

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2017

Deontological Originalism: Moral Truth, Liberty, and, Constitutional Due Process: Part II - Deontological Constitutionalism and the Ascendency of Kantian Due Process

Peter Brandon Bayer

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Bayer, Peter Brandon, "Deontological Originalism: Moral Truth, Liberty, and, Constitutional Due Process: Part II - Deontological Constitutionalism and the Ascendency of Kantian Due Process" (2017). *Scholarly Works*. 1279.

<https://scholars.law.unlv.edu/facpub/1279>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

DEONTOLOGICAL ORIGINALISM: MORAL TRUTH, LIBERTY, AND CONSTITUTIONAL “DUE PROCESS”

PART II – DEONTOLOGICAL CONSTITUTIONALISM AND THE ASCENDENCY OF KANTIAN DUE PROCESS

PETER BRANDON BAYER*

This article offers what has been needed but lacking in modern legal commentary: thorough, meticulous and timely proof that, pursuant to principles of Originalism, the Constitution -- the highest law of the United States -- *mandates that any governmental act is unconstitutional if it is immoral.*

Specifically, this article returns fundamental constitutional jurisprudence to where it rightly was until roughly a century ago; and, where, recently, it has been returning in the form of Supreme Court substantive due process precedents based on admittedly ill-defined principles of human dignity. The overarching concept, which I call Deontological Originalism, asserts that both the Founders of this Nation and the Reconstruction Congress properly believed in natural rights derived from principles of natural law. Accordingly, they sought to enforce through the Constitution, the natural rights philosophy set forth in the Declaration of Independence. Most importantly, natural law and resultant natural rights are deontological, that is, they enforce *a priori*, immutable moral precepts that descend not from human imagining but from the natural order of existence, what the Declaration denotes as, “Nature and Nature’s God.” That is why, under the Constitution, any and all immoral governmental conduct is unconstitutional regardless of bureau or actor -- legislative, judicial, executive, or administrative -- and regardless of level --- federal, state or local.

* Peter Brandon Bayer, Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks deeply The Thurgood Marshall Law Review for having the faith to publish the lengthy work. I am grateful that the editors have given me a full platform for my constitutional metatheory. I thank as well Dean Daniel Hamilton for his support and great patience. The author thanks as well his uncomplaining colleagues Ian Bartrum, Tom McAfee, Ruben Garcia, and Thom Main, for their thoughtful comments when discussing the ideas in this article. This article was written in remembrance of my Father, Stephen R. Bayer, whom I was fortunate to know for over 60 years and whose stalwart decency inspires me to this day. This article is written as well thinking of my Mother, Susan Bayer, who, thankfully is still with us and who is just the greatest person in the world.

Most of all, I dedicate this work to my wonderful wife Joan, who has made my life a blessing and who, as always, is my strongest support and my most perceptive yet devoted critic.

Unlike articles that aver similar ideas, this writing presents Deontological Originalism as a *metatheory*, meaning, it expounds at once essentially all fundamentals, and their respective proofs, as indeed any work defining and defending a theory of Originalism should do. Metatheory accounts for this commentary's length; but, frankly, it is time that one law review article presented a metatheoretical perspective given the exasperated skepticism and postmodernist complacency most often greeting serious assertions that the Constitution enforces natural law and, therefore, the bench and bar must become "natural lawyers" when addressing constitutional rights.

After roughly thirty years of perhaps sporadic writings addressing many of the relevant aspects, I offer Deontological Originalism, a venture proceeding from the utility of Originalism, to the meaning of Deontology, to the intent of the Founders and of the Reconstruction Congress, to the deontological principles of Enlightenment philosopher Immanuel Kant, to modern due process dignity theory enforcing Deontological Originalism *via* Kantian morality, culminating in the Supreme Court's bravura rulings requiring that Government accord same-sex marriage the full and equal legal status accorded opposite-sex marriage.

I. INTRODUCTION -- "BY JING, THAT'S ALL THERE IS TO IT, RIGHT AND WRONG."

Throughout the century-and-a-half since his assassination, scholarship and popular culture alike have extolled America's sixteenth and arguably greatest President, Abraham Lincoln.¹ Likely, most law review articles accent the scholarly aspect. Nonetheless, this introduction embraces popular culture observing that, beginning with the "silent era," motion picture dramatizations of Lincoln's life and legend are plentiful, usually respectful if not worshipful, although often lacking steadfast historical accuracy.² One of

1. "Surveys of historians and of presidential scholars consistently rank Lincoln as one of the greatest Presidents and many surveys rank Lincoln as the greatest President. *See, e.g., Lincoln Wins: Honest Abe Tops New Presidential Survey*, CNN.com, Feb. 16, 2009, <http://www.cnn.com/2009/POLITICS/02/16/presidential.survey/index.html>" Jeffrey M. and Linda B. Samuels, *Lincoln and the Patent System: Inventor, Lawyer, Orator, President*, 3 ALB. GOV'T. L. REV. 645, 675 note 219 (2010).

2. Important movies about Lincoln include *Abraham Lincoln* (1930), produced and directed by film pioneer D.W. Griffith, one of Griffith's but two sound films. Prior to *Abraham Lincoln*, the sixteenth president was an important figure in Griffith's 1915

the most respected such films is 1939's *Young Mr. Lincoln*, directed by the legendary John Ford and starring stalwart American actor, Henry Fonda, in a performance justly considered iconic.³ Recently reissued in digital form by the respected video production-distribution company The Criterion Collection, *Young Mr. Lincoln*, as the title implies, recounts Lincoln's early adulthood from storekeeper to attorney. Apparently inspired by the writings of venerated poet and Lincoln chronicler Carl Sandberg, one pivotal scene depicts the future president's first encounter with legal doctrine and theory. Professor Albert W. Alschuler described Sandberg's famous account: "a man driving west in a covered wagon lightened his load by selling a barrel of goods to a village store clerk. 'I did not want it,' Abraham Lincoln explained, 'but to oblige him I bought it, and paid him half a dollar for it.' Among the goods in the barrel, Lincoln discovered Blackstone's Commentaries."⁴

momentous, innovative if extremely controversial silent epic, *Birth of a Nation*. Other significant quasi-biographical movies include *Abe Lincoln in Illinois* (1940), featuring a rightly celebrated portrayal by Canadian actor Raymond Massey, and 2012's acclaimed *Lincoln*, co-produced and directed by the highly regarded film-maker Steven Spielberg and starring lauded actor Danial Day-Lewis whose nuanced performance earned him his third Motion Picture Arts and Sciences Academy Award -- "Oscar" -- for Best Actor.

While most films understandably present him as the beloved personage he was and remains, no less than with other revered historical figures, Hollywood has not hesitated to exploit Lincoln for fun and profit as evidenced by 2012's *Abraham Lincoln, Vampire Hunter* and the "direct to video" *Abraham Lincoln vs. Zombies* (2012) (advertisements of which touted, "While the Civil War rages on, President Abraham Lincoln must undertake an even more daunting task - destroying the Confederate Undead") -- two movies that, if nothing else, reconfirm the wisdom of the adage *sic transit gloria mundi* ("thus passes earthly glory").

3. As critic Derek Malcolm expressed it sixty years after *Young Mr. Lincoln*'s release, "Fonda's performance was once considered the sole reason for the film's success, and it is extraordinarily subtle even as it looks direct and simple." Derek Malcolm, *John Ford: Young Mr. Lincoln*, *The Guardian* (June 24, 1999), <https://www.theguardian.com/film/1999/jun/24/1>, (accessed, March 3, 2018).

This writing notes in passing that *Young Mr. Lincoln* was part of the exceptional film output that has inspired critics and film historians to credit 1939 as "Hollywood's greatest year." E.g., 1939 in Films, Wikipedia, https://en.wikipedia.org/wiki/1939_in_film#cite_note-EW_Article-3, notes 2 and 3 (accessed March 3, 2018). Other films of high repute produced in 1939 include: *Gone with the Wind*; *Mr. Smith Goes to Washington*; *The Wizard of Oz*; *Stagecoach*; *Ninotchka*; *The Women*; *Gunga Din*; *The Hunchback of Notre Dame*; *Goodbye, Mr. Chips*; *Beau Geste*; *Dark Victory*; *Confessions of a Nazi Spy*; *Destry Rides Again*; *Dodge City*; *Golden Boy*; *Juarez*; *Of Mice and Men*; *Only Angels Have Wings*; *The Private Lives of Elizabeth and Essex*; *The Roaring Twenties*, *Son of Frankenstein*; *The Rules of the Game*; and, *Wuthering Heights*.

4. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 6 (1996) (quoting, 1 Carl Sandburg, ABRAHAM LINCOLN: THE PRAIRIE YEARS 163 (1926)). Alschuler added that, "Chroniclers less credulous of traditional stories have reported that Lincoln purchased a set at a Springfield auction." *Id.* (citing, See David Herbert Donald, LINCOLN 53 (1995); Benjamin P. Thomas, ABRAHAM LINCOLN 43 (1952)).

Prof. Alchuler continued, “Sandburg pictured Lincoln reading Blackstone’s declaration that no laws are valid unless they conform to the law of nature or of God while lying ‘on the flat of his back on the grocery-store counter, or under the shade of a tree with his feet up the side of the tree.’”⁵ Indeed, *ala* Sandburg, director John Ford presented Lincoln immediately after acquiring his first law books, resting on the grass, feet pressed against a large tree, marveling at the new insights Blackstone sparked in his eager, inquiring mind. As history does not chronicle Lincoln’s exact thoughts or words at that moment, Ford relied on his screenwriters, including beloved poet Steven St. Vincent Benét whose book-length poem of the Civil War, *John Brown’s Body*, won a Pulitzer Prize in 1929, a decade before *Young Mr. Lincoln*’s release. Completely captivated having at last found a professional calling, the young Lincoln exclaims while reading Blackstone, “Law -- that’s the rights of persons and the rights of things. ... Wrongs are violations of those rights. *By Jing, that’s all there is to it, right and wrong. Maybe I ought to begin to take this up serious!*”⁶

Young Mr. Lincoln’s sentiments are a compellingly simple and, for so few words, an amazingly apt expression of the meaning, the purpose, and the function of law, particularly constitutional law. As this writing seeks to prove, “right and wrong” actually is “all there is to it,” at least regarding the basic foundation upon which the many and varied complexities of American “due process of law” doctrine derive. Therefore, a thorough and earnest understanding of “right and wrong” is the sole route to appreciating constitutional civil rights’ importance and magnificence. That is, only though correct moral philosophy can, as John Ford’s Lincoln admonished, sincere lawyers, judges, politicians, and legal scholars, “take this up serious!” In that spirit, for whatever it is worth, this article is the culmination of my forty years as an attorney and law teacher. It is essentially everything I understand and hold dear about the unique greatness of American constitutional law -- greatness that, if after two centuries still remains more potential than actuality, nonetheless often has manifested in the triumph of right over wrong, justice over bigotry, fairness over inequity.

5. *Id.* at 7 (quoting Sandberg at 164).

6. *Young Mr. Lincoln*, The Criterion Collection, at 00:06:25-00:07:00 (emphasis added). While contrived, the tone and sentiment of the screenplay seem accurate. For instance, historians note that Lincoln never cursed nor swore, “though Judge Weldon said at the Salem Chautauqua that once in his life when [Lincoln] was excited he said, ‘by Jing!’” William E. Barton, *THE SOUL OF ABRAHAM LINCOLN*, U. of Ill. Press 55 (2005) (quoting, T.G. Onscott, *LINCOLN AND SALEM -- PIONEERS OF MENARD AND MASON COUNTIES*, at 24).

The editors of the Thurgood Marshall Law Review graciously have divided *Deontological Originalism: Moral Truth, Liberty, and Constitutional “Due Process,”* into two parts. Part I, *Originalism and Deontology*,⁷ demonstrates that morality is not consequentialist but rather is deontological.⁸ Thereafter, Part I explicates “Kantian morality” as the best among competing deontological theories. Kantian morality comprises the holistic framework of ethics exhorting by the eminent Enlightenment philosopher Immanuel Kant (but does not necessarily embrace “Kant’s ethics,” the specific resolutions of discrete moral dilemmas Kant himself might have deduced from his own framework).⁹ In addition to expounding abstract moral philosophy, Part I elucidates why, to be valid, any theory of American constitutional law must be originalist,¹⁰ that is, the United States Constitution, “should be interpreted according to its original meaning.”¹¹ Hence, *Originalism and Deontology* presents in the abstract, the theory of Deontological Originalism, the fusion of Kantian morality with constitutional originalism.

This second part, *Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, verifies that both the original Founders (the drafters of the Declaration of Independence and the original Constitution) and the Reconstruction Congress (which drafted, *inter alia*, the Thirteenth and Fourteenth Amendments) embraced Deontological Originalism by enforcing

7. 43 T. MARSHALL L. REV. 1 (2017) (hereinafter, “*Originalism and Deontology*”).

8. *Id.* at Section 2. Put very briefly, regarding any particular problem, the morally correct answer is not that which produces the best consequence -- the most pleasing outcome. Accordingly, Utilitarianism, the most prevalent form of Consequentialism, wrongly avers that morality is utilitarian, meaning the proper moral result maximizes the happiness of some designated person, group or society. Rather, morality is deontological, a flow of *a priori*, immutable precepts discernable through neutral reason and descending not from human inventing but from the natural order of existence. That is why, according to Deontology, morality concerns not “the good,” meaning what people want, but rather “the right,” meaning what they must do regardless of how understandably undesirable any resulting outcome may be.

9. *Id.* at Section 3.

10. *Id.* at Section 4.

11. Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 83 (2010) (criticizing Originalism). Prof. Keith Whittington likewise expressed Originalism’s major premise: “the discoverable meaning of the Constitution at the time of its initial adoption [is] authoritative for purposes of constitutional interpretation in the present.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004); *see also, e.g.*, Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSACT. LAW 1239, 1248 (2011) (footnote omitted) (“In simple terms, originalism is a method for interpreting a constitutional provision by seeking to uncover its meaning at the time of its adoption.”); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 9 (2018).

through the Constitution as America's supreme law, the Natural Law principles of the Declaration.¹² Additionally, Part II recounts the development of the Supreme Court's substantive due process jurisprudence which, at present, surprisingly espouses two distinct *and essentially incompatible* constitutional frameworks. The first, designated as the *deeply rooted principles* approach, holds that governmental actions comport with "due process of law" if, as an empirical matter, they advance certain popular American traditions and customs. That standard purports to subordinate the personal partialities of judges in favor of the accrued, aggregate wisdom of the American people. In so doing, courts purport to eschew making moral judgments regarding the governmental actions under review.¹³

The second substantive due process standard -- designated the *dignity paradigm* -- avers that governmental action violates "due process of law" if it offends innate "human dignity." This "human dignity" judicial paradigm arguably is steeped in Kantian morality although it declines to acknowledge formally a Kantian source. Despite its lack of attribution to Kantian principles, Section 6 argues that the "human dignity" approach comports with Deontological Originalism, as intended by the Founders and the Reconstruction Congress. Accordingly, the *dignity paradigm* is correct and the *deeply rooted principles* framework should be abandoned.¹⁴

Highlighting the foregoing, Part II concludes by demonstrating that the Supreme Court's line of precedent sometimes denoted as "the homosexual rights decisions,"¹⁵ particularly its recent *Obergefell v. Hodges*¹⁶ ruling that States must treat same-sex marriages equally with opposite-sex marriages, is eminently correct constitutional moral theory sounding in the Deontological Originalism exhorted by this article.

12. See *infra* Section 2 (discussing the deontological theory justifying the American Revolution), Section 3 (original founders), and Section 4 (Reconstruction Congress).

13. See *infra* notes 771-98 and accompanying text.

14. See *infra* Sec.3-c. In that regard, I was considering entitling Part II either *Deontological Originalism -- The Deontologists Strike Back*, or *Deontological Originalism -- Revenge of the Framers*. However, I decided my dedicated and hard-working editors would not be amused.

15. Martin A. Schwartz, *Lawrence v. Texas: The Decision and Its Implications for the Future*, 20 *TOURO L. REV.* 221, 225 (2004).

16. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See *infra* notes 945-1020 and accompanying text discussing the Supreme Court's "homosexual rights" jurisprudence.

II. THE DEONTOLOGICAL FOUNDATIONS OF THE ORIGINAL CONSTITUTION –

Having proved in *Originalism and Deontology* that moral comportment is deontological, not consequentialist, this writing now turns to establishing the deontological *bona fides* of the American Revolution and resulting Constitution, including how, nearly a century later, those *bona fides* influenced the pivotal amending of the Constitution during the Reconstruction Era. Through this discussion I substantially expand and elucidate earlier work wherein I demonstrated that America's Founders were deontologists who understood and embraced morality's integral link to legitimate government¹⁷ -- a link they stressed in The Declaration of Independence to defend the American Revolution. Thereafter, to enforce the Declaration's principles as the new nation's highest law, the Framers wrote and helped to secure the ratification of the Constitution, requiring, *inter alia*, that offices and agents of American government act morally in all regards. Deontological morality is America's highest law because, as the Founders rightly expressed in the Declaration and operationalized in the Constitution's original text plus Bill of Rights, nothing but strict moral comportment legitimizes Government however any particular government might be structured.¹⁸

In addition to reconfirming that Deontological Originalism best expresses the Founders' intent and meaning, this writing explains how the *post*-Civil War Fourteenth Amendment completed the Constitution's deontological structure. Specifically, as a matter of law (but arguably not as a matter of moral philosophy), prior to the Fourteenth Amendment, the Bill of Rights, including that part of the Fifth Amendment guaranteeing "due process of law," constrained only the Federal Government, leaving the states, *as a matter of formal constitutional law*, free to abide by moral governance

17. Peter Bayer, *Sacrifice and Sacred Honor: Why the Constitution Is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 335-42 (2011); for a similar perspective, *see also, e.g.*, D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas's Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341, 346-53 (2013).

18. While all governments and their constituent offices and agents must act ethically, the Founders understood that, depending on their more particular priorities, a citizenry might design distinct offices of government in diverse fashions. For instance, under our system of federalism, "states will approach problems differently than the federal government because state governments are structured very differently than the national government, with many states electing judges, providing line-item veto authority to the Governor, and allowing the public to enact policy change through referendums." Gerald G. Ashdown, *Federalism's Floor*, 80 MISS. L. J. 69, 71 note 8 (2010) (discussing, M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47, 73-74 (2004)).

at their respective discretions.¹⁹ Thus, as originally ratified, the Constitution failed to enforce the Declaration's avowal of governmental moral legitimacy. In the aftermath of the Civil War, the Reconstruction Congress enacted and fostered the ratification of the Fourteenth Amendment, applicable to the States, mandating, *inter alia*, that all state and local governmental conduct must comport with "due process of law."²⁰ The Reconstruction Congress did so to realize at last the unfulfilled promise of the original Framers that, pursuant to the Constitution, all branches and levels of American government are obligated to conform with the deontological moral imperatives originally set forth in the Declaration of Independence. Because the Reconstruction Congress finished what the Founders began, specifically, mandating governmental moral comportment as America's dominant law, Deontological Originalism alone explains how to define and apply provisions of the Constitution.

A. The Founders Embraced Natural Law-Natural Rights Principles --

Logically, the proof of Deontological Originalism's principal premise that the Founders espoused and actualized deontological morality emanating from natural law begins with the American Revolution. Nearly seventy-five

19. *Barron v. City of Baltimore*, 32 U.S. [7 Pet.] 243, 247-50 (1833). Indeed, as a matter of technical law, to this day, the Bill of Rights is inapplicable to the states. *Id.*; see also, e.g., *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010) (citing, *inter alia*, *Barron*, "The Due Process Clause of the Fifth Amendment, however, applies only to the federal government."); *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) (Sixth Amendment read alone applies only to federal prosecutions). Nonetheless, of vital importance herein (see *infra*, Section 5-b), the Fourteenth Amendment's guaranty of "due process of law ... has [not only] the procedural component that these words suggest, but it also has been construed to have 'a substantive component,' ... that [effectively has] incorporate[d] most of the guarantees of the Bill of Rights ... and that protects other 'fundamental rights and liberties' that are not expressly mentioned in the Bill of Rights ..." *Bailey v. City of Port Huron*, 507 F.3d 364, 367 (6th Cir. 2007) (quoting, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

20. That amendment reads in pertinent part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. That text seemingly denotes "due process" and "equal protection" as two separate and implicitly distinct constraints on state actions. The federal courts, however, rightly explain that, in fact, "equal protection of the laws" is an offshoot or subset of "due process of law," a proposition urgent to the thesis of this writing that *all* constitutional fundamental rights are subsets of, and emanate from the idea "due process of law." E.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954); see *infra* notes 570-82 and accompanying text.

years ago, Pulitzer Prize winning historian Charles Warren²¹ aptly lamented, “It is a singular fact that the greatest event in American history -- the Declaration of Independence -- has been the subject of more incorrect popular belief, more bad memory on the part of participants, and more false history than any other occurrence in our national life.”²² To that effect, some critics complain that naïve academicians over-romanticize its abstract, theoretical prose, to minimize the partisan pragmatics that impelled the drafting and adoption of the Declaration. As Timothy Sandefur related,

Russell Kirk, for instance, wrote that the American revolutionaries “meant to keep their old order and defend it against external interference,” rather than fighting for any “theoretic dogma.” In his view, the Declaration, “[h]astily drawn up by Jefferson and a committee of four others,” was meant as “an apology to the world — France in particular — for the Patriots’ armed rising, in hope of assistance from abroad.”²³

Regardless that numerous and powerful practical political motives doubtless underlay the American Revolution, historian Alexander Tsesis, cogently summarized the Declaration’s extraordinary importance and abiding grandeur as, “both a statement of national independence and a foundational guarantee of individual rights and popular self-government. The document is the country’s original written statement of national principle, purpose, and sovereignty.”²⁴ Scholar Douglas Kmiec agrees that, whether for political reasons, moral imperatives, or indeed both, “In the

21. The noted scholar of legal history and jurisprudence won the 1923 Pulitzer Prize in History for his book, *THE SUPREME COURT IN UNITED STATES HISTORY* (Boston: Little, Brown, 1922). Dumbarton Oaks Research Library and Collection, *Charles Warren (1868-1954)*, <https://www.doaks.org/resources/bliss-tyler-correspondence/annotations/charles-warren>, (accessed, February 22, 2018).

22. Charles W. Carey, *Natural Rights, Equality, and the Declaration of Independence*, 3 AVE MARIA L. REV. 45, 45 (2005) (quoting, Charles Warren, *Fourth of July Myths*, 2 WM. & MARY Q. 237, 237 (1945)).

23. Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL’Y 489, 494 (2004) (quoting, RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 395-96, 400-01 (3d ed. 1991)). Kirk sullenly and inaptly continued, “[T]he Declaration really is not conspicuously American in its ideas or its phrases, and not even characteristically Jeffersonian.... [I]t was meant to persuade the court of France, and the philosophes of Paris, that the Americans were sufficiently un-English to deserve military assistance.... [I]t is not a work of political philosophy or an instrument of government” RUSSELL KIRK, INTRODUCTION TO ALBERT JAY NOCK, MR. JEFFERSON, at xiii, xvi (Hallberg, 1983) (quoted in Sandefur, *supra* note 23, at 495).

24. Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 CALIF. L. REV. 369, 372 (2016).

context of a revolution ... the founders needed a 'higher law' check to make their case for independence, ..."²⁵ That is, the Founders had to devise a theory of revolution,²⁶ but, of utmost importance, they properly chose not to ground that theory simply in competing partisan policies, pragmatic economics, or cynical *realé politik*.²⁷

Pursuant to their appreciation of moral transcendence, the Founders built their arguments legitimizing the Colonies' revolt against England on more than immediate political and financial policies. As significant as those policies were to denote extreme dissatisfaction with English rule, the authors of the Revolution rightly understood that justifying insurgency on current partisan frustration is not sufficient. Few if any governmental actions please all constituencies, leaving no disgruntled persons or groups. Likewise, few if any official programs engender only beneficial results with no consequent burdens felt more heavily by some than by others. Additionally, even if long in duration, unfair policies presumptively may be amended or rescinded through normal, lawful political processes. *If transitory discontent were adequate to warrant rebellion, no government would have moral authority to resist armed insurgency, nor to arrest and prosecute the disgruntled individuals or groups who pursue reform by force of arms over peaceful means.* In this regard, Enlightenment philosopher John Locke, well known as highly influential on the Founders,²⁸ sensibly admonished that, in the

25. Douglas W. Kmiec, *Natural Law Originalism for The Twenty-First Century - A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK U. L. REV. 383, 393 (2007).

26. "From the time of its drafting, the Declaration of Independence was almost universally viewed by the colonists as, first and foremost, a proclamation and justification of independence." Carey, *supra* note 22, at 46 (citing, Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 558-65 (3d ser.) (1962) and CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 226 (Vintage Books ed. 1958) (1922)).

27. *Realé politik* or *realpolitik* is, "political realism or practical politics, esp. policy based on power rather than ideals." *Random House Kernerman Webster's College Dictionary*, (2010) (quoted by, <http://www.thefreedictionary.com/Real+politik> (visited, August 20, 2010)). Similarly, "a ruthlessly realistic and opportunist approach to statesmanship, rather than a moralistic one, especially as exemplified by Bismarck." *Collins English Dictionary - Complete and Unabridged*, 12th Edition 2014 (quoted by, <http://www.thefreedictionary.com/Real+politik> (visited, August 20, 2010)).

28. As leading jurisprudent Prof. Charles Fried summarized, "[T]here is an immense literature demonstrating that the thought of Locke and other quite systematic Enlightenment thinkers had a profound influence on the American Revolution, on those who drafted, debated, and adopted the Constitution, and on the politicians, lawyers, and judges who interpreted it in its early years." Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1742 (1998) (citing sources); see also, e.g., Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 108

words of one scholar, pursuant to natural law, “the right of revolution” arises “only under the most dire circumstances.”²⁹

Of like significance, nor could the Founders resort solely to English legal principles, including the English Constitution,³⁰ as those principles did not fully recognize the type of rebellion the Founders contemplated. Thus, in the absence of helpful positive law, the Founders had to present a philosophical justification predicated on higher law. As Prof. Gedicks summarized:

The English constitution provided an incomplete justification of the American Revolution because revolt necessarily entailed withdrawal from that constitutional system. Thus, the Declaration of Independence begins with the natural rights theory drawn from Locke’s Second Treatise, rather than arguments of higher-law constitutionalism drawn from the English common law. Nevertheless, the colonial belief that the common law captured and reflected natural rights and the natural law, imported from the English seventeenth century, enabled them to combine the Declaration’s appeal to natural rights with arguments about customary rights based on the common law.³¹

(2000) (citations omitted; noting Locke’s inspiration on the Founders); Carey, *supra* note 22, at 47-48 (citing, Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 914-15 (1993) (same)).

29. Christian G. Fritz, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 13 (2008) (cited in, Tom Ginsburg, Daniel Lansberg-Rodriguez, Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184, 1203 note 78 (2013)).

30. Unlike the U.S. Constitution which is a single, formal document, what is called the “English Constitution” actually evinces, “the foremost example of a ‘living’ constitution, drawing its authority ... from the promulgation of statutes, the evolving interpretations of common law, and faith in custom and convention. The English constitution represents an unbroken legal tradition reaching across fourteen centuries.” RALPH C. CHANDLER, RICHARD A. ENSLEN AND PETER G. RENSTROM, *CONSTITUTIONAL LAW DESKBOOK* § 1:9 *English Constitution* (accessed via Westlaw, 07/23/2017). Of particular importance among the English Constitution’s constituents is the Magna Carta. *Id.* (listing as well numerous other pivotal statutes).

“The English constitution is a ‘living’ constitution because the people of Great Britain have never felt compelled to commit their governing agreements and processes to paper. It is a remarkably stable system in view of the fact that the government of Great Britain has not undergone any significant upheaval in at least three centuries.” *Id.*

31. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L. J. 585, 622 (2009) (footnotes omitted).

Accordingly, the Founders' philosophy was not simply that George III was so hostile to colonial interests that revolution would be beneficial for the Colonies -- that is, insurgency would be a good thing. Rather, they argued that, based on principles greater than and preceding anything humanly created, revolution was not only legitimate, but morally required -- *that revolt, perhaps ultimately a good thing for the colonies, more importantly was the right thing, that is, moral precepts inherent in natural law demanded that the Colonists free themselves from British bondage through violent means as nothing less was availing*. Thus, whether revolution actually would foster the colonists' comfort and contentment was secondary to the necessity of the now which had triggered their incontrovertible duty as human beings to mutiny; or, as they famously expressed the idea, sometimes, "in the Course of human events *it becomes necessary* for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, [a] separate and equal station ..."³² Indeed, The Founders unequivocally explicated their concept of not merely a beneficial, but rather a "necessary" revolution -- a revolution born of natural obligation: "But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, *it is their Duty*, to throw off such Government, and to provide new Guards for their future Security."³³

32. DECLARATION OF INDEPENDENCE, par. 1 (U.S. 1776) (emphasis added).

33. *Id.* at par. 2 (emphasis added). Modern eyes may wonder about the Declaration's syntax and punctuation, particularly the now unfamiliar frequent capitalizing of words that neither begin a sentence nor are proper nouns. "Twentieth-century orthography has blinded us to [a] powerful piece of textual evidence ... In formal writing of the late eighteenth-century, nouns generally were capitalized; adjectives and pronouns were not. This rule is followed throughout the Declaration." Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 738-39 (2001) (footnotes omitted). The importance of such style is not insignificant. For example, Larson argues that the Founders' phrasing such as "United Colonies" evinces not an adjective -- United -- modifying a noun -- Colonies -- but rather a "complete noun phrasing." *Id.* at 739. Accordingly, the Founders' use of capital letters helps inform the meaning of the text. *Id.* at 740 ("It does not seem implausible that capitalization played some role in their arguments.").

Similarly, "Carl Becker proposed that Thomas Jefferson's use of capitalization and italicization in the Declaration was designed to emphasize words he considered to be the most important." Bayer, *supra* note 17, at 336 note 270 (citing, CARL BECKER, *THE DECLARATION OF INDEPENDENCE: STUDY IN THE HISTORY OF POLITICAL IDEAS* 220-21 (Vintage Books ed., 1958) (1922)). Moreover, some capitalization might evince a proper noun not often used today. For example, "The capitalization of the word 'Men' [in some but not all instances] may suggest that Jefferson was referring to a collective body of men rather than a few or a small group." Thompson Smith, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 2 VAL. U. L. REV. 269, 303 note 296 (1997).

Doubtless then, the Founders knew that arguments sufficient to challenge this or that law, or combinations of laws, as unwise, unsound or even unjust are inadequate to justify systemic revolt³⁴ seeking either to replace the existing governmental structure or, as in the case of the American Revolution, to extricate as free and independent, the Colonies from the British Empire.³⁵ Recognizing Locke's admonition, the Founders urged that independence was fully justified due to a complete and irrevocable failure of Great Britain to fulfill its higher duty -- indeed, its moral duty -- as the Colonies' sovereign. The substance of that moral duty, the Founders understood, derives not from governmental officers' or even the Sovereign's personal preferences or predilections, but from natural law, specifically, the natural rights inherent in natural law. As the Declaration's famous second paragraph explains, "Nature and Nature's God" bestows "unalienable Rights" inuring to "all Men"; and, that "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,"³⁶ The Founders' theory then, "reflected a

34. Some scholars advocate, "distinguishing between a rebellion (an unlawful uprising for personal gain or selfish reasons) and a revolution (an uprising to establish liberty and justice)." William C. Plouffe, Jr., *A Federal Court Holds the Second Amendment Is an Individual Right: Jeffersonian Utopia or Apocalypse Now?*, 30 U. MEM. L. REV. 55, 82 (1999) (citing, Thompson Smith, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 32 VAL. U. L. REV. 269, 311 (1997)). This writing does not see a need to make such distinctions, but does not impugn that, regarding different issues, distinguishing a revolution from a rebellion might advance a theorist's proposition.

35. One might think that the justification becomes all the more arduous when insurgents revolt against a monarch whose royalty may be considered decreed by divine right, thus revolution is not only sedition, but could, as well, be sacrilege. However, historical research indicates that such was not the widespread outlook under English thinking. To the contrary, a commonly held, arguably prevailing belief among Eighteenth Century philosophers and laypersons averred religious justifications for overthrowing despots. John M. Kang, *Appeal to Heaven: On the Religious Origins of the Constitutional Right of Revolution*, 18 WM. & MARY BILL RTS. J. 281 (2009). Kang argues, *inter alia*, that by the time of the American Revolution, the "divine right of kings" did not *per se* mean that, through celestial ordination, the King could do anything and everything he wanted. Rather, even if royal lineage is divinely decreed, theorists including John Locke and many clergy firmly believed that, "God had given people reason to discern moral principles and make meaningful decisions about self-direction. And because people were reasoning beings, government had to rest on their consent; when government transgressed its authority, the people were justified in their right to alter or abolish it." *Id.* at 318.

Accordingly, an accepted sentiment in Eighteenth Century America and Europe held that a proper reading of sacred texts, particularly St. Paul's epistle, "implore[s] rulers to dedicate themselves to the people's happiness, and that the people had a right from God, even a duty to Him, to overthrow despots." *Id.* at 324. Indeed, such principles informed the drafting of the Declaration of Independence.

36. DECLARATION OF INDEPENDENCE, par. 1 (U.S. 1776).

well-known justification for revolution under both natural law and English constitutional doctrine.”³⁷ The proposition was nicely expressed by historian Carl S. Becker:

When honest men are impelled to withdraw their allegiance to the established law or custom of the community, still more when they are persuaded that such law or custom is too iniquitous to be longer tolerated, they seek for some principle more generally valid, some “law” of higher authority, than the established law or custom of the community. To this higher law or more generally valid principle they then appeal *in justification of actions which the community condemns as immoral or criminal*.³⁸

Even Judge Richard Posner, thoroughly and wrongly skeptical about American positive law’s link to natural law,³⁹ acknowledged that the Founders were, “imbued ... with the philosophical thinking of the Enlightenment ...”⁴⁰ Regarding its overall prevalence, Prof. Robert George explained,

The concept of “natural law” is central to the western tradition of thought about morality, politics, and law. Although the western tradition is not united around a single theoretical account of natural law, its principal architects and leading spokesmen ... have shared a fundamental belief that humanly created “positive” law is morally good or bad -- just or

37. Fritz, *supra* note 29, at 13.

38. CARL S. BECKER, THE DECLARATION OF INDEPENDENCE 277-78 (1942) (emphasis added; quoted in *Scales v. U.S.*, 367 U.S. 203, 268 note 4 (1961) (Douglas, J., dissenting)). Becker worries that proponents may use such rationalizing disingenuously, even, perhaps, to delude themselves that their cause is just. “They formulate the law or principle in such a way that it is, or seems to them to be, rationally defensible. To them it is ‘true’ because it brings their actions into harmony with a rightly ordered universe, and enables them to think of themselves as having chosen the nobler part, as having withdrawn from a corrupt world in order to serve God or Humanity of a force that makes for the highest good.” *Id.* at 278.

Doubtless, even well-meaning insurgents might misconstrue, deliberately or innocently, unjustified principles as rightful and apt. History is replete with mistaken or hypocritical rebels. Regarding America’s Founders, however, this writing joins the seemingly general consensus that their revolution was justified not merely on practical grounds, but indeed impelled by moral political theory.

39. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1636, 1695 (1998).

40. *Id.* at 1696.

unjust -- depending on its conformity to the standards of a “natural,” (viz., moral) law that is no mere human creation.⁴¹

Famously, much of the validation for the Revolution against England stems from profound and embedded sources of English law. Sir. William Blackstone, arguably England’s most eminent fount of law and legal meaning,⁴² and a profound influence on the Founders,⁴³ espoused the natural law as the source of all right legal value,

[A]s God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature. . . and gave him also the faculty of reason to discover the purport of those laws. . . .

41. Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001)) (natural law colloquium).

42. “Blackstone’s Commentaries was ‘the first important and the most influential systematic statement of the principles of the common law. For generations of English lawyers, it has been both the foremost coherent statement of the subject of their study, and the citadel of their legal tradition.’” Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 422 note 18 (1995) (quoting, DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1941) (quoting C. WARREN, *HISTORY OF THE AMERICAN BAR* 187 (1911)).

43. “Early Americans drew heavily on legal scholars like William Blackstone, . . .” *Obergefell*, 135 S.Ct. at 2613 (Thomas, J., with Scalia, J., dissenting) (noting the influence of Blackstone on the Framers). Commentators agree with Justice Thomas’ conclusion, “[N]o other figure so influenced American lawyers and political figures during the Revolutionary period and the nation’s first century, . . .” Alschuler, *supra* note 4 at 19 note 106. Likewise, Douglas Kmiec wrote, “In the eighteenth century, the leading American colonists regarded Sir William Blackstone’s famous Commentaries on the Laws of England as the best treatise on the English common law.” Kmiec, *supra* note 25, at 392. In this regard, Daniel J. Boorstein remarked,

To lawyers on this side of the Atlantic, it has been even more important. In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law And many an early American lawyer might have said, with [influential exponent of American law] Chancellor [James] Kent, that he owed his reputation to the fact that when studying law . . . he had but one book, Blackstone’s Commentaries, but that one book he mastered.” DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1941) (quoting C. WARREN, *HISTORY OF THE AMERICAN BAR* 187 (1911) (quoted in Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 422 note 18 (1995)).

. . . These are the eternal, immutable laws of good and evil. . . . Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law.⁴⁴

Moreover, Magna Carta,⁴⁵ the most influential predecessor of the Declaration,⁴⁶ “is the embodiment of transcendent principles of natural law.”⁴⁷ Prof. Mary Sarah Bilder recently explained,

The important connection to Magna Carta is made apparent in [historian Ken] Macmillan’s comment:

“As Coke, Hale, and later writers such as John Locke and William Blackstone explained, in exchange for their allegiance, those living in the [American] colonies retained basic rights to life, limb, health, reputation,

44. Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 492 (2009) (quoting, William Blackstone, 1 Commentaries *39-40).

45. “The Magna Carta was the ‘Great Charter’ issued by King John at Runnymede on June 15, 1215,” to forestall a thoroughgoing civil war against the Crown by disgruntled barons complaining of over-taxation. RALPH C. CHANDLER, RICHARD A. ENSLEN, PETER G. RENSTROM, CONSTITUTIONAL LAW DESKBOOK § 1:16 MAGNA CARTA (Westlaw). As noted, Magna Carta is part of the English Constitution. See, *supra* notes 30-31 and accompanying text.

46. Chandler, Enslen and Renstrom noted, “Magna Carta is not unlike the American Declaration of Independence in that it serves as a focal point for the living tradition of a government.” CONSTITUTIONAL LAW DESKBOOK § 1:19 ENG. CONST. (Westlaw).

47. Dr. Jur. Eric Engle, *Death Is Unconstitutional: How Capital Punishment Became Illegal in America -- A Future History*, 6 PIERCE L. REV. 485, 490 (2008); See also, Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and The Values Of Procedural Due Process*, 95 YALE L. J. 455, 460 (1986) (citing, see II COKE, INSTITUTES 50 (4th ed. 1671), “It was Lord Coke’s position that the term ‘per legem terrae,’ [the law of the land] the Magna Carta’s equivalent of due process, included components of natural law and was therefore capable of overriding parliamentary action.”); Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J. L. & PUB. POL’Y. 337, 430 (2015) (“[T]he law of the land’ as Magna Carta used that term . . . was a small set of principles, rooted in natural law and contemporary mores, which governed English society in the thirteenth century and would evolve over time, . . .”).

However, attorney and scholar Timothy Sandefur opined, “[I]f in some sense the Magna Carta contained elements of natural law reasoning, it was not a natural rights document. On the contrary, the Magna Carta was one of those documents, like the English Bill of Rights or the Edict of Nantes, that represented only promises by the throne to respect certain specified freedoms of the subject.” Timothy Sandefur, *Lex Terrae 800 Years On: The Magna Carta’s Legacy Today*, 9 N.Y.U. J. L. & LIB. 759, 772 (2015) (emphasis removed). In sharp contrast, while influential to the origin of the United States, one may argue that unlike Magna Carta, the Declaration of Independence and the Constitution were, to borrow Sandefur’s terms, “natural rights document(s)” that represent not merely “promises,” but true protection of individuals’ rights emanating from the natural order of existence.

property, and protection that all subjects enjoyed as part of their English subjecthood *and as guaranteed by natural law*.⁴⁸

Considering this wealth of references, the Founders would have agreed with Prof. Kmiec's gripping "chicken-or-egg" summary: regarding, "the pervasive significance of the natural law tradition to the common law of England[:]" 'one may say that men establish governing power through the law of nature, but in the last analysis it is better to say that it is the law of nature that establishes the power through men'⁴⁹

In sum, "The British colonists who founded the United States developed their theory of self-government within the philosophical framework of the British seventeenth and eighteenth century 'natural law-social contract' movement."⁵⁰ Their justification for revolution was grounded earnestly in the immutable morality of natural law, a validation, the Founders believed, that reasonable persons could not honestly refute. Thus, commentators of various bents agree that,

there is a growing scholarly recognition that natural law and natural rights did, in fact, form the theoretical basis for the political philosophy of the Founding Fathers. . . . [A competent] review of the historical role played by natural law and natural rights during the Founding era confirms, as historical fact, that natural law and natural rights were the foundation upon which the new nation was erected.⁵¹

48. Mary Sarah Bilder, *Charter Constitutionalism: The Myth of Edward Coke and the Virginia Charter*, 94 N.C. L. REV. 1545, 1557 (2016) (emphasis added) (quoting, KEN MACMILLAN, *THE ATLANTIC IMPERIAL CONSTITUTION: CENTER AND PERIPHERY IN THE ENGLISH ATLANTIC WORLD* 27 (2011)).

49. Kmiec, *supra* note 25, at 391-92 (quoting, JOHN FORTESCUE, *DE NATURA LEGIS NATURAE*, I, c. 18 (Garland Pub. 1980)); *see also*, John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471, 477 note 21 (1999-2000) (likewise quoting Fortescue).

50. Niles, *supra* note 28, at 108 (citing, Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 230 (1983); *see also*, STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 34-35 (1990); DONALD S. LUTZ, *THE ORIGINS OF THE AMERICAN CONSTITUTIONALISM* 139-47 (1988) (discussing the influence of Montesquieu, William Blackstone, Locke, and David Hume on the thinking of the Framers); and, MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 20-21 (1994)).

51. Broyles, *supra* note 17, at 346 (citing, RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 3-16 (Vicki L. Been et al. eds., 1st ed. 2008)); *see also*, e.g., Hamburger, *supra* note 28, at 914, 918-24; Robert G. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights And Fourteenth Amendment*, 66 TEMP. L. REV. 361, 363 (1993) (noting the Declaration asserts, "natural rights to life, liberty, and property.");

Given the foregoing, a verbatim litany of the Founders' sentiments seems almost unnecessary. As Prof. Kmiec stressed, "it would be amazing if any Revolutionary leader of the Commonwealth could be found who did not subscribe to the doctrines of natural law and right"⁵² However, citation to some original sources adds useful buttressing to this writing's basis that the original Founders and the Reconstruction Congress did not reference these principles simply to provide a worldly gloss to their political ambitions.⁵³ Rather, they were sincerely dedicated to the concept that: Humanity's capacity to reason reveals moral truths; and, such truths:

- are immutable because they arise from natural law;
 - are animated by natural rights, the birthright of each individual;
 - should be practiced dutifully by individuals in their private conduct;
- and,
- must be enforced under law through the offices of legitimate government.⁵⁴

Certainly, historians have claimed that the Founders selfishly prosecuted the American Revolution to preserve and to promote their own economic interests and those of their peers.⁵⁵ Not incompatibly,⁵⁶ other scholars, perhaps most notably Douglas Adair who arguably spearheaded the elucidation, argue that the Founders sought fame, esteem and the acclaim of

R. Randall Kelso, Contra Scalia, Thomas, and Gorsuch, *Originalists Should Adopt a Living Constitution*, 72 U. MIAMI L. REV. 112, 128 (2017).

52. Kmiec, *supra* note 25, at 391 (quoting, Chester James Antieau, *Natural Rights and the Founding Fathers - The Virginians*, 17 WASH. & LEE L. REV. 43, 43 (1960)). I disagree strongly, however, with Kmiec's attendant belief, predicated largely on Blackstone, that legislatures, not courts, are the rightful authorities to assure that governmental policies conform with the principles of natural law. *Id.* at 392-93. See *infra*, notes 480-520 and accompanying text.

53. See generally, Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent"*, 15 HARV. J.L. & PUB. POL'Y 965, 971-74 (1992) (recounting the virtually unanimous agreement of the Founders that "no plan of government would be acceptable unless the natural rights of the people were secure." *Id.* at 972).

54. A strong line of scholarship argues that at least as originally understood by the Founders, under principles of natural law, Government legitimately could constrain individuals' natural rights to promote the greater societal good. This writing addresses why any such original concept misperceives the actuality of natural law and, thus, no longer can control constitutional adjudication. See notes 245-79 and accompanying text.

55. *E.g.*, CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

56. "The economic interpretation of the founding is now widely regarded as inadequate." PETER McNAMARA, THE NOBLEST MINDS vii (1999).

history.⁵⁷ Still, historians such as Adair recognize that personal ambitions notwithstanding, Jefferson, Adams and their fellows, strongly believing in the ethical mandates of natural law, earnestly pursued their revolution both to free the colonists from tyranny and to create a freer, better nation. Subject to human foibles as well as human decency, the Founders were “complex personalities, susceptible, as are we all, to various complementary and conflicting inducements,” including, as they, “candidly admitted their quite-human longing for fame, honor, glory and posterity’s favor which, along with patriotism, and a calling to serve the best interests of their community, ‘urge[d] some of them to act with a nobleness and greatness that their earlier careers had hardly hinted at.’”⁵⁸

1. *The Founders’ Words* --

Perhaps it is appropriate to begin with Thomas Jefferson, the primary author of the Declaration’s text, who unequivocally averred “[B]ut that between society and society, or generation and generation there is no municipal obligation, no umpire but the law of nature.”⁵⁹ Prof. Broyles encapsulated the future third president’s abiding belief in immutable principles of right and law:

*Jefferson never wavered in his dedication to natural rights as the cornerstone of republican government, stating that “[e]very species of government has its specific principles. Ours perhaps are more peculiar than those of any other in the universe. It is a composition of the freest principles of the English constitution, with others derived from natural right and natural reason.” For Jefferson, natural rights were not contingent upon discrete historical periods, or changing human mores. For him, “Nothing then is unchangeable but the inherent and unalienable rights of man.”*⁶⁰

57. In this regard, one of the most notable works is Douglas Adair’s truly groundbreaking article, “Fame and the Founding Fathers.” DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS 8 (1974).

58. Bayer, *supra* note 17, at 341 (quoting, DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS 8 (1974) and generally discussing Adair at 8, 24-25).

59. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 631-36 (1995).

60. Broyles, *supra* note 17, at 348-49 (*emphasis added*) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 93 (1853)).

John Adams too accepted the existence of natural law and attendant moral commands as shown by his letter penned nearly two decades after the Revolution:

To him who believes in the Existence and Attributes physical and moral of a God, there can be no obscurity or perplexity in defining the Law of Nature to be his wise benign and all powerful Will, discovered by Reason. A Man who disbelieves the Being of a God, will have no perplexity or obscurity in defining Morality or the Law of Nature, natural Law, natural Right or any such Things to be mere Maxims of Convenience, to be Swifts pair of Breeches to be put on upon occasion for Decency or Conveniency and to be put off at pleasure for either.⁶¹

Influential advocate for the Constitution Alexander Hamilton, “made his natural law principles clear early in his career, stating, ‘[N]atural liberty is a gift of the beneficent Creator . . . Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.’”⁶² Prof. Marc Trapp recounted that “Hamilton once defended the natural rights of man against a British loyalist by arguing, ‘(T)he fundamental source of all your errors, sophisms and false reasonings is a total ignorance of the natural rights of mankind.’”⁶³ Employing remarkably poetic prose, Hamilton further enthused, “The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature . . . and can never be erased or obscured by mortal power.”⁶⁴

61. *Id.* at 349 note 42, (quoting Letter from John Adams to Thomas Boylston Adams (Mar. 19, 1794)). As Prof. Broyles explained, “In language strikingly similar to Jefferson’s, John Adams wrote that the principles of the American Revolution ‘are the principles of Aristotle and Plato, of Livy and Cicero, and Sidney, Harrington, and Locke; *the principles of nature and eternal reason*; the principles on which the whole government over us now stands.” *Id.* at 349 (quoting, JOHN ADAMS, NOVANGLUS: ADDRESSED TO THE INHABITANTS ON THE COLONY OF MASSACHUSETTS BAY, NO. 1, IN THE POLITICAL WRITING OF JOHN ADAMS 26 (2000) (emphasis added)); *See also* THE FOUNDERS ON RELIGION: BOOK OF QUOTATIONS 132 (2005).

62. Broyles, *supra* note 17, at 350 (quoting, ALEXANDER HAMILTON, THE FARMER REFUTED (1775), reprinted in 1 THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES 53, 87 (1904)). “Hamilton, similar to Jefferson and Adams, emphasized the centrality of natural rights to a just regime of liberty[.]” *Id.*

63. Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 831 (2001) (quoting, ALEXANDER HAMILTON, THE FARMER REFUTED (1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 104 (1961)).

64. ALEXANDER HAMILTON, THE FARMER REFUTED (1775), reprinted in 1 THE PAPERS OF ALEXANDER HAMILTON 122 (1961) (quoted in Trapp, *supra* note 63, at 832 note 58).

During the ratification of the Constitution, Hamilton was no less vocal about the dominance of the metaphysical:

The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.⁶⁵

Likewise, James Wilson, a member of the Continental Congress and Constitutional Convention, signer of both the Declaration and the Constitution, and, future Associate Justice of the Supreme Court⁶⁶ exclaimed, “we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects.”⁶⁷ John Jay, advocate for the

65. ALEXANDER HAMILTON, *THE FARMER REFUTED* (1775), reprinted in 1 *THE WORKS OF ALEXANDER HAMILTON IN TWELVE VOLUMES* 63-64 (1904) (quoted in Broyles, *supra* note 17, at 350).

66. Commenters rank Justice Wilson among, “the most significant [of the] Framers ... whose important role in drafting the U.S. Constitution remains unnoticed by many constitutional scholars.” Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. ST. L. REV. 665, 667, 670 (2013). In that regard, the eminent scholar Akhil Reed Amar explained,

Most important [regarding the theory of popular sovereignty] were the arguments of James Wilson during the Pennsylvania ratifying convention. Though less famous today than some of his companions, Wilson deserves our most careful attention. He was one of only six men to sign both the Declaration of Independence and the Constitution. At Philadelphia, he played a role second — if that — only to Madison. As Gordon Wood has written, Wilson was the Federalists’ preeminent popular sovereignty theorist; and it was his hand that first penned the bold first three words of the Constitution, “We the People.” In the 1780s, Wilson was universally regarded as perhaps the most brilliant, scholarly, and visionary lawyer in America. Within three years of the Constitution’s ratification, he would spearhead a successful effort to replace the Pennsylvania Constitution of 1776, serve as one of the first five Associate Justices of the U.S. Supreme Court, found the University of Pennsylvania Law School, and deliver the most important and celebrated lectures on law ever given in eighteenth century America.

Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 473-74 (1994) (quoting, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969) and citing, 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (1937)).

67. JAMES WILSON, *OF THE LAW OF NATURE*, in 1 *COLLECTED WORKS OF JAMES WILSON* 525 (2007).

proposed Constitution,⁶⁸ an author of *The Federalist*,⁶⁹ and, future first Chief Justice of the United States Supreme Court, reminded that although government is necessary to protect liberty, “the people must cede to it some of their natural rights in order to vest it with requisite powers.”⁷⁰ No less a profound thinker, Thomas Paine⁷¹ succinctly extolled the fundamental basis

68. Hon. Richard E. Welsh III, Associate Justice, Superior Court, Commonwealth of Massachusetts, called John Jay, “a critically important supporter of the Constitution, ...” Hon. Richard E. Welsh III, *Mr. Sullivan’s Trunk: Constitutional Common Law and Federalism*, 46 NEW ENG. L. REV. 275, 289 (2012). Regarding his influence on its ratification, along with his essays in *The Federalist*, Jay’s address of June 23, 1788, to the New York Ratifying Convention is considered instrumental in that State’s decision to adopt the proposed Constitution. CALVIN H. JOHNSON, *THE DUBIOUS ENUMERATED POWER DOCTRINE*, 22 CON. COMM. 25, 46 and note 76 (2005).

69. Although authoring significantly fewer essays than his co-authors Alexander Hamilton and James Madison, John Jay’s contributions were significant. For instance, Prof. Robert F. Turner noted that Jay’s *The Federalist* No. 64 is, “by far the most important of the *Federalist Papers* on foreign affairs ...” *A Forum on Presidential Authority*, 6 SEATTLE J. SOC. JUST. 23, 84 (2007) (Remarks of Prof. Robert F. Turner; emphasis in original).

70. *The Federalist* No. 2 (John Jay) (Terrence Ball ed., 2003). Of significant importance, while correctly understanding the dominance of natural rights, like many others then and now, Jay wrongly conflated forming and abiding by social contracts with ceding some natural rights. To the contrary, as Kant explained regarding his third Categorical Imperative, the Kingdom of Ends, formation of societies is not merely sensible, it is a moral imperative. See, *Originalism and Deontology*, supra, note 7 at Section 3-d-5-B. Not only during interactions with others within a given social order, but indeed when forming and preserving Society itself, as Kant clarified, individuals may neither treat others nor themselves in an immoral fashion. Specifically, persons may not treat either themselves or others merely as means without regard to each individual’s, including the given actor’s, innate human dignity. *Id.*

Accordingly, compelling individuals to perform immoral acts to form or to preserve their social orders is illegitimate because, as Deontology proves, there is never a moral justification for immoral behavior. *Id.* at Sections 2-a, f. It must follow that whatever freedom to act individuals relinquish as the price to form legitimate social orders cannot include losing or renouncing actual natural rights for such rights are moral imperatives, as this writing shortly will accent. See, *infra* notes 245-79 and accompanying text. Indeed, as this writing is now proving, the entire legitimacy of Government depends on preserving not inhibiting natural rights. Thus, no person may legitimately be compelled to abandon any natural right because denying rights to others is an immoral act against those others, and, indeed, allowing oneself to be denied rights is an immoral act against oneself. Therefore, although carelessly denoted as natural rights, any freedoms properly and morally resigned by leaving the state of nature were never moral imperatives and likely were immoral choices in and of themselves.

71. Patriot Thomas Paine’s inspiring 1776 pamphlet *Common Sense* strongly affected colonists’ positive sentiment towards breaking from English rule. Paine’s work was “enormously influential” with *Common Sense* heralded as “America’s first literary best seller.” J. Andrew Kent, *A Textual and Historical Case against a Global Constitution*, 95 GEO. L. REV. 463, 468 (2007). Indeed, *Common Sense* has been called, “the most brilliant pamphlet written during the American Revolution, and one of the most brilliant pamphlets ever written in the English language.” Judge Grant Dorfman, *The Founder’s Legal Case: “No Taxation without Representation” Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1387 (2008)

that the Revolution established “Government founded on a moral theory ...”⁷² And, patriot Samuel Adams,⁷³ “echoed the principles of natural law when he wrote that it is ‘by the eternal and immutable laws of God and nature’ that all men are entitled to ‘just and true liberty.’”⁷⁴

2. *The Shared Understanding of the Colonists --*

As the numerous quotes above show, there is no doubt that the Founders’ concept of legitimate political theory sprang from their deeply rooted belief in natural law. Moreover, as though anticipating Original Public Meaning Originalism,⁷⁵ the Founders believed that the substance of the Declaration’s premises and arguments were commonly understood and shared among the colonists. Granted, neither the Founders nor their contemporaries agreed in all regards about the composition and scope of natural law and its subset, natural rights, particularly regarding whether and, if so, to what extent natural law constrains natural rights for the greater public good.⁷⁶ Yet, whatever disagreements or misunderstandings about that

(quoting, ERIC FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 75 (1976) (quoting Bernard Bailyn, *Common Sense*, 25 AM. HERITAGE 36, 36 (1973)).

72. THOMAS L. PANGLE, *THE PHILOSOPHIC UNDERSTANDINGS OF HUMAN NATURE INFORMING THE CONSTITUTION IN CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FRUEDIANISM, PRAGMTISM, EXISTENTIALISM* 10 (Allan Bloom ed., 1990) (discussing Locke and Montesquieu) (quoting THOMAS PAINE, *RIGHTS OF MAN, IN THE BASIC WRITINGS OF THOMAS PAINE* 148 (Willey Book Co., 1942).

73. Samuel Adams was cousin to John Adams and, like his cousin, both a signatory to the Declaration of Independence and “one of the most influential Revolutionary leaders ...” Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for The Common Good*, 91 TEX. L. REV. 1609, 1630 (2013).

74. Trapp, *supra* note 63, at 832 (quoting, WELLS, *THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS* 7502 (1865)).

75. See generally, *Part I: Originalism and Deontology*, *supra* note 7, Section 4-G-1.

76. The astute scholar of natural rights Jud Campbell recently noted,

But while largely in agreement on substance, the Founders spoke in a confusing assortment of ways about the retention of natural rights. ...

This dizzying array of statements -- that individuals retained some, all, or none of their natural liberty -- has created an extraordinary amount of confusion among scholars. And it would seem to indicate substantial differences of opinion among the Founders about the scope of their natural rights. In truth, however, the disagreement was semantic, not substantive, because competing views about the terms of the social contract mirrored the competing views about the scope of pre-political natural rights. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 274 (2017) (footnote omitted).

complex matter might have existed, as Alexander Tsesis explained, “The Declaration of Independence so quickly gained colonial assent because its author, Thomas Jefferson, drew his inspiration from ideas about governance that enjoyed widespread support throughout the colonies.”⁷⁷ Barely a year before his death, Jefferson candidly acknowledged that the Declaration was premised on well established, widely held theories justifying the imposition of government over the affairs and conduct of the citizenry.⁷⁸ As Jefferson emphasized, “with respect to our rights, and the acts of the British government contravening those rights, there was but one opinion on this side of the water. All American whigs thought alike on these subjects.”⁷⁹

Indeed, as Jefferson stated, the philosophy of natural law was generally appreciated and accepted by the people in whose name the Founders conceived and prosecuted the Revolution. Respected scholar Philip

This writing answers Prof. Campbell’s urgent point by proving that the Founders’ “dizzying array of statements” are interesting but, as a matter of moral philosophy, extraneous. Deontological Originalism verified that no social contract *legitimately* -- *that is morally* -- may require as the price of residency that individuals -- citizens, sojourners, visitors, or even trespassers -- relinquishing their natural rights, because safeguarding such rights is the singular moral imperative -- the legitimizing characteristic -- of any Government through which civil society enforces order. See, *infra* notes 245-79 and accompanying text.

77. Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for The Common Good*, 91 TEX. L. REV. 1609, 1631 (2013) (footnote omitted). Indeed, the principles collected in the Declaration were found as well in numerous state constitutions adopted in 1776 and 1777. “These individual state constitutions reflected the common voice of the American people as similarly expressed in the Declaration of Independence.” Broyles, *supra* note 68, at 348 (having discussed at 346-47, MASS. DECLARATION OF RTS.; NEW HAMPSHIRE BILL RTS.; VA. DECL. RTS. (authored by George Mason), adopted by the VA. CONST. CONVENTION (June 12, 1776); PA. CONST. of 1776; N.J. CONST. 1776; MD. CONST. 1776; N.C. CONST. 1776; and VT. CONST. 1777)).

78. For instance, Jefferson famously wrote to fellow Virginian Continental Congress delegate Richard Henry Lee, that,

the object of the Declaration of Independence [was] [n]ot to find out new principles, or new arguments, never before thought of, no[r] merely to say things which had never been said before; ... Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

Letter from Thomas Jefferson to Richard Henry Lee (May 8, 1825), 16 THE WRITINGS OF THOMAS JEFFERSON 117, 118-19 (Library ed. 1904) (quoted in, Broyles, *supra* note 17, at 348 note 38); see also, e.g., American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 354 F.3d 438, 452-53, and note 7 (noting that the Declaration collects and presents an amalgam of ancient and Enlightenment political theory).

79. Letter from Thomas Jefferson to Richard Henry Lee (May 8, 1825), in THOMAS JEFFERSON, WRITINGS 1501 (Merrill D. Peterson ed., 1984).

Hamburger noted the integral connection: “Americans [of the late Eighteenth Century] tended to take for granted that natural law had a foundation in the physical world and yet had moral implications. Natural law, according to Americans, was a type of reasoning about how individuals should use their freedom.”⁸⁰ Prof. Charles W. Carey similarly explained, “It is important to note that, despite their differences over the derivation of the natural law, Americans of the founding era still had ample grounds for meaningful dialogue, given their shared understanding of the conditions in the state of nature to which this natural law -- however derived -- would apply.”⁸¹ While the degree of depth varied among the assorted populations, the Colonists accepted that from natural rights and natural law derived the duties of government, the right to expect government to meet its duties, and, the attendant right to revolt against a government that adamantly and obdurately refuses to meet its duties.⁸²

Jefferson’s admission that the Declaration of Independence expressed neither original ideas nor novel embellishments makes eminent sense because the Founders’ purpose in publishing that document was instrumental. As he clarified, the Founders’ “objective was ‘to place before mankind the common sense of the subject, in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take, ...’”⁸³ Through his words, Jefferson explicated the Declaration’s advocacy character: elucidating to “mankind,” using principles generally accepted and understood among experts and laity alike, the logic and theory (“the common sense of the subject”) validating the Revolution (“to justify ourselves in the independent stand we are compelled to take”) sufficiently “to command their [mankind’s] assent.” Accordingly, as Prof. Broyles rightly determined, “Jefferson wrote the Declaration ... with the belief that it

80. Hamburger, *supra* note 28, at 923 (quoted in, Douglas W. Kmiec, Inserting the Last Remaining Pieces into the Takings Puzzle, 38 WM. & MARY L. REV. 995, 999 note 16 (1997)). Prof. Hamburger explicated the close association assumed between natural law and morality. “Thus, Americans derived social obligations from enlightened self-interest - morality from something deceptively similar to materialism - and therefore could talk about natural law both as a law of human nature and as the foundation of moral rules.” Hamburger at 924 (footnote omitted); see also, R.J. Arjo, S.J., *Thomas Aquinas: Prudence, Justice and the Law*, 40 LOYOLA L. REV. 897, 921 (1995).

81. Carey, *supra* note 22, at 52.

82. *Id.* (citations omitted).

83. *Id.* at 47 (2005) (quoting, LETTER FROM THOMAS JEFFERSON TO RICHARD HENRY LEE (May 8, 1825), in THOMAS JEFFERSON, WRITINGS 1501 (Merrill D. Peterson ed., 1984)).

reflected the understanding of the American people, not a mere ideological or political tract.”⁸⁴

Agreeing with Broyles’ assessment of Jefferson and the Founders, scholars accent that the Declaration was not an elitist expression of highbrow principles unappreciated and undecipherable by the Public. Rather, “From the time of its drafting, the Declaration of Independence was almost universally viewed by the colonists as, first and foremost, a proclamation and justification of independence.”⁸⁵ Prof. Bernard H. Siegan nicely summarized the point:

From the sixteenth through the eighteenth century, the natural law concept [requiring government to act in a moral fashion] commanded a great deal of scholarly attention, and by the time of the Constitutional Convention of 1787, a considerable number of philosophers, ecclesiastical scholars, social commentators, and jurists had written on the subject. All agreed that people by reason of their humanity possessed natural rights which could not be abridged by positive law. *American constitutional and bill of rights models were constructed at a time when the natural law school of judicial thought was highly influential.*⁸⁶

In sum, the Declaration was not an “apology” as Russel Kirk scornfully averred,⁸⁷ but rather, an unequivocal, noble, *unapologetic* explanation of the moral imperatives that rightly dominate human existence, of how those imperatives delimit legitimate government, and how George III’s government irredeemably violated its duties to the point that the Colonies were left with only two choices: either exist in pathetic hypocrisy by acquiescing to incorrigibly immoral governance, or rebel.

In light of the foregoing litany of quotes and historians’ analyses, it strains credulity to believe that the Founders simply were appealing to cynical politics when they stressed so emphatically the inextricable link between natural law and the legitimacy of Government. As Jefferson explained nearly a half-century after the drafting of the Declaration, “‘an appeal to the tribunal of the world was deemed proper for our justification’ after the colonists were ‘forced ... to resort to arms for redress.’”⁸⁸

84. Broyles, *supra* note 17, at 348.

85. Carey, *supra* note 22, at 46.

86. Siegan, *supra* note 42, at 421-22 (emphasis added).

87. See *supra*, note 23 and accompanying text.

88. Carey, *supra* note 22, at 46 (quoting, LETTER FROM THOMAS JEFFERSON TO HENRY LEE (May 8, 1825), in THOMAS JEFFERSON, WRITINGS 1500 (Merrill D. Peterson ed., 1984)).

Importantly, the sentiments expressed therein were, in Jefferson's apt reckoning, "an expression of the American mind."⁸⁹ In that regard, the aged Jefferson contemporaneously stated that Americans should, "cherish the principles of the instrument [The Declaration] in the bosoms of our own citizens. . . . I pray God that these principles may be eternal."⁹⁰

Steeped in the credo of natural law, a doctrine embraced not only by the Founders themselves but also by the society whose government they sought to change so radically, we now can appreciate how the Founders incorporated those principles explicitly into the Declaration of Independence.

B. The Declaration's Text --

1. The Declaration as a Legal Brief --

As taught to American youth from their elementary school days, the Declaration of Independence expresses a litany of detailed grievances supporting rebellion against England.⁹¹ These specific, implacable failures of George III's reign to respect the responsibilities of legitimate governance constitute the Founders' detailed factual support for their lawyerlike argument asserting the Colonies' right, in fact duty, "to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, ..." ⁹² Indeed, the Declaration has the form of a legal memorandum,⁹³ particularly argument formation referred to among legal writing faculty as the "CREAC" paradigm.⁹⁴ Following the

89. *Id.* (quoting, LETTER FROM THOMAS JEFFERSON TO HENRY LEE (May 8, 1825), in THOMAS JEFFERSON, WRITINGS 1501 (Merrill D. Peterson ed., 1984)).

90. Kmiec, *supra* note 25, at 395 (quoting, LETTER FROM THOMAS JEFFERSON TO JAMES MADISON (Aug. 30, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 460, 463-64 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905)).

91. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

92. *Id.* para. 1.

93. Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 SO. CAL. INTERDIS. L. J. 549, 551 (1995) ("The Declaration might be said to be a kind of legal brief, setting forth the colonists' case against King and Parliament."); *see also*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 49 (1980).

94. Highly respected professor of theory and legal writing Linda H. Edwards, among others, aptly instruct budding law students (and indeed experienced lawyers) to use the following "paradigm" of "small-scale" argument-discussion formation for any legal writings' major points and sub-points: the CREAC form. Specifically: Conclusion, Rule, Explanation, Application, Conclusion (restated). Accordingly, for ease of understanding, the legal writer should first state the conclusion she plans to draw. Next, set for the applicable rule on which

logic of what roughly two centuries later would be conceived as CREAC, the Declaration's text presents: (1) its ultimate conclusion -- the validity of the American Revolution as matters of law, reason and history; (2) the overarching legal premises supporting the conclusion -- the legitimate function of Government and the right to revolt when Government utterly refuses to function legitimately; (3) facts relevant to prove the illegitimacy of the challenged government -- numerous and consistent instances where England failed to govern the Colonies in a legitimate fashion despite frequent entreaties from the Colonies beseeching for proper treatment; and, (4) reassertion of the basic conclusion that, under the circumstances, revolution is appropriate, if not mandatory.

Therefore, "The language of the Declaration of Independence is not that of a mere political manifesto[.]"⁹⁵ Rather, in prose at once accessible yet lyrical, the Declaration is a stunningly exquisite exposition of the character and purpose of government -- an unprecedented use of Enlightenment liberal political theory addressed to the World, articulating a tangible, rational justification for open, armed rebellion against presumptively lawful but provably illegitimate sovereign authority.⁹⁶ The Declaration is a sophisticated advocacy brief, applying abstract political and moral philosophy to discrete but cumulative offenses by the British Government

the conclusion will be premised. Then explain the rule, particularly how the rule works as well as explicating the rule's policy, that is, why the rule exists. Based on the explanation, the writer applies the rule to the given set of facts to ascribe those facts' legal meaning under the rule. With analysis complete, the writer restates the initial conclusion the derived from applying the explanation of the controlling rule or set of rules. LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS*, Chs. 8 & 9 (Wolters Kluwer, 4th ed. 2015).

The process differs slightly if the writers' project is to create or define an as yet unestablished rule. However, the Founders' project falls into the classic CREAC paradigm, for them, the application of rules of natural rights to the facts arising from George III's despotism against the Colonies.

95. Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DEN. U. L. REV. 437, 437 (2010).

96. John C. Holmes accented the then-extraordinary nature of reducing to writing such a justification:

[A]t the time of the founding of the United States, the very concept of a written document being paramount in a governmental system was unique. The framers of the Declaration of Independence and the Constitution were aware of the potential influence that these documents might have throughout the world, and they made frequent references to the universality of the principles they hoped to establish. John

C. Holmes, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective* by George Athan Billias New York University Press, New York, NY, 2009, 57 SEP. FED. L. 64, 64 (2010) (book review).

thereby demonstrating the legal basis – indeed the lawful necessity – of armed revolution against England.⁹⁷

2. God, “the Pursuit of Happiness” and Natural Law --

Turning to the text itself, the Founders opened their argument by explaining why they drafted and published the Declaration: specifically, to convince all and sundry that revolution can be and, in the case of the Colonies, is morally and legally justified. Accordingly, in the Founders’ words, “a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”⁹⁸ In that same opening paragraph, they introduced what would be the consistent, predominate theme of the Declaration: natural law theory appreciating laws higher than and existing prior to those that might be formed by human intellect. The Founders referred to the “Laws of Nature and of Nature’s God,”⁹⁹ thus, as commentators agree, invoking the idea of natural law,¹⁰⁰ as

97. See, e.g., PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 189-208 (1997) (discussing that it was during the early to mid-1800s, one or two generations after its initial dissemination, that the American public viewed the Declaration not only as a blueprint for legitimate revolution but as well, a basic theoretical exposition of fundamental human rights).

98. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

99. *Id.*

100. Hon. Clarence Thomas, *Toward a “Plain Reading” of the Constitution -- The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L. J. 983, 995 (1987); Hon. Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORD. L. REV. 1513, 1516 (2011) (Natural Law Colloquium) (through the term “Laws of Nature and of Nature’s God,” “The Declaration explicitly appeals to the natural law.”); Kmiec, *supra*, note 25, at 395 (same, but suggesting interestingly that “Nature’s God” refers to “scripture.”); Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537, 571 note 250 (2016) (“*Natural Law: The Ultimate Source of Constitutional Law*, National Center for Constitutional Stud., <https://www.nccs.net/natural-law-the-ultimate-source-of-constitutional-law.php> (last visited Mar. 15, 2016) (noting that that Founders alluded to a higher law as the ultimate source ‘to protect ... natural rights for all of mankind.’”)); A. Scott Loveless, *The Forgotten Founding Document: Considering the Ends of the Law*, 27 BYU J. PUB. L. 365, 368 (2013) (“The Declaration and its reference to natural law thus comprise a *chapeau* by which to read the Constitution.”; footnote omitted, emphasis in original); Charles Fahy, *The Supreme Court in The American System of Government*, By Robert H. Jackson, 69 HARV. L. REV. 580, 581 (1956) (book review) (noting Justice Robert Jackson’s lecture identifying the reference to the “Laws of Nature and of Nature’s God” as “The natural law”).

The courts as well have recognized that “the Laws of Nature and of Nature’s God” references the Enlightenment belief of rights deriving from a natural, not humanly created, existence. See, e.g., *Newdow v. Rio Linda Sch. Dist.*, 597 F.3d 1007, 1030 & n.23 (9th Cir.

the source that, under dire circumstances, “entitles” “one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, [a] separate and equal station ...”¹⁰¹

With the foregoing prelude, the Founders explained what circumstances would permit “dissolve[ing] the political bands.” They expressed their foundational concept in what certainly is among the most celebrated and quoted paraphrasing of the theory of natural rights emanating from natural law: “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.”¹⁰² From this single, elegant assertion, if nothing else, we understand that the Founders were deontologists, not consequentialists. The “Rights,” as they noted, derive not from human manufacture, but from a “Creator” who devised the “Laws of Nature and Nature’s God.”¹⁰³

a. What Is “Nature’s God?”

With regard to their use of terms such as “Creator,” the arguably prevailing understanding is that the Founders predominately were deists, meaning they believed in a supreme being or unifying force in the Universe, but, unlike theists, not necessarily one who intervenes incessantly in human affairs, preordaining and ordering the destinies of each discrete member of Humankind, a theology that Rick Fairbanks called, “a weak understanding of God’s governance.”¹⁰⁴ There remains an ongoing and lively debate regarding

2010) (stating that the Declaration embraces natural law theory); *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 453 n.7 (6th Cir. 2003) (citations omitted), *aff’d*, 545 U.S. 844 (2005).

101. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

102. *Id.* para. 2 (U.S. 1776) (emphasis added). Perhaps it should go without saying but nonetheless this article notes that the Founders’ references to “men,” should and must be understood now to mean “persons,” including, doubtless controversially but appropriately, corporate and other such legally recognized artificial persons created by human beings to serve human beings. *E.g.*, *Citizens United v. Fed. Elections Commission*, 558 U.S. 310, 342-43 (2010) (corporations have First Amendment speech rights equivalent to those of natural persons).

103. Moreover, as natural rights arise from natural law, and as natural law precedes Humankind and, likewise, must have been created by “Nature and Nature’s God,” the Founders declared themselves to believe in immutable principles of morality. *See, infra*, Section 3.

104. Rick Fairbanks, *The Laws of Nature and of Nature’s God: The Role of Theological Claims in the Argument of The Declaration of Independence*, 11 J. L. & RELIG. 551, 555 (1994-95). Alternatively, depending on your choice of definitions, it could be said that generally, the Founders were theists in that they believed in a supreme being, but took a deist view of

the religious precepts of the various founders and how those precepts informed their respective theories of morality and government.¹⁰⁵ The

God's relationship with human beings. "There is no doubt that, to the Framers, religion entailed a relationship of man to some Supreme Being ... [but] [w]hile they were theists, there is no clear evidence that the Founders wished to protect only theism." Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060 (1978). Or, as Prof. Fairbanks put it, "a theist is someone who believes in one god who is both creator and 'governor' of the world. So far as I know all of the founders were theists in this sense, including those called deists." Fairbanks at 555.

105. For instance, Steven K. Green concluded,

deism should be understood as a rational belief in a God, his goodness, and providential plan (though most viewed providence as indirect, rather than an active force). Most deists, like many of the Founders -- Benjamin Franklin, George Washington, Thomas Jefferson -- denied the divinity of Jesus, of his substitutional atonement, and the reality of biblical miracles. But it mischaracterizes their faith to claim that deists rejected theism or the importance of piety and civic virtue. Most deists viewed their rational theology as consistent with general principles of Christianity -- if not a perfection of the latter -- and most felt no tension in reading the Bible or attending more orthodox Protestant churches (though George Washington avoided taking communion throughout his adult life). Efforts by modern-day religionists to canonize the Founders are thus misplaced, but so too are those efforts by secularists to characterize the Founders as unconcerned about religious issues.

Steven K. Green, *Understanding the "Christian Nation" Myth*, 2010 CARDOZO L. REV. 245, 257 (2010) (footnotes omitted).

Somewhat similarly, historian David Barton attributes "Jefferson's [early] writings very critical of organized religion" to a youthful enamor of David Hume's critiques which, Jefferson later recalled with amiable candor, "'I remember well the enthusiasm with which I devoured it [Hume's work] when young, and the length of time, the research and reflection which were necessary to eradicate the poison it had instilled into my mind.'" David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 445 (2003) (quoting, LETTER FROM THOMAS JEFFERSON TO COL. WILLIAM DUANE (Aug. 12, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 405 (Andrew A. Lipscomb ed., 1905)). Therefore, according to Mr. Barton,

While Jefferson might fail the standard of being a Christian by an orthodox definition (on occasion he expressed his doubts about the divinity of Christ), there is no evidence to impute any charge of deism to Jefferson. A deist believes in an impersonal God uninvolved with mankind and embraces the "clockmaker theory" that there was a God who made the universe and wound it up like a clock but it now runs of its own volition; the clockmaker is gone and therefore does not respond to man. None of Jefferson's religious writings from any period of his life reveal anything less than his strong conviction in a personal God, and that every individual would stand before God to be judged by Him.

Id. at 446 (footnotes omitted).

In this regard, Barton, among others, debunks the legend of a so-called "Jefferson Bible," wherein Jefferson took a scissors to expunge from the New Testament all "objectionable" and "unreasonable" references to religion and miracles, leaving only historical accounts and moral precepts. *Id.* According to Mr. Barton, "there is, in fact, no such single Jefferson work." *Id.* at 447. Rather, in 1804, 1813, and 1817, Jefferson composed three

consensus nonetheless remains that, consistent with their Enlightenment roots, the Founders were captivated by science, logic, and free will allowing individuals to discern from reason the precepts of right living and, thereby, to make independent choices of how best to attain their respectively personal goals informed by and consistent with abiding moral precepts. In sum, as historians Charles and Mary Beard explained, “Jefferson, Paine, John Adams, Washington, Franklin, Madison and many lesser lights were to be reckoned among the Unitarians or Deists. It was not Cotton Mather’s God to whom the authors of the Declaration of Independence appealed; it was to Nature’s God.”¹⁰⁶

Accordingly, Humankind’s “endowment” from “their Creator” -- from “Nature’s God” -- is the amalgam of rights, derived from the natural order of things -- from an innate actuality -- which human beings can discern through reason, a classic expression of Enlightenment liberalism.¹⁰⁷ Moreover, and

distinct but related collections of Jesus’ moral teachings in Jesus’ own words, intended to set forth without complexities and confusing interpretations, “the most sublime and benevolent code of morals which has ever been offered to man. . . . The result is an octavo of forty-six pages of pure and unsophisticated doctrines, such as were professed and acted on by the unlettered Apostles, the Apostolic Fathers, and the Christians of the first century.” *Id.* (quoting, Letter from Thomas Jefferson to John Adams (Oct. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 389-90 (discussing JEFFERSON, THE PHILOSOPHY OF JESUS). While believing his biblical abridgements would assist all interested students of Christian morality, Jefferson intended his “wee-little book” for what he considered to be unsophisticated, usually uneducated audiences, particularly Native Americans of his era. *Id.* (quoting, LETTER FROM THOMAS JEFFERSON TO CHARLES THOMPSON (Jan. 9, 1816), in 14 THE WRITINGS OF THOMAS JEFFERSON 385).

106. CHARLES A. & MARY R. BEARD, THE RISES OF AMERICAN CIVILIZATION 449 (1940). Regarding the quote’s comparative reference, from the late 1600s into the 1700s, “the Reverend Increase Mather and his son, the Reverend Cotton Mather, were both influential Puritan Ministers and intellectuals enamored with science. Yet, their scientific views were animated by their belief in the invisible world, both diabolical and divine. . . . Some scholars opine that the genesis of the Salem witchcraft trials may have been the publication in 1689 of Cotton Mather’s widely-disseminated treatise, *Memorable Providences*.” Jane Campbell Moriarty, *Wonders of The Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43, 50-51 (2001) (footnotes omitted). The Mathers, *père et fils*, were renowned for fanatical religious beliefs. “Increase and Cotton Mather were outspoken on many issues of morality and proper conduct. . . . [They] contributed to the witchcraft hysteria in Salem in 1692.” Mary Wishner, “*That Most Congenial Lawyer/Bibliographer*,” 104 LAW. LIBR. J. 135, 142 (2012) (footnote omitted).

107. E.g., Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURISPRUDENCE REV. 195, 257 (2015) (noting that Benjamin Franklin understood that rights such as “the pursuit of happiness” are properly understood through reason, not passion). In point of fact, comprehension and the attribution of meaning require the interaction of reason and passion. Peter Brandon Bayer, *Not Interaction but Melding - The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with*

certainly consistent with any endowment from a metaphysical force,¹⁰⁸ rights are “unalienable,” meaning something that no Government, indeed no person nor humanly created entity, can eradicate, abrogate or mitigate.¹⁰⁹ Such is the very fabric of Deontology, the concept that something, in this case rights, emanates from a natural order and may not be altered by Humankind for any reason regardless of the outcome.¹¹⁰ As scholar A. Scott Loveless précised “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.”¹¹¹ These are principles the Founders well understood.

Suggested Related Maxims for Judges and Other Legal Decision Makers, 52 MERCER L. REV. 1033 (2001). Nonetheless, the point for this article remains that, as scholars such as Conklin and the others referenced herein accent, the Founders believed in the deontology of natural rights.

108. E.g., Craig A Stern and Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMCK L. REV. 939, 959-62 (2008) (discussing but not necessarily embracing theories).

109. E.g., Landon W. Magnusson, *Selling Ourselves into Slavery: An Originalist Defense of Tacit Substantive Limits to the Article V Amendment Process and The Double-Entendre of Unalienable*, 87 U. DET. MERCY L. REV. 415, 416 (2010) (“For years, [‘unalienable’] has been understood to mean that there are certain rights that no government is permitted to abridge. ... [T]he unalienability of rights also forbids people from alienating those rights on their own through democratic processes.”); Larson, *supra* note 33, at 709 note 31 (citing, Justice David J. Brewer, Address at Yale Law School (1891) (specifically discussing the right to property), quoted in Owen M. Fiss, *David J. Brewer: The Judge as Missionary*, in PHILIP J. BERGAN ET AL., *THE FIELDS AND THE LAW* 59 (Federal Bar Council 1986)).

In this regard, Michael Novak plausibly concluded, “that almost every signer of the Declaration of Independence believed that Christian moral teaching (which they understood as aligned with Jewish moral teaching) was necessary to a republican government. The early founders recognized that ‘human history is the history of liberty’ -- individual decisions of will -- and that religion and state ‘do not compete in a zero-sum game.’” Candyce T. Beneke, *The Separation of Personal Religious Faith and Professional Identity-Is This Really Possible? Is It Truly Desirable?* 41 S. TEX. L. REV. 1423, 1431 (2000) (quoting, Michael Novak, *It’s OK to Put God in Political Campaigns*, Houston Chron., Dec. 26, 1999, at 1C).

110. See generally, *Part I: Originalism and Deontology*, *supra* note 7 at Section 2. Charles Carey and Jud Campbell, among others, argue that the concept of “unalienable Rights” had a more limited context; but, while their argument sounds plausible, the overarching deontological nature of natural law from which natural rights descend demonstrates that, in effect, government simply cannot infringe rights, that is, principles of natural law cannot properly limit principles of natural rights even if for the sake of the greater general good.. See, *infra* notes 245-79 and accompanying text.

111. A. Scott Loveless, *The Forgotten Founding Document: Considering the Ends of the Law*, 27 BYU J. PUB. L. 365, 368 (2013).

b. *What Is "the pursuit of Happiness?"*

A word is in order about the Founders' meaning of the right to "the pursuit of Happiness" because, contrary to some dismissive commentary, it "is not an empty phrase, but carries meaning for those seeking to vindicate their rights."¹¹² Indeed, "the pursuit of Happiness" captures the Founders' belief that the natural law enforces strict and immutable moral duties. As Prof. Douglas Kmiec explained, Blackstone devised the phrase "pursuit of happiness" for his influential legal treatise which, "likewise indicates that the natural law -- man's reasoned deduction of that impressed by God within the design of human nature -- has become interwoven with the common law."¹¹³ From these propositions, Blackstone wrote:

The creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, ... *For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter.* In consequence of which mutual connection of justice and human felicity, [God] has not perplexed the law of nature with a multitude of abstracted rules and precepts... *but has graciously reduced the rule of obedience to this one paternal precept, "that man shall pursue his own true and substantial happiness."*¹¹⁴

We see, then, a most profound and perhaps unexpected understanding: the *pursuit of happiness*, while surely motivated by personal desires for personal fulfillment, is not simply constrained by "the laws of eternal justice" (which might well have been sufficient to link legitimate pursuit of happiness with moral conduct). *Rather, the pursuit of happiness is itself God's sole "rule of obedience" to satisfy "the laws of eternal justice."* Instead of, "perplex[ing] the law of nature with a multitude of abstracted rules and precepts," God -- what the Founders would call "God and Nature's God" -- coalesced natural law's command of "eternal justice" -- of moral comportment -- into, as Blackstone expressed God's command, "man shall

112. Tesis, *supra* note 24, at 380.

113. Kmiec, *supra* note 25, at 392 (discussing, 1 William Blackstone, 1 COMMENTARIES ON THE LAW OF ENGLAND 41 (James Dewitt Andrews ed., Callaghan Co. 4th ed. 1899) (Commentaries using terminology "pursuit of happiness")).

114. *Id.* at 392 note 45 (emphasis added; quoting, 1 William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 40-41 (James Dewitt Andrews ed., Callaghan Co. 4th ed. 1899).

pursue his own true and substantial happiness.” Prof. Albert W. Alschuler likewise profoundly illuminated Blackstone’s point, “As ‘a being of infinite wisdom,’ however, God had ‘inseparably interwoven the laws of eternal justice with the happiness of each individual.’ *Happiness could be attained only by observing the law of nature, and obedience to this law could not fail to produce human happiness.*”¹¹⁵

Hence, inherent in the “unalienable Right [of] ... the pursuit of Happiness” is *the duty* to pursue one’s happiness in accordance with the natural law, meaning abiding by the natural rights that enforce moral comportment. This is so because persons may not legitimately be happy -- be pleased with what they have made of their respective lots -- if they have disparaged other persons by infringing on their unalienable rights. In this regard, the link between the Declaration and natural rights stemming from natural law remains unquestionable.

3. *The Legitimate Purpose of Government and the Right to Rebel --*

Along with the premise of unalienable rights, the Founders asserted a second equally vital premise explaining the fundamental purpose and legitimacy of Government: “*That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, ...*”¹¹⁶ From these two premises -- the unalienability of natural rights and the primary, legitimate governmental responsibility to safeguard such rights -- the Founders drew their principle conclusion defining the legitimacy of revolution: “[W]hensoever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”¹¹⁷

115. Alschuler, *supra* note 44, at 493 (emphasis added; quoting, William Blackstone, 1 Commentaries *40).

116. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

117. *Id.* It is worth emphasizing that the Founders’ prose asserting that the populace may construct post-revolutionary government “in such form, as to them shall seem most likely to effect their Safety and Happiness” accords only limited discretion. While there may be any number of means and structures to choose when designing and maintaining public authority, as the foregoing discussion shows, the Founders agreed and understood that none may disobey Government’s immutable, *a priori* duty to preserve “unalienable Rights.” Indeed, consistent with this writing’s *Part I: Originalism and Deontology*, *supra* note 7, we know from the just quoted Blackstonian theory, “Happiness” is illegitimate unless it conforms with moral norms. Therefore, the latitude attendant to structuring government that maximizes “Safety and

Continuing in the style of legal argument, having presented and explained the legal premises, the Founders then applied those premises to the particular facts¹¹⁸ in the form of an extensive inventory¹¹⁹ verifying that, "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."¹²⁰ Completing the argument, the Founders explained that the Colonies are blameless, having met fully their obligations to attempt salvaging their relationship with their Sovereign, attempts that England utterly rebuffed.¹²¹ With the legal argument completed, the Founders drew the inevitable legal conclusion: "That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved ..."¹²²

In sum, the Declaration's argument clearly and directly appeals to the inescapable intersection of law, logic, and morality:

As is evident from Jefferson's statements in the Declaration of Independence, natural rights are those particular claims -- assertions of principle -- that humans not only may rightly make against government authority, but that also form the basis upon which a just government is established. As such, the only true, just form of government is one which seeks "to secure these rights," which is why "[g]overnments are instituted among Men." Indeed, the failure to secure mankind's fundamental natural rights leads to the right to revolution -- "the Right of the People to alter or to abolish it."¹²³

The above paragraphs describing the structure and perceptions expressed in the Declaration establish that the Founders' sentiments are

Happiness" surely cannot justify despotism -- Government's most atrocious contravention of the "Laws of Nature and Nature's God" -- even if doing so makes the entire population happier and safer than the next most popular alternative. Bayer, *supra* note 17, at 396-403.

118. "To prove this, let Facts be submitted to a candid world." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

119. *Id.* para. 3.

120. *Id.* para. 2.

121. "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." *Id.* para. 4 (U.S. 1776).

122. *Id.* para. 6 (U.S. 1776).

123. Broyles, *supra* note 17, at 348.

entirely deontological, patently premised on the belief that the “Rights” which Governments are formed and entrusted to preserve are “unalienable,” meaning *a priori*, immutable and untouchable. Accordingly, the Founders’ argument proclaiming the Colonies’ very right to revolt, as it must be, is premised on the wrongfulness -- the inherent immorality -- of England’s conduct – a wrongfulness so horrible, destructive, and interminable that no affected persons reasonably would tolerate and that, indeed, they have an obligation to escape if only to preserve their dignity as human beings.¹²⁴ Because its wrongful behavior consisted of contravening without remorse rather than fostering the colonists’ “unalienable Rights,” England acted immorally – it failed to meet its duty to its populace. *Even presuming its abuse of the Colonies was good for England, it was not right for England because, as the Declaration explains, any government’s duty – its justification for existing – is to preserve and protect each subject’s “unalienable Rights.”* Failing in its non-delegable duty, then, was England’s immoral act, severe enough to warrant the American Revolution.¹²⁵

124. “But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, *it is their Duty*, to throw off such Government, and to provide new Guards for their future Security.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

It should be emphasized that this writing uses the term “affected persons” rather than “adversely affected persons” because no less than those who suffer from the infirmities of immoral governments, those who benefit from governmental immorality have an affirmative, immutable moral obligation to reform the offices of government. Interestingly, often it is the very nature of government under law which bears that moral burden, although, if course, the reformations must emanate from the governed themselves. For example, under the Kantian theory that should animate governmental conduct (*see, infra* note 125 and *Part I: Originalism and Deontology, supra*, note 7, Section 3-d), a wealthy individual has no moral obligation to expend any funds or efforts to assist the destitute so long as that wealthy individual did not immorally cause the destitution. However, Government itself has an affirmative moral obligation to assist the destitute at taxpayers’ expense, at least to the extent it restores to such destitute individuals the ability to attain for themselves acceptable, minimal subsistence including food, cloathing, shelter and arguably, access to health care, to education, and to employment opportunities. Peter Brandon Bayer, *The Individual Mandate’s Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 LOY. U. CHI. L.J. 865 (2013).

