

ORIGINALISM & INTERPRETIVE SIN: NATURAL LAW, SUBSTANTIVE DUE PROCESS, & THE DECLARATION

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Abstract

The jurisprudence of originalism has been well-represented on the Supreme Court and in the legal academy for decades, such that it has become a now mainstream judicial philosophy. The legal and metaphysical dogmatics of originalism, however, continue to be debated on and off the Court. Ever since the borking of Judge Bork and the confirmation of Justice Thomas, the role of natural law in constitutional interpretation and construction has been a contested matter for originalists. Part I of this Article argues that material applications of natural law by the originalist are hermeneutically analogue to applications of substantive due process. Part II presents a surveyed use of case law to facilitate this discussion, examining originalism and Court jurisprudence from the first decade of the Supreme Court to the modern era. Both dissents and majority opinions are utilized in this survey. Part III considers the role of the Declaration of Independence in constitutional

interpretation. The tension between two subsets of originalist jurisprudence is introduced, and the justifications for both dispositions are established and defended in terms of legal and historical canons. Attention is given to the East Coast, West Coast Straussian differences, exemplified by the Jaffa-Mansfield debates. The Preamble to the Constitution is considered as a further justification for incorporating the Declaration and natural law into constitutional construction. Ultimately, this Article contends that natural law reasoning for the originalist is internally inconsistent, and that the Declaration of Independence – used to justify this reasoning – should play no role in an originalist jurisprudence of the Constitution.

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Part I

The law, and therefore its interpretation, is charged with moral energies which tell a population or jurisdiction not only what “is” but also what “ought” to be in the laws of society; law is not just for the worst of us, against what Justice Oliver Wendell Holmes’s Bad-Man theory maintains. Merely describing the law provides no justification to obey it, and without that normative scaffolding, positivist legal interpretation remains comprehensively inert as to why any legal official should subscribe to a certain jurisprudence.¹ The foundations of the American system, although supplementary positive in fixity, are not positivistic; rather, the legal-philosophical foundations of not just the Constitution, but the Founding as an institutional whole is rooted in the natural law tradition. The customary positivism of so-called “living constitutionalism,” not even interpretive vogue until the 20th Century, overthrew originalism as the *de facto* jurisprudence.² But until originalism lost sole interpretive clout – though not always faithfully applied – judges were “expected to consult [natural law] in

1 As a legal philosophy, originalism has been accused by critics of adopting this positivist approach, and although the “positive turn” in originalist thought provides an interesting theoretical exploration, the contentious connection to natural law is worth examination.

2 Jeffery Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 115 GEO. L. J. 97, 135-158 (2016).

the cases,” even constitutional cases, “before them.”³ The “New Natural Law” movement hails the return of natural law considerations to originalist thought, best exemplified through jurists in the mold of Justice Thomas, as a means to properly interpret the broad principles of the Constitution and Founding to defend natural rights. Although natural law remains historically essential to understanding the Founding, the use of natural law as a constitutional hermeneutic remains inapposite for originalist interpretation and is effectually equivalent to substantive due process.

Natural law, properly understood within the legal-interpretive context, is not the laws of nature (“the natural law” or “natural laws”) which function fully regardless of the freedom of human agents; neither is natural law a veiled Judeo-Christian morality, which definitionally requires substantive faith and belief in the divine.⁴ Although there is often significant overlap between conclusions of Judeo-Christian morality and natural law, natural law depends on reason, not revelation; the use of natural law by judges is therefore not the state’s oppressive use of religion, but instead remains the rationalistic inquiry towards unchanging and ubiquitous human action and nature. Therefore, the claims of natural law are a stark repudiation of the historicism inherent in the “living Constitution” approach.

The substantive effects of natural law in the American

3 Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 *FORDHAM L. REV.* 1541, 1541-1544 (2011).

4 Santiago Legarre, *The New Natural Law Reading of the Constitution*, 78 *LA. L. REV.* 879, 879-883 (2018).

judicature are foundationally relevant for this discussion, as the uneven use of natural law in jurisprudence has a two-fold historical role of varying strength of application for judicial interpretation. Natural law was regularly employed – regardless of the strength of function – as an interpretive mechanism, serving as both a formal and material corollary to originalist jurisprudence: formal in that the Constitution assumed a structured order informed by natural law, viz., natural law-laden ideas such as “equal,” “freedom,” “right,” or the text of the Ninth Amendment; material in that American case law held that:

“[T]he general principles of law and reason [constrain governments].... To maintain that our federal or state legislature possesses such powers [to violate contracts or private property] if it had not been expressly restrained would... be a political heresy altogether inadmissible in our free republican governments.”⁵

The early Supreme Court held certain natural rights, e.g., private property, as rights that existed outside the rules of sovereign governments.⁶ These *dicta* demanded that governments are not only beholden to their own constitutions, but also any power or limit essentially determined through natural law. Indeed, the Constitution was not written out of a Thermidorian Reaction, but instead developed and subsists in the Common Law system, which recognized

5 *Calder v. Bull*, 3 U.S. 386, 388 (1798) (per Chase, J.).

