The Natural and the Positive in American Law

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. Of course, those hearings also demonstrated 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. An observation made some years ago by Dr. Frederick D. Wilhelmsen captures the public mind and seems to anticipate the Thomas 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. [1]

Much of the public's confusion about 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."

Of course, a blanket rejection of natural law runs counter to much of what is characteristically American in the history of the United States, which, beginning with the Declaration of Independence and continuing through its legal development, has been intertwined with various ideas labeled "natural law." Today, however, such various and contradictory theories claim the title "natural law" that the confusion has become compounded.[2] As a result, "natural law" tends to be equated—especially in legal circles—with any appeal to an unwritten source of law.

The distinction between natural law and its antagonist, positivism, does not in fact correspond to a division between written and unwritten law. Written law may declare or agree with, and at least generally does not contradict, natu-

ral law.[3] The fundamental controversy between natural law and positivism is a moral, not a narrowly legal one.[4] Nevertheless, most of the actual differences involve legal reasoning. Certainly, positivistic separation of law and morality affects legal reasoning. As long as a common Judeo-Christian morality prevailed in America and influenced legislation and judicial interpretation, the differences between natural law and positivist reasoning may not have been so apparent. But now that that moral consensus has disintegrated, the great gulf that has come to separate contemporary legal thinking from that of the founding period has become more apparent, at least to some. The dissolution of the moral consensus appeared to occur quite suddenly in the 1960s; the reality, however, is that shifts in legal reasoning have been ongoing and subtle. In what can only be a sketchy overview of clashes between natural law and positivist legal reasoning, I will consider in this article the changing role of natural law in our founding documents and in selected Supreme Court cases.

A great and ever-growing literature has generated conflicting views about what was the prevailing political and legal philosophy of the founding period. Regardless of these differences, however, there was undoubtedly a coexistence then of 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 and St. Thomas Aquinas, and incorporated into English common law by Sir John Fortescue, the classical and medieval discussions of natural law focused on reason, moral law, and the common good. 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.[5] 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. The result has been a mixing of concepts and doctrine which has produced contradictory tendencies in American law. As discussed 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.

Debate about American public philosophy often begins with the Declaration of Independence, including its references to the law of nature and its allusions to natural law.[6] Given its specific legal/political purpose, the breaking away from Great Britain to form one or more newly independent states, the Declaration can be viewed primarily as a legal brief to a "candid World." Out of "a decent Respect to the Opinions of Mankind," the representatives "declare the causes which impel them to the Separation," beginning with 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.

The Declaration makes the case of the former colonies for recognition by other countries of their independent statehood,[7] with all its attendant rights and responsibilities. In referencing the "law of nature," the authors of the Declaration invoked the language of the day for international law, then known as the law of nations. At that time international law, as well as domestic law, was studied within a framework based on principles of natural law and on law-of-nature theory.[8]

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."[9] Hugo Grotius, a Dutch Protestant jurist who drew but deviated from the Spanish jurists,[10] 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 princes; the result was a restriction of the temporal jurisdiction of the Church, including its authority to regulate and moderate wars.[11] 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.

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 of people, whatever may be the form of its internal construction, which governs itself independently of foreign powers"[12]), the general concept of sovereignty has often been used to support claims that the sovereign entity 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—e.g., the 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.[13]

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-à-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 fundamentally defective—specifically for its lack of a bill of rights. *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."[14] 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."[15] But what rights could courts have been expected to protect without relying on a written bill of rights? The proposed Constitution already included some 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 procedural provisions 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, e.g., the right to jury trial in civil cases.[16] Whether federal courts could generally apply the common law or resort to principles of natural justice were questions not explicitly addressed by the Constitution, but ones later addressed by the Supreme Court.

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.[17] 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.[18] 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 had been understood to be the manifestation of the natural law.[19] The older tradition represented in Lord Coke, whose work was most influential in America until the Revolution,[20] 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 nonenforceable 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.

