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COLLOQUIUM

NATURAL LAW, THE CONSTITUTION, AND THE THEORY AND PRACTICE OF JUDICIAL REVIEW

*Robert P. George**

INTRODUCTION

The concept of “natural law” is central to the western tradition of thought about morality, politics, and law. Although the western tradition is not united around a single *theoretical account* of natural law, its principal architects and leading spokesmen—from Aristotle and Thomas Aquinas to Abraham Lincoln and Martin Luther King—have shared a fundamental belief that humanly created “positive” law is morally good or bad—just or unjust—depending on its conformity to the standards of a “natural,” (viz., moral) law that is no mere human creation. The natural law is, thus, a “higher” law, albeit a law that is in principle accessible to human reason and not dependent on (though entirely compatible with and, indeed, illumined by) divine revelation.¹ Saint Paul, for example, refers to a law “written on [the] heart[]” which informs the consciences of even the Gentiles who do not have the revealed law of Moses to guide them.² Many centuries later, Thomas Jefferson appeals to “the Laws of Nature and of Nature’s God” in justifying the American Revolution.³

Most modern commentators agree that the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order. The framers of the Constitution sought to create institutions and

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1. See Robert P. George, *Natural Law Ethics*, in A Companion to the Philosophy of Religion 453-65 (Philip L. Quinn & Charles Taliaferro eds., 1997).

2. 2 *Romans* 14:15.

3. The Declaration of Independence para. 1 (U.S. 1776).

procedures that would afford respect and protection to those basic rights ("natural rights") that people possess, not as privileges or opportunities granted by the state, but as principles of natural law which it is the moral duty of the state to respect and protect. Throughout the Twentieth century, however, a lively debate has existed regarding the question of whether the Constitution incorporates natural law in such a way as to make it a source of judicially enforceable, albeit unwritten, constitutional rights and other guarantees.⁴ In my remarks this evening, I will discuss two significant "moments" in this debate: (1) the exchange between majority and dissenting Justices in the 1965 Supreme Court case of *Griswold v. Connecticut*,⁵ and (2) an important effort by a distinguished constitutional law scholar, the late Edward S. Corwin of Princeton University, to specify, and draw out the implications of, the rootedness of American constitutional law in natural law concepts.

I. THE *GRISWOLD* PROBLEM

In 1965, the Supreme Court of the United States, by a vote of seven to two, invalidated a Connecticut anti-contraception law on the ground that it violated a fundamental right of marital privacy that, though nowhere mentioned or plainly implied in the text of the constitution, was to be found in "penumbras, formed by emanations"⁶ from various "specific guarantees in the Bill of Rights."⁷ Writing in dissent, Justice Hugo Black accused the majority of indulging in "the natural law due process philosophy"⁸ of judging. Although critics would later heap ridicule on the majority's metaphysics of "penumbras formed by emanations," Black was content on this score to merely record his view that we "get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions."⁹ His focus, rather, was on unmasking what he judged to be an implicit revival by the majority of the long discredited "natural law" doctrine.

As far as Black was concerned, bringing to light the "natural law" basis of the *Griswold* decision was sufficient to establish the incorrectness of the ruling and the unsoundness of the reasoning set forth in Justice William O. Douglas' opinion for the Court. Black assumed that Douglas would not dare to defend the proposition that judges are somehow authorized to enforce an unwritten "natural law,"

4. For a valuable summary of, and important contribution to, the debate, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907 (1993).

5. 381 U.S. 479 (1965).

6. *Id.* at 484.

7. *Id.*

8. *Id.* at 524 (Black, J., dissenting).

9. *Id.* at 509-10 (Black, J., dissenting).

or invalidate legislation that allegedly violated unwritten “natural rights” or substantive due process.¹⁰ He was correct in this assumption. Douglas emphatically denied that the majority was resurrecting the jurisprudential doctrine under which the Court had earlier in the century struck down worker protection laws and other forms of economic regulation and social welfare legislation as violations of unwritten natural rights (above all the right to freedom of contract) allegedly protected by the due process clauses of the Fifth and Fourteenth Amendments.¹¹ Indeed, Douglas did not even mention due process in his long catalogue of explicit Bill of Rights guarantees whose penumbral emanations supposedly created a right of married couples to purchase and use contraceptives.¹²

Both Black (in 1937) and Douglas (in 1939) had been appointed by Franklin D. Roosevelt whose manifest intent was to put onto the Supreme Court jurists who could be counted on to oppose the judicial philosophy that had impeded the progressive legislative agenda since at least 1905. The most celebrated cases involved freedom of contract and other economic issues,¹³ although a small number of cases invalidated restrictions on non-economic liberties, such as the right of parents to choose private, religiously affiliated schools, rather than public education, for their children,¹⁴ or of teachers to teach foreign languages.¹⁵ Roosevelt and other critics had excoriated the Court for its rulings in cases involving economic regulation and social welfare legislation, suggesting that the Justices were, without the slightest

10. *Id.* at 512-13 (Black, J., dissenting).