125. Importantly, this writing’s proposition that understanding the constitutional meaning of “due process” is an ethical endeavor premised on the moral theory of Immanuel Kant is not undermined by Kant’s insistence that, no matter how grave the circumstances, revolution against an existing government is never rightful, thus always is impermissible. According to Kant, “[I]f the ruler or regent, as the organ of the supreme power, proceeds in violation of the laws, as in imposing taxes, recruiting soldiers and so on, contrary to the law of equality in the distribution of political burdens, the subject can interpose complaints and objections (*gravamina*) to this injustice, but not active resistance.” Uncredited, *Kant’s Political and Juridical Doctrine*, 31 HARV. L. REV. 40, 52 (1917) (emphasis in original) (quoting, Immanuel Kant, *Éléments méaphisiques de la doctrine du droit* [THE METAPHYSICAL ELEMENTS

OF JUSTICE] (Part I of *La métaphysique des moeurs*), at 178, J. Barni's translation, Paris, 1853.) The logical conclusion is that, while Kant certainly embraced the structural idea of "separation of powers," e.g., Lewis W. Beck, *Kant and the Right of Revolution*, 32 J. HIST. OF IDEAS 411, 413-17 (1971), the executive power, symbolizing the essence of government, is immune to revolution by definition.

As if his meaning were not already clear, Kant explicated, "And least of all when the supreme power is embodied in an individual monarch is there any justification for seizing his person or taking away his life. The slightest attempt of this kind is high treason; and a traitor of this sort who aims at the overthrow of his country may be punished, as a political parricide, even with death." 31 HARV. L. REV. at 52 (citing, *Éléments méaphisiques de la doctrine du droit* at 180).

Kant's rational for his perhaps counter-intuitive proposition that no amount of official immorality can morally justify revolution is, according to one scholar, "brief to the point of lucidity." Beck, at 413. As explained by Prof. Beck, Kant had to be true to the logic of his constructs. "By virtue of the ideal of the social contract, sovereignty is indivisible. A constitution cannot have within it a positive law permitting the abrogation of the constitution; ..." *Id.* Therefore, rightful means to promote the Government's duty of moral comportment eschew rebellion that would declare the present Government unlawful and, for that reason, replace it. Beck appropriately denotes this aspect of Kant's philosophy as "formalism *in extremis*" while accepting that, given his deontological bent, nothing but purity of ideas would satisfy Kant. *Id.* (Indeed likewise, this writing's two-part exegesis linking Deontology and Originalism neither brooks exceptions nor indulges anomalies based on purported pragmatism akin to Justice Scalia's "faint-hearted" originalism. See generally, *Part I: Originalism and Deontology*, *supra*, note 7 at Sections 2-a, b. To be viable, a theory must be unwavering and completely consistent.) For Kant, then, despite his third Categorical Imperative admonishing that governments must act morally by comporting with the first two Categorical Imperatives (*id.* at Section 3-d-5), a constitution's promise to abide by natural law is precatory, part of its preamble. The true purpose of a constitution is to enforce the positive law. Beck at 414. Therefore, according to Kant, because, "Revolution abrogates positive law ... positive law and its system condemn revolution. *Revolution means a return to nature which the contract establishing positive law renounces.*" *Id.* (footnote omitted, emphasis added).

Hence, subjects may petition Government for reforms, but regardless whether those petitions are accepted, obedience to authority is mandatory. "For to disobey is to return to the state of nature and leave it to chance, or Providence, whether the new government yet to be established will be better or worse than the one which is overthrown." *Id.* at 415.

The foregoing might well be classified as an example of "Kant's ethics," which progressive Kantians need not obey. Modern understandings and applications of that unique and virtuoso philosopher's theories sound not in "Kant's ethics" -- the actual applications of his precepts Kant himself endorsed to resolve discrete moral problems -- but rather "Kantian ethics," "an ethical theory formulated in the basic spirit of Kant . . ." A proponent of Kantian ethics enthusiastically adapts Kant's broad principles to form what she believes is either a more accurate, pertinent meta-theory or a better application of such to precise circumstances." Bayer, *supra* note 17, at 347 (quoting ALLEN W. WOOD, KANTIAN ETHICS 1 (2008)); see also, *Originalism and Deontology*, *supra*, note 7 at Section 3-c. David Richards explained the idea neatly, "Kant's moral and political philosophy is studded with problematic casuistry to which contemporary Kantians object sharply, often on Kantian grounds. Neo-Kantians ... distinguish between the abstract theory and the casuistry in the interest of more fully understanding and explicating the permanent philosophical value in the abstract theory itself."

David A.J. Richards, *Kantian Ethics and the Harm Principle: A Reply to John Finnis*, 87 COLUM. L. REV. 457, 458-59 (1987) (footnote omitted).

As Prof. Richards accented, careful, properly elucidated use of Kantian ethics to improve Kant's ethics is justifiable, not a contrivance seeking the cachet of a Kantian patina to distort Kant's philosophy. "There may be the best of reasons, including the persecutory intolerance of absolutist Prussia of the late eighteenth century, why even a philosopher of Kant's stature may not have fully understood and elaborated the radical political implications of his views." *Id.* at 459 (citing, L. STRAUSS, PERSECUTION AND THE ART OF WRITING 179-201 (1952)). Richards added a useful clarification,

I do not suggest ... that Kant is self-consciously concealing his true meaning, but it is, in my judgment, plausible that the authoritarian Prussian culture in which Kant lived and worked may have led Kant to find plausibility in arguments not, in fact, critically defensible on the more abstract terms of his moral and political philosophy.

Kant's objection to the right to revolt is, I believe, reasonably thus understood.

Id. at 459 note 12 (citing, I. Kant, *Metaphysical Elements of Justice* at * 318-23).

Thus, although Kant himself denied the moral legitimacy even of revolts against unremitting tyrants, Kantian ethics credibly deduces that under the extreme conditions of the relentless immoral treatment they endured as chronicled in the Declaration, where any plea to the tyrannical ruling government was utterly futile, the American Colonists had not simply the right, but in fact the moral duty to liberate themselves. One might urge that George III had thrust the Colonists back into the state of nature from which they had an immutable obligation to extricate themselves. Accepting the unrelenting despotism of George III without rebelling would have rendered the Colonists complicit in their own subjugation, thus violating what Kant denoted as the duty of rightful honor, meaning, the moral imperative that individuals not allow themselves to be treated immorally. Bayer, *Originalism and Deontology*, *supra*, note 7, at notes 263-67 and accompanying text; *see also*, e.g., Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 811 (2003) (quoting Immanuel Kant, *The Metaphysics of Morals*, in *The Cambridge Edition of the Works of Immanuel Kant--Practical Philosophy* 392 [6:236] (Mary J. Gregor ed. & trans., 1996) (1797) ("Do not make yourself a mere means for others but be at the same time an end for them."); Peter Brandon Bayer, *The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 LOY. U. CHI. L.J. 865, 903 and note 159 (2013). As I noted elsewhere, "In sum, just as one may not use another solely as a means, neither may one deliberately sacrifice one's dignity by allowing oneself to be used exclusively as a means. Those who allow themselves to be literally or figuratively enslaved act as immorally as those who do the enslaving. Thus, there is an affirmative duty--a moral imperative--not to allow oneself to be 'subordinated' by 'surrendering control of [personal freedom] to others.'" *Id.* at 903 (footnote omitted, quoting, Weinrib at 812).

Moreover, even if recourse to Kantian ethics were an illicit means to expound Kant's moral philosophy, Kant provided an arguably too coy route not to justify revolutions, but rather to explain why governments born of insurrections nonetheless must be obeyed. Perhaps engaging in philosophical artifice, Kant urged that because even an immorally conceived government "realizes the idea of government," such government is morally authorized to govern regardless whether such government arose through immoral means. Kant's *Political and Juridical Doctrine*, at 54. As the Harvard Law Review article's unattributed author explicated:

"For that matter," writes the philosopher, "when a revolution has once taken place and a new constitution is set up, the illegality of its origin and of its foundation could not relieve the subjects from the obligation of submitting themselves, as good

C. The Constitution and Natural Law --

1. The Constitution's Commitment to the Declaration of Independence --

As I noted in prior writings, "It is long and well established that the Constitution's concept of legitimate government is derived from and loyal to the Declaration of Independence."¹²⁶ After the American Revolution and the failed attempt at governance under the Articles of Confederation,¹²⁷ the

citizens, to the new order of things; and they could not honestly refuse to obey the authority which actually has possession of the reins of government." It is the necessary and logical consequence of this idea that all authoritative power is sacred — is divine — and that it is never within the people's rights to ask for an account of its origin.

Id. at 554-55 (quoting, *Éléments métaphisiques de la doctrine du droit* (Part I of *La métaphisique des moeurs*), at 183, J. Barni's translation, Paris, 1853).

Apparently, Kant validated his controversial and counter-intuitive proposition on the basis that while the emergence from the state of nature to civil society is not a choice born of prudence, but rather a moral imperative, *Part I: Originalism and Deontology*, *supra*, note 7 at Section 3-d-5-A; *see also, e.g.*, Bayer at 903-07 (discussing Kant's third Categorical Imperative), given human imperfection, it cannot be presumed that any government will ever be the product of moral comportment. After all, "[F]rom such crooked wood as man is made of, nothing perfectly straight can be built." Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View*, from *KANT OF HISTORY* *22-23 (L. Beck ed. 1975). Thus, Prof. Beck explained, "That a government may have been established by an act of lawless violence does not impugn its legal authority and validity, nor reduce its claim to allegiance. Kant is willing to believe that all governments began with power, not with contract." Beck, *supra* at 415. Indeed, it is unlawful *per se* to inquire into the origin of a government as a means to "impugn its authority." *Id.*

Then, at least in a philosophical sense,

All established power then has its origin, as a fact, in violence; and it is violence, force, which is the foundation of public law. What, therefore, does it matter whether such and such a political power has sprung from a revolution? It is not because the power is legitimate that obedience is due it. We must obey it because it realizes a holy and divine idea.

Kant's Political and Juridical Doctrine, at 56.

The upshot becomes, "This principle of the irrelevancy of historical origin to judicial validity is used to legitimize the government which is, in point of historical fact, established as the result of insurrection." Beck, *supra* at 415. Accordingly, through either Kantian ethics or Kant's interesting codicil that even illegitimately conceived government must be obeyed, this or any writing's use of Kant's moral philosophy to inform American constitutional due process is justifiable despite the fact that but for the American Revolution, the former British colonists would have been unable to ratify the Constitution.

126. Bayer, *supra* note 17, at 385.

127. *E.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I Section 8*, 63 STAN. L. REV. 115, 121-22 (2010) (discussing the numerous problems with the Articles of Confederation leading to the forsaking of that charter in favor of the U.S. Constitution).

Framers drafted the Constitution specifically to memorialize as America's highest law the same moral *cum* political theory expounded in the Declaration to justify the Revolution. In that regard, as the Declaration's sestercentennial approaches, the Ninth Circuit rightly noted Chief Justice Warren Burger's perceptive and pithy comment, "The Declaration of Independence was the promise; the Constitution was the fulfillment."¹²⁸ Adopting a different but compatible metaphor to express the same sentiment, the Supreme Court accented twelve decades ago,

While [the] declaration of principles [within the Declaration of Independence] may 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.*¹²⁹

Although certainly not without vigorous dissenters, many respected constitutional scholars agree. For example, Declaration of Independence expert Douglas Kmiec avers, "The Declaration of Independence becomes the incorporation document for the United States, articulating inviolate, self-evident truths of natural law that the subsequent Constitution (as the by-laws of the new corporate sovereignty, known as the United States) is intended to observe."¹³⁰ Numerous notable adherents to this position include Alexander Tsesis,¹³¹ Phillip Bobbitt,¹³² Jeffrey Pojanowski and Kevin Walsh,¹³³ Kelly J.

128. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (2010) (quoting Chief Justice Warren Burger in Charles Alan Wright, *Warren Burger: A Young Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995)).

129. *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159-60 (1897) (emphasis added).

130. Kmiec, *supra* note 25, at 393.

131. Tsesis, *supra* note 24, at 375. ("The political philosophy of self-government, adopted into the Constitution, advances the Declaration's demand that authority be used for the public good.").

132. Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3, 32 (2002) ("The Declaration provides the foundation on which the unique American theory of constitutionally limited government is constructed.").

133. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L. J. 97, 126 (2016) ("Evidence from the Founding and early practice under the Constitution reveals that the Constitution was designed to be, and was understood to serve as, the kind of stipulated positive law that classical natural law theory identifies as the central case of positive law. It was made to be a fixed and authoritative legal settlement of certain matters contributing to the common good of a complete political community.").

Hollowell,¹³⁴ Michael Lawrence,¹³⁵ and, noted attorney, then-law review editor, Dan Himmelfarb who summarized:

[T]he Declaration of Independence is more than a propaganda instrument or legal brief; that in fact it is fundamental to a proper understanding of the Constitution; and that abundant support for this proposition can be found in the leading writings and debates of the Founding Era. Indeed, it would hardly be an exaggeration to say that the most fundamental pronouncements made in connection with the framing and ratification of the Constitution are restatements of the principles articulated in the second sentence of the Declaration of Independence.¹³⁶

Some scholars go even further, urging the Declaration as a legal source unto itself, a proposition that has not been adopted formally by the Judiciary. Famously, and not inconsistent with the premises of this writing, Prof. Henry V. Jaffa exhorts the, “constitutional hermeneutic ... that the Declaration is law, and more specifically, that the Declaration is part of the Organic law of the United States.”¹³⁷ Indeed, one of our greatest founding jurist-jurists, the eminent Justice Joseph Story,¹³⁸ implied if not actually

134. Kelly J. Hollowell, *Defining A Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U. L. REV. 67, 72 (2001-2002) (“[I]f the Declaration is viewed as a concise summation of natural law principles, then the Declaration's second sentence is ‘a sentence that might fairly be said to represent the philosophical infrastructure of the Constitution.’”) (quoting Harry V. Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper*, 1995 PUB. INT. L. REV. 209, 218 n. 20).

135. Michael Anthony Lawrence, *Government as Liberty's Servant: The “Reasonable Time, Place, and Manner” Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 8 (2007) (“What the founders, framers, and many other Americans since have shared is a common understanding that the irreducible nucleus around which all else orbits in America is liberty. *The Declaration of Independence stakes the claim, and the Constitution issues the guarantee.*” (emphasis added)).

136. Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 170-71 (1990) (quoted in Kmiec, *supra* note 25, at 399).

137. Patrick M. O’Neil, *The Declaration as Ur-Constitution: The Bizarre Jurisprudential Philosophy of Professor Harry V. Jaffa*, 28 AKRON L. REV. 237, 237 (1995) (reviewing and strongly criticizing, HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1994)).

138. Justice Story’s influence on American law, particularly through his Commentaries, is widely acknowledged. E.g., J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1008 (1998) (“Joseph Story's and Thomas Cooley's treatises were surely influential during the nineteenth century, ...”); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 718 note 390 (1989) (“Justice Story was one of the most important and influential jurists of his era.”) (citing, R. NEWMYER, *SUPREME COURT JUSTICE STORY: STATESMAN OF THE OLD REPUBLIC* 383 (1985)).

declared as much in his Commentaries: “[f]rom the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as belonging to a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies.”¹³⁹ As Prof. Cosgrove explained, “Thus, the act of independence created national citizenship, which had no basis in any antecedent form of nationhood. Moreover, Story argued, state sovereignty was limited by the event of independence, from which time Congress had exclusive authority to act in a range of domestic and international spheres.”¹⁴⁰

Interestingly, although appointed as an anti-Federalist, the thoughtful and erudite Story soon was persuaded by Chief Justice John Marshall to alter profoundly his initial estimate of American constitutionalism. In that regard, Marshall and Story formed a symbiotic relationship that shaped modern constitutional interpretation -- Marshall provided the theory, Story rendered the erudition.

Specifically, “[President James] Madison appointed Story to the bench because he was an active Republican-Democrat and opponent of the Federalists. Upon taking his seat, Story began his first serious study of the Constitution under the tutelage of Marshall. As a result of this endeavor Story became converted to many of Marshall’s ideas and began a long career in jurisprudence in which he was to become a memorable figure in his own right.” J. Allen Smith, *Marshall the Man John Marshall: A Life in Law*, by Leonard Baker. New York: Macmillan, 1974. Pp. x, 845, with Illustrations. \$17.95, 85 YALE L.J. 454, 459 (1976) (book review, footnote omitted). In return, as noted by eminent scholar Bernard Schwartz, “On the Marshall Court, Story supplied the one thing the great Chief Justice lacked -- legal scholarship. ‘Now, Story,’ Marshall once said to his colleague, ‘that is the law; you find the precedents for it.’ Story’s scholarship was, indeed, prodigious. ... If Marshall disliked the labor of investigating legal authorities to support his decisions, Story reveled in it. His opinions were usually long and learned and relied heavily on prior cases and writers.” Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. J. 93, 98 (1995) (quoting, EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 116 (1919)).

139. Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 110 (1998) (emphasis added, quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 110 (abr. ed. 1987)).

140. *Id.* (citing Story). One might take Story’s sentiment to mean that the legal creation of national citizenship and the attendant limits on state sovereignty derived from the very act of declaring independence regardless of any document commemorating and justifying that act. *Id.* at 110-11 (“In fact, the document, adopted by the Continental Congress two days after its declaratory act, could not effect an independence already legally declared; it could only explain it.”). Still, as Prof. Cosgrove explicated, “there was an early tendency to collapse the prior act of separation into the July 4 Declaration.” *Id.* at 111 (citing GARRY WILLS, INVESTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 336-37 (1978)). To be sure, “many courts simply assumed that the Declaration of Independence (the document) effected the legal independence of the states.” *Id.* (citing cases).

Additionally, akin to Joseph Story, Alexander Hamilton believed that state governments arose through the legal force of the Declaration:

According to Hamilton, “‘Our [New York’s] Sovereignty and Independence began by a Foederal Act,’ the Declaration of Independence. The Declaration of

Of course, Story's approach does not necessarily mean that had the victorious Colonists declined to premise their new Nation on one fundamental document, necessity or convenience would have morphed the Declaration into a *de facto* constitution. The United States might have developed an "unwritten" constitutional *ala* Great Britain wherein the Declaration could have attained the same function it now has as a reliable reference informing basic national principles. Still, because both its expression of natural rights and its legal argument premising legitimate government upon such rights are eminently correct, the Declaration alone surely could serve the same function that we will see is served not by the entire Constitution, but rather by its two Due Process Clauses whose brief texts informs us that, "No person shall ... be deprived of life, liberty, or property, without due process of law."¹⁴¹

Thus, while there undoubtedly is a counter-school of thought, Prof. Larson seriously blunders, I think, by bluntly declaring that, "the position of the Declaration of Independence in recent constitutional thought is one of utter and complete irrelevance. ... For most legal academics, the Declaration is little more than a political puff piece, or a 'propaganda manifesto, as

Independence was the fundamental document, and it reserved the treaty-making power to the United States as a whole: 'By the Declaration of Independence which is the fundamental constitution of every state, the United States assert their power to levy war conclude peace and contract alliances . . . ' The state government was called into being by the Declaration of Independence and that government had endorsed it: '[The Declaration of Independence] is acceded to by the New York Convention who do not pretend to authenticate the act, but only to give their approbation to it'"

William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 481 (2005) (alteration to the original) (footnote omitted) (quoting ALEXANDER HAMILTON, 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 374 (Julius Goebel, Jr. ed., 1964)).

Although not strictly asserting the Declaration as a legally enforceable source, like Story, Hamilton was willing to accord that document a force of its own which surely, at the very least, commends the Declaration as informing the legitimacy of subsequent American law.

141. U.S. CONST. amend. V. This article will show that the Judiciary rightly has recognized the Due Process Clauses as the font of rights and liberty -- the Constitution's value monism as it were. See, *infra* notes 521-98 and accompanying text; and see, Bayer, *Originalism and Deontology*, note 7 at Section 2-h (discussing "value monism," the principle that there is a single, core idea bedrocking a given concept such as *morality* or *due process*. That value monistic concept informs and defines every idea arising from the given concept). The many provisions of the Constitution are enforceable but only insofar as they comport with the overarching commands of the Due Process Clauses. Likewise, constitutional commands expressing discrete rights such as "free speech" or "free exercise" of religion are themselves enforceable but unnecessary as such particularized rights are subsets of "due process of law." *Id.* Therefore, had there been no Constitution and no Due Process Clauses, the Declaration of Independence itself would provide what the Constitution and its Due Process Clauses give us.

Richard Hofstadter described it.”¹⁴² Indeed, a brief further rejoinder is in order. Larson attributes two related causes explaining what he takes to be dominant hostility towards the Declaration as a source of either law or meaning. First, he avers that “the Declaration has been tainted by judicial decisions of dubious constitutional merit,” such as *Dred Scott* and *post-Bellum* rulings that substantially limited the reach of both constitutional and statutory civil rights.¹⁴³ Second, Larson smugly and unkindly asserts that,

The few academics who do emphasize the Declaration do nothing to dispel these concerns. These scholars focus almost exclusively on the second sentence of the Declaration, and they conclude that the Declaration is primarily about natural law and the protection of natural rights. ... Accordingly, the Declaration should be read in light of its natural law origins. ... Not surprisingly, arguments of this sort have been a resounding failure in the legal academy. ... Legal Realism has effectively banished “natural rights” to a distant cage in Felix Cohen’s “menagerie of metaphysical monsters.” Natural law has mystical overtones that seem out of place in a modern society, and cases that have invoked or implied natural law arguments are widely regarded as embarrassments.¹⁴⁴

Prof. Larson is hardly a lone voice.¹⁴⁵ Indeed, one commentator implies that modern scholarship has rendered natural law theory illicit.¹⁴⁶

142. Larson, *supra* note 33, at 705 (quoting, Richard Hofstadter, *The Progressive Historians* 269 (1968); and, citing, *inter alia*, Benno Schmidt, Interview by Lewis E. Lehrman with Benno Schmidt, quoted in Lewis E. Lehrman, On Jaffa, Lincoln, Marshall, and Original Intent, in Harry v. Jaffa et al., *Original Intent and the Framers of the Constitution* 3, 5 (1994)) (“American constitutional law is positive law, and the Declaration of Independence has no standing in constitutional interpretation whatsoever.”)).

143. *Id.* at 708-711. (discussing, *inter alia*, *Dred Scott*; *The Slaughterhouse Cases*, 111 U.S. 746 (1884); and the rise of *Lochnerism*).

144. *Id.* at 712 (quoting, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 829 (1935) (quoting BERTRAND RUSSELL, *MYSTICISM AND LOGIC* 155 (1918); footnotes omitted)).

145. Perhaps most famously, Jeremy Bentham declared essentially for all utilitarians then and now, “Natural rights is simple nonsense . . . nonsense upon stilts.” JEREMY BENTHAM, *ANARCHICAL FALLACIES*, 2 Works 501 (J. Bowring ed., 1843) (quoted in, Steven D. Smith, *Nonsense and Natural Law*, 4 S. CAL. INTERDISC. L. J. 583, 583 (1995)).

146. “My discussion does not suggest that talk of natural law and natural rights is ‘absolute nonsense,’ but only that such talk is nonsense to us. The sort of worldview within which such talk makes sense is one that we no longer accept-- or at least that the assumptions and restrictions of our academic culture no longer permit us to invoke. So when we speak positively or prescriptively about “natural rights” we speak a language, so to speak, that we have no right to speak.” Smith, *supra* note 145, at 603-04.

Nonetheless, the greater part of this writing's predecessor -- Part I, *Originalism and Deontology* -- disproves the claims that natural law, natural rights and deontological morality are fantasies of insipid minds or worse, the cynical constructs of hypocritical, manipulative liars. Doubtless, a sizable segment of legal and related scholarship smirks at arguments founded on transcendent, neutral moral precepts. Still, as *Originalism and Deontology* proves, *insofar as they purport to be viable moral theories*, Consequentialism and its prime component Utilitarianism are the products of weak analysis, corrupt purpose, or both.¹⁴⁷ Thus, infirm judicial rulings such as *Dred Scott* are not wrong because they appeal in whole or part to natural law. Rather, they are wrong because their grasp of natural law is infirm; having misunderstood the connotations of natural law, *Dred Scott* and its ilk reached the wrong legal conclusions. Indeed, this writing will conclude by extolling the recent line of Supreme Court precedent, steeped in natural law theory, ruling that, because it demeans their human dignity, governmental discrimination against homosexual individuals violates "due process of law."¹⁴⁸

Importantly, Prof. Larson does not claim that the Declaration is an irrelevant document -- "a 'propaganda manifesto,' as Richard Hofstadter described it."¹⁴⁹ Rather, in a long and thoughtful analysis, Larson urges, "that the deepest principles of the Declaration are not about an individual's natural rights against the state, but about the right of the American people to self-government and about the formal structures that allow self-government to flourish. When we understand the Declaration in this fashion, we can better appreciate the Declaration's place in American law."¹⁵⁰ In support, Larson

147. *Originalism and Deontology*, *supra* note 7 at Section 2-b. To explain how individuals might make difficult choices among various moral alternatives, Consequentialism makes eminent good sense. However, as an explainer of what is or is not moral -- as a clarification of what constitutes morality itself -- Consequentialism provides nothing better than a petulant child's view of right and wrong: What I want is "right" and, therefore, "good;" what I don't want is "wrong" and, therefore, "bad."

148. See *infra*, notes 864-944 and accompanying text. Therefore, Larson is simply wrong in his crude conclusion that, "The almost exclusive emphasis that has been placed on the Declaration's famous second paragraph has assured that the Declaration will always be seen as, well, a bit fluffy -- fine for Fourth of July orations, but useless for any serious analysis of legal issues." Larson, *supra* note 33, at 712 (footnote omitted).

149. *Id.* at 705 (quoting, RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS* 269 (1968)).

150. *Id.* at 783. In particular, Prof. Larson agrees with Justice Story that the Declaration created, "an American nation ... [not] thirteen independent nations." *Id.* at 784. Moreover, "the nationalist understanding of the Declaration is relevant to one of the most divisive issues in modern constitutional law, the so-called 'sovereign immunity' of the states. A paramount principle of the Declaration is that the people, not governments, are sovereign." *Id.* (footnote

claims that while, “the protection of minorities is [] a critical thread in the fabric of American law, [such] is much more a result of the Reconstruction Amendments than of the political ideas that animate the Declaration of Independence.”¹⁵¹

As this writing will show, Larson’s point is not entirely wrong but it is hugely exaggerated rendering it substantially incorrect.¹⁵² At this juncture, the important point is, as the above-quoted passages evince, like many other scholars, Larson ultimately acknowledges that the Declaration’s dominance over constitutional meaning is not only sensible, but indeed essential to any genuine originalism.¹⁵³ Encapsulating many of the themes earlier stressed herein, Harry V. Jaffa sagely urged:

omitted). However, the Declaration is not, according to Larson, a repository of individual rights that are trumps against the political power of recalcitrant forces. “There is not one line in the Declaration about the empowerment of minorities against popular majorities. The core principle of the Declaration is the people’s right of self-government; it is this principle that pervades all of the charges against the King.” *Id.* at 785 (footnote omitted).

151. *Id.* at 785 note 344 (discussing the protection of minorities in the declaration of independence).

152. We may assume that during the intervening century, culminating with the devastating Civil War, America’s understanding of human rights matured from that of its founding; which is exactly what our Founders expected and hoped. *See infra*, notes 280-87 and accompanying text. Nonetheless, the Reconstruction Congress made clear that it was propounding the Thirteenth, Fourteenth and Fifteenth Amendments primarily to fulfill the two broken promises of the original Constitution: (1) failing to abolish slavery and (2) limiting the Bill of Rights to constraining the federal level and not the states. *See infra*, notes 331-396 and accompanying text. Therefore, the fundamental premises of the *post-Bellum* civil rights amendments (and legislation predicated thereon) emanated from the very principles of natural rights set forth in the Declaration. *In that regard, as it must, the Declaration does address individual rights as bulwarks against the political power of corrupt majorities, even if that particular reality went if not unrecognized, unfulfilled until well after the Constitution’s original ratification.*

153. E.g., WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* (1987); SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995); LEONARD W. LEVY & DENNIS J. MAHONEY., *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 54-68 (1987) (cited in Cosgrove, *supra* note 139, at 124 note 106). As Prof. Cosgrove summarizes, “In Berns’s scheme, the Declaration is not itself a compact but has a privileged status as the explanation of the unwritten original compact. This relation between the Declaration and the original contract warrants interpreting the Constitution ‘by reference to the Declaration.’” Cosgrove, *supra* note 139, at 129 (quoting, Berns at 11 and generally discussing Berns at 23-25). Similarly, according to Cosgrove, Scott Gerber argues that, “the Constitution should be construed in the tradition of the natural law philosophy ‘expressed with unparalleled eloquence ... in the Declaration of Independence.’ The Constitution is the instrument designed to achieve the ends announced by the Declaration, namely, ‘to secure natural rights.’” *Id.* (quoting, Gerber at 6-7).

the original intent of the founders are the moral and political principles that guided them (their general intent), not “their personal judgment about contingent matters.” The Declaration of Independence states these principles. Moreover, unlike other statements of the founders’ philosophy, the Declaration is a privileged authority for establishing constitutional principles because it is “the fundamental legal instrument attesting to the existence of the United States.” As such, the Declaration identifies and authorizes the constitutional subject; “We the people of the United States.” Hence, the Declaration is “the most fundamental dimension of the law of the Constitution.”¹⁵⁴

154. *Id.* at 125-26 (quoting, HARRY V. JAFFA., ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 42, 23 (1994)). It is worth noting that Prof. Cosgrove remains unconvinced: “The approaches of Jaffa, Berns, and Gerber suffer from three weaknesses. First, they fail to adequately defend an originalist method of constitutional interpretation. Second, each has a tendency toward historical oversimplification. Third, they all make naive assumptions about the nature of interpretation.” *Id.* at 131. This writing cannot agree with Prof. Cosgrove’s concerns. Regarding his first critique, to borrow Cosgrove’s phrasing, this article’s Part I carefully and, I believe, convincingly, “defend[s] an originalist method.” See, *Originalism and Deontology*, *supra* note 7, at Section 4.

About the second alleged infirmity, Cosgrove explains, “The originalism of Jaffa, Berns, and Gerber also tends toward oversimplification in historical reconstruction. Their common claim that the Declaration is a Lockean document obscures the complexity of influences on not only Jefferson as drafter but on the Congress that adopted the Declaration. They also oversimplify the history leading to the framing of the Constitution.” Cosgrove at 132 (footnotes omitted). This writing’s response is, essentially, *history be damned*. Although a fascinating study, the proper *jurisprudential* concern is not what impulses history, economics, religion, vanity, or other forces may have imposed prior to 1776 and would impose thereafter. Rather, by rightly linking *via* the Declaration the Constitution’s meaning to the moral imperative of natural law, the Founders expected successive generations to adopt and to apply any newly discovered morality superior to those ethical precepts embraced by the founding generation. See, *infra* notes 280-87 and accompanying text. That better morality is Kantian which, as argued herein, rightly has been applied, albeit without attribution, by the Supreme Court. See, *Originalism and Deontology*, *supra* note 7, at Section 3 (discussing Kantian deontology) and *infra*, Section 6-c (discussing the Supreme Court’s due process dignity paradigm).

Prof. Cosgrove’s third concern posits that any form of Originalism “requires an implausible view of the interpretive process.” Cosgrove at 135. In support, he offers, “A famous example is the early disagreement between Madison and Jefferson over whether the United States Supreme Court had the power under the Constitution to find an act of Congress unconstitutional.” *Id.* (footnote omitted). His reproach holds water *if* one needs to find consensus, or even perhaps near unanimity, regarding the Declaration’s and the Constitution’s meaning derived from either their respective texts, or from the Founders’ themselves, or from their particular communities, or some amalgam of those considerations. But, again, as interesting and possibly informative as such inquiries may be, the essential task of enforcing the Declaration through the Constitution is understanding and applying Kantian morality. While human imperfection, particularly frailty and corruption, has and likely always will

In sum, one need not prove that the Declaration stands as law itself; it is sufficient to show, as a huge swath of scholarship agrees, that the Framers adopted and adapted the Declaration's propositions, both general and specific, as governing the Constitution and, thereby, all inferior law.

2. *Judicial Recognition of the Constitution's Commitment to the Declaration of Independence* --

The historical record amply supports scholars' assertions of a deliberate, inextricable link between the Declaration which espoused the Founders' belief in natural law as the arbiter of legitimate government and the Constitution through which the Framers enforced the Declaration's natural law philosophy.¹⁵⁵ This means, of course, that the same theory of moral comportment anchoring the Declaration's natural law predicates, likewise governs the meaning and application of the Constitution in all regards.¹⁵⁶

hinder that task, moral awareness is a matter of neutral reason. See, *Originalism and Deontology*, *supra* note 7 at Section 2-e. Accordingly, the true and correct answer to any constitutional problem is neither a matter of opinion, nor of competing politics. Rather, answers derive from the Categorical Imperatives predicated on the value monism of human dignity. *Id.*

155. Frederick Schauer, *Why The Declaration of Independence Is Not Law -- And Why It Could Be*, 89 S. CAL. L. REV. 619, 619 note 1 (2016) (citing, Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 419-20, 422-23, 429-31, 435-37 (2006) ("giving examples of how the Declaration has been treated as binding positive constitutional law")).

156. Some scholars purport that the Constitution itself acknowledges the Declaration as its source of authority and meaning. Prof. David Barton put the assertion most emphatically: "No other conclusion logically can be reached since the Constitution directly attaches itself to the Declaration of Independence in Article VII by declaring: 'Done in convention by the unanimous consent of the States present the seventeenth day of September in the Year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth.'" David Barton, *A Death Struggle between Two Civilizations*, 13 REGENT U. L. REV. 297, 312 (2001). (emphasis added, quoting, U.S. CONST. art. VII); see also, e.g., Paul M. Brodersen, *Personhood and the Constitutional Puritan Covenant: an the Federal Government Dictate ate Constitutional Definitions?*, 6 LIB. U. L. REV. 379, 404 (2012); Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. 95, 97 (2010).

By accenting as the Constitution's founding date not only the exact year-month-day it was finalized by the Convention, but as well the number of years since the Nation's founding -- "and of the independence of the United States of America the twelfth" -- the Framers clarified that the meaning of the Constitution derives from the American Revolution. Because the Declaration is the moral-legal-historical-logical thesis of that Revolution, there is much strength to Barton's argument. Granted, one might have wished for a more direct statement in the Constitution's text. However, the Declaration's espousal of principles so clearly informs the Constitution that referencing the Declaration implicitly through the phrase "and of the independence of the United States of America the twelfth" arguably is more than sufficient to

Indeed, there seems little doubt that under the domain of Originalism, the true originalist position must be what the Supreme Court plainly expressed a decade after the Declaration's centennial, "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress . . . in securing . . . the blessings of civilization under the reign of just and equal laws . . ." ¹⁵⁷ A century later, as previously quoted, such was the very avowal of Chief Justice Warren Burger, no radical liberal, who vividly summarized this dominant norm linking the philosophy of the Revolution to the philosophy of republican governance: "The Declaration of Independence was the promise; the Constitution was the fulfillment." ¹⁵⁸

The Chief Justice's conclusion that the Constitution is the "fulfillment" of the Declaration's "promise" has been long recognized by the American judiciary. No less authority than Learned Hand ¹⁵⁹ unflinchingly acknowledged the obvious natural law origins of America: The Declaration expresses the natural law theory of government; the Constitution operationalizes the Declaration's principles as an actual government. Specifically, Hand stated, the rights in the Bill of Rights, "were generally regarded as embodying the same political postulates that had been foreshadowed though not fully articulated in the exordium of the Declaration of Independence: 'self-evident' and 'unalienable rights' with which all men are 'endowed by their creator' and among which are 'life, liberty and pursuit of happiness.'..." ¹⁶⁰ As Justice Louis Brandeis, one of America's most

comprise a textual reference acknowledging the inextricable association between the two founding documents.

157. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see generally, Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965 (1992).

158. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (2010) (quoting Chief Justice Warren Burger as quoted by Charles Alan Wright, *Warren Burger: A Young Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995)).

159. Highly regarded theorist, judge on the United States District Court for the Southern District of New York from 1909-1924, and thereafter judge on the United States Court of Appeals for the Second Circuit from 1924-1951 (the last three years as chief judge), "Learned Hand is probably the most influential and famous jurist who never served on the Supreme Court." Stewart Schiffman, *Judicial Biographies: A Sampling*, 39 No. 4 JUDGES' J. 38, 40 (2000).

160. Learned Hand, *BILL OF RIGHTS*, 1-2 (1958) (quoted in, G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and The Jurisprudence of The Federal Criminal Law*, B.Y.U. L. REV. 829, 876 note 130 (2002)).

acclaimed lawyers, jurists, and legal theorists,¹⁶¹ likewise précised thirty years earlier, “The makers of our Constitution *undertook to secure conditions favorable to the pursuit of happiness*. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect.”¹⁶²

It is only relatively recently that judges have hesitated to acknowledge that, if not law itself, the principles of the Declaration must greatly inform the meaning of its offspring, the Constitution.¹⁶³ Accordingly, courts understandably and rightly have recognized the Constitution’s link to natural law and natural rights theory. Indeed, two centuries ago, Chief Justice John Marshall declared somewhat wryly for the Court, “there are certain great

161. Nicknamed “the People’s lawyer” because of his innovative, enthusiastic legal advocacy on behalf of laborers, indigents, radicals, criminal defendants and others often lacking power and influence (Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1472 (1996) (discussing Brandeis’ “series of brilliant forays into the public realm”)), Louis Dembitz Brandeis is regarded as “one of our most brilliant and consequential legal minds.” Katherine A. Helm, *What Justice Brandeis Taught Us about Conflict of Interest*, 35 J. LEGAL PROF. 1, 22 (2010). His “legacy” of legal principles, especially in the realms of privacy and rights, still informs American law. *See Generally*, Hon. Mary Murphy Schroeder, *The Brandeis Legacy*, 37 SAN DIEGO L. REV. 711 (2000); Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863, 1182 (1983) (book review) (noting the accord between Justices Brandeis and Holmes “in numerous cases of vital importance to the New Deal”).

162. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added; discussing the right of individual privacy), o., *Katz v. United States*, 389 U.S. 347 (1967).

163. In fact, up until 1972, the Supreme Court quoted Justice Brandeis’ *Olmstead* dissent accenting the Declaration’s influence on constitutional meaning. *Eisenstadt v. Baird*, 405 U.S. 438, 453 note 10 (1972); *see also*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In the mid-Twentieth Century, the highly respected Justice John Marshall Harlan (the second), a strong exponent of scrupulous judging always within the strictures of proper restraint (*see, infra* note 459 and accompanying text), and arguably the most influential modern judicial voice on due process theory (*see, infra* notes 729-70 and accompanying text), readily quoted the *Olmstead* dissent as pivotal to understanding the Due Process Clauses. *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting). In Harlan’s words, Brandeis’ observation that, “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness” is, regarding its, “rational purposes, historical roots, and subsequent developments ... [p]erhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution.” *Id.* at 549-50 (Harlan, J., dissenting).

State highest courts likewise continue to quote Brandeis into the Twenty-First Century. *Pennsylvania State Education Association v. Commonwealth, Department of Community and Economic Development*, 148 A.3d 142, 151-52 (Pa. 2016); *People v. Weaver*, 2 N.Y.3d 433, 438 (2009); *In re T.R.*, 557 Pa. 99, 105 (1999); *Employment Sec. Com’n of Wyoming v. Western Gas Processors*, 786 P.2d 866, 872 note 10 (Wy. 1990) (*dictum*); *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1989); *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 239-40 (1982) (*en banc*).

principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.”¹⁶⁴ Four decades later, Marshall’s immediate successor, the perhaps notorious Roger Brooke Taney, reflecting the

164. *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 133 (1810). Many commentators interpret Marshall’s prose to recognize natural law’s useful influence in constitutional interpretation. E.g., Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U CHI. L. REV. 1127, 1170-71 (1987). Others however, claim that, “Far too much has been made of Marshall’s remarks[.]” Christopher L. Eisgruber, *John Marshall’s Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 467 note 19 (1996). Prof. Eisgruber suggests, “it is at least possible” that Marshall’s reference to “certain great principles of justice” means “the common law rules of contract, providing that a third party purchaser for value from the holder of a voidable title secured a good title.” *Id.*

True, some scholars have dismissed as ephemeral Marshall’s references to transcendental forces. For instance, “Felix Frankfurter once described early citation of natural law as ‘not much more than literary garniture’ in John Marshall’s opinions, and it is true that one cannot be certain what authority weighed most heavily with him—or with any individual judge.” R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401, 409 (2007). However, as Prof. Helholz cunningly surmised, “But Justice Frankfurter’s scoffing remark mirrors his own opinion. It enables him to dismiss the evidence untested.” *Id.* In fact, consistent with his compatriots discussed *supra* at Section 2-a, Chief Justice Marshall spoke glowingly of natural law by referencing, “writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages.” *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J., dissenting) (quoted in Helmholz at 405 n. 23). Marshall’s quote certainly is consistent with the determination of law professors Charles D. Kelso and R. Randall Kelso that, “Justice [Anthony] Kennedy’s [modern] approach mirrors the early natural law lawyers’, including Chief Justice John Marshall, who believed more in an evolving Constitution based on enlightened reasoning about the natural law principles placed into the Constitution by the framers and ratifiers.” Charles D. Kelso & R. Randall Kelso, *Judicial Decision-Making and Judicial Review: The State of the Debate, Circa 2009*, 112 W. VA. L. REV. 351, 388 (2010) (footnote omitted); see also, e.g., Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U. L. REV. 993, 1040 (1991) (noting that in, Sherry, *Original Sin*, 84 NW. U. L. REV. 1215, 1224 (1990), “[Law professor Suzanna] Sherry cites ‘John Marshall of *Marbury v. Madison*’ for ‘support of natural law restraints on legislation.’”)

I hope I am not adding a Twenty-First Century gloss to Marshall’s early Nineteenth Century prose when I wonder, in response to Prof. Eisgruber, whether, as important as they are, “common law rules of contract” would be, in Marshall’s words, the sole “great principles of justice” an American or English judge would have denoted. While the common law of contracts undoubtedly has greatness in its role of enabling reliable, effective and peaceful commerce, Marshall’s stress on “justice” evinces something grander than economic efficiency, or even the vital principle of civil society that breaches of commercial transactions are met with legal process, not violent self-help. Rather, given Marshall’s possibly off-handed melding of natural law and common law precepts, e.g., Sherry, 54 U CHI. L. REV. at 1170-71, even if he was referring to contract law, his referencing the “great principles of justice” inspires the question: from where would contract law derive, inspire or enforce such *justice*? The answer must be from natural law if we are to credit the undeniable thinking of the Founders who authored the Declaration and the Constitution. Accordingly, I disagree with Prof. Eisgruber’s waiving away of Marshall’s natural law terminology.

dominant sentiment,¹⁶⁵ wrote, “There are, undoubtedly, fixed and immutable principles of justice, sound policy, and public duty, which no State can disregard without serious injury to the community, and to the individual citizens who compose it.”¹⁶⁶ If Taney rightly is castigated, most prominently for authoring the Court’s opinion in *Dred Scott*,¹⁶⁷ often derided as the single

165. Courts long had recognized the existence of “immutable principles of justice.” *E.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796) (*per* Chase, J.); *Sturges v. Crowninshield*, 17 U.S. 122, 184 (1819) (“The constitution was intended to secure the inviolability of contracts, according to the immutable principles of justice.”); *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 475 (1830) (“It is an acknowledged general principle, that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principles of natural justice, that no man’s rights should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right.”); *Mayor, Aldermen and Inhabitants of City of New Orleans v. U.S.*, 35 U.S. (10 Pet.) 662, 735 (1836) (“It is a principle sanctioned as well by law as by the immutable principles of justice, that where an individual acts in ignorance of his rights, he shall not be prejudiced by such acts. And this rule applies at least with as much force to the acts of corporate bodies, as to those of individuals. We will, therefore, inquire, as we are bound to do, whether, under the circumstances of this case, the acts of the city can, justly, be considered as prejudicing the claim which they assert.”); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 598 (1839) (M’Kinley, J., dissenting, “[C]ertain rules founded in the law of nature and the immutable principles of justice have, for the promotion of harmony and commercial intercourse, been adopted by the consent of civilized nations.”); *generally*, *Helmholtz*, *supra* note 164, at 407–08 (citing numerous sources).

166. *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 428 (1853) (*per* Taney, C.J.).

167. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Prof. Daniel Farber, for one, has not hesitated to rebuke Taney the judge and the person:

The Taney opinion also occupies suspect moral ground. Unlike some other judges of the time, Taney was untroubled by the moral dimensions of his judicial support for slavery. Robert Cover’s book, *Justice Accused: Antislavery and the Judicial Process* (1975), tells the story of Northern judges forced to carry out a deeply immoral law, the Fugitive Slave Act, by their fidelity to law. In contrast, Chief Justice Taney went far out of his way to leap to the defense of slavery and racism. *If many Northern judges were unwilling bridegrooms of evil, Taney can only be considered an ardent suitor.*

Daniel Farber, *A Fatal Loss of Balance: Dredd Scott Revisited*, 39 PEPP. L. REV. 13, 14 (2011) (emphasis added).

Some, however, offer a bit more charity, as in Prof. Louis Michael Seidman’s analysis:

For Taney, racist views about African Americans were relevant not because they were correct (although, at least in slightly diluted form, he thought that they were), but because they helped interpret the original understanding of constitutional text. ... At least on his own account, Taney scrupulously abstained from injecting his own moral and political judgments into the decisional calculus and modestly deferred to judgments made by the Framers.

Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115, 123 (arguing that Taney’s error was not that he, “departed from

most unpardonable American judicial decision¹⁶⁸ -- “the worst atrocity in the Supreme Court’s history,”¹⁶⁹ -- other decisions show that Taney was not completely blind to the principles of liberty emanating from the natural rights recognized in the Declaration. As part of his prosecution of the Civil War,

[President Abraham] Lincoln had suspended the writ of habeas corpus along the route between Washington and Philadelphia, and the army had imprisoned a Confederate sympathizer, John Merryman, in Baltimore’s Fort McHenry ... In an opinion denying Lincoln’s power to suspend habeas corpus, Taney [acting as Circuit Justice] admonished the President that “[t]he constitution of the United States is founded upon the principles of government set forth and maintained in the Declaration of Independence.” One such principle was civilian control of the military, as evidenced by the Declaration’s charge that George III “‘had affected to render the military independent of, and superior to, the civil power.’”¹⁷⁰

If Chief Justice Taney is a dubious advocate for immutable principles of justice, for the purposes of this writing, he is part of a thoroughgoing recognition among Anglo-American theorists of the persistence of natural law and its rightful place in legal analysis.

Roughly four decades thereafter, addressing a takings issue, the highly-regarded first Justice John Marshall Harlan cited the likewise regarded Justice Joseph Story to express the same legal sentiment, “The requirement that the property shall not be taken for public use without just compensation is but ‘an affirmance of a great doctrine established by the common law for the protection of private property. *It is founded in natural equity, and is laid*

original [constitutional] text and understanding, but because his insistence on adhering to his reading of the text led him to ignore the huge moral issue at stake.” *Id.* at 124).

168. Austin Allen, *Rethinking Dred Scott: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141, 174 note 234 (2007) (quoting, *inter alia*, 1 Bruce Ackerman, Bruce Ackerman, *We the People: Foundations* 63 (1991) (“calling Dred Scott ‘[f]rom a moral point of view, ... the single darkest stain upon the Court’s checkered history’”); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 415 (1998) (“calling Dred Scott ‘the most repugnant and reviled of Supreme Court decisions’”)).

169. Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMM. 37, 41 (1993) (quoted in, Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMM. 271, 272 (1997)).

170. Larson, *supra* note 33, at 703-04 (quoting, *Ex parte Merryman*, 17 F. Cas. 144, 152 n.3 (C.C.D. Md. 1861) (No. 9487) (emphasis added, other citations omitted)).

down as a principle of universal law. . . .”¹⁷¹ Equally, at the dawn of the last century, *Cotting v. Goddard* noted, “The first official action of this nation declared the foundation of government” as the Declaration’s enumeration of ‘unalienable rights.’”¹⁷² In support, *Cotting* quoted the Court’s admonition of four years earlier from *Gulf, C. & S.F. Ry. Co. v. Ellis*¹⁷³ which, as noted above¹⁷⁴ but worth repeating, boldly but aptly explained:

While [the Declaration’s] . . . principles may not have the force of organic law, or be made the basis of judicial decision[s] as to the limits of right[s] and dut[ies], 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.¹⁷⁵

Given the accepted connection between the Declaration and the Constitution as exemplified by *Cotting* and *Ellis*, commentator A. Scott Loveless aptly concluded,

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. . . . *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*

171. *Chi., B. & Q. R. Co. v. City of Chi.*, 166 U.S. 226, 236 (1897) (per, Harlan, J.; quoting 2 Story, Const. § 1790) (emphasis added).

172. *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79, 107 (1901). That same year, the Court affirmed, “We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. *Of the former class are the rights ... to due process of law ...*” *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (emphasis added); *see also*, *Tuaua v. U.S.*, 788 F.3d 300, 308 (D.C. Cir. 2018) (quoting, *Bidwell* but not referencing due process); *Ralpho v. Bell*, 569 F.2d 607, 619 note 70 (D.C. Cir. 1977) (quoting *Bidwell*); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 414 (7th Cir. 2015) (citations omitted) (right to keep and bear arms, “are natural rights that pre-existed the Second Amendment.”).

173. 165 U.S. 150 (1897).

174. *See supra* note 129 and accompanying text.

175. *Id.* at 160.

*go against not simply a clause or phrase of the Constitution; they would go against the core and foundation of the Constitution itself.*¹⁷⁶

These federal level acknowledgements of natural law's role in constitutional adjudication are consistent with early post-Revolution state cases recognizing "higher law" constitutionalism. For example, in 1789, anticipating much modern substantive due process theory, South Carolina's *Ham v. McClaws*¹⁷⁷ stated,

"is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles,' [therefore,] it was obligated to construe the statute [in question] in a manner 'consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.'"¹⁷⁸

Such decisions are not at all surprising given that the sentiments of state law were no different from those at the federal level:

An examination of state constitutions and accompanying declarations of rights in existence during the Founding era reveals that the fundamental principles those state governments were erected upon were grounded in natural rights concepts. As these documents demonstrate, the founding generation distinguished between natural rights and positive law, decrying the latter when it violated the natural rights of life, liberty, property and conscience: ...¹⁷⁹

176. Loveless, *supra* note 111, at 368 (emphasis added).

177. 1 S.C.L. (1 Bay) 91 (S.C. Ct. Com. Pl. 1789).

178. *Id.* (quoted in Gedicks, *supra* note 31, at 629).

179. Broyles, *supra* note 17, at 348. Similarly, Prof. Gedicks chastised commentators who selectively highlight cases while,

ignor[ing] the wealth of earlier precedent from the years preceding and immediately following the 1791 ratification of the Fifth Amendment. Robin v. Hardaway (1772), Butler v. Craig (1787), Ham v. McClaws (1789), Bowman v. Middleton (1792), Vanhorne's Lessee v. Dorrance (1792), Zylstra v. Corp. of Charleston (1794), Lindsay v. Commissioners (1796), Calder v. Bull (1798), and Marbury v. Madison (1803) all support the conclusion that judges and attorneys during that period understood the meaning of "law" to include a fundamental normative dimension as prescribed by classical natural law theory and higher-law constitutionalism.

Gedicks, *supra* note 31, at 658 footnote omitted).

While neither as prevalent nor as adamant, modern rulings rightly recognize that the Constitution enforces the principles of the Declaration.¹⁸⁰ Very recently, for instance, citing Blackstone and other commentators as part of an “original public meaning” approach to hold that the Second Amendment permits individuals to openly carry firearms for self-protection, the Ninth Circuit stated that natural law principles predating that Amendment strongly implied the right of “open carry.”¹⁸¹ Almost as recently, albeit overturned by the Supreme Court, that Circuit invoked the Declaration to bolster its order quashing those portions of President Donald J. Trump’s Proclamation 9645, sec. 2, that, *inter alia*, sought, “to bar over 150 million nationals of six designated countries from entering the United States or being issued immigrant visas that they would ordinarily be qualified to receive.”¹⁸² In addition to statutorily-based infirmities underlying Trump’s challenged policy,¹⁸³ the Ninth Circuit ruled, “that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress.”¹⁸⁴

180. See, e.g., *Vance v. Bradley*, 440 U.S. 93, 94-95 n.1 (1979) (noting that “all of [Section] 1 of the Fourteenth Amendment is already within the spirit of the Declaration of Independence” (citation omitted)); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (“The liberty preserved from deprivation without due process included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’”) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972)); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“[T]he conception of political equality from the Declaration of Independence,” as evinced in the Constitution’s Fifteenth, Seventeenth and Nineteenth Amendments prescribes “one person, one vote.”) (quoting *Gray v. Sanders*, 372 U.S. 368 (1963)); *Bute v. Illinois*, 333 U.S. 640, 651 (1948) (“The Constitution was conceived in large part in the spirit of the Declaration of Independence”); see also, *Tuaua v. U.S.*, 788 F.3d 300, 308 (D.C. Cir. 2018); Bayer, *supra* note 17.

181. *Young v. Hawaii*, --- F.3d ---2018 WL 3542985 at *7 and note 8 (9th Cir. 2018). Identically, the Seventh Circuit linked the Second Amendment to principles of natural rights accentuating that the rights to keep and bear arms, “are natural rights that pre-existed the Second Amendment.” *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 414 (7th Cir. 2015) (citations omitted).

182. *Hawaii v. Trump*, 878 F.3d 662, 672-73 (9th Cir. 2017) (*per curiam*; footnote omitted), *rev.*, 138 S.Ct. 2392 (2018).

183. “The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act (‘INA’), 8 U.S.C. § 1101 et seq., vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President’s issuance of the Proclamation once again exceeds the scope of his delegated authority.” *Id.* at 673; see *id.* at 683-97, *rev.*, 138 S.Ct. 2392 (2018) (Ninth Circuit’s statutory analysis).

184. *Id.* at 697 (footnote omitted). The Court clarified that it was not addressing extraordinary powers a president might exercise during a time of “national emergency” as Trump raised no such claim. *Id.* at 697 *rev.*, 138 S.Ct. 2392 (2018).

Explicating the Trump Administration's constitutional error, the Ninth Circuit appealed to the Declaration:

Exclusive congressional authority over immigration policy also finds support in the Declaration of Independence itself, which listed “obstructing the Laws for Naturalization of Foreigners” and “refusing to pass [laws] to encourage their migrations hither” as among the acts of “absolute Tyranny” of “the present King of Great Britain.” The Declaration of Independence para. 2 (U.S. 1776). As Justice [Robert] Jackson noted in *Youngstown [Sheet & Tube Co. v. Sawyer]*, 343 U.S. 579 (1952), “The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.” 343 U.S. at 641, 72 S.Ct. 863 (Jackson, J., concurring). This is perhaps why the Constitution vested Congress with the power to “establish an [sic] uniform Rule of Naturalization”: the Framers knew of the evils that could result when the Executive exerts authority over the entry of aliens, and so sought to avoid those same evils by granting such powers to the legislative branch instead. See U.S. Const. art. I, § 8, cl. 4.¹⁸⁵

185. *Id.* at 698, *rev.*, 138 S.Ct. 2392 (2018). As noted, the Supreme Court reversed the Ninth Circuit. First, the Court found that, contrary to the Circuit's analysis, the Trump Proclamation provisions at issues comport with presidential authority allowed under the Immigration and Nationality Act (“INA”). *Trump*, 138 S. Ct. 2407-2415. Next, after briefly addressing standing, the Court rejected the challengers' claims of unlawful religious *animus* in violation of the First Amendment. *Id.* at 2416-23. In particular, the *Trump* majority stressed that, given the direct and indirect implications for foreign affairs, even when under the judicial bailiwick of constitutional review, courts must be highly deferential to immigration policies promulgated by the Executive and the Legislature. *Id.* at 2418-20. Such is especially so when reviewing presidential immigration policies and procedures evoking national security matters that, given the volatility of international relations, can change suddenly and precipitously. History and legal tradition inform that, unlike the Executive and even Congress, the Judiciary is not well positioned to respond pointedly and swiftly to world affairs. *Id.* at 2419-20. Accordingly, in most instances, a reviewing court's determination that, as therein, “the policy is facially legitimate and bona fide, would put an end to [such] review.” *Id.* at 2420.

Nonetheless, the Court conducted an at least mildly probing review finding that the challenged immigration policy did not discriminate against Muslims as a class, *id.* at 2420-23, a proposition strongly challenged by the dissenting justices. See, *id.* at 2433 (Breyer, J., with Kagan, J., dissenting) (“If this Court must decide the question without this further litigation [on asserted facts that have not been reviewed by the trial-level court], I would, on balance, find the evidence of antireligious bias ... a sufficient basis to set the Proclamation aside.”); *id.* at 2435-2440 (Sotomayor, J., with Ginsberg, J., dissenting) (“Ultimately, what began as a policy explicitly ‘calling for a total and complete shutdown of Muslims entering the United

Thus, the familial connection between the Declaration and the Constitution remains, as it should and must, part of our American jurisprudence. Justices as diverse as John Paul Stevens and Clarence Thomas¹⁸⁶ recognize the Declaration demarcates the meaning and application of the Constitution.¹⁸⁷ Indeed, nearly thirty years ago, Justice Thomas, arguably the Declaration's most ardent promoter among the Judiciary,¹⁸⁸ boldly but aptly discerned the elevated, unique status of the Declaration as the prime arbiter of constitutional meaning: "[T]he Constitution is a logical extension of the principals of the Declaration of Independence *The*

States' has since morphed into a 'Proclamation' putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers." *Id.* at 2440).

Possibly, *Trump* calls into question the Ninth Circuit's claim that separation of powers bestows, "Exclusive congressional authority over immigration policy ..." *Id.* 878 F.3d at 698. However, as noted, the Supreme Court found that the President's policies were authorized under the broad discretion accorded by the INA; thus, there was no occasion to inquire whether the Constitution's Article II in-and-of-itself would support Trump's immigration policy absent statutory authorization. *Compare, id.* at 2424 (Thomas, J., concurring) ("[INA] Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. ... Nor could it, since the President has inherent authority to exclude aliens from the country.") (citations omitted).

Regardless, there is nothing in the Supreme Court's reversal to challenge the Ninth Circuit's proposition that constitutional meaning is informed by the text and spirit of the Declaration. Indeed, nowhere does the Supreme Court mention the Declaration which is unsurprising given that it found the Trump policy proper under the INA and it limited its review of the challengers' constitutional claims to the issue of *anti-Muslim animus vel non*.--

186. Fully consistent with this article's premises (*see*, Sections 2, 4), as the Justice himself wrote, "The proper way to interpret the Civil War amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration." Clarence Thomas, *Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation*, 30 *How. L.J.* 983, 994 (1987).

187. Bayer, *supra* note 17, at 386 note 548:

See, e.g., Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2334 (2009) (Stevens, J., with Ginsburg and Breyer, JJ., dissenting) ("The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots.") (citing *The Declaration of Independence*, para. 2 (U.S. 1776)); *Adarand Constructors Inc., v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) ("[T]he principle of inherent equality that underlies and infuses our Constitution" is linked to the unalienable rights recognized in the Declaration); *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., with Brennan and Marshall, JJ., concurring in part and dissenting in part).

188. "Justice Clarence Thomas ... is perhaps the contemporary champion of the values of the Declaration." Trapp, *supra* note 63, at 843; *see also, e.g.,* John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 *Regent L. Rev.* 471 (1999-2000); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 *Regent L. Rev.* 33 (1997).

higher-law background of the American Constitution . . . provides the only firm basis for a just, wise, and constitutional decision."¹⁸⁹

In a seemingly different yet, upon reflection, actually similar vein, "conservative" textualist Justice Antonin Scalia, joined by Justice Thomas, accented that the Constitution ought not be interpreted in ways that frustrate the principles of the Revolution as commemorated in the Declaration. Lamenting the majority's ruling that states must treat same-sex marriages equally with opposite-sex marriages, Scalia urged, "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, *robs the People of the most important liberty they asserted in the Declaration of Independence* and won in the Revolution of 1776: the freedom to govern themselves."¹⁹⁰ While, with scant exceptions, this writing does not agree with how Justices Thomas and Scalia would enforce the Declaration's natural law precepts, it agrees with Thomas', Scalia's, and Stevens' general admonition that the Constitution's meaning is informed by the Declaration's moral-legal philosophy.¹⁹¹

189. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 63, 64, 68 (1989) (emphasis added; quoted in Trapp, *supra* note 63, at 844). Interestingly and perhaps alarmingly, while consistent in his view as evinced by his judicial opinions and articles, "During the confirmation hearings on his appointment to the Supreme Court, however, Thomas virtually denied that he was committed to a natural law approach to constitutional decision-making." Cosgrove, *supra* note 139, at 160 note 328 (1998) (citing, Scott D. Gerber, *The Jurisprudence of Clarence Thomas*, 8 J.L. & POL'Y 107, 112 (1991)).

190. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2627 (2015) (Scalia, J., with Thomas, J., dissenting) (emphasis added).

191. Likewise, Congress understood (and, one hopes, still understands) that the Declaration should be regarded, indeed enforced, as, if not law, establishing essential principles of legitimate governance that inform law and other official actions. Prof. David Barton explained through examples, "the admission of territories as States into the United States was often predicated on an assurance by the State that its constitution would violate neither the Constitution nor the Declaration." David Barton, *The Image and the Reality, Thomas Jefferson and the First Amendment*, 17 Notre Dame J.L. ETHICS & PUB. POL'Y 399, 451 (2003) (citations omitted); David Barton, "A Death Struggle between Two Civilizations," 13 REGENT L. REV. 297, 313 (2000-2001) (quoting, 13 The Statutes at Large, Treaties, and Proclamations, of the United States of America 33 (Boston, Little, Brown & Co. 1866), "Furthermore, the admission of territories as States into the Union was often predicated on an assurance by the State that the State's '(C)onstitution, when formed, shall be republican, and not repugnant to the (C)onstitution of the United States and the principles of the Declaration of Independence . . .").

For instance, the Ninth Circuit recently stated, "The Alaska Constitution was ratified by Alaska's voters and approved by Congress, which found it to be 'republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of

3. *The Framers's Recognition of the Constitution's Commitment to the Declaration of Independence --*

The foregoing agreement among courts, Congress and scholars stem, as one would expect, from an inquiry into Originalism. Understandably consistent with the incorporation of natural law into the Declaration of Independence,¹⁹² The Framers and their contemporaries well understood that the Declaration does not merely inspire, but as well expresses the Constitution's meaning. "[I]t seems clear that the deliberations at Philadelphia presupposed widespread acceptance of the political theory of the Declaration. It seems clear, in particular, that the delegates agreed that the end of legitimate government is the safeguarding of rights."¹⁹³ James Madison, for example, explicitly stated regarding the republican form of government proposed in the Constitution, that, "It is evident that no other form would be reconcilable with the genius of the people of America; *with the fundamental principles of the Revolution*; ..."¹⁹⁴ As it is the document clarifying "the fundamental principles of the Revolution," Madison must have meant only a republic "would be reconcilable with" the Declaration. "Indeed, urging the ratification of the Constitution, [Madison in] Federalist No. 43 applied the very reasoning of the Declaration, underscoring 'the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.'"¹⁹⁵ Similarly, as recounted by Prof. Kmiec, "In a letter to Jefferson ... Madison recommended the Declaration as the first of the 'best guides' to the 'distinctive principles' of our government."¹⁹⁶

Independence." Kirk v. Carpeneti, 623 F.3d 889, 892 (9th Cir. 2010) (quoting Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958)); see also, e.g., Larson v. Seattle Popular Monorail Auth., 131 P.3d 892, 900-01 (Wash. 2006) (*en banc*) (Johnson, J., dissenting) (discussing Enabling Act, ch. 180, sec. 4, 25 Stat. 676 (1889), which admitted the State of Washington to the United States).

192. See, *supra* Section 2-b.

193. Himmelfarb, *supra* note 136, at 177.

194. The Federalist No. 39, at 181-82 (James Madison) (Terrence Ball ed., 2003) (emphasis added).

195. Bayer, *supra* note 17, at 387-88 (quoting, The Federalist No. 43 (James Madison) (Terrence Ball ed., 2003)).

196. Kmiec, *supra* note 25, at 395 (quoting, Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), in 9 The Writings of James Madison 218, 222 (Gaillard Hunt ed., 1910)).

Granted, in further 1825 correspondence, responding to Jefferson's assertion that legal studies texts should compile,

the writings on government by Algernon Sidney and John Locke, the Declaration of Independence, The Federalist, and the Virginia Resolutions of 1799, Madison opined that Sidney and Locke, are "admirably calculated to impress on young minds the right of Nations to establish their own Governments, and to inspire a love of free ones; but afford no aid in guarding our Republican Charters against constructive violations." And the Declaration of Independence, said Madison, "falls nearly under a like observation." That is, it too affords "no aid in guarding our Republican Charters against constructive violations."¹⁹⁷

Prof. Cooper plausibly concluded, "Thus, the Declaration, according to Madison, provides little if any protection against misconstructions of the Constitution. This is, to put it charitably, a very odd way of saying that the Declaration embodies constitutional principles even more authoritatively than does the Constitution itself."¹⁹⁸ True enough; still the prior Madison quotes unequivocally link the Constitution's purpose and meaning to the "fundamental principles of the Revolution," reference approvingly, "the transcendent law of nature and of nature's God," and endorse, "Declaration as the first of the 'best guides' to the 'distinctive principles' of our government." Madison, a scholar and a theorist, knew that the philosophical principles of the Declaration are both cognizable and translatable to practical applications such as those which would be generated by constitutional controversies. This writing is satisfied that "The Father of the Constitution"¹⁹⁹ understood that the Declaration's precepts, if not its text, can and should inform constitutional analysis.²⁰⁰

197. Charles J. Cooper, *Harry Jaffa's Bad Originalism*, 1994 PUB. INT. L. REV. 189, 200 (1994) (citations not provided).

198. *Id.* (citations not provided by Prof. Cooper or the editors).

199. I. Brant, JAMES MADISON, FATHER OF THE CONSTITUTION, 1787-1800 (1950); *see also*, e.g., *Rocky Mountain Farmers Union v. Carey*, 740 F.3d 507, 515 note 3 (9th Cir. 2014) (Smith, J., with five judges, dissenting from denial of rehearing *en banc*, thus referring to Madison).

200. Prof. Cooper makes an interesting rebuttal, that Madison's and Jefferson's references to "Government" was not to the Constitution alone, but rather, "'government' in its larger sense, of which the Constitution is a part but not the whole. ... [Given the context, o]bviously, the ... 'the principles of government' are not confined to those on which the Constitution was based, and indeed include some which are quite incompatible with the Constitution." Cooper, *supra* note 197, at 201-20. To this, Cooper adds that Madison expressly referenced The Federalist, "as the most authentic exposition of the text of the federal Constitution, as

Furthermore, we arguably ask too much of even the great Madison and his contemporaries by wondering why one or more might enthusiastically espouse the principles of the Declaration while, regarding some particular albeit significant controversy, not cite its text as a primary or secondary source. Busy individuals cannot be expected to mention every conceivable source especially when direct authority is plentiful enough. Moreover, Madison's theories of speech and press, although profound, were not premised on a full-fledged paradigm recognizing that any government

understood by the Body which prepared & the Authority which accepted it." *Id.* at 201 (citations not provided). Cooper offered that as Madison knew how to designate a proper constitutional arbiter when he wished to, Madison's categorizing *The Federalist* but not the Declaration as constitutionally authoritative proves that he did not ascribe such authority to the latter. *Id.* at 201-02.

Moreover, asserting that Madison rejected the idea that unwritten law was incorporated into the Constitution, *id.* at 204 n. 27, Prof. Cooper accented that in his thorough and brilliant argument in the "Virginia Report" challenging the constitutionality of the Alien and Sedition Acts, Madison applied a large assortment of authority from, inter alia, the Constitution's text, the proceedings of the Constitutional Convention, *The Federalist*, "--in short, 'everything from which aid [could] be derived,' in Chief Justice Marshall's famous phrase. He did not mention the Declaration." *Id.* at 204 (citations not provided Prof. Cooper or the editors).

This writing cannot account for why the meticulous Madison did not reference the Declaration, but it notes that the full scope of Madison's argument, premised on textual references, particularly the First Amendment, accents "Enlightenment philosophy," specifically, "a government created by the Constitution, under which, 'The people, not the government, possess the absolute sovereignty.'" Joseph Russomanno, *The "Central Meaning" and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM. L. & POL'Y. 117 127 (2015) (quoting, James Madison, *[Virginia] Resolutions of 1798*, in 6 THE WRITINGS OF JAMES MADISON 386 (Gaillard Hunt ed., 1906). Madison's specific reference to the First Amendment is in *id.* at 328). Sedition legislation, Madison argued, might be apt for a monarchy, but not for the anti-monarchical principles of American government where "the right of freely examining public characters and measures, and of free communication among the people thereon, [] has ever been justly deemed the only effectual guardian of every other right." Russomanno at 126 (quoting, *Times v. Sullivan*, 376 U.S. 254, 276 (1964) (citing 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 553-54 (1876)); see also, e.g., William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 126 (1984) ("... Madison first established that seditious libel, while perhaps appropriate to a nation (such as England) governed by a hereditary monarchy and by a legislature that was also largely hereditary, was contrary to the genius of the United States government, ...").

These arguments comport with Madison's earlier quoted respect for the principles of the Declaration. Perhaps Madison thought quoting the Declaration unnecessary given the more direct legal sources he employed, sources that themselves referenced the spirit of the Declaration and, in some instances, the Declaration itself. Indeed, bringing that document into the fray might have been more confusing and distracting than informative. By contrast, given the post-Nineteenth Century turns in American jurisprudence, reaffirming the Declaration's primacy *is* essential to understanding constitutional rights -- that is, "due process of law."

ordained by the will of the people must protect individual rights against the illegitimate will of the people. As David A. Anderson explained,

Madison's 1789 speech [presenting his proposed constitutional amendments to the first Congress] contains hints of a rather sophisticated understanding of the dangers of majoritarianism.

[I]n a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body.... [It] is not found in either the executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.

Although he made no claim that his amendments would provide a legally effective barrier against the power of the community, he suggested that they would at least engender some degree of public opinion in favor of protecting individual rights against the majority.²⁰¹

As Anderson aptly informs, even if they did not so realize at the founding, the amendments Madison and the other Framers espoused and saw ratified actually *must function* as “a legally effective barrier against the power of the community.” Thus, when interpreting their wills and acts, we commonly ascribe to the Founders neither full wisdom nor complete comprehension. Rather, we consider what they did to be a beginning, or perhaps a continuation, but emphatically not the end. If Madison, or any of the Founders, did not explicitly state that the Declaration's text is either a primary or secondary source,²⁰² that sentiment nonetheless is explicit from what they repeatedly wrote, spoke, and did. From that, we can and have discerned a more sophisticated and proper use of the Declaration as text and

201. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 532-33 (1983) (quoting, 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 454-55 (1789) (J. Gales ed. 1834)).

202. A “primary source” is enforceable law such as “the constitution, codes, and statutes.” *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 954 (5th Cir. 2009) (citing, *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007)). By contrast, a “secondary source” is commentary, scholarship, analysis, or other proposed explications of one or more primary sources, but not itself legally enforceable. Classic secondary sources include treatises, books, law review articles, monographs, and legislative history. Jonathan Peters, *Institutionalizing Press Relations at the Supreme Court: The Origins of the Public Information Office*, 79 MO. L. REV. 985, 988 (2014).

commentary -- a use promoted by this writing's paradigm of Deontological Originalism.²⁰³

Turning to the family of the Declaration's ardent proponent, John Adams, his son, John Quincy Adams, who would become America's sixth president, smartly stated, "The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government"²⁰⁴ Similarly, John Adams' second cousin, noted patriot and provocateur Samuel Adams, accented that the Declaration speaks not only for the Nation, but as well for the constituent States, "This declaration of Independence was received and ratified by all the States in the Union and has never been disannulled."²⁰⁵ In fact, as the research of one scholar confirmed, not only proponents, but as well, "even those who refused to sign [the Constitution] judged the Constitution by the standards of the Declaration."²⁰⁶

Based on this litany, I have not budged from the conclusion I drew in earlier writings. Further research has only fortified my conviction that,

Surely, for all the realpolitik and compromises of principle confirmed by historians that explain the final document, the Constitutional Convention nonetheless hoped to create the foundation that could not immediately, but ultimately would, kindle full faith with the Declaration's philosophy. In light of these precedents, Prof. Larson correctly concluded, "the Declaration was . . . the declaration of one American people declaring the existence of one American nation. It is therefore entirely appropriate to date the legal existence of the American nation from July 4, 1776"

203. Co-author of *The Federalist* Alexander Hamilton presents an interesting parenthesis. Although not an advocate for representative government, during the Constitutional Convention, Hamilton did express support for the concept of natural rights. As Dan Himmelfarb recounted:

Throughout the Convention Hamilton voiced his dissatisfaction with popular government. . . . Nevertheless, Hamilton "professed himself to be as zealous an advocate for liberty as any man whatever, and trusted he should be as willing a martyr to it though he differed as to the form in which it was most eligible." *Thus Hamilton, in agreement with the Declaration, recognized that the popular form of government is not the only one capable of securing rights.*

Himmelfarb, *supra* note 136, at 178 (emphasis added; quoting, 1 THE RECORDS OF THE FEDERAL CONVENTION 1787, at 424 (M. Farrand rev. ed. 1937)).

204. JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION: A DISCOURSE 40 (1839).

205. SAMUEL ADAMS, ADDRESS TO THE LEGISLATURE OF MASSACHUSETTS (Jan. 17, 1794), in 4 THE WRITINGS OF SAMUEL ADAMS 357 (Harry Alonzo Cushing ed., 1968) (1908).

206. Himmelfarb, *supra* note 136, at 178.

The American nation preceded . . . the Constitution, which ‘perfected’ that nation.”²⁰⁷

Or, as Scott Douglas Gerber rightly and concisely concluded, “The natural-rights principles embodied in the Declaration are not ‘above’ or ‘beyond’ the Constitution; they are at the heart of the Constitution.”²⁰⁸ True, some critics still maintain that the Constitution’s Framers lost their way, forsaking the imperatives of deontological morality they so eloquently proclaimed in the Declaration. Even were that so, as shortly will be shown, the Reconstruction Congress revived such slumbering national commitment to natural law by enacting and attaining ratification of the Thirteenth, Fourteenth and Fifteenth Amendments. Those amendments, and the resurgence of rights they eventually generated through the 1900s and into the Twenty-First Century have brought us significantly closer to the promise of Government constrained by and dedicated to the promotion of deontological morality. Still, while actual *pre*-Civil War enforcement surely was unsatisfactory, the original Framers deliberately and knowingly evoked in their proposed Constitution the moral precepts of the Declaration, including the equality of “all Men.” Critics such as Orville Burton exaggerate history, therefore, by stating, “‘Equality’ was memorialized in the Declaration of Independence, the United States’s mission statement, but not the Constitution, the country’s rule book. Lincoln revolutionized personal freedom in the United States by assuring that the law protected it. Lincoln essentially inserted the Declaration of Independence into the Constitution.”²⁰⁹ Equal protection of the laws always was part of the Constitution’s deontology. Tragically, it took the Civil War and its aftermath to give that truth meaningful life.

207. Bayer, *supra* note 17, at 387 (quoting, Larson, *supra* note 33, at 702). As Prof. Epstein similarly concluded, “The variety of opinions and disagreements of 1787-1788 did not call into question the fundamental political principles asserted in the Declaration of Independence.” DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE CONSTITUTION: CONFRONTING THE CONSTITUTION* 78 (Allan Bloom ed., 1990).

208. SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 3 (1995); *see also, e.g.*, Trapp, *supra* note 63, at 838 (“There is ample evidence that the principles of the Declaration are an acceptable or even a preferred means of interpreting the Constitution.”).

209. Orville Vernon Burton, *The Creation and Destruction of the Fourteenth Amendment During the Long Civil War*, 79 LA. L. REV. 189, 195 (2018). Doubtless, principles of equality derived from due process liberty took meaningful hold only after the ratification of the *post-Bellum* Amendments. But, it was the Founders who formalized the basic principles in the Declaration and the Framers who made those principles the basis of the Constitution.

III. THE FRAMERS' UNDERSTANDING OF NATURAL LAW AS A MORAL CONSTRUCT --

A. *The Meaning of Natural Law Is Grounded in Morality --*

The foregoing established that the Founders legitimized the American Revolution on the natural law principles set forth in the Declaration of Independence that define legitimate government. Moreover, the Framers and, thereafter, the courts and commentators, understood that the Constitution's primary function is to enforce the natural law precepts of the Declaration. Before turning to the identical sentiments of the Reconstruction Congress that completed, at least in a formal sense, the moral project the Founders began by applying the Declaration's natural law mandates to the States, *this is an apt juncture to explicate that the original Founders (and thus the Reconstruction Congress) fully appreciated that the underlying and operative principle of natural law is morality; therefore, they enthusiastically accepted and unapologetically embraced moral comportment as the highest American law. Accordingly, Deontological Originalism alone accurately depicts the Constitution's intended and proper meaning.*

Prof. Loveless rightly captured the core precept, "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."²¹⁰ In this regard seven decades ago, respected conservative attorney and law professor Clarence E. Manion confirmed, "The fact is that the Declaration is the best possible condensation of natural law[, which underlies] common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution."²¹¹ Specifically, the Founders grounded the American Revolution, and the Reconstruction Congress equally based the Reconstruction Amendments, on three interlaced beliefs: (1) that morality is *a priori*, (2) that moral duties inure from the natural rights inherent in natural law,²¹² and, (3) that Government is legitimate only so long as it protects and otherwise conforms with the immutable moral standards that animate natural rights. *Thus, to resolve*

210. Lovel  ss, *supra* note 111, at 368.

211. Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, 35 A.B.A J. 461, 462 (1949).

212. Carey, *supra* note 22, at 58 ("[N]atural rights, which can be understood as portions of natural liberty, were bounded or confined by the natural law") (citing Hamburger, *supra* note 28, at 956).

significant constitutional issues, reviewing courts must engage in moral reasoning, there is no other methodology.

As we learned in this article's Part I discussing Deontology,²¹³ natural rights inure not because of any given individual's arguable merit, attainment, or virtuous behavior. Rather, "people by reason of their humanity possessed natural rights which could not be abridged by positive law. American constitutional and bill of rights models were constructed at a time when the natural law school of judicial thought was highly influential."²¹⁴

Yet, the meaning of natural law "is not uncontroversial,"²¹⁵ ditto for natural rights.²¹⁶ Indeed, scholars decry the tendency to simplify and thus distort subtle principles into "bumper sticker versions of natural law often bandied about in constitutional discussion" evincing "constitutional scholars' seeming lack of interest in going beyond familiar slogans[.]"²¹⁷ This writing proceeds duly mindful to avoid that perhaps tempting pitfall.

Theorists largely agree that, consistent with its inherent deontological grounding, the "law" of natural law is not predicated on convenience, order, economics, politics or other practical concerns that are the proper realms of "positive law," that is, the specific, identifiable texts of laws such as statutes, regulations and judicial opinions.²¹⁸ Rather, put perhaps in its simplest yet

213. See *Originalism and Deontology*, *supra* note 7, Sections 2-a, f (addressing the immutability of moral requisites and explain why the duty to abide by such requisites supercedes all else); Section 3-d-1, 3 (explaining Kant's argument that morality is deontological and immutable, therefore, every individual owes to all others a duty of moral comportment regardless whether such others violate their moral duties); see also Carey, *supra* note 22, at 58 (Kant's explanation why, rather than being earned, rights inure to individuals because of their status as Human Beings).

214. Siegan, *supra* note 42, at 421-22. Likewise, Prof. George recounted:

Most modern commentators agree that the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order. The framers of the Constitution sought to create institutions and procedures that would afford respect and protection to those basic rights ("natural rights") that people possess, not as privileges or opportunities granted by the state, but as principles of natural law which it is the moral duty of the state to respect and protect.

George, *supra* note 41, at 2269-70 (emphasis added).

215. André LeDuc, *The Ontological Foundations of the Debate Over Originalism*, 7 WASH. U. JUR. REV. 263, 289 (2015) (footnote omitted); see also, e.g., George, *supra* note 41, at 2269.

216. Bayer, *supra* note 17, at 337.

217. Pojanowski & Walsh, *supra* note 133, at 118.

218. Hans Kelsen, *Law, State, and Justice in the Pure Theory of Law*, 57 YALE L.J. 377, 385 (1948) stated the classic definition,

"Positive" law means that a law is created by acts of human beings which take place in time and space, in contradistinction to natural law, which is supposed to originate

most expedient précis, applying now familiar propositions among Enlightenment philosophers²¹⁹ including the highly respected John Locke, through their capacities to reason, persons “possess[] the mental faculty to discover moral truths in the law of nature.”²²⁰

*Accordingly, and of utmost importance, natural law, “equates law and morality.”*²²¹ Natural law is about the abiding, transcendent moral precepts that apply equally to all human beings, setting ethical limits on how each person interacts with all other persons. Consistent with this article’s earlier exploration of Deontology, “Natural law, in a nutshell, assumes that just as there is a physical reality to the universe, there is also a moral one. This moral reality can be perceived by the reasonably functioning human mind, and when it is grasped, the mind will encourage the will to act accordingly.”²²² Likely, the reader already has anticipated that this definition is exactly what “Thomas Jefferson appeals to [in the Declaration of Independence as] ‘the Laws of Nature and of Nature’s God’ in justifying the American Revolution.”²²³ This actuality leads to an essential point worth re-emphasizing: while some might hastily assume that *natural rights*, in their

in another way. Consequently, the question of what is the positive law, the law of a certain country or the law in a concrete case, is the question of a law-creating act which has taken place at a certain time and within a certain space. The answer to this question does not depend on the feelings of the answering subjects; it can be verified by objectively ascertainable facts, ...

219. Cecil L. Eubanks, *Subject and Substance: Hegel on Modernity*, 6 LOY. J. PUB. INT. L. 129, 130 (2005) (“The philosophical underpinnings of modernity can be found in the Enlightenment faith in reason and the human capacity to apprehend the immutable laws of nature”); see also Libby Adler, *The Dignity of Sex*, 17 ULCA WOMEN’S L.J. 1, 10 (2008) (“[D]uring the Enlightenment, the universality of the capacity for reason as a basis for dignity displaced the pre-Enlightenment commitment to rank and hierarchy”).

220. Kang, *supra* note 35, at 306 (emphasis added; discussing JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 271-72 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)). Underscoring the logical link to Deontology, natural law is discerned, “by demonstrating rational conclusions from sound premises. ... [Accordingly,] natural law is discovered by the individual through rational inquiry and it can be taught by others through rational instruction.” Kmiec, *supra* note 25, at 385-86 (citing, MORTIMER ADLER, THE DOCTRINE OF NATURAL LAW PHILOSOPHY, IN I NATURAL LAW INSTITUTE PROCEEDINGS 82 (Alfred Scanlan ed., 1947)); see also, e.g., Bayer, *Originalism and Deontology*, *supra* note 7, at Sections 2-a, f (Deontology); 3-d-1, 2 (Kantian perspective).

221. Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115, 1125 (2012) (emphasis added).

222. See Kmiec, *supra* note 25, at 385 (citing, JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITIONS 327-28 (1960)); see also, e.g., Bayer, *Originalism and Deontology*, *supra* note 7, at Sections 2-a, f (Deontology); 3-d-1, 2 (Kantian perspective).

223. George, *supra* note 41, at 226; see *supra* notes 96-113 and accompanying text.

capacity as rights, comprise the moral components of *natural law* (therefore, all other aspects of natural law are not moral imperatives), in fact, natural law itself is a moral construct. Consequently, *all* classifications or categories of natural law, certainly including natural rights, must comport with deontological morality, as must natural law as a whole.

Given that moral comportment is the highest duty of human beings, natural law, then, is a reservoir ensuring that all subordinate laws -- *the positive laws* --, each promoting different human needs or goals, obey the absolute duty of moral comportment. As Prof. LeDuc ardently defined it, "natural law asserts that law is based upon, derived from, and legitimated by the requirements of morality that are themselves conceived as instrumental for securing or enhancing human flourishing."²²⁴ Consistent with the link between the Declaration and the Constitution, Pojanowski and Walsh likewise equate natural law with the goal of, in LeDuc's phrasing, "human flourishing"²²⁵ which generates, "a moral need for positive law -- law brought into being by human choice or act."²²⁶ Whether by divine intervention or fortunate happenstance, natural law preexists Humanity, arising from the innate order of all things. Because it is not humanly created yet constrains as a moral imperative human behavior, natural law compels us to respond "Yes"

224. LeDuc, *supra* note 215, at 289. Pojanowski & Walsh, *supra* note 133, at 18-19 (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351 (2d ed. 2011)) ("The classical natural law tradition we draw on concerns 'the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation'").

As emphasized in *Originalism and Deontology*, this basic principle likewise is part of Immanuel Kant's framework, a framework, this article argues, that best fulfills the Founders' quest for the moral truth that is envisioned by the declaration and enforced by the Constitution. See, *Id. supra* note 7, Section 3.

225.

[T]hinking about human law begins with the recognition that there are certain goods that persons and communities can achieve only by having authoritative legal institutions. To flourish, persons and communities need to be able to protect the peace, coordinate their activities, and cooperate on shared projects to promote the common good. Law is not the only social institution that helps persons and communities develop their potentialities, but it can do things that solitary persons and other institutions cannot, at least in a group of any size and complexity.

Pojanowski and Walsh, *supra* note 133, at 20.

226. *Id.* at 19-20 (citations omitted) ("We are interested in middle-range questions about why the natural law [objective morality and considerations of justice within a reasonably wide range of theories] requires human communities to develop legal systems and, given those reasons, how persons should respond to those legal norms"). Although Pojanowski and Walsh do not cite his work, more than his predecessors, Kant explained that, just as forming a social order itself, societal enactment of positive law is a moral imperative, not simply a convenience. See *Originalism and Deontology*, *supra* note 7, at Section 3-d-5.

to Prof. Kmiec's expression of the enduring inquiry, "Is law more than a mere assertion of power? ... We yearn to believe that law has an independent reality. Indeed, we colloquially talk this way all the time."²²⁷ *Given the proof of Deontology, we understand that law undeniably "has an independent reality," and that independent reality integrally includes moral comportment.*

Accordingly, the Founders must have rejected, as today likewise we must reject, jurisprudence that would separate law and morals, such as Positivism's assertion that, regardless of its moral exactitude,²²⁸ law is authentic,²²⁹ (1) if it is derived from those offices or instrumentalities a given society designates competent to make law,²³⁰ (2) if it conforms with the type of law the given office is competent to make,²³¹ (3) if it is made consistent with the proper procedures of the particular office,²³² and, (4) if it is sufficiently clear that reasonable persons intended to be regulated understand what is required of them.²³³ These four requisites, possibly five as *supra* note

227. Kmiec, *supra* note 25, at 383.

228. Pojanowski & Walsh, *supra* note 133, at 104 (footnote omitted) ("[L]egal positivism, ... claims that identifying 'the law' is a matter of identifying social facts, not moral evaluation").

229. See H.L.A. HART, THE CONCEPT OF LAW (3d. ed. 2012) (elaborating on classic statements of Positivism); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (elaborating on classic statements of Positivism).

230. For instance, although it may be profoundly influential on persons' beliefs and behaviors, religious doctrine is not positive law because, in America, organized religion is not an office of Government authorized to make law. *E.g.*, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating under the Establishment Clause of the First Amendment as applied by the Due Process Clause of the Fourteenth Amendment, a Massachusetts statute allowing a church to veto liquor license applications of establishments within 500 feet of the particular church).

231. For example, Congress cannot regulate purely intrastate commerce because, while expressly authorized to regulate interstate commerce, like authority to regulate intrastate commerce that does not genuinely affect interstate commerce is not among Congress' enumerated powers under Article I of the Constitution. *E.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995); *United States v. Gordon*, 272 Fed. Appx. 674, 675 (10th Cir. 2008).

232. *E.g.*, U.S. CONST. art. I, § 7 (explaining that a bill must attain a majority of votes from both the House of Representative and Senate to be a validly enacted law).

233. Although the Constitution does not require that any given law be perfectly defined in every regard for every applicable instance, such law at least must be sufficiently precise so that persons of reasonable capacity generally understand what is or is not lawful conduct. *E.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1261-62 (2016) ("The void-for-vagueness doctrine prohibits the government from imposing sanctions 'under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'") *Id.* at 1262 (quoting, *Johnson v. U.S.*, 135 S.Ct. 2551, 2556) (2015)).

One might urge a fifth element that, even when legitimized by meeting the proper formalities of enactment, the given law must be enforced not perfectly, but, considering the

233 mentions, might be apt, but only so long as the law at issue is moral. Therefore, Positivism, the assertion of positive law, “*is the specification of the more general, or conceptual requirements of natural law*. Functionally, positive law chooses ... specifications that instantiates the conceptual command of natural law.”²³⁴

Thus, because natural law is predicated on morality and positive law actualizes concretely the natural law, to be legitimate, positive law must be moral. In that regard, Profs. Pojanowski and Walsh nicely explained that, “the primary function of natural law is not to supplement positive-law reasoning. It is to underwrite the moral obligation of interpreters [and lawmakers] to treat the enacted Constitution [which enforces the natural law] as positive law.”²³⁵

Such was not lost on the Founders. As earlier quoted, Alexander Hamilton equally averred that positive laws implement but do not establish natural law: “The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of the Divinity itself, and

totality of relevant circumstances, sufficiently to evince that the Government truly deems that law to be law. Under that codicil, “Enforcement is legal prohibition, and lack of enforcement is legal permission. The contrary view, that enforcement policy is fundamentally different from ‘law,’ rests on a formalistic definition of law which has been largely discarded since the realist revolution of a half century ago.” Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 176 (1996). Cf., Julia Pugliese, *Don't Ask--Don't Tell: The Secret Practice of Physician-Assisted Suicide*, 44 HASTINGS L.J. 1291, 1297-99 (1993) (discussing the lack of enforcement of penal laws forbidding “assisted suicide”). Indeed, the courts recognize an understandably difficult to prove “defense of desuetude require[ing] a long period of nonenforcement, at least a decade, but probably longer.” Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1560 (2018) (footnote omitted).

