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The Forgotten Founding Document: Considering the Ends of the Law

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*Symposium on Whether
Legalization of Same-Sex Marriage
Is Constitutionally Required—2012*

II.

EQUALITY MANDATES FOR
SAME-SEX MARRIAGE IN
THEORY AND PRINCIPLE

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The Forgotten Founding Document: Considering the Ends of the Law

A. Scott Loveless*

ABSTRACT

In the jurisprudence of the last several decades, many issues have been addressed that have moral overtones. Abortion, the display of religious tenets on public property, expressions of faith in the pledge of allegiance or coinage, same-sex marriage, the ability of a state legislature to forbid homosexual conduct, whether and to what degree pornography is protected as free speech, and the ability of the people of a state to prevent same-sex attraction to be raised to the status of a protected class under their law, all raise moral questions, not merely legal ones. These are not only questions of constitutionality, but also of what we might call conflicts over the background morality and the moral objectives that guide American law, and what might be termed the “ends of the law.”¹

In all such cases, the advocates on each side typically claim the moral high ground for their respective positions, asserting the moral superiority of their own position over the benighted, insensitive, discriminatory, outmoded, liberal (or radical), conservative (or reactionary), hateful (or motivated by animus), outlandish, irrational or (fill in the pejorative blank) position of the other side. But how are courts, much less private citizens, to be guided in matters where opposing groups each claim not only the better solution to a political problem, but a moral justification for its position? How should legislators and courts (or even the people) handle moral dilemmas on this scale? Is there any legal authority applicable to such questions? This paper proposes that we seek answers

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1. In this regard, I recommend STEPHEN SMITH, *LAW’S QUANDARY* (2004).

to these questions in a long-neglected document: *The Declaration of Independence*. First, it argues that the Declaration is a useful legal document precisely in such difficult moral cases; next it discusses the moral basis for the Declaration’s assertions about government and freedom; and finally, it points out and discusses the consequent unconstitutional nature of the judicial activism that has given rise to, or at least abetted, the larger modern culture wars, and one of their many modern battlegrounds, the important “marriage question.”²

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2. This paper will not be a historical treatise on the ebbs and flows of various modern schools of legal thought about the philosophical foundations of law (legal conceptualism, logical positivism, legal realism, intentionalism, originalism, feminism, etc.). In this regard I recommend SMITH, *supra* note 1.

I. BACKGROUND

“The Laws of Nature and of Nature’s God”

—Declaration of Independence, Preamble³

The contemporary legal community in the United States generally assumes that the Declaration of Independence has no serious role to play in our modern legal system.⁴ It is counted a figurehead, but ultimately only a symbolic one, and certainly not a document with legal force, relevant, for example, in interpreting the Constitution.⁵ As precedential authority, it is ignored in most constitutional law courses⁶ and is not generally accepted as authority in practice or policy.⁷ This was not always so. Aside from the founding itself, the principles of the Declaration played a formative role in President Lincoln’s justification for not allowing states to secede and for pursuing the Civil War;⁸ its 1776 date provided his reference to “fourscore and seven years ago” in his Gettysburg Address,⁹ and its ideals provided the referent background for his second inaugural address and the extinction of slavery in this country.¹⁰ For an extended period in the nineteenth century the Declaration was actively looked to for guidance in interpreting the Constitution.¹¹ Justice Brewer, for example, wrote in 1897:

The first official action of this nation declared the foundation of government in these words “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.” While such declaration of principles may

3. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

4. *E.g.*, *Bowler v. Welsh*, 719 F. Supp. 25, 26 (D. Me. 1989) (noting that federal courts have “no jurisdiction over claims allegedly arising under the Declaration of Independence.”).

5. *See id.*

6. This assertion comes largely from the author’s own experience, but it is also noteworthy that the Index of Erwin Chemerinsky’s text book on Constitutional Law, for example, contains no reference of the Declaration of Independence. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* (3d ed. 2009).

7. *See Bowler*, 719 F. Supp. at 26.

8. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2006).

9. Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

10. *See* Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), *available at* <http://1.usa.gov/11DQTom>.

11. Other authors have dealt with the history of this process and many of its ramifications in trends in Supreme Court jurisprudence. *See, e.g.*, Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-interpretation*, 76 WASH. L. REV. 701, 703–05 (2001).

not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.¹²

As Justice Brewer indicates, the Declaration was seen as having legal effect because it established the legal philosophy on which the Constitution was based, the “foundation of government,” the philosophy that permeates every word and provides its guiding spirit. The Declaration declared the foundation of government in general, and the United States’ government in specific, to be what some call “natural law,” or “the Laws of Nature and of Nature’s God.”¹³ The Declaration and its reference to natural law thus comprise a *chapeau* by which to read the Constitution.¹⁴ In this light, perhaps the single most unconstitutional act a government entity, including a court, could commit would be to disregard and act inconsistent with that philosophy. Such actions would go against not simply a clause or phrase of the Constitution; they would go against the core and foundation of the Constitution itself.

All law rests on some fundamental deontology or moral philosophy, some idea of right and wrong, what we might term the objectives or “ends” of the law. Law’s most basic purpose is to provide order in a society that is otherwise potentially chaotic, but even that statement is premised on a moral concept—that order is better than chaos. Where people disagree, law provides a way to decide between competing views without resorting to fisticuffs or mob rule. If “unjust discrimination” is found and condemned, for example, it may be because the law requires that this result ensue, but the “law” only does so because of an underlying moral sense in society that some forms of discrimination are *wrong*—that it is simply not right to discriminate against people due to some factor over which they have no control, such as skin color or national origin, or that some freedoms *should* be protected over which we do have control, such as freedom of religious choice or political affiliation.

12. *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159–60 (1897) (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

13. THE DECLARATION OF INDEPENDENCE, *supra* note 3, at pmbl.

14. By “chapeau,” I reference the French usage, roughly equivalent to *ejustem generis* only in reverse; it supplies the context within which to read what follows.

As in the modern era, in 1776 the Founders of the United States of America were dealing with philosophical legal questions that had plagued humankind for millennia, questions they hoped to put to rest, but which continue to arise: Which is the higher authority, the State or the People? Can a state properly create a moral system through law and then use the authority of law to enforce it? The Declaration of Independence, the “first official action” of the new government, to quote Justice Brewer,¹⁵ represents their collective answer to these fundamental questions.

After two and a quarter centuries, it can be easy to overlook or take for granted the novel place it played in world history, but the Declaration of Independence represented a monumental break with the theory of government of its European antecedents. Until 1776, governments traditionally held that the State, usually in the form of a royal line, held supreme authority, dispensing rights to the people as an act of magnanimity. All such rights were held privately only at the discretion and pleasure of the monarch. Even the English Magna Carta, often described as the first relatively modern recognition of the limited power of the sovereign, only recognized superior rights in the nobility, not in the common man, and it did so only by virtue of a grant of these rights from King John (later contested and eventually confirmed, under pressure, by Henry III and later kings).¹⁶

The Founders emphatically broke with this tradition. The Declaration of Independence asserted that as a direct function of the “Laws of Nature and of Nature’s God” and as a self-evident truth, “all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”¹⁷ As Thomas Jefferson put it, “[a] free people [claim] their rights as derived from the laws of nature, and not as the

15. *Gulf*, 165 U.S. at 159.

16. “We have also granted to all free men [i.e. nobility, not the majority peasants and serfs] of our kingdom, for ourselves and our heirs for ever, all the liberties written below, to be had and held by them and their heirs of us and our heirs.” *MAGNA CARTA*, cl. 1 (1215). Only after hundreds of years in England did the Magna Carta come to be regarded (largely through re-interpretation in the writings of Edward Coke, 1552–1634) as an entrenched set of liberties guaranteed to the people against the monarch and government generally, and this after intervening periods of neglect, disregard, and outright opposition by various monarchs, particularly over the issue whether it was binding upon the King. *Magna Carta*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/356831/Magna-Carta> (last visited Mar. 29, 2013); see also GODFREY RUPERT CARLESS DAVIS, *MAGNA CARTA* (1977); J.C. HOLT, *MAGNA CARTA* (2d ed. 1992); S.I. JENNINGS, *MAGNA CARTA AND ITS INFLUENCE IN THE WORLD TODAY* (1965).

