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Cover Page Footnote

This article is Professor George's rebuttal to Professor Fleming's comments, James E. Fleming, A Further Comment on Robert P. George's "Natural Law," 70 Fordham L. Rev. 255 (2001), and to Professor Kelbley's article, Charles A. Kelbley, The Impenetrable Constitution and Status Quo Morality, 70 Fordham L. Rev. 257 (2001).

NATURAL LAW AND THE CONSTITUTION REVISITED

Robert P. George*

James Fleming says that I have misinterpreted him on several points. My essay,¹ Fleming's critique,² and my reply to his critique³ are now before the reader. Happily, anyone who is interested in our debate can easily examine these texts and decide the question for himself.

Fleming states that I am trying "to wed natural law with Borkian legal positivism."⁴ It is regrettable that he continues casually to toss around terms like "natural law" and "legal positivism" without clarifying what he means by them. I can do little more here than repeat my admonition that nothing but error and confusion comes of this.⁵

Apparently, Fleming supposes that someone who believes in natural law and natural rights, and who acknowledges that the framers and ratifiers of the Constitution were believers in natural law and natural rights, should also believe that the meaning of constitutional provisions "turn[s] on what is morally right or wrong," and that judges exercising the power of judicial review have the authority to enforce, in the name of the Constitution, their particular moral judgments.⁶ This, I'm afraid, is a *non sequitur*.

Further, Fleming suggests that I have a stake or interest in something he is pleased to call a "'natural law' reading" of the Constitution.⁷ In this, too, he is mistaken. I do indeed believe that the

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1. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review,* 69 *Fordham L. Rev.* 2269 (2001).

2. James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation,* 69 *Fordham L. Rev.* 2285 (2001).

3. Robert P. George, *The Natural Law Due Process Philosophy,* 69 *Fordham L. Rev.* 2301 (2001).

4. James E. Fleming, *A Further Comment on Robert P. George's "Natural Law,"* 70 *Fordham L. Rev.* 255 (2001).

5. See George, *supra* note 3, at 2301.

6. Fleming, *supra* note 4, at 255.

7. *Id.* at 255.

framers and ratifiers of the Constitution sought to incorporate into the nation's positive law key principles of natural justice. And I believe that to a remarkable degree they succeeded. What a judge is authorized to give effect to, however, when interpreting the Constitution is *the positive law that the Framers created*. It is not the prerogative of judges to alter or displace the positive law of the Constitution even when they believe that their own view of what natural justice requires is superior to the view embodied in the constitutional text.

Nothing in what I have said here or elsewhere entails that a judge may not be *right* to conclude, in any particular case, that a law is unjust, perhaps seriously so. And in the face of legal injustice, a judge certainly must consider his moral obligations. Is the injustice so grave and pervasive as to justify subversion of the legal system? If not, is it, or is it not, possible for him to exercise his function of interpreting and applying the law without rendering himself formally or wrongfully materially complicit in the law's injustice? Questions of this sort can be analytically difficult. They can also be emotionally wrenching. As a matter of moral obligation, and thus of conscience, the judge may be required—even in a basically just legal system—to recuse himself from a case or, depending on the scope and nature of the injustice, even resign his office. But none of these issues bear on the question in dispute between Fleming and myself.

Charles Kelbley begins his critique of my work by calling into question “the nature and extent of [my] commitment to the American legal tradition that is founded on a belief in natural law and the protection of natural rights.”⁸ This criticism is followed by the claim that my understanding of the place of judicial review in the American constitutional system “seems largely to negate two centuries of well-established practice under our Constitution.”⁹ This is absurd. Nothing I have said or implied called into question the 1803 decision of the Supreme Court in *Marbury v. Madison*.¹⁰ Surely I cannot justly be depicted as a constitutional (or, rather, anti-constitutional) radical for believing that the Court acted unconstitutionally in the 1856 decision of *Dred Scott v. Sandford*¹¹ or in the 1905 decision of *Lochner v. New York*.¹² These cases are widely condemned by constitutional scholars as examples of judicial power run amok. They exemplify precisely the undisciplined judicial review that I have sought to show cannot be justified by appeal to natural law.

