urbanism and Against Sprawl: Part One*, PUB. DISCOURSE (July 11, 2011), http://www.thepublicdiscourse.com/2011/07/3379 (expounding on arguments for urban planning including walkable distances and public commons).

assumed that people had an obligation to restrain themselves in their expression and their acting out when they ventured into public—that they bore an obligation to refrain from gross, assaulting speech or obscene, shocking acts, out of a respect for the sensibilities of others in a public place. But with the shift in the *Cohen* case in 1971, confirmed now over many years, the presumptions have been shifted. We begin now with the presumptive freedom of people to express themselves in any manner, no matter how shocking or assaulting, and the burden falls to all other people to avert their eyes—or simply avoid public places altogether. Restaurants have gone out of business on Connecticut Avenue in Washington because customers have not found the evening enhanced by walking through a battery of hawkers, importuning or insulting them.[115] But in the curious jurisprudence wrought by the courts, as Justice Scalia has not let us forget, these presumptions have been notably reversed for one class of speakers: pro-life demonstrators, standing outside of clinics, may not even approach people with a request to talk, let alone hold up signs of reproach and condemnation.[116] And the people entering these clinics need not take on the responsibility, assigned to everyone else, of averting their eyes, toughening their skin, and even avoiding this venture into public.

But the differences in jural perspective that I am marking off here may have their most profound effect as they reach the most central question that the law may ever reach: who counts as a human person—who counts as the kind of being whose injuries matter? It was the question raised as President Clinton vetoed the bill on partial birth abortion and expressed the deepest concern for the health of the woman denied that procedure.[117] Of that other being present in the surgery—the one whose head was being punctured and the contents sucked out[118]—the assault on the health of that being made no impression on President Clinton. The harms did not register because the sufferer of the harms did not count in this picture. No more did they count to that anesthesiologist asked by Judge Casey in New York whether he had thought of administering an anesthetic to the child, legs dangling out of the birth canal, about to have its head punc-

115 *See* HADLEY ARKES, NATURAL RIGHTS & THE RIGHT TO CHOOSE 55 (2002).

116 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

117 *See* Remarks on Returning Without Approval to the House of Representatives Partial Birth Abortion Legislation, 32 WEEKLY COMP. PRES. DOC. 643, 644–45 (Apr. 10, 1996).

118 *See* Stenberg v. Carhart, 530 U.S. 914, 959–60 (2000) (Kennedy, J., dissenting) (describing in detail partial birth abortion procedures).

tured.[119] That possibility, the doctor admitted, had simply never occurred to him.[120] The problem disappeared from view as soon as one absorbed the notion that the being in the womb did not count.

But in raising questions of this kind, a jurisprudence with our perspective would pose the question insistently: what is the ground of principle on which the law may remove a whole class of human beings from the circle of rights-bearing beings who may be subject to the protections of the law? But then we would press the question further upon our conservative judges: What was the ground, again, on which even the conservatives on the Court have assumed that the Constitution has nothing to say about the principled grounds on which legislators may withdraw the protections of the law from those small human beings in the womb? I have mused in print over the problem of what the judges would have done if the understanding had settled in quite early that those Civil War Amendments applied only to blacks who had become human. For after all, we've been told that not everything conceived of humans is human at all times and stages in its life. And so the matter could be returned to the States as the judges declare that they have no more competence in deciding on the beginning of human life than the first nine names in a local telephone directory.[121] Does anyone really think the judges in our own day would have no questions to raise if the States decided that children were more human as they were lighter in complexion, or scored higher on verbal tests? But we know that the judges have the modes of argument readily at hand in a case of that kind to identify grounds that were thoroughly arbitrary in making discriminations here between the human and the not-quite-human, between those with a claim to live and those whose lives may be taken without the need to render a justification. Why then should we suppose that judges in our own day, liberal or conservative, would encounter an inscrutable problem if they found humans in the womb put outside the protections of the law because of their height or weight, because they are lacking limbs or had not acquired yet the facility to speak and do syllogisms? Why then, we

119 Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2005), *vacated*, 224 Fed. App'x 88 (2d Cir. 2007) (recounting the testimony of the main anesthesiologist consulted by the defenders of partial-birth abortion, Dr. Kanwaljeet Anand, a professor of pediatrics, anesthesiology, pharmacology, and neurobiology at the University of Arkansas for Medical Sciences).

120 Referring to Dr. Anand, the anesthesiologist, and others, Judge Casey noted that "[w]hen questioned about whether they spoke to their patients about fetal pain, Plaintiffs' answers ranged from uncertainty about whether fetuses feel pain to a lack of caring on the matter." *Id.* at 466.

121 For this thought experiment, see ARKES, *supra* note 115, at 208–11 (2002).

must ask, are the men we regard with the highest respect as jurists so utterly convinced that something in the scheme of jurisprudence and the Constitution somehow bars them from raising that kind of question, the question that pierces to the core of those rights, and those persons, that the Constitution was designed to protect?

We raise then an appeal to our friends doing conservative jurisprudence: You were drawn to the life of the law because you thought it raised questions of the gravest consequence, questions of moral consequence, about the just ordering of our lives, about the things that are just or unjust, right or wrong. You thought it was worth the effort of extended study, of immersing yourself in the study and way of life of lawyers. And having come this far, why would you ask us or yourselves to settle in with a mode of reasoning about the law that gives us a kind of sing-song morality, a set of the slogans pretending to be a jural philosophy, and whose main rationale is to avoid the appearance of engaging in moral reasoning. You think that the effort to address the moral questions at the heart of the law too ambitious, too risky, too difficult to do well, and likely to license mischief. You seek safety in contriving formulas of the positive law without looking into the deep principles that underlie the positive law. You offer constructions to scale down the project, to look only at the text of the Constitution, or the tradition of holdings by judges, while cautioning us again not to ask the questions that run beneath the surface to the core of things. At best, we may produce in that way decisions that seem by and large to come out the right way. But we cannot give our best reasons, our fullest reasons, the reasons that give the most coherent account of the decisions we are making, the law we are shaping. And the question at the end is, why should you—why should we—settle for anything so diminished, when measured against the moral seriousness of the questions brought before us?

In the *Physics*, Aristotle remarked that if the art were in the materials, we would expect to see ships growing out of trees.[122] But ships were part of a world governed by design, by the awareness of ends, and the shaping of reasons. The world of law is part of that same world. And so we offer this appeal from the old jurisprudence to our friends who are offering us their version of conservative jurisprudence: Where in all of this is the *art*? Where is the understanding *you* have cultivated, the judgment *you* have seasoned in experience? Where in all of this would we find the record, to be lingering in time,

122 ARISTOTLE, PHYSICS bk. II, at 199 (350 B.C.E.), *reprinted in* THE COMPLETE WORKS OF ARISTOTLE 340 (Jonathan Barnes ed., 1987) ("If the ship-building art were in the wood, it would produce the same results by nature.").

that *we were here*: that the law we are preserving would be as comprehensible and compelling, as resonant with common sense, in the next generation as it is in our own, and as it will ever be?

This we may take as our Natural Law Manifesto; this is the challenge we would pose now to our friends in the law. But it is a challenge to join us in a conversation. Some of our friends find something attractive about the very idea of natural law, but they doubt that it is practicable and they are wary of it. To them we say, join us: If we are wrong, you can help show us where we're wrong. And if we are right, we simply discover anew the grounds of law we share more deeply, the grounds of law that have ever been in place.