6 Fitzpatrick, *supra* note 3, at 1541.

natural law as a genetic contributor. “[T]he written constitution... was the instrument of positive law required for the realization of first principles [of natural law] on which healthy republican society depended.”⁷ Thus, to offer a necessary distinction, natural law is the method of analysis and interpretive hermeneutic which begets an understanding of natural rights. The Constitution as a positive product of natural law thinkers, however, does not merely typify “abstract principles of natural law or natural right” or “a scheme of abstract moral principles,”⁸ but rather enumerates the specific provisions, roles, and powers of the federal government, even as these each may be informed by natural law – the Constitution plainly is the enumerated text, and enumeration is limitation.

As the metaphysical foundation for the Declaration and other expressions of Foundational thought, natural law reasoning does not prescribe strict behaviors of conduct, but rationally promotes general principles of action – there is no one natural law precept, per St. Thomas Aquinas.⁹ For many social and judicial conservatives, natural law thus safeguards an ordered and legally legitimate approach to preserving good and avoiding evil; natural law then provides not only a rational basis for moral legislation – al-

7 Herman Belz, *Americanization Of Natural Law: A Historical Perspective*, 12 THE GOOD SOCIETY 7, 8-13 (2003).

8 James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285, 2292-2293 (2001).

9 Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 VILLANOVA L. REV. 247, 269 (2009).

though legislation is inherently moral in some respect – but specifically allows for the institutional defense of social structures, like the family or property. Yet, natural law as a method of analysis does not leave a trail of breadcrumbs in which adherents can follow to reach the same or similar conclusions. As evidenced by sodomy laws, although classical natural law theorists generally agree that “[natural law] has condemned such homosexual activity as immoral,”¹⁰ the legal prescription following the natural law reasoning is hardly uniform. Justice Thomas, in his dissent in *Lawrence v. Texas* (2003), conceded the anti-sodomy law of Texas was a misuse of state powers;¹¹ furthermore, other natural law theorists have argued that not only are anti-sodomy laws an illegitimate exercise of natural law, structures and institutions like “marriage [are] such a good thing that [they] ought to be made available to all, heterosexuals and homosexuals alike.”¹² To those that claim fidelity to natural law reasoning, there is then little unanimity as to what actually is a proper exercise of natural law or expression of natural rights. Therefore, when one claims to follow natural law, there is no guarantee that their conclusions on an issue will be shared by other natural law adherents.¹³ Nonetheless, these disagreements are largely products within the

10 *Id.* at 276.

11 *Id.* at 277.

12 Fleming, *supra* note 8, at 2289.

13 The orthodox methodological process and application of natural law, though of corollary import, is not considered. Rather, any employment of natural law and natural rights is assumed to be genuine.

“New Natural Law” movement and the modern discussion of natural law and rights; until the deposition of originalism from the jurisprudential throne in the early 20th century, there was vague agreement on what was natural law and what was not, although the specifics and applications were still not entirely uniform.

Originalism no longer holds an interpretive monopoly upon natural law – the formal and material application of natural law does not demand one be a constitutional originalist – though most iterations of competing judicial philosophies officially reject natural law as a component of interpretation.¹⁴ Instead of employing natural law in jurisprudence, non-originalist philosophies often utilize substantive due process. The nomenclature of the tool aside, substantive due process is the idea that some rights are so substantive that due process cannot be affected to limit those rights or take them away – what those rights are, however, is an open-ended discussion that depends almost entirely on the jurist. In effect, substantive due process is an oxymoron, as due process is actually the process required to limit or take away rights.¹⁵ In parallel, a firm belief in natural rights – those rights afforded by nature and nature’s God – demand that these rights take priority over any asser-

14 To be a constitutional originalist does not demand that one reject natural law in the context of legal philosophy, nor does one need to be an originalist to apply a natural law hermeneutic to constitutional interpretation (cf. Fleming, *supra* note 8).

15 Radu, *supra* note 9, at 249.

tion of positive law, regardless of due process.¹⁶ Although substantive due process is a favored tool of “living constitutionalism,” the device is far older than Justices Brennan or Douglas; the earliest example of substantive due process in American jurisprudence is the long-reviled and truly evil *Dred Scott v. Sandford* (1856). In the majority opinion, the Court determined that as a slave, Scott was ineligible to sue; the Court additionally held that the right to private property, viz., slavery, was so substantive and essential that the federal government could not ban the practice, let alone regulate it:

Nothing can be more conclusive to show the equality of [slave-holding] with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument which imparts to Congress its very existence and its every function guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation, and farther that the only private property which the Constitution has *specifically recognised* [sic], and has imposed it as a direct obligation both on the States and the Federal Government to protect and enforce, is the property of the master in his slave; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a

16 Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S. CAL. INTERDISC. L.J. 501, 506 (1995).

similar guaranty.¹⁷

Substantive due process is thus the scion of slavery – although the ruling of *Dred Scott* was overturned by the reconstruction amendments, the framework of law clearly persisted, as is evident from modern legal reasoning. Only the right of substance has changed, e.g., *Obergefell v. Hodges* (2015). There exist effectively two critiques to the majority’s employed reasoning in *Dred Scott*, however. *Prima facie*, one can argue that this case was an example of substantive due process “done wrong.” Certainly, no juridic interpretation is going to be employed correctly all the time by fallible and errant jurists, and bad rulings tend to present themselves for later critique. Assuming a “living constitutionalism,” aspirational senses of evolving standards of decency demand that slavery is itself wrong, and so argue that substantive due process – “properly employed” – would have recognized the substantive right of a slave to not be owned. In effect, the modern adherents of substantive due process view slavery as a violation of substantive right, not the regulation of slavery as argued by Chief Justice Taney. Yet this critique presents a substantive issue: the Taney Court effectively developed substantive due process in the *Dred Scott* decision; it is a great irony if, in the first instance of a principle’s implementation, the architect of that principle gets it wrong, and such a reading is rather inap-

17 *Dred Scott v. Sandford*, 60 U.S. 393, 490 (1856) (per Taney, C.J.).

posite and implausible. Rather, substantive due process is idea-clay, shaped in effect to suit the potter, i.e., the jurist.

