

NATURAL LAW AND THE UNITED STATES
CONSTITUTION

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ON JULY 4, 1776, the United States of America, in declaring their independence, invoked “*the Laws of Nature and of Nature’s God,*” proclaimed that men are “*endowed by their Creator*” with unalienable rights, appealed to “*the Supreme Judge of the world,*” and concluded by expressing their reliance on “*Divine Providence.*”¹

There can be no doubt that those delegates in Philadelphia who adopted that Declaration believed in, and, based the nation’s independence on, the Natural Law; that is, that God, in creating the universe, implanted in the nature of man a body of Law to which all human beings are subject, which is superior to all manmade law, and which is knowable by human reason.²

Eleven years later, another group of delegates, representatives of the States, assembled in the same hall in Philadelphia, this time with the eminently practical task of creating a new structure of government for the United States, one that would establish “a more perfect union.”³ That document, written in 1787, was ratified by the several States,⁴ and entered into effect in 1789 as the Constitution of the United States of America.

Since the Constitution was designed to be a practical-judicial document for the operation of a more effective government, one

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¹ Declaration of Independence of the United States of America, July 4, 1776, U.S.C.A. *Constitution* vol. 1, 1–5. Emphasis added.

² For a detailed review of the Natural Law, see Charles Rice, *50 Questions on the Natural Law: What It Is and Why We Need It*, rev. ed. (San Francisco: Ignatius Press, 1999); hereafter *50 Questions*.

³ For the history of the Constitutional Convention, see Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September, 1787* (Boston: Little, Brown and Co., 1966), and Clinton Rossiter, *1787: The Grand Convention* (New York: W. W. Norton and Co., 1966).

⁴ For the history of the ratification process, see Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon and Schuster, 2010); hereafter *Ratification*.

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should not expect to find there the ringing statements of principle that characterize the Declaration of Independence,⁵ and, indeed, no such philosophical statements are present. But several important characteristics of the Constitution—indeed its most important characteristics—are clear and admirable applications of the Natural Law.

Before examining those characteristics of the Constitution, it is important to emphasize that the Natural Law as understood by the Founding Fathers of the Constitution was the Natural Law that for two millennia had been a traditional and essential element of Western Civilization; that is, Natural law as understood and explained by, for example, Sophocles, Aristotle, Cicero, St. Thomas Aquinas, and Francisco de Vitoria.⁶ It was the Founders' traditional understanding

⁵ In the words of one historian, "the delegates at the Constitutional Convention did not discuss abstractions like the nature of liberty. . . ." Henry Steele Commager, introduction to *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September, 1787*, by Catherine Drinker Bowen (Boston: Little, Brown and Co., 1966), page xxi, note 3. "The temper of the Convention, in marked contrast to that of the French Constituent Assembly of 1789, was realistic and objective, rather than idealistic and theoretical." Samuel Eliot Morison, Henry Steele Commager, and William E. Leuchtenberg, *The Growth of the American Republic*, 6th ed., vol. 1 (New York: Oxford University Press, 1969), 246.

⁶ In Sophocles' play *Antigone*, the heroine (of that name) is condemned to death for having buried the body of her brother (who had been killed in battle), such burial having been prohibited by royal decree. Facing the king, Antigone justifies her disobedience by invoking a superior, natural law. She tells the king:

I had to choose between your law and God's law, and no matter how much power you have to enforce your law, it is inconsequential next to God's. His laws are eternal, not merely for the moment. No mortal, not even you, may annul the laws of God, for they *are* eternal.

Sophocles, "Antigone," trans. Kelly Cherry, in *Sophocles, 2: King Oedipus, Oedipus at Colonus, Antigone*, ed. David R. Slavitt and Palmer Bovie (Philadelphia: University of Pennsylvania Press, 1999), 209. Emphasis in original.

In his *Rhetoric*, Aristotle asserts:

The two sorts of law . . . are the particular and the universal. *Particular* law is the law defined and declared by each community for its own members. . . . *Universal* law is the law of nature. . . . *there* really exists, as all of us in some measure divine, a natural form of the just and unjust which is common to all men, even when there is no community to bind them to one another.

of Natural Law, rather than the various "Enlightenment" versions, that was most influential in the thinking that characterizes the United States Constitution.

The fundamental difference between the classical-traditional understanding of the Natural Law and that of the Enlightenment is that the classical-traditional thinkers knew and declared that God is the author and source of the Natural Law, and that human reason is the faculty by which the Law established by God is made accessible to man, while the philosophers of the Enlightenment (who inspired the French Revolution) rejected God as the author of the Natural Law, or diminished His significance, and elevated human reason, or its variants, such as the general will or a legislative majority, to the position of supremacy. In the words of one historian, the Enlightenment philosophers "deified nature and denatured God."⁷ These differences

Aristotle, *Rhetoric*, in *Politics*, by Aristotle, trans. Ernest Barker (New York: Oxford University Press, 1958), Book 1, chapter 13, page 369, 1373b2-8. Emphasis in original.

Cicero writes: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people. . . . And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature. . . ." Cicero, *Republic*, in *Masters of Political Thought*, vol. 1, ed. Michael B. Foster (Cambridge, Mass.: The Riverside Press, 1941), 188.

For Thomas Aquinas' discussion of Natural Law, see his *Treatise on Law* (*Summa Theologica*, Questions 90-97) (Chicago: Henry Regnery Co., 1948), 32-3, 40-54 (translator not identified). See also, F. C. Copleston, *Aquinas* (Harmondsworth, U.K.: Penguin Books, 1955), 199-242.

Vitoria affirmed that "public power is founded upon natural law, and if natural law acknowledges God as its only author, then it is evident that public power is from God, and cannot be over-ridden by conditions imposed by men or by any positive law." Vitoria: *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge, U.K.: Cambridge University Press, 1991), 10.

