NATURAL LAW AND JUSTICE THOMAS

John S. Baker, Jr.[*†]

Mention of the term "natural law" can create confusion and concern, as was evident in the early stages of the United States Senate's confirmation proceedings for Supreme Court Justice Clarence Thomas in 1991.[1] Of course, those hearings also demonstrate that the level of the public's concern about "higher law" is much lower than its curiosity about such earthier aspects of law as an allegation of sexual harassment. Nevertheless, the anxious questions asked by the Senators about natural law and the nominee's disavowal that natural law would have any role in his decision of actual cases evidence a pervasive lack of understanding or acceptance of natural law.[2] Moreover, even among those who claim to

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* Dale E. Bennett Professor of Law, Louisiana State University Law Center. This article incorporates and expands a previously published article, *The Natural and the Positive in American Law*, *in* SAINTS, SOVEREIGNS, AND SCHOLARS: STUDIES IN HONOR OF FREDERICK D. WILHELMSEN (1993). The author thanks the Earhart Foundation for financial support during the preparation of these articles. I also gratefully acknowledge the research assistance of Seán Patrick Donlan.

† After submission of this article, the United States Supreme Court decided *Saenz v. Roe*, 526 U.S. 489 (1999), which, because it reinvigorates the Fourteenth Amendment's "Privileges or Immunities" Clause, has a bearing on this discussion of natural law. Justice Thomas's dissent in that case is discussed in a postscript following this article.

1 Previous statements by the nominee as inspired or innocuous as the following, "Natural Law provides a basis in human dignity by which we can judge whether human beings are just or unjust, noble or ignoble," brought criticism and concern from members of the Judiciary Committee. *Hearings Before the Committee on the Judiciary, United States Senate, One Hundred Second Congress, First Session, On the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., at 120–21 (1993) (quoting *Affirmative Action: Cure or Contradiction?*, CENTER, Nov./Dec. 1987) [hereinafter *Hearings*]. Senator Biden began the Thomas Hearings by stating:

> Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. *Finding out what you mean when you say that you should apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee.*

Id. at 111 (emphasis added).

2 Senator Joseph R. Biden began the questioning of Judge Thomas by remarking, "[H]ere (sic) is good natural law, if you will, and bad natural law in terms of informing the Constitution, and there is a whole new school of thought in America that would like very much to use natural law to lower the protections for individuals in the zone of personal privacy, . . . and who want to heighten the protection for businesses and corporations." *Id.* at 2.

be within the same tradition of natural law, opinions on the subject can vary considerably, even to the point of contradiction.[3]

Watching the attempt to derail the nomination of Justice Thomas, I was reminded of an observation made some years ago by a former teacher of mine, Dr. Frederick D. Wilhelmsen, which captures the public mind regarding natural law. The quote's prediction of punishment for those espousing traditional natural law views seems to have anticipated the attacks on Thomas at his hearings.

> We have come, corporately as a people, to hold the proposition that justice equals statute. A natural law man today, if he wishes to stay out of jail, must content himself with urging his convictions within his own sphere of influence in the hope that he can accomplish something on a limited scale. . . . An appeal to the natural law will gain no lawyer his case in court—unless he is a spellbinder arguing before a jury uncorrupted by legal positivism and higher education, nor will such an appeal protect the rights of man before the higher judicial courts of appeal. The Supreme Court is possibly the highest repository of the denial of natural law in the nation.[4]

Having eluded his pursuers during the nomination process, Justice Thomas has since had to endure attempts from some members of the academy and their allies to ostracize him for his refusal to conform to their notions of orthodoxy.

I. NATURAL LAW TERMINOLOGY

A. Confusing Terminology

Much of the confusion about and aversion to the term "natural law" stems simply from a lack of philosophic background. However, even for those who are philosophically literate the term carries considerable ambiguity. Traditional explanations of natural law thinking which appeal to a "higher" or "unwritten" law superseding human or written law do little to lessen the confusion, and they create a concern. The specter of unknown laws of uncertain origin nullifying laws enacted by democratically elected legislatures gives natural law a negative connotation, making it sound "un–American." This animosity was

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[3] See, for example, differences between this article and Kirk A. Kennedy's *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*. Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U.L. REV. 33 (1997) (arguing that Justice Thomas should demonstrate an activist natural law theory and approach to adjudication).

[4] Frederick D. Wilhelmsen, *The Natural Law Tradition and the American Political Experience*, *in* CHRISTIANITY AND POLITICAL PHILOSOPHY 191 (1978).

reflected in some of the questions posed by Senators to then Judge Thomas in his hearings for confirmation to the Supreme Court.[5]

Of course, as then Judge Thomas tried to explain in the confirmation hearings, a blanket rejection of natural law runs counter to much of what is characteristically American. Beginning with the Declaration of Independence, American law has been intertwined with various ideas labeled "natural law." Today, however, such various and contradictory theories claim that title that the confusion has become compounded.[6] As a result, "natural law" tends to be equated—especially in legal circles—with any appeal to an unwritten source of law.[7]

The distinction between natural law and its antagonist, positivism,[8] does not in fact correspond to this division between written and unwritten law. Written law may declare or agree with, and at least generally need not contradict, natural law.[9] As applied to common law judicial reasoning, the differences have historically focused on the issue of whether the judges "find" the law through reason or "make" the law as

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[5] At the hearings, Senator Ted Kennedy stated, "the reason I am pursuing this line of questioning is to get some kind of sense about your view about various statutes . . . [or] hostility to statutes . . . . The real question is whether we can—we can draw any conclusion as to the degree of hostility that you might have by yourself in interpreting statutes when perhaps there is an approach to dealing with these kinds of conditions that you may or may not agree with." *Hearings*, *supra* note 1, at 143.

[6] *See* NATURAL LAW THEORY v–viii (Robert George ed., 1992). Understanding the many forms of natural law is difficult enough. When one adds the necessary distinctions between natural law as ethics, as political theory, and as jurisprudence or between natural law and natural rights, its complexity is compounded. The classical natural law of Aristotle and Aquinas is frequently confused with the modern natural rights philosophies of Locke or *Lochner v. New York*, 198 U.S. 45 (1905).

[7] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

[8] John Austin, perhaps the most noted positivist, defined law as a command backed by a sanction from a political superior. *See also* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (John Murray 1885). Using positive or humanly posited "law" as the paradigm, Austin's use of the term "law" excluded what had previously been referred to as the natural or *moral* law. H.L.A. Hart has developed the most sophisticated theory of positivism, one which criticizes Austin's "command theory." Hart, studying the *use* of rules and words in legal discourse, maintained that moral content was necessary in a legal system's secondary rules (specifying how the primary rules were to be ascertained, changed, and adjudicated), but not in the primary rules (those that impose duties) themselves. *See* H. L. A. HART, THE CONCEPT OF LAW (2d ed., 1994).

Natural law theory, at least that of St. Thomas Aquinas, does not exclude positive law from the definition of "law." But the difference in nomenclature between natural lawyers and positivists creates tremendous confusion. As natural lawyer John Finnis writes, "Aquinas is an enthusiastic exponent of the bipartite classification of law: natural or positive." John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW 199 (Robert George ed., 1996).

[9] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 281–90, 351–52 (1980).

a matter of will.[10] The fundamental controversy between natural law and positivism, however, is a moral, not a narrowly legal one.[11]

The most famous recent legal debates about positivism versus natural law have concerned the relationship between law and morality.[12]

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[10] *See infra* notes 141–52 and accompanying text. The distinction between the "reason" of natural law and the "will" of later theories, including that of natural rights, is not a simple one. The term "reason" can be used in such a way that it means no more than what is willed. And what is willed is not, of necessity, unreasonable. There are meaningful distinctions, however, between the two. The classical natural law tradition did emphasize, unlike that of modern natural rights, reasoning as a *practice* and *process*. Right reason, like the Good, was an ideal to which actions could be referred. Enlightenment thought effectively redefined "reason" as concomitant with will. That is, individual human will reflects a universe ordered and regulated, not by *eudaimonia* but by pleasure and pain. *See infra* note 109 and accompanying text.

[11] *See,* FINNIS, *supra* note 9, at 354–62. Professor Robert George of Princeton, a lawyer and political theorist, has written that

> [n]atural law is not a theory of legal interpretation. Rather, it is a theory of law that holds that there are true standards or principles of morality that human beings are bound in reason to respect, and that among these are norms of justice and human rights that may not be sacrificed for the sake of social utility. Both liberals and conservatives share a belief in fundamental principles of justice and right, however much they disagree about the exact content and implications of some of these principles. The relevance of natural law to judging, is that out of respect for the rule of law, judges are obligated to recognize the limits of their own authority. The scope of a judge's authority is settled not by natural law, but the constitutional allocation of political authority among the judicial and other branches of government.

Hearings, supra note 1, at 170. In the confirmation hearings, Judge Thomas was asked (by Senator Orrin Hatch) if he agreed with this statement. Thomas said "I think that is, in part, the point I was attempting to make." *Id. See also* Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989).

[12] See the debates between H.L.A. Hart and Lon Fuller (as well as between Hart and Lord Devlin). Fuller criticized Hart's version of positivism for failing to come to terms with the "internal morality" of law. Fuller proposed a minimal, *procedural* natural law (what is frequently referred to in the common law as "natural justice"). Legal rules, he suggested in *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958), must be general, promulgated, prospective, clear and comprehensible, and free from contradiction. They should not be impossible to meet, too frequently altered, and the law and official acts should be consistent. Hart's response was to claim that these "internal" principles were, in fact, neutral and utilitarian. *See* H. L. A. HART, THE CONCEPT OF LAW (2d ed. 1994). At bottom, the debate seemed to be, as is often true in legal debates about natural law, about terminology not philosophy. *See also* LON L. FULLER, THE LAW IN QUEST OF ITSELF (1940); LON L. FULLER, THE MORALITY OF LAW (Rev. ed. 1969).

The debate between Hart and Devlin was more narrowly concerned with the legal *enforcement* of morality. Hart's argument, in a nutshell, was that while law could not regulate morality *per se*, it could do so consistently with certain principles of critical morality. That is, while Devlin seemed to argue that society could forbid actions that conflict with public morality (that of the average citizen), Hart limited legal regulation to that consistent with John Stuart Mill's harm principle, a limited legal paternalism protecting individuals from self-inflicted harm, and the principle of punishing *public* offenses.

The positivist attempt to separate law from morality benefited from the *de facto* relationship between the two that had largely been taken for granted without sufficient attention given to natural law reasoning about questions of morality.[13] As long as a common Judeo–Christian morality prevailed in America and influenced legislation and judicial interpretation, as it did from the time of the Mayflower Compact until relatively recently, the differences between natural law and positivist reasoning may not have been so apparent. Since that moral consensus has disintegrated, however, a great gulf has come to separate contemporary legal thinking from the legal thought of those who created, originally interpreted, and—after the Civil War—amended the Constitution. While the dissolution of this moral consensus appeared to occur quite suddenly in the 1960s, subtle shifts in thinking about public morality had been occurring for some time. During the twentieth century, important changes in public philosophy have also been brought about—at least in part—by decisions of the Supreme Court. Apart from the merits of particular decisions, it can be said that collectively these decisions have helped to shape a more libertarian view towards matters of public morality. The Court, however, did not do so simply by making moral pronouncements. The many different members of the Court naturally applied their own individual methods of legal reasoning to particular cases. Nevertheless, despite differences from justice to justice, positivism of the Legal Realist variety has for a long time dominated the thinking of the Court and served to wedge apart law and morality.[14]

B. Origins of Natural Law Terminology

Legal realism and other theories of legal reasoning in the United States have had their primary origins in the law schools. The changes in the legal academy, however, derive from earlier, on–going, and broader intellectual debates. Until the attacks of Descartes, Hobbes, Locke, and others, Aristotelianism had held sway in the West.[15] Aristotelian

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[13] *See* Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purpose, in* NATURAL LAW THEORY 42–70 (Robert P. George ed., 1992).

[14] *See* discussion *infra* Section IV. C.

