2008

Influence of the Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the United States Constitution

H. Wayne House

Follow this and additional works at: http://digitalcommons.liberty.edu/lu_law_review

Recommended Citation
Available at: http://digitalcommons.liberty.edu/lu_law_review/vol2/iss3/6
INFLUENCE OF THE NATURAL LAW THEOLOGY OF THE DECLARATION OF INDEPENDENCE ON THE ESTABLISHMENT OF PERSONHOOD IN THE UNITED STATES CONSTITUTION

H. Wayne House†

Abstract

Often it is emphasized that the United States Constitution is not a theological document, and so any claims of a Christian orientation to American government are unwarranted, and basic concerns of human personhood in such matters as fetal right to life are not protected by the Constitution. Any human rights claims are only protected within the Amendments to the United States Constitution, it is said, especially the Bill of Rights and the Fourteenth Amendment. It is the contention of this Article that the Declaration of Independence is the rightful preamble to the United States Constitution, and its recognition of the laws of nature and of God is the basis of providing for the inalienable rights of life, liberty and the pursuit of happiness. Government secures these rights granted by the Creator for all persons, and the United States Constitution is the means by which the founders sought to achieve this theological goal. Consequently, the Declaration provides the necessary theological underpinning of the national compact, apart from which there would be no philosophical and theological bases to provide for the safeguard of persons in United States Constitution. The theological basis, however, is not explicitly biblical in nature, though possibly implicitly, but comes from the natural law theology passed down from the apostle Paul in the Scriptures, the Summa Theologica of St. Thomas Aquinas, and into American law through John Locke and Sir William Blackstone, among others.

† Distinguished Research Professor of Biblical and Theological Studies at Faith Evangelical Seminary (Tacoma, WA) and Adjunct Professor of Law, Trinity Law School of Trinity International University. Dr. House is the New Testament editor of the Nelson Study Bible and Nelson Illustrated Bible Commentary, and the General Editor of Evangelical Exegetical Commentary (44 vols.), Israel: the Land and the People, and Charts of Bible Prophecy, among the 30 books that he has authored, co-authored, or edited. Dr. House has received a Certificate in International Human Rights, Institut International des Droits de l'Homme, Strasbourg, France; J.D., Regent University School of Law; Th.D., Concordia Seminary; M.A., Abilene Christian University; M.A., M.Div, Western Conservative Baptist Seminary; B.A. Hardin-Simmons University. Copyright © 2008 H. Wayne House. All Rights Reserved. Liberty University School of Law has permission to publish this article.
I. INTRODUCTION

The Declaration of Independence and the United States Constitution serve as two of the four foundational bodies of law for the United States, the third being the Northwest Ordinance and the fourth the Articles of Confederation. Within these documents our Founding Fathers set forth their view of human rights and human government with a vision that we would be a free people within prescribed boundaries of a limited federal government. When I say that they envisioned boundaries for the American people, this is a recognition that the "government by the people" was required to work within certain strictures found in the United States Constitution through the enumerated powers of the federal government, respective state governments, and through their various branches.

Also, the Founders set forth human rights as not being a creation of a government, but as bestowed by a Supreme Being on His human creatures. Consequently, these rights were not subject to debate (self-evident) and could not be separated from our humanness, being limited only by due process of law. In the words of Jefferson, "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty, and the pursuit of happiness." Such words would not, and maybe could not, come from the lips of many political philosophers, nor the legal community today, who operate under a legal positivism, or alternate natural law theory, different from what was believed by the men who crafted the Declaration and United States Constitution.

When Clarence Thomas was being considered as an Associate Justice of the Supreme Court of the United States, a criticism that was leveled against him was that he would seek to understand the United States Constitution through the Declaration of Independence. Laurence Tribe, professor of constitutional

1. See 1 UNITED STATES CODE XLV-LXXIII (2000) (The four organic laws are the DECLARATION OF INDEPENDENCE, the ARTICLES OF CONFEDERATION, the NORTHWEST ORDINANCE, and the UNITED STATES CONSTITUTION. All four are reproduced in full at the front of every copy of the UNITED STATES CODE.). See generally FOUR PILLARS OF CONSTITUTIONALISM: THE ORGANIC LAWS OF THE UNITED STATES (Richard Howard Cox ed., 1998).
2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
3. Justice Thomas was criticized for adherence to natural law by some of the same senators who criticized Judge Bork for being a strict constructionist and positivist, surely demonstrating that these confirmations related to something other than the candidates' views of interpretation. See 137 CONG. REC. E3325-01 (daily ed. Oct. 8, 1991) (statement in extension of remarks of Rep. Rohrabacher).
law at Harvard Law School, writes despairingly of Thomas’ tenure on the Supreme Court in the *New York Times*:

Clarence Thomas, judging from his speeches and scholarly writings, seems instead to believe judges should enforce the Founders’ natural law philosophy—the inalienable rights “given man by his Creator”—which he maintains is revealed most completely in the Declaration of Independence. He is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation.⁴

That a liberal scholar such as Tribe would criticize Thomas’ adherence to the divine rights guaranteed in the Declaration is ironic since reliance on non-positivistic rights by former liberal Justice William Brennan has not brought similar criticism. When Justice Brennan, an advocate of the “living” Constitution, was challenged on his view of the death penalty by the actual text of the United States Constitution that provides for capital cases, he responded that an evolving standard of decency had developed within the United States since the eighteenth century. When further pressed with the facts that polls have showed a high majority of American citizens favored the death penalty, his response was that they should not. He, then, would not base his decisions on the God-given rights stated in the Declaration but would embrace a nebulous personal view of rights apart from the Constitution.⁵

Jeffrey Sikkenga points out the consistency of Thomas’ position with that of the founding documents of the United States:

---


Writing to this controversy, Jerome J. Shestack, former United States Ambassador to the United Nations Commission on Human Rights, remarked that “there may be reasons to question Judge Clarence Thomas’s qualifications for the Supreme Court, but his espousal of natural rights philosophy is not one of them.” Shestack pointed out that such documents as the American Declaration of Independence, from whence in fact came the phrase “The Laws of Nature and of Nature’s God,” the French Declaration for the Rights of Man, and the Universal Declaration of Human Rights found their “moral philosophic underpinnings” in “natural rights.” James V. Schall, *Essays on Natural Law*, http://www9.georgetown.edu/faculty/schallj/7.htm#3 (last visited April 15, 2008).

In his view, "the ‘original intention’ of the Constitution" is to fulfill "the ideals of the Declaration of Independence." As we know, the Constitution was originally intended to replace the Articles of Confederation and create "a more perfect Union." For the Founders, "a more perfect Union" meant a Union that more perfectly embraced the principles for which they risked their "Lives," "Fortunes," and "sacred Honor" in the Revolutionary War. As Justice Thomas points out, these principles are the "ideals of the Declaration of Independence." Hence he draws the reasonable conclusion that to understand the original intent of the Constitution, we must first understand the principles of the Declaration.6

Though many of today’s legal scholars and judges believe that the Declaration is not a valid basis for interpreting the law today, this was not originally so:

Fortunately, though, the natural law approach has held a high place in American jurisprudence. Thomas Jefferson and James Madison agreed, for example, that the best guide to the Constitution is the Declaration of Independence and its philosophy of natural rights. This view was common at the Founding; so common, in fact, that early Supreme Court decisions, like Calder v. Bull (1798), claimed that even laws "not expressly restrained by the Constitution" should be struck down if they violate natural rights. Nor was this view limited to the Founding era. Before and during the Civil War, for example, Abraham Lincoln repeatedly appealed to the legal authority of the Declaration in his fight against slavery.7

Recognition of basic human rights is found within the Declaration of Independence without any reference to a sacred text. Though the vast majority of the signers of the Declaration and Constitution were professing members of orthodox churches within the colonies, some were Unitarian, such as Adams and Jefferson, while a few leaned toward Deism,8 which shared along with the Christian population belief in the laws of nature and of God.

Though few would deny that the Declaration expresses natural law perspectives, many desist from the view that the Declaration should guide the decisions of the Court, and even more reject that the Constitution has within it

6. Sikkenga, supra note 5.
natural law philosophy or tenets. I would contend, however, that the Declaration reflects ideas that bridge Christian and non-Christian perspectives, being universal in scope. The theistic perspectives of the founders is reflected in the Declaration and secured through the positive law of the Constitution. Even if judges ignore the Declaration today, without this document there is no basis for the vision of rights of the people, and limitation of government, envisioned by the founders. It is like sinew to the bones of the Constitutional document. Additionally, the rights of the Bill of Rights build on the Declaration, though some later Amendments, such as the Fourteenth Amendment, some believe to be founded on positive law, whereas the impetus for these amendments are the rights of men found, unfulfilled, in the Declaration of Independence.

If what I have stated is accurate, then personhood, I believe, that is mentioned many times in the Constitution and Amendments is dependent on a view of God-given rights set forth in the Declaration and to be guaranteed by government. What then was the role of government in regards to human rights? Jefferson continued his statement about the endowment of rights that government is instituted among men to “secure these rights.” Whenever governmental officers, including officers of the judicial branch, do not secure these God-given rights, they have failed at the very point of their reason for existence.

Moreover, and last for this introduction, the rights were invested in human beings as a class, so that no one who satisfied the criterion “human” was to be excluded from having the rights and having them secured by government. Conversely, those beings in the world such as animals and plants did not share this unique and high status of rights nor protection of rights. What is fascinating, and at the same time disheartening, in the last thirty years or so of American legal history is that the Declaration of Independence, with its aspiration toward promoting humanity, has been largely set aside by a jurisprudence which has turned the Declaration on its head. Humans have lost many of their endowed rights, while animals, plants, and even business enterprises have gained rights.9

II. THE NATURE OF NATURAL LAW (LEX NATURALIS)

A. Definition of Natural Law

What is natural law? Ostensibly it is law which is natural versus unnatural, or more particularly, law that relates to the nature of things, how they ought to work. As such, natural law and the law of nature have been closely related from the inception of the idea among the Hebrews, Greeks, and Romans. Natural law, or the law of nature, refers to the belief that there exists a law that has validity everywhere since its content is determined by nature. It is often placed in juxtaposition to positive law, law passed by a community or state. Generally those advocating natural law would contend that justice may only be achieved when governments incorporate natural law into their legal systems.

The use of the term “natural law,” according to Black’s Law Dictionary, refers to:

a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution.\(^\text{10}\)

Describing the various possible definitions of natural law, Barton says,

In speaking of “natural law” at all, one is faced with a jungle of possible definitions and implications. The term is meant to suggest a way of looking at ethics which stresses that certain moral norms are felt to be natural, in tune with the way things are, or likely to be held by everyone in virtue of some innate moral sense. The Dictionary of Christian Ethics provides a useful, concise definition: natural law is “the view that there are certain precepts or norms of right conduct, discernible by all men.” The author of the article goes on to suggest various subtypes, including (1) “those rules of justice which may be found written in the hearts or consciences of men” and (2) “a set of ethical judgments obtained by reflecting on man’s ordinary experience, as contrasted with the divine laws that may be supernaturally revealed.”\(^\text{11}\)

\(^\text{10. BLACK’S LAW DICTIONARY 106 (6th ed. 1990).}\)

\(^\text{11. JOHN BARTON, UNDERSTANDING OLD TESTAMENT ETHICS: APPROACHES AND EXPLORATIONS 32-33 (2003).}\)
B. Distinction of Two Views of Natural Law

Natural law is in contrast to positive law, as we have said, and there are many ways natural law has been expressed over the centuries, but there are two broad categories into which the viewpoint has been divided: theistic and non-theistic, the formerly based on divine law and the latter solely on human reason. The theistic view, in western thought, has been expressed from St. Thomas to Grotius, believing that God’s eternal law is imprinted on each person. This eternal law does not only provide the guide for the physical world but also the moral. Moral propositions contain objective truth and derive these moral standards from the nature of the world, including the moral conscience of man.