17. *THE DECLARATION OF INDEPENDENCE*, *supra* note 3, at para. 2.

gift of their chief magistrate.”¹⁸ Proper government, the Declaration clarified, is instituted by the people, who in essence delegate limited powers to their chosen governing bodies in order to help *secure* these rights, not to create them, and certainly not to interfere with them. This was no mere passing intellectual fad or convenient argument for their position, but a recognition of what they surmised to be a deep truth about the nature of mankind and of the place and foundation of government. The Founders risked their lives for this belief, wresting their freedoms from King George, claiming those freedoms as derived from a higher law than the King’s.

This claim was virgin ground as an implemented basis for government, asserting compliance with this “higher law” as the only morally legitimate foundation for government. It permitted the further bold proclamation that government could be held accountable for its compliance with the moral standard established by “the Laws of Nature and of Nature’s God.” The Declaration thus proceeded to evaluate King George’s performance against that standard, effectually declaring his actions morally *wrong*, and consequently withdrawing his authority to govern the former colonies. The American colonists, in effect, held King George *accountable* for his failure to respect the rights granted them by “Nature’s God,” a higher law than his own. Noting the King’s many failings in this obligation, the colonists withdrew his right to govern them at all, and proceeded to set up a government that would respect the rights King George had so denigrated.

The Declaration of Independence was not mere rhetoric. It was a document drafted with specific legal intent and effect: to “declare the causes”¹⁹ for and to proceed with the termination of suzerain relations with Great Britain and the establishment of a better government. The legal justification for taking this extreme action was grounded in the existence and reality of natural law, which stands apart from and independent of any governing entity. It is a *non sequitur* to read the Constitution apart from this philosophical grounding. The Constitution was drafted to comply with the natural law standard King George had failed to meet.

Yet, legal treatment of the Declaration and natural law has fluctuated wildly since 1776. Today’s affirmative neglect can be attributed to

18. THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 120–21 (Merrill D. Peterson ed., Library of America 1984) (1774).

19. THE DECLARATION OF INDEPENDENCE, *supra* note 3, at pmbl.

many causes, not the least of which is Justice Oliver Wendell Holmes's disdainful but influential dismissal of the entire concept of natural law.²⁰ John Locke, whom Thomas Jefferson placed alongside Isaac Newton and Francis Bacon as "the three greatest men the world had ever produced,"²¹ once noted that natural law provides the standard by which one may know of the justice of any government.²² The American Founders took Locke seriously, seeing a fundamental truth in his observations, but Justice Holmes dismissed all of them as "naïve," mocked natural law as "that brooding omnipresence in the sky,"²³ and initiated a trend in American law toward faith in rational secularism and science that has in recent years seemingly relegated the Declaration to the curio pile and natural law to the dustbin.²⁴

The virtual omission of the Declaration's philosophical guidance in our current legal system and the subsequent rise of legal realism and other modern strains of jurisprudence have opened the way for many jurists to adopt alternative ideas to guide their interpretations of law,

20. See Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

21. Letter from Thomas Jefferson to Benjamin Rush, in 11 THE WORKS OF THOMAS JEFFERSON 168 (PAUL LEICESTER FORD, ed. 1905).

22. Locke points out that the bounds of government are natural law:

A Man, as has been proved, cannot subject himself to the Arbitrary Power of another; and having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Common-wealth, and by it to the Legislative Power, so that the Legislative can have no more than this. Their Power in the utmost Bounds of it, is limited to the publick good of the Society. . . . Thus the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as other. The Rules that they make for other Mens [sic] Actions, must, as well as their own and other Mens [sic] 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 the preservation of Mankind, no Humane Sanction can be good, or valid against it.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 402–03 (Peter Laslett ed., Cambridge University Press 1965) (1689) (emphasis omitted).

23. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (quoted language refers to "common law," but used in the sense referred to here as "natural law.") Elsewhere, after dismissing natural law, Justice Holmes stated that jurists who believe in it are doubtless in a "naïve state of mind." Holmes, *supra* note 20, at 41. This evinces how professional myopia can contribute to the erosion of the basic principles the Declaration and Constitution once relied upon.

24. Justice Holmes perhaps had not read Thomas Jefferson's observation: "I fear, from the experience of the last twenty-five years, that morals do not of necessity advance hand in hand with the sciences." Letter from Thomas Jefferson to M. Correa de Serra (June 28, 1815), available at <http://bit.ly/Xj9uYO>.

to engage in sometimes dubious “appellate fact-finding” about societal trends and values,²⁵ and to impose personal views on decisions without waiting for “the people” to speak for themselves, either directly or through legislation. In recent decades, such “judicial activism” has produced several controversial decisions that have provoked increasing concern about whether the courts have remained evenhanded in their distribution of justice or whether “individual preference” has been deemed acceptable as a new guiding norm. Justice Scalia addressed this kind of judicial activism with his insight in his dissent in *Lawrence v. Texas* that “the Court has taken sides in the culture war.”²⁶

Justice Scalia’s is only a late observation of a process that began much earlier. The judicial activism represented by *Griswold v. Connecticut*²⁷ and its invention of a Constitutional “penumbra” and a “right of privacy” (in the laudatory object of preserving the sanctity of marriage, but which might have been accomplished with a simple reference to natural law) has since proceeded to expand, alter, and inflate this new “right” into the preferred weapon in the battle to redefine and vitiate the very concept of marriage and marital commitment that the Court had used to justify it. Proceeding through *Roe v. Wade*²⁸ and its successors in the abortion struggle, as well as in the more recent decisions in *Romer v. Evans*,²⁹ *Lawrence v. Texas*,³⁰ *Goodridge v. Department of Public Health*,³¹ and now most recently in the California Supreme Court’s decision, *In re Marriage Cases*³² and the subsequent struggles in that state, the Court’s version of this invented and subsequently distorted right of privacy and the judicial activism that engendered it continue to polarize the American people. On two occasions—*Romer v. Evans* and California’s *In re Marriage Cases*—courts have actually overruled decisions of the people.³³ Marriage, a product itself of “natural law,”

25. For example, the majority expressed in *Lawrence v. Texas* “that our laws and traditions . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003).

26. *Id.* at 602 (Scalia, J., dissenting).

27. *Griswold v. Connecticut*, 381 U.S. 479, 483–85 (1965).

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

29. *Romer v. Evans*, 517 U.S. 620 (1996).

30. *Lawrence v. Texas*, 539 U.S. 558 (2003).

31. *Goodridge v. Dep’t of Pub. Health*, 748 N.E.2d 941 (Mass. 2003).

32. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

33. *Romer*, 517 U.S. at 623, 635 (overruling an amendment to the Colorado Constitution prohibiting same-sex marriage which had been adopted by way of a statewide referendum); *In re Marriage Cases*, 183 P.3d at 399 (overruling legislative and ballot-initiative measures prohibiting

was the sacred justification for overturning Connecticut's ban on condom sales in *Griswold*,³⁴ but is now in danger of falling victim to the very "right of privacy" which derived from it—the "penumbral" right now threatens the structure, marriage, that gave it rise.

To date, in attempts to inoculate themselves from the potential effects of the *Goodridge* case in Massachusetts, thirty-eight states have either amended their constitutions or enacted laws that protect man-woman marriage.³⁵ Meanwhile, several others (and some of the same states) have enacted legislation allowing either same-sex civil unions or marriage.³⁶ Marriage, once sacrosanct enough to overturn a state law, has become a political football. Meanwhile, social activists continue their efforts to reform society in their preferred philosophical image,³⁷ using sympathetic, activist jurists to advance their cause. Just as "tolerance" has changed for some from "agreeing to disagree and still get along" to "you're intolerant if you don't accept me and my lifestyle," "constitutional" seems in many cases to have changed from "consistent with the Founders' intent" to "consistent with our recent interpretations and pronouncements of what the Constitution means." "Follow us," the judicial activists say, "not the Founders."

