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## COMMENT

### RISING IN DEFENSE OF THE DECLARATION: THE NATURAL SCOPE OF THE RIGHT TO CONTRACT

*Justin M. Goins*<sup>†</sup>

#### I. INTRODUCTION

In the United States, “I have the right to do X” is a belief often asserted by litigants,<sup>1</sup> political activists,<sup>2</sup> and even illegal immigrants.<sup>3</sup> Often, this belief is applied to licentiousness or counter-cultural behavior as an ill-advised justification or excuse.<sup>4</sup> Although misguided,<sup>5</sup> who can fault aspirations of personal autonomy, especially in a country founded on similar principles?

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† *Senior Staff*, LIBERTY UNIVERSITY LAW REVIEW, Volume 8. J.D. Candidate, Liberty University School of Law (2014); B.A., Political Science: Pre-Law, University of Central Florida (2011). To my captivating wife, Erin, I dedicate this Comment; thank you for your patience and encouragement. Thank you also to Professor Tuomala, for graciously extending your time and intellect, and to Senator Rand Paul from Kentucky, for speaking until you are no longer able.

1. Madeleine Morgenstern, *Texas Teen Suing School District After She Was Punished For Not Reciting Mexican National Anthem In Class*, THE BLAZE (Mar. 2, 2013, 7:04 PM), <http://www.theblaze.com/stories/2013/02/28/texas-teen-suing-school-district-after-she-was-punished-for-not-reciting-mexican-national-anthem-in-class/> (reporting that high school student filed suit because “her constitutional right to freedom of speech and equal protection under the law” was violated).

2. Sandra Fluke, *Slurs Won't Silence Women*, CNN (Feb. 17, 2013, 3:34 PM), <http://www.cnn.com/2012/03/13/opinion/fluke-contraception/index.html>.

3. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS & ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 49 (2010). Professor Arkes, a political scientist and the Edward N. Ney Professor of Jurisprudence and American Institutions at Amherst College, recounts demonstrations on immigration in which many illegal immigrants were demanding citizenship, despite their being in America illegally, or in violation of the positive law. *Id.* The illegal immigrants were appealing to a standard of right and wrong, or natural law, because they could not turn to the positive law. *Id.*

4. Fisher Ames, *The Dangers of American Liberty*, in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760–1805 76 (Charles S. Hyneman & Donald Lutz eds., 1983) (“The known propensity of a democracy is to licentiousness, which the ambitious call, and the ignorant believe to be, liberty.”).

5. See discussion *infra* Part IV. In general, this Comment argues that autonomy is beholden to morality. *Id.* See also 1 *Peter* 2:16 (“Live as people who are free, not using your freedom as a cover-up for evil, but living as servants of God.”).

Common sense tells us that our freedom to act is not unequivocal.<sup>6</sup> Therefore, no matter how noble the endeavor, a man does not have the right to do *everything* he pleases.<sup>7</sup> The notion that personal rights and freedoms are subject to inherent limitation has long been understood.<sup>8</sup> America, in particular, established this understanding in the Declaration of Independence, which brazenly appeals to natural law.<sup>9</sup> The Declaration

6. Scholar Dr. Christian Overman says simply, "People are not free to break God's moral laws." DR. CHRISTIAN OVERMAN, ASSUMPTIONS THAT AFFECT OUR LIVES 56 (6th ed. 2006) (1989). Dr. Overman points to the Hebraic view that man is not free to set his own moral code, noting that "[man] may choose to violate the moral code God put in place, just as he can choose to jump off the edge of a tall building, but in either case, the consequences are such that to boast of "freedom of choice" is grossly misleading." *Id.* at 57.

7. *Id.* See generally VA. CODE ANN. § 18.2-250 (West 1998); *Wolkind v. Selph*, 495 F. Supp. 507 (E.D. Va. 1980), *aff'd*, 649 F.2d 865 (4th Cir. 1981) (holding that private possession of cocaine is not a fundamental constitutional right).

8. RANDY BARNETT, THE STRUCTURE OF LIBERTY 1-2 (1998). As far as America is concerned, one need look no further than Jean Jacques Burlamaqui's treatise on natural law. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 12 (Cato Institute 2011). Burlamaqui's treatise informed the ideas of Thomas Jefferson, as well as the other Founding Fathers and American culture in general. *Id.* According to Burlamaqui:

As soon as we have acknowledged a Creator, 'tis perfectly visible, that he is a master, who of himself has a supreme right to lay his commands on man, to prescribe rules of conduct to him, and to subject him to laws; and 'tis no less evident, that man on his side finds himself, by his natural constitution, under an obligation of subjecting his actions to the will of this supreme Being.

JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW 133-34 (Thomas Nugent trans., The Lawbook Exchange, LTD 2004) (1748). Today, at least one major political party is moving toward "principles of libertarianism." Becket Adams, *New Poll Shows GOP Shifting in Fascinating New Direction*, THE BLAZE (Sep. 11, 2013, 10:13 AM), <http://www.theblaze.com/stories/2013/09/11/new-poll-shows-republicans-flocking-toward-libertarian-principles/>. Such principles are sometimes identified with licentiousness, but many libertarians, such as author and scholar Randy Barnett, recognize, regarding individual autonomy, that there is a line between liberty and license. BARNETT, *supra* note 8, at 1-2. Liberty, writes Barnett, is the "freedoms which people ought to have," and license "refers to those freedoms which people ought not to have and thus those freedoms which are properly constrained." *Id.* at 2.

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). To wit, natural law can be defined as: "a moral law accessible to all human beings through reason." Hon. Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1521 (2011). Put more simply, natural law is God's law. Sir William Blackstone believed man is commanded to use his reason to determine God's law:

But laws . . . in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the

declares that the very purpose of civil government is to secure man's natural rights.<sup>10</sup> When the time came to craft a functioning system of government from the principles espoused in the Declaration, there was a great debate over whether it was even necessary to mention these natural rights.<sup>11</sup> Because natural rights are pre-existing—inherent in man's being—they can be recognized, but not created.<sup>12</sup>

Man's right to contract is among these natural rights.<sup>13</sup> As a natural right, its scope is pre-defined, and cannot be altered by government.<sup>14</sup> Indeed, the

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precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior.

3 WILLIAM BLACKSTONE, COMMENTARIES \*39.

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Natural rights are “objective rights held by all humans as a matter of moral principle.” O’Scannlain, *supra* note 9, at 1514. Furthermore, natural rights are understood as being granted by God, as demonstrated by the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration proclaims:

We hold these truths to be self-evident, that all men are created equal, *that they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed[.]

*Id.* (emphasis added).

11. ARKES, *supra* note 3, at 51. (“They were the first principles of ‘lawfulness,’ so fundamental that few people thought it necessary even to state them.”). A great example of this is the debate over whether or not to include the ex-post facto clause in the Constitution. *Id.* at 28. The Founders thought that a ban on ex-post facto laws was so ingrained in civilized society that restating it was unnecessary. O’Scannlain, *supra* note 9, at 1518 (noting that “[t]he principle was so obvious, and so widely known, that some Framers thought it was unnecessary, and almost embarrassing, to declare it in the Constitution as though it were news.”).

12. OVERMAN, *supra* note 6, at 56 (“Man does not invent these laws, he recognizes them, accepts them, and lives at peace with them.”). “Indeed, when our founders codified fundamental rights in the Constitution, they did not believe that they were ‘creating’ those rights, any more than a mathematician ‘creates’ mathematical principles when he writes the axioms of a formal system.” O’Scannlain, *supra* note 9, at 1517.

13. The Contract Clause of the Constitution does not establish a right to contract; it assumes this inherent right and prohibits the States from infringing upon it. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

14. BLACKSTONE, *supra* note 9, at \* 39–40. God, wrote Blackstone, [C]reated man, and endued him with freewill to conduct himself in all parts of life . . . [and] laid down certain immutable laws of human nature, whereby that

law of contracts reflected this premise for much of our nation's history, as it was tailored to the principles rooted in the common law: a man could not contract for something immoral or illegal.<sup>15</sup> To properly analyze the scope of man's right to contract, an appropriate analytical framework should acknowledge a basic principle long entrenched in the common law—that man has pre-existing rights given to him by his Creator.<sup>16</sup> This principle can be broken down into two elements for our present purposes. First, the scope of each natural right is pre-defined.<sup>17</sup> Second, and somewhat redundantly, the rights themselves cannot be altered or abolished by a majority.<sup>18</sup>

To be clear, this Comment is not proposing that we, as a nation, begin to enforce natural law.<sup>19</sup> Nor does it suggest that laws are to be disobeyed, or

freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

*Id.*

15. Hadley Arkes, *The Shadow of Natural Rights, or A Guide from the Perplexed*, 86 MICH. L. REV. 1492, 1516 (1988) [hereinafter *Shadow*]. Professor Arkes explains that the moral scope of the right to contract was not merely esoteric, but actually applied when adjudicating matters: “The judges who spoke seriously about the ‘freedom of contract’ were alert to the moral ground from which that freedom arose.” *Id.*

16. ARKES, *supra* note 3, at 49. See JOHN LOCKE, I TWO TREATISES OF GOVERNMENT, bk. II, ch. II, § 6 (Thomas Hollis ed., 1764) (1690) (“The state of Nature has a law of Nature to govern it, which obliges every one [sic].”); BLACKSTONE, *supra* note 9, at \* 39 (“Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. . . . And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker’s will.”); BURLAMAQUI, *supra* note 8, at 125–36; 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA bk. II. pt. II. Q. 96. art. 5, *sed contra* (Fathers of the English Dominican Province trans., Christian Classics 1981) (c. 1265) (“The Apostle says: *Let every soul be subject to the higher powers*. But subjection to a power seems to imply subjection to the laws framed by that power.”) (internal citation omitted); CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS 6 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds., 1989) (1748). Montesquieu put it this way:

Prior to all these laws are the laws of nature, so named because they derive uniquely from the constitution of our being. . . . The law that impresses on us the idea of a creator and thereby leads us toward him is the first of the *natural laws* in importance, though not first in the order of these laws.

*Id.*

17. BLACKSTONE, *supra* note 9, at \* 39.

18. 113 CONG. REC. S1160 (2013) (Sen. Rand Paul filibuster).

19. Indeed, Judge O’Scannlain, himself a believer in natural law, notes that “[e]ven the jurists who are well-known for believing in the natural law, Justice Clarence Thomas and Judges Robert Bork and William Pryor, for instance, do not believe that judges have the authority to enforce it.” O’Scannlain, *supra* note 9, at 1515, 1519 (citing Randy E. Barnett,

are otherwise invalid, if not in conformity with the natural law.<sup>20</sup> It seeks to define neither the scope of all natural rights, nor that of a single natural right—such as the right to contract. Indeed, the singular purpose of this Comment is to demonstrate that an understanding of our country’s natural law foundation is of tremendous import when interpreting constitutional rights, especially those in which the Framers sought to codify a natural right.

Therefore, this Comment will show that the scope of man’s natural rights, and the rights themselves, are eternal and not subject to redefinition by a majority. More specifically, the original understanding of a particular natural right must inform its constitutional counterpart. This remains true if the natural right—like the right to privacy—was not explicitly codified in the Constitution. Furthermore, this Comment will show that the scope of the right to contract is limited by natural law, that the Framers were keen on this notion, and that the Supreme Court applied this principle for most of our nation’s history. In sum, this Comment proposes that the Court return to interpreting man’s natural rights in light of our Constitutional Consensus.<sup>21</sup>

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*Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 95 (1995); William H. Pryor, Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1, 8 (2003); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989).

20. Such a discussion is beyond the scope of this Comment. The inquisitive reader, however, should see BARNETT, *supra* note 8, at 12–17 (answering “[w]hether human law prescribes acts of all the virtues[?]” and “whether it pertains to human law to repress all vices[?]” (quoting AQUINAS, *supra* note 16, at bk. II. pt. II. Q. 94. art. 2)). The reader should also note that proponents of natural law tend to advocate the notion that freedom requires virtue, while rejecting the notions that the government has the ability to, or should, impose morality through the positive law. See ARKES, *supra* note 3, at 55–56 (discussing the constraints on individual liberty that arise from the inherent moral autonomy of man); Video: Liberty University Convocation (Senator Rand Paul Address Oct. 28, 2013) (*available at* <http://www.paul.senate.gov/?p=video&id=1026>) (lamenting America’s “spiritual crisis”).