⁷ Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Vintage Books, 1958), 51. Becker says that for the Illuminati "Nature was now the new God." Ibid. See also, Herbert W. Schneider, "Editor's Introduction" to *Leviathan: Parts One and Two*, by Thomas Hobbes (New York: The Library of Liberal Arts Press, Inc., 1958), vii-ix; George Rudé, *Revolutionary Europe, 1793-1815* (New York: Harper and

can produce, and in fact have produced dramatic differences in the activities of the governments of the nations of the world.⁸

Row Publishers, Inc., 1975), 142–4 (with respect to Rousseau and Robespierre); and Edmund Burke, "Reflections on the Revolution in France," in *Selected Works of Edmund Burke*, vol. 2, ed. Francis Canavan (Indianapolis: Liberty Fund, 1999), 208–9.

⁸The famous French observer and analyst Alexis de Tocqueville, in his classic work, *Democracy in America*, wrote in 1835:

The religious atmosphere of the country was the first thing that struck me on arrival in the United States. The longer I stayed in the country, the more conscious I became of the important political consequences resulting from this novel situation.

In France I had seen the spirits of religion and of freedom almost always marching in opposite directions. In America I found them intimately linked together in joint reign over the same land.

Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence (Garden City, N.Y.: Doubleday and Co., Inc., 1969), 295.

The important Venezuelan constitutionalist of our own day, Dr. Allan R. Brewer-Carías, speaking of the French Revolution, says:

One principle that arises from French revolutionary constitutionalism is that of national sovereignty.

. . . [I]n the absolutist regime, the sovereign was the Monarch, who exercised all powers, including the authorization of the State Constitution. With the Revolution, the King is deprived of his sovereignty . . . ceases to be King of France, and becomes King of the French, sovereignty being transferred to the people. Thus the idea of the Nation arises, in order to deprive the King of his sovereignty, but as sovereignty existed only in the person who could exercise it, the idea of the "Nation," as the personification of the people, was necessary to replace the King in its exercise. In the words of Barthélemy:

"There could be but one sovereign person, who had been the King. Another person had to be found in opposition to him. The men of the Revolution found that sovereign person in a moral person: the Nation. They took the Crown from the King and placed it on the head of the Nation."

Allan R. Brewer-Carías, *Reflexiones sobre la Revolución Americana (1776) y la Revolución Francesa (1789) y sus aportes al constitucionalismo moderno* (Caracas: Editorial Jurídica Venezolana, 1992), 186. Translated by the author of the present article. The long-term consequences of these philosophical differences are noted by the Spanish jurist Marian Ahumada Ruíz in *La Jurisdicción Constitucional en Europa* (Cizer Menor, Navarra, España: Thomson Civitas, 2005), 253–5.

The liberal State of nineteenth century European law, by basing the safety and liberty of the individual upon the system of State norms, led

The most influential Founders of the United States Constitution saw God as the source of the supreme rules of law and government, and applied the Natural Law in their work in the 1787 Constitutional Convention. Let us examine the thinking of the four most influential delegates at the Convention.

James Madison, of Virginia, considered the "Father of the Constitution," wrote, two years before the Philadelphia Convention, of the duty that man owes to God:

This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe.⁹

Alexander Hamilton, of New York, wrote in 1775 that God:

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 sacred rights of mankind . . . are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power. . . . No tribunal, no codes, no systems, can repeal or impair this law of God, for by his eternal law, it is inherent in the nature of things.¹⁰

James Wilson, of Pennsylvania, considered by everyone to have been the second or third most influential delegate at the Constitutional Convention, not only affirmed the traditional, Divinely based understanding of the Natural Law, but indeed, refuted and rejected the Enlightenment ideas that utilized that same name. He wrote:

That our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles. . . . There is only one source of superiority and

inevitably to the conclusion that there is no genuinely fundamental right other than "to be treated in accordance with the laws of the State."

Ibid. 254. Translated by the author of the present article.

⁹ James Madison, "Memorial and Remonstrance Against Religious Assessments, June 20, 1785," in *The Founders' Constitution*, vol. 5, ed. Philip B. Kurland and Ralph Lerner (Indianapolis: Liberty Fund, 1987), 82.

¹⁰ Alexander Hamilton, *The Works of Alexander Hamilton*, vol. 1, ed. Henry Cabot Lodge (New York: The Knickerbocker Press, 1904), 62-3.

obligation. God is our creator: in him we live, and move, and have our being; from him we have received our intellectual and our moral powers: he, as master of his own work, can prescribe to it whatever rules to him shall seem meet. Hence our dependence on our Creator: hence his absolute power over us. This is the true source of all authority. . . . The law of nature is universal. For it is true, not only that all men are equally subject to the command of their Maker; but it is true also, that the law of nature, having the foundation in the constitution and state of man, has an essential fitness for all mankind, and binds them without distinction.

This law, or right reason, as Cicero calls it, . . . is, indeed, . . . a true law, conformable to nature, diffused among all men, unchangeable, eternal.¹¹

George Washington, delegate from Virginia, President of the Constitutional Convention, and the most respected man in the country, said very little during the debates in Philadelphia, but did express himself on other occasions. In his first year as President of the United States, he issued a Thanksgiving Proclamation that began this way:

. . . it is the duty of all Nations to acknowledge the providence of Almighty God, to be grateful for his benefits, and humbly to implore his protection and favor. . . .¹²

John Adams, another Founding Father of great importance, did not attend the Constitutional Convention, as he was at that time the United States Minister to the Court of St. James. However, as a coauthor of the Declaration of Independence, the drafter of the Massachusetts Constitution of 1780, and the leading American political thinker of the day, his prompt and unwavering support for the proposed new national Constitution was a significant factor in its ratification.¹³ Adams, who regarded Cicero as the greatest of philosophers,¹⁴ demonstrated an understanding of God, human nature, and government that is unmistakably that of a Natural Law thinker:

¹¹ *Collected Works of James Wilson*, vol. 1, ed. Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), 500, 501, 523.

