NATURAL-LAW ORIGINALISM—OR WHY JUSTICE SCALIA (ALMOST) GETS IT RIGHT

DOUGLAS W. KMIEC*

The Articles in this Symposium elucidate the natural-law philosophical tradition of the American founding and seek to differentiate natural law from natural right. Necessarily, the Symposium invites a re-examination of the relationship between natural law and constitutional interpretation. This is a subject much in mind because of Justice Antonin Scalia's eloquent, but incomplete, plea that federal judges be guided by constitutional text and structure and give virtually complete deference to legislated outcome not contradicted by explicit constitutional provision.[1] Justice Scalia's demonstrated legal erudition merits close attention, but, respectfully, it also warrants supplementation if it suggests that the American Constitution's text and structure can be ascertained outside its natural-law tradition.[2]

---

* Professor of Constitutional Law, University of Notre Dame; Straus Distinguished Professor, Pepperdine University.

1. ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

2. Recently, Professor Michael McConnell nicely summarized the importance of reference to tradition and why that reference is not noninterpretivism. McConnell comments:

> the privileges and immunities of citizens of the United States were conceived against a common law backdrop, gradually evolving over time as circumstances and public mores change. . . . [It would be narrow original intentionalism] to ask whether [a claimed] putative right [was] recognized in 1866. But [it] is wrong to suggest that, having rejected that alternative, the only remaining approach is for today's judge to decide the moral question independently. Nothing . . . refutes the plausible alternative that the judge should carry out the Framers' understanding, and examine the putative right in light of longstanding practice.

Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution*, 65 FORDHAM L. REV. 1269, 1286 (1997).

It is natural law and the natural rights derived therefrom[3] that affirm and secure the Constitution's original meaning. The recognition of what I shall call here "natural-law originalism," however, is at odds with some of Justice Scalia's broader claims accepting democratic result without qualification. This peculiarity in the Justice's otherwise impeccable position deserves to be addressed before it leads to more serious error.

Justice Scalia is a witty man, and he is fond of saying that you can't beat somebody with nobody. The somebody in that formulation is non-interpretivism, and Justice Scalia has properly articulated an outline of originalism that ensures that more than nobody answers judicially active claims. As the Justice knows, noninterpretive, activist assertions are frequently implanted in classes on constitutional law and bloom into briefs filed with the Court.[4] The Justice is surely right to caution us against this

3. Natural right has been frequently traced to natural law. *See generally* THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); RUSSELL KIRK, THE ROOTS OF THE AMERICAN ORDER (1991). But some of the authors in this Symposium dispute the precise derivation of natural right from natural law. Professor Zuckert, for example, writes skeptically of the consensus tradition that "'attempted to interpret the thought of the Founders . . . in the light of a supposedly uninterrupted, steadily evolving Western tradition.' This 'tradition' traced back to Plato and Aristotle, gathered up Christianity (Thomas Aquinas, Richard Hooker), then early modern philosophy (Locke, Montesquieu) on its way to America." MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC 6 (1996). Professor Zuckert doubts whether the consensus position still holds, but he does not want to be understood as "reject[ing] other options." *Id.* at 7. These lines of difference are fine academic points and should be thoroughly addressed in both history and philosophy, and they can have some relationship, in terms of originalist accuracy, to the work of the Court. But, as with other aspects of originalism, it is more important to the present discussion that there be agreement on the necessity of originalist inquiry, including natural-law originalism, than complete scholarly agreement on the result of that inquiry.

4. Justice Scalia, a former law professor himself, writes:

> If you go into a constitutional law class, or study a constitutional law casebook, or read a brief filed in a constitutional law case, you will rarely find the discussion addressed to the text of the constitutional provision that is at issue, or to the question of what was the originally understood or even originally intended meaning of that text. The starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.

"evolutionary constitutional jurisprudence [where] the Constitution means whatever it ought to mean [in the mind of judges]."[5] But we can hope that he is mistaken in predicting that there are "hard times ahead [for] individual rights disfavored by the majority."[6] Were that true, the natural-law originalism that is embodied, not in some abstract democracy, but in the very tangible one that is our own—and that is shaped uniquely by *both* natural-law premises *and* a written, federalist constitutional system of textual rights and separated (and checked) powers—would be forfeited. In the vernacular of the Justice, you can't beat somebody with just anybody.

Before turning specifically to the relationship between the Constitution and the natural law, this Article introduces the individual Articles that follow, which are addressed to a more fundamental understanding of natural law and natural right within the larger study of legal philosophy. It is evident, however, that in addressing this topic, the writers included here—along with all philosophers—have not fully agreed. Philosophy of most any type asks what we can know about ourselves and our world, and this, in turn, raises the age-old problem of whether anything can be known by reason at all. Skeptics, such as Montaigne, denied the accessibility of such knowledge by unaided reason. "[T]here cannot be first principles for men," Montaigne wrote, "unless the Divinity has revealed them; all the rest—beginning, middle, and end—is nothing but dreams and smoke . . . every human presupposition and every enunciation has as much authority as another. . . . The impression of certainty is a certain token of folly and extreme uncertainty."[7] In modern times, this may be the credo of much of the academy and the entertainment industry, but none of the writers here assume this extreme

SCALIA, *supra* note 1, at 39. Noting this unfortunate practice, several of us have undertaken to assemble materials more in keeping with original meaning. *See, e.g.*, DOUGLAS W. KMIEC & STEPHEN B. PRESSER, AN INTRODUCTION TO THE HISTORY AND NATURE OF AMERICAN CONSTITUTIONAL LAW (forthcoming Anderson 1998).

5. SCALIA, *supra* note 1, at 149.

6. *Id.*

7. MICHEL DE MONTAIGNE, *Apology for Raymond Sebond*, *in* THE ESSAYS (1580), *reprinted in* 23 GREAT BOOKS OF THE WESTERN WORLD 248, 301 (Mortimer J. Adler ed. & Donald M. Frame trans., Encyclopedia Brittanica 2d ed. 1990).

position, and natural-law originalism does not either. Jefferson, after all, premised the independence of the American republic upon "truths" not only known, but held to be "self-evident."[8]

But is such knowledge merely assertion on Jefferson's part? No. Long before Jefferson, in the *Metaphysics*, Aristotle confronted the extreme skepticism of those who would assert that all propositions are either true, or the converse, that all are false.[9] Again, this position claims that nothing can be truly known, a proposition that violates Jefferson's practical assertion of self-evidence and, more subtly, the philosophical principle of noncontradiction that something cannot both be and not be at the same time.[10] Any skeptic who maintains otherwise would necessarily contradict himself. As Mortimer Adler writes, "if all propositions are true, then the proposition 'Some propositions are false' is also true; if all propositions are false, the proposition 'All propositions are false' is also false."[11]

