

Constitutional Corner: Natural Law Today – A Question of Rights

“We hold these truths to be sacred and undeniable (as Jefferson wrote in his first draft of the Declaration), that all men are created equal, that they are endowed (i.e., gifted/supplied/blessed) by their Creator (that would be God) with certain unalienable (i.e., non-transferable/inherent/innate/implicit) rights, among which are (at least the right to) life, (the right to enjoy) liberty, and (the freedom to pursue) happiness.”

Webster’s 1828 dictionary tells us *truth* is “Conformity to fact or reality; exact accordance with that which is, or has been, or shall be.” *Sacred* meant “Entitled to reverence; venerable, inviolable.” Undeniable? That speaks for itself.

The Supreme Court in 1897 called Mr. Jefferson’s little 1300-word essay “the thought and spirit of our government,” relegating the Constitution itself to merely the “body and letter” of our government.¹ I (and others) contend that the Constitution can only be rightly understood and interpreted in the illumination provided by the Declaration.

But let’s not take Jefferson’s view on the matter; it is, after all, rather sparse. You might prefer Alexander Hamilton’s more expansive view:

*"Good and wise men, in all ages, ... have supposed that the deity, from the relations we stand in to himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever. This is what is called the law of nature ... Upon this law depend the natural rights of mankind: the Supreme Being gave existence to man, together with the means of preserving and beatifying that existence. He endowed him with rational faculties, by the help of which, to discern and pursue such things, as were consistent with his duty and interest, and invested him with an inviolable right to personal liberty, and personal safety ... The Sacred Rights of Mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the Hand of the Divinity itself; and can never be erased or obscured by mortal power."*²

Too verbose? Something more succinct? Perhaps that of John Adams:

¹ GULF, C. & S. F. R. CO. v. ELLIS , 165 U.S. 150 (1897)

² The Farmer Refuted, February 23, 1775

*"You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."*³

Declaration of Independence and Constitution signer, and drafter of the Articles of Confederation, John Dickinson, put it this way:

*"Kings or parliaments could not give the rights essential to happiness... We claim them from a higher source - from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives. In short they are founded on the immutable maxims of reason and justice."*⁴

Or perhaps from Jefferson's *Notes on the State of Virginia*:

*"[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties (i.e. rights) are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever."*⁵

The Founders who proclaimed their belief in natural law/natural rights are too numerous to list. As Chester Antieau writes in an essay entitled [Natural Rights and the Founding Fathers – The Virginians](#), "It would be amazing if any Revolutionary leader of the Commonwealth could be found who **did not** subscribe to the doctrines of natural law and right. Moreover, the doctrine was widely held and continually expressed by the popular assemblages throughout the Commonwealth during Revolutionary days."⁶

As Thomas West argues in his new book [The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom](#), "the founders shared a 'theoretically coherent understanding' of politics rooted in natural rights philosophy."

So is this essay about law or rights? Both; law begets rights and natural law begets natural, unalienable rights. The Founders understood this, nearly to a man.

³ A Dissertation on the Canon and Feudal Law, 1765

⁴ John Dickinson, An Address to the Committee of Correspondence in Barbados, 1766

⁵ Notes on the State of Virginia, Query 18, 1781

⁶ <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=3506&context=wlulr>

As Jefferson would write late in life, the thoughts he expressed in the Declaration were nothing more than the *“harmonizing sentiments of the day...an expression of the American mind.”*⁷

The dual concepts of natural law and natural rights were not discovered by the Founders, these ideas had been expounded upon for millennia. Plato (427–347 B.C.), Aristotle (384–322 B.C.), Cicero (106–43 B.C.), St Thomas Aquinas (1225 – 1274), William of Ockham (1280–1349), Richard Hooker (1554–1600), Hugo Grotius (1583-1645), Thomas Hobbes (1588–1679) and Matthew Hale (1609-1676), all these men contributed to natural law thought long before John Locke (1632 –1704) -- upon whom Jefferson largely relied -- took up his pen. Frenchman Baron de Montesquieu (1689–1755) and Swiss thinker Emmerich de Vattel (1714-1767) later added to the assembled wisdom. The Founders studied them all.

But another set of “enlightened” political philosophers: David Hume, Jean-Jacques Rousseau, Immanuel Kant and others, were hard at work during this same timeframe dismantling the classical-traditional view of natural rights. These philosophers of the Enlightenment (who inspired the bloody French Revolution) rejected God as the author of the Natural Law, or at least diminished His significance, and elevated human reason, the “general will” that was found in legislative majorities, to the pinnacle of authority. The Enlightenment philosophers, in the words of noted historian Carl Lotus Becker, *“deified nature and denatured God. Since Nature was now the new God, source of all wisdom and righteousness, it was to Nature that the eighteenth century looked for guidance, from Nature that it expected to receive the tablets of the law; and it was just as necessary now as ever for the mind of the rational creature to share in the mind of this new God, in order that his conduct, including the ‘positive laws of particular states,’ might conform to the universal purpose.”*⁸

But the Founders rejected this notion. For them, natural law was *“antecedent to all earthly governments,”* it preceded even the creation of man; and it gave rise to natural, unalienable rights. Around that concept they built our government.

They agreed with Sir William Blackstone (1723-1780), who wrote in his *Commentaries on the Laws of England*, published in America in 1771:⁹

"This will of [man's] maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the...direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain

⁷ Letter to Richard Henry Lee, 1825

⁸ Carl Lotus Becker, *The Declaration of Independence, A Study in the History of Political Ideas*, p. 51.

⁹ More copies of Blackstone's *Commentaries* were sold in the American colonies than in the rest of the British Empire.

*immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws....Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due."*¹⁰

Ergo, Jefferson's "Laws of nature and Nature's God" which gave the colonists the right to "assume among the powers of the earth, the separate and equal station" to which they felt entitled.

But was natural law enough? Was Blackstone's "faculty of reason" sufficient "to discover the purport of those laws?"

Blackstone himself conceded it was not. He added:

"[D]ivine providence... in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in diverse manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."

Which leads us to the Law of Moses, i.e. the Ten Commandments.

When God inscribed: "Thou shalt not murder" on a block of stone it became "revealed or divine law," in Blackstone's view, and this particular commandment enshrined a right to the preservation of one's life. "Thou shalt not steal" affirmed a right to retain property, "Thou shalt not bear false witness against thy neighbor" affirmed a right to receive honest testimony.

But did the Israelites or even we today really need an inscription in stone to confirm that murder and lying are wrong, that human life should be preserved? When Cain slew Abel, 1500 years before Moses delivered the two tablets, did Cain really need God to personally come and tell him he had violated natural law? Abel's blood is said to have cried out from the very ground upon which it had poured. Cain needed no reminder of the gravity of his action, as Romans 2:15 reminds us, the natural law was written on his heart, as it is ours. But due to the "frailty" of our ability to naturally discover the natural law purely through reason, some key features had to be revealed to us.

And this was the view of the Founders.

But as we all "know," Jefferson and the others of his time were writing in what is today considered "Founders'-speak," a "dead language" consigned to the "dustbin of history" along

¹⁰ Commentaries on the Laws of England, Introduction, Section the Second

with Koine Greek and Babylonian, the language of an “unenlightened age” where men had only recently cast off the geocentric theory of the solar system and still owned slaves. Or so the critics of natural rights theory would have us believe.

Today we know better, they say. *“There is no god and there is no soul. Hence, there is no need for the props of traditional religion. With dogma and creed excluded, then immutable truth is dead and buried. There is no room for fixed and natural law or permanent moral absolutes,”*¹¹ wrote Father of the modern public school, John Dewey.

Despite these attacks, the idea of natural law and unalienable rights still persisted. In his January 1961 Inaugural Address, John F. Kennedy reminded us that:

“The world is very different now. [M]an holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God.”

Two years after Kennedy’s inaugural speech, Dr. Martin Luther King Jr. wrote in his famous [“Letter from a Birmingham Jail:”](#) *“We have waited for more than 340 years for our ... God-given rights,... To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law.”* As we will see, Dr. King is merely reciting Blackstone.

Though he did not live to enjoy the final fruits, King’s movement achieved its long-awaited goal: unjust laws were repealed and God-given rights restored. Why? Because the rights they sought were grounded in natural, immutable law -- they were unalienable.

In 1991, when Clarence Thomas was nominated to replace Thurgood Marshall on the Supreme Court, the New York Times noted that Thomas was “the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.”

His confirmation hearing put natural law back in the spotlight, with Joe Biden calling it a “dangerous” view.

For more recent evidence of this “enlightened” view we can turn to noted “political philosopher” (and lawyer) Chris Cuomo of CNN, who proclaimed recently: *“Our rights do not come from God, your honor (he told Alabama Chief Justice Roy Moore), and you know that. They come from man... Our laws come from collective agreement and compromise.”*¹²

¹¹ John Dewey, “Soul-Searching,” Teacher Magazine, September 1933, p. 33

¹² <http://www.cnsnews.com/blog/curtis-kalin/cnn-anchor-our-rights-do-not-come-god>

Did you notice Cuomo's slight-of-hand there? He begins his statement speaking of rights and ends up talking about laws. At least he sees the connection; but since in Cuomo's world (and many today join him in so thinking) there is no such thing as natural law, there is no such thing as a natural right. If a civil, man-made law doesn't create a right, the right simply does not exist. Cuomo's thinking is a natural outgrowth of the Enlightenment.

Instead of natural rights we have substituted, ala Cuomo, rights created by civil law. The rights mentioned in the Bill of Rights have become a "gift" of the Constitution. As proof: for the last ten years at least, the Whitehouse website proudly proclaims: "*The 2nd Amendment gives citizens the right to bear arms.*"

Now, to be fair, we must admit that civil law can indeed create rights, I would call these civil rights, although that term is also sometimes used to describe natural rights. But there certainly are rights created by the consent of the governed. If we are honest we will also acknowledge that "what the government giveth, the government can taketh away." Civil, man-made rights, are clearly alienable; here today and perhaps gone tomorrow. Rights bestowed by those representing the "will of the majority."

If there is no natural law, as Thomas Aquinas put it in *Summa Theologiae*, "Whatever the Prince wills, is the law."

But let's approach that idea with caution. As James Madison warned: "*In Republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.*" Madison called the Declarations of Rights of his time, "*Parchment Barriers,*" which had been violated "*by overbearing majorities in every State*" whenever they were "*opposed to a popular current.*"

If our rights are nothing more than an expression of civil law, then one moment it can be: "You have a right to life," and the following moment it can be "We'll decide whether life-prolonging medical care will be provided you." One year it can be "you have a right to property" the next "you have a right to retain some portion of your property." Your rights become whatever a majority in Congress deem important at that moment, they are neither enduring nor immutable. This is wonderful as long as your view of what's important happens to align with that of the majority; but what if you find yourself in the minority? What then?

So where has been the legal profession in all this?

Many, if not most lawyers of the founding period, and there were about 30 of them in the Constitutional Convention, held to Blackstone's view. They were called "Blackstone Men" if they did so. There were more copies of Blackstone's *Commentaries* sold in America than in England.

But I would contend that most lawyers today, if asked, would not subscribe to Blackstone's view of the law. Our nation's law schools and a British import, legal positivism, are to blame.¹³

Enter English jurist and philosopher, Jeremy Bentham (1748 – 1832). Bentham, a contemporary of some of the Founders,¹⁴ is generally regarded as the founder of the British legal positivist movement. Bentham's "fundamental axiom" was: "It is the greatest happiness of the greatest number that is the measure of right and wrong." In other words, morality, and the rights attendant to it, is determined by majority rule.

The tenets of legal positivism include:

- There are no divine absolutes in law, or if there are, they are irrelevant to a modern legal system.
- Law is constructed – not discovered or revealed.
- Law evolves as man evolves.
- Judges guide the evolution of law through their decisions.
- To study law the scientific way, go to the original sources, i.e., the decisions of judges.

Christopher Columbus Langdell, Dean of Harvard Law School, having studied in England with Bentham's acolytes, is credited with bringing legal positivism to American law schools. From Harvard, it quickly spread. Today's law schools, with a few exceptions, teach natural law in their *History of Law* course. It is certainly not studied as a living, breathing part of contemporary law.

A final point: is there a relationship between natural law and civil law. We heard Dr. King insist that "*An unjust law is a human law that is not rooted in eternal law and natural law.*" Sounds a lot like Blackstone, who wrote: "*This law of nature...is of course superior to any other.... No human laws are of any validity, if contrary to this: and such of them as are valid derive all their force...from this original.*"¹⁵

Let that last point sink in: No man-made law is valid unless it comports with natural law. And since natural law and revealed law have the same "adorable source,"¹⁶ it follows that no man-made law is valid if it contradicts revealed law found in the Bible in any way. What does this imply about "laws" which allow for the killing of the unborn?

¹³ https://en.wikipedia.org/wiki/Legal_positivism.

¹⁴ Bentham died only three years after James Madison.

¹⁵ Commentaries on the Laws of England, Book 1, Chapter 2

¹⁶ "*The law of nature and the law of revelation are both Divine: they flow, though in different channels, from the same adorable source. It is indeed preposterous to separate them from each other.*" Declaration of Independence and Constitution signer James Wilson, Law of Nature, 1804.

Like the rest of God's creation, natural law and natural rights remain with us, in the background perhaps, waiting to be rediscovered and returned to their rightful place of prominence in our society.

If you are content to have your rights decided by a vote of the majority, to have the majority decide whether you may speak freely, whether or not you can assemble or associate, whether you may follow your conscience, then there is nothing further to do. That is the path our society is on. But if you prefer to have natural rights, as determined by the Creator of the Universe, the One who brought mankind into existence, the One whose image we bear, then there is work to do.

And here are the "marching orders," not from a Founding Father, but a Founding Mother. In 1805, Mercy Otis Warren, sister of the great patriot James Otis, Jr., wrote: "*It is necessary for every American, with becoming energy to endeavor to stop the dissemination of principles evidently destructive of the cause for which they have bled. It must be the combined virtue of the rulers and of the people to do this, and to rescue and save their civil and religious rights from the outstretched arm of tyranny, which may appear under any mode or form of government.*" Translated from "Founder-speak" this means we must stop teaching or otherwise promoting a false view of natural rights and natural law.

That is our charge today, the charge to every freedom-loving American: to stop the dissemination of principles, wherever they are found being promoted, that are destructive of the cause for which the Founders bled, the preservation of their rights as Englishmen.

Does natural law exist today? It's really a question of rights.¹⁷

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¹⁷ For further reading on this subject I recommend two books: "Written on the Heart" by J. Budziszewski, and "Retrieving the Natural Law" by J. Daryl Charles.