11. “We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” *Id.* at 482.

12. Douglas listed “[t]he right of association contained in the penumbra of the First Amendment;” the Third Amendment’s prohibition of quartering soldiers in private houses in peace time; the Fourth Amendment right against unreasonable searches and seizures; the Fifth Amendment right against self-incrimination; and the Ninth Amendment’s concept of rights “retained by the people.” *See id.* at 484. In a famous concurring opinion, Justice Arthur Goldberg (a Kennedy appointee), joined by Chief Justice Earl Warren and Justice William J. Brennan (both Eisenhower appointees), expounded a due process theory of the case, one buttressed by the invocation of the Ninth Amendment, which, according to Goldberg, “lends strong support to the view that the ‘liberty’ protected by the Fifth and Fourteenth Amendments . . . is not restricted to rights specifically mentioned in the first eight amendments.” *Id.* at 493 (Goldberg, J., concurring). Justice John Marshall Harlan (another Eisenhower appointee), in a separate concurrence, announced his preference for a more straightforward Fourteenth Amendment due process theory. *See id.* at 499-502 (Harlan, J., concurring in judgment).

13. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a New York statute limiting the number of hours employees in a bakery could be required or permitted to work); *Adair v. United States*, 208 U.S. 161 (1908) (striking down a federal law against “yellow dog contracts” on interstate railroads); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (citing *Lochner* to invalidate legislation setting minimum wages for women workers in the District of Columbia).

14. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

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

constitutional warrant, substituting their personal political and economic opinions for the contrary judgments of the elected representatives of the people.¹⁶ Under the pretext of giving effect to implied constitutional protections, the critics alleged, the “nine old men” were reading the social and economic policies they favored into the Constitution as a means of imposing them on the public.¹⁷ Even twenty years after Roosevelt’s death, no self-respecting Roosevelt appointee to the Supreme Court would want to be caught indulging in the practice he had condemned.

In those twenty years, however, much had changed in American social life, and new issues were before the Court. One of these was contraception.¹⁸ The development of the anovulent birth control pill in the early 1960s energized pro-contraception groups, such as Planned Parenthood, and catapulted the issue into the mainstream of public discussion. The practice of contraception, which even fifty years earlier had been condemned not only by the Catholic Church but across the denominational spectrum (and by such esteemed organs of the American social-political establishment as *The Washington Post*), became increasingly respectable among opinion-shaping elites and middle and upper class Americans generally. Protestant and Jewish leaders came almost unanimously to endorse the use of contraceptives by married couples to limit the size of their families, and more than a few people predicted—wrongly, as it turned out¹⁹—that the Vatican would soon revise Catholic teaching to permit contraception for married couples who had legitimate reasons to postpone or avoid pregnancy. People of a liberal social and political persuasion, together with more than a few conservatives, came to view effective contraception as a great boon both for individuals and society alike. The availability of contraceptives would, they supposed, strengthen marriages by relieving the pressures created by couples having more children than they desired or could comfortably afford to take care of. It would, moreover, enable sexually active unmarried

16. Roosevelt’s criticisms of the Court have come to be widely accepted as valid by liberal and conservative constitutional scholars alike. A notable exception is Hadley Arkes, whose recent writings offer a vigorous defense of the “natural rights” approach taken by the Justices in *Lochner*, *Adair*, *Adkins*, and other leading “Lochner era” cases. See, in particular, Hadley Arkes’ essay, *Lochner v. New York and the Cast of Our Laws*, in *Great Cases in Constitutional Law* (Robert P. George ed., 2000) and his book, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (1994).

17. In his Radio Address of March 9, 1937, Roosevelt defended his “court packing plan” as necessary to “save the Constitution from the Court and the Court from itself.”