Now the principle of noncontradiction may seem far removed from the papers that follow or from constitutional interpretation, but it is not. Although Montaigne declared there were no "first principles" knowable to reason alone to guide us, the papers in this Symposium aim to demonstrate logically that such first principles exist. Indeed, the first principle of human natural right flows from the self-evident premise that we exist—from the fact of

---

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Justice Scalia, I would speculate, acknowledges the knowability of truth as well. In his personal life, he has declared a "love" for natural law, which presumably means that as the Justice directs his family and his own life, he does not indulge the proposition of an unknowable human nature. I suspect that more than once, as a father, he has declared: "Listen, Dad knows [and if you would only think about it, you would too] what is best for you, and skipping school or getting insufficient rest or eating an improper diet or using alcohol, drugs, tobacco, etc., does not advance your well-being [that is, your human nature]." I doubt sincerely if the Justice would graciously accept the majority will interfering with his judgment in these familial and personal matters, but, as there is nothing expressly in the Bill of Rights to impede such government interference, what's to stop it?

9. Thomas Aquinas wrote: "[T]he first indemonstrable principle is that the same thing cannot be affirmed and denied at the same time, which is based on the notion of being and not-being; and on this principle all others are based, as is stated in [the Metaphysics]." THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 94, art. 2 (Fathers of the English Dominican Province trans., Benziger Brothers 1947) (citing ARISTOTLE, METAPHYSICS IV.3, which is reprinted in 7 GREAT BOOKS, *supra* note 7, at 524-25 (W.D. Ross trans.)).

10. *See* CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 116 (1993).

11. I THE SYNTOPICON, AN INDEX TO THE GREAT IDEAS 686 (Mortimer J. Adler ed., 1991).

being, itself. In Jefferson's terminology, "[we] are endowed by [our] Creator with certain unalienable rights."[12] Furthermore, the securing of these rights is the entire point of the practical workings of government specified in the Constitution. As Professor Michael Zuckert has written in his superb new book explicating the natural-rights foundation of the American republic, "the truths about the institution of government . . . follow from the truths about prepolitical society as the truths about the postpolitical situation follow from the truths about the institution of government."[13] As Zuckert explains, the pre-political recognition of the self-evident truth that all human beings are "created equal," endowed with unalienable rights, leads directly to the subsidiary truth that no human being has a natural right to govern another. Thus, just power comes from the consent of the governed, and governments are instituted to secure the pre-political, unalienable rights. Governments that fail this purpose may be, post-politically, "alter[ed] or abolish[ed]."[14]

With this as background, the thrust of Professor Barnett's instructional piece is that the natural law is a system of ethics, guiding us in personal decision. This ethical system should not, he cautions, be "run together" with the concept of natural right. Natural-law ethics, writes Professor Barnett, "instructs us on how to exercise" our liberty. By contrast, natural rights define the scope of liberty or "moral space" in which individuals are "free from the interference of other persons."[15] Professor Barnett's distinction between natural law and right should partially comfort Justice Scalia because it suggests that as essential as natural-law ethics is to the personal pursuit of happiness, and as essential as our Founders knew it to be, it is not generally to be "discovered" and imposed upon others by unelected judges. But less reassuring

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

13. MICHAEL P. ZUCKERT, THE NATURAL RIGHTS REPUBLIC 48 (1996).

14. Wrote Thomas Jefferson in the Declaration of Independence: "[W]henever 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." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. Randy Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 669 (1997).

to the Scalian democratic-trump position is that at least some normative positions are not to be made or imposed by legislatures, either. Arguably, when legislature invades natural right, it should be checked. In Professor Barnett's words, "the obligation of law makers to respect natural rights rests, at least in part, on the 'consent of the governors' to respect these rights."[16]

Defining natural right as the necessary allowance of "moral space," as Professor Barnett does, is yet another example of how natural-law originalism bolsters intended constitutional structure. Professor Mary Ann Glendon has observed that "[u]p to about thirty years ago, the typical constitutional law course was heavy on federalism, separation of powers, and the commerce clause, but light on the Bill of Rights. . . . But in the 1960s the emphasis was simply shifted to individual rights."[17] The effect of this shift has been to overlook how enumerated limits and allocations of government power protect rights, often more securely than specific Bill of Rights provisions. Having to fit one's exercise of speech or religion, for example, into the juridical cubicles of Court analysis is less protective of liberty than if the federal government is understood to have no constitutional warrant to talk about some subjects at all.

So what, then, is the content of our natural rights? Jefferson supplied a *nonexhaustive* list ("among these rights are"): "life, liberty and the pursuit of happiness."[18] Professor Barnett instructs that all claims of right are conclusions and, particularly in the sense of natural-law originalism, that they are conclusions drawn from what he lucidly describes as the "given-if-then" methodology of natural law. The "given" in that formulation is "the nature of human beings and the world in which they live."[19] With that predicate, H.L.A. Hart specified the minimum content of such rights as that which advances the "minimum purpose of survival which men have in associating with each other."[20] Barnett

16. Barnett, *supra* note 15, at 677 (emphasis added).
17. Mary Ann Glendon, *Comment*, *in* SCALIA, *supra* note 1, at 11.
18. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
19. Barnett, *supra* note 15, at 661.
20. H.L.A. HART, THE CONCEPT OF LAW 189 (1961).

indicates that he would add "the pursuit of happiness, peace, and prosperity."[21]

At this point, Justice Scalia is surely shifting a bit uneasily in his chair. Words referencing minimum conditions for survival or peace and prosperity, one can anticipate him saying, are simply too indefinite to serve the very purpose claimed for them as natural rights—namely, protecting an individual's scope of liberty or moral space or serving as the measure by which positive law can be said to be binding not just by force, but also in conscience.[22] In any event, Justice Scalia would likely say, you can't expect me, a humble, worldly (but, of course, unelected) judge to displace majority will with something this thin. Even Professor Barnett hedges a bit, writing that he does not assert "that we can always *know* what a particular person's background rights are independent of the processes that produce legal rights."[23] But, as Professor Barnett knows, working backwards from legal rights or positive law to discover natural rights—the measure of positive law—presents the risk of travelling in a circle. At a minimum, such a path will be assailed as not natural-law principle, but culturally-dependent preference.

Richard Tuck argues that conceptions of natural right, being premised upon an objective, universal characterization of human nature, may be less, not more protective, of tangible civil liberties than theories premised on utility.[24] Tuck seeks to defend utilitarian or consequential analysis from the standard claims that essential human rights suffer because utilitarianism measures utility and that, when the cost of rights outweighs their benefits, the rights are toast. Professor Tuck insists, nevertheless, that utilitarianism better secures, say, the right of trial by jury, because natural-right proponents such as Barnett would abolish the jury right where it consistently frees terrorists and leads to the killing of innocents. Utilitarian theory, says Tuck, would put more things in the balance in considering whether to abolish trial by jury, such

21. Barnett, *supra* note 15, at 671.

22. *See id.* at 674.

