

NATURAL LAW JURISPRUDENCE: A SKEPTICAL PERSPECTIVE

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I am a textualist, and the text of the Ninth Amendment says that the enumeration of certain rights does not indicate that no other rights exist.¹ Being primarily a textualist, I am also a bit knowledgeable about history. Many of the Founding Fathers were believers in natural law.² I am tempted by and interested in the subject of this debate regarding natural law and constitutional law, and I think the work that Professor Arkes is doing in trying to explore the limits of natural law and its contours is very important. The Constitution aside, there is something fundamentally right about the idea that we have rights that inure to us because of who and what we are as human beings.

I am tempted. But my mission is to raise a little skepticism about the contours of natural law and perhaps to suggest some caution. Although I don't oppose the approach, I think it's important to be careful what you wish for. You might actually get more than you want.

There are a few problems I want to identify at the outset. First, one prominent natural rights regime is based on a theory that we came out of the state of nature, brought with us certain rights, and never gave up those rights upon entering society,

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1. U.S. CONST. amend. IX.

2. See, e.g., Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1516 (2011) (noting that the Founders' "writings are replete with references to a higher, unwritten law, accessible to human reason").

except to the extent society could better effectuate them.³ The reality, of course, is that there never was a state of nature. Human beings have always lived in society, so the idea is really more philosophical than historical.

Because the state of nature is a construct, we don't have any real history of what the state of nature was. We therefore need to start with some sort of agreement as to what rights we had in that theoretical state that never existed, which leaves a lot of room for play. Having been around judges for a long time, I must say that when you give judges room for play, you are taking your life in your hands.

We also must realize that the idea of what those natural rights are has changed, and will continue to change, over time. Let me give two simple examples. Cast your mind back to the time when the Constitution and the Bill of Rights were adopted. At that time the right to vote, which today everyone would say is the right of every law-abiding adult,⁴ was limited to white men. Women were not allowed to participate, nor were people of color or Indians. But it wasn't only minorities who weren't allowed to participate; not even all white men could vote. In many places, you had to own property to vote, and the idea that people who didn't have a house would participate in the political process was heresy.⁵

Few people today would suggest that it is not a natural right of citizenship to be able to vote and participate in the political process. Never mind what the Constitution says. Never mind what the courts have said. Regardless of all those things, we all agree that being an adult human being, regardless of sex or race, entitles you to participate in the political process if you are a citizen. Our view of what is natural has changed in this regard.

Think about the Internet. Most of the Founding Fathers would have thought the right to speak freely—the right to stand on a street corner on a soapbox and speak—was a natural right. But what if someone had asked, “Well, George or James, what do you think of the Internet? Do you think there's a right to blog?” They would have said, “Huh?” Obviously, these

3. See, e.g., JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 58–59 (Tom Crawford ed., Dover Publications 2002) (1690).

4. See generally Note, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002).

5. See, e.g., Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383–84 (1997).

things evolve, and it's not just a question of technology. Technology changes the way we relate to one another, the way we communicate, and the way we participate in the community and in the political process. The idea that there is not some fixed notion of natural rights that existed then and that we apply today is an important one. Our conception of natural rights evolves over time, just as our constitutional interpretation does.

Finally, there is the question of what happens when natural rights clash with statements in the Constitution. There is a provision, for example, that says you have to be a natural-born citizen to be President.⁶ That doesn't feel natural to me. Let's take as an example somebody who came to the United States, say, fifty years ago. In December of 1962. From Romania.⁷ Someone who has been here for a while and participated in the political process for much longer than many Americans. It seems odd to say that a person has no natural right to run for President after he's lived in this country and watched the election process for more than fifty years. What should be done if somebody makes a claim like this that has some natural appeal, but that runs up against a positive prohibition in the Constitution?

Consider the natural law case for three rights that are somewhat controversial these days: the right to same-sex marriage, the right to abortion, and the right to government-sponsored healthcare.

First, how do we make a natural rights case for same-sex marriage? We would say it's natural for one adult to join with another adult to form a household, to raise children, and to share a life together, faithful to each other. People may react by saying that marriage has always been between a man and a woman. But one could say that this is an accident of history. Historically, technology allowed only men and women to have children together, but now we have *in vitro* fertilization, adoption, and other ways through which people can have children that are not necessarily the product of their physical union.

