Natural Law Constitutionalism and the Culture of Death

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Would the use of natural law principles in constitutional adjudication be effective in overturning the "death decisions" of the United States Supreme Court? This article argues that a natural-law oriented jurisprudence is not only consistent with, but is inherent in, a full intent-of-the-framers approach to constitutional interpretation.

Introduction

In the papal encyclical *Evangelium Vitae*, *The Gospel of Life*, Pope John Paul II discussed the various forces--particularly the rationalizations which demeaned the personhood and dignity of the unborn and terminally ill in order to justify abortion and euthanasia--which contributed to the growth of a "culture of death," marked by a radical individualism and cultural materialism, and leading to a concept of rights oriented toward individual self-gratification, ultimately resulting in a "war of the powerful against the weak," in which " a life which would require greater acceptance, love and care is considered useless, or held to be an intolerable burden."[1]

This culture of death, the Holy Father argued, is in direct opposition to the Gospel, and so he called on Catholics, and indeed all people of good will to work to understand the origins and basis of the culture of death, so that "a new culture of human life will be affirmed, for the building of an authentic civilization of truth and love."[2] A particular aspect that he calls our attention to is the paradox that assaults human life at its most vulnerable stages have not only ceased to be considered crimes, but have been elevated to the status of rights. In the United States the main vehicle for this process has been the judiciary, beginning with *Roe v. Wade* (1973).

Currently there is a major debate about whether or not these "death decisions" are themselves aberrations from legitimate standards of judicial review, and in fact whether or not there are legitimate, discoverable, and manageable standards for judicial decision-making in constitutional questions of fundamental importance or whether judicial review is in fact inherently arbitrary and hence particularly available for such decisions.[3] In particular, I will examine whether or not natural law principles, which could be assessed in constitutional law through adjudication of the privileges or immunities clause

of the Fourteenth Amendment, provide a grounding for judicial decision-making that would overcome the recent pattern of Supreme Court decisions, and perhaps provide a starting point for embarking upon the Holy Father's project of constructing an authentic civilization of truth and love.

The plan of this paper is, first, a consideration of whether natural law principles are legitimate bases for constitutional decision making. Many (perhaps most) critics of the court's decisions would probably argue that they aren't. Such leading legal critics as Lino Graglia, Robert Bork, Matthew Franck, and Chief Justice Rehnquist would argue that attempting to develop standards of natural law to guide justices in their decision making is equally illegitimate as (and in fact, is indistinguishable from) using mere personal preference or caprice to guide judicial decision making. These scholars would say that the only sure and legitimate standards for constitutional adjudication are the intentions of the framers of the Constitution, determined by means of rigorous historical and legal analysis and accompanied by deference to the legislature when the intention of the framers of the Constitution is ambiguous. However, I will argue that this argument is unsatisfying for several reasons, but most specifically for the purpose of my argument because *the framers themselves clearly implicated natural law standards of decision-making by the inclusion of the privileges and immunities clause of Article IV (and, then, subsequently translated into the Fourteenth Amendment.) Hence, a natural-law oriented jurisprudence is not only consistent with, it is inherent in, a full intent-of-the-framers approach to constitutional interpretation.*

This paper was in many ways inspired by the paper, "*Evangelium Vitae* and Modern Political Thought: The Philosophical Origins of the Culture of Death," delivered at the Fall 1998 SCSS conference by Professor Carson Holloway, who argued that the transformation of American culture into a culture of death was not an aberration from an essentially healthy foundation, but rather was a development implicit in modern political thought.

This paper next takes up Professor Holloway's challenge; namely, wouldn't an appeal to natural law, understood in the modern sense, be simply an appeal back to the self-serving, ruthlessly individualistic, and relentlessly hedonistic impulses which have driven us to where we are today? I will argue, following James Stoner, that the conception of natural law held by the framers, was essentially an amalgamation of two separate traditions--common law principles and Lockean theory--which had been twined together by Blackstone. Despite the fact that ultimately these ideas proved to be incompatible, both were significantly influential at the time of the founding. However, subsequent court forays into the realm of natural law did this on the basis of a Lockean understanding of natural law, and so did not adequately provide reliable standards of justice.

Finally, the paper will conclude with the argument that the explication of appropriate natural law standards to guide judicial decision-making is of particular significance at the present moment. The Supreme Court last term invoked the privileges or immunities clause of the Fourteenth Amendment in the case *Raez v. Doe*, and Justice Thomas, in his dissent in that case, issued what amounted to an invitation for further litigation concerning the meaning of this clause. Since this is the principal link between natural and constitutional law, it would be well to be prepared to articulate a clear and robust conception of natural law that could be invoked in further adjudication on this issue. Ultimately, distinguishing between Lockean and common-law understandings of natural law paves the way for conceptualizing a new--and possibly distinctively Catholic (not in a sectarian sense, but in the sense of being consistent with Catholic teaching and worldview)--social science; one not based on the scientism that undergirds modern political thought, but rather on the prudential reasoning of Aristotle and St. Thomas.