21. THE DECLARATION OF INDEPENDENCE paras. 1, 2 (U.S. 1776). The Declaration’s opening paragraph announced to the world that the American settlers were discontent, and now former, subjects of British Rule;

WHEN in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

## II. BACKGROUND

### A. *The Constitutional Consensus*

The Framers of the Constitution were focused on effectuating a workable system of government that was aligned with the natural law principles proclaimed in the Declaration.<sup>22</sup> They understood that a man could only

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*Id.* The Declaration's second paragraph infamously declares that all men are equal under the eyes of God, and that all men have intrinsic rights from birth: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

*Id.* The reason for the separation from England was simple; the Crown would not recognize its subjects' God-given, or inalienable, rights:

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

*Id.*

22. Of our founding Constitutional Consensus, Kevin Ryan, said

Those who settled this country, founded its government, and framed its Constitution, inherited the teachings of a natural law tradition rooted in both philosophy and religion. Natural Law provided the background language in which Americans of all social strata—not only preachers, lawyers, and statesmen, but merchants and planters as well—could argue about public purposes, about means and ends, about the many affairs of the nation; it formed the common sense upon which political and legal claims could be made. The settlers of America believed that identifiable moral, legal, and political principles were written in the nature of things, where they were discoverable by the free exercise of the mind; they believed that it is within the

govern another man with consent<sup>23</sup> and according to a rule of law<sup>24</sup> that reconciles with natural law.<sup>25</sup> Scholar John Courtney Murray<sup>26</sup> described this uniformity of belief in, or reliance upon, particular truths as a “constitutional consensus.”<sup>27</sup> The word, “constitution refers not to a charter document, but rather to “those cultural factors binding a political society together, creating the character of the nation.”<sup>28</sup> Henry Saint John, Lord Bolingbroke, the English statesman and philosopher, concluded that the laws and customs of a community, which are “derived from certain fixed principles of reason,” evidence a consensus.<sup>29</sup> Moreover, a Constitutional Consensus reaches beyond the laws of a community, setting them aside to analyze the principles, reason, and beliefs upon which the very laws are founded.<sup>30</sup> Political philosophers, such as Aristotle, Cicero, and Plato have

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native powers of the human intellect, especially when disciplined by logic and careful reflection on experience, to discover the highest metaphysical truths.

Kevin F. Ryan, Esq., *We Hold These Truths*, VT. B.J. 9, 11 (Winter 2005–2006).

23. *Shadow*, *supra* note 15, at 1512. According to Professor Arkes:

[The] “freedom to contract” was understood, at the beginning, as grounded in the premises of “natural rights.” It began with an understanding of the things that separated human beings, in nature, from beings that did not have the competence of moral agents. And it was drawn then from the same premises that established “government by consent” as the only legitimate form of government over human beings: No obligations could arise from contracts that were not entered freely, with the “consent” of the parties; and no arrangements of government could be binding without establishing the same “consent” on the part of the governed.

*Id.*

24. LOCKE, *supra* note 16, at bk. II, ch. XI, § 137.

25. *Id.* at bk. II, ch. XI, § 135 (“Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men’s actions must, as well as their own and other men’s actions be conformable to the law of nature, *i. e.* to the will of God.”). As will be explored more thoroughly in this Comment, Locke’s work was highly regarded by the Framers. See discussion *infra* Part II.A.3.

26. In addition to his scholarly work, Murray was also a Jesuit priest. Many of his published essays discuss the American proposition. Ryan, *supra* note 22, at 9.

27. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 9 (1988).

28. Ryan, *supra* note 22, at 9.

29. *Id.* (citing Bolingbroke, *A Dissertation upon Parties*, in 2 *THE WORKS OF LORD BOLINGBROKE* 88 (Univ. Press of the Pacific 2001) (1841)).

30. MURRAY, *supra* note 27, at 9 (“The state of civility supposes a consensus that is constitutional, *sc.*, its focus is the idea of law, as surrounded by the whole constellation of ideas that are related to the *ratio iuris* as its premises, its constituent elements, and its



long recognized that this shared set of beliefs is the foundation of social order.<sup>31</sup>

A Constitutional Consensus is created by “long percolation, by slow, persistent deliberative exchange by the people as they encounter and reflect upon the ever-changing circumstances of their political and social world.”<sup>32</sup> In other words, a constitution is the mind of the people.<sup>33</sup> It reflects their understanding of reality; a common appreciation of the nature of things accrued through trial and error, prosperity, and adversity.<sup>34</sup> Formed this

consequences.”). Murray emphasizes that a consensus is neither imposed nor stumbled upon; “This consensus is come to by the people; they become a people by coming to it. They do not come to it accidentally, without quite knowing how, but deliberately, by the methods of reason reflecting on experience.” *Id.*

31. Ryan, *supra* note 22, at 9. See generally ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS 65 (Stephen Everson ed., 1996) (c. 350 B.C.) (“[O]ne citizen differs from another, but the salvation of the community is the common business of them all. *This community is the constitution*; the excellence of the citizen must therefore be relative to the constitution of which he is a member.” (emphasis added)). Aristotle describes “excellence” as the “virtues of temperance, courage, justice, and the like.” *Id.* at 28; See PLATO, THE REPUBLIC 186 (Benjamin Jowett trans., Prometheus Books 1986) (c. 360 B.C.) (asking “Can there be any greater evil than discord and distraction and plurality where unity ought to reign? [O]r a greater good than the bond of unity? There cannot.”).

32. Ryan, *supra* note 22, at 9.

33. MURRAY, *supra* note 27, at 9 (“[It is] the constitutional consensus whereby the people acquires its identity as a people and the society is endowed with its vital form, its entelechy, its sense of purpose as a collectivity organized for action in history.”).

34. See *id.* at 11.

[The] vitality [of the consensus] depends on a constant scrutiny of political experience, as this experience widens with the developing—or possibly the decaying—life of man in society. Only at the price of this continued contact with experience will a constitutional tradition continue to be “held,” as real knowledge and not simply as a structure of prejudice.

*Id.* Murray is quick to note, however, that “the consensus[] is not a mere record of experience. It is experience illumined by principle, given a construction by a process of philosophical reflection. In the public argument there must consequently be a continued recurrence to first principles.” *Id.*; see Ryan, *supra* note 22, at 9. It should be noted that a consensus is not a sufficient basis for adjudicating rights bestowed by God if that consensus runs contrary to natural law. BLACKSTONE, *supra* note 9, at \* 41. As Blackstone proclaimed:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

*Id.*

way, a constitution becomes a body of substantive truth that means more than a set of rules or maxims.<sup>35</sup> So then, a consensus might be reflected in a written constitution, but the drafting of documents is not capable of creating a consensus, nor can it be imposed by a political institution or process.<sup>36</sup>

Constitutions that do not align with the people's actual consensus, ultimately, do not function properly.<sup>37</sup> Neither charter nor government can impose fundamental beliefs; they remain outside policy and are the foundation, which all policy is built upon.<sup>38</sup> Thus, the consensus establishes a framework under which discourse and debate may operate.<sup>39</sup>

35. According to Murray,

It is not simply a set of working hypotheses whose value is pragmatic. It is an ensemble of substantive truths, a structure of basic knowledge, an order of elementary affirmations that reflect realities inherent in the order of existence. It occupies an established position in society and excludes opinions alien or contrary to itself.

MURRAY, *supra* note 27, at 9.

36. *Id.*; see JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 7 (Maurice Cranston trans., Penguin Books 2006) (1762) ("Since no man has any natural authority over his fellows, and since force alone bestows no right, all legitimate authority among men must be based on covenants.").

37. MURRAY, *supra* note 27, at 9. See Letter from John Adams, Second President of the United States, to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), in IX *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR* 229 (Charles Francis Adams ed., Little, Brown & Co. 1854) [hereinafter *WORKS OF JOHN ADAMS*] (noting that "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."). Similarly, President George Washington said in his Farewell Address to the Nation:

Of all the dispositions and habits, which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity.

GEORGE WASHINGTON, *WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES* 2 (U.S. G.P.O. 2004).

38. See MURRAY, *supra* note 27, at 9–10. Echoing this notion, Ryan describes a consensus in this way:

[T]he consensus is composed of a body of substantive truths, accepted by the people as basic knowledge about the nature of things. . . . The consensus truths provide the streambed upon which events, policies, and decisions flow, the solid ground upon which takes place the speech and action that makes up a people's life together as a nation.

The Declaration of Independence is significant for this very reason.<sup>40</sup> In addition to being “the first political act of the American people in their independent sovereign capacity,”<sup>41</sup> the truths which it declared were momentous.<sup>42</sup> “We hold these truths to be self-evident,<sup>43</sup> that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of

Ryan, *supra* note 22, at 9.

39. MURRAY, *supra* note 27, at 10. Murray rests a society’s ability to engage in discourse on its Constitutional Consensus:

The whole premise of the public argument, if it is to be civilized and civilizing, is that the consensus is real, that among the people everything is not in doubt, but that there is a core of agreement, accord, concurrence, acquiescence. We hold certain truths; therefore we can argue about them.

*Id.* Furthering this point, Ryan notes,

[p]recisely because [the Constitutional Consensus] stands outside of policy, providing a means by which to test the ends of government against basic principles, the consensus becomes the ground on which communication between government and the people, and among the people themselves, can and should occur. It offers a common universe of discourse in which public issues can be intelligibly stated and intelligently debated.

Ryan, *supra* note 22, at 9.

40. MURRAY, *supra* note 27, at 28 (labeling the Declaration a “landmark of Western political theory”). Murray believes the Declaration’s significance is found within its principles, which “radically distinguishes the conservative Christian tradition of America from the Jacobin laicist tradition of Continental Europe.” *Id.*

41. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 115–16 (1872) (Field, J., dissenting).

42. MURRAY, *supra* note 27, at 28–29. Murray highlights the significance of America’s Constitutional Consensus, found within the text of the Declaration of Independence:

[T]he first article of the American political faith is that the political community, as a form of free and ordered human life, looks to the sovereignty of God as to the first principle of its organization. In the Jacobin tradition religion is at best a purely private concern, a matter of personal devotion, quite irrelevant to public affairs. Society as such, and the state which gives it legal form, and the government which is its organ of action are by definition agnostic or atheist. The statesman as such cannot be a believer, and his actions as a statesman are immune from any imperative or judgment higher than the will of the people, in whom resides ultimate and total sovereignty (one must remember that in the Jacobin tradition “the people” means “the party”). This whole manner of thought is altogether alien to the authentic American tradition.

*Id.*

43. This does not mean it must be obvious to everyone, but merely must be true in itself. See AQUINAS, *supra* note 16, at bk. I. pt. II. Q.94, art. 4, *sed contra* (noting that truth may be “the same for all, but is not equally known to all”).

Happiness.”<sup>44</sup> This statement is simple but powerful.<sup>45</sup> Considering also that the Declaration champions “the Laws of Nature and of Nature’s God”<sup>46</sup> and “unalienable Rights” endowed by a Creator,<sup>47</sup> it is inescapable that our Constitutional Consensus was premised upon natural law.<sup>48</sup> The peripheral writings of the Framers lend credence to the notion that both this founding document and, later, the Constitution were drafted upon the understanding that the country would be governed by the rule of law established by natural law.<sup>49</sup>

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

45. See generally *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 115–16 (Field, J. dissenting) (discussing the nature of the fundamental rights to life, liberty, and the pursuit of happiness). Justice Field described the significance of the statement this way:

[T]he Declaration of Independence, which was the first political act of the American people in their independent sovereign capacity, lays the foundation of our National existence upon this broad proposition: ‘That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.’ Here again we have the great threefold division of the rights of freemen, asserted as the rights of man. Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all; and these rights, I contend, belong to the citizens of every free government.

*Id.*

46. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The Founders understood the Laws of Nature and Nature’s God to be “law[s] that God imposes on all men, and which they are able to discover and know by the sole light of reason, and by attentively considering their state and nature.” BURLAMAQUI, *supra* note 8, at 126.

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

48. MURRAY, *supra* note 27, at 29–30 (explaining that the “first principle” of our Constitutional Consensus is “the sovereignty of God over society as well as over individual men . . .”). See Ryan, *supra* note 22, at 9, 11 (“Rather than a set of unanchored beliefs, our [Constitutional Consensus] is an attempt to assert a set of truths, truths that grow out of the ‘Laws of Nature and of Nature’s God.’” (quoting THE DECLARATION OF INDEPENDENCE (U.S. 1776))).

49. MURRAY, *supra* note 27, at 28–33. This concept was established in the Declaration of Independence when the Founders justified their decision to become a new nation abiding by the “Laws of Nature and of Nature’s God entitle them.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Similarly, the Honorable Diarmuid F. O’Sannlain, of the United States Court of Appeals for the Ninth Circuit, points out that, despite not directly appealing to the natural law, as did the Declaration, the Constitution uses “terms which

### 1. Self-Evident Truths

The Founders labeled the proposition that “all men are created equal” as a “self-evident” truth.<sup>50</sup> They understood this truth to be eternal; the very type of truth that Saint Thomas Aquinas, the philosopher and theologian, determined must be true in itself.<sup>51</sup> In other words, an eternal truth, Aquinas remarked, is “the same for all, but . . . not equally known to all.”<sup>52</sup> Aquinas used geometry to fashion an example: “[I]t is true for all that the three angles of a triangle are together equal to two right angles, although it is not known to all.”<sup>53</sup>

Alexander Hamilton began the *Federalist No. 31* with a stark and stunning examination of the nature of eternal truths, or what he labeled “first principles”:

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. Where it produces not this effect, it must proceed either from

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cannot be understood apart from the natural law tradition from which they were plucked.” O’Scannlain, *supra* note 9, at 1517.

50. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Of this equality, Professor Arkes explains:

[I]f one began with that sense of where humans stand in the rankings of nature, it was plausible to take the next step and draw the inference made by Locke, Rousseau, and the men who framed the American republic: that the inequalities which stand out so plainly in nature reveal, quite dramatically, the attributes in which human beings as a species must be regarded as *equal by nature*.

HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* 34 (1986) [hereinafter *First Things*]. The Professor goes on to explain how this inherent equality gives rise to the polity, or in the case of America, the republic; if a man has power over another man, it must be through consent:

The understanding could be expressed in this way: no man can be, by nature, the ruler of other men in the same way that God is by nature the ruler of men, and men are by nature the rulers of dogs, horses, and monkeys. Therefore, if a situation has come about in which some men have been placed in the position of exercising power over others, that situation could not have arisen from *nature*. It had to arise from convention or agreement; it had to arise, one might say, from *consent*.

*Id.* at 34–35.

51. AQUINAS, *supra* note 16, at bk. I. pt. II. Q.94, art. 2, *sed contra*.

52. *Id.* at bk. I. pt. II. Q.94, art. 4, *sed contra*.

53. *Id.*

some disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. 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 inclose 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. And there are other truths in the two latter sciences, which, if they cannot pretend to rank in the class of axioms, are such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common sense, that they challenge the assent of a sound and unbiased mind, with a degree of force and conviction almost equally irresistible.<sup>54</sup>

The nature of eternal truths is a perpetual existence, regardless of knowledge, insistence, or ideology, and demonstrates that those truths are deductive rather than inductive.<sup>55</sup> An inductive principle cannot be eternal

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54. THE FEDERALIST NO. 31 (Alexander Hamilton) (emphasis added). Professor Arkes explains “first principles” in this way:

[N]ecessary truths . . . must be understood before we are capable of understanding other things. They cannot be “demonstrated” in the sense of carrying out an experiment, because if these truths are not understood, anterior to experiments or “experience,” we would have no basis on which to understand the experience. But when we speak in this way of propositions that must be grasped as necessary before we can know anything else—before we can know “secondary” truths—we are speaking, in the strictest sense, of “first principles.”

FIRST THINGS, *supra* note 50, at 52.

55. ARKES, *supra* note 3, at 58. According to the dictionary,

*Deductive* and *inductive* refer to two distinct logical processes. *Deductive* reasoning is a logical process in which a conclusion drawn from a set of premises contains no more information than the premises taken collectively. *All dogs are animals; this is a dog; therefore, this is an animal*: The truth of the conclusion is dependent only on the method. *All men are apes; this is a man; therefore, this is an ape*: The conclusion is logically true, although the premise is absurd. *Inductive* reasoning is a logical process in which a conclusion is proposed that contains more information than the observations or experience on which it is based. *Every crow ever seen was black; all crows are black*: The truth of the conclusion is verifiable only in terms of future experience and

and, therefore, cannot be considered truth.<sup>56</sup> For an inductive proposition is based upon experience; thus, it can only accumulate information and propose a generalization or probability.<sup>57</sup> It is not possible to experience an eternal truth; “experience . . . informs us only what is, or has been, not of what must be[.]”<sup>58</sup>

## 2. Constitutional Republic

Upon exiting Independence Hall, following the successful Constitutional Convention, in Philadelphia, during the summer of 1787, a woman approached Benjamin Franklin and asked what type of government the delegates had created.<sup>59</sup> To the crowd’s surprise,<sup>60</sup> Dr. Franklin announced “a Republic, if you can keep it.”<sup>61</sup> The distinction between republic and democracy is not merely an esoteric debate—it truly matters.

A democracy is, effectively, majority rule.<sup>62</sup> In fact, there’s an old saying that democracy is ‘two wolves and a sheep deciding what to have for lunch.’<sup>63</sup> As Senator Rand Paul noted in his filibuster of John Brennan’s nomination for director of the CIA on March 6, 2013, “with majority rule

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certainty is attainable only if all possible instances have been examined. In the example, there is no certainty that a white crow will not be found tomorrow, although past experience would make such an occurrence seem unlikely.

DICTIONARY, <http://dictionary.reference.com/browse/deductive?s=t> (last visited Dec. 16, 2012).

56. ARKES, *supra* note 3, at 57.

57. *Id.* at 57–58 (“If ‘all men are created equal’ were really an inductive proposition, it would have to be recast as ‘Most men are created equal, most of the time.’”).

58. *Id.* (internal quotation marks omitted) (“Though it should be found by experience in a thousand cases, that the area of a plane triangle is equal to the rectangle under the altitude and half the base, this would not prove that it must be so in all cases, and cannot be otherwise[.]” (quoting THOMAS REID, *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* (1969))). This is not to say that truths are not eternal, but that truth is eternal independent of our experience. *Id.*

59. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 85 (Max Farrand ed., 1911) [hereinafter *FEDERAL CONVENTION RECORDS*].

60. 113 CONG. REC. S1160 (2013) (Sen. Rand Paul filibuster). Senator Paul suggests the people expected the new government to be either a monarchy or a democracy. *Id.*

61. *FEDERAL CONVENTION RECORDS*, *supra* note 59, at 85.

62. 113 CONG. REC. S1160 (2013) (Sen. Rand Paul filibuster).

63. This quote is often attributed to Benjamin Franklin, although it does not appear in his known writings. See generally BENJAMIN FRANKLIN, *SELECTIONS* (J.A. Leo Lemay ed., 1997).

... you set yourself up for a diminishment of rights.”<sup>64</sup> This echoes the convictions of James Madison, Father of the Constitution:

[A] pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.<sup>65</sup>

In a republic, on the other hand, citizens hold the power; they are entitled to vote and elect representatives who are constrained by a rule of law.<sup>66</sup> A republic “is a nonmonarchical system that makes no claim to . . . embody the will of the people; it is a system merely for the appointment of leaders and the administration of law.”<sup>67</sup> Indeed, Madison declared that a republican form of government, borrowed from the Romans,<sup>68</sup> was America’s “cure.”<sup>69</sup>

64. 113 CONG. REC. S1161 (2013) (Sen. Rand Paul filibuster) (noting that majorities passed Jim Crow laws, which discriminated against people based on skin color). Senator Paul’s father, former Congressman Ron Paul, argues in his book *Liberty Defined* that this affect has come to pass in America. “[T]he slogan [“]democracy[“] has come to mean domestically . . . that the government prevails over the people by claiming the blessing of mass opinion” when it was intended to mean that “the people prevail over the government.” RON PAUL, *LIBERTY DEFINED: 50 ESSENTIAL ISSUES THAT AFFECT OUR FREEDOM* 63–64 (2012).

65. THE FEDERALIST NO. 10 (James Madison). Dr. Paul argues that these threats still exist today. “The difference between a democracy and a republic is important. Pure democracy, in which the law itself is up for grabs based on legislative maneuvering, is the enemy of individual rights, and it victimizes the minority. [Such authority is] every bit as harmful as a single dictator.” PAUL, *supra* note 64, at 65. Dr. Paul notes that this “‘democratic mandate’ is more seductive since the people too often are conditioned to accept the notion that as long as the consensus of 51 percent agree, something is morally acceptable.” *Id.*

66. PAUL, *supra* note 64, at 65.

67. *Id.*

68. *Id.* at 63.

69. THE FEDERALIST NO. 10 (James Madison). Madison went on to write that a republic serves:

[T]o refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest



### 3. Founding Influences

To understand what America's founding fathers believed, an examination of what, or whom, they were reading is critical.<sup>70</sup> The three authors most quoted by the Founders are John Locke, Sir William Blackstone, and Baron de Montesquieu;<sup>71</sup> therefore, knowledge of the truths upon which they approached philosophy and political science aids in a comprehensive understanding of the Founders' assumptions regarding civil jurisdiction.<sup>72</sup> Indeed, John Locke was referenced most by the Founders when their most prevalent concern was "independence and the rights of man," while Blackstone and Montesquieu were most cited whilst the Founders were "forming a government to secure those rights."<sup>73</sup>

All three men published works contemporaneously with the founding of America; John Locke's *Two Treatises of Government*, which was "the primer on just government at the time of the Nation's founding,"<sup>74</sup> was published in the late Seventeenth Century.<sup>75</sup> In Locke's writings there is great

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of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

*Id.*

70. CYNTHIA N. DUNBAR, *ONE NATION UNDER GOD* 12–13 (2008) ("To read these authors' writings, which were fairly contemporaneous to our country's founding, is to obtain a clear vision of the underlying belief systems our Founders possessed concerning civil jurisdiction."). Chief Justice John Marshall explained the relevance of scholars and philosophers who wrote prior to the Nation's founding:

When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract.

*Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 353–54 (1827). Although the Chief Justice singles out contract law as having been influenced, it is certain that these men influenced America's entire Constitutional Consensus.

71. Donald S. Lutz, *The Relative Importance of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193–94 (1984).

72. DUNBAR, *supra* note 70, at 13.

73. JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION* 53 (1987).

74. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 527 (1987).

75. DUNBAR, *supra* note 70, at 13.

emphasis on the Law of Nature, which Locke considered to be the will of God.<sup>76</sup> Positive law, Locke believed, was “ill made” unless drafted “according to the general laws of nature, and without contradiction to any positive law of scripture.”<sup>77</sup>

Sir William Blackstone, who is renowned for his *Commentaries on the Laws of England*,<sup>78</sup> asserted natural law more aggressively than Locke did as the cornerstone for any positive law.<sup>79</sup> Indeed, the Founders “drew three major points from Blackstone,” the first being that God is the source of all law.<sup>80</sup> The second point was that judges merely apply the law—they do not create the law; and the third was Blackstone’s “systematizing” of England’s Common Law.<sup>81</sup> It should be noted here that the Common Law of England was based upon Biblical principles and was integral to the Christian heritage of America, a reality that, but for Blackstone, might not be.<sup>82</sup>

That Christian heritage was further nurtured by Baron de Montesquieu’s *The Spirit of the Laws*, which recognizes God as the authority of all law.<sup>83</sup> He

76. *See id.*

77. LOCKE, *supra* note 16, at bk. II, ch. XI, § 136 (quoting RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY (1593)).

78. Scholar John Eidsmoe notes:

Throughout the latter half of the 1700s and the first half of the 1800s Blackstone’s popularity in America was uneclipsed. It is said that more copies of Blackstone’s *Commentaries* were sold in American than in England, that his *Commentaries* were in the offices of every lawyer in the land, that candidates for the bar were routinely examined on Blackstone, that he was cited authoritatively in the courts, and that a quotation from Blackstone settled many a legal argument.

EIDSMOE, *supra* note 73, at 57 (citing Lutz, *supra* note 71, at 195–96).

79. DUNBAR, *supra* note 70, at 14.

80. EIDSMOE, *supra* note 73, at 57.

81. *Id.* at 58–59.

82. *Id.* at 59–60.

83. MONTESQUIEU, *supra* note 16, at 3. Montesquieu opines that:

God is related to the universe, as creator and preserver; the laws according to which he created are those according to which he preserves; he acts according to these rules because he knows them; he knows them because he made them; he made them because they are related to his wisdom and power.

*Id.* at 3. Thus, writes Montesquieu:

Particular intelligent beings can have laws that they have made, but they also have some that they have not made. Before there were intelligent beings, they were possible; therefore, they had possible relations and consequently possible laws. Before laws were made, there were possible relations of justice. To say that

also colored his understanding of both man's nature and existence with scripture; Man, he wrote, "constantly violates the laws [G]od has established."<sup>84</sup> To counter man's fallen nature, Montesquieu proposed a system of checks and balances among three branches of government, based upon *Isaiah* 32:22, which was adopted by the Founders to structure America's Republic.<sup>85</sup> Sir Edward Coke, another scholar who heavily impacted the Founders' Constitutional Consensus, similarly wrote of natural law, "The [l]aw of [n]ature is that which God at . . . creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the [m]oral [l]aw, called also the [l]aw of [n]ature . . . written with the finger of God in the heart of man . . . before that [l]aw was written by Moses."<sup>86</sup>

In addition to the influence of these three philosophers, the drafter of the Declaration—Thomas Jefferson—studied the works of Lord Bolingbroke.<sup>87</sup> To be sure, most historians credit Lord Bolingbroke for the Jeffersonian phrase that appears in the Declaration, "the Laws of Nature and of Nature's God."<sup>88</sup> To understand what Jefferson meant by the phrase then, we must look to its origin. Lord Bolingbroke, in an infamous letter to Alexander Pope, wrote: "You will find that it is the modest, not the presumptuous inquirer who makes a real, and safe progress in the discovery of divine

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there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle was drawn, all its radii were not equal.

