

# THE NATURAL LAW CHALLENGE

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It is never out of season to recall James Wilson's line that the purpose of this Constitution was not to invent new rights, but to secure and enlarge those rights we already had by nature.<sup>1</sup> In radical contrast, Blackstone said that when we enter civil society, we give up that unrestricted set of rights we had in the state of nature, including the "liberty to do mischief."<sup>2</sup> We exchanged them for a diminished set of rights under civil society—call them "civil rights"—which are rendered more secure by the advent of a government that can enforce them. To which Wilson responded: When did we ever have a "liberty to do mischief"?<sup>3</sup> When did we ever have, as Lincoln would say, a "right to do a wrong"?<sup>4</sup> The laws that restrained us from raping and murdering deprived us of nothing we ever had a "right" to do. And so when the question was asked as to what rights we give up in entering into this government, the answer tendered by the Federalists was, "none." As Hamilton said in *Federalist*

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A more expansive, slightly different exploration of the same subject can be found in Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245 (2012).

1. 2 JAMES WILSON, THE WORKS OF JAMES WILSON 298–99 (Chicago, Callaghan & Co., James DeWitt Andrews ed., 1896).

2. *Id.* at 299.

3. *See id.* at 300.

4. Abraham Lincoln, Sixth Debate with Stephen Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 257 (Roy P. Basler ed., 1953).

No. 84, "Here . . . the people surrender nothing."<sup>5</sup> It was not the purpose of this project to give up our natural rights. And so, what sense did it make to attach a codicil, a so-called "bill of rights," reserving against the federal government those rights we did not give up? How could we do that without implying that, in fact, we had given up the corpus of our natural rights in coming under this Constitution?

If we are invoking traditions here, this is the tradition I would claim. I should represent nothing exotic in this assembly; I am here to sound again the things we used to hold.<sup>6</sup>

My friend Dan Robinson remarked that he wanted on his tombstone the inscription "He died without a theory." A former President of Amherst College remarked that "Hadley has a theory of natural law." I remarked that when one says something like that, one imagines a detached observer, watching theories whiz past him, and somehow coming to a judgment on the fragments of those theories he regards as plausible or implausible, true or false. And I said, take me back to the ground on which you make those judgments, and you would be led back to what some of us have regarded as the ground of the natural law in "the laws or canons of reason," or what Blackstone called "the laws of Nature and reason."<sup>7</sup>

That first generation of jurists in this country showed a remarkable knack for tracing their judgments back to those anchoring axioms of the law. Hamilton remarked in *Federalist* No. 78 that we draw on this rule of construction: Any later statute supersedes an earlier one.<sup>8</sup> But that is not the rule of construction we draw upon for the Constitution, for the Constitution, coming earlier, must be able to override a statute, coming later, or else it loses its function as a control on the legislative power. Hamilton asked how this rule of construction was derived. It was not part, he said, of the positive law—it was not a rule set down in the Constitution. Rather, it ran back, he said, to the "nature and reason and nature of the thing."<sup>9</sup>

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5. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. See generally Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245 (2012).

7. 1 WILLIAM BLACKSTONE, COMMENTARIES \*58 n.8.

8. THE FEDERALIST NO. 78, *supra* note 5, at 468 (Alexander Hamilton).

9. See *id.*

We may recall that at the end of *Gibbons v. Ogden*, as a kind of throwaway line, John Marshall apologized to his readers for spending so much time demonstrating what should stand in the class of an “axiom.”<sup>10</sup> He assumed that all of his literate readers understood that, before we can carry out a demonstration, certain axioms had to be in place—like the law of contradiction. They were things that had to be grasped, as the saying went, *per se nota* as true in themselves. As Hamilton put it in the *Federalist* No. 31, there are certain “primary truths, or first principles, upon which all subsequent reasonings must depend.”<sup>11</sup> They contain, he said, “an internal evidence which antecedent to all reflection or combination commands the assent of the mind.”<sup>12</sup>

We grasp the law of contradiction in the same way we grasp that it is senseless, even in the age of “animal rights,” to sign contracts with horses and cows or seek the informed consent of our household pets before we authorize surgery on them; but, we continue to think that those beings who can give and understand reasons deserve to be ruled with a rendering of reasons in a regime that elicits their consent. That was the self-evident truth that entailed government by the consent of the governed. Once that point was in place, we had the deepest principle of the American regime: that the security of the American people may not be put in the hands of officers, whether in Westminster or in courts with unelected judges, who bear no direct responsibility to the people whose lives are at stake. That understanding, finding its ground in the natural law, tells us what is deeply wrong with the holding in *Boumediene v. Bush*,<sup>13</sup> and it also explains just why unelected judges must work under far more restraint, with a more severe discipline, to cabin their judgments. I do not doubt for a moment that Justice Sutherland, in the *Belmont* case (1937),<sup>14</sup> thought there was something deeply wrong with taking the assets held by Russian nationals in New York and transferring

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10. 22 U.S. (9 Wheat.) 200, 221 (1824).