Part One: Natural Law and the Constitution

Critics of a natural-law approach to constitutional adjudication often appear to assume that such an approach implies either substituting natural law principles for the Constitution (as did, for example, the abolitionists, who used as a slogan the concept of a "higher law than the Constitution" and in the name of this higher law urged their followers to engage in various forms of civil disobedience), or using the concept of natural law to read personal predilections into the Constitution (as critics charge, the Lochner-era court did with the concept of "substantive due process" protecting an unwritten "liberty of contract" which superseded state attempts to regulate wages and working conditions.) However, it is the argument of this paper that *natural law constitutionalism is not necessarily limited to these alternatives*. Rather, natural law principles can be used to construe, where such construction is necessary, the significance of constitutional provisions in specific cases. Furthermore, based upon an analysis of the meaning and intent of the privileges and immunities clause of Article IV and its sister clause in the Fourteenth Amendment, one may make the claim that the framers of the Constitution provided for this approach.[4]

Most of the Supreme Court's "death decisions" are based, at least in part, on the Fourteenth Amendment, and in particular on either the Equal Protection or Due Process clauses of that amendment. These two clauses have two things which recommend them for this particular purpose: they apply, as does the amendment as a whole, directly to state governments; and they are both fairly plastic in meaning, allowing a wide scope for judicial lawmaking in the guise of adjudication. What is almost entirely absent from constitutional law is the privileges or immunities clause, which is, or should be, fairly surprising, since

that clause was clearly understood at the time of the amendment's passage to be the heart of the amendment.

But why should anyone care? Shouldn't we all, as Professor Lino Graglia has suggested, simply count our blessings that in this litigious society at least one clause of the Constitution has remained "one of those blessed constitutional provisions that by being ignored has not caused a single bit of trouble."[5] Who cares if the court has managed to overlook one small clause; after all, it wreaks enough havoc with those it uses. In fact, many contemporary critics of the court, when they note the absence of the privileges or immunities clause at all, note with some satisfaction that this particular clause is virtually undisturbed. The very reason, however, that this is a source of satisfaction to some scholars is the reason that it is of fundamental importance in our constitutional structure, and should be revived.

Professor Graglia indeed speaks for a group of eminent conservative legal scholars, including Robert Bork[6]and most notably Raoul Berger[7], who adamantly oppose the reinvigorating of the privileges and immunities clause, on the grounds that the clause is "a constitutional provision whose intended meaning remains largely unknown;" and that indeed, "it is quite possible that the words meant very little to those who adopted them."[8] Bork cautions, "that the ratifiers of the amendment presumably meant something is no reason for a judge, who does not have any idea what that something is, to make up and enforce a meaning that is something else."[9] However, far from being intrinsically inscrutable, this clause only appears to be meaningless because the natural law conceptions which animate it have, in many significant ways, been lost in our legal culture.

Those who have taken constitutional law will remember that the reason why the privileges or immunities clause is never invoked is the decision in the Slaughterhouse Cases of 1873, which defined the clause so narrowly as to make it essentially meaningless. What is not ordinarily considered is that the power of this single, singularly inept and virtually incoherent 5-4 decision to derail, for 125 years, the central provision of what has become the most significant amendment in constitutional history must be explained by reference to something outside the decision itself. The reason why the Privileges or Immunities Clause could not recover from the Slaughterhouse decision was that the natural-law conception which informed this clause had already been abandoned by legal elites by the time of this decision; thus the meaning of the Privileges or Immunities clause was largely lost to them. To flesh out this conclusion, it will be necessary to briefly examine the background and history of the privileges or immunities clause.

The Privileges or Immunities Clause of the Fourteenth Amendment is unequivocally linked, both by similarity of language and by explicit statements made during congressional debates and in the ratification process, to the

Privileges and Immunities Clause of Article IV of the Constitution, and more specifically, to the construction of that clause advanced in *Corfield v. Coryell*,[10] the leading case in this area.

The Article IV Privileges and Immunities Clause was simply an abbreviated version of the much more specific clause found in the Articles of Confederation. Being understood as such, its inclusion in the Constitution occasioned little recorded debate in the Constitutional Convention, and only passing mention in the *Federalist*. However, the mention in the *Federalist* is brief, it is not slighting; Hamilton goes so far as to describes this clause as "the basis of the Union."[11]

Our contemporary understanding of this clause casts it almost exclusively as an interstate equal protection clause; the Supreme Court announced in 1948 that this clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." [12] And as far as it goes, there is nothing wrong with this interpretation--one intention of the Framers of the Constitution certainly was to guarantee comity among the states. It is however, when this aspect of the clause is mistaken for the entire meaning of it (consider, for example, Judge J. Harvie Wilkinson III, who writes "the Article IV clause itself does not require a state to recognize any particular right as being fundamental; it commands only that having recognized a fundamental right, the state must afford it equally to residents and nonresidents") that serious distortion of the meaning and purpose of the clause sneaks in.[13]

To recall the full scope of the Article IV clause, it is helpful to consider the text of the Fourth Article of Confederation, which guarantees that all free inhabitants of each state:

> shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state; and shall enjoy therein all the privileges of trade and commerce[14]

It is quite clear from this text that the states were in fact required to recognize some rights as fundamental, i.e., the right to travel and the "privileges of trade and commerce." Furthermore, the specified privileges are not the full extent of the Article's guarantee, but rather are placed in the article as examples of the "privileges and immunities of free citizens." Furthermore, the Article IV language is itself drawn from a long legacy of legal protection of "privileges and immunities" in the fundamental governing documents of the American colonies, dating back to the Charter of Virginia of 1606.[15] Given that the records of the Constitutional Convention show that the delegates were convinced that the Privileges and Immunities Clause of the Constitution was "formed exactly upon the principles of the 4th article of the present confederation," the conclusion is inescapable that both the authors and ratifiers

of the Constitution understood the Privileges and Immunities Clause to lay substantive obligations on the state governments, not only in terms of equal treatment, but also in terms of specific guarantees.