23. *Id.* at 678.

24. *See* Richard Tuck, *The Dangers of Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 683, 684 (1997).

as "a feeling of popular control over the judicial system."[25] Because the harms caused by truncated procedures cannot be easily expressed in the "language of rights," posits Tuck, the jury right is safer in the hands of utilitarians.

Professor Tuck's philosophizing carries the discussion pretty far—thankfully—from the American situation.[26] Such speculative jurisprudence is not likely of ready interest to Justice Scalia, who has modestly declared his orientation to be that of "a worldly judge . . . just do[ing] what the Constitution tells me to do."[27] Even the more philosophically attuned Professor Barnett would probably concede that nothing inherent in the need to preserve human nature mandates jury trials. Rather, this is the stuff of constitutions and bills of rights. Neither natural law nor natural right is a detailed code or elaborated set of required conventions. Perking up, Justice Scalia would direct deep thinkers such as Professor Tuck to see the Sixth Amendment and be done with it.

Begging the Justice's patience only for a moment, one may observe that, on its own terms, Tuck's description of natural right is open to challenge because it too easily imports considerations of utility into natural right methodology. Professor Tuck contends, wrongly, that both natural right proponents and utilitarians would somehow "weigh" the deaths of terrorists against the deaths of innocents. In truth, Jefferson's unalienable right to life puts this "weighing" exercise off-limits.[28]

---

25. *Id.* at 691.

26. Professor Tuck reveals tragically that it is not far from his own country, where "after a few years of the Troubles in Northern Ireland [the British Government decided] to suspend trial by jury in terrorism cases." *Id.*

27. Robert A. Connor, *Justice Scalia and Yogi Berra: A Matter of Interpretation*, 41 AM. J. JURIS. 165, 167 (1996) (citing Antonin Scalia, Lecture at the Pontifical University Gregoriana (May 2, 1996)).

28. To say that such balancing of life interests is out of bounds under the American Constitution is not to make the noninterpretivist argument that, despite the text of the Fifth Amendment, capital punishment is illicit as an unconstitutionally "cruel" form of punishment. As Justice Scalia remarks, "[n]o textualist-originalist interpretation that passes the laugh test could, for example, extract from the United States Constitution the prohibition of capital punishment that three nontextualist justices have discovered, or the prohibition of abortion laws that a majority of the Court has found." SCALIA, *supra* note 1, at 132. This is natural-law originalism. There is no question but that capital punishment coincides with original text and meaning, even within the natural-law tradition. For example, Thomas Aquinas wrote: "If a man be dangerous and infectious to the community, . . . it is praiseworthy and advantageous that he be killed in order to safeguard

the common good." AQUINAS, *supra* note 9, at II-III, q. 64, art. 2. In light of the sufficiency of modern forms of incarceration, Catholic social teaching now views capital punishment unfavorably. Pope John Paul II writes: punishment "ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvement in the organization of the penal system, such cases are rare, if not practically non-existent." JOHN PAUL II, THE GOSPEL OF LIFE [EVANGELIUM VITAE] para. 56 (1995). Of course, that a particular faith tradition reaches this conclusion is not germane to interpretation of existing constitutional text. Those mindful of this position from their faith would have the burden of convincing their fellow citizens that capital punishment should be proscribed, and, in culminating success of that persuasive effort, amending the text of the Constitution accordingly.

As Justice Scalia observes, however, the present text of the Constitution does not address abortion. Certainly, any natural-law inference from existing text would resolve the issue exactly opposite from the present position of the Supreme Court. The text of the Constitution either: (1) denies the federal government authority to reach the abortion issue altogether; or (2) reasoning from the natural-law meaning of person, precludes any government from authorizing abortion. In speaking to this issue outside of the context of a specific case adjudication, Justice Scalia overlooks the second possibility of natural-law inference, stating that "if [the positive] law is abortion, 'the state should permit abortion, in a democracy." Connor, *supra* note 27, at 165 (quoting Antonin Scalia, Lecture at the Pontifical University Gregoriana (May 2, 1996)). Robert Connor argues that Justice Scalia's lecture commentary ignores that the liberty about which the American Constitution speaks is a freedom that is attached to truth, including the truth of the human person, not just as part of a majority, but as gift, with obligation to preserve oneself and serve others. *See* Connor, *supra* note 27, at 187-88. Connor's fuller understanding of person originates in the natural-law tradition and from the uncontradicted modern scientific understanding of personhood. Elsewhere, Justice Scalia is comfortable applying original meaning to new, or better-known, fact, as in the handling of new technology and First Amendment speech claims. The Justice comments: "In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires." SCALIA, *supra* note 1, at 45. Why does a natural-law trajectory of personhood not require the same? Such development would be consistent with natural-law originalism. For example, it is reflective of the wisdom of James Wilson, perhaps the Founder most learned in natural law. Wilson wrote:

> On these subjects, one who has had the advantage of a common education in a christian country, knows more, and with more certainty, than was known by the wisest of the ancient philosophers.
>
> ....
>
> The *law of nature is universal.* For it is true, not only that all men are equally subject to the command of their Maker; but it is true also, that the law of nature, having its foundation in the constitution and state of man, has an essential fitness for all mankind, and binds them without distinction.
>
> ....
>
> ... [W]e may infer that the law of nature, though immutable in its principles, will be progressive in its *operations* and *effects*.... In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.

1 JAMES WILSON, *Of the Law of Nature, in* THE WORKS OF JAMES WILSON 126, 144-47 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (emphasis added).

It may be, however, that Professor Tuck or others are disinclined to take Jefferson's claim of the unalienability of life at his word. Tuck writes that "[e]ven the definition of man, the most fundamental proposition of any natural-law system, was for Hobbes [a rights theorist of sorts, but a grumpy and distrustful one] a matter of debate to be settled by the local sovereign."[29] The only item not up for debate for Hobbes was self-preservation, but Tuck argues that Hobbes meant only undisputed cases of self-preservation; disputed ones, too, had to be referred to the sovereign. Justice Scalia would certainly be wide awake now, and he is likely to be saying: see, I told you so, not very much about natural rights can be known apart from democratically chosen outcomes. Tuck would likely second that notion with arguments such as the one above, suggesting that natural-right theory does not meaningfully secure basic civil liberties better than alternative philosophical systems.