[15] The modern era replaced the Aristotelian understanding of practical reason, human nature and community, and natural law with, among other things, Cartesian rationalism, Hobbesian will and atomism, and Lockean natural rights. In sum, the natural law tradition saw positive law as guidance and boundary to bring men to the moral law and to virtue. In the natural rights tradition, as exemplified by Grotius, Hobbes, Locke, and Rousseau, *positive* law becomes the necessary order or regulation of private desires. In natural law, the "natural" community of individuals permitted specific individuals various liberties directed towards the common good of all and, in theory, consistent with human dignity. But where the natural law measured utility against the ideal of the good, in a sense, the natural rights tradition equated the useful and the good. In natural rights, too,

philosophy provided the moral and metaphysical basis for philosophical and legal reasoning, as well as for virtually all other areas of learning. Aquinas adapted this philosophy and demonstrated the compatibility of Aristotle's beliefs with those of Christianity. The later scholastics took this Thomistic–Aristotelian natural law and, combining it with elements of the Roman legal tradition, worked out specific areas of law.[16] By the mid–eighteenth century, Aristotelian philosophy—the basis for natural law—"had lost its hold on the schools and on educated people alike. By the nineteenth century it was all but unintelligible."[17] In law, as a result, various forms of positivism and natural rights theory succeeded classical natural law.

In what can only be a sketchy overview of clashes between natural law and positivist legal reasoning, I will consider the relationship of natural law to our Founding documents and to selected Supreme Court cases, while interspersing and footnoting the discussion with excepts from Justice Thomas's writings and speeches. For present purposes, it is not necessary to delve into the great and ever–growing literature about the prevailing political and legal philosophies of the Founding period.[18]

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the community was an association founded, not on sociality or ontological community, but on compact, entered into from conflict or opposing interests, that guaranteed the inherent dignity housed in "natural" liberties. This transformation was, as I note below, gradual. *See infra* note 115.

[16] The rediscovery of Justinian's *Institutes* (c. 1100) and the birth of Canon Law (particularly, Gratian's *Decretum*, c. 1140) were critical to the natural law tradition. Human practices consistent with natural law principles obviously predate Aristotle, but his articulation of a more *formal* theory was critical to Western thought. Natural law ideas entered Roman Law from a variety of Greek and Roman theories (largely Stoic) and practices. While not Aristotlian *per se*, Stoicism shared much of the same sense of reason, nature, and community. Early Christians, particularly Lactanius (c. 250–317), were to fuse this Stoicism with the teachings of the Catholic Church. After all, had not St. Paul said that the Gentiles, even though they did not know the law of Moses, still held "the requirements of the law, written on their hearts." *Romans* 2:14–15. Indeed, St. Augustine's more personal conception of natural law, in his *City of God*, was certainly closer to that of the Stoics than Aquinas. Roman Law would slowly become accepted, though vulgarized and glossed, throughout Europe. These different elements were more thoroughly synthesized by the late scholastics of the sixteenth and early seventeenth century.

[17] *See* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 7 (1991). While in many ways the Thomist–Aristotelan–Roman worldview was replaced with modern social and economic contractualism, elements of natural law continue to be important to us today. This is particularly true, as Gordley points out, of modern contract theory. From the late scholastics to Grotius, Pufendorf, Barbeyrac, Domat, and Pothier, a natural law concept of economic contract rooted in *natural* obligations was bequeathed to the new world of "will" theories. Contract tacitly relies, that is, ultimately not on will, but natural law.

[18] *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987); ROBERT BORK, THE TEMPTING OF AMERICA, (1990); FORREST MCDONALD, NOVUS ORDO SECLORUM (1985); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (Yale Univ. Press 1982); CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993); MARK TUSHNET, RED, WHITE, AND BLUE (1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN

Regardless of the differences among scholars, during this period there undoubtedly coexisted both the remnants of a broad classical/medieval tradition of natural law and the more recent law of nature theories. Rooted in Plato and Aristotle, articulated by Cicero[19] and St. Thomas Aquinas,[20] and exemplified in English common law by Sir John Fortescue,[21] the classical and medieval discussions of natural law focused on reason, moral law, and the common good.[22] The later law of nature theories of Hobbes, Locke, and Rousseau, on the other hand, were based on a view of law as will. The latter broke philosophically, but not rhetorically with the tradition. The "law of nature" terminology operated like a legal fiction, a device appearing to maintain continuity while in fact ushering in change.[23] Even when combined with a doctrine of natural rights, as in Locke, law of nature theories shifted the controlling criterion for law from reason to will. References to natural law and the law of nature appearing in cases and other legal writings since the American founding have often equated the two without recognition of the inherent tension between them.[24] The result has been a mixing of concepts and doctrine which has produced contradictory tendencies in

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REPUBLIC, 1776–1787 (1969); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1993).

[19] This law is "not only older than the existence of communities and states; it is coeval with that god who watches over and rules heaven and earth." II CICERO, LAWS §9, at 124 (Oxford Univ. Press 1998).

[20] For Aquinas, God is coextensive with reason and we know the natural law as "a kind of reflection and participation in the eternal law." 2 THOMAS AQUINAS, SUMMA THEOLOGICA, Q. 93, art. 2 (Fathers of the English Dominican Republic trans., 1747).

[21] Indeed, "one may say that men establish governing power through the law of nature, but in the last analysis it is better to say that it is the law of nature that establishes that power through men . . . ." JOHN FORTESCUE, DE NATURA LEGIS NATURAE, I. c. 18.

[22] The natural law entered into English common law *formally* through St. Augustine, the Roman legal tradition, and the canon law, as well as through Aquinas. Both John of Salisbury (1110–1180) and Henry of Bracton (d. 1268) studied Roman law. Bracton, in fact, took his definition of natural law from the civilian Ulpian and by substituting the Christian God for "nature,"—as Aquinas was soon to do with Aristotle—transformed its meaning to comport with Christian doctrine. See, too, Christopher St. Germain (c. 1460–1540). "[I]n euery lawe well made," St. Germain wrote, "is somwhat of the lawe of reason and of the lawe of [G]od." ST. GERMAN, DOCTOR AND STUDENT 27 (T. F. T. Plucknett & J. L. Barton eds., Selden Society 1974).

[23] A legal fiction is "[a]ny assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." DAVID WALKER, THE OXFORD COMPANION TO LAW 468 (1980).

[24] The shift from natural law to natural rights is critical to an understanding of European and American history. In the natural law tradition, positive law was seen as guiding men to moral natural law and to virtue. In the tradition of natural rights, positive law becomes the necessary regulation of plural, private desires. The natural law tradition is rooted in natural sociality and community, that of natural rights in modern individualism and conflict. *See, e.g.*, LEO STRAUSS, NATURAL RIGHT AND HISTORY (1965).

American law. As I discuss below, this mixture of the two derived at least in part from attempts to explain the role of law in regulating relations among nation–states.

C. Use of Natural Law Terminology

Debate about American public philosophy often begins with the Declaration of Independence,[25] including its references to the law of nature and its allusions to natural law. What most people, including Justice Thomas, focus on is the second paragraph ("We hold these truths . . . ."). They emphasize the language of equality and some cite the reference to the "Creator" as evidence of the religious dimension of the Nation's founding. While noteworthy, such references should not be considered novel. Jefferson writes that "[w]hen forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper . . ." but, he continues, this was "[n]either aiming at originality of principle or sentiment, . . . it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion."[26] This expression unavoidably includes the natural law.[27]

In his confirmation hearings Justice Thomas referred to the Declaration as the basis for his interest in natural law and natural rights as political philosophy. He distinguished his political philosophy from his approach to adjudication, saying he thought theories of natural

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[25] The pertinent part of the Declaration is the following: "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). It continues,

> We hold these truths to be self–evident that all men are created equal, that they are endowed by their Creator, with certain unalienable Rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Id. at para. 2.

[26] THOMAS JEFFERSON, WRITINGS 1501 (Merrill D. Peterson ed., Viking Press 1984).

[27] Judge Thomas said that, "the founders of our country, or at least some of the drafters of our Constitution and our Declaration, believed in natural rights. And . . . in understanding overall our constitutional government, that it was important that we understood how they believed—or what they believed in natural law of natural rights." *Hearings*, *supra* note 1, at 112.

law and natural rights have no role in decision–making.[28] As political philosophy, he explained the origin of his interests. "My interest," Thomas said,

> started with the notion, with a simple question: How do we end slavery? By what theory do you end slavery? After you end slavery, by what theory do you protect the right of someone who was a former slave or someone like my grandfather, for example, to enjoy the fruits of his or her labor?[29]

The nominee later said that "[i]n exploring, on a part–time basis during my busy work day, a unifying theme on civil rights and on the issue of race, I was looking for a way to unify and find a way to talk about slavery and civil rights . . . ."[30] In order to articulate a political philosophy that would permit this, Thomas asked himself (and repeated at the confirmation hearings), "You and I are sitting here in Washington, D.C. with Abraham Lincoln or with Frederick Douglass, and from a theory, how do we get out of slavery?"[31] Faced with this problem, Thomas turned to a moral and political philosophy rooted in "Higher Law," an idea not unfamiliar to one raised, as Thomas was, in the Catholic faith.[32]

Prior to his appointment to the bench, as Chairman of the United States Equal Employment Opportunity Commission, a non–judicial post, Thomas gave a fuller explanation of his understanding of the Declaration of Independence and its connection to the Constitution. What, he asked, "is the ultimate American principle but that contained in the Declaration of Independence: that all men are created equal."[33] He noted the Constitution

> makes explicit reference to the Declaration of Independence in Article VII, stating that the Constitution is presented to the states for ratification by the Convention "the Seventeen Day of September in the

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[28] Thomas said that his interest in natural law was "in reassessing and demonstrating a sense that we understood what our Founding Fathers were thinking when they used phrases such as 'All men are created equal,' and what that meant for our form of government." *Id.*

[29] *Id.* at 114.

[30] *Id.* at 147.

[31] *Id.*

[32] In his statement before the hearings began, Judge Thomas stated that

> The nuns gave us hope and belief in ourselves when society didn't. They reinforced the importance of religious beliefs in our personal lives. Sister Mary Virgilius, my eighth grade teacher, and the other nuns were unyielding in their expectations that we use all of our talents no matter what the rest of the world said. After high school, I left Savannah and attended Immaculate Conception Seminary, then Holy Cross College.

Id. at 108.

[33] Clarence Thomas, *Towards a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 993 (1987).

> Year of our Lord one–thousand seven hundred and eighty–seven of the Independence of the United States of America the twelfth . . . ."[34]

The Constitution, Thomas wrote, "is a logical extension of the principles of the Declaration of Independence,"[35] without guidance from which, "Lincoln explained, the Constitution can be a mask for the most awful tyranny, and not just over a particular race."[36]

While clarification at several points was necessary, Thomas was careful to state that his political philosophy did not lead to judicial activism. It meant, he argued, just the opposite. This fact, something neither political conservatives nor activists seemed to appreciate, required an explanation. Nevertheless, what many wondered was whether Thomas would employ this "Higher Law" political philosophy as a theory of *adjudication*. Would Thomas attempt to apply unwritten law to cases before the Supreme Court? Is it possible to separate the two? What did the nominee mean when he asked whether we could "do better than to re–read the Declaration of Independence, and take seriously the idea of founding a nation based in 'the laws of nature and of nature's God,' established on self–evident truths of human equality and natural rights?"[37]

II. NATURAL LAW AND THE FOUNDING

A. The Declaration of Independence and Law

Before addressing how Justice Thomas has related his understanding of natural law to the positive law of the Constitution, we should discuss the evolution of the terms "natural law" and "natural rights" and how those terms have been or have not been integrated into American constitutional jurisprudence. We begin by looking at other, often–neglected parts of the Declaration of Independence. They remind us of the specific legal/political purpose of the Declaration which was to explain the causes and justify the decision of breaking away from Great Britain to form one or more newly independent states. The Declaration is a legal brief to a "candid World," designed to persuade (what today would be called) "world opinion." Rather than a declaration of radicalism as it is sometimes portrayed, the Declaration attempts to persuade world leaders of the reasonableness of the decision to break with England. Out of "a decent Respect to the Opinions of Mankind," the representatives "declare the causes which impel them to the Separation," beginning with

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[34] *Id.* at 987.