The second critique is – in the originalist’s estimation – the correct one: substantive due process is just bad doctrine, a tool that is foundationally wrong and opposed to the Constitution. After all, specific to *Dred Scott*, the originalist would recognize that Congress always had the power to regulate slavery in the territories, e.g., the Northwest Ordinance. Substantive due process is effectually wrong because it seeks to materialize rights out of thin air, be it an absolute right to property *qua* slavery or rights of person; for the originalist, *Dred Scott* was not only wrong in decision, but also in decisional theory. Commenting on both *Dred Scott* and *Korematsu v. U. S.* (1944), Justice Gorsuch writes, “In both cases, judges sought to pursue policy ends they thought vital. There was a living and evolving Constitution.”¹⁸ Substantive due process can, as a principle, be used to protect good or necessary rights, e.g., life and liberty and property. The principle, however, remains procedurally antifoundational, as no right – especially any right surrounding property – has ever been so fundamental as to warrant the near-absolute protection that substantive due process provides. Furthermore, the principle allows for the creation *ex nihilo* of rights by pure judicial fiat. The rights that are historically rooted in the nation are those that are constitutionally well-expressed or so enumerated by the legislature, not invented by nine black robes through

perceived “penumbras,” “emanations,” or “concept[s] of ordered liberty.” Substantive due process is an exercise of power that goes beyond what has been constitutionally committed to the Court, and the real effects of substantive due process are a striking mirror to natural rights and natural law reasoning.

To be clear, natural law reasoning and substantive due process are not synonymous, hermeneutical Gemini under different nomenclature. The political outcomes among cases utilizing the two are often disparate. Rather, recognizing the accidental properties of each – the history, the foundational reasoning, etc. – as different, the substantive effects of these two are essentially the same: both substantive due process and natural law as constitutional hermeneutics promote a procedurally and constitutionally inviolable interpretation. Therefore, when a jurist engages in natural law interpretation, he effectively engages in substantive due process, and the originalist critique against the one applies to the other. A survey of case law reveals the striking parallel (or even interchangeability) between the two, and effectually demonstrates that when an originalist engages in natural law reasoning for constitutional interpretation, he exposes himself to the error of substantive due process.

Part II

Calder v. Bull (1798) presents the earliest internal debate in American constitutional history as to whether the originalist should employ natural law or preserve a structuralist and textualist position. Writing for the majority, Justice Chase maintained that natural law could void any constitutional action by a government, for,

[a]n act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded.¹⁹

The majority rightly understood according to natural law, that no positive law which violates natural law or natural rights can be considered a law; this reasoning perfectly comports with the Common Law, as Blackstone had previously articulated that all laws derive validity and force from their comportion with natural law. This reasoning, however, neglects that the authority of the federal government comes from the Constitution and the people. Natural law recognizes the import inherent in positive law, and although natural law is theoretically higher than positive law, any positive law properly established then constrains natural law through that positive law. Once positive

19 *Calder v. Bull*, *supra* note 5, at 388.

law which comports with natural law is established, the external validity of that law constrains any future operation of natural law in that system by nature of procedure. If one recognizes the natural law basis for government, as Justice Chase did in *Calder*, then the procedural justness of the Constitution bestows the necessary powers and primary authority to the federal government.

Therefore, if one functions within a constitutional-ly provided office or authority, natural law and procedural justice constrain one to only the valid positive law, i.e., the Constitution and procedurally appropriate laws; regardless if those derivative laws materially comport with natural law, their procedural validation and implementation formally comport with natural law, and therefore the material component is rendered moot by the immediate primacy of positive law. “Robert Bork state[d] his opinion on the matter succinctly: ‘I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us.’”²⁰ Furthermore, the textual fixity of the Constitution constrains any material employment of natural law, lest “speculative jurists”²¹ apply natural law to defy the procedurally just conclusions of positive law which itself already comports with and authoritatively limits natural law. As Justice Iredell wrote,

20 Radu, *supra* note 9, at 280.

21 *Calder v. Bull*, *supra* note 5, at 398 (per Iredell, J., concurring in judgement).

If, on the other hand, the legislature of the Union or the legislature of any member of the Union shall pass a law within the general scope of its constitutional power, the court cannot pronounce it to be void merely because it is in its judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have diverged upon the subject, and all that the court could properly say in such an event would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.²²

This idea of natural law interpretation in the judiciary effectively implies a form of judicial supremacy, demanding that the legislature and executive accede to whatever determination the courts make with respect to natural law and natural rights. If the legislature attempts a foray into the natural law discussion, it becomes the judiciary's business to either affirm or deny the legislative lunge – thus, they adopt another duty to not only interpret the Constitution, but also natural law. Natural law incorporated into constitutional interpretation does not require the tacit approval of anyone but the majority of justices, who, despite their learnedness, rarely can agree even on legal history, let alone moral philosophy. Nonetheless, it was Justice Chase's majority opinion that established early on the direction that most originalists would at least attempt to take with respect to constitutional interpretation.