The nature and extent of those substantive obligations were addressed in only one significant case prior to the Civil War. Although this case, *Corfield v. Coryell*,[16] was only a circuit decision, and Justice Bushrod Washington's elucidation of the meaning of Privileges and Immunities was, strictly speaking, not a necessary element of the decision of the case (in legal terms, *obiter dicta*), nonetheless this case was considered, both in legal and popular opinion, as the authoritative interpretation of Article IV, section II.[17]

The case itself involved the narrow issue of whether the clause protected the rights of non-citizens to gather shellfish in New Jersey waters. Ruling that it did not, Justice Washington went on to elucidate what was protected by the clause. He maintained that the clause protected rights:

> which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[18]

Maintaining that it would be "more tedious than difficult" to enumerate these rights, Justice Washington offered illustrative categories, such as "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety ."[19]

Several points are worth noticing here. In the first place, Justice Washington definitely sees the Privileges and Immunities Clause as imbued with substantive content. Furthermore, he obviously does not consider his opinion in this matter as controversial, but rather expects that his litany of the rights protected by the Privileges and Immunities Clause will be familiar to the point of tedium to his audience. We also see that Washington's language echoes that of the Declaration of Independence, but at the same time is based on common-law reasoning (the rights which "have at all times been enjoyed.") It appears--since this case was received, contemporaneously and subsequently, as the authoritative explication of the Privileges and Immunities clause--that drawing the Declaration into the Constitution through this clause was considered unremarkable. In fact, it is through reflection on the *Corfield* opinion that we in the twentieth century can recapture the point that was tediously obvious to the Americans of the eighteenth and early nineteenth centuries: that *the Privileges and Immunities Clause was essentially intended to constitutionalize (or as we might be more likely to say today, "incorporate") the natural rights philosophy of the Declaration.*

Lest we think that Washington was merely idiosyncratic in his choice of language, it is important to note that the phrase "privileges and immunities" was in fact a technical legal term, defined by William Blackstone (a primary legal authority in the Founding generation) in a manner wholly consistent with Washington's exegesis.[20] In his *Commentaries on the Laws of England*, Blackstone discusses the concept of the "rights of Englishmen" as follows:

> The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear to be indeed no other, than either that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals.[21]

Here Blackstone explicitly defines "privileges and immunities" as pointing back from the civil to the natural law. In fact, as Blackstone's definition makes clear, the concept of privileges and immunities serves as a bridge between the realm of civil rights and natural rights, immunities being the natural rights not surrendered upon entrance into civil society, and privileges being the civil rights substituted for the natural rights so surrendered.

Furthermore, analysis of the framing and passage of the Fourteenth Amendment reveals, as Michael Kent Curtis has demonstrated in his book, *No State Shall Abridge*, the authors of the Fourteenth Amendment repeatedly expressed their understanding that the purpose of the Amendment they were fashioning was to protect a broad array of rights of all citizens, black and white, from all government interference.[22] Furthermore, the authors of the amendment looked first and foremost to the Privileges and Immunities Clause to bear the burden of protecting those rights. Consider, for example, the statements of John Bingham, principle author of the amendment:

> There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. It is the power *to protect by national law the privileges and immunities of all the citizens of the Republic* and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.[23]

And Senator Jacob Howard, who introduced the amendment in the Senate, said: "This is a general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. This is its first clause, and I regard it as very important." In the same speech, Howard went on to discuss the nature of the privileges and immunities protected by the amendment. He relied substantially (and explicitly) on an expansive reading

of *Corfield*, and in fact asserted a much broader conception of the Privileges or Immunities Clause, indicating that it also encompassed the guarantees of the Bill of Rights.[24]

The congressional debates over section one of the Fourteenth Amendment show a focus on the Privileges or Immunities Clause as the substantive heart of the amendment.[25] The equal protection and due process clauses appear to have been considered by many to be more procedural than substantive. This emphasis also appears in the records--sketchy as they are--of the ratification debates in the states. That is, regardless of whether or not the states approved of the amendment, they discussed it in terms of a broad protection of rights, and that protection provided primarily by the Privileges or Immunities Clause. The ratification debates also show an emphasis on this clause as a source for the protection of the rights of whites as well as blacks (as can well be imagined, the rights of Southern Unionists were of especial concern to many Republicans during Reconstruction.)