18. Pro-contraception groups had attempted to challenge anti-contraception statutes in the courts beginning in the 1940s. Prior to *Griswold*, however, these constitutional challenges had ultimately been dismissed on procedural grounds. See *Poe v. Ullman*, 367 U.S. 497 (1961); *Tileston v. Ullman*, 318 U.S. 44 (1943).

19. See Pope Paul VI, *Humanae Vitae* (1968).

girls to avoid the ignominy and other burdens of illegitimate pregnancy. Above all, perhaps, it would alleviate welfare costs by reducing out-of-wedlock births to impoverished women.²⁰

Many supporters of contraception neither anticipated nor desired a “revolution” in sexual morality. At the same time, most considered the old moral objections to contraception, not to mention legal prohibitions such as the Connecticut statute, to be relics of an unenlightened—even sexually repressive—age.²¹ There is every

20. The dubiousness of some of these suppositions was not evident in 1965, though opponents of contraception warned that the social consequences of its widespread availability and acceptance would be dire. The *Griswold* court barely considered these warnings. In the end, Douglas' opinion rests on the essentially undefended assertion that the availability of contraceptives is good for the institution of marriage. But that was a debatable proposition even in 1965. Supporters of Connecticut's law argued that access to contraceptives, far from strengthening the institution of marriage, would weaken it by fueling a revolution in sexual mores leading to increased family breakdown, abandonment, divorce, adultery, fornication, and other evils. Some maintained that these social pathologies were predictable consequences of the intrinsically anti-marital nature of contraception as a severing of the link between spousal love and openness to procreation that gives marriage its intelligible purpose and specifies its essential requirements (e.g., permanence of commitment, exclusivity [fidelity], obligations of mutual support). If, indeed, the question ultimately turns on empirical, and even moral judgments as to whether contraception strengthens or weakens the institution of marriage, it is difficult to see how a court could be justified in displacing a legislative judgment of the matter one way or another. It obviously won't do to say that the invalidation of laws restricting contraception simply leaves the question of the goodness or badness of the practice to the conscientious judgment of individuals and married couples. The question, as Douglas seemed to grasp clearly enough, is whether the *availability* of contraception is good for the *institution* of marriage. The decision is an inherently social one. To recognize this fact is not necessarily to conclude that contraception is bad for marriage or that laws against it will do more good than harm; it is merely to suggest that these questions are unavoidably political. To endorse the political proposition that contraception should be left to individual judgment is to answer the questions in a particular way. And even if one is prepared to answer them in precisely this way, the question remains as to whether courts should have the authority to displace contrary legislative judgments. Thus, Black and Stewart, basing their dissenting opinions solely on the denial of judicial authority, could denounce the Connecticut law as “offensive” and “silly” yet judge it to be constitutionally permissible.

21. Anti-contraception laws in Connecticut and other states had been enacted by legislatures in the mid-nineteenth century—a time when religious and moral opinion was largely united in opposition to the practice of contraception. The pro-contraception movement, beginning with Margaret Sanger's crusade for birth control and sexual liberation in the early twentieth century, attempted to persuade state legislators to repeal anti-contraception statutes. When, as in Connecticut, their efforts in the legislatures failed or stalled, they turned to the courts in the hope of persuading judges to do what public opinion, still clinging at some level to the older sexual morality, prevented elected representatives from doing. As Justice Douglas' opinion for the majority in *Griswold* makes clear, the pro-contraception parties suggested that a decision invalidating the Connecticut statute could be based explicitly on precisely the doctrine which Black would accuse the majority of surreptitiously reviving, namely, the “natural law [substantive] due process philosophy” of the “*Lochner* era.” After all, *Lochner* itself, though in gross disrepute, had never been *expressly* reversed. Although most commentators were (and are) of the view that *Lochner* had been implicitly overruled in *West Coast Hotel Co. v.*

reason to suppose that all nine of the *Griswold* justices shared this view. Black, who was joined in dissent by Potter Stewart, opened his opinion by remarking that Connecticut's law was "every bit as offensive to me as it is to my Brethren."²² Stewart's opinion began with a denunciation of the statute as "uncommonly silly."²³ What distinguished Black and Stewart from their brother Justices was not any difference of opinion over the morality of contraception or the undesirability of laws against it; rather, it was their unwillingness to declare that anti-contraception laws, however "offensive" or even "silly," violated the Constitution.