Non-theistic natural theory, held by the majority of contemporary moral theorists, subscribes to natural rights that may be discerned solely through appeal to human reason and experience. This began with Grotius; though he did believe in God, he also believed in human ability to know internally apart from external revelation from God. This natural law view does not consider law and morality to be clearly distinguished. This broader type of natural law is also divided into two forms: secular natural law, and historical natural law.

Hugo Grotius is viewed as a bridge from a theistic natural law to one grounded in human reason alone without reference to any divine law. Grotius’ famous statement that appears to divorce natural law from God is often quoted, that natural law would be binding even if “which cannot be conceded without the utmost wickedness,” God did not exist. And unlike William

13. From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 787-92 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999) [hereinafter FROM IRENAEUS TO GROTIUS].
14. Hugo Grotius, Prolegomena, para. 11, quoted in Paul E. Sigmund, Natural Law in Political Thought 61 (1971). O’Donovan and O’Donovan seek to rescue Grotius from what they believe is a serious misunderstanding of him as:

one of the most startlingly misunderstood figures in early modern thought. There is a persistent misreading of his intentions which constitutes a sobering object lesson in the history of scholarship. Five Latin words isolated from the ‘Prolegomena’ of The Right of War and Peace are still found—as they have been found for generations—quoted in every encyclopedia article: etiam si daremus Deum non esse, ‘even were we to accept that God did not exist’; and on the basis of these five words Grotius is marked out as a pioneer of ‘secular’ natural law theory. Only a small proportion of those who quote them have read the sentence in which they occur, let alone the context of the discussion, or anything further that the author wrote. And this lopsided characterization has a history as long as the name of Grotius itself. For at the time of their first publication, the Vatican took offense at them (though they had a good pedigree in scholastic theology), and
Ockham before him who could have God alter moral teaching, Grotius' God cannot make something right that is in fact evil: "Just as even God cannot cause that two times two should not make four, so He cannot cause that which is intrinsically evil be not evil." Yet, though Grotius himself still appears to have great regard for the theological arguments of the past regarding natural law, he does provide a bridge to later thinking in Locke, to some degree, and to Thomas Hobbes, for whom the actions of the state are always wholly justified.

Under this view, human reason is informed by the physical, biological, and behavioral laws of nature and is influenced by the thinking that came out of the Enlightenment. Humans exist in a state of nature that was before the creation of government institutions. In this state of nature, according to Locke, humans live "according to three principles," namely, "liberty, equality, and self-preservation." Because of these rights in the state of nature individuals have the right of self-preservation to ensure the equality that the government cannot guarantee. Since others seek to infringe on rights in the state of nature, this produces the need for a government:

Ultimately, Locke wrote, the state of nature proves unsatisfying. Human liberty is neither equally fulfilled nor protected. Because individuals possess the liberty to delineate the limits of their own personal needs and desires in the state of nature, greed, narcissism, and self-interest eventually rise to the surface, causing irrational and excessive behavior and placing human safety at risk. Thus, Locke placed the book on the Index. That was the cue for Grotius to be claimed by younger figures who really did aspire to found a moral science that would be valid independently of God. But such a thing was not Grotius's purpose, and we hope that the selections which follow may persuade readers that to understand Grotius as a legal and political theorist implies understanding him also as a lay theologian.

15. See Sigmund, supra note 14, at 58.
17. Grotius offered a disclaimer to his separation of natural law from religion when he defined natural law as "that which is in conformity with the rational nature"; he also added "and therefore is commanded and forbidden by God, the author of nature." HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. I, ch. 1, sec. x, para. 1, quoted in Sigmund, supra note 14, at 61-62.
19. Id.
concluded, the law of nature leads people to establish a government that is empowered to protect life, liberty, and property.\textsuperscript{20}

The third broad form of natural law is the historical natural law. Under this school of thought, those unwritten but well-established customs and traditions of a people that have evolved throughout history limit the power of government. This perspective gave rise to challenges to the power of the British crown and served, through the Magna Charta and other human rights, for many of the rights enumerated in the United States Constitution.\textsuperscript{21}

All three forms of natural law had influence on the development of United States law, with the Constitution incorporating the truths that had existed in divine law, the inherent rights found among all humans, and those that had been part of the experience of humanity throughout history:

One federal court said that the Constitution “did not create any new rights to life, liberty or due process. These rights had existed for Englishmen since Magna Charta. The Declaration of Independence . . . merely declared and established these rights for the American colonies.” Thus, natural law in the United States may be best understood as the integration of history, secular reason, and divine inspiration.\textsuperscript{22}

C. Relation of Natural Law to General Revelation

Natural law has also been known as the “law of nature” and reveals to those aspects within nature that are common to the experience of all humans by virtue of their humanity. Within Christian natural law theory, the law of nature has also been equated with the general revelation of God that He gives to all people everywhere throughout all time. Usually general revelation refers to God’s revelation through nature and secondly in the human conscience. For example Psalm nineteen, verses one through four read:

\begin{quote}
“The heavens declare the glory of God; 
And the firmament shows His handiwork.
Day unto day utters speech, 
And night unto night reveals knowledge.
There is no speech nor language 
Where their voice is not heard.
\end{quote}

\textsuperscript{20. Id.}
\textsuperscript{21. Id.}
\textsuperscript{22. Id.}
Their line has gone out through all the earth,
And their words to the end of the world.
In them He has set a tabernacle for the sun[.]

These verses indicate that nature expresses information about God everywhere and to all peoples. That humans have adequate information in nature to be morally culpable is then confirmed by St. Paul in Romans one, verses eighteen through thirty-two. Paul, then, reveals that residing within each human is a sense of right and wrong, and that punishment attaches to doing wrong, and rewards to doing right.

D. Relation of Natural Law to Natural Rights

If there is universal law found within the natural order, either given by divine revelation or discovered within human reason or common human experience, the first being the view emphasized within this article, then are there rights guaranteed to all humans that should not be abrogated by other individuals or by government? There are certain rights that arise from human nature that are common to all humans. Harry Jaffa elucidates this theme:

“Natural rights” under “natural law” mean neither more nor less than what all of us understand when we speak of “human rights.” What do we understand ourselves to intend when we accuse the Chinese government of abusing human rights? What did we mean when we denounced Hitler’s government, and Stalin’s, and Pol Pot’s, and Saddam Hussein’s, and Assad’s, of being abusers of human rights? These rights and freedoms are what every government in the world owes its citizens, for the reason that they are human beings and not beasts or inanimate objects. Human law, or positive law, exists to implement these rights, but the rights themselves exist independently of whether they are recognized, or whether they are trampled upon and denied.

The claim to natural rights, however, that are divorced from a divine natural law, is open to serious abuse, in which each person may claim rights that are not essential to the natural order, and may be nothing other than personal desires or preferences.

24. Romans 2:12-16.
This distinction between natural rights based in divine law, rather than individual claims to rights, is not lost on Schall. He criticizes the thinking of Jerome Shestack, who, a major champion of natural rights without religious foundation, believes that natural rights are "inalienable" "because they are the foundations of why we enter society in the first place." Schall notes that the desire of modern philosophers to connect rights to the thinking of Kant that "rights flow from the autonomy of the individual in choosing his or her own ends," brings the conundrum that in our freedom we are able to choose ends against nature. If this is so, then the "autonomy of the individual is not remarkably different from the positivist position. This position holds that whatever the state, which itself is but a collection of equally autonomous wills, establishes as law is law, with no answerability to some 'higher law.'"

Whatever may be the merits of natural law alternatives to divine natural law, and in spite of the positive law influence from Hobbes to the present, it is abundantly clear that these were not the views of the founders of the nation as represented in the Declaration of Independence. These authors grounded whatever rights humans possessed flowed directly from creation in the image of God, and that it is the Creator who gave rights as they were, particularly life, liberty and the pursuit of happiness. Moreover, the function of government, in positive law, was to ensure the rights granted by the Creator were not infringed by government or individuals.

It is my contention that all positive law, including the United States Constitution, that would seek to protect the rights of the citizens of any government must stand on the foundation of natural rights, which in turn depends on the law of nature. Just, moral laws cannot originate apart from reliance on the law of God. As a litany of persons, including St. Peter, St. Augustine, St. Thomas Aquinas, Samuel Rutherford, Benjamin Franklin, Sir William Blackstone, and Martin Luther King, Jr., among others, have asserted that any human law that contradicts the moral law of God is in fact no law at all. Martin Luther King, Jr., from his Birmingham Jail, clarifies how one discerns whether a law is just or not:

How does one determine whether a law is just or not? A just law is a man-made code that squares with the moral law or the law of God.


27. Id. Mary Ann Glendon, says Schall, has argued that "rights talk" today has actually undermined the "higher sources of human living together. The individualist theoretical basis of modern natural rights has ended leaving positive law and the struggle over rights as the core of public life." Glendon is concerned that everything may become a right demanded, and without which, a person is a victim. The call for "rights" without obligations becomes a perversion of genuine natural law rights. Id.
An unjust law is a code that is out of harmony with the moral law... Any law that uplifts human personality is just. Any law that degrades human personality is unjust.  

III. THE HISTORICAL DEVELOPMENT OF NATURAL LAW

A. The Origin of Natural Law

We have discussed briefly the understanding of what natural law is. Now we will turn our attention to the origin of natural law.

A clear divide exists between the philosophy of the Orient in contrast to that of the West. The East was skeptical and negative about nature. It was steeped in agnosticism or atheism, ideas that led to belief in nothingness as the ultimate truth of the universe.

This is in stark contrast to the West where a distinction was made between the world and God, and a belief in a higher law developed in contradistinction from the positive law of the state. This is generally thought to have developed in Greek society in the thinking of philosophers such as Aristotle, though we will see below that Hebrew society predated the Greeks in their belief in natural law. The western view of natural law found a firm hold in the late medieval period, particularly from the Renaissance, heavily relying on the thinking of St. Thomas Aquinas, until recently.

B. Natural Law in the Hebrew Scriptures

The Hebrew Scriptures (Old Testament) contain considerable teaching on the natural law of God in addition to the written words of God, dating to the late second millennium through the time of the prophets. Tayler Lewis avers,

It may seem a bold assertion, and yet we will hazard it, that no where do we find the ideas of law and order more distinctly set forth than in the Old Testament. We mean natural law and order. It is, indeed, never parted from the Divine Personality, but it is true law notwithstanding.  