[35] Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 64 (1989).

[36] *Id.* at 65.

[37] *See Hearings*, *supra* note 1, at 153 (speech before the Pacific Research Institute in San Francisco, CA, Aug. 10, 1987).

a statement of general principles of government, setting out specific grievances, and ending with the conclusion

> That these united colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great–Britain, is and ought to be totally dissolved; and that as Free And Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other acts and things which INDEPENDENT STATES may of right do.[38]

This conclusion of the Declaration argues for legal recognition of statehood for the United Colonies.[39] Under international law, the status of statehood cannot be achieved if other states do not recognize a "state" as such. In referencing the "law of nature," the Declaration invokes the language of the day for international law, then known as the law of nations. This occurs at a time when international and domestic law were still studied within a framework based on principles of natural law and on law of nature theory.[40]

It was within the context of what has since come to be called international law that the shift in thinking from classical natural law to modern law of nature theory began. The transition corresponded to the changed religious, political, and legal reality in Europe. In the sixteenth and seventeenth centuries, Spanish international law jurists had "grounded the law of nations on Catholic natural law foundations."[41] Hugo Grotius, a Dutch Protestant jurist who drew from and modified the work of Spanish jurists,[42] wrote *The Law of War and Peace* (1625), which is generally considered to mark the beginning of modern international law. Discussing the principles of a just war at the time of Catholic–Protestant disputes and the Thirty Years War, he propounded a positive law of nations based on right reason and the consent of sovereigns as the foundation for regulating war. The settlement of the conflict in 1648 by the Treaties of Westphalia recognized the sovereignty of nations and

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[38] THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

[39] Later, disagreement would arise as to whether each of the former colonies was a fully independent "state" or whether this union already constituted one nation. To be recognized in international law as a "state," a political body must have the competence to conduct international relations with other states, but "states do not cease to be states because they . . . have delegated authority to do so to a 'supranational' entity, e.g. the European Communities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS § 210 cmt. e (1986). Whatever doubts may have existed under the Articles of Confederation, the matter was settled by the Constitution, which denies that competence to the states. U.S. CONST. art. 1 § 10.

[40] From the sixteenth through the eighteenth centuries, texts on international law often "described themselves as studies of the 'laws of nature and of nations.'" MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 59 (2d ed. 1993).

[41] *Id.* at 60.

[42] *See id.* at 60, 157.

princes; the result was a restriction of the temporal jurisdiction of the Church, including its authority to regulate and moderate wars.[43] As the role of religion receded, reason assumed the principal place in regulating relations among *sovereign* nations, together with custom and, to a lesser extent, treaty.

B. The Impact of Sovereignty on Law

While the term "sovereign state" can be defined legally in a way that would not seem to conflict with principles of natural law (e.g., "any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers"[44]), the general concept of sovereignty has often been used to support claims that the sovereign person or institution of government is "above the law" or at least immune from suit to enforce the law unless it has waived its sovereign immunity. Thus without an accepted, independent, international authority—for example, the Catholic Church or an international court—to determine, interpret, and apply the natural law among nations, sovereign states came to assume that authority. Whether rulers did or did not in fact act on the basis of reason, their actions were the expression of sovereign power. The reality of sovereign power able to act without external restraint inexorably led to a shift in emphasis in international law from reason to will, as reflected by the replacement of natural law with custom (understood to be the product of consent) as the primary source of international law during the nineteenth century.[45]

The crafting of the Constitution occurred before this shift away from reason took place; nevertheless, the practical and legal problems of sovereignty loomed large as the Philadelphia Convention divided governmental power internally while unifying power for relations vis–a–vis other nations. To achieve the purposes stated in its Preamble, to "establish Justice" and "secure the Blessings of Liberty," the Constitution did not resort to natural law or natural rights. For that omission the anti–Federalists attacked the Constitution as

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[43] *See id.* at 161–62.

[44] HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF THE SCIENCE 51(1st ed. 1836).

[45] In international law, natural law and positivist theories have long disagreed over the basis for explaining why sovereign nations are *bound* by the rules of international law. *See* JANIS, *supra* note 40, at 5–6. If international law is based only on consent, as positivists assert, and there is no superior power to enforce it, it is difficult to explain its claim to be binding or even to be law at all.

fundamentally defective—specifically for its lack of a bill of rights.[46] *The Federalist* countered "that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous."[47] At the same time, however, *The Federalist* articulated the classic argument for judicial review, concluding that an independent judiciary is "requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which [threaten] oppressions of the minor party in the community."[48] But what rights could courts have been expected to protect without relying on a written bill of rights? The proposed Constitution already included very significant individual protections: the right to jury trial in criminal cases, the writ of habeas corpus, limits on the proof of treason, and prohibition against ex post facto laws and bills of attainder. These were procedural provisions that either confirmed common law rights or rejected certain British practices. In addition, it was apparently expected that federal courts would resort to common law rules and that Congress would confirm common law rights, such as the right to jury trial in civil cases.[49] Whether federal courts could generally apply the common law was a question not explicitly addressed by the Constitution, but one later addressed by the Supreme Court.[50]

Although *The Federalist* has sometimes been viewed in positivist terms, important parts of it seem inconsistent with such an approach. *The Federalist* rejected, for example, the notion that the failure to list a right, such as jury trial in civil cases, meant that the right was denied.[51] Moreover, it clearly opposed at least judicial positivism, emphasizing that judges would have the power of reason, not will—that they would, in fact, have to rely on the executive branch to enforce their judgments.[52] The source of these other rights was the common law; but the role of the common law remained ambiguous. In medieval times the common law

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[46] *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 3 *passim* (1981).

[47] THE FEDERALIST No. 84 at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[48] *Id.* No. 78, at 469.

[49] *See id.* No. 83.

[50] *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (involving the use of general common law in diversity cases); U.S. v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (holding that the federal government has no common law criminal jurisdiction).

[51] *See* THE FEDERALIST No. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[52] As Hamilton wrote in THE FEDERALIST No. 78,

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Id. No. 78, at 465.

had been understood to be the manifestation of the natural law.[53] The older tradition represented in Lord Coke, whose work was most influential in America until the Revolution,[54] adhered to the natural law position that judges should refuse to give effect to legislation and executive acts which contradicted fundamental principles of law. But by the time Blackstone wrote his *Commentaries* (1765–1769), which were widely read in the Colonies, the common law had to accept that the sovereignty of Parliament eliminated the authority of judges to invoke natural law to void legislative acts. In England, consequently, the role of natural law was reduced to that of a non–enforceable obligation devolving on members of Parliament.

While largely preserving the common law, the newly independent states rejected parts of it as incompatible with their notions of liberty. Within the structure of federalism the role of the national judiciary was untested and the relationship among different layers of law uncertain. The fracturing of sovereign power certainly meant considerably more legal complexity than it would have meant in a unitary state. Substantive questions of law, which in the common law had always been intertwined with procedure, now became enmeshed also in thorny jurisdictional issues dictated by the Constitution's structure of federal and separated powers. While *The Federalist* provided a fairly coherent explanation and justification for the main features of the Constitution, it remained for the newly created institutions actually to implement the plan of government in specific detail.

C. Judicial Review—Reconciling Sovereignty and the Rule of Law

As is well known, the doctrine of judicial review was not explicitly provided for in the text of the Constitution. Some have even said that the doctrine constitutes a usurpation of power.[55] Others have justified the doctrine as an application of the "higher law" background of the Constitution.[56] Given, however, the striking similarity between Chief Justice Marshall's language in *Marbury v. Madison*[57] and Hamilton's discussion in *The Federalist, No. 78,* the doctrine does not appear to have

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[53] Wilhelmsen, *supra* note 4, at 182. *See also* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (Charles M. Gray ed., 1971).

[54] *See* ELLIS SANDOZ, A GOVERNMENT OF LAWS 231 (1990).

[55] Judge Learned Hand wrote that there was "nothing in the United States Constitution that gave courts any authority to review the decisions of Congress . . . ." LEARNED HAND, THE BILL OF RIGHTS 10 (1960). Indeed, he concluded that it "gave no ground for inferring that the decisions of the Supreme Court . . . were to be authoritative upon the Executive and the Legislature." *Id.* at 27.

[56] *See* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1929).

[57] 5 U.S. (1 Cranch) 137 (1803).

been a product of pure judicial willfulness, as it has so often been portrayed. In the language of both *Marbury* and *The Federalist*, the emphasis is on the lack of power in the federal courts to force a result that may be dictated by law but over which the Court lacks the power to speak (i.e., jurisdiction).

Although *Marbury* has long been extolled by the legal profession as the triumphant beginning for the Court, it was not an obvious triumph, nor was it the beginning. Prior to the arrival of Chief Justice Marshall, the Court had had an inauspicious beginning in its first major decision, *Chisholm v. Georgia*,[58] which was quickly reversed by the Eleventh Amendment. In holding that a citizen of one state could sue the government of another state, *Chisholm* ignored the widely understood meaning of the relevant text of Article III, as had been explained in *The Federalist*.[59] In *Marbury*, the majesty of Chief Justice Marshall's language has often obscured, in retrospect, the fact that the Court avoided issuing another opinion that would have been ignored. The refusal of the defendant, Secretary of State James Madison, to appear before the Court had communicated that President Jefferson did not recognize the Court's jurisdiction over his executive officers and therefore suggested that the President might not abide by an order issued against the Executive. Chief Justice Marshall's response in *Marbury* avoided the humiliation that would have followed from issuing an order that the Executive refused to honor. The Court established its authority to pronounce on the Constitution not by exercising power, but by recognizing the constitutional limits on its power, specifically the lack of jurisdiction to pronounce on the particular legal question presented by the plaintiff. Marshall followed *Federalist* 78, almost to the point of plagiarism, in laying out the rationale for judicial review. *Marbury* put into practice the teaching that federal judges "have neither Force nor Will, but merely judgment."[60] The Court's power has been limited to "saying" what the Constitution provides because it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[61] *The Federalist* expected that judges would faithfully follow

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58 2 U.S. (2 Dall.) 419 (1793).

59 The literal language of Article III references such suits. Nevertheless, the result contradicted the general understanding, as reflected in *The Federalist* and the ratification debates, that the states were not subject to suit by citizens of other states—unless of course a state consented. The Constitution provides that the judicial power shall extend to controversies "between a State and Citizens of another State." U.S. CONST. art. III, § 2, cl. 1. As *The Federalist* affirmed, however, it "is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . ." THE FEDERALIST No. 81, at 487–88 (Alexander Hamilton).

60 THE FEDERALIST NO. 78, *supra* note 52, at 504.

61 *Id.*

the Constitution; but if they did not, there was, in addition to the possibility of impeaching individual judges, the power of the Executive to constrain the Court itself.

On the one hand, judicial review as understood in *Marbury* and in *The Federalist* seemed to develop from the pre–Blackstonian position that judges possessed authority to void acts of the legislature and of the executive which contradict "higher law" and reason; on the other hand, the Court's voiding power is in many ways circumscribed because the Court itself is under the "higher law" of a written Constitution which places limits on its jurisdiction. This tension between the natural law tradition and sovereign power was evident early on, before the doctrine of judicial review was confirmed in *Marbury*, when the Court decided *Calder v. Bull*.[62] The case actually established that the Constitution's prohibition of Ex Post Facto laws does not apply to civil legislation, but only to criminal laws. In the principal opinion, Justice Chase said, by way of dicta, that he could not "subscribe to the omnipotence of a state Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law, of the state."[63] This and his discussion of "the great first principles of the social compact" have been referred to as examples of natural law jurisprudence. More accurately, the opinion seems to have mixed elements of traditional natural law with law of nature theory. Justice Iredell responded: "It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess the power to declare it so."[64] After quoting Blackstone to that effect, he explained that to correct such a situation, American courts have been given the constitutional power to declare legislative acts void only in "a clear and urgent case." He went on to say,

> If on the other hand, the [l]egislature of the Union, or the [l]egislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgement contrary to the principles of natural justice.[65]

D. Mixing Positive and Natural Law

Despite their differences concerning the role of natural justice, the two justices in *Calder* actually agreed on the result. For Justice Iredell it was merely a matter of interpreting positive law; that is, the Ex Post

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[62] 3 U.S. (3 Dall.) 386 (1798).