Black and Stewart reminded their brethren that the judicial invalidation of legislation in the name of rights that lack any foundation in the constitutional text or its historical understanding was precisely what critics had condemned an earlier Court for doing in the cause of conservative economic and social policy. Doing it in the cause of a particular view of sexual morality—even an "enlightened" view—was, they maintained, no more justifiable. They argued that because the Constitution provided no textual or historical basis for a right to contraception (or "marital privacy"), the only ground on which such a right could be declared is the very ground on which the discredited right to freedom of contract had been declared, namely, the idea of natural law—a law superior to the statutory law to which judges may appeal in striking down a statute even where the constitutional text provides no warrant for doing so. In their view, the majority could not escape the problem merely by declining explicitly to invoke the "natural law due process philosophy" and appealing instead to "penumbras formed by emanations."²⁴ "Natural law"

Parrish, 300 U.S. 379 (1937)—a case officially overruling the decision in *Adkins Children's Hospital*, which, in turn, had relied on *Lochner*—the *Griswold* majority could, presumably, have invoked the basic principle of *Lochner* while arguing that the court in *Adkins* had misapplied it to the facts in that case. Indeed, they could have argued that the *Lochner* court itself had erroneously applied a perfectly sound principle of constitutional interpretation to the facts before it. However that may be, Douglas plainly wanted no part of such a strategy: "Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish* . . ." *Griswold*, 381 U.S. at 481-82 (1964) (citations omitted). In the very next paragraph he introduced the "penumbras formed by emanations." *Id.* at 482. Interestingly, Douglas' original proposal was to invalidate the Connecticut statute on the ground that it violated the First Amendment right to freedom of association. He could not, however, put together a majority for that remarkable proposition.

22. *Griswold*, 381 U.S. at 507 (Black, J., dissenting).

23. *Id.* at 527 (Stewart, J., dissenting).

24. One suspects that the "penumbras formed by emanations" rhetoric was designed to suggest that the alleged marital right to use contraceptives is somehow derivable from the "logic" or "structure" of the Constitution, and does not depend on any independent moral-political judgment that married couples ought to be free from legal interference in deciding whether to use contraceptives. But this suggestion is dubious. Someone who happens to believe that contraception is morally wrong and damaging to the institution of marriage, and that the legal permission of

jurisprudence by any other name remains natural law jurisprudence; and “natural law” jurisprudence is, Black insisted, in principle illegitimate.²⁵

But, someone may ask, is it not true that the framers and ratifiers of the Constitution were firm, indeed fervent, believers in natural law and natural rights? Did they not found the United States precisely on the proposition that the institutions of government are justified by the moral imperative that natural rights be protected by civil authority? Did they not design institutions of government with a view to insuring that civil authority would conform itself to the requirements of natural law and not degenerate into tyranny by violating the very rights government is instituted to protect? But, if so, how could Black and Stewart condemn a jurisprudence of natural rights? And why would Douglas and those joining his majority opinion in *Griswold* go out of their way to deny, rather implausibly, that theirs was such a jurisprudence?

II. CORWIN ON NATURAL LAW AND AMERICAN CONSTITUTIONALISM

In 1949, more than a decade after the effective demise of *Lochner*, and a decade-and-a-half before the Court’s decision in *Griswold*, Edward S. Corwin—Woodrow Wilson’s successor as McCormick Professor of Jurisprudence at Princeton and perhaps the nation’s preeminent constitutional scholar—delivered an address at the Third Annual Natural Law Institute of the College of Law at the University of Notre Dame. There, Corwin sought to show “how very large a part of its content American Constitutional Law has always owed, and still owes, to its Natural Law genesis.”²⁶ He argued that the positive law of the “documentary Constitution is still, in important measure, [n]atural [l]aw under the skin.”²⁷

Corwin’s analysis was largely historical. His aim was to show that the legal tradition that shaped the understanding of the framers of the American constitution and the early practitioners of American constitutional law was deeply informed by two central natural law concepts (or “juristic connotations of the concept [of Natural Law]”): “first, that Natural Law is entitled by its intrinsic excellence to prevail

contraception would harm public morals and exacerbate various social ills, simply has no reason to affirm a constitutional right to contraception. It is only by bringing belief in a right to marital contraception (with all that it presupposes and entails) to the enterprise of constitutional interpretation that one can find such a right in the “logic” or “structure” of the Constitution.