11. THE FEDERALIST NO. 31, *supra* note 5, at 193 (Alexander Hamilton).

12. *Id.*

13. 553 U.S. 723 (2008) (holding that stripping the jurisdiction of the federal courts over Guantanamo detainees’ habeas petitions violated the Constitution).

14. *United States v. Belmont*, 301 U.S. 324 (1937).

them to Stalin's government. But he also understood that judges should not be interfering with decisions on diplomatic recognition, which went hand in hand with military strategy. To take seriously again the deep principles of natural law is not to license judges to float untethered from the text, or from those principles that command their respect even when those principles are not mentioned in the Constitution.

Part of the genius of the Founding generation is that they showed us how they could reach back to those principles of natural right, or those canons of reason, to explain the coherence of their judgments, even as they worked under these rightful constraints. And so in *McCulloch v. Maryland*,<sup>15</sup> Marshall noted that the Constitution gives Congress the power to punish only piracies on the seas.<sup>16</sup> And yet if Congress can establish the mails, the power to establish must entail the power to preserve—in this case, to protect the mails against theft.<sup>17</sup> Chief Justice Marshall drew the answer here from the very logic of a law. To say there is a national government is to say that there must be the power to legislate, to govern; and how would a law be binding if it could not be enforced? But several years earlier he offered a lesson even more compelling.

In *Fletcher v. Peck*,<sup>18</sup> Chief Justice Marshall led the Court in striking down an attempt in Georgia to cancel a grant in lands; he saw this as the equivalent of impairing the obligation of a contract. He could have settled the matter then simply by invoking the Contracts Clause.<sup>19</sup> But instead, he did something far more elegant: He showed how the Contracts Clause could be drawn deductively—with the logical force of a syllogism—from the deeper principle of *ex post facto* laws, a principle of lawfulness that would have to be part of any regime of law. With that move he could say something truly striking: Georgia, he said, was a great State, part of this American empire. But even if Georgia were a separate, sovereign State, outside the Union—and therefore outside the Constitution and Article One, Section Ten—this law in Georgia would still be wrong,

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15. 17 U.S. (4 Wheat.) 316 (1819).

16. *See id.* at 417.

17. *Id.* at 417–18.

18. 10 U.S. (6 Cranch) 87 (1810).

19. *See* U.S. CONST. art. I, § 10, cl. 1.

because its wrongness was rooted now in a principle that did not depend at all for its validity on being mentioned anywhere in the text of the Constitution.

Now we fast forward, as they say, and I recall to my friend of many years, Antonin Scalia, his fine argument in the *Heller* case<sup>20</sup> on the Second Amendment in Washington, D.C. I noted to him that he had appealed to a deep principle of self-preservation, which I took to mean the right of an innocent person to fend off an unjustified assault.<sup>21</sup> He agreed. I pointed out that those words were not contained anywhere in the Second Amendment, and so I wondered: Was he appealing to a deep principle of the law whose validity did not depend on being mentioned in the text of the Constitution—just as he had said that this was a right “pre-existing” the Constitution?<sup>22</sup> Or was he saying, rather, that Blackstone and James Wilson said it at the time and that many people read them?

If it is the latter, then we convert jurisprudence into legislative history. We would have to find out how many people who worked on the drafting and passage of that Amendment, or voted to ratify it, had incorporated and understood Blackstone’s argument. Even if we could get an answer to that question, which we cannot, we would still not have the answer to the question we are asking, namely: Is there in fact a deep principle that gives innocent people the right to use lethal weapons, if they become necessary, to preserve their lives and freedom?

Why this persistent move on the part of jural conservatives to find refuge in appealing to history or legislative history? Some of our friends appeal to history because they think it to be fraught with less controversy, that it is easier to get agreement on the historical record—a point we have discovered to be quite manifestly untrue. As we have seen, the appeal to history simply begets contentious readings of the historical record. It is hard to avoid the sense that many conservatives appeal to history because they have lost their confidence that there is a discipline of reason that offers guidance and constraint to the judges. In their own way, they have become chil-

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20. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

21. *See id.* at 594–95.