Given the high and rising levels of social problems experienced under the guardianship of "legal realism" and its variations, perhaps it is time to again consider the wisdom of the Founders. It is clear that they saw natural law as the source of all rights in the people, including the inalienable right to form a government that protected those rights—and to abolish or disengage from one that did not. However, what exactly did they mean by "natural law?"

same-sex marriage in California).

34. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

35. Following are the states that have protected man-woman marriage: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See NAT'L CONF. ST. LEGISLATURES, <http://ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited Mar. 30, 2013).

36. Following are the states that allow same-sex civil unions or marriages: Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Washington, and the District of Columbia. See *id.*

37. The activists similarly use the media, active legislative and even judicial lobbying, and strategic political contributions as well as boycotting and harassing those who oppose their positions. See, e.g., Joshua Green, *They Won't Know What Hit Them*, ATLANTIC (Mar. 1, 2007, 12:00 PM), <http://www.theatlantic.com/doc/200703/tim-gill>.

Without becoming embroiled in the centuries-old debate about the definition, precise scope, and content of natural law, two principles seem clearly within the founders' contemplation and intent.³⁸ First, natural law exists independently of government as a basic truth of human nature, with the object of the preservation of humankind. Secondly, natural law fundamentally has to do with a universal moral sense of how we deal with and treat other people. Natural law incorporates a morality that places limits on personal (as well as governmental) behavior, claiming at least that freedom does not extend to allowing people to harm one another, as individuals or as a society.³⁹ In other words, natural law insists that our rights are inseparably connected with, and related to, our duties and obligations to others, and that freedom is ultimately coextensive with its responsible use. Importantly, it also assumes we choose our actions and can be held accountable for them. As President Truman once observed, "[r]eal Americanism means also that liberty is not license. There is no freedom to injure others."⁴⁰

38. This is not to suggest that definition is not important. Definition is crucial. The misuse of the label "natural law," including Justice Holmes's misuse mentioned earlier, has almost certainly contributed to the current eclipse of its use in legal circles.

39. People often debate whether the Constitution was grounded in a "Judeo-Christian" morality, but while the morality of natural law is indeed reflected in Judeo-Christian teachings, it is much broader than Judaism and Christianity alone. Every major world religion, including not only Judaism and Christianity, but also Taoism, Islam, Confucianism, Buddhism, Hinduism, Sikhism, and Jainism, teaches some paraphrase of what Christianity holds as the Golden Rule, that you should treat others as you would be treated, i.e. at least not harmed. See KAREN ARMSTRONG, *THE GREAT TRANSFORMATION: THE BEGINNING OF OUR RELIGIOUS TRADITIONS* (2006); C.S. LEWIS, *THE ABOLITION OF MAN* (HarperCollins ed. 2001) (1943).

40. Harry S. Truman, Address at the Dedication of the New Washington Headquarters of the American Legion (August 14, 1951), in *1951 PUBLIC PAPERS OF THE PRESIDENTS, HARRY S. TRUMAN* 462 (1951), available at <http://bit.ly/14qk9Dl>.

President Truman continued as follows: "The Constitution does not protect free speech to the extent of permitting conspiracies to overthrow the Government. Neither does the right of free speech authorize slander or character assassination. These limitations are essential to keep us working together in one great community." *Id.* In another speech earlier in 1951, he elaborated on this concept.

We talk a lot these days about freedom – freedom for the individual and freedom among nations. Freedom for the human soul is, indeed, the most important principle of our civilization. We must always remember, however, that the freedom we are talking about is freedom based upon moral principles. Without a firm moral foundation, freedom degenerates quickly into selfishness and license. Unless men exercise their freedom in a just and honest way, within moral restraints, a free society can degenerate into anarchy. Then there will be freedom only for the rapacious and those who are stronger and more unscrupulous than the rank and file of the people.

If we neglect these truths, our whole society suffers.

Harry S. Truman, Address at the Cornerstone Laying of the New York Avenue Presbyterian

On occasion, events transpire that bring us back to these natural law roots. In the Nuremberg war crimes trials following World War II, the prosecution turned to the concept of natural law to refute the defendants' arguments that they had merely followed the law of Hitler's Germany when they committed the heinous crimes of which they were accused.⁴¹ The prosecution's ultimately successful position was, in effect, that people simply know they should not treat other people in the manner the Nazis had treated the Jews and others, regardless of what the words of a nation's positive law might require.⁴² Law can itself become corrupt when it attempts to refute or contravene natural law. Natural law, as the Nuremberg war criminals learned, and as King George learned from the American colonists, will eventually trump contrary positive law. Natural law, with its fundamental premise that harming another is wrong unless warranted by extraordinary and exceptional circumstances, is a universal "higher law," and when positive law fails to comport with its requirements this background moral law can be enforced separately.

Making the same point in 1816, Thomas Jefferson wrote, "No man has a natural right to commit aggression on the equal rights of another: and this is all from which the laws ought to restrain him."⁴³ Setting aside discussion of what level of harm is sufficient to warrant criminal or other legal sanction and whatever else natural law may require in specific instances, natural law, as used herein, is a fundamental truth of human nature and a higher law than positive law, a higher moral law that calls upon all citizens to exercise their freedoms only in conjunction with a moral duty to refrain from actions that harm others.

II. DISCUSSION

Given the above principle of natural law, two basic moral/legal questions arise that are answered in the framework of the Constitution itself, but which are often obscured by the background ideas being implemented through modern judicial activism.

Church (April 3, 1951), in *PUBLIC PAPERS OF THE PRESIDENTS*, *supra*, at 211.

41. See MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY* (1997); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1993); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (2010).

42. See sources cited *supra* note 42.

43. Letter from Thomas Jefferson to F.W. Gilmer (June 7, 1816), in *CORRESPONDENCE OF THOMAS JEFFERSON AND FRANCIS WALKER GILMER, 1814-1826*, at 40 (Richard Beale Davis ed., Read Books 2007).

1. In light of natural law, what did the Founders consider the proper role of the government *vis-à-vis* the people?
2. Within this government structure, what is the role of natural law in determining the freedoms of the people?

A. The Role of Government Under Natural Law

The Declaration's reference to the "Laws of Nature and of Nature's God"⁴⁴ envisions a government structure that is dependent on natural law for both its context and its content. First, natural law establishes that the government is an entity of limited authority and must therefore work within the *context* of the superior rights of its creators, the people. Government must "secure" or protect the people's inalienable rights from the tendency of all government to overstep its bounds while not exceeding the restrictions imposed upon it within the natural law framework. In other words, it must guard the fundamental rights of its citizens without infringing on them. Yet, government is also obligated to help the people recognize their own responsibility under natural law to avoid harming one another. This duty requires the creation of legal *content* in the form of positive law rules and regulations. Accordingly, this *content* should be in the hands of those who must comply with it (or their elected representatives), and it should minimize harm while allowing people to conduct their daily affairs with the greatest amount of freedom. This interplay between a people and their government, if both are responsive to the requirements of natural law, creates a potentially self-regulating system where governmental deference to inalienable rights combines with positive law's enforcement of the private duty "not to harm" to secure an expanding atmosphere of peace and freedom.

The seemingly innocuous phrase "among these are"⁴⁵ indicates that the Declaration's brief list of inalienable rights—"life, liberty, and the pursuit of happiness"⁴⁶—is not comprehensive of all rights conferred by natural law. Indeed, the balance of the Declaration is premised on a fourth such right, "the Right of the People to alter or to abolish"⁴⁷ a government destructive of these fundamental rights and to

44. THE DECLARATION OF INDEPENDENCE, *supra* note 3, at para. 1.

45. *Id.* at para. 2.