22 *Id.* at 399.

Chief Justice Taney's majority opinion in *Dred Scott* would be no more wrong had the natural right of private property been his basis than relying instead upon substantive due process, although the former hypothetical would provide an excellent illustration for the misapprehension of natural law by the Court. Taney avoided the language of natural law entirely, and therefore *Dred Scott* cannot be pointed to as an example of natural law misapprehended, only shoddy jurisprudence and historicity by the majority of that opinion. A tangible case does exist, however, where the Court relied on natural law reasoning to accomplish their decision.

During the height of the Gilded Age, the Court handed down *Lochner v. New York* (1905), ruling that the fundamental right to contract found in the Due Process Clause of the Fourteenth Amendment was violated by a New York statute: "Under such circumstances, the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with without violating the Federal Constitution."²³ This acrimonious ruling has long been hailed as an exemplar of substantive due process, yet later Court references to *Lochner* make this claim only partially accurate. Rather, the decision is arguably a case of both substantive due process and natural law jurisprudence: "When [natural law reasoning] was revived during the

23 *Lochner v. New York*, 198 U.S. 45, 64 (1905) (per Peckham, J.).

Lochner era, disguised as substantive due process jurisprudence... it triggered similar criticisms of resurrecting natural law.”²⁴ To demand that a decisional theory is either based in natural law or rooted in substantive due process is a picayune dichotomy, as the two functionally coexist well. The natural law component of *Lochner* was essential for the jurisprudential basis of that ruling, centering on the Fourteenth Amendment, since the first section of the Fourteenth Amendment had been formed and interpreted before through essentially natural law reasoning.²⁵ Thus, the *Lochner* court did not offer a material distinction between the natural right of contract and the substantive right of contract, even though the decisional theory formally leaned on the Due Process Clause.²⁶ Although *Lochner* came to be a derided case by future Courts, this is true only in the decision itself, rather than the decisional theory.

Since the natural law reasoning was so repugnant to the aspirationalist disposition of later Courts, those Courts attempted to achieve the same ends through at least nominally different means. In *Griswold v. Connecticut* (1965), the majority opinion expressed belief in a right to privacy through nearly any constitutional vehicle excepting the Due

24 Legarre, *supra* note 4, at 884.

25 Radu, *supra* note 9, at 281.

26 “Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.” *Lochner v. New York*, *supra* note 23, at 53.

Process Clause.²⁷ This utter avoidance was to expressly confirm that the Court was not relying on *Lochner*'s reasoning, instead seeing penumbral emanations from nearly every other right afforded in the Bill of Rights. Justice Goldberg, in a concurrence joined by Chief Justice Warren and Justice Brennan, argued, "that the right of privacy in the marital relation is fundamental and basic -- a personal right 'retained by the people' within the meaning of the Ninth Amendment...which is protected by the Fourteenth Amendment from infringement by the States."²⁸ But by linking the Due Process Clause to his argument concerning the Ninth Amendment, Goldberg ensured that the more senior Justice Douglas would not join the concurrence. The formal linkage with *Lochner* was too great a legal quagmire for Douglas to embrace Due Process Clause justifications for a right to privacy, yet this ruling is still regarded as an act of substantive due process. Nonetheless, it would only seem causally relevant to ignore the formal reasoning in *Lochner* for Douglas unless it was understood that this formal reasoning through the Due Process Clause was in fact understood as natural law reasoning. Justice Black, in his *Griswold* dissent, said as much:

Writing in dissent, Justice Hugo Black accused the majority of indulging in "the natural law due pro-

²⁷ Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2271 (2001).

²⁸ *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (per Goldberg, J., concurring).

cess philosophy” of judging. Although critics would later heap ridicule on the majority’s metaphysics of “penumbras formed by emanations,” Black was content on this score to merely record his view that we “get nowhere in this case by talk about a constitutional ‘right of privacy’ as an emanation from one or more constitutional provisions.” His focus, rather, was on unmasking what he judged to be an implicit revival by the majority of the long discredited “natural law” doctrine.²⁹

The material reasoning of *Griswold* offered the same hermeneutical issues as *Lochner* and *Dred Scott*, and Justice Black merely knew natural law jurisprudence when he saw it. The concurring opinions only reinforce this notion of natural law reasoning: Justice Goldberg cited the Ninth Amendment – definitionally requiring some degree of natural law reasoning from a historical perspective – as protected from the states, and Justice Harlan concurring in judgement argued that the ordered concept of liberty found implicit in the Due Process Clause of the Fourteenth Amendment was sufficient reasoning enough for the case.³⁰ Although Justice Harlan may not himself have understood the Fourteenth Amendment in terms of natural law reasoning, both Justice Black and Justice Douglas understood it so – and so did the *Lochner* Court. In effect, substantive due process and natural law reasoning are functional sub-

29 George, *supra* note 27, at 2270.

30 Radu, *supra* note 9, at 252-253; *cf. Griswold v. Connecticut*, *supra* note 27, at 486-502 (per Goldberg, J., concurring; Harlan, J., concurring in judgement).

stitutes, where the nomenclature selected depends only on the jurist's favored interpretive philosophy. Substantive due process becomes the favored mechanism for the so-called liberal Justice, and natural law reasoning the temptation of the conservative or originalist Justice.