22. *Id.* at 592.

dren of David Hume: They really have come to believe that reason is just the instrument of the passions, of likes and dislikes; that reason has no moral truths to discern;<sup>23</sup> that when a judge gives reasons as to why he found a statute wrong or unjustified, he really means that he does not like it. In this way, some have made of themselves operational relativists, while being pleased to conceal it from themselves.

Perhaps the most striking example here comes from the cases on freedom of speech. What can be a clearer slogan of relativism than Justice Harlan's famous line in *Cohen v. California* in 1971 that "one man's vulgarity is another's lyric"<sup>24</sup>—that there is no principled ground, as he said, on which to distinguish offensive, assaulting speech from anything else. Justice Harlan thought he was bringing a fresh novelty to the law by injecting the logical positivism that was all the rage when he was an undergraduate—and injecting it about thirty years after it had been abandoned in the schools of philosophy. And the reason for the rejection could be seen in the incoherence of Harlan's own opinion. One may recall that the defendant in the case was wearing a jacket with the inscription "Fuck the Draft."<sup>25</sup> Justice Harlan asked: "How is one to distinguish this from any other offensive word?"<sup>26</sup> The meaning of words was subjective. And yet, Harlan was protecting Cohen's jacket as a species of *political* speech. But if the meaning of words were truly subjective, "Fuck the Draft" could have meant "make love to the wind." Yet Harlan knew that the words were political because he knew that Cohen was *condemning* the draft. The words may alter, but the *moral functions* of commending and condemning are simply built into our nature and therefore into our language. The words that carry these functions must be clear to people at any time if language itself is to function. Juries composed of ordinary people using ordinary language can be relied on here—they can be told just to pick out the words that are established now in the language as terms or symbols of assault or insult, and in case of doubt to let borderline cases go—

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23. See 2 DAVID HUME, A TREATISE OF HUMAN NATURE 303 (Oxford, Clarendon Press, L.A. Selby-Bigge ed., 1888).

24. 403 U.S. 15, 25 (1971).

25. *Id.* at 16.

26. *Id.* at 25.

do not convict. Given that instruction—given a list of racial slurs mixed with neutral terms—ordinary people do not have trouble picking out from this list the terms of derision or assault: kike, bastard, nigger, urologist, meter maid, saint. Nor do people have trouble telling the difference between a burning shoe box and a burning cross. Or the difference between burning of an American flag in disposal and the burning of a flag as a gesture of contempt.

These are not inscrutable problems; my point is that the ground for answering them is built into the very logic of language. The case that recognized these critical points—*Chaplinsky v. New Hampshire*<sup>27</sup>—was a case grounded in certain truths in nature that could not be effaced. And the Court recognized that it could sustain bans on gross, assaulting words or gestures without impairing in the least the freedom of people to make the most searing, substantive arguments.

But by absorbing the lines of argument from the *Cohen* case, some of our most distinguished judges have persuaded themselves that a burning cross could not be judged and barred as an act of assault, for that would judge the content of the message being conveyed. In an echo of Justice Harlan's logical positivism, Justice Scalia argued that the law banned the speech that the legislators merely "disfavored" or disliked.<sup>28</sup> With the same premises in place, and over the dissent of Justice Alito, the Court insisted that the law could do nothing to restrain or shunt from the scene the Reverend Fred Phelps and his gang as they harassed the funeral of a dead marine with signs saying "Semper Fi Fags," and "Thank God for Dead Soldiers."<sup>29</sup> In the past, policemen working with the common sense of *Chaplinsky* and the common law would have shooed these people off the scene, out of the way. But now, in the post-*Chaplinsky* age, people like Reverend Phelps and his congregation are clothed with a constitutional right, while the public and the dead marine's family are obliged to look the other way. And why did Mr. Snyder have to seek a suit for personal damages here? Precisely

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27. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that a state law as applied against offensive speech did not impinge on the privilege of free speech).

28. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

29. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216–17 (2011).

because the Court has removed that simple authority that the police could use when *Chaplinsky* was still good law. Even more recently, in the case of the Stolen Valor Act,<sup>30</sup> Justice Kennedy began again with a presumption *against* making judgments based on the content of speech. With that anchoring premise in place, he would bar the law from forbidding those people who used their speech to represent themselves falsely as the recipients of military honor. Again, Justice Alito was in dissent.<sup>31</sup> In the Ninth Circuit below, Judge O’Scannlain had raised the question of when there was ever a constitutional right to lie.<sup>32</sup>

Recall Robert Jackson’s warning from years earlier: that “[n]o liberty is made more secure by holding that its abuses are inseparable from its enjoyment.”<sup>33</sup> And yet this species of relativism seems to be absorbed as wisdom now even by some of our friends as a species of conservative jurisprudence.

In some respects, of course, we are all originalists, but there are varieties of originalism. I, too, study Hamilton, Marshall, and the Founders, because they give us the most luminous account of the Constitution they helped to frame—and explain. I happen to stand with Professors Richard Epstein, John Eastman, Randy Barnett, and Justice Clarence Thomas in holding that the Commerce Clause should be scaled back to something closer to its older, original meaning before it was transformed during the New Deal. But that argument was sounded only by Clarence Thomas in the recent decision on Obamacare;<sup>34</sup> and he has not gained firm allies for that position even among the conservative Justices.

Justice Story used to invoke that maxim outside the text—that what may not be done directly may not be done indirectly.<sup>35</sup> If it is wrong to kill Jones, it is wrong to hire someone to kill Jones. If the federal government does not have the authori-

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30. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

31. *See id.* at 2556 (Alito, J., dissenting).

32. *United States v. Alvarez*, 638 F.3d 666, 678 (9th Cir. 2011) (O’Scannlain, J., dissenting from denial of rehearing en banc).

33. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

34. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting).

35. *See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 617 (1837) (Story, J., dissenting).



ty to set the wages at the Hoosac Mills in North Adams, Massachusetts, it may not do that indirectly by imposing a tax on the plant and then offering to remit the tax if the company accepts the federal policy.<sup>36</sup> As Justice Owen Roberts said in the *Butler* case, they were asking us to buy back our freedom.<sup>37</sup> Now we have another Roberts, John Roberts, insisting that there is no way, even under the Commerce Clause as we know it now, that individuals can be compelled to buy medical insurance—but that Congress can accomplish the same thing indirectly by using taxes as a penalty.<sup>38</sup> The old alarms and whistles should have gone off on that one. But some of us no longer hear them.

On that question of “originalism,” I have put the question to Justice Scalia: What about Senator Lyman Trumbull on the Fourteenth Amendment and interracial marriage? Trumbull assured his colleagues that nothing in the proposed Fourteenth Amendment would challenge those laws in Illinois as well as Virginia that barred marriage across racial lines.<sup>39</sup> Without that assurance there was no ghost of a chance that that Amendment would pass. Does that mean that the Court should not have taken up *Loving v. Virginia*<sup>40</sup>—or that it should have respected the original understanding by not challenging those laws on marriage in Virginia? It is inconceivable to me that Justice Scalia would hold now that the Court was improvident in taking that case or that the decision should have come out another way. But in that case, we would have to appeal to a deeper principle to explain the wrongness of racial discrimination—a principle implied in the Fourteenth Amendment but never really explained.

Even the conservative judges in our own day persistently move beyond the text, but with little awareness that they are doing it as in the recent decision on the Affordable Care Act (aka Obamacare). However, in an earlier time, not all that long ago, judges like George Sutherland understood that they were

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36. See *United States v. Butler*, 297 U.S. 1 (1936).

37. *Id.* at 73 (“The Congress cannot invade state jurisdiction to compel individual action; no more than can it purchase such action.”).

38. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2600–01.

39. CONG. GLOBE, 39TH CONG., 1ST SESS., pt. I, at 322.

40. 388 U.S. 1 (1967) (overturning a Virginia statute banning interracial marriage).

doing it, and they did it with a certain discipline. What Justice Sutherland did mainly was to draw upon those axioms that moved with simple short steps from the very logic of respecting the difference between innocence and guilt. He would then draw out the implications for those procedures that should be in place in testing evidence and testimony before we visit punishment on people for wrongdoing.<sup>41</sup>

But at the same time, a law that draws its principles in this way, will recognize all the sooner that nothing in this chain of reasoning can possibly tell judges the right number of divisions when breaking up AT&T, the right price for a pair of pants, the standards that govern wage-price controls—or, with Judge Janice Rogers Brown in the recent *Hettinga* case,<sup>42</sup> these principles will not tell us why it is *wrong* for the Hein Hettinga company to market milk at twenty cents less a gallon in Southern California, or why that state of affairs should constitute a “disorderly market conduct” that the law has any justification in barring.<sup>43</sup>