Given this history, it is hard to understand why this clause has so completely disappeared. The Slaughterhouse cases were the vehicle for the disappearance, yet an examination of this decision would seem to deepen, rather than resolve the mystery, for this decision was so poorly crafted that not only critics of the decision, but the author himself, expressed doubts as to whether or not it should be followed immediately following its issuance.[26]

The case itself dealt with a challenge to a legislative grant of a monopoly to the Crescent City Livestock Company to control the slaughtering of cattle in New Orleans. Billed as a public health measure, it was nevertheless clearly the result of almost disdainfully unconcealed bribery. A group of butchers challenged the granted monopoly on the ground that it interfered with their right to pursue a lawful profession, and thus was a violation of the privileges or immunities clause of the Fourteenth Amendment.

The court by a bare 5-4 majority sided with Crescent City and the restrictive interpretation of the Privileges or Immunities Clause which was assumed in their position. In delivering the opinion of the majority, Justice Miller essentially provided the country with a new Fourteenth Amendment; to make the package complete, he provided a new history to accompany it.

In Justice Miller's version, "the most casual examination" of the Civil War amendments showed that they were concerned almost exclusively with the rights of blacks.[27] Thus, even though the language of the amendment clearly encompassed universal rights, Justice Miller maintained that, particularly where whites were concerned, this amendment was not intended "as a protection to the citizen of a state against the legislative power of his own state." He reached this conclusion on the basis of an extraordinary reading of the citizenship clause. Ignoring the overwhelming and uncontroverted evidence that the citizenship clause was added to the Fourteenth Amendment to overturn that

aspect of the *Dred Scott* decision which held that citizenship in the United States was derivative of state citizenship, Miller held that the clause created distinct citizenships--state citizenship and national citizenship--and that the Privileges or Immunities Clause applied only to the rights of national citizenship.[28] Since Miller believed that it was the rights of state citizenship that comprehended "nearly every civil right for the establishment and protection of which organized government is instituted, " his new national Privileges or Immunities Clause was left with very little substance. In fact, the only examples of rights protected by the Privileges or Immunities Clause which he could come up with were either rights which had already been explicitly recognized by the Supreme Court as protected against governmental interference prior to the passage of the Fourteenth Amendment, or rights, such as protection on the high seas, which it was literally impossible for state governments to abridge.[29]

Since in Justice Miller's view, the entire domain of the privileges and immunities of citizens of the states, "lay within the constitutional and legislative power of the states, and without that of the Federal government," he was left with--and more importantly, he left the country with--a Privileges or Immunities Clause which, in the words of the noted constitutional scholar James Bradley Thayer, "seems to be unnecessary."[30] Thus Justice Miller's construction of the Privileges or Immunities Clause not only flew in the face of both the language and the clear legislative history of the Amendment, but it also violated the basic tenets of judicial construction, for judges are expected to assume that lawmakers--and especially Constitution-makers--mean *something* by their laws, even when the judges are unsure of what it is.[31]

This brings us to the great unanswered question: why? Why did the court reach this decision, and why did it have such a significant and lasting impact, despite its defects? At this remove it of course is impossible to say with certainty, but there seem to be two answers. In the first place, many members of the court were intensely concerned with the effect of the Civil War amendments on the federal structure of the government; that is, there was some significant concern, expressed in Miller's opinion, that the Fourteenth Amendment threatened to "radically change . . . the whole theory of the relations of the state and Federal government," which would "fetter and degrade the state governments" by transforming the Federal government into a "perpetual censor upon all the legislation of the states."[32] Thus it may be argued that for the majority of the court, concerns of federalism were uppermost in their minds as they turned to the task of explicating the Fourteenth Amendment, and the *Slaughterhouse* decision represents their determined attempt to protect the states' reserved police powers, even if such protection required a significant reinterpretation of the meaning of the amendment. In fact, a few years after the *Slaughterhouse* decision was handed down, an influential legal scholar,

Christopher Tiedeman, wrote approvingly that the court in that case had "dared to withstand the popular will as expressed in the letter of the amendment" in order to save the federal structure of the government by protecting the reserved powers of the states.[33]

However persuasive the need for preserving federalism seemed to the Court in 1873, it does not explain the enduring significance of *Slaughterhouse*. It certainly would be impossible to maintain today that the court's ongoing concern for protecting the structure of the federal system adequately explains its continuing acquiescence in what was clearly an erroneous decision. In order to do that, we must look at a deeper and more pervasive reason for the resonance of the Slaughterhouse decisions, one rooted in a great sea-change in basic outlook which was beginning to occur at just about the time of the *Slaughterhouse* decision. Up through the Civil War, the dominant intellectual orientation--in politics generally and in jurisprudence specifically--was toward the natural rights philosophy which informed the Declaration and Constitution. After the war, a new intellectual orientation began to emerge in the United States, which counseled that in political life one should take one's bearings not by nature--indeed, the very concept of nature was challenged--but by the demands of progress. While by no means universal at the time of the *Slaughterhouse* decision, this outlook was coming increasingly to dominate America's political and intellectual elite, until by the turn of the century it was firmly established as the dominant view. For example, just seven years after *Slaughterhouse*, Oliver Wendell Holmes published his famous and influential study of the development of the law--*The Common Law*--which specifically applied this progressive, or evolutionary, conception of nature to the legal system.[34]

In this new outlook, not only the Fourteenth Amendment, but the entire Constitution--in fact, the very concept of constitutionalism--was stripped of substantive content. Rather than seeing the Constitution as an attempt to secure the rights which reflection on human nature reveals to be inherent in that nature, the new outlook saw it merely as a more or less arbitrary set of institutional arrangements. This view, which I shall call intellectual progressivism (although the political movement which bore that name was still in the future) is based on the concept that there can be no natural standards by which to structure and evaluate government, for nature is not static and determinate, but fluid and evolving.