But, of course, the American democracy is not anchored in just any philosophical system; it is rooted in the natural law, as the asserted "self-evident" natural rights reveal. In his very readable effort in this Symposium to locate the meaning of natural right, Professor Michael Zuckert contends that the American tradition Jefferson knew was most shaped by John Locke and that Locke was skeptical of how much of the human personality could be described as universal. Argues Zuckert:

> Locke drew... 'relativist' conclusions—there is no natural consensus about moral standards; what one people calls good and sacred, another violates and considers that good and sacred. In some places, Locke liked to recount, the old are revered; in others they are killed; in some places, [it is] command[ed] that children be cherished, in others that they be eaten.[30]

Locke refused to assume that the natural law was immanent or inherent in the design of man, a supposition of the great natural-law philosopher Thomas Aquinas, and he further denied that the

---

29. Tuck, *supra* note 24, at 688.

30. Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL'Y 695, 720 (1997) (referring to JOHN LOCKE, QUESTIONS CONCERNING THE LAWS OF NATURE (Robert Horwitz et al. trans., 1990)).

natural law could be known by any natural desire of a person's reason to seek the good. "Locke observed that conscience is merely the voice within us of social norms we learn in the nursery."[31]

As Professor Zuckert sees it, Locke's position was thus a substantial break from Aquinas and Aristotle before him. Aquinas wrote that "all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance."[32] Man's basic inclinations, said Aquinas, are to seek the highest good or eternal happiness with God, preserve himself in existence, unite sexually for preservation of the species, live in the community of men, and employ intellect and will to know truth and make individual decisions.[33] Aquinas found that the natural law "is nothing else than the rational creature's participation of the Eternal Law."[34]

Even though Locke was unable to see the imprint of natural law and questioned whether reason is naturally inclined to the good, he nevertheless insisted "on the existence of the natural law."[35] Why? Professor Zuckert surmises that it is because of self-ownership. But in his natural-law essay, Locke said something quite different. Locke concluded that natural law can be known through an "knowledge of God the creator and legislator."[36]

Perhaps because, as will be discussed shortly, Zuckert describes Locke's rational case for God as unconvincing to the modern reader,[37] Zuckert separates Locke's view sharply from that of Aquinas. Yet the significance of the recognition of a transcendent God, both to the Founders and to an understanding of natural right, suggests that the sharp division of Aquinas's natural law from Locke's natural right is overstated. Without God, right often yields not liberty, but license. Without the Aristotelian and

31. Zuckert, *supra* note 30, at 720-21.
32. AQUINAS, *supra* note 9, at I-II, q. 94, art. 2.
33. *See* RICE, *supra* note 10, at 45.
34. AQUINAS, *supra* note 9, at I-II, q. 91, art 1.
35. Zuckert, *supra* note 30, at 721.
36. *Id.*
37. *See id.*

Thomistic natural-law inclinations toward the good, little remains but Hobbes's war of wills in a very aggressive, if not barbaric, state of nature. Locke's awareness of cultural dissimilarity may have prompted him to dispute a uniform imprint of natural law, but, in recognizing the Creator (as Jefferson and the founding generation did and as clearly Aquinas did), he located ownership of self outside of self. The present Supreme Court may proclaim in *Planned Parenthood v. Casey*[38] that all people have "the right to define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life,"[39] but natural-law originalism, as restated by Locke, gives God the benefit of the doubt in such matters. As Locke's thinking is summarized in the Symposium Articles:

> Human beings are the creation or "workmanship" of God; they therefore belong to God and are His property. From this fact derives a set of prescriptions under the natural law. These prescriptions mainly take the form of limitations on what human beings may do: they may not use force (may not directly harm each other), for they belong to God, not to each other; they may not harm themselves (they may not commit suicide, for example) for the same reason; and they may not indirectly harm each other through taking more than their fair share of the goods of the external world.[40]

And it is our equality vis-a-vis a transcendent God that supplies the necessary insight for democratic rule. When all are created equal, no one has a superior right to govern.[41]

Justice Scalia is probably feeling a bit uneasy with all this overt God-talk—not in his personal disposition,[42] but in the fact that his Court since the 1960s has abandoned the founding

38. 505 U.S. 833 (1992).

39. *Id.* at 851.

40. Zuckert, *supra* note 30, at 724.

41. *See* HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION 62-63 (1994) (indicating that the legitimacy of the consent of the governed is a reciprocal of natural human equality).

42. For a perceptive comment on Justice Scalia's disposition in such matters, see Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 864 (1997) (commenting on a speech the Justice gave at a prayer breakfast, in which he reportedly observed: "[R]eason and intellect are not to be laid aside where matters of religion are concerned. What is irrational to reject is the possibility of miracles and the resurrection of Jesus Christ.").

acknowledgment of a Creator God in the Declaration of Independence. Erroneously thinking a sovereign affirmation of man's transcendent origin is the same as establishing or coercively prescribing individual religious belief or practice,[43] the modern Court remains aloof toward God or, for that matter, any principle derived from His ownership of creation.[44] But Justice Scalia is not responsible for the Court's tangled religion clause precedents. Far from it. If anything, his dissenting opinion in *Lee v. Weisman*,[45] his opinion for the Court in *Capitol Square v. Pinette*,[46] and his concurring opinion in *Lamb's Chapel*[47] go a long way in unsnarling the mess.

---

43. Of course, the public outcry in response to Justice Scalia's prayer breakfast speech illustrates that even a personal affirmation of religious belief by a government official, such as a Supreme Court Justice, is erroneously perceived as unethical because of false implications of establishment. As Paulsen and Johnson ask:

> Does [Justice Scalia's] frank discussion of religion really cast doubt on his ability impartially to execute his judicial duties? Is it really true, as one 'practicing attorney and ethics expert who asked not to be identified' chided, that Scalia 'shouldn't be saying anything like that because it's going to come up before the court[, and because] [i]f he's got anything to say about religion or anything else, he should say it in his opinions [because] [t]hose are the rules?' [Paulsen and Johnson respond astutely] the answer to these questions is plainly 'no.' Yet the idea is abroad, at least in some quarters, that [Justice] Scalia's speech was not only an inaccurate account of the treatment of religion in American public life, but ethically improper.

Id. at 866.

> The idea that a Supreme Court justice's statement of his own religious beliefs is somehow a threat to the First Amendment is simultaneously naive and itself a threat to freedom of speech and religion. It is naive because it assumes that a judge somehow becomes less religious simply by not stating his views publicly. . . . But more fundamentally, to assert that a judge's possession or expression of religious opinions is improper is to discriminate against a certain set of views, in violation of everything most dear to the values of the First Amendment.

Id. at 874-75.

