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## The Natural Law in the American Tradition

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**NATURAL LAW COLLOQUIUM**  
**THE NATURAL LAW IN THE AMERICAN**  
**TRADITION<sup>†</sup>**

*Hon. Diarmuid F. O'Scannlain\**

It is a privilege to be giving this lecture in the Fordham Natural Law Colloquium. I embrace the Colloquium's mission to encourage reflection on the natural law tradition, which I believe to be critical to a proper analysis of the most difficult issues of our day. I am honored to be part of this discussion, and I want to thank the Colloquium and its supporters for making all of this possible.

I

On the last day of her testimony before the Senate Judiciary Committee, our newest Supreme Court Justice, Elena Kagan, was asked a question that seemed to surprise her: "Do you believe it is a fundamental, pre-existing right to have an arm to defend yourself?," asked Senator Tom Coburn of Oklahoma.<sup>1</sup> When Kagan began to answer by stating that she "accept[ed]"<sup>2</sup> the Supreme Court's decision in *District of Columbia v. Heller*,<sup>3</sup> which held that the Second Amendment guarantees an individual right to keep and bear arms, Coburn interrupted. He was not asking whether she believed the right to be protected by the Constitution, but rather whether she considered it to be a "natural right."<sup>4</sup> "Senator Coburn," replied Kagan, "to be honest with

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<sup>†</sup> Judge Diarmuid F. O'Scannlain delivered this address at the Natural Law Colloquium, held on November 17, 2010 at Fordham University School of Law. The remarks have been lightly edited and footnotes have been added.

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1. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, WASH. POST, June 30, 2010, <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf>.

2. *Id.*

3. 128 S. Ct. 2783 (2008).

4. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.

you, I don't have a view of what are natural rights independent of the Constitution."<sup>5</sup>

This answer concerns me. How could someone who spent her entire career studying the Constitution and the Supreme Court, not have a view about natural law, or natural rights? The implication of Justice Kagan's answer is that she does not think one needs to reflect on the natural law in order to be a good judge or a good constitutional lawyer. Now, I certainly do not mean to pick on Justice Kagan. In fact, her agnosticism about natural rights reflects the mainstream of contemporary legal thinking. Too many of us have succumbed to the view that our rights arise "merely from the law that [is] 'posited' or written down."<sup>6</sup> Too few of us take seriously the notion of natural rights, that is, of objective rights held by all humans as a matter of moral principle. This is why, when people today refer to the freedoms of speech and of religion, they will speak of "the rights we have *through* the First Amendment," as if their existence depended on the positive law. Or, we speak of our right to keep and bear arms *under* the Second Amendment, as if the right was created by the Constitution.<sup>7</sup>

This view stems from a variety of sources. Some are skeptical of the existence of natural law. In the academy, it is oft-heard that those who believe in the natural law are "metaphysical," as opposed, I presume, to empirical. And, of course, throughout the last century there was a movement to materialize philosophy, to respect the work of theoretical physicists or molecular biologists while distrusting the first principles philosophy of traditional metaphysics. There is also, I sense, a widespread view that the natural law is parochial, specifically, Catholic.

This skepticism of the metaphysical is backed by an historical argument which contends that the American legal tradition does not include a natural law element. The counternarrative I have heard, which focuses on Benjamin Franklin, is that America is founded on something like Dewey's "pragmatism."<sup>8</sup> America, in this view, is a nation solely of the practical. John Hart Ely, in his rightly-praised classic *Democracy and Distrust*, states that the belief that the Constitution embodies natural law principles "was not even the majority view among those 'framers' we would be likely to think of first."<sup>9</sup> Ely contends that "natural law and natural rights philosophies were not that broadly accepted; in fact, they were quite controversial."<sup>10</sup>

Others believe that natural law, regardless of its existence or its historical pedigree, is dangerous. Their concern is that natural law might empower judges to base decisions on their own sense of justice, rather than relying on

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5. *Id.*

6. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 7 (2010).

7. *Id.*

8. RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE (2000).

9. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 39 (1980).

10. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 25 (1978).

traditional legal sources such as text and precedent.<sup>11</sup> This last thread of criticism is hostile to natural law, not merely apathetic. It asserts natural law concerns are antithetical to responsible judging.