[63] *Id.* at 387–88.

[64] *Id.* at 398 (Iredell, J., concurring).

[65] *Id.* at 399.

Facto provision written into the Constitution. On the other hand, that provision does reflect the natural justice concerns of the Framers of the Constitution.[66] For much of American constitutional history, positive law has declared or implemented much of what "speculative jurists" would prescribe as being a requirement of natural justice. As a result, judges of both positivist and natural law bent have routinely reached the same legal conclusions, but for different reasons.

Fletcher v. Peck,[67] known for its flirtation with natural law, demonstrated the difficulty of explaining the language used to reach a particular result. The Supreme Court invalidated an act of the Georgia legislature rescinding a previously granted land patent. It was claimed that the legislature's action violated the Constitution's prohibition against a state's impairing the obligation of contract. While the legislative action did indeed seem unjust, it was not clear that it violated the Contracts Clause.[68] The positive language stating the provision in the Constitution was not self–explanatory, and the term did not have an established common law meaning. In voiding the act of the Georgia legislature, Chief Justice Marshall did not rely solely on constitutional text. He stated: "It is, then, the unanimous opinion of the court, that . . . Georgia was restrained, *either by general principles which are common to our free institutions,* or by the particular provisions of the constitution of the United States, from passing [this] law . . . ."[69] The holding may have rested on a dual basis simply for the purpose of achieving the claimed unanimity. Justice Johnson wrote separately to indicate his disagreement about the Contracts Clause; he would have rendered the decision solely "on a general principle, on the reason and nature of things: a principle which will impose laws even on the [D]eity."[70] Johnson's opinion indicated that Marshall's construction of the language of the Contract Clause was somewhat debatable. Apart from his explicit reference to natural justice, Marshall's interpretation of the actual language of the Constitution seemed to draw from notions of natural justice.

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[66] *See, e.g.*, JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Norton 1987); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1986). While all of those commenting at the Convention clearly thought Ex Post Facto legislation illegitimate, some thought a clause specifying this was unnecessary and "would proclaim that [they were] ignorant of the first principles of Legislation, or are constituting a Government which will be so." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 511 (Norton 1987). Others thought such a clause, being clearly part of the positive law, may "[do] good . . . because the Judges can take hold of it." *Id.* In any event, both those for and against a clause did so in light of a sense of natural justice.

[67] 10 U.S. (6 Cranch) 87 (1810).

[68] U.S. CONST. art. 1, § 10.

[69] *Fletcher*, 10 U.S. (6 Cranch) at 139 (emphasis added).

[70] *Id.* at 143 (Johnson, J.).

But for the explicit reference to natural justice, Marshall's construction of the Contracts Clause would have been considered—at least by contemporary legal academics—a relatively non–controversial example of common law judging technique. The Constitution has routinely been interpreted against the background of the common law, both in terms of legal content and approach to judging. Common law as custom provided natural law and positivist judges common ground, although they had different explanations for their decisions. Traditionally, the common law had been viewed as embodying natural law. Then it became understood in historicist terms as simply "positive" social custom (what Austin called "positive morality") and eventually in purely positivist terms as judge–made law.

The relationship of the Constitution and the common law was for a long time a controversial issue with both philosophical and federal–jurisdictional dimensions. The views of Justice Joseph Story, a nationalist and a natural law thinker, figured prominently in this debate. In criminal matters, the issue revolved around state sovereignty and the extent of federal powers. The Constitution was understood to have left police powers to the states. The Jeffersonians opposed the notion that the federal government had any common law criminal jurisdiction, especially regarding matters of libel. Justice Story disagreed. Nevertheless, in *United States v. Hudson and Goodwin*,[71] the Supreme Court held that the federal government had no common law jurisdiction over crimes. As a result, all federal criminal law has been statutory.

On non–criminal matters, however, Justice Story prevailed for a time. In *Swift v. Tyson*,[72] the Court held that a general common law, at least on commercial matters, was the law of the United States and applicable in federal courts.[73] Writing for the Court, Justice Story rejected the idea that decisions by the courts constituted laws:

> In the ordinary use of language, it will hardly be contended, that the DECISIONS of COURTS constitute LAWS. They are, at most, only evidence of what the laws are, and are not, of themselves, laws. They are often re–examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill–founded, or otherwise incorrect.[74]

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[71] 11 U.S. (7 Cranch) 32 (1812).

[72] 41 U.S. (16 Pet.) 1 (1842).

[73] In *Swift*, Justice Story was referring to that commercial law which is the product not of sovereignty but of the practices of merchants, sometimes called the Law Merchant: "'[t]he law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield, in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world." *See also* Harold J. Berman, *Mercantile Law, in* LAW AND REVOLUTION 333–56 (1983).

[74] *Swift*, 41 U.S. (16 Pet.) at 18 (emphasis added).

Justice Story, who while serving on the Supreme Court was also teaching at Harvard Law School, incorporated natural law thinking into his treatise writing. In these treatises, including his important *Commentaries on the Constitution,* he explained and shaped federal law and common law in light of Cicero, Burke, Blackstone, *The Federalist,* and Civil Law jurists.

Following the Civil War, there emerged Story's positivist counterpart. Oliver Wendell Holmes, another Harvard law professor who went on to become a justice of the Supreme Court, led American legal thought to reject anything that might be considered natural law. His ultimate triumph actually came after he had left the Court, when *Erie v. Tompkins*[75] overturned *Swift.* Holmes' view that judges "made" law was reflected in the following statement by the Court rejecting what was understood to be "natural law."

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law . . . [b]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it."[76]

Holmes, however, had devoted more of his attention on the Court to contending against another so–called form of natural law known as "substantive due process." In particular, he had dissented from decisions of the Supreme Court that used the Due Process Clause of the Fourteenth Amendment to invalidate state economic regulations said to deprive individuals of economic liberty interests.[77]

III. NATURAL LAW SINCE THE CIVIL WAR

A. The Fourteenth Amendment and Substantive Due Process

The framers and ratifiers of the Fourteenth Amendment included both those who thought they were defining positive rights and those who

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[75] 304 U.S. 64 (1938).

[76] *Id.* at 79 (footnote omitted).

[77] Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). At the hearings, Thomas said, "I think that those post–*Lochner* era cases were correctly decided, and I see no reason why those cases and that line of cases should have been or should be revisited." *Hearings, supra* note 1, at 173. Earlier Thomas had said, "I cannot accept the libertarian jurisprudence which argues that the Court should again exploit the Due Process Clause and become active in striking down laws which regulate the economy." Speech to A.B.A. Business Law Section, Aug. 11, 1987. Thomas questioned whether libertarians could "really think such a powerful court would stop at striking down only those laws?" Speech to Cato Institute, *in Hearings, supra* note 1, at 126.

thought they were enshrining Lockean natural rights.[78] Either way, the Fourteenth Amendment reduced the residual sovereign powers of the states. The capacious language of its Equal Protection and Due Process Clauses allowed them to be used as vessels into which different judges could pour their individual views of justice. In particular, later nineteenth– and early twentieth–century cases read the Due Process Clause to include not only procedural but also substantive claims: thus the oxymoron "Substantive Due Process."[79] At about the same time it was rejecting (in *Erie)* any reliance on natural law as a basis for ignoring the sovereign law–making power of state courts, the Supreme Court overthrew the economic Substantive Due Process doctrine.[80] The victory of Justice Holmes seemed complete. As it turned out, however, neither the Substantive Due Process doctrine nor the natural law debate died out altogether. Ironically, during the same period the Court planted the seeds for a later rebirth of a different version of Substantive Due Process and natural law when in 1938 the Court, in the famous *Carolene* footnote, signaled greater concern for individual rights.[81]

Over several decades the Court gradually expanded the procedural aspects of the Due Process Clause. While doing so, members of the Court began to debate the relevance of what was sometimes termed "natural law." In cases ranging from the later 1940s through the mid–1960s,

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[78] John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1419 (1992). In a Speech before the Pacific Research Institute, Thomas reemphasized that "the libertarian argument overlooks the place of the Supreme Court in a scheme of separation of powers. One does not strengthen self–government and the rule of law by having the non–democratic branch of the government make policy." *Hearings*, *supra* note 1, at 166.

[79] *Id.* Harrison's research has convincingly demonstrated that many decisions resting on equal protection or substantive due process grounds would more appropriately have been dealt with under the Fourteenth Amendment's privileges or immunities clause. Part of the reason for the neglect of the privileges or immunities clause has been its natural law connotation. That is to say, the other and original privileges or immunities clause in Article IV, Section 2, as between citizens of different states, was early interpreted in a way thought to reflect natural law thinking. See the opinion of Justice Bushrod Washington in a circuit case, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823, No. 3230). *See also* The Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1873).

[80] *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[81] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938). The "preferred position doctrine" of the *Carolene* footnote suggested additional court protection for political, rather than economic, liberties. "There may be," the Court said:

> narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution. . . . [But it] is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Id.

Justice Black fought against what he considered to be the "natural law" interpretation of the Due Process Clause in the Fourteenth Amendment.[82] The term "Due Process" had generally been understood as referring to "the law of the land" and as being rooted in Magna Carta. Justice Black insisted that the Court not resort to "natural law," by which he meant non-written sources, for explaining the content of the clause.[83] Consistent with his concern to give the clause rule-like content, Justice Black concluded that the draftsmen of the Fourteenth Amendment had intended it to incorporate the Bill of Rights.[84] Prior to 1947, however, no member of the Court had ever taken that position.[85] Justice Holmes and other positivists who rejected Black's "total incorporation" looked to the common law with an evolutive understanding of the term "Due Process." Nevertheless, Justice Black accused members of the Court—in particular, Justice Frankfurter—of resorting to natural law. Frankfurter, an intellectual follower of Justice Holmes, was actually defending a jurisprudence that considered the common law a mixture of custom and judge-made law. He viewed the common law language used in the Constitution as terminology to be shaped by judges in accordance with its evolution in customary practice and opinion. Justices Frankfurter and Black, who had both been New Dealers, disagreed on epistemological issues as well as structural constitutional issues, but both were positivists. It was Justice Black, however, who went so far as to mistakenly equate "natural law" with any appeal to an unwritten source of law.[86]

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[82] *See* Adamson v. California, 332 U.S. 46 (1947). "I further contend," Justice Black wrote in dissent, "that the 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution." *Id.* at 75 (Black, J., dissenting).

[83] In *Duncan v. Louisiana*, 391 U.S. 145 (1968), Justice Black wrote that

> [D]ue process, according to my Brother [Justice] Harlan, is to be a phrase with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. . . . [I]t is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power. Each of such tests [of "fundamental fairness"] depends entirely on the particular judge's idea of ethics and moral instead of requiring him to depend on the boundaries fixed by the written words of the Constitution.

Id. at 168–69 (Black, J., concurring).

[84] In his *Adamson* dissent, Black wrote that he would implement what he believed "was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights." *Adamson*, 332 U.S. at 89 (Black, J., dissenting).

[85] *See id.* at 59 (Frankfurter, J., concurring).

[86] While Justice Black's concerns were genuine, his target was doubly mistaken. The judges that Justice Black believed had espoused natural law (Justices Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, Robert Jackson, and the second John Marshall

A very strong declaration of judicial positivism came in 1958, when a unanimous Supreme Court, including Justices Black and Frankfurter, pronounced its sovereignty *over* law:

> Article 6 of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice John Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* . . . that "It is emphatically the province and duty of the judicial department *to say what the Law is.*" This decision declared the basic principle that *the federal judiciary is supreme in the exposition of the law of the Constitution,* and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[87]

In the same positivistic vein as *Erie*, the Court in *Cooper* read the language *of Marbury*—"to say what the law is"—to mean *"make* what the law will be."[88] Regardless of the reasonableness of their underlying interpretations, such language is positivistic because it expresses priority for judicial *will.*

B. Constitutional Common Law

Erie has been praised by judicial "liberals" and "conservatives" alike.[89] Conservatives have considered the case a restriction on federal judicial interference with the states because it disclaimed power to create a national common law (in the sense of judge–made law) and therefore seemed to leave such decisions to state courts. In the past half century since *Erie,* however, the Court has increasingly invaded areas previously governed by state law, both common law and statute, by making the Equal Protection and Due Process Clauses of the Fourteenth

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Harlan) *were* non–textualists (in the Constitutional sense Black desired). They were not, however, natural lawyers. In fact, their jurisprudence of "fundamental fairness" closely resembled Holmes' *evolutive* positivism. Frankfurter said, in *Rochin v. California*, 342 U.S. 165, 172 (1952), that "the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self–willed." Fundamental meant, not "natural rights," but guarantees fundamental to our nation's history and evident in our traditions. In any event, what Justice Black intended to criticize was a jurisprudence of natural *rights* and substantive due process like that of the late nineteenth, early twentieth century.