46. *Id.*

47. *Id.*

“institute new Government”⁴⁸ that would respect the natural rights of the citizenry.⁴⁹ After citing the repeated failures of the King to do so, the Declaration goes on to assert American sovereignty over its own territory, forming a new government consistent with the natural law King George had so egregiously and consistently violated.⁵⁰

Embodied in the Constitution is the Founders’ subsequent effort to frame a government that accomplished what natural law (and the Declaration) required. What must be born in mind here is that because the rights alluded to in the Declaration are granted by a higher law than that created by government, the government itself derives only indirectly from that higher source through a limited delegation of authority from the true sovereigns, the people. Seen in this light, the “Bill of Rights,” comprising the first ten amendments to the Constitution,⁵¹ should be perceived as a further enumeration and specification of the rights of the people *vis-à-vis* the subservient government they had created and therefore as a list of limitations on the authority of government (including the judiciary), *not* as a list of rights granted to the people by the government in the tradition of King John and the Magna Carta.⁵²

Our government is one of limited powers, constitutionally shackled with numerous restrictions: limited terms of office, periodic election, the veto power and its override, the balance in Congress between the Senate and House of Representatives, State involvement in amendments to the Constitution, and the well-known system of checks and balances intended to keep a single branch of government from acquiring too much authority or exceeding the authority delegated to it in the Constitution. The Constitution is devoid of any reference to authority in the courts, for example, to create new law out of whole cloth, as in *Roe* or *Lawrence*, or to disregard and overrule the expressed will of

48. *Id.*

49. This right—also described as an affirmative duty in the Declaration—was not to be exercised for less than serious breaches and only after long and strenuous efforts to correct the government’s disregard of the peoples’ natural-law rights. *Id.*

50. *Id.* at para 6.

51. The Thirteenth and Fourteenth Amendments also fit easily into this category of making express what was already implicit (i.e. bringing out more examples from the “among these are” doorway from natural law rights).

52. The notion of limited government has been well maintained by the Supreme Court in evaluating actions of the Legislative and Executive Branches; it is only in a lack of self-restraint on the part of the Judicial Branch (in “judicial activism”) that the Court sometimes appears to have lost track of the fact that the limited delegation of authority from the People also applies to the judiciary.

the people on moral questions, as in *Romer* and *In re Marriage Cases*, let alone to replace natural law as the moral/philosophical foundation of our legal system with a substitute of their own creation.⁵³ Indeed, the Founders' use of the word "unalienable" in the Declaration suggests the depth of their conviction on this point.

B. The Hierarchy of "Rights"

That the United States government was created under a limited delegation of authority from the people is further made clear by the Ninth and Tenth Amendments, which reserve to the people and the States, respectively, all rights not delegated from the sovereign people (and States) to the federal government. Nonetheless, Congress and the States are free to legislate within a broad range of subject matter. Through legislation, the government can create another class of "rights." A second class of rights beneath the inalienably granted or fundamental rights under natural law results from government enactments and programs; they are rights that must be recognized by the government and by third parties, but which the government can choose to amend or repeal.⁵⁴ A third class of rights that might be termed "conditional regulatory rights" or "privileges" is temporary and revocable by the government if the holder does not comply with the conditions for maintaining the right.⁵⁵ A fourth class of rights may be perhaps best described as "tolerance-based" rights, "rights" which are permissible not because they are not harmful, but only because their harm is sufficiently attenuated that the legislature has decided not to criminalize them. These are actions which are undeniably harmful, but which the people's representatives have decided to tolerate despite their reflection of an inherent disregard of personal responsibility toward others.⁵⁶

It is critically important that we not blur the distinctions between fundamental rights granted by natural law and the various classes of

53. Indeed, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), with its presumption of authority in the Supreme Court to interpret the Constitution, might represent the first step away from the Founder's intent, the first step away from the people as the ultimate sovereigns.

54. Examples include the rights of military veterans to enjoy certain benefits, the right to obtain a homestead patent upon qualification, or the right of qualified citizens to receive Medicaid.

55. Examples include the right to a driver's license or a permit to graze livestock on state or federal lands.

56. Examples include the right to smoke in public or the right to drink alcohol, both of which are permitted but only within regulated limits.

legal rights established by those chosen to govern us. Our inalienable rights predate government and must be respected by its officials as they regulate and order public life. They restrict the reach and authority of government.⁵⁷ The other classes of rights are the creations of our elected office holders and exist only subject to varying degrees of discretion in the government. Over the course of time, rights of this latter type can be amended, enlarged, redefined, or even revoked, as opposed to the “fundamental rights” based in natural law, which the government cannot presume to alienate or alter, much less supplant in favor of, for example, a tolerance-based right. Such a supplanting would upend the Constitution entirely, denying its very foundation, source and grounding moral philosophy.

Yet, it is a more rhetorical use of the word “rights” that we often hear in much of the ongoing public debate. What about “rights” that would seem more basic than permits or benefits, such as the right to health care or to a good education or, in the current context, to a right to public acknowledgment of a same-sex relationship by placing it on the same protected footing as traditional marriage? Do these types of alleged rights fit into the rights hierarchy described above, and if so, where? Proponents claim that same-sex marriage is a simple extension of fundamental constitutional rights. Is this true? A proper response to this question requires a closer examination of how the natural law on which the Declaration of Independence and Constitution were grounded affects not just governmental authority, but also individual freedom, and how, in the American system of government, natural law and positive law combine to determine and protect the freedoms of the people.

C. Personal Freedom Under Natural Law

As described above, the government is restricted by natural law and must perceive its limitations in deference to the superior fundamental rights of the people. In addition, the moral obligation under natural

57. In modern jurisprudence, under the Fourteenth Amendment, the Supreme Court has developed hierarchical “substantive due process” analysis with increasing levels of scrutiny for various classes of private actions and the government’s ability to interfere with them. The lowest level of scrutiny is the “rational basis test” proceeding up to “heightened” or “strict scrutiny.” Heightened scrutiny is reserved for government regulation of a fundamental right, rational basis scrutiny for regulation of activities that do not rise to the level of fundamental rights. This paper proposes, as discussed hereafter, another and perhaps clearer and less inconsistent method of considering these issues, one that stems from the Declaration of Independence and is consistent with the Fourteenth Amendment’s object of ensuring due process of law.

law not to cause harm also imposes duties on the citizens, duties which curtail the range of personal freedom of choice. These moral restrictions on one's individual liberties are essential to the maximum overall freedom within society. Unless most people willingly surrender some freedom of choice in deference to their obligations to others, all people are likely, eventually, to experience increasing infringement on their rights, a loss of freedom by a beleaguered government attempting to enforce compliance with its positive law.

While our freedoms are automatically limited by the fact that other people exist and share in the same rights we do, our freedoms are also enhanced by the presence of people with whom we enjoy our rights of peaceable assembly, free speech, and other activities related to our "pursuit of happiness." In a nation established under natural law, many citizens live in a rich and wonderful web of relationships, interacting with one another according to various moral codes along a continuum from genuine concern for the welfare of other people to total self-absorption and the inclination to harm those who stand between them and fulfillment of short-term desires. Yet not all of these moral codes are equally effective in keeping peace and preserving freedom.

If a person chooses to uphold a strict code of honesty, for example, his self-imposed restraint will engender trust and confidence from others, enabling a quality of interaction with them that would not be possible if his prior actions had given rise to distrust, suspicion, or hostility. At a minimum, any person committed to the moral obligation not to harm others (required by natural law) will live up to basic responsibilities and even display virtues such as patience, simple kindness or courtesy, and compassion. She will more likely recognize that facts may not always support her preferences, and she will therefore often act consistently with guidance from the truths of a situation regardless of the personal inconvenience, self-control, or additional work the attendant responsibilities require.

In a seeming paradox, as people exercise a minimum of self-management, their scope of free activity tends to enlarge and become enhanced. The criminal and civil limitations imposed by law are all but irrelevant to these people since they have little or no desire to injure anyone and so do not need law to tell them what not to do. They honor their contractual commitments, respect the property and other rights of their fellow citizens, and are generally busy doing things with which the law is not concerned. By living willingly within the minimal moral

limits of the “no harm” standard, they have the freedom to be as morally “good” as they wish, by pursuing any number of morally acceptable opportunities within a wide range of preference.