44. The Court's aloofness can breed overstated hostility. Paulsen and Johnson comment that

> an entire generation of educators has come of age since the School Prayer and Bible Reading cases of the early 1960s and learned a shorthand—and inaccurate—version of First Amendment law, along the lines of 'no religion in the schools.' Ignorance of the law leads to hostility toward religion, rather than simply the absence of government-sponsored religion.

Id. at 880.

45. 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).

46. 415 U.S. 753 (1995).

47. 508 U.S. 384, 397 (1993) (Scalia, J., concurring).

For this reason, Justice Scalia's originalism is all the more troubling in that it demotes a founding document, the Declaration of Independence, to an aspiration of no more relevance to constitutional interpretation than the French Declaration of the Rights of Man.[48] In the same vein, Justice Scalia's contention that Jefferson and his contemporaries were habituated to parliamentary or legislative supremacy is mistaken. The Justice's observations seriously understate the framing influence of the reasoning of Lord Coke in *Dr. Bonham's* case that "in many cases, the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void."[49] Unlike some recent magazine criticism,[50] it is not a fault in originalism to be cognizant of the general traditions of the people as expressed in common law.[51] As Justice Scalia notes in responding to Professors Dworkin and Tribe, he,

> no less than Professor Dworkin [and Tribe], believe[s] that the Eighth Amendment is no mere 'concrete and dated rule' but rather an abstract principle .... What it abstracts, however, is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what is cruel.... It is, in other words, rooted in the moral perceptions *of the time.*[52]

Well, the moral perceptions of the Constitution's time *included* a desire to secure natural rights derived from a transcendent God.

---

48. *See* SCALIA, *supra* note 1, at 134.

49. *Id.* at 129 (citing Dr. Bonham's Case, 8 Co. Rep. 114a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610)).

50. *See* Jeffrey Rosen, *Originalist Sin*, THE NEW REPUBLIC, May 5, 1997, at 26. For a counterpoint to Mr. Rosen's argument, see McConnell, *supra* note 2.

51. Again, as Professor McConnell observes, it is clear that

> the constitutional text, historically understood, has reference to a slowly evolving, common law understanding of rights, and that the people who instituted the Constitution expected their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change. It is sometimes said that our Founders confused the ideas of natural rights and conventional rights ... but in this confusion there is much wisdom.

Id. at 1292.

52. SCALIA, *supra* note 1, at 145.

As Edward Corwin concluded after meticulous study of the history of the Constitution, "the *legality* of the Constitution, its *supremacy*, and its claim to be worshiped, alike find common standing ground on the belief in a law superior to the will of human governors."[53]

Unlike the enigmatic philosophical assertion of the present Supreme Court in *Casey*, John Locke, reflecting the tradition of the time, wrote "we do not owe our origin to ourselves." [54] Locke was sure that this is not a religious doctrine, even as such doctrines may confirm "the truth of our argument that man can, by making use of sense and reason together, arrive at knowledge of some supreme power."[55] Locke admitted that reason may prompt some to doubt whether God exists, but he said "there exists nowhere a race so barbarous, so far removed from all humanity" that is not suited to "infer from sensible things that there exists some powerful and wise being who has jurisdiction and power over men themselves."[56]

Again, it is important to reiterate that acknowledging the originalist tradition, or even the overwhelmingly Christian nature of those present at the founding,[57] is *not* advocacy of theocracy or government-established religion. The text of the Constitution is not to be subverted by original meaning or context—it is to be explained. The text of the Establishment and Free Exercise Clauses exists. But precluding government from prohibiting religious belief or practice is not equivalent to total disregard of the significance of the founding belief in a Supreme Being. Locke said this explicitly in making his case solely from reason for God's existence. Moreover, as Walter Berns has observed, the Founders "were fully convinced that the Constitution of the United States derived from a 'self-evident' truth respecting man's nature and

53. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 153 (1928).

54. JOHN LOCKE, QUESTIONS CONCERNING THE LAW OF NATURE 161 (Robert Horowitz et al. trans., 1990).

55. *Id.* at 165.

56. *Id.* at 165-67.

57. *See* BENJAMIN HART, FAITH AND FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY 337 (1988) (reporting that those present were 98.4 percent Protestant, 1.4 percent Roman Catholic, and three-twentieths of one percent Jewish).

the government appropriate to it. In fact, toleration of different religious opinions rests, and only rests, on this political truth."[58]

For similar reasons, the Declaration of Independence cannot be relegated to a constitutionally insignificant aspiration. Jefferson himself understood the Declaration as the embodiment of "the American Mind" and the "harmonizing sentiments of the day."[59] Few originalist traditions will come so well-described in the search for original meaning.[60] As one author described it, "the clarity of [the natural-rights] doctrine in the minds of the Americans is indicated by the first phrase. The statement that 'we hold these truths to be self-evident' . . . indicates that to the colonists the principled argument is well-known and widely accepted."[61] When Jefferson undertook to prescribe a curriculum for the University of Virginia, he instructed the Board of Visitors that it was their "duty . . . to provide that no [principle of government] be inculcated which [is] incompatible with those on which the Constitution of this State, and of the United States were genuinely based."[62] The first text on Jefferson's prescribed list was the Declaration of Independence. The enduring significance of the Declaration can also be seen in the recourse made to it by Abraham Lincoln in the midst of the gravest threat to the Union. As Professor Zuckert nicely remarked in his recent volume on natural rights and the American republic, one finds in the Book of Proverbs the meditation that "[a] word fitly spoken is like an apple of gold in a frame of silver."[63] Lincoln likened the Constitution to the frame, and the Declaration to the apple,

58. WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 146 (1985).

59. THOMAS JEFFERSON, Letter to Henry Lee (May 8, 1825) *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 1501 (Adrienne Koch & William Peden eds., 1944).

60. For example, Harry V. Jaffa has dedicated a lifetime to documenting the importance of the Declaration of Independence to the constitutional tradition. His work is unrefuted. *See generally* JAFFA, *supra* note 41.

61. ROBERT WEBKING, THE AMERICAN REVOLUTION 100 (1989).

62. THOMAS JEFFERSON, Minutes of the Board of Visitors, University of Virginia, 1822-1825 (March 4, 1825), *in* WRITINGS 479 (Merrill D. Peterson ed., 1984).