Lewis, in his subsequent words, reveals that he speaks specifically of natural law in reference to physical laws, but his quotes refer to God's words "settled in

the heavens" and "peace in his high places." Subsequent to this Lewis continues,

   It is applied there [Jer 33:19] to inanimate things; but this is just the transfer we make of our word law from rational and moral to physical agencies. Thus the idea of law, of natural law, is clearly in the Bible; but it never sinks into that inane conception of a law without a lawgiver. Neither does it ever lose its essential idea of ordinance or decree.30

Similarly, Oxford Old Testament scholar John Barton says,

   In the heyday of the biblical theology movement, it might have seemed absurd to suggest that the Old Testament contained any reference to 'natural law'—surely a Graeco-Latin idea if ever there was one. . . . Now that the climate of Old Testament theology is markedly more pluralist, it may be easier to make a case for natural law as an important element in much Old Testament thinking about ethical obligation; not just in, say, the Wisdom books, where it might be readily accepted as part of the essentially non-Israelite concepts with which wisdom may be thought to function, but in the Prophets and perhaps even in some strands of the Pentateuch itself.31

Claiming natural law in the Old Testament raises some important concerns in view of the strong presentation of revealed written law found in the Torah, the Prophets, and the Writings. What unwritten law is found that governs Israel, or the universal humanity, the heart of natural law? To do so requires that moral law governing all of humanity, including Israel, may be discovered within the Hebrew Scriptures and that a distinction of laws is evident in the text. Barton quotes Horst as one who held to this view:

   [T]he supposed universality of natural law rests on the notion that it is inherent to humankind, just as it is inherent in the world, not merely a matter of widely agreed convention . . . . However, it is useful to preserve the distinction if one is looking for evidence of "natural law" in the Old Testament, and to ask, as Horst does, first, "Is the Old Testament aware of any moral norms embracing all humanity and existing over and above particular moral injunctions (either God-given or made-made)?"—norms, that is, applicable to human beings qua human; and second, "Does the Old Testament

30. Id. at 396.
31. Barton, supra note 11, at 32.
acknowledge any moral norms or principles built into the nature of things?"\textsuperscript{32}

Horst believes that the morality that governs all mankind came to Noah after the Flood in the Noahic Covenant with Yahweh.\textsuperscript{33} God is seen as the source of the general law to humanity and the divine law at Sinai, both prohibiting murder. Horst argues that the two laws are not merely arbitrary laws and of the same sort but that the prohibition of murder relates to the nature of human existence: man is made in the image of God and thus has a natural right to be free from the negative acts of others.\textsuperscript{34}

Barton also adds, among several arguments, that \textit{Amos} chapters one and two support a natural law to be obeyed by the nations.\textsuperscript{35} The oracles against the nations seem to distinguish the ethical demands of the covenant relationship that Israel maintained with Yahweh from an obligation on the nations' part to obey Yahweh even as Israel was required under covenant. Barton explains,

Many recent commentators have therefore come round to the views stated carefully by Mays in his commentary: that the nations are assumed to owe obligations to Yahweh by analogy with the obligations that Israel, in the law, is known to owe. Ethical obligation is here being extended to the nations, just as (on many interpretations) Yahweh's power is so extended by the prophets. The unsatisfactory feature of this understanding of the matter, briefly, is that it does not easily account for the element of surprise in the Israel oracle (2:6-16), which according to a consensus opinion is the ultimate aim of the oracles on the nations. For the surprise effect to work, we must suppose that Amos can safely assume his audience's acquiescence in the oracles against the nations—that the atrociousness of war crimes and their abhorrence to Yahweh seemed obvious to them; for it is the very obviousness of what Amos says

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 33; \textit{see also} \textit{Genesis} 9:6.
\item \textsuperscript{33} \textit{See} my arguments on the prohibition against murder and introduction of the death penalty in H. \textsc{Wayne House} & \textsc{John Howard Yoder}, \textit{The Death Penalty Debate} (1991). \textit{See also} Markus Bockmuehl, \textit{Jewish Law in Gentile Churches: Halakhah and the Beginning of Christian Public Ethics} 146 (2000).
\item \textsuperscript{34} Barton, \textit{supra} note 11, at 34.
\item \textsuperscript{35} \textit{See} my analysis of the duty of the nations to follow wisdom rather than the Mosaic law in H. \textsc{Wayne House} & \textsc{Thomas Ice}, \textit{Dominion Theology: Blessing or Curse? An Analysis of Christian Reconstructionism} 123-38 (1988).
\end{itemize}
that is meant to lull his hearers into that false sense of security from
which the Israel oracle of 2:6-16 is to awaken them so rudely.36

Barton continues that the recognition of war crimes was viewed to be a
common feeling about human rights based in the very nature of being human,
something certainly like natural law.37

Surely the idea of some universal morality makes good sense in the Old
Testament, predating the Greeks by more than a millennium. One observes a
sense of guilt for murder and the recognition of such by those among whom
Cain was to travel.38 Also, some standard was present in the judgment for sin
against all the earth in the Flood in the time of Noah,39 and later in the
destruction of Sodom in Genesis chapter nineteen. Those incurring divine
wrath were not under the later Sinaitic moral legislation but were judged for
violation of laws later enacted in Israel under Moses.

Bockmuehl draws out this important relationship of the law of Moses with
that which undergird it:

Gentile obligation remains basically unaltered by the Sinaitic
covenant. The Noachide laws form the basic ethical foundation for
both Jews and Gentiles: the extensive discussion in Tractate
Sanhedrin concludes that “there is nothing permitted to Jews which
is forbidden to Gentiles.” Observance of the Noachide
Commandments also served to define the status of a resident alien . . .

. . . two important final observations are in order before proceeding
to examine the relevance of this subject to the New Testament. The
first is that the core of the Noachide Commandments is explicitly
made up of three capital offences, viz. fornication, bloodshed, and
blasphemy or idolatry. Only for these three is a Noachide said to be
liable to the death penalty—and it is interesting that for the Christian
consensus of the first three centuries these remain the ‘mortal’ sins
that necessarily entail excommunication . . . . There is thus an
overlap in content between the Noachide and natural law traditions,
as we suggested above. Maimonides later made that link explicit.40

36. Barton, supra note 11, at 34-35.
37. Id.
40. Bockmuehl, supra note 33, at 160-62.
C. Natural Law in the Graeco-Roman World

One finds in Greek philosophy a distinction between nature (φυσις, physis) and law (νομος, nomos). What was "custom" or "law" varied from place to place, but "nature" was the same everywhere. Aristotle in his Rhetoric makes clear that he thought there was a universally recognized unwritten law that served as the basis for moral action that was "according to nature," something that he shared in common with Xenophon, Demosthenes, and other Greek thinkers.41

Similarly in Roman culture, natural law and unwritten international law (ius gentium) was contrasted with the positive law of the state (ius civile).42 Bockmuehl elucidates this point:

We find this notion especially in Cicero, who regards the ius gentium to be part of the unwritten law that applies to all people everywhere and derives from universal practice; institutions that are common to all peoples enter into the "law of nature." It was of course usually recognized that unwritten law could be peculiar to certain communities. Nevertheless, both Cicero and the second-century jurist Gaius clearly identified ius gentium with natural law, although later Roman legal authors by and large did not. Cicero's view on this matter was bolstered by his close link between natural law and his notion of the common good.43

D. Natural Law in the Teaching of the Apostle Paul

The authors of the New Testament do not explicitly refer to the Graeco-Roman natural law tradition, and speak differently from the later expressed in medieval and Christian thought, but there is little doubt that:

in spite of justified modern philosophical and theological qualms, Graeco-Roman and NT authors in their different ways confirm the antiquity of both the substance and the terminology of natural law discourse. Most ancient writers shared the unquestioned assumption that humanity's place in the social and natural order implied fundamental principles of morality; and that these were continuous

41. Id.
42. Id. at 115.
43. Id.
with all good systems of positive law, and recognized by cultured peoples everywhere.\textsuperscript{44}

We shall confine ourselves to how the law of nature is developed by the apostle Paul, and do so in very a very brief manner. Paul speaks of nature in both his epistles to the Romans and the Corinthians,\textsuperscript{45} but our interest in specifically the revelation of God in \textit{Romans}. To Paul, rejection of the ontological existence of God,\textsuperscript{46} leads ultimately to moral rejection of God’s intention of creation revealed in nature.\textsuperscript{47} Paul appeals to “nature.”\textsuperscript{48} Homosexual intercourse is viewed as the pinnacle of sinful rejection of God as creator.\textsuperscript{49}

Joseph Fitzmyer explains the train of thought as follows:

The human being who fails to acknowledge God and turns from him, who is the source of life and immortality, seeks rather a vicarious expression of it through the misuse of the natural procreative faculty. . . . Homosexual behavior is the sign of human rebellion against God, an outward manifestation of the inward and spiritual rebellion.\textsuperscript{50}

In \textit{Romans} one and two Paul argues that God revealed Himself in creation and human conscience in such a perspicuous manner that human rejection and ingratitude of God left man without any excuse. In these two chapters he demonstrates that the knowledge of God is universal and carries with it universal knowledge of sin that deserves the judgment of God.\textsuperscript{51}

\textbf{E. Natural Law in the Justinian Code}

After Christianity became the official religion of the Roman Empire, an attempt to join together the Roman Law and the ethics of Christianity was undertaken. The emperor Justinian, in approximately A.D. 534, caused a

\begin{footnotes}
\item[44] Id. at 116.
\item[45] Romans 1:26-27; Romans 2:14; 1 Corinthians 11:14.
\item[46] Romans 1:25.
\item[47] Romans 1:26.
\item[48] “παρά φύσιν,” id. at 1:26.
\item[49] Paul’s use of ἀρσενοκοίτη or arsenokoite (1 Corinthians 6:9) appears to be a literal translation of the Hebrew for “one who lies with a male.”
\item[50] Boeckmuehl, supra note 33, at 130 (quoting Joseph Fitzmyer, \textit{Romans}: A New Translation with Introduction and Commentary 276 (1993)).
\end{footnotes}
massive collection of legal materials that joined Christian ethics with Roman law. Though this became known as the Justinian Code, it included more than the laws of Justinian. After the fall of the Roman West, this law was adopted by the conquering barbarians, ultimately becoming the law of Eastern Europe.

Corpus Juris Civilis or the Justinian Code, was the result of Emperor Justinian’s desire that existing Roman law be collected into a simple and clear system of laws, or “code.” Tribonian, a legal minister under Justinian, lead a group of scholars in a 14-month effort to codify existing Roman law. The result was the first Justinian Code, completed in 529. This code was later expanded to include Justinian’s own laws, as well as two additional books on areas of the law. In 534, the Justinian Code, made up of the Code, the Digest, and the Institutes, was completed.

The Justinian Code was developed under the authority of Emperor Justinian in A.D. 534, a composite of a Codex, which was a codification of the Roman law existing at the time, a Digest, which was a summary of the common law of the time as a guide to judges, and last, the Institutes, which was an introduction to law and to the Code and intended for law students.

52. Berman provides a breakdown of the Justinian material:

The manuscript consisted of four parts: (1) the Code (Codex), comprising twelve books of ordinances and decisions of the Roman Emperors before Justinian; (2) the Novels (Novellae), containing the laws promulgated by Emperor Justinian himself; (3) the Institutes (Institutiones), a short textbook designed as an introduction for beginning law students; and (4) the Digest (Digestum), whose 50 books contain a multitude of extracts from the opinions of Roman jurists on a wide variety of legal questions. In a modern English translation, the Code takes up 1,034 pages, the Novels 562 pages, the Institutes 173 pages, and the Digest 2,734 pages.


54. For additional discussion see BERMAN, supra note 52, at 35-53.


56. Fader, supra note 55.
The Code has public law for the state and private law for individuals, the latter divided among natural law, law of nations, and civil law. Natural law is the law of nature taught to all humans and animals and governs the relation of all creatures to each other and is immutable. The law of nations is based on natural reason and is used by all nations equally. This law deals with contractual relationships of various parties within a state. The civil law is different from the law of nations, referring to community government that uses partly local laws and partly laws governing all humanity.57

IV. Influences of Aquinas, Locke and Blackstone on the Declaration

Between the time of Justinian in the sixth century A.D. and the writing of the Declaration of Independence in A.D. 1776, the natural law was generally viewed to be a creation of God whereby He sought to express His will in nature and in the consciences of men and women everywhere. Dealing with this period, other than what we have briefly done above, would be beyond the scope of the article and would tax the limited space available. Suffice it to say that the rise of alternative natural law theories that excluded the divine will, not to mention the greater acceptance of positive law due to the belief in evolutionary law in the late nineteenth century, has changed the debate as to the nature of natural rights, and the manner in which natural rights and positive law relate to each other. My purpose in this section is to review three of the major influences on the writing of the Declaration of Independence, recognizing that other persons not discussed also had differing significance on the ideas found within the document.