8. Charles A. Kelbley, *The Impenetrable Constitution and Status Quo Morality*, 70 *Fordham L. Rev.* 257 (2001).

9. *Id.* at 257.

10. 5 U.S. (1 Cranch) 137 (1803).

11. 60 U.S. (19 How.) 393 (1856).

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

What has Professor Kelbley agitated to the point of questioning my “commitment to the American legal tradition”¹³ is that I criticize, as did Justice Hugo Black and more than a few other liberals of his day, the justifiability of the Court’s ruling and reasoning in the 1965 case of *Griswold v. Connecticut*.¹⁴ For a certain sort of contemporary liberal—namely, one for whom liberalism serves as a pseudo-religion of personal liberation whose dogmas embrace the sexual revolution of the 1960s—*Griswold* is sacrosanct. People who refuse to bow before it are either liberal heretics (like Black) or conservative infidels (like me). We “embrace a narrow legal positivism,”¹⁵ Kelbley declares as if he is rooting out the remaining adherents to some long-anathematized heresy. But Kelbley never says exactly what the heresy is or what makes it heretical. He too tosses around the term “legal positivism” without clarifying what he means by it and without considering the different schools of thought—some compatible with belief in natural law, some not—that fall under that label in contemporary writing on law, politics, and morality.

At one point in his paper, Kelbley attempts to turn the tables on me regarding the importance of clarity and precision in the use of terms. In trying to persuade his readers that “on balance” Fleming’s reading of Justice Black on natural law is “more careful” than mine,¹⁶ he says that “it is only in his response to Fleming that George tries to give some indication of what he means by natural law.”¹⁷ He notes my quotation of John Finnis’s one-sentence summary of what natural law theory proposes to show, then says that this “short proposition is the only substantive indication we have from either of George’s two papers of what he means by natural law.”¹⁸

This is unfair. As Kelbley knows, having previously commented on some of my work, for fifteen years I have been (1) saying what I mean by natural law; (2) distinguishing the various things that different writers mean by it; and (3) calling attention to misunderstandings flowing from the widespread failure to attend to these differences. I have provided a detailed account of my understanding of natural law in my books and in numerous published articles.¹⁹ I have not hidden my views on the subject or left readers in any doubt about what I mean by the term. Charles Kelbley knows what I mean by it.

Even Kelbley’s claim that my quotation of Finnis is the “only substantive indication”²⁰ of my view of natural law from either of the

13. Kelbley, *supra* note 8, at 257.

14. 381 U.S. 479 (1965).

15. Kelbley, *supra* note 8, at 258.

16. *Id.* at 264.

17. *Id.*

18. *Id.*

19. See, e.g., Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (1993); Robert P. George, *In Defense of Natural Law* (1999).

20. Kelbley, *supra* note 8, at 264.

two papers published in the exchange with Fleming is false. I began telling the reader what I mean by “natural law” in the first two paragraphs of the first paper, and I move forward to the point of showing that natural law, so conceived, does not entail the authority of judges to enforce its tenets other than by enforcing provisions of positive law that embody natural law precepts.²¹ I distinguish my understanding of natural law from the views of those natural law thinkers who believe that judges necessarily have such authority.²² At the same time, I acknowledge that natural law principles do not entail the moral illegitimacy of constitutional provisions, if any, allocating to the judiciary a measure—even a large measure—of responsibility for enforcing unwritten principles of natural justice as a check on democratic legislative power.²³ My central claim—expressly contested by neither Fleming nor Kelbley—was that “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.”²⁴