63. Proverbs 25:11 (King James version).

noting, "the frame is made for the apple, not the apple for the frame."[64]

Although there may be some historical dispute about the extent to which Lord Coke's reasoning in *Dr. Bonham's* case represented settled English law, it was hardly, as Justice Scalia terms it, "an extravagant assertion."[65] Roscoe Pound, who lectured widely on the natural law at Notre Dame in the 1940s, commented that just as English common-law lawyers utilized the principles underlying the Magna Carta to contest with the Stuart monarchs, so too colonial American lawyers used Coke to justify the American separation from England.[66] Coke was also not bashful about locating the significance of common law in the hand of God. Coke wrote:

> [t]he Law of nature was before any judicial or municipal law [and] is immutable. The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed . . . before any laws written and before any judicial or municipal laws.[67]

Coke's writing, of course, was restated in Blackstone. The 1765 publication of Blackstone's Commentaries, and a subsequent 1771 edition printed especially for the American colonies, reiterated the relationship between the common law and the will of the Creator. To Blackstone, "[God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that [happiness] cannot be attained but by observing the former; and, if the former be punctually

64. ABRAHAM LINCOLN, *Fragment on the Constitution and the Union*, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy Basler ed., 1953), *quoted in* MICHAEL ZUCKERT, THE NATURAL RIGHTS REPUBLIC 13 (1996). Professor William Treanor also writes eloquently of Lincoln's use of the Declaration of Independence in the Gettysburg Address, concluding, "Lincoln invoked the Declaration of Independence 'as a way of correcting the Constitution itself without overthrowing it.'" William Michael Treanor, *Learning from Lincoln*, 65 FORDHAM L. REV. 1781, 1785 (1997).

65. *See* SCALIA, *supra* note 1, at 129.

66. Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*, 20 NOTRE DAME LAW. 347, 348 (1945).

67. Calvin's Case, 7 Co. Rep. 12(a), 77 Eng. Rep. 392 (1608).

obeyed, it cannot but induce [happiness]."[68] Dean Clarence Manion in this century thus concluded that Blackstone not only interwove the natural law with the pursuit of happiness, but also found the natural law to be "the inspiration of the common law of England."[69]

"All this would be an unqualified good," Justice Scalia writes, "were it not for a trend in government that had developed in recent centuries, called democracy."[70] The Justice posits that democracy and the common law can no longer coexist because we are all legal realists in the modern age,[71] and we no longer indulge the notion that the common law is discovered, rather than made. Why latter-day legal realism should displace original meaning, the Justice does not say. Instead, Justice Scalia comes within intellectual inches of declaring common-law courts to be violative of the separation of powers.[72]

---

68. I WILLIAM BLACKSTONE, COMMENTARIES *40.

69. Clarence Manion, *The Natural Law Philosophy of Founding Fathers, in* 1947 NATURAL LAW INSTITUTE PROCEEDINGS 11.

70. *See* SCALIA, *supra* note 1, at 9.

71. If Justice Scalia has concern about the indeterminateness of natural law, he should find little comfort in legal realism.

> The 'legal realists' were far from a cohesive group—indeed, their principal unity was on common points of departure from the Langdellian tradition.... [Realists] challenged the determinacy of legal reasoning and emphasized the range of choices presented to a judge in a given case: the choice of adopting one case or another as precedent; the interpretation of precedent; and the range of possibilities in applying the selected rule to the present facts.

ROBERT L. HAYMAN JR. & NANCY LEVIT, JURISPRUDENCE 13 (1994). This type of "buffet-line" approach to legal process invites the manipulation and nontextualism that Justice Scalia rightly chastises.

72. SCALIA, *supra* note 1, at 10. The separation of powers is a vital aspect of American democracy; it should not, however, eclipse the balance of the federalist structure that limits the federal government to enumerated subjects, and thus reserves [on paper at least] most decisions to the several States and the people. In other words, originalism cannot be so tightly focused on controlling runaway judicial activism at the federal level that it denies the people reliance upon their own common-law principles, even if they are articulated by state judges, rather than legislators. Justice Scalia concedes that he "is content to leave the common law, and the process of developing the common law, where it is [and here, I take it, he means clearly at the state level]." *Id.* at 12. Curiously, however, Justice Scalia questions in an off-hand way whether the common law is relevant even to much of the work that state judges do. *Id.* at 13. This is an unusual slight to our federalist structure from the Justice even if, as he says, "we live in an age of legislation." *Id.* Finally, and quite apart from the text and structure of the Constitution and the Founders' distinctly non-legal-realist conception of the common law as reflective of the natural law, modern economic analysis of law suggests that the common law is often a better—that is, more just and more efficient—reflection of social

Certainly, Justice Scalia is right to question whether "the *attitude* of the common-law judge . . . is appropriate for most of the work that [he does]."[73] The work of *his* Court (unlike that of the courts of *general* jurisdiction in the several States) is the work of a Court of *limited* jurisdiction. The Article III text is its limit, and that text aims the work of the federal court at specific provisions of the Constitution, statutes, and the regulations that issue thereunder. However, from this important structural limit, it does not follow that there is virtual legislative supremacy in the United States.

Justice Scalia highlights that Blackstone compromised the common law to positive enactment. As Blackstone wrote:

> if there arise out of [acts of Parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions: I know it is generally laid down more largely, that acts of Parliament contrary to reason are void. But if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with authority to control it.[74]

With this, Blackstone separated himself from Coke. Roscoe Pound in his Notre Dame lectures speculated that Blackstone accepted legislative supremacy because of the English Revolution of 1688. Perhaps, but such an acceptance was of no consequence to the new American republic because it was not transferred to colonial America. Pound wrote unequivocally of America's rejection of an "omnicompetent" legislature: "The Seventeenth Century polity as set forth in Coke's doctrine, was the one we accepted at our Revolution and put into our Constitution."[75]

As Professors Farber and Sherry have similarly documented, "[t]he notion that fundamental law might be superior to legislative enactments was attractive to the colonists, especially since it provided a principled basis on which to challenge such

---

arrangements than statute. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 4 (1983) (positing that the common law is uncannily consistent with efforts to maximize economic welfare).

73. SCALIA, *supra* note 1, at 13.

74. I BLACKSTONE, *supra* note 68, at *91.

75. Pound, *supra* note 66, at 367.

abhorred statutes as the Stamp Act."[76] So, too, they reported that "as early as the 1760s" American thinkers embellished "Coke's theory of the supremacy of fundamental law with an idea that . . . the *judiciary* might be charged with enforcing the society's fundamental law against legislative or executive usurpations."[77] In the 1780s, while the Constitution was being debated, state courts were finding state laws unconstitutional when statutes transgressed fundamental principles. The mindset of the Framers was not one of text detached from fundamental right. Hamilton located the most sacred rights not "among old parchments or musty records," but "in the whole volume of human nature."[78]

In the convention of 1787, several critical discussions revealed the continuing significance of natural law to constitutional interpretation. These cannot be taken up in detail here, but much of what we know about the Founders' conception of judicial review comes from the convention's discussion, and rejection on four separate occasions, of a proposed Council of Revision. As promoted by James Madison, the Council would have consisted of members of both the executive and judicial branches, and a primary function would have been to review federal legislation before it took effect. As so contemplated, the Council was empowered to veto new laws, subject to an override for laws repassed by the national legislature.