A. Natural Law in St. Thomas Aquinas

1. Influence of Aquinas on the Declaration

Though most would acknowledge the influence of Locke on the Declaration, and many would also accept Blackstone, there is less agreement that Aquinas influenced the Declaration. This is probably so since the Founders generally did not invoke Aquinas in a positive sense. This is probably the case because of the negative attitude that the Founders had toward the Roman Church, and Aquinas was inextricably associated with Rome.58 Nonetheless, the Founders did readily and regularly consult Locke and others within the natural law

57. Id.
tradition who relied heavily on Richard Hooker, whose ideas may ultimately be traced back both to Aquinas and Aristotle. Consequently the family tree of divine natural law goes from Jefferson to Blackstone to Locke to Hooker and to Aquinas. Catholic missionaries had Christianized England after the conquest of England in A.D. 1066 by William the Conqueror, and the thinking of St. Thomas became the fountain of natural law that subsequent natural law thinkers drank.

2. The Categories of Law in Aquinas

St. Thomas believed that there were four divisions of law, and those who followed him, including Sir William Blackstone, who was so influential on the Founders of the United States, adopted these in most part. For Aquinas the eternal law was identical to the divine "reason" that governs the universe and is composed of timeless truths. Next is the natural law, which consists of what goodness that man has, including his instincts and the personal manifestations of man’s God-consciousness. This part of the law pertains to human behavior. Third there is the divine law, the written revelation of God in Scripture. Last is human law, the ordinances of society, or the human application of natural law. The perspectives of law argued by Aquinas were adopted into the common law of England, used in the common law courts and ecclesiastical courts, and finally brought into American law.

B. Natural Law in John Locke

1. The Importance of John Locke to the Declaration of Independence

Generally John Locke is credited with having the most influence on the Declaration of Independence, but as important as he was, his influence must not be exaggerated. I believe that there were at least five major influences on the development of American law: the conservative Enlightenment led by the thinking of Locke, the common law of England, the influence of Sir William Blackstone, the Bible, and the impact of the Protestant Reformation. Locke is usually viewed a major influence on the leaders of the War for Independence. Carl Becker says,

So far as the "Fathers" were, before 1776, directly influenced by particular writers, the writers were English, and notably Locke. Most Americans had absorbed Locke’s works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows

59. Id.
closely certain sentences in Locke's second treatise on government.\[^{60}\]

Becker is correct that Locke's thinking was important but this should not be overemphasized. His ideas of social contract had already existed in the colonies for at least a half a century before Locke published his book.\[^{61}\] Additionally, though Locke discusses "rights" in his Second Treatise on Government, none of these things are found in the Bill of Rights. The colonists had drawn their sense of rights from the Bible rather than Locke.\[^{62}\]

The Enlightenment in which Locke was involved was conservative, even as the War for Independence was conservative. He was reared in a Puritan home, and though he adopted a view of the ability of reason closer to Aquinas than Puritanism, he never departed from his basic Christian roots. He developed his ideas of government, the law of nature, and social compact from the Bible.\[^{63}\] He accepted special creation, and wrote a book on the "reasonableness of Christianity,"\[^{64}\] including the authority of the Bible: "The Bible is one of the greatest blessings bestowed by God on the children of men.— It has God for its author; salvation for its end, and truth without any mixture for its matter. — It is all pure, all sincere; nothing too much; nothing wanting."\[^{65}\]

2. Locke Held to a Divine Natural Law View

Often Locke is thought to have been a follower of the thinking of Thomas Hobbes\[^{66}\] rather than the natural law perspectives of medieval scholasticism, begun with St. Thomas Aquinas, and represented in most Christian circles even until the present. This is incorrect, for Locke clearly embraced the perspective of divine natural law and reversed the thinking of Hobbes. Hobbes believed

\[^{60}\] CARL BECKER, THE DECLARATION OF INDEPENDENCE 27 (1942).

\[^{61}\] The concepts of compact or covenant were well known by the people who came to the shores of America. See generally Donald S. Lutz, Religious Dimensions in the Development of American Constitutionalism, 39 EMORY L.J. 21 (1990) [hereinafter Religious Dimensions of American Constitutionalism].

\[^{62}\] Id. at 39-40 (arguing that as a covenantal people religion is an important background to politics but should not be involved with the Constitution proper).


that the ruler’s declaration of positive law bound the people and their rights. Though Hobbes is considered an advocate of natural law, in that he believed that people follow their natural instincts naturally, such as self-preservation, the fact that he supported the acts of a ruler absolute over a people makes his view little more than a harsh form of positive law. Locke believed, on the other hand, that when the ruler violated the natural law given by God, the people had a right to overthrow the lawless ruler.

For Locke, the “law of nature” had its source and authority in the Creator, not in the government and even not in the individual (different from secular natural law theory):

Thus 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, 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 preservation of mankind, no human sanction can be good, or valid against it.67

In addition, the law of nature stood alongside the law of God and not incompatible with the law of God (the Bible):

Human Laws are measures in respect of Men whose Actions they must direct, albeit such measures they are as have also their higher Rules to be measured by, which Rules are two, the Law of God, and the Law of Nature; so that Laws Human must be made according to the general Laws of Nature, and without contradiction to any positive Law of Scripture, otherwise they are ill made.68

3. Locke’s Use of the Terms “Law of Nature” and “Law of God”

The phase “law of nature” and “law of [nature’s] God” is familiar to anyone who has read the Declaration of Independence.69 Jefferson made plain that this was a divine natural law position held by the colonists’ declaration of independence, because he connects it with creation and rights hinged to the Creator. How did Locke understand these two phrases? He uses the terms in a manner that they were used prior to his time, and those who followed Locke, such as Sir William Blackstone70 and Thomas Jefferson, used them similarly.

67. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, in LOCKE, TREATISES, supra note 63, at 121, 190.
68. Id. at 190 n.3, quoted in EIDSMOE, supra note 8, at 62.
69. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
70. 1 BLACKSTONE, COMMENTARIES *41-42 (1765-69).
Blackstone (a contemporary of Jefferson), and Jefferson both held to a divine natural law and natural rights perspective. God endowed humans with inalienable rights, rights that were created by the law of nature and the law of God (the Bible). 71

We can see that Locke understood the law of nature and the law of God, namely, the written divine Word, to be both from God and the basis of rights by looking at a number of statements from Locke. He quoted Genesis chapter nine, verse six, the law of God, to confirm the law of nature described in it: "And upon this is grounded the great Law of Nature, whoso sheddeth Man’s Blood by Man shall his Blood be shed." 72

Speaking of political power, Locke connects the law of nature and the law of God: "That if his heirs had, there being no law of nature nor positive law of God that determines which is the right heir in all cases that may arise, the right of succession, and consequently of bearing rule, could not have been certainly determined." 73 The meaning of "positive" law of God becomes plain when he speaks of the positive law of God as God's commands in Scripture:

This may give one reason to ask whether this might not be more properly called "parental power," for whatever obligation nature and the right of generation lays on children, it must certainly bind them equally to both concurrent causes of it. And accordingly we see the positive law of God everywhere joins them together without distinction, when it commands the obedience of children: "Honour thy father and thy mother" (Exod. xx. 12); "Whosoever curseth his father or his mother" (Lev. xx. 9); "Ye shall fear every man his mother and his father" (Lev. xix. 5); "Children, obey your parents" (Eph. vi. 1), etc., is the style of the Old and New Testament. 74

Again, Locke speaks of Scripture and the state of nature, when using the phrases "law of nature" and "law of God":

But though there be a time when a child comes to be as free from subjection to the will and command of his father as he himself is free from subjection to the will of anybody else, and they are each under no other restraint but that which is common to them both, whether it be the law of nature or municipal law of their country, yet this freedom exempts not a son from that honour which he ought, by

71. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
72. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, in LOCKE, TREATISES, supra note 63, at 121, 126.
73. Id. at 121.
74. Id. at 146.
the law of God and Nature, to pay his parents. God having made the parents instruments in His great design of continuing the race of mankind and the occasions of life to their children.  

These are the bounds which the trust that is put in them by the society and the law of God and nature have set to the legislative power of every commonwealth, in all forms of government:

First: They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough.

Secondly: These laws also ought to be designed for no other end ultimately but the good of the people.

Thirdly, They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies to be from time to time chosen by themselves.

Fourthly, The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.

Last of all, Locke identifies the law of Nature as relying on the state of Nature and that based on the will of God.

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another’s pleasure. And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.
4. Locke’s Understanding of the Relation of Natural Law to Positive Law and Constitutional Law

My thesis that the law of God and law of nature in the Declaration serve as the underlying philosophy regarding rights that the government protects through its positive law is borne out in Locke’s understanding of the relationship between natural law and positive law. He is clear that the constitution from which the legislature operates must be “antecedent to all positive laws” and gives it the right to make laws. However, Locke continues that the Constitution cannot itself spring from positive law. Locke said that the origins of the constitution are “depending wholly on the people,” on their natural right to be governed with their own consent. But we might take it one step back, to which Locke would not demur, the natural right comes from the law of nature that comes at its final resting place, there being no infinite regress, in the Creator Himself.

5. Locke Was Considerably Influenced by Richard Hooker, Who Also Used Similar Terminology

Human laws are measures in respect of men whose actions they must direct, howbeit such measures they are as have also their higher rules to be measured by, which rules are two—the law of God and the law of Nature; so that laws human must be made according to the general laws of Nature, and without contradiction to any positive law of Scripture, otherwise they are ill made.

78. HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 36 (2002).
John Locke once put the matter in this way, in his Second Treatise, in an instruction that really did run the root: “the constitution of the legislative being the original and supreme act of the society,” it had to be “antecedent to all positive laws.” That there is a ‘legislature “with the power to make positive laws is a matter established in the Constitution.” But the Constitution itself cannot spring then from the positive law. It had to find its origins, as Locke said, in that understanding “antecedent to all positive laws,” and that authority was “depending wholly on the people,” and that authority was “depending wholly on the people,” on their natural right to be governed with their own consent.

Id. (quoting JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT § 157).

79. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT, in LOCKE, TREATISES, supra note 63, at 121, 190 n.3 (quoting RICHARD HOOKER, ECCLESIASTICAL POLITY Bk. III, ch. ix.2 (1594)).
C. Natural Law in Sir William Blackstone

1. Similarity of Blackstone to Locke and Aquinas

As I have stated previously, Blackstone's view of natural law follows that of Locke, the scholastics, and in most respects the categories that were articulated by Aquinas. For example, Blackstone, like Aquinas, also divided law into four categories: the Law of Nature (the order of creation as the will of God, and similar to Aquinas' eternal law); the Law of God (revelation in Scripture given to assist humanity due to inability to properly perceive the law of nature); Natural Law (man's imperfect interpretation and application of the law of nature); and Human Law (the practical application of the law of nature as understood by men, and essentially the common law).

Sometimes Blackstone and Aquinas are seen in conflict regarding their use of the word "reason." This is probably not correct. Aquinas understood reason to be God's communication to man's soul so that he can understand the certain truth of God. Blackstone, however, speaks of reason as man's mental process of thinking. The latter is central to how Blackstone understood the function of the judiciary. Consequently, one should not put final confidence in judicial opinion since that opinion would periodically need revision.