At the other end of the moral spectrum, however, the picture is quite different. A focus on self to the exclusion of others encourages individuals to take advantage of those around them for personal gain. Harm to others is of little or no concern, as long as “I get what I want.” Facts and even the meaning of words, like “tolerance,” are conveniently redefined, altered, or ignored to facilitate personal desires; and repeated patterns of dishonesty, fraud, and deceit confine one either to friends who can be trusted with secrets because they are complicit, or to superficial acquaintances from whom some aspects of one’s personal life must remain hidden. Appearances and façades must be cultivated and managed. At its extreme, this end of the spectrum exhibits such complete disregard for both truth and other people’s well-being that it often leads to the commission of crimes like theft, mayhem, arson, rape, child abuse, pedophilia, drug abuse, or even murder.⁵⁸

The paradox at this end of the moral spectrum is a reverse image of that described above. Here people tend to define “freedom” as license to “do whatever I want.” Yet by seeking licentious freedom to gratify one’s desires, the actual freedom experienced becomes progressively more restricted. This selfish focus on desire gratification generally earns one distrust, wariness, dislike, and/or avoidance from others and perhaps with eventual financial and health problems related to irresponsibility and risky habits. If legal lines are crossed, worse possibilities emerge, like fines, probation, city or county jail, state and federal penitentiaries, isolation in maximum security facilities, and even the death penalty.

A free people installs a government under natural law specifically to inhibit, if not prohibit, this last form of “freedom.” Perhaps the major role of our American government, certainly the end result of much of its positive law, concerns the creation of a line below which society will not permit an individual’s personal morality to fall without punishment—an articulation of the level of harm to others that the citizens in general will not accept. Otherwise, all may enjoy a wide range of

58. While many crimes involve at least some degree of mental illness, or at least distorted perception, all of them would seem to demonstrate a selfish desire for personal satisfaction at the cost of harm to another person, a violation of conscience and of a fundamental principle of natural law.

freedom, acting according to their interests and private views of morality by pursuing activities that remain above the line of legality established in positive law.

The mere establishment of such a line, however, cannot guarantee personal freedom. If the majority of citizens were to decide that good and evil equate to legal and illegal (i.e. if positive law were to become viewed as *creating* the moral standard), and were to pursue activities that barely skirt the legal limit, government would soon be overwhelmed in its attempts to police those who breach the line. Enough people must live well above the legal standard of “no harm” to ensure that the government can instead focus primarily on problem cases. In the maintenance of freedom, it is critical that many citizens interpret their natural law duty at a higher level than simply the avoidance of harm, viewing it rather as a call to *actively assist others*. The importance of this role—usually fostered by churches and eleemosynary organizations that provide material assistance to those in need, religions that promote an other-centered lifestyle, and families that simply rear children to work together, assume responsibility for one another and retain a conscious sense of duty not to harm others—cannot be overstated.⁵⁹ The more people who choose to live well above the “no harm” barrier of positive law, the more peaceful (and free) society will be.⁶⁰

The American Founders clearly recognized this relationship between freedom and morality under natural law. James Madison: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”⁶¹ John Adams: “Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁶² Benjamin Franklin: “[O]nly a virtuous people are capable of freedom. As nations

59. Indeed, before the rise of the modern welfare state, family, nuclear and extended, provided much social welfare and church communities provided most of the balance. Meeting others' needs was generally first assumed to be a family duty, a large part of what it meant to be family or kin, or to “belong” to a family. Caring for one's kin in such ways, assuming this responsibility in life, was among the quintessential characteristics of family, nuclear and extended, and it still is—in strong families.

60. For a more detailed discussion of the role of familial or kin altruism in maintaining a peaceful and stable society, see A. Scott Loveless, *The Macro Effects of Micro-Morality: Moral Law, Legal Law, and the “Rights-Based Approach”* (July 17, 2002) (unpublished manuscript), http://www.law2.byu.edu/wfpc/About_the_WFPC/papers/MacroEffectsMicro.pdf.

61. 11 JAMES MADISON, *THE PAPERS OF JAMES MADISON* 158, 163 (Wm. T. Hutchinson et al. eds., Univ. of Chi. Press 1991) (1962) (Speech at the Virginia Convention, June 20, 1788), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s36.html>.

62. 9 C.F. ADAMS, *THE WORKS OF JOHN ADAMS* 229 (Little, Brown & Co. 1854).

become corrupt and vicious, they have more need of masters.”⁶³ George Washington: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . It is substantially true that virtue or morality is a necessary spring of popular government.”⁶⁴

It is instructive that the only way our government can properly “alienate” an individual citizen’s fundamental rights to property, liberty, or even life is when that citizen has failed to meet his or her duties toward other citizens by committing a tort, violating a contract duty, or committing a crime. The government cannot arbitrarily deprive a citizen of a fundamental right granted by natural law. However, when one citizen materially harms another, the government can then step in to abridge his or her individual right to property by imposing a fine, the personal right to liberty by requiring incarceration, and even the right to life itself in the most extreme cases. Because it is subservient to the people, the government must spell out and carefully follow specific requirements in order to deprive a person of such rights (procedural due process), and tailor its restrictions according to the nature of the affected right and the degree of regulation (substantive due process), but in doing so, it is in effect, enforcing a genuinely minimalist standard of the morality idealized by natural law.

In sum, while the effect of natural law on a government is to limit the government’s authority to act against the people (due to their inalienable rights), it also has a vitally important and similarly “limiting” effect at the inter-personal level among the people. Within a natural law system, every citizen is morally bound by a minimal moral duty or responsibility not to harm others. As long as a majority of citizens respect this moral limitation, the people remain in control of the breadth and depth of their own freedom. In Locke’s words: “Thus the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others.”⁶⁵

63. Letter from Benjamin Franklin to Messrs, the Abbés Chalut and Arnaud (Apr. 17, 1787), in *THE WORKS OF BENJAMIN FRANKLIN* 297 (Jared Sparks ed., 1840).

64. George Washington, Farewell Address (Sept. 19, 1796), in *ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES FROM WASHINGTON TO HARRISON*, 56, 62 (1841).

65. LOCKE, *supra* note 22, at 30–32.

D. Determining Fundamental Rights

The clamor for “my rights” among various groups of Americans has become almost deafening. People speak of “the right to education” or “the right to health care” or “the right to food and shelter” as if our government is withholding ready-made services that could be immediately dispensed to anyone who wants or needs them and is violating the citizens’ inalienable rights by doing so. As mentioned earlier, some people do have the “right” to avail themselves of established government programs, including social entitlements to education and health care intended to lift the burdens of those in poverty. However, a government benefit, whether broadly granted or narrowly defined, is only a government-created right for which one must qualify and which might at some time be altered or repealed. If “we the people” have a fundamental right to good health, the government does not have a duty to provide us with that good health, but only to protect our right to pursue it. The government must not take away our opportunities to seek it or to provide it to one another.

The ability to behave in ways that might appall the neighbors or one’s grandparents is another “right” much in demand: “I have the right to do that. It’s not illegal!” In fact, all actions not specifically prohibited by law are, according to the natural law model, allowed in a free society. These behavior-related rights usually involve addictive habits that are undeniably harmful, but to a lesser or debatable degree—perhaps primarily harmful to the individual participating in it. Such behavior is often regulated, but is not prohibited except in extreme cases where concern for the public welfare is justified, e.g. individuals over a certain age can choose to drink beer or hard liquor, but cannot operate a motor vehicle after consuming a designated amount. Within legal limitations, citizens have the “right” to drink, smoke, gamble, use foul language, insult other people, dress in a peculiar manner, and engage in numerous other activities that might be frowned upon by others. This is the fourth class of rights alluded to earlier, “tolerance-based” rights.

Inevitably, over time, the precise placement of the legal limits drawn on such behaviors (always in response to the implicit question: “How much harm or risk of harm are we willing to tolerate?”) is repeatedly debated. This freedom of the people to revisit an issue or to maintain a somewhat flexible line, one that fluctuates as better information is gathered, is an important feature of government based in natural law. For example, recent restrictions on smoking in airplanes

or public buildings demonstrate that some harmful behaviors can be regulated after long periods of general acceptance, once the serious nature of the harm is recognized and understood. Regulation in such cases does not violate fundamental rights, even though it restricts a former “freedom.” Nor does decriminalizing a behavior suddenly elevate its status to a constitutionally protected inalienable right, or even to constitutional protection at the lower level of the rational basis test. A range of activities involving some level of risk to others are only tolerated, not protected under the Constitution, and this is the range where the legislatures, not the judicial branch, perform their function in deciding what will be tolerated and what will not.