Separation of powers principles led the convention to reject the Council, and the convention gave a qualified veto to the President alone instead. The rejection of the Council did not mean a rejection of judicial review premised on natural law originalism, though it did signal that the delegates did not believe such review to include a revisionary power in judges *before* laws were applied. In the convention debate of July 21, 1787, James Wilson made plain that the concept of unconstitutionality is not limited to constitutional text.[79] In particular, Wilson related

76. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 67 (1990).

77. *Id.* at 68.

78. ALEXANDER HAMILTON, *The Farmer Refuted*, I PAPERS OF ALEXANDER HAMILTON 122 (Harold C. Syrett ed., 1961).

79. *See* II THE RECORDS OF THE FEDERAL CONVENTION 73-83 (Max Farrand ed., 1966).

unconstitutionality to injustice, ill-wisdom, and dangerousness. Ellsworth and Madison seconded this broader conception of unconstitutionality, making reference to "the law of nations," which was merely the natural law differently expressed, and by repeating how a constitutional inquiry is one aimed at avoiding "calamity."[80] Similarly, Virginia's George Mason can logically be read as supporting Wilson, but as expressing the worry that not every law may be so plainly "unjust oppressive or pernicious" as to allow judges in the normal exercise of their constitutional review function alone to address such a defect.[81]

No one in the convention debates challenged this understanding of constitutional evaluation, and thus the fact that the delegates were simultaneously developing the idea that the constitutional text was a separate source of authoritatively-declared positive law did not mean that they saw this development as repealing the natural law. It is true that Mr. Gerry argued against the Council, fearing that it would make "Statesmen of the judges," but this opposition was directed more at the difficulties of allying judges to the executive under the proposed Council of Revision structure and inviting such an alliance to perform a lawmaking, rather than an interpretative, function—namely, the evaluation of laws before they went into effect and unrelated to actual cases or disputes.[82]

Late in the convention, long after the written, declared nature of the new constitutional framework had fully taken shape in the Supremacy Clause, the delegates turned their attention to whether the document should prohibit bills of attainder and ex-post-facto laws. Bills of attainder were commonplace in the States, so an explicit prohibition was readily thought necessary to alter this practice. But the delegates did not immediately see the necessity of writing down a prohibition against ex-post-facto laws. As Wilson related in the debate of August 22, 1787, such laws contravene the first principles of legislation, and to include a prohibition of them would make it appear that the delegates were

80. *Id.* at 74.
81. *Id.* at 78.
82. *Id.* at 75.

"ignorant of the first principles of Legislation, or are constituting a Government which will be so."[83] James McHenry, who along with Elbridge Gerry initiated the proposal, recorded the opposition to it this way:

> Gouverneur Morris Wilson Dr. Johnson etc. thought the [ex post facto prohibition] an unnecessary guard as the principles of justice law et[c.] were a perpetual bar to such. To say that the legislature shall not pass an ex post facto law is the same as to declare they shall not do a thing contrary to common sense—that they shall not cause that to be crime which is no crime.[84]

Natural law and the natural rights derived therefrom lie deeply within the history and the tradition that supplies original meaning of a constitutional text that includes the words: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[85] Justice Scalia accepts the Ninth Amendment as an explicit statement of how the Constitution is to be construed.[86] It could not be otherwise. Legal historian Edward Corwin found natural law to be the essential core of the Amendment. The only difference, noted Corwin, is phraseology, because "the principles of transcendental justice have been [there] translated into terms of personal and private rights."[87] Corwin was sure that the Founders' intent in the Ninth Amendment was not to confer legitimacy on these personal rights by their incorporation into the Constitution, but to confer legitimacy on the Constitution by not assuming the pretense that natural rights were legislatively derived. Corwin thus wrote that these transcendental rights "owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."[88]

---

83. *Id.* at 376.

84. *Id.* at 378-79.

85. U.S. CONST. amend. IX.

86. *See* SCALIA, *supra* note 1, at 135.

87. Corwin, *supra* note 53, at 152-53.

88. *Id.* at 153. The history of the Ninth Amendment now also includes an impressive treatment by Professor Barnett. *See* RANDY BARNETT, THE RETAINED RIGHTS BY THE PEOPLE (1989); *see also* DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER 17-46 (1992).

Natural law is an inescapable and important element of originalism, and no sincere originalist can omit the inquiry. But what is the Court to do after such investigation? As Professor Zuckert relates, a scientific law of nature such as gravity cannot be disobeyed, but a moral law of nature can.[89] Is it then the government's job—the Supreme Court's function—to compel us from violating our own natures?

The contributors to this Symposium answer in the negative. Professor Barnett, for example, concludes that "although principles of natural-law ethics can be used to guide individual conduct, they should not be enforced coercively by human law if doing so would violate the moral space or liberty defined by natural rights."[90] But what are these natural rights when they lack divine origin? Essentially, Professor Zuckert answers, they constitute the right to be left alone. Claiming that "modern readers," unlike the founding generation, find Locke's acceptance and reasoned proof of God to be unconvincing,[91] Professor Zuckert situates natural right solely upon property—specifically, the property in oneself. Argues Zuckert:

> My self, my happiness and misery, my body and its actions are all mine in such a way that my sovereignty over them necessarily and *ipso facto* excludes similar claims to them by others. . . .
>
> This claim of exclusivity . . . [implies] a subsequent duty—a duty of forbearance. Each claims a right that others forebear from interfering with what is the self's own. . . .[92]

If Professor Zuckert is correct that this "natural property" basis for natural rights is the full extent of "the actual source of morality and justice in human existence,"[93] this position is too weak to carry forward the American proposition of Jefferson and the Founders. Zuckert candidly acknowledges that when natural

89. But the ill consequence of such disobedience, be it in the killing of the unborn, the infirm, or oneself, cannot be escaped.

90. Barnett, *supra* note 15, at 680-81.

91. Zuckert, *supra* note 30, at 721 .

92. *Id.* at 729.

93. *Id.* at 730.

right is separated from natural law, even the right to life becomes a "'choice right' (a kind of sovereignty over the object of the right)[, which] implies a right to suicide."[94] Of course, the Supreme Court has rejected a natural right to assisted suicide, noting that for over 700 years, the Anglo-American common-law tradition (the gradual exposition of natural law in context and over time) could sustain no such right.[95] Nevertheless, Justice Scalia properly anguishes over the invention of other right claims with no basis in originalism, commenting that the Court "[d]ay by day, case by case, . . . is designing a Constitution for a country I do not recognize."[96]

The way back, however, is not the path of unchecked positivism, which is not original meaning, but natural-law originalism. In part, this entails the recognition that private property in oneself is not, as Professor Zuckert asserts, the opposite of acknowledging that human beings belong to God. The founding postulate that creation originates with God does not negate the necessary management or preservation of self anymore than it negates the logical expediency of private property. The Framers in the natural-law tradition quite simply understood God as the ultimate holder in fee simple, with men and women holding possessory, but defeasible, interests in life.