¹² George Washington, "Thanksgiving Proclamation, New York, October 3, 1789," in *Our Sacred Honor: Words of Advice from the Founders in Stories, Poems, and Speeches*, ed. William J. Bennett (New York: Simon and Schuster, 1997), 386.

¹³ David McCullough, *John Adams* (New York: Simon and Schuster, 2001) 374–81; Maier, *Ratification*, 387.

¹⁴ McCullough, *John Adams*, 375.

The moral government of God, and his vice regent, Conscience, ought to be sufficient to restrain men to obedience, to justice, and benevolence at all times and in all places; we must therefore descend from the dignity of our nature when we think of civil government at all. But the nature of mankind is one thing, and the reason of mankind another; and the first has the same relation to the last as the whole to a part. The passions and appetites are parts of human nature as well as [are] reason and the moral sense. In the institution of government it must be remembered that, although reason ought always to govern individuals, it certainly never did since the Fall, and never will till the Millennium; and human nature must be taken as it is, as it has been, and will be.¹⁵

Many lesser-known delegates at the Philadelphia Convention, such as John Dickinson¹⁶ of Delaware, George Mason of Virginia, and Daniel Carroll¹⁷ of Maryland, also expressed their adherence to the traditional concept of Natural Law.

It should be remembered that a large number of the delegates to the Constitutional Convention were educated in the law, and that most of those were in fact practicing lawyers.¹⁸ At that time the most widely

¹⁵ John Adams, *The Political Writings of John Adams: Representative Selections*, ed. G. A. Peek, Jr. (New York: The Liberal Arts Press, Inc., 1954), 159. It may strike some as strange that no mention is made of Thomas Jefferson. There are two reasons for this omission. First, Jefferson's views—on so many topics—are so varied that it would be difficult, and pointless, to try to characterize him as an adherent (or an opponent) of any position discussed herein. Second, and equally important, Jefferson played no part in the drafting of the Constitution (serving at the time as United States Minister to France), and his initial reaction to the document was one of ambivalence. Only later did he come to support its adoption. As to the first reason, see, for example, Gordon S. Wood, *The Purposes of the Past: Reflections on the Uses of History* (New York: The Penguin Press, 2008), 21. Regarding the second, see for example, Thomas Jefferson, Letter to Edward Carrington, 21 December 1787, in *The Political Writings of Thomas Jefferson: Representative Selections*, ed. Edward Dumbauld (New York: The Liberal Arts Press, 1955), 137.

¹⁶ Dickinson said, "Our liberties do not come from charters; for these are only the declarations of preexisting rights. They do not depend on parchment or seals; but come from the King of Kings and the Lord of all the earth." John Dickinson, in Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (San Francisco: Encounter Books, 2002), 75.

¹⁷ Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding*, 14, 140–2.

¹⁸ Of the thirty-nine signers of the Constitution, at least twenty were practicing lawyers. Saul K. Padover, *The Living Constitution* (New York: Mentor Books, 1953), 35–6.

used lawbook, for students and practitioners in the United States as in England, was Blackstone's *Commentaries*. In that most influential work, Blackstone says the following:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life. . . .¹⁹

Indeed, the relationship between traditional Natural Law and the English Common Law was so close and profound that the latter was understood to be but the practical application of the former. This relationship is evident in the opinion of one of England's most renowned jurists, Lord Edward Coke, in the famous *Dr. Bonham's Case* in 1610:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . . Because . . . [such statutes] would be against common right and reason, the common law adjudges the said Act of Parliament as to that point void. . . .²⁰

Similarly, another of England's most respected judges, Lord William Mansfield, asserted in 1744 that a statute "can seldom take in all cases, therefore the common law that works itself pure by rules drawn from the fountain of justice is for that reason superior to an Act of Parliament."²¹

This understanding of the Common Law as applied Natural Law was shared by lawyers in the United States before and after independence. The Twentieth Century Harvard historian Henry Steele

¹⁹ William Blackstone, *Commentaries on the Laws of England*, vol. 1 (Chicago: University of Chicago Press, 1979), 41.

²⁰ *Dr. Bonham's Case*, 8 Co. Rep. 113b, 77 Eng. Rep. 638 (C.B., 1610).

²¹ *Omychund v. Barker*, 1 Atk. 22, 26 Eng. Rep. 15 (1744).

Commager begins his chapter on "The Evolution of American Law" by stating (disapprovingly) that:

Americans inherited their law as they inherited their language and their political institutions. . . . Resourceful and ingenious in politics, Americans were content in the legal field to abide by familiar formulas. . . . In the realm of private law Americans took over the common law, and in the realm of public law the natural law. . . . This strength and persistence of natural law is one of the most arresting phenomena in American intellectual history.²²

A more friendly Harvard scholar, United States Supreme Court Justice Joseph Story, whose *Commentaries on the Constitution of the United States*, first published in 1833, has long been a classic, says:

The common law is our birthright, and inheritance, and . . . our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.²³

In the words of the historian Gordon Wood:

what is truly extraordinary about the [American] Revolution is that few Americans ever felt the need to repudiate their English heritage for the sake of nature or of what ought to be. In their minds natural law and English history were allied. Whatever the universality with which they clothed their rights, those rights remained the common-law rights embedded in the English past, justified not simply by their having existed from time immemorial but by their being as well, "the acknowledged rights of human nature."²⁴

Most of the Founding Fathers were, of course, familiar with the natural law writings of Enlightenment-era thinkers, especially John Locke; however, this familiarity does not undermine the fact that the dominant philosophical influence upon the Founders was that of classical-traditional Natural Law. In this regard, two facts are important: First of all, Locke's writings (unlike those of many others

²² Henry Steele Commager, *The American Mind* (New York: Bantam Books, 1970), 368–9.