234. LeDuc, *supra* note 215, at 289. Pojanowski and Walsh similarly explained:

Even where the natural law speaks clearly, the positive law must fill in details that are under-determined by reason. By ‘under-determination,’ we mean that the natural law provides a framework within which people can make reasoned choices, and bounds beyond which they ought not choose, but no precise algorithm for making such choices. Right reason, in short, does not precisely determine the right answer in all places for all purposes. To take a simple example, even if the moral law requires a human law against murder, it does not speak directly or categorically about every element of the crime, degrees of culpability, available excuses and justifications, and particular penalties.

Pojanowski and Walsh, *supra* note 133, at 121 (footnotes omitted.)

235. *Id.* at 99 (So long as it is loyal to the moral precepts of natural law, “the positive content of our Constitution is sufficiently just to merit our moral obligation to its authority”).

can never be erased or obscured by mortal power.”²³⁶ Similarly, Thomas Paine extolled the American Revolution as a “moral” construct.²³⁷ Certainly, even a cursory review of Jefferson’s defense of Revolution in the Declaration of Independence²³⁸ reveals that, “Like Jefferson, natural law theorists postulate a necessary connection between law and morality to make the law credible.”²³⁹ Member of both the Continental Congress and the Constitutional Convention, Justice James Wilson as well “made clear the dependence of positive law on natural law: ‘Human law must rest its authority, ultimately, upon the authority of that law, which is divine.’”²⁴⁰ To offer additional instances of philosophers influential on the Founders, Cicero (shortly before the birth of Jesus) and Blackstone (roughly eighteen centuries after Cicero) likewise believed, “that positive law is only genuinely law insofar as it comports with certain moral principles.”²⁴¹

The foregoing validates the two significant truths discussed above. First, albeit very general in its most abstract sense, natural law can be reduced to text and, thus, comprises the highest ranking positive law, as in the case of our Constitution, complete with enforceable, substantive meaning.²⁴² Identically, natural law’s principles, albeit expansive, are understandable and, thus, can be actualized into more specific positive law. Second, by applying and effectuating natural law *via* subordinate laws of greater specificity (such as criminal laws, civil rights laws, and property laws), positive law must conform with the moral requirement attendant to natural law; thus, law and morals are inseparable.²⁴³ Indeed, “as [philosopher

236. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 188 (1967) (quoting ALEXANDER HAMILTON, *THE FARMER REFUTED* 122 (Harold C. Syrett et al. eds., 1961)).

237. PANGLE, *supra* note 70, at 10.

238. See *supra* notes 91-97 and accompanying text.

239. Omar Swatz, *Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona*, 29 T. MARSHALL L. REV. 285, 289 (2004) (footnote omitted.).

240. Charles L. Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1075 (2004) (quoting JAMES WILSON, *THE WORKS OF JAMES WILSON* 93 (James DeWitt Andrews ed., Chicago, Callaghan and Company 1896)).

241. Frederick Schauer, *On the Utility of Religious Toleration*, 10 CRIM. L. & PHIL. 479, 482 (2016); see also, *supra* notes 113-15 and accompanying text discussing Blackstone and the “pursuit of happiness.”

242. Pojanowski & Walsh, *supra* note 133, at 100 (identifying the Constitution as positive law that enforces natural law).

243. *Id.* at 99 (“[T]he primary function of natural law is not to supplement positive-law reasoning. It is to underwrite the moral obligation of interpreters [and lawmakers] to treat the enacted Constitution [which enforces the natural law] as positive law...the positive content of our Constitution is sufficiently just to merit our moral obligation to its authority”).

Mortimer] Adler instructed: '[p]ositive law without a foundation in natural law is purely arbitrary. It needs the natural law to make it rational. But natural law without positive law is ineffective for the purposes of enforcing justice and keeping peace.'"²⁴⁴

B. The Nature of Natural Rights -- Are Natural Rights Truly "Unalienable" or Are They Subordinate to a Higher Natural Law? --

As earlier discussed, the Founders expressed in the Declaration of Independence that Humankind is, "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."²⁴⁵ Given its singular prominence in that most important of sentences from the Declaration, the Founders apparently (and rightly) believed that "unalienable Rights" surpass among all the gifts or benefits arising from the natural order of things that both preexisted and generated Humanity.²⁴⁶ For that reason, a cadre of lawmakers or nation builders "could no more rewrite these laws of nature than they could the laws of physics."²⁴⁷

Understandably, the exact extent and nature of these rights has generated much discussion. Commentators have wondered why the Founders did not provide a more complete list given their assertion that "Life, Liberty and the pursuit of Happiness" are "among" but not the entirety of "unalienable Rights." Similarly, analysts inquire why the Founders did not expound the applicable rights, but only denoted them by their names. The pragmatics of their project surely guided the Founders' decisions not to elucidate within the Declaration the theoretical foundations of natural rights more than to name the most prominent. The Founders did not try to write either a treatise on legal philosophy nor a law review-like article on the

244. Kmiec, *supra* note 25, at 386 (quoting MORTIMER ADLER, *THE DOCTRINE OF NATURAL LAW PHILOSOPHY* 83 (Alfred Scanlan ed., 1947)).

245. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see supra* notes 91-125 and accompanying text (discussing the meaning of the Declaration's text).

246. Sherry, *supra* note 164, at 1170-71.

247. *Id.* at 1132 (quoting Silas Downer, A Discourse at the Dedication of the Tree of Liberty (1768)); *see supra* notes 91-125 and accompanying text (discussing the meaning of the Declaration's text). Commentators agree with Prof. Sherry's embracing of Downer's assessment of natural rights' immutability. James Lanshe, *Morality and the Rule of Law in American Jurisprudence*, 11 *RUTGERS J. L. & RELIGION* 1, 12 (2009) (quoting Sherry); Jerry E. Norton, *Liberty: A Human Right, or A Citizen Right*, 36 *LOY. U. CHI. L.J.* 565, 567 note 12 (2005) (same); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment As an Instrument of Federalism*, 35 *STAN. J. INT'L L.* 1, 48 note 199(1999) (same).

intersection of political and moral theory. As earlier stressed, their goal was to present in careful, coherent prose the legal argument to justify rebellion -- a legal brief in effect.²⁴⁸ While they ultimately included in the Declaration's third paragraph a lengthy list of specific grievances against the British Crown that may be interpreted as demarcating specific rights,²⁴⁹ and certainly their other writings provide insights into the Founders' beliefs regarding natural rights emanating from natural law,²⁵⁰ attempting to itemize "unalienable Rights" would have been divisive, distracting and, indeed, futile, especially as part of a succinct legal document such as the Declaration or the Constitution.²⁵¹

248. See *supra* text accompanying notes 91-97.

249. E.g., G. Edward White, *Revisiting the Ideas of the Founding*, 77 U. CINCL. L. REV. 969, 983 (2009) ("Jefferson's draft of the Declaration, in the course of listing grievances the Americans had with the king, was implicitly suggesting that some of those grievances were connected to the violation of particular liberties"); Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L. J. 21, 36 (1990) ("The list of grievances in the Declaration of Independence is interesting in that it is actually a negative statement of rights, fundamental values, and commitments."); Carey, *supra* note 22, at 65 ("It may be inferred that the drafters accepted the natural law's mandate for due process that would serve to curb arbitrary and capricious government. Many of the specific grievances listed in the Declaration relate directly to breaches in due process as it had come to be understood in the common law").

250. For instance, "In the [celebrated] debates with Senator [Stephen] Douglas [of Illinois], Lincoln recalled Jefferson and repeatedly defined liberty as follows: 'I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights.'" Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1332 (1985) (quoting, Letter from Abraham Lincoln to H.L. Pierce and others (Apr. 6, 1859) in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 394 (R. Basler ed. 1946)). Prof. Nichol, then, proposes in detail a Jeffersonian understanding of Enlightenment-style liberal *liberty* suitable for modern times. Similarly, regarding John Adams, "and his contemporaries, civil and political liberty did not allow individuals to demand privileges, rights, or government recognition from the Commonwealth, rather liberty meant "[s]elf-direction or [s]elf-government." Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage"?*, 12 B.U. PUB. INT. L.J. 137, 159 (2002). In particular, "Richard Price, in his 1776 Boston publication, *Observations on the Nature of Civil Liberty*, set forth an understanding of liberty adopted by John Adams, noting that moral, religious, physical and civil liberty have 'one general idea, that runs through them all ... the idea of Self-direction.'" *Id.* at 159-60 (citing *inter alia*, RICHARD PRICE, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, OBSERVATIONS ON THE NATURE OF CIVIL LIBERTY, THE PRINCIPLES OF GOVERNMENT, AND THE JUSTICE AND POLICY OF THE WAR WITH AMERICA, 2-3 (1776)) and 4 WORKS OF JOHN ADAMS, 401, 403 (Charles F. Adams ed., 1851) ("As the society governs itself, it is free, according to the definition of Dr. Price."))

251. James Iredell, *Marcus I*, NORFOLK & PORTSMOUTH J., Feb. 20, 1787, reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (John P. Kaminski & Gaspare J. Saladino eds., 1986) ("All the political writers, from Grotius and Puffendorf

Importantly, as vital as they are, we now understand that “unalienable Rights” are not independent, but rather, derive from natural law. As Prof. Carey explained, “[T]he Declaration points to the significant role and function of the natural law in political thinking both before and during the founding period. *At its core is the understanding that natural rights are discrete portions of a natural liberty which, in turn, is modified, limited, or conditioned by the natural law.*”²⁵² Accordingly, one line of scholarship questions whether the Declaration’s term “unalienable” truly means what it appears to mean: natural rights simply are not subject to either modification or abridgement. Carey, for example, argues that, as a practical actuality, “unalienable” natural rights always were perceived as alienable due to their subservience to natural law:

Simply put ... all natural rights, both alienable and unalienable, are bounded, regulated, or controlled by the natural law. In other words, it was understood that these rights inherently embodied or contained within them the restrictions and caveats of the natural law. Obscenity, slander, and defamation, for instance, were not part of the right of freedom of speech. Likewise, individual actions or behavior contrary to the natural law were not regarded as part of liberty. *Viewed in this manner, unalienable rights could be subject to regulation or control by society through positive law in accordance with the natural law -- for example, in order to preserve or advance the general welfare.*²⁵³

If, as it appears, Prof. Carey’s analysis is true, “[Such] analysis leaves scholars to wonder in what meaningful sense unalienable rights are

down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people”). It is worth noting in passing that although an ardent supporter of the proposed Constitution -- “At North Carolina’s first ratification convention, Iredell quickly became the ‘acknowledged leader for ratification’” -- as one of this Nation’s first Associate Justices of the Supreme Court, “In [a] dissent, which resonates even to this day, Justice Iredell authored the first Supreme Court opinion rejecting the use of ‘natural law’ in striking down a legislative act.” Oyez, *James Iredell*, https://www.oyez.org/justices/james_iredell (accessed, August 1, 2018). This writing, however, disagrees with Justice Iredell insofar as he would have rejected the use of the Due Process Clause of the Fifth Amendment (he died prior to the enactment and ratification of the Fourteenth Amendment) to apply a natural law principle of “fundamental fairness” that could invalidate acts of Congress.

252. Carey, *supra* note 22, at 67 (emphasis added).

253. *Id.* at 62 (emphasis added).

unalienable.”²⁵⁴ In response, he offered the “corporate” understanding of the term “unalienable Rights,”

*[T]he “unalienable rights” asserted in the document are those that belong to the people in their corporate or collective capacity. As such, these rights are unalienable in the sense [that] ... they cannot be parted with (i.e., transferred to another people), nor can they be controlled or regulated by another people. In this account, it is critical to note that once the government was established, these rights (“life,” “liberty,” “pursuit of happiness”) lost their unalienable status. A majority, or whatever sovereign power there would be, in keeping with the natural law, could regulate these rights as they related to individuals, in order to promote the well-being of society.*²⁵⁵

In sum, according to Prof. Carey, government cannot alienate -- abandon or diminish -- natural rights either by technically purging them from the positive law or by subcontracting to a foreign entity the authority to enforce natural rights on behalf of Americans. Nonetheless, consistent with their natural law origins, according to Carey, American Government can enforce a classic Utilitarian approach to “promote the well-being of society” by establishing positive laws that recognize when natural law limits the latitude of natural rights. The corporate understanding, then, “reduces unalienable rights to their essence by way of emphasizing that they constitute no barrier or hindrance to society pursuing the common good.”²⁵⁶

Prof. Cary’s analysis is consistent with the general argument urging that the Founders believed, and believed rightly, that, in the words of scholar Jud Campbell, “most retained natural rights were *individual* rights that could be *collectively* defined and controlled.”²⁵⁷ Similarly, almost as though anticipating this writing, noted historian Patrick J. Charles charges that, by failing to understand exactly pivotal terms “[i]n the context of eighteenth-century constitutionalism,” analysts wrongly use the Founders’ exhortation of “liberty,” “happiness,” and “rights,” to “proclaim[] that the Declaration stands for individual natural rights or a presumption of liberty under the guise

254. *Id.*

255. *Id.* at 63 (emphasis added).

256. *Id.* at 62.

257. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMM. 85, 98 (2017); see also, e.g., Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 264-80 (2017).

of originalism in order to restore a constitution that never existed.”²⁵⁸ In his long, thoughtful article, Mr. Charles concludes that at the time of the founding, “liberty and happiness were not personal or individual guarantees, but conditions that only a virtuous society and public spirit could achieve. True liberty is tough to obtain, rare to find, *and has to be earned*. To put it another way, the dichotomy between personal and collective liberty that we imagine today is not eighteenth-century liberty.”²⁵⁹

Consistent with that framework, historian Charles continues, “liberty” derived from natural rights included the perfect freedom of the state of nature, a freedom that, moving into civil society, natural law must constrain through positive law prescribing “rules of conduct” for the good of all, and punishing those who disobey.²⁶⁰ Accordingly, in post-Revolution America, “In the words of Judge George Thatcher, laws based upon the consent of the people were presumed valid ‘on the presumption that they will produce the degree of happiness before-mentioned.’”²⁶¹ That “happiness” derives from, as expressed by America’s fourth Vice-President, George Clinton,

The first and most essential support of republican government [which] is the virtue of the people. Constitutions may be formed; institutions may be established on the most liberal, just and philanthropic principles; and all in vain-if the morals of the people be corrupt; if self-interest predominate[s] over the love of country, and vice and licentiousness usurp the place of religion.²⁶²

Charles undoubtedly is correct in his conclusions that, “if one actually reads the different state ratifying debates, the constitutional link between preserving liberty and happiness and the Constitution’s text and structure becomes blatantly apparent. The question repeatedly asked and answered among the different state delegates was, ‘Did the proposed text and structure

258. Patrick J. Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 524 (2011).

259. *Id.* at 524 (discussing BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 368-76 (1967) (emphasis added)).

260. *Id.* at 524-25 (discussing WILLIAM ASHHURST, *CHARGE DELIVERED TO THE GRAND JURY IN MIDDLESEX*, (NOV. 19, 1792), in 43 *CHARGES TO THE GRAND JURY 1689-1803*, at 447-48 (Georges Lamoine ed., 1992)).

261. *Id.* at 526 (quoting, Hon. George Thacher, *Scribble Scrabble*, CUMBERLAND GAZETTE (Portland), Mar. 23, 1787, at 4).

262. *Id.* at 527 (quoting GEORGE CLINTON, *AN ORATION, DELIVERED ON THE FOURTH OF JULY 1798*, at 9 (New York, M.L. & W.A. Davis 1798)).

of the federal Constitution ensure the happiness of the people?”²⁶³ And, certainly, Vice-President Clinton correctly surmised that a corrupt polity can, and almost certainly will, thwart a nation’s moral comportment.

However, ignoring the plain text of the Declaration, Carey’s, Campbell’s, and Charles’ fundamental mistake, sounding in the consequentialist error,²⁶⁴ is their *presumption* that to promote societal “happiness,” individual fundamental rights *per se* are abrogable “in furtherance of the common good.” It is in response to even accurate historical critique that, *before* relating how the Founders linked this nation’s formative documents with the enforcement and preservation of moral imperatives, this writing first proves that morality itself is deontological, not consequentialist. As we now appreciate, morality is not predicated on fostering outcomes to attain some person’s or some group’s notion of “the greater good.” Rather, morality comprises principles and attendant duties to assure that human conduct -- individual, group-wide, or, societal -- comports with what is “right” (although, of course, one hopes that the right fortuitously furthers good -- happy -- outcomes).²⁶⁵ Deontological morality engenders natural law from which are discerned natural -- unalienable -- rights. Because, as earlier discussed, modern social orders enforce natural law and resulting natural rights through positive law, that positive law must be moral which, in turn, means that it may only promote the “greater” or “common” good in ways consistent with what is right. *The good does not trump the right; instead, what is right dominates what is good. Accordingly, natural law, subservient to morality, cannot derive natural rights that foster the good above the right.*²⁶⁶

263. *Id.* at 531 (footnote omitted).

264. As noted in Part 1 of this article, the consequentialist error presumes that morality is humanly created rather than *a priori*, transcendent and immutable; and, therefore, further mistakenly presumes that rights are malleable, capable of reformulation to promote not *a priori*, immutable moral duties, but rather, the selfish preferences of those in power, often sincerely purported to foster the “greater good.” See generally, *Originalism and Deontology*, *supra* note 7, at Sections 2-a, d.

265. *Id.* at Section 2. Section 3 proposes that the moral philosophy of Enlightenment philosopher Immanuel Kant best describes the rudimentary workings of deontological morality.

266. See, *infra* notes 210-79 and accompanying text; see also *Originalism and Deontology*, *supra* note 7, at Sections 2-a-d.

For instance, to borrow one of Prof. Cary’s examples, assuming that such is the correct meaning, excluding slander from First Amendment protection does not narrow the “unalienable right” of “free speech” for the public good. Rather, “free speech” never included a right to commit slander even though slander technically is defamation arising from spoken words. The natural right of speech does not *per se* immunize anything and everything that

Indeed, as has just been demonstrated and of great importance to this writing's concept of Deontological Originalism, the Founders accepted the Enlightenment principle of natural law -- not simply the subset "natural right," but rather, natural law in its entirety -- as a moral force, constraining positive law, and generating discrete natural rights each of which inure not to greater society, but to all persons individually. Natural rights must accord with and enforce deontological morality not because they are a special subclass of natural law concerned with morality, but because, as part of the realm of natural law, natural rights *must abide by* natural law's greatest requisite that, as earlier quoted from Prof. LeDuc, "natural law asserts that law is based upon, derived from, and legitimated by the requirements of morality that are themselves conceived as instrumental for securing or enhancing human flourishing."²⁶⁷

Thus, the Declaration affirms, "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, ..." ²⁶⁸ There is no mention of either Humankind's society, or Humankind's capacity to form societies. Rather, the Founders accented with capitalization the singular importance of the designated noun "Men."²⁶⁹ It is only later in the document that the Founders addressed social orders: "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, ..." ²⁷⁰ According to the text, "unalienable Rights" belong to individuals, who bring those rights with them into Society. True, the Declaration further states that the people may establish new, "Government ... on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."²⁷¹ But, as earlier explained, that discretion cannot be exercised in abrogation of "unalienable Rights" for such is the very definition of tyranny.²⁷² Therefore, however it is exercised for the purported greater good, positive law can neither distort

happens to be spoken, thus in need of natural law abridging due to overreach, any more than the natural right to liberty ever included the liberty to commit homicide or the natural right designated "the pursuit of happiness" ever meant that anyone freely and without consequence may do anything, at any time, in any place, to any person.

267. LeDuc, *supra* note 215, at 289. Pojanowski & Walsh, *supra* note 133, at 18-19 (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 351 (2d ed. 2011)). See, *supra* notes 210-44 and accompanying text (natural law is premised upon and enforces moral requisites).

268. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

269. See, *supra* note 33.

270. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

271. *Id.*

272. See, *supra* notes 116-25.

nor ignore natural law's moral mandate by revoking the moral imperatives of natural rights.²⁷³

Importantly, as shortly detailed, the Founders exhorted successive generations not to follow blindly the Founders' precepts, but rather to seek and, if found, apply a greater understanding of moral and other relevant principles than the Founders themselves knew.²⁷⁴ Accordingly, even if Prof. Cary's analysis correctly describes the sentiments of some, most, or even all of the Founders, those sentiments have been nullified by our better understanding of the morality inherent in natural law and specifically enforced by natural rights -- the morality described by Deontological Originalism.

In fact, Prof. Carey admits as much by explicating his theory with a most revealing codicil,

The major safeguard against arbitrariness with regard to the regulation of rights was due process, which was established by positive laws and which also conformed with the natural law. ... In keeping with its purpose, the theory underlying the arguments of the Declaration does not in any way enshrine individual rights in the sense they are generally understood today. *It may be inferred that the drafters accepted the natural law's mandate for due process that would serve to curb arbitrary and capricious government.*²⁷⁵

Carey is correct that, pursuant to consistent constitutional law, the preservation of rights in American law stems from and, in fact, is completely bounded by the due process clauses of the Constitution and that "natural law's mandate for due process ... curb[s] arbitrary and capricious government."²⁷⁶ Perhaps unknowingly, Carey has fully adopted the principles of Deontological Originalism. Although he claims that, "In

273. True, one can find instances where, for instance, some among the Founders urged that rights and their moral imperatives must give way to a sufficiently grave threat to national peace and security. "Thomas Jefferson, for instance, opined, "[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." Bayer, *supra* note 17, at 291 note 12 (quoting, Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 11 *The Works of Thomas Jefferson*, 146 (Paul Leicester Ford ed., Fed. ed. 1905)). Assuming Jefferson's reference to "written law" subsumes natural rights as well as positive law, the short but apt retort is: Jefferson was wrong, as my article referenced *supra* at note 17 strives to prove.

274. See, *infra* notes 280-87 and accompanying text.

275. Carey, *supra* note 22, at 60, 64-65 (emphasis added; footnote omitted).

276. See *infra* 600-10 and accompanying text.

keeping with its purpose, the theory underlying the arguments of the Declaration does not in any way enshrine individual rights in the sense they are generally understood today”, Carey nonetheless admits in the very same paragraph that the Framers intended constitutional due process to proscribe “arbitrary and capricious government.” Proscribing “arbitrary and capricious government” is exactly what “due process of law” rightly has come to mean.²⁷⁷ Because “arbitrary and capricious” is a moral determination,²⁷⁸ resolving any given due process issue cannot be based on the concept of virtue -- happiness -- that Carey, Campbell and Charles say undergirded the original meaning of the Declaration. *Rather, for keep faith with the Founders, we must understand “unalienable Rights” in fact to be “unalienable” -- not modifiable for the “greater good” even if believed to advance civic “virtue” -- regardless whether the Founders and the Reconstruction Congress would have agreed.* Indeed, given what the Founders saw as their Divine origin, it is worth recalling Prof. Sherry’s stark but apt admonition that lawmakers and nation builders “could no more rewrite these laws of nature than they could the laws of physics.”²⁷⁹ Therefore, natural rights emanating from natural law, which is given as a gift to Humanity from a generous and compassionate deity or force of Nature, cannot be amended and altered for the purported “public good,” because to do so would be to impugn the perfection that is inherent in Nature or Divinity.

277. *Id.*

278. *Id.*

279. Sherry, *supra* note 164, at 1132; *see also, e.g.*, Jerry E. Norton, *Liberty: A Human Right, or a Citizen Right*, 36 LOY. U. CHI. L.J. 565, 566 (2005) (quoting Sherry). As one commentator explained:

Furthermore, the notion of fundamental rights (rights that could never be delegated or relinquished, even voluntarily) also impacted American thought about constitutionalism. Fundamental rights were inalienably bestowed upon humanity by God and were rights “which no creature can give, or hath a right to take away.” Legislators could “no more rewrite these laws of nature than they could the laws of physics.” Thus, natural rights were conceived of as possessing the same law-like status, and by implication as having a similarly compelling “scientific” style of justification, as the laws governing the behaviour of physical bodies. To these concepts, the Founding Fathers added a third idea: “the constitution as a charter or form of government.”

James Lanshe, *Morality and the Rule of Law in American Jurisprudence*, 11 RUTGERS’ J. OF L. & RELIGION 1, 12 (2009) (quoting Sherry at 1130, 1132).

C. Like Good “Parents,” The Framers Hoped and Expected their Descendants to Do Better --

At this juncture, it is necessary to reiterate an important touchstone stressed by the Supreme Court:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.²⁸⁰

The Court correctly gleaned the intent of the Founders who, as I accented nearly a decade ago,

knew that their noble motives were entwined with their “love of fame,” personal ambition and vanity. They also recognized that, due to their frailty and imperfect wisdom, their political-moral philosophy was neither complete nor correct in all regards. Consequently, ... we must take the Founders’ expression ... not to be the last word, but instead as part of ongoing deliberation of that subject. Like the Constitution, we may appreciate the Declaration not only in its own context, but as the wellspring of principles, understood profoundly, yet only partially by the Founders. Indeed, they hoped that subsequent generations would attain an ever fuller understanding, even if elucidation invalidated customs and beliefs that they either did not recognize as immoral or so recognized but

280. *Obergefell*, 135 S.Ct. at 2598 (states must treat same-sex marriages the same as opposite-sex marriages). A decade earlier, the Court likewise admonished,

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–579 (2003) (states may not criminalize acts of homosexual intercourse performed in private by consenting adults).

nonetheless, for political, pragmatic or other purportedly appropriate reasons, refused to abandon.²⁸¹

Perhaps most significantly, James Madison, frequently denoted the “father of the Constitution,”²⁸² stressed that, “the leaders of the revolution . . . pursued a new and . . . noble course. . . . They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, *which it is incumbent on their successors to improve and perpetuate.*”²⁸³ A bit earlier in that essay, Madison expressed the sentiment as a rhetorical question:

Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?²⁸⁴

281. Bayer, *supra* note 17, at 343 (quoting PAUL A. RAHE, *FAME, FOUNDERS, AND THE IDEA OF FOUNDING IN THE EIGHTEENTH CENTURY*, IN *THE NOBLEST MINDS* 25 (Peter McNamara ed., Rowman & Littlefield Pubs., Inc. 1999)).

282. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 n.7 (1997) (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193, n.9 (1994)); *Board of Trustees of U. of Ill. v. United States*, 20 C.C.P.A. 134, 147 (U.S. Ct. Cust. & Pat. App. 1932).

283. THE FEDERALIST NO. 14, 88-89 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (emphasis added). As one leading scholar explained, “This passage is especially noteworthy because it completes the first major section of *The Federalist*.” Akhil Reed Amar, *Architexture*, 77 IND. L. J. 671, 673 n.13 (2002). Likewise finding *The Federalist* No. 14 significant, respected constitutional jurisprudent Sanford Levinson called Madison’s sentiment, “my favorite passage in all of the *Federalist Papers*,” and castigates “us today,” the scholars and officials “who have not learned that all-important lesson from the generation of the Founders.” Sanford Levinson, *Reconsidering the Modern Hanoverian Kings*, 36 HARV. J.L. & PUB. POL’Y 63, 70 (2013).

For whatever it is worth, I agree. Despite the clear lesson the influential Madison expressed for himself and his colleagues, a Westlaw search conducted on August 17, 2018, revealed that only I and Profs. Levinson and Amar have quoted in any law review articles that portion of *The Federalist* No. 14. More distressingly, it has not been referenced by any American court, federal or state.

284. THE FEDERALIST NO. 14, *supra* note 283, at 88. Unlike his bold assertion that the Founders, “formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate,” Madison’s less demanding and less radical observation that Americans, “have not suffered a blind veneration for antiquity” enjoys a bit more citation, thirty-five articles as of my Westlaw search, February 27, 2018, (although many of them are Levinson’s, Amar’s and mine), but again, no judicial opinions reference *Federalist* No. 14.

Indeed, shortly before the fiftieth anniversary of the Declaration, Madison wrote to Jefferson, “And I indulge a confidence that sufficient evidence will find its way to another generation, to ensure, after we are gone, whatever of justice may be withheld whilst we are here.”²⁸⁵ In a like vein, employing his characteristically abrupt, self-assured style, Jefferson ridiculed the notion that, “one generation of men has the right to bind another,” bluntly concluding, “but that between society and society, or generation and generation *there is no municipal obligation, no umpire but the law of nature.*”²⁸⁶ Surely Jefferson, who valued imagination and intellectualism, expected future theorists, free from the “bind” of past generations, to improve upon the Founders’ understanding of “the law of nature,” for he certainly would have scant patience for intellectual lethargy.

Present at the drafting of both the Constitution and the Declaration, future associate justice of the Supreme Court James Wilson similarly hoped that the Founders’ descendants would come to appreciate the transcendent principles of governance more profoundly than did the Founders themselves.

Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. . . . In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.²⁸⁷

These testimonies, while entirely obvious, are compellingly important. They are obvious because, to borrow Justice Wilson’s phrasing, believing in “the law of nature, . . . immutable in its principles,” the Founders could neither ethically expect nor honorably hope that their successors would simply mimic their moral precepts. Rather, they had to trust that their inheritors would continue Humanity’s pursuit of moral truth regardless whether discerning ever more exact deontological canons would supplant doctrines

285. John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL’Y. 195, 321 n.906 (2009) (quoting LETTER FROM JAMES MADISON TO THOMAS JEFFERSON (Feb. 24, 1826)).

286. *Letter from Thomas Jefferson to James Madison* (Sept. 6, 1789), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, 631-32 (James Morton Smith ed., 1995) (emphasis added).

287. Bessler, *supra* note 285, at 321 n.907 (quoting James Wilson, *Of the Law of Nature*, in 1 COLLECTED WORKS OF JAMES WILSON 525 (Kermit L. Hall & Mark David Hall eds., 2007)).

avored by the Founders and their compatriots. That is why, as we will shortly discover, in perfect compliance with their original intent, Deontological Originalism can, indeed must, understand and enforce the Constitution by improving the Founders' Enlightenment moral philosophy to encompass Kantian morality.

IV. THE DEONTOLOGICAL FOUNDATIONS OF THE RECONSTRUCTION AMENDMENTS.

A. The Reconstruction Congress Completed the Unfinished Constitution of the Founders --

This writing's preceding sections accent that the Founders promised in the Declaration a nation governed by the principles of natural rights, a promise they fulfilled partially by replacing the Articles of Confederation with the United States Constitution.²⁸⁸ Never before had any nation builders attempted to codify and obtain popular ratification of²⁸⁹ the very structure of a nation's government through a single formative, controlling document conceived to constrain that government's power by requiring mandatory obedience to the "unalienable Rights" "endowed" upon Humankind from "Nature and Nature's God."²⁹⁰ The remarkable uniqueness of the

288. See, *supra* Section 2, notes 17-209 and accompanying text.

289. As Justice Clarence Thomas, among many others, has admired,

In order to protect against government tyranny, yet at the same time create a government based on consent, the framers of our Constitution engaged in an unprecedented exercise in popular lawmaking. Rising above ordinary politics, the framers of our Constitution toiled for months in the summer heat of Philadelphia, not to establish a government, but to draft a proposal for government, which they then submitted for consideration to the people, who met through their representatives in state ratifying conventions specially convened for the purpose of deliberating on the proposed form of government. Our Federal Constitution was adopted only after an elevated process of popular lawmaking: A constitutional convention called for the explicit purpose of amending the existing Articles of Confederation; submission of the proposed constitution to the people for ratification; and ultimate ratification by a super-majority of the people, meeting in state ratifying conventions.

Remarks of the Honorable Clarence Thomas, Associate Justice, Supreme Court of the United States, *Why Federalism Matters*, 48 *DRAKE L. REV.* 231, 232-33 (2000).

290. The Framers, "demonstrated the value of checks and balances on power with their unprecedented federal constitution." David C. Hendrickson, *International Law and Universal Empire: A View from the Eighteenth Century*, 99 *AM. SOC'Y INT'L L. PROC.* 307, 307 (2005) (citing, DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (2003)). Likewise, a recent law review note accented, "In establishing the federal

Constitution, then, is vouchsafing not simply liberty, but morality itself even at the cost of optimal governmental efficiency and efficacy, and, as I have argued elsewhere, even at the cost of jeopardizing the very security of the Nation.²⁹¹ As the late federal appellate judge Stephen Reinhardt succinctly underscored, “The Constitution is an unprecedented achievement.”²⁹²

However, despite their “unprecedented” Constitution of 1787 and its Bill of Rights added in 1791, the Founders failed to fulfill the promise of moral governance in two significant regards. *Both aspects of their unfulfilled promise arose from the Founders’ unwillingness to enforce fully the natural rights principles of the Declaration into the original Constitution.* First, the Founders permitted slavery to continue as a lawful institution although the immorality of that practice was widely acknowledged.²⁹³ Second, to augment the recently ratified Constitution, the Framers proposed and promoted the Bill of Rights enumerating many of the “unalienable Rights” alluded to in the Declaration, including what we will learn is the “value monism”²⁹⁴ of natural rights, “due process of law.”²⁹⁵ As initially ratified, however, the Bill of Rights addressed and constrained only the conduct of the Federal Government, and, thus, by its own force, was inapplicable to both the States and their respective local governments. In this way, the Declaration’s assertion that Government must abide by and enforce “unalienable Rights” originally was not constitutionally mandated against the States through the Bill of Rights.²⁹⁶ Such was the original Framers’ second broken promise, a serious deficiency that the Reconstruction Congress rectified through what

government, the Founders had no real precedent or experience to guide their actions. The United States Constitution established a unique form of government.” John Rogers, *The Defense of Marriage Act (Doma) and California’s Struggle with Same-Sex Marriage*, 23 REGENT L. REV. 97, 106 (2011) (note) (citing, JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTION GENERATION* 6-11 (2000)).

291. See, Bayer, *supra* note 17 (explaining why moral obedience under the Constitution must dominate even the most urgent concerns of national security and preservation of society).

292. Judge Stephen Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391, 411 (2010).

293. E.g., Britney Beal-Elder, *Meaning and Development Behind American Law*, *Law in America: A Short History*. By Lawrence M. Friedman, 80 DENV. U. L. REV. 717, [text and notes 12-23, no page numbers] (2003) (book review discussing how custom and economics prompted the colonial tolerance, indeed support of slavery despite its immorality).

294. As explained in *Originalism and Deontology*, *supra* note 7, at Section 2-h, value monism denotes the single prime or paradigmatic concept that unifies a body of theory and from which sub-tenets arise.

295. See, *infra* notes 521-98 and accompanying text.

296. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247-50 (1833).

are often referred to as the Reconstruction Amendments,²⁹⁷ specifically, the Thirteenth Amendment proscribing “slavery and involuntary servitude,”²⁹⁸ the Fifteenth Amendment prohibiting racial discrimination in voting,²⁹⁹ and most particularly, the Fourteenth Amendment’s proscription that states and localities may not violate “due process of law.”³⁰⁰ As part of its justification, the Reconstruction Congress expressly referenced the Declaration³⁰¹ as the pivotal source for those hugely significant amendments.³⁰²

297. “The Amendment[s] grew out of investigations into the conditions in the South in the aftermath of the Civil War.” Paul Finkelman, *Original Intent and The Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI-KENT L. REV. 1019, 1049 (2014).

298. “Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII (1866).

299. “Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV (1870).

300. That amendment reads in pertinent part, “[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, sec. 1 (1868).

301. See *supra* notes 91-125 and accompanying text.

302. Noted constitutional scholar Akhil Reed Amar, among many others, “sees the Reconstruction Amendments ... as a fundamental alteration of the original Constitution, something that eliminated the fatal vices of the original Constitution and propelled the modern nation toward its more egalitarian, populist, democratic character.” *Symposium on America's Constitution: A Biography*, 59 SYRACUSE L. REV. 31, 34 (2008) (remarks of Prof. William M. Wiecek discussing AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY*). Accordingly, it is hardly overstatement to urge that, “The Reconstruction Amendments are the most important amendments to the U.S. Constitution since the Bill of Rights of 1791. . . . The Reconstruction Amendments were the expression of the greatest struggle of the American people since the founding to remember and recover the narrative thread of their story of themselves as a people constituted by their revolutionary constitutionalism.” Kenneth S. Tollett, Sr., *The Fate of Minority-Based Institutions After Fordice: An Essay*, 13 REV. LITIG. 447, 485 (1994) (quoting, DAVID A.J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 17 (1993)); see also, e.g., Mehrdad Payandeh, *Constitutional Aesthetics: Appending Amendments to the United States Constitution*, 25 BYU J. PUB. L. 87, 88 (2011) (“The Civil War resulted in the Reconstruction Amendments, arguably the most important transformation of U.S. constitutional law in the nineteenth century.”).

There was some hope,³⁰³ quixotic as it turned out,³⁰⁴ that from the death and devastation of the Civil War straightaway would arise a more just Nation whose citizens, if not in harmony, at least in civility would work together to heal their wounds and better their lives, especially those of the newly freed slaves. Yet, we all recall from high school and college history classes that the immediate *post-Bellum* years known as “Reconstruction”³⁰⁵ were marked by renewed violence, unalloyed bigotry, bitterness in all quarters, and resistance to change.³⁰⁶ As Prof. Finkelman explained,

To the great shock of northerners, defeated Confederates did not simply lay down their arms, accept the end of slavery, and move forward towards reconstructing the former Confederate states on a biracial and egalitarian basis. Instead, the nation witnessed massive violence in the South directed at blacks, U.S. army soldiers, white southern unionists, and northern whites who had moved to the South after the War. Newly elected

303. “Immediately after the Civil War, there seemed to be a glimmer of hope that African Americans would enjoy the fruits of liberalism and escape the burdens of racism.” Michael W. Combs and Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L. J. 627, 635 (2004).

304. *Id.* (“But the political gains of African Americans were not widespread, ...”); *see also*, e.g., David L. Abney, *Constitutional Interpretation: Moving towards a Jurisprudence of Common Sense*, 67 TEMPLE L. REV. 931, 942 note 53 (1994) (“The hopes of African Americans were only briefly fulfilled after the Civil War.”).

305. Julie M. Spanbauer, *Kimel and Garrett: Another Example of the Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 793 note 34 (2003) (quoting, GARY A. DONALDSON, *THE SECOND RECONSTRUCTION: A HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT*, V. (2000)):

The period immediately following the Civil War until as late as 1877, is known as the First Reconstruction:

“It was a plan designed by the federal government to bring the defeated South back into the Union, and through legislation, manage and regulate race relations in the Old Confederacy. Instead, Reconstruction became the basis of a social upheaval and a national political realignment, aspects of which could still be felt in the social and political fiber of the nation well into the second half of the next century. For the newly freed slaves, supposedly a primary benefactor of federal legislation in this period, post-Civil War Reconstruction was a dismal failure.”

306. Tom I. Romero II, *Wringing Rights Out of the Mountains: Colorado’s Centennial Constitution and the Ambivalent Promise of Human Rights and Social Equality*, 69 ALB. L. REV. 569, 569 note 3 (2006) (discussing, ERIC FONER, *RECONSTRUCTION: AMERICA’S REVOLUTION, 1863-1877* (1988):

The period following the Civil War, known as Reconstruction, is perhaps one of the most contentious and troublesome eras in American history. As federal administrative, political, and military forces attempted to reshape Southern society while bringing its citizenry back into the national fold, Southern “redeemers” resisted at almost every turn, and in often violent and extralegal ways, thwarted efforts to reconstruct Southern society along more egalitarian and industrial lines.

southern state legislatures passed numerous laws, collectively known as black codes, which were designed prevent black political activity and economic success. Across the defeated Confederacy new local and state governments and white terrorists did everything they could to reverse the outcome of the Civil War.³⁰⁷

It soon was apparent that nothing but significant Federal intervention would refurbish a society and culture that extolled the principles of the Declaration but had allowed slavery and similar affronts against natural rights to flourish. As is customarily American, those changes took the form of law,³⁰⁸ a series of Congressional civil rights acts plus the Reconstruction Amendments. While Prof. Robert A. Burt's conclusion is true that, "the Thirteenth and Fourteenth Amendments were the fulfillment of the generalized promise of the American Revolution,"³⁰⁹ those words do not convey fully the profundity and impact of the Reconstruction Amendments on American governmental and legal philosophy. Indeed, many historians and legal scholars agree that the Amendments amount figuratively to a second American revolution,³¹⁰ or, put a bit more mildly, achieved a fundamental re-shifting of governmental power from allowing the States to

307. Finkelman, *supra* note 297, at 1049 (footnotes omitted; reviewing, WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988)).

308. Early observer of American morays Alexis De Toqueville famously remarked in his highly-regarded book, *DEMOCRACY IN AMERICA* 248 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (1835) (as quoted in Paul E. McGreal, *Review Essay of Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues*, 30 IND. L. REV. 693, 702 (1997)),

There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of everyday party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate.

309. Robert A. Burt, *Overruling Dred Scott: The Case for Same-Sex Marriage*, 17 WIDENER L. J. 73, 78 (2007).

310. "When the North won the Civil War, a second American Revolution succeeded." Christian C. Day, *Resisting Serfdom: Making the Market Work in a Great Republic*, 25 IND. L. REV. 799, 818 note 83 (1991) (citing, JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* (1990)); Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1172 (1993)).

abide by the principles of the Declaration at their respective discretions, to designating the Federal Government supreme enforcer against state and local governments infringements of that document's "unalienable Rights" precepts.³¹¹ As enforcer of the Reconstruction Amendments,³¹² thus the highest arbiter of "due process of law," the Federal Government gained what it lacked under the original Constitution and the Bill of Rights, the authority to superintend the States' compliance with the primary stricture of government: protection of the "unalienable Rights" recognized in the Declaration and enforced by the Constitution. Prof. Christian C. Day explained, "The states' rights, antifederalist, Southern vision of the republic was defeated. The new union was stronger and more centralized. Political and economic power gravitated toward the federal government never to return to the states or the people. Federal power was employed to enfranchise and liberate the former slaves."³¹³ In the words of Senator Jacob Howard when introducing a revised draft of what would become the Fourteenth Amendment's section 1, "The great object of th[e] amendment[s] is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."³¹⁴

It is important to stress that, while the changes wrought were deliberately massive, the Reconstruction Congress did not seek to utterly upend the Constitutional system. Whether out of respect for the founding theory, in light of pragmatic politics, or likely both, as Historian Michael Les

311. Prof. Amar offered additional and complimentary explanations. Reconstruction shifted the Bill of Rights' from its original emphasis which sought to promote majoritarian forces by, *inter alia*, deploying States as bulwarks against federal tyranny, particularly prosecuting federal officials for misuse of their federal offices for their own personal enrichment. AKHIL REED AMAR, *THE BILL OF RIGHTS—CREATION AND RECONSTRUCTION*, xiii (Yale U. Press 1998). As originally understood, the Bill of Rights strove,

To minimize such self-dealing ... [by] protect[ing] the ability of local governments to monitor and deter federal abuse, ensure that ordinary citizens would participate in the federal administration of justice through various jury provisions, and preserved the transcendent sovereign right of the majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.

Id.

312. Congress is authorized to enforce the Thirteenth Amendment's anti-slavery mandate, the Fifteenth Amendment's proscription against racial discrimination in voting, and the entirety of the Fourteenth Amendment including its requirement that States abide by the strictures of "due process" and "equal protection of the laws." U.S. CONST. amend. XIII, sec. 2 (1866); U.S. CONST. amend. XIV, sec. 5 (1868); U.S. CONST. amend. XV, sec. 2 (1870). But, of course, any such congressional enforcement is itself subject to judicial review under the Bill of Rights, particularly the Fifth Amendment's Due Process Clause.

313. Day, *supra* note 310, at 818.

314. 39th Cong. Globe, 1st Sess. 2766 (1866) (Remarks of Senator Howard, R. Mich.).

Benedict explained, Congress strove to cure the infirmities of the antebellum system within familiar Federalism thereby preserving the States as meaningful political entities regarding property, contract, criminal, and similar legal genres traditionally within their domain.³¹⁵ In sum, "If the Civil War was the second American Revolution, the Thirteenth and Fourteenth Amendments gave birth to a transformed Constitution and Bill of Rights."³¹⁶ While, as Prof. Benedict cautioned, basic Federalism remained, States could no longer ignore with impunity their natural law duties described in the Declaration because, under the Fourteenth Amendment, America at last attained what the Framers should have established seventy-five years earlier: the administration of natural rights codified under a Bill of Rights or its equivalent, applicable to all governmental levels including States and localities, but ultimately enforced by the Federal Government.

315. Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 YALE L.J. 2011, 2030 (1999) (symposium edition; footnote omitted):

No historian familiar with the legal position of African Americans before the Civil War can deny that Reconstruction radically altered it. And giving the federal government the power to intervene to protect civil and political rights where the state infringed them, or possibly when it failed to assure them, would have worked a fundamental change in the federal system. But the fact is that Republicans agonized over the choices they had to make between preserving federalism and protecting black rights. Faced with the choice, they opted to protect rights, but they did so in such a way as to preserve as much as possible of the traditional, state-centered system. Refusing to transfer primary responsibility for ordinary protection of the law from the states to the federal government, they mandated essentially that such protection be provided by the states equally, regardless of race.

316. Curtis, *supra* note 310, at 1172. By contrast, historian Herman Belz has "argu[ed] that the Civil War established the continuity of the first revolution rather than displacing the first revolution." Andrew W. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. L. REV. 709, 726 note 93 (1999) (discussing, Herman Belz, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA 1-15 (1998)). Both propositions, I think, are true, therefore the revolution imagery is apt. Certainly, as this article accents, the Reconstruction Amendments continued the original Revolution by compelling the States, under federal oversight, to abide by "due process of law." However, to accomplish that, the former sovereignty of states had to be substantially reduced by bringing States under the direct natural rights command of the Constitution, with compliance not left to the self-enforced integrity of the States themselves, but now to the federal level. In that regard, the continuation of the American Revolution required, in essence, a governmental restructuring that amounted to a second revolution.

And, of course, the terrible Civil War itself was a revolution that justly failed for the South but promoted a shifting of powers from the States to the central government that can be called nothing less than *revolutionary*.

1. The Framers of the Reconstruction Amendments Embraced the Deontology of the Constitution's Original Framers --

As just emphasized, the Reconstruction Congress fulfilled the Founders' fundamental promises by instilling into the Civil War Amendments the deontological moral principles of natural law that the Founders memorialized in the Declaration and codified into the Constitution as purely federal mandates. Therefore, Prof. Kmiec properly concluded, "[T]he founding generation of the original Constitution and the one existent in 1868, at the time of the addition of the Fourteenth Amendment, could not envision us individually or collectively answering ... questions [concerning 'controversial implied rights'] ... without reference to natural law."³¹⁷ In particular, the Reconstruction Congress understood and embraced the principle that, as earlier discussed, "The Declaration of Independence was the promise; the Constitution was the fulfillment."³¹⁸ Thus, constitutional expert Alexander Tsesis determined, "The Abolitionists' sentiments were shared by many in Congress, who understood the Reconstruction

317. Kmiec, *supra* note 25, at 385 (bracketed quote at 383). No commentator should be unmindful of Prof. Finkelman's admonition, applicable to all similar analyses, but a particular pitfall of Fourteenth Amendment inquiries:

Lawyers and judges have often used -- or more likely misused -- history to reach a certain conclusion without any regard for nuance, complexity, or even the very real possibility that there is no certainty about the intentions of those who wrote the Amendment. Those who think that history will offer them a Rosetta Stone to understand the Fourteenth Amendment are unlikely to be successful in their quest. Some scholars and lawyers have sought a "true" and certain original meaning of the Amendment, often with a self-conscious political agenda to undermine integration, affirmative action, and even substantive racial fairness. ... [Rather,] research shows the complexity of the debates and the impossibility of answering many of the modern questions that swirl around the Fourteenth Amendment."

Finkelman, *supra* note 297, at 128 (footnotes omitted).

Aware of Finkelman's meaningful warning, I still join researchers who have concluded that, as with the history of the Declaration's adoption in 1776, the frequency and intensity of contemporaneous statements of the pivotal actors, coupled with the thoughtful commentaries of knowledgeable scholars, provide a reliable basis to aver that, like the Founders, the Reconstruction Congress believed in and sought to enforce the Declaration's principles of "unalienable Rights." (Indeed, to respect Prof. Finkelman's caution, this article's length results from compiling primary and secondary sources to convince readers that any assertions herein are supported.)

318. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (9th Cir. 2010) (quoting Chief Justice Warren Burger as quoted by Charles Alan Wright, *Warren Burger: A Young Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995)).

Amendments to incorporate the Declaration's fundamental principle of equal inalienable rights."³¹⁹ Prof. Kmiec identically surmised,

Overall, the founders established a written Constitution as law that was to be informed by natural law embodied in the Declaration. The founding generations of 1787 and 1868 had no intention of displacing the fundamental natural-law principles in the Declaration or the understanding of human nature reflected in the common law tradition that preceded the ratification of the Constitution or the Fourteenth Amendment.³²⁰

Equally, the highly-regarded scholar Frank Michelman recently wrote, "In the 38th and 39th Congresses, numerous members made reference to the Declaration-text as a guide to the work of preparing constitutional amendments for submission to the states. Members might go so far as to say or imply that the amendments were designed to fulfill a pledge or carry out a project of justice set going by the Declaration."³²¹ Two decades earlier, Dean Robert G. Reinstein likewise accented, "The consistency of the references to and reliance upon the Declaration ... is remarkable. ... What is perhaps more remarkable than the number of Republicans in both houses who expressed one or both of these propositions is the singular fact that not one Republican member denied, disputed or questioned either proposition."³²²

Again, primary sources verify the conclusions of researchers. Massachusetts's fiery, influential Sen. Charles Sumner³²³ unequivocally

319. Tsesis, *supra* note 24, at 392 ("Republican leaders, especially those in the Radical Republican camp, believed the Declaration 'must be heeded,' having been 'whispered into the ears of this nation since first we pronounced life, liberty, and the pursuit of happiness to be the inalienable rights of all men'"); *Id.* at 394 (quoting Rep. James F. Wilson (R. Iowa) CONG. GLOBE, 38TH CONG., 1st Sess. 1202 (1864)).

320. Kmiec, *supra* note 25, at 399, n.71 (arguing positivism jurisprudentially flawed because it detaches legal rules from historical and political background).

321. Frank I. Michelman, *The Ghost of The Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress*, 89 S. CAL. L. REV. 575, 589 (2016) (citing Tsesis, *supra* note 24, at 392-97); see also, Daniel Farber, *Historical Versus Iconic Meaning: The Declaration, the Constitution, and the Interpreter's Dilemma*, 89 S. CAL. L. REV. 457, 467 (2016).

322. Robert G. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 388-89 (1993).

323. Charles Sumner, WIKIPEDIA (2017), https://en.wikipedia.org/wiki/Charles_Sumner (last visited Jul 23, 2017):

Charles Sumner was an American politician and United States Senator from Massachusetts. As an academic lawyer and a powerful orator, Sumner was the leader of the anti-slavery forces in Massachusetts and a leader of the Radical Republicans

asserted, “First comes the Declaration of Independence, the illuminated initial letter of our history Here is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution, and enter into and diffuse itself through all the national legislation.”³²⁴ Of great significance, Sumner extolled the overriding importance of the Declaration, averring that without it, there would be no meaningful Constitution. “[T]he Declaration has a supremacy grander than that of the Constitution, more sacred and inviolable, for it gives the law to the Constitution itself.”³²⁵ As Prof. Trapp explained, “For Sumner, the Constitution merely ‘supplied the machinery’ whereby the ‘great rights’ of the Declaration were ‘maintained.’”³²⁶

It followed logically that the Constitution can only be understood in light of the meaning of the Declaration. In Sen. Sumner’s words:

Sir, I insist that the Constitution must be interpreted by the Declaration. I insist that the Declaration is of equal and coordinate authority with the Constitution itself. I know, sir, the ground on which I stand. I need no volume of law, no dog eared book, no cases to sustain me. . . . And now,

in the U.S. Senate during the American Civil War working to destroy the Confederacy, free all the slaves, and keep on good terms with Europe. During Reconstruction, he fought to minimize the power of the ex-Confederates and guarantee equal rights to the freedmen.

Sumner is equally renowned for being “caned” in the Senate Chamber by Rep. Preston Brooks (D. S. Car.) on May 22, 1856. Brooks became incensed by Sumner’s May 19th speech in favor of admitting Kansas as a “free state,” wherein the often-acerbic abolitionist described Sen. Stephen Douglas (D. Ill.) as a “noise-some, squat, and nameless animal . . . not a proper model for an American senator.” A second prime trigger for Rep. Brooks’ attack was Sumner’s further diatribe against Brooks’ home-state legislative colleague, Sen. Andrew Butler (D. S. Car.). Sumner pronounced that Butler had taken “a mistress . . . who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight . . . I mean, the harlot, Slavery.”). The Caning of Senator Charles Sumner, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm (last visited Jul 23, 2017) (citing DAVID HERBERT DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN (1970); DAVID M. POTTER, THE IMPENDING CRISIS 1848-1861 (1976)).

In the words of the cliché, the beating left Sumner literally “bloodied but unbowed” as, after a period of convalescence, he continued his successful career in the Senate. His assailant was not so fortunate. “Surviving a House censure resolution, Brooks resigned, was immediately reelected, and soon thereafter died at age 37.” *Id.*

324. Sandefur, *supra* note 23, at 508 (quoting CONG. GLOBE, 36TH CONG., 1st Sess. 2602 (1860)).

325. Trapp, *supra* note 63, at 840 (quoting CONG. GLOBE, 42ND CONG., 2d Sess. 825 (1860)).

326. *Id.* (quoting, THE RECONSTRUCTION AMENDMENT DEBATES 611 (Alfred Avins, ed., 1967)).

sir, I am prepared to insist that, whenever you are considering the Constitution, so far as it concerns human rights, you must bring it always to that great touch-stone; the two must go together, and the Constitution can never be interpreted in any way inconsistent with the Declaration. Show me any words in the Constitution applicable to human rights, and I invoke at once the great truths of the Declaration as the absolute guide in determining their meaning.³²⁷

Identically, "Senator John P. Hale of New Hampshire called on his fellow citizens to 'wake up to the meaning of the sublime truths' that the nation's 'fathers uttered years ago and which have slumbered dead letters upon the pages of our Constitution, *of our Declaration of Independence*, and of our history.'" ³²⁸ Invoking the Declaration, Sen. James W. Nye of Nevada joined his colleagues by noting that Congress has "necessary and proper" authority to "restrain the respective states from infracting" both enumerated and unenumerated "natural and personal rights."³²⁹ Likewise suggesting the Declaration, Michigan's Francis William Kellogg exclaimed that Congress must see to the enforcement of "rights which are inalienable."³³⁰

327. *Id.* (emphasis added) (quoting, THE RECONSTRUCTION AMENDMENT DEBATES 597 (Alfred Avins, ed., 1967)).

It is no surprise that this writing emphasizes the participation of Sumner and other influential "Radical Republican" leaders. Granted, "As modern historians have demonstrated, the Republican majority in the Thirty-Ninth Congress was dominated not by radicals like Thaddeus Stevens and Charles Sumner but by a coalition of moderates and conservatives, many of whom were former Jacksonian Democrats." Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 269-70 (1997). Nonetheless, the Radical Republicans provide not just vivid but compelling analysis of the early *post-Bellum* amendments and civil rights laws. Indeed, Rep. Stevens is recognized as then "the most influential member of the House of Representatives." Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 43 n.87 (2013).

328. Tsesis, *supra* note 24, at 392 (emphasis added) (quoting, Cong. Globe, 38th Cong., 1st Sess. 1443 (1864) (statement of Sen. John P. Hale)). Similarly, "'Our ancestors,' asserted Senator John B. Henderson of Missouri, had paved the way to civil war by hypocritically preserving their own 'inalienable right of liberty unto all men,' and 'came to refuse it to others' under the guise of expedience." *Id.* (quoting, Cong. Globe, 38th Cong., 1st Sess. 1461 (1864) (statement of Sen. John B. Henderson)).

329. Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 433 note 59 (2011) (quoting, CONG. GLOBE, 39th Cong., 1st Sess. 1072 (remarks of Mr. Nye)).

330. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMPLE L. REV. 561 (quoting CONG. GLOBE, 38TH CONG., 1st Sess. 2954 (1864)).

2. *The Reconstruction Congress Specifically Sought to Rectify the Original Framers' Two Broken Promises --*

Consistent with, indeed arguably compelled by their embrace of the Declaration as the Constitution's voice and conscience, through their legislation and proposed constitutional amendments, the Reconstruction Congress expressly sought to realize the earlier mentioned two fundamental promises that the original Founders failed to fulfill: (1) the Constitution did not explicitly prohibit slavery and (2) failing to bring the States under the umbrella of the natural rights protections emanating from the Bill of Rights.

a. *Abolishing Slavery --*

That prior to the Thirteenth Amendment, the enslavement of human beings for profit was not clearly and completely unlawful has always been considered one of the Framers most coldblooded concessions to the realpolitik of replacing the feeble Articles of Confederation with a constitution establishing a viable federal government strong enough to govern a new and growing nation. As Prof. Amar explained crisply, "The original Constitution had been tainted by its open compromise with slavery, ..."³³¹

Doubtless, "the negotiations (and compromise) which allowed slavery to continue for a future generation in American constitutional processes were immoral compromises (as many of the founders agreed at the time) ... because they continued an inhumane and cruel regime, which affected those who were not themselves part of the negotiating and compromising."³³² Nonetheless, as ubiquitous school lessons aver, absent those compromises, the Founders neither would have obtained the Continental Congress' unanimous assent to adopt the Declaration of Independence, nor would have secured the Constitution's ratification after the *post*-Revolution experience with weak governance under the Articles of Confederation. Thus, the classic explanation holds that, "Scholars have defended the Founders' willingness to compromise with slave forces as a necessary choice among evils, with the greater evil being disunion. Such a disunion would have created a Southern nation firmly committed to racial slavery and unencumbered by [the]

331. AMAR, *supra* note 311, at 190.

332. Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 906 (2011).

abolitionist feeling in the North.”³³³ If the initial price of attaining a nation ostensibly dedicated to natural rights was to compromise substantially morality’s most fundamental moral principles, the Founders hoped and expected that, “[their] revolutionary ideals [would] serve[] as a challenge to future generations to improve upon the Constitution’s flawed commitment to social justice.”³³⁴

These historical interpretations surely are interesting and informative, but, perhaps not as pertinent as they might initially seem regarding the moral *bona fides* of America’s governing documents. Whatever may have been the combination of motives and perceptions -- noble, ignoble, or neutral -- that culminated in the Declaration, the original Constitution and the Bill of Rights,³³⁵ the Founders did verify as morally binding the philosophical principles of good and right governance in the Declaration’s explicit text.³³⁶ *The Declaration establishes the correct rules even if the original Constitution’s Framers, for good or bad reasons, appallingly cheated in 1787 and 1791.* Accordingly, while during the Civil War, Representative William B. Kelley of Pennsylvania rightly stated, “the founders had

333. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1311 (2000) (footnote omitted).

334. Hon. Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L. J. 18, 21 (2003); Jason A. Adkins, *Lincoln’s Constitution Revisited*, 39 N. KY. L. REV. 211, 230 (2009) (symposium issue) (“Because the Founders knew there would be no Union without at least some recognition of slavery, they made a provision for it in the Constitution, but put it on the road to ultimate extinction. The 1787 Northwest Ordinance, which excluded slavery from the new Northwest Territories, makes this point abundantly clear”).

Several critics, by contrast, have challenged the conventional explanation as too pat. They claim that the Founders, in fact, were bigoted, believing in the natural supremacy of the “White” race, of men, of European Enlightenment culture, and, of Protestantism, therefore, perhaps, not as adverse to the practice of enslaving Africans as we would like to believe. *E.g.*, David Hodas, *The Laws of Science, Constitutional Law, and the Rule of Law*, 22 WIDENER L. REV. 135, 154-55 (2016) (discussing Jefferson); Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, But Title VII Has Not Reached Its True Potential*, 89 ST. JOHN’S L. REV. 693, 706 (2015) (discussing George Washington).

335. Larson, *supra* note 33, at 704 (discussing some historians’ preferences to view the Founders “as honest racists, not hypocrites”).

336. The Reconstruction Congress understood that, in the words of one researcher, perhaps it is better, “not to condemn the founders for their weaknesses and failings, but to search in their hearts for clues to our own. We must work with the ideological tools they left us. More importantly, we must take responsibility for the choices they made and hope for the courage to take responsibility for our own choices.” Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience*, 3 LOY. J. PUB. INT. L. 1, 46 (2001).

‘compromised with wrong’ at the Constitutional Convention,”³³⁷ seeking to overcome that compromise, echoing the general sentiments of his colleagues, Representative Isaac N. Arnold of Illinois did not advocate abandoning the founding. Rather, Kelley, “sensibly called for ‘incorporating into our organic law the glorious prohibition of slavery’ directly from the Declaration.”³³⁸ Fully and deliberately consistent with the spirit of the Declaration, the bills proposing the respective Reconstruction amendments, then, “clearly derived from America as a nation and proclaimed freedom, not slavery.”³³⁹

It is not startling, then, that recounting the deontological sentiments of the Reconstruction Congress, Prof. Reinstein noted, “Throughout their deliberations, the Republicans reiterated the theme that the Founders had omitted the Declaration’s principles from the Constitution because of slavery, and that those principles must now become the supreme law of the land.”³⁴⁰ For instance,

In his first speech in the 39th Congress, before any legislation was introduced, [Pennsylvania’s] Thaddeus Stevens, the Republican leader in the House, said that the duty of that Congress was to complete the Constitution as the Founders would have done but for slavery:

“Our fathers repudiated the whole doctrine of the legal superiority of families or races, and proclaimed the equality of men before the law. Upon that they created a revolution and built the Republic. They were prevented by slavery from perfecting the superstructure whose foundation they had thus broadly laid. For the sake of the Union they consented to wait, but never relinquished the idea of its final completion. The time to which they looked forward with anxiety has come. It is our duty to complete their work.”³⁴¹

Likewise, the dour Stevens, whose assessment of Reconstruction was that the Union should act as a conqueror, inaugurating a “radical

337. Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.S. DAVIS L. REV. 1773, 1807 (2006) (quoting CONG. GLOBE, 38TH CONG., 1st Sess. 2983 (1864) (statement of Rep. William B. Kelley (R. PA.))).

338. Tsesis, *supra* note 24, at 393 (quoting, CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864) (statement of Rep. Isaac N. Arnold (R. IL.))).

339. AMAR, *supra* note 311, at 190.

340. Reinstein, *supra* note 322, at 387 (footnote omitted).

341. *Id.* at 385 (quoting, CONG. GLOBE., 39th Cong., 1st Sess. 74 (1866) (remarks of Rep. Stevens (R. PA.))).

reorganization of southern institutions, habits, and manners,"³⁴² stated, "Our fathers had been compelled to postpone the principles of their great Declaration and wait for their full establishment till a more propitious time. That time ought to be present now."³⁴³

Hardly surprisingly, Congress recognized slavery as a most horrific violation of the "unalienable Rights" championed in the Declaration. To offer a few more instances, Illinois' Ebon Clark Ingersoll stated poetically, "I believe that *the black man has certain inalienable rights*, which are as sacred in the sight of Heaven as those of any other race. I believe he has a right to live, and live in a state of freedom. He has a right to breathe the free air and enjoy God's free sunshine. ..." ³⁴⁴ Likewise invoking higher law, Ohio's John Sherman, perhaps most noted for the antitrust act that still bears his name, opined,

It seems to me that when we legislate on this subject we should secure to the freedmen of the Southern States certain rights, naming them, defining precisely what they should be. . . . We should secure to these freedmen the right to acquire and hold property, to enjoy the fruits of their own labor, to be protected in their homes and family, the right to be educated, and to go and come at pleasure. *These are among the natural rights of free men.*³⁴⁵

In this vein, Prof. Tsesis recounted Speaker Schuyler Colfax's invocation of the "enduring justice" stemming from the "inalienable rights" set forth in "our Magna Charta, the Declaration of Independence,"

The Thirty-Ninth Congress opened in 1865 with a statement by Schuyler Colfax, the incoming Speaker of the House of Representatives [and future Vice-President under President Grant]. Given shortly after Congress passed the proposed Thirteenth Amendment and before the introduction of the proposed Fourteenth Amendment, the statement was indicative of how Congress planned to use the Thirteenth Amendment for Reconstruction. Colfax told the House:

342. *Id.* at 386.

343. *Id.* (quoting, CONG. GLOBE., 39th Cong., 1st Sess. 2459 (1866)).

344. Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 475 (1989) (emphasis added; quoting, CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (remarks of Rep. Ingersoll (R. IL.))).

345. *Id.* (emphasis added; quoting, CONG. GLOBE, 39th Cong., 1st Sess. 42 (1866) (remarks of Sen. Sherman (R. OH.))).

“[I]t is yours to mature and enact legislation which, ... shall establish [state governments] anew on such a basis of enduring justice as will guarantee all necessary safeguards to the people, and afford what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government--protection of all men in their inalienable rights.”³⁴⁶

The Republicans repeatedly emphasized the link between abolishing slavery and the principles of the Declaration. Indiana’s Rep. Godlove S. Orth described the proposed Thirteenth Amendment as “a practical application of that self-evident truth,” of the Declaration “that [all men] are endowed by their creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness.”³⁴⁷ Similarly, Prof. Tsesis reported, “Representative Francis W. Kellogg of Michigan traced the sources of the proposed amendment to the Declaration and to the Preamble of the Constitution’s requirement that government promote the general welfare and secure liberty.”³⁴⁸ And, New York’s Rep. Thomas T. Davis melodiously extolled the linkage between liberty and American governance, “Liberty, that civil and religious liberty which was so clearly beautifully defined in the Declaration of Independence African slavery, was regarded as temporary in its character Our fathers predicted that the time would soon come when the interests of the country would demand that slavery should pass away.”³⁴⁹

Moreover, leading observers of the Reconstruction Congress recognized the need to vindicate the Declaration from the gutter of slavery. As a prime instance, “The great philosopher John Stuart Mill wrote a letter from England to a friend calling for ratification of the Thirteenth Amendment and the necessity ‘to break altogether the power of the slaveholding caste’ as necessary for ‘the opening words of the Declaration of Independence’ to no longer be ‘a reproach to the nation founded by its authors.’”³⁵⁰

I have tested the reader’s patience with this lengthy rendition to assuage any doubts that, like the original Constitution, the Thirteenth Amendment

346. Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B. C. L. REV. 307, 326-27 (2004) (quoting, CONG. GLOBE, 39th Cong., 1st Sess. 5 (1865) (remarks of Rep. Colfax (R. IN.))).

347. *Id.* at 327 (quoting CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865) (remarks of Rep. Orth (R. IN.))).

348. *Id.* (discussing, CONG. GLOBE, 38th Cong., 1st Sess. 2954-55 (1864) (remarks of Rep. Kellogg (R. MI.))).

349. *Id.* at 327-28 (quoting, CONG. GLOBE, 38th Cong., 2d Sess. 154 (1864) (remarks of Rep. Davis (R. NY.))).

350. THE LATER LETTERS OF JOHN STUART MILLS 1849-1873 at 393-94 (Francis E. Mineka & Dwight N. Lindley eds. 1972).

was understood to protect “natural, inalienable and civil rights”³⁵¹ as commemorated in the Declaration of Independence.³⁵²

*b. Applying the Declaration’s Natural Rights Theory to the States --
Was More than Equal Protection Intended? --*

In addition to rectifying the Founders’ betrayal of the Declaration through declining to outlaw slavery, the Reconstruction Congress enacted its civil rights statutes and proposed constitutional amendments, especially the Fourteenth Amendment, to correct the Founders’ second infidelity to the principles of moral government: failure to make the States and their respective local governments subject to the Declaration’s natural rights theory particularly as propounded by the Bill of Rights. Importantly, Congress did not propose measures that explicitly applied the Bill of Rights as an entirety onto the States.³⁵³ Rather, the Fourteenth Amendment, *inter alia*, forbids states and their political subdivisions from denying “persons” within their respective jurisdictions “due process of law,” “equal protection of the laws” and other basic safeguards that, as we will see, emanate from the theory of natural rights espoused in the Declaration of Independence.

Concurrently, as earlier emphasized, the Fourteenth Amendment changed the balance of Federalism, by withdrawing the freedom from Federal oversight that the States formerly had enjoyed. Specifically, Section Five of the Amendment authorizes Congress to enact legislation compelling states to comply with that Amendment’s various provisions, most notably

351. Jacobusten Broek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 200 (1951).

352. Tesis, *supra* note 24, at 370 (emphasis added):

The original Constitution contained clauses, which protected the institution of slavery, that were irreconcilable with the moral commitments the nation undertook at independence. The Reconstruction Amendments were meant to set the country aright by formally incorporating the Declaration's principle of representative governance into the Constitution. That principle had been foundational to the nation's ethos from its founding in 1776, but by protecting slavery, the 1787 Constitution violated the Declaration's mandate that government secure liberal equality for the common good. The Reconstruction Amendments were a major step forward because they empowered Congress to enact legislation conducive to a society of free and equal individuals.

353. See *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010) (“The Due Process Clause of the Fifth Amendment, however, applies only to the federal government”); *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) (noting that Sixth Amendment read alone applies only to federal prosecutions); see *infra*, notes 565-87 and accompanying text.

“due process of law.”³⁵⁴ Moreover, based on fundamental principles of American judicial review of the Constitution,³⁵⁵ the federal judiciary is empowered to review actions of both the States and their respective localities to assure compliance with “due process” and related principles.³⁵⁶

The Fourteenth Amendment’s sweeping restructuring of political power, making the federal not state level dominant, inspires an intriguing quandary: While the Due Process Clause has become the modern centerpiece for civil rights enforcement,³⁵⁷ contrary to what one might expect, Congress, “devoted comparatively little time and energy to this clause when debating the Amendment.”³⁵⁸ Profs. Chapman and McConnell offer one reason why Congress’ debate was perhaps surprisingly scant: the courts had delineated in some detail a definition of “due process,” thus, the meaning of the proposed Due Process Clauses’ basic substantive content was not a focus of Congressional concern.

The Fourteenth Amendment was adopted to ensure that all persons would enjoy the same civil liberties against the states that whites had previously enjoyed against the federal government. There was not much debate about the meaning of the Fourteenth Amendment Due Process Clause, presumably because it had a well-defined legal meaning. Except that it applied to the states instead of the federal government, it was lifted entirely from the Fifth Amendment. ...

[Indeed,] Fourteenth Amendment due process was understood to mean nothing different than what due process and[, derived from Magna Carta,] the law of the land had meant up to that point. ... Because it applied to all

354. See U.S. CONST. amend. XIV, § 5.

355. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803).

356. *Bailey v. City of Port Huron*, 507 F.3d 364, 367 (6th Cir. 2007) (noting “due process of law ... has [not only] the procedural component that these words suggest, but it also has been construed to have ‘a substantive component,’ ... that [effectively has] incorporate[d] most of the guarantees of the Bill of Rights ... and that protects other ‘fundamental rights and liberties’ that are not expressly mentioned in the Bill of Rights.” (citations omitted)).

357. Finkelman, *supra* note 297, at 1022 (explaining the axiomatic proposition that the Due Process Clause along with the Equal Protection Clause, “have led to almost all civil rights litigation and all cases incorporating the Bill of Rights to the states); see also, *infra* notes 521-98 and accompanying text.

358. Finkelman, *supra* note 297, at 1022-23; see also John Marquez Ludin, *The Law of Equality Before Equality Was Law*, 49 SYRACUSE L. REV. 1137, 1182 (1999).

persons, the effect was to make the treatment of black citizens the same as the treatment of whites.³⁵⁹

Additionally, comparative legislative silence apparently was inspired partially by Congress' overarching worry that, ironically, the South might enjoy greater representation in Congress after the Civil War than before. Specifically, African-American citizens henceforth would be counted not as respectively three-fifths of a person pursuant to the original Constitution, but as full persons for representation in the House of Representatives. Therefore, if southern states could manipulate suffrage laws to deprive or limit minority voting while still enjoying greater representation based on population counts, the *post-Bellum* South, although defeated, could wield unseemly and corrosive national political power. Better, then, not to stress that potential political actuality in prolonged debates.³⁶⁰

Moreover, the issue was never whether, as a matter of moral and political philosophy, the natural rights propositions of the Declaration constrained the States as well as the Federal level. The States recognized their immutable duties to respect "unalienable Rights," but, in the *ante-Bellum* era, honored that duty mostly in the breach. Consequently, Prof. Amar informatively emphasizes that at the time of the Reconstruction Congress, States did not boldly deny the natural rights philosophy of the Declaration, rather, while according such rights formal recognition, States felt free to flout them as they saw fit:

With few exceptions, most notably the grand-jury rules ... the substance of the federal [proposals] rights and freedoms did not greatly diverge from rights already formally protected under state laws and state constitutions.

359. Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1777-78 (2012) (emphasis added; citing, Amar, *supra* note 311, at 171 n.* (1998)). "This is why Representative John Bingham, when asked what he believed due process entailed, responded that 'the courts have settled that long ago, and the gentleman can go and read their decisions.'" *Id.* at 1777 (quoting, Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (remarks of Rep. Bingham (R. OH.)). As similarly explained by journalist Jeffrey Rosen, the Fourteenth Amendment,

guarantee[s] to all citizens a limited set of absolute civil rights. These rights were unclear at the margins, but not in broad relief. They were widely understood to include the common law rights guaranteed in the Civil Rights Act of 1866, such as the right to make and enforce contracts, the right to sue and be sued, and the right to inherit property, as well as (and this is more controversial) the rights guaranteed in the first eight amendments to the Constitution. Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U.L. REV. 791, 792 (1996).

360. Finkelman, *supra* note 297, at 1020-21.

True, the slavery experience led many states to betray their own constitutional safeguards of speech, press, personal security, and the like, but the principles themselves were deeply etched in both the popular and legal mind.³⁶¹

Thus, perceiving a need to actualize the Declaration's promise upon States that, although acknowledging natural law's rightness, chose to ignore it, Finkelman, among others, confirms, "the authors of the [Fourteenth] Amendment and its leading supporters believed [it] would make ... the 'immortal bill of rights' applicable to the states."³⁶² Verifying the analysis of Profs. Amar and Finkelman is Ohio Congressman John Bingham's observation that eleven states,

had failed to enforce [the Bill of Rights] and thereby rendered it "a mere dead letter." Bingham, however, found it "absolutely essential to the safety of the people that it should be enforced" and therefore asked for "the additional grant of power" ultimately contained in section 1, noting that those who "who oppose[d] this amendment" were simply "oppos[ing] the grant of power to enforce the bill of rights."³⁶³

Equally, Thaddeus Stevens stated regarding the proposed Fourteenth Amendment,

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. . . . Some answer, 'Your civil rights bill secures the same things.' That is

361. AMAR, *supra* note 311, at 205.

362. Finkelman, *supra* note 297, at 1027.

363. WILLIAM E. NELSON, *FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPAL TO JUDICIAL DOCTRINE* 117 (1988) (quoting, Cong. Globe, 39th Congress, 1st Sess. 1090 (1866) (remarks of Rep. Bingham (R. OH.)); see generally Michael Les Benedict, *Moments of Change: Transformation in American Constitutionalism*, 108 YALE L.J. 2022 (2011) ("When one studies Bingham carefully one learns that many of his utterances cannot be accepted as serious propositions"); Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES (Sept. 17, 2003), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/?_r=0 (Moreover, in a recent opinion piece, PROF. GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT*, noting that Rep. Bingham, "took the lead in framing the 14th Amendment of the Constitution, ... More than any man except Abraham Lincoln, John Bingham was responsible for establishing what the Civil War meant for America's future.").

partly true, but a law is repealable by a majority This amendment once adopted cannot be annulled without two thirds of Congress.³⁶⁴

Thus, consistent with this article's position, champions and foes of the Fourteenth Amendment at both the State and Federal levels understood that the Constitution enforces the natural law principles expressed in the Declaration. Whatever States' actual *pre-Bellum* laws, customs and practices might have been, both the Amendment's supporters and opponents did not seriously dispute the well-established abstract duty of Government both state and federal to respect fundamental rights. As the foregoing summary of the Congressional debates reveals, albeit three-quarters of a century after the ratification of the Bill of Rights, compelling the States *via* a constitutional amendment to respect natural rights (plus the proscription against slavery) would at last fulfill the principles of the American Revolution. Moreover, even if opposed on the basis of either abstract moral theory, practical politics, or both, the defeated and essentially disarmed South was in no position to quibble.³⁶⁵

Therefore, the relevant legislative history stresses two interrelated pivotal themes. First, the proposed Fourteenth Amendment would require as a constitutional mandate that States actually comply with the natural rights theory of the Declaration, principles that the States had never disputed, but equally had hardly respected. Second, such compliance would effectively mean that States must enforce the Bill of Rights, as least insofar as it enumerates a litany of unalienable rights. Thus, one powerful reason debates surrounding the Due Process Clause seem unexpectedly short and lacking in rancor is that States did not have to be compelled to enact natural rights protections, for, indeed, they already had done so in substantial measure. Rather, the important matter was mandating nondiscriminatory enforcement which no longer would depend on States' good faith. Instead, the Federal level became the States' superior through the simple but bravura expedient

364. THE SELECTED PAPERS OF THADDEUS STEVENS VOLUME 2: APRIL 1865-AUGUST 1868 at 134 (Beverly Wilson Palmer & Holly Byers Ochoa eds., 1998) (quoting, CONG. GLOBE, 39th Cong., 1st Sess. 2459(1866) (emphasis added) (remarks of Rep. Stevens (R. PA.)).

365. Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and The Transformation of the American Constitution*, 108 YALE L.J. 2021, 2029 (1999) ("It was once a historical axiom that Reconstruction had been imposed on the South by radical extremists, led by the vengeful Representative Thaddeus Stevens and the fanatical Senator Charles Sumner. In the 1960s and 1970s, historians debunked that idea, absolving Stevens and Sumner of the canards and demonstrating that centrists . . . exercised greater influence.").

that, “the [Fourteenth] Amendment protect[s] everyone in the United States from arbitrary and capricious abuses by their state governments.”³⁶⁶ As Prof. Amar cunningly summarized, under the circumstances and given the realities, “Democratic critics of the [fourteenth] amendment [] had much easier targets than section 1. Who wants to campaign against the Bill of Rights?”³⁶⁷

The brevity of Congressional attention, then, reflects some apparent national consensus about due process in general but, as Prof. Benedict stresses, a conspicuous yet understandable lack of details regarding how “due process of law” in particular, and natural rights emanating from the Declaration in general, might be enforced on a case-by-case basis. While “due process of law’s” meaning certainly was relevant, undistracted by minutiae, the Reconstruction Congress and the general public concentrated on what were then more pressing concerns, specifically, restoration of the Union,³⁶⁸ rendering national citizenship paramount over state citizenship,³⁶⁹ and enfranchising the recently freed slaves which, “in the [quixotic] words of the Chicago Tribune, would ‘terminate forever the long disturbance of the public peace over the civil and political status of the black man.’”³⁷⁰ Indeed, Congress’ deliberations over the proposed Fourteenth Amendment concentrated predominately on matters other than exhaustive due process theory. “Most of the debates in Congress were about the other sections of the Amendment, dealing with post-Civil War representation, the disfranchisement of former Confederate leaders, and post-Civil War debt.”³⁷¹

In light of these overarching concerns, details elucidating what “due process of law” actually means and who would so determine were secondary:

The initial Republican program, of which the Fourteenth Amendment was the centerpiece, had been designed primarily to accomplish the restoration

366. Finkelman, *supra* note 297, at 1034. This, as we will soon learn, is exactly what modern due process jurisprudence demands. See *infra* notes 600-10 and accompanying text.

367. AMAR, *supra* note 311, at 205.

368. Benedict, *supra* note 315, at 2026 (“[V]oters were not energized, however, over the specific content of the Fourteenth Amendment, but over the general issue of how quickly and under what conditions to restore the Union. As Stephen A. Hurlbut, a leading southern Illinois politician and later congressman, reported to Thaddeus Stevens as the Thirty-Ninth Congress organized in December 1865, ‘The people care little for Constitutional hair splitting as to the legal status of rebeldom & its communities. They care much as regards their admission to political power in their existing frame of mind & prejudices’”).

369. *Id.* at 2025.

370. *Id.* (quoting, The Suffrage Amendment, Chi. Trib., Mar. 2, 1869, at 2).

371. Finkelman, *supra* note 297, at 1022-23.

of the Union. Its delegation of power to the federal government to protect civil rights was merely a vague promise, particularly shaky in light of the federal government's traditional impotence in protecting the rights of racial minorities. It was a promise made precisely because the first Republican program left black Southerners without political power in their states.³⁷²

Therefore, that the actual debates might have been remarkably brief (especially as contrasted with how, in fact, the Due Process Clause eventually changed the face of American law) does not diminish the actuality that the Fourteenth Amendment enforces the Declaration of Independence's scheme of natural law. Nonetheless, some theorists maintain that Congress did not intend to mandate onto the States either the letter or the spirit of the Bill of Rights. These critics deny that, as earlier quoted, Congress sought to, "ensure that all persons would enjoy the same civil liberties against the states that whites had previously enjoyed against the federal government."³⁷³

In particular, Prof. William E. Nelson opined that historians remain "puzzl[ed]" because at the time of ratification, not only the former Confederacy, but likewise several Northern states that had declined to enforce their Bill of Rights equivalents were assured that the Fourteenth Amendment essentially would have no effect on them.³⁷⁴ Only such assurances, Nelson surmised, would explain why, "those states undertook ratification of the amendment without objecting to or even discussing the impact that the application of the Bill of Rights would have on their criminal process, and after ratification they made no changes to their criminal law."³⁷⁵ Because, according to this theory, the ratifying states either correctly assumed the Fourteenth Amendment would not apply the Bill of Rights or they were deliberately misinformed, enforcing the Bill of Rights in letter or spirit cannot be that amendment's function.³⁷⁶ Rather, Congress meant that the Amendment's section 1 would impose equal treatment, thus the States need not enforce the panoply of natural right, but, regarding those rights they

372. Benedict, *supra* note 315, at 2024, 2026 ("The framers of the Fourteenth Amendment simply never took advantage of the many opportunities they had to specify its precise boundaries. Their purpose was not to provide future judges with clear guidelines for its application but, in Nelson's words again, "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule.")

373. Chapman & McConnell, *supra* note 359, at 1777-78.

374. NELSON, *supra* note 363, at 118.

375. *Id.*

376. *Id.*

chose to recognize, States could not limit enforcement to Caucasians. Congress,' and by implication the courts', enforcement power would lie chiefly in assuring non-discrimination, not in creating or enforcing substantive rights.³⁷⁷

Prof. Nelson's argument is clever, but unconvincing. Section 1 of the Fourteenth Amendment, of course, includes an Equal Protection Clause alongside the Due Process Clause. As later will be detailed, the former technically is surplusage because "equal protection" is a sub-set of "due process" liberty.³⁷⁸ But, the presence of an explicit Equal Protection Clause is helpful to counter Nelson's logic. Courts rightly have reasoned that the Equal Protection Clause does not imply that the Due Process Clause merely constitutes a prohibition against discrimination, but rather, the very opposite: that non-discrimination -- "equal protection" -- is an essential component of, but scarcely the fullness of "due process of law."³⁷⁹ Prof. Nelson's contention reduces the Due Process Clause into simply a second equal protection clause, rendering the former needless because the Fourteenth Amendment's text already has an equal protection component. This confounds Congress' actual intent to assure that by including an Equal Protection Clause, courts and other enforcers understand that due process embraces but is not limited to equal protection.³⁸⁰ The presence of both clauses fosters Congress' belief that equal protection is subsumed by, but does not itself subsume due process. Rather, aware of the likely recalcitrance of obedience by the former Confederacy, the Equal Protection Clause stands as a pointed reminder that the Fourteenth Amendment's anti-discrimination function is a pivotal adjunct to "due process of law."

377. *Id.* at 118-19 ("By understanding section one as an equality guarantee, the puzzle of how Congress could simultaneously have power to enforce the Bill of Rights and not have power to impose a specific provision of the Bill on a state is resolved").

378. See *infra* notes 570-82 and accompanying text.

379. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *Davis v. Passman*, 442 U.S. 228, 234 (1979) (noting that Due Process Clause of the Fifth Amendment "forbids the Federal Government to deny equal protection of the laws"); *Ingram v. Faruque*, 728 F.3d 1239, 1243 (10th Cir. 2013); see generally *Bolling v. Sharpe*, 347 U.S. 497 (1954).

380. See generally Bayer, *supra* note 17 (noting that, as we will learn, in addition to "equal protection," "due process of law" comprises numerous substantive and procedural components including essentially every right set forth in the First, Fourth, Fifth and Sixth Amendments and many "unenumerated" rights such as a multi-faceted right to privacy and a right to travel. This is because, with rare exception, both the specific enumerations within the Bill of Rights and various unenumerated rights constitute essential aspects of what the Judiciary denotes as "ordered liberty," what the Founders called in the Declaration, "unalienable Rights"). See *infra* notes 565-87 and accompanying text.

Furthermore, given Congress' above-established esteem for the Declaration, and notwithstanding the pressures of Reconstruction politics, it seems counterintuitive at best that Congress thought America endured the approximately 620,000 Union and Confederate combined Civil War military deaths,³⁸¹ and roughly 476,000 wounded³⁸² plus the catastrophic quantum of damaged and destroyed property, simply to assure nondiscriminatory administering of such "unalienable Rights" as each state, including those of the former Confederacy, respectively deemed fit to protect. The Declaration promises that any and all offices of Government must abide by and foster "unalienable Rights," which, of course, is the very meaning of unalienability. The only way to fulfill the broken promise of the *pre-Bellum* Constitution, then, is to require States to apply the Declaration's moral-political philosophy, not to adulterate that philosophy by allowing the States to violate persons' natural rights so long as such violations are racially neutral.

Possibly, under Prof. Nelson's logic, Congress simply assumed that, after ratification of the Fourteenth Amendment, faced with federal enforcement, the States would fully promote the Bill of Rights for all, rather than deprive White persons of integral rights simply to indulge denying the same to Black persons. Intuitively, there seems little to gain by depriving rights to others at the cost of depriving those same rights to yourself and your associates. Yet, given the pronounced economic, social, and financial advantages that much of the White race enjoyed (and continues to enjoy),³⁸³ it is entirely plausible to posit a system in which all are officially denied some fundamental rights if, based on practical experience, the burden of such denials falls more heavily on minority individuals and the poor than on the White gentry.³⁸⁴ Moreover, southern leaders might have reasonably

381. See *History: Civil War Casualties*, <http://www.civilwar.org/education/civil-war-casualties.html> (last visited Jan. 22, 2017).

382. *Id.*

383. E.g., James Jennings, *Globalization and Race Hierarchy in the United States*, 15 NEW ENG. J. PUB POL'Y 19, 26 (2000):

Even when class factors are controlled, there is strong evidence of racial hierarchy in the United States. This means that even poor whites in a context of racial hierarchy are much better off than poor blacks; working-class whites as well as middle-class whites are much better off and enjoy a higher status than their black counterparts. Other illustrations of racial hierarchy include the fact that female-headed white families are significantly better off than female-headed black families; the poverty rate for black families headed by a married couple is usually twice the rate of that for white families headed by a married couple; and unemployment rates for blacks are generally higher than those of whites with comparable levels of education.

384. For instance, enacted by former Confederate States shortly after the end of the Civil War, the "Black Codes" imposed a disabling series of limitations and burdens upon the newly

anticipated that federal enforcement would be sporadic at best once the jubilation of the victorious North quelled and the taste for expensive, extensive civil rights enforcement dissipated. An eventual lack of Northern will could enable subtle or even blatant racial discriminatory enforcement despite the technical presence of the Equal Protection Clause. The combined authority, however, of both an Equal Protection and a Due Process Clause, with the latter broadly enforcing “unalienable Rights” in all regards, might serve as a greater deterrent to non-compliance. Accordingly, the argument is weak that because states are unlikely to disadvantage White persons so that they can disadvantage Black persons, the proposed Due Process Clause merely reiterates the companion Equal Protection Clause.

In further response to Prof. Nelson’s claim, it bears emphasizing yet again that advocates of the Thirteenth and Fourteenth Amendments repeatedly and emphatically extolled the merits of both the Bill of Rights and the Declaration’s natural rights thesis. Congress did not simply debate anti-discrimination principles; rather, it re-explored and re-affirmed the Founders’ basic philosophy of government under the Declaration and the original Constitution. Concluding that Congress only sought to assure equality should states volitionally deign to enforce natural rights in whole or part renders much of the Fourteenth Amendment’s enactment history puff, not substance -- low homage indeed to commemorate the aftermath of a civil war that nearly destroyed the Nation³⁸⁵ -- a civil war fought substantially in the name of anti-slavery natural rights. The better understanding is that Congress’ copious, persistent and emphatic acclamations exalting both the Bill of Rights and the Declaration’s natural rights philosophy sensibly confirms the Fourteenth Amendment’s affirmative power to direct recalcitrant states to abide by all Bill of Rights’ provisions that address “unalienable Rights” (plus such rights as are not recounted in the Constitution’s first eight amendments). Anything less obviates the above-

freed slaves. While many portions of those Codes were explicitly based on race, others were drafted in a “facially neutral” fashion, intended to cause harm predominately on African Americans but without expressly singling out that class. Indeed, in large part, Congress enacted the Reconstruction Amendments and much civil rights legislation to overturn the Black Codes, otherwise known as Jim Crow laws. *E.g.*, *General Building Contractors Ass’n. v. Pennsylvania*, 458 U.S. 375, 386-87 (1982); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights* 51 EMORY L.J. 1397, 1431 (2002) (noting that the classic “racially neutral” example within the Black Codes were perhaps *grandfather clauses* “that guarantee the right to vote to citizens whose grandfathers had been eligible to vote while placing additional voting qualifications on other citizens”).

385. *See, supra* notes 381-82 and accompanying text.

quoted Congressional history extolling natural rights as the very premise of legitimate government by making abidance thereof a matter of States' discretion. Therefore, Prof. Nelson erroneously conflates "due process" solely with anti-discrimination theory. Rather, "due process" prohibits government from denying fundamental rights of which anti-discrimination is an important subpart, but only a subpart.