It is essential that “the people” are able to distinguish among “tolerance rights,” government-granted rights, and the fundamental, inalienable rights under natural law that must be respected and protected by those who govern, for if some form of tolerance-based right becomes elevated to the level of, or even supersedes, a fundamental right, our system of law becomes fundamentally altered and endangered, our Constitution (and the Declaration) mere puffs of smoke. Such “rights” can only be implemented and enforced by positive law overriding natural law, and when positive law transcends or supplants the natural moral law, we revert to being subject to the will of a modern King George or Hitler; we lose the true “fundamental rights” the Founders secured for us and to which government itself is subject.

One useful guideline is to consider that fundamental rights are not those claimed by one citizen against another (we call such personal violations “crimes” or “torts,” not “violations of human rights”). Fundamental rights are universal, shared by all people, and only in certain limited instances may a governing body violate them, or place one such right in priority over another. While a comprehensive list of specific inalienable rights endowed by “the Laws of Nature and of Nature’s God”⁶⁶ might vary from citizen to citizen, the idea behind such rights arises from instincts we share as human beings that certain freedoms should exist among all peoples in all times, whether in highly complex societies or in simple family groups.

Indeed, a definitive litmus test for a fundamental right under natural law would be to imagine a society where everyone employed that right fully.⁶⁷ If every member of our American society were to freely

66. THE DECLARATION OF INDEPENDENCE, *supra* note 3, at para. 1.

67. Some argue that homosexuality ought to be recognized as a “fundamental human

and responsibly practice their freedom of religion, freedom of the press, or freedom of speech, for example, society could thrive without harm to anyone.⁶⁸ Even the moral limitations on our freedoms imposed by natural law exhibit this characteristic. If everyone were to accept and practice duty and responsibility toward others as a limit on the gratification of personal desires and preferences, roads would be safer, business both more efficient and profitable, divorce virtually nonexistent, and more children would be raised in a loving and secure environment. Moreover, trust in others could be safely assumed, taxes greatly reduced, and government minimized, among other social benefits.

The effective functioning of American democracy and freedom itself depends on these distinctions between classes of rights and, above all, on their moral (no harm) use. A jurist in the United Kingdom, Sir John Laws, recently observed: "A society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing about individual duty—nothing about *virtue* . . . Accordingly rights must be put in their proper place."⁶⁹

For rights to be kept "in their proper place," they must never supplant or override the moral duties that balance them. Thomas Jefferson, in his second inaugural address, asserted: "We are firmly convinced, and we act on that conviction, that with nations, as with individuals, our interests soundly calculated, will ever be found inseparable from our moral duties . . ."⁷⁰ Sir Laws continues in this vein, noting that a generation that knows Hitler or Stalin only as historical figures "may not see rights as an antidote against tyranny but rather as a legitimate means of promoting their own interests above the interests

right," that is, a right acknowledged in the soft law and positive law treaties, agreements, regulations, and practices that combine to form international law. If this right were exercised universally and exclusively, human society would come to an end within a single generation. Construing the right more broadly—for example, as a fundamental "right to have sex with any willing partner" so as to apply equally to heterosexuals—would also undermine and ultimately destroy the important role of monogamous marriage and family in the perpetuation of human life and training in moral education, also resulting in the eventual demise of civilized society.

68. Obviously, freedom of religion cannot be construed consistently with natural law as a means or justification to harm others or commit acts of terrorism in the name of one's faith. This demonstrates once more how natural law places moral restrictions on the people as well as on the government.

69. John Laws, *Beyond Rights*, 23 OXFORD J. LEGAL STUD. 265, 268–69 (2003).

70. THOMAS JEFFERSON, WRITINGS 518 (Merrill D. Peterson ed., 1984).

of others.”⁷¹ His implication is that rights thus misconstrued can facilitate tyranny rather than defend against it. In his words, “Unless personal moral values are seen as duty not rights, the subservience of the State to the people will at length become corrupted.”⁷²

E. Judicial Activism and the Rejection of Natural Law

The minimum level of morality required by natural law, that people should not harm others, was largely accepted in the United States, even assumed, until an alternative approach to morality began to gain political traction in the mid-20th century. Known today through concepts such as “political correctness,” “moral relativism,” “religious humanism,” and other catch phrases, including the “rights-based approach to human rights law,”⁷³ it appears, at first blush, to be a simple extension of the duty-based morality of natural law because it calls on people to champion the “human rights” of certain minorities perceived to be so underprivileged, neglected, and downtrodden that they cannot speak for themselves. On closer examination, however, it becomes clear that this philosophy rejects the principles, and even the very concept, of natural law. Beginning with the assumption that one moral system is neither better nor more natural than another, its proponents argue that every aspect of human life is “socially constructed,” the product of immersion in the norms of a given culture. One lifestyle choice is thus presumed as valid and valuable as any other, negating the need to restrict private behavior.

On the political plane, however, this alternative moral assumption has the effect of shifting the “no harm” requirement of natural law from a duty to restrict one’s own behavior toward others to a demand that others accept any and all personal behavior “from me.” This subtle but critical sea change shifts society away from the self-regulation of natural law toward a system that requires a large amount of government intervention and enforcement. The government must compel compliance with norms it establishes, since no guiding principle, no “social conscience” apart from government, exists as an internal guide

71. Laws, *supra* note 69, at 266.

72. *Id.* at 278.

73. For a more detailed discussion of the rights-based approach, see A. Scott Loveless, *Children on the Front Lines of an Ideological War: The Differing Values of Differing Values*, 22 ST. LOUIS U. PUB. L. REV. 371 (2003).

for the citizens. Without a “north star” moral standard outside of government to measure against, this system relies on positive law alone to establish a universal code of conduct. The result is greater, uninhibited freedom of behavior for some at the expense, primarily, of freedom of belief and greater safety for others. Even “fundamental rights” become creations of governmental debate and action, often based on whatever issues are in fashion at the time. Since *all* rights are legislated, they are also subject to revision, with the result that no rights are truly inalienable.

Another feature of this alternative morality is that its advocates seek to protect not just categories of people who share distinctions over which they have no control, but also behaviors, such as the use of certain illegal drugs or pornography, over which they can exert control. It is axiomatic in a natural law-based legal system that the law restricts only problematic behaviors, not privately held beliefs, but this alternative morality tends to create protected classes of behavior that are only “tolerated” under natural law due to their potentially harmful character. Its advocates often downplay or disregard the harmful effects of those choices at the societal level, exacerbating tension with such questions as, “Do we overlook the harm if the action is between consenting adults?” Arguments originating from this perspective have spawned concepts like “victimless crime” and “right of privacy” and have altered common, trusted words by giving them new meanings. “Tolerance,” for example, comes to mean the acceptance of all lifestyles as equal in value, and one can demand this version of tolerance without extending it to others who see unique value in, say, the principles of natural law.

It is worth observing that in those cases where modern judicial activism in the United States is most apparent, such as in *Roth v. United States*,⁷⁴ *Roe* and its progeny, *Lawrence*, *Romer*, *Goodridge*, and *In re Marriage Cases*, the courts have consistently moved in one direction only: away from the citizen’s moral duty requirements under natural law, which requires a degree of self-control, and toward this alternate version of morality that perceives some areas of license as a protected moral good.⁷⁵ As a result, we now have a novel and virtually unchecked

74. *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscene material is protected under the constitutional protection of freedom of speech, and therefore beyond the states’ authority to regulate except in extreme cases). Later cases further restricted the states’ ability to regulate, much less define, obscenity. This was a usurpation of states’ rights by the federal government, arguably in violation of the Tenth Amendment.