Given this perspective, rights are not individual attributes revealed by reasoned reflection on the human condition, but rather competing claims put forth by groups seeking government sanction. Stripped of its moorings in natural law, the Constitution itself is nothing more than a collection of arbitrary value choices. The argument over the proper scope of constitutional interpretation thus becomes a question of whose arbitrary value choices should

be imposed, those of the Founders or those of the current Justices? Conservatives (such as Bork and Graglia) argue for the Founders, liberals (such as Lawrence Tribe) for the Justices (at least some of them), but neither side can give satisfactory reasons why anyone's arbitrary value choices should trump anyone else's. In this view, the traditional conception of privileges or immunities, as providing a bridge between the civil and the natural law and so between civil and natural rights, was quite literally meaningless. *If there is no such thing as human nature, there can be no natural rights, and so the idea that natural rights provide a limit to the permissible activities of government must disappear.*

Justice Miller's opinion in *Slaughterhouse* was completely consonant with this intellectual progressivism. *Given an intellectual worldview which made the Privileges or Immunities Clause meaningless, nothing could be more appropriate than a constitutional decision that it had no meaning.* This dramatic reconceptualization of the meaning of constitutional government is the only phenomenon I can think of which can explain the ongoing success of the *Slaughterhouse* decision despite its obvious flaws.

Part Two: Modernity, Natural Law, and the Possibilities of Constitutional Construction

But isn't this, as Professor Holloway argued, precisely the problem? Doesn't the intellectual progressivism that undermined the privileges or immunities clause have its origins in the very modern concept of natural law that informed it? The best answer to these questions is both yes and no. Yes, insofar as the natural law foundations of the Constitution were understood in the Lockean sense, which was a, if not the, prominent understanding at the time of the Constitutional Convention. No, however, in the sense that however prominent, Lockean conceptions of natural law were never hegemonic. Remember, for example, that when Thomas Jefferson recalled his purpose in crafting the Declaration of Independence, he declared it was aimed at "harmonizing . . . the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."[35] Without fully considering all the implications of this statement; and in particular, without delving into the thought of Cicero or the relatively obscure Sidney, we can still ask: where does Aristotle fit in to the political theory of the Declaration?

The most Aristotelean aspect of the Declaration is its appeal to prudence; a tempering of the theoretical construct ("whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, . . .) with the prudential concern for stability and careful discernment ("prudence indeed will dictate that governments long established should not be changed for light or transient causes.") Furthermore, the bulk of the Declaration is not taken up with the theoretical abstractions of the first three

paragraphs; most of it encompasses the building of the case that the causes of the revolution were neither light nor transient.

Building on the work of James Stoner, [36] we can argue that this Aristotelean prudentialism was incorporated into fundamental American legal construction through the Americanization of the common law. That is, the Declaration and the Constitution (which was designed to institute the principles on which the Declaration was based) drew from two somewhat separate traditions: Lockean social contract theory and common law legal reasoning. The conception of natural law, like everything else in the common law, is hedged round with qualification and limitation, and hence is exceedingly complex, but the basic thrust is that the common law develops by a process of discovering and applying, through the application of rigorous legal reasoning, the principles of natural law that are discernable through reflection on the customs and precedents of the people, to the specific circumstances that are presented in a given case.

Thus practitioners of common law reasoning, traditionally understood, typically speak of finding or discovering, rather than making, law, even when the legal issues in a given case could not possibly have been anticipated by those who decided the cases which serve as precedent. New factual situations were analyzed in light of the principles of previous holdings, rather than being seen as opportunities to create new legal standards. In contrast it has become standard, since the publication of *The Common Law* by Oliver Wendell Holmes, to define common law as "judge-made law", but this redefinition was still far in the future when the Constitution was ratified. Its framers still saw common law as "discovered" law, bearing, as alluded to above, a complex, but inextricable relationship to natural law.

It is important to keep in mind that the common law understanding of natural law did not see natural law as a theoretical construct that set limits to sovereign power. Rather, natural law was revealed through the particular historical development of the law, which itself set limits on the power of sovereigns. Looking back at the *Corfield* opinion, one can see both the theoretical Lockean version of natural law, when Justice Washington describes certain rights as "in their nature fundamental;" and a common-law version when those rights are described as those "which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." The privileges or immunities clause reflects this two-fold character of natural law thought, incorporating both a Lockean understanding and a common-law understanding.

Furthermore, the (pre-Holmesian) common-law understanding of natural law should answer the fears of those critics who worry that natural law is just another phrase for judicial propensity, in other words, that admitting the concept of natural law as a tool for constitutional construction is opening the

door once again for judges to make up new rights in the name of nature, and ever more severely limit the realm of democratic decision making. The common law approach to natural law requires a rigorous prudence and an attention to both history and legal analysis which would rather limit than expand the realm of judicial decision making.