²³ Joseph Story, *Commentaries on the Constitution of the United States* (Durham, North Carolina: Carolina Academic Press, 1987), 65.

²⁴ Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (New York: W. W. Norton and Co., Inc., 1972), 10, in which Wood quotes Founding Father John Dickinson.

of his time) are sufficiently supportive of classical-traditional Natural Law theory, that there is no necessary conflict between the two. Consider, for example, the following:

the law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must . . . be conformable to the law of Nature—*i.e.*, to the will of God, of which that is a declaration, and the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it.²⁵

Second, even if one concludes that the totality of Locke's writings on "natural law" bring him closer to his Enlightenment contemporaries than to his classical-traditional predecessors, it is the consensus of historians that in the United States, Enlightenment thought, including that of Locke, was so tempered by its immersion in the older and larger classical tradition, that it did not operate in opposition to traditional Natural Law. In the words of the historian Sidney Ahlstrom, in the United States "the wines of the Enlightenment were sipped with cautious moderation."²⁶

How, then, are the Natural Law understandings of the Founders reflected in the Constitution? Most importantly, in three interrelated ways:

First, in the establishment of limited government;

Second, in the establishment and recognition of subsidiarity; and

Third, in the guaranteeing of traditional rights, and only as against government.

²⁵ John Locke, "Second Treatise on Government," in *Of Civil Government* (New York: E. P. Dutton and Co., 1924), 185.

²⁶ Sidney E. Ahlstrom, *A Religious History of the American People*, vol. 1 (Garden City, N.Y.: Doubleday and Co., Inc., 1975), 435. See also, Frederick Copleston, *A History of Philosophy: Modern Philosophy, Part I: Hobbes to Paley* (Garden City, N.Y.: Doubleday and Co., Inc., 1964), 176; Clinton Rossiter, *1787: The Grand Convention* (New York: W. W. Norton and Co., 1966), 59–60; Martin E. Marty, *Pilgrims in Their Own Land: 500 Years of Religion in America* (New York: Penguin Books, 1985), 154–6; Randolph G. Adams, *Political Ideas of the American Revolution*, 3rd ed. (New York: Barnes and Noble, Inc., 1958), 172–7.

I

Limited Government. The Natural Law tradition, as enunciated by its leading exponents and affirmed by Hamilton, Wilson, Madison, and other American founders, holds that the state, and human law, are by nature limited; that is to say, there are things that government may not do. St. Thomas Aquinas's distinction between just and unjust laws is a clear theoretical exposition of this principle,²⁷ and Francisco de Vitoria's discussion of the limits of Spanish imperial authority in the New World is a forceful, practical application of the same principle.²⁸

The Enlightenment thinkers, either by rejecting God, or by excluding Him from any continuing role in the governance of creation, eliminated any principled limitation on the state and government. Human reason ceased to be the faculty by which the law of nature was made known to humans; reason became instead—almost always in some collectivized form, such as “the General Will” or “the Nation”—the ultimate source of law itself. The difference between the Enlightenment view, which prevailed in much of Continental Europe, and the American understanding is well described by James Bryce, jurist, historian, and British ambassador to Washington:

the Americans had no theory of the state, and felt no need for one, being content, like the English, to base their constitutional ideas upon law and history. . . . To those nations [of the European continent] the state is a great moral power, the totality of the wisdom and conscience and force of the people, yet greater far than the sum of the individuals who compose the people. . . . [For the Americans] . . . [t]he state is nothing but a name for the legislative and administrative machinery whereby certain business of the inhabitants is dispatched. It has no more conscience, or moral mission, or title to awe and respect, than a commercial company. . . .

There are laws of nature governing mankind as well as the material world; and man will thrive better under these laws than under those which he makes for himself through the organization we call government.²⁹

With equal perception, Professor Randolph Adams says:

²⁷ St. Thomas Aquinas, *Treatise on Law (Summa Theologica, Questions 90-97)*, 71-3.

²⁸ Vitoria, *Vitoria: Political Writings*, 250-327.

²⁹ James Bryce, *The American Commonwealth*, vol. 2 (Indianapolis: Liberty Fund, Inc., 1995), 1210, 1211, 1212-13.

the natural rights school, to which our Revolutionary thinkers belong, could not think in terms of absolute, unlimited power anywhere outside of the deity, because the natural rights, themselves, were things which limited the powers of governments and states.³⁰

The Constitution drafted in Philadelphia reflects this principle by establishing a national government of enumerated powers. The powers of each branch of the national government are specified, with the necessary implication that all powers not thereby granted, are denied. Article I begins by stating:

All legislative powers herein granted shall be vested in a Congress of the United States. . . .³¹

It does not say that “*all* legislative powers shall be vested” in the Congress, but only those legislative powers granted by the Constitution shall be so vested.

Article II begins with the words, “The executive Power shall be vested in a President of the United States of America,” but Article II then proceeds to specify the President’s powers, thereby limiting executive authority.³²

Article III, establishing the national judiciary, states that “The Judicial Power [of the United States] shall extend to” certain specified categories of “cases and controversies,”³³ thereby limiting that branch of government as well.

Another manifestation of the principle of limited government is found in the separation of powers and system of checks and balances within the national government. Either Hamilton or Madison—it is not known for certain which of them—advocating the ratification of the Constitution, said:

the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition . . . the constant aim

³⁰ Randolph G. Adams, *Political Ideas of the American Revolution*, 3rd ed. (New York: Barnes and Noble, Inc., 1958), 174.

³¹ Constitution of the United States of America, Art I, § 1 (hereafter Constitution).

³² Constitution, Art I, §§ 1–3.