*Id.* at 4.

84. MONTESQUIEU, *supra* note 16, at 5. Montesquieu believed man to be intelligent, but limited:

As an intelligent being, [man] constantly violates the laws god has established and changes those he himself establishes . . . he is a limited being; he is subject to ignorance and error, as are all finite intelligences; he loses even the imperfect knowledge he has. . . . [And he] falls subject to a thousand passions.

*Id.* See also *Jeremiah* 17:9 ("The heart is deceitful above all things, and desperately sick; who can understand it?").

85. See generally U.S. CONST. Montesquieu's concept of checks and balances, which made three co-equal branches accountable to the rule of law, was not designed for the purpose of perfecting republican government; rather, it was designed to "remedy . . . the concern that mankind left to itself was incapable of selfless and altruistic governing." DUNBAR, *supra* note 70, at 15–16.

86. SIR EDWARD COKE, CALVIN'S CASE, OR THE CASE OF THE POSTNATI (1608), reprinted in THE SELECTED WRITINGS OF SIR EDWARD COKE 1, 195 (Steve Sheppard ed., 2003).

87. ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE 19 (1998). Jefferson quotes Bolingbroke extensively in his *Literary Commonplace Book*. *Id.* at 20.

88. See *id.* at 40.

truths. One follows nature, and nature's God, that is, he follows God in his works, and in his word[.]”<sup>89</sup> To Lord Bolingbroke, and therefore the Founders, the law of nature's God was found in the Bible—God's Word.

The Declaration of Independence champions these “Laws of Nature and of Nature's God” as authority to dissolve our ties to England,<sup>90</sup> and the Constitution is an effort to codify them.<sup>91</sup> Thus, these two documents are inter-related—the Constitution is the framework for implementing the Declaration's principles.<sup>92</sup> Early in the twentieth century, the Supreme Court recognized that “it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.”<sup>93</sup> President Lincoln echoed this observation—quoting Proverbs 25:11, Lincoln opined that “[a] word fitly spoken is like an apple of gold in a frame of silver.”<sup>94</sup> According to Lincoln, the Declaration's natural law presumption is the apple, or substance, of the law, and the Constitution is the schema for fulfillment; that is, the Constitution was intended to achieve our Constitutional Consensus, discussed above.<sup>95</sup>

89. Bolingbroke, *Letters or Essays Addressed to Alexander Pope, Esq.*, in 3 THE WORKS OF LORD BOLINGBROKE 62 (Univ. Press of the Pacific 2001) (1841).

90. Book Note, *The Role of Natural Law in the American Revolution*, 108 HARV. L. REV. 1202, 1206 (1995) (noting that “[t]he colonists based their decision to seek independence on their conclusion that the entire legitimacy of positive law and legal rights relied upon conformity with natural rights.” (internal quotation marks omitted)).

91. O'Scannlain, *supra* note 9, at 1528.

92. *Id.* at 1517.

93. *Cotting v. Godard*, 183 U.S. 79, 107 (1901). The full passage reads:

The first official action of this nation declared the foundation of government in these words: ‘We hold these truths to be selfevident [sic], that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.’ While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

*Id.*

94. MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* 13 (1996).

95. See *supra* Part II.A.

### B. *Theories of Contract*

Although the right to contract is both a natural right and fundamental to individual liberty, the Supreme Court has altered both its scope and remedy over the last two centuries.<sup>96</sup> One significant way the Framers incorporated the Declaration's natural law principles into the Constitution was by instituting the Constitution itself—simply put, Constitutionalism establishes the rule of law.<sup>97</sup> The Contract Clause of Article I, discussed below,<sup>98</sup> further exemplifies this commitment to the rule of law.<sup>99</sup> Prior to the ratification of the Constitution, the right to contract had long been recognized as pre-existing government—a natural right.<sup>100</sup> The Framers sought to codify this natural right with an express prohibition on the impairment of contracts.<sup>101</sup> By codifying the pre-existing right to contract, the Framers also acknowledged the right's pre-existing limitations.<sup>102</sup>

96. K.M. Sharma, *From "Sanctity" to "Fairness": An Uneasy Transition in the Law of Contracts?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 95, 95–97 (1999); James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 371 (2005).

97. MURRAY, *supra* note 27, at 32. Indeed, Murray explains the Constitution's significance in this way:

Through the American techniques of the constitutional convention and of popular ratification, the American Constitution is explicitly the act of the people. It embodies their consensus as to the purposes of government, its structure, the extent of its powers and the limitations on them, etc. By the Constitution the people define the areas where authority is legitimate and the areas where liberty is lawful. The Constitution is therefore at once a charter of freedom and a plan for political order.

*Id.* at 33–32.

98. See *infra* Part II.B.1.

99. See generally *Shadow*, *supra* note 15, at 1512. Professor Arkes explains the rule of law inherent in the Contract Clause this way:

A promise may be binding only when it is accepted, freely, without coercion—when it is accepted, that is, with the 'consent' of the contracting party. In other words, this 'freedom to contract' was understood, at the beginning, as grounded in the premises of 'natural rights.' It began with an understanding of the things that separated human beings, in nature, from beings that did not have the competence of moral agents.

*Id.* As discussed later in this Comment, the Contract Clause yielded the 'freedom of contract' doctrine. See discussion *infra* Part II.B.1.

100. See *Shadow*, *supra* note 15, at 1512.

101. *Id.* at 1514 (noting that before and after the American Revolution, "the understanding of the time [was] that the right to enter into contracts, and to be bound only by consent, was not merely a 'conventional' right, but a 'natural' right."). To this end, James

Initially, the Contract Clause spurred frequent and vehement litigation;<sup>103</sup> the issue usually being whether a State could burden an existing contract.<sup>104</sup> After nearly a century, the Court set aside<sup>105</sup> this doctrine and began analyzing contracts under the Liberty of Contract Doctrine.<sup>106</sup> The Fourteenth Amendment, which was adopted in 1868, spurred this change.<sup>107</sup>

The Fourteenth Amendment was drafted in the spirit of the Declaration and our Constitutional Consensus;<sup>108</sup> its Privileges and Immunities

Madison noted in *The Federalist Papers*, “laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation.” THE FEDERALIST NO. 44 (James Madison).

102. See O’Scannlain, *supra* note 9, at 1517–19; *Shadow*, *supra* note 15, at 1516. Professor Arkes asserts that the Framers codified the natural scope of the right to contract that is bound to a moral autonomy. *Id.* This is evidenced by the fact that it was still impossible to contract for immoral things. *Id.* As noted above, *first principles* are “primary truths . . . upon which all subsequent reasonings must depend.” THE FEDERALIST NO. 31 (Alexander Hamilton). The Framers demonstrated in the Declaration of Independence, the Constitution, and individual publications, such as the *Federalist*, their commitment to natural law principles. See discussion *supra* Part II.A.

103. Kmiec & McGinnis, *supra* note 74, at 535 (“For the first eighty years, the Contract Clause appears to have generated more Supreme Court cases than any other constitutional provision—reflecting the original importance of the Clause.”). See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 123 (1810); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 123 (1819); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 518 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 215 (1827); *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 623 (1869).

104. Ely, *supra* note 96, at 372.

105. “Set aside” here means that the Court no longer analyzed contractual issues under this doctrine, not that the doctrine was affected in any way.

106. MAYER, *supra* note 8, at 1; Ely, *supra* note 96, at 371. According to Mayer:

Exercising its power of judicial review, the Court declared unconstitutional various state and federal laws that abridged [the liberty of contract] by denying individuals the freedom to bargain over the terms of their own contracts—maximum-hours laws, minimum-wage laws, business-licensing laws, housing-segregation laws, and compulsory-education laws—laws that interfered with individuals’ liberty of contract in each of the above-mentioned cases.

MAYER, *supra* note 8, at 1 (citation omitted).

107. Ely, *supra* note 96, at 371.

108. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 105 (1872) (Field, J., dissenting) (“[The Fourteenth A]mendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes.”).

Clause<sup>109</sup> “significantly altered our system of government,” by incorporating the Bill of Rights and all natural rights against the States.<sup>110</sup> Nevertheless, the eminence of the Privileges Clause was short-lived. In 1872, the *Slaughter-House Cases* decision significantly narrowed the scope of the Privileges and Immunities Clause.<sup>111</sup> Had it not been for this decision, the Liberty of Contract Doctrine might have been expressly limited by natural law principles. Instead, the Court opted to read substantive, unenumerated rights into the Fourteenth Amendment’s Due Process Clause. This jurisprudence became known as substantive due process,<sup>112</sup> a doctrine that greatly expanded the scope of “liberty.”<sup>113</sup>

The Court’s analytical evolution regarding contract law was a response to American society’s elevation of individual autonomy in contracting.<sup>114</sup> The primary issue litigated under the Liberty of Contract Doctrine was not whether a State had the ability to burden an existing contract—as it was with Freedom of Contract; rather, the issue was whether the individual parties were able to enter into the contract in the first place.<sup>115</sup>

### 1. The Contract Clause and Obligation of Contract

The Contract Clause, found within Section Ten of Article I, is significant in that it is one of a few constitutional prohibitions on the rights of individuals, as opposed to the federal government.<sup>116</sup> It is also one of the

109. U.S. CONST. amend. XIV, § 1.

110. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3060 (2010) (Thomas, J., concurring). See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 105–06 (Field, J., dissenting) (describing the significance of the Privileges and Immunities Clause).

111. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79 (concluding that ‘privileges and immunities’ meant those “which owe their existence to the Federal government, its National character, its Constitution, or its laws”).

112. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501–10 (1999) (discussing the nature and history of substantive due process jurisprudence).

113. ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW* 66–68 (1997). Clinton argues that liberty of contract and the Court’s zone of privacy protections, both substantive due process doctrines, “can be read to support legal or constitutional protection for almost anything” and are based upon “a virtually nonexistent constitutional and historical foundation.” *Id.* at 67.

114. SHARMA, *supra* note 96, at 96–97 (“At the heart of these manifold changes has been the much-vaunted sanctity of individual autonomy in contracting, an offshoot of the liberal notion of freedom of contract, which was the ideological backbone for the development of the law of contract.”).

115. Ely, *supra* note 96, at 383.

116. Kmiec & McGinnis, *supra* note 74, at 525.

rare prohibitions imposed upon the States.<sup>117</sup> On these observations, it can be concluded that “the [Contract] Clause was clearly of significance to the Framers.”<sup>118</sup>

The Contract Clause provides, in relevant part, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”<sup>119</sup> Interpreted correctly,<sup>120</sup> the Clause prohibits all legislation that retrospectively infringes vested contractual rights by shifting the benefit of a bargain among parties to the contract.<sup>121</sup> It is ultimately concerned with prospectivity—a principle inherent in the rule of law.<sup>122</sup> In this way, the Framers sought to implement the natural law by establishing a rule of law.<sup>123</sup> Furthermore, it was

117. *Id.*

118. *Id.*

119. U.S. CONST. art. I, § 10, cl. 1.

120. Kmiec & McGinnis, *supra* note 74, at 526. According to Kmiec and McGinnis, [M]ost fundamentally, the interpretation of the Contract Clause as a prohibition against retrospective interference with contracts comports with the ideal of government that the Framers actually possessed: namely, a government constrained by a concept of the rule of law, restrained in circumstances which present particular risks of majoritarian disregard for minority rights, and rendered stable by barriers against abrupt change in social policy and organization.