[87] Cooper v. Aaron, 358 U.S. 1, 18 (1958) (emphasis added).

[88] *Id.* Mirroring the traditional understanding of natural and positive law, Francis Bacon wrote in *The Essayes* that English judges were to speak the law, not make the law. *See* FRANCIS BACON, ESSAYS, ADVANCEMENT OF LEARNING, NEW ATLANTIS, AND OTHER PIECES 155 (Richard Foster Jones ed., Odyssey Press 1937) (1625).

[89] In matters of judicial interpretation, I consider the commonly used "liberal" and "conservative" labels inappropriate and misleading. Justices Frankfurter and Black were both *political* liberals. On the Court, however, Frankfurter was considered a conservative and Black a liberal—at least until his later years. As their debate over the role of natural law demonstrates, a judge's approach to interpretation can be more involved philosophically than political decision–making normally is.

Amendment applicable to more and more matters of state law. The Court, in many cases, has created *constitutional* law where once there was common law.[90] In this process of redefining the Constitution's structural boundaries and departing from its text, the Court has engaged in a new version of "natural law [rights?]," one ironically initiated by Justice Black.

In the 1960s, Justice Black at first appeared to win a victory over what he termed "natural law." The Court began to tie its decisions, in cases involving state criminal procedure, not simply to the Fourteenth Amendment Due Process Clause, but through it to the more specific provisions of the Bill of Rights. Justice Black prevailed in effect, though not in his theory concerning "total incorporation." The Court incorporated, one by one, almost all the provisions of the Bill of Rights. While Justice Black was triumphing in one sense, the Court's repeated departures from the principle of *stare decisis*[91] seemed to foster innovation not tied to the text of the Bill of Rights, the development of which Justice Black disapproved.[92] Justice Black's ideological brother, Justice Douglas, revived Substantive Due Process in *Griswold v. Connecticut*.[93] By striking down a state statute prohibiting the use of contraceptives, and finding a right to privacy within the "penumbras" of the Bill of Rights, *Griswold* followed what Justice Black referred to as "natural law."[94] This unwritten "right to privacy," of course, later became

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[90] *See* Henry Monaghan, *The Supreme Court, 1974—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[91] Professor Earl M. Maltz has calculated that, "[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions." Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467 (1980).

[92] As Chairman of the Equal Employment Opportunity Commission, Thomas gave a speech about the "Due Process revolution." "Today, there appears to be a proliferation of rights," he remarked, "animal rights, children's rights, welfare rights, and so on." Speech to the Pacific Research Institute, *in Hearings*, *supra* note 1, at 156. Justice Thomas has continued to sound this theme since his appointment to the Supreme Court. In the "Keynote Address" before the Federalist Society, Justice Thomas said:

> I have no doubt that the rights revolution had a noble purpose: to stop society from treating blacks, the poor, and others—many of whom today occupy our urban areas—as if they were invisible and not worthy of attention. But the revolution missed a large point by merely changing their status from invisible to victimized. Minorities and the poor are humans capable of dignity as well as shame, of folly as well as success. We should be treated as such.

Hon. Clarence Thomas, *Keynote Address*, 1 MICH. L. & POL'Y REV. 269, 276 (1996).

[93] 381 U.S. 479 (1965).

[94] "That formula [that of *Lochner*], based on subjective considerations of 'natural justice,'" Justice Black wrote in his *Griswold* dissent, "is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had

the basis for striking down state abortion statutes in *Roe v. Wade*.[95] At that point, commentators realized that Substantive Due Process, or what some have called a "natural law" philosophy (actually a "natural rights" philosophy) of constitutional law, had been resurrected by the Court.[96]

In *Planned Parenthood v. Casey*, which reaffirmed *Roe* even while cutting it back, the Court explicitly embraced Substantive Due Process.[97] According to the plurality opinion, "neither the Bill of Rights nor the specific practice of the states at the time of the Fourteenth Amendment makes the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[98] In expanding the concept of liberty beyond the text and its history, the Court was *not* resorting to classical/medieval notions of natural law. If anything, it was invoking the primacy of will as reflected in public—or at least elite—opinion. *Casey*, it appears, relied in effect on something like a Rousseauean general will[99] to strike down Pennsylvania's requirement that a woman notify her husband of a planned abortion.[100] In denying that abortion, "is a liberty protected by the Constitution of the United States"[101] and that the "Constitution says absolutely nothing about [abortion], and . . . the

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thought that we had laid that formula, as a means of striking down state legislation, to rest once and for all . . . ." *Id.* at 522.

[95] *See* 410 U.S. 113 (1973).

[96] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 20 (1980).

[97] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[98] *Id.* at 848.

[99] It should be noted, however, that even for Rousseau, this "general will" was discerned by the Legislature, not the Courts. The point is precisely that the Court, by deciding these issues in this manner, is performing a *legislative* function contrary to the principle of the separation of powers, to the Courts own precedent, and to American traditions. It is not that the laws should not change, that is a *political* question, but that the Courts are not where they are supposed to be changed.

[100] The Court found the statute unconstitutionally *"embodies a view of marriage* consonant with the common law status of married women but *repugnant to this court's present understanding of marriage* . . . ." *Roe*, 410 U.S. at 118 (emphasis added). Given that, until recent statutory changes, the traditional view of marriage had prevailed in much the same form from long before the Founding, it was difficult to understand the "Constitutional" basis for this shift.

Barbara DaFoe Whitehead explains this movement by both the increasingly powerful role of women in society as well a more wide-spread ethic of personal fulfillment that trumps values of familial obligation. This ethic is rooted in the privatization of values and the will theories remarked on earlier. Where such will waivers, obligation no longer binds. *See* BARBARA DAFOE WHITHEAD, THE DIVORCE CULTURE (1997). "Once the domain of the obligated self, the family [is] increasingly viewed as yet another domain for the expression of the unfettered self." *Id.* at 5. Whether one welcomes or worries about such a change, in terms of understanding the meaning of an historical document like the Constitution, it is critical that one reads it, however difficult it is. The Framers clearly did expect that attitudes about traditional institutions would evolve, but it is quite another thing for the Courts to lead that evolution.

[101] *Casey*, 505 U.S. at 980.

longstanding traditions of American society have permitted it to be legally proscribed,"[102] the dissenters were adhering to textualism in a way that both traditional natural law and strict positivists could support.[103]

C. Whose Natural Law?

Whether one is a textual positivist of the Justice Black variety, a "common law" positivist of the Justice Holmes/Frankfurter variety, or a natural law thinker like Justice Story, all can inquire skeptically: how does the Court determine limits on liberty other than arbitrarily if not from the constitutional text, history, and the common law?[104] If from notions of natural law or justice, on what are such notions based? On reason, or on will? And does not even traditional natural law teaching require adherence to the limits of a judge's constitutional authority?[105]

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[102] *Id.*

[103] In the hearings, Senator Joseph R. Biden attempted to pin Judge Thomas down as to his views on abortion by asking, "in your view, does the liberty clause of the 14th amendment protect the right of women to decide for themselves in certain instances whether or not to terminate pregnancy?" Justice Thomas stated that his view was that "there is a right to privacy in the 14th amendment." *Hearings*, *supra* note 1, at 127. He also said that,

> the Supreme Court has made clear that the issue of marital privacy is protected, that the State cannot infringe on that without a compelling interest, and the Supreme Court, of course, in the case of *Roe v. Wade* has found an interest in the woman's right to—as a fundamental interest, a woman's right to terminate a pregnancy. I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case.

Id.

[104] It is important to separate the blunt textualism of Justice Black ("Congress shall make no law") with that of Justice Scalia. Whether one is or is not a textualist of either variety, it is clear that the interpretative method of Justice Scalia is more nuanced than that of the late Justice Black. Justice Scalia is perhaps more accurately a *contextualist* who looks to the social–historical context and common law background of the Constitution to better understand the *meaning* of text as a whole (as distinguished from the intent of its drafters), aware, too, that the document serves not merely as a bill of governmental guarantees (whatever their ultimate source), but also as a structural design for government. As Justice Scalia writes,

> Textualism should not be confused with so–called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a non–textualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed *reasonably*, to contain all that it fairly means.

ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) (emphasis added). But, he writes, "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible." *Id.* at 24.

[105] *See* THE FEDERALIST, NO. 78., *supra* note 52.

Again, it is important to emphasize that the most basic issue between positivism and natural law regarding legal reasoning is *not* that of written versus unwritten law. As discussed above, positivists in international law straightforwardly recognize unwritten law in the form of custom. As discussed below, both positivists and traditional natural lawyers can be textualists in American constitutional law. Rather, positivist and traditional natural law approaches provide different *explanations* of the same laws and legal phenomena. Positivists in international law explain custom in terms of consent. Traditional natural lawyers emphasize the priority of reason over will as the basis for obligation, even when explaining arrangements based on consent. Positivism certainly does not deny reason, but subordinates it to will. Accordingly, some so–called versions of "natural law" which give primacy to the will, notably in manufacturing new "rights," are actually forms of positivism based on unwritten sources of law. Positivists, who are also textualists in Constitutional law, tend to conflate a natural rights approach with traditional natural law, assuming that non–textualism is the defining characteristic of both.[106]

The Constitution as originally drafted has been viewed from both positivist and natural law perspectives, and it is often difficult to differentiate between the two kinds of interpretation.[107] Judicial review, as explained in *The Federalist* and *Marbury v. Madison*, is certainly tied to written law, but not necessarily to positivism. In other words, being a textualist does not necessarily mean being a positivist. Given our written Constitution and its allocation of authority through federalism and the separation of powers, it is difficult to understand how one who claims to adhere to Thomistic or Aristotelian–based natural law could be anything but a textualist. As explained in *Federalist* 78, the Court's exercise of judicial review is supposed to represent the power of reason conforming

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[106] *See infra* text accompanying note 123.

[107] Robert Bork, often labeled a "positivist" in our all too simplistic classification schemes, has written, "I am far from denying that there is a natural law, but I do deny that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us. Judges, like the rest of us, are apt to confuse their strongly held beliefs with the order of nature." BORK, *supra* note 7, at 66. As Professor George has noted, "Judge Bork's idea of a body of law that is properly and fully (or almost fully) analyzable in technical terms is fully compatible with classical understandings of natural law theory." *Natural Law and Positive Law*, *in* THE AUTONOMY OF LAW, *supra* note 8, at 331. Indeed, George writes,

> to the extent that judges are not given power under the Constitution to translate principles of natural justice into positive law, that power is not one they enjoy; nor is it one they may justly exercise. For judges to arrogate such power to themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law, it is to violate the very natural law in whose name they purport to act.

Id. at 332.

to the Constitution. The other two branches, in particular the legislative, have the authority to exercise will, to the extent permitted by the Constitution. The Supreme Court has no *legitimate* will of its own.

After decades of judicial willfulness, the view of *Federalist 78* seems naive and anachronistic. Many would argue that judicial review has never and could never operate in the manner described. Others completely misrepresent *Federalist 78* as a justification for judicial adventurism. Certainly, since the beginning of the Court's existence, its members have had difficulty distinguishing their own wills from detached reasoning. On this much, commentators have generally agreed but they have disagreed about when and which justices have been guilty of such transgressions.[108] Nevertheless, it is one thing to acknowledge that judges have not always lived up to their obligations; it is a completely different matter to deny that judges have any obligation to hold the exercise of will in check. Only since the advent of Legal Realism has it been asserted that judges should actuate their own wills.