³³ Constitution, Art III, § 2.

is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.³⁴

Thus, for example, the national government is divided into three branches: legislative, executive, and judicial;³⁵ the legislative branch is, in turn, divided into two chambers;³⁶ the President has a qualified veto of bills passed by Congress;³⁷ and the President and the Senate both participate in the appointment of federal judges, cabinet members, and other principal officers of the federal government, and in the making of treaties.³⁸

II

Subsidiarity. The second Natural Law principle embedded in the Constitution is the principle of subsidiarity; that is, the principle that government should perform only those tasks not better performed by the family or by private associations;³⁹ and that, when it *is* appropriate for government to intervene, governmental authority should be exercised by the smallest, most local unit of government capable of effectively performing the task in question.⁴⁰ The Natural Law basis of

³⁴ Alexander Hamilton or James Madison, "The Federalist, No. 50," in *The Federalist*, by Alexander Hamilton, James Madison, and John Jay (Norwalk, Connecticut: The Easton Press, 1979), 347–8.

³⁵ Constitution, Arts I, II, III.

³⁶ Constitution, Art I, §§ 1–3.

³⁷ Constitution, Art I, § 7.

³⁸ Constitution, Art II, § 2.

³⁹ In the words of Professor Rice: "The jurisprudence of the Enlightenment is an individualist, utilitarian positivism. It leaves no room for mediating institutions, such as the family and social groups, between the individual and the state. . . . The natural law tradition, by contrast, includes the principle of subsidiarity, which emphasizes the role of intermediate family and voluntary groups . . . which stand between the individual and the state." Rice, *50 Questions*, 43.

⁴⁰ This "governmental subsidiarity" is an obvious corollary to the general principle of subsidiarity. Its importance in the constitutional system of the United States is recognized by Madison in "Federalist, No. 14."

In the first place it is to be remembered that the general [that is, national] government is not to be charged with the whole power of

this principle is explained by Professor John Finnis in his treatise on the moral, political, and legal theory of St. Thomas Aquinas:

Prior to or independently of any politically organized community, there can exist individuals and families and indeed groups of neighboring families. . . . The family, essentially husband, wife, and children, is antecedent to, and more necessary than, political society. . . . What is it that solitary individuals, families, and groups of families, inevitably cannot do well? . . . [I]ndividuals and families cannot well secure and maintain the elements which make up the *public good* of justice and peace . . . And so their instantiation of basic goods is less secure and full than it can be if public justice and peace are maintained by law and other specifically political institutions and activities, in a way that no individual or private group can appropriately undertake or match.⁴¹

The American understanding of subsidiarity in political affairs is succinctly stated by that perceptive British observer, Lord Bryce:

Where any function can be equally well discharged by a central or by a local body, it ought by preference to be entrusted to the local body, for a central administration is more likely to be tyrannical, inefficient, and impure than one which, being on a small scale, is more fully within the knowledge of the citizens and more sensitive to their opinions.⁴²

The early constitutional history of the United States was indeed a series of exercises in applied subsidiarity. The colonial period was characterized by the proliferation of local government units throughout the colonies, and by their increasing importance and autonomy.

making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the convention to abolish the governments of the particular states, its adversaries would have some ground for their objections; though it would not be difficult to show that if they were abolished the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction.

Madison, "The Federalist No. 14," in *The Federalist*, 85.

⁴¹ John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 242, 243, 247–8.

⁴² Bryce, *The American Commonwealth*, vol. 2, 1211–12.

The Cornell historian and political scientist Clinton Rossiter, in his masterful study of America before 1776, concludes:

In general, the central governments of the colonies exercised even less control over local institutions than did the mother country over the colonies. Self-government was doubly the rule in colonial America. . . .

Although colonial assemblies passed many laws dealing with the organization and powers of the towns, these units were in fact quite independent of central control. More important, they were self-governing in the most obvious sense—through the famous town meeting, the selectmen, and a host of unpaid minor officials: constables, tithing men, surveyors, fence-viewers, field-drivers, haywards, notice-givers, assessors, pound-keepers, corders of wood, leather-sealers, overseers of the poor, “hog constables,” cutters of fish, and “comities” for almost every conceivable purpose, all chosen from and by the citizenry.⁴³

When the United States declared independence in 1776, their sole organ of national government, the Continental Congress, promptly began work on a constitutional document for the nation. That document, the Articles of Confederation, was approved by the Congress in 1777, and entered into effect four years later, when Maryland became the last state to ratify them. The Articles established subsidiarity in the following terms:

Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.⁴⁴

It soon became apparent that the limitations imposed by the Articles on the national government were too severe, particularly in that it lacked power to regulate interstate commerce or to impose direct taxes. At the behest of several States and prominent individuals, the Congress called on the States to send delegates to a convention to be held in Philadelphia, the purpose of which would be to recommend amendments to the Articles of Confederation, amendments that would,

⁴³ Clinton Rossiter, *The First American Revolution* (New York: Harcourt, Brace and Co., 1953), 119–20.

⁴⁴ The Articles of Confederation, Art II, in Henry Steele Commager, *Documents of American History*, 6th ed. (New York: Appleton-Century-Crofts, Inc., 1958), 111.

it was hoped, enable the national government to deal effectively with the interstate commercial rivalries and economic discrimination that then plagued the nation. As is well known, the delegates in Philadelphia did not propose (or even discuss) amendment of the Articles, but rather drafted an entirely new document, the Constitution.

While the Constitution did create a national government more powerful than that under the Articles of Confederation, the new arrangement continued to be based on the principle of subsidiarity. The debates in Philadelphia demonstrate that the overriding concern of the delegates was the proper allocation of governmental authority between the national government and the States, and the debates that followed in the States over ratification almost always centered on whether the proposed new government would have too much power (leaving the States and the people too little). Almost no one argued that the national government should be given more power than the proposed Constitution allowed.⁴⁵

The Constitution, by enumerating the powers of the various branches of the national government (see discussion hereinabove), established by clear implication the principle that all governmental powers not given to the national (or federal) government by the Constitution, belonged to the respective States.

In arguing for the ratification of the Constitution, James Madison emphasized this principle:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.⁴⁶

⁴⁵ See, Maier, *Ratification*.