Part III

A

Lest this claim of originalists “discovering” rights through natural law reasoning fails as a claim rooted in the misapplied originalism of *Lochner* and Courts long past, one need only look to the more recent debates between originalists on the bench. In *Troxel v. Granville* (2000), this debate was evidenced by Justice Thomas's concurrence in judgment and Justice Scalia's dissent. The issue central to the disagreement was the place of natural law reasoning and positive law. In his brief concurrence, Justice Thomas emphasizes three essential holdings that allow him to concur in judgment: he did not hold a fundamental right of parents to direct their upbringing as guaranteed through a substantive reading of the Due Process Clause; he instead held that the fundamental right of parents is found through the *Lochner*-era ruling *Pierce v. Society of Sisters* (1925), though he does not express a decisional theory beyond loose *stare decisis*; additionally, “[he] would apply strict scrutiny to infringements of fundamental rights.”³¹ His con-

31 *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (per Thomas, J.,

currence depended on the precedent of natural law reasoning of *Pierce* to secure the unenumerated rights of parents, although the plurality couched the unenumerated right in terms of substantive due process, once again demonstrating that the two hermeneutics are only interpretive mirrors; through natural law reasoning, Justice Thomas effectually engaged in substantive due process, his Due Process Clause rejection notwithstanding. This moral right of parents – a correct materialization of natural law – bears the same procedural problems as a right to privacy or freedom of contract, however.

Recognizing the natural law basis of the Declaration and the Ninth Amendment, Justice Scalia did not disagree with the natural law conclusions of Justice Thomas, though he dissented in the material employment of natural law by the majority.

The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming anyone of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.³²

This dissent raises the question, then, of the role the Declaration of Independence in legal and jurisprudential considerations. If the Declaration does play a substantive concurring in judgement).

32 *Id.* at 91 (per Scalia, J., dissenting).

role in the “proper” originalist’s hermeneutic, then natural law does indeed have a material function in constitutional interpretation and construction. Justice Scalia held that, because the Declaration is not a legal document and does not empower or confer any authority to the Court, a jurist need not consider the promises or the philosophy inherent to the foundational document. Certainly, the logic behind Scalia’s reasoning is at least somewhat coherent; other documents, e.g., the *Federalist Papers*, used to guide interpretation of the Constitution were written in the constitutional context or during the ratification debates. The Declaration, however, was written at a different historical moment, when our constitution was the Articles of Confederation, and the Declaration does not itself offer any commentary on the proper form of government or the courts specifically. As Kirk argues, “the Declaration and the Constitution were drawn up under different circumstances for quite different purposes: the first in the enthusiasm of revolution, the second in the restoration of order, and the men of 1787 were not the men of 1776.”³³ In brief, the apparent historical and jurisprudential difference of the two Founding documents should be sufficient grounds for the jurist to only consider the text of the Constitution or other tributary works. Justice Thomas disagrees. Thomas “sees an intimate connection between the principles of the Declaration, which are the principles

33 Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1040 (1993).

of individual liberty, and the text of the Constitution.”³⁴

Thomas thus, *contra* Scalia and other originalist-textualists, sees the text of the Constitution as only having sense when understood around the Declaration; the American painting (the Declaration) is defined, experienced, and preserved by its frame (the Constitution).

Echoing the acrimonious Jaffa-Mansfield debate on the “soul” of the country, Thomas and Scalia’s more civil debate serves as a microcosm for a larger jurisprudential question as to how the Founding should be understood and how the Constitution and Declaration should interplay. The position of Jaffa and therefore Thomas is largely the political-historical default. For Thomas, the Declaration’s claims of equality are an indispensable necessity to give reason to follow the Constitution. Abraham Lincoln, as “one of the framers of the post-Civil War Constitution,”³⁵ centered the question on slavery during the Civil War. The Constitution and its institution of free elections – that which secession jeopardized – only matter because of the principles of liberty and equality inherent in the Declaration, otherwise the price of bloodshed for preserving the Constitution and the Union would have been too high.³⁶ Without the demand for equality in the Declaration, the Constitution has no politi-

34 Thomas G. West, *Jaffa versus Mansfield: Does America Have a Constitutional or a “Declaration of Independence” Soul?*, 31 PERSPECTIVES ON POLITICAL SCIENCE 235, 243 (2002).

35 Lewis E. Lehrman, *On Jaffa, Lincoln, Marshall, and Original Intent*, 10 U. PUGET SOUND L. REV. 343, 343-349 (1987).

36 West, *supra* note 34, at 241.

cal locomotion from one generation to the next. The mere persistence of established law does not offer an evaluation thereof. As a document, the Constitution does not much give a moral reason to admire itself – plenty of governing documents or principles order the state well and limit the powers of the government, or nominally afford the citizenry plenary protections from abuse by the state. In the context of the Civil War, “[b]oth sides appealed to the Constitution with perfect sincerity.”³⁷ Without the moral inclinations of the Declaration, the Constitution can be read *tabula rasa* as a pro-slavery document, as the Antebellum South demonstrated; however, such is an inaccurate and inapposite reading of the Constitution. Lincoln and the North were in the right on both the Constitution and the War because they correctly understood the Constitution, but the correct reading for Lincoln was only achieved through a grounding in the Declaration and her principles, external to the Constitution itself. To the question of slavery, Mansfield and his disposition have no answer, philosophic or legal:

The problem of slavery, Jaffa argues, exposes more clearly than anything else the weakness of Mansfield’s position. The text of the original Constitution contained significant protections for slavery. That was the price the South demanded for its acquiescence in the Union. But if we read the Constitution as Mansfield recommends, namely, as a document whose authority is not derived from the idea of equal individual natural rights, we cannot know, on

the basis of the Constitution, that slavery is wrong. We cannot know that anything is wrong. Quite the contrary: we might as easily conclude that slavery is right. For if Mansfield is right, a “constitutional people” does not aspire to look beyond the revered constitutional text. In this decisive instance, the Constitution contains not an ambiguity open to later distortion but a massive evil, a cancer that almost destroyed the Constitution in the Civil War.³⁸

Indeed, slavery is not just a one-off historical example; rather, any legal-political issue that has divided the nation may be substituted in its place. Thus, for Thomas, the only way of properly reading the Constitution is not textualistically, but through the moral promises of the Declaration. The political-historical realities, however, stand in tension with the jurisprudential.

This political analysis of the two documents has obvious jurisprudential implications. If the Constitution is effectively understood only through the Declaration of Independence, then the constitutional hermeneutic which appeals to the Declaration must ontologically be correct, even if the reasoning and employment thereof has formal problems, like Thomas’s reliance on natural law in *Troxel*. Yet this discontinuity between the constitutional ontology and the constitutional form of jurisprudence raises the issue of legitimacy to such an ontological position. After all, a jurisprudence which properly understands constitutional form can misunderstand the essence of the Constitution, but

38 *Id.* at 243.

still retain formal verity; the jurisprudence which properly understands constitutional ontology, however, can only yield proper form, as the formal proceeds out of ontological.³⁹ Therefore, if Justice Thomas's constitutional ontology were correct, so too would the formal exercise of his jurisprudence. Yet the material applications of natural law are formally incoherent with a proper constitutional ontology.

For Jaffa, and therefore Thomas, the Declaration is at the head of America's legal significance in part because of what the document legally accomplished, i.e., independence. Such is more than a mere philosophical document, *contra* Kirk.⁴⁰ Yet for Jaffa, and more pertinently for Thomas, the Declaration serves as a higher law than the Constitution, "according to which the positive law... must be interpreted in ambiguous cases, are codified in the natural law doctrine of the Declaration of Independence."⁴¹ This jurisprudential approach offers a technical apparatus which conforms well to the Common Law tradition, building on the Anglo-American legal customs naturally. Furthermore, the theory of constitutional validity on which Jaffa and others in this minority opinion rely upon – "that 'there exists in the nature of things a natural standard for judging whether governments are legitimate or not.' That extrinsic

39 This theoretical reasoning understands a logical relationship between how jurists understand the Constitution *in se* and how the Constitution interacts with and is applied in the current legal setting, notwithstanding any such argument for human fallibility or judicial inconsistency.

40 *Cf.* Kirk, *supra* note 33, at 1040.

41 Lehrman, *supra* note 35, at 346.

authority - the standard of the Constitution - one finds in the Declaration of Independence,⁴² – is not entirely incompatible with the mainstream originalism popularized by Justice Scalia.⁴³ In some sense, as Lehrman and O’Neil both note, the Declaration as an organic law of the United States becomes necessarily incorporated into and reaffirmed by any law proceeding.⁴⁴ Unlike the Constitution, which claims its authority from the people and through ratification, the Declaration is not exogenously empowered. The Continental Congress was an *ad hoc* creation, designed to act on behalf of the colonial legislatures, and did not meet as a duly elected or representative body. The people certainly did not authorize the Continental Congress to emend the organic law of the newborn country.

Locke would say that when government legally dissolves - as it did in the Glorious Revolution - then the legislative power devolves upon the people (for it can never be destroyed unless civil society itself ceases). In what way, however, may the rhetorical flourishes of Jefferson be seen as an act of the people corporately? Independence was undoubtedly an act of the people, but the high-blown rhetoric in

42 *Id.*

43 Scalia and those originalists currently on the Court with Thomas might, instead of grounding the authority of the Constitution in the Declaration, formulate constitutional legitimacy more broadly as based on the Founding and the people. Nonetheless, that both sides of this debate would agree for an objective extrinsic legitimacy is a significant bulwark against both legal positivism and legal pragmatism.

44 Lehrman, *supra* note 35, at 345; Patrick M. O’Neil, *The Declaration as Ur-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 AKRON L. REV. 237, 241 (1995).

the document of its proclamation - the Declaration of Independence - cannot, seemingly, claim that status.⁴⁵

Nevertheless, the approach which affirms the Declaration as licit insists that this document is inherent to the character of all subsequent American law. Why the Declaration is chief as organic law in the United States becomes a matter of its historicity: because the *ad hoc* Congress effectually dissolved their own body in the writing of the Constitution, there is no legal means of adding to or amending the Declaration. “The seeming unamendability of the Declaration comes from... that the Continental Congress... went out of existence with the adoption of the Articles... and was placed further at a distance historically by the adoption of the U.S. Constitution as our Organic Law.”⁴⁶ Yet the premise, that because the specific body which composed the Declaration is defunct, the document is immortalized in law and history, does not follow by Common Law principles. That the Continental Congress dissolved does not make whatever valid law they left behind impermeable to alteration or supersedure. It is easy to understand the contrapositive. No law that the Continental Congress passed which was invalidated, viz., the Articles of Confederation, was invalidated by the presiding body. Rather, the invalidation of the Articles came about externally by the ratification of the Constitution. Hence, it is illogical to hold,

45 O’Neil, *supra* note 44, at 242.

46 *Id.* at 242.

that because the body which composed the Declaration is no more, the law itself cannot be altered.