Furthermore, we don't prohibit men and women from marrying because they are past child-bearing age. We do not check

6. U.S. CONST. art. 2, § 1, cl. 5.

7. Chief Judge Kozinski was born in Romania and immigrated to the United States in 1962 at the age of twelve. See Shikha Dalmia, *Searching for Alex Kozinski*, REASON, July 2006, available at <http://reason.com/archives/2006/07/01/searching-for-alex-kozinski>.

up on people and see how often they have sexual relations. We don't tell them, "You have to get a divorce because you no longer have sexual relations often enough." We leave those kinds of decisions to the partners themselves. And though it's true that, historically, only people of the opposite sex have married each other, it also used to be the case that people married only others of the same race or religion. That too was partially an accident of history, and we have gotten past that, just as we have gotten past allowing only white males to vote. We now accept that people of different races can vote and that people of different races can marry each other.⁸ Why, then, should people of the same sex not be allowed to marry? Why isn't that a natural right?

Now consider abortion. Professor Arkes made a very good case that the fetus is a person and should be treated as a person.⁹ But if a person attacks you, you have the right to self-preservation. Using that line of reasoning, a case can be made for abortion. This is not my view, but I am putting it forth to suggest various ways in which natural law can be used. A pregnant woman could say, "As a woman, this is my body, and this human being, this other person, is attacking me. It depends on me for sustenance. I have to carry it around for nine months. It limits what I can do. Sometimes it impairs my health, and I have no obligation to allow that to continue."

Let's say you had a neighbor who was on a heart-lung machine, and it turns out that it is very expensive to run in terms of electricity. One day you find out that he has been plugged into your garage and is using your electricity. Would you have a right to unplug the machine and say, "I don't have to pay for your treatments"? I would argue that you would. It would not be a kind thing to do, but you would have a right to do it.

Let me describe a situation that is a little more acute. My father spent many years in a concentration camp. He survived the Holocaust because he managed to get enough food to get him past those terrible times. What if he had seen somebody trying to steal his bread, which he needed to stay alive? Would he have been entitled to smite or attack that person? Probably

8. See U.S. CONST. amend. XV; *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

9. See Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J.L. & PUB. POL'Y 961, 973 (2013).

so. When it is a question of your own life and your own body, you have some right to self-preservation.

Applying this logic to abortion, a woman might say, "I don't dispute that the fetus is a human being. If it can live on its own outside of my body, that is perfectly fine, but so long as it is occupying my body and making demands of me, I am entitled to get rid of it." Again, this is not my view. I am just telling you what could be done with theories of natural rights.

Consider healthcare. When I was in college, John Rawls was widely read. His theory was that, as a matter of justice, as a matter of how we ought to order our lives, we ought to imagine that we start out not knowing what gifts we have been given at birth.¹⁰ You don't know whether you're going to be rich or poor, smart or stupid, beautiful or ugly, or anything else, and the question becomes how you would order yourself in that state. How would you order society if you didn't know where you would come out? I never bought into his theory, but many people did. And, according to Professor Rawls, the rational thing would be to arrange society in such a way that we are all bound together at the ankle, that we are all responsible for one another's basic needs.¹¹

Professor Arkes will accuse me of being like Justice Harlan and looking at philosophers many years out of vogue,¹² but philosophy has a way of sticking around. Many people still believe strongly in the Rawlsian notion. And based on that notion, one could say there are certain things we need, and one of them is healthcare. In that case, individuals have a natural right to have their healthcare paid for by society, regardless of whether this is actually mandated by Congress. We share in the costs and the benefits.

I'm concerned that these are the kinds of debates we would get into if we accepted natural law. And, unlike with the Constitution and laws, where there's actually some text to guide us, with natural law there is none. I know federal judges are not supposed to look at text too much, but Judge Bea, Judge

10. In his seminal work, *A Theory of Justice*, Professor Rawls refers to this exercise as operating behind the veil of ignorance. JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971).

11. Professor Rawls assumes that, from behind the veil of ignorance, rational actors would follow a maximum utility theory, according to which they would structure society to make the least well-off person as well off as possible. *Id.* at 14–15.

12. See Arkes, *supra* note 9, at 966.

O'Scannlain, and I occasionally manage to catch a glimpse here and there despite the rules. The primary reason I remain skeptical of natural law is that it gives such a wide berth to debates and makes it possible to construct all manner of arguments depending ultimately on what you feel in your gut is the right and just thing to do. The problem with natural law is that it is oriented in this manner, and that is why I believe a textualist like Justice Scalia would reject it.

In a society where courts have immense powers and where judges, at least in the federal system, are not elected and serve for life, we ought to be wary of allowing a few hundred men and women to use natural law to change our lives. Exploring natural law is a worthwhile project and deserves serious thought. But first and foremost, we ought to be exceedingly cautious.