⁴⁶ Madison, "The Federalist, No. 45," in *The Federalist*, 311.

To remove any doubt, the principle of subsidiarity, as implied in the original constitutional text, was made explicit in the Tenth Amendment, adopted in 1791:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.⁴⁷

The Tenth Amendment thus acknowledges both political subsidiarity—by recognizing that powers are reserved to the States—and subsidiarity in its larger sense—by recognizing that there are powers that do not belong to government at all, but rather are reserved to the people, individually or in voluntary association.⁴⁸

III

Guarantees of Rights. The original text of the Constitution contains few explicit declarations of rights.⁴⁹ At the Philadelphia Convention, several delegates had proposed that the document include a charter of rights, but the proposal was unanimously rejected.⁵⁰ The principal reason for the rejection was the belief, explained by Hamilton in *The Federalist*, that the new national government under the

⁴⁷ Constitution, Amend X.

⁴⁸ In the words of Justice Story,

This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as part of their residuary sovereignty.

Story, *Commentaries on the Constitution of the United States*, 711–12. Emphasis in original.

⁴⁹ The original document does, for example, prohibit both the federal government and the States from adopting ex post facto laws and bills of attainder, and from granting titles of nobility; it limits the power of the States to discriminate against citizens of other States, and limits the power of the federal government to suspend the writ of habeas corpus. Constitution, Art I, §§ 9, 10; Art IV, § 2.

⁵⁰ James Madison, *Notes of Debates in the Federal Convention of 1787*, 1st paper ed. (Athens, Ohio: Ohio University Press, 1984), 630. Votes in the Convention were cast by States, not by individual delegates.

Constitution, although it would be more powerful than the government under the Articles, would nevertheless still lack authority to engage in activities that could threaten traditional rights and that, indeed, an enumeration of rights would be counterproductive in that it would support an inference that the national government had more authority than was actually given to it by the Constitution.⁵¹ During the ratification debates in the States, however, it became evident that much of the opposition to the Constitution was based on fear that the new national government would indeed possess the wherewithal to become oppressive, and that a bill of rights was therefore necessary. As a result, a tacit compromise was reached whereby, if the Constitution were to be ratified, it would be amended to include guarantees of traditional rights.⁵²

The Constitution was ratified by the States, and entered into effect in 1789. The Congress, in its first session, proposed a series of twelve amendments, ten of which were promptly ratified, and have long been known collectively as the Bill of Rights.⁵³

The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁵⁴

It is significant that the First Amendment does not pretend to create the freedoms and rights referred to; quite the contrary. The language of the Amendment clearly implies that these freedoms and rights have existed prior to and independent of their mention in the Constitution, and that the reason—the only reason—for including them in the Constitution is to make certain that the new national government will not violate them. Contrast the phrasing of the First Amendment—and the other Bill of Rights guarantees which read like it—with declarations of rights framed in the Enlightenment style and proclaimed in the wake of the French Revolution.

⁵¹ Hamilton, "The Federalist, No. 84," in *The Federalist*, 572–83.

⁵² Maier, *Ratification*, 435–68.

⁵³ See *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, ed. Neil H. Cogan (New York: Oxford University Press, 1997).

⁵⁴ Constitution, Amend I.

The French Declaration of the Rights of Man and of the Citizen, adopted in 1789, includes the following provisions:

The principle of sovereignty resides essentially in the Nation. No body and no individual may exercise authority which does not derive expressly therefrom. . . .⁵⁵

The law is an expression of the general will. . . .⁵⁶

. . . Those who solicit, promote, execute or cause to be executed arbitrary orders must be punished; but every citizen summoned or apprehended by virtue of the law must obey instantly; he renders himself culpable by resistance.⁵⁷

The first Latin American constitution, the Venezuelan Constitution of 1811, was strongly influenced by Enlightenment and French Revolutionary ideas. Its chapter on the "Rights of Man . . ." begins:

Men, after being constituted in society, have renounced that unlimited liberty and license, appropriate only to a state of savagery, to which their passions had so easily led them. The establishment of society presupposes the renunciation of those doleful rights, the acquisition of others more sweet and pacific, and subjection to certain mutual duties. . . .⁵⁸

The social contract assures to each individual the enjoyment and possession of his goods, without injury of the right of others with respect to theirs. . . .⁵⁹

A society of men meeting under the same laws, customs, and Governments forms a sovereignty. . . .⁶⁰

The sovereignty of a country, or the supreme power to regulate or direct equitably the interests of the community, resides, thus, essentially and originally in the general mass of its inhabitants and is exercised through their agents or representatives. . . .⁶¹

⁵⁵ The [French] Declaration of the Rights of Man and of the Citizen [1789], Art III, in *Human Rights: Documentary Supplement*, ed. Louis Henkin et al. (New York: Foundation Press, 2001), 1028.

⁵⁶ *Ibid.*, Art VI.

⁵⁷ *Ibid.*, Art VII.

⁵⁸ Federal Constitution for the States of Venezuela [1811], Art CXLI. Translated by the author of the present article.

⁵⁹ *Ibid.*, Art CXLII.

⁶⁰ *Ibid.*, Art CXLIII.

⁶¹ *Ibid.*, Art CXLIV.

Law is the free expression of the general will of the majority of the citizens, made by the organ of their legally constituted representatives. . . .⁶²

The Venezuelan Constitution specifies that the basic rights of man are liberty, equality, property and security, and proceeds to define each.⁶³

This same state-centered approach to rights is reflected in the supraconstitutional European Convention on Human Rights, which was concluded in 1950 and remains in effect today:

Everyone has the right to freedom of thought, conscience and religion; this right includes. . . .⁶⁴

Everyone has the right to freedom of expression. This right shall include. . . .⁶⁵

All of these declarations of rights—and there are many others like them throughout the world—despite their sweeping (not to say grandiose) language, contain a telling, indeed ominous, qualification: expressly or by implication, they cast the State as the dispenser, regulator, and indeed, the source of the rights proclaimed. In the U. S. Bill of Rights, on the other hand, the freedoms are treated as having their immediate source in the Common Law tradition, and their ultimate origin in the nature of man, that is, in the Natural Law. The role of government is but to respect and protect those freedoms.