As is well known, the doctrine of judicial review was not explicitly provided for in the text of the Constitution. Some have said the doctrine constituted a usurpation of power. Others have justified the doctrine as an application of the "higher law" background of the Constitution. Given, however, the striking similarity between Chief Justice Marshall's language in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and Hamilton's discussion in *The Federalist*, No. 78, the doctrine does not appear to have 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 on which question the courts lack the power to speak, i.e., jurisdiction.

Marbury is remembered as the triumphant beginning for the Court, but it was not an obvious triumph, nor was it the beginning. By recognizing limits on its power to mandamus an officer of the executive branch due to lack of jurisdiction, the Court established its authority to pronounce on the law. Undoubtedly, Chief Justice Marshall had in mind the inauspicious beginning of the Court, prior to his arrival, in its first major decision, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). That case held that a citizen of one state could sue the government of another state. Although the literal language of Article 3 seemed to allow for such a suit, the result contradicted the general understanding, as reflected in *The Federalist*[21] and the ratification debates, that the states were not subject to suit by citizens. The result was quickly reversed by the Eleventh Amendment to the Constitution, which reaffirmed the principle of the sovereign immunity of the states.

On the one hand, the Court's role resembles the pre-Blackstonian position of voiding acts of the legislature and of the executive; on the other hand, the Court's voiding power is in many ways circumscribed by limits on its jurisdiction which reflect the role of the division of sovereign power. This tension between the natural law tradition and sovereign power was evident early on, before the doctrine of judicial review was even established, when the Court decided *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). 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" (387-388). 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 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" (398). 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 in "a clear and urgent case." He went on to say, "If on the other hand, the legislature of the Union, or the legislature 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" (399).

Despite their differences concerning the role of natural justice, the two justices agreed on the result. For Justice Iredell it was merely a matter of interpreting positive law; that is, the ex post facto provision written into the Constitution. On the other hand, that provision reflected the natural justice concerns of the framers of the Constitution. And so it has been 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, 10 U.S. (6 Cranch) 87 (1810), which is 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.[22] 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 . . ." (139; emphasis added). 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 Deity" (143). Johnson's opinion indicates that Marshall's construction of the language of the contracts 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.

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 noncontroversial example of common law judg-

ing 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 it. Originally common law was viewed as the embodiment of natural law. Then it became understood in historicist terms as simply custom 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*, 11 U.S. (7 Cranch) 32 (1812), 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 noncriminal matters, however, Justice Story prevailed. In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), the Court held that a general common law, at least on commercial matters, was law of the United States applicable in federal courts.[23] 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 courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect (p. 18).

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 the 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 Supreme Court justice, 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*, 304 U.S. 64 (1938), overturned *Swift v. Tyson* and specifically proclaimed judicial positivism, saying:

> 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 . . . but law in the sense in which courts speak of it today does not exist without some definite authority behind it" (79, footnote omitted).

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 which used the due process clause of the Fourteenth Amendment to invalidate state economic regulations said to deprive individuals of economic liberty interests.[24]

The framers and ratifiers of the Fourteenth Amendment included both those who thought they were defining positive rights and those who thought they were enshrining Lockean natural rights.[25] Either way, the Fourteenth Amendment reduced the residual sovereign powers of the states. The open 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."[26] 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. 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 signaled greater concern for individual rights.[27]

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 they termed "natural law." In cases ranging from the later 1940s through the mid-1960s, Justice Black fought against what he considered to be the "natural law" interpretation of the due process clause in the Fourteenth Amendment. The term "due process" has 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 nonwritten sources, for explaining the content of the clause. 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. Prior to 1947, however, no member of the Court had ever taken that position.[28] Justice Holmes and other positivists who rejected the idea that the Fourteenth Amendment's due process clause was intended to incorporate the Bill of Rights looked to the common law with a historicist understanding of the term "due process." Nevertheless, Justice Black accused members of the Court—in particular, Justice Frankfurter—of resorting to natural law. Frankfurter, who happened to be an intellectual follower of Justice Holmes and also a former Harvard law professor, was actually defending the common law considered as a mixture of custom and judge-

made law. He viewed 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 equate "natural law" with any appeal to an unwritten source of law.