25. See *Griswold*, 381 U.S. at 511-12 (Black, J., dissenting).

26. Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 Notre Dame Law. 258, 258 (1950).

27. *Id.* Corwin’s lecture builds on his famous essay, *The “Higher Law” Background of American Constitutional Law*, 42 Harv. L. Rev. 149-85 (pts. I-II), 365-409 (pt. III) (1928).

over any law which rests solely on human authority; second, that Natural Law may be appealed to by human beings against injustices sanctioned by human authority."²⁸

Central to Corwin's account is the idea that the English common law emerged historically as a sort of positive embodiment of the natural law, that is, as a body of law which is the fruit of (juristic) *reason* and enjoys its status as law precisely as such. It differs from statutory law inasmuch as its legal status does not derive, as does, say, an act of Parliament, from the sheer *will* of a lawmaking authority. Thus, Corwin concludes, "the Common Law becomes higher law, without at all losing its quality as positive law."²⁹

From the philosophical viewpoint, however, Corwin's distinction is highly questionable. Common law judges *were* lawmaking authorities. They, no less than legislators, faced choices between options as to what rules to lay down; like legislators, their stipulations conferred upon the rules they selected the status of binding law. In "developing" the law of contract, tort, crime, and so forth, they made decisions based in significant measure on judgments as to how the common good of their communities would best be served. True, the theory of judging associated with the common law places a particular premium on choosing rules that best "fit" with pre-existing patterns of the law. But precisely inasmuch as a new rule is needed, judges must exercise choice and judgment. Sound judgment, to be sure, requires careful reasoning. But this does not mean that the rule selected by a common law judge enjoyed its status as law simply by virtue of its reasonableness. On the contrary, from the intrasystemic viewpoint, its status as law depended entirely on the judge's *authority* ("jurisdiction") to make the choice between (or among) competing possible rules, and (unless reversed by a higher court) its status of law obtained even when the judge made what was, from the point of view of reason, or even justice, a (or the) incorrect choice. In an important sense, then, it was, and was understood to be, the judge's will—that is, the fact that the choice was *his*—that was crucial, though his obligation was certainly to choose as reasonably as possible.

Now, a legislator's choosing is in significant respects less restricted than the choosing of a conscientious common law judge. But the legislator's (and the legislature's) obligation, no less than the judge's, is precisely to *make the choice as reasonably as possible*—"reasonable" here includes the concepts of morality and justice, such that immoral and, particularly, unjust choices are in principle unreasonable. To be sure, the status of a legislative enactment as law depends on the jurisdictional authority of the legislature, and in this way it is, indeed, a matter of *will*. But, as we have seen, this does not

28. Corwin, *supra* note 26, at 259.

29. *Id.* at 261.

distinguish in principle the (common law) judicial from the legislative office, as Corwin seemed to suppose. It is true that natural law thinkers held (and hold) that the constitutive power of humanly posited law to create (or reinforce existing) moral obligations depends on the substantive justice (“reasonableness”) of the law, and not *merely* on the jurisdictional authority of the person or institution purporting to promulgate it. But, again, this is true whether that person or institution in question is a judge (or court) or a legislature. Either way, valid law is the fruit (or, as traditional natural law theorists would put it, “an act”) *of both reason and will*.³⁰

Corwin suggests that an important strand of the English legal tradition conceives the common law as enjoying a certain superiority to acts of Parliament. He gives significant weight to the “famous ‘dictum,’ so-called [of Lord Coke] in *Dr. Bonham’s Case*”³¹ which reads: ‘And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void’” In this “dictum,” according to Corwin, we have a jurisprudential notion which, when allied later (as it would be) with John Locke’s conception of substantive (“inherent and inalienable”) rights of the individual, provides the foundation for American-style judicial review.³² He notes that “the dictum had won repeated recognition in various legal abridgements and digests before the outbreak of the American Revolution,” and cites various invocations of the substance of the dictum by American lawyers and political figures in the years leading up to the Revolution.³³

A central feature of Corwin’s account is his claim that “*judicial review initially had nothing to do with a written constitution*.”³⁴ He asserts that the idea of judicial review appeared in America some twenty years before the first written constitution, and that judicial review was practiced “in a relationship of semi-independence of the written constitution on the basis of ‘common right and reason,’ Natural Law, natural rights, and kindred postulates throughout the first third of the Nineteenth Century.”³⁵ He argues that the “competing conception of judicial review as something anchored to the *written constitution* had been in the process of formulation in answer to Blackstone’s doctrine that in every [s]tate there is a

30. See John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law: Essays on Legal Positivism* 195, 202 (Robert P. George ed., 1996).