75. A common argument is that there is no significant harm in such actions. The high and

“right of privacy,” invented in *Griswold v. Connecticut* (in the name of protecting the sanctity and importance of marriage), a seemingly innocuous right later expanded in *Roe v. Wade* and its successors to deny completely the right to life of the unborn in favor of the right of a woman to control her own body, regardless of the views of state legislatures comprised of representatives elected by the people. The penumbral right of privacy now casts its own shadow not only over marriage, but over the Constitution itself and our sacred inalienable rights.

In *Lawrence*, the Court further expanded the privacy right to include how and with whom one might choose to have sex, in favor of a morally preferred sexual license, without regard for the weight of precedent such as *Bowers v. Hardwick*,⁷⁶ and again without regard for the expressed law created by a state legislature of publicly elected officials. In doing so the Court may not have adequately considered the harmful social consequences and possible valid reasons for which the Texas Legislature, like many others, may have enacted its prohibition and satisfied the rational basis test in doing so. In *Romer*, the Supreme Court struck down a state constitutional amendment that simply affirmed that homosexuality would not be considered a separate “protected class” under the state constitution (but not denying homosexuals the same rights all other citizens held).⁷⁷ More recently, in *Goodridge* and *In re Marriage Cases*, activist state supreme courts have relied on this same “right of privacy,” along with a new view of “human dignity,” to elevate homosexual relationships to a position of equal value to society as reproductive man-woman unions.⁷⁸ The effect of this “equality” is a leveling one—by raising the status of homosexual pairings it actually devalues as “special” the role and unique and vital social contributions of heterosexual marriage.⁷⁹ Children, America’s future, are

rising rates of crime and violence (even among the youth and in schools), child and spouse abuse, the general coarsening of society, the AIDS pandemic and sexually transmitted diseases, drug and alcohol abuse and addiction, as well as the recently much publicized ethical breaches in business and lending practices, indicate that such is not the case.

76. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state legislatures have the right to legislate against homosexual acts).

77. *Romer v. Evans*, 517 U.S. 620, 620 (1996).

78. See *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008); *Goodridge v. Dep’t of Pub. Health*, 748 N.E.2d 941, 948 (Mass. 2003).

79. This competing morality also underlies no-fault divorce, which virtually swept the country in the 1970s and 1980s, replacing the formerly acknowledged duties of husband and wife to each other—even when those duties run counter to revised personal desires, often licentious in character.

left out of the equation or at least pushed into the background as extraneous, in favor of the immediate “rights” of selfish adults unbridled by considerations of effects on others.

In these critical cases involving moral issues, the respective courts have also elevated themselves to a position of unusual authority, denying the place of the legislative branch, much less the formerly sovereign people and states, to speak to such questions. Contrast these instances of judicial activism with the recent language of the New York Supreme Court when confronting a similar issue: “It is not for us to say whether same-sex marriage is right or wrong. We have presented some (though not all) of the arguments against same-sex marriage because *our duty to defer to the Legislature* requires us to do so.”⁸⁰

By imposing court-determined value judgments in the place of natural law (and in place of the legislature), certain judges have reinterpreted the Constitution as rejecting the very natural law-based rights it was intended to preserve and which these judges were sworn to protect. Both actions appear profoundly unconstitutional⁸¹ and call into question the ability of the courts to police themselves as strictly as do the other branches of government. The unique guiding principles the Founders described as “unalienable,” are rapidly being alienated by courts that replace the Founders’ intent with alternative, and ultimately dangerous views.

F. Marriage As Seen Under Natural Law

Aside from its involvement with the legal issues surrounding abortion, pornography as artistic expression,⁸² cohabitation, the “separation of church and state,” and divorce and family law questions, this alternative view of morality also drives the current efforts to redefine marriage, using positive law in an attempt to reform an institution that precedes positive law and is truly a function of natural law. It urges a view of marriage based solely in personal fulfillment and selfish self-interest. Traditional marriage is not just about sex, or even about sex and affection. While it does encompass feelings of friendship, romance,

80. *Hernandez v. Robles*, 7 N.Y.3d 338, 366 (2006) (emphasis added).

81. It might also be suggested that the best argument for allowing displays of the Ten Commandments in courthouses and in public facilities is not that they promote a particular religion or a belief in God, but that they emphasize the relation of our law to the moral principles of natural law, which are reflected in the Ten Commandments.

82. *Roth v. United States*, 354 U.S. 476 (1957).

and mutual self-fulfillment, marriage is first and foremost about accepting the obligation and responsibility to create, raise, and provide for a family. Marriage is generative, not derivative or dependent; it channels sexual expression into a path that naturally produces children, a new generation of human beings, and it demands that the marriage partners take responsibility for those children—responsibility for nurturing, educating, providing moral instruction, and in general preparing them for the future—and for the financial obligations inherent in doing so. Marriage is about creating a family, and family is all about responsibility for each other. It is about making a public commitment to remain together even through the disappointments, hardships, and inevitable changes encountered by every couple, in order to assume the responsibility of preparing a rising generation for their own turn with the torch of freedom, for their own responsible adulthood and citizenship. Of all the issues involving the moral debates of the modern “culture wars,” transforming marriage into a simple creation for adult preference and pleasure represents perhaps the single greatest blow to the natural law foundations of our Constitution.

John Adams wrote, “The foundations of national morality must be laid in private families. In vain are schools, academies, and universities, instituted, if loose principles and licentious habits are impressed upon children in their earliest years.”⁸³ The family in which a marriage between a man and a woman produces, nurtures, and teaches children is, in the final analysis, the core feature that natural law is intended to protect because it is the surest training ground for developing the “moral sense” that shapes responsible, caring citizens and helps them avoid the inclination to do harm. By building this moral center, families help preserve maximum freedom in society by preserving natural law morality among the people. The government cannot serve this function, and by attempting it, would only undermine families in the role only they can genuinely fulfill.

Locke asserted that “the *fundamental Law of Nature* being the *preservation of Mankind*, no Humane Sanction can be good, or valid against

83. JOHN ADAMS, *Diary*, in III THE WORKS OF JOHN ADAMS 94, 171 (1854). Adams’s comment in the full quote might also give us pause to consider the rising proportions of American children being raised in a fragmented family or otherwise by a single parent. The proportion of children born to an unmarried mother has risen from below ten to almost forty percent (39.7% in 2007) in the last forty years, and much higher in some subpopulations. STEPHANIE J. VENTURA, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES 2 (2009), <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>.

it.”⁸⁴ Traditional marriage meets the key requirements both Locke and Adams identify; it “preserv[es] Mankind” by allowing for its regeneration and, when conducted properly, it provides children with real-life experience in the moral principles on which our American freedoms depend. Traditional heterosexual marriage and its natural perpetuation of human life, its commitment to the preparation of the rising generation, and its internal consistency with the right/duty tie of natural law to positive law cannot be duplicated by a homosexual pairing.

Undoubtedly numerous gay and lesbian couples truly care about each other and enjoy their sexual relationship, share financial and other obligations, and contribute to the community and each other’s extended families. But they will never share the wonderment of looking into the face of an infant, a miracle that they together have created, nor will they feel the intensity and weight of that joint responsibility stretching into the future. It is biologically impossible.

Until *Lawrence*, homosexual behavior was considered sufficiently harmful to justify State regulation or prohibition.⁸⁵ Some of the harms of homosexuality are well-known, such as its role as a primary vector in the spread of HIV/AIDS and other public and private health risks.⁸⁶ Other significant costs and risks are less publicized.⁸⁷ While the ho-

84. LOCKE, *supra* note 22, at 36–38.

85. In *Lawrence*, the Supreme Court did not conclude that homosexual activity was a fundamental right, only that Texas had not satisfied the lower rational-basis test to prohibit it. Given the established risks to personal and public health and well-being, among others, one might wonder how strenuously Texas argued its case. See generally WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? (Lynn D. Wardle ed., 2008); A. Dean Byrd & Shirley E. Cox, *Strict Scrutiny of Prospective Adoptive Parents: What Children Really Need*, in THE FAMILY IN THE NEW MILLENNIUM: WORLD VOICES SUPPORTING THE “NATURAL” CLAN (A. Scott Loveless & Thomas B. Holman eds., 2007). In any event, behavior receiving constitutional protection only at the level of surviving the rational-basis test does not rise to the level of a fundamental right under natural law. With better evidence of harm and, therefore, a legitimate state interest, appropriate regulation might still be instituted.