*Id.*

121. *Id.*

122. *Id.* at 528 (“Prospectivity is an essential requirement of the rule of law because only prospective laws allow citizens to plan their conduct so as to conform to the law.”). Professor Hayek explained “prospectivity” to mean “that [the] government in all its actions is bound by rules fixed and announced beforehand— rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.” F.A. HAYEK, *THE ROAD TO SERFDOM* 80 (University of Chicago Press 1994) (1944). Hayek also argued that “[n]othing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law.” *Id.*

123. See MURRAY, *supra* note 27, at 32–33; LOCKE, *supra* note 16, at bk. II, ch VI, § 57 (claiming “*Liberty* . . . cannot be, where there is not *Law*”). As noted above, Locke’s *Two Treatises* was of tremendous influence at the birth of our Nation. See discussion *supra* Part II.A. Locke maintained that “the rule of law was a presupposition of liberty in a civil society.” Kmiec & McGinnis, *supra* note 74, at 527. Furthermore, Locke defined “liberty” as one’s ability to live “within the allowance of those Laws under which he is . . . .” LOCKE, *supra* note 16, at bk. II, ch. VI, § 57. Apparent to the Founders, then, was that one must have knowledge of a law in order to conform to it, and “one cannot know what does not exist.” Kmiec & McGinnis, *supra* note 74, at 527.



understood that this achievement depended upon the nation having “settled standing laws,”<sup>124</sup> which are “general, prospective, and relatively stable.”<sup>125</sup>

The Marshall Court provided the original judicial understanding of the Contract Clause<sup>126</sup>—an understanding that demonstrated the Court’s appreciation of the right to contract’s status as a natural right.<sup>127</sup> Decided in 1810, *Fletcher v. Peck*<sup>128</sup> exemplifies the recurring themes of Chief Justice

124. LOCKE, *supra* note 16, at bk. II, ch. XI, § 137. As Kmiec and McGinnis noted, “[t]he task of the Framers was to translate this basic postulate of just government into rules of practical application by which governing power could be restrained from departing from ‘settled standing Laws’ and injuring interests which were created in reliance on such laws.” Kmiec & McGinnis, *supra* note 74, at 527.

125. Kmiec & McGinnis, *supra* note 74, at 527.

126. *Id.* at 535 (noting that the first significant opinion in which the Clause was interpreted, and many thereafter, was handed down during the Marshall Court’s tenure).

127. CLINTON, *supra* note 113, at 39 (noting that “[n]atural law . . . was never an explicit, generally acknowledged source of constitutionally justiciable principles for the Court; it was rather a collection of highly general theoretical principles that were no doubt subscribed to by almost everyone.”).

128. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The controversy in *Fletcher* began after the Georgia Legislature revoked land grants which were made under the Yazoo Land Act of 1795. *Id.* at 87–91. Fletcher purchased a tract of land from John Peck, who had purchased the land from the original grantee under the Act. *Id.* at 87–88. Fletcher sued Peck for breach of contract upon the Legislature’s invalidation of the 1795 Act, as this voided all subsequent transactions, including Fletcher’s purchase from Peck. *Id.* at 87–90. The issue was whether the Georgia Legislature could retroactively revoke the grant by repealing the 1795 Act. *Id.* at 136 (“The constitution of the United States declares that no state shall pass any . . . law impairing the obligation of contracts. Does the case now under consideration come within this prohibitory section of the constitution?”). Chief Justice Marshall’s rationale centered upon the plain language of the Clause, noting that the terms “are general, and are applicable to contracts of every description.” *Id.* at 137. The opinion declared that, by these general terms, the Clause must apply to contracts between private citizens as well as sovereigns, such as States. *Id.* Chief Justice Marshall applied America’s Constitutional Consensus in deciding this issue:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

*Id.* at 137–38.

Marshall's Contract Clause analysis.<sup>129</sup> Generally, the Marshall Court construed the term 'contract' broadly,<sup>130</sup> this prohibited almost every impairment of contract argued before its bench and applied the Clause to contracts of both public and private nature.<sup>131</sup>

Chief Justice Marshall's only dissent was in *Ogden v. Saunders*,<sup>132</sup> which also revolved around the Contract Clause.<sup>133</sup> Holding to natural law principles and America's Constitutional Consensus, the Chief Justice argued that *any* law, retrospective or prospective, that impairs the right to contract is unconstitutional.<sup>134</sup> He reasoned that:

[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it.<sup>135</sup>

That is, Chief Justice Marshall believed that the right to contract is a natural right, and each party's obligation under the contract arose from and was subject to a higher law.<sup>136</sup> Nevertheless, the Majority disagreed, holding that:

129. *Id.*

130. *Id.* Chief Justice Marshall believed that grants and corporate charters were contracts, and analyzed all executed conveyances under the Contract Clause. *Id.*

131. *Id.*

132. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

133. *Id.* at 254 (framing the issue as "whether the obligation of a contract is impaired by a State bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that State after the passage of the act?").

134. *Id.* at 354 (Marshall, C.J., dissenting) ("The propositions we have endeavoured to maintain, of the truth of which we are ourselves convinced, are these: That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a *prospective*, as well as of a *retrospective*, operation." (emphasis added)).

135. *Id.* at 346.

136. *Id.* Philosophers often theorize about man's state of nature, which means nothing more than a period prior to governments and laws. THOMAS HOBBS, *LEVIATHAN* 140 (Richard Tuck ed., Cambridge University Press 1996) (1651) (discussing the state of "mere Nature" prior to all laws).

The obligation of the contract is not the contract itself, but something arising out of it. The moral obligation is that which binds the conscience only. *The legal obligation is that which the law imposes.* It binds the contracting party to do that which the law says he shall do, under certain contingencies which may arise. There is nothing of mere human institution (and it is with this that the constitution deals) which binds to the performance of any contract, except the laws under which that contract is made, and the remedies provided by them to enforce its execution.<sup>137</sup>

According to the Majority, but for the positive law, contracting individuals would only have a *moral* obligation to perform; the positive law necessarily imposes obligations and provides a means for remedying a breach.<sup>138</sup> The evidence for this, rationalized the Majority, is the lack of restrictions upon contracting parties in the state of nature.<sup>139</sup> That is, the positive law determines at what age an individual may legally contract and under what circumstances a divorce may be obtained—to the majority, this supported the proposition that obligation of contract is a “positive rule of society.”<sup>140</sup>

While Chief Justice Marshall’s beliefs were not aligned with the majority in *Saunders*, the Marshall Court did apply natural law principles to its jurisprudence.<sup>141</sup> Indeed, Justice Marshall applied these principles in many of the cases brought before the Court, including those litigating the freedom of contract.<sup>142</sup> The majority in *Saunders* rejected the principle that the freedom of contract was not and could never be granted by the State; this

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137. *Saunders*, 25 U.S. (12 Wheat) at 234–35 (emphasis added). To the point that obligation of contract is because the positive law determines it is, the Majority said:

Every municipal code contains a provision determining at what age a person shall be deemed capable of contracting, and the period of majority is different under different systems of law. This is a positive rule of society. In a state of nature, there is no definite age at which an individual becomes capable of contracting. Is not the whole of this subject under the control of State legislation; and would a law, extending the period of minority, be said to be a law impairing the obligation of contracts?

*Id.* at 236.

138. *Id.* at 234–35.

139. *Id.* at 236.

140. *Id.*

141. *Shadow*, *supra* note 15, at 1513–14.

142. *Id.* (noting specifically *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Saunders*, 25 U.S. (12 Wheat) at 213 (1827), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

played a crucial role in the outcome of another case decided by the Court—*Worcester v. Georgia*.<sup>143</sup>

In *Worcester*, Samuel Worcester entered Cherokee Territory as a missionary in order to live amongst the Indians and preach the Gospel.<sup>144</sup> Worcester was arrested and indicted for failing to comply with a Georgia law that required visitors to the Cherokee Territory to obtain a license from the governor of Georgia in order to enter or live there.<sup>145</sup> In the majority opinion authored by Chief Justice John Marshall, the Court held that the Georgia law was unconstitutional and examined the Indians' relationship with the British in conjunction with its conclusion.<sup>146</sup> The Chief Justice recalled a victorious British government that won a war against the Indians, not by conquering the Indians, nor by taking their land.<sup>147</sup> Instead, the British strategy was to acquire land that the Indians wished to sell through purchase contracts.<sup>148</sup> As Professor Arkes notes, the Marshall Court understood that the British had demonstrated deference to natural law principles<sup>149</sup> and therefore applied these same principles to Worcester.<sup>150</sup>

143. *Id.* at 1513; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

144. *Worcester*, 31 U.S. (6 Pet.) at 538.

145. *Id.* at 539. The Act at issue required:

'[A]ll white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorise to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanour, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour, for a term not less than four years.'

*Id.* at 542.

146. *See generally id.* at 542–62 (ultimately concluding that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”).

147. *Id.* at 547.

148. *Shadow, supra* note 15, at 1513.

149. *Id.* at 1514. Professor Arkes suggests:

[T]hat these fastidious arrangements could be explained only if we take seriously the understanding of the time: that the right to enter into contracts, and to be bound only by consent, was not merely a “conventional” right, but a “natural” right. It could be accorded then, with propriety, to any moral agent, including an aborigine.

*Id.*

The holding in *Worcester* is merely a restatement of Chief Justice Marshall's dissenting opinion in *Ogden v. Saunders* that the right to contract is antecedent to the State.<sup>151</sup> Although the Chief Justice dissented in *Saunders*, it was due to his view that a contracting party would be legally obliged even without the positive law.<sup>152</sup> The majority opinion did not discredit natural law; it merely believed moral obligation to be unenforceable without the positive law.<sup>153</sup> In fact, Justice Marshall's natural law foundation permeates the Marshall Court's understanding of the freedom of contract and is representative of America's Constitutional Consensus as applied to contract law.<sup>154</sup>

## 2. The Due Process Clause and Liberty of Contract

The Contract Clause was litigated for a few decades after *Worcester*, but it ultimately became second fiddle as the Court began to develop its substantive due process jurisprudence.<sup>155</sup> The aim of substantive due process is to ensure that the government does not deprive a person of his liberty without proper justification.<sup>156</sup> This is achieved by reading unenumerated rights into the word "liberty" of the Fourteenth Amendment's Due Process Clause.<sup>157</sup> Eventually the Court began to regard that simple word, "liberty," as the source of rights; in doing so, it fabricated the pretense that government, not the Creator, defines the scope of natural rights.<sup>158</sup>

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150. *Worcester*, 31 U.S. (6 Pet.) at 562 (holding that the Georgia law, which violated the Indian's sovereignty, was "repugnant to the constitution, laws, and treaties of the United States").

151. *Shadow*, *supra* note 15, at 1514 (noting that "this was hardly a trivial point" and that "[f]or Marshall it mattered profoundly").

152. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 346 (1827).

153. *Id.* at 235.

154. *Shadow*, *supra* note 15, at 1515.

155. Ely, *supra* note 96, at 371.

156. Chemerinsky, *supra* note 112, at 1501 (noting that "if you look through Supreme Court opinions you will never find a definition").

157. *Id.* at 1509.

158. See *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring). Legal historian James W. Ely, Jr. attributes the demise of the Court's freedom of contract jurisprudence, and the rise of its liberty of contract jurisprudence, largely to the opinions of one man: Justice Stephen Field. Ely, *supra* note 96, at 384 ("Justice Stephen J. Field, the most influential jurist of the Gilded Age, was instrumental in laying the groundwork for due process protection for liberty of contract."). Ely notes that Justice Field, in his concurrence in *Butchers' Union Co. v. Crescent City Co.*, as well as his dissents in

Many scholars describe Liberty of Contract as “economic substantive due process” due to *Lochner*, its case of origin, “proclaim[ing] freedom of contract to be a fundamental right under the due process clause.”<sup>159</sup> Liberty of Contract holds that individuals are free to bargain and contract on their own terms, and “embodie[s] a notion approaching an absolute transactional liberty in economic matters.”<sup>160</sup> Although Liberty of Contract relies heavily on the Fourteenth Amendment for the premise and scope of liberty, it did not originate with that Amendment’s adoption.<sup>161</sup> Rather, it is the simultaneous application of two preceding developments in constitutional common law.<sup>162</sup> That is, the doctrine combined the protections that had been established for property and economic liberty, according to due process, with the individual autonomy that had arisen from the Court’s limitation of the States’ police power.<sup>163</sup>

a. *Allgeyer* and the liberty of contract

Although the concept of Liberty of Contract is most commonly associated with the Supreme Court case *Lochner v. New York*,<sup>164</sup> the Court first held that the Due Process Clause of the Fourteenth Amendment protected the right to contract years before *Lochner* in *Allgeyer v. Louisiana*.<sup>165</sup> In *Allgeyer*, the Court voided a Louisiana statute that prohibited insurance companies from outside of the state to do business inside of the state without maintaining an authorized agent and a place of business there.<sup>166</sup> The decision unanimously declared that the statute

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both *Munn v. Illinois* and *Slaughter-House Cases*, “urged recognition of the right of individuals to pursue common occupations without governmental interference.” *Id.*; *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746, 754–60 (1884); *Munn v. Illinois*, 94 U.S. 113, 136–54 (1877); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83–111 (1873). Justice Field’s desire to protect individuals who engaged their autonomy in pursuit of livelihood eventually gained prominence, and the right to contract was re-tooled so that the individual was at liberty to achieve his goals. Ely, *supra* note 96, at 384.