The Union remains perpetual, and consequently, any legitimate legislature of that Union – be it the Continental or constitutional Congress – can change the law from what a previous legislature wrote. If the same idea of unamendability were applied to a different law from the Continental Congress still in force, e.g., the Treaty of Paris (1783), would the post-1787 American government be utterly powerless to look back and pass a law of supersession? Furthermore, the Repeatability Canon pacifies the claims that the Declaration is legally immutable and therefore integrated into everything as organic law. “The legislature cannot derogate from its own authority or the authority of its successors...As Cicero wrote to Atticus: ‘When you repeal the law itself,...you at the same time repeal the prohibitory clause which guards against such repeal.’”⁴⁷ Even the Constitution and her amendments are not immune to this legal canon, as the Eighteenth and Twenty-first Amendments demonstrate; such is only limited procedurally by the process enumerated within the Constitution. Even this procedural limit is not a theoretical absolute. The Articles of Confederation had their own amendment process, which the Framers expressly rejected in writing the Constitution. Should the U.S. Constitution ever be dissolved, it seems unlikely that it will be done so abiding by the enumerated

47 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 278 (2012).

amendment process.

Returning to the slavery question, then, it is difficult to see for Jaffa how the Constitution's Slave Clauses (the Slave Trade Clause, the Fugitive Slave Clause, and the Three-Fifths Clause) did not then supersede the Declaration's principles of equality, only to be later superseded themselves by the Civil War Amendments.⁴⁸ The texts of the Slave Clauses are clearly at odds with the Foundational ideas of equality and natural law which Jaffa and Justice Thomas see as essential for their constitutional hermeneutic. The historicity of the Declaration as an essential organic law does not, then, give the document merit for a means of constitutional interpretation:

If the Declaration of Independence could be passed by a simple act of the Continental Congress, why could an act of the U.S. Congress - a more regular and representative a legislative body than its predecessors - not repeal the Declaration (if that were what the act purported to do)? By the same token, an enactment of Congress which violated some part of the Declaration would seem by that very contradiction to invalidate that portion of the Declaration which its content contradicted.⁴⁹

For whatever political-historical weight Jaffa may bear in

48 An argument for the re-incorporation of the Declaration into the Constitution through the Civil War Amendments may offer an argument worth considering, the complexities of the Fourteenth Amendment notwithstanding, though neither Jaffa nor Thomas make this claim.

49 O'Neil, *supra* note 44, at 244.

this debate, his position remains jurisprudentially inapposite.

B

Without commenting on the political-historical veracity of his point, Mansfield thus offers the more correct jurisprudence of the Constitution. The morality inherent in the Constitution is a textual and formal morality, not a material force of application. When critics of this textualist inclination point to the language of the Preamble as a moral expectation in the Constitution, they fail to understand the essential nature of the Preamble. The Preamble's force does not guarantee the Constitution but is realized through the Constitution. The Preamble to the document thus serves as a sort of political desideratum, not a moral foundation. Or, to frame it another way, the eschatology of the Constitution – the to-be realized expectation of the people and society – is co-temporaneous to the protology of the Constitution. Therefore, even though the Preamble textually comes first with moral language that might otherwise indicate the material employment of natural law reasoning or some acknowledgement of the Declaration's principles, that which is contained in the Preamble is absent of any legal or binding force. The Articles of the Constitution and the amendments to the Constitution are lacking anything beyond formal natural law reasoning. The Preamble does not beget the latter, but the latter induces the former. The

morals inherent to the Preamble were not some theoretical, primordial ooze out of which the Constitution grew, but they serve as an unrealized teleology in which the goal of American governance is expressed.

Furthermore, even if one were to argue that the Preamble to the Constitution should have the legal force of law, jurisprudence evinces that this is not so. “Laws often have prefatory statements prefixed to them, but no *necessary* logical relationship exists between the facts and values asserted in any preamble and the contents of the law it introduces [emphasis original],”⁵⁰ nor could an act of Congress become licit merely by anointing the act with the language of the Preamble. This latter point reveals the same thing about the Constitution: just because there is the Preamble does not make the Constitution the means of establishing justice or ensuring domestic tranquility. Rather, the form of the Constitution – the government it prescribes – becomes the means of achieving that end. Unlike the Declaration, there is such a process established in the Constitution. Where the moral and legal purposes of the Declaration are immediate and realized, the Constitution is expected and unrealized.