Similarly, Prof. Amar rightly criticizes the distinguished theorist Charles Fairman's assertion that the Reconstruction Congress could not have intended a plan as radical as incorporating the Bill of Rights onto the states because Congress never clarified that exact position in roughly those words. Fairman posits that nothing so fundamental and new would have been treated with "silence" either by the Congress proposing it or by the States upon which the new order would apply. Of course, this writing's entire present subsection has recounted how fervently and consistently the Reconstruction Congress affirmed that one function of the proposed amendments was to bring the States under the natural rights structures commemorated in the Bill of Rights.³⁸⁶ Even if that recital were not enough, Prof. Amar cogently notes that "Fairman wisely avoided [the] outlandish claim" that "section 1 was utterly meaningless, imposing no obligations whatsoever on states, ..." ³⁸⁷ Rather and of huge significance, "Fairman ... argu[ed] instead that section 1 *simply* required fundamental fairness and ordered liberty."³⁸⁸ Amar artfully accented in response that if Congress was "silent" about incorporation of the Bill of Rights, it was no less "silent" that Section 1 imposes the "fundamental fairness and ordered liberty" Fairman aptly believes arises under the Fourteenth Amendment.³⁸⁹

While Amar is correct regarding that important but technical point, I emphasized the word "simply" in Prof. Fairman's quoted assertion because, perhaps unintentionally, he used that word ironically. Requiring that states act in conformance with "fundamental fairness" may be "simple" in the sense of obviousness: respecting "fundamental fairness" clearly is what states must do. But, respecting "fundamental fairness" is not "simple" in the sense of being banal, because "fundamental fairness" is the very essence of what it means to abide by "unalienable Rights."³⁹⁰ Indeed, this article agrees with judicial holdings that the Fourteenth Amendment does not *per se*

386. See, *supra* notes 353-73 and accompanying text.

387. AMAR, *supra* note 311, at 199.

388. *Id.* (emphasis added).

389. *Id.*

390. See *infra* notes 611-23 and accompanying text.

“incorporate” the Bill of Rights onto the States, but rather, recognizes, as does the Fifth Amendment’s Due Process Clause, that Government must respect fundamental natural rights.³⁹¹ *Accordingly, even if Fairman correctly claimed that “section 1 simply required fundamental fairness and ordered liberty,” that is precisely what it means to mandate upon the States the Declaration’s promise that Government will vouchsafe individuals’ “unalienable Rights.”*

In sum, as Profs. Farber and Muench stated, “The fourteenth amendment was intended to bridge the gap between positive law and higher law by empowering the national government to protect the natural rights of its citizens.”³⁹² The Reconstruction Congress advanced the Fourteenth Amendment to realize what the Founders could not or would not: no less than the Federal level, the states and their respective localities must enforce the moral precepts of the Declaration.

It is of utmost significance, then, that the Reconstruction Congress enacted the Fourteenth Amendment to complete the promise of the Declaration, that is, in the words of Rep. Bingham, enforce “law in its highest sense:”

Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law -- *law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.*³⁹³

Moreover, as the Reconstruction Congress fully knew, unlike its proposed “privileges and immunities clause” that, by its express text, would apply only to American “citizens,” the proposed “due process clause’s” use

391. See *infra* notes 551-87 and accompanying text.

392. Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. CMT. 235, 236 (1984).

393. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 480 (2010) (quoting, CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (remarks of Rep. Bingham (R. OH.)); see also Siegan, *supra* note 42, at 446 (describing Rep. Bingham’s natural law bent for the provisions of § 1 of the 14th. Amendment).

of the term “persons” promises the Fourteenth Amendment’s universal application to all those under the jurisdiction of the United States regardless of citizenship.³⁹⁴ Indeed, addressing the breadth of the term “person” in the proposed Fourteenth Amendment, Representative “Bingham successfully argued that the [Civil Rights Act] 1866 Act’s restriction of rights to only ‘citizens’ did not go far enough in rejecting the status-based, feudal ideas of the Old World. The 1866 Act ‘commit [ed] the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and the stranger.’”³⁹⁵

The force of evidence instructs that the Reconstruction Congress undeniably envisioned the Fourteenth Amendment not simply as related to, but, albeit three-quarters of a century thereafter, the true formal legal achievement of the Constitution’s original enforcement of the Declaration, including the abrogation of slavery and bringing the States under the ambit of natural rights, including but not limited to the Bill of Rights. As Rep. Bingham enthused:

The great men who made [the Fifth Amendment] . . . abolished the narrow and limited phrase of the old Magna Charta of five hundred years ago, which gave the protection of the laws only to ‘free men’ and inserted in its stead the more comprehensive words, ‘no person,’ . . . Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men.”³⁹⁶

394. Robert A. Burt, *Overruling Dred Scott: The Case for Same-Sex Marriage*, 17 WIDENER L.J. 73, 77 (2007) (“The draftsmen made clear that by explicitly speaking of the rights of ‘people’ rather than ‘freed slaves’ or ‘black people,’ the Fourteenth Amendment intended to generalize for all political relations the lessons drawn from the abolition of slavery”).

395. Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 99 (2009) (quoting CONG. GLOBE, 39TH CONG., 1st Sess. 1292 (1866) (remarks of Rep. Bingham (R. OH.))).

Rep. Bingham explicated, the Constitution protects all persons “[n]o matter upon what spot on the earth’s surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor.” *Id.* at 99 n. 230 (quoting, Cong. Globe, 37th Cong., 2d Sess. 1638 (1862) (remarks of Rep. Bingham (R. OH.))); see also, *id.* Cong. Globe, 36th Cong., 2d Sess. 83 (1861) (Rep. Bingham) (“The Constitution has the same care for the rights of the stranger within your gates as for the rights of the citizen.”); Cong. Globe, 37th Cong., 3d Sess. 266 (1863) (Rep. Bingham) (Constitution “is no respecter of persons [and] declares that the poor and the rich, the citizen and the stranger within your gates, are alike sacred before the sublime majesty of its laws”).

396. Cong. Globe, 39th Cong., 1st Sess. 1292 (1866) (remarks of Rep. Bingham (R. OH.)).

V. MODERN DUE PROCESS AND KANTIAN DEONTOLOGY --

A. The Supreme Court's Two Competing Paradigms of Constitutional Rights --

This writing's previous sections have shown that a central tenet of the American Revolution was the Founders' deeply rooted and sincere belief that governance must be grounded in the deontological morality of natural rights derived from natural law -- principles they expounded into the Declaration of Independence.³⁹⁷ Thereafter, to fulfill "the promise of the American Revolution," the Founders actualized the Declaration's philosophy into the Constitution, ordaining moral comportment by all offices and levels of Government as this Nation's highest law, a most remarkable first principle of governance.³⁹⁸ Despite the addition of the Bill of Rights only four years after its original ratification in 1789, two severe infirmities plagued fulfillment of the Constitution's formal promise to enforce the Declaration.³⁹⁹ The first was the Constitution's failure to outlaw slavery. The second was that the Constitution's transformation of deontological moral theory into supreme positive law, the Bill of Rights, applied only at Federal level, leaving

397. Of equal importance, this article has demonstrated that the Founders were absolutely correct to espouse natural rights as the foundation of legitimate government. The earlier Part I established the *bona fides* of Deontology -- the principle that immutable, *a priori* morality exists. See, *Originalism and Deontology*, supra note 7, at Sections 2 (correctness of Deontology) and 3 (correctness of Kantian morality). Such is the foundation of natural rights under natural law. See, supra notes 210-79 and accompanying text.

398. E.g., Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1023 (1989); see also, supra notes 126-209 and accompanying text.

399. Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 3 ARIZ. L. REV. 811, 843 (1991); see also PHILLIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 5-7 (1982). I say "formal" because, of course, no matter how adamantly and unequivocally its text promises liberty and freedom, the success of any charter of government is no better than the will of the governed to enforce those promises. Absent the charter's text, the governed have imperfect guidance; therefore, the text is vital. But, absent the will, the text remains only words. For example, Prof. Paulsen lamented Congress' seeming unwillingness to explicate the meaning and operation of its impeachment power, perhaps allowing that important authority, "gradually to recede into irrelevance ... [evincing] that Congress lacks the will to make a serious part of the Constitution's plan of checks and balances." Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1401-02 (1999).

There is apparent popular consensus that the national dedication to the constitution remains strong. "The commitment to the Constitution is widely shared in our political culture. When the Constitution and democracy conflict, most often people accept the Constitution as overriding their will." Saunders at 843.

the states legally (although certainly not morally) free to ignore the Declaration's natural rights philosophy. It was almost a century after the American Revolution, in the immediate aftermath of the devastating Civil War, that the Thirteenth Amendment banning slavery and the Fourteenth Amendment, particularly its Due Process Clause, at last mandated onto states and localities the Constitution's implementation of the Declaration. In that way, "the Thirteenth and Fourteenth Amendments were the fulfillment of the generalized promise of the American Revolution."⁴⁰⁰

This writing now confronts the modern judiciary's partial mutiny against the deontology of the Constitution -- a revolt championed, ironically, by many jurists and commentators who proudly and loudly declare themselves "originalists." I say "partial" because incongruously, current constitutional jurisprudence is torn between two distinct and essentially incompatible paradigms defining constitutional rights emanating from the Due Process Clauses, particularly "substantive due process."⁴⁰¹ One, which may be called the *dignity paradigm*, espouses that Government violates the tenets of due process when it impugns human dignity. The dignity paradigm unabashedly inquires whether the challenged governmental action is moral, with morality defined as remaining faithful to principles of human dignity. Accordingly, if the contested action is moral -- if it does not offend human dignity -- it is constitutional.⁴⁰² The Court has premised recent rulings such as *Windsor v. U.S.* and *Obergefell v. Hodges* on its *dignity paradigm*, concluding therein that treating same-sex marriages differently from opposite-sex marriages offends the innate dignity of same-sex couples themselves and of their children.⁴⁰³ Although relevant decisions never so

400. Burt, *supra* note 394, at 78.

401. Thomas J. Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329, 335 n.21 (1988); Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksberg*, 21 LEWIS & CLARK L. REV. 245 (2017); Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-*Osborne* Options*, 17 TEX. WESLEYAN L. REV. 565, 585 (2011).

402. While it began to employ the dignity paradigm most directly and explicitly near the turn of the last century, the Supreme Court has referenced dignity to define constitutional rights since the Constitution's ratification. *E.g.*, Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 85 (2011) ("At least as dignity pertains to the Constitution, the Supreme Court has, albeit scantily, developed certain narratives based on human dignity as it pertains to certain constitutional rights"); Edwin Baker, *Outcome Equality and Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 (1983).

403. Specifically, pursuant to the Due Process Clause of the Fifth Amendment, *Windsor v. United States*, 133 S. Ct. 2675 (2013) overturned section 3 of the Defense of Marriage Act

admit, the concept of dignity courts use essentially and rightly is Kantian, or so this writing will argue.⁴⁰⁴ Moreover, this article maintains that the *dignity paradigm* comports with proper originalism -- Deontological Originalism -- by faithfully and properly fulfilling the Constitution's highest duty: to enforce the natural rights principles of Declaration of Independence.

During the last hundred years, however, courts, supported by many commentators, have openly disparaged the once widely accepted paradigm of natural rights grounded in moral theory, offering in its place a bland, often imprecise empirical review of history and culture to discern what, over the course of decades, the American people (or some segment) popularly recognize to be "deeply rooted" principles of liberty. That empirical approach essentially is uncritical, most often reporting and applying, but rarely questioning and judging the "deeply rooted" liberty principles it discerns.⁴⁰⁵ The empiricism of what may be called the *deeply rooted principles* paradigm, then, is unconcerned with, indeed scorns what so genuinely excited the Founders: discerning and safeguarding through Government the moral principles that emanate from the natural order of existence. Although 2010's *McDonald, v. City of Chicago, Ill.* declared that the *deeply rooted principles* paradigm governs substantive due process analysis,⁴⁰⁶ as *Windsor* and *Obergefell*, both issued after *McDonald* show,

("DOMA"), 110 Stat. 2419 (1996) (current version at 1 U.S.C. § 7 (2018), Congress' statute banning the Federal Government from officially recognizing same-sex marriages lawfully performed in states then permitting such nuptials). Two years later, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) held that the Due Process Clause of the Fourteenth Amendment requires that states must accord same-sex marriages the same legal status as they do opposite-sex marriages.

404. See, *infra* notes 971-1020 and accompanying text (explicating *Windsor*, 133 S. Ct. 2675 and *Obergefell*, 135 S. Ct. 2584).

405. See, e.g., Stephen G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1459-63 (2012) (discussing empirical methods); Stephen G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 18-22 (2008) (discussing the empirical methods to discern whether a given purported right is or was "deeply rooted" in American legal tradition).

406. See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (explaining that the Second Amendment is a fundamental right); see also *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015) and *Peruta v. County of San Diego*, 742 F.3d 1144, 1149 (9th Cir. 2014).

the Court continues to retain both paradigms, applying in any particular litigation the one that can command at least five of the nine justices.⁴⁰⁷

407. See *Windsor*, 133 S. Ct. at 763-68; see also *Obergefell*, 133 S. Ct. at 2595-97; *Romer v. Evans*, 517 U.S. 620, 633 (1996) (finding that the government may not unconditionally limit solely to “rational basis” review challenges to laws regulating homosexual individuals as a class); *Lawrence v. Texas*, 539 U.S. 558, 599-604 (2003) (ruling that the government may not criminalize homosexual sexual conduct performed in private between two consenting adults). All four opinions were authored by Justice Anthony Kennedy who, more than any other justice, has written explicitly about the *dignity paradigm*, although, as discussed at Section 6-c-6, the Court has yet to clarify in depth the meaning of pivotal concepts such as “human dignity.” Therefore, this writing’s supposition that the *dignity paradigm* essentially enforces Kantian ethics as constitutional law derives from analyses of the facts, holdings, and rationales of the relevant opinions rather than from any explicit declarations therein.

Interestingly, Justice Kennedy was part of the *McDonald* majority that asserted the dominance of the “deeply rooted” paradigm. Therefore, from the perspective of practical Supreme Court politics, until only months ago of this writing, it appeared that whether the *dignity paradigm* or the *deeply rooted principles* standard applies depended on which coalition of four justices Justice Kennedy joined to form at least a bare majority to decide a given case. E.g., Erwin Chemerinski, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEXAS TECH L. REV. 13, 13 (2010) (as of late June, 2010, “in the area of criminal procedure, like in all areas, [the Supreme Court] is the Anthony Kennedy Court.”); Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinski*, 54 WAYNE L. REV. 983, 1008-1011 (2008) (responding to Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008), Adler concluded that perhaps the term “Kennedy Court” is an overstatement, still, based on voting patterns, “even as his influence waned, Justice Kennedy remained a pivotal justice.” *Id.* at 1009); Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy’s Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N. CA. CEN. L. REV. 25, 25 (2007) (“With the retirement of Sandra Day O’Connor, there has been an increased recognition of Justice Anthony M. Kennedy’s key role as the remaining centrist, or swing voter, on the Court.”; (footnote omitted)).

As his vigorous dissents show, see *infra* notes 971-1020 and accompanying text (discussing the “homosexual rights” cases), the late Justice Antonin Scalia was always a reliable vote against the *dignity paradigm*. On April 7, 2017, the Hon. Neil Gorsuch, formerly of the United States Court of Appeals for the Tenth Circuit, was confirmed by the Senate to assume the seat Scalia relinquished upon his sudden death. Although it may be too early for reliable analysis, based on his dissenting opinion in *Pavan v. Smith*, Justice Gorsuch agrees with his immediate predecessor. *Pavan v. Smith*, 137 S.Ct. 2075, 2079-2080 (2017) (*per curiam*) (Gorsuch, J., with Thomas and Alito, JJ., dissenting from *Pavan*’s ruling that if state birth certificates set forth the names of male spouses of birthmothers, then that state may not refuse to issue birth certificates setting forth the name of “female spouse[s]” of the birthmothers). Arguably then, regarding “due process of law” issues, Gorsuch’s appointment to replace Scalia did not change but rather maintained the seeming balance of four justices supporting the *dignity paradigm*, four justices supporting the *deeply rooted principles* standard, and Justice Kennedy providing the critical fifth vote.

That balance is now in question because on June 27, 2018, Justice Kennedy announced his retirement effective July 31st. E.g., Ariane de Vogue, *Justice Anthony Kennedy To Retire from Supreme Court*, <https://www.cnn.com/2018/06/27/politics/anthony-kennedy-retires/index.html> (June 27, 2018) (accessed, August 2, 2018). Shortly after Kennedy’s announcement, on October 6, 2018, after an extraordinarily contentious and partisan-saturated

As explained below, because the *deeply rooted principles* standard is contrary to the overarching intent of both the Framers and the Reconstruction Congress, it confounds Originalism. Rather, the correct standard is the *dignity paradigm* because it comports with Deontological Originalism -- it fulfills the Framers' intent, both circa 1787-1791 and 1868, that the Constitution must enforce the natural rights moral philosophy of the Declaration of Independence pursuant to the best available moral theory.

B. Why the Constitution Must Recognize Substantive Due Process --

As found in the Fifth and Fourteenth Amendments, the constitutional term "due process of law" might be read to address only legal procedures -- "process." Nonetheless, it is long settled that due process further includes a substantive component, logically denoted as "substantive due process."⁴⁰⁸ While certainly relevant to procedural matters, it is over the meaning and application of substantive due process that the warring extant Supreme Court doctrines, the *dignity paradigm* and *deeply rooted principles*, each seek dominion. Given what is at stake, it is perhaps not surprising that within American constitutionally law, no other concept is as pivotal to the Constitution's very meaning, purpose, and legitimacy, and yet is as bitterly contentious as is substantive due process. Indeed, amid the numerous provocative canons and principles derived from our Constitution, none are

confirmation hearing, the Senate confirmed President Trump's nominee to fill Justice Kennedy's seat, Hon. Brett Kavanaugh, formerly United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit. A highly respected attorney and judge, Kavanaugh is considered to be extremely "conservative," thus, as a general matter, likely to vote with Chief Justice Roberts and Justices Thomas, Alito and Gorsuch, especially regarding matters of constitutional law. *E.g.*, David Singh Grewal, Amy Kapczynski, And Issa Kohler-Hausmann, *There Is No Liberal Case for Brett Kavanaugh*, L.A. Times, August 1, 2018, [http://www.latimes.com/opinion/op-ed/la-oe-grewal-kapczynski-kohlerhausmann-20180801-story.html#\(accessed, August 2, 2018\)](http://www.latimes.com/opinion/op-ed/la-oe-grewal-kapczynski-kohlerhausmann-20180801-story.html#(accessed, August 2, 2018)). One probable upshot of the elevation of Justice (formerly Judge) Kavanaugh is that the Court might no longer apply, indeed could altogether repudiate the theory of "human dignity" as a legitimate standard to assess the constitutionality of governmental conduct. That is, the Court may reaffirm not simply in words but in actuality *McDonald's* declaration that the Constitution recognizes only the *deeply rooted principles* approach (at least until there is, if ever, another personnel shift resulting in a "liberal" majority willing to apply the *dignity paradigm*).

408. "If text and history are inconclusive on this point, our precedent leaves no doubt: It has been 'settled' for well over a century that the Due Process Clause 'applies to matters of substantive law as well as to matters of procedure.'" *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 863 (2010) (Stevens, J., dissenting) (quoting, *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)), *see also, id.* at 753-766 (majority opinion discussing the history of substantive due process).

more controversial than substantive due process, as courts⁴⁰⁹ and commentators agree.⁴¹⁰ Correspondingly, “It is difficult to imagine a more maligned constitutional doctrine than ‘substantive due process.’”⁴¹¹ Naysayers have and continue to castigate substantive due process as “a legal fiction,”⁴¹² as a judicially created lie,⁴¹³ as “incoherent,”⁴¹⁴ as contradictory,⁴¹⁵ as lacking any principled constitutional basis,⁴¹⁶ as

409. *United States v. Fortney*, 357 F.3d 818, 821 (note 4) (8th Cir. 2004) (discussing substantive due process as a “controversial inquiry”); *see also* *Pena v. Mattox*, 84 F.3d 894, 898 (7th Cir. 1996) (discussing substantive due process as a “controversial and oft-abused doctrine”); *Employers Ins. of Wausau v. Browner*, 848 F. Supp. 1369, 1377 (N.D. Ill. 1994) (“[T]he controversial and complex concept of ‘substantive due process’ remains nebulous”).

410. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) (“Substantive due process is one of the most confusing and most controversial areas of constitutional law”); *see also* Kermit Roosevelt, *The Indivisible Constitution*, 25 CONST. COMMENT 321, 326 (2009) (“[T]he enterprise of substantive due process [is] perhaps the invisible Constitution’s most contentious project”); *see also* Stephen L. Mikochik, *Self-Restraint and Substantive Due Process*, 27 QUINNIPIAC L. REV. 817, 817 (2009) (“Substantive due process is among the most contentious areas of constitutional law”).

411. Gedicks, *supra* note 31, at 588.

412. *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring); *accord* Adam Lamparello & Charles E. Maclean, *It’s the People’s Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia’s Legacy*, 45 U. MEM. L. REV. 281, 289-90 (2014) (“In the last fifty years, the path to judicial supremacy has been a messy one indeed, paved with legal fictions such as substantive due process”).

413. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990) (substantive due process is, “momentous sham” that “has been used countless times since by judges who want to write their personal beliefs into a document”).

414. *Nat’l Aero. & Space Admin. v. Nelson*, 562 U.S. 134, 162 (2011) (Scalia, J., with Thomas, J., concurring in the judgment) (“I shall not fill the U.S. Reports with further explanation of the incoherence of the Court’s ‘substantive due process’ doctrine in its many manifestations”). Similarly, noted scholar Charles L. Black castigated that substantive due process, follows no sound methods of interpretation (how could it, given the nature of the phrase itself?) and is therefore neither reliably invocable in cases that come up, nor forecastable in result by anything much but a guess. This kind of non-standard is not good enough for a systematic equity of human rights. It everlastingly will not do; it is *infra dignitatem*, it leaks in the front and leaks in the back. CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 3 (1997) (quoted in Niles, *supra* note 28, at 136).

415. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 63 (2006) (“Substantive due process is in serious disarray, with the Supreme Court simultaneously embracing two, and perhaps three, competing and inconsistent theories of decision making”); *see also* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997) (“[S]ubstantive due process is not just an error but a contradiction in terms”).

416. *See McDonald*, 561 U.S. at 812 (Thomas, J., concurring) (“This Court’s substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle”).

“oxymoronic,”⁴¹⁷ as “idiotic,”⁴¹⁸ as clearly wrong,⁴¹⁹ and, perhaps most charitably, difficult to define.⁴²⁰

Because, as will be shown, substantive due process is the quintessence of the Constitution, it behooves this work to undertake a rather detailed review of that doctrine’s origin and importance to explain why “due process of law,” both substantive and procedural, exemplifies Deontological Originalism via the *dignity paradigm* rather than the *deeply rooted principles* approach. *Such a thorough examination is appropriate because nothing less than the meaning of American liberty itself depends on which paradigm the judiciary rightly applies.*

1. Substantive Due Process’ Core Definition --

What, then, is this doctrine which numerous legal experts condemned in most ardent and unkind terms as brutishly and irredeemably corrupt, yet has become the Constitution’s most paradigmatic concept -- its value monism⁴²¹ -- thus, the essence of that charter’s predominant duty to vindicate the Declaration of Independence? We can begin with the not surprising observation that, “Substantive due process is often defined but rarely with precision.”⁴²² Yet, substantive due process’ basic premises are clear and, given our understanding of Deontology, familiar enough to be reduced to a

417. CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* 3 (1997) (“This paradoxical, even oxymoronic phrase -- ‘substantive due process’ -- has been inflated into a patched and leaky tire on which precariously rides the load of some substantive human rights not named in the Constitution”).

418. Antonin Scalia, *A Look Back—1994 William O. Douglas Lecture Series Transcript*, 51 GONZ. L. REV. 583, 584 (2016) (“Think about that—substantive due process—it’s idiotic...”).

419. See generally Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (“*Lawrence* is a paragon of the most anticonstitutional branch of constitutional law: substantive due process”).

420. See *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended”).

421. See generally, *Originalism and Deontology*, *supra* note 7, at Section 2-h (value monism is the concept or idea from which, in a given field, all other concepts and ideas derive).

422. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMM. 253, 257 (2016); see also Irina D. Manta & Cassandra Robertson, *Secret Jurisdiction*, 65 EMORY L. J. 1313, 1342 (2016) (discussing the fact that scholars have concluded, despite its nearly two-hundred-year persistence and “deep historical roots,” that “The Supreme Court has never clearly defined the contours of the doctrine of substantive due process. ... [Rather,] the Court has treated it as a gap-filler to be applied when procedural due process fails to adequately protect against [deprivations of] individual liberty”) (footnote omitted).

relatively short definition: “The substantive due process doctrine can be defined as ‘the body of law produced by the courts as they employ the due process clauses to review government action on its merits.’”⁴²³ That is, while a matter of *procedural due process* discerns whether the legal process -- the applicable procedures -- employed to enforce challenged “government action” comport with principles of due process, a question of *substantive due process* inquires whether the substance -- the purposes, standards, and outcomes -- of challenged “government action” comport with principles of due process. Accordingly, “due process of law” comprises fundamental, that is unalienable, rights that not only comprehend procedural matters, but as well “substantive” liberty interests.⁴²⁴

As the Supreme Court has explained, substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored

423. J. Nicholas Murosko, *Communicable Diseases and the Right to Re-Enter the United States*, 24 WM. & MARY BILL. RTS. J. 913, 933 (2016) (quoting, Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 569 (1991)).

424. A classic example of a fundamental procedural right is the Sixth Amendment’s guarantee of legal counsel in criminal prosecutions, a right that the courts deem “essential to a fair trial.” *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (discussing, *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Similarly, “A criminal defendant’s right to present a defense is essential to a fair trial.” *United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005); *United States v. Portillos*, 714 F. App’x 889, 893 (10th Cir. 2017). An archetypal substantive due process right is the First Amendment protection of free speech. E.g., *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) (public school system may not compel unwilling students to engage in a formal ceremony saluting the American Flag, nor to participate in daily recital of The Pledge of Allegiance). A seemingly different instance of a substantive right protected by “due process of law” is the “fundamental right of privacy in one’s sexual life.” *Lambert v. Hartman*, 517 F.3d 433, 441 (6th Cir. 2008).

This writing notes in passing that the very familiar texts of both the Fifth and Fourteenth Amendments ensure that no person under the jurisdiction of any governmental entity of the United States will, “be deprived of life, liberty, or property, without due process of law; ...” For the sake of simplicity, this writing refers to deprivations of “liberty” as the emblem of all possible Due Process Clauses violations. And, indeed, while judicial decisions may draw distinctions, we understand substantive “due process liberty” to encompass more than instances of imprisonment or similar governmental measures restricting against their wills the ability of persons to move about physically. Rather, as we will see, substantive and procedural due process combined covers *every* issue arising under the Constitution’s DFue Process Clauses.

Therefore, claims of deprivation of “life” or “property” without “due process of law” actually are species of “liberty” deprivation claims. Consequently, limiting discussion to “due process liberty” does not actually exclude issues addressing “life” and “property” under “due process of law.”

to serve a compelling state interest.”⁴²⁵ Thus, as noted, governmental conduct may offend “due process of law” by employing infirm means, that is, illegitimate process or procedure, even if the ends are legitimate.⁴²⁶ Likewise, although the means to enforce legislation or other governmental policies and practices may be constitutional, substantive due process, “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’”⁴²⁷ Accordingly, accomplishing, in Prof. Phillips’ words, a “review” of “government action on its merits”⁴²⁸ requires determining whether the particular challenged *action* offends at least one right sufficiently *fundamental* to be covered under the Due Process Clauses. If so, the tested “government action” is unconstitutional; if not, the conduct is constitutional, thus, lawful.

Assuming that the Constitution indeed recognizes claims of substantive due process, the palpable difficulty becomes, to borrow Prof. Phillip’s phrasing, how does the Judiciary conduct such a “review” of, “government action on its merits”?⁴²⁹ That is, how do courts and other reviewing bodies ascertain the nature and extent of any applicable rights, and then determine whether the challenged action comports with the strictures of such applicable rights? As accented above, this writing insists that the *dignity paradigm*

425. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted, emphasis in original); see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); see *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (quoting *Flores*); see also *Kitchen v. Herbert*, 775 F.3d 1193, 1218 (10th Cir. 2014); see also *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008); see also *Russ v. Watts*, 414 F.3d 783, 789 (7th Cir. 2005) (discussing *Flores* and *Glucksberg*).

426. For instance, while the goal of arresting criminals surely is legitimate, unreasonable searches conducted in the hope of discovering evidence sufficient to premise an arrest (and subsequent indictment and conviction) violate individuals’ fundamental right of privacy. Accordingly, the Fourth Amendment’s ban against unreasonable searches and seizures comprises a fundamental constitutional right. *E.g.*, *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967).

427. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

428. While the very purpose of this writing is to discern a general definition of fundamental -- unalienable -- rights, the Supreme Court *per* Justice Robert Jackson, offered a celebrated and useful shorthand during the height of World War II: fundamental constitutional rights, “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943) (public school system may not compel unwilling students to participate in daily recital of The Pledge of Allegiance).

429. See, *supra* note 423.

rather than the *deeply rooted principles* standard provides the correct analytical criteria.

To perform due process analysis, the courts ascertain a core of rights -- "liberty interests" -- that cannot be infringed to advance governmental policies unless justified by sufficiently overarching needs.⁴³⁰ I note in passing that pursuant to deontological morality, *I demonstrated in an earlier work that there is no compelling governmental interest, including national security concerns, more urgent than enforcing liberty under the Due Process Clauses.*⁴³¹ Accordingly, the precept of Kantian ethics that "justice [must] be done even if the world should perish,"⁴³² means that the United States must be willing to face destruction rather than violate due process, a proposition in which I fully believe but which has no resonance with either courts or the overwhelming bulk of commentators. Because my project herein is to validate Deontological Originalism, this writing does not challenge the Judiciary's proposition that necessity may trump liberty, although, when properly understood, constitutional morality debunks that presumption.

Setting forth complaints commonly mustered against substantive due process, two scholars recently insisted,

"Due process of law" is the oldest phrase and the oldest idea in our Constitution, but it may be the most unrecognizable in modern interpretation. Due process was not at all about judicial creation of fundamental rights outside the reach of legislative amendment, and only secondarily about notice and the opportunity to be heard. Fundamentally, it was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies, and that legislatures

430. Michael J. Philips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L. J. 567, 569 (1991) (discussing, MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 117 (1982)). As the Second Circuit recently summarized, "A constitutional violation only occurs when the individual's interest in privacy outweighs the government's interest in breaching it." *Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 65 (2d Cir. 2018).

431. See, Bayer, *supra* note 17.

432. IMMANUEL KANT, *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

would not be able to step beyond their properly legislative roles of enacting general rules for governance of future behavior.⁴³³

Thus, according to Profs. Chapman and McConnell, the Due Process Clauses exist to preserve “separation of powers.”⁴³⁴ That is, “Legislative acts violated due process not because they were unreasonable or in violation of higher law, but because they exercised judicial power or abrogated common law procedural protections. These applications of due process to the legislature were based on common law principles about the nature of legislation as distinguished from judicial acts (not “natural law” as that term is commonly used), ...”⁴³⁵ Consequently, they assert, “It is ironic that the courts, starting in the late nineteenth century, seized upon this principle to subvert the separation of powers by giving themselves a super-legislative power to change rather than interpret and enforce the law.”⁴³⁶

Importantly, Chapman and McConnell’s project is not to deny that somewhere in the Constitution may lie one or more provisions that alone or in combination function as now does substantive due process. Rather, their claim is that the Due Process Clauses are not that source, should such a source exist.⁴³⁷ In support, their fascinating and meticulously researched article concludes that, with but two exceptions which themselves are “controversial,” prior to the adoption of the Fourteenth Amendment, “Every known application of the principle of due process involved the deprivation of

433. Chapman and McConnell, *supra* note 359, at 1807.

434. “Due process both undergirded and gained its definition from the emerging separation of powers first in Britain and then in America.” *Id.*

435. *Id.* at 1677. Explicating their historical research and conclusions, the two authors urge, The distinctive aspect of modern “substantive due process,” in contrast, is its treatment of natural liberty as inviolate, even as against prospective and general laws passed by the legislature and enforced by means of impeccable procedures. No significant court decision, legal argument, or commentary prior to the adoption of the Fourteenth Amendment, let alone the Fifth, so much as hinted that due process embodies these features. With two controversial exceptions [], antebellum courts did not assert the power to declare that individuals “should have” certain rights that legislatures had denied to everyone.

Id. at 1679-80

436. *Id.* at 1807.

437. “We emphasize that our argument here is confined only to the Due Process Clauses, and only to their original meaning. Our argument is not based on any jurisprudential skepticism about the desirability of judicially enforceable unenumerated rights as a general matter, but solely on the historic understanding of ‘due process.’ We take no position here on whether other provisions of the Constitution, such as the Ninth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment, empower courts to engage in practices akin to substantive due process ...” *Id.* at 1680.

rights (usually property rights; there are far fewer liberty cases) that had their source in positive law, whether in a written constitution, a statute, or the common law.”⁴³⁸

The Chapman-McConnell critique is powerful. But, the Deontological Originalism proposed herein harkens to the quintessence of the moral-political theory that the Founders and the Reconstruction Congress rightly understood to legitimize both the American Revolution and the Constitution now governing the nation that Revolution produced. As has been shown,⁴³⁹ its true founding document, the Declaration of Independence, grounds the United States (as must any rightful nation) in deontological morality. The commands of the Declaration are correct and supersede other understandings or habits that might have been prevalent, but confounded the moral precepts that legitimize American government. The Constitution formalizes -- sets the positive law -- to enforce the Declaration’s natural rights precepts.⁴⁴⁰

Therefore, contrary to Chapman and McConnell’s assertion, substantive due process emanates from the “positive law ... written in [our] constitution,”⁴⁴¹ because the Due Process Clauses are extant in the texts of the Fifth and Fourteenth Amendments. Granted, those texts are sparse, providing little explicit guidance;⁴⁴² but, their few words are amenable to *some* textual analysis.⁴⁴³ More importantly, as Chapman and McConnell’s

438. *Id.*

439. See, text accompanying *supra* notes 126-209.

440. That fulfilling the Constitution’s rightful relationship to the Declaration’s edicts might have taken decades -- or centuries -- does not imply that the link between law and morality is illicit. Rather, the fact that nearly two and a half centuries after its founding, despite undeniable and truly remarkable progress, the United States still strives to enforce fully the Declaration’s principles simply confirms what logic and experience generally instruct: due to corruption, imperfect understanding, or likely a combination of both, identifying the correct paradigm does not assure that from the first, or even with considerable passage of time, the paradigm will be duly and fully understood, much less completely enforced.

441. Chapman & McConnell, *supra* note 359, at 1680.

442. “The Due Process Clause is tucked into a compound sentence without a proper subject. The Fifth Amendment is silent about whom it prohibits from depriving rights ‘without due process of law.’ The passive voice suggests that the Amendment is not limited as to ‘who,’ but only as to ‘what.’ Just as importantly, the Constitution nowhere defines ‘due process of law.’” *Id.* at 1721.

443. Indeed, Chapman and McConnell include textual evaluation in their article. For example, they argue, “The Clause says that no one may be deprived of the relevant set of rights ‘without due process of law.’ That surely means persons may be deprived of those rights if due process of law has been accorded. The words chosen would be a very odd way of communicating the idea that the rights mentioned are inalienable.” *Id.* at 1725 (footnote omitted). While their assertion is aptly debunked by Justice John Marshall Harlan’s more persuasive reading, see, text accompanying *infra* notes 459-72, we see that, despite the

very project evinces, the meaning of the Due Process Clauses' admittedly meagre prose can and should be informed by history -- a history confirming, as argued below, that the Constitution protects all "unalienable Rights" whether enumerated therein or not. It is consistent enough with their origins, as demonstrated next, to conclude that the Due Process Clauses are the enumeration of the Constitution's protection of unenumerated rights.⁴⁴⁴

2. *Substantive Due Process' Disreputable Birth and Childhood --*

Part of its controversial nature derives from the unfortunate fact that substantive due process first reared itself in American law to defend slavery, an ignoble debut to be sure. Specifically, the premiere substantive due process decision, *Dred Scott v. Sandford*,⁴⁴⁵ overturned that portion of The Missouri Compromise⁴⁴⁶ declaring slaves who enter free territory to no longer be the enslaved property of their "masters." The *Dred Scott* Court wrote, "And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."⁴⁴⁷

The brutality of that inauspicious beginning was compounded during the early-Twentieth Century when substantive due process became the underpinning of the Supreme Court's now discredited doctrine known as *Lochnerism*. *Lochner v. New York*⁴⁴⁸ controversially ruled, "The general right to make a contract in relation to his business is part of the [substantive] liberty of the individual protected by the [Due Process Clause of the] 14th

clauses' very brief and incomplete texts, Chapman and McConnell do not begrudge the Due Process Clauses at least a modicum of textual meaning.

444. Therefore, contrary to Chapman and McConnell's assertion, echoing the sentiment of most critics of substantive due process, that the courts have "giv[en] themselves a super-legislative power," (*supra* note 359, at 1807), because the Judiciary is the proper interpreter of the Due Process Clauses, (*see*, text accompanying *infra* notes 799-863), it is the courts' integral duty, free from the inherent politics of the legislative and executive branches, to identify and to safeguard such unenumerated rights as the other government branches, knowingly or inadvertently, have contravened.

445. *See Scott v. Sandford*, 60 U.S. 393 (1857).

446. Missouri Enabling Act, ch. 22, § 8, 3 Stat. 548 (1820) (admitting Missouri into the Union as a "slave state").

447. *Scott*, 60 U.S. at 450; *see also, supra* notes 167-69 and accompanying text (discussing critical disapproval of *Scott*).

448. *See Lochner v. New York*, 198 U.S. 45 (1905), abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Amendment The right to purchase or to sell labor is part of the liberty protected by this amendment.”⁴⁴⁹ Pursuant to *Lochner*’s proposition that freedom to contract emanates from substantive due process, the Supreme Court overturned numerous beneficent state laws regulating certain employment terms and conditions to help laborers considered unduly exploited by management.⁴⁵⁰ Moreover, in related decisions, the Court invalidated similarly motivated acts of Congress arguing that regulating working conditions is the province of state governments, therefore, Congress’ “Commerce Clause” authority cannot reach what was then interpreted to be essentially intrastate business conduct related to the manufacturing of goods and services.⁴⁵¹ Whether based, as some commentators argue, on the justices’ personal belief in laissez-faire economics,⁴⁵² or on their honest belief that a general “right to contract” is

449. *Id.* at 53; see *Whole Women’s Health v. Hellerstedt*, 136 S.Ct. 2292, 2328 (2016) (Thomas, J., dissenting) (“During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law”); see also *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1362 (11th Cir. 2011) (Murphy, J., dissenting in part) (summarizing the “bygone” *Lochner* era as a period where “substantive due process was more broadly interpreted as also encompassing and protecting the right, liberty, or freedom of contract”), rev’d in part, aff’d in part by Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

450. See, e.g., Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 896-924 (2005) (recounting cases).

451. See generally, William W. Buzbee & Robert Schapiro, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1210-16 (2003); Christina E. Coleman, *The Future of the Federalism Revolution: Gonzales v. Raich and the Legacy of the Rehnquist Court*, 37 LOY. U. CHI. L. J. 803, 816 (note 75) (2006) (discussing “the pre-1937 [commerce] cases distinguishing production and manufacturing from commerce” (citing, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 822 (3d ed. 1999))). Simply put, “The pre-1937 Court followed the principle that the Commerce Clause vests power in Congress to regulate activities that directly affect interstate commerce (such as the rates charged by railroads on intrastate lines), but that the Commerce Clause does not authorize Congress to regulate activities that indirectly affect interstate commerce (such as the employment of child labor).” Wilson Huhn, *Constitutionality of The Patient Protection and Affordable Care Act Under the Commerce Clause and The Necessary and Proper Clause*, 2 J. LEG. MED. 139, 150 (2011) (footnotes omitted) (citing *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal law prohibiting child labor on ground that law exceeds Congress’ power under the Commerce Clause)).

452. Laissez-faire economics refers to the theory that, as a general matter, markets and other such aspects of economics ought not be subject to governmental regulations, even for altruistic purposes. See generally Kevin S. Marshall, *Product Disparagement Under the Sherman Act, Its Nurturing and Injurious Effects to Competition, and the Tension Between Jurisprudential Economics and Microeconomics*, 46 SANTA CLARA L. REV. 231, 238-39 (2006) (explaining that the rationale against official regulation is predicated on the perfect competition model, which is “the assumption that all market participants are rational, with rational action being defined by the principle of utility-profit maximization. Any act of consumption or production

among the unenumerated fundamental rights arising under the Constitution,⁴⁵³ *Lochnerism* erroneously forbade⁴⁵⁴ State actors from regulating the “free market” of contracts absent some formidable countervailing interest.⁴⁵⁵

Famously, in the midst of the Great Depression, the 1937 Supreme Court reversed what some claim to have been its purported laissez-faire partiality by upholding state regulation under the Tenth Amendment (and similar Congressional legislation under the Commerce Clause) that formerly seemed condemned to legal oblivion by *Lochnerism* regarding state laws, and by a miserly understanding of “interstate commerce” regarding acts of

that fails to maximize the utility or profit of an individual or firm is considered to be irrational economic behavior”).

453. Cushman, *supra* note 450, at 998-99 (offering the plausible viewpoint that numerous perspectives informed the justices who joined the Court’s *Lochner*-based rulings). Actually, it is hard to imagine that even the most ardent *anit-Lochner* proponents would deny that the Constitution implies a fundamental right to contract as part of private transactions. While of the highest improbability, should Congress, a State, or some locality actually adopt legislation prohibiting any and all private contractual transactions, the obvious and immediate means to quash such law would be to argue that such a law is arbitrary and devoid of validating public purpose, a proposition recognized consistently by the Judiciary. *E.g.*, *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) (“To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, ... The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way.”); *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir.), amended, 881 F.3d 792 (9th Cir. 2018), “The fundamental right to make contracts is guaranteed by the Constitution, which forbids the government from arbitrarily depriving persons of liberty, including the liberty to earn a living and keep the fruits of one’s labor. See, *e.g.*, *Lowe v. S.E.C.*, 472 U.S. 181, 228, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (“It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose.”)(quoting *Dent v. W. Va.*, 129 U.S. 114, 121–22, 9 S.Ct. 231, 32 L.Ed. 623 (1889))).

454. *Whole Women’s Health*, 136 S.Ct. at 2328 (Thomas, J., dissenting) (“The Court in 1937 repudiated *Lochner*’s foundations”).

455. For instance, *Muller v. Oregon*, 208 U.S. 412 (1908), distinguishing *Lochner*, unanimously upheld Oregon’s statute prohibiting manufacturers from compelling their female employees to work more than ten hours *per* workday. In an opinion now notorious for its chauvinism, the Court stated that, “history discloses the fact that woman has always been dependent upon man,” due essentially to women’s inherent weaknesses coupled with the unique physical and societal demands of Motherhood. *Id.* at 421. Accordingly, “Differentiated by these matters from the other sex, [womanhood] is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him.” *Id.* at 422.

Congress.⁴⁵⁶ Some commentators still too casually describe the fall of *Lochnerism* as essentially the death of substantive due process, when, in fact, that doctrine has never been more alive.⁴⁵⁷ In actuality, the Supreme Court's error, "was not its philosophy that the due process clauses contain implicit substantive as well procedural meanings ... Rather, [Dred Scott's and] *Lochner's* foundational premise remains the Constitution's prevailing paradigm: the Due Process Clauses invalidate all arbitrary or unreasonable federal, state and local governmental conduct."⁴⁵⁸

If the birth and adolescence of substantive due process were dubious, not promising a particularly upright maturation, like a petulant child who upon attaining her majority unexpectedly blossoms into selfless decency, the adulthood of substantive due process has culminated in the *Obergefell-Windsor* line of precedent evincing the nobility and profundity *Dred Scott* and *Lochner* lacked: adopting Kantian morality as the paradigm of "due process of law."

456. Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2214 n.5 (1996) ("Beginning in 1937, the courts accommodated ['Progressive neoclassical'] views with a much more benign attitude toward regulation"). Indeed, *Lochner* itself was abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

457. See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. J. 215, 217-18 (1987) (During the late 1930s into the 1940s, "in line with prevailing political sentiments...the Court rapidly eliminated substantive due process as a serious ground of constitutional challenge. The first life of substantive due process was at an end.") (footnotes omitted). The "second life," according to Conkle and other scholars, began in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Supreme Court applied the implied and unenumerated right of personal privacy—arising under substantive due process—to invalidate state laws prohibiting married couples from obtaining contraception. *Id.* at 219-221 (discussing *Griswold* and its progeny). Similarly, Prof. James E. Fleming opined that, "In 1937, ... the constitutional revolution wrought by the New Deal ... officially repudiated the *Lochner* Era, marking the first death of substantive due process." James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 149 (1999) (footnote citing authorities omitted).

The purported "second death" of substantive due process derives from the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) upholding states' authority to criminal homosexual "sodomy." See generally, Conkle at 221-41. *Bowers*, however, was overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003), decided a decade after *Bowers*, showing that the Supreme Court had never abandoned substantive due process to vindicate fundamental rights under the Constitution. See also *Romer v. Evans*, 517 U.S. 620 (1996) (states may not purely on the basis of their status single out a class of homosexual individuals for adverse legal treatment). See, *infra* Section 6-c-6 (discussing the "homosexual rights" cases and the dignity paradigm).

458. Bayer, *supra* note 17, at 877 n.42. See also, text accompanying *infra* notes 600-10.

3. *The Textual Proof of Substantive Due Process --*

Despite its just described imperfect past and although some judges and scholars still resist its existence, nearly sixty years ago, making a purely textual argument expounding on the logic and power of the Due Process Clauses, in what is known as his “*Poe* dissent,” the second Justice John Marshall Harlan explicated succinctly why the concept “due process of law” must include a substantive component.⁴⁵⁹ In fact, as we shortly will see, more

459. Harlan often is referred to as the “second Justice Harlan” because his grandfather, Hon. John Marshall Harlan, was an Associate Justice of the Supreme Court from 1877 until his death in 1911, an astonishing 34 years, to date the sixth longest tenure of any justice. The first Justice Harlan is perhaps best remembered as “the great dissenter,” for his acclaimed dissents in *The Civil Rights Cases*, 109 U.S. 3, 33-63 (1889) (Harlan, J., dissenting), *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting), *o.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 652-54 (1895) (Harlan, J., dissenting from ruling that Federal income tax is unconstitutional and expressing his concurrence in Justice White's dissenting opinion); and *Lochner v. New York*, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting) (while the Due Process Clauses have substantive content, a right of contract as described by the Majority, is not among those rights), abrogated by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

While perhaps not as brisk in tone and judicial demeanor as his forebare, the “second Justice Harlan” maintained the illustriousness of his grandfather. Courtly yet forceful, quietly dynamic, erudite and imaginative, the online source *Oyez* astutely encapsulated the uniqueness of Harlan as a Supreme Court justice:

John Marshall Harlan II was a conservative icon of the U.S. Supreme Court who practiced a unique form of jurisprudence combining judicial restraint and activism. ... Justice Harlan's jurisprudence, while conservative, is perhaps best described as a balance between textualism and support for evolving constitutional principles. He adamantly opposed strict textualism, but found that the original intent of the Constitution could be supplemented by measuring the social impact of judicial decisions. Ultimately, he believed in a limited federal judiciary and favored the political process as the best realm for addressing and remedying public issues.

Oyez, Body Politic -- The Supreme Court and Abortion Law, https://www.oyez.org/justices/john_m_harlan2 (visited, January 30, 2019).

The hallmarks of Harlan's judicial tenure were integrity, dignity, and mettle. In the words of his former law clerk, Hon. Henry J. Friendly (a judge on the Second Circuit Court of Appeals, as was Harlan prior to his elevation to the Supreme Court), “[T]here has never been a Justice of the Supreme Court who has so consistently maintained a high quality of performance or, despite differences in views, has enjoyed such nearly uniform respect from his colleagues, the inferior bench, the bar, and the academy.” Henry J. Friendly, *Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 384 (1971). See also Hon. Robert H. Henry, *Living Our Traditions*, 86 N.Y.U. L. REV. 673, 680 (2011) (Judge Henry noted, “Today, Justice Harlan is remembered for his marvelously crafted opinions, his consistent and principled judicial conservatism, and his patrician traditionalism that was, at the same time, remarkably sensitive to other views.”) (footnote omitted).

than any other single jurist, the second Justice Harlan provided scholars and practitioners with the single most complete abstract theory of “due process of law.”⁴⁶⁰ The *dignity paradigm* is, I believe, the natural progeny of Harlan’s *Poe* dissent although Harlan likely would not have applied his *Poe* standards as has the Supreme Court through the *dignity paradigm*.

Interestingly, even before his elevation from judge on the United States Court of Appeals for the Second Circuit, the “conservative” Harlan set a formidable, forceful new standard for Supreme Court justices. Nominated by President Eisenhower in 1955 to fill the seat of Justice Robert Jackson who has died suddenly that January, some members of the Senate were concerned that Harlan would foster the Warren Court “liberalism” that only months earlier had produced *Brown v. Board of Education*. *Id.* Then-Judge Harlan accepted the Judiciary Committee’s request to testify regarding his, “judicial philosophy. This had never been done before, but it set a precedent for every future Supreme Court nomination.” *Id.* As SCOTUSblog notes,

Although we think of nominees’ testimony as the centerpiece of the confirmation process, for most of the country’s history, Supreme Court nominees did not testify publicly. Justice Harlan Fiske Stone appeared before the committee in 1925 to address allegations related to a political scandal, and Justices Felix Frankfurter (1939) and Robert Jackson (1941) also testified. But it was not until 1955, with the nomination of John Marshall Harlan, that the current practice of routine appearances began.

Carolyn Shapiro, *Putting Supreme Court confirmation hearings in context*, SCOTUSblog, <https://www.scotusblog.com/2018/08/putting-supreme-court-confirmation-hearings-in-context/> (visited, January 30, 2019).

However one may feel about the discrete opinions he wrote or joined, John Marshall Harlan II was a jurist of utmost integrity and learning -- a cautious theorist who, recognizing the dynamism inherent in constitutional law, was not afraid to perform the work his judicial job titles suggested. He understood his job was to *judge* in order to do *justice*.

460. *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting). See, text accompanying *infra* notes 729-70.

Purported “textualists”⁴⁶¹ such as Justice Antonin Scalia claim that the Due Process Clauses cannot cover anything but procedural law.⁴⁶² Typical of Justice Scalia’s critique is his assertion that,

*By [their] inescapable terms, [the Due Process Clauses] guarantee[] only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require -- notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.*⁴⁶³

461. “Properly understood, textualism means that in resolving ambiguity, interpreters should give precedence to semantic context (evidence about the way reasonable people use words) rather than policy context (evidence about the way reasonable people would solve problems). Purposivists claim [by contrast] that this approach is backwards. There is no reason, they assert, to believe that legislators vote on the basis of semantic minutiae.” John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 110 (2006). Similarly, Prof. Paulsen stated,

Written textualism means giving the text its objective and public meaning. The document’s instruction to look to the document--“this Constitution”--commands an internal perspective, forbidding external, private assignments of meaning. The fact that the document specifies the document as the sole source of binding authority also implies the exclusivity of the text. It precludes treating any “thing” external to the text as authoritative. Thus, it is not anyone’s “intent,” outside the document, that governs, but the meaning of the language inside the document: that is, the objective meaning of the words, according to the usual rules of language as they would have been employed by a hypothetical objective observer (that old friendly ghost of the law, the “reasonable man”) at the time. ...

Written textualism also implies that the meaning of the text is fixed. It is fixed not only as against private assignments of meaning, but as against shifting understandings of words and phrases over time--that is, it is fixed as against sudden or gradual anachronistic readings of its words. The meaning of the text is fixed at a point in time.

Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. L. REV. 857, 920 (2009).

462. See Timothy C. McDonnell, *Justice Scalia’s Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 181 (2015) (discussing the theory of interpretation known as *textualism*, according to Justice Scalia, “the textualist ‘begins and ends with what the text says and fairly implies.’ Put differently, “the text is the law, and it is the text that must be observed”).

463. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 24-25 (1997) (emphasis added).

Accordingly, “Due process textualists, ... argue that the plain language of the Due Process Clauses precludes substantive due process. ... [This is because] as John Harrison simply restated, ‘Process means procedure.’”⁴⁶⁴

In a stunning, indeed dazzling rebuke of such textualist arguments, accenting in particular the Supreme Court’s Late-Nineteenth Century’s *Hurtado v. California*,⁴⁶⁵ Justice Harlan’s celebrated dissenting opinion in *Poe v. Ullman*⁴⁶⁶ expounded,

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. ... Thus the guaranties of due process ... have in this country “become bulwarks also against arbitrary legislation.”⁴⁶⁷

Harlan’s argument rebukes Scalia and his followers not by renouncing textualism itself, but by noting that text can be subject to more than one cogent interpretation with *context and lucidity* helping to determine the best

464. Stephen Durden, *Partial Textualism*, 41 U. OF MEMPHIS L. REV. 1, 46 (2010) (citing Paul E. McGreal, *There is No Such Thing as Textualism: A Case Study in Constitutional Method*, 69 FORDHAM L. REV. 2393, 2440 (2001) and quoting John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 538 (1997)).

465. *Hurtado v. People of State of Cal.*, 110 U.S. 516 (1884).

466. *Poe v. Ullman*, 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting). The eminent constitutional law scholar Laurence Tribe acclaimed Justice Harlan’s *Poe* dissent as, “justly famous.” Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 16 (2015); see also, Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 23 (1993). Likewise, Harlan’s dissent properly has been denoted “influential,” “important,” and, “seminal.” See e.g., John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 502 (1997) (“influential”); Roy Lucas, *New Historical Insights on the Curious Case of Baird v. Eisenstadt*, 9 ROGER WILMS. U. L. REV. 9, 27 (note 69) (2003) (“important”); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U.L. REV. 425, 461 (2017) (“seminal”); see also Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N. U. L. REV. 511, 521 (1989) (“seminal”).

467. *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (quoting *Hurtado*, 110 U.S. at 532). That “due process of law” proscribes arbitrary or capricious governmental actions remains the basic understanding of the two Due process Clauses. E.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (“[T]he guaranties of due process ... considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation’”); see also *Poe*, 367 U.S. at 497 (majority opinion) (quoting *Hurtado*, 110 U.S. at 532); *infra*, Section 5-e-1, 2 (discussing the meaning of “arbitrary or capricious”).

among plausible meanings, an interpretive norm Justice Scalia himself freely and frequently acknowledged.⁴⁶⁸ Granted the word “process” in the phrase “due process of law” subsumes *procedure*; but, as Justice Harlan astutely declaimed, within the context of the Due Process Clauses, “process” need not and does not mean only or exclusively *procedure*. Rather, any given substantive law creates a *process*, meaning conduct that governmental actors either cannot do,⁴⁶⁹ or must do,⁴⁷⁰ or may do based on reasonable exercise of

468.

The meaning of statutory terms, according to Justice Scalia, is to be understood in light of context as well as ordinary usage. Justice Scalia may be referring here to the internal context, that is, how a term is used within the text. ... [As well,] Justice Scalia may be referring to external contexts, that is, where the statute fits in a larger picture that includes legislative history, policy considerations, institutional arrangements, and facts about the world. ... The legal context or surrounding body of law is also relevant to the meaning of a statute in Justice Scalia's view.

Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 407 (1994) (note) (footnotes omitted).

Karkkainen avers that such references to “context” are, “inconsistent with a purely textualist approach to statutory interpretation.” *Id.* Nonetheless, Justice Scalia rightly believed that context informs texts, McDonnell, *supra* note 419, at 181 (discussing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997) and ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012)); *see also*, Alexander v. Sandoval, 532 U.S. 275, 288 (2001) (*per* Scalia, J.; citation omitted), a proposition fully consistent with Justice Harlan's textual proof that the Due Process Clauses encompass substantive as well as procedural aspects.

469. To illustrate with one classic instance of substantive due process, the Free Speech Clause of the First Amendment applies to the States pursuant to the Due Process Clause of the Fourteenth Amendment. *E.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004); *see infra*, notes 565-87 and accompanying text detailing substantive due process “incorporation” of almost the Bill of Rights's entirety. Thus, states may not violate that portion of the First Amendment.

For example, in *Chabad of Southern Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 434-36 and note 3 (6th Cir. 2004), the Sixth Circuit correctly ruled that a city ordinance prohibiting holiday displays on municipal property that fail to “appeal[] to the widest of audiences” violates the Due Process Clause of the Fourteenth Amendment by proscribing controversial and offensive speech. Of course, that law's infirmity was not based on “due process of law” defined as legal procedures such as faulty rules of either civil procedure or administrative adjudication that might be used to criminally or civilly enjoin purported violators. Rules of civil or criminal procedure -- adjudicative and administrative -- enforcing Cincinnati's ban on unpopular speech likely are perfectly constitutional in and of themselves. Rather, the unconstitutionality arose from the ordinance's substantive limitation proscribing all but the most popular holiday-related displays on public property during the “holiday season.”

470. Most germane for this writing is that the federal and state levels must treat same-sex marriages equally with opposite-sex marriages. *U.S. v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); and, *see infra*, notes 971-1020 and accompanying text.

governmental discretion.⁴⁷¹ Accordingly, “due process of law” certainly requires that legal procedures, such as official investigations, litigation, and, administrative review, do not unconstitutionally deprive individuals of “life, liberty and property.” Simultaneously, “due process of law” requires that substantive laws are constitutional only if such laws’ processes -- that which government specifically authorizes or proscribes -- do not unconstitutionally deprive individuals of “life, liberty and property.” In this way, Justice Harlan’s impeccable logic explains how the constitutional text itself denotes substantive due process.⁴⁷²

C. Substantive Due Process’ Natural Law and Historical Origins --

*This writing now moves to the inevitable melding of Justice Harlan’s textual explanation of why “due process of law” must include “substantive” constitutional law with the natural law principles that, as earlier sections of this article have shown, inform the meaning and application of all constitutional rights.*⁴⁷³ In that regard, Justice Harlan’s reliance on the Supreme Court’s 1884 *Hurtado v. California* opinion is particularly important because as one leading treatise explains, *Hurtado* (which will be discussed in detail shortly)⁴⁷⁴ is a prime example that, “Much of both civil and criminal procedure is rooted in natural law.”⁴⁷⁵ Similarly, Prof. Albert Alschuler noted,

This writing notes in passing the interesting point that any constitutional prescription, such as government *must* treat opposite-sex and same-sex marriages equally, may be expressed as constitutional proscriptions, such as government *may not* treat same-sex marriages differently from opposite-sex marriages. That interchangeability, of course, only underscores Justice Harlan’s wisdom that the term “due process of law” subsumes not only legal procedures, but legal process that takes the form of substantive law constraining or commanding certain governmental conduct. See, Bayer, *supra* note 125, at 894 note 118 (explaining, “But negative versus positive essentially is a distinction without a difference because negative duties naturally take on positive aspects and vice-versa.” (citation omitted)).

471. *E.g.*, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985) (city may set reasonable zoning restrictions on “group homes;” however, imposing unique, burdensome requirements for zoning permit to establish a group home for non-violent, mentally challenged individuals was an unreasonable abuse of City’s discretion and, thus, violated the Fourteenth Amendment).

472. “The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words ‘liberty’ and ‘due process of law.’” *Washington v. Glucksberg*, 521 U.S. 702, 764 (1997) (Souter, J., concurring). *See also*, Andrew T. Hyman, *The Little Word Due*, 38 AKRON L. REV. 1, 47-48 (2005).

473. *See, supra* notes 12-209, 288-396 and accompanying text.

474. *See infra* notes 514-20 and accompanying text.

475. MODERN CONSTITUTIONAL LAW CONSTITUTIONAL LITIGATION § 2:11 (3rd ed.).

The view of due process advanced in [decisions such as] *Hurtado v. California* ... had a “natural law” bent. ... *The Court’s view was tolerant of diversity and experimentation but insisted that law must adhere at its core to immutable principles of human dignity.* The due process clause empowered the judiciary to articulate these principles and to treat legislation that offended them as unconstitutional.⁴⁷⁶

Consistent with Justice Harlan’s argument, and in agreement with Prof. Alschuler’s analysis, Prof. Frederick Gedicks’ discussion elucidating the extraordinary significance of substantive due process’ natural law genesis is worth quoting at length. Echoing Harlan’s textual logic, Gedicks concluded:

The argument for an exclusively procedural understanding of the Fifth Amendment Due Process Clause implicitly projects an anachronistic positivist meaning onto the term “law” in the crucial phrase “due process of law.” In this positivist understanding, a “law” is any legislative or other governmental act that has satisfied the rule of recognition; in other words, any such act that effects a deprivation of life, liberty, or property necessarily comports with the due process of law because the act that effects the deprivation has satisfied the formal requirements for lawmaking. Under this reading, Congress complies with the Due Process Clause -- that is, it satisfies the “due process of law” in depriving a person of life, liberty, or property -- so long as it accomplishes the deprivation by means of a congressional act passed in accordance with the lawmaking provisions of Article I of the Constitution.

*By contrast, classical natural law theory has long assigned normative as well as positivist content to the definition of “law.” To fall within the meaning of “law” in the classical view [of Cicero, Augustine and Aquinas], a legislative or other governmental act required more than mere positivist compliance with the rule of recognition; it also needed to be just.*⁴⁷⁷

476. Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 522 (1986) (emphasis added).

477. Gedicks, *supra* note 31, at 642 (emphasis added). Responding in their thoughtful and provocative article, Chapman and McConnell do not agree that, according to the Founders and their society, “laws made by Congress that did not conform to natural law were not really law. To be sure, [the Founders and] some early American jurists held to a version of the law of nature as a universal moral code made known by conscience, reason, and even scripture, but there is little evidence that any Americans in the late eighteenth century thought the law of nature trumped the enacted [] law of a political society.” Chapman and McConnell, *supra*

Despite the foregoing textual *cum* logical argument that absent substantive content informed by natural law, the Due Process Clauses cannot protect liberty, there remains a lively and fascinating scholarship averring that, *as a matter not of text but of history and historical intent*, “due process of law” covers only procedural matters. For instance, Ryan C. Williams avers that the leading Revolutionary War-era treatises -- Lord Edward Coke, Justice Joseph Story, Chancellor James Kent, Judge Henry St. George Tucker, and William Rawle -- “were remarkably uniform in attributing to the Due Process Clause an exclusively procedural meaning, ...”⁴⁷⁸ Similarly, Prof. Edward S. Corey steadfastly maintains that, “no one at the time of the framing and adoption of the Constitution had any idea that this clause did

note 359, at 1725. Interesting, at 1725 note 235, as illustrations of “some early American jurists,” these authors first cite the English jurist William Blackstone whose influence on the Founders was enormous (*see*, text accompanying *infra* note 487), and next mention the American jurist James Wilson who, as already noted, was signatory to both the Declaration and the Constitution, and a respected judge who would be elevated to the Supreme Court. Thus, despite their attempt to dismiss such writings, Chapman and McConnell cite not authors of small repute, but two among the most respected and regarded in Colonial and early *post*-Revolutionary America.

Moreover, consistent with the sources Chapman and McConnell found cite-worthy, this writing has shown that Jefferson, Hamilton, Madison and Adams likewise agree that natural law is superior to all other law. *See*, text accompanying *supra* notes 58-90. Indeed, such is the very message of this nation’s founding document, the Declaration of Independence. *See*, text accompanying *supra* notes 98-125. Accordingly, even though it did not become a prominent, formalized constitutional doctrine until after the Civil War, substantive due process as a natural law trump of lower law that infringes on “unalienable Rights” comports with the predominate moral-political philosophy upon which the United States was founded.

Chapman and McConnell’s anti-natural law posture is undermined further by their concluding argument on that matter: “Indeed, Article VI [of the Constitution] defines ‘the supreme Law of the Land’ in purely positivist terms: the Constitution, acts of Congress, and treaties are ‘law.’ While the law of nations and reserved (but unenumerated) individual rights are acknowledged in the text of the Constitution and the Bill of Rights, the Supremacy Clause implies that they are subordinate to the ‘supreme Law of the Land,’ which was entirely positive.” Chapman and McConnell at 1726. However, those authors neglect to quote Article VI which reads in relevant part, “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; ...” U.S. CONST. Art. VI. Granted, Article VI’s term “This Constitution” technically references positive law in that, by definition, the Constitution is a written text. But that text, as Chapman and McConnell acknowledge in the above-quote, contains within both its original body and the Bill of Rights, “reserved (but unenumerated) individual rights.” Because those rights must reference natural law for their meanings, Art. VI embraces natural law constraints on positive law.

Moreover, and perhaps more cogently, the Due Process Clauses themselves *are* positive if pithy law. As those Clauses enforce the Declaration of Independence, again natural law morality becomes the touchstone for constitutional meaning.

478. Williams, *supra* note 301, at 453.

more than consecrate a method of procedure against accused persons, and the modern doctrine of due process of law . . . could never have been laid down except in defiance of history.”⁴⁷⁹

Understandably, regardless of natural law theory, whether as a matter of historical intent “due process of law” covers only procedural matters harkens back to the origin of “due process” in American legal thought. Because a brief review elucidates Deontological Originalism’s influence on due process under the Constitution, this article turns to that aspect of American legal history.

1. How America’s Due Process Clauses Conform with and Differ from Magna Carta --

As one would expect, any discussion of due process’ origin begins with, “the Magna Carta, England’s Great Charter of Liberties.”⁴⁸⁰ Interestingly, “The more than five dozen clauses in the Magna Carta follow no discernible plan of organization. Many of the provisions are concerned with [contemporarily irrelevant] ‘feudal incidents’ -- the incidental rights of lords arising from feudalism’s hierarchical organization of status relationships.”⁴⁸¹ Nonetheless, as Prof. Johnson accents, “Magna Carta’s text reflects many concerns that are still central today. Considering that eight centuries have passed, and that there are profound differences between the Feudal Age and the Digital Age, these commonalities . . . suggest that the ancient Magna Carta and modern jurisprudence were ‘cut from the same cloth.’”⁴⁸² Specifically and poetically, Johnson explained, “Like a blazing light piercing the medieval darkness, the Magna Carta illuminated the importance of legal principles, fair procedures, proportional punishment, official accountability, and respect for human dignity.”⁴⁸³ Indeed, Prof. Johnson concluded strongly but likely without hyperbole that, “What’s in the Magna Carta is the beginning of modern legal thought.”⁴⁸⁴

Premised, then, on concepts of dignity, Magna Carta is a fit initiation for what became known in America as “due process of law,” both substantive and procedural. Indeed, scholars agree that the Due Process Clauses derived

479. EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 118-19 (1934).

480. Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L. J. 621, 622 (2016) (citing, J.C. Holt, *MAGNA CARTA* (3rd ed. 2015)).

481. *Id.* at 623.

482. *Id.*

483. *Id.* at 622-23 (emphasis added).

484. *Id.* at 622.

from Magna Carta's Chapter 39, its "law of the land" provision.⁴⁸⁵ As the early exponent of American Law, Chancellor James Kent urged, "The words by the law of the land, as used in magna carta ... are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and thus, says [renown English jurispudent] Lord [Edward] Coke, is the true sense and exposition of those words."⁴⁸⁶ Scholars confirm Kent's central conclusion that the highly influential Lord Coke⁴⁸⁷ considered the terms "law of the land" and "due process of law" to be virtually synonymous,⁴⁸⁸ although, how the latter term derived from the former remains strangely shrouded.⁴⁸⁹

485. "The ancestry of the due process clause is universally traced to ... the Magna Carta, which was signed by King John and his rebellious barons on the field of Runnymede in June 1215. [Chapter 39 of which] reads [in part] as follows: 'No freeman shall be taken or and imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or and the law of the land.'" Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WISC. L. REV. 941, 948-49 (footnotes omitted).

486. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (New York: Clayton & Van Norden, 2d ed., 1832) (citations omitted).

487. As one source put it, "[T]he American Revolution was a lawyers' revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of the common and right and of the rights of Englishmen. . . . The views of Coke . . . were adopted not merely by patriotic leaders like John Adams, Samuel Adams and James Otis, but by Colonial legislatures, colonial and town conventions, and innumerable town meetings during a long series of years prior to 1776." Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1244 (2011) (quoting N.Y. State Bar Ass'n, Proceedings of the Thirty-Eighth Annual Meeting 238, 249 (1915)). See also, U.S. v. Morgan, 51 F.3d 1105, 1112 (2d Cir. 1995) ("The two English common law commentators who most influenced colonial American jurisprudence were Sir Edward Coke and Sir William Blackstone."); but see Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 424-27 (1991) (noting, *inter alia*, that Coke's natural law theory was one among many that influenced the Founders and their society and may not have been the predominate theory regarding the nature and scope of judicial review).

488. Riggs, *supra* note 485, at 958-59, 992-95; Williams, *supra* note 301, at 445-46.

489. *Id.* at 445 (footnote omitted); see also Gedicks, *supra* note 31, at 641 (footnote omitted) ("Although [Madison's] proposed amendment underwent significant changes before it was reported out to the states and ratified, there is no record of any discussion of the Due Process Clause itself in any of the ensuing reports or debates of the proposed amendments"); see also Riggs, *supra* note 485, at 947 ("The legislative history of the 1791 due process clause is especially sterile"); see also Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 478 (2005) (legislative history); see also, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT 315, 325 (1999) (legislative history is "remarkably skimpy"). But see, *infra* text accompanying notes 496-520 explaining that Madison employed the term "due process"

Many writers still insist that Magna Carta's Chapter 39 delineates only procedural not substantive rights against the Crown;⁴⁹⁰ therefore, "due process," Chapter 39's offspring, should be identically limited. While procedural protections doubtless figure prominently in Chapter 39,⁴⁹¹ the weight of scholarship holds that, as Prof. James W. Ely concluded,

Given the paucity of debate over the Bill of Rights and the meaning of due process in the 1790s, historical inquiry cannot reveal with certainty the scope of the due process clause in the minds of the framers and ratifiers. Nonetheless, I fail to see how American statesmen accustomed to viewing due process through the lens of Coke and Blackstone could have failed to understand due process as encompassing substantive as well as procedural terms.⁴⁹²

In support of the foregoing conclusion, Prof. Riggs offered that although procedural safeguards occupied much of Coke's analysis, he as well understood "law of the land" to include both proscribing monopolies and forbidding the Sovereign, absent an act of Parliament, from imposing banishment or exile upon English subjects. From this, Riggs surmised,

Since both of these limitations upon government (primarily the king) are substantive, not procedural, the conclusion is inescapable that Coke's concept of the 'law of the land' was not narrowly limited to procedural

in part to verify that, unlike Magna Carta's Law of the Land provision, the Due Process Clause would apply to legislative as well as executive actions.

490. See Williams, *supra* note 301, at 453.

491.

Chapter 39 was important at the time of its origin as a proscription against arbitrary action by the king, who in the past had sometimes seized the property of his subjects or caused them to be exiled, outlawed, imprisoned, killed or subjected to other disabilities, without the benefit of any legal process. It rested on the central principle that penalties should be imposed only after "the deliberate judgment of a competent court of law." Most commentators agree that chapter 39 was meant to be a guarantee of minimal fairness by providing judgment before execution of penalty.

Riggs, *supra* note 485, at 949-50 (quoting W. McKECHNIE, *MAGNA CARTA* 381 (2d ed. 1914)).

492. Ely, *supra* note 489, at 326-27 (1999); see also, e.g., Riggs, *supra* note 485, at 999 ("The specific inquiry of this study is whether the due process clause had substantive as well as procedural content in 1791. The short answer to that question is only slightly equivocal: 'Yes, it probably did'").

safeguards. ... [W]hen it suited his purposes, he also used the 'law of the land' to convey a broader meaning, even in the context of chapter 39.⁴⁹³

Understandably mindful of its English derivation, scholarly commentary⁴⁹⁴ agrees with the highly respected constitutional expert Laurence Tribe:

[T]he historical evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of "life, liberty, or property, without due process of law" would have understood that ban as having substantive as well as procedural content, given that era's premise that, to qualify as "law," an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness.⁴⁹⁵

In addition to questioning the *bona fides* of substantive due process itself, some researchers continue to espouse that, even if due process has substantive content, under its Magna Carta origin, courts are authorized only

493. *Id.* at 960. Citing, *inter alia*, Prof. Riggs and discussing Blackstone, Prof. Jeffrey Shaman identically accented,

In particular, Blackstone maintained that Chapter 39 provided substantive protection for the rights of property owners. ... Whether Blackstone, like Coke, thought that "the law of the land" and "due process of law" were equivalent is a matter of pure conjecture, but there is considerable indication that both jurists believed that the former phrase encompassed both substantive and procedural safeguards.

Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 478 (2005) (citing, *inter alia*, 1 William Blackstone, *Commentaries* *138-39).

In further support, Riggs accented two English precedents wherein the "Law of the Land" provision proscribed not procedures but the substantive penalties imposed by the challenged laws. Specifically, *Clark's Case*, 77 Eng. Rep. 152 (1596) (Ct. Comm. Pleas) held that a municipality may impose forfeiture but not imprisonment as a penalty for failure to pay certain assessments; and, *Bagg's Case*, 77 Eng. Rep. 1271 (1616) (King's Bench) ruled that an incorporated city, therein Plymouth, cannot disenfranchise -- revoke municipal citizenship -- for purported slander. Riggs, *supra* note 485, at 960-61; *see also, id.* at 961-963 (additional examples supporting the conclusion that Magna Carta always applied to substantive as well as procedural issues).

494. "Because the barons had wanted to circumscribe specific arbitrary actions of the King, Magna Carta contained sixty-three chapters *comprised of a series of substantive provisions* that regulated everything from the rights of widows and wards to levels of taxation. Similar to more recent notions of substantive due process, many of the substantive provisions of Magna Carta protected either property or family." Jane Ruthford, *The Myth of Due Process*, 72 BOS. U. L. REV. 1, 8 (1992) (emphasis added) (footnotes omitted).

495. Laurence Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297, n.247 (1995).

to invalidate executive, not legislative abuses.⁴⁹⁶ If so, the Judiciary's competence to enforce the natural law originalism of the Due Process Clauses would be severely limited as the bulk of substantive due process litigation challenges legislative enactments. Indeed, no less an authority than William Blackstone understood Magna Carta not to constrain Parliament.⁴⁹⁷ Initially, Blackstone's conclusion was not unanimously shared by scholars of English law. In particular, based on his opinion in the significant early-Seventeenth Century precedent *Dr. Bonham's Case*, much learned comment surmises that Lord Coke apparently accepted judicial review voiding legislative acts that are contrary to "Common right and reason."⁴⁹⁸ Scholars accent that Coke

496. As Prof. Riggs noted,

[B]y general agreement, the expression 'law of the land,' in the current usage of that day, was broad enough to include substantive as well as procedural law. ... This, of course, is a far cry from today's substantive due process as a limit upon actions of the legislature. ... [However,] [t]he Magna Carta ... was intended as a limit upon the king. Chapter 39 was not directed to his 'legislative' functions, if they could be distinguished, ...

Riggs, *supra* note 485, at 952-53 (footnote to numerous citations omitted).

497. *Id.* at 972, 1001 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 161); *see also*, Shaman, *supra* note 449, at 478 (citing, *inter alia*, 1 WILLIAM BLACKSTONE, COMMENTARIES * 138-39)

498. 8 REP. 113b, 77 ENG. REP. 646, 652 (K.B. 1610) ("And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such act to be void"). *But see, e.g.,* R.H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 337 (2009) (footnote omitted):

The third point required to understand what Bonham's Case stood for in its time is that judicial review, at least in the modern American sense of the term, was not a part of the law of nature. Despite their unstinted praise for the immutable laws of nature and despite their emphatic statements that all statutes and grants must conform to the law of nature to pass the test of validity, for jurists versed in the law of nature it did not follow that judges had the final word. Judges could not "strike down" statutes simply because the statutes violated the tenets of natural law.

Still, Prof. Helmholz noted that, although extraordinarily rare as compared with the somewhat more common, but still infrequent modern American instances of judicial invalidation of legislative actions based on fundamental rights, judicial nullification of acts of Parliament was at least a theoretical possibility. "Some laws, it is true, no judge might enforce - a statute directly contrary to the Word of God, for example. But that was a rare situation, one not raised by Bonham's Case. In ordinary litigation, judges were subordinate officers in a commonwealth. They were not vouchsafed a right to nullify the considered acts of their governors. The right to weigh the merits of any statute belonged to the sovereign. Even the errors of the prince were normally to be obeyed as if they were law." *Id.* (footnotes omitted). For example, "[I]f a statute enacted 'that no one shall give alms to any object in never so necessitous a condition, such an Act is void.'" *Id.* at 337 n.60 (quoting, William Noy (1792, ch. 1)).

continued to espouse, and notable authority embraced, that principle: "Coke's dictum, that judges could void government acts contrary to fundamental common law, is evident in other decisions he authored, and was affirmed by his immediate successor on Common Pleas, and by the Chief Justice of King's Bench nearly a century later."⁴⁹⁹

Nonetheless, "During the century following England's Glorious Revolution in 1688, parliamentary supremacy replaced Coke's understanding that due process and higher law checked royal and parliamentary encroachments on substantive liberties."⁵⁰⁰ Therefore, appealing to Chapter 39 in support of substantive due process restricting legislative prerogatives is ambivalent at best, and perhaps erroneous.

Nonetheless, accepting that Chapter 39 applies only to the Sovereign or its equivalent only underscores how America during its colonial years and into the Revolution departed from that particular aspect of English precedent. While English law surely influenced much American legal tradition,⁵⁰¹

Accordingly, given that Government must vouchsafe the "unalienable Rights" emanating from "Nature and Nature's God," judicial authority to nullify governmental conduct, including statutes that infringe on such "Rights" has an undeniable English provenance.

499. Gedicks, *supra* note 31, at 603 (citations omitted).

500. *Id.* at 611. Indeed, Coke himself planted the seeds of reappraisal by urging that, "the power and jurisdiction of the Parliament ... is so transcendent and absolute ... that it cannot be confined either for causes or persons within any bounds." Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C.L. REV. 421, 425 (1991) (quoting, 4 Coke Institutes 39 (1644), quoted in George P. Smith II, *Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence*, 41 WASH. L. REV. 297, 310 (1955)).

501. Interestingly,

The power of English law was greater in the mid-19th century than it was with the Revolutionary generation ...

There was no love of English cases for their own sake in [jurist and treatise-writer Justice Joseph] Story's research, nor in Kent's or Hamilton's. Story had few reported American cases to refer to, a deficiency his own reporting sought to diminish. Furthermore, the industrial age, which Hamilton in the 1790's had tried so hard to incubate, came swiftly to America after the Embargo of 1808. England and its law had been compelled to deal with the Industrial Revolution for half a century by that date; and it was Lord Ellenborough, prominent during English industrialization, whom American chauvinism could not keep out of the decisions of 19th-century American judges, not the great English jurists of the 17th and 18th centuries. Also, in the first half of the 19th century, American judges were ranging over much legal literature, including the English decisions. Even though they were the "legal elite" rather than average lawyers, this reading had widespread significance. The members of this curious elite were very important in forming American law, especially the precedent of court opinion, whatever

colonial elaborations on law in general as well as the pivotal matter of legitimate governmental authority often differed from British antecedents,⁵⁰² hardly surprising given England's subjugation of the Colonies that ultimately inspired the American Revolution. *Indeed, the historical divergences between young America and old England explain not only why the United States from the first embraced substantive due process as a constraint against all levels of government, but, equally importantly, how America justified substantive due process under natural law.*⁵⁰³ In this regard Prof. Levy highlighted, "The traditions that gave shape and substance to the Bill of Rights has English roots, but a unique American experience colored that shape and experience."⁵⁰⁴ Although English law understood Magna Carta primarily to limit the prerogatives of the Crown,⁵⁰⁵ the experience of the American Colonies with the tyranny of George III and Parliament inspired early post-Revolution state constitutions to enshrine principles of natural law⁵⁰⁶ *applicable against all offices of Government.*⁵⁰⁷ Thus, while it would defy law and history in England, the Colonies were developing theories of constitutional limitations against legislatures -- "higher level

democratic theorizing might have been saying about law being an emanation of the people's voice.

Earl Finbar Murphy, *A Legal History for America*, 26 STAN. L. REV. 701, 704 (1974) (reviewing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 1973).

502. "Thus, as Julius Goebel long ago observed, the Englishmen who came to [Colonial] America brought with them more of the other kinds of English law than they did of the common law; early American law owed more to the custom of London than to the common law of England." Murphy, *supra* note 501, at 702 (citing, Julius Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931)).

503. As Prof. Murphy generally noted about early post-Revolution America, "Americans responded innovatively to the needs of their environment. ... There was scant imitation of English provisions in the laws of this period that dealt with matters of everyday concern. Where commercial activity and the holding of property were concerned, the American legislator was not confined to parliamentary or common law precedent." *Id.* at 702-03.

504. LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 1 (Yale U. Press 1999). That unique experience arose because "Americans were the freest people, ..." *Id.* at 2. In particular, "Freedom was mainly the product of New World conditions, the English legal inheritance, and skipping a feudal stage. ... [America] was unencumbered by oppressions associated with an ancient regime -- a rigid class system dominated by a reactionary and hereditary aristocracy, arbitrary government by despotic kings, and a single established church extirpating dissent." *Id.*

505. Riggs, *supra* note 485, at 1001.

506. Gedicks, *supra* note 31, at 640.

507. Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 317-318 (1988) (explaining that in the *antebellum* era, a "substantial number of states," as well as antislavery advocates, "imbued their [constitutions'] respective due process clauses with a substantive content").

constitutionalism" -- that they effectuated after the Revolution,⁵⁰⁸ *including adapting and revising Magna Carta principles*.⁵⁰⁹

Accordingly, despite the sparseness of legislative history, Profs. Chapman and McConnell concluded that, "circumstances strongly suggest that [pivotal constitutional author and advocate James] Madison deliberately chose to employ the phrase 'due process of law' instead of the Magna Carta formula of 'law of the land.'" ⁵¹⁰ By so doing, "Madison avoided foreclosing the possibility of applying the Due Process Clause against Congress [which

508. Riggs, *supra* note 485, at 1001. "The entire system of separation of powers responds to the legislative omnipotence that the framers sought to avoid." Martin H. Redish and Lawrence C. Marshall, *Adjudicatory Independence and The Values of Procedural Due Process*, 95 YALE L. J. 455, 461 (1986). Similarly, Prof. Gedicks noted, "Higher-law constitutionalism, however, was received and adapted by the American colonies in their revolutionary struggle with Britain. Parliamentary supremacy slowly displaced higher-law constitutionalism during the eighteenth century in Britain, but not in America, thereby framing the constitutional conflict that led to the American Revolution and, ultimately, to the American Constitution and Bill of Rights." Gedicks, *supra* note 31, at 611-12.

509. Indeed, there are some notable similarities between the emergence and development of American constitutional doctrine and the development of Magna Carta itself. The passage of time saw,

the final and complete emergence of Magna Carta from its feudal chrysalis.

Nor did Magna Carta develop solely along one dimension. As the range of classes and interests brought under its protection widened, its quality as higher Law binding in some sense upon government in all its phases steadily strengthened until it becomes possible to look upon it in the fourteenth century as something very like a written constitution in the modern understanding.

Corwin, *supra* note 479, at 177.

As Prof. Corwin explicated regarding the American experience,

The eventual role, indeed, of Magna Carta in the history of American constitutional theory is due immediately to its revival at the opening of the seventeenth century, largely by Sir Edward Coke. The tradition which Coke revived was, however, by no means his own invention; it referred back to and was to a great extent substantiated by an earlier period in the history of this famous document — famous especially because it was a document and so gave definite, tangible embodiment to the notion of higher law.

From the first, Magna Carta evinced elements of growth, and it was fortunately cast into a milieu favoring growth. For one thing, its original form was not that of an enactment, but of a compact. ... Far more important is it that certain of the Charter's clauses, like those of the Fourteenth Amendment six hundred and fifty years later, were drawn in terms that did not confine their application to the immediate issues in hand or to the interests therein involved; while to match this feature of the document itself came the early discovery by the baronage that the successful maintenance of the Charter against the monarch demanded the cooperation of all classes and so the participation by all classes in its benefits.

Id. at 175-76 (emphasis added).

510. Chapman and McConnell, *supra* note 359, at 1723.

likewise] was [likewise influential advocate Alexander] Hamilton's analysis of the significance of 'due process' in the New York bill of rights."⁵¹¹

While the sources discussed above confirm *as a matter of history*, the uniquely American endeavor to constrain not only the Executive but also the Legislative branch, importantly for this writing, Prof. Gedicks explained why, *as a matter of moral philosophy*, the natural law origins -- the Deontological Originalism -- of the American Revolution and the ratification of the Constitution reject Blackstone's view that the legitimacy of legislative enactments is judicially unreviewable:

*The classical natural law tradition was still vibrant in late eighteenth-century America, when the Fifth Amendment was drafted and ratified, and the term "law" had not yet acquired the almost entirely positivist connotation that it carries today. To call a legislative act a "law" during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather signified that it conformed to substantive limitations on legislative power represented by natural and customary rights. Legislative acts that violated these limitations would not have been considered "laws," even when they satisfied the constitutional requirements for lawmaking.*⁵¹²

Turning to precedent, shortly before the Civil War, *Murray's Lessee v. Hoboken Land & Improvement Co.* unequivocally held that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government."⁵¹³ Building on *Murray's Lessee*, the Supreme Court's pivotal 1884 *Hurtado* opinion⁵¹⁴ reached exactly the same conclusion

511. *Id.* at 1724 (footnote omitted); *see also*, Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 408 (2002) ("Madison substituted the phrase 'due process of law' for the more traditional 'law of the land' in the proto-fifth amendment precisely to avoid the kind of claim of legislative omnipotence that later appeared ...").

Furthermore, employing the term "due process" would obviate any conflict or confusion with the term "supreme law of the land" used in the Constitution's Article IV. Chapman and McConnell, *supra* note 359, at 1723; *see also, e.g.*, Andrew T. Bodoh, *Liberty Is Not Loco-Motion: Obergefell and the Originalists' Due Process Fallacy*, 40 CAMPBELL L. REV. 481, 529 n.186 (2018).

512. Gedicks, *supra* note 31, at 644 (emphasis added; footnotes omitted).

513. *Den Ex Dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1855).

514. "Hurtado often is described as the launching pad for the flexible, evolving conception of due process that later came to dominate the application of due process in both its procedural and substantive context. Indeed, it even has been described as the Supreme Court case that

regarding how Magna Carta should inform a nation where, unlike England, both the central government and the individual states memorialized natural rights into written, dominant constitutions.⁵¹⁵ That aspect of *Hurtado* is worth quoting fully:

The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the commons. *In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.* It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.⁵¹⁶

‘made judges [through the due process clause] censors over what was ‘fundamental’ in a judicial procedure.’” Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303, 346 (2001) (footnote omitted; quoting, DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 368 (1985)).

515. Ruling that criminal indictment by a grand jury is not a requisite of “due process of law,” *Hurtado* was, “The first case to reach the Supreme Court in which the meaning of the Due Process Clause of the Fourteenth Amendment was a controlling issue ...” Joseph G. Cook, 1 *CONSTITUTIONAL RIGHTS OF THE ACCUSED* 3D § 2:3. Applying the federal Bill of Rights in state criminal prosecutions—Theories of interpretation—The independent content approach, 1 *CONSTITUTIONAL RIGHTS OF THE ACCUSED* 3D § 2:3 (3d ed.).

516. *Hurtado v. California*, 100 U.S. at 531-32 (emphasis added). Over a century later, substantive due process nay-sayer Justice Antonin Scalia observed, “Not until *Hurtado* ..., however, did the Court significantly elaborate upon the historical test for due process advanced in *Murray's Lessee*.” *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 31 (1991) (Scalia, J., concurring in the judgment). Whatever may have been the reason for the Court's four-decade silence is immaterial to the facts that *Hurtado* does reaffirm *Murray's Lessee's* doctrine and that both precedents correctly differentiated the American from the British experience even if the latter's laws, particularly Magna Carta, influenced to some degree the latter's melding of natural law and constitutional authority.

In sum, the unique American perspective, predicated on the natural law principles of the Declaration of Independence, instructs that any law from any governmental office that fails to, “conform[] to substantive limitations on legislative power represented by natural and customary rights”⁵¹⁷ is illegitimate under the Constitution. Hurtado’s apt historical assessment,⁵¹⁸ consistent with the bulk of scholarly commentary, confirms Deontological Originalism. That is, the Framers, the Reconstruction Congress, and, the citizenry they served understood “due process of law” to have both procedural and substantive content, *derived from the moral precepts of natural law*, applicable to constrain the actions of legislatures as well as executives and judiciaries.⁵¹⁹ As Prof. Gedicks summarized, “On balance, the historical evidence shows that one widespread understanding of the Due Process Clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action.”⁵²⁰

517. Gedicks, *supra* note 31, at 644.

518. *Hurtado* has been recognized by some, albeit scant, contemporary Supreme Court precedent. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992) (citing *Hurtado* as discussed in *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)).

519. Predictably, Justice Scalia disparaged *Hurtado*, averring that the Court, “provided scant guidance. It merely suggested that due process could be assessed in such cases by reference to “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” *Haslip*, 499 U.S. at 32 (Scalia, J., concurring in the judgment, quoting, *Hurtado*, 100 U.S., at 535). However, as explicated *infra* at notes 899-923 and accompanying text, Kantian morality, applied under the Supreme Court’s dignity paradigm of due process, provides more than an ample basis to discern and to apply the natural law standards this Nation ratified as supreme law in the Constitution.

520. Gedicks, *supra* note 31, at 669. Similarly, Ryan C. Williams determined the ambivalence of scholarship *in toto*,

Modern scholars who have surveyed the pre-Civil War case law for themselves have almost uniformly concluded that support for substantive due process in the antebellum era was far stronger than [most prominent] Lochner-era critics of the doctrine had acknowledged. But despite such modern reevaluations, the notion that substantive due process is inconsistent with the original meaning of the Fourteenth Amendment continues to enjoy relatively widespread support.

Williams, *supra* note 301, at 460 (footnotes omitted); *see also, id.* at 495, 500.

D. Due Process Is the Value Monism of the Constitution's Moral Imperatives --

Although perhaps it was not clearly destined to so become,⁵²¹ “due process of law,” both substantive and procedural, has become the Constitution’s value monism.⁵²² That is, true to its Magna Carta origin, *due process is the singular, formative concept from which the entire panoply of constitutional fundamental rights derives*. Particularly in the Bill of Rights, the Constitution lists several discrete rights, each of which apparently assumes equal merit and authority with the others. But, in fact, decades of precedent hold that all constitutional issues involving rights -- each and every matter that in any manner raises a question of constitutional rights -- actually is an issue of “due process of law.” *Indeed, there is no issue, dispute or matter arising under and concerning constitutional rights -- including separation of governmental powers -- that is not ultimately a question of “due process of law.”*

While at first not a source of much judicial comment,⁵²³ “Since the turn of the [twentieth] century ... due process has come into its own as a great bulwark of individual rights.”⁵²⁴ For instance, a half-century ago, *In re Gault* declared, “Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”⁵²⁵ *Gault’s* estimation comports with one leading treatise’s apt summary of due process’ depth and breadth, “It has been stated that no other phrase known to the American and English law comprehends so much that which is basically vital in the protection of human rights and the redress of human wrongs as the phrase ‘due process of law.’”⁵²⁶ Although

521. *E.g.*, Thomas Y. Davies, *Correcting Search-And-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and The Original Understanding of “Due Process of Law,”* 77 MISS. L. J. 1, 195 (2007) (discussing the Reconstruction Court’s emphasis on “privileges and immunities”).

522. *See generally*, *Originalism and Deontology*, *supra* note 7, at Section 2-h (defining value monism in detail).

523. “The fifth amendment due process clause was seldom litigated during the early decades of the republic and was not authoritatively construed until 1855. Even when the fourteenth amendment made due process applicable to the states in 1868, its potential as a limitation upon governmental action only gradually became apparent.” Riggs, *supra* note 485, at 941 (citing, *inter alia*, Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855)).

524. *Id.*

525. *In re Gault*, 387 U.S. 1, 20 (1967).

526. 16B AM. JUR. 2D CONSTITUTIONAL LAW § 947 (2011) (citation omitted).

a popular view depicts due process as a “negative” protection,⁵²⁷ that is, proscribing what cannot be done, Justice Felix Frankfurter, whose commentaries provide much of due process’ modern basis,⁵²⁸ rightly understood that at its core, the Due Process Clause must have an affirmative as well as a negative aspect because due process itself evinces nothing less than, “ultimate decency in a civilized society.”⁵²⁹

Granted, the full meaning of “due process” may not have been discernable from the debates in which that clause became part of the Fifth and Fourteenth Amendments.⁵³⁰ Paul Finkelman, for example, noted, “Virtually all supporters of the [Fourteenth] Amendment agreed that it would protect the ‘civil rights’ of blacks and everyone else, but ... they did not necessarily agree on the substantive content of civil rights, equal protection, or even due process.”⁵³¹ Yet, no formal explications from 1791 or 1868 were needed for, as the Supreme Court has recognized for over twelve decades, consistent with its natural rights-deontological origins, due process, particularly its liberty component, is “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice”⁵³² Indeed, the Supreme Court acknowledged three-quarters of century after *Chi. B. & Q. R.R. Co.*,

527. As I noted in a different context,

negative versus positive [rights] essentially is a distinction without a difference because negative duties naturally take on positive aspects and vice-versa. See [Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009)] (“After all, a plaintiff can often transform a positive into a negative duty simply by reframing the pleadings....” (citation omitted)). For instance, [pursuant to federal civil rights statutes,] the arguably negative duty not to discriminate means that bigoted employers, labor unions, workers, hotel managers, restaurateurs, merchants, and customers (among others) will have to hire, serve, work alongside, deal with, and otherwise associate with persons who, absent mandating legislation, such bigots would disregard. The positive-negative duties distinction, then, offers little ...

Bayer, *supra* note 17, at 894 note 118.

528. See *infra* notes 687-728 and accompanying text.

529. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring), o. in part, *Malloy v. Hogan*, 378 U.S. 1 (1964).

530. “The legislative history of the Fourteenth Amendment sheds little light on how the term ‘due process of law’ was understood in 1868, because the Amendment was presented and debated largely in terms of the ‘privileges and immunities of citizens.’” Thomas Y. Davies, *Correcting Search-And-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and The Original Understanding of “Due Process of Law,”* 77 *MISS. L. J.* 1, 195 (2007); see also, *supra* notes 358-60 and accompanying text.

531. Finkelman, *supra* note 297, at 1026 (footnote omitted).

532. *Chi. B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897) (holding that due process enjoins States from taking private property without just compensation).

“‘Liberty’ and ‘property’ are broad and majestic terms. They are among the ‘(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience. . . . (T)hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.’”⁵³³

Based on the breadth the Supreme Court has accorded them, the Due Process Clauses essentially now subsume whatever panoply of specific fundamental rights might have emanated from other constitutional provisions such as the Ninth Amendment,⁵³⁴ and the privileges and immunities clauses.⁵³⁵ That thousands of pages of official reporters and scholarly

533. *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972) (quoting, *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (Frankfurter, J., dissenting)); *See also, e.g.*, *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1041-42 (11th Cir. 1989) (quoting *Roth*); *Little v. City of North Miami*, 805 F.2d 962, 969 (11th Cir. 1986) (same); *Banks v. Bock*, 700 F.2d 292, 295-96 (6th Cir. 1983) (quoting *Tidewater Transfer Co.*); *Mazaleski v. Treusdell*, 562 F.2d 701, 711 note 25 (D.C. Cir. 1977) (same).

534. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

The dominance of the Due Process Clauses does not make the Ninth Amendment surplusage nor, as Judge Robert Bork unkindly and inaptly described, render that Amendment an “ink blot.” Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 100th Cong. 249 (1989) (statement of Robert H. Bork, Judge, United States Court of Appeals for the District of Columbia Circuit). For instance, one budding scholar offered that, “courts should use the Ninth Amendment to supplement the substantive due process analysis in evaluating unenumerated rights” that are important but are not “fundamental,” and, thus, do not emanate from the due process clauses. Joseph F. Cadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 413 (2007) (note).

Taking a similar tack, during his confirmation hearing, then-Judge (later-Justice) Anthony Kennedy, “expressed the view that the Ninth Amendment was designed to protect the states’ ability to confer rights beyond those enumerated in the Bill of Rights.” Phoebe A. Haddon, *An Essay on the Ninth Amendment: Interpretation for the New World Order*, 2 TEMP. POL. & CIV. RTS. L. REV. 93, 100 note 45 (1992) (citing, SENATE COMM. ON THE JUDICIARY, NOMINATION OF ANTHONY M. KENNEDY TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. Exec. Rep. No. 113, 100th Cong., 2d Sess. 20-21 (1988)).

535. The Constitution, Art. IV, sec. 2, states in part, “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” Similarly, Section 1 of the Fourteenth Amendment reads, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .”

Of course, the above-quoted Privileges and Immunities Clause could not “fit the bill” as the Constitution’s natural law value monism because, their very texts applies only to “citizens.” *E.g.*, Finkelman, *supra* note 297, at 1039. Consequently, that clause would accord non-citizens subject to United States jurisdiction no rights at all, a proposition that is untenable

publications are filled with thoughtful critiques against according due process such an all-encompassing character is interesting but extraneous to the point of this article which is, *given its purpose to effectuate the Declaration of Independence, somewhere explicit in the Constitution must be a provision, or combined provisions, guaranteeing that no facet of American government may impinge on natural rights derived from natural law.* Pursuant to its Magna Carta provenance, the Due Process Clauses were if not an obvious choice, certainly a fitting choice to house the Constitution's value monism of fundamental fairness.

1. The Need for Constitutional Value Monism --

That the Constitution must contain some value monistic source is obvious and easily proved. As has been shown, the theory of deontological natural rights undergirding the Constitution requires that all subordinate moral precepts must derive from one paradigmatic idea. That is why moral precepts can never conflict, rather, they always harmonize.⁵³⁶ Consistent with value monism, the logical admonition of one of the Supreme Court's most perceptive minds, Justice Robert Jackson,⁵³⁷ observed that, "We cannot

under natural rights theory. For example, there can be no doubt that American government would act immorally by arresting a lawfully present foreign visitor and summarily execute her. Thus, the use of the term "person" in the Fourteenth Amendment was not happenstance. "[I]t is clear from the Congressional debates and those in the state legislatures that the framers of the Amendment believed the Amendment protected everyone in the United States from arbitrary and capricious abuses by their state governments." *Id.* at 1033-34.

536. See generally, *Originalism and Deontology*, supra note 7, at Section 2-h (defining value monism in detail). Thus, while earnestly arguing that there are correct moral resolutions for each moral dilemma, Prof. Markovits wrongly avers as essential, at least in American constitutional law, "*that arguments of moral principle proceed by balancing the effects of the choice under consideration on the rights-related interests of all relevant moral-rights holders.* In this respect, arguments of moral principle differ from the types of balancing arguments that some courts have employed in that the courts in question have engaged either in utilitarian balancing or in some other non-liberal type of balancing." See Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHIKENT L. REV. 415, 425 (1999) (emphasis added). As stressed herein, under deontological morality, rights -- moral precepts -- coexist; that is, where one begins, others end. Rights do not balance in the sense of sometimes being weightier -- more pronounced -- and sometimes less, that is, subordinate to other rights.

537. Robert Houghwout Jackson is considered to have been one of the sharpest intellects ever to sit on the Court, often regarded as "brilliant." Michael J. Gerhardt, *Constitutional Humility*, 76 U. CINCI. L. REV. 23, 45 (2007). Indeed, spouting one of his well-known "back-handed compliments," former Harvard Law School professor Justice Felix Frankfurter remarked to his judicial colleague Jackson, who would be the last justice to have earned his law license through legal apprenticeship rather than by obtaining a law degree, "If you had

give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds.”⁵³⁸ That is because, by definition, neutral principles explain how to choose among competing rights; thus, there can be no doubt which right would prevail in the relevant instance: the one that unbiased reason reveals.⁵³⁹ The vital point is that because from the perspective of unbiased reason the outcome was never in doubt, the rights at issue never actually conflicted -- neutral reason discerns the boundaries between the relevant rights. Until the boundaries were determined, one hopes correctly, by the appropriate reviewer, herein the Judiciary, the rights appeared to conflict because the parties did not know with certainty what the boundaries actually were.⁵⁴⁰ The Judiciary’s duty then, is not deciding which right it preferred -- which would have been the applicable analysis had the rights actually clashed -- but rather, the duty is discerning two things: first the boundaries of each right and, second, within which boundary the given facts actually reside.

The courts, then, must have some mechanism to resolve disputes when rights seemingly clash. As an example, one might consider *Marsh v. State of Alabama* which ruled that a “company town” owned and managed by a private corporation but otherwise evincing, “all the characteristics of any

gone to the Harvard Law School, there would have been no stopping you.” *Id.* (quoting MICHAEL E. PARRISH, FELIX FRANKURTER, IN THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 177 (Melvin I. Urofsky ed., 1994)). See, *infra* notes 688-91 and accompanying text for additional discussion of Justice Frankfurter’s feistiness and how it affected his tenure on the Supreme Court.

538. *Brinegar v. U.S.*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (arguing that the Fourth Amendment does not set forth rights inferior to others in the Bill of Rights).

539. See, *Originalism and Deontology*, *supra* note 7, at Section 2. Human frailty might prevent any given person from performing unbiased reasoning well enough to discern the correct answer to a particular dilemma; but, the fact remains that neutral reason, properly performed, would yield the one and only correct resolution.

540. For instance, if Smith asserts Right X, but Jones maintains that Smith’s construction of Right X unduly interferes with her exercise of Right Y, the resolution cannot be that both X and Y are rights, but, in some instances, one right predominates over the other. Rather, assuming both truly *are* rights, X and Y coexist under the value monism of “due process of law.” Therefore, if the reviewing court correctly rules in favor of Jones, it is because, in fact, contrary to Smith’s assertion, Right X never reached as far as Smith claimed. It is not that Right X, in the given case, is subordinate to Right Y; it is that Jones proved that her exercise of Right Y did not erroneously attempt to enlarge Right Y by intruding into Right X. The ruling neither expanded nor contracted either Right X or Right Y. Rather, the ruling, assuming it is correct, identified the parameters of each right to discern that Jones was properly exercising Right Y, while Smith was improperly exercising Right X.

other American town,”⁵⁴¹ could not prohibit peaceful dissemination of religious literature on public sidewalks.⁵⁴² Purporting to compare the competing interests, *Marsh* concluded, “When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”⁵⁴³ Accenting as it does the First Amendment’s purported “preferred position,” one might conclude that under the Constitution, free speech and expression rights trump property rights.

However, twenty-six years later, *Lloyd Corporation, Ltd. v. Tanner* held that the owners of a large shopping mall in Portland, Oregon,⁵⁴⁴ lawfully prohibited distributions of handbills that are unrelated to commercial activities of the mall.⁵⁴⁵ *Tanner* distinguished *Marsh* accenting that as owner of the entire town, the corporation in *Marsh* acted akin to town government, literally regulating all the streets, sidewalks and byways. By contrast, because the mall in *Tanner* was surrounded by public streets through which patrons access the mall and over which the mall exercised no dominion,⁵⁴⁶ “Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets. Indeed, respondents moved to these public areas and continued distribution of their handbills after being requested to leave the interior malls.”⁵⁴⁷

Due to the fact variances as contrasted with *Marsh*, the *Tanner* Court concluded, “It would be an unwarranted infringement of property rights to require [the mall owners] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without

541. “In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.” 326 U.S. 501, 503 (1946).

542. The town enforced its anti-leafletting policy arresting and demanding the prosecution of Petitioner *Marsh*, a Jehovah’s Witness, for violating Title 14, Section 426 of the 1940 Alabama Code, an anti-trespass criminal statute. *Id.* at 503.

543. *Id.* at 509.

544. “Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.” *Lloyd Corp. v. Tanner*, 407 U.S. 551, 553 (1972).

545. The Court rejected the broad assertion that, “since the Center is open to the public, the private owner cannot enforce a restriction against handbilling on the premises.” *Id.* at 564.

546. *Id.* at 566-67.

547. *Id.* at 567.

significantly enhancing the asserted right of free speech.”⁵⁴⁸ In *Tanner*, then, the private property interests of the mall owners trumped the speech interests of the would-be leafletters.

Based on their highly-particularized facts, the constitutional compatibility of *Marsh* and *Tanner* is discernable, although the latter declined to explicate that compatibility in meaningful detail.⁵⁴⁹ While not specifically identified in either opinion, *Marsh*’s and *Tanner*’s harmony must stem from some principle more rudimentary than either “property rights” or “speech rights.” That is, some additional and predominating concept must explain the coherence that required speech rights to prevail in *Marsh* but allowed property rights to triumph in *Tanner*. As we now understand from the characteristics of deontological morality, fundamental rights cannot conflict, for if they did, there would be no unbiased method to discern which of the conflicting rights should prevail; such a decision would be entirely consequentialist. So, the arguably unspoken premise in *Marsh* and *Turner* is that an overarching precept allowed the Court to discern that the “company town’s” proscription violated the right of speech regardless of any purportedly countervailing property rights, while the private mall’s similar proscription did not violate speech because of actual, not merely asserted, countervailing property rights. To make those determinations, however, required understanding both what each right entails and how they harmonize. Those harmonizing principles must derive from concepts informed by, but ultimately beyond the specific right of speech and specific right of property.⁵⁵⁰

548. *Id.*

549. The *Tanner* Court did not clarify *why* the mall owners’ interests predominate, especially as, given the many activities that take place in a mall, peaceful leafletting need not be intrusive. Even if it was right that leafletting outside the mall imposed little costs on the leafletters, the Court did not clarify why “it would be an unwarranted infringement on property rights,” *id.* at 567, to require the mall owners to indulge the leafletters to the same extent they indulge others who are engaging in non-commercial activities, such as reading the newspaper or conversing with each other while walking from store-to-store. Accordingly, theorists need to discern from *Tanner* and *Marsh* what is not fully explicated: why the fact that leafletters could use the adjoining sidewalks means that a publicly assessable mall need not permit peaceful, non-disruptive First Amendment activity such as leafletting.

550. Perhaps, most obviously, the privately owned and operated shopping mall in *Tanner* did not exercise the quasi-governmental powers of the “company town” in *Marsh*. Thus, the First Amendment simply was inapplicable in *Tanner* because that Amendment only constrains official, not private conduct. *Harris v. Quinn*, 134 S.Ct. 2618, 2628 note 4 (2014); *Stanko v. Bosselman Enterprises*, No. 17-1810, 2018 WL 3525311, at *2 (8th Cir. July 23, 2018) (discussing *Quinn*). Accordingly, the leafletters wrongly averred that their speech rights were implicated at all.

2. Due Process Is the Constitution's Value Monism --

Had they looked for it, the *Marsh* and *Tanner* Courts would have found the applicable overarching principle in the Constitution's due process clauses.⁵⁵¹ During the mid-1940s, Justice Frankfurter explained the constitutional logic in response to his colleague Justice Hugo Black's argument that the due process clauses of the Fifth and Fourteenth Amendment have no independent content, but rather, only encompass the specific rights enumerated in the Bill of Rights.⁵⁵² Applying a textualist

Applying the principles of Deontological Originalism, the company town in *Marsh* impugned the dignity of its inhabitants by, in essence, cutting off entirely the fundamental right of leafletting as a means to communicate ideas and information. While there are other means to disseminate such ideas and information, the company town's leafletting ban was irrational in that no inhabitant rationally would tolerate that limitation on speech and expression. The town in *Marsh*, then, used a constitutionally illegitimate means, and thus treated its residents merely as means to some likely illegitimate end such as quashing dissension against town management.

By contrast, the private mall owners in *Tanner* did not impugn the dignity of either its patrons or the would-be leafletters by proscribing leafletting. First, the important legal standard reveals that, as a private entity not exercising the quasi-governmental power of a "company town," the mall's policies are not subject to review under the Constitution. However, even if the Due Process Clauses applied, it is not a necessary function of a private business mall to allow political activity in its passageways. The purpose of malls is to allow patrons easy access to numerous and varied businesses. Even if that function is not interrupted by peaceful leafletting, prohibiting that practice does not assault the innate dignity of either patrons or protesters who have no objectively valid expectation that a private mall comprised of commercial businesses open to the general public will be, as well, a place of political activity.

551. While neither *Tanner* nor *Marsh* used the exact terms, the unspoken value monistic concept must sound in the ban against "arbitrary and capricious" governmental conduct which emanates from the due process clauses of the Fifth and Fourteenth Amendments. See *infra* notes 600-10 and accompanying text. See, *supra* note 550 explaining the reasons why the ban on leafletting was arbitrary and capricious in *Marsh* but not in *Tanner*.

552. As Justice Black defended his counterintuitive conclusion, "My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states." *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting), o. in part, *Malloy v. Hogan*, 378 U.S. 1 (1964). Along with a lengthy historical analysis of precedents, Justice Black argued that anything more would require, "Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights." *Id.* at 90 (Black, J., dissenting). But, as we now appreciate, see, *supra* Sections 2-4, that is exactly what the Founders and the Reconstruction Congress realized interpreters of the Constitution, herein the courts, must do: understand and apply natural law. See, *infra*, Section 6-b explaining why that duty inures to the Judiciary. Contrary to Justice Black's assertion, doing so is not "improv[ing] on the Bill

approach, Frankfurter replied by reminding that the Fifth Amendment consists of several specific, discrete rights plus the pivotal general guarantee of “due process of law.”⁵⁵³ Accordingly, Justice Black’s assertion that “due process of law” *only includes* the Bill of Rights’ express provisions renders the Fifth Amendment’s explicit term “due process of law” devoid of meaning, thus merely surplusage -- excess, repetitive language that would be unwarranted in the most mundane set of regulations, much less in the charter of American government.⁵⁵⁴ After all, if “due process” only covers “enumerated rights,” that is, only relates to provisions already expressly specified in the Bill of Rights’ text, then the Fifth Amendment’s Due Process Clause adds nothing -- implicates no unenumerated rights to enforce -- and, thus, is superfluous. If “due process” infers nothing textually unexpressed, then that clause is unnecessary because, by definition, the fully expressed rights in the Bill of Rights’ text are explicit, thus obvious. *Accordingly, simple logic -- reason -- informs that the Due Process Clause serves a vital function: to alert interested parties that the Bill of Rights covers more than its express terms comprehend.*⁵⁵⁵

of Rights,” but rather, discerning through unbiased reason how the natural law applies in any given case.

553. The Fifth Amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added).

554. Understandably, as a general matter, judicial review presumes that all words and phrases in statutes, ordinances, documents and other sources have unique although possible similar meanings. Therefore, courts presume that any term under review is not *surplusage* unless there is no plausible alternative conclusion. *E.g.*, *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013). However, on rare occasions, there may be “no plausible alternative conclusion.” That is why, “While it is generally presumed that statutes do not contain surplusage, instances of surplusage are not unknown.” *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 note 1 (2006).

555. As Justice Frankfurter explained, “Not to attribute to due process of law an independent function but to consider it a shorthand statement of other specific clauses in [the Bill of Rights] is to charge those who secured the adoption of this Amendment with meretricious redundancy by indifference to a phrase — ‘*due process of law*’ — *which was one of the great instruments in the very arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.* ...” *Malinski v. New York*, 324 U.S. 401, 415-16 (1945) (Frankfurter, J., concurring) (emphasis added).

Indeed, steeped in the philosophy of natural law, the Framers understood that almost certainly they would be unable to capture every discrete natural right even within the numerous provisions that ultimately comprised their Bill of Rights. Along such lines, during the initial drafting of Constitution two-and-a-quarter centuries ago, in response to the urging of “Anti-Federalist” forces, the Federalists, likewise staunch believers in natural rights, employed a value monistic argument *against* a Bill of Rights or similar inventory within the proposed constitutional drafts. “The Federalists ... maintained that an enumeration of natural and customary rights was unnecessary, because the Constitution nowhere delegated to the national government any power to infringe upon such rights.”⁵⁵⁶ In fact, as the former-Colonists, now the United States’ first generation, fully agreed with the Declaration of Independence’s natural rights principles,⁵⁵⁷ “The Federalist defense of the Philadelphia Convention’s near-complete failure to protect such rights in the 1787 Constitution reflected the higher-law belief

It is perhaps ironic, therefore, as shortly this article will argue, that based on formal, positive constitutional law, the Fourteenth Amendment’s Equal Protection Clause technically is surplusage because while it has unique aspects other forms of “due process” do not, equal protection is but one category -- one example -- of due process. *See infra* notes 570-82 and accompanying text. Indeed, and of even deeper irony, as explained *infra* at notes 565-78 and accompanying text, *because the concept “due process of law” essentially encompasses, contains, and subsumes all of the more specific, enumerated rights within the Bill of Rights, every one of those explicit rights technically is surplusage.* That is because, had the Bill of Rights consisted solely of its Due Process Clause, thus no other more exact rights had been enumerated within the Bill of Rights, *via* judicial review, that Due Process Clause alone would be sufficient to trigger the natural law/natural rights inquiry that must disclose, *inter alia*, the First Amendment, the Second Amendment, the Fourth Amendment, and all other fundamental rights set forth within the Bill of Rights. Identically, amendments or discrete rights within amendments that, through the Fourteenth Amendment’s Due Process Clause, courts have applied upon States and localities.

Nonetheless, regardless of the extraordinary surplusage, as soon will be explained, sound policy and logical reasons inspired the the Framers to include a discrete Due Process Clause among the many slightly more specific rights set forth in the Fifth Amendment.

556. Gedicks, *supra* note 31, at 635 (citing as examples, ALEXANDER HAMILTON, THE FEDERALIST NO. 84 578-79 (Jacob E. Cooke ed., 1961); *see, e.g.*, James Wilson’s Speech at a Public Meeting (Oct. 6, 1787), in 1 THE DEBATE ON THE CONSTITUTION 63-64 (Bernard Bailyn ed., 1993); Remarks of Thomas McKean, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 641, 643 (Bernard Schwartz ed., 1971); Remarks of James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 641, 633-46; Remarks of James Iredell, North Carolina Convention Debates (July 29, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 641, 945, 949-51. *Id.* at 635 note 272.).

557. *See supra* notes 75-90 and accompanying text.

that such rights were enforceable against federal and state government action independent of any constitutional enumeration or writing.”⁵⁵⁸

Moreover, there was some fear that any attempt to enumerate rights would be treacherous because the list, bound to be incomplete, possibly might be perceived to limit the Constitution’s coverage only to that imperfect inventory.⁵⁵⁹ In this light, James Iredell, later to sit as an Associate Justice of the Supreme Court, writing as Marcus, asked, “who would undertake to recite all the state and individual rights not relinquished by the new Constitution?”⁵⁶⁰

Federalist opponents of any bill of rights bowed not so much to the philosophy of the Anti-Federalists, but to political pressure. “The Anti-Federalists won the bill-of-rights battle, although the Federalists won the ratification war.”⁵⁶¹ Pragmatics aside, it is hardly incongruous that to assure

558. Gedicks, *supra* note 31, at 640 (footnotes omitted). Likewise, Terry Brennan explained, “Natural rights were not incorporated in the text of the Constitution because, as Federalist friends of the Constitution repeatedly observed, natural rights did not require textual recognition. Far from being accepted by the Founders, the notion that a national government could somehow confer the rights of nature by annexing amendments was condemned as a ‘glaring absurdity.’” Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* 15 HARV. J.L. & PUB. POL’Y 965, 993-94 (1992) (quoting, “Mariat,” MASS. CENTINEL, Jan. 2, 1788, at 124; other citations omitted); *see generally id.* at 993-97 (quoting and discussing original sources).

559. “During the ratifying debates, Federalists assured skeptical Anti-Federalists that retained rights were not defined by enumeration because natural rights could not be effectively enumerated.” *Id.* at 998. *See also*, Gedicks, *supra* note 31, at 635-36 (Federalists, “argued that an enumeration of rights and liberties against the national government would supply a dangerous basis for recognizing unenumerated governmental powers. They argued that delegates could not possibly enumerate all of the rights and liberties individuals held and that those that were not enumerated would be presumed to have been ceded to the national government or not to exist at all.” (footnotes omitted)).

Likewise, future Supreme Court Associate Justice James Wilson -- Declaration of Independence signatory, proponent of the proposed Constitution, but, opponent of amending the newly ratified charter with a Bill of Rights -- opined, “All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people” James Wilson, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 454 (Jonathan Elliot ed., 1888) (quoted in Brennan, *supra* note 558, at 998).

560. “Marcus” (James Iredell), NORFOLK & PORTSMOUTH J., Feb. 20, 1787, reprinted in 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (quoted in Brennan, *supra* note 158, at 999).

561. Gedicks, *supra* note 31, at 639. As Prof. Gedicks detailed, “In Massachusetts, New York, and Virginia, three states whose approval was essential for organization of a viable national government, a majority opposed ratification without a bill of rights. The necessary majority in these states was obtained only after pro-ratification forces promised amendment of the Constitution to include a bill of rights once the post-ratification national government

it always remains faithful to the Declaration, as part of any inventory of specific rights, the Constitution would include some overarching instruction recognizing and preserving the entirety of the Declaration's natural rights *specific and unspecified* principles which, as it turned out, is the value monism found in the combined Due Process Clauses of the Fifth and Fourteenth Amendments.

Given the foregoing, Justice Frankfurter aptly deflated Justice Black's interpretation that, had it been adopted by the Court, would have actualized the Federalists' fears by rendering the Bill of Rights an incomplete protector of natural rights.⁵⁶² Under Black's approach, the Bill of Rights might well be more dangerous than beneficial by allowing Government to run roughshod over any natural right that, through contrivance or inadvertence, had been omitted from the text.⁵⁶³ In such cases, courts either would either declare the

was organized. Even so, the ratification margins were dangerously narrow." *Id.* (footnotes omitted).

562. Exposing his renown prickly side (*see infra* notes 688-91 and accompanying text), Justice Frankfurter further remarked that,

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court — a period of 70 years — the scope of that Amendment was passed upon by 43 judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments *Adamson*, 332 U.S. at 62 (Frankfurter, J., concurring).

563. A retort that omissions might be fixed through constitutional amendment is not cogent. The rights protected by the Constitution emanate from natural law and, thus, must be protected and abided by Government. Amending the Constitution, by contrast, is a difficult procedure, as the Framers seemingly intended. "The U.S. Constitution ... is difficult to amend because the procedures in Article V for amending the Constitution are so onerous. The Constitution thus has a low amendment rate: only seventeen amendments in more than 200 years." F.E. Guerra-Pujol, *Gödel's Loophole*, 41 CAP. U. L. REV. 637, 656-57 (2013) (citing, Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008) and Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 369 (1994)).

Moreover, amending the Constitution is profoundly political. Recognizing, "the interplay of polity and legal principle which is the basis of our constitutional System," many contend that "on the subject of amending the Constitution: 'the Constitution is basically a political, not a judicial, document, and its continuation or rejection (in whole or in part) should partake of the same flavor.'" Samuel H. Hofstadter, *Constitutional Law by Morris D. Forkosch*. Brooklyn, N.Y.: The Foundation Press, 1963. Pp. xxi, 541. \$7.50, 64 COLUM. L. REV. 795, 796 (1964) (quoting, Forkosch at 93). (Similarly, "The writing and amending of state constitutions has been of a distinctively populist and political nature." Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 1005 (1996)). Indeed, it took decades of anger and violence culminating with the devastating Civil War before the Constitution's two pivotal infirmities -- legalizing slavery and failing to require States to abide

Constitution unable to perform its primary function of vouchsafing the full panoply of fundamental rights, or, knowingly would distort the meaning of enumerated rights' texts to ameliorate, although artificially, gaps in coverage.⁵⁶⁴

As next elucidated, indeed decades of precedent have verified that the Due Process Clauses comprise the Constitution's value monism in that "due process of law" has become the very definition of fundamental rights and, accordingly, those clauses are now the repository of all fundamental constitutional rights, enumerated or unenumerated. Put slightly differently, whether specified in the constitutional text or not, rights are fundamental only if they emanate from the meaning of "due process of law."

a. Enumerated and Unenumerated Rights under the Due Process Clauses --

To illustrate the foregoing assertion first with enumerated rights, due process' stance as the Constitution's value monism is confirmed by what is known as the "selective incorporation" theory, as I encapsulated in an earlier writing:

[I]t is axiomatic constitutional law that the Due Process Clause of the Fourteenth Amendment does not fully incorporate - that is, it does not per

by the strictures of natural rights -- were cured by the Thirteenth, Fourteenth and Fifteenth Amendments. Thus, the respective drafters wisely incorporated the value monism of "due process of law" into the Fifth and Fourteenth Amendments, thereby assuring that, in the hope they are willing and able, the courts will rectify omissions of natural rights, rather than making the amending process the sole route to vindicate unenumerated rights. *See, infra* sec. 6-b addressing why the Judiciary is competent and proper to discern such unenumerated rights.

564. In Frankfurter's words, "A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights ... leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions." *Malinski v. New York*, 324 U.S. 401, 415-16 (1945) (Frankfurter, J., concurring).

In addition to the positions of Justices Frankfurter and Black, Justices Murphy and Rutledge, by contrast, argued that, given their position of prominence through inclusion in the Bill of Rights, *every listed right therein*, all such "specific guarantees ... should be carried over intact into the first section of the Fourteenth Amendment [thus applicable to the States]." *Adamson*, 332 U.S. at 124 (Murphy, J., with Rutledge, J., dissenting). However, as well, there may be unenumerated -- unwritten -- rights so fundamental that they too are cognizable and enforceable as highest law under the Due Process Clauses. *Id.*

As explained next in the text, the Frankfurter position, rather than the Black or the Murphy-Rutledge positions, rightly has prevailed.

se mandate onto the states - the rights set forth in the Bill of Rights. Rather, through a right-by-right review, the judiciary has applied to the States pursuant to the Fourteenth Amendment those provisions of the Bill of Rights that derive from the American “scheme of ordered liberty and system of justice.” *In other words, due process requires states and localities to respect those rights essential to the very legitimacy of governmental conduct.*⁵⁶⁵

“Selective incorporation” tells us that, contrary to the view of Justices Murphy and Rutledge’s *Adamson* concurrence,⁵⁶⁶ the due process clauses do not unthinkingly encompass every right set forth in the first eight amendments. Rather, those enumerated rights judicially determined to be part of “the American ‘scheme of ordered liberty and system of justice’” constrain, *via* due process under the Fourteenth Amendment, States’ regulatory discretion.

As a result of this right-by-right evaluation known as ‘selective incorporation,’ every discrete liberty under the Bill of Rights has been applied to the States through the Fourteenth Amendment’s Due Process Clause except the Sixth Amendment’s right to a unanimous jury verdict, the Fifth Amendment’s requirement of indictment by a grand jury and the right to a jury trial under the Seventh Amendment.⁵⁶⁷

Along with selective incorporation, the doctrine of unenumerated fundamental rights evinces the inherent significance of “due process of law.” From that the natural rights concepts inherent in “due process,” we may discern those fundamental rights extant in natural law but unlisted within our national charter’s text. For instance, the Constitution’s Sixth Amendment contains an express “confrontation clause” explicitly permitting criminal defendants to confront, through cross-examination and related means, witnesses who the Government calls to testify.⁵⁶⁸ But, the Constitution does not contain a counterpart allowing criminal defendants directly to summon witnesses and to submit physical evidence in their own defense. Surely allowing defendants the fundamental right to rebut evidence brought against

565. Bayer, *supra* note 17, at 395 (emphasis added; quoting, *McDonald v. City of Chicago*, 561 U.S. 742, 763-64 (2010)).

566. See, *supra* note 564.

567. Bayer, *supra* note 17, at 395 (citing, *McDonald*, 651 U.S. at 763-65 and notes 12-13).

568. “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ...” U.S. CONST. amend. VI.

them but depriving them the equally vital opportunity to produce their own exculpatory evidence would be an arbitrary and capricious infringement on the right to defend in a criminal action as there is no legitimate reason to deny a criminal defendant that integral aspect of preparing a defense. Therefore, the unsurprising rule is that such a right is inherent in the meaning of “due process” even though it is nowhere explicit in the Constitution’s text.⁵⁶⁹

A perhaps even more powerful example is that the Fifth Amendment’s Due Process Clause implies an “equal protection” aspect identical to the Equal Protection Clause expressly set forth in the Fourteenth Amendment. Specifically, over sixty years ago, *Bolling v. Sharpe*⁵⁷⁰ held that public schools in the District of Columbia cannot practice mandatory racial segregation of students. *Bolling* is the companion case to *Brown v. Board of Education*⁵⁷¹ which, overturning the “separate but equal” doctrine, likewise ruled that state-run public schools may not mandate racially separate curricula and facilities. Technically, the constitutional infirmity in *Brown* was that racially separate public schools violate the Equal Protection Clause of the Fourteenth Amendment. The Court famously explained, “To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁵⁷²

While the Court applied the identical rationale in *Bolling*, the constitutional dilemma was that, unlike the Fourteenth Amendment, the Fifth Amendment, upon which suits against federal entities such as the District of Columbia may be brought,⁵⁷³ contains no express equal protection component. However, as has been accented, both amendments contain an

569. *E.g.*, *Bedoya v. Couglin*, 91 F.3d 349, 352 (2d Cir. 1996) (“An inmate has a due process right to summon witnesses in his defense at a prison disciplinary hearing, provided facility officials do not determine that this would in any way threaten institutional safety or correctional goals. *Wolff v. McDonnell*, 418 U.S. 539, 566, ... (1974).”). Accordingly, even if the Sixth Amendment’s right of confrontation evinced the Framers’ implicit intent to allow only confronting, thus depriving criminal defendants of the right produce their own in-court evidence (and presumably it does not), such corrupt intent would be thwarted by the natural rights force of the Due Process Clauses.

570. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

571. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

572. *Id.* at 494.

573. The Fifth Amendment applies to the federal government, of which the District of Columbia is a part, while the Fourteenth Amendment applies to state government and localities. *See, e.g.*, *S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm.*, 483 U.S. 522, 542 n.21 (1987); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985); *Patchak v. Jewell*, 828 F.3d 995, 1004 (D.C. Cir. 2016); *Truong v. Hassan*, 829 F.3d 627, 630-31 and note 4 (8th Cir. 2016).

express and identically worded Due Process Clause. Within a remarkably short three-page opinion, the *Bolling* Court unanimously determined that the meaning of “due process of law” is broad enough to include the same principles covered by the Fourteenth Amendment’s Equal Protection Clause. Expressing the sublime and crucial precept in rather understated prose the Court concluded, “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”⁵⁷⁴ Accordingly, a violation of equal protection essentially states an identical claim sounding in due process, because “discrimination may be so unjustifiable as to be violative of due process.”⁵⁷⁵

Importantly, despite what its critics claim, *Bolling* is not devoid of theory.⁵⁷⁶ *Bolling* is not a conclusory statement linking equal protection to due process to avoid the surely embarrassing situation that, because the Fifth

574. 347 U.S. at 499.

575. *Bolling*, 347 U.S. at 499. Roughly three decades earlier, speaking for the court, Chief Justice Taft wrote, “The [equal protection] clause is associated in the [fourteenth] amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous.” *Traux v. Raich* 257 U.S. 312, 331-32 (1921) (per Taft, C.J.). Predecessors to *Traux* had intimated, arguably reluctantly, that the Fifth Amendment’s due process component invalidates Congressional acts based on arbitrary classifications, but no more so than does the Fourteenth Amendment addressing comparable state claims. David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L. J. 1253, 1265 (2005) (citing, *inter alia*, *District of Columbia v. Brooke*, 214 U.S. 138, 150 (1909) (“‘prohibition cannot be stricter or more extensive’ than the scope of the Fourteenth Amendment’s Equal Protection Clause upon the states, and this law would be valid if enacted by a state.”)). Early treatise authors likewise believed that because it proscribes irrational discrimination, “due process contain[s] an equal protection component.” *Id.* at 1267 (discussing, HANNIS TAYLOR, *DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS* 297 (1917); CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 408, 418-19 (1922); and, Oliver H. Dean, *The Law of the Land*, 48 AM. L. REV. 641, 668 (1914)).

Of course, as will be discussed, the appropriate limit on governmental acts under Fifth or Fourteenth Amendment due process is precisely and properly what those early cases and commentaries speculated: that the challenged governmental classification is unconstitutional only if *objectively* the classification was “arbitrary or capricious,” not simply questionable policy or inefficient. See, *infra* text accompanying notes 600-10. Thus, *Bolling* was not wholly unanticipated by the courts, although *importantly* it clarified that indeed due process is not “associated” with, nor does it “overlap,” but rather actually *subsumes* equal protection.

576. Raoul Berger, *Activist Censures of Robert Bork*, 85 NW U. L. REV. 993, 1015 (1991) (an equal protection aspect within the Fifth Amendment is “quite untenable;” quoted in David Bernstein, *supra* note 575, at 6; see also, e.g., MICHAEL W. MCCONNELL, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 158, 166 (Jack M. Balkin ed., 2001) (concurring in the judgment); Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 774 (1998)).

Amendment contains no express Equal Protection Clause, absent an act of Congress or an appropriate constitutional amendment, unlike the then-48 states, the District of Columbia (and impliedly any United States territory or possession) may mandate officially racially discriminatory public facilities and services, including schools.⁵⁷⁷ A careful reading of *Bolling*'s scant three pages shows that the Court did not impose a *de facto* constitutional amendment by recognizing an equal protection component within the Fifth Amendment. Rather, "While dicta in *Bolling* state that the concept of due process overlaps to some extent with the concept of equal protection, *the ultimate holding of the Court is based on the traditional due process concern that the government not engage in arbitrary deprivations of liberty.*"⁵⁷⁸ Indeed, Prof. Lawrence Lessig smartly accented that, "What is significant about the actual opinion . . . is not that the Court found an 'equal protection component' to the Due Process Clause. No such 'component' was ever 'found.'"⁵⁷⁹ Rather, the *Bolling* Court rightly recognized a liberty interest that minority children (and white children as well)⁵⁸⁰ have in avoiding the

577. Bernstein, *supra* note 575, at 3; cf., Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995) ("describing the 'embarrassing textual gap' with which defenders of *Bolling* must reckon") (quotation from, Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 977 note 7 (2004)).

Indeed, one might plausibly presume that, had *Bolling* reluctantly upheld the District of Columbia's discriminatory school system on the technical grounds that the Bill of Rights contains no explicit equal protection clause, Congress and the States, likely in record time and with few if any nay-sayers, would have enacted and ratified an amendment placing an equal protection clause into the the Constitution, likely within the Fifth Amendment. Supporters of *Brown* would have endorsed such an amendment to end the injustice of constitutional federally-managed school districts. Opponents of *Brown* conceivably would support the amendment if, for no other reason, out of spite based on the supposition that because *Brown* likely would not be overturned in some future case, it makes no sense to allow the Federal level to discriminate when States may not.

578. Bernstein, *supra* note 575, at 3 (emphasis added).

579. *Id.* (quoting, Lessig, *supra* note 577, at 409).

580. *U.S. v. School Dist. 151 of Cook County, Ill.*, 301 F.Supp. 201, 206 (N.D. Ill. 1969), mod. on other grnds., 432 F.2d 1147 (7th Cir. 1970) ("Conversely, segregation harms the white as well as the black student. Just as racial isolation tends to cripple a black child by inducing a feeling of inferiority, it inflates the white child with a false belief in his superiority."); *Hart v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 21*, 383 F. Supp. 699, 731 (E.D.N.Y. 1974) *aff'd*, 512 F.2d 37 (2d Cir. 1975) ("[T]he negative impact of racially segregated schools is not confined exclusively to Black students. White children may also react to racial isolation in ways harmful to themselves."); cf., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) (The Fair Housing Act of 1968, 42 U.S.C. sec. 3610(a), recognizes as cognizable, "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex [resulting in] the loss of important benefits from interracial associations. . . . [T]he proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.") (footnote omitted)); *see also, e.g.*,

psychological, societal and other related affronts inflicted by racially segregated public schools, injuries “not justified by any valid police power rationale.”⁵⁸¹ Understandably, *Bolling’s* determination that due process subsumes “equal protection,” remains good law.⁵⁸²

To summarize, under “selective incorporation,” principles of “due process of law” have applied to the States the vast majority, but not all of rights enumerated in the Bill of Rights. Accordingly, its presence within the Bill of Rights strongly implies, but does not *per se* establish that any given enumerated right is fundamental enough to be a natural right with which, pursuant to the Fourteenth Amendment, States must abide. Conversely, the doctrine of unenumerated rights means that the realm of natural rights is not limited to rights, such as those in the First and Fourth Amendments, both explicitly set forth in the Bill of Rights and deemed “fundamental” under due process doctrine. Thus, oddly but inescapably, apt due process jurisprudence has rendered the Fourteenth Amendment’s Equal Protection Clause superfluous, an idea that should pique the textualist in us all. Indeed, adding to the pique, pursuant to the just-discussed doctrine of “selective incorporation,” virtually *all* enumerated rights in the Bill of Rights are surplusage because even if they had not been cataloged therein, those rights’

Coleman Realty v. Havens, 455 U.S. 363, 377 (1982) (same); *McCardell v. U.S. Dept. of H.U.D.*, 794 F.3d 510, 517-18 (5th Cir. 2015) (same); *Palmer v. Occidental Chem. Corp.*, 356 F.3d 235, 237 (2d Cir. 2004) (same; declining to address if a similar claim is cognizable in a private workforce under The Fair Employment Act of 1964, 42 U.S.C. sec. 2000e, *et seq.*).

581. Bernstein, *supra* note 575, at 6. Thus, although otherwise correct, the recent *Obergefell* opinion misunderstood the relationship by stating, “The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.” *Obergefell*, 135 S. Ct. at 2602-03. Similarly, even the acute Prof. Laurence Tribe misidentified the interrelationship of due process and equal protection as a “legal double helix.” Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) (discussing, Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004)).

Rightly linking the concepts under the rubric of “dignity,” in response to Tribe, Prof. Yoshino aptly concluded, “Too much emphasis has been placed on the formal distinction between the equality claims made under the equal protection guarantees and the liberty claims made under the due process or other guarantees. In practice, the Court does not abide by this distinction.” *Id.* at 749.

582. See, e.g., *Ashcroft v. Iqbal*, 566 U.S. 662, 675 (2009); *Davis v. Passman*, 442 U.S. 228, 234 (1979) (noting that Due Process Clause of the Fifth Amendment “forbids the Federal Government to deny equal protection of the laws” (internal quotation marks and citations omitted)); *Ingram v. Faruque*, 728 F.3d 1239, 1243 (10th Cir. 2013).

fundamental character is discernable through neutral reason. Accordingly, substantive and procedural due process would discern and apply those unenumerated rights pursuant to the Due Process Clauses' moral authority to enforce the Declaration of Independence's "unalienable Rights" doctrine. Thus, in theory, the Framers and Reconstruction Congress need not have listed any rights in the Bill of Rights or in the Reconstruction Amendments save "due process of law."⁵⁸³

583. See, *supra* note 555. As a seemingly disgruntled Prof. Dan T. Coenen opined, "If the concept of due process embodied all of what is Fourteenth Amendment equal protection, ... one wonders why that amendment itself contains both a Due Process and an Equal Protection Clause. ... Such a result, it might well be said, offends traditional text-driven canons of construction and thus must be highly structural in nature." Dan T. Coenen, *Institutional Arrangements and Individual Rights: A Comment on Professor Tribe's Critique of the Modern Court's Treatment of Constitutional Liberty*, 2001 U. ILL. L. REV. 1159, 1205 note 133 (2001) (discussing, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995)).

Despite the concerns of theorists such as Coenen, our inner (or outer) textualist must remain disgruntled because all selectively incorporated enumerated rights' status as surplusage, including "equal protection of the laws," is inexorable given that due process is the value monism unifying all more specific constitutional rights, enumerated or unenumerated. Thus, aside from roughly four enumerated rights either deemed non-fundamental or as yet un-litigated (see, *supra* notes 566-67 and accompanying text), everything else -- the First, Second, Fourth, and most of the Fifth, Sixth, and Eighth Amendments -- are redundant because, even if they were not enumerated, the principles of "due process of law" would reveal them to us. Presumably, the Thirteenth Amendment also is surplusage as there are few violations of innate morality more heinous than slavery. Yes, the textualist within us, regardless of its prominence, must have fits; but aggravation cannot change the immutable rules of "Nature and Nature's God."

Moreover, in answer to Coenen inquiry, that so much of our Constitution technically is redundant hardly means that enumerating those rights is a useless gesture -- a waste of valuable textual space. Enumeration starkly reminds us that reason, often prodded by experience, already has identified certain rights as fundamental, thereby relieving us of the burden of teasing them out of the abstract principles of due process. Two prominent scholars agree, "The Framers specifically enumerated protections that they regarded as especially important, and then added a catch-all. It is impossible to give 'due process of law' its historical meaning and avoid redundancy." Chapman and McConnell, *supra* note 359, at 1718. Profs. Chapman and McConnell explicated their conclusion, "The Constitution and Bill of Rights are shot through with prohibitions that some Founders thought to be redundant with enumerated powers or prohibitions. Furthermore, there is no historical evidence that the Founders believed that the antiredundancy canon of interpretation should be determinative. To the contrary, the Framers no less than contemporary constitutional lawyers wrapped their arguments in as many constitutional provisions as possible." *Id.* at 1721.

Comparably, we often enfold and compare the general and the specific because each can inform the other; the specific offers clues how to understand the general, while simultaneously, the general provides analytical tools to comprehend the specific. Such reminds us of the venerable canon of statutory construction, "noscitur a sociis" -- "a word is known by the company it keeps" -- provides that words grouped together should be given related meaning." *Rizo v. Yovino*, 887 F.3d 453, 461 (9th Cir. 2018) (citation omitted); see

Nevertheless, as the second Justice John Marshall Harlan correctly explained, “selective incorporation” coupled with the doctrine of unenumerated rights evinces that, “due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions” in the Bill of Rights.⁵⁸⁴ “Indeed, when originally interpreted under the Fourteenth Amendment’s Liberty Clause, principles such as free speech were applied to restrict state action not through an incorporation doctrine, but as derivations of the very notion of liberty itself.”⁵⁸⁵ Accordingly and worth re-emphasizing, while the first eight amendments certainly are instructive, *if the Constitution contained no mention of rights other than its due process clauses -- if its language were utterly silent except to guarantee “due process of law” -- appeals to reason, informed but not determined by history and experience, would tease from that scant and bare text almost every aspect of the Bill of Rights along with rights unidentified in the Constitution’s prose.*⁵⁸⁶ There is no conclusion to be drawn other than “due process” is the Constitution’s value monism because

also, *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016); *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534 (5th Cir. 2016), cert. denied, 138 S. Ct. 55, 199 L. Ed. 2d 18 (2017). Similarly, “A related canon, *eiusdem generis*, ... appl[ies] ... when interpreting general terms at the end of a list of more specific ones. In such a case, ‘the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Rizo*, 887 F.3d. at 462 (quoting, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114–15 (2001) (quoting 2A NORMAN J. SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 47.17 (1991) (additional citation omitted)); see also, *Magee*, 833 F. 3d at 534.

Thus, canons such as *noscitur a sociis* and *eiusdem generis* suggest that the general precepts of due process not only disclose unenumerated rights, but also enable us to explicate the meaning of specific rights such as free speech, free exercise of religion, and freedom from unreasonable searches and seizures. Comparably, understanding specific rights should provide insights that, through inductive logic, help us better apprehend the abstract principles of due process itself.

584. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

585. Bayer, *supra* note 17, at 395 (citing, *McDonald*, 130 S. Ct. at 3092 & n.9 (2010) (Stevens, J., dissenting) (citing, *inter alia*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *id.* at 672 (Holmes, J., dissenting)); *Malloy v. Hogan*, 378 U.S. 1, 24-25 (1964) (Harlan, J., dissenting)). Such is essentially what so-called “selective incorporation” is and does.

586. As I explicated a few years ago, “Consequently, adept jurists and other officials would have discerned as specific constituents of due process discrete rights such as equal protection, free speech, religious liberty, criminal defense counsel, freedom from self-incrimination and freedom from unreasonable police conduct, even if such rights were not set forth explicitly in specific portions of our Constitution.” Bayer, *supra* note 17, at 395.

we now understand that from the right of “due process of law,” all other fundamental constitutional rights, express or implied, emanate.⁵⁸⁷

b. Due Process as Separation of Powers and Federalism --

The Due Process Clauses’ value monism is further evidenced by judicial recognition that due process governs not only fundamental rights themselves, but other pivotal sections of the Constitution such as the Commerce Clause⁵⁸⁸ which, as part of both Federalism and “separation of powers,” preserve the liberty vouchsafed by “due process of law.” Yes, courts regularly understand Congress’s commerce authority in terms of economic pragmatism, rather than as an expression of natural law.⁵⁸⁹ “Nonetheless, practical commercial reality is not, and correctly never has been, sufficient to explicate entirely Congress’s commerce regulating authority. As Chief Justice Marshall explained in *Gibbons v. Ogden* nearly 200 years ago, ‘This power, like all

587. As noted, the courts have identified a very small number of rights set forth in the Bill of Rights, thus binding on the Federal level, but not on the States because they are not “fundamental.” Specifically excepted are, “the Sixth Amendment’s right to a unanimous jury verdict, the Fifth Amendment’s requirement of indictment by a grand jury and the right to a jury trial under the Seventh Amendment.” *Id.* (citing, *McDonald*, 651 U.S. at 763-65 and notes 12-13).

Under Deontological Originalism, those exceptions are sound only if, according to Kantian morality, deprivation of these purportedly non-fundamental rights does not offend the innate dignity of individuals by treating such individuals merely as means and not simultaneously as ends. *See generally, Part I: Originalism and Deontology, supra* note 7, at Sections 2 and 3. Otherwise, those precedents must be reversed as the Court has done on occasion in different contexts. *E.g.*, *Betts v. Brady*, 316 U.S. 455 (1942) (Sixth Amendment’s right to counsel is not applicable to the States in misdemeanor prosecutions), *o.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Adamson v. California*, 332 U.S. 46 (1947) (Fifth Amendment’s right against self-incrimination is not applicable to the States), *o.* in relevant part, *Malloy v. Hogan*, 378 U.S. 1 (1964).

588. *E.g.*, *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (“[N]ot even resort to the Commerce Clause can defy the standards of due process.”); accord, *e.g.*, *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006) (holding that due process applies to extraterritorial application of U.S. law), cert. denied, 549 U.S. 1343 (2007); *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir. 1976).

589. Justice Holmes, for example, offered, “[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.” *Swift & Co. v. U.S.*, 96 U.S. 375, 398 (1905); *see also, e.g.*, *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946) (“Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.” (citation omitted)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) (“[I]nterstate commerce itself is a practical conception.”); *Narbona v. Gold Coast Beverage Distributors, Inc.*, 2014 WL 11906594 *5 (S.D. Fla. 2014) (quoting, *Swift & Co.*).

others vested in Congress, . . . acknowledges no limitations, other than are prescribed in the constitution”⁵⁹⁰

Consistent with Chief Justice Marshall’s understanding, at the turn of the Twentieth Century, the Supreme Court, speaking through the first Justice Harlan, reiterated, “[T]he power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. *This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument.*”⁵⁹¹ Therefore, while Congress’ unconstitutional use of the Commerce Clause habitually is deemed a violation of the authority of state governments⁵⁹² under the Tenth Amendment,⁵⁹³ in fact, as the Court repeatedly emphasizes, the authority of state governments exists not to aggrandize the states as entities. Rather, the axiomatic theory holds that the division of governmental power between states and the federal level, coupled with the separation of governmental functions -- legislative, executive and judicial -- at the federal levels (a practice adopted uniformly by the States), forestalls tyranny by ensuring that no office or level can exercise dominant control by assuming the full panoply of governmental functions.⁵⁹⁴

590. Bayer, *supra* note 124, at 880 (quoting, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

591. *Champion v. Ames*, 188 U.S. 321, 362-63 (1903) (emphasis added).

592. *E.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (discussing that the police power is a power reserved for the states and not the federal government).

593. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend X.

594. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1546-47 (2016). As the Supreme Court of Washington aptly and emphatically reaffirmed, “Separation of powers created a clear division of functions among each branch of government, and the power to interfere with the exercise of another’s functions was very limited. The doctrine recognizes that each branch of government has its own appropriate sphere of activity. It ensures that the fundamental functions of each branch remain inviolate.” *Hale v. Wellpinit School Dist. No. 49*, 165 Wash. 2d 494, 504 (2009) (citations omitted).

The classic theory avers that because their authority and power derive from their separate status, each office and level of government jealously guards its particular authority from invasions -- deliberate or inadvertent -- by the others. Yet, because only by functioning together can they form a workable whole, each office and level must cooperate even as they preserve their separate identities. As the Court has accented, “Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.” *Loving v. U.S.*, 517 U.S. 748, 773 (1996); *see also, e.g.*, *Hale*, 165 Wash.2d, at 504 (“However, separation of powers ‘does not depend on the branches of government being hermetically sealed off from one another.’ It recognizes that the separate branches must remain partially

In this way, the possibility of autocracy is minimized if not completely obviated for government offices and levels cannot meld into one dictatorial entity. Therefore, the principle of divided powers allows courts comfortably to assert that, “Federalism secures the freedom of the individual.”⁵⁹⁵ Indeed, as though enforcing Kant’s third categorical imperative that Government exists to protect human dignity and, therefore, must comport itself morally,⁵⁹⁶ *the Supreme Court has unequivocally clarified that under the Constitution, organs of government, including States, are not ends in themselves, but rather means to preserve the goal of liberty.*⁵⁹⁷

Because “liberty” interests are fostered by constitutional separation of powers, it follows that, like discrete fundamental rights, the due process clauses alone, absent specific provisions, denote some systemic, mandatory estrangement of governmental functions into disconnected offices sufficient to preserve liberty. Thus, if the Constitution had no governmental structure at all, the due process clauses would require the creation of a system that fulfills the liberty interests of separation of powers, although the actual form could be somewhat different from that set forth in our Constitution.⁵⁹⁸

E. The Meaning of Due Process --

We now understand that “due process of law” is accepted as the Constitution’s value monism, that is, were there nothing but a due process clause, interpretation thereof would comprehend some system of separated

intertwined in order to ‘maintain an effective system of checks and balances, as well as an effective government.’”) (quoting, *Carrick v. Locke*, 125 Wash.2d 129, 135 (1994)).

595. *Bond v. United States*, 564 U.S. 211, 221 (2011). *See also*, *Dept. of Transportation v. Assoc. of Am. Railroads*, 135 S.Ct. 1225, 1233 (2015); *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011) (noting that the separation of powers protects the individual in addition to protecting each branch of government from intrusion by other branches). As Justices Clarence Thomas and Antonin Scalia summarized, “The Framers believed that the division of powers between the Federal Government and the States would protect individual liberty.” *U.S. v. Kebodeaux*, 570 U.S. 387, 420 (2013) (Thomas, J., with Scalia, J., dissenting).

596. *See generally*, *Part I: Originalism and Deontology*, *supra* note 7, at Section 3-d-5.

597. “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities. ... To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.” *New York v. U.S.*, 505 U.S. 144, 181 (1992); *see also, e.g.*, *LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) (quoting, *New York v. U.S.*).

598. *See generally*, *Bayer*, *supra* note 124, at 879-884. As a practical matter, almost certainly any system discerned from the sense of “due process” would include a legislature, an executive and a judiciary. But, their exact parameters might not comport on “all fours” with what our Constitution explicitly provides.

powers augmented by fundamental rights, all to protect “liberty.” We have reached the point of defining the exact meaning of due process, a definition this writing argues, that to date has best been captured by the *dignity paradigm*. Fittingly, over a century ago, the Supreme Court expressed the rudimentary nature of due process, “The fundamental guarantee of due process is absolute and not merely relative. . . . [T]he constitutional safeguard as to due process [is] at all times dominant and controlling where the Constitution is applicable.”⁵⁹⁹ Thus, “due process” in its most abstract and fundamental essence must likewise be the meaning of “unalienable Rights” under the Declaration of Independence. The next step, then, is explaining what “due process of law” specifically means.

1. Due Process Protects Individuals from “Arbitrary” Governmental Conduct --

Expressing the essence of liberty, the Supreme Court fairly recently reaffirmed in *Sacramento County v. Lewis*⁶⁰⁰ that substantive and procedural due process prevent exactly what the Declaration addressed: tyranny. Specifically, *Lewis* stressed that “due process of law” forbids government from “abusing its power, or employing it as an instrument of oppression,”⁶⁰¹ a proposition keenly followed by the judiciary.⁶⁰² The *Lewis* Court summarized that proposition with a familiar legal term, “Since the time of our early explanations of due process, *we have understood the core of the concept to be protection against arbitrary action* . . . We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government, . . .’”⁶⁰³ *Lewis* embraced

599. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909); *see also*, *United States v. Smith*, 480 F.2d 664, 668-69 note 9 (5th Cir. 1973).

600. *County of Sacramento v. Lewis* 523 U.S. 833 (1998).

601. *Id.* at 846 (quoting, *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)), abrogated on other grounds, *Saucier v. Katz*, 533 U.S. 194 (2001), *Saucier* receded from in *Pearson v. Callahan*, 555 U.S. 223 (2009)).

602. *E.g.*, *Doe v. Rosa*, 795 F.3d 429, 437 (4th Cir. 2015); *Hatfield v. O’Neill*, 534 Fed. Appx. 383, 844 (1st Cir. 2013); *Raab v. Blakey*, 370 Fed. Appx. 303, 309 (3rd Cir. 2010).

603. *Lewis*, 523 U.S. at 836 (emphasis added; quoting, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The Louisiana Supreme Court expressed that well-accepted standard succinctly: “Substantive due process may be broadly defined as the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property. *The essence of substantive due process is protection from arbitrary and unreasonable action.*” *Babineaux v. Judiciary Commission*, 341 So.2d 396, 400 (La. 1976) (emphasis added; citing, *Poe v. Ullman*, 367 U.S. 497 (1961); *Galvan v. Press*, 347 U.S. 522 (1954); 16 Am. Jur.2d, *Constitutional Law*, s 550, p. 946).

the nascent Supreme Court's two-centuries-old interpretation of Magna Carta, expressed but three decades after ratification of the Bill of Rights, "[A]fter volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: *that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.*"⁶⁰⁴ Verifying its link to the meaning of due process, Lewis explained that, pursuant to the above-quoted passage from *Okely*, "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action ..."⁶⁰⁵

Regarding the *post-Bellum* Amendments, uninterrupted precedent of both the Supreme Court⁶⁰⁶ and lower federal courts,⁶⁰⁷ identically confirm the objective of the Reconstruction Congress and ratifying states that, "the [Fourteenth] Amendment[']s Due Process Clause] protected everyone in the United States from arbitrary and capricious abuses by their state governments."⁶⁰⁸

Conceptually, there can be no greater protection from official misconduct because those broad categories -- "arbitrary and capricious abuses" -- subsume every conceivable governmental malfeasance serious enough to evoke a sense of tyranny.⁶⁰⁹ Nothing is larger in the Constitution

604. *Bank of Columbia v. Okely* 17 U.S. (4. Wheat.) 235, 244 (1819) (emphasis added). The Court's conclusion in *Okely* has been reaffirmed and remains good law as of this writing. *Lewis*, 523 U.S. at 845-46; *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986) (quoting *Okely*); *Hurtado v. California*, 110 U.S. 516, 527 (1884) (same).

605. *Lewis*, 523 U.S. at 845-46

606. Due process is, "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (procedural due process, "protect[s] against arbitrary deprivation of property").

607. E.g., *Uschock v. Pennsylvania*, 2018 WL 834247 (Mem) at *1 (3rd Cir. 2018) (*per curiam*); *Hancock v. County of Rensselaer*, 882 F.3d 58 (2d Cir. 2018); *Livengood v. Bureau of Prisons*, 503 Fed. Appx. 104, at **4 (3rd Cir. 2012); *Harron v. Town of Franklin*, 660 F.3d 531, 535 (1st Cir. 2011); *Green v. Post*, 574 F.2d 1294, 1302 (10th Cir. 2009); *Hawkins v. Holloway*, 316 F.3d 777, 784 (8th Cir. 2003); *Nix v. Franklin County School District*, 311 F.3d 1373, 376 (11th Cir. 2002); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 98 (D.C. Cir. 2002)

608. Finkelman, *supra* note 297, at 1034.

609. An apt set of definitions is found in J. Michael McGuinness, *The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness Standard*, 11 GEO. MASON U. CIV. RTS. L.J. 263, 293 note 111 (2001),

-- no idea more encompassing -- than that which by its own significance, with nothing else to enable it, enforces the natural law principles of the Declaration of Independence by “protect[ing] everyone in the United States from arbitrary and capricious abuses by their [] governments.”⁶¹⁰

2. Governmental Action Is “Arbitrary or Capricious” If It Is Immoral, that Is, Lacking “Fundamental Fairness” --

Importantly, as mandated by its deontological origins, courts grant that *determining whether a challenged governmental action is arbitrary or capricious, in fact, constitutes a moral judgment*. As Prof. Richard Worf summarized, “due process or equal protection contexts . . . embody deontological concepts of fairness and morality.”⁶¹¹ *This makes perfect sense*

Arbitrary is defined as “without adequate determining principle ... [or] fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, ... decisive but unreasoned.” [see *United States v. Carmack*, 329 U.S. 230, 243 n.14 (1946).] Capricious is defined as “apt to change suddenly, freakish; whimsical; humorsome.” *Id.* See also *Bruno’s, Inc. v. U.S.*, 624 F.2d [592,] 594 [5th Cir. 1980] (stating that arbitrary and capricious means either “unwarranted in law” or “without justification in fact.”); *Dynallectron Corp. v. United States*, 659 F. Supp. 64, 68 (D.D.C. 1987) (noting that one indicia of arbitrary and capricious conduct is “subjective bad faith”).

See *Chaudron v. Pasquotank County Dep’t of Soc. Serv.*, No. 84-1-CIV-2, 177 (E.D.N.C. 1985). In jury instructions in *Chaudron*, the court defined arbitrary as “subject to one’s own prejudices.” Capricious was defined as “whimsical, fickle, or trifling.” Trivial was defined as “unsubstantial, insignificant, or trifling.” See also *Flower Cab Co. v. Petite*, 658 F. Supp. 1170, 1179 (N.D. Ill. 1987) (defining arbitrary as a decision reached “without adequate determining principle or was unreasoned”).

In several public employee discharge cases, the Claims Court employed the arbitrary and capricious test. See, e.g., *Crocker v. United States*, 127 F. Supp. 568, 572-73, n.12 (Ct. Cl. 1955) (“Arbitrary has been defined as ‘fixed or done capriciously or at pleasure; without adequate determining principle ... depending on the will alone ... capriciously.’”); *Gadsden v. United States*, 78 F. Supp. 126, 128 (Ct. Cl. 1948) (stating that the court equates arbitrary and capricious with bad faith or “so grossly erroneous as to imply bad faith”).

610. Finkelman, *supra* note 297, at 1034. While Prof. Finkelman’s discussion concerns the effects of the Fourteenth Amendment, we know that Congress enacted and promoted the ratification of that amendment’s Due Process Clause to complete what was begun when the nation adopted the Fifth Amendment whose Due Process Clause applies to the Federal level. See, *supra* notes 331-396 and accompanying text. Therefore, the two due process clauses combined protect all those under the jurisdiction of the United States “from arbitrary and capricious abuses by their [] governments.”

611. Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 119 (2007); see also, e.g., Aya Gruber, *Righting*

because the constitutional fault of arbitrary or capricious conduct is not that it is bad policy (which may not be so), nor that it is inefficient (which likewise may not be so), but that it is wrongful -- arbitrary or capricious conduct might promote the good, but it contravenes the right. Indeed, one prime axiom of due process jurisprudence familiar to every lawyer and law student is that reviewing courts, “begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained ...”⁶¹² That perspective, well over a century old,⁶¹³ is encapsulated by the popular phrasing, although, “evidence ... may cast some doubt on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary ‘to sit as a ‘superlegislature to weigh the wisdom of legislation’ . . .”⁶¹⁴

Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 BUFF. L. REV. 433, 457 (2004) (fairness and due process are deontological concepts); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087, 2093 (2001); Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the “Metaethics” of Legal Ethics*, 49 EMORY L.J. 87, 105 (2000) (due process is deontological because it mandates, “structural values that must be respected in and of themselves, . . . regardless of the social results any particular instance might produce . . .”).

612. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983); *see also, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 973 (1982) (“Our view of the wisdom of a state constitutional provision may not color our task of constitutional adjudication.”); *Schweiker v. Hogan*, 457 U.S. 569, 589 (1982) (“A belief that an Act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that it is unconstitutional.”); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (“it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.” *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93 (1963).”).

613. “But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court.” *Leffingwell v. Warren*, 67 U.S. 599, 606 (1862).

614. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (quoting, *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (citation omitted). Granted, sometimes courts express the concept as, “Whether embodied in the Fourteenth Amendment or inferred from the Fifth, *equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.*” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added); *see also, e.g.*, *Seepersad v. Sessions*, 892 F.3d 121, 123 (2d Cir. 2018); *ACRA Turf Club, LLC v. Zanzuccki*, 724 F. App’x 102, 110 (3d Cir. 2018). With respect, the inclusion of the concept “fairness” is offhand, reflexive, and fundamentally incorrect. Understandably, courts wish to underscore the inappropriateness of upholding or rejecting constitutional challenges based not on objective constitutional premises, but rather on judges’ subjective assessments of the merits or demerits of the challenged governmental action’s worth. In that regard, perhaps writing hastily, courts may deem evaluating “fairness” to be synonymous with judging the societal value of governmental policy.

Instead, nearly seven decades ago, as though anticipating the Court's formal expression of dignity as due process' paradigmatic meaning, Justice Felix Frankfurter intrepidly and enthusiastically declared:

It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. *Due process is that which comports with the deepest notions of what is fair and right and just.*⁶¹⁵

Constitutional law as expressions of morality could be nothing else and nothing less because, as we now know, the Constitution exists to enforce the natural rights principles of the Declaration.⁶¹⁶ Those principles, in turn, derive from natural law which itself is a moral construct.⁶¹⁷ *Accordingly and rightly, the courts have understood due process' prohibition against arbitrary and capricious governmental conduct to be a moral command, therefore, resolving due process disputes requires moral determinations based, understandably, on a working knowledge of what actually comprises moral comportment.* Despite some resistance past and present,⁶¹⁸ the courts

However, as next discussed, the Judiciary firmly and aptly has explained that official conduct violates the Due Process Clauses if the conduct offends principles of "fundamental fairness." Consistent with Deontological Originalism, fundamental fairness does not involve judging the wisdom, efficiency, or prudence of challenged governmental actions. Rather, properly understood and applied, fundamental fairness inquires whether the challenged actions impugn the dignity of adversely affected persons. If yes, the actions are unconstitutional. Thus, assessing fundamental fairness is a matter of moral evaluation premised on unbiased reason, not subjective appraisal of any given policy's usefulness.

615. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), abrogated on other grounds, *Ford v. Wainwright*, 477 U.S. 399 (1986).

616. *See, supra* notes 126-209 and accompanying text.

617. *See, supra* notes 210-279 and accompanying text.

618. For example, contrary to it general jurisprudence, roughly one-hundred-thirty years ago, the Supreme Court opined:

If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law. ... It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures.

Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 519-20 (1885); *see also, e.g., Fallbrook Irr. Dist. v. Bradley*, 164 U.S. 112, 157 (1896) (citations omitted) ("It never was intended that the

hold that, *because the Due Process Clauses forbid Government from acting arbitrarily or capriciously, to fulfill that immutable moral duty, governmental conduct must comport with "fundamental fairness."*⁶¹⁹ That is, to be constitutional, government conduct need not be efficient, nor well-considered, nor smart; *rather, it must be fair*, a principle constantly repeated

court should, as the effect of the [fourteenth] amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination."); *French v. Barber Asphalt Pav. Co.*, 181 U.S. 324, 328-29 (1901); *Davidson v. New Orleans*, 96 U. S. (6 Otto) 97, 103 (1877).

More recently, three justices angrily and inaptly asserted, "a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of 'due process.'" *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

619. *E.g.*, *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 24-25 (1981) (due process, "expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty."); *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977) ("The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment"); *Kinsella v. U.S. ex rel. Singleton*, 362 U.S. 234, 246 (1960) (citation and footnote omitted) ("Due process cannot create or enlarge power. ... It has to do, as taught by the Government's own cases, with the denial of that 'fundamental fairness, shocking to the universal sense of justice.' *Betts v. Brady*, 1942, 316 U.S. 455, 462, [o., *Gideon v. Wainwright*, U.S. (1963)]"); *accord.*, *U.S. v. Russell*, 11 U.S. 423, 432 (1973).

As one treatise accented, the concept of constitutional fundamental fairness predates the Civil War:

The fundamental fairness doctrine was not adopted as the reigning interpretation of due process until after the adoption of the Fourteenth Amendment, when the Supreme Court found itself applying due process to actions of state governments. However, many commentators have found the roots of that doctrine in several prominent state and federal rulings rendered over the period extending from the adoption of the Bill of Rights to the end of the Civil War.

1 LaFave, Israel, King, Kerra, *Crim. Proc.* § 2.4(a) (4th ed.), CRIMINAL PROCEDURE | December 2017 Update, Part I. Introduction and Overview, Chapter 2. *The Constitutionalization of Criminal Procedure*, § 2.4(c) The pre-Fourteenth Amendment cases, <https://1.next.westlaw.com/Document/1986034aa9cf311dc8c42a169332e61f0/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Category%29> (accessed, Feb. 28, 2018) (footnotes omitted).

by the both Supreme Court⁶²⁰ and lower courts.⁶²¹ The appellation fundamental fairness nicely encapsulates the anti-arbitrariness foundation of the Fifth and Fourteenth Amendments for, as earlier discussed, Justice Felix Frankfurter, an apostle of judicial restraint,⁶²² boldly but aptly declared that due process is nothing less than, “ultimate decency in a civilized society.”⁶²³

3. Discerning Rights under the Due Process Clauses Is an Exercise in Deontological Moral Reasoning --

Let us now combine the foregoing aspects of due process analysis to forge one basic metatheory. As we now know, this Nation ratified the Constitution, including its *post-Bellum* amendments, to enforce as America’s highest law the Declaration of Independence’s philosophy that government

620. “In construing that Amendment, we have held that it imposes minimum standards of fairness on the States, ...” *Danforth v. Minnesota*, 552 U.S. 264, 269 (2008); *see also, e.g., Snyder v. Com. of Massachusetts*, 291 U.S. 97, 117 (1934) (per Cardozo, J.), *o. in part*, *Malloy v. Hogan*, 387 U.S. 1 (1964) (“Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results.”); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (per Cardozo, J.), *o. Benton v. Maryland*, 395 U.S. 884 (1969).

621. *E.g., Williamson v. Parker*, 2017 WL 2986898 at *2 (10th Cir. 2017); *Joy Pipe, USA v. ISMT Ltd.*, 2017 WL 3080901 at *8 (5th Cir. 2017); *Dang. v. Sheriff, Seminole Cnty., Fla.*, 856 F.3d 842, 850 (11th Cir. 2017); *Armstrong v. Daily*, 786 F.3d 529, 539 (7th Cir. 2015) (the constitutional protections that individuals may sue to enforce under 42 U.S.C. § 1983, “vindicate rights of fundamental fairness”); *U.S. v. Boultinghouse*, 784 F.3d 1163, 1172 (7th Cir. 2015) (regarding, “knowing and voluntary waiver of one’s [Sixth Amendment] right to an attorney ... the due process framework ... is a flexible framework that is focused on the fundamental fairness of the hearing ... [evincing] that the defendant made a knowing and voluntary choice to proceed without counsel.”); *In re Tsarnaev*, 780 F.3d 14, 33 (1st Cir. 2015) (“Fifth Amendment’s Due Process Clause requires fundamental fairness in [criminal] trials”); *U.S. v. Woods*, 764 F.3d 1242, 1246 (10th Cir. 2014) (citations omitted) (that a codefendant’s guilty plea is not admissible evidence of another defendant’s guilt “is grounded in notions of fundamental fairness and due process ... ”); *U.S. v. Smith*, 759 F.3d 702, 706 (7th Cir. 2014) (“Plea agreements ... are negotiated, executed, approved, and enforced in the context of a criminal prosecution that affords the defendant a due process right to fundamental fairness, ...”); *United States v. \$87,118.00 in U.S. Currency*, 95 F.3d 511, 517 (7th Cir. 1996) (quoted in, *U.S. v. Jimenez-Bencevi*, __ F.3d __, 2015 WL 3486658 at *6 (1st Cir. 2015), although contractual, “ordinary contract principles” must not be applied to immunity agreements in ways that “violate the defendant’s rights to fundamental fairness under the Due Process Clause.”)

622. Courts, “must adopt the thinking of Mister Justice Frankfurter, the archpriest of judicial restraint, ...” *Boysen v. Treadway Inn of Lake Harmony, Inc.*, 53 F.R.D. 96, 98 (E.D. Pa. 1971).

623. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring), *o. in part*, *Malloy v. Hogan*, 387 U.S. 1 (1964).

is legitimate only so long as it protects and preserves those “unalienable Rights” extant in the natural order of existence -- derived from “God and Nature’s God.”⁶²⁴ The natural law principles underlying such natural rights, in turn, sound in deontological moral ideology, that is, Government’s duty to enforce unalienable -- fundamental -- rights is a moral duty; *therefore, morality tells us what are and are not constitutional rights.*

a. The Supreme Court’s Early Post-Civil War Due Process Rulings --

As just discussed, building on admittedly scant *pre-Bellum* precedent,⁶²⁵ and in response to the Reconstruction Amendments, the Supreme Court set forth the core principle that “due process of law” proscribes “arbitrary or capricious” governmental conduct, meaning, governmental actions that deny “fundamental fairness.” The “fundamental fairness” principle remains, as it should, controlling constitutional law.⁶²⁶ Based on its natural law genesis, the Court recognized well over a century ago, as it must, the applicable deontological premise: that due process protects rights arising from “*a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.*”⁶²⁷ In that way, the 1897 Court reiterated its observation of just three years earlier in its pivotal *Hurtado* opinion,⁶²⁸ that due process encompasses “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”⁶²⁹

Hurtado’s phrasing, easily comports with the Constitution’s overarching purpose to enforce the natural rights principles of the Declaration of Independence, a principle expressly reaffirmed by the ratification of the Fifth and Fourteenth Amendments. One year after *Hurtado*, the Court in *Holden v. Hardy* stated the proposition unequivocally,

This court has never attempted to define with precision the words “due process of law” ... *It is sufficient to say that there are certain immutable*

624. See, *supra* Section 2.

625. See, *supra* notes 604-05 and accompanying text.

626. See, *supra* notes 611-23 and accompanying text.

627. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897) (due process prohibits a State from taking private property without just compensation) (emphasis added).

628. See, *supra* notes 514-20 and accompanying text (*Hurtado*’s explanation that the Constitution recognizes substantive due process and that substantive due process constrains the legislative as well as the executive branches).

629. *Hurtado*, 110 U.S. at 535.

*principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard ... Recognizing the difficulty in defining with exactness the phrase “due process of law,” it is certain that these words imply a conformity with natural and inherent principles of justice, ...*⁶³⁰

1908’s *Twining v. New Jersey*⁶³¹ reaffirmed *Holden* and other precedent through prose that capture fully and freely the meaning of the Constitution as enforcer of the natural law *cum* fundamental rights philosophy preserved by the Due Process Clauses:

‘This court has never attempted to define with precision the words ‘due process of law.’ . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.’ *Holden v. Hardy*, 169 U.

630. *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898) (emphasis added) (Utah law limiting working day in smelting plants to eight hours does not violate the Constitution) (quoted by *Malloy v. Hogan*, 378 U.S. 1, 22 (1964)); *see also*, *Cole v. Trammell*, 755 F.3d 1142, 152-53 (10th Cir. 2014); *U.S. v. Pogamy*, 465 F.2d 72, 77 note 7 (3rd Cir. 1972); *U.S. v. Schaffer*, 433 F.2d 928, 930 (5th Cir. 1970).

Of course, the Constitution does not constrain the states and the federal level to adopt only those procedures and to recognize only such discrete and specific rights as were understood at the time of the Declaration. As *Holden* explicated,

[W]hile the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible, and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens, as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land.

169 U.S. at 387 (emphasis added); *see also*, e.g., *Hurtado*, 110 U.S. at 528 (same).

Thus, the confines of immutable legal rights recognize flexibility in application *so long as such neither abrogates or otherwise infringes fundamental rights* for,

There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and, as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.

Holden, 169 U.S. at 388-89.

The *Holden* Court offered as a prime example what may be identified under today’s vernacular as the innate dignity of women. “Married women have been emancipated from the control of their husbands, and placed upon a practical equality with them, with respect to the acquisition, possession, and transmission of property.” *Id.* at 386.

631. 211 U.S. 78 (1908) (right against self-incrimination is not applicable to the states *via* the Due Process Clause of the Fourteenth Amendment), *o.*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383, 387 [1898]. ‘The same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’ Re *Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, 934 [1890]. ‘The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.’ *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650, 652 [1904, o. in pt., *Pointer v. Texas*, 380 U.S. 400 (1965)].⁶³²

Such then is Deontological Originalism: the meta-principle commanding that, as recognized by the Declaration of Independence and enforced by the Constitution, although wide and long, the parameters of governmental innovation must abide by the “natural and inherent principles of justice,” referred to as well as the “immutable principles of justice,” or as “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” or simply as “fundamental rights,” all of which are transcendent, a priori moral precepts of natural rights, derived from natural law, that protect all persons under the jurisdiction of the United States.

A particularly humane and profound statement of the foregoing constitutional morality is the nearly century-old *Meyer v. Nebraska*,⁶³³ arguably the Supreme Court’s “first right-to-privacy case,”⁶³⁴ thus an important example of substantive due process’ connection to the moral precepts of natural rights. Authored ironically by Justice James Clark McReynolds, renown as perhaps the single most prejudiced and unpleasant person ever to hold a Supreme Court justiceship,⁶³⁵ *Meyer* explicitly and

632. *Id.* at 101-02. Twenty-four years later, appealing to those “immutable principles of justice” denoted by the due process clauses, the Court ruled that denial of counsel in a capital case violates the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

633. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute proscribing the teaching of non-ancient foreign languages to students who had not completed the eighth grade violates the substantive due process rights of teachers and parents).

634. Wilson R. Huhn, *Abraham Lincoln’s Influence on the Modern Supreme Court’s Understanding of Liberty and Equality*, 36 OK. CITY L. REV. 555, 582 (2011).

635. Prof. Barbara Bennett Woodhouse described the acerbic McReynolds as, “the reactionary Associate Justice, a legendary bigot who hated Germans, Catholics, and Jews, and

yet authored the famous icons of liberal toleration.” Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1002 (1992). McReynolds was remarkably intelligent, well-educated, and, “blessed with a physical beauty that made him strangely attractive even to those who had reason to hate him.” *Id.* at 1081 (footnote omitted). Although apparently highly charismatic, McReynolds was extraordinarily prejudiced, intolerant and generally nasty in demeanor, attitude and nature. *Id.* McReynolds, “referred derisively to Jews as ‘Hebrews’ or the ‘orient,’ to women lawyers as the ‘female,’ [and,] to Blacks as ‘darkeys.’ ... He thought Blacks ‘ignorant, superstitious, immoral, ... improvident, lazy,’ ‘unfit’ for politics, and ‘unworthy’ of equality.” *Id.* (citations omitted).

McReynolds did not hide his derision from his “Jewish colleagues, [Justices Louis] Brandeis and [Benjamin] Cardozo, refusing to shake hands, turning his back on them in conference, disdaining their writings, and explaining, ‘that for four thousand years the Lord tried to make something out of Hebrews, then gave it up as impossible and turned them out to prey on mankind in general — like fleas on the dog for example.’” *Id.* at 1082 (quoting, ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE OLIVER WENDELL HOLMES DEVISE*, IX: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921, at 354 (Paul A. Freund & Stanley N. Katz eds., 1984) (quoting reprints from a “return to Holmes in a case [*Evans v. Gore*, 253 U.S. 245 (1920)] in which Holmes and Brandeis were dissenting”). Among his many insults to Brandeis, McReynolds would leave the conference whenever Brandeis discussed a pending case. In 1924, an exasperated Chief Justice Taft cancelled the annual Court photograph of the nine justices due to McReynolds’ refusal to participate because, based on seniority rankings, he would be seated next to Brandeis. Louise Weinberg, *The McReynolds Mystery Solved*, 89 DENVER U. L. REV. 133, 141-42 (2011) (footnotes omitted). Similarly, McReynolds refused to, “attend [Justice Felix] Frankfurter’s robing ceremonies (‘My God, another Jew on the Court!’) in 1939.” Jordan S. Rubin, *The Interpretation of Umpires’ Dreams: Testing Supreme Court Nominees’ Racial Biases*, 13 RUTGERS RACE & L. REV. 147, 160 note 68 (2012) (quoting, Henry J. Abraham, *Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Bush II* 140 (5th ed., 2008) (citations omitted)).

McReynolds (sadly like the present occupant of the Oval Office) took cruel pleasure in peppering his criticisms of persons with crass insults. “In ... emotional remarks from the bench, Justice McReynolds compared [then-President Franklin Delano Roosevelt] to Nero ...” Anna Gelpern, *Financial Crisis Containment*, 41 CONN. L. REV. 1051, 1093 (2009). Indeed, McReynolds, “especially hated Roosevelt and vowed [erroneously as it turned out], ‘I’ll never resign as long as that crippled son-of-a-bitch is in the White House.’” Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L. QUARTERLY 161, 244 (2007) (quoting, WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 121 (1995)). McReynolds’ non-Jewish colleagues were fair game as well. For instance, “During the Harding Administration, Justice [John Hessin] Clarke expressed a desire to resign partly because ‘McReynolds had made life on the Court almost unbearable for him by his incessant insolence and personal insults.’” Neumann at 244 (quoting, DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 42 (1964)).

McReynolds did not limit his renowned unpleasantness solely to tormenting his peers, individuals who, if they wished, had the authority and station to confront him. Stories are legion regarding his fondness for simply being horrid to all and sundry, often indulging “petty cruelties.” Laura Krugman Ray, *Justices at Home: Three Supreme Court Memoirs*, 101 MICH. L. REV. 2103, 2110 (2003). For instance, fresh from Harvard Law School, young John Knox,

candidly linked substantive due process with the Declaration's philosophy extolling the right to "the orderly pursuit of happiness by free men."⁶³⁶ Striking a Nebraska law banning the teaching of non-ancient foreign languages in schools,⁶³⁷ the Court underscored its rationale by again evoking the spirit of the Declaration, noting that the pursuit of education is essential, *inter alia*, to the "happiness of mankind."⁶³⁸ Famously, two terms after

McReynolds' "secretary" -- law clerk -- for the momentous 1936-37 Supreme Court Term, later recounted that he was, "thrilled when McReynolds, leaving town for the weekend, asks him to draft an opinion. On his return, McReynolds makes no mention of the draft, the product of long hours of hard work, except to deposit it gently in his wastebasket after observing to his clerk that '[w]e will now start writing the opinion as it should be written!'" *Id.* at 2110-11 (quoting, JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON* (Dennis J. Hutchinson & David J. Garrow eds., 2002)). That episode of McReynolds' cruelty is particularly ironic given his reputation for being especially, "lazy in his opinion writing." Laura Krugman Ray, *America Meets the Justices: Explaining the Supreme Court to the General Reader*, 72 TENN. L. REV. 573, 588 (2005) (quoting, DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 222 (1936)).

It is piteous but hardly surprising that, "No Justice attended McReynolds' funeral, although several went to the funeral of his messenger [Harry Parker], an African-American who for many years had suffered with great dignity through McReynolds' racist tirades." Neumann at 244 (citing, DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* 112 (1999)). Prof. Woodhouse seems justified indeed to classify McReynolds as, "the most bigoted, vitriolic, and intolerant individual ever to have sat on the Supreme Court, ..." Woodhouse at 1081. There is merit, then, to the claim that McReynolds is, "[t]he Supreme Court's greatest human tragedy." Ray at 588 (quoting, DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 222 (1936)).

636.

While this court has not attempted to define with exactness the liberty thus guaranteed, ... [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law *as essential to the orderly pursuit of happiness by free men*.

Meyer v. Neb., 262 U.S. at 399 (emphasis added).

637. Today, of course, such a prohibition seems extraordinarily peculiar, an unjustified and harmful impediment to educating future adults in the modern world. As a matter of historical fact, Nebraska's ban "had origins in both World War I-inspired nativism and Progressive efforts to use the educational system to homogenize the population, [and] was a precursor to efforts to entirely ban private schooling." David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2043 (2014) (footnotes omitted).

638. *Meyer v. Neb.*, 262 U.S. at 400 (quoting, *Northwest Territory Ordinance of 1787*, 1 STAT. 50).

Justice Holmes dissented in the companion case to *Meyer* averring that Nebraska's restriction against teaching any foreign language is at least reasonable because, "Youth is the time when familiarity with a language is established and if there are section [sic] in the State where a child would hear only Polish or French or German spoken at home I am not prepared

Meyer, *Pierce v. Society of Sisters*, likewise authored by Justice McReynolds, struck an Oregon law prohibiting private school education of children from ages eight through 16-years-old.⁶³⁹ Logically, *Pierce* cited *Meyer* as its main precedent to castigate the prohibition against private schooling as “arbitrary, unreasonable, and unlawful interference with [the rights of parents and guardians].”⁶⁴⁰ More profoundly, the *Pierce* Court accented that, despite its authority to set reasonable standards of education and safety, Oregon failed to treat its children with due regard for their young personhoods:

As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. *The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*⁶⁴¹

to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.” *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Iowa statute forbidding the teaching of German in schools unconstitutional) (Holmes, J., with Sutherland, J., concurring in the *Bartels* holding but dissenting from the holding in *Meyer v. Nebraska*).

Even for a jurist as willing as was Holmes to accord states the widest possible legislative discretion, his logic is odd in that foreign language instruction seems obviously linked to educating youth in the increasingly modernized post-World War I era. Especially as all other courses would be taught in English, a portion of classroom time dedicated to teaching a modern foreign language hardly seems to jeopardize a state’s goal of inculcating English as the primary tongue of its minor citizenry. Regardless, Holmes was true to the logic of his *Meyer* dissent, noting that while a blanket ban on non-classical languages may be rational, Iowa’s singling out for exclusion only German is constitutionally irrational as it lacks any of the merits of Nebraska’s complete ban and has no separate virtues to otherwise support it. Accordingly, Holmes, “agree[d] with the Court as to the special proviso against the German language contained in the [Iowa] statute ...” *Id.* at 413 (Holmes, J., with Sutherland, J., dissenting).

639. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

640. *Id.* at 536.

641. *Id.* at 535 (emphasis added). Unlike *Meyer*, *Pierce* was unanimous, with Justices Holmes and Sutherland this time joining the Court’s opinion.

Two years thereafter, again by the pen of Justice McReynolds, citing *Meyer* and *Pierce*, the Court struck under the Fifth Amendment’s Due Process Clause, the then-territory of Hawaii’s statute prohibiting “foreign language schools,” meaning secular schools that do not conduct their courses in either English or Hawaiian, unless such schools obtained special permits which required both annual renewals and the payment of annual fees. *Farrington v. Tokushige*, 273 U.S. 284 (1927). While not expanding on *Meyer*’s earlier theory linking

The foregoing opinions, particularly *Meyer's* unashamedly enthusiastic recognition that natural rights under the Declaration informs constitutional law,⁶⁴² have not gone either unnoticed or unremarked upon by today's judiciary. Predictably, Justice Antonin Scalia, with Chief Justice John Roberts and Justice Clarence Thomas, impugned *Meyer* as "repudiated" "dicta," an example of how "this Court has at times indulged a propensity for

substantive due process to the pursuit of happiness guaranteed by the Declaration, the *Farrington* Court noted, "Enforcement of the act probably would destroy most, if not all [foreign language schools]; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Id.* at 298.

Accordingly, the Court concluded, "We, of course, appreciate the grave problems incident to the large alien population of the Hawaiian Islands. These should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended." *Id.* at 299.

As in *Pierce*, without special comment, Justices Holmes and Sutherland joined the unanimous *Farrington* opinion. Presumably, they agreed that Hawaii did not rationally address its diversity problems by banning "foreign language schools," but rather, irrationally imposed untoward burdens and extracted discriminatory fees.

642. That the mordant, bigoted, insufferable Justice McReynolds (*see, supra* note 635) authored these seemingly enlightened elaborations of natural law constitutionalism is puzzling, especially as "McReynolds is remembered as the longest-sitting of the 'Four Horsemen,' a quartet of Supreme Court Justices [McReynolds, Pierce Butler, George Sutherland, and Willis Van Devanter] who generally could be counted on to vote to strike down progressive legislation", including even child labor laws. Weinberg, *supra* note 635 at 140. Regarding why someone of Justice McReynolds' temperament and tastes took the position he did as author of *Meyer* and its progeny, "The explanation may lie in the fact that, although *Meyer's* result was pluralist and libertarian, its underlying philosophy was emphatically reactionary." Woodhouse, *supra* note 635, at 1084. Prof. Weinberg similarly explained,

The striking down of laws compelling attendance in public schools, the permission to parents to home-school their children, the disapproval of English-only teaching following upon a veritable flood of immigration, all served the interests of those who might wish to exploit child labor. McReynolds understood the value to employers of helping distressed families sell their children's labor. He understood the value to employers of permitting parents to deny their children the education which might offer them escape in later life from the sweat shops and factories of that period. McReynolds' effort, in this view, had been to loosen the web of progressive-era legislation that sought to protect a child from its parents.

McReynolds, that most reactionary of judges, might well have thought that immigrant parents *ought* to have the "liberty" of diminishing their children's opportunity to obtain a secular public education in the English language. Those children, at once or later, could furnish a cheap, submissive, and trapped pool of workers. Weinberg, *supra* note 635, at 157-58 (emphasis in original).

grandiloquence when reviewing the sweep of implied rights, ...”⁶⁴³ By contrast, quoting *Meyer’s* pivotal precept, four justices fervently and, this writing urges, aptly disagreed: “As this Court has long recognized, the institution of marriage ... is central to human life, requires and enjoys community support, and *plays a central role in most individuals’ ‘orderly pursuit of happiness.’*”⁶⁴⁴ More importantly, at the dawn of the new millennium, the Supreme Court explicitly recognized *Meyer’s* observation that due process indeed enforces the “orderly pursuit of happiness.”⁶⁴⁵ Thus, into the Twenty-First Century, the manifest connection between the Constitution and the Declaration -- “the orderly pursuit of happiness” -- remains fundamental, supreme law as recognized by federal⁶⁴⁶ and state courts.⁶⁴⁷

b. Justices Cardozo, Frankfurter and Harlan Usher in the Modern Theory of Substantive Due Process Predicated on Unbiased Reason --

Hurtado, Hutton, Meyers and their immediate progeny substantiate the Constitution’s “‘natural law’ bent”⁶⁴⁸ -- its role as enforcer of the Declaration -- forcefully but without substantial elucidation to guide future

643. *Kerry v. Din*, 135 S. Ct. 2128, 2134 (2015) (plurality opinion of Scalia, J., with Roberts, C.J. and Thomas, J.).

644. *Id.* at 2142 (Breyer, J., with Ginsberg, Sotomayor and Kagan, JJ., dissenting) (emphasis added; quoting *Meyer v. Neb.*, 262 U.S. at 399).

645. *Conn. v. Gabbert*, 526 U.S. 286, 291 (1999) (Noted “conservative” Chief Justice Rehnquist, writing for the Court, acknowledged that *Meyer* and its progeny set the general standard for substantive due process); see also, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (citing *Meyer*).

646. As the Southern District of Georgia very recently admonished, “Historically, the liberty interest protected by the Due Process Clause included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’” *Daniels v. Upton*, No. 6:16-cv-94, 2017 WL 3158766, at *2 (S.D. Ga. 2017) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). See also, e.g., *Baraka v. McGreevey*, 481 F.3d 187, 209 (3rd Cir. 2007); *Women’s Medical Professional Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006); *Robertson v. Hecksel*, 420 F.3d 1254, 1257 (11th Cir. 2005); *Renaud v. Wy. Dept. of Family Services*, 203 F.3d 723, 726 (10th Cir. 2000); *Edelson v. Chapel Haven, Inc.*, No. 3:15-cv-1862, 2017 WL 810274, at *15 (D. Conn. 2017).

647. E.g., *Teague v. Schimel*, 375 Wis.2d 458, 494 (2017); *State v. Floyd*, 217 Conn. 73, 85 (1991); *People v. Hollman*, 68 N.Y.2d 202, 211 (1986) (no “fundamental right to appear nude in public”); *Frink v. Prod.*, 31 Cal.3d 166, 175 note 12 (1982) (right to pursue a lawful profession).

648. Alschuler, *supra* note 44, at 522.

applications.⁶⁴⁹ It fell then to three of the Court's most respected Twentieth Century jurist-scholars who, although ardently supporting "judicial restraint," provided substantive due process' natural law heritage its needed principled expression and explication. Justices Benjamin Cardozo, Felix Frankfurter, and, the second John Marshall Harlan, read together, espoused a systemic framework of substantive due process duly respectful of American history and tradition but ultimately defined by overarching principles of morality discern through impartial reason. The Cardozo-Frankfurter-Harlan construction of due process fairness is the judicially recognized basis upon which to review claims of fundamental constitutional rights.⁶⁵⁰ Indeed, recent federal and state precedent confirms the correctness of Justice Cardozo's due process analysis as explicated by Justices Frankfurter and Harlan.⁶⁵¹

i. Justice Cardozo's Due Process Jurisprudence --

"Immutable principles of justice" coupled with the natural law thrust of *Meyers-Pierce-Farrington* comprised the backdrop⁶⁵² which, although not directly cited, is fully consistent with and surely informed Justice Benjamin

649. For instance, writing for a perhaps unusual plurality consisting of himself and Justices O'Connor, Scalia and Ginsburg, Chief Justice Rehnquist, "conceded the general principle that substantive due process prohibited arbitrary government action, but contended that Hurtado did nothing to define the proper scope of substantive due process." Michael T. Carton, *Constitutional Law - Fourteenth Amendment - the Fourth Amendment, Rather Than Substantive Due Process, Must Be Used to Judge A S 1983 Claim Alleging A Violation of an Individual's Right to Freedom from Prosecution without Probable Cause -- Albright v. Oliver*, 114 S. Ct. 807 (1994), 25 SETON HALL L. REV. 1560, 1590 (1995) (note) (discussing, *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (per Rehnquist, C.J., with O'Connor, Scalia and Ginsburg, JJ.)).

650. Ironically, the Supreme Court recently so recognized in *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010), although misconstruing precedent to apply the *deeply rooted principles* standard rather than *dignity paradigm* of substantive due process. See, *infra* notes 771-98 and accompanying text.

651. See, e.g., *Danforth v. Minn.*, 552 U.S. 264, 269 (2008) (quoting Cardozo); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (same); *Spencer v. Peters*, 857 F.3d 789, 801 (9th Cir. 2017); *Aka v. U.S. Tax Court*, 854 F.3d 30, 34 (D.C. Cir. 2017); *Rogers v. Lee City, Miss.*, No. 16-60537, 2017 WL 1242114, at * 8 (5th Cir. 2017); *Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005); *Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002) (en banc); *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994); *State v. Aalim*, 83 N.E.3d 883 (Ohio 2017); *State v. Sherman*, 378 P.3d 1060 1068 (Kan. 2016); *State v. Dixon*, 141 A.3d 810, 820 (Conn. 2016); *Blake v. Jossart*, 884 N.W.2d 484, 498 (Wisc. 2016); *Jackson v. State*, 191 So.3d 423, 428 (Fla. 2016).

652. See, *supra* notes 633-47 and accompanying text.

Cardozo's⁶⁵³ explication of substantive due process in *Palko v. Connecticut*,⁶⁵⁴ perhaps the most famous Twentieth Century encapsulation of the "natural law bent." Indeed, Cardozo's explication of due process in *Palko*

653. Benjamin Cardozo is highly regarded for his legal erudition, writing both as a scholar and as a judge. His slim volume *The Nature of the Judicial Process*, "remains the most widely-cited pre-1960's work of jurisprudence behind those of Oliver Wendell Holmes, Jr." Michael E. Parrish, Andrew L. Kaufman, *Cardozo*, 43 AM. J. LEG. HIST. 216, 217 (1999) (book review). Of course, Cardozo is especially renowned for his influential eighteen-year judicial tenure on the New York Court of Appeals from 1914-1932 where he authored 566 opinions that set national standards for contracts, torts, property and similar private common law. Kaufman, chs. 12-22 (1998). Indeed, "Cardozo's judicial opinions and other legal writings are still frequently cited, marking him as one of the most influential jurists in the history of the American legal system." Lynn D. Wardle, *Cardozo. By Andrew L. Kaufman*, 16 CONST. COMMENT 459, 459 (1999) (book review).

It was, sadly, an ill and frail Cardozo who President Herbert Hoover elevated to the Supreme Court in March 1932, to fill the seat recently vacated by the equally esteemed Oliver Wendell Holmes. As an associate justice, Cardozo served short of six years before his death. While lauding his term as "one of the greatest short tenures on the Court in its history" Hon. Richard A. Posner, *CARDOZO: A STUDY IN REPUTATION* 8 (1990), Judge Posner maintains that Cardozo's lasting impact as a Supreme Court justice has been slight:

Whether because Cardozo was the junior member of a court in which cases were not assigned by rotation, or because Chief Justice [Charles Evans] Hughes hogged a disproportionate number of the best cases for himself, or because Cardozo was frequently in dissent, or because the work or working conditions of the Supreme Court did not suit his temperament, or because many of the issues that preoccupied the Court in the 1930s have proved transitory (but torts and contracts are eternal), or because six years is too short a time for a Supreme Court justice to make his mark (given the exceptional breadth of the Court's jurisdiction and the relatively small number of majority opinions that each justice writes) -- and Cardozo did not have a full six years of actual service on the Court, because of his terminal illness -- Cardozo did not place a strongly individual imprint on any field of Supreme Court jurisprudence. ... Cardozo's opinions, both majority and separate, are above the average for Supreme Court opinions, then or now, but they lack the verve and punch of his opinions for the New York Court of Appeals, and a sense of constraint is palpable.

Id. at 121-22 (quoted in, Robert M. Jarvis and Phyllis Coleman, *Benjamin N. Cardozo: New York Giant*, 13 MARQUETTE SPORTS L. REV. 63, 88 note 191 (2002)).

This writing is not in a position to doubt Judge Posner's assessment except in the realm of substantive due process where, as noted in the text above, Justice Cardozo brought vigor and clarity to that doctrine's natural law principles. Setting the fabric that Justices Frankfurter and Harlan later elucidated and enriched, Cardozo's due process jurisprudence remains authoritative for American courts. E.g., *Dragash v. Saucier*, No. 17-12031-JJ, 2017 WL 5202252, at *2 (11th Cir. 2017) (*per curiam*); *Guba v. Huron County, Ohio*, 695 Fed. Appx. 98, 103 (6th Cir. 2017); *Smith v. Hogan*, 794 F.3d 249, 255-56 (2d Cir. 2015); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015).

654. *Palko v. Connecticut*, 302 U.S. 319 (1937) (protection against double jeopardy is not encompassed under the Due Process Clause of the Fourteenth Amendment), *o.*, *Benton v. Maryland*, 395 U.S. 784 (1969).

aptly has been denoted as, “that seminal opinion ... [which] established a standard -- employed ever since in American Constitutional Law -- to determine whether a claimed right, liberty, protection, or prohibition is fundamental, and therefore, guaranteed against every level of government in the nation.”⁶⁵⁵ True, for all its potency, Justice Cardozo’s standard is highly abstract, lacking tangible intermediary criteria elucidating his foundational concepts sufficiently for discrete applications. Indeed, the same may be said for Justices Frankfurter’s and Harlan’s due process theories, discussed presently,⁶⁵⁶ predicated on the Cardozo formulation. Such is the very deficiency, however, that Deontological Originalism’s appeal to Kantian morality solves. The deontology of Immanuel Kant provides correct, applicable measures -- abstract to be sure, but intelligible and serviceable -- to effectuate the due process standard Cardozo introduced, Frankfurter explicated, and Harlan perfected.⁶⁵⁷

Writing for *Palko*’s eight-justice majority, in prose now iconic, Cardozo explained that governmental conduct infringing principles “implicit in the concept of ordered liberty,” violates “due process of law.”⁶⁵⁸ Importantly, Cardozo accented that understanding the concept of “ordered liberty,” and discerning whether a specific espoused right is subsumed thereunder, requires more than empirical research and historical analysis. Rather, adjudicators and critics can only discern *the meaning and impact* of history, tradition and similar relevant considerations through unbiased reason, what Cardozo called “the perception of a rationalizing principle which gives to discrete instances a proper order and coherence.”⁶⁵⁹

Pursuant to that “rationalizing principle,” Cardozo invoked the familiar concepts of *arbitrariness*, *transcendent justice*, and *fairness* as proper standards to discern whether the challenged governmental behavior offends

655. Vincent Martin Bonventre, *Aristotle, Cicero and Cardozo: A Perspective on External Law*, 69 ALBANY L. REV. 645, 649 (2006) (footnotes omitted); see also, Nicholas J. Eichenseer, *Reasonable Doubt in the Rear-View Mirror: The Case for Blakely-Booker Retroactivity in the Federal System*, 2005 WISC. L. REV. 1137, 1163 note 187 (2005) (note) (denoting *Palko* as a “seminal” due process opinion).

656. See, text accompanying *infra* notes 687-770.

657. See, text accompanying *supra* notes 899-1020.

658. *Palko*, 302 U.S. at 325. Similarly, three years earlier, writing for the Court, Cardozo defined procedural due process as ensuring that, “Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, ...” *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (emphasis added), o. in part, *Malloy v. Hogan*, 371 U.S. 1 (1964). Such, presumably, would be, as Cardozo accented in *Palko*, “implicit in the concept of ordered liberty.”

659. *Palko*, 302 U.S. at 325.

ordered liberty.⁶⁶⁰ Based on his general framework, Justice Cardozo accented that official conduct violates ordered liberty if it is “oppressive and arbitrary,”⁶⁶¹ thereby flouting qualities of “a fair and enlightened system of justice,”⁶⁶² qualities so essential, “that neither liberty nor justice would exist if they were sacrificed.”⁶⁶³ Roughly seven decades later, addressing the neutral “rationalizing” process that informed the *Palko* Court, Justice John Paul Stevens rightly offered that, “Implicit in Justice Cardozo’s test is a recognition that the postulates of liberty have a universal character ... [that may be] conceptualized as ... *a seamless web of moral commitments [that] ... transcend the local and the particular.*”⁶⁶⁴ Stevens’ interpretation steeped in transcendent, uniform morality is eminently correct given the natural law backdrop underlying Cardozo’s *Palko* rationale. That is, the Supreme Court’s natural law due process analysis, particularly in *Holden*, *Hurtado*, and *Meyer*, set the standards from which Cardozo, always respectful of precedent, derived his principle of “ordered liberty.” Thus, although Cardozo did not explicitly cite those ruling, implicitly *Holden*, *Hurtado*, and *Meyer* informed his *Palko* rationale.⁶⁶⁵

660. *Id.* at 325-27.

661. *Id.* at 327.

662. *Id.* at 325.

663. *Id.* at 327 (citing, *Twining*, 211 U.S. at 99).

664. *McDonald*, 561 U.S. at 871 (Stevens, J., dissenting) (emphasis added).

665. As one commentator well observed, through *Palko* and other “tradition-defining opinions” he authored, “Cardozo specifically sought to reclaim the doctrine of *Hurtado* ...” Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253, 1313 (2012). Cardozo indeed had referenced that doctrine when he wrote for the Court shortly before *Palko*, *American government, state and federal, is, “free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”* *Snyder v. Com. of Mass.*, 291 U.S. 97, 105 (1934), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964). While his *Snyder* opinion does not quote *Hurtado*’s homage to natural law constitutionalism, Cardozo’s emphasis in *Palko* that due process analysis must be based on “the perception of a rationalizing principle which gives to discrete instances a proper order and coherence,” *Palko*, 302 U.S. at 325, coupled with his invoking *arbitrariness*, *transcendent justice*, and *fairness* as relevant considerations to discern whether challenged governmental conduct offends “ordered liberty,” *id.* at 325-27 (discussed, *supra* at notes 660-63 and accompanying text), evince that Cardozo understood and accepted the link between immutable morality and due process as implored in *Hurtado* and its ilk.

Granted, in his seminal work on basic jurisprudence, Cardozo very generally admonished, “the judge is not to ‘concern’ himself with Natural law ...” Ellis Washington, *Reply to Judge Richard A. Posner on the Inseparability of Law and Morality*, 3 RUTGERS J. L. & RELIGION 1, [no page number] n. 32 (2001) (quoting, DAVID BARTON, *THE MYTH OF SEPARATION* (1989) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE*

In that regard, commentators view *Palko* as a liberal invitation for expansive application of the Due Process Clauses.⁶⁶⁶ Conservative critics such as Judge Robert Bork call *Palko* “pretty vaporous stuff” as contrasted with the purported greater specificity of the Bill of Rights.⁶⁶⁷ Specifically, Bork claimed,

Whatever line-drawing must be done [regarding the Bill of Rights] starts from a solid base, the guarantee of freedom of speech, of freedom from unreasonable searches and seizures, and the like. By contrast, the judge-created phrases [within *Palko* and its progeny] specify no particular freedom, but merely assure us, in sonorous phrases, that they, the judges, will know what freedoms are required when the time comes.⁶⁶⁸

JUDICIAL PROCESS 10 (1921)). However, Coardozo’s concern was not with the paradigmatic principles of legitimate government set forth in the Declaration and commemorated in the Constitution. Rather, “Cardozo rejected natural law theory [regarding], ‘The common law [which] does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.’” Richard Langone, *The Science of Sociological Jurisprudence As A Methodology for Legal Analysis*, 17 *TOURO L. REV.* 769, 776–77 (2001) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* at 23); see also, e.g., Brady Coleman, *Lord Denning & Justice Cardozo: The Judge As Poet-Philosopher*, 32 *RUTGERS L.J.* 485, 512 (2001) (denoting Cardozo, insofar as the common law is concerned, a “pragmatist” strongly affected by the American Legal Realist Movement).

Understandably and by contrast, in the rarified realm of constitutional rights, Cardozo’s carefully phrased approach, in Jason F. Robinson’s words, “implicitly appeals to natural law.” Jason F. Robinson, *Book Review: Gerber’s to Secure These Rights*, 12 *J.L. & POL.* 123, 140 n. 22 (1996) (discussing *Palko*). Indeed, noted scholar Sanford H. Kadish stated, “In recent times the most influential exponents of flexible-natural law due process have been Justices Cardozo and Frankfurter.” Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319, 326 (1957) (discussing, *inter alia*, *Palko*). Likewise, Prof. Hindes could smartly summarize, “The ‘ordered liberty’ approach is the general natural law standard for interpreting the fourteenth amendment taken from Justice Cardozo’s opinion in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).” Thomas L. Hindes, *Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 *U. PA. L. REV.* 344, 384 . 68 (1977); see also, Jordan Steiker, *Incorporating the Suspension Clause: Is There A Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 *MICH. L. REV.* 862, 901 (1994) (referring to “Justice Cardozo’s natural law formulation” regarding substantive due process).

666. E.g., David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 *L. & CONTEMP. PROBS.* 43, 56 (2014).

667. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 118 (1990) (quoted in, Paul Brickner, *Robert Bork’s Quest for Certainty: Attempting to Reconcile the Irreconcilable*, 17 *J. CONTEMP. L.* 49, 59 (1991)).

668. *Id.* at 118–19 (quoted in Paul Brickner, *Robert Bork’s Quest for Certainty: Attempting to Reconcile the Irreconcilable*, 17 *J. CONTEMP. L.* 49, 58–59 (1991)).

Bork's facially weak critique, typical of substantive due process' detractors,⁶⁶⁹ then, "seems to lump the Supreme Court's decision in *Palko* with the liberal left rulings that he so abhors."⁶⁷⁰ In stark contrast stand miserly interpretations such as that of Administrative Law Judge Paul Brickner who maintains that uninformed persons might,

mistakenly conclude that *Palko* was an early example of the High Court and its justices writing into the Constitution new rights that do not appear in the Constitution. On the contrary *Palko*, can be read as a restrictive decision drawing the line on incorporating into the fourteenth amendment all of the Bill of Rights. An ailing Justice Cardozo, less than a year before

669. Contrary to Bork's banal accusation, neither Justice Cardozo nor any of his successors claim that the mere invocation of, in Bork's terms, "sonorous phrases" alone will reveal the nature and application of due process rights. "Ordered liberty," for example, is not an incantation that magically evokes meaning; rather, it is a paradigmatic principle from which to discern more specific concepts that together form a meaningful analytical fabric from which to perceive and to apply specific due process values. Indeed, *Deontological Originalism provides the structure, implicit in Cardozo's phrase "ordered liberty," from which to determine whether, in any given constitutional dilemma, a fundamental right is implicated and, if so, how that right determines that dilemma's correct outcome.*

Moreover, as Bork well knew, what he called the "solid base" of the Bill of Rights provides a level of specificity so vague and imprecise that it is hardly more tangible than what Bork sneered to be the "vaporous stuff" of Cardozo's *Palko* opinion. Nearly half a century ago the Second Circuit remarked, "The variety of views expressed by the courts when resolving challenges by prisoners to the constitutionality of prison rules reflects the ambiguous mandate of the Bill of Rights and the Thirteenth and Fourteenth Amendments when construed together." *Morales v. Schmidt*, 489 F.2d 1335, 1337-38 (7th Cir. 1973). Likewise, one need not consult the thousands of judicial decisions attempting to determine what is or is not an unlawfully "unreasonable" search or seizure under the Fourth Amendment to realize that by itself, the Amendment's proscription is neither self-defining nor self-executing. *E.g.*, *N.G. v. Conn.*, 382 F.3d 225, 230 (2d Cir. 2004) ("The Fourth Amendment prohibits "unreasonable" searches, a somewhat amorphous standard whose meaning varies with the context in which a search occurs and the circumstances of the search."). Such uncertainty, not surprisingly, was the situation at this Nation's founding: "[I]t is astonishing to discover that the debate on a Bill of Rights was conducted on a level of abstraction so vague as to convey the impression that Americans of 1787-1788 had only the most nebulous conception of the meanings of the particular rights they sought to insure." *City of Boerne v. Flores*, 521 U.S. 507, 550 (1997) (O'Connor, J., with Breyer, J., dissenting; quoting, L. Levy, *Essays on American Constitutional History* 173 (1972)).

Indeed, as discussed earlier (*supra* notes 565-87 and accompanying text), the Bill of Rights' Fifth Amendment itself contains a Due Process Clause constraining every office and actor at the Federal level but offering no further defining nor explication regarding what exactly "due process of law" means. In sum, Judge Bork may not have approved of *Palko*'s attempt to provide some precise meaning to the term "due process," but his criticism that *Palko* is imprecise while the Bill of Rights provides significantly greater precision is empty.

670. Paul Brickner, *Robert Bork's Quest for Certainty: Attempting to Reconcile the Irreconcilable*, 17 J. CONTEMP. L. 49, 58 (1991).

he died, did not write in *Palko* a formula for use by judges wishing to create or invent new rights for incorporation into the Constitution through the fourteenth amendment's due process clause.⁶⁷¹

While Justice Cardozo strongly espoused judicial restraint,⁶⁷² Judge Brickner's assessment of the scope and depth of *Palko*'s meaning is too narrow. Just as we ought not feel bound by how the Founders might have resolved particular constitutional matter but rather respect their original intent to enforce under the Constitution the natural law principles of the Declaration of Independence,⁶⁷³ likewise it is immaterial that almost certainly, Justice Cardozo and the *Palko* Court would not have embraced contemporary constructions of due process such as validating same-sex marriages and invalidating mandatory racial segregation in all levels of public schools. Rather, what is important is that *Palko* sets a framework for analysis that is fully consistent with the natural rights due process paradigm -- rulings such as *Hurtado*, *Hutton*, and *Meyer* -- that *Palko* enforces. If in Judge Brickner's stingy words, *Palko* "merely rationalized the existing case law,"⁶⁷⁴ it was a most sublime rationalizing bringing new light to the Court's natural law jurisprudence predicated on natural rights derived from impartial reason.

As recounted above, speaking for the Court, Cardozo summarized due process as "ordered liberty" understood through "a rationalizing principle which gives to discrete instances a proper order and coherence,"⁶⁷⁵ to unearth

671. *Id.* at 59.

672. "Felix Frankfurter associated his position on judicial restraint with Justices Holmes, Brandeis and Cardozo." Nomi M. Schlotzenberg, *Un-Covering the Tradition of Jewish "Dissimulation": Frankfurter, Bickel, and Cover on Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 818 (1994) (footnote omitted). For Cardozo, restraint especially meant not substituting judicial policy for legislative policy. RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 195-96 (1997) (discussed in, Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for The Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 19 (2008)). Moreover, Cardozo famously accented that respect for *stare decisis* promotes judicial necessary judicial efficiency not simply to save time, but to foster respect for and reasonable reliance on Judiciary. "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (quoted in, Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1467 note 38 (2013)).

673. See, *supra* notes 280-87 and accompanying text.

674. Brickner, *supra* note 670, at 60-61.

675. *Palko*, 302 U.S. at 325.

and nullify official behavior that, being “oppressive and arbitrary,”⁶⁷⁶ defies the attributes of “a fair and enlightened system of justice,”⁶⁷⁷ attributes of such profundity “that neither liberty nor justice would exist if they were sacrificed.”⁶⁷⁸ If Cardozo’s “rationalizing principle” is nothing more than an uncritical recounting and acceptance of prevailing American traditions, customs or preferences, then the meaning of “a fair and enlightened system of justice” predicated on practices “that neither liberty nor justice would exist if they were sacrificed” becomes not a matter of higher morality, as the Founders rightly thought and Cardozo indicates, but rather, a matter merely of historical research wherein the Judiciary concludes that some standard (likely based on the partisan preferences of the group that originally set that standard) has become traditional, regardless whether such comports with the moral meaning of “unalienable Rights” under natural law.⁶⁷⁹ *No court attempting to actualize the natural law principles of late-Eighteenth Century through early-Twentieth Century American jurisprudence could advocate a due process framework relegating judges into credulous empiricists -- not guardians of constitutional law but instead historical bookkeepers.*

Of course, “Cardozo, in *Palko*, did not create new rights that were not in the Constitution. His opinion merely rationalized the existing case law, [was] hardly ... the go ahead to write their own version of the Constitution.”⁶⁸⁰ The same must be said for Justices Frankfurter and Harlan, as next will see next. But, while judges surely cannot “write their own version of the Constitution,” neither may they flinch from their duty to apply the Due Process Clauses through understanding the strictures of morality

676. *Id.* at 327.

677. *Id.* at 325.

678. *Id.* at 327 (citing, *Twining*, 211 U.S. at 99).

679. Under such a standard, citing a prevalent example, *Brown v. Board of Education* was wrongly decided because racially segregated public schools were still traditional in 1954. As Prof. McDonald noted, “American public opinion would not support official desegregation efforts in the South until after *Brown* was decided some sixty years later--and even then the South stiffly resisted *Brown* for more than a decade, until Northern public opinion had shifted in favor of its enforcement.” Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91, 98 (2011) (citing, Michael J. Klarman, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 157-59, 164, 177-78 (2007)). See also, e.g., Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 486-47 (2014) (noting fifteen states’ constitutions mandated racially segregated public education); Mark A. Rothstein, *Health Care: Public and Private Systems in the Americas*, 17 COMP. LAB. L.J. 612, 621 (1996) (“In 1954, the United States Supreme Court overturned the then-common practice of racial segregation in public schools.”).

680. Brickner, *supra* note 670, at 60.

stemming from natural law. That truth is not offset by Judge Brickner's presumptuous earlier quoted conclusion that, "An ailing Justice Cardozo, less than a year before he died, did not write in *Palko* a formula for use by judges wishing to create or invent new rights for incorporation into the Constitution through the Fourteenth Amendment's Due Process Clause."⁶⁸¹ Not surprisingly, Brickner offered no attributions to support his cold, hasty contention that weakness born of illness influenced Cardozo to espouse a frail, timid, and bland template for that most imperative and notable among constitutional provisions, the Due Process Clause of the Fourteenth Amendment.

Conversely, one might imagine that for a mind and consciousness as lively, brilliant and insightful as were Cardozo's,⁶⁸² the immediate specter of mortality could inspire a judge like him not to embrace the arrogance of creating rights, but rather to better understand the true vastness, perspicacity, and importance of the Founders' natural law undertaking, described in the Declaration and formalized in the Constitution, the new nation's highest law. As Ninth Circuit Judge the Hon. Kim McLane Wardlaw explained, Justice Cardozo's judicial restraint was, as it must be, judicious, that is, sensible and apt, but neither diffident nor craven: "judges must, consistent with their constitutional powers, declare as impermissible an act falling outside the bounds of the law. But they may not pass upon the wisdom of those permissible acts that do fall within the bounds of the law."⁶⁸³

Cardozo recognized that to properly perform their functions, "judges serve the public when they give voice to democratic principles."⁶⁸⁴ But of utmost urgency, Cardozo further understood, "That the judicial power must be exercised within its constitutional bounds does not mean 'that a judge is powerless to raise the level of prevailing conduct.' Throughout history, judges have played a central role in our collective progression toward a more perfect union."⁶⁸⁵ To illustrate that crucial duty, Cardozo summoned the

681. *Id.* at 59.

682. Respected scholar Grant Gilmore, for instance, "observed about Cardozo that, [] he was "a truly innovative judge' ..." Christopher L. Eisgruber, *Teaching Law Through Contracts and Cardozo*, 44 ST. LOUIS U. L.J. 1511, 1519 (2000) (quoting, Grant Gilmore, *The Ages of American Law* 75 (1977)). See also, *supra* note 653 (discussing Justice Cardozo's influence on American law).

683. Hon. Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1660 (2010).

684. *Id.* at 1662.

685. *Id.* at 1660 (quoting, Benjamin N. Cardozo, *The Nature of the Judicial Process*, 108 (1921)).

guiding force of this writing's deontology, Immanuel Kant, whose moral philosophy, Cardozo explicitly reminded us, is not simply a potentially applicable framework but indeed *is* a lynchpin of American constitutionalism: "Our jurisprudence has held fast to Kant's categorical imperative, 'Act on a maxim which thou canst will to be law universal.' It has refused to sacrifice the larger and more inclusive good to the narrower and smaller."⁶⁸⁶ While the foregoing quote references societal "good," not the "right," the clear implication is that courts do wrong by kowtowing to the will of elites when those elites treat other persons merely as means, treatment that never could be willed as a universal maxim. By referencing Kant, Cardozo infers his appreciation that the deontology of dignity animates "our jurisprudence," meaning constitutional law, especially due process liberty.

ii. Justice Frankfurter's Due Process Jurisprudence --

Along with Justice Cardozo, Justice Felix Frankfurter understood due process of law as a precept of absolute morality to attain, in his enthusiastic expression, "ultimate decency in a civilized society."⁶⁸⁷ Indeed, as next recounted, arguably no other Supreme Court justice expressed so well, if not always applied, the paradigmatic principles of the due process clauses. In that regard, like Justice Cardozo, although his efforts as an associate justice failed to attain the greatness many had expected, Frankfurter's contributions to due process theory remain a testament to his perspicacity and pluck.

Unlike Cardozo, however, the cause of Frankfurter's failure was not illness of his body but malaise of his character. The accounts of Felix Frankfurter's troubled tenure as a Supreme Court justice are as numerous as they are saddening. Considering his bravura pre-judicial career as attorney, diplomat, Harvard law professor, confidant to Holmes and Brandeis, and key architect of the New Deal, Frankfurter was expected but by most accounts failed to be the intellectual successor to his mentor Oliver Wendell Holmes and thereafter Benjamin Cardozo, both of whom had held the very seat that Frankfurter assumed on the Court.⁶⁸⁸ Despite the deep wisdom of his

686. *Id.* at 1660-61 (quoting, Benjamin N. Cardozo, *The Nature of the Judicial Process*, 138 (1921)).

687. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring). *See also*, *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (Brennan, J., concurring).

688. Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L. REV. 535, 540 note 11 (1993/1994) (citing Fred Rodell, *Nine Men: A Political History of The Supreme Court From 1790 To 1955*, 273 (1955)) (derisively but plausibly, Prof. Fred Rodell denoted Frankfurter as, "the New Deal Court's outstanding disappointment"). *See also*, Hon.

paradigmatic statements on due process, Frankfurter is remembered as a cantankerous, egoistic, pedantic, unpleasant person who more disrupted the Court and annoyed his colleagues than contributed to any lasting jurisprudence.⁶⁸⁹ Accounts of Frankfurter's reputed obnoxiousness may be

Stuart Shiffman, *More Pieces of the Puzzle*, 75 JUDICATURE 278, 278 (1992) (For that reason, some aver that, "No justice of the Supreme Court remains a more enigmatic figure than Felix Frankfurter"). But see John D. French, *The Enigma of Felix Frankfurter*, 57 N.Y.U. L. REV. 330, 330-31 (reviewing H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981) (commentary by a former Frankfurter law clerk posits, "Frankfurter was undoubtedly complex, ... But does that make Frankfurter enigmatic? ... In any event, even Prof. Hirsch does not find Frankfurter enigmatic. He finds him neurotic.)).

Indeed, many commentators believe that Felix Frankfurter's life of extraordinary successes and momentous disappointments do not bespeak an enigmatic nature, but rather mirror the conflicting aspirations of his youth, common traits among ambitious European immigrants of the early 1900s, to be esteemed by the privileged, staid society of, in Frankfurter's case, "Boston Brahmins" while simultaneously remaining foremost among liberal, Jewish social reformers in the mold of Louis D. Brandeis whose causes challenged the Brahmins' dominion of entitlement and elitism. *Id.* at 332-37.

Concurrently, many of Frankfurter's admirers misunderstood his constitutional philosophy, expecting that, in the style of Justice William O. Douglas, Frankfurter the judge would continue the work of Frankfurter the tireless social reformer, promoting from the bench the liberal legal politics that marked him as an attorney and Harvard law professor. However, as a prominent disciple of Holmes, Frankfurter was vehemently anti-*Lochner*; therefore, he staunchly practiced judicial restraint by deferring to the popular will unless, in his estimation, the Constitution clearly commanded otherwise. So concerned was Frankfurter not to appear *Lochnerian* that, as we will see, he espoused broad, elegant principles of due process yet applied them with arguably excessive parsimony lest, by his reckoning, he transformed himself from magistrate to policymaker. Cf., Steven G. Calabresi, Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 95 (2011) (criticizing as "extreme New Deal judicial restraint" Frankfurter's majority opinion in *Goeseart v. Cleary*, 333 U.S. 464 (1948) upholding a Michigan law forbidding women from "serving as a bartender unless she was the wife or daughter of the man owning the bar.").

Many, myself included, believe that, in needless defiance of his beautifully expressed due process doctrine, Frankfurter excessively erred on the side of restraint. Thus, Frankfurter's failure to ascend to the ranks of Holmes, Brandeis, John Marshall, and Joseph Story may better be understood not as arising from some enigmatic aspect of his character, but rather resulting from his arguably unwarranted fear of hypocrisy that he might mistake his political leanings for constitutional doctrine.

689. Prof. Hirsh, for instance, explained that unlike any other of his prior positions, Frankfurter as an associate justice had to contend, "with strong-willed colleagues who resented his attempts to influence and lead them. ... He shared power-equally-with eight other men; ..." Hirsh, *supra* note 688, at 127-28 (quoted in French, *supra* note 688, at 336.) According to Hirsh, "Frankfurter had a self-image as intellectual leader of the Court, and he found it challenged." French, *supra* note 688, at 337.

Unkindly denoted as, "the quintessential ego warrior," Kenneth C. Haas and Phillip J. Cooper, *Battles on The Bench: Conflict Inside the Supreme Court*. Lawrence: University Press of Kansas, 1995, 41 AM. J. LEG. HIST. 503, 504 (1997), "Frankfurter 'personalized every dispute, no matter what its cause.'" Howard Ball and Phillip Cooper, *Fighting Justices: Hugo*

true to the extent that, as one of Frankfurter's biographers, Melvin Urofsky, "confesse[d,] ... the more he learned about Frankfurter, the less he cared for him."⁶⁹⁰ Whatever may have been the reasons, Judge Shiffman sadly but aptly concluded, "Frankfurter's legacy came to be far different than 1939 prognostications. ... A quarter century [now, half century] after his death his opinions are all but ignored by both the courts and legal scholars."⁶⁹¹

L. Black and William O. Douglas and Supreme Court Conflict, 38 AM. J. LEG. HIST. 1, 12 (1994). Frankfurter was manipulative and, some claim, deceitful. For instance, Frankfurter habitually would praise colleagues' work while mocking them behind their backs. To cite one often recounted example, "in a letter to [Judge] Learned Hand, Frankfurter described [Justice] Stanley Reed as 'largely vegetable — he had managed to give himself a nimbus of reasonableness but is as unjudicial-minded, as flagrantly moved, at times, by irrelevant considerations for adjudication as any of [the justices].'" Haas and Cooper at 504 (quoting, *Phillip J. Cooper, Battles on the Bench: Conflict Inside the Supreme Court*, 108 LAWRENCE: UNIVERSITY PRESS OF KANSAS, 1995).

Historian Phillip J. Cooper attributed Frankfurter's petulance particularly to his, "growing dislike of [Justice] William Douglas, his rivalry for intellectual leadership with [Justice] Hugo Black, or his strong views on the principle of stare decisis and the limits of the First Amendment." Kenneth C. Haas, Phillip J. Cooper, *Battles on the Bench: Conflict Inside the Supreme Court*, 41 AM. J. LEG. HIST. 503, 504 (1997) (discussing, Cooper text but page not designated). Along these lines, Cooper and co-author Howard Ball documented the legendary Frankfurter-Douglas feud. Among other things, Frankfurter, "vilified Douglas in diary notes and in letters to friends on and off the Court. Douglas was 'one of the two completely evil men I have ever met;' 'malignant;' 'narrow minded;' 'the most cynical, shamelessly amoral character I've ever known;' and a 'mommser' (a yiddish epithet meaning bastard)." Ball and Cooper, at 13 (footnote omitted).

Still, the bad behavior was not one-sided. Justice Douglas did not hesitate to hurl insults, "refer[ing] to [the diminutive] Frankfurter as 'Der Fuehrer;' 'a little bastard;' 'the little Giant;' 'Machiavellian;' 'divisive;' and a 'prevaricator.'" *Id.* (footnote omitted). Thus, as Frankfurter's former law clerk John D. French aptly noted, "in the highly charged atmosphere of a Court packed with powerful and contentious minds, it may well be asked who goaded whom." French, *supra* note 688, at 343.

Still, the consensus remains that Frankfurter either did not understand or did not care that his penchant for self-importance and self-promotion made life on the Court tense and disagreeable for his colleagues. In fact, regarding Frankfurter's proclivity during Court conferences to reassume his stance as pompous law professor, lecturing at length on the given topic, Chief Justice Earl Warren lamented that the, "only way to handle [Frankfurter] in conference is [to] shut him up. I let him go 2-3 times, ignoring him. He would nag and nag. Then you'd put him in his place and he'd be quiet for a while." Roger K. Newman, *The Warren Court and American Politics: An Impressionistic Appreciation*, 18 CONST. COMM. 661, 676 (2001) (quoting, "Drew Pearson diary, August 23 [, 1966], Pearson papers" Lyndon Baines Johnson Library).

690. Shiffman, *supra* note 688, at 278 (citing but without specific page reference, Melvin I. Urofsky Twayne Publishers, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES*, NEW YORK, 1991).

691. Shiffman, *supra* note 688, at 278.

Yes, Justice Frankfurter's "third act" -- his Supreme Court tenure -- recalls John Greenleaf Whittier's famous lament, "For, of all sad words of tongue or pen, The saddest are these: 'It might have been!'"⁶⁹² Still, not too far beneath his ego-laden, haughty, seemingly interminable, sometimes impenetrable prose, *one finds in Frankfurter's due process theory something important, honest and worthwhile: a true respect for immutable morality as the dominant principle of American constitutional law.* If Frankfurter himself declined to follow his principles to their ending points, if he was troubled at the thought of applying his concepts to their fullest extent, we his successors, inspired by his due process theory, can devise in the style of Kantian morality, a realm of due process loyal to Frankfurter's theory but not necessarily to his discrete applications.⁶⁹³

a. Frankfurter's Methodology Steeped in Impartial Judicial Reason --

Consistent with his espousal of judicial restraint,⁶⁹⁴ Frankfurter appropriately accented that discerning due process liberty is not a matter of judicial fiat; "The vague contours of the Due Process Clause do not leave judges at large."⁶⁹⁵ Specifically, "In enforcing [liberty principles] this Court does not translate personal views into constitutional limitations. [Rather,] the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions."⁶⁹⁶ Yet, and most importantly, while accenting regard for history and American customs, and while aptly cautioning restraint and political neutrality, Justice Frankfurter understood that ultimately judicial

692. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721,728 (1952) (citing John Greenleaf Whittier, MAUD MULLER).

693. Bayer, *Deontology and Originalism*, *supra* note 7, at Section 3-c (Kantian ethic's defined).

694. See, e.g., *Boysen v. Treadway Inn of Lake Harmony, Inc.*, 53 F.R.D. 96, 98 (E.D. Pa. 1971); See also, *Duke v. James*, 713 F.2d 1506, 1509 (11th Cir. 1983) (noting Frankfurter's admonition "the propriety of restraint in the exercise of jurisdiction"); *Streight v. Ragland*, 655 S.W.2d 459, 466 (Ark. 1983) ("As no less a personage than Justice Felix Frankfurter points out, judicial restraint is the 'essence in the observance of the judicial oath.'"); Accord, Mark A. Grabber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L. REV. 23 (2007); Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863 (1983) (book review).

695. *Rochin v. California*, 342 U.S. 165, 171 (1952) (citation omitted).

696. *Solesbee*, 339 U.S. at 16 (Frankfurter, J., dissenting).

decisions must conform with principles transcending and greater than greater Society's partiality: "Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. ... *These are considerations deeply rooted in reason* and in the compelling traditions of the legal profession."⁶⁹⁷

Lest there be any doubts about the judicial role, five years earlier, Frankfurter accented that because it must be politically neutral, only the Judiciary has competence to be due process' final authority. Specifically, he urged that rather than unthinking submissiveness to history, due process concerns "the impersonal standards of society which alone judges, as the organs of Law, are empowered to enforce."⁶⁹⁸

Certainly Frankfurter was deeply respectful of American social and historical traditions which, due to their empirical nature, encourage judicial restraint. Still, as the above-quotes demonstrate, Frankfurter realized that a true appreciation of constitutional matters requires specialized professional training -- "the compelling traditions of the legal profession" -- imparting apt sensitivity to impartial, "impersonal standards of society," based on unbiased "reason," an analysis "which alone judges, as the organs of Law, are empowered to enforce." Therefore, Frankfurter knew that properly discerning the principles of due process cannot be solely and exclusively an empirical-societal process according mechanical deference to even long-standing traditions evincing the popular will (however that might be determined). Indeed, commenting on the unique demands of the Judiciary, Frankfurter remarked that judging, "*so dependent on the scientific spirit of truth-seeking*, without the aids of scientific verification, depends ultimately on those rare men in whom disinterestedness is an intellectual and moral habit, discernment on inadequate data almost a prophetic talent."⁶⁹⁹

The relatively direct, empirical task of identifying deeply rooted traditions, while not to be disparaged, does not require the dedication, training, perspicacity, and uprightness that Frankfurter finds both necessary and rare among individuals. If discerning due process morality were nothing more than such an empirical exercise, surely neither Frankfurter, nor Cardozo

697. *Rochin*, 342 U.S. at 171 (emphasis added) (citing, Hon. Benjamin Cardozo, *The Nature of the Judicial Process; The Growth of the Law; The Paradoxes of Legal Science*, (1982)).

698. *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring).

699. Felix Frankfurter, *The Spirit of Liberty*, N.Y. Herald Tribune, May 18, 1952, at § 6, 1 (reviewing Learned Hand, *The Spirit of Liberty* (Irving Dillard ed., 1953) (emphasis added) (quoted in, Alfred S. Neely, *Mr. Justice Frankfurter's Iconography of Judging*, 82 KY. L.J. 535, 573 (1994)).

before him, would have demanded such an extraordinary measure of selfless ability. *Thus, comprehending due process, Frankfurter rightly pronounced, is not the business of amateurs, hobbyists, empiricists, and politicians; rather, it is the responsibility of dispassionate professional jurists who alone hold ranks requiring the non-political intellectualism and self-sacrifice that demarcates a judge from a charlatan.*

Identically, Justice Frankfurter stressed that to avoid judicial consequentialist rulings, judges must perform “an evaluation based on disinterested inquiry pursued in the spirit of science. . . .”⁷⁰⁰ Certainly, his earlier explication, “considerations deeply rooted in reason”⁷⁰¹ coupled with the “spirit of science” evoke impartial reason which cannot simply accept an empirical reporting of American custom as self-legitimizing due to its persistence. Rather, because “considerations deeply rooted in reason,” when conjoined with the scientific method, becomes a system to seek truth, due process analysis surely is no apologist for either consequentialist preferences or tradition *qua* tradition. As Frankfurter explained shortly after *Rochin*,

Since due process is not a mechanical yardstick, it does not afford mechanical answers. *In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable.* But that is a very different thing from conceiving the results as ad hoc decisions in the opprobrious sense of ad hoc. *Empiricism implies judgment upon variant situations by the wisdom of experience.*⁷⁰²

In that regard, it is worth reiterating Frankfurter’s opinion in *Resweber* urging that judges cannot indulge an unthinking submissiveness to history because due process entails, “*the impersonal standards of society* which alone judges, as the organs of Law, are empowered to enforce.”⁷⁰³ While a bit vague, consistent with his philosophy, the term “impersonal standards” surely does not mean some principle arguably attributed to “society” in the sense of societal preferences even when historically constant, to be applied categorically and automatically by courts. This is especially so because, as

700. See *Rochin*, 342 U.S. at 172; see also, *Harrington v. Almy*, 977 F.2d 37, 43-44 (1st Cir. 1992) (*per curiam* denial of rehearing *en banc*) (discussing *Rochin*).

701. *Rochin*, 342 U.S. at 171.

702. *Irvine v. People of California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., with Burton, J. dissenting) (emphasis added).

703. *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring) (emphasis added).

just quoted, judges “alone ... are empowered to enforce [the Constitution],” therefore, they must exercise some degree of reasonable interpretive discretion rather than acting as mere empiricists, mechanically discerning and applying American traditions regardless whether such actually comport with due process morality encapsulated as “fundamental fairness.” Thus, “impersonal standards” should be taken as synonymous with “considerations deeply rooted in reason” discerned through “the spirit of science,” denoting things divorced from the partialities and preferences of both judges and greater society, but rather derived through neural rational thought.⁷⁰⁴

b. Frankfurter’s Definition of Due Process’ Meaning --

Having delimited the analytical process, Frankfurter turned to defining the essence of due process itself: “It is the compendious expression for: all those rights which the courts must enforce because they are basic to our free society.”⁷⁰⁵ Two years prior to the foregoing depiction in *Wolf*, citing both Magna Carta and the Court’s natural law-based due process exemplar *Hurtado v. California*,⁷⁰⁶ Justice Frankfurter explained that such “rights ... basic to our free society” are found among,

broad, inexplicit clauses of the Constitution, ... But broad as these clauses are, they are not generalities of empty vagueness. ... *The safeguards of ‘due process of law’ and ‘the equal protection of the laws’ summarize the meaning of the struggle for freedom of English-speaking peoples. They run back to Magna Carta but contemplate no less advances in the conceptions of justice and freedom by a progressive society.*⁷⁰⁷

704. See *Adamson*, 332 U.S. at 61-68 (1947) (Frankfurter, J., concurring); *Malloy* 378 U.S. 1 (1964) (again invoking reason, Justice Frankfurter stated that courts must “logically” discern under the Fourteenth Amendment’s Due Process Clause, which Bill of Rights protections are essential to liberty and which are not).

705. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J., plurality opinion); See also, *Mapp v. Ohio*, 367 U.S. 643, 643 (1961).

706. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (Frankfurter, J., plurality opinion) (citing, *Hurtado v. California*, 110 U.S. 516, 521 (1884)). See also, *supra* notes 514-20 and accompanying text (*Hurtado*’s explanation that the Constitution recognizes substantive due process and that substantive due process constrains the legislative as well as the executive branches).

707. *State ex rel. Francis*, 329 U.S. at 466-67 (Frankfurter, J., concurring) (emphasis added).

Because, as the just-quoted excerpt from *Francis* states, due process captures “the meaning of the struggle for freedom,” by logical extrapolation, due process addresses the questions: *Why do we want to be free?* and *What does freedom afford us?* Therefore, while mindful of its Magna Carta origins, to resolve those inquiries, due process is forward looking, the repository of, as the *Francis* passage adds, “advances in the conceptions of justice and freedom by a progressive society.” It is worth re-emphasizing that, as the above panoply of his writings recount, according to Frankfurter, pivotal ideas such as *freedom* and *justice* must not be understood merely as political constructs, but instead, as the product of impartial “reason” discerned “in the spirit of science” as informed by “the compelling traditions of the legal profession.”⁷⁰⁸ Frankfurter, then, must have perceived that *freedom*, *justice*, *liberty*, and their *ultimate meaning* -- why be free? -- derive from what *reason* in the “spirit of science” reveals.

Some irritable critics dismiss Frankfurter’s admonitions as essentially insubstantial. Prof. Greenwalt, for instance, sniffed, “Frankfurter is confident that judges can apply [substantive due process principles] disinterestedly, but all his rhetoric about the ‘spirit of science’ ... does not provide much of a guide about how judges can rise above their own personal evaluations.”⁷⁰⁹ To the contrary, expounding on his references to Magna Carta and *Hurtado*’s legacy, in his *Francis* concurring opinion Justice Frankfurter made a pronouncement as profound as it is broad: “The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. *It did mean to withdraw from the States the right to act in ways that*

708. Of course, his wary phrasing “spirit of science” reminds us that Frankfurter did not consider law to be a science in the sense of mathematics, physics, and other sciences that, according to Frankfurter, were subject to indubitably correct measurements and verification. “Whether one skilled in the art of science would agree with Frankfurter’s implication that there is certainty and precision in the sciences, it is clear that Frankfurter does not find the same in the process of judging. The further implication is that, for Frankfurter, law cannot be a science without deceptive simplification ...” Alfred S. Neely, *Justice Frankfurter, Universal Camera and A Jurisprudence of Judicial Review of Administrative Action*, 25 U. TOL. L. REV. 1, 34 (1994) (footnotes omitted).

Still, the evocative term “spirit of science,” joined with the other significant quotes in this writing text, evince, perhaps in the spirit of Kant, the hope yet uncertainty whether individuals routinely can both discern and apply neutral principles applicable to given legal issues. His admonition that judges are more apt to do so given their training and special vocation certainly underscores Frankfurter’s faith in neutral judging. See, *supra* note 699 and accompanying text.

709. Kent Greenawalt, *Variations on Some Themes of A "Disporting Gazelle" and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter*, 100 COLUM. L. REV. 176, 206–07 (2000) (footnote omitted).

are offensive to a decent respect for the dignity of man, and heedless of his freedom.”⁷¹⁰ Of course, the Court had frequently and unequivocally held that, within the strictures of the Due Process Clauses, government at all levels may innovate, changing legal practices and standards that might have been time-honored under English and Colonial antecedents, and into America’s early Constitutional experience.⁷¹¹ However, in *Francis*, Justice Frankfurter explicitly linked the “dignity of man,” “the meaning of the struggle for freedom,” and Humankind’s quest for “justice,” as factors affecting how the Due Process Clauses restrain such innovation. Thus, he anticipated the *dignity paradigm* that this writing urges, as contrasted with the *deeply rooted principles* standard, rightly implements the Framers’ intent to enforce through the Constitution the natural law principles of the Declaration of Independence.

In this regard, consistent with the Founders expectations that future generations would both correct their errors and improve upon their ideas,⁷¹² Frankfurter aptly explained that, as with all concepts legal and otherwise, apprehending “due process of law” is a process of studying, exploring, questioning, imagining, and, learning. That surely is why, referring to Justice Cardozo’s opinion in *Palko v. Connecticut*, Frankfurter stated:

Due process of law thus conveys neither formal nor fixed nor narrow requirements. ... But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. *It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right.* Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.⁷¹³

True, “The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the

710. *La. ex rel. Francis*, 329 U.S. at 468 (Frankfurter, J., concurring) (emphasis added).

711. As Justice Cardozo expressed it for the Court, a state, “is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Snyder*, 291 U.S. at 105 (citations omitted).

712. See, *supra* notes 280-87 and accompanying text.

713. *Wolf*, 338 U.S. at 27 (emphasis added) (discussing, *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

gradual and empiric process of 'inclusion and exclusion.'"⁷¹⁴ However, as already accented, the practice of testing -- of "inclusion and exclusion" -- so that "a free society [may] advance in its standards of what is deemed reasonable and right" to better understand the "living principle" called "due process of law" does not render due process' meaning a function of either popular will or partisan politics even if long-standing enough to be considered "deeply rooted." Rather, as Frankfurter informed in earlier passages, due process exposition is a progression in the "spirit of science," "rooted in reason" to discern for the sake of the "dignity of man" the meanings of "freedom" and "justice."⁷¹⁵ Thus, this writing's Deontological Originalism urges that, in Frankfurter's words, "the compelling traditions of the legal profession"⁷¹⁶ is the deontological morality that the Founders commemorated in the Declaration of Independence.

Equally profoundly, having defined "due process," and noting that understanding its meaning is an endeavor sounding in reason and "the spirit of science," Frankfurter explained the extraordinary latitude courts must exercise to ascertain when governmental action is "offensive to a decent respect for the dignity of man, and heedless of his freedom."⁷¹⁷ Specifically, while "great tolerance toward a State's conduct is demanded of this Court",⁷¹⁸

Once we are explicit in stating the problem before us in terms defined by an unbroken series of decisions, we cannot escape acknowledging that [due process of law] involves the application of standards of fairness and justice very broadly conceived. ... *the standards for judicial judgment are not narrower than 'immutable principles of justice, which inhere in the*

714. *Id.* (quoting, *Davidson v. New Orleans*, 96 U.S. 97, 104 (1887)).

715. Similarly, five years earlier, Frankfurter explained that "The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people." *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring). Accordingly, while surely informed by history and the accumulated wisdom of the American public, due process, "*expresses a demand for civilized standards of law*." It is thus not a stagnant formulation of what has been achieved in the past but a standard for judgment in the progressive evolution of the institutions of a free society." *Id.* at 414 (Frankfurter, J., concurring; emphasis added).

Again, we see that discerning the true meaning of due process requires "judgment," *neutral judgment* Frankfurter seems to mean, consistent with "the progressive evolution of the institutions of a free society," rather than popular judgment, even if born of wisdom, but nonetheless inevitably the fruit of political, lay evaluation. *Id.*

716. *Rochin*, 342 U.S. at 171.

717. *State ex rel. Francis*, 329 U.S. at 468 (Frankfurter, J., concurring).

718. *Id.* at 470 (Frankfurter, J., concurring).

*very idea of free government', 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', [and] 'immunities * * * implicit in the concept of ordered liberty', ... Such were recently stated to be 'the controlling principles'.*⁷¹⁹

Again, to define due process of law, Justice Frankfurter implores ideas sounding in deontological morality. Surely, due process' vindication of nothing less than the "freedom" -- that is, I take it, *the liberty* -- inherent in and essential to the "dignity of man [Humankind,]" enforced as "standards of fairness and justice very broadly conceived," cannot be reduced solely to a judicial recounting of either American traditions or what happens to predominate as American custom at the time of the relevant due process litigation. Nor can "immutable principles of justice, which inhere in the very idea of free government", 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', [and] 'immunities * * * implicit in the concept of ordered liberty'" rightly be discerned only through an uncritical recounting of historical and contemporary American popular practices. Founded as they are on natural law principles,⁷²⁰ discerned through America's "judicial process" that applies not partisan politics but rather "notions deeply rooted in reason," *the "immutable principles of justice" that define due process must allow reviewing judges to defer to American customs, practices, traditions and preferences only insofar as they are consistent with immutable, transcendent moral precepts deriving from natural law as instructed in America's founding documents.* In that regard, it is prudent to repeat Frankfurter's pivotal admonition, "The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. *It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.*"⁷²¹

And, to assuage any remaining doubts, almost seventy years ago Frankfurter yet again vividly explicated due process' inextricable connection to moral precepts:

719. *Id.* (emphasis added; quoting, *Holden v. Hardy*, 169 U.S. at 389; *Hebert v. State of Louisiana*, 272 U.S. 312, 316 (1926); *Palko*, 302 U.S. at 324, and, *Malinski v. N.Y.*, 324 U.S. 401, 438 (1945) (Stone, C.J., with Roberts, Reed and Jackson, JJ., dissenting)).

720. See *Holden v. Hardy*, 169 U.S. at 389; *Hurtado v. California*, 110 U.S. at 530-31.

721. *State ex rel. Francis*, 329 U.S. at 466-67 (Frankfurter, J., concurring) (emphasis added).

It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. *Due Process is that which comports with the deepest notions of what is fair and right and just.* The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause.”⁷²²

Although referring to “traditions and feelings of our people,” Frankfurter, as was his wont, added a careful, extra-societal *dominating* factor: “Due Process is that which comports with *the* deepest notions of what is fair and right and just.”⁷²³ I highlighted the word “the” to accent that “deepest notions of what is fair and right and just” do not refer back to his immediately preceding sentence referencing the popular will, specifically, “[T]he Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.”⁷²⁴ Had he wished such a relation-back, Frankfurter would have written (as emphasized in italics): “the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with *those deeply embedded* notions of what is fair and right and just.” That, of course, is not what he wrote. Rather, Frankfurter first stated that due process relates to American tradition and beliefs, but, then added “Due Process is that which comports with *the* deepest notions of what is fair and right and just,”⁷²⁵ evincing that beyond “the traditions and feelings of our people” there could be more profound, more true understandings -- that is, “*the* deepest notions” --which might be assessable to judges but either not yet known or not yet acknowledged by the public-at-large.

Yes, Frankfurter claimed to eschew the inevitability of right answers.⁷²⁶ Nevertheless, as his references to “reason,” “spirit of science,” and,

722. *Solesbee v. Balkom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), abrogated by *Ford v. Wainwright*, 477 U.S. 399 (1986).

723. *Id.* at 16 (Frankfurter, J., dissenting) (emphasis added).

724. *Id.*

725. *Solesbee*, 339 U.S. at 16 (Frankfurter, J., dissenting) (emphasis added).

726. For example, during his formative years, “In 1912, [while law officer of the Bureau of Insular Affairs and about to commence his remarkable tenure as professor at Harvard Law

“impersonal standards” underscore, Justice Frankfurter must have conceived judicial due process analysis to discern actual truths about fairness and justice. Otherwise, he would have had to admit candidly that, no matter how careful and forthright they may be, the absence of deontological moral truth renders any determination of due process the personal preferences of the reviewing judges.⁷²⁷ Given his respect for judicial restraint, Frankfurter

School, the 30-year-old Frankfurter] said that, ‘if facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life’” Joseph Gumina, *From Austria to Sacco and Vanzetti: The Development of Frankfurter's "Fundamental Rights" Theory*, 30 W. NEW ENG. L. REV. 389, 404 (2008) (quoting Helen Shirley Thomas, Felix Frankfurter: Scholar on the Bench 172 (1960) (quoting Felix Frankfurter, *The Zeitgeist and the Judiciary*, Address at the Harvard Law Review Twenty-fifth Anniversary Dinner (Mar. 30, 1912))). Indeed, Daniel Gordon opined that, like his mentor Louis Brandeis, “Frankfurter would adopt Holmes' skeptical view of natural law [comes as] no surprise. Natural law reflects the dominant Christian culture of Europe and America . . . grounded in Christian Scripture.” Daniel R. Gordon, *Revisiting Erie, Guaranty Trust, and Gasperini: The Role of Jewish Social History in Fashioning Modern American Federalism*, 26 SEATTLE U. L. REV. 213, 237 (2002) (footnotes omitted; discussing as well many other reasons for natural law skepticism).

In further support of the argument that Frankfurter was a postmodernist, Prof. Paulsen offered, “Frankfurter’s perspective on religious conviction is that of the quintessential modern secular liberal: There is no such thing as religious truth. Indeed, there are no objectively right answers at all to moral, religious, or philosophical questions, and thus no proper basis for moral absolutism. . . . [F]or example, Frankfurter writes that ‘no single principle can answer all of life’s complexities.’” Michael S. Paulsen, *The Unconscionable War on Moral Conscience: Robert P. George, Conscience and Its Enemies: Confronting the Dogmas of Liberal Secularism*. By Robert P. George, 91 NOTRE DAME L. REV. 1167, 1172 (2016) (quoting *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594 (1940)[, o., *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)]).

Of course, there can be different reasonable interpretations of given quotes. That Frankfurter opined, “no single principle can answer all of life’s complexities” does not mean that he believed there are no moral principles emanating from sources greater than human imagining and human preferences. Indeed, I take Frankfurter’s *Gobitis* quote simply to be stating that whether deontological or consequentialist, no single idea will yield the correct answer to any given dilemma. Rather, answers arise from a host of interactive “principle[s],” likely varying in levels of order, but no one of which comprises a universal cure for all problems. As Zachary Shemtob put it, “Frankfurter believed that courts could not mask their every decision behind inflexible absolutes, but had to recognize the contextual nature of judging.” Zachary B. Shemtob, *The Conflicted Constitution: The Textual Absolutism of Justices Black and Thomas Versus the Balanced Restraint of Justices Frankfurter and Breyer*, 1 BRIT. J. AM. LEG. STUDIES 217, 223 (2012).

Paulsen’s chosen quote cannot prove that Justice Frankfurter derided deontological morality.

727. Such personal preferences might not reflect given judges’ deliberate substitution of their personal moral precepts for constitutional law. Judges might enforce their personal preferences to respect precedent and similar canons of judicial restraint. Or, they might enforce their personal inclinations to respect the “will of the people” by not substituting the People’s penchants with a purportedly elitist judicial viewpoint. The point is, however, absent

would not have embraced a constitutional philosophy holding that, even though often exceptionally well informed, judges' personal moral preferences should trump Society's.

Indeed, Frankfurter did write, "canons of decency and fairness ... are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."⁷²⁸ And, granted, Frankfurter never explicitly stated a firm and unwavering belief in deontological morality; therefore, his grandiose prose might be interpreted to hide ambivalence -- a coy hedging of intellectual wagers allowing for the legitimacy of both deontological and consequentialist theory. Nevertheless, as shown in the text and accompanying notes *supra*, so many of Frankfurter's pronouncements in so many judicial opinions strongly implicate natural law theory understood through scientific methodology and neutral reasoning. Such pronouncements make no sense absent a deontological bent. Therefore, I stand by my conclusions that his jurisprudence, so influential, as we will see, on Justice Harlan, promotes the Deontological Originalism this writing proposes.

Accordingly, the only justification Frankfurter could offer to explain why the wisdom of judges should dominate is that, based on their status and training, judges can and will resist the urge to conflate subjective partialities with the meaning of constitutional law. To be true to that duty, there is no other available method except to seek through impartial reason the immutable moral principles of due process. In that regard, interpreting him as an adherent, if a reluctant one, to such jurisprudence, respected legal scholar Sanford Kadish aptly concluded, "... on the contemporary Court Justice Frankfurter, the storm center of the natural law-due process controversy, ..."⁷²⁹

finding -- or at least attempting to discern -- immutable moral precepts, any judicial determination purporting to apply due process morality must be based on the reviewing judges' personal moral biases.

Accordingly, I must disagree with Zachary Shemtob's assessment that, "Frankfurter believed judicial decision making was irreducible to a series of absolute rules, and the outer limits of law, whether unprecedented scenarios or vaguely worded provisions, therefore forced judges to make admittedly subjective determinations." Shemtob, *supra* note 726, at 227.

728. *Id.* (quoting, *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

729. Kadish, *supra* note 665, at 327. Similarly, Prof. Yassky identifies Frankfurter's due process jurisprudence as essentially a modernized "natural law" reformulation of Justice Bradley's natural law-based dissent in *The Slaughterhouse Cases*, 86 U.S. [6 Wall.] 36, 49-52 (1872) (regarding the "privileges and immunities" clause of the Fourteenth Amendment. *E.g.*, "But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are." *Id.* at 52 (Bradley, J., dissenting)). David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 658 (2000). *See also, e.g.*, Trisha Olson, *The*

iii. *The Second Justice Harlan's Due Process Jurisprudence --*

Along with Justices Cardozo and Frankfurter, Justice John Marshall Harlan is the third major influence on the meaning of due process. Most particularly, Harlan understood and fully accepted that, pursuant to the due process clauses, Government must comply with its unalienable moral duty to comport with “fundamental fairness.”⁷³⁰ Harlan famously penned his most thorough explication of that duty in *Poe v. Ullman*,⁷³¹ an exposition that justly has been lauded as “remarkable,”⁷³² “seminal,”⁷³³ and, in the words of Judge

Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment, 48 ARK. L. REV. 347, 361 (1995) (“Justice Frankfurter conceived of a richer understanding of natural law than natural rights.”).

As with Justice Cardozo (see particularly, *supra* notes 675-86 and accompanying text), Justice Frankfurter's anti-*Lochnerism* and embracing of a pragmatic common law does not mean that he completely eschewed the belief in natural law principles to define fundamental natural rights. As Prof. Steven G. Calabresi concluded after reviewing relevant materials, “Justice Frankfurter recommended using a historically glossed, natural law approach to the judicial role to deal with the problem he saw in the open-endedness of the Fourteenth Amendment.” Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment the Bill of Rights: Creation and Reconstruction*, by Akhil Reed Amar. (New Haven, Connecticut: Yale University Press, 1998) Pp. xv, 412, 87 GEO. L.J. 2273, 2298 (1999).

I note in passing that one can find a seemingly direct exhortation by Justice Frankfurter: “In the history of thought ‘natural law’ has a much longer and much better founded meaning and justification than such subjective selection.” *Adamson*, 332 U.S. at 65 (Frankfurter, J., concurring). Some commentators have taken this direct reference to conclude that, “Frankfurter defended ‘natural law’ theories, ...” Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1025 (2009) (quoting *Adamson*). I do not disagree. Moreover, Frankfurter did hint that natural law might inform judicial review of constitutional matters. “In the numerous cases either granting or denying judicial review, grant or denial were reached not by applying some ‘natural law’ of judicial review ... However useful judicial review may be, it is for Congress and not for this Court to decide when it may be used—except when the Constitution commands it.” *Stark v. Wickard*, 321 U.S. 288, 314 (1944) (Frankfurter, J., dissenting).

However, as I have not found similar direct references in other Frankfurter opinions, I am hesitant to cite his *Adamson* concurrence as sufficient proof. But, certainly, coupled with the tenor of his due process jurisprudence, Prof. Burnett's determination is apt.

730. *Duncan v. Louisiana*, 391 U.S. 145, 177 (1968) (Harlan, J., dissenting). See *supra* note 459 for a brief iteration of Justice Harlan's legacy and why he is referred to as the “second” Justice John Marshall Harlan

731. *Poe v. Ullman*, 367 U.S. 497 (1961).

732. Hon. Robert H. Henry, *Madison Lecture: Living Our Traditions*, 86 N.Y.U. L. REV. 673, 675 (2011) (discussing Justice Harlan's dissent in *Poe v. Ullman*).

733. Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 459 (2017); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 103 n.485 (2003);

Robert H. Henry, "perhaps the most eloquent defense of nonliteralism ever written by a conservative ..."⁷³⁴ Indeed, albeit now in some question, the Supreme Court has adopted Harlan's elucidation of due process.⁷³⁵

Dissenting from the Court's dismissal of the petitioners' constitutional challenge to Connecticut's law criminalizing the use of contraception by married couples,⁷³⁶ Justice Harlan embraced the traditional account that the moral imperative of fundamental fairness means that violations of due process comprise "arbitrary impositions" or "purposeless restraints"⁷³⁷ that defy, using Justice Cardozo's famous phrasing, the very "the concept of ordered liberty."⁷³⁸

Like his predecessors, the cautious and meticulous Harlan⁷³⁹ appreciated the need to respect history and tradition.⁷⁴⁰ He recognized as well that the Constitution does not redress every conceivable grievance.⁷⁴¹ While, *ala*

Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 90 (2001).

734. Henry, *supra* note 732, at 680.

735. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848-849 (1992); *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984); *but see*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (urging that Harlan's *Poe* stance has been replaced by the *deeply rooted traditions* paradigm).

736. The *Poe* majority decided on prudential grounds that the petitioners had failed to state a justiciable claim, that is, their record did not evince a likelihood that Connecticut actually would enforce its criminal prohibition against them as married couples. "The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again." *Poe*, *supra* note 157, at 509 (Brennan, J., concurring).

737. *Id.* at 543 (Harlan, J., dissenting) (citations omitted); *see also*, *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring, reasserting without fully repeating his *Poe* dissent).

738. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting). Inexplicably, although citing *Palko* elsewhere in his *Poe* dissent, Harlan did not acknowledge Justice Cardozo as the originator of that idiom.

739. "Harlan has been called the 'paradigm of the true conservative judge.'" Henry, *supra* note 732, at 679 (quoting BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 375 (1993)).

740. *Poe*, 367 U.S. at 543-44 (Harlan, J., dissenting) (citations omitted).

741. Shortly after *Poe*, Harlan expressed his concern over what he sensed was a rising sentiment,

that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.

Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting).

Justice Frankfurter, cognizant of proper judicial restraint,⁷⁴² Justice Harlan recognized, as did Frankfurter, that judges must rely on unbiased rationality to discern the meaning of “due process of law”:

[P]recisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, *the basis of judgment as to the Constitutionality of state action must be a rational one, ... [A]s inescapable as is the rational process* in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.⁷⁴³

Based on the foregoing, Justice Harlan offered his paradigmatic understanding of due process, not simply in terms of empirically researching time-honored traditions, but in terms of fairness and decency. Specifically, due process envisions a seamless, overarching fabric of compatible rights discerned through impartial rational contemplation:

This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. *It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ...* Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, *as they have been rationally perceived and historically developed.* Though we exercise limited and sharply restrained judgment, yet there is no “mechanical yardstick,” no “mechanical answer.” The decision of an

Deontological Originalism has no quarrel with Harlan’s stance, although that paradigm likely would embrace more controversies than the Justice would include under the strictures of his *Poe* dissent. The point is, so long as there is no moral problem, governmental policies are not subject to judicial nullification under the Due Process Clauses even if any challenged policy truly is a “blot upon the public welfare.” Like “due process” as envisioned by Harlan, Deontological Originalism applies only when reviewed governmental action violates a fundamental right emanating from natural law.

742. “If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.” *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

743. *Poe*, 367 U.S. at 539–40 (Harlan, J., dissenting) (emphasis added). Similarly, later in his opinion, Justice Harlan accented, “supplying of content to this Constitutional concept has of necessity been a rational process, ...” *Id.* at 542.

apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."⁷⁴⁴

Justice Harlan climaxed his insightful discussion by quoting Justice Frankfurter's majority opinion in *Rochin*, to reiterate for a fourth time that due process analysis is, "deeply rooted in reason."⁷⁴⁵ Indeed, it could hardly be some other process to discern those concepts, "which are considered to embrace those rights 'which are ... fundamental; which belong ... to the citizens of all free governments,' ... for 'the purposes (of securing) which men enter into society,' ..."⁷⁴⁶

I read Justice Harlan's intricate and detailed *Poe* dissent as consistent with the principles of deontological moral reasoning urged in this writing. Granted, the ever cautious and unassuming Harlan claimed that the process requires balancing, "The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."⁷⁴⁷ Regardless, pursuant to Justice Harlan's above-quoted dynamic and resolute rationale, we know that pursuant to the overarching "rational continuum" that is "liberty," *unjust* "demands of organized society" manifest as "*arbitrary impositions and purposeless restraints*" are unlawful deprivations of "liberty." Thus, there can be no truly just "demands of organized society" that infringe actual "liberty" because such would be the very tyranny the Declaration of Independence explains is illegitimate. Accordingly, the overarching thrust of his *Poe* dissent evinces Harlan's appreciation that, in actuality, there is no

744. *Id.* at 543-44 (Harlan, J., dissenting) (emphasis added) (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)); *accord, e.g.*, *Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ.*, 616 F.3d 963, 969 (9th Cir. 2010); *Zalewska v. County of Sullivan*, 316 F.3d 314, 321 (2d Cir. 2003) (municipal transit authority's rule requiring all affected personnel to wear pants did not violate female employee's liberty interests); *Neinast v. Bd of Trs. of Columbus Metro. Library*, 346 F.3d 585, 595 (6th Cir. 2003).

745. *Poe*, 367 U.S. at 544-45 (Harlan, J., dissenting) (quoting *Rochin v. California*, 342 U.S. 165, 170-71 (1952)).

746. *Id.* at 541 (Harlan, J., dissenting) (quoting *Corfield v. Coryell*, F. Cas.546, 551 (Cir. Court, E.D. Pa. 1823) and *Calder v. Bull*, 3 U.S. (Dall.) 386, 388 (1798)).

747. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). However, because due process is predicated on deontological morality, in this one regard, Harlan was mistaken. See *supra* notes 536-50 and accompanying text explaining that due process rights are not "balanced."

“balance;” the only constitutional “demands of organized society” are those that comport with liberty’s rational continuum.

Indeed, as the Justice himself accented, “The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.”⁷⁴⁸ If such “full scope of liberty” derives merely from an empirical discovery of “deeply rooted” traditions, then all of Harlan’s careful and intricate reasoning, particularly due process’ link to reason, means absolutely nothing because no such intricate, thoroughgoing intellectual exercises are needed to discern whether some “deeply rooted” tradition applies in some given instance. Thus, although informative, if deeply rooted traditions are not the only matters germane to what outside of the Constitution’s text informs the meaning of “due process of law,” then, Harlan’s emphasis on a “rational continuum” must relate to what are coalesced herein as Deontological Originalism. Justice Harlan’s explication of due process infers the Deontological Originalism espoused by this writing, even if, like Frankfurter and Cardozo before him, Harlan might have been disinclined to so acknowledge.

I feel justified, therefore, in completing the journey charted by the *Poe* dissent, as well as by Justice Cardozo’s *Palko* opinion and the amassed wisdom of Justice Frankfurter, regardless whether those jurists would or would not have been willing to acknowledge the *journey’s end* embedded in their due process precepts.⁷⁴⁹ It is a course that, based on prior judicial decisions, Justices Cardozo, Frankfurter and Harlan rightly modernized through “suggesting aspects of the natural law approach, ...”⁷⁵⁰ We must be true to where the voyage they charted actually takes us. Just as we should apply the Founders’ natural law principles even if doing so discredits discrete practices and traditions that the Founders themselves were loath to condemn,⁷⁵¹ so too must we follow the path of Cardozo-Frankfurter-Harlan

748. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

749. Adapting the phrasing the Ninth Circuit employed regarding Congress, “However, at journey’s end we are left where we began, and conclude that [Justices Cardozo, Frankfurter, and Harlan] meant what [they] said.” *Saipan Stevedore Co. Inc. v. Dir., Office of Workers’ Comp. Programs*, 133 F.3d 717, 720 (9th Cir. 1998).

750. R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S L.J. 1051, 1082 n. 103 (1995). See also, e.g., Unattributed, *Supreme Court, 1976 Term, I. Constitutional Law, D. Due Process 1. Protection of Family Interests*, 91 HARV. L. REV. 128, 134 n. 52 (1977) (noting, Justice Harlan’s invocation of natural law jurisprudence in *Poe v. Ullman*, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting)).

751. See *supra* notes 280-87 and accompanying text.

although it transports us to places they did not think are on “due process of law’s” map.

True, many scholars assert that the apparent sweeping breadth and depth of Harlan’s *Poe* dissent is atypical and out-of-place for a justice so steeped in the principles of judicial restraint.⁷⁵² Noted scholar Cass Sunstein, for instance, expressed the common interpretation that Harlan limited the range of substantive due process “to long-standing traditions.”⁷⁵³ Therefore, some urge that academics ought not read the *Poe* dissent too expansively (meaning, I think, do not read it too literally) for, indeed, Harlan himself harbored a narrow view of the panoply of unspecified rights deriving not from the Bill of Rights but from the Constitution’s guarantee of “due process of law.”⁷⁵⁴ Hence, analysts have noted with bemusement that numerous “liberal” legal theorists happily enlist Harlan, *via* his *Poe* dissent, as a proponent of expansive due process analysis.⁷⁵⁵

752. In a commendably thorough and thoughtful note, Andrew B. Schroeder recounts many of the critics who have found it difficult to reconcile Harlan’s purported judicial conservatism with his *Poe* dissent. Andrew B. Schroeder, *Keeping Police Out of the Bedroom: Justice John Marshall Harlan, Poe v. Ullman, and the Limits of Conservative Privacy*, 86 VA. L. REV. 1045, 1046-1049 (2000) (note).

753. Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1565 (2008) (“In *Griswold v. Connecticut*, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring in Court’s striking as violating substantive due process, Connecticut’s statute denying married couples access to birth control and to educational sources addressing birth control), Justice Harlan ... attempted to discipline the use of substantive due process, by reference to long-standing traditions, and this view is now taken to provide the most plausible understanding of *Griswold*.” (footnote omitted) (quoted in, Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J. LAW & PUB. POL’Y, 1031, 1075 n.182 (2010)).

754. For example, “Significantly, Justice Harlan included abortion, euthanasia, and suicide among those controversial moral issues about which states generally should be free to legislate.” David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQUETTE L. REV. 975, 1061 (1992) (citing, *Poe*, 367 U.S. at 547 (Harlan, J., dissenting)). Accordingly, some may aver that it was irresponsible for the Court after Harlan’s death to use the “rationale continuum” aspect of his *Poe* dissent to support a due process privacy right to abortion. *E.g.*, Mary Kathryn Nagle, *Abortion Post-Glucksberg and Post-Gonzales: Applying an Analysis that Demands Equality for Women Under the Law*, 16 DUKE J. GENDER L. & POL’Y 293, 297-302 (2009) (decrying subsequent Supreme Court decisions that seem to reject Harlan’s “rational continuum” approach).

Similarly, Justice Harlan likely would not have joined the *Obergefell* Court because, “Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.” *Poe* 367 U.S. at 553 (Harlan, J., dissenting) (quoted in Smolin, *supra* note 754 at 1061).

755. “Many commentators perceive Justice Harlan, the quintessential conservative judge, as liberal in his interpretation of substantive due process. This perception makes Justice

Of course, the art of critical appraisal is fraught with perils as critics must be careful not to accent only those passages which please them while hastily ignoring or improperly underplaying those that do not.⁷⁵⁶ Still, disagreeing with Anthony Cicia's analysis,⁷⁵⁷ this writing maintains that, akin to Frankfurter, Harlan left significant and meaningful leeway to rebuff "tradition" in the rare but important instances when sober, unbiased, erudite judicial reasoning reveals that "tradition," even if longstanding and deeply held, defies fundamental fairness.

As his prime example, Cicia offered:

Justice Harlan believed that "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, *as they have been rationally perceived and historically developed.*" This demonstrates that, although Harlan believed in looking to "constitutional purposes," which sounds aspirational, he relied on how these purposes have "historically developed." Thus, Justice Harlan's substantive due process formulation is confined to protecting only those rights that have enjoyed traditional protection in the United States.⁷⁵⁸

Cicia's conclusion is hasty. First, regarding Harlan's phrasing, "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed," Cicia completely ignores the significant term "rationally perceived" which implies resort to neutral reason to negate the influence of selfish, biased, uninformed preferences that might

Harlan's formulation appealing even to some liberal fundamental rights theorists. A closer inspection, however, reveals Justice Harlan's substantive due process formulation as very restrictive." Anthony C. Cicia, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 *FORD. L. REV.* 2241, 2266 (1996) (footnotes omitted). Accordingly, Cicia criticizes "liberal" scholars who, he believes, have carelessly isolated some of Justice Harlan's more expansive prose from his true framework for Harlan, Cicia argues, "tempered his language with emphasis on the common law tradition. Justice Harlan severely limited the scope of his substantive due process formulation by grounding it in tradition." *Id.* at 2247.

756. Certainly, commentators may not treat authors' points as they might, "look out over the heads of the crowd and pick out [their] friends." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 36 (Amy Gutmann ed., 1997) (crediting this metaphor to Hon. Harold Leventhal) (quoted in, John F. Manning, *Lessons from a Nondelegation Canon*, 83 *NOTRE DAME L. REV.* 1541, 1563 n.63 (2008)).

757. See *supra* note 755.

758. Cicia, *supra* note 755, at 2247-48 (emphasis added; quoting *Poe*, 367 U.S. at 544 (Harlan, J., dissenting)).

underlie the particular “historical development” under review. If Harlan’s verb-phrasing “must be considered” means that “a background of Constitutional purposes” is the *only* legitimate basis to review a claimed due process right, then his modifier “as [those purposes] have been rationally perceived” compels judges to consider not only the “historical development” of the relevant “Constitutional purposes,” *but also to discern if rational perception* actually justifies legitimizing as constitutionally valid, that “historical development.” Scrupulous judges make such assessments not by consulting and imposing their own subjective preferences. Rather, through neutral reason,⁷⁵⁹ judges discern what the applicable “background of Constitutional purposes” truly means. That assessment, as we now know, depends on whether the purported due process right does or does not emanate from the natural rights principles of the Declaration of Independence.

Accordingly, under Cicia’s reading, Harlan’s deliberate phrase “rationally perceived” means nothing, which, of course, is unlikely in the extreme given his emphasis, derived particularly from Justices Cardozo and Frankfurter, on rational analysis to explicate “due process of law.” Otherwise, surely Justice Harlan would not have included the term “rationally perceived.” Rather, he would simply have written, “Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been ~~rationally perceived and~~ historically developed” I certainly am hesitant to negate -- to declare as slapdash surplusage -- Justice Harlan’s term “rationally perceived” by in essence melding that term into the companion term “historical development.”⁷⁶⁰ The better understanding then is that while undoubtedly

759. As recounted in the text, Harlan repeatedly emphasized *rational* analysis encapsulated by his identification of due process as a, “rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints,” *Poe*, 367 U.S. at 543-44 (Harlan, J., dissenting). See, *supra* notes 742-48 and accompanying text.

760. Generally, “interpretations resulting in textual surplusage are typically disfavored.” *U.S. v. Ali*, 718 F.3d 929, 2013 A.M.C. 1843, 1853 (D.C. Cir. 2013) (citation omitted; concerning statutory analysis); See also, e.g., *Wisc. Cen. Ltd. v. U.S.*, 856 F.3d 490, 494 (7th Cir. 2017) (citing, *U.S. v. Ressam*, 53 U.S. 272, 277 (2008)). This instance is completely different from my earlier argument that, by rightly identifying the Due Process Clauses as the Constitution’s value monism, the Judiciary rendered almost the entire Bill of Rights plus the Fourteenth Amendment’s Equal Protection Clause redundant. See, *supra* notes 554, 583 and accompanying text. The technical surplusage of enumerated fundamental rights in the Bill of Rights and the Fourteenth Amendment is unavoidable given the Due Process Clauses’ role as repository for *all* fundamental rights, or, to use the declaration’s term, “unalienable Rights.”

By contrast, one would wrongfully alter Harlan’s due process standard, “rationally perceived and historically developed,” by declaring the term “rationally perceived” to be surplusage. That is because, not only the text “rationally perceived and historically

related, *rational development* may well be different from how the “historical development” actually manifested, thus requiring two separate enquiries by reviewing judges.⁷⁶¹

Moreover, even if “rationally perceived” were taken to mean not unbiased reason, but the personal “rational” perspectives of the individuals who collectively have formed the germane “historical development,” Harlan’s standard requires, as earlier quoted, that to be true to the “rational continuum” that comprises “liberty,” “Each new claim to Constitutional protection *must be considered against* a background of Constitutional purposes, as they have been rationally perceived and historically developed.” He aptly did not write, “Each new claim to Constitutional protection [*must be judged only and entirely*] against a background of Constitutional purposes, as they have been rationally perceived and historically developed;” rather his operate verb form is “must be considered.” Indeed, the recognized definition of the verb “consider” is, “Think carefully about (something), typically before making a decision.”⁷⁶² To *consider* implies, therefore, that the applicable “background of Constitutional purposes, as they have been rationally perceived and historically developed” is something that must be contemplated and, given the nature of judicial review, accorded considerable, but not dispositive respect. Therefore, consideration of the applicable “background of Constitutional purposes, as they have been rationally perceived and historically developed” would be an embarking point, not an inevitable, unassailable final destination.

To borrow the popular advertising phrase, “But wait. There’s more.” Cicia’s quote omitted the modifying sentences Justice Harlan included to explicate his term “rationally perceived and historically developed:” “Though we exercise limited and sharply restrained judgment, yet there is no

developed,” but also the entire corpus of his due process jurisprudence presented *supra* in the text informs that Justice Harlan never envisaged that “due process of law’s” meaning emanates solely and exclusively from its “historical development.”

761. For instance, in a sex discrimination claim, the *historical development* of some law or tradition may defy *rational perception*. A law requiring women in opposite-sex marriages to perform all legal endeavors such as opening bank accounts or buying property under their “married names” may be explained under an *historical development* that, as a matter of *rational perception* demeans and disparages such women’s individuality by compelling them against their will to be identified under their husband’s surnames.

762. *Consider*, ENGLISH OXFORD LIVING DICTIONARIES (2018). Essentially identically, The Law Dictionary, an online source, defines “consider” as, “the term that means to think about, or to ponder or study and to examine carefully.” The Law Dictionary (Featuring Black’s Law Dictionary Free Online Legal Dictionary Free Online Legal Dictionary 2nd Ed.), <https://thelawdictionary.org/consider/> (accessed August 4, 2018).

‘mechanical yardstick,’ no ‘mechanical answer.’ The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take ‘its place in relation to what went before and further [cut] a channel for what is to come.’”

By accenting that “is no ‘mechanical yardstick,’ no ‘mechanical answer’”, Harlan tells us that even the admittedly intricate and demanding empiricism attendant to discerning deeply-rooted traditions is insufficient for due process analysis, at least in hard cases. Were it otherwise, he would have been direct and clear, I believe, in clarifying that judges ought never go beyond historical inquiry. Instead, using undeniably metaphorical more than explicit prose, Justice Harlan recognizes that courts must understand and test “well-accepted principles and criteria” by using “restrained” but sound “judgment.” Like Cardozo and Frankfurter before him, Harlan cannot renounce the judges’ duty to judge, meaning, to discern based on rational analysis whether a given government practice, regardless of persistence and provenance, comports with the demands of “fundamental fairness,” that is, devoid of “arbitrary impositions and purposeless restraints.” Ultimately, that determination must rest with unbiased (one hopes) courts and not partisan Society.

I conclude this analysis with an observation by Justice Harlan that perhaps even more fundamentally deflates the analysis of Cicia and like critics. Four years after issuing his *Poe* dissent, citing Justice Frankfurter, Harlan explained that,

Judicial self-restraint ... will be achieved in [substantive due process analysis], as in other constitutional areas, only by continual insistence upon respect for the teachings of history, *solid recognition of the basic values that underlie our society*, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.⁷⁶³

763. *Griswold v. Conn.*, 381 U.S. at 501 (emphasis added) (Harlan, J., concurring; citing, *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring), o. in part, *Malloy v. Hogan*, 378 U.S. 1 (1964)).

Interpreters understand Justice Harlan’s *Griswold* concurring opinion to aver that, “the natural law approach was the acceptable way to recognize privacy as a fundamental right. Lisa Jane McGuire, *Banking on Biometrics: Your Bank’s New High-Tech Method of Identification May Mean Giving Up Your Privacy*, 33 AKRON L. REV. 441, 480 n. 84 (2000). Indeed, in his perceptive article, Richard M. Ré mentions that many commentators have embraced Harlan’s

Harlan's significant term "solid recognition of the basic values that underlie our society" denotes an analytical factor distinct from the empirical research needed to discern American values and traditions -- "respect for the teachings of history" -- and deference to the Constitution's structure of government, "the doctrines of federalism and separation of powers." "Solid recognition of the basic values that underlie our society," it seems to me, restates his pivotal claim in *Poe* that the "liberty" protected by "due process of law," "is not a series of isolated points pricked out in terms of [enumerated rights but rather] a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ..."⁷⁶⁴ Delineating that "rational continuum" (or its various synonyms⁷⁶⁵) is

Poe dissent over allegedly more expansive theories such as Justice William O. Douglas' "controversial constitutional 'penumbras' analysis [in *Griswold*]... that seemed capable of justifying any number of privacy rights." Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 HARV. J. L. & PUB. POL'Y, 1031, 1075 (2010) (discussing, *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (Douglas, J., with Warren, C.J., and Brennan and Goldberg, JJ., expressing the "opinion of the Court").

Perhaps ironically, Douglas cited Harlan's *Poe* dissent as the main support for his "penumbras" theory. *Id.* Significantly, Justice Harlan refused to join the Douglas opinion, "I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion." *Id.* at 499 (Harlan, J., concurring). Harlan's reason was that he understood Douglas to espouse essentially a strict *incorporation doctrine* approach: The Douglas standard "seems to me to evince an approach to this case very much like that taken by my Brothers [Justice Hugo] BLACK and [Justice Potter] STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights." *Id.*; see also, *id.* at 500 (Harlan, J., concurring). Rather, quoting Justice Cardozo's opinion for the Court in *Palko* and referencing his own *Poe* dissent, Justice Harlan reasoned that the challenged Connecticut statute limiting married couples' access to contraception was constitutionally infirm because it violated, "basic values 'implicit in the concept of ordered liberty,' ..." *Id.* (Harlan, J. concurring). Accordingly, Harlan concluded, "While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom." *Id.* (Harlan, J. concurring).

Ré cunningly interprets Harlan's *Griswold* concurrence to imply a view not more restrained than Douglas', but rather, because it is not limited to enumerated rights under the Bill of Rights, arguable larger. In support, Ré referenced the *Poe* dissent, "Harlan's discussion in *Poe* is quite varied. He canvassed an argument much like Douglas's 'penumbras' analysis in the *Griswold* majority opinion." Ré at 1075. Thus, Ré's analysis deflates Cicia's much more limited reading of Harlan's expansive prose.

764. *Poe*, 367 U.S. at 543-44 (Harlan, J., dissenting).

765. It is worth recalling that Harlan expressed the concept of "a rational continuum" in related ways throughout his *Poe* dissent. He accented the discernment of due process that is "deeply rooted in reason," *Id.* at 544-44 (Harlan, J., dissenting) (quoting *Rochin v. Cal.*, 342 U.S. 165, 171 (1952) (*per* Frankfurter, J.)), and as a "background of Constitutional purposes,

an independent judicial determination, surely informed through and respectful of, *but never categorically dictated by* historical development, tradition and custom. As this writing continually emphasizes, were it otherwise, the judicial role would only be as uncritical bookkeeper collecting accounts of “basic values that underlie our society,” but failing to judge whether, on a “rational continuum” that, of course, must be “deeply rooted in reason,” those popular accounts truly conform with values “implicit in the concept of ordered liberty.”⁷⁶⁶

In sum, consistent with the constitutional theory of his Supreme Court colleague Felix Frankfurter, Justice Harlan’s due process framework respects America culture, history and tradition, and, indeed, is inclined to defer to the accumulated wisdom of the American experience revealed through statutes, referenda, and other expression of popular will.⁷⁶⁷ However, in accord with Frankfurter and Cardozo, Harlan was a professional judge who believed that judges must judge, that is, substitute their more-learned judgment but only when necessary and only to the extent needed and no further.⁷⁶⁸ I agree then, with respected jurisprudent, professor and former Associate Justice of the Supreme Judicial Court of Massachusetts, Charles Fried, who commends Harlan’s *Poe* dissent as epitomizing, “belief in the possibility - indeed, inevitability - of reasoning and judgment in applying the Constitution.”⁷⁶⁹

as they have been rationally perceived” that Cicia himself quoted. Cicia, *supra* note 755, at 2247 (quoting *Poe*, 367 U.S. at 545 (Harlan, J., dissenting)).

766. Moreover, the task of discerning what the American public believes to be “basic values that underlie our society” or some variant thereof, is not simply a matter of quick research yielding unassailable results. As Justice Hugo Black nicely summarized in his *Griswold* dissent, “the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the ‘(collective) conscience of our people.’” *Griswold*, 381 U.S. at 519 (Black, J., with Stewart, J., dissenting, discussing the opinion of Justice Arthur Goldberg that the Ninth Amendment’s protection of “those liberties that are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’” invalidates the Connecticut ban prohibiting married couples from acquiring contraception.); *see also, Id.* at 487 (Goldberg, J., with Warren, C.J., and Brennan, J., concurring; quoting *Snyder v. Comm. of Mass.* 291 U.S. 97, 105 (1934), *o.*, *Maloy v. Hogan*, 378 U.S. 1 (1964)).

767. The tenor of Harlan’s judging, often stated as “conservative,” comprises an “approach ... that embraces judicial self-restraint, federalism, and a resistance to dramatic change.” Schroeder, *supra* note 752, at 1049.

768. As he must, Justice Harlan accepted Chief Justice John Marshall’s admonition that it is “emphatically the province and duty of the judicial department to say what the law is, ...” *Mackey v. U.S.*, 401 U.S. 667, 678 (1971) (Harlan, J., dissenting in part and concurring in part) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

769. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 73 (Simon & Schuster 1991) (quoted in Lawrence G. Sager, *Memoirs of a General in the Inglorious Revolution*, 90 MICH. L. REV. 1023, 1024 (1992)). In a similar vein, in his

The Hon. Jeff Brown offered an apt summary, “As they wrestled with the judiciary’s role in a representative democracy, certainly the Founding Fathers envisioned a Harlan-type judge -- deferential to the majority, yet cognizant enough to recognize when it exceeded its constitutional limits.”⁷⁷⁰

VI. KANTIAN DEONTOLOGY AND “DUE PROCESS OF LAW” --

A. *The Infirm Structure of the “Deeply Rooted Principles” Paradigm* --

As metatheory demands, the prelude has been long, intricate and relatively thorough to establish what once was beyond dispute, but became lost in a morass of Twentieth Century postmodernism-inspired constitutional revisionism: The very foundation of the United States as formalized in the Constitution, is fulfilling the moral promises of the Declaration of Independence. We are now ready to confront exactly how the Supreme Court applies the Founders’ and the Reconstruction Congress’ command -- the requirement of Deontological Originalism -- that through the Due Process Clauses, the Judiciary must discern and apply fundamental “unalienable Rights” by assuring that any governmental conduct under review is moral.

As earlier noted, the Supreme Court engages two incompatible yet extant paradigms to resolve due process issues, the *deeply rooted principles* standard and the *dignity paradigm*. The *deeply rooted principles* standard is predicated on what this writing urges is a misreading, or at least a reimagining

excellent law review note, disagreeing with most interpretations, Andrew B. Schroeder rightly urges that the *Poe* dissent is fully consistent with Harlan’s respect for judicial restraint tempered by his awareness that, when needed, judges must protect fundamental liberties of which the right to privacy in one’s home from unreasonable state intrusions is paramount. Accordingly, Harlan’s due process framework in *Poe* is wholly loyal to a cautious, “conservative” judge’s determination to use juridical authority as sparingly as possible, but to use it as fully as it may be needed to protect fundamental privacy rights.

In Schroeder’s words:

Justice John Marshall Harlan believed that the right to privacy could be used to invalidate substantive criminal enactments, which he did in *Poe v. Ullman* ... In utilizing the right to privacy in this way, Justice Harlan was not employing a vague constitutional concept as a mask for patrician social values, economic privilege, or political conservatism. ... [Rather, his] use of privacy remained firmly rooted in the context in which the doctrine developed: protecting citizens from egregious searches.

Schroeder, *supra* note 752, at 1094.

770. Hon. Jeff Brown, *The Platonic Guardian and the Lawyer’s Judge: Contrasting the Judicial Philosophies of Earl Warren and John M. Harlan*, 44 HOUS. L. REV. 253, 282-83 (2007) (footnote omitted).

of Justice Benjamin Cardozo's invocation that due process protects rights, "so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁷⁷¹ Three-quarters of a century later, in its pivotal *McDonald v. City of Chicago*,⁷⁷² the Supreme Court attempted to fashion from an amalgam of compatible but confusing benchmarks, a single, controlling due process norm based solely on the *deeply rooted principles* standard. *McDonald* summarized,

The Court used different formulations in describing the boundaries of due process. For example, in *Twining v. New Jersey*, 211 U.S. 78 (1908)], the Court referred to "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." 211 U.S., at 102, 29 S.Ct. 14 (internal quotation marks omitted). In *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934), the Court spoke of rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." And in *Palko v. Connecticut*, 302 U.S. 319 (1937)], the Court famously said that due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S., at 325, 58 S.Ct. 149.⁷⁷³

The *McDonald* majority dedicated several pages to recounting the history of due process analysis;⁷⁷⁴ but, notably, to employ a cliché, they stacked the constitutional deck by omitting a few significant due process cards, the ones that employ the *dignity paradigm*. That is, nowhere in *McDonald's* review of the Due Process Clauses' history did it so much as intimate that a significant line of due process decisions employed the *dignity paradigm*. Neither the term *dignity* nor citations to cases applying the *dignity paradigm* can be found in *McDonald's* due process analysis.⁷⁷⁵ The line of

771. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (per Cardozo, J.); *See also*, *McDonald*, 561 U.S. at 760; *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). As earlier explained, Cardozo's critical due process formulation, considered in full, supports this writings assertion of Deontological Originalism. *See supra* notes 652-86 and accompanying text.

772. *McDonald*, 561 U.S. 742 (2010) (Second Amendment applies to the States via the Due Process Clause of the Fourteenth Amendment).

773. *Id.* at 760.

774. *Id.* at 759-66.

775. By contrast, in dissent, Justice Stevens discussed the pivotal due process concepts that the majority chose to ignore. After noting the fundamental "principle" that the Due Process Clauses embrace substantive as well as procedural matters, *id.* at 861-64 (Stevens, J., dissenting), Stevens accented, "The second principle woven through our cases is that

decisions employing the *dignity paradigm* comprises a central part of fundamental rights constitutional history that the *McDonald* Court pretended does not exist. That the issue therein was whether the Second Amendment sets a fundamental right only underscores the *McDonald* Court's clumsiness because, as with any issue involving "partial incorporation,"⁷⁷⁶ the ultimate question is whether, under the abstract principles of the Fourteenth Amendment's Due Process Clause, the claimed right is essential to "ordered liberty." Such is the same "ordered liberty" that determines whether *any* enumerated constitutional right is "fundamental," thus applicable to all levels and offices of government.⁷⁷⁷ Therefore, as Justice Stevens correctly highlighted consistent with this writing's Deontological Originalism, the Judiciary always has, "recogni[z]ed that the postulates of liberty have a universal character."⁷⁷⁸ In that regard, whether deliberate or inadvertent, *McDonald's* failure to consider and to discredit the Court's *dignity paradigm* renders suspect its claim that, based on precedent, due process is understood through the *deeply rooted principles* standard.

substantive due process is fundamentally a matter of personal liberty. For it is the liberty clause of the Fourteenth Amendment that grounds our most important holdings in this field. *It is the liberty clause that enacts the Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons.*" *Id.* at 864 (Stevens, J., dissenting) (emphasis added; quoting, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992)). Explicating his point, Justice Stevens rightly accented, "The clause safeguards, most basically, 'the ability independently to define one's identity,' ... [including] the right to be respected as a human being. ... dignity and respect [are among] the central values we have found implicit in the concept of ordered liberty." *Id.* at 879-80 (Stevens, J., dissenting) (emphasis added; quoting, *Roberts v. United States Jaycees*, 468 U.S. 609, 619, (1984)).

In further support, Stevens quoted *Palko* and Justice Harlan's dissent in *Poe*, to stress the "moral" character implicit in due process of law's protection of human dignity. *Id.* at 871-72 (Stevens, J., dissenting). In that regard, Stevens alluded, *inter alia*, to *Lawrence v. Texas*, 539 U.S. 558 (2003) (states may criminalize homosexual sodomy only to the extent that they may criminalize heterosexual sodomy) as an instance of the Due Process Clauses protecting personal dignity. *McDonald*, 561 U.S. at 811 (Stevens, J., dissenting). (See, *infra* notes 945-1020 and accompanying text discussing the "homosexual rights" cases as prime examples of the dignity paradigm.) Based on the *McDonald* majority's failure to account for the dignity paradigm, Justice Stevens aptly concluded, "In this respect, too, the Court's narrative fails to capture the continuity and flexibility in our doctrine." *Id.* at 871 (Stevens, J., dissenting).

776. See, *supra* notes 565-87 and accompanying text.

777. And, such is the same "ordered liberty" that as well discerns whether an unenumerated right applies via the Due Process Clauses to all levels and offices of government. *Id.* Indeed, at some length, this writing has demonstrated that equal protection, indeed virtually all constitutionally enumerated rights, are subsets of basic due process jurisprudence. See, *supra* notes 521-98 and accompanying text.

778. *McDonald*, 561 U.S. at 871 (Stevens, J., dissenting).

Accordingly, from the outset, the *McDonald* majority engaged in a disingenuous review of due process theory by deliberately omitting from its analysis the important *dignity paradigm*. As the Court's avowed project was to discern one controlling due process framework, it is at the very least disappointing that *McDonald* declined forthrightly to confront the *dignity paradigm* either to explain how that approach can be harmonized with the *deeply rooted traditions* standard (which, in actuality, it cannot), or forthrightly to declare the *dignity paradigm* no longer valid.

Based on what we now understand to be an incomplete review of applicable precedent, the Court announced its unsurprising choice of applicable standard,

With this framework in mind, we now turn directly to the question whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process. *In answering that question, as just explained, we must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty*, *Duncan* [v. Louisiana], 391 U.S. [145,] 149, 88 S.Ct. 1444 [(1968)], *or as we have said in a related context, whether this right is "deeply rooted in this Nation's history and tradition,"* *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2302, 138 L.Ed.2d 772 (1997) (internal quotation marks omitted).⁷⁷⁹

Again, the Court's analysis is deceptive. The above-quoted *McDonald* "framework" accepted *Washington v. Glucksberg's* "whether this right is 'deeply rooted in this Nation's history and tradition'" and *Duncan v. Louisiana's* "fundamental to our scheme of ordered liberty." However, as the *McDonald* Court itself earlier quoted,⁷⁸⁰ *Palko v. Connecticut*, from which "fundamental to our scheme of ordered liberty" originated, crucially added that due process concerns, "those rights that are 'the very essence of a scheme of ordered liberty' and essential to 'a fair and enlightened system of justice.'" ⁷⁸¹

The Court's formalistic infirmity -- its intellectual trickery-- is clear because with neither acknowledgement nor explanation, *McDonald* accepted the half of *Palko's* formulation it preferred while spurning without comment the equally important phrase, "essential to a fair and enlightened system of justice." Along identical lines, *McDonald* conspicuously omitted from its

779. *McDonald*, 561 U.S. at 767 (emphasis added).

780. See *supra* note 773 and accompanying text.

781. *McDonald*, 561 U.S. at 760 (emphasis added; quoting, *Palko*, 302 U.S. at 325).

designated standard a principle it dutifully had quoted when describing the judicial history of substantive due process, specifically, the 1908 *Twining* decision's pronouncement that due process covers, "*immutable principles of justice* which inhere in the very idea of free government which no member of the Union may disregard."⁷⁸² Yet, *McDonald*'s text quite correctly does not list *Twining* among the several decisions that, according to the *McDonald* majority, the Court had fully abandoned in subsequent precedent.⁷⁸³ Thus, as *McDonald* implicitly acknowledged, *Twining* was good law that the *McDonald* Court did not affirmatively pronounce superseded.

By discarding *Palko*'s "essential to a fair and enlightened system of justice" and *Twining*'s "*immutable principles of justice* which inhere in the very idea of free government which no member of the Union may disregard," and by ignoring the *dignity paradigm* precedents altogether, *McDonald* apparently attempted to expunge "due process of law's" proven links to deontological morality, natural law, natural rights, "unalienable Rights," and such other judicial standards that render history and culture insufficient bases in and of themselves to premise constitutional decisions.⁷⁸⁴ *If the Court decided both to forego over a century of precedent culminating in the inspired due process jurisprudence of Justices Cardozo, Frankfurter and Harlan, and, to repudiate Originalism by revoking the Founders' will that "due process" is uniquely a matter of "justice," not exclusively a function of traditions, it should have done so more honestly.*

Not surprisingly given the composition of the *McDonald* majority, the avowed benefits of the *deeply rooted principles* standard sound in separation of powers and judicial restraint. *Deeply rooted principles* purports to be essentially objective, "and intrudes much less upon the democratic process" than do paradigms predicated on moral standards.⁷⁸⁵ Accenting its primary, nearly exclusive reliance on historical review, and indulging the familiar consequentialist error, Justice Scalia argued that "deeply rooted," "is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction

782. See *supra* note 773 and accompanying text (discussing the *Twining* Court's inclusion of "immutable principles of justice" that *McDonald* itself noted is part of the Court's due process history).

783. *McDonald*, 561 U.S. at 764-66.

784. Perhaps that is why in concurrence, Justice Scalia hastened to aver that regarding substantive due process analysis, "the traditions of our people are paramount." *Id.* at 792 (Scalia, J., concurring).

785. *Id.* at 804 (Scalia, J., concurring).

the judges favor.”⁷⁸⁶ As the Court urged a decade earlier, given its claimed relative simplicity, the *deeply rooted principles* framework minimizes judicial analysis, particularly “balancing” purported rights against purported governmental interest, thus ostensibly optimizing separation of powers.⁷⁸⁷

Even accepting the dubious propositions that it is relatively easy to apply⁷⁸⁸ and promotes a limited judicial role thereby respecting separation of

786. *Id.* (Scalia, J., concurring).

787. As the Court claimed roughly a decade before *McDonald*,

In our view, however, the development of this Court’s substantive-due-process jurisprudence, ... has been a process whereby the outlines of the “liberty” specially protected by the Fourteenth Amendment - never fully clarified, to be sure, and perhaps not capable of being fully clarified - have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review ... [and] avoids the need for complex balancing of competing interests in every case.

Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

788. Arguably, as with most theories, application of the *deeply rooted principles* standard is not as effortless as proponents claim. “Determining whether a right is deeply rooted in tradition is not easy. For example, subtle issues arise concerning how one identifies a tradition, the level of generality to be used in defining the relevant tradition, or the degree to which tradition changes.” Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 656 note 51 (1992) (citing, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n. 6 (1989) (“father of child born to a woman married to another man at time of conception has no fundamental right to visit child”)). In that regard, Justice Black briskly noted, “the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the ‘(collective) conscience of our people.’” *Griswold*, 381 U.S. at 519 (Black, J., with Stewart, J., dissenting, discussing the opinion of Justice Arthur Goldberg that the Ninth Amendment’s protection of “those liberties that are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’” invalidates the Connecticut ban prohibiting married couples from acquiring contraception. *Id.* at 487 (Goldberg, J., with Warren, C.J., and Brennan, J., concurring, quoting *Snyder v. Comm. of Massachusetts*, 291 U.S. 97, 105 (1934), o., *Maloy v. Hogan*, 378 U.S. 1 (1964)).

The proposition was encapsulated neatly by Adam Wolf,

[R]elying on tradition sanctions jurists’ personal beliefs because the judges, acting as historians, interpret history from the only perspective they know: their own. Their positionality and political ideology necessarily affect their analyses of history and tradition. For instance, the judge as historian should, though she almost never does, ask, “whose history?” As Professor John Hart Ely wondered: “Whose traditions? America’s only? Why not the entire world’s? (Justice Frankfurter liked to refer to the traditions of the ‘English-speaking peoples.’) And what is the relevant time frame? All of history? Anteconstitutional? . . . And who is to say that the ‘tradition’ must have been one endorsed by a majority?” Typically, white, straight, wealthy, male jurists will rely on a white, straight, wealthy, male history and historical perspective.

Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 103 (2002) (quoting, John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978) (footnotes omitted)

powers, the *deeply rooted principles* paradigm is fatally flawed because it denies the very Deontological Originalism from which “due process of law” arose and attained its meaning.⁷⁸⁹ Standards such as, *Palko*’s “essential to a fair and enlightened system of justice” and *Twining*’s “rights that are the very essence of a scheme of ordered liberty and essential to a fair and enlightened system of justice,” signify, as they should, the highly abstract moral principles that define the natural law philosophy of the Declaration, codified into the Constitution as “due process of law.” Indeed, such is the thrust of Justice Cardozo’s *complete* due process analysis,⁷⁹⁰ brought to fruition by Justices Frankfurter and Harlan.⁷⁹¹

By contrast, the standard adopted in *McDonald*, rights “deeply rooted in this Nation’s history and tradition,” asks only an empirical account of history, thereby, illicitly eschewing the Supreme Court’s original paradigm of moral principles sounding in “fundamental fairness” as augmented by the true apostles of judicial restraint, Cardozo, Frankfurter, and Harlan. Thus, the irredeemable flaw of the *deeply rooted principles* standard is that it defies the very premises of “due process of law’s” promise to assure governmental actions are, if nothing else, neither arbitrary nor capricious, but rather, fundamentally fair.⁷⁹² True, contested governmental action that fails the

For instance, the *McDonald* majority argued that the right to firearm possession for self-protection is “deeply rooted” in American tradition. *McDonald*, 561 U.S. at 767-78. Justice Stevens, by contrast, averred that,

although it may be true that Americans’ interest in firearm possession and state-law recognition of that interest are “deeply rooted” in some important senses ... it is equally true that the States have a long and unbroken history of regulating firearms. The idea that States may place substantial restrictions on the right to keep and bear arms short of complete disarmament is, in fact, far more entrenched than the notion that the Federal Constitution protects any such right.

Id. at 899 (Stevens, J., dissenting).

789. See *supra* Sections. 2 & 3 (the Founders and their society circa 1776-1791), and Section 4 (the Reconstruction Congress).

790. See *supra* notes 652-86 and accompanying text.

791. See *supra* notes 687-728 (Frankfurter), 729-70 (Harlan), and accompanying text.

792. See *supra* notes 600-23 and accompanying text. Thus, again, we see that the *deeply-rooted traditions* paradigm eschews the judge as anything except an empiricist -- an observer and determiner -- of when some practice is entrenched enough to be “deeply rooted,” a role better suited to uncritical historians than to the class of government officials entrusted with preserving the actuality of “due process of law” from of both the excesses ruling elites and majoritarian abuse. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 92-93 (2006) (supporting the *deeply-rooted traditions* standard); but see, e.g., Wolf, *supra* note 788, at 102 (“For six reasons I conclude that a tradition of protecting or denying a purported fundamental right should not be a factor when assessing the alleged fundamentality of the right.”).

deeply rooted principles framework nonetheless may be challenged as utterly lacking a rational basis under the “rational basis” standard which, because it strongly presume the legality of official action, portends that the particular governmental action will be constitutionally vindicated.⁷⁹³ But the relatively remote possibility of success under “mere rationality,” as often it is called, does not diminish either the chicanery of the Supreme Court’s modern *deeply-rooted traditions* paradigm, nor that paradigm’s infidelity to Deontological Originalism.

In sum, no matter what the pragmatic benefits may be, any due process framework that abdicates the definition of “fundamental fairness” to an empirical, basically uncritical inquiry of what some portion or portions of the American population, past or present, think is tolerable, violates the intent of the 1787 and 1868 Framers who both incorporated natural law morality into the Constitution and established the Judiciary to make independent assessments of what is or is not constitutional.⁷⁹⁴ *A true originalist, therefore, must accept that the McDonald standard is inappropriate, infirm constitutional law.*

Indeed, five years after *McDonald*, while invalidating state restrictions on same-sex marriages, the *Obergefell* Majority rightly rejected the *deeply rooted principles* approach:

If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. ... [I]n interpreting the Equal

793. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 703, 712 (D.C. Cir. 2007) (*en banc*) (no deeply rooted tradition for seriously ill persons to have access to experimental medical treatments when all other alternative medical interventions have been exhausted; and, Governmental bans against such access are not necessarily irrational). Regarding the various “levels of scrutiny” courts use in due process and equal protection litigation, *see infra*, notes 984-90 and accompanying text.

794. *See supra* Secs. 2-4 (intent of the Framers) and *infra* notes 804-44 and accompanying text (role of the Judiciary). It is interesting to note in passing that not only does the *deeply-rooted traditions* standard deny judges their proper role under our Constitution, it renders them inadequate historians as well:

[U]sing tradition as an analytical tool in fundamental rights opinions perpetuates discrimination in ways that defy an educational purpose of history. That is, blind obedience to history subverts an important objective of history: to learn from it in order to follow (and improve upon) what is worthy of replication and to avoid returning to that which should not be repeated. Not distinguishing between odious and laudatory traditions allows the reinvigoration of oppression that our nation knows intimately.

Wolf, *supra* note 788, at 104.

Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.⁷⁹⁵

Similarly, reminding us why “due process of law” must include a substantive component,⁷⁹⁶ dissenting Justice Stevens detailed in *McDonald* the principles accented in this article, worth quoting at length:

More fundamentally, a rigid historical methodology is unfaithful to the Constitution’s command. For if it were really the case that the Fourteenth Amendment’s guarantee of liberty embraces only those rights “so rooted in our history, tradition, and practice as to require special protection,” Glucksberg, 521 U.S., [702] at 721, n. 17, 117 S.Ct. 2258 [(1997)], then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection. That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently “rooted”; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes.⁷⁹⁷

Honest constitutionalists, therefore, must confront the *deeply rooted principles* standard directly as did Justice Stevens who, recognizing its claimed deference to separation of powers, devastated that standard as, “judicial abdication in the guise of judicial modesty.”⁷⁹⁸

Having shown that the *deeply rooted principles* standard is not plausible, the only available option in the *dignity paradigm* which, indeed, comports with due process morality.

795. *Obergefell*, 135 S.Ct. at 2603. The Court’s reference to the Equal Protection Clause does not affect this writing’s analysis because, as earlier proved, the meaning of “equal protection” derives from the morality of due process. See *supra* notes 570-82 and accompanying text.

796. See *supra* notes 408-72 and accompanying text.

797. *McDonald*, 561 U.S. at 875-76 (Stevens, J., dissenting).

798. *Id.* at 876 (Stevens, J., dissenting).

B. The Misconception that Judges Cannot Legitimately Engage in Moral Analysis --

Before explicating the *dignity paradigm*, this writing confronts one last contention proponents of the *deeply rooted standard* assert -- a contention that purports nothing less than the preservation of the United States as a republic. Consistent with its claim to vindicate separation of powers, advocates of the *deeply rooted* theory argue, predictably, that installing judges as the Nation's ultimate arbiter of what is or is not moral under the Constitution creates an authoritarian class of virtually untouchable elites who will superimpose their personal, selfish moral preferences for those of the greater population. Moreover, this argument avers, the rarified and privileged status of the Judiciary likely will encumber judges' moral grasp because they tend to hold themselves apart from, and therefore likely will be insensitive to the grassroots upon whom they would render moral judgments. Chief Justice John Roberts recently expressed the contention in conclusory terms: "a Justice's commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of 'due process.'" ⁷⁹⁹ Asserting, therefore, that the *Obergefell* Court's decision invalidating official disparate treatment of same-sex marriages, "is an act of will, not legal judgment," ⁸⁰⁰ Roberts undoubtedly asked the correct question about the role of judges, "Just who do we think we are?" ⁸⁰¹

That the Chief Justice articulated the right question does not change the fact that his answer is completely backwards. Discerning the moral meaning of the Constitution is neither foreign to nor merely an incidental aspect of, but that, is an essential facet of the Judiciary's responsibility to engage in "judicial review" of the Constitution, and rightly so. Consequently, judges who faithfully follow their commissions indeed will seek, and hopefully attain, to appropriate partially Chief Justice Roberts' phrasing, "special moral, philosophical, or social insight[s] sufficient to justify [not] imposing [but enforcing] those perceptions on fellow citizens under [their duty to enforce] 'due process.'" ⁸⁰² Roberts' compound-argument that moral analysis is not part of the Judiciary's function and that judges are not especially competent to make moral judgments is tired, trite, and stale, not to mention

799. *Obergefell*, 135 S.Ct. at 2612 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

800. *Id.* (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

801. *Id.* (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

802. *Id.* (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

untrue. It should have been put to pasture decades ago; that it has not evinces the need to detail herein what has been determined elsewhere, most notably, at the founding of the United States.⁸⁰³

1. The Judiciary Acts as the Constitution's "Final Arbiter" --

As the starting point, it is axiomatic, of course, that the Constitution and attendant documents require interpretation; therefore, *some* official office or offices must assume that role and effectively have the last word on any given issue. The necessity of correct explication is especially acute regarding the Due Process Clauses which, as earlier noted, is the Constitution's most fundamental concern, indeed, that charter's *value monistic* principle from which essentially all other constitutional matters arise.⁸⁰⁴ As highly regarded constitutional commentator A.E. Dick Howard summarized,

Even while it commands fidelity to its great purposes and design, the Constitution requires interpretation. This is especially true of those provisions that have a history grounded in English law and constitutionalism. Thus due process of law, whose history reaches back to Magna Carta's "law of the land," has seen manifold applications in American constitutional law.⁸⁰⁵

803. As implied above in the text, the urgency to revisit the appropriateness of judicial review is particularly acute when, as with due process, the meaning and application of law are matters of moral judgment. Compare, e.g., Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J. L. & PUB. POL'Y 101 (1987) (because the Constitution rests on natural rights theory, courts should play an active role), with Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49 (because the Constitution rests on natural rights theory, courts should play a limited role).

804. See *supra* notes 551-98 and accompanying text.

805. A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9, 27 (2007) (emphasis added).

Although perhaps it need not have so developed,⁸⁰⁶ although not an inherent proposition of natural law,⁸⁰⁷ and while other effective mechanisms might be imagined, prodigious evidence supports the conclusion that the Framers intended judicial management of the Constitution,⁸⁰⁸ a then unique and innovative mechanism,⁸⁰⁹ but not utterly lacking English and Colonial precursors.⁸¹⁰ Indeed, the now undeniable precept of *judicial review* holds

806. As one theorist explained,

[T]he proposition that the Constitution must be understood in light of the Declaration has no necessary implications for the question of judicial review, which is a distinct (albeit related) problem. That the Framers and ratifiers of the Constitution ... viewed democracy as instrumental rather than fundamental -- might lead one to conclude that there is nothing problematic about unelected judges' invalidating democratically enacted legislation in the name of individual rights, ... But this is merely a possible and not a necessary conclusion. For just as those who emphasize the democratic character of American government can disagree about the proper nature and scope of judicial review, so too can those who emphasize its liberalism.

Himmelfarb, *supra* note 136, at 186.

807. "[T]he natural law itself confers no authority on judges to go beyond the text, logic, structure, or original understanding of the Constitution to enforce principles of natural justice as they understand them. If and when judges possess such authority, they possess it, not as a matter of natural law, but, rather, as a power conferred upon them by the Constitution." George, *supra* note 41, at 2304; *See also Id.* at 2279.

808.

[A major source] of historical data concerning judicial review is the federal constitutional convention and the ratification process. This source offers the most fruitful support for the concept of judicial review. *At the Convention almost every statement of a delegate that might be implied as reflecting on the subject of judicial review of the constitutionality of federal laws indicates an acceptance of that concept in some general form.* ... However, the undefined nature of the judicial power referred to at the Convention leaves the historical support for the current concept of judicial supremacy unclear. In the ratification process The Federalist Papers endorsed a concept of judicial review using arguments very close to those that [Chief Justice John] Marshall used in *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803)], but Anti-Federalists disputed the extent of this power.

Rotunda and Nowak, 1 TREATISE ON CONST. L. § 1.4(b)(ii), *The Historical Antecedents of the Marbury Opinion*, Historical Antecedents (accessed at WestlawNext) (emphasis added; footnotes omitted).

809. As two leading constitutional scholars explained,

One can conclude from the historical data that some form of judicial review seems to have been accepted by a number of the drafters of the Constitution and that the concept, at least in part, had been endorsed by some of the states prior to the date of the *Marbury* decision. However, it must be remembered that this power was a truly unique American invention and at its earliest stages was so undefined that debate over the original understanding of the concept can be virtually endless.

Id. § 1.4(b)(i) (November 2017 Update) (accessed at WestlawNext) (discussing Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 552 (1914)).

810.

that, in the words of Justice Stevens, “The task of giving concrete meaning to the term ‘liberty’, like the task of defining other concepts such as ‘commerce among the States,’ ‘due process of law’, and ‘unreasonable searches and seizures’ was a part of the work assigned to future generations of judges.”⁸¹¹ That proposition, today almost needing no citations to authority, was perhaps best and certainly categorically spoken by Chief Justice John Marshall, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”⁸¹² As the Court stressed 160 years after *Marbury*, “[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”⁸¹³ So great, important and entrenched is judicial review, *particularly in the realm of fundamental liberty*, that, as one California jurisdiction aptly restated, “the courts have not hesitated to resort to their inherent equitable power to fashion appropriate remedies where necessary to guarantee to citizens their constitutionally protected rights.”⁸¹⁴

Accordingly, “Throughout history, judges have played a central role in our collective progression toward a more perfect union.”⁸¹⁵ That quest for perfection includes, pivotally, the unhesitant vindication of constitutional rights in their full array. Thus, the generally accepted established shorthand

The English precedents for judicial review and the colonial experience were the first source of historical antecedents that gave rise to judicial review in America. There is the widely quoted statement of Lord Chief Justice Edward Coke in *Dr. Bonham’s Case*: “When an Act of Parliament is against common right and reason, the common law will control it and adjudge such Act to be void.” But there is also no solid historical basis for finding any form of judicial review in British judicial practice.

Id., 1 TREATISE ON CONST. L. § 1.4(b)(ii) (November 2017 Update) (accessed at WestlawNext) (quoting *Dr. Bonham’s Case*, 77 Eng. Rep. 638; 8 Coke Rep. 107, 116–121 (1610)).

Nor was there a strong history of such judicial review among colonial courts. While the evidence is weak prior to the start of the Nineteenth Century, “Between 1800 and 1820, the concept of judicial review of the constitutionality of statutes received widespread acceptance” in state courts, although arguably “[t]he growth of the concept was ... adopted out of necessity, if not historical accuracy.” *Id.* (citing *Norris v. Clymer*, 2 Pa. 277, 281 (1845)).

811. Hon. John Paul Stevens, *The Third Branch of Liberty*, 41 U. OF MIAMI L. REV. 277, 291 (1986).

812. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *accord, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015); *N.L.R.B. v. Canning*, 134 S. Ct. 2550, 2560 (2014).

813. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (voting rights under the Fourteenth Amendment).

814. *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765, 779 (Cal. Ct. App. 1990).

815. *Wardlaw*, *supra* note 683, at 1660.

seems to be that, aside from the rare instance of a constitutional amendment, the Supreme Court acts as, “final arbiter of the United States Constitution ...”⁸¹⁶; and, as the Court is empowered to interpret any such amendments, even the act of amending is not the last word.

Admittedly there remains an on-going debate whether, ultimately, the American people in fact are and were originally intended to be the Constitution’s “final arbiters.” For example, “[Constitutional scholar Larry D.] Kramer has insisted that rather than crowning the judiciary supreme in constitutional interpretation, the Constitution actually took for granted that the people were the final arbiters of the Constitution’s meaning and that they would influence and discipline the federal branches through voting, petitioning, and mobbing.”⁸¹⁷ Similarly, “Jefferson continued to believe that the people acting in convention were the final arbiters of the constitution.”⁸¹⁸

For the purposes of this article, although in a very technical sense the power to amend the Constitution places that charter’s ultimate meaning in the hands of the people,⁸¹⁹ it seems proper to agree with the bold assertions of the Supreme Court (even though the justices certainly have an arguable

816. *Arizona v. Evans*, 514 U.S. 1, 9 (1995); *see also, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605, 621 (1989) (quoting *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940); *Wilson v. Wichita State U.*, 662 Fed. App’x. 626, 629 n.3 (10th Cir. 2016); *Viloria v. Lynch*, 808 F.3d 764, 769 (9th Cir. 2015).

817. Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1539-40 (2005) (discussing, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

818. William J. Watkins, Jr., *Popular Sovereignty, Judicial Supremacy, and the American Revolution: Why the Judiciary Cannot Be the Final Arbiter of Constitutions*, 1 DUKE J. CONST.L. & PUB. POL.’Y 159, 254 (2006) (citing Letter from Thomas Jefferson to William Johnson (June 12, 1823), in *THE COMPLETE JEFFERSON*, at 322 (Saul K. Padover ed., 1943)). Prof. Watkins likewise concludes that,

Whereas popular sovereignty provides clear support for the doctrine of judicial review, it provides no support for judicial supremacy. Popular sovereignty explicitly rejected the proposition that a mere branch of government had the final word on fundamental law. Unlike judicial review, judicial supremacy is not an outgrowth of popular sovereignty. Instead, it is a regression to an older theory of sovereignty that existed prior to the American Revolution. Judicial supremacy places the Supreme Court in the position of Parliament. Having the final word in constitutional interpretation, the Court can make or unmake any law as it sees fit. Other than a very difficult amendment process, the people can do nothing to control it.

Id. at 257.

819. While full explication of the following proposition is postponed for a future article, the principles of Deontological Originalism naturally limit the “People’s” authority to amend the Constitution in one material regard. Consistent with natural law, the Constitution may not be amended in any way that seeks to thwart the moral principles of the Declaration of Independence.

biased interest in the matter). Because the Judiciary is tasked with interpreting and applying the Constitution, including its amendments, absent either an apt new amendment or proper Article III legislation circumventing the jurisdiction of the federal courts, this writing will not challenge the premise that the courts enjoy the right of final say on matters constitutional.

The authority to act as the final arbiter discerning the fundamentals of “a more perfect union” requires, of course, courage and fortitude⁸²⁰ tempered by humility sufficient both to respect the expertise of the co-ordinate branches⁸²¹ and to preclude judges from misconstruing their duty to discern law with discretion to foist policy.⁸²² *Thus, if, as indeed is the reality, judges must apprehend morality to understand constitutional rights, then, apprehending morality is integral to the scope and duty of judicial review no matter how distasteful some find that actuality.*

2. The Anti-Democratic Character of Judicial Review Renders Judges the Proper Governmental Actors to Issue Moral Judgments --

Proposing an interesting, perhaps devious twist on the counter-majoritarian perspective, Alexander Hamilton, denoted by some as, “the Federalist elitist who cared little for ordinary people whom he viewed as hostile to his nationalist ambitions,”⁸²³ offered that, should the Constitution be ratified as drafted, the Judiciary would enjoy the power of review because such would be the will of the people. He opined:

820. “It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants.” *Pierson v. Ray*, 386 U.S. 547, 554 (1967); accord, *Kitchen v. Herbert*, 755 F.3d 1193, 1228 (10th Cir 2014) (Utah’s prohibition against homosexual marriage is unconstitutional).

821. For instance, courts understandably are chary to intrude into matters affecting foreign policy except when absolutely necessary. “Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.” *Boumediene v. Bush*, 553 U.S. 723, 796-97 (2008).

822. “As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches’ policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.” *Gonzales v. Reno*, 212 F.3d 1338, 1356 (11th Cir. 2000).

823. KENNETH W. GRAHAM, JR. ET AL., *Construing Confrontation—The Ante-Bellum Years*, 30A FED. PRAC. & PROC. EVID., § 6355 (1st ed.) (Westlaw).

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.⁸²⁴

In his renowned Federalist No.78, Hamilton, then, cleverly if perhaps circularly argued that the courts have assumed the anti-democratic mantle because that is what the people, through the ratification process, so willed. For those inclined to think Hamilton might have been a bit too glib, a more complete justification is in order.

Doubtless, the judicial task to discern the moral meaning of the Constitution is anti-democratic, but, indeed such is the very essence of judicial review itself in that courts may invalidate legislation, regulations and other purported acts of the public will regardless of how broadly and deeply that public will favors the now-expunged laws.⁸²⁵ The well-known justification is that, given the habitual willingness of “the majority” to vote its own interests regardless whether doing so violates the tenets of natural law as enforced by the Due Process Clauses and other enumerated rights, counter-majoritarianism frequently is the only available bulwark to protect, “the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.”⁸²⁶

Thus, the familiar principle contends, *the rightfulness of judicial review, particularly when determining moral aspects of law, it is not that legislators, executives, administrators, and the lay public inherently are less dedicated to and intellectually capable of sound moral judgment than are*

824. THE FEDERALIST NO. 78 The Judicial Department at 467-68 (Hamilton) (Clinton Rossiter ed., 1961).

825. As one federal appellate judge explained, “In most constitutional cases, courts face what is often referred to as the ‘counter-majoritarian difficulty.’ Alexander M. Bickel, *The Least Dangerous Branch* [sic] 16–23 (1962). We, unelected federal judges, interpret the Constitution to determine whether the pre-commitment strategy of the Founders invalidates the choices of current electoral majorities. The ‘counter-majoritarian difficulty’ goes directly to our legitimacy in a constitutional system.” Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1114 (10th Cir. 2006) (Lucero, J., concurring in part and dissenting in part); see also, e.g., Williams v. Att’y. Gen. of Alabama, 378 F.3d 1232, 1244 n.14 (11th Cir. 2004) (“courts ... often serve as an antimajoritarian seawall . . .”).

826. Raines v. Byrd, 521 U.S. 811, 829 (1997) (quoting, U.S. v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

judges. Rather, legislators, executives, administrators and the lay public are more likely to allow their political and personal biases to cloud moral judgment, and less likely to correct their errors of moral judgment if doing so jeopardizes the utilitarian and political outcomes they seek. In that regard, the theory of judicial review conspicuously purports that the Judiciary is more reliable on matters of constitutional meaning -- which we now know is moral meaning -- than are legislators, administrators and the lay public. As Edward Foley ably encapsulated the recognized rationale, “The whole point of putting the Bill of Rights into the Constitution was so that it would be enforced, by honest judges immune from political pressure and exercising the relatively objective craft of legal interpretation, against majoritarian sentiment that might conflict with those rights.”⁸²⁷ Consequently, according to such liberal theory, the lure of the judicial role will attract persons of high quality and integrity.

Moreover, even assuming that as a matter of fact, individuals, including judges, cannot or will not suppress their selfish inclinations, and thus are incapable of sufficiently unbiased reasoning (propositions that adherents to Deontology must reject),⁸²⁸ the Judiciary as a class still is better suited to set and apply constitutional standards because, unlike most government operatives, judges are expected to perform their work -- to render judgments -- untainted by personal partisan preferences.⁸²⁹ That is, under our system, we expect the Legislature and, in great measure, the Executive to be politically partisan. Not so the Judiciary. Therefore, even if utterly devoid of other motives such as devotion to the rule of law or dedication to honest public service, attaining what likely would then be their foremost selfish preference -- to be esteemed by their peers -- requires judges to render judgments as unsullied as possible by partisan preferences. *Because their immediate colleagues, the greater legal community, and, likely at least some segments of the public-at-large, will not respect a judge whose opinions are tarnished by political considerations, the occasional cheater notwithstanding, judges have a domineering self-interested incentive that*

827. Edward B. Foley, *Is Lawrence Still Good Law?*, 65 OHIO ST. L. J. 1133, 1135-36 (2004) (citing 1 ANNALS OF CONG. 439 (1789)).

828. See generally, *Part I: Originalism and Deontology*, *supra* note 7, at Section 2-e.

829. Granted, other offices in Government are not necessarily as political as are the Congress and the Presidency. Arguably, many administrators and military personnel do not set policies, but rather enforce laws and standards impartially. But, with the exception of administrative law judges and military judges, their roles involve little if any interpretation of law.

*other professionals often do not: to ensure that, to the extent humanly feasible, their personal predilections do not influence their work.*⁸³⁰

Understandably then, the likely most quoted authoritative source is The Federalist No. 78,⁸³¹ aptly entitled The Judicial Department, wherein Alexander Hamilton directly linked an independent judiciary to the preservation of constitutional rights:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. *Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the*

830. As one commentator explained, "Evidence for the theory that people conform to the normative expectations of others is strongest in the context of small groups. As Timothy Stein reports, the social psychology of small groups is such that esteem is granted to those who exemplify their group's normative ideal. The standard by which judges can gain the respect of their colleagues is by exemplifying the normative ideal they all share, irrespective of background or perspective, namely skilled and impartial legal analysis and judicial reasoning." Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed*, 45 CORNELL INT'L L.J. 77, 184 (2012) (citing, Bruce J. Biddle, *Recent Developments in Role Theory*, 12 ANN. REV. SOCIOLOGY 67, 79 (1986); R. Timothy Stein, *High-Status Group Members as Exemplars: A Summary of Field Research on the Relationship of Status to Congruence Conformity*, 13 SMALL GROUP BEHAVIOR 3, 14-15 (1982); Roland J. Pellegrin, *The Achievement of High Statuses and Leadership in the Small Group*, 32 SOC. FORCES 10 (1953); Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994-95 (1993)).

Thus, over and above the inherent allure of judgeships, the enticement of regard, likely enhanced by the appealing pomp and circumstance, combine to make the demands of the Judiciary attractive to the most qualified, most upright applicants. Along these lines, "John Adams sought to attract the most talented individuals into public service by means of symbolic public honors that would gratify their desire for fame." Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 150 n.106 (1993) (citing Bruce Miroff, *John Adams: Merit, Fame, and Political Leadership*, 48 J. POL. 116, 118, 122-26 (1986)).

831. The singular importance of The Federalist No. 78 is widely recognized. *E.g.*, Evan Bernick, *Reason's Republic*, 10 N.Y.U. J. L. & LIBERTY 522, 567 (2016) (discussing, "Alexander Hamilton's seminal argument for judicial review in Federalist 78."); Christopher L. Eisgruber, *Marbury, Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1208 (footnote omitted) ("Hamilton's argument is widely regarded as an important precursor to [Chief Justice] Marshall's [in *Marbury*].").

*Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*⁸³²

The very nature of the Judiciary under the Constitution renders it the right and natural “last word” on the meaning and application of that charter. Indeed, accenting the Constitution’s supremacy over acts of Congress,⁸³³ *Hamilton argued that only the courts could independently and unbiasedly assess the constitutionality of legislation.* As the proposed text accorded Congress no such definitive duty of restraint, self-judgment, and unselfishness,

It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.⁸³⁴

832. The Federalist No. 78 The Judicial Department at 438 (Hamilton) (Isaac Kramnick ed., 1987) (emphasis added).

833.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

Id. at 426 (E. H. Scott ed., 1898)

834. *Id.* 438-39 (Isaac Kramnick ed., 1987). Initially, Jefferson too accepted that “The laws of the land, administered by upright Judges, would protect you from any exercise of power unauthorized by the Constitution of the United States.” 1 Charles Warren, *THE SUPREME COURT IN UNITED STATES HISTORY* 259-60 (1924) (quoting Letter from Thomas Jefferson to Archibald H. Rowan (Sept. 26, 1798). Later on, however, Jefferson was not so confident. *See, e.g.,* Letter of Thomas Jefferson to George Hay (June 20, 1807) <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jeff1180>:

The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several

The foregoing underscores why Hamilton unequivocally stated that the then-proposed Constitution's limitations on the power of government, "can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void [Otherwise] all the reservations of particular rights or privileges would amount to nothing."⁸³⁵ As the noted jurist, law professor, and former Massachusetts Supreme Judicial Court justice Charles Fried concluded vindicating the spirit of Hamilton's stance, "It is encouraging that the best recent writing in moral and legal philosophy has abandoned sophomoric cynicism about the objectivity of values. The ultimate solution lies in the accession of judges who believe that law is more than just a continuation of politics by other means."⁸³⁶

Judicial restraint, of course, is the familiar *and serious* limitation cautions that the courts must not abuse their mandate by becoming "super-legislatures" usurping the authority of the people, an illegitimate act confounding separation of powers.⁸³⁷ That admonition undoubtedly is correct in the realms of policy and partisan politics -- the allocation of "guns and butter" in their various forms -- where, sage or not, the majority will may dominate so long as no fundamental rights are jeopardized.⁸³⁸ But, it is

courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

Intruding on his celebration of Christmas Day, 1820, Jefferson again wrote of his distress about courts: "The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone." Thomas Jefferson Letter to Thomas Richie (December 25, 1820) <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jeff263.php>. Comparably, Jefferson believed that each branch is the rightful judge of the constitutionality of its own affairs. *E.g.*, Letter to Judge Spencer Roane (September 6, 1819) <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jeff257.php>.

835. The Federalist No. 78 The Judicial Department (Hamilton).

836. *Brown v. Eckerd Drugs, Inc.*, 669 F.2d 913, 919 (4th Cir. 1981) (Russell, J., dissenting) (quoting Charles Fried, *The New York Times* (Nov. 10, 1981)).

837. Justice William O. Douglas expressed the idea classically, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (plurality opinion). The invocation of that term by the federal courts may be traced back nearly a century to *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) wherein, writing for himself and Justice Holmes, Justice Brandeis ended his dissent by stating that the majority opinion is an, "exercise of the powers of a super-Legislature-not the performance of the constitutional function of judicial review." *Id.* at 533 (dissenting opinion).

838. Certainly, the prevailing "standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what

equally axiomatic that when litigation concerns the constitutionality of governmental conduct, particularly the claim that the specific conduct offends fundamental rights protected by the Due Process Clauses, the courts, based on their singular role and unique expertise, may supplant the will of the people and their elected representatives.⁸³⁹ As the Supreme Court recently encapsulated decades of constitutional practice,

constitutes wise economic or social policy.” *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (footnote omitted) (equal protection case). Dissenting over one-hundred-fifty years ago in *Dred Scott*, Justice Curtis offered the classic elucidation that such usurpation converts us from a constitutional republic into a government without grounding principles:

Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Scott v. Sandford, 60 U.S. (19 How.) 393, 620-21 (1857) (Curtis, J., dissenting).

839. *Obergefell*, 135 S.Ct. at 2598. Recognizing the importance of fundamental rights as a backstop against tyranny, Ronald Dworkin offered what Gregory Bassham denoted a “boldly different” interpretation of the Constitution’s structure, but, one that, in fact, is both direct and obvious. Dworkin urged that, “the essence of democracy is equal citizenship, not majority rule. And because judicial review premised on the moral reading (if rightly conducted) is an effective means of protecting and promoting equal citizenship, such a reading is not only consistent with democracy, but may in fact serve to advance it.” Gregory Bassham, *Freedom’s Politics: A Review Essay of Ronald Dworkin’s Freedom’s Law: The Moral Reading of the American Constitution*, 72 NOTRE DAME L. REV. 1235, 1258 (1997) (quoting RONALD DWORKIN, *FREEDOM’S LAW* (1997); then citing, *inter alia*, DAVID RICHARDS, *THE MORAL CRITICISM OF LAW* 50-51 (1977)).

Specifically, Dworkin argued that, “moral membership in a democracy requires that each person be given an equal stake in the community by being treated as equally worthy of respect and concern. The intuition underlying this condition is that a political community in which a majority treats a minority with contempt is not only unjust but undemocratic as well.” *Id.* at 1264 (citing *FREEDOM’S LAW* at 25). Accordingly, “only if independent judges (or other political officials) are empowered to enforce strong constitutional limitations on majority will are the conditions of moral membership likely to be effectively maintained. In the American governmental system this responsibility rests ultimately with the justices of the Supreme Court.” *Id.* at 1265 (discussing, *FREEDOM’S LAW* at 7).

Prof. Bassham respectfully but unequivocally criticizes Dworkin’s argument. *Id.* at 1266-76. Dworkin, however, is correct. As argued in the text, because the meaning of constitutional law is premised on deontological morality, there must be an office of designated experts entrusted to understand abstract morality at a breadth and depth the lay public could, but routinely does not. So understood, Dworkin rightly notes that the role of moral interpreter falls to the Judiciary with the Supreme Court having the last say.

The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act [or acts wrongfully]. The idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."⁸⁴⁰

If, as Chief Justice Robert's *Obergefell* dissent presumes, the moral meaning of due process disputes such as governmental bans against same-sex marriages at bottom are solely policy issues, courts would have no constitutional competence to enter that debate, much less replace the popular will with theirs. Such, however, is not the case at all. We now understand that the moral standards raised by the Due Process Clauses neither require nor permit courts to assess the "wisdom and utility of legislation," policies about which reasonable persons may disagree and, therefore, properly left to the pleasure of the popularly elected branches.⁸⁴¹

Of equal importance, contrary to the frequent erroneous assertion, due process moral analysis does not, "[b]y gradually replacing the meaning of the Due Process Clause, [allow] the judiciary [to] exercise[e] judicial review of the Constitution itself, for conformity with the judiciary's own subjectivistic concept of inalienable rights and liberties."⁸⁴² Rather, as we now know, when properly performed, moral analysis is not subjective, consequentialist and political, but rather, objective, dispassionate and deontological.⁸⁴³ Correspondingly, as likewise we now know, the Constitution itself is predicated on deontological morality because its foremost purpose is enforcing the natural rights philosophy of the Declaration of

840. *Obergefell*, 135 S.Ct. at 2605-06 (quoting, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943)).

841. *E.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.").

842. Hyman, *supra* note 472, at 51; *see also, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA* 8-11, 16-18 (1990).

843. *See* Bayer, *Originalism and Deontology*, *supra* note 7, at Part III (Deontology) and IV (Kantian Morality).

Independence.⁸⁴⁴ Because the Declaration's natural rights philosophy sounds in the deontology of natural law, the only way reviewing courts properly can assess the constitutionality of governmental action is by determining whether the challenged law or official conduct is moral. Identically to questions of, say, interstate commerce, executive oversight of foreign affairs, and state "police powers," when properly done, judicial review of natural rights issues eschews partisan politics for unbiased reasoning.

3. *Judges Are Fully Capable of Rendering Moral Judgments --*

Concurrent with the proper status of the Judiciary as America's constitutional morality authority, only ingenuous commentators believe that, "Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases."⁸⁴⁵ Grasping the tricky legal intricacies of matters such as commerce, "separation of powers," and "police powers," requires judges to become experts in the Constitution's esoterica even though, prior to their appointments, they surely lacked practical experience in, and deep understanding of, the constitutional panoply that is now their solemn duty to decipher.⁸⁴⁶ Part of that duty, indeed arguably the most integral part, is discerning the meaning of constitutional rights and applying that meaning to discrete scenarios. Because those meanings and applications sound in deontological morality, judges are entrusted to become experts in that philosophy just as they must become experts in other comparably abstract and cryptic concepts arising from the constitutional text. Even if discerning the nature and practice of constitutional rights actually were more demanding than any other judicial duty, it is neither unfeasible nor impractical, and certainly worthy of the high and prestigious office that is the Judiciary.

True, some scholars assert that, "Most judges are not comfortable with the largest questions of political morality, ... As [Prof. Cass] Sunstein notes,

844. See *supra* notes 17-203 and accompanying text.

845. Posner, *supra* note 37, at 1639.

846. As Adam Gershowitz noted in a slightly different context, "Setting aside polyglots like Judge Richard Posner, few judges are experts on everything from CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.] to tax law to regulatory takings. Yet, they do not simply turn away cases because they have little background in certain doctrinal areas. If judges can learn complicated legal doctrine on the job, they can learn how to impose search protocols." Adam M. Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 625 (2016).

most judges lack the time, training, or fact-finding capacity to do such theorizing well, ...”⁸⁴⁷ Even if so, the fault is not inherent in judicial review, but rather stems from inadequate training, something cured relatively easily. As noted above but worth reiterating, the same might well be said of almost every issue that judges face which arise neither from common experience nor a particular judge’s wellspring of pre-judicial practice. Judges with no prior proficiency rule on intricate matters involving economics, such as antitrust, securities regulation and corporate dealings.⁸⁴⁸ Similarly, they review complex scientific issues concerning medical malpractice, patents, FDA approvals, environmental regulations and like concerns raising knotty questions requiring the assistance of specialized experts.⁸⁴⁹ Indeed, when called upon, judges are expected to become adroit at all manner of law, public and private, regardless of complexity, difficulty, and intricateness. *Understanding morality requires no greater intellectual capacity.*

Indeed, no less an authority than Learned Hand admonished judges to a high standard of worldly knowledge (including some knowledge of Immanuel Kant) to undergird their appreciation of American law:

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he

847. Bassham, *supra* note 839, at 1247-48 (quoting Cass R. Sunstein, Earl Warren is Dead, NEW REPUBLIC, 37 (1996) (book review); then citing John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987)); see also, e.g., CONNIE S. ROSATI, THE MORAL READINGS OF CONSTITUTIONS (2016); THE LEGACY OF RONALD DWORKIN, Wil Waluchow and Stefan Sciaraffa, eds., (forthcoming) http://www.academia.edu/12882570/The_Moral_Reading_of_Constitutions, at 18-21.

848. “The more efficient handling of disputes by judges who understand the complex economics and legal principles that apply to commerce will free up judicial resources for other litigants.” R. Franklin Balotti & Roland E. Brandel, Business Bench, BUS. L. TODAY, JANUARY/FEBRUARY 1995, at 25, 26.

849. The “*Reference Manual on Scientific Evidence*, Third Edition ... [published by] the Federal Judicial Center and the National Academies’ Committee on Science, Technology, and Law ... includes an introductory essay by Justice Stephen Breyer on the need for judges to understand science in general and to make well-informed decisions about the integrity of scientific testimony offered in litigation.” Joe S. Cecil, *Science Education for Federal Judges*, JUDGES’ J. 1, 8, 9 (2017).

can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which makes it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.⁸⁵⁰

Doubtless, “we should expect that conscientious judges will differ in the constitutional morality they believe best fits and justifies the extant law”,⁸⁵¹ and, indeed, even if there is agreement, “conscientious judges,” nonetheless prone to human frailty, will make errors regarding the content of moral precepts and their proper application in specific litigation. But, if lack of unanimity over theory is a criticism of the Judiciary as an institution, then the entire legitimacy of that branch of government is suspect.⁸⁵² Courts and

850. Thomas E. Baker, *Mastering Modern Constitutional Law*, 21 SEATTLE U. L. REV. 927, 929 n.8 (1998) (quoting Learned Hand, *Sources of Tolerance*, in THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND 81 (Irving Dilliard ed., 3d ed. 1974) [also found at 79 U. PA. L. REV. 1, 12-13 (1930)]). Implying that Judge Hand’s admonition reflects more the hoped for than the actuality, noted scholar Philp B. Kurland remarked, “Learned Hand[’s] statement ... probably tells more about him than about his judicial colleagues[.]” Philip B. Kurland, *Judicial Biography: History, Myth, Literature, Fiction, Potpourri*, 70 N.Y.U. L. REV. 489, 500 (1995).

I note in passing that surly Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit grumbled: “Hand’s list are authors one reads, or starts to read, in one’s youth, as he did. They leave a residue and may be reread at successive stages in one’s life. But if one hasn’t become familiar with such works in college (or before), one isn’t going to read them, for the first time, in middle age.” Richard A. Posner, *What Books on Law Should Be*, 112 MICH. L. REV. 859, 863 (2014). Understandably, given the somewhat off-handed tone of his prose, Posner did not bother to verify his empirical assumption with authority; still, lack of citations aside, experience and logic may advise that he is correct.

For what it is worth, however, I began my study of Hume and Kant not during my college and graduate years, but in my forties and fifties when it became clear that, if I wished to write seriously about abstract constitutional and general legal morality, I would have to acquire at least a working knowledge of those and other regarded philosophers. So too, those who have recently attained judgeships might, out of a sense of responsibility, self-educate to enhance their appreciation of domains such as morality, economics, and history. The purpose, naturally, would not be to acquire commanding knowledge, but rather to become familiar with basic concepts, perhaps discard popular but faulty stereotypes and presumptions, and otherwise become better prepared for the erudite challenges attendant to a judicial tenure. Indeed, a brief but intense course in moral philosophy could be part of any state or federal mandatory training for judicial newbies.

851. Rosati, *supra* note 847, at 20-21 (footnote omitted).

852. By perhaps obvious contrast, one would expect diversity within a legislature which, presumably, consists of elected representatives reflecting the preferences of different

judges habitually are not of one mind regarding the meanings and applications of law⁸⁵³ from the grandest constitutional principles to the most minute and specific technical regulations establishing, for instance, how many insect parts might lawfully be found in butter or tomato paste.⁸⁵⁴ We have a hierarchical judiciary, culminating in federal and state courts-of-last-resort, to resolve such disagreements. The hope, of course, is that courts-of-last-resort will decide matters correctly; but if we cannot be certain in all instances, then, at least, highest courts fulfill the practical necessity of concluding matters so that we can conduct our respective affairs with some suitable measure of certitude. As Justice Robert H. Jackson famously sighed about the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final."⁸⁵⁵

In sum, the onerousness of the judicial task and the lack of unanimity among judges on legal-philosophic matters are insufficient bases upon which to claim that judges are not fit to be moral arbiters.⁸⁵⁶

constituencies, resulting in some if not much diversity of opinion. Indeed, a lack of honest division in a legislature would be very unusual, if not suspect.

853. "[J]udges often disagree about what is and is not necessary to the resolution of a case." *U.S. v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (Kozinski, J.). Similarly, the Southern District of Texas noted, "District courts across the country often disagree as to their interpretations and applications of the law, but allowing that consideration to qualify a question for interlocutory appeal in every instance would severely undermine the general rule against piecemeal litigation in federal courts." *Adkihari v. Daoud & Partners*, 2010 WL 744237 *6 (S.D. Tex. 2010).

854. Cf., *U.S. v. 1,500 Cases More or Less, Tomato Paste*, 236 F.2d 208 (7th Cir. 1956); *338 Cartons, More or Less, of Butter v. U.S.*, 165 F.2d 728 (4th Cir. 1947).

855. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in judgment); *Dietz v. Bouldin*, 136 S.Ct. 1885, 1896 (2016) (quoting Justice Jackson).

856. One noted federal appellate judge wrote that,

Much of the judge-centered scholarship in contemporary law schools assumes that judges have the leisure to examine subjects deeply and resolve debates wisely. ... Pfah! ... In 1989 I issued 67 published opinions and was responsible for perhaps 30 unpublished opinions. You can work it out that I participated in approximately 300 cases, with perhaps three issues presented in the average case. Judges have a broad understanding of the law, not a deep one. Who can study 900 issues in depth? With luck, pluck, and awareness of intellectual limits, a judge may succeed in holding the rate of error as low as 5%. You may rest assured that we lack the rigorous training in music, metaphysics, mathematics, and gymnastics that Plato thought essential to his guardians—and that the process for selecting judges does not check whether the candidate has the acquaintance with the conduct of the Peloponnesian Wars that Learned Hand thought essential. The demands of the office preclude the ongoing intellectual study and extended discourse that would help a judge fulfill the expectations others have of judicial work.

Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 778–79 (1990) (footnote omitted).

A related common criticism in the form of a question asks, “Is your argument that judges are smarter than legislators, administrators, executives and the people?” The answer, of course, is, “No.” It is not that judges as a class are cleverer and more intelligent than other professional and lay classes. Rather, as highlighted above, the unbiased discernment of law, *including moral precepts premising law*, is the very meaning of judges’ work.⁸⁵⁷ In addition, at the federal level and, often at the state level, we confer the protection of life-tenure judges to minimize political and similar corrupting influences on the impartial pursuit of legal knowledge.⁸⁵⁸ Because it is their unique job to be the moral arbiters of the Nation, judges have a responsibility to learn and to apply the neutral principles of morality.

By contrast, while we hope they will act in conformity with moral precepts, legislators and executives make and enforce *policy*. Policy makers and enforcers should act morally, but need not become proficient, as must judges, because judges ultimately have the final say whether any challenged official action is moral, that is, satisfies constitutional “fundamental

I mean no disrespect to Judge Easterbrook who surely knows whereof he speaks, but I say “Pshaw” to his “Pfah.” Given that they *are required* to apply the strictures of the Constitution’s enumerated and unenumerated rights (plus similar strictures of civil rights, criminal and other statutes, regulations, judicial opinions, and official policies that implicate, indeed enforce the morality of those rights), it behooves judges to have sufficient knowledge of moral theory to render plausible rulings. If nothing else, this writing proves that so-called “common sense,” experience, or “good judgment” are no more sufficient in the realm of morality than they would be in the realms of economics, science, business, family relations, or any other abstract concepts that gird legal issues. In other contexts, judges must research and study rather than simply intuiting what comprises commerce, reasonable searches, probable cause, statistical significance, and other similar ideas commonly employed in judicial decisions. Likewise, they cannot leave to purported intuition or familiarity the meaning of constitutional morality.

857. Prof. Charles Fried well summarized the principle:

It is not because judges are smarter or better than other people that we give them the ultimate power -- ultimate only in the sense that it is last. It is because it is their particular job to know the law and to apply it truthfully. And only because of that peculiarly potent and impotent role did it a long time ago seem natural to give judges -- all judges -- the authority to hold ordinary laws unconstitutional: because the Constitution is law and it is the province and duty of the judicial branch to say what the law is -- with knowledge and in truth.

Charles Fried, *A Meditation of the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1233 (2004) (footnote omitted).

858. As Hamilton stressed, “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.” See generally, *The Federalist* No. 78, *The Judicial Department* (Hamilton) at 546 (H. Dawson ed. 1876).

fairness.”⁸⁵⁹ Correspondingly, while judges must attain some familiarity with relevant policy to understand what moral precepts apply and how to apply them, they need not become policy experts as should legislatures and executive offices because on such matters the People, by referendum or through their representatives, enjoy the final word.⁸⁶⁰

In this regard, perhaps expressing the classic counter-majoritarian principles, Hamilton accented that the cooler, neutral minds of judges would be needed

to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which ... have a tendency ... to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.”⁸⁶¹

True, Learned Hand bristled at the specter of judges as philosopher royalty: “For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”⁸⁶² But, as distasteful as it may be to some, judges indeed are and should be philosopher sovereigns in that they rightly are the final arbiters of the moral precepts of the Constitution. It cannot be otherwise for, as one trial court judge superbly expressed his obligation to substitute his presumably unbiased wisdom for attitudes often predominately motivated by politics, “Judges must follow their oaths and do their duty, heedless of editorials,

859. “What qualifies judges as being particularly well-situated to decide difficult, abstract questions is simply that they do, by requirement of their office, produce a thorough and rigorous justification for every decision they make, a process which legislators and voters need not regularly engage in themselves.” Scott M. Noveck, *Is Judicial Review Compatible with Democracy?*, 6 CARDOZO PUB. L., POL.’Y & ETHICS J. 401, 422 (2008).

860. *E.g.*, *Simmons v. Galvin*, 575 F.3d 24, 57 (1st Cir. 2009) (Torruella, J., dissenting) (Judges are not “policy-makers;” quoting, *Hayden v. Pataki*, 449 F.3d 305, 348 (2d Cir. 2006) (Parker, J., dissenting)).

861. *The Federalist* No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

862. *Learned Hand, THE BILL OF RIGHTS* 73 (1958) (quoted in *Griswold v. Connecticut*, 381 U.S. 479, 526-27 (1965) (Black, J., with Stewart, J., dissenting). Similarly, one federal judge recently warned, “We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment.” *Kitchen v. Herbert*, 755 F.3d 1192, 1240 (10th Cir. 2014) (Kelly, J., concurring that plaintiffs have standing to challenge the constitutionality of the Utah marriage statute and dissenting from the Court’s ruling that Utah’s ban against homosexual marriage is unconstitutional).

letters, telegrams, picketers, threats, petitions, panelists, and talk shows. *In this country, we do not administer justice by plebiscite.*”⁸⁶³

C. The Dignity Paradigm, the Correct Application of Deontological Originalism --

1. The Dignity Paradigm in General --

We now come to the crucial aspect. Perhaps in response to the infirmities of its own *deeply rooted liberties* standard, and consistent with its early *post-Bellum* jurisprudence,⁸⁶⁴ the Supreme Court conceived the *dignity paradigm*. Unlike the *deeply rooted liberties* standard, the *dignity paradigm* faithfully implements Deontological Originalism by enforcing the natural law precepts of the Declaration through a “due process of law” exemplar effectively grounded in Kantian morality although the Court has not cited that philosopher’s works (nor, indeed, any Enlightenment thinkers or modern scholars who espouse Enlightenment inspired principles).⁸⁶⁵ Specifically, the *dignity paradigm* declares that: because the Due Process Clauses protect liberty by forbidding official behavior that is arbitrary or capricious -- that is, offends “fundamental fairness” -- courts must invalidate any laws or other governmental actions that offend individual “dignity.” *Put more simply, pursuant to a distinctly Kantian attitude, official conduct that offends human dignity is unconstitutionally unfair. Appropriately, then, dignity is the decisive principle defining and informing the meaning and applications of “due process of law.”*

Perusing judicial opinions in hope of finding explications, some scholars uncharitably but excusably aver that the Court’s seemingly Kantian approach is, in the words of Prof. Rex Glensey, “steady, although inconsistent and haphazard, so that there is a partially developed body of American

863. *Commonwealth v. Woodward*, No. CRIM.97-0433, 1997 WL 694119 (Mass. Super. Ct. Nov. 10, 1997) at *1 (per Hon. Hiller B. Zobel) (emphasis added; quoted in Hon. Abner J. Mikva, *The Judges v. The People: Judicial Independence and Democratic Ideals*, 19 CARDOZO L. REV. 1771, 1777 (1998) (and quoting as well 1 Annals of Cong. 439 (1789)).

864. See, *supra* notes 480-520 and accompanying text, particularly notes 514-520 discussing *Hurtado v. California*.

865. Glensey, *supra* note 402, at 86. Prof. Glensey noted, “it is the Kantian vision of dignity that seemingly animates” the Court. *Id.* See also, e.g., Goodman, *supra* note 402, at 748-53, 757, 772-78 (discussed in, Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2178 (2016)).

constitutional law that deals with some semblance of the right to dignity.”⁸⁶⁶ Similarly, Prof. Neomi Rao observed, “Judges and lawyers, however, do not usually take up such lofty contemplations about man’s higher nature. ... Courts rarely focus on the meaning of dignity. Instead, they are concerned with what is required by human dignity -- what types of rights, freedoms, or entitlements may flow from ‘dignity’ as a legal concept.”⁸⁶⁷

866. Glensey, *supra* note 402 at 86.

867. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 202 (2011). I note in passing that while many of Prof. Rao’s general observations are profound, she seems to embrace a more consequentialist than deontological understanding of the meaning and nature of human dignity. Rao initially expresses a Kantian concept of dignity: the inherent worth of every human being arises solely from their humanness. “Such dignity exists merely by virtue of a person’s humanity and does not depend on intelligence, morality, or social status. Intrinsic dignity is a presumption of human equality -- each person is born with the same quantum of dignity.” *Id.* at 187. But, she accords as well a form of dignity based on societal conformance that enforces collective “substantive values.”

Protections for dignity can often reflect community norms. In this context, dignity is a value invoked to hold the individual and the community to shared social values or to maintain some conception of public order. Unlike intrinsic human dignity, positive conceptions of dignity choose a particular view of what constitutes the good life for man, what makes human life flourish for the individual and also for the community. Communities will have different understandings of dignity, but in each instance the content of dignity will depend on a particular understanding of what is valuable or good.

Id. at 222-23.

From this, Rao concludes,

By requiring evaluations and conformity to social norms, substantive dignity is often in tension with inherent or universal dignity. The conflict arises because socially defined forms of dignity must be acquired and maintained through conformity with social norms that may conflict with individual desires and pursuits. Legal enforcement of social standards of dignity will often conflict with inherent or equal dignity and may impinge upon human agency by overriding individual free choice in favor of the dignity chosen by the community.

Id. at 226.

This writing must respectfully disagree with Prof. Rao’s assessment because, as we now know, there cannot be *bona fide* conflicting community and individual dignity standards. Moral imperatives can never conflict, rather they always are compatible, harmonized though the formative moral principle that is the value monism from which all discrete, sub-principles or sub-categories arise. See, *supra* notes 536-50 and accompanying text. Therefore, the same moral imperatives and resolutions of moral dilemmas that command individuals identically command groups up to and including greater society. See generally, *Part I: Originalism and Deontology*, *supra* note 7, at Sections 2-a, b. Individual persons and groups might misperceive their actual moral duties or defiantly refuse to perform their rightly perceived moral duties; but there cannot be *rightful moral duties of individuals that conflict with rightful moral duties of a given society*.

For example, as I explained in Bayer, *supra* note 125, under Kantian morality, while acting charitably is praiseworthy, the prosperous have no perfect moral duty -- no affirmative obligation (see generally, *Part I: Originalism and Deontology*, *supra* note 7, at Section 3-d-5-

Accepting that dignity's "importance, meaning, and function are commonly presupposed but rarely articulated,"⁸⁶⁸ and despite frustration with the Judiciary's disinclination to clarify its standard,⁸⁶⁹ the discerning researcher can

c discussing perfect and imperfect duties) -- to aid even the starving, homeless poor so long as those prosperous individuals did not deliberately cause the latter's poverty. However, the Government of the society in which the poor and the prosperous reside has a perfect duty -- that is, an immutable moral obligation -- to use tax or other revenue to alleviate poverty at least enough to allow the poor meaningful opportunities to fend for themselves and, thus, not be in a slave-like status begging of sustenance. Bayer, *supra* note 125, at 907-13. It is true, then, that Government has a moral duty to help indigent citizens while more prosperous citizens, as discrete individuals, have no comparable moral obligation. But, that is because the very structure of the society enforced by its particular government has permitted some of its citizenry, often through no fault of that citizenry, to be so destitute that, to attain food and shelter, they must compromise their personal dignity by begging. Accordingly, greater Society is to blame for the population of beggars, while individual citizens themselves, at least according to Kant, have no such blame. Because the widespread poverty is Society's fault, Society has the duty to fix it.

Thus, it is not that Society has a special moral duty that individuals do not. Rather, it is that Society and its constituent residents have the same moral duty to respect the dignity of others; therefore, when one breaches that moral duty, however that breach may occur, the breacher has the immutable duty to make amends as fully as possible.

Of course, consistent with Kantian morality, the above-discussed governmental duty to tax or otherwise raise revenue to aid the destitute cannot be exercised in immoral ways, meaning ways that disregard either taxpayers or the recipients of government largesse as ends in themselves. For instance, requiring the poor to support a particular political party in order to receive largess treats those persons merely as means for the benefitted political party's ends. Had the Government respected its indigent citizens as ends in themselves, it would not have corrupted its program by requiring recipients to forsake their right of political participation to receive largesse. Thus, while wealthy individuals may have no moral duty to relieve the suffering of the poor, the Government may have such a duty.

The question whether a duty exists stems from one body of moral principles applicable equally to individual persons and the governments they create. Pursuant to that unified body of moral principles, individuals may have specific duties that Government does not, Government may have specific duties individuals do not (as we see regarding the duty to tax to alleviate indigency), and both may have certain identical duties. However, all such particular moral duties work in harmony; they cannot conflict. See, *supra* notes 536-50 and accompanying text (discussing "value monism"). Accordingly, insofar as Prof. Rao avers that "social standards" of dignity can conflict with individuals "inherent or equal dignity," she misperceives the deontological aspect of human dignity.

868. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011).

869. "It is not that the right to dignity has to be shapeless by its very nature, and thus is subject to inconsistent use, but rather, that so far there has been no coalescence (particularly in the United States) around the rational possibilities that exist for a coherent legal theory of human dignity." Glensey, *supra* note 402, at 107-08. Similarly, Prof. Rao averred that international covenants, constitutions and judicial opinions may declare a recognition of general human dignity, but leave "open the question of what is required by such intrinsic dignity" except, of course, a given case may describe how and possibly why dignity is or is not offended in the given circumstances. Rao, *supra* note 867, at 202-03 (discussing, *inter*

uncover what actually rests not too deeply beneath the surface of the Court's dignity paradigm: the Kantian perspective that Government violates due process liberty interests by treating individuals and groups merely as means for some governmental end without concurrently respecting such individuals and groups as ends in themselves.⁸⁷⁰

It is true that none of the pivotal opinions discussed below specifically acknowledge the Kantianism of the *dignity paradigm*. Nonetheless, Prof. Wright astutely observed that while courts rarely quote much less cite either "Kant [or] any other philosopher[, p]opular versions of philosophical accounts of dignity are an element of the jurisprudential air we breathe. Inevitably, philosophical accounts inform our constitutional case law on the meanings, sources, and roles

alia, at 202, "the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 1 (Dec. 10, 1948)).

870. In this regard, it is worth re-emphasizing that groups no less than individual human beings must comport with Kant's Categorical Imperatives, otherwise individuals could evade their moral duties simply by forming groups. Indeed, under Kant's CI₃, Government is legitimate only insofar as its conduct and edicts comport with CI₁ (Kant's equivalent of the "Golden Rule") and CI₂ (persons must treat all other persons not merely as means, but as ends in themselves). See generally, *Part I: Originalism and Deontology*, supra note 7, Sections 2 (Deontology) and 3 (Kantian morality).

of dignity.”⁸⁷¹ In sum, although not directly acknowledged,⁸⁷² *Kant provided the framework and principles, particularly the three formulations of the Categorical*

871. R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 537-38 (2006) (footnote omitted).

A Westlaw search conducted on August 07, 2018, accessing the library entitled “Cases” and using the search term “Immanuel Kant,” yielded only forty-three judicial opinions, twenty-eight federal (one Supreme Court, eight Court of Appeals, sixteen District Courts, two Bankruptcy Courts, and, one Tax Court) and fifteen state (six from state supreme courts and the rest from various state appellate courts). Within the appellate decisions is a mix of majority opinions and dissents.

According to this perhaps hasty search, the single most prominent topic judicially reviewed is Kant’s famous proposition, predicated on CI₂, “that the state should never do anything to a criminal that humiliates and degrades his dignity as a human being.” *State v. Perry*, 610 So.2d 746, 767 (La. 1992) (citation omitted). Based on this general principle, courts have noted that, according to Kant, “Juridical punishment can never be administered merely as a means of promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.” *State v. Gardner*, 947 P.2d 630, 634-35 (Utah 1997) (quoting, Immanuel Kant, *The Philosophy of Law* (W. Hastie tr. 1887), in Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 137 (5th ed. 1989)); see also, e.g., *U.S. v. Blarek*, 7 F. Supp. 2d 192, 200-01 (E.D.N.Y. 1998) (discussing Kant’s theory of retributive criminal justice); *U.S. v. Cole*, 622 F. Supp. 2d 632, 639 (N.D. Ohio 2008) (same principle).

Regarding another noteworthy Kantian maxim addressing moral enforcement of criminal justice, the California Supreme Court aptly ruled that it is not *per se* reversible error in a death penalty case for prosecutors to quote Kant’s plea, “The last murderer on earth has to be punished, the last, otherwise there is no justice.” *People v. Schmeck*, 37 Cal.4th 240, 302, 118 P.3d 451, 33 Cal. Rptr.3d 397 (Cal. 2005) (citing, *People v. Young*, 34 Cal. 4th 1149, 1222, 24 Cal. Rptr.3d 112, 105 P.3d 487 (Cal. 2005) (no citation in the *Schmeck* decision for the Kant quotation), abrogated on other grnds., *People v. McKinnon*, 130 Cal. Rptr.3d 590, 259 P.3d 1186, 52 Cal. 4th 610 (Cal. 2011)). A little over a decade earlier, in a particularly nasty dissent, Justice Scalia quoted that same Kantian plea for undiluted morality,

Today, obscured within the fog of confusion that is our annually improvised Eighth Amendment, “death is different” jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. Those who agree with the author of Exodus, or with Immanuel Kant, must be banished from American juries—not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court.

Organ v. Illinois, 504 U.S. 719, 751-52 (1992) (Scalia, J., with Rehnquist, C.J. and Thomas, J., dissenting; footnote omitted).

On a different tack, in a civil suit, one exasperated judge mercilessly whipsawed Plaintiffs’ counsels’ use of CI₁ (Kant’s statement of the “Golden Rule”) to salvage deficient pleadings:

Plaintiffs have presented the Court with an amended complaint that, more than simply being overrun with grammatical, typographical, and conceptual errors, has as its gravamen an ongoing series of conclusory statements barren of any factual content. From the complaint there emerges no coherent story, no sense of what actors committed which acts, and no hint that any of the defendants haled into court actually subjected plaintiffs to any legally cognizable injuries. Applying Kant’s categorical

imperative to the decision not to dismiss the claims in the complaint, as plaintiffs urge, would result in an outcome analogous to the case of the despondent man attempting to universalize a rule allowing suicide in the face of despair: such a principle “would contradict itself,” as the purpose of the legal system is not to allow a plaintiff with “a largely groundless claim” to “take up the time of a number of other people.” Kant’s theories for an *a priori* basis of morality do not aid plaintiffs’ case.

Wicks v. Anderson, 2010 WL 4916712 at *11 (M.D. Pa. 2010) (emphasis in original; citing, Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals* (Thomas Kingsmill Abbott ed., Gutenberg Project 2005) and quoting, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted)).

Occasionally a judge will radically misstate Kant’s basic concepts. For instance, instead of explaining that, pursuant to C1₂, persons may treat other persons as “means,” but only so long as they simultaneously treat such others as “ends in themselves,” the District of Alaska wrote, “Judge Noonan did not mention Immanuel Kant, but he echoes an important variation on Kant’s categorical imperative, that we must view all of the men and women with whom we come in contact as ends, *never as means to our ends*.” *U.S. v. Stevens*, 29 F. Supp. 2d 592, 612 (D. Alaska 1998) (emphasis added; citing, Brendan E.A. Liddell, *KANT ON THE FOUNDATION OF MORALITY—A MODERN VERSION OF THE GRUNDLEGUNG* 152–57 (Indiana Univ. Press 1970)), vac., 197 F.3d 263 (9th Cir. 1999).

Not surprisingly, this search found no serious use of Kantian morality to explicate, much less to define the meaning of “due process of law.”

872. One may speculate on the reasons for the Supreme Court’s lack of candor for surely the justices are aware of their *dignity paradigm*’s actual or at least apparent expropriation of Kantian ethics. Part of the answer likely stems from the general but not wholly accurate perception of the philosopher that the noted Kantian scholar Allan W. Wood condensed as, “the stiff, inhuman, moralistic Prussian ogre everyone knows by the name Immanuel Kant.” Allen W. Wood, *KANTIAN ETHICS* at xii (2008). Consistent with Deontology, Kant is renown, indeed infamous for espousing moral duties that are as inflexible as they are immutable. Given the many and varied unhappy outcomes faithful moral comportment may produce, judicial reluctance explicitly to associate legal doctrine with Kant (or any deontological theorist) is understandable. Courts certainly do not enjoy touting: the applicable constitutional standard will make many people unhappy and will cause much undeserved suffering, but it *is* consistent with the immutable morality of natural law.

For example, Kant famously interpreted the innate dignity of human beings to mean that, pursuant to the Categorical Imperative, lying is *per se* immoral no matter what the circumstances. E.g., Rebecca B. Cross, *Ethical Deception by Prosecutor*, 31 FORD. URBAN L. J. 215, 230 (2003) (student comment) (footnotes omitted). Ridiculing such an absolutist stance as absurd (*id.* (citing sources)), some critics conclude that, “Kant would direct the Nazis to the Jews, reasoning that one is not responsible for actions stemming from the truth, only those stemming from deception.” *Id.* at 230–31 (footnote omitted) (the author herself ultimately embraced the anti-Kantian proposition that, “prosecutors should be permitted to use deceit when the benefits will significantly outweigh any costs involved.” *Id.* at 233).

This is not the place to explain fully why such interpretations are infirm. (Briefly, while any lie is immoral, nothing in Kant prevents a person from *refusing to answer* when asked, for example, “Where are the Jews hiding?” The duty not to lie does not necessarily mandate a parallel duty always to answer questions.) Rather, the point is, at the risk of understatement, despite his notoriety and acclaim, “Kant’s views are controversial . . .” Jeremy Waldron, *Kant’s Legal Positivism*, 109 HARV. L. REV. 1535, 1536 (1996). Similarly, but with

Imperative,⁸⁷³ that the Supreme Court, via its dignity paradigm, rightly has adapted as the meaning of the Due Process Clauses. Thus, as Prof. Wright astutely observed, “[N]o broad formula, including the formula of ends, can be applied without intelligence, good faith, and sensible judgment. However, society has been able to make important, critical use in the law of Kant’s formula of ends while minimizing the relevance of typical criticisms of Kant.”⁸⁷⁴ Indeed, as earlier quoted, Justice Benjamin Cardozo, whose opinion for the Court in *Palko v. Connecticut* is instrumental in our understanding of “due process of law,”⁸⁷⁵ unequivocally linked Kant to the entirety of American law: “Our

more intensity, Prof. R. George Wright bluntly averred, “Kant’s formula of ends remains a radical insight and a radical agenda, and not an achievement of the late Eighteenth Century revolutions.” Wright, *supra* note 871, at 321. Likewise, popular critiques “current from almost the moment that it was published” of basic Kantian morality -- critiques that, this writing avers, are misplaced -- aver that: “The demands and status of the categorical imperative are unreasonable, inhuman, and, worst of all, empty or circular.” Charles Fried, *Heaven: What Sense Can It Make To Say that Something Is Absolutely Wrong?*, 59 UCLA L. REV. DISCOURSE, 58, 68 (2011) (recounting frequent criticisms). Relatedly, Prof. Robert P. Burns described Kant’s “moralism” as “notorious.” Robert P. Burns, *A Jury between Fact and Norm*, 82 CHI-KENT L. REV. 643, 658 (2007).

Conceivably, the Court does not wish to link unambiguously the meaning of due process with the theories of such a provocative philosopher, one who insists that all persons must obey moral commands no matter how catastrophic resulting outcomes may be: “Justice [must] be done even if the world should perish,” Immanuel Kant, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., 2006). Thus, Kant has become the Supreme Court’s furtive collaborator, possibly known but never acknowledged.

Along similar lines, the *dignity paradigm* denotes that indeed courts claim themselves capable of both discerning abstract moral precepts and correctly applying such precepts to discrete factual situations, assertions that the lay public -- and perhaps as well many legal professionals -- might consider arrogant, conceited, elitist, impudent, inappropriate, and misguided if not actually dishonest. *E.g.*, *Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting). In his livid *Obergefell* dissent, for instance, Chief Justice Roberts asserted that the majority, “omits even a pretense of humility, openly relying on its desire to remake society according to its own ‘new insight’ into the ‘nature of injustice.’” *Id.* at 2612 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting) (quoting the majority opinion at 2598, 2605). Directly naming Kant as the Court’s muse might only make the Chief Justice’s charges, although erroneous, all the more credible to both the lay and expert critics.

873. See generally, Part I: *Originalism and Deontology*, *supra* note 7, at Sections 3-d-4, 5.

874. Wright, *supra* note 871, at 325 (footnotes omitted); see also, e.g., Daniel Markovits, *Contract and Collaboration*, 113 YALE L. J. 1417, 1436 (2004) (Kant’s concepts of various “duties” is “useful”); but see, e.g., Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1922 (2000) (Kant’s Categorical Imperative is an “empty formula”).

875. See, *supra* notes 652-86 and accompanying text.

jurisprudence has held fast to Kant's categorical imperative, 'Act on a maxim which thou canst will to be law universal.'⁸⁷⁶

This article's exploration of Deontology in general and Kantian morality in particular has shown that indeed there is a formula -- applicable principles of morality -- not utterly precise but precise enough for reasonable interpreters including judges to apply reasonably. Therefore, the Court overly cautioned: "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. *That responsibility, however, has not been reduced to any formula.*"⁸⁷⁷ Indeed, pursuant to the "judicial duty" so aptly acknowledged in the above *Obergefell* quote,⁸⁷⁸ the Supreme Court established a workable, if, as critics note, undetailed formulation. While hardly a complete deontological theory, the Court has expounded *some* abstract concepts to premise an ever-developing body of practical caselaw, enabling subsequent courts and litigants to devise over time a coherent and correct framework enforcing the *dignity paradigm*.⁸⁷⁹

876. Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 139 (1921) (quoted in, Wardlaw, *supra* note 683, at 1660-61).

877. *Obergefell*, 135 S.Ct. at 2598, 2597 (emphasis added; quoting, *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); other citations omitted).

878. As Justice Thurgood Marshall nicely summarized roughly forty years earlier, "It is the duty of appellate courts to establish the legal standards by which the facts are to be judged." *U.S. v. Falstaff Brewing Co.*, 410 U.S. 526, 572 (1973) (Marshall, J., concurring). The Ninth Circuit offered a detailed explication of the Judiciary's responsibility:

Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well. ...

The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed — which is often the case — the court must explain why it is selecting one and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. ... Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task. *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (footnote omitted).

879. As earlier mentioned but worth brief reiteration, the arguable indeterminacy of ideas such as *morality* and *dignity* certainly does not *per se* render those ideas unfit for legal applications. Indeed, the law is replete with similarly imprecise concepts that, despite their imprecision, are essential to any fair and just legal system. Perhaps the most ubiquitous exemplar is the law's reliance on *reasonableness* and *unreasonableness* in any number of significant contexts both civil and criminal. As the Supreme Court recently remarked, "The term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal

2. *The Proper Role of History and Tradition* --

Under the *dignity paradigm*, the controlling concept, understandably, is “human dignity,” with American history and traditions possibly informing but never displacing dignity as the basis for discerning the meaning of “due process of law:”

The fundamental liberties protected by th[e Fourteenth Amendment’s Due Process] Clause include most of the rights enumerated in the Bill of Rights. *In addition these liberties extend to certain personal choices central to individual dignity and autonomy*, including intimate choices that define personal identity and beliefs. ...

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. ... [To do so,] courts ... exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. *History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.*⁸⁸⁰

As quoted above, rather than simply applying historical traditions and practices pursuant to an essentially uncritical acceptance of their own persistence, courts must enforce the core idea of human dignity. American traditions in-and-of-themselves, no matter how “deeply rooted,” neither define “due process of law,” nor alone legitimize under the Due Process Clauses any governmental actions. True to its Kantian premises, principles of “ordered liberty” may help discern the nature of human dignity under the Constitution, but, contrary to the *deeply rooted principles* standard,⁸⁸¹ such

world and, accordingly, federal judges are familiar with its meaning.” *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (federal *habeas corpus* statute review); *accord.*, *Wood v. Allen*, 558 U.S. 290, 301 (2010) (quoting *Taylor*). Addressing a different context, the Court likewise accented, “‘Reasonableness’ standards are not foreign to sentencing law. ... [W]e think it fair ... to assume judicial familiarity with a ‘reasonableness’ standard. And that is why we believe that appellate judges will prove capable of ... applying such a standard across the board.” *U.S. v. Booker*, 543 U.S. 220, 262-63 (2005).

880. *Obergefell*, 135 S.Ct. at 2598 (citations omitted).

881. *See, supra* notes 771-98 and accompanying text.

history or practices can never be constitutional ends in themselves. Therefore, as the *Obergefell* Court aptly instructed, the proper interpretive, “method respects our history and learns from it without allowing the past alone to rule the present.”⁸⁸² Prof. Kenji Yoshino rightly accented the liberating brilliance of the dignity standard:

In making the ingenious intentionalist argument that the Framers wished to free us of their specific intent, [the Court] struck the chains of history from due process jurisprudence. ... The importance of this move ... is difficult to overstate. Prior to [the *dignity paradigm*], history often operated as a significant constraint on the recognition of new due process rights. Even opinions that recognized such rights did so after paying obeisance at the altar of history, regardless of how impoverished that offering might be.⁸⁸³

3. *The Link between Dignity and Due Process of Law --*

Having established human dignity as the paradigm, the question becomes: has the Judiciary adequately articulated the link between dignity and due process? To help make that determination Prof. Barroso noted, “[T]he first role of a principle like human dignity [is] to be a source of rights -- and, consequently, duties -- including non-enumerated rights that are

882. *Id.* at 2598.

883. Yoshino, *supra* note 581, at 780-81 (footnote omitted); *see also, supra* notes 771-98 and accompanying text explaining the infirmity of the *deeply rooted principles standard's* sole and total reliance American history and traditions.

Prof. O'Rourke cautioned, “Such end-of-history claims may be premature, however. [The Court’s review of governmental hostility to same-sex marriages] is predicated on a historical analysis of how power has been allocated between the federal government and the states with respect to regulating marriage.” Anthony O'Rourke, *Windsor Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM. & MARY L. REV. 2171, 2176 (2014) (footnote omitted). O'Rourke is correct, but I do not agree with his attempt to dampen Prof. Yoshino's enthusiastic and vigorous interpretation of the *dignity paradigm*. Certainly, even at its most ardent, no proper application of the *dignity paradigm* would ignore history and experience as bases to test relevant moral interpretations. I do not take Yoshino to argue otherwise; but, rather, he rightly observes what this writing likewise urges: that history and tradition are no longer shackles inextricably binding constitutional analysis. As Justice Kennedy for the Court wrote in the case holding that states may not criminalize homosexual sodomy more stringently than it may criminalize heterosexual sodomy, “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) ((quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). History has its place at the table, but not at the head of the table.

recognized as part of a mature democratic society.”⁸⁸⁴ Barroso’s point comports with Prof. Glensey’s pertinent observation,

884. Luís Roberto Barroso, *Here, There, And Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 356 (2012) (emphasis added). Interestingly, regarding what he identifies as its second “major role,” Barroso inadvertently underplays, I think, the magnitude of human dignity: “The other major role played by the principle of human dignity is interpretive. *Human dignity is part of the core content of fundamental rights*, such as equality, freedom, or privacy. Therefore, it necessarily informs the interpretation of such constitutional rights, helping to define their meaning in particular cases.” *Id.* at 365 (emphasis added).