159. Chemerinsky, *supra* note 112, at 1509.

160. CLINTON, *supra* note 113, at 65.

161. MAYER, *supra* note 8, at 11.

162. *Id.*

163. *Id.*

164. *Id.* at 2 (“Known as the “*Lochner era*,” it is named for the best-known U.S. Supreme Court decision protecting liberty of contract, *Lochner v. New York*.”); Chemerinsky, *supra* note 112, at 1509.

165. *Allgeyer v. State of La.*, 165 U.S. 578, 589 (1897).

166. *Id.* at 593.

deprived Allgeyer of its liberty without due process of law, and, despite the absence of the term 'liberty of contract,' the Court defined the scope of this new doctrine:

The 'liberty' mentioned in [the Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to b[e] free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>167</sup>

The Court was careful to note, too, that the statute violated due process "because it prohibits an act which under the federal constitution the defendants had a right to perform,"<sup>168</sup> and that the right to contract would yield to the States' police power.<sup>169</sup>

b. *Lochner* and retention of natural law reasoning

Although "reviled [] and persistently misunderstood"<sup>170</sup> as the epitome of judicial activism,<sup>171</sup> a deeper look at *Lochner v. New York*<sup>172</sup> reveals that the judges of the so-called "*Lochner*-era" were not merely "laissez-faire judges" as Justice Holmes's dissent suggests.<sup>173</sup> Indeed, Justice Rufus Peckham—author of the Majority Opinion—and his colleagues "continued to think

167. *Id.* at 589.

168. *Id.* at 591.

169. *Id.* at 590–91.

170. ARKES, *supra* note 3, at 79.

171. *Id.* at 80.

172. *Lochner v. New York*, 198 U.S. 45 (1905).

173. ARKES, *supra* note 3, at 92.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law . . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

*Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

that there was a moral ground that underlay the law,” and “especially” individual rights, “including the rights of property.”<sup>174</sup> As noted by Professor Arkes, however, “it only stood to reason that the judges who understood a moral ground for the rights of property were quite alert then to the moral limits on those rights of property.”<sup>175</sup> In fact, *Lochner* and the *Lochner*-era cases are seen as exemplifying natural law reasoning; thus, “criticism of the ‘Lochner era’ became bound up with criticism of the natural law.”<sup>176</sup> Ever the standard-bearer for economic liberty,<sup>177</sup> *Lochner* also stands for the general proposition that natural rights are not subject to alteration or abolishment by a majority.<sup>178</sup>

The issue before the court in *Lochner* was whether the maximum-hours provision of New York’s Bakeshop Act was “a fair, reasonable, and appropriate exercise of the police power.”<sup>179</sup> The provision in question, justified as a health law enacted pursuant to the state’s police power, limited a baker’s hours to no more than ten per day or sixty per week.<sup>180</sup> The Court struck down the statute as unconstitutional under the Due Process Clause of the Fourteenth Amendment because there was “no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.”<sup>181</sup> The court noted that the quality of bread did not depend on how many hours the bakers had worked and, further, that bakers have the intelligence and capacity to care for themselves without “the protecting arm of the state, interfering with their independence of judgment and of action.”<sup>182</sup>

That is, the *Lochner* Court protected rights of property—rights which the Justices recognized as natural rights of the individual.<sup>183</sup> It was understood that the worker had a natural right “to his own labor” and this

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174. ARKES, *supra* note 3, at 92.

175. *Id.*

176. O’Scannlain, *supra* note 9, at 1515.

177. MAYER, *supra* note 8, at 2.

178. 113 CONG. REC. S1160 (2013) (Sen. Rand Paul filibuster).

179. *Lochner v. New York*, 198 U.S. 45, 56 (1905).

180. *Id.* at 46, n.† (reproducing the statute at issue).

181. *Id.* at 58.

182. *Id.* at 57.

183. ARKES, *supra* note 3, at 94–95 (noting that “[t]he right to make a living at an ordinary calling, to enter a legitimate occupation, without arbitrary restrictions, was a right that ran as deep as the right to speak or publish.”).



labor “did not belong . . . to the state – or to his employer.”<sup>184</sup> Man’s ownership of his labor also means that the natural rights “to sell his labor upon such terms as he deems proper,” and “to quit the service of the employer for whatever reason” are also vested in him.<sup>185</sup> This understanding harkens back to the overarching principles of natural law recorded in the Declaration, that the only legitimate form of government was one founded upon consent.<sup>186</sup> A man’s “labor could be committed, his body commanded, only with his *consent*.”<sup>187</sup> The Liberty of Contract doctrine enunciated in *Lochner* served as recognition of these natural rights.<sup>188</sup>

Despite retaining the spirit of natural law, Liberty of Contract is a flawed principle. As Justice Cardozo observed, “[t]he tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history.”<sup>189</sup> “[L]iberty of [C]ontract could not ‘expand itself to limit of its logic,’” argues Scholar and Professor Robert Lowry Clinton, “because, logically it had no limits.”<sup>190</sup> Additionally, Liberty of Contract “could not have been confined ‘within the limits of its history’ because it had no history.”<sup>191</sup> By reading these unenumerated rights into substantive due process, the meaning of “liberty” is expanded beyond its natural law scope and is, indeed, limitless.<sup>192</sup>

184. *Id.* at 95 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (Field, J., dissenting)).

185. *Id.* (citing *Adair v. United States*, 208 U.S. 161, 174 (1941)).

186. *Shadow*, *supra* note 15, at 1512; ARKES, *supra* note 3, at 95 (“For these judges, the notion of ‘liberty of contract’ was freighted with the same moral significance that attached to the notion of government by the consent of the governed.”).

187. ARKES, *supra* note 3, at 95.

188. *Id.*

189. CLINTON, *supra* note 113, at 67 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921)).

190. *Id.* Professor Clinton notes:

The experience that the [Liberty of Contract] doctrine symbolized was not that of the Framers, or the ratifiers, or nineteenth-century Americans, or ‘conventional morality’ in any form; rather, it symbolized the interest of a small group of economic and social elites who were able to enlist a small but influential group of lawyers and judges in their support.

*Id.*

191. *Id.*

192. *Id.* at 68 (“[L]ike liberty of contract, the logic of personal privacy ultimately does not admit of any principled limits.”).

### C. Interpretation of the Constitution

The Court's modern jurisprudence exemplifies the notion that the way one interprets the Constitution impacts the nature and scope of the rights found within.<sup>193</sup> Two well-established methods of constitutional interpretation are the "Living Constitution"<sup>194</sup> and "Originalist"<sup>195</sup> approaches. The Living Constitution approach views the Constitution as a "living document" that may be adapted to meet the needs and reflect the moral compass of an ever-changing society.<sup>196</sup> Under this view, the laws and principles in the Constitution are not fixed, nor tethered, to a permanent standard.<sup>197</sup> Instead, the text's meaning is subject to change with the perspective of society.<sup>198</sup> The notion that the Constitution is living emerged from the desire that the positive law consistently change to reflect the will of

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193. CALVIN R. MASSEY, *AMERICAN CONSTITUTIONAL LAW* 39 (3d ed. 2009); SAUL K. PADOVER, *THE COMPLETE JEFFERSON* 322 (1943).

194. This method travels under many names, Massey labels it 'Vectors of History,' but its essential tenet is that the Constitution should be interpreted with the changing times. MASSEY, *supra* note 193, at 39. For the sake of clarity and uniformity, this Comment will refer to it as the 'Living Constitution method.'

195. *Id.* at 70.

196. Justice William Brennan, Address at the Georgetown University Text and Teaching Symposium (October 12, 1985), available at <http://teachingamericanhistory.org/library/index.asp?document=2342>. Justice Brennan declared:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

*Id.*

197. William T. Barrante, *A Jurisdictional View of the United States Constitution*, 83 CONN. B.J. 217, 249 (2009). Barrante proposes that "[t]he difference between a jurisdictional constitution and a 'living' constitution is the difference between a real constitution and an imaginary constitution." *Id.* Originalism, he adds, "may . . . be described as a jurisdictional view of the Constitution." *Id.* at 217.

198. *Id.* at 223 (noting that the "Living Constitution" view holds that "the Constitution must grow with the times"). This view is flawed because, as John Adams declared, the United States Constitution will fail in the hands of a non-religious people. *WORKS OF JOHN ADAMS*, *supra* note 37. Therefore, we must be governed by our Constitutional Consensus, as opposed to the current, majoritarian consensus, in order to preserve our republic and its "Blessings of Liberty." *Id.*; see U.S. CONST. pmb1.

the majority.<sup>199</sup> Under this view, truth is not absolute.<sup>200</sup> Instead, the Constitution is read according to the “evolving standards of decency.”<sup>201</sup> In effect, this view culminates in “history and precedent [being] largely irrelevant; instead, unelected judges create policy to reflect modern needs through the Constitution they themselves write.”<sup>202</sup>

The other prominent method of Constitutional interpretation, Originalism, examines historical evidence to determine what the drafters meant to accomplish.<sup>203</sup> Those who implement this method use the plain meaning of words at the time the Constitution was adopted, and even the structure of particular provisions therein.<sup>204</sup> Originalism protects against the fear that has persisted since America’s founding—that without strict adherence to the text of the Constitution, the Constitution itself will become irrelevant.<sup>205</sup> Thus, Originalism views the Constitution as a literal document that establishes standards by which the country is bound.

199. Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy’s Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 29 (2007) (“The ‘Living Constitution’ has become a metaphor for an organic vision of the Constitution, one which evolves in meaning, adapting to contemporary values and practices.”).

200. *Id.*

201. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (“The Court recognized in [*Weems v. U.S.*] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

202. David Barton, *A Tale of Two Constitutions*, THE AMERICAN LEGION, October 2004, at 56.

203. KEN BLACKWELL & KEN KLUKOWSKI, *RESURGENT: HOW CONSTITUTIONAL CONSERVATISM CAN SAVE AMERICA* 166 (Threshold Editions 2011) [hereinafter *RESURGENT*] (“[O]riginalism is the belief that any law—including the Constitution—must be interpreted according to the original meaning of its words, as those words would have been understood by a reasonably well-informed and educated voter at the time those words were adopted.”). As Justice Houston, of the Alabama Supreme Court explained:

When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.

*Ex parte T.B.*, 698 So. 2d 127, 130 (Ala. 1997).

204. See generally *Dist. of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (noting that “[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.”).

205. Barrante, *supra* note 197, at 249 (referring to “an imaginary constitution” if the “Living Constitution” method of interpretation is employed).

Recently, the Supreme Court used the Originalist method of constitutional interpretation as a vehicle to consider the natural right to bear arms.<sup>206</sup> In *District of Columbia v. Heller*, the Court first examined the text of the Second Amendment,<sup>207</sup> along with historical evidence of how that amendment was interpreted following its ratification.<sup>208</sup> Upon concluding that “the individual right to possess and carry weapons” was guaranteed by the Second Amendment,<sup>209</sup> rather than end the analysis and the opinion, the Court looked to the historical understanding of this natural right for support. That is, in addition to the understanding of this right after ratification of the Second Amendment, the Court discussed its breadth in the century preceding the amendment.<sup>210</sup> The Court hastened to note this step of the analysis was necessary “because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.”<sup>211</sup>

Judge Diarmuid F. O’Scannlain, of the Ninth Circuit Court of Appeals, notes that this understanding of the right to bear arms influenced the court in more than one way.<sup>212</sup> Most obviously, it reinforced the Court’s holding—since the natural right to bear arms was an individual right and unconnected to military service, the Second Amendment right to bear arms must also be individual. After all, the Framers intended to codify the natural right within the Second Amendment.<sup>213</sup> The natural understanding was also given priority over other “clues to meaning and intent.”<sup>214</sup> The Court argued that it would be “dubious” to look to such evidence as drafting history for scope and intent when it was “widely understood” that the Second Amendment codified a pre-existing right, rather than a created one.<sup>215</sup>

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206. *Heller*, 554 U.S. at 592. See O’Scannlain, *supra* note 9, at 1523 (asserting that “*Heller* is at least as notable for its *method* of constitutional interpretation, as it is for its actual holding”).

207. *Heller*, 554 U.S. at 576–600.

208. *Id.* at 607–19.

209. *Id.* at 592.

210. *Id.* at 592–95.

211. *Id.* at 592. Indeed, the Court emphasizes Blackstone’s belief that “the right of having and using arms for self-preservation and defence” was “one of the fundamental rights of Englishmen.” *Id.* at 594 (citation omitted).

212. O’Scannlain, *supra* note 9, at 1524.

213. *Id.*

214. *Id.* at 1525.

215. *Heller*, 554 U.S. at 603.

## III. FROM LIBERTY TO LICENSE

The right to contract is a complex and fascinating paradigm. To contract, man engages his autonomy to “bargain for [his] own advantage”<sup>216</sup> and “fashion his . . . position in society.”<sup>217</sup> But man is not entirely free from restraint in this endeavor.<sup>218</sup> Therein lies the central issue this Comment seeks to address—how is the extent and scope of man’s right to contract determined? This Comment outlined America’s evolving treatment of codified natural rights,<sup>219</sup> and it will now advocate an appropriate framework for interpreting codified natural rights.<sup>220</sup> The task at hand, then, is to demonstrate how defining the scope of codified natural rights, specifically the right to contract, without a natural law framework is—as Justice Scalia put it—“dubious.”<sup>221</sup>

To begin, it is worth repeating that a man’s presuppositions about life and the nature of things “mold [his] way of thinking, shape [his] values, and direct the decisions that lie behind [his] actions and attitudes.”<sup>222</sup> The Framers understood that God is the source of all law, and that the scope of natural rights is defined by the “Laws of Nature and Natures [sic] God.”<sup>223</sup>

216. Ely, *supra* note 96, at 371.

217. *Id.* at 372.

218. See BARNETT, *supra* note 8, at 1–2 (noting that, at least, man is subject to positive law restraints).

219. See *supra* Part I.

220. See discussion *infra* Part IV.

221. *Heller*, 554 U.S. at 603.

222. OVERMAN, *supra* note 6, at 11. Dr. Overman frames the importance of presuppositions in this way:

We often underestimate the importance of unspoken assumptions behind the spoken words and visible actions of those around us. Like an iceberg floating in the ocean with just ten percent visible above the waves and ninety percent below the surface, we sometimes lose sight of the fact that the words we hear and read, and the actions of others that we see, are first shaped by invisible thoughts, deep in the unseen world of the heart.

*Id.* at 12. Indeed, as Dr. Overman notes, “[presuppositions] not only affect individuals, they also affect whole societies.” *Id.*

223. See LOCKE, *supra* note 16, at bk. II, ch. XI, § 135. As Locke notes:

The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them, to enforce their observation. Thus the law of nature stands as an eternal rule to all men, *legislators* as well as others. The *rules* that they make for other men’s actions, must, as well as their own and other men’s actions, be conformable to the law of nature, *i.e.*, to the will of God, of which that is a declaration, and the

These presuppositions were instilled in the common law,<sup>224</sup> inscribed into the Declaration of Independence,<sup>225</sup> and implemented by the Constitution.<sup>226</sup> Thus, it is problematic that the Court's modern autonomy jurisprudence,<sup>227</sup> which has enveloped the right to contract, deviates from this understanding.<sup>228</sup>

As discussed above, the right to contract was consistently analyzed in light of its natural law foundation both prior and subsequent to the Constitution's ratification.<sup>229</sup> Over the last century, however, the Court's

*fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it.*

*Id.*

224. This is evinced in many ways, one of which is the morality of the right to contract. See *Shadow*, *supra* note 15, at 1513–16.

225. O'Scannlain, *supra* note 9, at 1516. Judge O'Scannlain notes that:

The Declaration explicitly appeals to the natural law. It insisted "the Laws of Nature and of Nature's God" entitled this country to dissolve its political bonds with England, and declared that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." According to this seminal document, the purpose of government is to protect these natural rights. In the Declaration's words: "to secure these rights, Governments are instituted among Men."

*Id.* (quoting THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776)).

226. HADLEY ARKES, *BEYOND THE CONSTITUTION* 65 (1990) [hereinafter *BEYOND THE CONSTITUTION*] (noting that "the Founders were clear that the mission of the political order was nothing less than the protection of natural rights.>").

227. The term "autonomy jurisprudence" is used by this Comment to indicate the various rights and doctrines used by the modern Court to increase the scope of autonomy and individual liberty by circumventing morality. See *Shadow*, *supra* note 15, at 1516–18. A few examples are the right to privacy under *Griswold*, the right to abortion under *Roe*, and the right to homosexual activity under *Lawrence*. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

228. *Shadow*, *supra* note 15, at 1516. Indeed, as Professor Arkes notes:

This much may be said of the difference between the old apostles of "freedom of contract" and the new partisans of "autonomy": The judges who spoke seriously about the "freedom of contract" were alert to the moral ground from which that freedom arose. For that reason, they were alert to the fact that the freedom of contract could never encompass "the right to do a wrong" or to contract for immoral things. The same premises that established the rightful freedom of contract established an understanding, also, of the things that one could not claim in the name of one's "freedom to contract."

*Id.*

229. See discussion *supra* Part II.B.

autonomy jurisprudence subsumed the right to contract—a move that has allowed the Court to pretend that it has extricated the right to contract from its natural law underpinnings. Indeed, the notion of “liberty” is oft conflated with “license.” The Court’s autonomy jurisprudence deftly demonstrates this issue.

It is conventionally accepted that the right to privacy evolved from the Court’s liberty of contract jurisprudence.<sup>230</sup> The *Lochner*-era cases encompassed a vast array of protections outside of business and labor, and, by doing so, elevated autonomy.<sup>231</sup> Justice James C. McReynolds authored two of these significant cases.<sup>232</sup> In *Pierce v. Society of the Sisters*,<sup>233</sup> the Court struck down the Compulsory Education Act passed by the legislature of Oregon, which required children under the age of sixteen to attend public school.<sup>234</sup> Similarly, in *Meyer v. Nebraska*,<sup>235</sup> the Court vacated a statute that outlawed teaching children any language other than English.<sup>236</sup> In *Meyer*, Justice McReynolds listed a variety of rights the Court believed were protected under “liberty” within the Fourteenth Amendment, or substantive due process rights, including:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God

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230. MAYER, *supra* note 8, at 88. Mayer notes that:

Despite the popular assumption that the Court’s protection of privacy as a fundamental right began with its 1965 decision in *Griswold v. Connecticut*, some scholars have recognized that, long before the *Griswold* Court attempted to derive privacy rights from the “penumbras” that emanated from particular Bill of Rights guarantees, the *Lochner*-era Court had protected what today is regarded as an important aspect of privacy, so-called parental rights.

*Id.* at 89.

231. See *id.* at 88–91. Mayer, and other scholars, consider this so because “the Court protected liberty of contract by evaluating how laws limited persons’ liberty—the substance of the laws themselves, as distinct from the procedures by which laws were enacted or enforced.” *Id.* at 1–2.

232. WILLIAM M. WIECEK, *LIBERTY UNDER THE LAW 177–78* (The John Hopkins Univ. Press 1990) (1988) (“The right to privacy achieved constitutional status in two cases of the *Lochner* era, the only substantive due process decisions that survived the 1937 revolution.”).

233. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

234. *Id.* at 530, 534–35.

235. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

236. WIECEK, *supra* note 232, at 178.

according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>237</sup>

This notion of unenumerated substantive due process rights allowed the Court to declare a constitutional “right to privacy” for married couples in *Griswold v. Connecticut*.<sup>238</sup> The right to privacy was later expanded to include the childbearing decisions of individuals and unmarried couples in *Eisenstadt v. Baird*,<sup>239</sup> which led to the notorious substantive due process case, *Roe v. Wade*.<sup>240</sup> Since *Roe*, the Court has also found that an individual’s right to privacy includes private homosexual conduct.<sup>241</sup>

The problem here is that the right to privacy is a natural right<sup>242</sup> and, as such, should be interpreted according to a *Heller*-like analysis, which would consider the right’s historical scope. Instead, the Court is now looking to the word “liberty” in the Fourteenth Amendment’s Due Process Clause for

237. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Mayer points out that the cases additionally include, “the right of teachers to pursue their occupation and the right of private schools to engage in business,” as well as, “the educators’ freedom to enter into contracts with the parents.” MAYER, *supra* note 8, at 91.

238. WIECEK, *supra* note 232, at 178. In *Griswold*, the Court voided a pair of statutes prohibiting the giving of information about contraceptives to married people. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). Justice Douglas, writing for the majority, found an implicit right to privacy within the penumbras and emanations of the rights enumerated in the Bill of Rights. *Id.* at 484 (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). A more historically faithful approach would have overturned the Slaughter-House Cases by holding that the Privileges and Immunities Clause of the Fourteenth Amendment reserved all rights not given to the government to the people. See generally 113 CONG. REC. S1161 (2013) (Sen. Rand Paul filibuster); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring in part and concurring in the judgment).

239. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); WIECEK, *supra* note 232, at 178.

240. *Id.* at 178–79 (“The *Eisenstadt* extension proved to be a threshold to the preeminent substantive due process decision of the modern era, *Roe v. Wade* (1973), which restricted the powers of the states to regulate abortions.”).

241. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The *Lawrence* Court held that: The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Id.*

242. BARNETT, *supra* note 8, at 2.



the existence and scope of the natural right to privacy.<sup>243</sup> In doing so, the Court attempts to circumvent the natural law, in that the rights found within the word “liberty” are not beholden to the inherent limits placed upon them by their nature. This, however, departs from what the drafters—of both the Fourteenth Amendment and the Constitution—understood and intended. As discussed above, the Constitutional Consensus was to codify natural rights, including their moral scope.<sup>244</sup>

John Courtney Murray’s description of one of the principles within our Constitutional Consensus further illustrates the dichotomy between liberty and license, and why this discussion matters:

“A free people”: this term too has a special sense in the American Proposition. America has passionately pursued the ideal of freedom, expressed in a whole system of political and civil rights, to new lengths; but it has not pursued this ideal so madly as to rush over the edge of the abyss, into sheer libertarianism, into the chaos created by the nineteenth-century theory of the “outlaw conscience,” *conscientia exlex*, the conscience that knows no law higher than its own subjective imperatives. Part of the inner architecture of the American ideal of freedom has been the profound conviction that only a virtuous people can be free. It is not an American belief that free government is inevitable, only that it is possible, and that its possibility can be realized only when the people as a whole are inwardly governed by the recognized imperatives of the universal moral law.<sup>245</sup>

Today, however, “freedom” and “liberty” mean nothing more than unencumbered opportunity for licentiousness and are used as a vehicle to manipulate the natural scope of man’s rights.<sup>246</sup> This is evident in the unprincipled manner by which the Court sources its autonomy jurisprudence—the amalgam of substantive due process cases. By couching numerous natural rights under the label of “privacy,” the Court is able to abrogate the right’s proper constitutional framework. For example, many

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243. See discussion *supra* Part II.B.2.

244. See generally BEYOND THE CONSTITUTION, *supra* note 226, at 65.

245. MURRAY, *supra* note 27, at 36.

246. See discussion *supra* Part II.A. See also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (declaring that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

“privacy” cases involve the right to contract.<sup>247</sup> The Court, however, seems determined to sweep these subsidiary issues under the broad rug of “privacy” rather than analyze their validity under a constitutional contract doctrine.

This use of substantive due process is simply misguided.<sup>248</sup> The natural law scope of the right to contract cannot be abrogated by interpreting it within a different framework; the natural law is transcendent—similar to the law of gravity.<sup>249</sup> Man surely does not create either—he merely recognizes them.<sup>250</sup> This is in direct contradiction to those who would invoke “liberty” or “autonomy” for freedom of action. The ability to act autonomously does not equate to authority to act.<sup>251</sup> Indeed, Justice Thomas describes substantive due process as a “legal fiction” that disregards not only the natural law but also our Constitutional Consensus.<sup>252</sup>

#### IV. PROPOSAL

The problems outlined above flow from one main wellspring—the modern Court is operating under false presuppositions regarding the source of natural rights and the rule of law.<sup>253</sup> These false presuppositions, in turn, yield a judicial interpretation of natural rights that is inconsistent with natural law principles and our Constitutional Consensus.<sup>254</sup> By extracting unenumerated rights from the word “liberty” in the Fourteenth Amendment’s Due Process Clause,<sup>255</sup> the Court makes it clear that its goal is

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247. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a woman’s right to contract for an abortion); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the right of educators to enter into contracts with parents).

248. ARKES, *supra* note 3, at 55 (acknowledging that “[t]o invoke ‘autonomy’ is not to invoke a license for a freedom emancipated from moral restraint.”).

249. OVERMAN, *supra* note 6, at 56 (“That is, it exists above and independent of man.”).

250. *Id.* (“Man does not invent these laws, he recognizes them, accepts them, and lives at peace with them.”).

251. *Id.*

252. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) (“[T]his fiction is a particularly dangerous one. The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not.”).

253. See discussion *supra* Parts I, II.A, II.B.

254. See OVERMAN, *supra* note 6, at 11.

255. Justice Thomas declared this framework “particularly dangerous” and “a legal fiction.” *McDonald*, 130 S. Ct. at 3062 (Thomas, J., concurring).

to establish natural rights without their natural limitations, rejecting natural law principles.<sup>256</sup> In doing so, the Court seemingly attempts to unshackle natural rights from their implicit scope in an effort to make them alienable.

Therefore, this Comment proposes that the Court rededicate itself to our Constitutional Consensus and implement natural law principles consistent with the Declaration of Independence. With respect to the right to contract, specifically, the Court has two options. First, the Court could revive either of its seemingly outdated doctrines that prescribe recognition of the natural law.<sup>257</sup> Both the Freedom of Contract and Liberty of Contract doctrines contain presuppositions that enable the Court to implement our Constitutional Consensus regarding the right to contract—that its scope is predefined and cannot be altered or abolished by a majority. Alternatively, the Court could apply the *Heller* analysis to the right to contract, as well as natural rights in general. The *Heller* framework looks to the original understanding of preexisting rights to determine what the Framers intended the scope of such rights to be upon codification.<sup>258</sup> Either of these endeavors should strive to familiarize the law with the morally significant underpinnings of the natural law.<sup>259</sup>

Undoubtedly, the Law of Contracts has changed since the ratification of the Constitution.<sup>260</sup> Man's right to contract, however, has not—it is natural,

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256. See O'Scannlain, *supra* note 9, at 1528 (proposing that any “discerning constitutional thinker must appreciate the extent to which the constitutional project quintessentially was an effort to codify pre-existing natural law rights.”); *Shadow*, *supra* note 15, at 1516.

257. Specifically, either the “Freedom” or “Liberty” of Contract Doctrines. See discussion *supra* Parts II.B.1, II.B.2.

258. O'Scannlain, *supra* note 9, at 1525 (noting that “*Heller* tells us that natural law can factor into constitutional interpretation in subtle, but significant ways. It tells us that, where a constitutional provision codified a pre-existing, natural right, the historical understanding of that natural right can clarify ambiguities in the constitutional text and elucidate the rationale and scope of the constitutional right”); see generally *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). The majority opinion in *Heller* is an excellent example of the proper framework for interpreting natural rights. It should be lauded, but it is the exception, not the rule.

259. See generally BLACKSTONE, *supra* note 9, at \*40 (noting that “[God] has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms . . .”). See also BURLAMAQUI, *supra* note 8, at 138–39.

260. See *supra* Part II.B.

inalienable, and predates government.<sup>261</sup> Although the Court's elevation of autonomy, through its autonomy jurisprudence, is an attempt to judicially enforce the collective aims of society, such a disposition surely misses the forest for the trees. For it is self-evident that we are endowed with "objective rights held by all humans as a matter of moral principle"<sup>262</sup>—ours is not to define their scope, but merely recognize them.

#### A. *Revive the Freedom or Liberty of Contract Doctrine*

The Marshall Court developed the Freedom of Contract Doctrine by applying this Constitutional Consensus to the Contract Clause of the Constitution.<sup>263</sup> This doctrine recognized that the scope of man's right to contract was defined by natural law. Chief Justice Marshall's opinion in *Ogden v. Saunders*,<sup>264</sup> although a dissent, is an exceptional example of the proper framework for analyzing the right to contract. Consistent with the founders, Chief Justice Marshall concluded that the right to contract is antecedent to the State.<sup>265</sup> He went on to examine the right to contract in a state of nature, as well as under the common law.<sup>266</sup> Specifically, the Chief Justice examined where the right to contract comes from and why nations

261. See *supra* notes 12, 15.

262. O'Scannlain, *supra* note 9, at 1514.

263. See discussion Part II.B.1.

264. 25 U.S. 213 (1827).

265. *Id.* at 346 ("[I]ndividuals do not derive from government their right to contract, but bring that right with them into society.").

266. *Id.* On the importance of looking to the State of Nature, philosopher John Locke said:

To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature. But though this be a state of liberty, yet it is not a state of license; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself.

LOCKE, *supra* note 16, at bk. II, ch. II, § 4. See also BURLAMAQUI, *supra* note 8, at 126 (describing how man can "discover and know" God's natural law "by attentively considering their state and nature"); MONTESQUIEU, *supra* note 16, at 6 ("Prior to all these laws are the laws of nature . . . To know them well, one must consider a man before the establishment of societies. The laws he would receive in such a state will be the laws of nature."). Montesquieu notably posits that men receive law in a state of nature, rather than create. *Id.* at 7.

and individuals alike recognize the validity of contracts.<sup>267</sup> His simple conclusion was “that obligation is not conferred on contracts by positive law, but is intrinsic,” and that the right to contract is “not given by society, but [is] brought into it.”<sup>268</sup> In other words, the right is a natural right, inherent to man’s existence.<sup>269</sup>

Despite its lack of express limitations, the Liberty of Contract doctrine is an exemplary commitment to natural law reasoning. Its re-invigoration would be a boon to individual liberty and would implement our Constitutional Consensus more faithfully. The doctrine provides the moral significance of government by consent found within the Declaration, in that it advances the notion of man’s natural claim to ownership of his labor. Preserved in the Liberty of Contract doctrine is the understanding that the right to contract may only be claimed by a being capable of deliberating and “offering, or withdrawing, his consent.”<sup>270</sup> By his nature, this being also understands right and wrong, and therefore appreciates “the ends he [has] no right to pursue” through contract.<sup>271</sup> Indeed, the judges who applied Liberty of Contract explicitly noted that man’s right to contract “was very much open to the restraints of the law.”<sup>272</sup>

Application of either the Freedom or Liberty of Contract doctrines today would banish the Court’s autonomy jurisprudence, and replace it with a framework that acknowledges, first, that man has natural rights that exist outside of government and, second, that due to the inherent limitations upon natural rights, contracts outside of legality or morality are void. This would mean that congressional legislation, such as the Defense of Marriage Act,<sup>273</sup> would be redundant—because same-sex marriage is immoral, such a contract could not stand under either of the aforementioned doctrines.

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267. *Saunders*, 25 U.S. at 346. Chief Justice Marshall asks, “Whence is derived the obligation of . . . contracts?” He notes that there exists no superior legislature to the state, but even so, the “validity” of contracts “is acknowledged by all.” *Id.* “In a state of nature . . . individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.” *Id.*

268. *Id.*

269. *Id.*

270. ARKES, *supra* note 3, at 96.

271. *Id.*

272. *Id.* See discussion Part II.B.2.

273. H.R. REP. 104–664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906. The “Purpose and Summary” section of the Defense of Marriage Act provides:

H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to

### B. *Apply the Heller Analysis to Contracts*

The modern Court, through its autonomy jurisprudence, is applying improper presuppositions regarding the source of rights and law. This has translated into the abandonment of natural law in order to pursue a false notion of liberty. The Court either fundamentally misunderstands, or plainly ignores, the source of all law. This simply distorts the scope of natural rights—including the right to contract.<sup>274</sup>

Of all the methods of constitutional interpretation, only “Originalism,” focuses on the intent of the drafters.<sup>275</sup> This focus is inescapable; unless the text is viewed through the lens of its drafter’s intent, the meaning once crafted into the text becomes malleable and the provisions within it are subject to manipulation to meet any conceived objective.<sup>276</sup> It is therefore imperative to approach judicial interpretation with an original understanding.<sup>277</sup>

protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

To achieve these purposes, H.R. 3396 has two operative provisions. Section 2, entitled “Powers Reserved to the States,” provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex. And Section 3 defines the terms “marriage” and “spouse,” for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.

*Id.*

274. THE FEDERALIST NO. 31 (Alexander Hamilton) (concluding that if a man is unaware of natural law principles his interpretation of the law cannot be trusted).

275. MASSEY, *supra* note 193, at 41 (“[O]riginalism . . . itself takes two forms: (1) determining the original intent of the drafters of the Constitution or (2) establishing the original meaning of its text” (internal quotation marks omitted)). According to President Thomas Jefferson:

On every question of construction, [let us] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.

PADOVER, *supra* note 193, at 322 (quoting a letter from Thomas Jefferson to Justice William Johnson (June 12, 1823)).

276. Justice Antonin Scalia, Address to the Federalist Society (Feb. 14, 2006), *available at* <http://www.foxnews.com/story/0,2933,184815,00.html>.

277. See discussion *supra* Part II.C.

Additionally, when interpreting the scope of a natural, preexisting right, the Court should commit itself to the natural right analysis used in *District of Columbia v. Heller*.<sup>278</sup> At issue in *Heller* was the natural right to bear arms. Writing for the majority, Justice Scalia employed Originalism to examine the text of the Second Amendment and the relevant historical evidence, but the analysis did not end there. Justice Scalia recognized that the Framers understood that they were codifying a natural right with a predefined scope and, thus, intended to codify that scope. From there, Justice Scalia examined how the right to bear arms was understood in the one hundred years preceding the drafting of the Constitution. As demonstrated by Justice Scalia, the Framers' intent is still relevant—especially when interpreting natural rights. Understanding that the Framers intended to adopt the preexisting scope of natural rights upon their codification, the *Heller* analysis will ensure that the Constitution is not subverted in order to bestow rights upon the individual that supersede this natural scope.<sup>279</sup>

In practice, application of the *Heller* natural right analysis would undermine the right to privacy as currently understood, by re-incorporating a moral component into contracts. The modern right to privacy confuses “autonomy” with “licentiousness”—although these words represent two very distinct notions regarding individual liberty and restraint.<sup>280</sup> As moral

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278. *Dist. of Columbia v. Heller*, 554 U.S. 570, 577 (2008).

279. RESURGENT, *supra* note 203, at 168 (noting that agenda judges, in fact, “subvert the Constitution”).

280. ARKES, *supra* note 3, at 55 (“To invoke ‘autonomy’ is not to invoke a license for a freedom emancipated from moral restraint, in private or in public.”). Burlamaqui summarizes why this cannot be so in this way:

What would become of man and society, were every one to be so far master of his actions, as to do every thing he listed, without having any other principle of conduct than caprice or passion? Let us suppose, that God abandoning us to ourselves, had not actually prescribed any rules of life, or subjected us to laws; most of our talents and faculties would be of no manner of use to us. To what purpose would it be for man to have the light of reason, were he to follow only the impulse of instinct, without watching over his conduct? What would it avail him to have the power of suspending his judgment, were he to yield stupidly to the first impressions? And of what service would reflection be, were he neither to choose nor deliberate; and were he, instead of listening to the counsels of prudence, to be hurried away by blind inclinations? These faculties, which form the excellence and dignity of our nature, would not only be rendered hereby entirely frivolous, but, moreover, would become prejudicial even by their excellence; for the higher and nobler the faculty is, the more the abuse of it proves dangerous.

beings with the ability to deliberate and reason, humans have the capacity to ascertain the natural law—a basic appreciation of right and wrong.<sup>281</sup> Once man recognizes the natural law, his perception of autonomy should change.<sup>282</sup> Therefore, the right to contract, as well as the modern autonomy jurisprudence, is restrained under positive law principles of legality, as well as natural law principles of morality.<sup>283</sup>

## V. CONCLUSION

God is the source of man’s “inalienable” natural rights—not a voting majority. His law is, itself, immutable, and persists despite man’s ability to ignore its principles.<sup>284</sup> To that end, the Court should return to the original understanding of man’s right to contract. That is, the Court should endeavor to familiarize itself with the moral significance that defines the right to contract. This principle is aligned with our Constitutional

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This would be not only a great misfortune for man considered alone, and in respect to himself; but would still prove a greater evil to him, when viewed in the state of society. For this more than any other state requires laws, to the end that each person may set limits to his pretensions, without invading another man’s right. Were it otherwise, licentiousness must be the consequence of independence. To leave men abandoned to themselves, is leaving an open field to the passions, and paving the way for injustice, violence, perfidy and cruelty. Take away natural laws, and that moral tie which supports justice and honesty in a whole nation, and establishes also particular duties either in families, or in the other relations of life; man would be then the most savage and ferocious of all animals.

BURLAMAQUI, *supra* note 8, at 134–35.

281. See discussion *supra* Part II.B.1.

282. *Romans* 6:1–2 (asking “[w]hat shall we say then? Are we to continue in sin that grace may abound? By no means! How can we who died to sin still live in it?” and proposing “For just as you once [were] slaves to impurity and to lawlessness leading to more lawlessness, so now present your[self] as slaves to righteousness leading to sanctification”); *Galatians* 5:13 (“For you were called to freedom, brothers. Only do not use your freedom as an opportunity for the flesh.”).

283. SHARMA, *supra* note 96, at 98 (“[S]ince contracts are consensually assumed obligations, in principle, *within the confines set by the precepts of illegality and immorality*, the parties should be able to specify their own distinctive regime of rules to govern their contractual relationship.” (emphasis added)).

284. AQUINAS, *supra* note 16, at bk. I. pt. II. Q.94, art. 2, *sed contra* (discussing truths that are *per se nota*, or true in themselves).



Consensus,<sup>285</sup> and allows for the natural scope of the right to contract to be properly understood.

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285. See discussion *supra* Parts I, II.A.