IV. JUSTICE THOMAS AND CONSTITUTIONAL INTERPRETATION

Justice Thomas has been notable for articulating, in the various speeches that have been quoted herein, a public philosophy. The question remains, however, as to whether his political and moral philosophy, based as it is on natural law, has had any distinctive effect on his decision–making—recognizing, of course, that every justice has a judicial philosophy whether publicly articulated or not. At his hearings and elsewhere, Thomas has said his "Higher Law" understanding in moral and political matters would not intrude on issues of *judicial* interpretation and, indeed, was compatible with judicial restraint. Questions have been raised as to whether such a separation is possible without abandoning or disguising one's natural law views. Properly understood, traditional natural law thinking is compatible—indeed, it is a natural ally—of judicial restraint, as Justice Thomas has repeatedly insisted.

A. Natural Law and Natural Rights

Any reference to natural law creates some confusion about the meaning of the term as used; when the term natural law is also linked to

[108] Abortion is the most notable example. Since the early 1970s, when *Roe* launched the abortion debate, people on both sides of this issue, operating from completely incompatible moral premises, have at times been labeled adherents of natural law. As a result, "natural law" has simply become identified, in the minds of many, with uncertainty and arbitrariness. This reaction is understandable not only because the two "natural law" positions are contradictory, but because each side at times employs positivistic arguments against the "natural law" arguments of the other.

the word "moral,"—as ultimately it must be—the reference is likely to also generate skepticism and concern. Nevertheless, the key to understanding what is generally meant by classical natural law, as opposed to natural rights, is an appreciation for moral reasoning.[109] Certainly, the current lack of moral consensus makes discussion of anything labeled "moral" very problematic. Unless the discussion of moral and philosophic premises is to reflect only personal biases (which, some would say, is all that it can reflect), some common ground for discussion is necessary.[110] Among co-religionists, such common ground may exist; but the foundation for such discussions is likely to be religious only, rather than based on a common mode of reasoning. While religious consensus may have sufficed through much of America's history, at this point in time clearly the beliefs of no single religious group can provide the basis for moral consensus in the United States. For that very reason, some say that positive law provides the only common ground for discussion. That response, however, only begs the question of the methods for *interpreting* positive law.

Under the influence of positivism in general, and Legal Realism in particular, genuine discussion of possible connections between moral/philosophical (as distinct from religious) and legal reasoning has been avoided or obfuscated.[111] Prior to the disintegration of both

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[109] Natural law reasoning involves the harmonizing of desires with the basic human goods of natural law theory. In modern thought, reason is frequently employed only instrumentally towards the fulfillment of purportedly free or found desire. Justice and the good is *equated* with this liberty of choice, checked only by something like Mill's harm principle and natural *rights* which, as brute facts, need no rational defense. In a sense, practical reasoning is also instrumental, but its end or *telos* is the common good of human flourishing. This "flourishing" is perhaps the best rendition of what was for Aristotle *eudaimonia*. Flourishing is certainly related to happiness, but is not reducible to it. It is instead the practical attention to the balance or *mean* between the basic human goods. The substitution of raw pleasure or happiness for flourishing was a result of the change to a philosophy of natural rights, which initially saw in such happiness the will of God (the end, that is, was in theory God's will, not human happiness). Secularized, this became the philosophies of utilitarianism and of laissez-faire and "natural" moral ordering.

[110] It is not often that *any* individual maintains that there are neither morals nor truths. That is, as humans we all operate with some idea of a Good as well as standards of reasonableness, however thin. The American aversion to any moral imposition on others, however, makes us generally reluctant to articulate a *public* philosophy of the Good. But as the Founding generation understood, one cannot make either private or public decisions without meaningful, if unarticulated, concepts of morality and truth (epistemological and ontological). Arguably, those that promote moral or mental relativism in the name of pluralism may only do so because the "natural" inclinations of natural law and practical reasoning prevent moral atrophy. Genuine relativism is neither desirable nor possible. This is not to suggest, as Rousseau's "noble savage" might, that an education in virtue is unnecessary. But advocates of ever greater liberties are able to secure those liberties *because* of the moral truths of the natural law, not in spite of it.

[111] It is true that, since Watergate, legal education has re-emphasized "professional responsibility." The fact that the term "professional responsibility" was adopted as a

religious and moral consensus, such discussions might have seemed unnecessary. Since the disintegration, with positivism and Legal Realism already well–established, discussions of any connection between moral/philosophical premises and legal reasoning have been particularly controversial. Reflecting Legal Realism's focus on courts, discussions of legal reasoning have generally been limited to constitutional interpretation. The response of some textualists, which has been to reject as necessarily illegitimate any type of moral reasoning or "natural law" in judicial decision–making, fails to recognize that the moral reasoning of traditional natural law is perfectly compatible with textualism.[112] Indeed, it is ultimately necessary to make sense of positive law.

Traditional natural law has often been linked with, or at least not clearly differentiated from, natural rights. This occurs in the language of the Declaration of Independence as well as in various explanations of natural law, such as that given by Justice Joseph Story.[113] American Catholics, in particular, have been inclined to merge the two as a bridge between Catholic doctrine, which has often been identified with traditional natural law, and the modern constitutionalism of the United States which is often spoken of in terms of natural rights. Since the early nineteenth century, Catholics have embraced the rhetoric of rights to defend their claims to operate schools independent of state control.[114] In arguing against segregation and abortion, Catholics have often linked traditional "natural law," the language of the Declaration of Independence, and the Constitution. At least until about twenty–five years ago, those educated in Catholic parochial schools, as was Justice Thomas, would have been taught about the natural law, as defined by Thomas Aquinas, and also probably taught that the American emphasis on rights was an extension, adaptation, or rephrasing of traditional natural law.

Despite the rhetorical linkages between the traditional natural law and natural rights, they are actually quite different.[115] As Professor

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substitute for "legal ethics" indicates that the term "ethics"—implying morality—had become controversial.

[112] *See generally*, BORK, *supra* note 7.

[113] *See* Joseph Story, *Natural Law*, 9 ENCYCLOPEDIA AMERICANA 150–58 (F. Lieber ed., 1836), *reprinted in*, JOSEPH STORY AND THE AMERICAN CONSTITUTION (J. McClellan ed., 1971).

[114] *See Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), are the cases generally cited by those claiming constitutional protection for parental and religious control over their children's education.

[115] Even though the meanings of the two traditions can, indeed must, be distinguished, they do possess a shared history. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS (1997). Professor Tierney argues that the movement from classical natural law to modern natural rights—that epitomized in Hobbes, Locke, etc.—took place haltingly through centuries of scholastic debate (c. 1150–1625). He writes that,

Lloyd L. Weinreb has written: "In contemporary philosophy, although they are frequently joined for rhetorical effect, there is scarcely any connection, substantive or formal, between natural law and rights."[116] While Oxford Professor John Finnis has attempted a philosophical integration of the two,[117] his theory—frequently called by opponents the "new natural law theory"—has been rejected by other traditional natural law theorists for its failure to identify a connection with "nature," in the sense of a metaphysics or ontology.[118] Pointing this out, even without fully elaborating the differences will facilitate a judgment of the effect "natural law" has had on the decision-making of Justice Thomas.

In itself, natural law (as opposed to natural rights) does not enjoin any particular *judicial* philosophy; rather, it requires the use of reason to effect the Good. A natural lawyer decides not in the abstract or arbitrarily, but according to the legitimate authority within the particular political and legal order. If one were appointed a judge in a political order which clearly established the role of judge to be that of "philosopher-king," then traditional natural law would, within that system, obligate the judge actively to pursue the common good directly. Systems such as the American constitutional tradition, based on popular election rely on the rule of law, rather than philosopher-kings, however,

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> The idea of natural rights grew up—perhaps could only have grown up in the first place—in a religious culture that supplemented rational argumentation about human nature with a faith in which humans were seen as children of a caring God. But the idea was not necessarily dependent on divine revelation, and later it proved capable of surviving into a more secular epoch. The disinclination of some Enlightenment skeptics to regard God's law as a sufficient ground for moral behavior, and the widespread tendency, after Hume, to doubt whether reflecting on human inclinations could yield moral insights, raised new problems about the justification of rights that are still matters of dispute. But the appeal to natural rights became more prominent than ever in the political discourse of the eighteenth century. The doctrine of rights shaped by the experience of previous centuries turned out to be still of value in addressing the problems of a new era. The proponents of the secularized rights theorists of the Enlightenment had forgotten the remoter origins of the doctrines they embraced; but their rhetoric about the rights of man becomes fully intelligible only when seen as the end product of a long process of historical evolution.

Id. at 333–34.

[116] Lloyd Weinreb, *Natural Law and Rights*, *in* NATURAL LAW THEORY, *supra* note 6, at 279.

[117] *See* FINNIS, *supra* note 9. For Finnis, "rights" are not raw facts of the world, but are politically, not philosophically, necessary to meet the natural law demands of individual dignity.

[118] The "new natural law theorists" include Germain Grisez, Joseph Boyle, William May, and Patrick Lee. *See* Robert George, *Natural Law and Human Nature*, *in* NATURAL LAW THEORY, *supra* note 6, at 31. George, who should also be included in this list, suggests that this reading—that the new natural law theorists reject metaphysics—is mistaken.

to bring about the common good. The United States Constitution both expands the power of federal judges through judicial review and restrains it through separation of powers and federalism. Within the American framework, then, traditional natural law certainly does not justify judicial activism,[119] and would seem to make obligatory an adherence to some type of textualism and originalism.[120] Both take as their first principles the necessity of honoring the rule of law as established by the legitimate political order.

B. Originalism and Textualism

Among originalists, some, like Dr. Raoul Berger, are clearly positivists and textualists;[121] others—maybe most—are not so easily classified. An originalist like Robert Bork can recognize the validity of natural law, but deny that it has any role in judicial decision-making; such originalism emphasizes textualism.[122] Other originalists incorporate what they identify as either a natural law or a natural rights philosophy into their theories of constitutional interpretation;[123] this

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[119] The U.S. Constitution, however, does not prevent states, through their own constitutions, from giving state judges broader powers.

[120] For a discussion of the meaning of "textualism" see SCALIA, *supra* note 104. As for "originalism," Justice Scalia has distinguished "original meaning" from "original intent." As he has written, "Government by unexpressed intent is . . . tyrannical. It is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us." *Id.* at 17. While exploring the context of the Constitution's text (including statements by the Framers about the meaning of constitutional terms) is critical to constitutional interpretation, this is not the same as relying on the "intent" of the Framers.

[121] *See, e.g.*, Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5 (1992).

[122] *See infra* text accompanying note 123.

[123] Professor Barnett has also discussed the confusion between "natural law" and "natural rights" terminology in Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 107–08 (1995). Barnett writes that "whereas natural law assesses the propriety or ethics of individual conduct, natural rights assesses the propriety or justice of restrictions imposed on individual conduct." *Id.* at 108. He notes, however, that he does

> not claim that everyone, or even most people, use all these terms in precisely this way. I claim only that natural law thinking is distinguishable from natural rights thinking and that this terminology best describes the difference between them. Moreover, running these two modes of thought together leads to serious confusion.

Id.

See also Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655 (1997). "In short," Barnett writes, "natural-law ethics instructs us on how to exercise the liberty that is defined and protected by natural rights." *Id.* 680. While this is certainly true, practically speaking, those that employ natural rights arguments are frequently saying more than this. That is, they are typically also contractualists of some sort.

type of originalism departs in varying degrees from textualism. Such departures may—except for the results they reach—be indistinguishable from those *judicial* philosophies which invoke natural law or natural rights in order to justify non–textualism.[124] That is, while natural law/rights originalists focus on property and economic rights as central to the Framers and/or Ratifiers of the Constitution,[125] natural law/rights non–originalists emphasize rights of privacy and autonomy.[126] Whether they use the term "natural law" or "natural rights," these theories, which attach themselves to the (substantive) Due Process Clause and/or the Ninth Amendment, depart from textualism.[127]

Justice Thomas is a traditional natural law thinker and a textualist. While prior to his confirmation Justice Thomas sometimes expressed his thinking in terms of natural rights, as well as natural law, his method of judicial interpretation—as he said at the hearings—does not read non–enumerated (non–textual) rights into the Constitution.[128] As a theory of

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[124] *See* Thomas Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 706 (1975). *See generally*, Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); *See also* BORK, *supra* note 7, at 209–10.