The ultimate 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. (*Cooper v. Aaron*, 358 U.S. 1, 18 [1958]; emphasis added.)

Faithful to the positivistic spirit of *Erie*, *Cooper* read the language of *Marbury* – "to say what the law is" – to mean "*make* what the law *will be*."

Erie has been praised by judicial "liberals" and "conservatives" alike.[29] 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 Amendment applicable to more and more matters of state law. The Court, in other words, has created constitutional law where once there was common law.[30] In this process of redefining the structural boundaries carved out by the Constitution, the Court eventually fashioned a new version of "natural law."

In the 1960s, Justice Black at first appeared to win over what he termed "natural law." He prevailed in effect, though not in theory, on his interpretation of the due process clause. His theory of the Fourteenth Amendment was not accepted by a majority; yet the Court incorporated, one by one, almost all the provisions of the Bill of Rights. But while Justice Black was triumphing in one sense, his ideological brother Justice Douglas was reviving substantive due process, or what Black would call "natural law," in *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court struck down a state statute prohibiting the use of contraceptives by finding a right to privacy within the "penumbras" of the Bill of Rights. *Griswold*'s discovery of a right to privacy not written into the Constitution was later extended to strike down state abortion statutes in *Roe v. Wade*, 410 U.S. 113 (1973). 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. Most recently, in *Casey v. Planned Parenthood*, ___ U.S. ___ (1992), which reaffirmed *Roe* even while cutting it back, the Court explicitly embraced substantive due process.[31] Under what some might call a version of natural law, "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."[32] 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 on a Rousseauan general will in striking down Pennsylvania's requirement that a woman notify her husband of a planned abortion on the basis that the statute "embodies a view of marriage concurrent with the common law status of married women but repugnant to our present understanding of marriage."[33]

One need not be a positivist of the Justice Black variety but could be a positivist of the Justice Frankfurter variety or a natural law jurist like Justice Story to inquire skeptically: How does the Court determine limits on liberty other than arbitrarily if not from the constitutional text, history, and the common law? 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? See *The Federalist*, No. 78.

The basic issue between positivism and natural law regarding legal reasoning is not that of written versus unwritten law. Positivists in international law straightforwardly recognize unwritten law in the form of custom. Rather, positivist and natural law approaches provide different *explanations* of the same laws and legal phenomena. Positivists in international law explain custom in terms of consent; that is to say, positivism emphasizes will, whereas natural law gives priority to reason. Whenever the controlling criterion is the primacy of will rather than the writing of a law, it becomes apparent that some so-called versions of "natural law" are simply forms of positivism based on unwritten sources.

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. The operation of judicial review was certainly intended to be tied to written law, but not necessarily to positivism. At least in the view of *The Federalist*, the exercise of sovereign powers by the legislative and executive branches was subordinated to the rule of reason, as thought to be incorporated into the Constitution which was intended to be interpreted by a Supreme Court having no will of its own. Whether or not this was inevitable, many members of the Supreme Court have certainly had difficulty distinguishing their own will from detached reasoning. On this much, most commentators have generally agreed; but they have disagreed about when and which justices have been guilty of such transgressions.

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.

Laymen and lawyers who are unable to sort out the moral reasoning are inclined simply to dismiss such debate as being about something other than actual law. Lack of interest turns to concern, however, when claims are made of a natural law right to act contrary to positive law. Such claims are often opposed, even by those who hold to essentially similar moral attitudes, on the positivistic grounds that no one ever has the right to disobey a law. Of course, if the men gathered in Philadelphia during 1776 had held this view, the Declaration of Independence would never have been signed. They, however, were capable of making certain reasonable distinctions. They acknowledged, for example, that "prudence, indeed, will dictate that governments long established should not be changed for light or transient causes." They understood, in other words, the role of moral reasoning. Thus they turned to revolution as the very last resort. Then later, in creating the Constitution, our fathers created a political and legal structure with procedures designed to correct injustices and to eliminate the need for revolution even as a last resort.