We used to have available, in the logic of natural right, the language readily used by judges to protect the freedom of ordinary people to earn their living at a legitimate calling. It was the kind of language used by Justice Sutherland when he protected the right of Willie Lyons to keep her job running an elevator in the Congress Hotel in Washington, at a wage she was quite willing to accept and her employers were quite willing to offer. That was the famous case of *Adkins v. Children's Hospital*,<sup>44</sup> in which Justice Sutherland, a leader in the cause of votes for women when he was a Senator, wrote for the Court in striking down this paternalistic act imposing a minimum wage for women in the District of Columbia.

Ms. Lyons had been quite pleased with that job, paying thirty-five dollars a month and two meals a day.<sup>45</sup> But her employ-

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41. *Patton v. United States*, 281 U.S. 276, 291–93 (1930).

42. *Hettinga v. United States*, 677 F.3d 471 (D.C. Cir. 2012).

43. *See id.* at 482 (Brown, J., concurring).

44. 261 U.S. 525, 555 (1923) (“[The law] is based wholly on the opinions of the members of the board . . . as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals.”).

45. William P. Quigley, “A Fair Day’s Pay for a Fair Day’s Work”: *Time to Raise and Index the Minimum Wage*, 27 ST. MARY’S L.J. 513, 520 (citing Brief for Appellants at ii, *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1922) (No. 795) (detailing board’s order regarding women and children working in District of Columbia), reprinted in 21

ers could keep her on the job only by paying her seventy-one dollars and fifty cents a month.<sup>46</sup> And yet men, not covered by the law, could still be employed at the market rate, which turned out to be thirty-five dollars a month and two meals a day.<sup>47</sup> A law passed for the purpose of protecting the morals and health of women was working systematically to replace women with men in these jobs.

In our own day, conservatives will argue against the minimum wage and other controls by marshaling empirical data to show, for example, that the minimum wage was cutting out entry-level jobs and discouraging the hiring of black workers. But Sutherland's argument was rooted in the deeper axioms of law and moral judgment in the rejection of "determinism" in all of its forms. We see the issue more often in matters of race. We may understand that race could not possibly exert a deterministic control over the moral conduct of any persons so that, if we simply knew a person's race, we would have the grounds for drawing moral inferences about whether that man deserves to be welcomed or shunned, applauded or reproached, rewarded or punished. Every one of us is a member of a race, and if race determined our most morally significant acts, none of us would deserve credit or blame; none of us could be held responsible for our own acts.

As Justice Sutherland managed to see, the laws mandating minimum wages for women in Washington were rooted in these kinds of premises of determinism. There was at work here a "gender determinism"—the assumption that if we knew that someone was a woman, we would then know how much money she needed, whether she needed to support her family or simply wanted some additional spending money. And we would know what income she needed to preserve her morality.<sup>48</sup> But as Justice Sutherland pointed out, apparently a beginner in a laundry needed only nine dollars a week to sustain her morals while a woman in a department store required as much

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LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 370 (Philip B. Kurland & Gerhard Casper eds., 1975)).

46. *Id.*

47. See HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND*, 12–14, 71–80 (1994).

48. *Adkins*, 261 U.S. at 554–56.

as sixteen dollars and fifty cents.<sup>49</sup> It was absurd because it was clear that income does not control morality. As Justice Sutherland put it, "The relation between earnings and morals is not capable of standardization."<sup>50</sup>

It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages.

But the law in *Adkins* was also based on premises of class determinism—it assumed that anyone who fell into the category of employer had the capacity to pay the mandated wage, regardless of whether the business was a small family shop, just hanging by a thread, or a large corporation. Conservatives in our own day will bring forth the evidence that the minimum-wage and wage-price controls do not work, and those arguments often meet the counterclaim that they have never been tried with the kind of subtlety that could be brought to these measures in a sophisticated community such as Berkeley, California. But Justice Sutherland's argument for natural rights, or natural law, was rooted in the deepest axioms of legal and moral judgment; and so Justice Sutherland managed to explain why these kinds of controls are simply wrong in principle, regardless of whether people sought to claim that, on one occasion or another, these controls happened to *work*.<sup>51</sup>

I would draw as a final example one of the most serious differences among friends on the conservative side—the jurisprudence of abortion. Why has the assumption settled in so deeply among our favorite conservative judges that the most the Supreme Court can do is overturn *Roe v. Wade*<sup>52</sup> and send the matter back to the States? I, too, would like to see the matter sent back to the States, and it is being done gradually now. But is that really all we can say? From the perspective of those who see the matter through the lens of natural law, the question is: What is the ground of principle on which the law may remove a whole class of human beings from the circle of rights-bearing beings subject to the protections of the law? I have mused in

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49. *Id.* at 556.