I, like many, trace this hostility to *Lochner v. New York*,<sup>12</sup> in which the Supreme Court invalidated an employment law on the grounds that it violated a substantive due process right to “liberty of contract.” In dissent, Justice Oliver Wendell Holmes rightly accused the Court of importing a laissez faire economic philosophy into the Constitution.<sup>13</sup> *Lochner*, and similar cases of that age, were seen as instances of “natural law reasoning.” Thus, criticism of “the *Lochner* era” became bound up with criticism of the natural law. And, by the time *Griswold v. Connecticut* was decided, all nine of the Justices had decried the use of the natural law in judging.

In *Griswold*, of course, the Court held that a “right to privacy” in the Constitution forbade states from criminalizing the use of contraceptives by married couples. In dissent, Justice Black accused the majority of “*Lochnerizing*,” that is, of importing a “natural law due process philosophy” into the Constitution.<sup>14</sup> Justice Black’s dissent insisted that the Court cannot rely on “any mysterious and uncertain natural law concept as a reason for striking down [the Connecticut] law.”<sup>15</sup> The majority, for its part, decried the use of natural law as well, in an effort to distance itself from *Lochner*. Accordingly, those who believe in judicial restraint are skeptical of natural law because, to them, it conjures up the judicial adventurism of the *Lochner* era and the Warren Court.

So, we find the natural law under attack from both sides. To the left, it is an invention of mystics and religious conservatives. To the right, it is a dangerous invitation for judges to impose their own sense of justice on the country.

Tonight, I offer a different view. I believe that, in many important respects, the natural law is woven into the fabric of the Constitution, and, therefore, is relevant to originalist constitutional interpretation. Thus, every lawyer, and certainly every judge, should study and understand the natural law—not because it is enforceable in its own right—but because it informs our understanding of the Constitution’s original meaning.

In offering these thoughts, I am mindful that I speak as a federal judge, not a professional philosopher. My main purpose tonight is not to lay out a path-breaking philosophical theory. Rather, it is to assure you that the natural law plays an important role in what I do as a judge, and should play an important role in what you do as lawyers.

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11. *Id.* at 26–29.

12. 198 U.S. 45 (1905).

13. *Id.* at 75 (Holmes, J., dissenting) (“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.”).

14. *See Griswold v. Connecticut*, 381 U.S. 479, 516–17 (1965) (Black, J., dissenting).

15. *Id.* at 522.

## II

First, let's discuss history. Professor Hadley Arkes, in his latest book, *Constitutional Illusions and Anchoring Truths*, has provided an excellent guide to the understanding of natural rights shared by our Founding Fathers. Professor Arkes shows how the founding generation was deeply attuned to the moral grounding of our rights. The Founders possessed, in his words, a "remarkable capacity . . . to trace [their] judgments back to first principles."<sup>16</sup> And, indeed, their writings are replete with references to a higher, unwritten law, accessible to human reason. *The Federalist Papers*, for instance, frequently rely on "nature" and "reason" to justify general principles of law.<sup>17</sup>

But I want to focus on the *Declaration of Independence* for a moment. 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."<sup>18</sup> 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.*"<sup>19</sup>

I think this last line is critical because it defines the relationship between natural rights and civil governments. The *Declaration* is not saying, "we are starting this new government and we are going to *give* our citizens all sorts of new rights." It is saying that human beings have innate rights that everyone has a moral obligation to respect, whether or not there is a government to define and protect those rights. And the only reason to create governments, in the first place, is to protect those rights which humans have independent of government.

The doctrines of "unalienable rights" and universal equality in the *Declaration* were derived from the works of John Locke, one of the foremost natural law theorists of the day.<sup>20</sup> Indeed, that natural rights include life, liberty and pursuit of happiness is but a tweak away from the Lockean proposition that men have rights to life, liberty, and property.<sup>21</sup> And the phrase "all men are created equal" all but plagiarizes Locke's phrase, "all Men *by Nature* are equal."<sup>22</sup>

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16. ARKES, *supra* note 6, at 8.

17. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 81, at 545 (Alexander Hamilton); *see also* ARKES, *supra* note 6, at 25.

18. THE DECLARATION OF INDEPENDENCE para. 2.

19. *Id.* (emphasis added).

20. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 108–16 (2000).