2. The Impact of Blackstone on the Founders of the Declaration and Constitution

Many scholars have not discerned the influence of Sir William Blackstone on the men who wrote the Declaration of Independence and the United States Constitution, though it was profound. In the early 1980s three evangelical historians wrote a book delineating what they considered to be the insignificant impact of Christian thought on the founding period of America, a view that I find amazing. Their conclusion should not be so surprising when evaluating their theses, which cannot be dealt with in this article. But what is significant for the current article is that they failed to mention Blackstone even once in their book. Rather than the Founders relying on the thoughts of philosophers such as Voltaire, Diderot, and Helvetius, in reality the Founders relied far more on Locke for the War for Independence, and on men like Montesquieu and Blackstone for the structure of the new government. It is an important

81. The Enlightenment may be divided into at least three periods: the first represented by men like Montesquieu, Locke, and Pufendorf; the second by Voltaire, Diderot, and Helvetius; and the third by Beccaria, Rousseau, Mably, and Raynal. See Donald S. Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought, 78 AM. POL. SCI. REV. 189, 190 (1984).
oversight on the part of these historians because Blackstone is a prime candidate for a person that influenced the law and government of the new nation:

The prominence of Blackstone would come as a surprise to many, and he is the prime candidate for the writer most likely to be left out in any list of influential European thinkers. His work is not readily available in inexpensive form, but like Montesquieu he was cited frequently by all sides. A trenchant reference to Blackstone could quickly end an argument. Such a respected writer deserves a much closer look by those studying American political thought. Blackstone produced his famous *Commentaries on the Laws of England* a decade before the American war with England. His work became immediately popular and these commentaries became the primary text on the common law in the American colonies. Several important persons in American history were greatly motivated to the study of law by Blackstone, such as Daniel Webster, James Kent, and Abraham Lincoln.

Not only were several men inspired to begin the practice of law, but Blackstone’s *Commentaries* also had influence on the writing of the Declaration of Independence, particularly his first volume. The phrase “laws of nature and of nature’s God” is very close to the two-fold view of law stated by Blackstone, and those before him. Blackstone, following Burlamaqui and Pufendorf, viewed nature as having laws established by God that expressed the will of the Creator.

---

82. Id. at 195-96.
85. Nolan, *supra* note 84, at 748, quotes Lincoln saying, “I never read anything which so profoundly interested and thrilled me.” (citing James M. Ogden, *Lincoln’s Early Impressions of the Law in Indiana*, 7 Notre Dame L. Rev. 325, 328 (1932)).
86. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
87. This latter idea has been held by Augustine, Thomas Aquinas, Samuel Rutherford in *Lex Rex*, and adopted by Dr. Martin Luther King Jr. King cites Aquinas saying, “An unjust law is a human law that is not rooted in eternal law and natural law.” Martin Luther King, Jr., *Why We Can’t Wait* 85 (1964). Also he writes, “All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority . . . segregation is not only politically, economically, and sociologically unsound, it is morally wrong and sinful.” Id. at 82. Ironically, “[t]he late Austrian legal theorist Hans
[W]hen the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform.  

Not only did nature express the physical will of God, but it also displayed the moral law of God:

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being . . . . And, consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker’s will.

This will of his Maker is called the law of Nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature . . . . These are the eternal, immutable laws of good and evil.

The law of God in written form and the unwritten law of nature were in agreement with the law of nature preceding the Scripture:

In other words, God’s putting in written form, “Thou shalt not murder” (Ex. 20:13) did not make murder wrong, but His putting the rule in writing revealed more effectively to fallen people the original law protecting the sanctity of human life that God had placed and revealed in the created order from the beginning. Murder was wrong, therefore, because it was contrary to the nature of people and to the very nature of God’s creation.

Since the law of nature everywhere expresses the will of God, no human law

---

Kelsen stated that an unjust law is a contradiction in terms, because it is law itself that sets the standard for what is just. Indeed, although Kelsen was Jewish, the anti-Semite Hitler availed himself of Kelsen’s arguments in setting up his totalitarian system.” H. WAYNE HOUSE, THE CHRISTIAN AND AMERICAN LAW 123 (1998).

88. 1 BLACKSTONE, supra note 70, at *38.
89.  Id. at *39-40.
could be allowed to contradict it:

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all 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 mediatly or immediately, from this original. 91

This is also true of the law of God, the Bible:

[I]f our reason were always, as in our first ancestor [Adam] before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this [i.e., the law of nature]. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased . . . to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures . . . .

These precepts [the ones written in the holy Scriptures] . . . , when revealed, are found on comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed [in writing], they were hid from the wisdom of the ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. 92

In strident language Blackstone advocated resistance to human law that was contrary to the laws of nature and God: "Nay, if any human law should allow or enjoin us to commit it [an act contrary to divine or natural law], we are bound

91. 1 BLACKSTONE, supra note 70, at *41.
92. Id. at *41-42, quoted in Titus, supra note 90, at 19-20.
to transgress that human law, or else we must offend both the natural and the divine.\textsuperscript{93}

One may easily see that the young men reading Locke and Blackstone would understand that positive laws of men must be in agreement to the law of nature and law of God in Scripture to be just and right, and that when they were not, they were to be resisted.

3. Distinction and Interdependence of Natural and Positive Law in Blackstone

We now come to an important consideration, even as we did with John Locke, that is, how do the natural law and positive law relate to each other. We have already seen that in the writings of both men, the positive laws could not contravene the natural law and yet be legitimate. But the question remains, is the natural law incorporated in some way into the positive law? Both men appear to be consistent. The natural and positive laws were complementary, not inherently contradictory. Snowiss comments,

\begin{quote}
Natural law provided the standards for positive law but depended on positive law to achieve the ends to which it pointed. To the extent that positive law was the actual instrument through which these ends were achieved it was superior to natural law. But positive law remained, at the same time, dependent on natural law for its self-understanding and, in its broadest outlines, for its content. In that sense positive law was subordinate to natural law.\textsuperscript{94}
\end{quote}

This perspective of Locke and Blackstone is consistent with how the Founders of the United States understood the relationship of the Declaration of Independence (a natural law document) and the United States Constitution (a

\textsuperscript{93} 1 BLACKSTONE, \textit{supra} note 70, at *43. Even though Blackstone wrote in this manner, he rejected how his ideas were implemented in the American Revolution, which he opposed. Snowiss states:

\begin{quote}
Despite allusions to the superiority of natural law, Blackstone ultimately supported positive law more strongly in his unequivocal defense of parliamentary omnipotence and in his refusal to recognize any right, including a judicial one, to challenge its authority. Blackstone also explicitly rejected any public recognition of a right to revolution. After quoting a passage from Locke expressing the people's inherent power to "remove or alter the legislative," he granted that Locke's conclusions were just 'in theory.' But he denied that "we [could] adopt it, [or] argue from it, under any dispensation of government at present actually existing."
\end{quote}


\textsuperscript{94} SNOWISS, \textit{supra} note 93, at 115.
positive law document), a point to be argued below, and illustrated by the issue of personhood in both documents.

V. RELATIONSHIP OF THE DECLARATION OF INDEPENDENCE AND THE UNITED STATES CONSTITUTION

A. The Declaration Impliedly and Explicitly is Incorporated into the Constitution

The Declaration of Independence is not simply a document that declared a separation with England. It sets forth the philosophical and legal reasons why such a separation was an appropriate and moral action. This is consistent with what I mentioned earlier in reference to natural law advocates such as Locke and Blackstone (and those church men that preceded them) that when the positive law of a ruler violated the natural rights guaranteed to humans created by God, it was legitimate to consider the positive law as non-law. The Declaration says as much. But it is also more in that it has an official, essential, and organic relationship to the United States Constitution. It is not inappropriate to consider the Declaration a preamble to the United States philosophically, so that the two documents form one organic whole. The former is plainly a theistic document setting forth God-given rights that should be protected by government while the latter uses positive laws to secure these rights. When the founders replaced the Articles of Confederation with the United States Constitution, the Declaration was left as the national compact and basis of government. The Constitution, as its introduction says, is in order to form a more perfect union; it is not the creation of the union, but an attempt to add to that union already established previously, as explained by Donald Lutz:

After approving the Declaration, the Continental Congress turned to writing a national constitution. The Articles of Confederation that resulted proved defective in important respects. As a result, the new Constitution of 1787 replaced the Articles. The Declaration, however, continued to stand as the preface to the American national compact. The Constitution begins, “We, the people of the United States, in order to create a more perfect union . . . .” The people already exist, and exist in a political union. This can be so only if there is a first part to a compact of which the Constitution is the second part. There is no document that can be pointed to as fulfilling such a role other than the Declaration of Independence.

95. See Religious Dimensions of American Constitutionalism, supra note 61, at 37.
To say that we live under a national compact of which the Declaration is the first part may sound a bit strange at first, but it would be stranger still to have begun our national bicentennial in 1976 if the Declaration of Independence was not part of our national founding.\textsuperscript{96}

Not only do the external considerations of the Declaration, the Articles of Confederation and the Constitution demonstrate that the Declaration and Constitution relate together, but there are also internal considerations.

The integral relationship of these two documents is indicated a number of places in the Constitution which cannot be argued in full here,\textsuperscript{97} but the first line of evidence is from the Declaration itself: "The Unanimous Declaration of the Thirteen United States of America."\textsuperscript{98} The document is said to come from the "one people" of the United States of America. Also, the Declaration toward the end concludes, "We, therefore, the representatives of the United States of America, in General Congress, assembled." The subsequent Constitution written in 1787 was "for" the nation already formed in 1776.

Other internal considerations\textsuperscript{100} are the requirements of citizenship for representatives and senators before holding office (seven years\textsuperscript{101} for the former and nine\textsuperscript{102} for the latter), which indicate the existence of the nation at least nine years before 1787. Also, the requirement that the president be a natural born citizen, or citizen of the United States, and resident of fourteen years,\textsuperscript{103} requires a creation of the government prior to 1787, as explained by Cannada:

\textsuperscript{96} The concepts of compact or covenant were well known by the people who came to the shores of America. See Religious Dimensions of American Constitutionalism, supra note 61, at 37; see also Daniel L. Dreisbach, In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution, 48 BAYLOR L. REV. 927 (1996); Dennis J. Mahoney, The Declaration of Independence as a Constitutional Document, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 65 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (arguing that the Declaration of Independence "is the real preamble to the Constitution").

\textsuperscript{97} For a more complete statement of reasons for my position, see H. Wayne House, A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State? 3 BYU J. PUB. L. 203, 239-41 (1999) [hereinafter House, A Tale of Two Kingdoms].

\textsuperscript{98} THE DECLARATION OF INDEPENDENCE, heading (U.S. 1776).

\textsuperscript{99} Id. at para. 32.

\textsuperscript{100} I am indebted for some of these observations to an unpublished paper by Cannada, Inalienable Rights and the Declaration of Independence 6-7 (1992).

\textsuperscript{101} U.S. CONST. art. I, § 2(2).

\textsuperscript{102} U.S. CONST. art. I, § 3(3).

\textsuperscript{103} U.S. CONST. art. II, § 1(5).
Clearly, this provision recognizes that there could a "natural born citizen" at the time of the adoption of the Constitution and thus "citizenship" did exist prior to the time of the adoption of the Constitution. It is also interesting to note that the "residence" requirement went even beyond the date of the Declaration and that the term "resident" was used rather than the term "Citizen." There was no such thing as a Citizen until the nation was established and that was done by the adoption of the Declaration.\textsuperscript{104}

The final factor demonstrating the existence of the government from the creation of the Declaration may be observed at the end of the Constitution: "DONE in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth." The unanimous consent was from "states present" at the Declaration.

These two documents are intended to work in concert. The Declaration provides the divine principles on which the government would be established. The Constitution creates the civil structure to secure God-given rights set forth in the Declaration through the laws of nature and of God. In the words of John Quincy Adams, "The highest glory of the American Revolution was this: it connected in one indissoluble bond the principles of civil government with the principles of Christianity,\textsuperscript{105} and again, "From the day of the Declaration . . . they (the American people) were bound by the laws of God, which they all, and by the laws of The Gospel, which they nearly all, acknowledge as the rules of their conduct.\textsuperscript{106}

The Constitution is not a theological document but it is a document to guard the theological interests of the Declaration. One suspects that the truth of this statement gives part of the reason why the Declaration is so ignored by contemporary judges, legal scholars, and politicians who are not favorable to the religious disposition of the Founders of the United States.