31. Corwin, *supra* note 26, at 262 (quoting what is cited by Corwin as 8 Rep. 113b, 77 Eng. Rep. 646 (1610)).

32. *Id.* at 258.

33. *Id.* at 263.

34. *Id.* at 266 (emphasis in original).

35. *Id.*

supreme, absolute power, and that this power is vested in the legislature."³⁶ It was one thing, according to Corwin, for Blackstone to reject the idea of judicial review, as he did, in the context of a system in which the supreme will was embodied in the legislature; it is another thing altogether, however, where the supreme will is understood to be that of *the people themselves as expressed in their constitution*. In the latter case, as American authorities such as Alexander Hamilton³⁷ and John Marshall³⁸ recognized, the duty of courts facing a conflict between legislation (considered as the act of mere agents of the people) and the constitution (considered as the act of the people themselves), was plainly to give effect to the constitution.

Corwin viewed these competing conceptions of judicial review as clashing near the beginning of our national history in the case of *Calder v. Bull*.³⁹ There, in a dispute involving the question whether the Constitution's prohibition of ex post facto laws applies only to the criminal legislation, Justice Samuel Chase asserted the authority of the Court to invalidate legislative acts on the basis of "certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of legislative power."⁴⁰ In reply, Justice James Iredell, though agreeing with Chase that the constitutional prohibition of ex post facto laws did not extend beyond the criminal law, denied the power of courts to act on the basis of the proposition, advanced by "some speculative jurists . . . that a legislative act against natural justice must, in itself, be void."⁴¹

Who had the better view? Characteristically, Corwin appeals to the authority of history, asserting that while Iredell's view prevailed as a matter of official doctrine, his victory was "more in *appearance* than in *reality*."⁴² "[I]n the very process of discarding the doctrine of natural rights and adherent doctrines as the basis of judicial review," Corwin insists, "the courts have contrived to throw about those rights which originally owed their protection to these doctrines the folds of the documentary [C]onstitution."⁴³

III. NATURAL LAW AND THE *GRISWOLD* PROBLEM

Does Corwin's analysis provide what is needed to vindicate the "natural law" jurisprudence Justice Black complained about in *Griswold*?

36. *Id.* (emphasis in original).

37. *Id.* (citing *The Federalist* No. 78 (Alexander Hamilton)).

38. *Id.* at 267 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

39. 3 U.S. (3 Dall.) 386 (1798).

40. *Id.* at 388.

41. *Id.* at 398 (Iredell, J., dissenting).

42. Corwin, *supra* note 26, at 268.

43. *Id.* at 269.

It is possible to read Corwin as supposing that belief in natural law entails the authority of judges to enforce it when they judge it to be in conflict with positive law, at least in those jurisdictions that authorize courts to exercise judicial review of legislation, and, in particular, where the framers and ratifiers of a written constitution evidently sought to protect natural rights and insure the conformity of governmental acts to the requirements of natural law. But if this was, in fact, Corwin's view, and his essentially historical approach to the subject leaves the matter a bit unclear, then I do not believe he was correct. It is certainly true that believers in natural law consider positive law to be legitimate and binding in conscience only where it conforms to natural law and, as such, respects the natural rights of people subject to it. But natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights.⁴⁴ And nothing in the record suggests that the American founders believed otherwise. To be sure, there were debates at the margins, such as the debate between Chase and Iredell. But the questions at issue in such debates involved nothing like the *Griswold* problem. Rather, they dealt with whether the judiciary could, in effect, refuse to enforce laws that were incapable of being complied with, for example. Or whether courts could overrule legislative acts which plainly violated "vital principles" that, though not expressly stated, were presupposed by the very institutions of "free republican government."