Kelbley’s critique of my work is in three parts. The first defends the *Griswold* decision. It is not, he declares, as I said it was, “free wheeling judicial review,”²⁵ but rather “common sense.”²⁶ But whose “common sense” is it? To grasp the relevance of that simple question is to see immediately that *Griswold* is what I said it was, and what Hugo Black very clearly saw it was, namely, unprincipled (“free wheeling”) judicial review. Of course, I can see how a certain sort of contemporary liberalism can view any decision extending what Kelbley is pleased to call “responsible . . . sexual freedom”²⁷ as “common sense.” Around the altars in this particular temple, sexual self-expression and reproductive rights are orthodox doctrines. Only the ignorant, perverse, or willfully unbelieving would deny them. William O. Douglas was certainly among the faithful. Even he, however, abstained from making the type of argument Kelbley now proposes in defending *Griswold*. Where Douglas rested his case on the value and inviolability of marriage as an institution, Kelbley argues from the individual “married woman[’s] . . . right to have sexual relations.”²⁸ Douglas no doubt believed in such a right, but it is critical to understand that, however poor his argument, he at least perceived the need to argue *to*, rather than *from*, it. The right to marital sexual relations and contraception was, according to Douglas, an entailment of the value and inviolability of marriage. What was

21. See George, *supra* note 1.

22. *Id.*

23. *Id.*

24. *Id.* at 2279.

25. George, *supra* note 3, at 2305.

26. Kelbley, *supra* note 8, at 259.

27. *Id.* at 260.

28. *Id.*

wrong with the anti-contraception statute, he argued, was precisely its harm to marriage, "a coming together," as he described it, "for better or for worse, hopefully enduring, and intimate to the degree of being sacred."²⁹

The trouble with Douglas's analysis is that he failed to take account of the competing view (one might call it the competing "common sense") embodied in the anti-contraception legislation he condemned. That view held that contraception was anti-marital in principle or, at a minimum, threatened to unleash a revolution in sexual mores that would lead to widespread marital breakdown, family abandonment, promiscuity, illegitimacy, abuse, abortion, and other pathologies. In consequence, he failed to justify the substitution of his own views for those embodied in the law about what threatened marriage and what did not, and how the threat, whatever it was, should be addressed. To see that this is true, one need only consider how the case would have come out had the justices accepted as a matter of fact Connecticut's claims about the social consequences of the legalization and consequent widespread availability of contraception. Does anyone honestly believe that even so orthodox a liberal as William O. Douglas would have concluded an opinion granting that contraception would undermine the institution of marriage with a declaration of the constitutional invalidity of the Connecticut statute? Anyone who does believe that must believe that everything Douglas actually said about the value and inviolability of marriage, the importance of protecting it, and the responsibility of the state toward it was a brazen lie.

Kelbley claims that the right to use contraceptives somehow follows (as a "peripheral" or "penumbral" right) from a married woman's (or man's?) right to have sexual relations, just as the right of someone accused of a crime to remain silent follows from the Fifth Amendment right against self-incrimination.³⁰ This is fallacious. Since the question of contraception (in marriage or otherwise) is, as the long history of philosophical reflection on sexual ethics makes abundantly clear, an analytically separate moral question from the question of the morality of sexual intercourse (in marriage or otherwise), there is no reason to infer from anybody's right to sexual relations (assuming one believes in such a right) a right to contraception. To conclude that there is a right to contraception for married couples or anybody else, one needs additional premises beyond a right to sexual intercourse about the morality and likely social consequences of contraception. Of course, determined liberals can try to sneak these premises in under the label "common sense." But those outside their church will have no difficulty seeing that their "common sense" is a mere *sensus fidelium*.

29. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

30. Kelbley, *supra* note 8, at 260.

Kelbley's invocation of Justice Harlan's "due process" justification for striking down state anti-contraception statutes³¹ is to no avail. Everything I've said about Kelbley's appeals to "common sense" in defending Douglas applies with equal force to Harlan's claims to be engaged in a "rational process." The fundamental problem for Harlan, as for Douglas, is that arguments supporting the invalidation of the laws necessarily rely on controversial premises that the Constitution itself neither supplies nor authorizes judges to import. These premises are unavoidably the product of extraconstitutional moral and political judgment. As such, the burden is on the Court in *Griswold* (and those like Kelbley who defend the decision) to say why the moral and political judgment of the judges should prevail over the judgment of the people and their elected representatives.

The difficulty would be clear enough to Kelbley and those of like mind if only they paused for a moment to consider how they would react if, in an opinion by, say, Antonin Scalia or Clarence Thomas, the Court struck down anti-discrimination or rent control laws in the name of a right to private property allegedly discovered in "penumbras formed by emanations" or in guarantees of "due process." Kelbley and others would not be impressed by the Court's invocation of, say, Professor Richard Epstein's sophisticated work in law and economics to show that the judicial invalidation of the laws was according to a "rational process." Nor would they be comforted by the assurances of the libertarians at the Cato Institute that the Court's ruling was a matter of "common sense." Imagine how they would hoot if some conservative professor of law and philosophy were to insist that the "right responsibly to exclude people one doesn't want from one's private property," or one's "right to charge what one likes for use of one's possessions," follows as a "peripheral" or "penumbral" right from, say, the right to own property at all, or to invite whom one pleases to one's home for dinner, or to allow one's rentable property to remain vacant if one chooses. "No," they would protest, "the analogies do not hold. The judges are smuggling their partisan moral and political judgments into constitutional interpretation and imposing them on the nation under the pretext of interpreting the Constitution." And they would be right.

In the second part of Kelbley's critique of my work he says that "there is no discernible difference between George and [Hugo] Black, George's embrace of Black seems complete, absent any effort on George's part 'to attend carefully' to how his understanding of natural law differs from Black's."³² It was in this connection that Kelbley tried to turn the tables on me, claiming that I had failed to indicate what I mean by "natural law." As I said in my first reply to Professor

31. *Id.* at 261-62.

32. *Id.* at 264.

Fleming, I do not pretend to know what Justice Black's views were on fundamental metaethical questions, and I am aware of no writing of his that addressed such questions clearly enough for us to conclude that he was or was not a metaethical skeptic.³³ My point is simply that what Black condemned in his dissent in *Griswold* as the "natural law due process philosophy,"³⁴ no natural law theorist of my stripe need embrace. On the contrary, we can recognize the force of Black's critique of Douglas, Harlan, Goldberg, and others who purported to find in the Constitution a right to contraception, under the rubric of "marital privacy," in "penumbras formed by emanations." That provides no ground whatsoever for saying that my understanding of natural law is identical to Justice Black's.

Although I don't know whether Black was a metaethical skeptic, Kelbley is certain that he knows. "Black's skepticism—ethical and metaethical—could hardly be more complete."³⁵ In support of this assertion, Kelbley quotes an eminent scholar for whom I have profound regard, Professor Hadley Arkes.³⁶ Now, the reader may recall that the context of this discussion of Black's alleged skepticism is Kelbley's claim that, "on balance," Fleming's reading of Black is "more careful" than mine. Professor Kelbley can scarcely object, then, if I quote in my defense, Professor Fleming himself: "I would never characterize Black—a heroic figure whom I greatly admire—as a metaethical skeptic."³⁷ So, "on balance" whose is the "more careful" reading of Black: Kelbley's or Fleming's?

Eventually Kelbley gets to the punch line of this part of his critique: "Perhaps George himself is a skeptic."³⁸ The intellectual alchemy by which Kelbley generates so ludicrous a claim is easy to expose. He simply combines the unwarranted assumption that my view of natural law is identical to Black's with the questionable assertion that Black is certainly a metaethical (and, indeed, an ethical!) skeptic. Presto!