86. See, e.g., Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997 (2007).

87. Despite the volume, frequency and intensity of the rhetoric on this topic, it is not a scientifically established fact that homosexuality is a genetically determined trait. Dr. Francis S. Collins, head of the Human Genome Project at the National Institute of Health, after reviewing the literature on homosexuality and genetics, concluded, “There is an inescapable component of heritability to many human behavioral traits,” including homosexuality, but that “for virtually none of them is heredity ever close to predictive.” FRANCIS S. COLLINS, THE LANGUAGE OF GOD 226 (Free Press 2006). Hair, eye, and skin color are genetically *determined*. There is no way around them. The statistical genetic component for homosexuality (from .20 down to .11, depending on the statistical model employed) is more akin to that for depression, or to an increased

mosexual community undoubtedly desires to be recognized as “normal,” and to have their style of sexual behavior freed of its historical stigma, the rush to judgment and the sudden impetus to give it equal footing with traditional marriage is premature. In contrast with heterosexual marriage, and whatever its ultimate harm to public well-being may or may not be, homosexual activity does not directly benefit society. It only satisfies the desires of the individuals involved, in the pattern of tolerance-based rights. The attitude with which it is trumpeted as a “right” and the tone and strength of the campaign to normalize this behavior have seen few equals, even in recent history. They have the feel of precisely the type of “self-interested promotion” Sir Laws warns against—the use of “rights” as a means to self-interested ends rather than serving the larger interest of society.⁸⁸

It is possible that many Americans would not wish to outlaw the cohabitation of a genuinely devoted homosexual couple, regardless of any discomfort with same-sex behavior. However, when condoning it includes redefining traditional marriage as no more beneficial to society than homosexual coupling, when homosexual practices are presented as an acceptable option in the schools, even introducing young schoolchildren for the first time to the concept of this practice (which, post-*Goodridge*, is now happening in Massachusetts and elsewhere), it becomes a matter of deeper concern. When it also means redefining marriage and thereby implicitly denying or brushing aside the social benefits of traditional marriage and the consequent importance of its normative function in society, the sense of alarm becomes urgent.

In the long run, however, the greatest adverse effect of this shift may be its overall erosive influence on the self-regulating aspects of natural law to a peaceful, free society—the logical result of changing the definition of marriage to include homosexual couples. The recent leap from prohibition (even if largely unenforced) to constitutional

susceptibility to an addiction to alcohol or tobacco after exposure. It indicates a *predisposition* at most, not a biological given, and it does not foreclose the human capacity to choose one's behavior. A predisposition would never be expressed without environmental exposure. NAT'L ASSOC. FOR RESEARCH & THERAPY OF HOMOSEXUALITY, <http://www.narth.com>. For the sake of argument, it may be possible that some people professing homosexual orientation were born with a genetic predisposition, as opposed to a genetic determination, in that regard. However, it has not been demonstrated, given the powerful, pleasurable stimulus of the sexual experience and the known problems of addiction to sex among some heterosexuals, that early, pubescent (or later repeated) exposure to homosexual acts and Pavlovian association and habituation are not at least equally explanatory.

88. Laws, *supra* note 69.

protection demonstrates the significance of shifting the moral foundation of a legal system from one philosophical base to another, in this case from natural law to an alternative morality emphasizing freedom alone, freedom unhinged from responsibility to others, freedom that is often hostile to the self-restraint that natural law requires. Rights so perceived, destabilize rather than protect, and ultimately jeopardize our freedoms in this democratic republic.

III. CONCLUSION

The framers of the Constitution were guided by the moral and philosophical principles of the Declaration of Independence, the concept of natural law being chief among them. Many modern social issues turn on moral issues, but our courts often seem adrift on the moral questions, lacking a North Star, influenced by whatever social fad is currently in vogue or has captured the attention of the media. Reliable guidance is available, however, by simply turning back to the original source document that started it all, the Declaration of Independence.

Although one might address any of several current issues in the light of natural law, this article has focused on whether same-sex marriage comports with the Constitution. With regard to marriage and the Constitution, the first question to consider is whether marriage is merely a creation of government and therefore subject to government modification, or whether it is an “inalienable” feature of natural law that the Declaration of Independence and the Constitution were intended to protect. Stated differently, is marriage simply the right to public acknowledgment and acceptance of a frequently ephemeral amorous relationship? Or is it the fresh spring for long-term generation and regeneration of society, placing sexual union into a restricted context of fidelity, commitment, and long-term acceptance of responsibility that both benefits children and society? Is marriage not itself a primary feature of natural law, which should therefore remain outside the scope of government interference, let alone redefinition?

The second and companion question is whether the judicial activism that has decreed constitutional protection for same-sex “marriage” is a judicial violation of substantive due process and the constitutional separation of powers, a government in the style of King George, with judges rather than a king, a model rejected more than 200 years ago. Looking through the lens of natural law, we might well conclude that if the people of a given state decide that they can “tolerate” same-sex

relationships and the associated public health risks and costs to the taxpayer, to the extent they are willing to afford it some form of legal recognition, their elected representatives can enact legislation to make suitable provision for the experiment. But it should not be done so as to equate such relationships with traditional marriage, and it should not be accomplished through a judicial fiat of extra-constitutional “rights.” It would necessarily remain no more than a government-created and “tolerance-based” right, susceptible to amendment or repeal if the harm is greater than anticipated, as was done when states began to legislate against smoking in public as a public health risk. A created government cannot invent a new fundamental right that contradicts the higher natural law under which the government itself was created.

For all of the foregoing reasons, the right to marry a member of the opposite sex must be seen as a fundamental right, an “inalienable” feature lying at the heart of natural law. Its covenantal heritage pre-dates all government and its male/female nature brings to the world the children to whom natural law subsequently grants their precious and “unalienable” rights. If marriage becomes no more than a label of social approbation for any amorous or close relationship, we will truly have lost the major safe harbor of responsibility-based, natural law morality—the “foundation of the fabric” once described by George Washington for which he and the other Founders placed their best efforts and risked their lives.⁸⁹

Almost two centuries after the founding, in his 1961 inaugural address, President John F. Kennedy proclaimed that these principles were still alive.

[T]he same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God.

We . . . [are] unwilling to witness or permit the slow undoing of those human rights to which this Nation has always been committed, and to which we are committed today at home and around the world.⁹⁰

89. The extended quotation from George Washington reads as follows:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . It is substantially true that virtue or morality is a necessary spring of popular government. . . . Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?

George Washington, Farewell Address, *supra* note 64, at 62.

90. John F. Kennedy, Inaugural Address (Jan. 20, 1961), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 305, 306 (1989).

In the question of recognizing same-sex relationships, we are once again being asked to choose between two mutually exclusive moral systems on which to base the law: the natural law providing the core principles of the Declaration of Independence and the United States Constitution or an alternative morality based in moral relativism that allows people to, through law, turn their personal preferences into “rights” regardless of the social consequences—a “morality” that would facilitate the “undoing of those human rights to which this Nation has always been committed”⁹¹ In 1776, the Founders chose natural law and made enormous sacrifices to afford us our responsible freedoms. Our country has benefitted immensely from their choice and sacrifices. Our future optimal course may be uncertain, but we should first be aware of the full implications, rather than allow ourselves to be force-fed by judicial decree or dissembling social advocates. We must not confuse or conflate our fundamental rights and responsibilities under natural law with lesser, government-created rights, much less with tolerance-based “rights” which might as easily be regulated as a public nuisance like smoking or drunk driving. Doing so stands the Constitution on its head. The vitality of our form of government and the Constitution itself are ultimately at stake, lying on the block alongside marriage. In Lincoln’s immortal words, the question is whether a “government of the people, by the people, for the people, shall not perish from the earth” without the moral constraints of natural law, its lifeblood.⁹²

91. *Id.*

92. Lincoln, *supra* note 10.