B. The Declaration Is a Public Document

Some might wonder why the Declaration would have such a strong theological statement since Jefferson was its author. There are several possible

\textsuperscript{104} Cannada, \textit{supra} note 100, at 6.


\textsuperscript{106} \textit{Id.}
responses to this. First, one should not assume that Jefferson’s views were in conflict with the divine natural law view simply because he differed with orthodox Christianity regarding doctrines such as the deity of Christ and the Trinity. Views regarding creation and divine law were held by orthodox and non-orthodox, such as deists and Unitarians in the eighteenth century. Second, and more to the point, the Declaration was not a private document, but a public one, seeking to express the sense of the American people, which was overwhelmingly Christian—and Reformation—oriented: “The Declaration was meant, as Jefferson later testified, to provide ‘an expression of the American mind, and to give that expression the proper tone and spirit called for by the occasion,’ and its summary of fundamental political principles helped it fulfill those purposes.”

Jefferson was not writing a personal letter to King George but he, and his fellow authors of the Declaration, sought to state the common views of the colonists who intended to separate from England.

C. The Declaration Is Based on a Variety of Sources

The Declaration was not totally unique in its sentiment but was a legal patch among a quilt of documents expressing similar ideas. One of these is the Virginia Declaration of Rights: “The preferred document by far was a draft of the Virginia Declaration of Rights that the planter George Mason wrote for a drafting committee appointed by the Virginia Convention in the middle of May, 1776.”

The Declaration stated

that all men are born equally free and independent [sic], and have certain inherent natural rights, of which they cannot, by any compact, derive or divert their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

108. Id. at 878.
109. A Declaration of the Rights Made by the Representatives of the Good People of Virginia, reprinted in PENNSYLVANIA GAZETTE, June 12, 1776, quoted in Maier, supra note 107, at 878.
D. The Declaration Has Legal Authority Which Provides a Natural Right Foundation for the United States Constitution

It is common to declare the Declaration as a document with no legal significance today, deferring entirely to positive law, or to secularistic natural rights at best. The Founders would never have understood this task in this manner:

[T]hey assumed the Declaration stated principles that were guarantees of the natural rights of man which government was powerless to alter. . . . [T]he Constitution itself presupposed and was meant to incorporate the principles of the Declaration. . . . [In light of this it] become[s] apparent that the Constitution has been (and should be) interpreted in light of the natural rights philosophy and principles of the Declaration. 110

Consequently, the Declaration is not merely a propaganda piece, as argued by some, to inspire the colonists in their war against the English. Rather it is a statement, at least in part at its beginning, of first principles on which the framers relied in their just cause with England, and what would inform their establishment of government. The Declaration reads in part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." 111

Immediately after the Declaration declares the "Laws of Nature and Nature's God," and "All men are created equal," "endowed by their Creator with certain unalienable Rights," of "Life, Liberty and the pursuit of Happiness," the text goes on to read that governments are instituted among men to secure these rights. Because men are equal and no one rightfully rules over another by nature, the government receives its power only by consent. The Constitution, then, has as its purpose to secure the rights of the Declaration. Such a view reflected the ideas of persons like Locke and the Framers in view of their belief in the Laws of Nature and Nature's God.

---


They read the Constitution wrongly who believe that the Constitution creates any rights. The Declaration created the nation and brought into existence the Constitution, which document had as its purpose to limit the power of government from intruding on these natural rights guaranteed in the Declaration and given by God. The historic view is that above the laws of any government are the laws of God (in nature and in Scripture).

Mark Trapp is correct when he says,

It is beyond dispute that the revolutionary leaders, the Founders of this country, and the framers of the Constitution all felt that human beings have fundamental natural rights that exist independent of the Constitution. They felt that the Declaration was the fundamental law of this nation. The Constitution was merely the means of achieving the ends established by the Declaration.\(^\text{112}\)

A second reason I offer in support of the Declaration of Independence being a part of the organic law of the United States is that it is found alongside the Constitution in the United States Code, being the first document in the code that guides the laws of this nation.

VI. IS NATURAL LAW IN THE UNITED STATES CONSTITUTION?

There would be little dissent that the Declaration of Independence reflects natural law and natural rights perspectives, though the exact form would be debated. Many, if not most, legal scholars would express difficulty with the view that natural law is found within the Constitution. Supposedly, the United States Constitution is entirely a secular (non-religious) document of positive law. That this is not so, and that actually the Constitution provides evidence of Christian influence, I have argued elsewhere.\(^\text{113}\)

My concern in this article is only to demonstrate that implicit within the Constitution is recognition of natural law, and that many of the provisions of the Constitution are meant to protect natural rights that flow from the divine natural law ideas in the Declaration.

A. Government Is Properly Founded on an Understanding of Natural Law

James Madison, the primary architect of the United States Constitution, in seeking to persuade citizens of New York State to support the Constitution, wrote in *Federalist* number fifty-one that government should be based upon a proper understanding of human nature, a natural law theme:

\(^{112}\) Trapp, *supra* note 110, at 831.

\(^{113}\) House, *A Tale of Two Kingdoms*, *supra* note 97, at 237-38.
But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself.\textsuperscript{114} Madison viewed the republic he offered to the American people as a means to control human depravity and enhance human dignity:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.\textsuperscript{115}

B. How Should Natural Law Be Used to Interpret the Constitution?

Many legal theorists, commentators, and politicians have argued that the principles of the Declaration of Independence are an acceptable and even preferred method of interpreting the United States Constitution.\textsuperscript{116} Even the Supreme Court has stated that "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." Additionally, the father of the Constitution, James Madison, said that the Declaration was the "best guide[ ]" to interpret the Constitution.\textsuperscript{117} If the Constitution does embody within it the implications of natural law and natural rights, how should courts deal with the Constitutional document? The country, and the theory of natural law, is best served by the courts following the positive law through "textualist" (to use Justice Scalia's term) or "originalist" interpretation. This is so for at least three reasons. First, the form of natural rights that would be used by the judges would not likely reflect the kind of divine natural law, and ensuing natural rights, understood by the framers and subsumed into the Constitution. In its place would probably be arbitrary human rights or civil rights, often in conflict with divine natural right theory, and that would be at variance with the Constitution given to us by the Founders.

\textsuperscript{114} THE FEDERALIST NO. 51 (James Madison).
\textsuperscript{115} THE FEDERALIST NO. 55 (James Madison).
\textsuperscript{116} Trapp, \textit{supra note} 110, at 839.
\textsuperscript{117} Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 159 (1897).
\textsuperscript{118} \textit{Letter to Thomas Jefferson from James Madison} (Feb. 8, 1825), \textit{in} 9 \textit{THE WRITINGS OF JAMES MADISON} 218, 221 (G. Hunt ed., 1910) (\textit{cited in} Trapp, \textit{supra note} 110, at 839).
Second, the function of judges is to interpret law, not to create it, no matter how good their intentions might be and their philosophy of law correct. As Judge Robert Bork has rightly said,

The Framers were not legal positivists for the very good reason that no one who makes law can be. The lawgiver must have ideas of right and wrong that antecede the law he makes. The Framers wrote law, presumably embodying as much of their thinking on natural rights as prudence allowed, and the judge is bound to follow that law no matter what he thinks of its correspondence to natural law. That means that, in his judicial capacity though in no other, the judge must be a legal positivist. . . . [O]nly a legal-positivist judge can be an adherent of the Framers' original intent. 119

I would add only one proviso to Judge Bork's argument here. Since there is legal commentary in the eighteenth century that may be used to understand what the Framers meant by Constitutional provisions, this must be taken into consideration to be faithful to a historical and grammatical interpretative method that gives proper regard to the meaning of the original words and meaning of the Constitution, 120 consistent with their natural law view. What the judge is not to do is to substitute an alternative natural law interpretation to words of the Constitution that were not in the clear understanding of the Framers when it was written.

Third, the God-given rights found in nature, to be secured by the government through its Constitution, are better expressed through the legislative branch than the judicial, 121 since legislators have access to lively debate on basic issues of morality and greater sensitivity to the needs of the people they serve.

C. The Relation of Natural Law to Positive Law

How does the natural law find fulfillment through the positive laws of men, recognized as needed by natural law theorists such as Aquinas and Blackstone? Aquinas, for example, argued that just positive laws (unjust laws, remember,


120. For a statement of proper interpretative methods to be used by judges in interpreting the Constitution, see Jeffrey A. Aman & H. Wayne House, Constitutional Interpretation and the Question of Lawful Authority, 18 MEM. ST. U. L. REV. 1 (1987).

121. For additional discussion of this theme, see Robert P. George, Natural Law, the Constitution, and Judicial Review, available at http://www.frc.org/get.cfm?i=WT0111 (last visited Feb 17, 2009).
are not truly law) should be derived from natural law. Ways in which the natural law may be fulfilled within society may then come in a variety of forms. Brian Bix speaks to this:

Sometimes natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices). Thus while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 miles per hour or 65, are matters for which either choice would probably be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second Aquinas refers to as the “determination” of general principles (‘determination’ not in the sense of “finding out,” but rather in the sense of making specific or concrete). The theme of different ways in which human (positive) law derives from natural law is carried by later writers, including Sir William Blackstone . . . and, in modern times, John Finnis . . .

Another example of how the natural law ideas of the Declaration have been worked into the positive law of the Constitution may be observed through a statement from divine natural law theorist Sir William Blackstone’s statement regarding “living honestly.” The natural right is:

that of individual freedom to acquire and own, through honest initiative, private property. In the Founders’ view, this law and this right were inalterable and of a higher order than any written law of man. Thus, the Constitution confirmed the law and secured the right and bound both individuals and their representatives in government to a moral code which did not permit either to take the earnings of another without his consent. Under this code, individuals could not band together and do, through government’s coercive power, that which was not lawful between individuals.

122. BRIAN BIX, Natural Law Theory, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 225 (Dennis M. Patterson ed., 1996).
Mortimer Adler explains the relationship of these two laws:

The first precept of natural law is to seek the good and avoid evil. It is often put as follows: "Do good unto others, injure no one, render to every man his own." Now, of course, such a general principle is useless for organized society unless we can use it to specify various types of rights and wrongs. That is precisely what man-made, or positive, law tries to do.

Thus, the natural law tells us only that stealing is wrong because it inflicts injury, but the positive law of larceny defines the various kinds and degrees of theft and prescribes the punishments therefor.

Such particular determinations may differ in various times and places without affecting the principles of natural law. Neither Aquinas nor Aristotle thinks that particular rules of laws should be the same in different times, places, and conditions.\textsuperscript{124}

One may see from this example that the natural law does not necessarily dictate what the positive law should be in its detail. Legislators may find ways to apply the natural law, and then judges must decide whether these applications of natural law have been violated or obeyed by cases before them.

Though Hobbes would identify the raw exercise of power by a sovereign as consistent with natural law, most natural law theorists would probably acknowledge that mere exercise of power is not the same as the right to exercise power. If this is not true, there is absolutely no way to criticize the terrible atrocities of the twentieth century in Nazism and Marxist Leninism (especially under Stalin and Mao Tze-tung). The seizure of divine prerogatives by totalitarian tyrants is a distortion of divine natural law, whereby God as Creator and Caretaker of His Creation seeks to bring harmony and freedom to His creatures through the human institution of government. Something must bestow law with validity and this something must outside the law. Even "we the people" is inadequate as a sovereign to declare whatever it wishes to be valid law. Were this so, then the majority could legitimately declare a minority as non-humans and treat them as chattel, and this would be true law.