[125] *See, e.g.*, BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). *See also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). Both are critiqued by Robert Bork. *See* BORK, *supra* note 7, at 224–31.

[126] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Modern adherents to this class of natural rights philosophy are typically associated with John Rawls, whose works *A Theory of Justice* (1971) and *Political Liberalism* (1993) seem to support such a view. Even outside of the question of adjudication, Rawls's work has come under heavy criticism by Michael Sandel and others. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1982). The whole of Sandel's book is a critique of *A Theory of Justice*. Professor Sandel criticizes, what he calls, Rawls's "deontological liberalism" whose "core thesis can be stated as follows: society . . . is best arranged when it is governed by principles that do not *themselves* presuppose any conception of the good." *Id.* at 1. This is what Sandel means when he writes that for those following Rawls, the "right is prior to the good." *Id.* at x. Such a deontological theory is incoherent to a natural lawyer for whom both a concept of human nature and the good are critical and complementary. In addition, as Sandel and others have argued, such a concept of the good is implicit in Rawls, thereby defeating the version of liberalism offered in his theory of justice. "By putting the self beyond the reach of politics," Sandel writes, "it makes human agency an article of faith rather than an object of continuing attention and concern, a premise of politics rather than its precarious achievement." *Id.* at 183. The second edition of *Liberalism and the Limits of Justice* contains an additional section critiquing Rawls's *Political Liberalism*, published subsequent to the first edition.

[127] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11, at 769–84 (2d ed. 1988).

[128] In matters of interpretation, reasonable minds, including those of reasonable textualists, often disagree about particular texts. This is sometimes seized upon by non–textualists as proof that *all* interpretation is inherently *arbitrary*, that is, reading meaning

achieving the Good, traditional natural law does not *necessarily* lead to a theory of rights.[129] Natural rights theories typically differ from or do not address the concern of traditional natural law for metaphysics and epistemology. Justice Thomas has indicated an awareness that "there are different versions of natural law and natural rights, including some in sharp conflict with one another."[130] His own view, consistent with natural law, is that there is a Higher Law that "rests on an objective teaching, a science."[131] That is to say, separate from his religious beliefs, about which he has been quite open, his understanding of natural law rests primarily on reason. Justice Thomas connects law and ethics in a way that is characteristic of natural law, rather than natural rights,[132] recognizing the

> need to reexamine natural law is as current as last month's issue of *Time* on ethics, yet it is more venerable than St. Thomas Aquinas. It both transcends and underlies time and place, race and custom and until recently it has been an integral part of the American political tradition.[133]

Such views are likely to cause critics to charge and some admirers to hope that Justice Thomas's political theory of natural *rights*, as expressed before his confirmation, finds its way into his opinions. Both may think that the statements made by Justice Thomas at his hearings, which separated the role rights play in *political* theory from the role of the judiciary, represented a deviation from his natural law philosophy. On the contrary, however, the nominee's previous writings demonstrate that he has consistently held the opinion that "far from being a license for unlimited government and a roving judiciary . . . natural rights and higher law arguments are the best defense of liberty and of limited government."[134] Every judge, indeed every lawyer, should know that

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into a text rather than from a text—the difference between "finding" and "making" law. But if, instead, interpretation involves careful reasoning, history, and hermeneutics, then textualists can be expected to reach different conclusions sometimes in hard cases. Although interpretation may be, as Justice Thomas has stated, a "science," it is an imperfect "science." *See also* JUSTICE SCALIA, *supra* note 104, at 3.

Justice Thomas's majority opinion in *United States v. Bajakajian*, 524 U.S. 321 (1998), is a notable example. Justice Thomas reasons to a very different conclusion from the other members of the Court generally thought of as textualists. In *Bajakajian*, the Court for the first time strikes down a fine under the Eighth Amendment's prohibition against excessive fines.

[129] Positive rights may, of course, be thought to guarantee the moral demands of the natural law. Many, including the Catholic Church, use the term "natural rights" to refer to this idea rather than to any variant of contractualism. *See* Barnett, *supra* note 123.

[130] *Hearings*, *supra* note 1, at 12 (Pacific Research Institute).

[131] *Id.*

[132] *See* Hittinger, *supra* note 13, at 42.

[133] *Hearings*, *supra* note 1, at 128 (speech before the Heritage Foundation).

[134] Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

natural law and natural rights theories, in some sense, did inform the Framers' understanding of government. Consequently, it is reflected in the *positive* law of the Constitution. Without such knowledge, a judge will have great difficulty in ascertaining the meaning of the Constitution as both a frame of government and a guarantee of rights, whatever one's beliefs about the proper role of such knowledge. As Judge Thomas said at his hearings,

> I do not think that you can use natural law as a basis for constitutional adjudication, except to the extent that it is the background in our Declaration, it is a part of the history and tradition of our country, and it is certainly something that informed some of the early litigation, . . . it is certainly something that has formed our Constitution, but I don't think that it has an appropriate role directly in constitutional adjudication.[135]

Consistent with this statement, Justice Thomas's opinions do reflect that he separates his natural rights theory (as distinct from natural law thinking) from his judicial interpretation. The absence of natural rights rhetoric in his opinions is one indication. As noted, his statements, while Chairman of the Equal Employment Opportunity Commission, did incorporate frequent references to the Declaration of Independence.[136] Since joining the Supreme Court, however, Justice Thomas has referred to the Declaration of Independence in only one of his own opinions.[137] Likewise, references to natural rights or natural law as such do not appear in any meaningful way.[138] As elaborated below, however, traditional natural law thinking is evident in Justice Thomas's

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[135] *Hearings*, *supra* note 1, at 147. When pressed by Senator Ted Kennedy at the confirmation hearings, Thomas responded that,

> when the legislative branch makes a decision, when you write a statute, when [Congress] deliberates and concludes, whether I agreed or not in the policymaking function, when I operate as a judge or when I decide a case and look at it as a judge, I am no longer an advocate for that policy point of view. My job is to interpret your intent, not to second–guess your intent. It is not to second–guess what you think is the appropriate policy.

Id. at 16–17. Here, of course, Justice Thomas revealed a difference in *statutory* construction from that of Justice Scalia. As noted, Justice Scalia would look not to intent, but to the *original meaning of the text* of the statute. *See* SCALIA, *supra* note 104.

[136] *See* Thomas, *supra* note 33; Thomas, *supra* note 35.

[137] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). The use of the Declaration of Independence here follows Justice Thomas's use of the document prior to nomination. Then Chairman Thomas had remarked favorably towards the "Color–Blind Constitution" of the first Justice Harlan. This approach reads the "equality" of the Declaration as "equality before the law" and is consistent with a belief in a firm rule of law.

[138] Justice Thomas did quote a reference made to "natural justice" by Justice Story in a discussion of the Ex Post Facto clause of the Constitution.

reasoning, but it does not necessarily lead to predetermined results in the same way a natural rights philosophy might.[139]

C. Legal Realism

Since joining the Court, Justice Thomas has made it a point to reject the methods of legal realism. He disagrees fundamentally with the view of those legal realists (and their progeny in the courts and classrooms) who suggest that law and legal reasoning are necessarily arbitrary.[140] As Justice Thomas has said,

> Legal Realism taught us that the outcomes of cases were not "predetermined" by the law and that law was not the "science" envisioned by Dean Langdell of Harvard. Instead, the legal realists argued, each case provided a realm of discretion within which a judge could pursue his own policy preferences. Any judge could then craft, from any number of interchangeable forms of legal reasoning and doctrine, a post hoc justification that gave the appearance that the result had been dictated by the law.[141]

Justice Thomas has said, instead, that "[i]t is time for our law schools to change course, to return to the legal method and legal reasoning, and to refocus all of us on our mission in this profession—serving a master

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[139] *See supra* text accompanying notes 120 and 123.

[140] Legal Realism rejected not only the natural *rights* philosophy of the age (that of *Lochner*), but also "analytical positivism." The vice of both was said to be their formalism, that is reliance on formal logic. Deduction required, the Realists argued, substantive first principles. For positivists such as Austin, the reliance on formal logic had provided a theory that explained and restrained the judicial function in a system–of legislative supremacy. As Professor, Judge, and later Supreme Court Justice, Holmes recognized that analytical positivism could not explain the American constitutional system. While Justice Holmes' positivism emphasized restraint, the legacy of Legal Realism is a lack of such restraint. *See generally* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973). The Legal Realist, aligned with progressives in politics and pragmatists in philosophy, stressed: the inadequacies of the "legal science" of Harvard Law Dean Christopher Columbus Langdell and the Formalists, the creative, instrumental role of law, the evolutionary nature of law, the importance of the social sciences in providing data for legal reform, and the divorce of legal and moral concepts. This led many of them to conclude that if legal decisions were determined by non–legal motives, that judges should rely more explicitly on concepts of Justice. While "[t]o harm the cause of democratic government was the last thing the realists wished to do. . . . [their] motives could not explain away the intellectual problems they generated." *Id.* at 94. The more radical among the realists (Karl N. Llewellyn and Jerome Frank) resembled those currently associated with the Critical Legal Studies movement. These realists stressed not merely the underdetermination of legal rules, but their fundamental indeterminancy. Even the more moderate of those associated with Legal Realism, however, by stressing conscious and unconscious non–legal motives in decision–making, seemed to free judges from the restraint that Justice Holmes had championed. The result was, as I have stated it, a shift in presumption from reason to will.

[141] Hon. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 3 (1996).

greater than ourselves, the Law."[142] "Our ultimate duty," Thomas has said, "is to the law as an institution."[143]

Given his references to Dean Langdell and the view of law as a science, Thomas's statements rejecting legal realism—standing alone—might be thought of as a call to return simply to a more rule-oriented positivism. Justice Thomas's "vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions."[144] In terms of traditional natural law, this means "right reason" or *recta ratio*. Right reason is the act of reasoning consistent with the demands of natural law. It is more a matter of the right reasoning process, the delicate harmonizing of basic human goods in the specific circumstances of choosing, rather than right answers waiting to be found (as is typical of philosophies of natural rights). As natural lawyer and theorist John Finnis writes, a "natural law theory in the classical tradition makes no pretense that natural reason can determine the one right answer to those countless questions which arise for the judge who finds the sources unclear."[145] In Justice Thomas's view, "[J]ust because it is tough to discern a principle does not mean that we should seek no principles at all."[146]

Justice Thomas's views on natural law reasoning and judging echo *Federalist 78*: "[i]f judges and judicial decisions are nothing but the expressions of the preferences and agendas of different groups in society,

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[142] Hon. Clarence Thomas, *Address at the Cordell Hull Speakers Forum, Cumberland School of Law*, 25 CUMB. L. REV. 611, 612 (1995).

[143] *Id.* at 616.

[144] Thomas, *supra* note 141, at 5. Thomas writes that while

> reasonable minds can certainly differ . . . that does not mean that there is no right or correct answer; that there are no clear, eternal principles recognized and put into motion by our founding documents. This was the mistake of the legal realists, and it continues to be the mistake of the critical theorists: law is something more than merely the preferences of the power elites writ large. The law is a distinct, independent discipline, with certain principles and modes of analysis that yield what we can discern to be correct and incorrect answers to certain problems.

Id. at 6.

[145] John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 13 (1990). *See also* JOHN FINNIS, FUNDAMENTALS OF ETHICS 93–94 (1983). Another well-known proponent of natural law writes that right reasoning does not give easy answers, "[O]ne's choice . . . though rationally grounded, is in a significant sense rationally underdetermined. Doing X or not doing X in order to do Y are both fully reasonable, are both fully compatible with *recta ratio*." *Natural Law and Positive Law*, *in* THE AUTONOMY OF LAW, *supra* note 8, at 324. A. MacIntyre, too, makes clear that "the judgment of right reason . . . will always refer implicitly or explicitly to that *telos* the achievement of which is the genuine good to be achieved for that particular agent in his or her particular circumstances." ALASDAR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION 62 (1990).