Take for example, the case of the right to privacy. This right first entered the American legal system on the basis of an influential law-review article written by Charles Warren and Louis Brandeis.[37] In this article, they argued that an examination of the common-law principles which protected intellectual property and protected individuals from libel and from even the most inconsequential trespass on their property, could be understood to be protecting a more fundamental right to privacy, that only the intrusive technology of modern times (the article was written in 1890; newly-available portable photographic equipment was making great intrusion upon the lives of socially prominent families like those of Charles Warren) had revealed to be necessary. On this basis, the courts in several states articulated a right to privacy which protected individuals from such violations as having their photographs used as advertising symbols without their consent. As long as the right to privacy remained moored in the history and traditions of its common-law origins, it was both remarkably successful in preventing the kinds of intrusions that it was developed to combat, and remarkably uncontroversial.

However, in 1963, casting about for a basis upon which to invalidate Connecticut's law against the distribution of birth-control devices, the court hit upon the right to privacy.[38] Obviously, this understanding of the right to privacy had almost nothing in common with the common-law origins put forward by Warren and Brandeis; rather, the Court found it in "penumbras and emanations" from several constitutional amendments. Wrenched free of its principled and historically rooted base, the right to privacy was very shortly perverted beyond all recognition to become the original basis for abortion rights.[39] While the court offered in both *Griswold* and *Roe* what it claimed were precedents, and even a version of historical analysis, both areas of legal support were so weak that even supporters of these decisions evinced significant uneasiness with the basis of them.[40]

This example illustrates the difference between the Blackstonian common-law and Lockean theoretical approaches to natural law constitutionalism. The common-law approach rests on incremental development, based on case-by-case decision making, always guided by historical and legal analysis. A theoretical approach determines a right or principle abstractly, then allows it to expand to the limit of its logic in the course of case law.

It is my opinion that the same intellectual progressivism which rendered the privileges or immunities clause incomprehensible also destroyed the grounding of the common-law understanding of the relationship between natural and

constitutional law. If common law was "judge-made" rather than discovered, the decisions any given judge would come to were more or less arbitrary; thus the common-law method was just elaborate window-dressing for injecting personal predilection into constitutional decision-making. Given this understanding of the common law, it is certainly understandable that legal scholars and justices themselves would prefer to base their decisions on clearly articulable, theoretically justifiable general principles. It may well be for this reason that natural law constitutionalism, starting in the late nineteenth century, became focused entirely on the theoretical (Lockean) understanding of natural law. At the same time, it is possible (and important) to recover the older, more prudential, and ultimately sounder basis for responsible, limited, and justifiable natural-law standards for constitutional decision making. To do this, I believe, it will be necessary to take up again Professor Holloway's challenge to understand fully the basis of modernity, and how that basis has influenced our current predicament.

Modernity, Social Science, and the Requirements of Political Life

Professor Holloway argued that the origins of the culture of death were very deeply rooted in modern thought. He argued that what appeared to be the centrality of the right to life as the basis of modern government turned out to be, upon reflection, only the right to life for those strong enough to claim it. Since the government's protection of the right to life was only the result of enlightened self-interest--the passionate desire to preserve oneself, enlightened by the knowledge that in a world where all were roughly equal in the ability to kill and be killed, governmental protection of the weak as well as the strong was your best bet for keeping yourself alive--that right only extended to those who our self-interest could conceivably encompass. In particular, those yet unborn, or those too weak to leave their bed, who can't in any case threaten anyone, are outside the purview of this enlightened self-interest.

This is a compelling argument, and it is appropriate here to explore an additional dimension of it which is related to the legal issues discussed above. This dimension can best be described as the combination of motive and method which animates Hobbesian (and in a more guarded fashion, Lockean) political thought. Hobbes was primarily concerned with developing a system of political science which could guarantee civic peace and personal security. He believed for that to happen, politics had to become a scientific study; only by understanding politics with the same level of rigor and sophistication as mathematicians understood geometry could one develop an understanding of legitimate government which would put an end to civil strife by compelling assent from all sane people. In developing this scientifically rigorous political science, however, he had to contend with a basic problem inherent in politics:

the power of the irrational elements of the psyche (will and desire) to override rational judgments regarding justice and the social good.

This problem has been of concern to political philosophers as long as there has been political philosophy. It, for example, is a central theme of the Platonic dialogue *The Gorgias*. A pivotal juncture in that dialogue occurs when Socrates is arguing with his third interlocutor, Callicles. Socrates has been steadfastly maintaining, in the face of increasingly aggressive opposition, that there is a radical disjunction between the good and the pleasant. Finally he gets Callicles to agree that some pleasures are more noble than others, at which point Socrates relentlessly drives him to admit that this means that there is a standard of good unrelated to pleasure. Just when it is clear that logically speaking, Socrates has won the argument, Callicles makes the declaration which demonstrates how thoroughly Socrates has lost, from a political point of view: "It seems to me, I don't know how, that you are right, Socrates, yet I feel as the many do. I am not quite convinced by you."[41] This obstinate refusal to accept the philosophic conclusions of Socrates demonstrates the impotence of reason against the willful disregard of rational argument.