This acknowledgement of the nature, origin, and practical significance of constitutional rights, exemplified importantly by the First Amendment, is confirmed by the last two articles of the Bill of Rights, the Ninth and Tenth Amendments. The Ninth Amendment states:

The enumeration in the Constitution, of certain rights, shall not be construed to disparage others *retained by the people*.⁶⁶

The Tenth Amendment, set forth hereinabove, merits repetition:

⁶² Ibid., Art CXIL.

⁶³ Ibid., Arts CLII–CLVI.

⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 9(1), 213 U.N.T.S. 221, E.T.S. 5.

⁶⁵ Ibid., Art 10(1).

⁶⁶ Constitution, Amend IX. Emphasis added.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁶⁷

There continues to be debate over the substantive content of the Ninth Amendment,⁶⁸ and some would deny to the Tenth Amendment any juridically significant substance at all.⁶⁹ However, these Amendments acknowledge and mean, at least, that fundamental rights do not owe their existence or exercise to the state or to any government; rather, they are derived immediately from the Common Law tradition, and ultimately from the Natural Law.

The language of the Bill of Rights places its guarantees in an historical context, a Common Law-traditional Natural Law context that gives content and definition to the rights referred to. What has already been said herein about the First Amendment is true of the rest of the Bill of Rights as well.

The juridical relevance of the fact that our Bill of Rights is grounded in the Natural Law is explained by United States Court of Appeals Judge Diarmuid O'Scannlain in his brilliant article, "The Natural Law in the American Tradition."⁷⁰ Judge O'Scannlain, after explaining his position (with which this writer agrees) that judges have no freestanding authority to enforce the Natural Law,⁷¹ refers to the Second Amendment to the Constitution and to the United States

⁶⁷ Constitution, Amend X. Emphasis added.

⁶⁸ See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 183–5.

⁶⁹ See, for example, the dissenting opinion of Justice William J. Brennan in *National League of Cities v. Usery*, 426 U.S. 833, 856–80, 96 S.Ct. 2465, 2476–88, 49 L.Ed.2d 245, 260–75 (1976).

⁷⁰ Diarmuid F. O'Scannlain, "The Natural Law in the American Tradition," *Fordham Law Review* 79 (2011): 1513.

⁷¹ *Ibid.*, 1520–22. Judge O'Scannlain also says:

I believe that, in many important respects, the natural law is woven into the fabric of the Constitution, and therefore, is relevant to originalist constitutional interpretation. Thus, every lawyer, and certainly every judge, should study and understand the natural law—not because it is enforceable in its own right—but because it informs our understanding of the Constitution's original meaning. *Ibid.*, 1515.

Supreme Court's 2008 decision in *District of Columbia v. Heller*,⁷² interpreting that Amendment.

The Second Amendment says:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.⁷³

The *Heller* case involved a challenge by a resident of the District of Columbia to a District ordinance that prohibited the possession of usable handguns, even in the possessor's own home. The District of Columbia argued that the Second Amendment did not protect the litigant Heller, or any other individual, but guaranteed only the right of governments to maintain "militias" (or their modern-day equivalents, the state National Guards), and perhaps the rights of militiamen when in such service. As O'Scannlain notes, the Supreme Court "launched into an extended discussion of the natural right to bear arms, as it was understood during the one hundred years leading up to the enactment of the Constitution."⁷⁴ The Court, utilizing historical, natural rights analysis, concluded, *inter alia*, that the Second Amendment's "right to keep and bear arms" referred to a natural right of the individual to bear arms for self-defense, and not just to a collective right connected to militia service. The analytical approach utilized in *Heller* and praised by O'Scannlain is, or should be, applicable to our many other constitutional rights that are rooted in traditional Natural Law.⁷⁵

The Natural Law has long recognized explicitly that "the social nature of man is not completely fulfilled [by or] in the state, but is realized by various intermediary groups, beginning with the family and including economic, social, political, and cultural groups which stem

⁷² *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2780, 171 L.Ed.2d 637 (2008).

⁷³ Constitution, Amend II.

⁷⁴ O'Scannlain, "The Natural Law in the American Tradition," 1524.

⁷⁵ As Justice Scalia, speaking for the Court, said, "We look to this [history] . . . because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing right*. The very text of the Second Amendment implicitly recognizes the preexistence of the right and declares only that it 'shall not be infringed.'" *District of Columbia v. Heller*, 592. Emphasis in original.

from human nature itself and have their own autonomy.”⁷⁶ This principle, discussed hereinabove with respect to subsidiarity, deserves mention again with respect to the structure of rights guarantees in the United States Constitution. With a single exception, the rights protected by the Constitution are guarantees only as against government, federal or state.⁷⁷ In other words, the United States Constitution (unlike many other constitutions) does not purport to regulate purely private conduct. Recall, for example, that the First Amendment states that “Congress shall make no law . . . abridging” the rights referred to therein.⁷⁸ The remainder of the Bill of Rights prohibits conduct that is, by its nature, necessarily governmental. This commonsense (and Natural Law) approach to rights is continued in that other great repository of constitutional rights, the Fourteenth Amendment, which was adopted in the aftermath of the Civil War. Its protection of the “privileges and immunities” of citizens, and its guarantees of “due process of law” and “the equal protection of the laws,” are framed as limitations upon the States of the Union. The relevant language is:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*⁷⁹

These rights guarantees confirm that the Constitution is not meant to regulate all of society, neither does it attempt to guarantee everything that might be considered desirable. The classical and medieval exponents of the Natural Law understood that, given the limitations and imperfections of human nature, “the [human] law should not try to prescribe every virtue and forbid every vice,”⁸⁰ and the Founding Fathers and their nineteenth century successors

⁷⁶ Rice, *50 Questions*, 277, citing Pope John Paul II’s encyclical “*Centesimus Annus*.”