21. *Id.*

22. JOHN LOCKE, LOCKE'S SECOND TREATISE OF GOVERNMENT 322 (Lester DeKoster, ed., 1978).

And it is not just the rhetoric of the *Declaration of Independence* that invokes the natural law. The *Declaration* is above all an act. It does what it says. The act it performs is one of separation. It proclaims that, “whenever any Form of Government becomes destructive of these ends,” that is, the end of protecting unalienable rights, “it is the Right of the People to alter or to abolish” the government. And so it does. This theory of government, put into action by the *Declaration*, is the practical application of Locke’s natural law idea that the government exists to further natural law and to protect natural rights, and, therefore, when a government fails to do so, it is owed no allegiance.<sup>23</sup>

That the *Declaration* embodies natural law principles is no surprise given that its author, Thomas Jefferson, was heavily influenced by Locke. He constantly recommended Locke to his friends, provided Locke a prominent place in the curriculum of the University of Virginia, and even remarked that “Locke’s little book on government is perfect as far as it goes.”<sup>24</sup> And at least three of the other members of the “Committee of Five” appointed to write the *Declaration*, are on record as believers in natural law, albeit different versions.<sup>25</sup>

When it came to writing a Constitution, the Framers aimed to create a positive law that would protect pre-existing natural rights. This should not surprise us. After all, the *Declaration of Independence* asserted that *the very purpose* of civilian governments was to protect natural rights. Although the Constitution, unlike the *Declaration*, does not explicitly reference natural law, it does use terms which cannot be understood apart from the natural law tradition from which they were plucked. 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.

For example, Philip Hamburger has marshaled extensive evidence that the natural law was understood as the source of the rights codified in the First Amendment.<sup>26</sup> The Founders regarded the freedoms of speech and of the press as natural rights—rights individuals had even in the absence of government.<sup>27</sup> Writing in 1789, for instance, Roger Sherman declared “the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom” as among the “natural rights which are retained by [the people] when they enter into society.” And individuals ranging from

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23. *Id.* at 77–79.

24. Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), in 5 THE WRITINGS OF THOMAS JEFFERSON 171, 173 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895); see also Niles, *supra* note 20, at 109 n.73.

25. Terry Brennan, *Natural Rights and the Constitution: The Original Intent*, 15 HARV. J.L. & PUB. POL’Y 965, 971 nn.23 & 33 (1992).

26. Philip Hamburger, *Natural Law, Natural Rights, and American Constitutions*, 102 YALE L.J. 907 (1993).

27. *Id.* at 919.

James Madison to the anti-federalist, “Brutus,” spoke of the natural right to freedom of conscience, which became the freedom to exercise religion.<sup>28</sup>

The freedom of the press also derived from the natural right to speak, to write, and to publish one’s thoughts. Patrick Henry proclaimed that freedom of the press was among the “rights of human nature.”<sup>29</sup> Roger Sherman insisted that “[s]peaking, writing and publishing [one’s] [s]entiments” is a natural right.<sup>30</sup> And the freedom of assembly was derived from the natural right to associate with other human beings.<sup>31</sup>

Professor Arkes likes to illustrate the founders’ view of this relationship between natural rights and the positive rights guaranteed by the Constitution, by discussing their debate during the constitutional convention, about whether to include a ban on ex post facto laws.<sup>32</sup> “For the Founders,” Arkes explains, “the principle on ‘ex post facto’ laws was one of those deep principles of lawfulness that had a claim to be respected in all places, or incorporated in the basic law of any country that would claim to be a civilized country under the rule of law.”<sup>33</sup>

The 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.<sup>34</sup> James Wilson, for one, feared that placing an ex post facto ban in the Constitution would “proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so.”<sup>35</sup> Thus, we see that the Ex Post Facto Clause merely codified a principle which eighteenth century lawyers grew up believing was a fundamental command of the natural law.

The natural law played a similar role in the Civil War era debate which would eventually spawn the Reconstruction Amendments. The Fourteenth Amendment, of course, echoes the *Declaration’s* promise of equality.<sup>36</sup> It enshrines equality in our law, fulfilling the natural law promise made nearly one hundred years earlier.

This congruence between the natural law and the principles that came to be embodied in the Reconstruction Amendments was not lost on the greatest lawyer of the day, Abraham Lincoln. In his debates with Senator Stephen Douglas, Lincoln articulated a natural law argument against slavery. In Lincoln’s view, the *Declaration of Independence* established “an abstract truth, applicable to all men and all times,” that “all men are created equal.”<sup>37</sup> The *Declaration* “meant simply to declare the right, so

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28. *Id.* at 919 n.38.