The classical answer to this dilemma, articulated most fully by Aristotle, was to rely on prudential, rather than theoretical, reason to examine political life. Thus, rather than develop abstract, universal standards of justice, Aristotle emphasized the necessity of starting the examination of politics where the people lived, so to speak. He took seriously the ordinary concerns of politics, and sought to engage political life in a gentle dialectic, tempering the demands of philosophic consistency to the realities of political concerns.

This prudential approach to political life was adopted by St. Thomas; this approach does not deny nor denigrate the importance and existence of objective normative standards of justice; yet it cautions against the application of those standards without due consideration of the traditions and customs of the people. Further, such an approach counsels that the consequences of actions designed to further the pursuit of abstract justice be carefully considered, because often those consequences can be the infliction of greater injustice than that which adhered in the original situation.

This approach is also that of the common law; the judicious application of principle to circumstance, bound always within the strict limits of the factual situation. Such an approach avoids the articulation of specific principles designed to be applied without exception (the so-called "bright-line rules" which do serve to make adjudication easier and more efficient) in favor of more cautious, circumstantially limited principles designed to be applied with accommodation to particular situations.

It was, however, precisely this prudential approach to politics which Hobbes blamed for much of the unrest which plagued political life. Because the application of prudential wisdom, both in politics and law, requires careful

study and a long training, the grounds of prudential decision-making are not universally compelling to those untutored in the subjects. Thus prudential decision-making can be challenged; it does not compel assent.

Hobbes thus wished to return to the logically compelling political philosophy practiced by Socrates; yet in view of the inability of Socratic philosophy to actually influence politics, he realized that the most fundamental aspect of this approach to political philosophy had to be altered: political philosophy must be grounded on passion, which was strong, rather than reason, which was weak.

We can see that the turn to science as the model for understanding politics necessarily includes basing that understanding on the passions. The conclusions which Professor Holloway draws are implicit in the concept of a scientific social science. It seems to me that Pope John Paul II's warning against scientism, "the philosophical notion which refuses to admit the validity of forms of knowledge other than those of the positive sciences," is extremely apt when applied to the social sciences.[42]

It is here that readers of this article may wish to consider two fairly audacious suggestions: first, to consider, in all of our teaching, scholarship, and public activity, to attempt to build up an alternative to the dominant paradigm of social science. Perhaps the best way to start is to attack the central premise of scientific social science which holds that there are such varieties of moral systems ("values") in the world, the selection of any one such system is utterly arbitrary. This is a fine premise in the sense that it leads to all sorts of interesting conclusions; the only problem with it is that it is entirely false. C.S. Lewis pointed out, in *The Abolition of Man*, that all of the major cultures of the world are in agreement about basic moral principles. Some societies, such as Communists and Nazis, do, in fact, distort the ordinary moral law (what he calls the Tao) by emphasizing one element of it to the detriment of others; but even they can only justify themselves from within the Tao. In his memorable phrase, Lewis pointed out that "the human mind has no more power of inventing a new value than of imagining a new primary color."[43] Since the major argument against prudential reasoning is that it is arbitrary and hence unpersuasive, a re-invigoration of the concept of natural law as the basis for reasoning about society seems like an appropriate first step in promoting a broader understanding of the kind of society which would promote a culture of life rather than a culture of death.

The second suggestion is directed specifically at legal scholars and attorneys. Last June the Supreme Court decided a case, *Saenz v. Roe*, in which, for basically the first time since *Slaughterhouse*, they invalidated a state law on the basis of the privileges or immunities clause of the Fourteenth Amendment. One particularly striking feature of the case was that Justice Thomas, in his dissent, practically begged for new cases to be brought to the court under this

clause, to provide an opportunity to reinvigorate and consider the appropriate scope of the clause. He said:

> Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the framers of the Fourteenth Amendment thought that it meant.[44]

This is an opportunity to attempt to influence the legal culture indirectly through research and writing, but also directly through litigation which might provide a basis to begin to nibble away at the foundations the court has erected through their jurisprudence. For example, it might be possible to support a legal challenge to a state hospital ethics committee that decides that the time has come to refuse food and water to an incapacitated patient on the grounds that one of the basic privileges of citizenship is the protection of life.

The heart of this argument is that a prudential understanding of politics is closely and inextricably interwoven with an understanding and acceptance of natural law; that one way that such an understanding unfolds itself in the legal realm is through the common law method of discovering the general law in concrete cases; and that such an approach is both legitimate and valuable in the realm of constitutional law. Further, a prudential political "science" is best equipped to address the fundamental issues which challenge us as a culture, and an important tool in attempting to turn the culture from death to life.

Notes

1. *Evangelium Vitae*, 12.

2. Ibid., Introduction.

3. See, for example, the *First Things* Symposium "The End of Democracy? The Judicial Usurpation of Politics" *First Things*, November, 1996. Published with responses in Mitchell Muncy ed., *The End of Democracy?: The Judicial Usurpation of Politics* (Dallas: Spence, 1997). The argument is continued with additional authors in a second volume by the same editor and publisher *The End of Democracy? II:A Crisis of Legitimacy* (1999), Introduction by J. Budziszewski.

4. The argument in this section of the paper is drawn primarily Kimberly Shankman and Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among Sates, Individuals, and the Federal Government*, Cato Institute Policy Analysis No. 326 (Nov. 23, 1998).