When the Constitution announces "we the people" the purpose is a social compact to preserve the blessings of liberty and benefits of rights that had already been enunciated in the Declaration as having come from the Creator. It was not to invest human beings with divine prerogatives. Within the Constitution are restraints to the governing authorities, and if the people have acceded some of the rights to the government that were given to them by God,

they have the right to take these back even as they have given them. The government is limited, not absolute, and the positive law is also limited and controlled by the greater divinely given rights. Paul DeHart discusses this limitation on the sovereign under the Constitution:

Under the Constitution, given the constraining mechanisms, the sovereign is not free to command however he or they please. Even if one were to concede (though I do not) that all the constraints are procedural, even so they constrain the sovereign by forcing his or their will to conform to the procedure. Furthermore, the Constitution favors long-term majority will (or preference or desire) over immediate popular will. But this is just the sort of distinguishing among exercises of will that makes no sense in terms of normative positivism. Consequently, I think we must reject normative positivism as a possible constitutional presupposition.\textsuperscript{125}

As DeHart has well said, the government may not do as it pleases under the Constitution, but also even the majority will of the people is circumscribed and kept from fickle acts by long term interests and not reaction. That the Constitution favors "weaker, long-term emotions over immediate stronger ones seems to presuppose the externality of moral knowledge to the sentiments."\textsuperscript{126}

The Constitution, by its assumption of underlying moral law, may call for obedience on the part of the people that is intrinsically understood in the people as conformity to a higher law. If this were not so, then there is no legitimate obligation:

If the Constitution doesn't presuppose a norm of natural law underwriting its own prescriptions, then it is merely an act of force (even if the force is the will of society exhibited in the choice to honor certain conventional norms). But acts of force do not impose obligation. Thus, if the Constitution doesn't presuppose a natural law that imposes obligations upon human persons, then it presupposes both that it is and that it is not binding, obligatory, and prescriptive. And that would be rather absurd. So, to be consistent, the Constitution must presuppose norms of obligation transcendent of human willing.\textsuperscript{127}

\begin{thebibliography}{99}
\bibitem{126}Id. at 194.
\bibitem{127}Id. at 195.
\end{thebibliography}
D. The Conflict Between Natural Law of the Declaration and the Positive Law of the Constitution

The universal and inalienable rights guaranteed by the Declaration seems to be a hollow promise when it is realized that the government has the power under the Constitution to take life, liberty and property. How can this incongruity be reconciled? One must understood that the Founders of the United States and Framers of the Declaration and Constitution were not oblivious to this situation. What they spoke of was the rights given by God until those rights are limited somewhat by those possessing them. In order to enter into relationships with others, persons could volunteer certain rights within reason for the protection offered by the government, and to maintain association with others. Conflict between limitations on rights of life, liberty, property, and pursuit of happiness by the Constitution that provided for capital punishment and forfeiture of property and personal rights could only legitimately occur by due process of law, just law. This reflects Locke’s sense of surrendering natural rights granted by God by forming government for protection. The Declaration says the God-given rights of life, liberty and pursuit of happiness were inalienable by government and that government’s function is to secure the rights. If the government may legitimately seize these rights, then they certainly are not inalienable, yet the solution may be that we may surrender some of these rights ourselves in order to more greatly secure the exercise of rights against the exercise of raw power denying rights that are ours by divine endowment. In this manner, the government has not alienated these rights; we have limited them ourselves so that we might enjoy a greater good.

VII. The Meaning of Humanness and Personhood as Understood Within These Legal Documents at the Time of Their Writing

It is generally agreed that the Constitution does not define when personhood begins. Nonetheless, it does recognize that persons have certain rights. It does not equate persons with citizens for in fact many persons are citizens but it does follow that all citizens are persons. As well, there is no direct equation between being human and being a person. This is assumed. So there are no persons who are not humans and no humans who are not persons.

John Marshall, the first Chief Justice of the Supreme Court of the United States once said that he apologized to his readers for “much time . . . consumed in the attempt to demonstrate propositions which may been thought axioms.” 128 In some respects this is my feeling as I present the evidence that humans and

---

128. Gibbons v. Ogden, 22 U.S. 1, 221 (1824).
persons are the same in the founding documents of our nation. The framers of the Declaration said that the truths of which they spoke were self-evident. They saw them beyond debate and rooted in the very fabric of the created order. It is likely that such views were, at least partly, dependent on the apostle Paul’s words in Romans chapters one and two that God had revealed certain truths clearly in the external world of nature and the internal world of conscience. This is the basis in the teachings of both Locke and Blackstone, who were highly influential on the intellectual development of the founders of the United States.129 Upon looking at pictures of the unborn, and seeing children and adults often viewed as non-persons by our courts, I am astounded that the arguments even need to be made. Dr. Seuss presented an elephant who understood that a person is a person no matter how small (or shall we say sick, crippled, or incapacitated in some other way).

One of the contradictions of our current anti-human-life culture is seen by contrasting how we protect, in our law, two different species. The American bald eagle’s eggs are protected by law whereas a human child is not. A person can be fined up to $5,000.00 for breaking or molesting or killing an eagle.130 Unborn children may be killed from fertilization up to the process of birth.

A. The Declaration Accepts All Humans as Having Rights of Life, Liberty, and Pursuit of Happiness

1. ALL MEN in the Declaration Refers to ALL Humans

a. Eighteenth-Century Dictionaries Reveal the Usage of “Men” at the Time of the Writing of the Declaration and Fourteenth Amendment

What would the men who wrote the Declaration have meant by “men” when they said that “all men” are created equal, and would the authors of the Fourteenth Amendment have understood this term to include “fetus” within term “person”? The use of the terms appears to be interchangeable during this period of American history, including the time of the writing of the Declaration, Constitution, and the Fourteenth Amendment. Using the basic logic of language, if A=B and B=C, then A=C; thus, if a “fetus” is a “child” and a “child” is a “person,” then a “fetus” is a “person.” Such seems to be the case during this era of history.

129. See House, A Tale of Two Kingdoms, supra note 97.
At the time of the Framing of the Constitution, a person is defined as "an individual, a man, a woman; one, any one, one’s self"\textsuperscript{131} and at the time of the Fourteenth Amendment person is defined as "a man, woman, or child, a body."\textsuperscript{132} During the former period a “child” was defined as “[a]n infant, a very young person; a son or daughter; the descendant of a man however remote; one that is in some respect or other like an infant or young person.”\textsuperscript{133} In the latter period “child” was “an infant, or person, in its tenderest years; the offspring of a person; the descendant of a man of any age.”\textsuperscript{134} In the former period a “foetus” was “a child in the womb perfectly formed”\textsuperscript{135} and in the latter “signifies the child in the womb, after it is perfectly formed.”\textsuperscript{136} All of this shows that a child is a fetus and a child is a person, thus a fetus is a person.

b. The Constitution of Pennsylvania, Heavily Relied Upon by the Authors of the Declaration, Clarifies the Usage

“All men” refers to “all people” as evidenced in the Pennsylvania Constitution of 1776, upon which the authors of the Declaration in large part relied:

\begin{itemize}
  \item I. That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.
  \item VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto.\textsuperscript{137}
\end{itemize}

\begin{itemize}
  \item \textsuperscript{132} JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1841), cited in Putka, supra note 131, at 33.
  \item \textsuperscript{133} 1 NEW AND COMPLETE DICTIONARY, supra note 131, quoted in Putka, supra note 131.
  \item \textsuperscript{134} BARCLAY, supra note 132, cited in Krason, supra note 131, at 165.
  \item \textsuperscript{135} 1 NEW AND COMPLETE DICTIONARY, supra note 131, quoted in Putka, supra note 131, at 34.
  \item \textsuperscript{136} WILLIAM GRIMSHAW, AN ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 96 (1848), quoted in Putka, supra note 131, at 34.
  \item \textsuperscript{137} PENN. CONST. of 1776, art. I, VIII.
\end{itemize}
2. All Men are CREATED Equal

Something often overlooked in the discussion of this portion of the Declaration is the distinction between "created" and "born," the former occurring in the Declaration and not the latter. The difference is profound for the abortion debate and consists of at least three components. First is the text read that all men are "created" equal, not "born" equal. A person does not need to be born in order to begin to benefit from the rights inherent in human personhood. Create means to cause to exist or bring into being. The text does not argue when a person is created but it is clear that the point at which all persons have in common as individual beings is the time of fertilization, for only then is a separate being brought into existence. Second, this self-evident truth comes from the Creator, indicating that the Founders did not believe that rights are created by the state and bestowed by the government on the people. Third, these self-evident truths include life, liberty and the pursuit of happiness. Consequently, every created human, including the unborn, has a right to life within the meaning of the Declaration. One would conclude from this, that personhood is inherent in humanity, endowed by God, and that the government has no right to decide what is a person, or to define it differently from what is given by God and recognized in the Declaration.

This differs from what one observes in documents in the several states of the union, significant differences from the Declaration of Independence, as Pauline Maier points out:

One state Declaration of Rights after another said, for example, that all men were "born" equally free and independent, not that they were "created equal." And in describing man's "inalienable rights," they bypassed Jefferson's brief statement that "among these are life, liberty, and the pursuit of happiness." Instead they adopted some version of Mason's assertion that among men's "inherent natural rights" were "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."  

This accentuates the importance of the Declaration of Independence to personal liberties and the assumptions of the Declaration underlying the Constitution. Maier elucidates on the important differences between the federal and state documents:

138. Mark Trapp argues that the issue in the Declaration regarding the issue of abortion is not "life" but "created." Trapp, supra note 110, at 823.
139. Maier, supra note 107, at 879.
But the assertion that men were "created" or "born" equal meant that all men were originally free of subjection, and so were all on the same level, because nobody had a title from God or nature to rule others. All legitimate authority, as the Declaration of Independence went on to say, was founded upon consent. That "original understanding" is clear in texts composed without the requirement of brevity that shaped Jefferson's draft Declaration of Independence. Mason, for example, said men were born "equally free and independent." Earlier, in Common Sense, Thomas Paine said that, "all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever," coupling a statement of original equality with a rejection of hereditary authority. The inconsistency between that idea and the institution of slavery was hard to deny. A slave's status was inherited. And consent had nothing to do with the authority of masters. 140

3. All Men are Created EQUAL

a. Aspirational Document

The Declaration of Independence is an aspirational document, which though not fully fulfilled nonetheless serves as the ideal to which all should aspire. The fact is that slaves as persons did not enjoy these rights before their emancipation, and even until the Civil Rights Act of the 1960s. It is generally recognized that persons under majority do not exercise these rights in their entirety even now. But tragically the unborn person enjoys NONE of these rights and protections of the government. 141

b. "Equal" Does Not Mean Full Usage of Rights

The Framers do not imply by the word "equal" that all human beings were equal in all respects. For example, born children are fully human and have life, liberty, and pursuit of happiness but do not fully exercise those rights until majority. Likewise, slaves and American Indians were fully persons, notwithstanding their lack of status for purposes of political apportionment, but

140. Id. at 883.
141. See the discussion of Paul DeHart on the difference between the allowance of slavery in the Constitution and apodictic provision for slavery. DeHART, supra note 125, at 195-98. The former did not violate natural law and provided for its demise, whereas the type of judgment by Justice Taney in Dred Scott recognized a right of slavery. Id.
these rights were not fully realized. Taney, in *Dred Scott*, did not like the implications of the Declaration regarding African-Americans.\(^{142}\)

Lincoln explained that the proposition referred to "those differences anchored in nature between human beings and animals."\(^{143}\) The axiom is that "beings capable of giving and understanding reasons over matters of right and wrong deserve to be ruled only with their consent."\(^{144}\) In agreement with this understanding is the comment by Harry Jaffa:

> No man is by nature the ruler of other men in the way that God is by nature the ruler of men, and men are by nature the ruler of horses and dogs. And therefore, as the argument ran, if we find about us today a situation in which some men are put in the position of ruling over others, that state of affairs cannot arise from nature. It must arise from convention or consent.\(^{145}\)

Similar to Lincoln, Maier says,

> The men who signed the Declaration did not mean to say that men were "equal in all respects." They did not mean to say, he said, that "all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal." Men were equal in having "certain inalienable rights, among which are life, liberty and the pursuit of happiness." This they said, and this [they] meant.\(^{146}\)

So then, the equality is not relating to equality of traits or talents or even of matters of servitude imposed, but the inherent nature that humans have as equal rulers over God's creation, not over each other but as they surrender rights, or are denied them by others.