If we see that natural law does not dictate an answer to the question of its own enforcement, it is clear that authority to enforce the natural law may reasonably be vested primarily, or even virtually exclusively, with the legislature; or, alternatively, a significant measure of such authority may be granted to the judiciary as a check on legislative power. The question whether to vest courts with the power of constitutional judicial review at all, and, if so, what the scope of that power should be, is in important ways underdetermined by reason. As such, it is a matter to be resolved prudently by the type of authoritative choice among morally acceptable options, what Aquinas called "determinatio," and distinguished from matters that can be resolved "by a process akin to deduction" from the natural law itself.⁴⁵ It is a mistake, then, to suppose that believers in natural law will, or necessarily should, embrace expansive judicial review or even "natural law" jurisprudence (of the type criticized by Justice Black in *Griswold*). And that is because questions of the existence and content

44. See Robert P. George, *Natural Law and Positive Law, in The Autonomy of Law*, *supra* note 30, at 321.

45. St. Thomas Aquinas, *Summa Theologiae* I-II, q. 95, a. 2c., on which see John Finnis, *Natural Law and Natural Rights* 284-89 (1980), and Aquinas: *Moral, Political, and Legal Theory* 266-74 (1998).

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.

Let us now return to the *Griswold* case. Imagine that someone, say Justice Black, accepts the proposition that the framers and ratifiers of the Constitution were fundamentally motivated by a concern to conform governmental acts to natural law and protect natural rights. Suppose further that he agrees that people have a natural right to "marital privacy" which includes the right to use contraceptives. He could, nevertheless, without logical inconsistency, come down on the question of the constitutionality of the Connecticut statute exactly as he did in *Griswold*. Moreover, he could come down that way for precisely the reasons he stated in the case. These reasons do not necessarily involve, and certainly do not logically entail, denial of the existence of natural law or natural rights. Rather, they constitute the denial that judges are authorized under the positive law of the Constitution to invalidate legislation based simply on their (as opposed to the Constitution's) understanding of natural law and natural rights.

As Robert Bork, perhaps the leading contemporary critic of "natural law" jurisprudence, explains his position: "I am far from denying that there is a natural law, but I do deny both that we have given judges authority to enforce it and that judges have any greater access to that law than do the rest of us."⁴⁶ Of course, Bork's view of the scope of judicial authority under the Constitution might or might not be correct. A proposition may be logically sound yet substantively false. Perhaps the Constitution, properly interpreted, does, in fact, confer upon judges the power to enforce their views of natural law and natural rights, even in the absence of textual or historical warrant for their views. What matters for purposes of the current analysis is that the issue is itself textual and historical. If judges do, as Ronald Dworkin, for example, claims, legitimately enjoy the constitutional authority to invalidate legislation precisely on the ground that it violates abstract constitutional principles understood in light of the judges' own best judgments of natural law (*viz.*, moral truth), then, as Dworkin himself acknowledges, that is because this power is conferred on courts by the positive law of the Constitution, not by the natural law itself.⁴⁷ Any argument seeking to establish the authority

46. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 66 (1990). Of course, some people, including, it seems, Chief Justice William H. Rehnquist, reject what Black condemned as natural law jurisprudence precisely on grounds of skepticism about the existence of natural law and natural rights. The statement by Bork that I quote in the text was evidently intended to make clear to those who had interpreted his earlier writings as grounding his rejection of "judicial activism" in skepticism about natural law and natural rights that he is not of this view.

47. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Introduction (1996). See generally Ronald A. Dworkin, "Natural" Law

of courts to invalidate legislation by appeal to natural law and natural rights ungrounded in the constitutional text or history, therefore, will itself have to appeal to the constitutional text and history. This is by no means to suggest that there is anything self-contradictory or necessarily illicit about such arguments. There is no reason in principle why a Constitution cannot, expressly or by more or less clear implication, confer such authority on Courts. It is merely to indicate that the question whether a particular constitution in fact confers it is, as I have said, one of positive, not natural, law.

Now, I should observe before concluding that someone who believes that our own Constitution does, in fact, confer upon judges authority to enforce natural law and natural rights need not come down in favor of the decision in *Griswold*. This is because that decision presupposes not only (a) the authority of courts to enforce natural rights, but also (b) the existence of a substantive natural right to contraception, at least for married couples. Someone who believes in (a) may or may not also believe in (b). Stephen Krason, for example, who relies heavily on Corwin's account of the natural law basis of American constitutionalism to argue for the broad judicial enforcement of natural law principles, at the same time sharply condemns some of the leading decisions in which the Court seems most clearly to have been acting on the Justices' understanding of natural law and natural rights, for example, the establishment of a right to abortion in *Roe v. Wade*.⁴⁸ Responding to arguments by Bork and others that acceptance of judicial authority to enforce natural law will likely result in decisions incorporating into our constitutional law the modern liberal view of morality, Krason insists that the answer is to appoint judges who reject liberalism and would enforce "the true natural law."⁴⁹ According to Krason, the problem with *Roe* (and, he would no doubt add, *Griswold*) is not the judicial enforcement of natural law and natural rights, but, rather, the enforcement of a *false* conception of natural law and natural rights. Challenging the views of Bork and other conservative jurists, including, notably, Justice Antonin Scalia,⁵⁰ Krason argues that the correct decision in *Roe* would not have been a form of judicial abstention which would have permitted the question to be resolved legislatively (on the ground, adduced by Bork, Scalia, and others that the Constitution is "silent" on the issue of abortion), but, rather, a decision recognizing the right