To those who would separate natural right from natural law, it should be sufficient that Locke did not separate right from duty. The Creator, wrote Locke, "has not made this world at random and to no purpose."[97] From his own self-consciousness, the fitness of his mind and body, Man cannot believe that "all these things have been given to him by a most wise creator, ready for use, so that he can do nothing"[98]—or, paraphrasing Professor Zuckert, so that he can merely forebear or raise no interference with others

94. *Id.* at 716.

95. *See* Washington v. Glucksberg, 117 S. Ct. 258 (1997).

96. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting) (finding an independent contractor trash hauler to have a First-Amendment right not to have his trash contract terminated because of unflattering comments about the county commissioners).

97. LOCKE, *supra* note 54, at 167.

98. *Id.*

or assert choice rights. Rather, argued Locke, in the natural-law tradition,

> [man] perceives that he is impelled to form and preserve a union of his life with other men, not only by the needs and necessities of life, but [he perceives also that] he is driven by a certain natural propensity to enter society and is fitted to preserve it by the gift of speech and the commerce of language. And, . . . he is obliged to preserve himself, since he is impelled to this part of his *duty*.[99]

The Constitution of the United States is the deliberative result of our Founders' respect for natural law and its call to "form a union" with others. It is not premised upon a right to be left alone, but upon a duty to preserve ourselves and others and a correlative right to be free in the performance of *that* duty. Is it for the Supreme Court then to tell us how exactly to perform that duty? For the most part, no. This is primarily the job of all of us in family, church, and voluntary association, and is a subsidiary obligation of the legislature. Nevertheless, because of the natural law, the Court as nondelegable agent of the people is bound by oath not to give credence to any alleged constitutional claim or legislative enactment that forfeits this duty.

Nothing written here disparages constitutional or statutory text or suggests that the chief role of Justice Scalia or any judge is to set aside freely those texts as part of some "historic voyage of interpretation."[100] An occasional corrective cruise, however, is unavoidable given the imperfect human condition and our modern tendency to neglect the natural-law landscape of our place of beginning. Professor Barnett refers to the wisdom of Thomas Aquinas that law not enact every virtue or prohibit every vice. However, the law is not silent, and, as Aquinas wrote, it must legislate against "the more grievous vices . . . chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and suchlike."[101] *A fortiori*, the Court is not free to

---

99. *Id.* at 169 (emphasis added).

100. SCALIA, *supra* note 1, at 137 (describing Professor Laurence Tribe's approach to constitutional law).

101. AQUINAS, *supra* note 9, at I-II, q. 96, art. 2.

distort constitutional text in ways that authorize the more grievous vices. Beyond this, however, the natural law is instructive, not directive, and under our Constitutional system, Justice Scalia is right that such instruction, for legal purposes at least, is directed primarily at the legislative representatives of the people.

Natural law is far from noninterpretivism; indeed, properly understood, it is a check upon the very judicial creation of novel rights that Justice Scalia laments.[102] Specific claims such as the right to be free of excessive jury awards or the practice of political patronage do not flow inexorably from immutable aspects of human nature and justice, and not even those who pretend to "define their own existence in the universe" can credibly argue otherwise. As one writer well put it: natural law

> principles and precepts—like the injunction to seek the good or the proscription against killing or theft are not capable by themselves of governing action,—for different reasons . . . : in the case of principles, because they specify only one end, and action depends on specification of means; in the case of precepts, because they specify the means only generally and without reference to the contingent circumstances which are always involved in action.[103]

Contingent circumstances make rules the usual subject of positive law and make those rules far different from principles and precepts. But what is the usual or pervasive reach of statute is not the entire law. And the question for originalists, including Justice Scalia, is whether enough of the Founders' natural law remains to declare that all human life is unalienable and no one ought to be

---

102. Justice Scalia writes that in a recent term, the Court has fashioned

> a novel constitutional right against statewide laws denying equal protection to homosexuals, [Romer v. Evans, 116 S. Ct. 1620 (1996)], a novel constitutional right against excessive jury awards, [BMW of North America v. Gore, 116 S. Ct. 1589 (1996)], a novel constitutional right against being excluded from government contracts because of party affiliation, [Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 116 S. Ct. 2353 (1996)], a novel constitutional prohibition of single-sex schools, [United States v. Virginia, 116 S. Ct. 2211 (1996)], and a novel constitutional application of federal appellate review of jury verdicts, [Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996)].

SCALIA, *supra* note 1, at 139.

103. Harold R. McKinnon, *Natural Law and Positive Law*, 1947 NATURAL LAW INSTITUTE PROCEEDINGS 97.

enslaved.[104] If that much of natural-law originalism does not remain, then surely the Founders would join Justice Scalia in concluding that today's Court writes "for a country [they] do not recognize."[105]

No, you can't beat somebody with nobody—but the people aren't nobody. And the people count not just in the make-up of majorities but intrinsically by their created human nature.

---

104. I suspect this may be a far smaller list of judicially enforceable natural rights than perhaps Professors Barnett and Zuckert would articulate. It is, however, a list that is the most defensible in terms of judicial enforcement of natural-law originalism taking into consideration both the original and amended text of the constitutional document. Beyond this, natural law and corresponding claims of natural right are instructive, not directive, and broader claims are appropriately addressed in state common-law adjudication, and are subject to the enumerated limits of federal power. Subject then to this modest claim of judicial cognizance of natural-law originalism, Justice Scalia is correct that "the government... in and of itself is totally neutral [except for the non-neutrality of textual rights] on [matters of morality]. It is the people who must bring out the morality of Christianity or any other morality that is to be reflected through the government." Antonin Scalia, *Of Democracy, Morality, and the Majority*, 26 ORIGINS 81, 88 (1996).

Of course, were a more expansive list of natural rights not textually or legislatively recognized or acknowledged in common-law cases, Jefferson's reservation of the ultimate right to alter or abolish would need to be taken seriously. Within that more expansive list would be the right to live in a family and to direct the upbringing of one's children, the right to acquire, possess, use, and transfer property, the right to a criminal justice system that appropriately punishes threats to the integrity of the human person, such as murder, armed assault and the like, the right to personal mobility, and the right to work. Looking at this list, it is remarkably similar to Justice Washington's identification of the fundamental privileges and immunities of citizens in *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823). But, like Justice Washington's conclusion in *Corfield*, the exact specification or application of these privileges is generally not a matter for the U.S. Supreme Court.

105. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting).