

The distillate of our tradition of laws governing marriage and sex could (as of 1961 at least) be fairly expressed as: marriage is the principle of legitimate sexual activity. Since the 1960s this integrating principle has been battered and obscured by practices, among married and unmarried alike, which are not reconcilable with the rigorous statement and consistent application of the norm that marriage is the principle of upright sexual activity. It does not follow (and I think it is not the case) that so many people reject the principle.

People do not accept all that is entailed by their premises. Few are aware of all that their premises lead to, and many do not know much of what is entailed. Many people contracept, but the same people are sure that “gay marriage” is impossible. Now is their opportunity to see what premises are necessary to defend what they *still hold to be true*: that marriage is the more or less permanent and exclusive union of one man and one woman and that this relationship is the principle of all sexual morality. Once the two coherent accounts of sexual morality are fully sketched—and only then—can the American people decide. They can also see what is presupposed and entailed by acceptance of “gay marriage.”

The vast majority of Americans who oppose legal recognition of “gay marriage” do so because they think it is wrong, even impossible. Not just impossible for them, in their private circle, but objectively impossible: no one can enter into a “gay marriage,” just as no one can be Babe Ruth, no matter how much they might wish or believe themselves to be the Bambino.

This argument, consistent with, but not explicitly an appeal to, the truth of the matter about marriage, *might* gain five votes on the Supreme Court. It is an argument which appeals most of all to a Justice’s sense that *this* revolution in social mores, if it is to come at all, ought not come the way that the abortion revolution did, through the courts.

Natural Law and the Limits to Judicial Review

—by David F. Forte

As Aristotle bluntly put it, “He who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast.”¹ The Massachusetts Constitution of 1780 directs that the powers of government must be separated “to the end it may be a government of laws and not of men.”² And Chief Justice John Marshall declared, “The government of the United States has been emphatically termed a government of laws, and not of men.”³

Today, no one disputes that judges must uphold the rule of law. Every judge claims that as a sacred duty.

Even the plurality in *Planned Parenthood v. Casey*⁴ made such a claim in upholding the right to an abortion. True, they in effect admitted that *Roe v. Wade*⁵ was a decision that was without legal and constitutional justification. But, the plurality declared, both on the basis of *stare decisis* and in the face of popular opposition, they must uphold what was the flawed decision in *Roe*. Why? To uphold the rule of law.

For his part, Justice Scalia tells us that he must stick to the text of the Constitution with only the most specific level of historical example to illuminate the text.⁶ Why? To up the rule of law. Justices Kennedy and O'Connor embrace the school of "legal process" that binds judges within the interstices of the technique of judging.⁷ For them, that is the rule of law. Chief Justice Rehnquist often defers to the legislative judgment, lest he substitute his own view of appropriate policy for those who have legitimate discretion in deciding such matters. Otherwise, he would be violating the rule of law. And Judge Bork famously decried the use of the unwritten natural law as a source for a judge's decision-making.⁸ That too would violate the norms of the rule of law.

In particular, judges who embrace positivism as the touchstone of their legal authority claim that positivism is the best protection against judicial usurpation and judicial activism. They, like Judge Bork, assert that judges who avow a natural law provenance for their decisions are unbounded and subjective. As Justice Black declared, a "natural law" approach would "degrade the constitutional safeguards of the bill of rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."⁹

Yet it has been the positivism of the Supreme Court since World War II that has led to the most massive and unapologetic assertion of judicial power in our history. *Roe v. Wade* is not an example of natural law jurisprudence gone awry. It is an example of untrammelled positivism.

Although positivistic jurisprudence begins with the modest declaration that judges should stick to the text of the Constitution as it is given to them, its very premise legitimates the extension of judicial power far beyond the text.

The essence of the positivistic justification is that the *assertion of the will by an authoritative law-maker legitimates the force of the law*. Of course, if a judge recognizes that the legislature is that authoritative body, the judge's decisions will be concomitantly limited. If he recognizes the text of the Constitution as the source of the authoritative action of the collective will, then that will limit his function. That is Robert Bork's position.¹⁰

But if it is the *will* that legitimates the exercise of power, why should the judge posit that will in someone else? Once the judge acknowledges, as the legal realists noted, that judges do indeed make law, and once he accepts that fact as legitimate, he has agreed that his own will is indeed an authoritative source of the law. And once he accepts that moral proposition, there is nothing (except perhaps

the constraints of tradition) to prevent him from venturing outward from the text to rely upon his own notions of right and wrong policy to make the law. In *Roe*, Justice Blackmun admitted it in terms. "This right of privacy," he declared, "is founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is,"¹¹ There was no authority given for the assertion of the abortion right outside of the judges' own desires. In Federalist 78, Hamilton declared that the liberty of the people "can never be endangered" from the judiciary "so long as the judiciary remain distinct from both the legislature and the executive."¹² The Court's assertion of its will as sufficient justification for its decree in *Roe* made it, in essence, indistinct from the legislature.

History indicates that it is natural law, not positivism, that provides a surer limit to judicial excess. As Justice Frankfurter indicated in contesting a positivistic theory of the incorporation of the Bill of Rights, "In the history of thought 'natural law' has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth."¹³ But where did Justice Frankfurter find such a proposition? After all, he was a disciple of positivism of the Holmes. What caused the turn? And what did he mean by natural law?

Documentary evidence gives us little guidance. Though a positivist, Frankfurter was certainly educated enough to know about the natural law tradition, even though it was out of favor in the academy. Yet being in the school that resolutely opposed natural law, Frankfurter's mention of it is surprising. It certainly surprised Justice Black, whose outrage may fairly be imputed partially to the connection at the time between natural law theory and the Roman Catholic tradition, a tradition Black had been famous in decrying since his days with the Ku Klux Klan.¹⁴ Frankfurter, after all, was a Jew. And perhaps it was that, in 1947, that made him, like some other positivists, recognize the validity of natural law in the face of the pure positivism of the Final Solution.

Thus though Frankfurter was not trained to "reason" in the natural law tradition, he knew it meant a grounding in certain fundamental authoritative norms, and believed those norms to be few and general, and certainly not the extensive list of specific rights in the Bill of Rights that Black wished to incorporate into the Fourteenth Amendment through the due process clause.

If Frankfurter's advice had been followed, the Supreme Court would have been far more modest about finding particular "rights" unrelated to any moral, philosophical, or legal tradition upon which the American Constitution was based. Instead, Black's positivism paved the way for the expansion of the Court's desire to remake the Constitution, and nothing Black could do in his later years could stem the flow he had let loose.

But the connection of judicial restraint to natural law is not merely a function of the historical record. It is an aspect of the internal workings of natural law itself.

A judge operating under the norms of natural law is more respectful of his limitations under positive law than a positivist is.¹⁵ A positivist must acknowledge that the will is the authenticator of the law. But a natural law judge knows precisely, as Alexander Hamilton noted, that he is empowered by “neither *Force* nor *Will*, but merely judgement”¹⁶ in his functions. Without will as an authenticator, a judge has no authority to supersede authoritatively passed positive law.

Long ago, St. Thomas Aquinas enunciated that truth. Not only does a judge act unlawfully, he said, when he decided a case on his subjective knowledge instead of the facts as presented to him in court,¹⁷ but such a judge has no authority to decide outside of the written law at all.¹⁸ In order to show that the judge was not basing his decision on mere subjective preference, Aquinas requires a judge to give reasons, so that the objective basis of his judgment can be known.¹⁹

More particularly, St. Thomas explains: positive law contains both rights deriving from natural law and rights deriving from positive law itself. Positive law does not establish natural rights, but only “contains” or effectuates them. But positive law does establish positive rights, or what we would call entitlements. Most policies of any regime are neutral in terms of the natural law. “For positive right has no place except where it matters not, according to the natural right, whether a thing be done in one way, or in another.”²⁰ Any number of choices are available before the lawgiver. Those choices, thousands upon thousands of them, are enplaced in the positive law. A judge’s basic function is to give effect, as honestly and fairly as he can, to the choices made by legislative authority, for a judge gains his authority by the lawgiver only to effectuate the written law of the lawgiver. If he goes beyond the written law, his judgment is “perverse.”²¹

Thus the natural law judge is more securely respectful of the positive law precisely because he knows the limits of his authority. His will is of no account.

But what about those rare instances when the lawgiver himself violates the norms of natural law? First, a judge properly respectful of the authority of the legislature would be wary of presuming that a law flies in the face of an imperative norm. Further, a judge would be morally bound to turn his craft to interpret a law in such a way that any possible ambiguity would be read as being not in conflict with any higher norm. But in the end, what if a state legislature does depart radically from a primary natural law norm? What if the police do it? The logic is inescapable. “If the written law contains anything contrary to the natural right, it is unjust and has no binding force.”²² Just as a judge has no authority to make new positive law, the lawgiver has no authority to make positive law that is patently and inescapably contrary to natural law. And if a judge should enforce such a law, the judge himself would be acting unlawfully.²³

Chief Justice John Marshall made this logical point the centerpiece of his argument in *Marbury v. Madison*, the very case that established the right of the Supreme Court to review positive law. The Court, it was argued, was not superior

to Congress in determining whether a law was constitutional. If Congress, in good faith, believed a statute was in conformity with the Constitution, the Court should defer to the Congress's judgement.

That misses the point, Marshall in effect said. True the Court is only a coequal branch. It is not innately superior to Congress in the constitutional scheme. But the judges of the Supreme Court are under a duty to decide cases according to the law. They have no authority to do anything else. They have undertaken an oath to support the Constitution. Congress has decreed that judges must take an additional oath to the same effect. "How immoral to impose it on them," Marshall bristled, "If they were to be used as the instruments, and the knowing instruments, for violating what they swear to support"! Marshall continued, "If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."²⁴ In sum, it would be a "crime," if the Court, after swearing to uphold the law, should enforce an act that was not truly law. The Court simply has no authority to do such a thing.

Thus, the very premise of judicial review in America is rooted in the structure of natural law. Judges have no authority to make any kind of law. They can only enforce and apply authoritatively passed positive law. But if the positive law has not been enacted, either in form or substance, without proper authority, then if the judge should enforce such a law, he would in fact be making new positive law, and would be acting outside of his authority.

Under the principles of the natural law and under the first principles of judicial review in this country, both judicial restraint and the rule of law are truly maintained.

Notes

1. Aristotle, *The Politics*, trans. T. Sinclair (New York: Penguin, 1979), 143.
2. Massachusetts Constitution (1780), art. 30, in 3 Francis Neton Thorpe, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws* 1893 (1909).
3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).
4. 114 S.Ct. 909 (1992).
5. 410 U.S. 113 (1973).
6. *Michael H. v. Gerald D.*, 491 U.S. 110, at 127 n. 6 (1989).
7. William N. Eskridge, Jr. & Philip P. Frickey, "The Supreme Court 1993 Term: Foreword: Law As Equilibrium," 108 *Harv. L. Rev.* 26, 37 n. 37 (1994).
8. Robert H. Bork, "Natural Law and the Constitution," *First Things* (March 1992): 16.
9. *Adamson v. California*, 332 U.S. 46, 70 (Black, J. dissenting) (1947).
- 10 "The formulation and expression of moral truths as positive law is, in our

system of government, a system based on consent, a task confided to the people and their elected representatives.” Bork, “Natural Law and the Constitution,” 19n.

11. 410 U.S., at 153.

12. *The Federalist*, No. 78.

13. *Adamson v. California* 332, U.S. 46, 65 (Frankfurter, J. concurring) (1947).

14. Roger K. Newman, *Hugo Black* (New York: Pantheon, 1994), 104.

15. “[W]hen judges understood more clearly the difference between natural law and positive law, they understood more readily that the mission of judges would not encompass the management of schools or the allocation of public housing.” Hadley Arkes, “Natural Law and the Law: An Exchange,” *First Things* (May 1992): 45.

16. *The Federalist*, No. 78.

17. *Summa Theologica*, Pt. II-II q. 67, art 1.

18. *Summa Theologica*, Pt. II-II q. 60, art 5.

19. *Summa Theologica*, Pt. II-II q. 67, art 1.

20. *Ibid.*, art. 2.

21. *Summa Theologica*, Pt. II-II q. 60, art 6. As Hamilton put it, Every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.” *The Federalist*, No. 78.

22. *Summa Theologica*, Pt. II-II q. 60, art 5.

23. Justice Frankfurter realized this when he struck down evidence gained by police emptying the stomach of an unconscious man. Such an action, he said, “shocks the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). “Conscience,” in Frankfurter’s sense, was not a subjective distaste, but the conscience of a judge, rooted in the verities of natural justice. See generally, Richard G. Stevens, *Frankfurter and Due Process* (Lanham, Md.: University Press of America, 1987).

24. 5 U.S. (1 Cranch), at 180.

The Recourse to Natural Law

—by Russell Kirk

The late Dr. Kirk delivered this paper as the 1992 Orestes A. Brownson Lecture in Politics, Law, and Religion at Franciscan University of Steubenville.

The literature of natural law is complex, copious, and monthly growing vaster. All I aspire to accomplish in this paper is to offer some general introduction to the subject; to treat of natural law and the moral imagination; to describe Orestes Brownson’s assault upon “higher law” doctrine; and to suggest that in politics, appeal to natural law is the court of last resort.

Objectively speaking, natural law, as a term of jurisprudence and politics, may be defined as a loosely-knit body of rules of action prescribed by an authority