[146] Thomas, *supra* note 141, at 6.

then the law is nothing more than Force and Will, rather than reason and judgment."[147] As a consequence of contemporary moral and legal skepticism, Justice Thomas believes that "[w]e have come to see law as a means and not as an end."[148] Indeed, he writes that, "Central to this vision of law and democracy is a rule of law as a set of clear rules that are neutral and applicable to all."[149] This is not an indefensible "formalism," however.[150] Thomas agrees that "many cases will have some play in the joints . . . . But the area for discretion is not so broad or as difficult to avoid as the legal realists believed."[151]

D. Natural Law Reasoning And Judicial Restraint

Justice Thomas's opinions demonstrate that he takes seriously the view that judges should "say" what the law is, not make it. That is, what distinguishes him from some of his brethren is not the results he reaches (for they often agree), but his premises and reasoning. His opinions, for example those involving retroactivity, reflect an understanding of the role of the judge and the principle of *stare decisis* based on natural law, rather than positivistic, principles.[152] In a case that found the retroactive application of a particular statute violated the Takings Clause,[153] an opinion in which he joined, *Eastern Enterprises v. Apfel*,[154] Justice Thomas also wrote that he thought the understanding of the Ex Post

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[147] *Id.* at 3–4.

[148] Thomas, *supra* note 142, at 615.

[149] *Id.* at 616.

[150] The Formalism of the *Lochner* era presented a theory of natural rights, which disguised a specific vision of the Good. Regardless of its merits as political theory, it was justly criticized because it infused specific *substantive* requirements into the text of the Constitution. Quite apart from this kind of formalism, there is legitimate formalism. As Justice Scalia has said, "Long live formalism. It is what makes a government of laws and not of men." SCALIA, *supra* note 104, at 25.

[151] Thomas, *supra* note 141, at 5.

[152] In *Harper v. Virginia Dep't. of Taxation*, 509 U.S. 86 (1993), Justice Thomas's majority opinion held that Supreme Court decisions apply retroactively in civil cases. Extending to civil cases a standard previously applied only to criminal cases, Justice Thomas wrote that, "[w]hen this Court applies a rule of federal law to the parties before it, that rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. His opinion reaffirmed the view that "prospective decisionmaking is incompatible with the judicial role." *Id.* at 96. That view was further explained by Justice Scalia in his concurrence, arguing that "[p]rospective decisionmaking is the handmaid of judicial activism and the born enemy of stare decisis." *See also* Hughes Aircraft Co. v. United States, 520 U.S. 939 (1997) (holding, by a unanimous Court, that the presumption against the non-retroactivity of statutes applied to the particular federal statute).

[153] The Fifth Amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[154] 524 U.S. 498 (1998).

Facto Clause as applying only to criminal cases should be re–examined. He based his willingness to overturn a 200 year old precedent, *Calder v. Bull*,[155] on a reference to Justice Story's treatise on the Constitution, specifically, quoting a phrase about "natural justice."[156] He wrote

> separately to emphasize that the Ex Post Facto Clause of the Constitution, Art. I, §9, cl. 3, even more clearly reflects the principle that "[r]etrospective laws are, indeed, generally unjust." 2 J. Story, Commentaries on the Constitution § 1398, p. 272 (5th ed. 1981). Since *Calder v. Bull*, [citation omitted], however, this Court has considered the Ex Post Facto Clause to apply only in the criminal context. I have never been convinced of the soundness of this limitation, which in *Calder* was principally justified because a contrary interpretation would render the Takings Clause unnecessary. *See id.*, 3 U.S. at 394 (opinion of Chase, J.). In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause.[157]

As that concurring opinion illustrates, Justice Thomas has demonstrated an unusual willingness to re–examine long–established precedent. In addition to *Apfel*, *United States v. Lopez*[158] is notable for his suggestion in a concurring opinion that the Court "[a]t an appropriate juncture, . . . must modify our Commerce Clause jurisprudence."[159] Some will find a contradiction between this willingness to ignore *stare decisis* and Justice Thomas's pledge of judicial restraint. Legal realists and other non–textualists would likely say that he is actually doing what he denies, and they admit to, namely permitting personal philosophy to dictate judicial decisions. A commitment to bring the Court's jurisprudence into line with the original meaning of the Constitution's text, however, differs from a jurisprudence which either ignores text or gives text a meaning that its words will not bear. The latter implements the will of the judge; the former, the will of the people as embodied in the text of the

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[155] 3 U.S. 386 (1798).

[156] In his time on the Supreme Court, Justice Thomas has cited Justice Story only a handful of times: Justice Thomas attacked the nationalist perspective of Justice Story's treatise on the Constitution and was very critical of Story's fundamental position. *See* U.S. Term Limits, Inc., v. Thorton, 514 U.S. 779, 845, 856 (1995).

[157] *Apfel*, 524 U.S. at 538–39 (Thomas, J., concurring).

[158] 514 U.S. 549 (1995).

[159] *Id.* at 602 (Thomas, J. concurring). Because the substance of the change Justice Thomas articulated would overturn decades of precedent, this was no small suggestion. His opinion was that "[i]f anything, the 'wrong turn' was the Court's dramatic departure in the 1930's from a century and a half of precedent." *Id.* at 599 (Thomas, J., concuring). As I have explained elsewhere, disagreeing with the Court's post 1937 Commerce Clause jurisprudence does not need to mean endorsing the previous jurisprudence which it overturned.

Constitution, which is the rationale for judicial review as stated in *Marbury*.

If it were true that Justice Thomas was simply implementing his own agenda, then he should be more actively promoting natural rights. At least one writer has urged him to do just that.[160] Justice Thomas's opinions indicate his commitment to following his announced opposition to a *judicial* application of Higher Law philosophy, (other than "natural law" provisions that have become part of the constitutional text). His judicial philosophy rests on the belief that "[o]ne does not strengthen self–government and the Rule of Law by having the non–democratic branch of government make policy. . . . [T]he court has its dignity, and its power, by virtue of being above and beyond such clamoring."[161] His clearest explanation (and it deserves quotation at length) of his position is as follows:

> I think that in order to maintain our impartiality, judges must also adopt methodologies and principles that encourage judicial restraint. For example, I have said in my opinions that when interpreting the Constitution, judges should seek the original understanding of the provision's text, if that text's meaning is not already apparent. This approach works in several ways to reduce judicial discretion and to maintain judicial impartiality. First, it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text. Second, it places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the non–elected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. Third, it recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change. Otherwise we would have adopted the British approach of an unwritten, evolving constitution. Aside from an amendment adopted pursuant to the procedures set forth in Article V, the Constitution's meaning cannot be updated, or changed, or altered by the Supreme Court, the Congress, or the President.[162]

As between a decision that does not adhere to the Constitution and the Constitution itself, for Justice Thomas, it is clear which controls. That obviously does not mean voting to reverse every or even many decisions with which he may disagree. But for Justice Thomas, when judges go very far astray from the Constitution, their decisions should be

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[160] *See* Kennedy, *supra* note 3.

[161] *Hearings*, *supra* note 1, at 166–67.

[162] Thomas, *supra* note 141, at 6–7.

overturned regardless of *stare decisis*. That follows from his view that judges should get the answer right.

V. CONCLUSION

In matters of constitutional interpretation, positivists and traditional natural lawyers, in practice, often will not differ noticeably as long as both are willing to respect the text of the Constitution as fairly interpreted according to its actual, rather than imagined, language. Although traditional natural law theory justifies disobedience of *unjust* laws, traditional natural lawyers should not have to face such dilemmas if American constitutional law is actually followed.[163] As the authors of *The Federalist* explained, the Constitution was structured in a way that permits individuals to pursue their own self interests through processes which tend to produce justice. The document supplies the mechanisms to pursue democratic choice as well as protections against simple majoritarianism. Moreover, traditional natural law theory actually provides a greater reason to respect positive law than does positivism. Whereas positivism binds only by force, natural law binds also in conscience. That is to say, classic positivism says that one is obligated to obey the law because failure to do so will result in punishment. According to positivism, if one can avoid the sanction of the sovereign, one is not obligated to obey the law. While recognizing the need for punishment to enforce the law, natural law, unlike classic positivism, does not tie its understanding of law to punishment. Rather, by viewing law in terms of reason, natural law concludes that it is unreasonable to violate the law, regardless of the possibility of punishment, unless the law itself violates natural law. That, of course, does not eliminate the role of punishment.[164] Simply stated, natural law reasoning about the Good of the person and society emphasizes one's *moral* obligations, including the obligation to obey the Constitution and laws of a "basically

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[163] When constitutional protections are not in fact followed, other legal remedies generally remain available. For example, the common law has traditionally recognized natural law notions about limits on the use of state power by recognizing a right to resist unlawful arrest as a legitimate defense in appropriate circumstances. Although some jurisdictions in the United States have rejected this common law right when one knows the arresting agent to be a police officer, they have done so on the basis that our legal system affords one wrongly arrested the possibility of redress and remedy and that the indignity and inconvenience of arrest are minor compared to the potential consequences of forceful resistance. *See* WAYNE R. LAFAVE & AUSTIN SCOTT, JR., CRIMINAL LAW 462 (2d ed. 1986).

[164] Punishment is, of course, a legitimate "expression of society's resolve that certain behavior will not be tolerated because it either hurts others, is counterproductive, or is offensive to the sensibilities of our culture." Thomas, *supra* note 92, at 272. In the same speech, Justice Thomas quoted Aquinas as saying, "it is not always through the perfect goodness of virtue that one obeys the law, but sometimes it is through fear of punishment." *Id.* at 271 (quoting 2 THOMAS AQUINAS, SUMMA THEOLOGICA Q. 92, art. 1, Reply Obj. 2 (Fathers of the English Dominican Republic trans., 1747)).

just" legal system.[165] For these reasons, traditional natural lawyers like Justice Thomas, should be originalists and textualists.

VI. POST SCRIPT

Before publication of this article, the United States Supreme Court decided *Saenz v. Roe*.[166] *Saenz* held that a California statute imposing durational residency requirements limiting Social Welfare benefits through the recipient's first year of residency violated the Fourteenth Amendment right to travel and also that the federal statute authorizing states to impose such durational requirements was equally unconstitutional. The Court based its decision on the Privileges or Immunities Clause of the Fourteenth Amendment, thereby reinvigorating a provision largely dormant since *The Slaughter House Cases*.[167] Justice Thomas's dissent, welcoming this reinvigoration, protested strongly against its *extension* to rights not traditionally protected under the common law as fundamental. At the same time, Justice Thomas was hopeful that the Court would return to a principled "privileges or immunities" jurisprudence—and who can blame him—provided the privileges or immunities were limited to historically identifiable (common law) fundamental rights. "Because I believe," he wrote,

> that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the

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165 That is, in what Professor George referred to as "basically just legal systems, i.e. systems which do not deserve to be subverted and which judges would do wrong to subvert." George, *supra* note 6, at 331. By contrast to Nazi Germany, for example. In making obedience a matter of *moral* obligation, a Thomistic–Aristotelean view does not deny the need for sanctions to enforce the law, but views such sanction as the enforcer of, not the essence of, what positive and natural law is really about. The *legal* order's ultimate concern, of course, is *moral* justice. *See* John Finnis, *The Truth in Legal Positivism*, *in* THE AUTONOMY OF LAW 199 (Robert George ed., 1996).

166 119 S. Ct. 1518 (1999).

167 83 U.S. (16 Wall.) 36 (1872). Whereas Article IV, Section 2, Clause 1 of the Constitution entitles Citizens of each State to "Privileges and Immunities of Citizens of the several States," the Fourteenth Amendment, Section 1 prohibits the abridgement of the "privileges or immunities of citizens of the United States." *Compare* U.S. CONST. art. IV, *with* U.S. CONST. amend. XIV.

> "predilections of those who happen at the time to be Members of this Court."[168]

Against the decision here, he writes that

> at the time the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it "discriminates" against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefit appears contrary to the original understanding and is dubious at best.[169]

This should safely debunk any idea that Justice Thomas's understanding of natural law produces judicial *activism.*

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[168] *Saenz*, 119 S. Ct. at 1538 (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

[169] *Id.*