50. *Id.*

51. *Id.* at 556–61.

52. 410 U.S. 113 (1973).

print over the problem of what the judges would have done if the understanding had settled in quite early that the Civil War Amendments applied only to blacks who had become human.<sup>53</sup> After all, we have been told that not everything conceived of by humans is human at all times and stages of life. And so the matter could be returned to the States, as some of the Justices declare that they have no more competence in deciding on the beginning of human life than the first nine names in a local telephone directory.<sup>54</sup> Does anyone really think the judges in our own day would have no questions to raise if the States decided that children were more human if they were lighter in complexion or scored higher on verbal tests? But we know that the judges have the modes of argument readily at hand to identify grounds that were thoroughly arbitrary in making discriminations here between the human and the not-quite-human, between those with a claim to live and those whose lives may be taken without the need to render a justification. Why, then, should we suppose that judges in our own day would encounter an inscrutable problem if they found humans in the womb put outside the protections of the law because of their height or weight, because they are lacking limbs or had not yet acquired the facility to speak and do syllogisms? Why then, we must ask, have some of our most accomplished judges talked themselves into the notion that something in the scheme of our jurisprudence and the Constitution somehow bars them from raising that kind of question, which pierces to the core of those rights, and those persons, that the Constitution was designed to protect?

Justice Scalia has referred to the right to bear arms, the right of the innocent to protect themselves, as a “pre-existing” right, which was there before the Constitution.<sup>55</sup> He might say with others that the Second Amendment was meant to secure that natural right. Others among the Justices say that we can consider parts of the Constitution as meant to protect natural rights when we find something in the historical record to confirm that understanding of the Founders. But that rule itself—

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53. See HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 206–10 (2002).

54. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

55. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

that the Constitution may protect only those natural rights that we had some evidence the Founders intended to protect—that *very rule is not itself in the positive law of the Constitution*. How, then, do we claim to know it, and what makes it true or authoritative for us in interpreting the text? Our friends have backed into this rule because they apparently think that it is one of those things sensible in itself—as Hamilton said in the *Federalist* No. 31, it is something to be grasped as true in itself, something revealing its own internal evidence, “which, antecedent to all reflection or combination, commands the assent of the mind.”<sup>56</sup> Which is to say, our friends have simply backed into the logic of a first principle, or the logic that attaches to the natural law. As with that character in Molière, it turns out that they have been speaking prose all of their lives.<sup>57</sup> The simple truth is that they keep falling into the natural law because they have never left it. They are, as they are, never far from the natural law, and even in exotic places and cultures—even in the Ninth Circuit—it will always be with them.

When we launched our new Claremont Center for the Jurisprudence of Natural Law in June of last year, I ended that launching talk with a plea to conservative jurists: Why should we settle in with a mode of reasoning about the law that gives us a kind of sing-song morality—with terms such as “activism” that explain nothing and have no moral content? Some think the effort to address the moral questions at the heart of the law too ambitious, too risky, too difficult to do well, and likely to license mischief. Our friends seek safety in contriving formulas of the positive law while cautioning us again not to ask the questions that run beneath the surface to the core of things. But in that path there has been no safety, and therefore no prudence, and beyond that, no coherence, for we cannot give our best reasons, our fullest reasons, the reasons that give the most coherent account of the decisions we are making, the law we are shaping. The question at the end is: Why should you—why should we—settle for anything so diminished, when measured against the moral seriousness of the questions brought before us? Why would we not strengthen conservative jurisprudence

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56. THE FEDERALIST NO. 31, *supra* note 5, at 193 (Alexander Hamilton).

57. See generally MOLIÈRE, LE BOURGEOIS GENTILHOMME (1670).

by drawing again on the understanding of that first generation of lawyers on natural right, a teaching that will always be with us, there to be read and learned anew?

Where could we find a better assurance that the law we are preserving would be as comprehensible and compelling, as resonant with common sense, in the next generation as it is in our own, and as it will ever be?