Today's rejection of natural law involves the separation of moral reasoning from its connection to law. Argument tends toward the purely positivistic, because otherwise the discussion leads into an extended elaboration of moral philosophy and epistemology explaining the meaning of natural law and why some versions of "natural law" are merely forms of positivism. And always the question comes: How does one know? Much of the confusion and concern about natural law echoes this skepticism about moral reasoning. With the term "natural law" equated in legal circles with any unwritten source for law, and with conflicting versions of natural law competing for acceptance, the natural response has been to reject anything unwritten. Otherwise, judgments must be made about the underlying moral and philosophic premises upon which these contrary "natural law" claims are made. This is a discussion in which many are unable or unwilling to engage.

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Notes

1 F. D. Wilhelmsen, "The Natural Law Tradition and the American Political Experience," *Christianity and Political Philosophy* (Athens, GA: Univ. of Georgia Press, 1978), p. 191.

2 See R. George, ed., *Natural Law Theory* (Oxford: Clarendon Press, 1992); in particular, the Foreword, p. v-viii.

3 See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 281-290 and 351-352.

4 Ibid., pp. 354-362. See also C. Rice, "Some Reasons for a Restoration of Natural Law Jurisprudence," 24 *Wake Forest Law Review* 539 (1989).

5 A legal fiction: "Any 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* (Oxford: Clarendon Press, 1980), p. 468.

6 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.

"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."

7 Later, disagreement would arise as to whether each of the former colonies was fully an 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." American Law Institute, *Restatement of the Foreign Relations Laws of the United States* (Revised, 1986), "Comments" to Section 201. Whatever doubts may have existed under the Articles of Confederation, the matter was settled by the Constitution, Article I, Section 10, which denies that competence to the states.

8 From the sixteenth through the eighteenth centuries, texts on international law often "described themselves as studies in the 'law of nature and of nations.'" M. Janis, *An Introduction to International Law* (Boston, MA: Little, Brown & Co., 1988), pp. 50-51.

9 Ibid., p. 51.

10 Ibid. pp. 51 and 130-131.

11 Ibid., p. 131.

12 H. Wheaton, *Elements of International Law With a Sketch of the History of the Science* (1st ed., 1836), p. 51.

13 International law theory has always struggled to explain why sovereign nations are *bound* by rules. If international law is based only on consent 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.

14 *The Federalist*, No. 84. E. Rossiter edition (New York, NY: Mentor, 1961), p. 513.

15 *The Federalist*, No. 78, p. 469.

16 See *The Federalist*, No. 83.

17 *The Federalist*, No. 83, pp. 495-498.

18 "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." *The Federalist*, No. 78, p. 465.

19 Wilhelmsen, p. 182.

20 E. Sandoz, *A Government of Laws* (Baton Rouge: L.S.U. Press, 1990), p. 231.

21 *The Federalist*, No. 81, pp. 487-488.

22 Article 1, Section 10 of the Constitution.

23 In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), 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: "The 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 H. Berman, "Mercantile Law" in *Law and Revolution* (Cambridge: Harvard UP, 1983), pp. 333-356.

24 *Lochner v. New York*, 198 U.S. 45, 74 (1905) [Holmes, J., dissenting].

25 J. Harrison, "Reconstructing the Privileges or Immunities Clause," 101 *Yale Law Journal* 1385, 1419 (1992).

26 Ibid. 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).

27 *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

28 See *Adamson v. California*, 332 U.S. 46 (1947) [Black, J., dissenting].

29 In matters of judicial interpretation, I consider the commonly used "liberal"/"conservative" labels inappropriate and misleading. Justices Frankfurter and Black were both political liberals. On the Court, 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.

30 See H. Monaghan, "The Supreme Court, 1974—Foreword: Constitutional Common Law," 89 *Harvard Law Review* 1 (1975).

31 *Casey v. Planned Parenthood*, ___ U.S. ___ (1992), Slip Opinion, pp. 23-41.

32 Ibid., p. 31.

33 Ibid., p. 118.