29. *Id.* at 919 n.39.

30. *Id.* at 948.

31. *Id.* at 919 n.40.

32. U.S. CONST. art. I, § 9, 10; *see* *Smith v. Doe*, 538 U.S. 84, 92 (2003).

33. ARKES, *supra* note 6, at 28.

34. *Id.* at 9.

35. *Id.* at 27 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand, ed., Yale Univ. Press 1937) (1966)).

36. U.S. CONST. amend. XIV.

37. Letter from Abraham Lincoln to Henry L. Pierce (Apr. 6, 1859), *available at* <http://showcase.netins.net/web/creative/lincoln/speeches/pierce.htm>.

that the enforcement of it might follow,”<sup>38</sup> Slavery, Lincoln insisted, violated a fundamental notion of equality, one promised by the *Declaration of Independence*. Lincoln quoted Proverbs 25:11: “A word fitly spoken is like an apple of gold in a frame of silver.” Lincoln likened the Constitution to the frame, and the Declaration to the apple, noting, “the frame is made for the apple, not the apple for the frame.”<sup>39</sup> Thus, to Lincoln, the Constitution should be designed to capture the natural law’s sense of justice. And, of course, with respect to equality, it soon was, in the Fourteenth Amendment’s Equal Protection Clause. Accordingly, Justice Thomas and others have argued, correctly in my view, that the Equal Protection Clause codified a natural law version of equality.<sup>40</sup>

### III

Now we reach the most difficult question of any lecture, or any academic paper, and that’s: so what? What does this history have to do with your jobs as lawyers and academics, and with my job as a judge?

The one version of natural law theory, espoused by Professor Arkes and others, holds that judges should interpret and enforce the natural law themselves. Arkes believes that, if judges are “to apply the Constitution sensibly,” they must “appeal beyond the text of the Constitution” to “those deeper principles that informed and guided the judgment of the Founders as they went about the task of framing the Constitution.”<sup>41</sup> In Arkes’s view, the line separating law and morals is a thin one, and judges should openly engage in moral reasoning when deciding cases. Arkes proposes that judges give effect to “the first principles of . . . moral judgment” in interpreting the Constitution.<sup>42</sup>

But this is not the only theory of how natural law is relevant to judging, nor is it necessarily the majority view. In fact, I do not know of a single American judge who is on record as supporting the direct judicial enforcement of the natural law. Even 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.<sup>43</sup> And there is nothing contradictory about believing

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38. *Id.*

39. Douglas W. Kmiec, *The Human Nature of Freedom and Identity: We Hold More Than Random Thoughts*, 29 HARV. J.L. & PUB. POL’Y 33, 49 (2005).

40. Clarence Thomas, *Toward a Plain Reading of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 691 (1987).

41. ARKES, *supra* note 6, at 6–7; *see also* HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990).

42. ARKES, *supra* note 6, at 12.

43. Judge Pryor has indicated that, if he ever felt that human law conflicted with natural law to such an extent that he could not in good conscience enforce the human law, the proper remedy would be to resign, not to disregard the human law. *See* William H. Pryor, Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1, 8 (2003) (“As a public official, if I am ever *unable* to fulfill my oath and obey the command of a federal court directed against me, in my official capacity, then I should resign.”). Before becoming a judge, Justice Thomas gave a speech that his critics interpreted as supporting the judicial enforcement of the natural law. *See* Clarence Thomas, *The Higher Law Background of the Privileges or*



in natural law, on the one hand, but rejecting judicial authority to enforce it, on the other.

Indeed, ten years ago at this very colloquium, Robert George eloquently defended the view that “questions of the existence and content of natural law and natural rights are, as a logical matter, independent of questions of *institutional authority to give practical effect* to natural law and to protect natural rights.”<sup>44</sup> That is, the natural law itself does not settle the question of which actors, in any given governmental system, have the authority to say what the natural law requires. As Professor George put it, “Natural law does not dictate an answer to the question of its own enforcement.”<sup>45</sup> Rather, whether it is better to give the power to determine which positive laws are consistent with the natural law to legislatures, or whether it is better to give that power to courts, is a question that is “underdetermined by reason.”<sup>46</sup> Thus the natural law allows government designers to choose either of these “morally acceptable options.”<sup>47</sup> This means that “[a]ny argument seeking to establish the authority of courts to invalidate legislation by appeal to natural law and natural rights ungrounded in the constitutional text or history, . . . will itself have to appeal to the constitutional text and history.”<sup>48</sup>

And I have not seen a persuasive textual or historical argument that the Framers intended to vest federal judges with the power to strike down statutes that conflict with the judge’s own conception of what the natural law requires. Indeed, I believe that constitutional text and history compel the opposite conclusion.

Textually, Article III of the Constitution endows the federal courts with “the judicial power.” Just as the President can only exercise “executive power,”<sup>49</sup> and the Congress only “legislative power,”<sup>50</sup> we judges have no constitutional authority to exercise anything except “judicial power.” While the Constitution does not define “judicial power,” it was a concept well-known to eighteenth century lawyers. As Philip Hamburger explains in his recent book, *Law and Judicial Duty*, the “judicial Power” was originally

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*Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989). But Justice Thomas renounced such a position at his confirmation hearings. See Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 95 (1995). And, a close reading of the speech suggests that Justice Thomas supports the more moderate view that, where a constitutional provision codifies a natural law principle, the natural law can inform our understanding of that right. See Thomas, *supra*, at 66 (“The higher law background of the Constitution reminds us that our political arrangements are not mere mechanical contrivances, but rather have a purpose.”); *id.* at 68 (arguing that *Brown v. Board of Education* would have “had the strength of the American political tradition behind it if it had relied on the natural law purpose of the Fourteenth Amendment, instead of relying on dubious social science”).

44. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2279–80 (2001) (emphasis added).

45. *Id.* at 2279.

46. *Id.*

47. *Id.*

48. *Id.* at 2280–81.

49. See *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

50. See *INS v. Chadha*, 462 U.S. 919 (1983).

understood to mean essentially what it had meant in England: the power of courts to decide cases in accord with the *law of the land*.<sup>51</sup>

Historically, Alexander Hamilton, in *Federalist No. 78*, defended the idea of an unaccountable and independent judiciary by promising the People that “*nothing* would be consulted [in the courts] *but* the constitution and the laws.”<sup>52</sup> Thus, because judges would be, “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them,” there would be no “arbitrary discretion in the courts.”<sup>53</sup> As Hamilton famously put it, the judiciary was to exercise “neither Force nor Will, but merely judgment.”<sup>54</sup> This conception of a neutral judicial power precludes judges from dictating what the natural law requires.

Now, one might respond that *Marbury v. Madison* told us that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” and perhaps this should include the power to say what the natural law is. But recall that before Chief Justice Marshall uttered that famous line, he first went to great lengths to establish that the Constitution is law, not an aspirational moral code, and, accordingly, that judicial review is no different from any other choice of law question.<sup>55</sup> Put another way, deciding whether one law, a constitutional provision, conflicts with another law, a statute, is the kind of thing that judges do.<sup>56</sup> But, by contrast, there is no reason to believe that it is “emphatically the province” of courts to discern moral truths from first principles.

As my friend Robert Bork put it, “I am far from denying that there is a natural law, but I do deny . . . judges have any greater access to that law than do the rest of us.”<sup>57</sup> Judge Bork had a point: lawyers are very good at interpreting written texts, but there is no reason to believe that they are any more moral than anyone else. In fact, in poll after poll, the public rates us lawyers behind almost every other profession when it comes to morality, just above used-car salesmen. One might respond that those politicians in the legislature are not exactly known for their morality either, but at least politicians can be thrown out of office if they write laws in violation of the public’s sense of what the natural law requires.

To make the point more formally, natural law is by its nature a moral law accessible to all human beings through reason. It is not something uniquely

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51. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 17 (2008).

52. *THE FEDERALIST NO. 78*, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphases added).

53. *Id.*

54. *Id.* at 523.

55. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.”).

56. *See id.* (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

57. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 66 (1990).

assessable to lawyers, like civil procedure or secured transactions. I therefore do not believe that judges have an inherent right to interpret the natural law in a way that is binding on the rest of the country. In saying this, I do not mean to imply that the natural law is subjective, only that judges are not its authoritative interpreters.

Along these lines, I have been told the story of a lawyer who made a natural law argument in court. The judge interrupted him and said, "I'm sorry, counselor, but I will not entertain natural law arguments in my courtroom." The attorney became indignant, asking the judge "why, don't you believe in the natural law?" The judge responded, "yes, I certainly do, but the problem is that I lack jurisdiction." That's how I feel about the matter: I do not believe that judges have the freestanding authority to enforce the natural law.

But before moving on, I want to speak about one more philosopher who dealt with the distinction between legitimate and illegitimate efforts to enforce the natural law. And I dare say he was at least as good a philosopher as Professor George. His name was Socrates. In two of the most famous works involving Socrates, *The Apology* and *Crito*, one finds an apparent contradiction. *The Apology* tells the story of the trial of Socrates, at which he argues, by appeal to something like the natural law, that the Athenians are acting unjustly by putting him to death. *Crito* tells the story of a friend who comes to rescue Socrates before his execution, only to find that the stubborn Socrates refuses to leave prison, arguing that he would be acting unjustly if he did *not* let the Athenians execute him.

What gives? Did the greatest logician ever to walk the earth contradict himself with his dying breath? Of course not. In *Crito*, Socrates explained that, even though his execution violated the natural law, it would be unjust for him to take the law into his own hands by evading an execution which Athens, through a lawful process, determined that he deserved. Socrates believed that, by living in Athens, he agreed to be bound by Athenian law, which he knew would never perfectly capture the natural law. In one particularly dramatic scene, Socrates imagines that he is speaking with the laws of Athens. The laws ask Socrates whether the agreement (between Socrates and the laws) was that the laws would never wrong him, or "was it that you would respect the judgments that the city came to?" If he were to break out of prison, Socrates concluded, he would be "destroying the law which says that the decisions of the city must be carried out." Socrates leaves us with the edict that "One must obey the commands of one's city and country, or persuade it as to the nature of justice."

Like Socrates, I believe that were I, as a judge, to enforce my own version of the natural law, I would "destroy that law which says the decisions of this nation must be respected." Indeed, I would break my oath of office, in which I explicitly agreed to be bound by the Constitution and laws of the United States. As Robert George put it, "respect for the rule of law is itself a requirement of natural justice."<sup>58</sup>

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58. George, *supra* note 44, at 2282.

Along these lines, let me add that Socrates was not just saying that the natural law does not *require* that he circumvent the procedures of the positive law to achieve justice, he was saying that the natural law *affirmatively mandates* that he *not* do so. Indeed, Socrates was saying that he must stay and suffer an unjust death rather than take the law into his own hands. Now, thankfully, my own refusal to take the law into my own hands has never caused me to suffer unjust death, save only, perhaps, unjust criticism from some of my Ninth Circuit colleagues.

So I do not believe that I, as a judge, have the authority to strike down a statute, simply because I think it violates the natural law.

#### IV

But, if judges cannot strike down statutes as violative of natural law, how *is* natural law relevant to judging? I believe it is relevant in two major ways: one rather technical, and the other more abstract.

#### A

On the more technical side, the natural law is useful when interpreting provisions of the Constitution that were themselves efforts to codify pre-existing natural law rights. There, the judicial inquiry is an historical one, not a philosophical one. The question is how the relevant principle was understood at the time the provision was enacted—not how the principle ought to be understood as a matter of abstract moral philosophy.<sup>59</sup>

Consider, in this respect, the recent controversy over the meaning of the Second Amendment. In *District of Columbia v. Heller*, the Supreme Court held that a blanket prohibition on the possession of usable handguns in the home violates the Second Amendment.<sup>60</sup> In the process, the Court declared that the Second Amendment guarantees an individual right to keep and to bear arms for the purpose of self-defense.<sup>61</sup> *Heller* has been extensively analyzed by those interested in the gun-control debate. But I would like to suggest that *Heller* is at least as notable for its *method* of constitutional interpretation, as it is for its actual holding.

Justice Scalia's majority opinion in *Heller* begins with a straightforward examination of the text and the relevant historical evidence that would reveal how each phrase of the text would have been understood by your average, eighteenth century reader. Justice Scalia then concludes that "Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation."<sup>62</sup>

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59. See ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 181–82, 196 (2001).

60. 128 S. Ct. 2783, 2787–88 (2008).

61. *Id.* at 2821 ("[W]hatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

62. *Id.* at 2797.

One might have expected this to be the end of the matter. But instead, the Court launched an extended discussion of the natural right to bear arms, as it was understood during the one hundred years leading up to the enactment of the Constitution. “We look to this,” the Court explained, “because it has always been widely understood that the Second Amendment . . . codified a pre existing right.” Indeed, the Court continued, “[t]he very text of the Second Amendment implicitly recognizes the preexistence of the right and declares only that it ‘shall not be infringed.’”<sup>63</sup> The *Heller* Court explained that, because the right to keep and bear arms was considered a natural right, the debate “was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.”<sup>64</sup>

The Court found that the natural right to bear arms, as understood in the eighteenth century, was what Blackstone called “the natural right of resistance and self preservation,” and “the right of having and using arms for self preservation and defence.”<sup>65</sup> *Heller* found this understanding of the natural right to bear arms relevant in four ways.

First, it confirmed the Court’s earlier conclusion, based on the original meaning of the text, that the Second Amendment guarantees an individual right to bear arms for self-defense, as opposed merely to protecting a collective right to bear arms for militia service.<sup>66</sup> Because the natural right to bear arms was an individual right unconnected to militia service, the Court reasoned, the Second Amendment right, which aimed to codify the natural right, must also be an individual right unconnected to militia service.

Second, the Court relied on the natural right to bear arms in order to find that the Second Amendment’s primary rationale was self-defense, not militia service. Indeed, *Heller*’s ultimate conclusion was that, “[w]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*.”<sup>67</sup> This statement stands in stark contrast with the *Heller* Court’s willingness to admit that the Second Amendment probably does not protect any arms that would be useful in modern warfare.<sup>68</sup> Accordingly, *Heller* defined the core Second

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63. *Id.*

64. *Id.* at 2801.

65. *Id.* at 2798 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*136, \*140).

66. *Id.* at 2797 (“Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment.”); *see also id.* at 2798 (noting that the natural right to bear arms “was clearly an individual right, having nothing whatever to do with service in a militia”).

67. *Id.* at 2821 (emphasis added).

68. *Id.* at 2817 (“It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at

Amendment right more by reference to Blackstone's conception of "the natural right of . . . self preservation and defence," than by reference to the text of the amendment, which refers to "well-regulated militia[s]." Since the rationale for a right often determines its scope, *Heller's* conception of the Second Amendment right as being primarily about self-defense, could play an important role as lower courts struggle to determine which gun control regulations are permissible under the Second Amendment.

Third, and relatedly, *Heller* used the framer's belief in a natural right to bear arms to explain the relevance of the Second Amendment's prefatory clause. Recall that the Second Amendment states that: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>69</sup> Just to be clear, when I speak of the "prefatory clause," I'm referring to that first clause, about militias. The *Heller* Court found that:

The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right . . . was codified in a written Constitution.<sup>70</sup>

Thus, to the *Heller* Court, although the need to protect militias was the reason that the natural right to bear arms *had to be codified*, it was not the *primary purpose* of the underlying natural law right; self-defense was. As the Court put it, although "self defense had little to do with the right's *codification*; it was the *central component* of the right itself."<sup>71</sup>

Finally, the *Heller* Court noted that the fact that the Second Amendment codified a natural law right reduced the significance of other clues to meaning and intent, such a drafting history. The Court deemed it "dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."<sup>72</sup>

Accordingly, *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.

It remains to be seen how *Heller*-style attention to natural rights might affect other areas of constitutional jurisprudence. Recall that *Heller* twice referred to other constitutional rights that were also mere codifications of

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large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

69. U.S. CONST. amend II.

70. *Heller*, 128 S. Ct. at 2801.

71. *Id.*

72. *Id.* at 2804.

pre-existing natural rights. *Heller* asserted that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre existing right.”<sup>73</sup> Recall also that the Ex Post Facto and Equal Protection Clauses have natural law roots. I think that further research is necessary to determine how an understanding of the natural law predecessors to each of these codified rights should affect our interpretation of the codified rights. Indeed, for all you students out there, who are desperately searching for a note topic, this might not be a bad one to take up.

### B

But there is another way that natural law is relevant to judging which is more abstract, but just as important. To make this point, I would like to discuss a speech Pope Benedict XVI gave, not very far from this site, over at the United Nations. Well, the UN is not far as the crow flies, but it’s an eternity in cross-town traffic.

Pope Benedict spoke about the importance of remembering that the natural law underlies the U.N.’s *Universal Declaration of Human Rights*.<sup>74</sup> He explained, “that the rights recognized and expounded in the [*Universal Declaration*] apply to everyone by virtue of the common origin of the person.”<sup>75</sup> These rights are “inscribed on human hearts and present in different cultures and civilizations.”<sup>76</sup> The Pontiff was worried about efforts “to reinterpret the foundations of the Declaration” and to “fall back on a pragmatic approach, limited to determining ‘common ground.’”<sup>77</sup>

The Pope criticized this approach as wrongly implying that human rights are “the exclusive result of legislative enactments or normative decisions” made by “those in power.”<sup>78</sup> But, more practically, he warned that this subjective interpretation of the *Universal Declaration* could weaken the UN’s institutional resolve and moral authority to enforce human rights around the globe.<sup>79</sup> Indeed, if the *Universal Declaration* is merely a statement of the rights which a number of diplomats thought desirable at a

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73. *Id.* at 2797 (emphasis added). Similarly, *Heller* noted that “[t]he debate with respect to the right to keep and bear arms, as with other guarantees in the *Bill of Rights*, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution.” *Id.* at 2801 (emphasis added).

74. Pope Benedict XVI, Remarks to the United Nations General Assembly (Apr. 18, 2008), available at <http://www.nytimes.com/2008/04/19/nyregion/18popeatun.html>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See id.* (warning that “[r]emoving human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks,” and that abandoning the natural law conception of the *Declaration* would weaken the UN’s moral authority to enforce human rights, because it would “undermine[] the cogent and inviolable principles formulated and consolidated by the United Nations”).

particular time, then the UN's duty and authority to enforce *the Declaration* might properly be called into question.

The lesson is that *ideas matter*. And I believe this lesson applies equally to the philosophical underpinnings of our constitutional rights. The judiciary will always be confronted with situations where constitutional rights appear inconvenient or even dangerous. It is our job to protect these rights against the passion of the times. I submit that judges are better equipped for this task when they recall that our constitutional rights are codifications of those innate rights which exist independent of government. Conversely, were we to give in to the view that constitutional rights are simply what the founders decided to protect two hundred years ago, I believe that the judicial resolve to enforce them would be weakened. Indeed, we would be more likely to accept an approach that allows judges to decide, on a case-by-case basis, whether constitutional rights are really worth insisting upon.<sup>80</sup>

Relatedly, just as the idea that human rights are subjective, and exist only because the UN decided they should, could weaken the moral authority of the UN, I suggest that applying an analogous view to the Constitution could weaken the moral authority of the judiciary. After all, judges hold neither the keys to the Treasury, nor the allegiance of the 101st Airborne Division. For that reason, in much of the world, the judiciary is a subservient branch of government. In the United States, judicial decisions are enforced, ultimately, because the American people believe that complying with the Constitution is a fundamental obligation of government. I fear that adopting the view that the government created constitutional rights, could elevate the government above the Constitution, and thereby weaken the judiciary's moral authority.

## V

Returning to the Kagan hearings, after stating that she did not “have a view of what are natural rights independent of the Constitution,” now-Justice Kagan stressed that her “job as a justice will be to enforce and defend the Constitution and other laws of the United States”; in that office, she would not “act in any way” on the basis of her personal beliefs about natural law.<sup>81</sup>

In closing, I can agree with Justice Kagan to this extent: to interpret the Constitution faithfully, a judge need not believe *personally* in the natural law, and a judge certainly should not invalidate legislation simply because it does not comport with the judge's own views of what the natural law requires.

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80. *Cf.* *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (Scalia, J.) (“The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth insisting upon*.”).

81. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.



But, at the same time, a discerning constitutional thinker must appreciate the extent to which the constitutional project quintessentially was an effort to codify pre-existing natural law rights. As we saw in *Heller*, an appreciation for the natural law foundations of the Constitution can be useful when interpreting a constitutional provision which codified a pre-existing, natural right. In such a case, the historical understanding of the natural right can clarify ambiguities in the constitutional text, and elucidate the rationale and scope of the constitutional right. And, hopefully, as we saw when comparing the Constitution to the *Universal Declaration of Human Rights*, a clear understanding that the Constitution codifies innate, pre-existing natural rights, will embolden judges, and citizens, to protect and to defend such rights.

Thank You.