5. Lino Graglia, "Do We Have an Unwritten Constitution?--The Privileges or Immunities Clause of the Fourteenth Amendment" *Harvard Journal of Law and Public Policy*, vol. 12, (1989) p. 83.

6. Robert Bork, *The Tempting of America: The Political Seduction of the Law*, New York, 1990. pp. 37-40 and *passim*.

7. See, e.g., Raoul Berger, *Government by Judiciary,* Harvard University Press, 1977.

8. Bork, p. 39. It should be noted that much scholarly discussion of the meaning of the Privileges and Immunities Clause is directed to the single issue of whether or not it was intended to "incorporate" (i.e., make enforceable against state governments) the Bill of Rights.

9. Ibid.

10. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

11. *Federalist* No. 80 at 575 (Modern Library 1937).

12. *Toomer v. Witsell* 334 U.S. 385, 395 (1948).

13. J. Harvey Wilkinson, "The Fourteenth Amendment Privileges or Immunities Clause,"12 *Harvard Journal of Law and Public Policy*, vol. 12, (1989) p. 43. See also John Hart Ely, *Democracy and Distrust,* Cambridge: Harvard University Press, (1980) p. 23.

14. Quoted in Anastaplo, *The Constitution of 1787 A Commentary*, Baltimore: Johns Hopkins University Press (1989) p. 170.

15. F. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters and Other Organic Laws*, VII, 3788 (1909). Michael Conant, *The Constitution and the Economy*, Norman: University of Oklahoma Press (1991) has a discussion of the historical background of the concept of privileges and immunities in the colonial charters and their relationship to the Privileges and Immunities clause of Article IV (pp. 203-206).

16. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

17. See e.g., Tribe op. cit., p. 530.

18. 6 Fed. Cas. 546 at 552.

19. Ibid.

20. Nor was Blackstone himself idiosyncratic in his definition; similar definitions are found in other contemporary legal dictionaries. Conant, op. cit., discusses this point (pp. 202-204).

21. W. Blackstone, *Commentaries on the Laws of England*, (1765) 125-129. The Blackstone connection is pointed out in Michael Curtis, *No State Shall Abridge*, Durham: Duke University Press, (1986) p. 64.

22. Ibid., pp. 57-153. See also, William E. Nelson, *The Fourteenth Amendment*, Cambridge: Harvard University Press (1988) 40-63.

23. *Congressional Globe* 39th Congress 1st Session 2542 (1866).

24. Ibid., 2765-66.

25. See Nelson, op. cit., chapter 4.

26. In a case called *Bartemeyer v. Iowa,* decided in 1874, Justice Miller, writing this time for a unanimous court, specifically noted that the decision in this case was consistent with both the majority and minority constructions of the Privileges or Immunities Clause in *Slaughterhouse. Bartemeyer v. Iowa* 85 U.S. (18 Wall.) 129 (1874).

27. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) (1873). The following quotations are from the opinion of the court, per Justice Miller.

28. See Curtis, chapter 3.

29. See Fairman, p. 1354.

30. The phrase is from Thayer's teaching notes, quoted in Nelson, p. 163.

31. For the clearest statement of the basic canons of constitutional interpretation, see Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (First edition, 1833; reprint Durham: Carolina Academic Press, 1987) vol. 3, pp. 285-286.

32. *The Slaughterhouse Cases,* at 78.

33. An analysis of the work of Tiedeman, including the quotation, is found in David Mayer, "The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism" *Missouri Law Review* vol. 55 (1990), pp. 94-161. I am indebted to Professor Mayer for drawing my attention to this.

34. Oliver Wendell Holmes, *The Common Law* (1881). Holmes' progressive jurisprudence was also influentially articulated in his 1897 *Harvard Law Review* article, "The Path of the Law". Two excellent analyses of this change and its impact on American law and politics are Glenn Thurow, "Equality and Constitutionalism: The Relationship of the Declaration of Independence and the Constitution as Understood Today," in Sarah Thurow, ed., *Constitutionalism in America,* Vol. I *To Secure the Blessings of Liberty*, (New York: University Press of America, 1988), pp. 305-320; and Roger Pilon, "On the Foundations of Economic Liberty," *Cato Policy Report* 1988. Mayer also has a brief discussion of this issue, with references to many additional sources (see especially pp. 95-96 and attendant notes).

35. Jefferson to Henry Lee, May 8, 1825.

36. Stoner, James R., *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* Lawrence: University Press of Kansas, 1992.

37. "The Right to Privacy," *Harvard Law Review* vol. 4, (1890).

38. *Griswold v. Connecticut* (1963).

39. *Roe v. Wade* (1973).

40. See for example, Emerson, "Nine Justices in Search of a Doctrine" *Michigan Law Review* vol. 64 (1965).

41. *Gorgias*, 513c; just to insure that the careful reader did not miss the point, earlier in the dialogue Socrates told a previous interlocutor that " . . . if on my part I fail to produce you yourself as my one witness in agreement with my arguments, I consider I have achieved nothing." [472b].

42. *Fides et Ratio*, paragraph 88.

43. Lewis, C. S., The *Abolition of Man*, Collier, 1955; p.57 .

44. Thomas, Clarence, dissenting opinion, *Saenz v. Roe*; May 17, 1999.