Revisited, 34 U. Fla. L. Rev. 165 (1982).

48. See Stephen M. Krason, *Constitutional Interpretation, Unenumerated Rights, and the Natural Law*, 1 Cath. Soc. Sci. Rev. 20, 25-26 (1996).

49. *Id.* at 25-28.

50. See Antonin Scalia, *Of Democracy, Morality and the Majority*, Origins, June 27, 1996, at 82.

to life of the unborn and “declar[ing] legalized abortion to be unconstitutional.”⁵¹

I agree with Corwin and his followers that the fabric and theory of our Constitution embodies our founders’ belief in natural law and natural rights. And while I also share their view that judicial review itself emerged as part of the strategy of the founding generation to insure governmental conformity with natural law and to protect natural rights, I do not draw from this the conclusion that judges have broad authority to go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice. On the contrary, Black, Bork, Scalia, and other “textualists” and “originalists” are nearer the mark, in my judgment, in calling for judicial restraint in the absence of a clear constitutional warrant for overturning duly enacted legislation. This is because the Constitution, as I read the document, places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts, in circumstances in which nothing in the text, its structure, logic, or original understanding dictates an answer to a dispute as to proper public policy. It is primarily for the state legislatures, and, where power has been duly delegated under the Constitution, to the Congress to fulfill the task of making law in harmony with the requirements of morality (natural law), including respect for valuable and honorable liberties (natural rights).

Judicial review is, I believe, constitutionally legitimate, and can, if exercised with proper restraint, help to make the natural law ideal of constitutional government a reality. Courts, however, can usurp, and, I believe, often have usurped, legislative authority under the guise of protecting individual rights and liberties from legislative encroachment.⁵² And courts can usurp, and have usurped, legislative authority in good as well as bad causes. Whenever they do so, however, even in good causes, they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government (even if that power could, rightly, have been allocated to them). And respect for the rule of law is itself a requirement of natural justice.⁵³

51. Krason, *supra* note 48, at 26.

52. See Robert P. George, *Justice, Legitimacy, and Allegiance: “The End of Democracy?”*, 44 Loy. L. Rev. 103, 113-15 (1998), reprinted in *The End of Democracy II: A Crisis of Legitimacy* 86 (Mitchell S. Muncy ed., 1999); Robert P. George, *The Tyrant State*, First Things, November, 1996, at 39, reprinted in *The End of Democracy? The Judicial Usurpation of Politics* 53 (Mitchell S. Muncy ed., 1997).

53. See Robert P. George, *Free Choice, Practical Reason, and Fitness for the Rule of Law*, in *Social Discourse and Moral Judgment* 123-32 (Daniel N. Robinson ed., 1992). I am assuming that the question at hand is that of the obligation of judges and other officials to respect the constitutionally established limits of their authority in reasonably just regimes. I do not here address issues of the rights and responsibilities

Sometimes courts have no legitimate authority to set right what they perceive (perhaps rightly) to be a wrong; and where this is the case, it is wrong—because usurpative—for them to do so. There is no paradox in this. Fidelity to the rule of law imposes on public officials in a reasonably just regime (that is, a regime that it would be wrong for judges to attempt to subvert) a duty in justice to respect the constitutional limits of their own authority. To fail in this duty, however noble one's ends, is to behave unconstitutionally, lawlessly, unjustly. The American founders were not utopians; they knew that the maintenance of constitutional government and the rule of law would limit the power of officials to do good as well as evil. They also knew, and we must not forget, that to sacrifice constitutional government and compromise the rule of law in the hope of rectifying injustices is to strike a bargain with the devil.

Notes & Observations