This framing may seem backwards – the Constitution was immediately instituted upon ratification and the Declaration’s demand for equality is for some still an on-going battle. Yet this is not the political-historical issue that embroiled Jaffa and Mansfield. Rather, the legal and

jurisprudential framing of this debate reorients the discussion away from historical chronology and to legal relevance. The Declaration's philosophical and sociological demand for equality may or may not be continuous, but its legal function is realized *in toto*. If the Declaration rests in natural law, then it is inherently transcendent and materialized in effect with immediacy; so, too, was independence immediate, not depending on the Treaty of Paris (1783). Yet the Constitution, with aspects formally rooted in natural law, is secular and ephemeral. As such a construction, it must be reapplied every day, constantly interpreted, and staunchly defended until its purpose and end are realized. It is even possible to imagine that the Constitution's purpose and end are altered through the amendment process.

Mansfield is correct from a jurisprudential perspective when he agrees with Publius that the Constitution puts its own form before its end because its form is part of its end.⁵¹ Yet West and others see a contradiction in Mansfield, who also maintains that "the Founders thought that the form of the Constitution was never more than a means to securing justice."⁵² The Preamble is still compositionally part of the Constitution, however, and so the form and end of the Constitution become somewhat unified in the Preamble, the first stated goal of which is to secure justice. All other enumerated goals are derivative thereof. Of course, the Constitution is not the source of the mores and

51 West, *supra* note 34, at 243.

52 *Id.*

philosophies in America, so there need not be any force of application like is necessitated by the Declaration. Thus, for this hermeneutical concern, it does not matter if Jaffa or Mansfield is correct about the “soul” of America. Such is beyond the scope of this paper, and it remains unclear if a resolution to that debate will have any political significance in this historical moment. Yet what is clear is that the Declaration of Independence by itself, without any support from post-constitutional work or analysis, remains otiose as a constitutional interpretation. As Lehrman notes about John Marshall’s own originalism, “legal reasoning and opinion show that the original intent of the Framers and of the Constitution can generally be discovered intrinsically, that is, by analysis of the *full* text of the document itself [emphasis original].”⁵³

Distilling the issue, Scalia is right about this if nothing else: the Declaration does not empower the judiciary, and therefore the judiciary cannot interpretively employ it under the name “Constitution.” In binding judicial power to the Constitution, so too is the jurist’s scope limited to the Constitution and any law begotten out of that constitutional system, viz., legislation. The Declaration, however relevant it may be for American political thought or governance, is *a priori* to the Constitution’s order. Thomas’s position is fundamentally wrong not because he misapplies natural law through the lens of the Declaration, but because he applies it at all. This does not mean that the Constitution

and the Declaration are somehow at odds with each other, or that the documents do not politically comport. Kirk is right to recognize the different contexts and purposes to the documents but overstates the change in character between the Framers of 1776 and 1787. After all, the Declaration and the Constitution both are Founding documents. For the elected official – the legislator or executive – the political-historical incorporation of the Declaration suggested by Jaffa is the normative expectation, given Lincoln's example. Nonetheless, this jurisprudential approach to constitutional hermeneutics is wrong. The Constitution can be well interpreted and constructed without the Declaration, as case law past and present demonstrate. The incorporation of the Declaration into constitutional interpretation by the jurist allows only for the procedural injustice of substantive due process *qua* natural law.

Part IV

In practical result, the affirmation of rights by a judge-willed entitlement would inevitably require a judicially controlled and defined structure, thereby undermining the natural law reasoning. Nevertheless, natural law is a reality within the Constitution and the Founding that cannot be ignored by the originalist. After all, to be an originalist, one must consider the original meaning and intent behind the Constitution; by the philosophical ecosystem that

reared the Constitution, natural law was both architecturally utilized in the construction of the Constitution – e.g., the Preamble – and provided the milieu under which the Constitution was written. Yet natural law is not archetypal within the Constitution, but ectypal and provisional. The originalist’s engagement with natural law must therefore be a purely historical inquiry, limited to formal and dialectical reasoning. The jurist must look at a provision in the Constitution only through the historic enforcement of that provision; as particular natural law reasonings are inherent in certain readings, this demands the formal implementation of natural law in a historical, not material, sense. To employ natural law reasoning, with or without the Declaration, is to commit interpretive sin for the originalist.

Yet this is not an implementation particular to the jurist or case but is merely the historiographic realization of the Constitution in full. The proper originalist does not employ natural law reasoning, he recognizes it where it is the textual impetus. Although this does allow for the Supreme Court to become merely a historiography club whose disagreements can wreak legal and political havoc, legal interpretation is definitionally an individual undertaking on the Supreme Court. The incorporation of natural law as a constitutional hermeneutic by originalists provides a coy rejection of substantive due process, only to be followed by the judicially seductive wink of approval when rights of merit are under consideration. Natural law calls for positive

law, provides the foundational authority for positive law, and ultimately is the loadstar by which to evaluate positive law. Sedition against positive law for the sake of natural law cannot come from official exercises of duty and office, e.g., the jurist, but rather only from a personal capacity through one's citizenship. Jurists therefore cannot strike down whatever the legislature has passed on grounds of natural law comportion, any argument for fidelity to the Constitution or procedural apposition notwithstanding. But the constitutional instrument of implementation is not the courts, but the legislature, if natural law is to be implemented at all. As John Marshall famously wrote, "it is a *Constitution* we are expounding."⁵⁴ For the Constitution to be expounded, it would become an odious burden if the Declaration needed to be carted out each time to act as a sort of cereal box decoder ring. When the originalist employs natural law reasoning, he wanders through the looking glass to arrive in a topsy-turvy world yclept substantive due process where he does not belong.

54 *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (per Marshall, CJ.).