Part three of Kelbley's critique features that great bogeyman of contemporary liberalism, Robert H. Bork. Kelbley's strategy here is familiar: Tie George to Bork, root Bork's criticism of the judiciary's usurpation of legislative authority in metaethical skepticism, and then suggest either that George is himself a skeptic (and thus no true natural law theorist) or that he rejects William O. Douglas's "common sense" and John Marshall Harlan's "rational process" only because the results they reach fail to square with his conservative political

33. George, *supra* note 3, at 2303.

34. *Griswold*, 381 U.S. at 515 (Black, J., dissenting).

35. Kelbley, *supra* note 8, at 265.

36. *See id.*

37. E-mail from James Fleming, Professor of Law, Fordham University School of Law, to Robert P. George, McCormick Professor of Jurisprudence, Princeton University (Apr. 18, 2001, 13:10:55 EST) (on file with the *Fordham Law Review*).

38. Kelbley, *supra* note 8, at 266.

views. As it happens, Judge Bork and I have had some lively private debates on points of ethical theory. But assuredly, he does not hold the views Kelbley attributes to him, such as the belief that “no one position can be right, for if it were it would convince all reasonable persons and disagreements would vanish.”³⁹

Indeed, Kelbley informs his readers that Bork states this proposition with “repeated insistence.”⁴⁰ He then cites five separate passages from Bork’s book *The Tempting of America: The Political Seduction of the Law*,⁴¹ each of which purportedly exemplifies this insistence. This book, by the way, is the one in which Bork explicitly addresses the question of metaethical skepticism, saying that he is “far from denying that there is a natural law,”⁴² plainly meaning by that term a body of objective moral truths whose validity does not depend on everybody or, indeed, anybody recognizing or accepting them. I invite readers to examine for themselves Kelbley’s “five proofs” of Bork’s skepticism. Not one of the passages he quotes proves Bork’s adherence to the proposition Kelbley accuses him of “repeatedly” insisting on. In none of these statements does Bork deny that there is moral truth or contradict what he expressly says in the book about not denying natural law. All are about the impossibility of *agreement* on moral truth (or, on a possible reading of one part of one of the passages, developing a single correct moral *theory*). He does not commit the elementary fallacy that Kelbley accuses him of committing, namely, inferring from the fact of disagreement the conclusion that there is no truth. Bork’s skepticism regarding *the possibility of agreement* among fallible human beings in circumstances of freedom should hardly scandalize someone familiar with recent writings of the great liberal political theorist John Rawls. It is true that the denial of this possibility figures prominently in Bork’s writings on constitutional law, just as it figures in Jeremy Waldron’s important critique of inadequately restrained judicial power.⁴³ It is false to say that Bork denies that there is moral truth or that moral truth can exist in the absence of moral agreement.

What should be done in the face of disagreement? Bork, Waldron, and I, notwithstanding any differences we may have on other issues, say that absent a more or less clear legal basis for judicial intervention in public policy making, disputed questions—including questions of moral principle in dispute among reasonable citizens—are properly resolved in the ordinary processes of representative democracy. We see no basis in the Constitution, nor in natural law, for the judiciary to

39. *Id.* at 267.

40. *Id.*

41. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990).

42. *Id.* at 66.

43. See Jeremy Waldron, *Law and Disagreement* 209-312 (1999).

arrogate to itself the power to enforce elite moral opinion when it conflicts with popular opinion. When, to establish the sheer fact of moral disagreement along the elite/popular divide, I observed that polling the faculty of Princeton or Fordham on controversial social issues would certainly produce a result different from what one would get by polling the first seven hundred names from the Trenton or Pelham phone books,⁴⁴ Kelbley accused me of embracing “the positive morality located between the covers of telephone books.”⁴⁵ Although this is ridiculous, it turns out not to be gratuitous, for in the sentence following it Kelbley suggests that I am “playing politics, in the sense of making a political judgment about which group or institution is most likely to endorse [my] conservative moral and legal views about natural law.”⁴⁶ And in the next paragraph he concludes the matter by suggesting that I am willing to entrust the elaboration of natural law to the legislative branches of government because those branches will likely affirm “status quo morality, or . . . what Justice Holmes described as letting the herd get its way.”⁴⁷

A response in kind would question the wisdom and justice of the alternative policy of entrusting the elaboration of natural law to institutions likely to enforce the status quo morality of what William F. Buckley famously calls the “liberal herd of independent minds.” But the truth is, of course, that our fellow citizens—liberals and conservatives alike—are not herd animals; they are rational beings who hold and are entitled to their opinions. Moreover, as a matter of natural justice, they have a right to a say in making the laws and policies by which we order our lives together. In a well functioning democracy, this right will have its place in the written or unwritten constitution, and it will be honored in practice by courts and other official bodies.

Kelbley concludes by quoting Fleming’s observation that “the course of human history, including American history, . . . is strewn with both atrocities committed against, and appalling neglect for, basic human rights, dignity, and needs.”⁴⁸ I could not agree more. But it would be a mistake of tragic proportions to conclude on the basis of this truth that that the sure-fire, or even the best, way to prevent injustices is to transfer to courts more or less unchecked power. The legacy of *Dred Scott*, *Lochner*, and, in my opinion, *Roe v. Wade*,⁴⁹ should quickly sober anyone who believes that unconstrained judicial power will always, or even usually, be deployed in the cause of justice. Moreover, the very history that Fleming invokes should lead one to be

44. George, *supra* note 3, at 2307.

45. Kelbley, *supra* note 8, at 269.

46. *Id.*

47. *Id.* at 270.

48. *Id.* at 271 (quoting Fleming, *supra* note 2, at 2291).

49. 410 U.S. 113 (1973).

skeptical of the proposition that whatever appears to members of any particular class at any particular point to be "enlightened" opinion will turn out to be anything other than profoundly regrettable. Consider that the doctrine of *lebens unswertes leben* was devised not by the Nazis who would later carry out their genocide in its name, but by self-consciously progressive physicians, lawyers, and academics who viewed the policy of eliminating retarded people and other "undesirables" as enlightened and, indeed, compassionate. Their success in overcoming "status quo" morality's prohibition of the killing of innocent human beings surely belongs high on the list of those atrocities committed against basic human rights and dignity in the course of human history.

Of course, unjust policies can be, and sometimes have been, put into place by democratic means. And they have sometimes, as in the case of racial segregation, been rectified at least in part by judicial enforcement of the Constitution. Justice Holmes is often faulted for upholding forced sterilization in *Buck v. Bell*,⁵⁰ though in this particular case the unjust legislation itself reflected the triumph in the broader culture of elite opinion—such as the opinion of Holmes himself and other leading figures—over what had hitherto been the "status quo morality" on the subject of eugenics. In any event, neither Bork, Waldron, nor I believe that the will of the people is always morally right or that the history of the Supreme Court in America is one of nothing but abuse and injustice. Far from it. But neither are we willing to pretend that the Court's history shows the wisdom of preferring the moral opinions of judges or other elites to those of the majority of our fellow citizens. The record for courts as for legislatures is mixed; so is the record for elite opinion and the popular will.

From this record, nothing follows about whether as a matter of natural law (or, for that matter, wise policy) judges have (or ought to be given) broad power to impose on the nation principles that they believe to be morally right. There is certainly no hope of deciding the question of the proper scope and limits of judicial power on the basis of some grand balance sheet of historical offenses and achievements. A wide variety of ways of settling the question are compatible with natural law, including a settlement that vests a large amount of essentially legislative power in the hands of the judiciary. But, as it happens, I do not believe, and neither Fleming nor Kelbley has provided any reason to believe, that the settlement put into place by the framers and ratifiers of our Constitution does that.

50. 274 U.S. 200 (1927).

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