4. Endowed by the Creator with Inalienable Rights, Including Life, Liberty, and the Pursuit of Happiness

The inalienable rights delineated by Jefferson have logical relationship. As equal, created beings, all people have a right to life, without which no other


\(^{143}\) ARKES, *supra* note 78, at 44.

\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) ARKES, *supra* note 78, at 45 (summarizing, not quoting, Jaffa).

\(^{146}\) Maier, *supra* note 107, at 885.
rights may be had. Blackstone said that:

The right of personal security, consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. Life is an immediate gift from God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick [living] with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.1

Blackstone shared with others in an age less knowledgeable about fetal development, not understanding the growth of the child prior to he or she being felt by the mother, but clearly saw the creation of the baby as deserving of protection and the killing of such a serious crime.

All who are persons share the commonality of what to be human is and have been created by the Creator for a purpose so that the government has no right to infringe upon a right other than by a person's surrender of that right. As we have seen, this relies not on "birth" but on "creation" as Jefferson carefully said.

Following the right to life is the right to liberty, in which a person can direct his own paths before God without hindrance from others.

Last of all is the pursuit of happiness, to be discussed below, since it often misunderstood. Walter Berns, when arguing regarding inalienable rights, says of the right of the "pursuit of happiness": "One of these rights is the right to pursue happiness, presumably . . . a happiness that each of us defines for himself."148 Additionally, Berns, after discussing the natural right of conscience, cites Locke as saying that "there can be no definitive understanding of happiness."149

Yet the understanding on the meaning of "happiness" in the writing of the Framers is not as difficult as Berns envisions. Their thinking is similar to that of Blackstone, for whom one's happiness was inextricably connected to the Creator so that one cannot attain this happiness except through association with the Creator. Blackstone speaks of the pursuit of happiness in terms of relation to the Creator:

147. 1 BLACKSTONE, supra note 70, at *125.
149. Id. at 185.
As therefore the creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own happiness."\(^{150}\)

An additional misunderstanding of the "pursuit of happiness" is represented by Alexander Solzhenitsyn in his address at Harvard. He identified "pursuit of happiness" with the pursuit of material possessions in the West, and that such material emphasis did not bring happiness.\(^{151}\)

Harold J. Berman explains Solzhenitsyn’s confusion between the eighteenth-century and contemporary ideas of happiness. Whereas people in the last hundred or so years might connect happiness to material welfare or a decent standard of living for which a person is willing to expend tremendous time and energy, this is not true of the eighteenth century, where happiness related rather to blessedness or the aspiration of what is good. One must remember that the Founders did not associate "pursuit of happiness" with abundance. Berman says that:

The notion that there is a necessary conflict between the pursuit of happiness and the willingness to risk one’s life for defense is disproved by the example of the framers of the Declaration of Independence, who for the sake of life, liberty, and the pursuit of happiness were willing to pledge their lives, their fortunes, and their sacred honor.\(^{152}\)

\(^{150}\) BLACKSTONE, supra note 70, at *40-41.


\(^{152}\) Berman, supra note 52, at 384. Jefferson chose not to use the usual "life, liberty and property" substituting "pursuit of happiness," but in so doing he was not denying the right of
C. The Term "Person" Within the United States Constitution and Its Amendments Recognizes the Unborn as Persons

1. The United States Constitution's Preamble's Statement of Posterity

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.\(^1\)

An often-missed reference to the unborn is found within the first words of the United States Constitution, namely, to "secure the Blessings of Liberty to ourselves and our Posterity." Evidence exists that the intent of this afterthought preamble to the United States Constitution is to clarify kinds of rights sets forth by the Declaration and the desire to secure these rights under the document at hand. The clause mentioning the blessings of liberty is a reference to the liberty through the Declaration and that these are not only for the people of the United States who were born but to all those unborn for whom they establish the protection of the Constitution.

2. The Term "Person" Occurs with Certain Specific Contexts in the Constitution

Person in the United States Constitution speaks of persons within certain constitutional contexts that do not deny the human personhood of the unborn any more than adolescents or aliens are denied personhood. The Constitution, unlike the Bill of Rights and the Fourteenth Amendment, speaks of persons who have rights and obligations of citizenship, not rights of life, liberty, and pursuit of happiness. Throughout the Constitution the terms “person” and “persons” is used, but in most instances the term is limited by the context in which it is found, as we discover in a review of Articles I-IV.\(^2\)

\(^1\) U.S. CONST. pmbl.
\(^2\) See U.S. CONST. arts. I-IV.

Article I, Section 2

Clause 2: No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Clause 3: Representatives and direct Taxes shall be apportioned . . . according to their respective Numbers, which shall be determined by adding to the whole...
Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Article I, Section 3
Clause 3: No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Article I, Section 6
Clause 2: [N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article I, Section 7
Clause 2: Every Bill which shall have passed the House of Representatives and the Senate . . . and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. . . .

Article I, Section 9
Clause 1: The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.
Clause 8: No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Article II, Section 1
Clause 2: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Article II, Section 1
Clause 3: The Electors shall meet in their respective States, and vote by Ballot for two Persons, . . . And they shall make a List of all the Persons voted for, . . . The Person having the greatest Number of Votes shall be the President, . . . and if no Person have a Majority, . . . In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. . . .

Article II, Section 1
Clause 5: No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Article III, Section 3
Clause 1: Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
3. "Persons" in Bill of Rights and Fourteenth Amendment Used More Broadly

"Persons" within the meaning of the Bill of Rights and the Fourteenth Amendment refers to human personhood in inclusive language, encompassing all human beings who have been created, not only all persons born. This was the understanding at the time of the writing of the Fourteenth Amendment.\(^{155}\)

Though there is no specific reference to the unborn person, the amendment includes all who are persons and that only those born or naturalized are citizens. Courts have recognized that the provisions of the Declaration as secured by the Constitution adhere to all persons in regards to life, liberty, and pursuit of happiness, not just to citizens. Citizens, however, additionally have the rights of holding office and voting.

It is noteworthy to point out that the current courts have recognized that corporations have personhood, though a legal fiction, under the Fourteenth Amendment, and invested with many of the rights of natural persons. Surely, unborn persons should have at least this recognition.

In *Sierra Club v. Morton*, Justice Douglas argued in dissent:

---

Clause 2: The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV, Section 2

Clause 2: A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

155. The Fourteenth Amendment reads, in part:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State . . . 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. . . .
The ordinary is a ‘person’ for purposes of the adjudicatory processes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.

With all respect, the problem is to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed.

The voice of the inanimate object, therefore, should not be stilled.

That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak.

Eight months after Sierra Club, Justice Douglas joined the majority opinion in Roe v. Wade, which held that “the word ‘person’ . . . does not include the unborn.”

VIII. THE MOVE FROM NATURAL LAW TO POSITIVE LAW IN AMERICAN LAW AND JUDICIAL INTERPRETATION

In contrast to this thinking in the West has arisen two forms of opposition: the first from those who deny natural law, and the second from those who believe that the law of God is above nature. Among this group are relativists, positivists, Marxists and others who deny natural law. This group recognizes positive law as the only true law of the government, with nothing above the will of the state. It is the general theory of evolution that gave strength to this position. Instead of nature being the expression of a perfect and good Creator, the blind, random and lawless force of nature moves men toward the establishing of laws through human experience. Beginning at Harvard under Christopher Columbus Langdell, Roscoe Pound, and others, an evolutionary view of law began to reign. Blackstone and other natural law thinkers were

---

confined to the dustbin of history, and a brave new world of law began. This positivist law evolved in the decisions of the judges, and though often contradictory to the Declaration and nothing but the exercise of raw judicial power, such as in *Roe v. Wade* (to use Justice White's terms), this idea of law predominates today.

Under the Darwinian perspective, there is no objective standard to guide humanity. Rather than divinely given human rights there is simply the raw exercise of power. If we are to follow only positive law then the ideas of *Mein Kampf* and *Das Kapital* will not survive critique. With natural law we have the American Declaration of Independence and the justice of Nuremberg that condemned the positive law edicts of German Nazism.

Among the second group, a minority position of natural law has developed that does not recognize the divine lawgiver. They believe that natural law and natural rights are found only within the experience of humanity or a development of history. Rather than a law of nature premised in the character of a Creator, it is law over nature. Ultimately only individuals become the standard for truth and ethics, without any outside source. Man simply does what is right in his own eyes. This is little better than positive law.

The Christian should not recognize nature as the standard for there is much evil in the world of nature; we are in a fallen world that is in rebellion against God. Nature is imperfect due to sin and that within nature there is no consistent standard within nature itself and that it is devoid of information for the moral life of humanity. God, though has placed within the nature order information on how to live before Him, and though it is infected by sin and not entirely understandable is supplemented and clarified by the Scripture. Ultimately, as the founders knew, and those natural law theorists for nearly two millennia knew, the Creator God is the standard. Natural law is merely the way in which He reveals His will to men.

**IX. WHAT IS THE REAL ISSUE: ABANDONMENT OF FIRST PRINCIPLES BY THE COURTS**

That humans have been created equal was not viewed as a radical thought in the eighteenth century. It was not viewed as a belief, but a first principle, an irrefutable fact. The Framers did not set forth this perspective as a "belief" or "opinion" in which there could be a difference of opinion among men, any more than $2 + 2 = 4$. As Arkes has said,

[T]he founders would have regarded it as quite as queer if anyone had remarked that he “believed” that “all men are created equal” — that human beings are radically different from animals. They would
have found it, also, quaint or unintelligible if anyone had suggested that this proposition was distinctly “American” or “English” or that it should not hold true, as an axiom, anywhere else in the world.\(^{158}\)

Consequently, with the claims of the Declaration, we find first principles, upon which other views are built, from which they come. The decision of Roe is so weak and contradictory because it runs afoul of the first principles. Some contemporary moralists have argued that if there are universals that held in all places they would be universally recognized everywhere. Since people differ in these matters there must be no such truths. This argument reflects, what philosophers call self-refuting argument—the argument defeats itself. Yet, this is the type of argument given to us by Blackmun in Roe. He says there,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.\(^{159}\)

This is a rejection of natural law, or self-evident truth, in favor of a philosophy of “contending moralities,” called by Arkes. Apparently if something does not have a consensus it is a mere opinion, not a truth, so the people may proceed with personal choice.

This, in fact, was part of the debate over slavery in the nineteenth century with Lincoln versus Douglas. Lincoln said slavery violated the Declaration and natural law while Douglas agreed with legal positivism, law through court evolution and without reference to God-given rights.

The issue that I have sought to prove is that all humans are persons both by nature and their inclusion within the Declaration of Independence and the United States Constitution. Consequently, all humans from their creation at fertilization through their death are persons in fact and should be accepted as persons under the law. To reject this argument is to wander around in a moral fog and to encounter a self-refuted legal quandary.\(^{160}\)

---

158. ARKES, supra note 78, at 47.
160. See Patrick G. Derr, “The Argument” and “The Question,” 5 HUM. LIFE REV. 77 (1979), for additional arguments relating to the legal evolution of personhood in the U.S.