⁷⁷ The exception is the Thirteenth Amendment, which has always been understood to prohibit all slavery and involuntary servitude, regardless of by whom they may be practiced.

⁷⁸ Constitution, Amend I.

⁷⁹ Constitution, Amend XIV, § 1. Emphasis added.

⁸⁰ See, St. Thomas Aquinas, *Treatise on Law (Summa Theologica, Questions 90–97)*, 70–1.

understood that as well.⁸¹ Thus, the Constitution, in protecting rights, does not seek to deprive the family and private intermediate institutions of their natural, legitimate freedom of action; rather, the Constitution recognizes that the state should not attempt to control all of society, or try to meet all societal needs, or subordinate all other groups to governmental domination. The family, churches, labor unions, political parties, business enterprises, and schools and universities have a right to exist and to operate independent of government.

In drafting and promoting a Constitution of limited government, of subsidiarity both in governmental and in larger societal matters, and of restraint in the imposition of obligations, the Founders did not explicitly declare that they were applying classical Natural Law principles.⁸² Such a declaration would have been both inappropriate and unnecessary.⁸³ But anyone who doubts the overwhelming influence of the Natural Law should read the best known of the Federalist Papers No. 10, written in 1787 by James Madison, "The Father of the Constitution," in urging the ratification of the Constitution by the State of New York.

Federalist No. 10 reveals a classical Natural Law understanding of the nature of man and of government. Man is neither depraved nor angelic, but fallen—capable of good but subject to temptation. The state and government are natural institutions, not artificial creations. Government exists neither to perfect man (which it cannot do) nor to repress him (which it should not do), but rather to pursue the limited goal of promoting the common good by acting or refraining from acting, as the situation may require, always in accordance with its own nature and the nature of man.⁸⁴

⁸¹ See, for example, Commager, *The American Mind*, 368–82.

⁸² The historian R. R. Palmer observes that, "The men at Philadelphia in 1787 were too accomplished as politicians to be motivated by anything so impractical as ideology or mere self-interest. . . ." R. R. Palmer, *The Age of the Democratic Revolution*, vol. 1 (Princeton: Princeton University Press, 1964), 229.

⁸³ Rossiter calls the Constitution the enduring monument to the success of the delegates who declared independence. Clinton Rossiter, *Conservatism in America* (New York: Vintage Books, 1962), 103–4.

⁸⁴ Madison, "The Federalist, No. 10," in *The Federalist*, 54–62.

In juridical circles, the Natural Law has been under attack for more than a century, not just in the United States, but throughout the Western World. Those attacks have made it easier for activist courts and weak or misguided legislators and administrators to reject or ignore the Natural Law foundations of Western Civilization and of the United States Constitution,⁸⁵ and to adopt programs that deny the inherent dignity and essential equality of every human being, that weaken the family,⁸⁶ that distort education,⁸⁷ that seek to make all groups and organizations in society subservient to the state,⁸⁸ and that even deny legal protection to the weakest and most innocent among

⁸⁵ As the jurist Professor Harold Berman wrote in 1985:

in the past two generations . . . the public philosophy of America [has] shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a historical to a pragmatic theory. . . . The triumph of the positivist theory of law—that law is the will of the lawmaker—and the decline of rival theories . . . have contributed to the bewilderment of legal education.

Harold Berman, "The Crisis of Legal Education in America," *Boston College Law Review* 26 (1985): 347–8.

⁸⁶ In some States, all adoption agencies—private as well as public—are required by law to place children with homosexual couples, and pharmacists are required to dispense contraceptive pills and devices, and even abortifacients. At this writing, the federal Department of Health and Human Services is in the process of implementing regulations (which, incidentally, it promulgated without affording a prior opportunity for public comment—a usual requirement in such situations) that will obligate almost all employers who provide health coverage for their employees to include coverage for contraception and sterilization. 45 C.F.R. § 147.130 (2011).

⁸⁷ Concerning governmental discrimination against religious education, see, for example, *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004).

⁸⁸ In many States, government has limited the right of private voluntary groups to establish and maintain their own membership criteria, or to maintain the integrity of their principles, even when those principles are based on sincerely held, traditional Judaeo-Christian beliefs. In *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the United States Supreme Court upheld such a limitation, rejecting the argument that it violated the constitutionally guaranteed freedom of association. In *Christian Legal Society v. Martínez*, 561 U.S. ___, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010), the Court upheld the right of a state university to deny "student organization" status to an otherwise qualified organization, the Christian Legal Society, precisely because the Society limited its membership to adherents of traditional Judaeo-Christian principles concerning sexuality and marriage.

us.⁸⁹ There is considerable irony in the fact that as government seeks to control more and more of society, it simultaneously abdicates its original and most important duty: to protect the most basic right—the right to life—of innocent people. On the other hand, it should not be surprising that when a human legal system loses sight of its proper place in the eternal order of things, disastrous disorder is the result.

With respect to many of these excesses, then-Justice Byron White of the United States Supreme Court, in an opinion written in 1986, observed:

The Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.⁹⁰

Justice White was correct. It should be added that a renewed awareness of the Natural Law and of its foundational role in the making of the United States Constitution would be of enormous benefit to the United States and to the world.

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⁸⁹ In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court created a “constitutional right” to abortion, and in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973), decided the same day as *Roe*, the Court construed that right to be, effectively, a right to abortion on demand.

⁹⁰ *Bowers v. Hardwick*, 478 U.S. 186, 194, 106 S.Ct. 2841, 2846, 93 L.Ed.2d 140, 148 (1986).