I stress Barroso’s language because it typifies how even astute commentators too often underestimate the most vital concept: human dignity is not “part of the core content of fundamental rights,” *it is the entire content of fundamental rights*. As this article’s sections on Kant have shown, it is from human dignity that all persons are at once entitled to the protections of the three categorical imperatives and required to obey those imperatives regarding their interactions with other persons. *See generally, Part I: Originalism and Deontology, supra* note 7, at Part IV. Accordingly, dignity does not “help[] to define [rights’] meaning in particular cases.” Rather, the only relevant question is whether the challenged conduct is consistent with human dignity, and thus lawful, or whether it offends human dignity, and therefore is unlawful.

Perhaps, I am seriously over-reading Barroso’s words; but, any delineation that would allow some aspect to supplant human dignity’s status as a *sine qua non* -- a “necessary cause” -- to “the core content” of any fundamental right threatens to weaken dignity’s stature. We know that the *deeply rooted principles* standard would oust dignity as the defining trait of fundamental rights, indeed that standard would eliminate dignity altogether as an informative concept in due process analysis. Therefore, I worry about a formulation that could be interpreted to allow some idea, possibly *ordered liberty*, to challenge dignity’s supremacy on the theory that dignity may be “part of the [right’s] core content,” but not necessarily essential to the legitimacy of the given right.

Similarly, as with Prof. Rao (see *supra*, note 867), I must disagree with Prof. Barroso’s seemingly utilitarian understanding of human dignity. “Dignity as a community value, therefore, emphasizes the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life.” Barroso at 374 (citing, ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 128 (1995)). Not surprisingly, Barroso attempts to hedge his consequentialist emphasis by urging that the overarching question is how to know when such limitations on autonomy are legitimate, especially when the State must be neutral and allow, if not encourage, diverse conceptions of “the good life.” Accordingly, to be legitimate, constraints must be justified as fostering “(1) the protection of the rights and dignity of others, (2) the protection of the rights and dignity of oneself, and (3) the protection of shared social values.” *Id.* (citing, *inter alia*, Deryck Beyleveld & Roger Brownsword, *HUMAN DIGNITY IN BIOETHICS AND BIOLAW* 29-38, 63-66 (2001)). Accordingly, one might say that Barroso joins the legion of consequentialists who long to be deontologists. *See*, Bayer, *Originalism and Deontology, supra* note 7, at notes 161-79 and accompanying text. While Prof. Barroso’s standards fall short of pure Kantian morality, they go far towards preventing a consequentialist usurpation of his theory.

The most sweeping impact that one could give to the right to dignity would be to view it as a separate independent right, upon which individuals could assert a private action against both the government and other private parties, and which would require the government to provide a minimum set of standards to ensure that each person's human dignity is protected. ... This concept implies that respect for human dignity is not merely a vague goal, but a normative abstraction given substance through both general principles of law and more specific legal rules.⁸⁸⁵

What Profs. Glensey and Barroso posit is, this writing urges, exactly what the Supreme Court has done. Indeed, *Obergefell* explicitly reaffirmed⁸⁸⁶ what a decade earlier the Court had elevated from plurality opinion status to positive constitutional law:⁸⁸⁷ the concept of human dignity espoused by Justices O'Connor, Kennedy, and, Souter in *Planned Parenthood of Southeast Pennsylvania v. Casey*:

[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment*. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁸⁸⁸

Consistent with our exploration of Deontology and Kantian morality, the Court's above-quote recognizes, indeed emphasizes the inseparable link between human dignity and the pursuit of happiness, that is, the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁸⁸⁹ In that regard, within a dissent rightly

885. Glensey, *supra* note 402, at 111.

886. *Obergefell*, 135 S.Ct. at 2597.

887. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (government may not criminalize acts of homosexual sex performed in private by consenting adults).

888. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added) (plurality opinion of O'Connor, Kennedy and Souter, JJ.), cited as controlling rationale, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (government may not criminalize acts of homosexual sex performed in private by consenting adults).

889. Justice Harry Blackmun illustrated this principle, "We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. ... And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." *Bowers v. Hardwick*, 478 U.S. 186,

recognized as “famous,”⁸⁹⁰ Justice Harry Blackmun famously and poetically identified the very heart of human dignity, although he did not use that explicit term, and explained why constitutional vouchsafing of dignity is essential. “We protect [fundamental] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life. ‘[T]he concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’”⁸⁹¹

*While evincing a profound understanding of dignity, as we now know, the Supreme Court’s formulation alone is insufficient because it does not expressly acknowledge that the pursuit of happiness must conform with moral strictures.*⁸⁹² At most, without more, the Constitution’s respect for human dignity measured as individual self-fulfillment can only obey Kant’s CI₁, the prohibition against hypocrisy.⁸⁹³ That is, we have not yet determined whether the Court has set any moral limits on pursuing happiness other than, consistent with CI₁, an equal protection/due process requirement that

205 (1986) (Blackmun, J., with Brennan, Marshall and Stevens, JJ., dissenting; citations omitted), o., *Lawrence v. Texas*, 539 U.S. 558 (2003).

890. Gary L. Young, Jr., *The Price of Public Endorsement: A Reply to Mr. Marcossan*, 64 UMKC L. REV. 99, 113 (1995).

891. *Bowers*, 478 U.S. at 204 (Blackmun, J., with Brennan, Marshall and Stevens, JJ., dissenting) (emphasis added; quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 note 5 (1986) (STEVENS, J., concurring), quoting *Fried, Correspondence*, 6 PHIL. & PUB. AFFAIRS 288–89 (1977), o., *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

892. See *supra* notes 98–115 and accompanying text.

893. See generally, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Section 3-d-4 (discussing Kant). Kant’s CI₁ states that any moral maxim an individual employs cannot simply benefit that person and those she chooses to likewise be benefitted. Rather, any moral precept must be generally applicable to all similarly situated persons. CI₁ clearly embraces that aspect of “due process of law” concerning “equal protection of the law.” See, *supra* notes 570–82 and accompanying text.

For example, under CI₁, which might hastily be denoted Kant’s statement of the “Golden Rule,” a person cannot morally espouse her claimed right to same-sex marriage while denouncing the same right for other similarly situated individuals. But, the fact that a person would apply any espoused moral standard equally to all similarly situated persons *including herself* does not itself prove that the particular standard indeed *is* moral. Indeed, the particular proposed standard could be immoral such as if a person claims that she and anyone similarly situated who is verbally insulted may kill the offender. Even if the proposer sincerely acknowledges that she rightfully could be killed for verbally insulting someone else, thus meeting CI₁, that standard unequivocally fails CI₂ by assailing the innate dignity of the offender; that is, death is so excessive a punishment for the perceived offense—spoken insults—that it treats the offender merely as a means to promote the offended party’s excessive lust for vengeance.

Government cannot prevent similarly situated persons from pursuing identical modes of happiness.

4. *Does the Judiciary Properly Understand from Whence Comes Dignity?* --

While as earlier noted, they have employed the terms “dignity” and “human dignity” fairly frequently,⁸⁹⁴ one immediate concern is whether the courts rightly understand the source that generates such dignity? Arguably, the Supreme Court’s dignity jurisprudence mistakenly implies that human dignity is bestowed by Government’s recognition of the human condition. In particular, *U.S. v. Windsor*⁸⁹⁵ struck section 3 of The Defense of Marriage Act (“DOMA”), codified at 1 U.S.C. sec. 7, prohibiting the Federal level from recognizing same-sex marriages lawfully performed in those states then-allowing such nuptials. As part of its rationale, the *Windsor* Court stated, “The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. *Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.*”⁸⁹⁶ Properly responding, albeit in the subsequent *Obergefell v. Hodges*, dissenting Justice Clarence Thomas scolded that the Court wrongly, “rejects the idea — captured in our Declaration of Independence — that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic.”⁸⁹⁷

894. See, *supra* notes 884-93 and accompanying text.

895. *United States v. Windsor*, 570 U.S. 744, 810 (2013).

896. *Windsor*, 570 U.S. at 768 (emphasis added). Similarly, the Court wrote,

By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, *New York sought to give further protection and dignity to that bond*. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, *a relationship deemed by the State worthy of dignity in the community equal with all other marriages*.

Id. at 769 (emphasis added).

Shortly thereafter, *Windsor* added, “Responsibilities, as well as rights, enhance the dignity and integrity of the person.” *Id.* at 772. These quoted portions certainly imply that *dignity* is a commodity dispensed, if not created, by governmental actors.

897. *Obergefell*, 135 S.Ct. at 2631 (Thomas, J., with Scalia, J., dissenting). Thomas pertinently continued:

Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that “all men are created

Justice Thomas' general understanding of human dignity as protected by the Constitution's enforcement of the Declaration correctly articulates Deontological Originalism, particularly the unalterable quality of human dignity as described in this article (although Thomas failed to appreciate how discrimination against same-sex marriages violates the very principles of human dignity). Regardless, to the extent they do so, the *Windsor-Obergefell* Court's insinuation that the Government bestows dignity was a careless expression of what I take to be the Court's true meaning, that the inherent – the innate -- dignity of same-sex couples, and the children their raise, requires Government at all levels to treat opposite-sex and same-sex marriages equally. *Indeed, the idea that dignity emanates from positive law certainly seems anathema to the Windsor and Obergefell majorities' stance that individuals' dignity is safeguarded, but not defined by, their Government.*⁸⁹⁸ If, however, in any degree the Court indicated otherwise, Justice Thomas' reproach, of course, is correct and must be espoused in future Court dignity doctrine.

5. The Prohibition against “a Bare Desire to Harm” -- The Dignity Due Process Paradigm and Kant's CI₂ --

What is required, then, is a judicial equivalent of CI₂ because that second formulation of Kant's Categorical Imperative explains how to obey CI₁ within the requisites of moral comportment.⁸⁹⁹ The Supreme Court espouses

equal” and “endowed by their Creator with certain unalienable Rights,” they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.

The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.

Id. at 2639 (Thomas, J., with Scalia, J., dissenting).

898. See *infra* notes 971-1020 and accompanying text.

899. As earlier noted, CI₁ holds that a moral proposition must be universally applicable to all like cases. One might take that to be a requirement of equal protection or, very generally, Kant's expression of The Golden Rule. CI₂ requires individuals to treat themselves and others as ends and not merely as means. See generally, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Section 3-d-4. The relevant principles were described briefly *supra* at note 893 and accompanying text.

a particularly appropriate, if still abstract, definition of unconstitutionally harmed dignity. *Specifically, due process liberty -- the moral philosophy of fundamental fairness derived from the principle of natural rights emanating from natural law*⁹⁰⁰ -- *prohibits governmental actions that evince, "a bare desire to harm a politically unpopular group."*⁹⁰¹ While that benchmark invites charges of ambiguity,⁹⁰² a charge that surely might be brought against most foundational legal standards, arguably no profounder encapsulation of constitutional morality is required *because, as next detailed, "a bare desire to harm" denotes Kantian morality, particularly CI₂. That is, the victim has been treated not as an end in herself, but solely as a means -- a dehumanized object -- upon which the offending governmental office enforced its "bare desire to harm."* As such official conduct by definition is immoral, no rational person could consent to live in a society whose Government legally inflicts its "bare desire to harm" upon any person under its jurisdiction whether citizen, resident, lawful visitor, or even trespasser.⁹⁰³

900. See, *supra* notes 599-623 and accompanying text.

901. *Windsor*, 570 U.S. at 769 (citing *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973)); see also, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

902. See *supra* notes 864-79 and accompanying text.

903. For example, imposing imprisonment on a person who has not committed a crime evinces Government's bare desire to harm — in this case to deprive liberty — for an immoral reason such as trying to silence a person engaged in lawful dissidence, or using the criminal justice system to extract retribution for unrelated perceived wrongs, or despite her innocence, using the defendant as an example to deter criminal conduct. By contrast, levying a justly proportionate sentence upon a defendant duly convicted of a crime comports with due process of law by imposing a just punishment against a proven deserving offender. Legitimate -- moral -- process renders legitimate both the desire to inflict and the resulting "harm" that necessarily arises from the imposition of punishment. See, e.g., Jeffrie G. Murphy, KANT: THE PHILOSOPHY OF RIGHT 108 (1994); Thomas E. Hill, Jr., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 180-84 (1992); generally, e.g., Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

Likewise, contrary to much accepted theory, imposing disproportionate punishment as a means to dissuade future criminal conduct by the perpetrator and by others, should be considered an abuse of due process. That is because, to the extent her punishment exceeds the severity of her crime, the criminal's punishment, as the common saying goes, does *not* fit her crime. Rather, to the extent her punishment exceeds her culpability, she is being used *merely* as a means to dissuade her or unknown third parties from committing crimes. "Kant highlights the retributivist nature of punishment when he argues that the scope of punishment should be determined by the harm done by the criminal (*lex talonis*) and match the inner viciousness of the criminal." Ekow N. Yankah, *Crime, Freedom and Civic Bonds: Arthur Ripstein's Force and Freedom: Kant's Legal and Political Philosophy*, 6 CRIM. L. & PHIL. 255, 259 (2012) (citation omitted).

Identically, because it would mean treating oneself merely as a means, an immoral act in and of itself,⁹⁰⁴ no person rationally could consent to suffer Government's "bare desire to harm." Even if some self-sacrificing individual earnestly believed that accepting such abuse would engender some greater good, martyring herself violates CI₂.⁹⁰⁵ Thus, the Court's "bare desire to harm" shorthand aptly captures classic instances when, even to attain commendable goals, governmental actors unconstitutionally affront affected persons' individual dignity.⁹⁰⁶

904. See, *supra* note 125, and see generally, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, notes 263-67 and accompanying text (discussing the *duty of rightful honor*).

905. Again, referring to the example of criminal penalties, a convicted felon cannot morally condone being subjected to excessive punishment even if she is so wracked with guilt that she is happy to endure the immoral penalty as a salve to her conscience. Doubtless, lamenting her criminal behavior is both commendable and moral; and, the same is true for her desire to pay her "debt to society." Nonetheless, that repentant felon acts immorally if, to assuage her rightful feelings of guilt, she seeks, or even personally accepts as rightful, an excessive penalty. By condoning more punishment than she morally deserves, she has impugned her own dignity -- treated herself merely as a means to justify unjustifiably excessive criminal sanctions.

906. As this writing will shortly accent, of utmost importance, the "bare desire to harm" does not imply that the relevant desire to harm was the offender's sole or even predominate desire. See, *infra*, notes 924-934 and accompanying text. Nor, does "bare desire to harm" mean that the Due Process Clauses proscribe only governmental actions intentionally calculated to cause untoward harm. Rather, the *dignity paradigm*, as it must, recognizes what might be called a claim of "disparate impact," meaning unintended or unpredicted harm (which unlike "disparate impact" under civil rights statutes, might be proven by, but does not require statistical- based proof that a given group is harmed by a significant proportion more than some other group). See, *infra*, notes 935-44 and accompanying text.

In regard to the *dignity paradigm's* breadth, depth and, indeed, very existence, I note the perhaps unsurprising actuality that even its most ardent naysayers recognize, if reluctantly dignity's constitutional legitimacy. For instance, as might be expected, Justice Scalia unabashedly castigated "dignity" as one of a number of empty ideas that "simply decorate a value judgment and conceal a political choice." *Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and dissenting in part). Yet, two cases challenging mandatory, suspicionless bodily searches demonstrate that when it suited him, the same incredulous Justice Scalia was quite comfortable discerning whether challenged governmental actions are unconstitutionally "offensive to personal dignity." *NTEU v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting). Indeed, employing his typical immodesty, Scalia declared the resolutions of the dignity issues not merely discernable, but "obvious."

Von Raab upheld U.S. Customs Service's policy that, absent probable cause or reasonable suspicion of illicit drug use, required agents seeking assignments involving drug interdictions to provide urine samples. Fervently dissenting, Scalia stated, "In my view the Customs Service rules are a kind of *immolation of privacy and human dignity* in symbolic opposition to drug use." *Id.* at 681 (Scalia, J., dissenting) (emphasis added). And, again evoking dignity as self-evident, Scalia accented in an unexpectedly Kantian manner that governmental offenses against dignity injure and affront not only the victim, but as well, the entire society in which the offense occurred.

Before discussing exactly how the courts have applied this remarkable standard, a few additional preliminary points of clarification are needed.

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, *whose dignity is thus offended*, but all of us -- who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

Id. at 687 (Scalia, J., dissenting) (emphasis added).

Six years after *Von Raab*, Justice Scalia authored *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), upholding that school district's random thus suspicionless urinalysis requirement to participate in interscholastic athletics. Distinguishing *Von Raab*, Scalia claimed that due to their immaturity and vulnerability, children under state supervision, therein students attending public school, are subject to greater legitimate control than are adult governmental employees. Accenting, *inter alia*, the purportedly unobtrusive nature of collecting the samples, and concerned about a purported potential epidemic of illicit drug use among American high school students, Scalia wrote the opinion sustaining District 47J's program although, as just noted, he had dissented from *Von Raab's* validation of mandatory drug testing, "where there was no documented history of drug use by any customs officials." *Id.* at 663.

I do not write this footnote to support *Acton*, a ruling with which I disagree for the reasons well expressed by the dissenting justices. *Id.* at 666-86 (O'Connor, J., with Stevens and Souter, JJ., dissenting). I simply underscore that when pressed, contrary to his vehement assertions, Justice Scalia recognized that *dignity* is a profound, fathomable concept essential to resolving claims of constitutional rights. *Equally, because "dignity" is a moral concept, Scalia implicitly debunked his own assertions that judges cannot and ought not attempt to render moral judgments.* See, *supra* notes 799-803 and accompanying text.

Of course, it may be unreasonable to expect pristine theoretical consistency from any theorist. An unusual or very limited anomalous instance may well be insufficient to debunk an otherwise sound general premise. But, Justice Scalia's unabashed embracing of dignity theory in *Von Raab* and *Acton* is extraordinarily substantial, premising the very menaing of a fundamental right, therein the Fourth Amendment, and neither easily nor properly limited to only those cases whatever Scalia might otherwise wish to claim. Indeed, Scalia accented that governmental offenses to individual human dignity engender constitutional harm, as well, to the entire American Society. *E.g.*, L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL'Y 1, 37 (2013) (Justice Scalia, "argued that not only these employees but the entire society would suffer from this 'affront to . . . dignity'"). As one commentator similarly remarked regarding the *Von Raab* dissent, "Even Justice Scalia, a noted advocate of law-and-order policies, described a particular special needs case as 'destructive of privacy and offensive to personal dignity.' *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting)." Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L. J. 787, 799 note 49 (1999) (emphasis added). Indeed, using the example of *Von Raab*, one critic lamented, "Justice Scalia, at one time, understood the dangers inherent in intruding upon individual rights." George M. Dery III, *The Coarsening of Our National Manners: The Supreme Court's Failure to Protect Privacy Interests of Schoolchildren-Vernonia School District 47j v. Acton*, 29 SUFFOLK U. L. REV. 693, 734 (1995).

a. Why the “Bare Desire to Harm” Standard Is Not Millian --

At first blush, courts and commentators might conflate “a bare desire to harm” with the famous “harm principle,” a consequentialist hypothesis set forth prominently by the highly respected theorist John Stuart Mill. However, I believe the Supreme Court correctly implies Kant more than Mill in its *dignity paradigm*. In brief, Mill urged that “society may interfere with an individual’s decision to do or not do as he or she wishes . . . [when such] individuals act or decline to act in ways that cause harm to important interests of others.”⁹⁰⁷ As the Eleventh Circuit recently summarized, “John Stuart Mill’s celebrated ‘harm principle,’ [] would allow the state to proscribe only conduct that causes identifiable harm to another.”⁹⁰⁸

As a crucial threshold matter, Mill expressly eschewed any metatheory of morality to undergird his harm principle. In Mill’s words, “I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility.”⁹⁰⁹ *Thus, Mill himself declined to construct a purely conceptual meaning of morality to delimit “harm,” a challenge, by contrast, Kant assumed while purging consequentialist hokum from moral theory.*⁹¹⁰ This is critical because, as the previous sections of this

907. Bayer, *supra* note 125, at 882 (discussing, Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, 38 AM. J. L. & MED. 374, 389 (2012) (discussing, John Stuart Mill, ON LIBERTY 139 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859)). Specifically, Mill wrote in his classic work ON LIBERTY,

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

John Stuart Mill, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (1859) (quoted in, Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 120–21 (1999)).

908. *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1240 (11th Cir. 2004) (citing, John Stuart Mill, On Liberty (Elizabeth Rapaport ed., Hackett Pub. Co. 1978) (1859)).

909. Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 YALE L.J. 826, 846 (1976) (quoting, J.S. Mill, ON LIBERTY 12 (D. Spitz ed. 1975)).

910. Mill “did not evoke the rationalism of Kant.” Vincent J. Samar, *The First Amendment and the Mind/Body Problem*, 41 SUFFOLK U. L. REV. 521, 531 (2008); *cf.*, David Shelledy, *Access to the Press: A Teleological Analysis of a Constitutional Double Standard*, 50 GEO. WASH. L. REV. 430, 464 (1982) (note) (“As a utilitarian, Mill specifically disclaimed the belief that freedom is inherently valuable ...”). As distinguished theorist Jeremy Waldron

writing have proved, regarding due process “fundamental fairness,” the *only legitimate* use of the Supreme Court’s “bare desire to harm” standard is to help us determine the moral *bona fides* of challenged governmental action -- that is, as the Court rightly asserts, whether the discerned harm has or has not impugned the harmed party’s innate dignity. Consequently, as Mill proffered not a moral meta-theory, but rather, a mid-level theory, and, as “due process of law’s” enforcement of “unalienable Rights” derived from “God and Nature’s God” requires a metatheory of morality, Mill’s harm principle must be applied pursuant to the best available moral paradigm which, as we know, is Kantian.⁹¹¹ In sum, to the extent it helps ease of understanding and application, the Millian harm principle may be a useful adjunct, but only an adjunct to proper enforcement of Kant’s deontology.

In that regard, Mill evidently was no deontologist. Fully consistent with consequentialist theory, many, perhaps most analysts understand Mill’s “harm principle” to be predicated on the utilitarian practice of enforcing, using Profs. Purdy and Siegel’s term, “contemporary social morality,” chiefly through law.⁹¹² “Such reasoning is classic Consequentialism: the belief that the proper moral answer derives from ‘contemporary social morality’

summarized, “Following the lead of John Stuart Mill, the tendency is almost always to try to ground individual rights in considerations relating to the importance of truth, progress and social utility, and to avoid adducing justifications for rights which are themselves right-based.” Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 857 (1993) (footnote omitted).

911. See, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Sections 2-3 (discussing Deontology and Kantian morality).

912. Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, 38 AM. J. L. & MED. 374, 385, 388 (2012); see also, e.g., Jeremy J. Ofseier, *Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 402 (1999) (“explain[ing] Mill’s utilitarianism[:] Given a utilitarian conception of rightness and the alleged link between autonomy and happiness, Mill proposes the harm principle as the right way for society to act towards the individual.”); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 626 (2001) (footnote omitted) (“The harm principle was not, for Mill, a departure from utilitarianism, but rather a specification of what utilitarianism, properly understood, implied about interferences with people’s liberty.”).

For example, Prof. Roberts recently accented that, “Yet not all actual harms are similarly situated. ... [P]erhaps most complex-aspect of the harm principle is severity. As one scholar put it, harm for purposes of the harm principle must involve ‘a minimum quantity of welfare.’” Jessica L. Roberts, *Rethinking Employment Discrimination Harms*, 91 IND. L.J. 393, 421 (2016) (quoting, Nils Holtug, *The Harm Principle*, 5 ETHICAL THEORY & MORAL PRAC. 357, 366 (2002)). In sum, “a harm [must be] sufficient to invoke the authority of the harm principle ...” *Id.* at 422-23. While how to make such assessments was not Prof. Roberts’ project, *id.*, the very idea of *sufficiency* portends the weighing of outcomes, that is, Consequentialism.

reflecting the purported best overall outcome measured by some quantum of societal satisfaction.”⁹¹³ Indeed, Mill himself made plain that his harm theory is linked inextricably to consequentialist theory. To expand the earlier quoted portion of his *On Liberty*, Mill left little doubt: “I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. *I regard utility as the ultimate appeal on all ethical questions.*”⁹¹⁴

Prominent Mill expert and commentator Prof. John Lawrence Hill credibly has posited,

The most important consequence of the harm principle is that it rejects, as inconsistent with the principles of a free society, laws which prohibit private or ‘self-regarding’ acts on grounds that the majority believes the activity to be morally objectionable. ... [Thus, for instance, to] the extent that the right to privacy is understood in Millian terms, it would immunize from constitutional attack all such laws [such as proscriptions against homosexual conduct], at least to the extent that they do not directly harm third parties.⁹¹⁵

Accordingly, Mill may be numbered among those consequentialists who have attempted to expunge from consequentialist theory too-literal Utilitarianism that would morally justify any behavior so long as it maximizes aggregate happiness. In that regard, as noted in Part I, many, perhaps most consequentialists try to modify strict Utilitarianism with moral principles nobler than gratifying base human desires.⁹¹⁶ Such modifications are all well and good; indeed, they bespeak a laudable hidden hope to find a viable theory of deontological moral theory as a bulwark against the excesses

913. See, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Sections 2-3 (discussing Deontology and Kantian morality).

914. John Stuart Mill, *ON LIBERTY* 14 (Curran V. Shields ed., Liberty Arts Press 1956) (1859) (quoted in, Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 934 (1999)).

915. John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 3-4 (2010). Accordingly, what in the upcoming text I argue is essential Kantian, Prof. Hill sees as evoking Mill: “Over the course of the last twenty-five years, the Supreme Court has adopted an increasingly Millian gloss to its Due Process jurisprudence.” *Id.* at 4. (While I disagree with his evaluation of relevant precedent, I mention in passing that, having known him for over twenty-five years, I can attest that, as both a friend and a scholar, Prof. John Hill is “one in a Millian.”)

916. See, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at notes 161-78 and accompanying text.

of Consequentialism itself.⁹¹⁷ However, insofar as Mill's harm principle remains a specie of Consequentialism, it cannot suffice as moral theory.

Thus, the *harm* the Court refers to in its "bare desire to harm" corollary to its *dignity paradigm* cannot be Millian consequentialist. Indeed, if the *dignity paradigm* is consequentialist, then it is no different from the *deeply rooted traditions* standard because, as a matter of outcomes, applying the deeply rooted traditions presumably will engender greater societal happiness if, as likely, those traditions replicate the greater preferences of the relevant society or subclass thereof. And, if perchance such is no longer the case, that is, some germane old tradition no longer pleases the relevant sector of American society, then applying Millian harm theory still would be consequentialist because the courts would remain unconcerned with the dignity of the challenger, but rather, would attempt to find the new "deeply rooted" principle that seems to maximize that relevant sector's happiness.

Lamenting the too glib conclusion that, "The initial appeal of the harm principle derives in part from the empirical gloss normally accorded the concept"⁹¹⁸, Prof. Hill offers a more robust and convincing perception of what Mill meant by "harm," specifically, "The concept of harm, however, cannot be reduced to a strictly physical, financial, or even a psychological commodity."⁹¹⁹ That is, Mill's model cannot be "value neutral" because logic and experience teach us that *harm* is not simply something that adversely affects a given person. Rather, harms must, "involve the kind of invasion of one's physical, emotional, or economic interests [that renders them] genuine harms,"⁹²⁰ thus, regulable by law. To be regulable, that is, to be *legitimately* proscribed by law, and thus something that law rightfully may force the perpetrator to suffer criminal and civil penalties, a harm can only be a, "*wrongful* injury or setback of interests ... [because p]ersons may be injured or have their interests thwarted in a litany of morally permissible ways."⁹²¹ *Thus, as Prof. Hill rightly extrapolates, the law may only regulate*

917. *Id.*

918. Hill, *supra* note 915, at 15.

919. *Id.* at 16.

920. *Id.* at 44 note 213.

921. *Id.* (emphasis added) (citing, John Stuart Mill, On Liberty 141 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859)). Hill offered useful illustrations, "Examples include when one person injures another in the course of self-defense; when one person permissibly outcompetes a second person for a prize or a scarce commodity; when the harmed individual has consented to, or assumed the risk of, an injury; and, when one person is justified in invading the personal or property interests of another, as in cases of public necessity, among others." *Id.* (footnote omitted).

*immoral harms.*⁹²² But, despite John Hill’s noble project clearly linking Millian harm theory to moral wrongs, the *consequentialist error* underlying Mill’s theory persists.⁹²³

b. A “Bare Desire to Harm” Does Not Mean a Sole or even Predominate Desire to Harm --

In light of the foregoing discussion of Mill, it is this writing’s contention that the cases applying the *dignity paradigm* must eschew a Millian comparative or balancing approach. Rather, under the *dignity paradigm*, “a bare desire to harm” means Government has disparaged the particular victims’ dignity in an illegitimate way even when some, indeed even overwhelming, arguable societal good results. *That is, the term “bare” does not mean the sole, exclusive, or predominate “desire to harm.” Rather, “bare” connotes a manifest, a blatant, a naked, or an apparent “desire to harm,” or even a once hidden but ultimately revealed, thus now-bare “desire to harm.”* Such is consistent with the common meanings of *bare* that include, “lacking a natural, usual, or appropriate covering” and “open to view.”⁹²⁴

Accordingly, that any given “bare desire to harm” accompanies one or more lawful -- moral -- causes does not necessarily salvage the challenged governmental conduct. Once again, the dominant concept is that understanding the *dignity paradigm* to balance comparative measures of happiness or outcomes offends the deontological premises of the United States’, meaning, the Declaration of Independence’s principle of “unalienable Rights” that the Founders and the Reconstruction Congress preserved in the Constitution. As we know, morality is not relative; if an act is immoral, it remains immoral even if promoting a great good or even if inspired by arguably proper motives.⁹²⁵ Therefore, the inquiry under “due

922. *Id.* at 16-17; *see also, e.g.,* John Stanton-Ife, *What Is the Harm Principle for?*, 10 CRIM. L. & PHIL. 329, 332 (2016) (most modern Millians reject pure Utilitarianism for some form of outcome measurements based on moral principles).

923. Regarding the meaning of morality, Hill recognizes that, while it may dismay “purer Millians,” “Contemporary Millians have frequently reverted to a utilitarian balancing formula. They permit intervention when the gravity and the probability of potential harm outweigh the infringement on the liberty interests of the individual.” Hill, *supra* note 915, at 42 (footnote omitted).

924. Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/bare> (accessed, August 20, 2018); *see also*, English Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/bare> (accessed, August 20, 2018) (“not clothed or covered,” “without the appropriate, usual, or natural covering”).

925. *See*, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Sections 2-a, b.

process of law's" doctrine of "fundamental fairness"⁹²⁶ *always* is whether the challenged governmental action is moral by treating adversely affected parties not merely as means, but as ends in themselves. Accordingly, if it enacts an unjust law, promulgates an immoral regulation or ruling, issues an unethical judicial opinion, conducts a corrupt investigation, or otherwise acts immorally by regarding adversely affected persons merely as means, Government violates "due process of law" no matter how much societal benefit that immoral action engenders, and no matter how pure the motives underlying that immoral behavior may be.⁹²⁷

The logic of precedent explains why the shorthand "bare desire to harm a politically unpopular group" does not mean that the "desire to harm" necessarily was Government's sole, overarching or dominant motivation. For example, *U.S. Dept. of Agriculture v. Moreno*,⁹²⁸ apparently the Court's first express use of the term "bare desire to harm,"⁹²⁹ struck under the Fifth Amendment's Due Process Clause, 1971 amendments to the Food Stamp Act of 1964 that reduced eligibility solely to "households" where all residents are

926. See, *supra* notes 599-623 and accompanying text.

927. See, *supra* notes 599-770 and accompanying text. Along similar lines, as was emphasized during the discussion of Deontology, acting morally does not guarantee that moral persons will escape harm even when that moral person is Government itself. Moral comportment does not assure that innocent persons will not suffer. Indeed, the heartrending reality is that moral comportment may cause more underserved harm than would immoral behavior. See, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Section 2-f (why we must be moral). Nevertheless, if Government acts in ways that satisfy Kantian ethics, those acts comport with due process of law even if innocent persons suffer harm. The rationale is not that by acting morally Government did everything it could to avoid harming innocents. Rather, by acting morally, *Government did all it constitutionally was required to do*.

For example, as noted in this writing's Part I, if lawful authority criminally convicts someone—say, Smith—through means that fully comport with due process of law, Smith has no moral claim against the Government even if Smith is innocent and subsequent events reveal Smith's innocence. *Id.* Doubtless, Smith was harmed, likely severely and certainly undeservedly so, by the Government's erroneous criminal prosecution, conviction and imposition of punishment. But, by scrupulously following the strictures of due process, the Government fulfilled its duty to act morally even though the outcome caused Smith unearned detriment. That Smith suffered unmerited harm at the Government's hands does not *per se* render that governmental conduct immoral and, thus, does not engender a governmental duty to rectify that harm as fully as possible. Rather, the Government only has a duty to rectify injuries that it caused through immoral conduct. Such is consistent with the correct and constant admonition of the courts that "[A person] is entitled to a fair trial but not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *United States v. Roy*, 855 F.3d 1133, 1135 (11th Cir. 2017), *cert. den.*, 138 S. Ct. 1279 (2018); *Faria v. Harleysville Worcester Ins. Co.*, 852 F.3d 87, 97 (1st Cir. 2017).

928. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

929. *Id.* at 534

familiarly related. Congress' enacted the 1971 amendments principally to prohibit "hippie communes" from receiving food stamps. Although the mere existence of such communes broke no federal laws, members of Congress disapproved of the supposedly unproductive, sexually permissive, grubby, drug permeated idleness of the so-called "hippy lifestyle."

The *Moreno* Court declared Congress' 1971 Food Stamp amendments unconstitutional because they were enacted to, and indeed caused undeserved harm to hippy-individuals who had done nothing immoral, much less unlawful, to deserve such treatment.⁹³⁰ *Moreno* easily fits the Kantian analysis proposed in this writing because as they were undeserving of the harmful treatment imposed against them, Congress treated hippies and their communes not as ends in themselves but merely as means to satisfy Congress' vindictive and otherwise immoral *animus*.

As matter of constitutional law, the *Moreno* Court concluded that, "[T]he classification here in issue ... is wholly without any rational basis."⁹³¹ Importantly, orthodox constitutional "rational basis" review advises that a challenged governmental action is constitutional so long as there is some -- *any* -- rational basis to support that action regardless whether such rational basis actually motivated the challenged action.⁹³² Under that standard, *Moreno* erroneously averred that the invalidated 1971 amendments to the Food Stamp Act were unsupported by "any rational basis." Certainly, by limiting the type of households that can obtain food stamps, the Federal Government would have saved money which surely is a legitimate governmental interest.⁹³³ Nonetheless, denying food stamps to households that shelter one or more non-familial individuals was unconstitutional because Congress' effectuated intent -- its bare desire to disadvantage hippies

930. Bayer, *supra* note 17, at 400 (footnotes omitted). See also Bayer, *supra* note 383, at 34-35.

931. *Moreno*, 413 U.S. at 534-35.

932. E.g., *Ryan v. City of Detroit, Michigan*, 2017 WL 2829521 at *5 (6th Cir. 2017); *Puckett v. Lexington-Fayette Urban County Government*, 833 F.3d 590, 608 (6th Cir. 2016); *Zia Shadows, L.L.C. v. City of La Cruces*, 829 F.3d 1232, 1239 (10th Cir. 2016); see generally, Bayer, *supra* note 383, at 10; see also, *infra* notes 984-86 and accompanying text (discussing the "levels of scrutiny" usually associated with due process and equal protection analysis).

933. *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 684 (2012). Furthermore, Congress could have asserted that limiting food stamp eligibility only to households consisting of families helps to maintain healthy and intact families. The prospect of family nutrition *via* food stamps, for instance, might dissuade otherwise frustrated parents from abandoning their children if doing so meant that the children were cared for by non-family members which might, then, invalidate that household's food stamp eligibility. Such a goal is *rational* even if, by so doing, impoverished persons in non-family households receive no government nutrition assistance.

-- was infirm. Such treatment, *Moreno* rightly concluded, is fundamentally unfair, thus, unconstitutional even if, secondarily, it furthered lawful goals such as reducing governmental expenses and sustaining intact families in the face of poverty.⁹³⁴

In sum, "a bare desire to harm" need not be Government's sole motivating force, nor even its predominate or substantial motivation; rather, the "desire to harm" renders the challenged governmental action

934. *Saenz v. Roe*, 526 U.S. 489, 507 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 662-63 (1969) and citing *Zobel v. Williams*, 457 U.S. 55, 64 (1982)). To offer one brief additional example, *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) overturned *Cleburne*, Texas' zoning ordinance requiring group homes for mentally challenged persons to obtain unique permits not required of other proposed group homes. Specifically, *Cleburne* held that, "the record does not reveal any rational basis for believing that the Featherston home would pose any threats to the city's legitimate interests . . . sufficient to justify the singular requisite for a special use permit for this facility when other case and multiple-dwelling facilities are freely permitted." *Id.* at 448.

Although not expressly quoting the "bare desire to harm an unpopular group" standard, the Court essentially applied that benchmark. Concluding that the City treated such group homes differently than other group homes due to unfounded stereotypes arising from the political unpopularity of mentally challenged persons, *Cleburne*'s special zoning standards were unconstitutionally irrational because, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like." *Id.* Therefore, according to the Court, "the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, ..." *Id.*

While not discussed in the *Cleburne* opinion, certainly group homes for mentally disabled individuals could reduce the property value of neighboring homes and businesses, and otherwise make such neighborhoods less attractive for commercial and residential development. Preserving and enhancing property values are rational bases for governmental regulation, particularly regarding property. "[T]he desire to 'enhance property values' may 'easily serve as the rational basis for a municipal zoning ordinance.'" *Sumner v. Board of Adjustments of City of Spring Valley Village, TX*, 2013 WL 1336604 at *6 (S.D. Tex. 2013) (quoting *Yur-Mar, L.L. C. v. Jefferson Parish Council*, 451 Fed. App'x 397, 401 (5th Cir.2011)). Accordingly, despite the Supreme Court's blunt assertion, the discriminatory ordinance was supported by a classic, legitimate rational basis, economic incentives. Thus, the ordinance's infirmity was: despite plausible financial justifications, *Cleburne* indulged baseless, offensive, bigoted stereotypes depicting mentally disabled persons as unworthy neighbors when in fact they did not comprise any "special threat to the city's legitimate interests." In other words, *Cleburne* evinced "a bare desire to harm" the "politically unpopular group" of mentally disabled persons; thus, financial justifications notwithstanding, *Cleburne* treated that class merely as a means to foster untoward popular prejudices by excluding them from mainstream society, utterly disregarding mentally disabled persons as ends in themselves.

Therefore, it did not matter whether *Cleburne*'s bigotry was the sole, primary or a secondary motivation. By treating mentally disabled persons so dismissively, the City unconstitutionally disregarded their innate dignity.

unconstitutional if it treats adversely affected persons merely as means and not as ends in themselves.

c. The Dignity Paradigm's "Bare Desire to Harm" Standard Proscribes Both Unintentional and Inadvertent Failures by Government to Treat Individuals and Groups as Ends in Themselves --

Addressing another corollary of great importance, *although its text arguably implies affirmative intent, the dignity paradigm's "bare desire to harm" standard may be understood to cover both unintentional and inadvertent failures by Government to treat individuals and groups as ends in themselves.* After all, the moral question always is whether challenged conduct is or is not moral, not whether the alleged offender intended to act immorally, although certainly that latter inquiry may be very informative.⁹³⁵ To offer an example, *O'Brien v. Skinner* invalidated under the Fourteenth Amendment's Equal Protection Clause, that portion of New York State's absentee ballot statute that disparately impacted classes of incarcerated persons. Specifically, the *O'Brien* Court noted that, under New York's revised law, an incarcerated New York resident who is eligible to vote but is incarcerated in his home country cannot obtain an absentee ballot. By contrast,

If a New York resident eligible to vote is confined in a county jail in a county in which he does not reside, paradoxically, he may secure an absentee ballot and vote and he may also register by mail, presumably because he is 'unavoidably absent from the county of his residence.' N.Y. Election Law s 117(1)(b) (1964).

Thus, under the New York statutes, two citizens awaiting trial — or even awaiting a decision whether they are to be charged — sitting side by side in the same cell, may receive different treatment as to voting rights. As we have noted, if the citizen is confined in the county of his legal residence he cannot vote by absentee ballot as can his cellmate whose residence is in the adjoining county. Although neither is under any legal

935. See, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Sections 2-f and 3-d (generally explaining that the duty of moral comportment cannot be breached due to inadvertence).

bar to voting, one of them can vote by absentee ballot and the other cannot.⁹³⁶

O'Brien rightly invalidated the relevant portion of New York's election code because there is no sensible reason why an otherwise qualified voter incarcerated in her home county is unfit to vote by absentee ballot, while a different eligible voter, incarcerated outside of her home county, is deemed qualified to obtain an absentee ballot. The happenstance of being or not being incarcerated in one's county of residence is completely unrelated to any legitimate concern regarding the integrity of elections and the legitimate qualification of voters (at least, this writing cannot conceive a valid reason).⁹³⁷ Thus, the Court understandably concluded that, "New York's election statutes, as construed by its highest court, discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary."⁹³⁸

For the purposes of this writing, the important point from *O'Brien* is that New York violated the challenger's fundamental rights even though, as one astute commentator noted, "there was manifestly no discriminatory purpose at work."⁹³⁹ Despite an arguable lack of clear "discriminatory purpose" to explain the logic of its prohibition, by its clear design, the infirm election legislation evokes a bare desire to harm, in that case, harm to otherwise eligible voters who sought absentee ballots while incarcerated in their home counties because that is the very class directly and adversely affected by the challenged election law.

936. 414 U.S. 524, 528-29 (1974) (footnote omitted).

937. As an obvious example, Smith jailed in a county neighboring her home county could obtain an absentee ballot. But, if she suddenly were moved before the election to a prison in her home county, possibly only a mile away, she would be unable to cast her absentee ballot. There is no sound basis why being relocated to the second jail suddenly rendered Smith unfit to vote yet New York law had deemed her fit when, perhaps only seconds before, she was incarcerated in the nearby jail that happened to be outside her home county.

If incarceration itself rendered voters disqualified, New York would not have constructed its idiosyncratic system, therefore, the challenged law could not be justified under the argument a jailed person does not deserve to vote.

938. *O'Brien*, 414 U.S. at 530.

939. Nelson Lund, *From Baker v. Carr to Bush v. Gore, and Back*, 62 CASE WESTERN RESERVE L. REV. 947, 958 note 62 (2012). Surely, the New York State Legislature did not purposefully draft the absentee ballot law specifically to harm otherwise eligible incarcerated voters, but only if incarcerated in their home counties. There is no coherent reason historical or logical why lawmakers would single out among all others that particular, unusual class to be deprived absentee voting rights. See, *supra* notes 936-38 and accompanying text.

Indeed and equally, courts regularly have, “found violations of the Fourteenth Amendment in voting-related cases by declaring certain classifications ‘invidious’ without confronting the intentional discrimination question.”⁹⁴⁰ In such cases, under Kantian analysis, government failed to respect the dignity of the harmed individuals -- abridged without sufficient cause their fundamental right to vote -- thus treated them merely as means to advance some obscure electoral purpose, although government did not expressly intend to cause the harm the unconstitutional laws engendered. *By negligently failing to respect the unduly harmed voters as ends in themselves, Government acted immorally albeit unintentionally, but nonetheless in violation of the Constitution.*⁹⁴¹ In sum, while often the product of actual *animus*, the *dignity paradigm*’s stricture against official acts evincing a “bare intent to harm a politically unpopular group,” applies equally to governmental behavior that is inadvertently immoral.⁹⁴²

940. Roseann R. Romano, *Devising a Standard for Section 3: Post-Shelby County Voting Rights Litigation*, 100 IOWA L. REV. 387, 397 (2014) (note) (discussing applicable precedents in *id.* at 397-99).

941. To underscore this point with more examples, fighting crime and punishing criminals certainly are legitimate governmental goals. But, as numerous Bill of Rights provisions instruct, the government may not do so in an unreasonable—arbitrary or capricious—manner. Therefore, even if the given criminal misdemeanor trial otherwise was due process letter perfect, because the lay defendant almost certainly cannot present a suitable defense absent the assistance of a lawyer, refusing to appoint competent legal counsel for the indigent defendant violates the Sixth Amendment’s right to counsel provision. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Regardless whether all other due process requisites are fully followed, by denying the essential assistance of counsel and consequently jeopardizing a fair trial, the prosecution uses the defendant merely as a means; this likely enhances the probability of a conviction.

Of course, it is immaterial whether, in fact, unlawful deprivations of “right to counsel” actually were motivated by a desire to harm criminal defendants, certainly a politically unpopular group. Even if the relevant record proves beyond *cavil* that the government denied defense counsel not out of hostility or *animus*, but for seemingly legitimate reasons such as saving money in light of severe budget constraints, the deprivation would be no less unconstitutional. Regardless of motive, the government treated the adversely affected criminal defendants merely as means, disregarding them as ends in themselves worthy of fundamental rights protections. Similarly, one court noted, “the defendants’ claim that it would be reasonably [*sic*] expensive to alleviate unconstitutional overcrowding in the Milwaukee county jail is not compelling. In my view, the defendants’ reliance on ‘cost’ as a defense is not sufficient to relieve them of their duty to hold pretrial detainees in a facility meeting minimal constitutional requirements.” *Jordan v. Wolke*, 460 F. Supp. 1080, 1088 (E.D. Wisc. 1978) (citations omitted), rev. on other grnds., 615 F.2d 749 (7th Cir. 1980).

942. Accordingly, a thoughtful Kantian approach seriously questions the Supreme Court’s general conclusion reiterated recently that, “‘liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.’” *Kingsley v. Henrickson*, 135 S.Ct. 2466, 2472 (2015) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849

Pursuant to the foregoing examples, it is not hyperbolic to conclude that the *dignity standard* is applicable to *any* controversy involving one or more constitutional rights. As Justice Scalia rightly recognized, “[T]he impairment of individual liberties cannot be the means of making a point; [] symbolism, even symbolism for [a] worthy a cause ... cannot validate an [impairment of individual liberties such as] otherwise unreasonable search.”⁹⁴³ That is, the rubric that Government may not evince “a bare desire to harm” a person or group, particularly a “desire to harm” a politically unpopular group due to its unpopularity, describes *every* judicial opinion addressing both due process

(1998) (emphasis added) and further quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property”). Doubtless, *Kingsley* rightly avers, “if an officer’s Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim.” *Id.* But, such instances are akin to “acts of God” beyond the reasonable control of the persons involved. As the Fourth Circuit noted almost nine decades ago, “It is quite true that one is not liable for an injury caused by an act of God, ...” *American Coal Co. of Allegany County v. De Wese*, 30 F.2d 349, 352 (4th Cir. 1929); *see also, e.g., West v. Drury Co.*, 412 Fed. Appx. 663, 670 (5th Cir. 2011). Because under “act of God” scenarios, the relevant actors have been robbed of their capacity to act consciously, that is deliberately, they cannot have acted immorally.

Logically, however, “if the negligence of the defendant concurred with such act in producing the injury, or in any manner contributed thereto, then liability exists.” *De Wese*, 30 F.2d at 352. As the earlier discussed *O’Brien* decision shows, the Fourth Circuit in *De Wese* correctly ruled that deliberate acts rendering unintended negative impacts may be immoral, and, indeed, therefore unlawful. *See supra* notes 935-39 and accompanying text; *see also, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment tests or standards that disproportionately disadvantage members of classes protected by The Fair Employment Act, 42 U.S.C. § 2000e, *et seq.*, violate that statute unless justified by a “business necessity,” even if the relevant defendant employer did not intent its test or standard to cause such “disparate impact”).

943. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting). The reader will recall that in his *Von Raab* dissent, Justice Scalia unequivocally and enthusiastically employed human dignity theory as a pivotal factor in Fourth Amendment analysis. *See, supra*, note 906.

For instance, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014) (quoting, *Romer v. Evans*, 517 U.S. 620, 634 (1996) (alterations and ellipsis omitted), ruled that Arizona’s statute banning “Deferred Action for Childhood Arrivals” (“DACA”), 8 C.F.R. 214.14(d)(3), recipients from obtaining drivers licenses lacks any legitimate rational bases. Rather,

Defendants’ policy appears intended to express animus toward DACA recipients themselves, in part because of the federal government’s policy toward them. Such animus, however, is not a legitimate state interest. “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

“fundamental fairness” in terms of Kantian ethics and due process’ progeny of specific natural rights derived from natural law.⁹⁴⁴

d. The Dignity Due Process Paradigm and “Homosexual Rights” --

An especially notable, some might well say extraordinary, application of the *dignity paradigm*, particularly that aspect concerning the “bare desire to harm” principle, arises from the Supreme Court’s “homosexual rights” decisions of the late-Twentieth Century and into the burgeoning Twenty-First Century. The first instance, *Romer v. Evans*, invalidated a referendum known as “Amendment 2,” amending the Colorado Constitution to require that any future legal protection of homosexual individuals as a class must be enacted exclusively through state constitutional amendment, and, repealing all statutes, ordinances and state precedents specifically prohibiting discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”⁹⁴⁵ Speaking through Justice Kennedy, the *Romer* Court accented Amendment 2’s far-reaching destructive impact: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁹⁴⁶ *Romer* implicitly pronounced that Government must have not simply legitimate, but rather significant justification to impose such enormous limits on *any* class’ access to law and legal relief. Underscoring the mammoth depth and breadth of Amendment 2’s impediments onto LGBTQ classes (and the individuals who comprise those classes),⁹⁴⁷ Justice Kennedy wrote, the “Amendment ... is at

944. Therefore, this writing must disagree with Prof. Barroso’s conclusion that, “the Justices have never considered human dignity to be a stand-alone or autonomous fundamental right, but rather a value underlying express and unenumerated rights.” Barroso, *supra* note 884, at 347. Technically, he is correct that the Court may not have labeled dignity as a right in itself. Indeed, we will see that, perhaps understandably but somewhat frustratingly, the Court is coy about the definition of “dignity.” Still, analysis of those instances where the court expressly has referenced dignity demonstrate that concept as the source and meaning of constitutional rights.

945. *Romer*, 517 U.S. at 624.

946. *Id.* at 633.

947. For the sake of convenience and clarity, this writing will employ the now-common acronym LGBTQ. Enhanced understanding of the biology, psychology and sociology of “sexual preference” or “sexual orientation,” particularly regarding the nature of discriminatory attitudes, has led to the truncation LGBTQ, standing for “lesbian, gay, bisexual, transgender, and queer ...” *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 260 (7th Cir. 2017). Some have instead attributed to the letter “Q” the term “Questioning.” *E.g.*, *Students and Parents for Privacy v. United States Department of Education*, 2016 WL 3269001 at *2 (N.D. Ill. 2016).

once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. *The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.*"⁹⁴⁸

It is a fair interpretation, I think, that, according to *Romer*, Colorado assailed LGBTQ individuals' human dignity⁹⁴⁹ by imposing only on them oppressive and extraordinary limits on their capacity to obtain civil rights protections under law, thus shattering, in one commentator's words, their "equal status before the law."⁹⁵⁰ Not surprisingly, *Romer* grounded its rationale on the constitutional premise that, "'a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.' ... We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."⁹⁵¹

On that basis, *Romer* rejected the claimed justifications for Amendment 2's assault on the dignity of LGBTQ individuals and classes.⁹⁵² "The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or

Either way, LGBTQ deftly encapsulates those particular classes who suffer from what generally might be called anti-homosexual bias.

948. *Romer*, 517 U.S. at 633 (emphasis added).

949. "In the gay rights canon of Supreme Court cases, *Romer* is definitively a case about unconstitutional *animus*. Dignity was not specifically invoked by Kennedy but *Romer* was a [] decision in which privacy issues had been eventually couched in the language and sentiments of dignity. There were, in the subtext, whisperings or murmurings of humanity that will help draw the jurisprudence for gay rights toward concepts of dignity and respect." Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463, 496 (2017). See also, e.g., Katie Aber, *When Anti-Discrimination Law Discriminates: A Right to Transgender Dignity in Disability Law*, 50 COLUM. J.L. & SOC. PROBS. 299, 316 (2017) (note) ([T]he anti-subordination and anti-humiliation principles on which it relies are at the heart of the Court's dignity jurisprudence.").

950. Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Barge": The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 37 (2014).

951. *Romer*, 517 U.S. at 634, 635 (quoting *Moreno*, 413 U.S. at 534). See, *supra* note 899-944 for a general discussion of the constitutional meaning of the "bare desire to harm" principles, especially as it relates to Deontological Originalism.

952. *Romer* rightly rebuffed Colorado's claim that Amendment 2 was not predicated on any discriminatory *animus* because LGBTQ individuals still could enjoy the protection of statutes according protections to non-suspect classes. While understandably skeptical that, moved by the spirit if not the text of Amendment 2, Colorado courts truly would accord the full protections of such statutes, the *Romer* Court retorted that whether such neutral laws protect LGBTQ individuals is irrelevant to the fact that Amendment 2 itself is a violation of LGBTQ individuals' right to equal protection and due process. *Romer*, 517 U.S. at 630.

employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups.”⁹⁵³ The aghast Court responded,

The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.⁹⁵⁴

Writing for himself and two colleagues, Justice Scalia feverishly dissented, claiming that *anti-LGBTQ* bias is a legitimate basis for governmental action that Scalia denoted to be, “a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”⁹⁵⁵ This would not be Scalia’s last such dissent, as the following explication of the “homosexual rights” cases shows. For now, it is enough to say that, consistent with the *deeply rooted traditions* standard he so earnestly embraced, Justice Scalia and those who endorse his dissents, view the various challengers’ overall constitutional position not as sounding in basic human dignity, nor as emanating from a general privacy right allowing adults to engage in privately performed, consensual sexual acts, but as, “whether there [is] a legitimate rational basis for ... *the prohibition of special protection for homosexuals*.”⁹⁵⁶

953. *Id.* at 635.

954. *Id.* A fair reading of the majority opinion supports the dissenting justices’ accusation that *Romer*’s constitutional rationale is conclusory, long on suppositions and short on thoughtful explanations. *Id.* at 640 (Scalia, J., with Rehnquist, C.J., and Thomas, J., dissenting) (“I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes.” (footnote omitted)). As explained *infra* at notes 961-1020 and accompanying text, as with all of the Court’s “homosexual rights” decisions post-dating *Romer*, *Romer* itself correctly applied the equal protection component of “due process of law” because Amendment 2 treated LGBTQ individuals merely as means to placate to unjustifiable bigotry of a significant portion of the Colorado’s citizenry. Still, as this writing will emphasize, the Court’s lack of thorough analysis of its pivotal *dignity paradigm* is lamentable.

955. *Romer*, 517 U.S. at 636 (Scalia, J., with Rehnquist, C.J., and Thomas, J., dissenting).

956. *Id.* at 640 (Scalia, J., with Rehnquist, C.J., and Thomas, J., dissenting) (emphasis added).

It is no surprise that the palpable infirmity of Scalia's constitutional argument permeates all of his dissents in the LGBTQ cases, as well as fouls his meagre fundamental rights awareness in other contexts. Despite his claimed devotion to original intent,⁹⁵⁷ Scalia's infirm precept rebukes Deontological Originalism. As we now understand, under Deontological Originalism, there is but one dominating right from which all others derive - one right that unifies those 'unalienable Rights' emanating from "Nature and Nature's God." Specifically, as acknowledged by the Due Process Clauses, all persons under the jurisdiction of the United States have the right of freedom from "arbitrary or capricious" governmental treatment, or, as the courts often put it, the right to "fundamental fairness."⁹⁵⁸

The proper measure of fundamental fairness is respect for inherent human dignity, which means that Government may not treat any individual as merely a means without regard for the individual as an end in herself. Whether identified by the "bare desire to harm" principle or some equally valid measure, the immutable duty to safeguard human dignity, as explicated by Kantian morality, tells us that there are no "special rights" -- or, using Justice Scalia's term, no "special protections" -- under the Constitution. *Rather, regardless how novel or unfamiliar the context, if a challenger proves that the challenged governmental conduct violates the challenger's dignity, then the challenger does not obtain a "special" right or protection, but instead at last receives the constitutional protection to which she always had been entitled.* Appropriately, then, the *Romer* challengers did not seek "special rights," but rather, successfully asserted that Colorado had no legitimate justification to abridge for LGBTQ individuals what properly is accepted as a general principle of fundamental fairness: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."⁹⁵⁹

Thus, as the *Romer* Court properly discerned, "The rights that homosexuals seek to acquire are basic rights, available to virtually every other member of American society. In characterizing this campaign as one for special rights, opponents operate on the premise that homosexuality is

957. See generally, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at 4-G-2 (Fainthearted Originalism).

958. See, *supra* notes 600-623 and accompanying text.

959. *Romer*, 517 U.S. at 633.

intrinsically wrong, and that courts and legislatures should not entitle gays and lesbians to rights that are truly equal.”⁹⁶⁰

Seven years after *Romer*, reversing its earlier opinion,⁹⁶¹ *Lawrence v. Texas* ruled that government may not *per se* criminalize homosexual sodomy performed in private between consenting adults. Sensibly accenting *dignity*, the *Lawrence* Court, again under Justice Kennedy’s pen, ruled that, “It suffices for us to acknowledge that adults may choose to enter upon [an intimate personal] relationship in the confines of their homes and their own private lives *and still retain their dignity as free persons*.”⁹⁶² Moreover, understandably similar to its findings in *Romer*, *Lawrence* emphasized that Texas had failed to prove that treating homosexual intimacy equally with heterosexual intimacy would cause any cognizable societal harm other than offending the sensibilities of bigoted individuals who disapprove of homosexuals and homosexuality. In that regard, the Court unequivocally stated, “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁹⁶³

960. Scott K. Kozuma, *Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy*, 30 WILLAMETTE L. REV. 891, 915 (1994) (note) (discussing same-sex marriage).

961. *Bowers v. Hardwick*, 478 U.S. 186 (1986), o., *Lawrence v. Texas*, 539 U.S. 558 (2003).

962. *Lawrence*, 539 U.S. at 567 (emphasis added). It is worth recalling that, as Justice Thomas correctly has accented albeit in dissents, *dignity* is innate and, thus, cannot be revoked or mitigated by individuals and their governments. See, *supra* notes 894-98 and accompanying text. Accordingly, if the phrasing in *Lawrence*, “still retain their dignity,” means that dignity can be taken away by Government, by private parties, or by both, the Court severely misconstrued dignity’s meaning in terms of natural rights. The better and, I think, completely compatible meaning of “still retain their dignity” recognizes that, while immoral to do so, dignity may be disregarded as it is when Government acts contrary to the “unalienable Rights” emanating from “the laws of Nature and of Nature’s God.” See, *supra* notes 907-60 and accompanying text.

I make the foregoing assertion because, the Supreme Court’s *dignity paradigm*’s emphasis clearly will not change whether dignity is deemed destructible or merely ignorable. *The Court’s concern under the dignity paradigm is that Government not impugn dignity however such impugning might occur*. Accordingly, as had been earlier proved, it is due and proper to effectuate the true meaning of the *dignity paradigm* by interpreting terms such as “still retain their dignity” to mean Government may not act as though individuals affected by government policies have no innate dignity. See *supra* notes 894-98 and accompanying text.

963. *Lawrence*, 539 U.S. at 578. Although the majority opinion did not use the phrase, implicit in its decision, as Justice O’Connor expressly recognized, is the principle that Government cannot act based on, “a bare ... desire to harm a politically unpopular group ...” *Id.* at 580 (O’Connor, J., concurring). Justice O’Connor concurred on the basis that the Texas statute violates the Fourteenth Amendment’s Equal Protection Clause, in contrast with the

By so stating, surely the *Lawrence*, as does *Romer*, implies Kantian morality. That is, because gratifying the biases of those who find LGBTQ life-styles offensive was a reason underlying the criminalization of same-sex sodomy, the law treated LGBTQ individuals merely as means to gratify those biases, and not an ends in themselves -- as persons whose indulgence in same-sex sexual gratification are entitled to the same regard as heterosexual individuals engaging in sodomy.⁹⁶⁴

Not surprisingly, as in *Romer*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented accenting, *inter alia*, that because the Court did not expressly declare a “fundamental right” of homosexual sex, any constitutionally cognizable interest in such behavior, like “All other [non-fundamental] liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state

majority’s stance that the law offends that amendment’s Due Process Clause. However, given the constitutional fact that equal protection is a subset of due process (*see supra*, notes 570-82 and accompanying text), Justice O’Connor’s distinction does not connote a significant constitutional difference. The true question is whether, when limiting the pursuit of happiness of some person or groups, the applicable law does so in a way that does not impugn that person’s or group’s human dignity.

964. In that regard, let me add two quick additional points. First, had defenders proved that somehow homosexual sodomy engendered constitutionally cognizable harms that heterosexual sodomy does not, such proof would not *per se* constitutionalize criminalizing only homosexual sodomy. Rather, even taking such harms into account, the reviewing court would still have to determine whether the harms were significant enough that the disparate treatment the adversely affected persons and groups suffered does not demean their dignity, that is treat them merely as means and not as well as ends in themselves. We always must recall that, pursuant to deontological principles, the issue never is whether there are countervailing social concerns justifying official limitations on human dignity. Rather, this issue is whether of ends and means proves that the official limitations do not impugn individual dignity. *See*, Bayer, Part I, *supra* note 7, at Sections 2-a, b, f.

For example, it is worth recalling the example of *Cleburne v. Cleburne Living Center* that invalidated as lacking any rational basis the City of Cleburne’s special zoning ordinance imposing special restrictions on group homes for mentally disabled individuals while zoning requirements for other forms of group homes were less stringent. The Court rejected the argument that because they may be unsightly, or discomfoting, or might engender crime or accidents, limiting access of the mentally disabled is justified. Moreover, the Court did not even address the likely possibility that group homes for mentally disabled persons might lower property values overall -- surely a legitimate rational basis, but one that presumably would not justify Cleburne’s special zoning laws. *See, supra* notes 924-34 and accompanying text (discussing that Government’s desire to harm need not be the sole or predominate motive).

Turning to a second point, *Lawrence* did not address laws that, regardless of sexual preference or orientation, criminalize all privately performed acts of sodomy between consenting adults. However, given the tenor of *Lawrence* and other decisions addressing sexual privacy, almost certainly a blanket ban on such sodomy would be unconstitutional under the Court’s *dignity paradigm*. *E.g.*, *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).

interest.”⁹⁶⁵ Discerning no “deeply rooted” American tradition favoring a right to homosexual sexual practices, the dissenters concluded that criminalizing such practices is constitutional.⁹⁶⁶

The Scalia dissent castigated the Court for not clearly setting a “standard of review,” and for purportedly ignoring or actually overturning precedents without so stating: “I address some aspersions that the Court casts upon *Bowers*’ conclusion that homosexual sodomy is not a ‘fundamental right’—even though, as I have said, the Court does not have the boldness to reverse that conclusion.”⁹⁶⁷ However, when at last he addressed whether, as a matter of fact, aside from offending the sectarian or secular sensibilities of opponents, same-sex sexual practices cause any harm unknown to lawful heterosexual practices, Justice Scalia had very little to say:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” *Bowers* [*v. Hardwick*], *supra*, [478 U.S.] at 196, 106 S.Ct. 2841—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. ...[*Lawrence*] effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.⁹⁶⁸

965. *Lawrence*, 539 U.S. at 593 (Scalia, J., with Rehnquist C.J. and Thomas, J., dissenting).

966. *Id.* (Scalia, J., with Rehnquist C.J. and Thomas, J., dissenting).

967. *Id.* at 594 (Scalia, J., with Rehnquist C.J. and Thomas, J., dissenting). This writing addresses the issue of the Court’s reluctance, perhaps adamant refusal, to designate a “level of scrutiny” in “homosexual rights” cases *infra* at notes 984-90 and accompanying text.

968. *Id.* at 599 (Scalia, J., with Rehnquist C.J. and Thomas, J., dissenting). One immediately notices within his almost hysterically-tone prose how Justice Scalia artfully constructed his list of long-time proscribed marriage and sexual practices that are rendered constitutionally problematic under *Lawrence*. He seemingly chose those practices that notionally cause no harm except alarming the sensibilities of third parties, the very type of governmental intrusion we now understand Deontological Originalism’s definition of “due process of law” delegitimates. Accordingly, if any within Scalia’s categories cause harm, the inquiry would proceed to whether nonetheless governmental bans violate the dignity of the adversely affected parties. And, indeed, Scalia’s list of likely sex-based candidates for constitutional protection itself is problematic.

For instance, one researcher opined, “There is very little research on incest; the extreme taboo and victim-blaming have made it a difficult subject for empirical study. Virtually all of the scant research focuses on the most prevalent type, which is adult-child incest, in particular father or stepfather and daughter.” Cynthia Godsoe, *Redrawing the*

Boundaries of Relational Crime, 69 ALA. L. REV. 169, 193 (2017) (note 135, “Sandra S. Stroebe et al., *Father-Daughter Incest: Data from an Anonymous Computerized Survey*, 21 J. OF CHILD SEXUAL ABUSE 176, 177-178 (2012) (noting the research difficulties in studying incest”). Still, as Prof. Godsoe strongly asserts, sufficient bases exist to indicate the following conclusions:

[V]ertical incest poses a great risk of [] harm because it inherently entails power differentials that call into question whether real consent is possible. The inability of adults to meaningfully consent to sex with other adults in a power relationship is an established legal principle. Moreover, both psychological research and the experiences of persons who have engaged in adult incest demonstrate that vertical incest, particularly parent-child adult incest, *is a situation where meaningful consent by the child, even as an adult, is virtually impossible.* Psychologists, for instance, consider incest to be “abusive when the individuals involved are discrepant in age, power, and experience.” Some experts go further and describe incest in general “as a form of sexual violence ... a form of sexual assault ... relationships [that are] normally one-sided and abusive.”

Id. at 192 (emphasis added) (quoting, Richard P. Kluff, *Ramifications of Incest*, 27 PSYCHIATRIC TIMES, Jan. 11, 2011, at 3, and, Harrison Faigen, “Game of Thrones” Romanticizing of Incest Could be Problematic, DAILY TITAN (Aug. 28, 2017, 1:34 PM), <https://dailytitan.com/2017/08/game-thrones-romanticizing-incest-problematic/> (quoting Janna Kim, Associate Professor of Child and Adolescent Studies at California State University, Fullerton).

In a like vein, Prof. Hörnel wrote

[I]t would be premature to conclude that in all constellations of adult incest, factual consent must be regarded as valid consent. For two subgroups of adult incest, it is plausible to assume invalid consent despite the fact that the young woman or young man was legally an adult. The first constellation consists of cases in which sexual acts started as sexual abuse or/and rape while the younger one was still a child or juvenile, and then were continued in a habitual way. ...

There might be a second exception ... if the context is a parent-child relationship. Even if the sexual relationship began ... at a time when both persons were legally adults, validity of consent can be challenged if the social roles are such that there is a clear and evident social split into “weaker partner” and “powerful partner.”

Tatjana Hörnle, *Consensual Adult Incest: A Sex Offense?*, 17 NEW CRIM. L. REV. 76, 89, 90 (2014).

If Profs. Godsoe and Hörnel are correct, as they well may be (*see*, Godsoe at 193-204; Hörnel at 89-101), then Government can raise a likely defense that the presumptions of mature adulthood notwithstanding, adult vertical incest comprises treating one participant merely as a means often enough that, if not subject to a complete ban as is adult-minor incest, adult incest is at least regulable.

To cite one more instance, Scalia’s inclusion of *bestiality* in his list of likely doomed traditional bans may be challenged. Indeed, Kant opined that bestiality is a violation of the duty of rightful honor by degrading one’s body and moral purity. John Kleinig, *The Paternalistic Principle*, 10 CRIM. L. & PHIL. 315, 320 note 14 (2016) (citations omitted). *See, supra* note 125, and *see generally*, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, notes 263-67 and accompanying text (discussing the *duty of rightful honor*). Such is reflected in modern criminal codes even if the drafters were not steeped in Kantian theory. “Bestiality laws, for reasons unrelated to the welfare of the exploited creature, try to prevent humans from having sex with nonhuman animals, who in human society are relegated to a lower plane of

Importantly, the dissenters could not identify any genuine societal harm that actually justifies criminalizing homosexual sodomy while simultaneously sustaining the legality of sodomy between opposite-sex

existence.” Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1093 (2004) (citing, See ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds., 2004)).

Arguably, without more, any such self-chosen denigration might be insufficient grounds to uphold anti-bestiality laws. However, “With the advent of the animal rights movement, it is not too far fetched to suggest that protecting animals from harm is a legitimate state interest rationally furthered by bans on bestiality.” Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 147 (2003) (article vehemently reproving the *Lawrence* decision and arguing that, “So, most of the critters in Justice Scalia’s parade of sexual monsters can be reined in by state laws designed to prevent demonstrable harms.” *Id.* at 147-48). Allison’s snide tone notwithstanding, there are strong moral arguments supporting the criminalization of human intercourse with beasts. “Cruelty statutes have been enacted in most states because suffering—including animal suffering—should never occur absent extreme justifying circumstances, and because society recognizes that the act of cruelty has a negative effect on the abuser.” Justin P. Nichols, *The Hidden Dichotomy in the Law of Morality*, 31 CAMPBELL L. REV. 591, 605 (2009) (citing, Luis E. Chiesa, *Why Is It a Crime to Stomp a Goldfish?—Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. 1, 40-58 (2008)).

Certainly, sexual acts on and with animals might cause pain and other physical, even emotional harm to such animals. “While it may seem silly to think in terms of an animal’s emotional distress, there can be no doubt that bestiality, even where it does not physically injure the animal, harmfully traumatizes it in some manner.” Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 847 note 267 (1994). Accordingly, bestiality is anti-Kantian because, while Kant presumed that non-human lifeforms lack the intellectual capacity to conceive moral precepts, the deliberate, wanton inflection of pain on “lower” beings violates moral precepts. “[A]ccording to Kant, man possesses an indirect duty toward nonhuman animals. Cruelty to nonhuman animals harms the moral character of humans, while kindness to such animals supports humanity; ‘a master [who] turns out his ass or his dog, because it can no longer earn its keep, shows a small mind.’” Ani B. Satz, *WOULD ROSA PARKS WEAR FUR? TOWARD A NONDISCRIMINATION APPROACH TO ANIMAL WELFARE*, 1 J. ANIMAL L. & ETH. 139, 143 (2006) (quoting, Immanuel Kant, *Lectures on Ethics* 239-41 (Louis Infield trans., Methuen 1930)).

Moreover, our deeper understanding of moral duties informs that palpable injury is not a requirement; after all, morality is not consequentialist. “Like children, non-human animals are unable to be fully informed, communicate consent, or to speak out about their abuse. Thus, Dr. Frank Ascione has stated that ‘bestiality may be considered cruel even in cases when physical harm to an animal does not occur (this is similar to the case of adult sexual activity with children where consent is presumed to be impossible).’” Lee Hall, *Interwoven Threads: Some Thoughts on Professor Mackinnon’s Essay of Mice and Men*, 14 UCLA WOMEN’S L.J. 163, 212 note 14 (2005) (quoting, Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychology*, *Anthrozoös* Vol. 6 (4), No. 4 (1993) at 229 (parenthetical in the original)).

Therefore, Justice Scalia’s claim that *Lawrence* would lead to wholesale invalidation of time-honored taboos is not only bad constitutional analysis, it is as well weak logic.

couples. The Scalia dissent cites no claims of increases in crime, untoward violence, singular physical or mental illnesses, loss of business opportunities, loss of production of goods and services, or any other detriments that *might* justify regulating conduct causing such injuries. Instead, classically applying the *deeply rooted traditions* standard, the dissenters say it is enough that criminalizing homosexual sodomy assuages the mere sensibilities of either a majority of a given segment of society, or some powerful elite therein.⁹⁶⁹ Under that standard, as has been earlier discussed, *Brown v. Board of Education* might well have been decided in favor of states' authority to administer segregated school systems given the arguably deeply rooted American tradition of racial discrimination prevalent in 1954.⁹⁷⁰

Justice Scalia is correct that, pursuant to the *dignity paradigm*, no longer will the Due Process Clauses accept either bald assertions by Government or persistent historical intolerance as sufficient proof that some conduct is immoral and, thus, regulable up to and including designating such conduct to be criminal. Indeed, consistent with *Romer*, *Lawrence* correctly held: courts fail their duty by simply and uncritically accepting that some popular determination -- some "deeply rooted" tradition -- is constitutional justified due to its mere persistence. Rather, to fulfill the *dignity paradigm's* unspoken

969. Indeed, their refusal to turn any sort of critical eye towards Texas' criminalization of homosexual sexual practices, certainly the hallmark methodology of the deeply rooted traditions standard, renders inadvertently ironic and shallow the dissenters' earnest assertion that only "principle and logic" should determine "the decisions of this Court." *Id.* at 605 (Scalia, J., with Rehnquist C.J. and Thomas, J., dissenting).

970. *See, supra* notes 570-82 and accompanying text. Not surprisingly, Justice Scalia repeated the infirmities of his *Lawrence* and *Romer* dissents when dissenting in the same-sex marriage decisions next discussed. Indeed, while Justice Scalia, among others, has attempted an originalist argument supporting *Brown*, emphasizing in particular the first Justice Harlan's dissent in *Plessy v. Ferguson*, the consensus among scholars is, as Prof. Ronald Turner summarized, while one may pose as "a serious ... whether *Brown* can be squared with originalism as that interpretive methodology is defined and conceptualized by Justice Scalia, ... [his] mere conclusory statement that *Brown* is consistent with Justice Harlan's 'thoroughly originalist' dissent is unconvincing, as is his nonoriginalist and traditionalist approach to and defense of the Court's seminal 1954 ruling." Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 60 UCLA L. REV. DISCOURSE 170, 184 (2014); *see also, e.g.*, Ronald Turner, *Justice Antonin Scalia's Flawed Originalist Justification for Brown v. Board of Education*, 9 WASH. U. JURISPRUDENCE REV. 179 (2017); *but see, e.g.*, Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996) (accenting early *post-ratification* enforcement of the Reconstruction Amendments and *post-Bellum* civil rights acts); Patrick J. Kelley, *An Alternative Originalist Opinion for Brown v. Board of Education*, 20 S. ILL. U. L. J. 75 (1995).

Of course, had Justice Scalia embraced the Deontological Originalism proven in this writing, he could have expressed a perfectly plausible originalist defense of *Brown v. Board of Education*.

demonstrably manifest connection to natural law, Government must prove that its intrusions into individuals' personal choices -- its impositions limiting the Pursuit of Happiness, if you will -- respect affected individuals' innate dignity by treating them not merely as means to fulfill even valid governmental goals, but as ends as well.

Accordingly, as the dissenting justices rightly observed, under *Lawrence*, "due process of law" cannot be satisfied by stark declarations and longstanding traditions that LGBTQ individuals' preferred sexual conduct is immoral and regulable while like conduct by opposite-sex couples, again by stark declaration and longstanding traditions, is moral and protected by the Constitution. Therefore, although the *Lawrence* Court did not make as explicit as it might have the meaning of *dignity*, as a matter of judicial restraint, a thorough explication, while likely informative, arguably would have exceeded the rationale needed to invalidate Texas' criminalization of homosexual conduct. Even the dissenting opinion failed to provide cogent evidence proving either that homosexual conduct actually evokes cognizable societal harm, or that any such harm exceeds the harm engendered by identical sexual practices performed in private by consenting heterosexual adults. Absent such proof, nothing more was needed to demonstrate the unconstitutionality of Texas' ban on homosexual conduct.

This at last brings us to the two Supreme Court decisions that together require all levels and offices of American government to treat same-sex marriages identically with opposite-sex marriages. On June 26, 2015, the Court ruled in *Obergefell v. Hodges* that state laws prohibiting same-sex civil marriages contravene the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁹⁷¹ Just two years prior, the Court's *U.S. v. Windsor*⁹⁷² struck as violative of the Fifth Amendment's Due Process Clause, § 3 of the Congress' Defense of Marriage Act ("DOMA"),⁹⁷³ banning the Federal Government from officially recognizing same-sex marriages lawfully performed in states then permitting such nuptials.⁹⁷⁴ As it must, the

971. *Obergefell*, 135 S. Ct. at 2584. Concurrently and logically, *Obergefell* overturned state statutes barring official recognition of same-sex marriages lawfully performed in other jurisdictions.

972. *Windsor*, 133 S. Ct. at 2675.

973. Defense of Marriage Act, Pub. L. No. 104-199, §1738C, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2012).

974. Section 3 of DOMA amended, unconstitutionally as it turned out, 1 U.S.C. § 7 (2012) to read, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

core legal rationale for both *Obergefell* and *Windsor* holds that pursuant to the Constitution's guarantee of "due process of law," all acts and edicts of every office, agent or level of American government must be morally sound, that is, respect the dignity of affected persons. Specifically, together, *Obergefell-Windsor* deduces that discrimination against same-sex marriages unjustifiably offends the innate human dignity of individuals who wish to engage in same-sex civil marriages, and of such unions' children.

Reaffirming that due process exists to protect and preserve dignity,⁹⁷⁵ and accenting that the institution of marriage is a most profound expression of such dignity,⁹⁷⁶ the Court unsurprisingly concluded that, pursuant to their individual and combined dignity, individuals comprising same-sex couples are entitled to the benefits of marriage equally with opposite-sex couples.⁹⁷⁷ Integral to that proposition, of course, is the Court's reiteration that homosexuality *qua* homosexuality poses no untoward societal harms justifying discriminating against otherwise legally eligible same-sex couples who wish to marry.⁹⁷⁸ Specifically, *Obergefell* explained the wrongful historical persistence of *anti-LGBTQ animus*,

Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both

975. "In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S. Ct. at 2597-98 (citations omitted).

976. "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 2599 (citation omitted). Indeed, "[a] first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy[, denoting an] abiding connection between marriage and liberty ..." *Id.* Along these lines, *Obergefell* accented that, "[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.*

Identically, *Windsor* accented that marriage is Society's imprimatur permitting couples, through the solemnization of official ceremony, "to define themselves by their commitment to each other." *Windsor*, 133 S. Ct. at 2689.

977. *Obergefell*, 135 S.Ct. at 2606.

978. At this juncture this writing's phrase "no untoward societal harms" should be neither mysterious nor confusing. Out of caution, as we approach the final themes, I repeat one of Deontology's fundamental propositions: moral comportment does not guarantee that either moral actors or innocent persons affected by moral actions will escape undeserved harm. That is because of Deontology's most basic premise: moral compliance promises the right result, not a good result. Therefore, "societal harms" resulting from morally sound behavior are unfortunate but not "untoward." See generally, Bayer, *Part I: Originalism and Deontology*, *supra* note 7, at Section 2, particularly, 2-f.

law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.⁹⁷⁹

Turning to the formerly similar opinions of the medical community, the Court added, “For much of the 20th century, moreover, homosexuality was treated as an illness. ... Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”⁹⁸⁰

Of equal magnitude, bans and lesser discriminatory disadvantages imposed on same-sex marriages disparage the human dignity of children raised by a same-sex couples who wish to marry or whose marriages are treated by governmental offices differently – inevitably as less worthy, thereby less protected – from opposite-sex marriages. Denouncing such disparate treatment, *Obergefell* explained, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. ... This provides powerful confirmation ... that gays and lesbians can create loving, supportive families.”⁹⁸¹ Considering

979. *Obergefell*, 135 S. Ct. at 2596 (citing Brief for Organization of American Historians as Amicus Curiae In Support of Respondent Edith Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307)).

980. *Id.* (citations omitted). As detailed momentarily in the text, the Court’s arguably brief and cursory review of the nature and meaning of homosexuality may not be correct in all significant regards although its ultimate holding invalidating official disparate treatment of same-sex marriages is certainly right under Deontological Originalism. *See infra* notes 1012-18 and accompanying text. To accent one aspect implicit in the above-quote, even assuming homosexuality indeed is “immutable,” that characteristic ought not be determinative, or even significant in deciding whether regulation is unconstitutional. Commentaries seriously challenge the concept of “immutability” as useful in anti-discrimination jurisprudence. *E.g.*, Jessica A. Clarke, *Against Immutability*, 25 YALE L.J. 2 (2015); Peter Brandon Bayer, *Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory*, 89 ST. JOHN’S L. REV. 401 (2015) (lead article in symposium on Title VII); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987).

981. *Obergefell*, 135 S. Ct. at 2600 (citing, Brief for Gary J. Gates as Amicus Curiae in Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, and 14-574). Underscoring that American law has in great measure rightfully come to respect same-sex couples as parents, *Obergefell* added, “Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-

both the importance of marriage as a social institution and the proven capacity of homosexual individuals as a class to parent children equally with heterosexuals as a class, the Court concluded,

Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.⁹⁸²

Closing its opinion as it should by re-emphasizing human dignity, the Court summarized the core constitutional concern: same-sex couples wishing to marry, “respect [that institution] so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions. *They ask for equal dignity in the eyes of the law.* The Constitution grants them that right.”⁹⁸³

Like *Romer* and *Lawrence* before them, *Windsor* and *Obergefell* are noteworthy not only for what they say—their adamant emphasis on the breadth of human dignity as constitutionally protected—but as well for something they did not mention. Usually in constitutional civil rights opinions, courts will open by ascribing the particular controversy a “level of scrutiny,” the purported importance of which is setting a judicial presumption regarding which side is likely to win, thus, which side, carries the evidentiary burden to persuade the given court. The “level of scrutiny” spectrum

sex parents, ...” *Id.* (citing Brief for Gary J. Gates as Amicus Curiae In Support of Petitioners, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, and 14-574) at 5).

982. *Id.* at 2600-01 (citation omitted).

983. *Id.* at 2608 (emphasis added).

ostensibly ranges from “strict”⁹⁸⁴ to “middle level”⁹⁸⁵ to “rational basis.”⁹⁸⁶ Importantly and, I think, most appropriately, neither *Obergefell* nor *Windsor* specify the applicable level of scrutiny. That omission frustrated the dissenters,⁹⁸⁷ but rightly underscores a crucial point: identifying technical

984. The first level is “strict scrutiny,” pertaining to discrimination based on a “suspect class” of which the predominating two are race or ancestry. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013). Courts likewise use strict scrutiny standards to review certain violations of fundamental rights such as regulations that discriminate against speech based on viewpoint or content. *McCullen v. Cokley*, 134 S. Ct. 2518, 2530 (2014).

Because, “any official action that treats a person differently on account of his race or ethnic origin is inherently suspect,” *Fisher*, 133 S. Ct. at 2419 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting)), under strict scrutiny, the Government bears the burden of proving both that the presumptively unconstitutional use of race or ethnicity is legitimate and that such use is “narrowly tailored,” meaning, no reasonably available alternative non-discriminatory mode of regulating can attain the same important governmental goals. *Id.* at 2418-19 (citations omitted).

985. The second level of scrutiny, called “middle” or “intermediate,” applies, *inter alia*, to governmental distinctions predicated on sex and illegitimacy of childbirth. *J.E.B. v. Ala. ex rel T.B.*, 511 U.S. 127, 136-37 & n.6 (1994) (sex discrimination); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-26 (1982) (same); *Pickett v. Brown*, 462 U.S. 1, 7-8 (1983) (legitimacy); *Morales-Santana v. Lynch*, 804 F.3d 520, 528 (2d Cir. 2015) (sex discrimination); *Pierre v. Holder*, 738 F.3d 39, 50 (2d Cir. 2013) (legitimacy). That level applies, as well, in certain instances of alleged violations of fundamental rights such as so-called “content neutral regulations” claimed to violate free speech. *BBL, Inc. v. City of Angola*, 809 F.3d 307, 325-36 (7th Cir. 2015) (noting that often such claims actually involve speech restrictions that may not be content neutral but are justifiable absent reference to content).

“[L]ike ‘strict scrutiny,’ [middle level] requires the government to prove the constitutional validity of the challenged enactment. Unlike strict scrutiny, however, the State’s burden [requires only that] ‘[t]he classification must be substantially related to an important governmental objective.’” *Bayer*, *supra* note 17, at 337 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

986. All judicial review not sounding in strict or intermediate scrutiny, purportedly engenders “rational basis” review. “[O]ften referred to somewhat demeaningly as ‘mere rationality,’ ... any governmental classification reviewed for ‘mere rationality’ is presumptively valid unless, ‘the one attacking the legislative arrangement . . . negative[s] every conceivable basis which might support it.’” *Bayer*, *supra* note 17, at 337 (quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 547-48 (1983)); *see also, e.g., Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080-81 (2012) (citations omitted). Common instances subject to rational basis review include economic regulations, *e.g., FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-314 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), and, governmental regulation premised on age or disability, *e.g., Engquist v. Or. Dept. of Agri.*, 553 U.S. 591, 605 (2008) (age discrimination, citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-17 (1976) (per curiam)); *Ragsdell v. Regional Housing Alliance of La Plata County*, 603 Fed. Appx. 653, 656 (10th Cir. 2015) (disability discrimination, citing *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 725 (10th Cir. 1988)).

987. A justifiably exasperated Justice Scalia wrote, “The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether,

levels is not as important as presenting a thoughtful, lucid rationale determining the challenged official action's constitutional *bona fides vel non*. Rather than spend pages on the distractions of setting scrutiny levels, a determination that actually and needlessly may be more complex than

under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.” *Windsor*, 133 S. Ct. at 2706 (Scalia, J., with Thomas, J., dissenting); see also, *id.* at 2716 (Alito, J., dissenting, citing *id.* at 2695, that the Majority refers to some vague “heightened” level of analysis that the offending portions of The Defense of Marriage Act fail to satisfy). The dissenters are right. The origin of setting levels of review is attributed to *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 note 4 (1938). E.g., William Woodyard & Glenn Boggs, *Public Outcry: Kelo v. City of New London-A Proposed Solution*, 39 ENVTL. L. 431, 446 (2009). Specifically, “The concept of strict scrutiny can be traced back to *Korematsu v. United States* [323 U.S. 214, 216 (1944)]. The case [upheld] the constitutionality of a military decree whereby Americans of Japanese descent were evacuated and interned in camps during World War II[,] ... declar[ing] that the government could take whatever steps were necessary to ‘prevent espionage and sabotage.’ More importantly, the Court approached the equal protection challenge in a new light, holding that ‘all legal restrictions which curtail the civil rights of a single racial group are immediately suspect’ and warrant the use of ‘the most rigid scrutiny.’” Paul Enriquez, *Deconstructing Transnationalism: Conceptualizing Metanationalism As A Putative Model of Evolving Jurisprudence*, 43 VAND. J. TRANSNAT’L L. 1265, 1328–29 (2010).

Four years later in *Carolene Products*, after noting that courts review economic regulation on the presumption that it is at least constitutionally rational, thus lawful, in the famous “footnote 4,” the Court stated, “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Indeed, the Court did not actually set up a framework for analysis. Rather, emphasizing consistently throughout footnote 4 that there was no “need” within the *Cerolene Products* opinion to discern whether there is a higherarchy of rights analysis, the Court dropped perhaps unobtrusive hints that some constitutional rights are more momentous than others. Subsequent courts picked up that hint transforming what might have been considered an innocent, innocuous aside into what commonly is referred to as, “the most famous footnote in constitutional law. ... Almost no one cites it without paying tribute to its fame and influence. It has been called ‘[t]he great and modern charter for ordering the relation between judges and other agencies of government’; and if this is something of an optimistic overstatement, it is at least partly true.” Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004) (quoting, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979)).

Like a collector who buys her first two items but shortly thereafter seeks more in quality and diversity, thus began what might be called a judicial fetish to discern levels and sub-levels of scrutiny to cover the vast variety of matters arising under the Due Process and Equal Protection Clauses. As Prof. Fletcher succinctly stated, “The difference is supposedly only one of degree, and *there can be various levels of scrutiny between the two extremes* [of rational basis and strict scrutiny].” George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1624 (1999); see also, *infra* note 988. So, yes, the *Obergefell* dissenters make a valid point: If the Court is going to forego its long-standing tradition of according scrutiny levels, it should say as much with frankness.

resolving the substantive due process issue itself,⁹⁸⁸ the *Windsor* and *Obergefell* Courts went straight to the heart of the matter: denying the right to marry to otherwise eligible, responsible adult couples who happen to be of the same sex irrefutably imposes *unjustified* severe detriment upon the couples and their children.

Perhaps the Court is signaling that choosing the level of scrutiny, once though a helpful, efficiency-enhancing exercise, has too often become a bewildering disruption of the judicial review process threatening not simply to waste time but worse, possibly hindering the proper resolution of the substantive constitutional question.⁹⁸⁹ The “homosexual rights cases,” then,

988. The idea of levels of scrutiny has the surface allure of setting a seemingly logical set of legal niches that helps parties and the courts follow an order of evidentiary proof. However, in response to the unique complexity of many constitutional issues, determining which level appropriately applies to any given matter has become a challenge in itself.

For instance, Prof. Mark M. Harrold, “notes that the Supreme Court itself may be responsible for the proliferation in these odd [First Amendment establishment of religion] cases by interpreting the Constitution ‘in a vague, sometimes intellectually dishonest, manner, erecting a confusing maze of balancing tests and fluid levels of scrutiny....’” MARC M. HARROLD, OBSERVATIONS OF WHITE NOISE: AN ‘ACID TEST’ FOR THE FIRST AMENDMENT 75 (2005) (quoted in, Michael J. Gorman, 75 MISS. L.J. 1167, 1170 (2006) (student book review)). Such complexity *cum* uncertainty understandably inspires courts to dodge assigning a level of scrutiny if at all possible. *E.g.*, *Wollshlaeger v. Governor of Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (*en banc*) (court does not have to determine if the apparently “content-based” speech regulations at issue are subject to “strict” or lesser-level “heightened” scrutiny because, “the record-keeping, inquiry, and anti-harassment provisions ... fail even under heightened scrutiny ...”); *Culp v. Madigan*, 2015 WL 13037427 at *14 (C.D. Ill. 2015) (depending of specific facts, “Determining the correct level of scrutiny [can be] difficult” in firearms regulation cases).

Another ploy is not assigning a level but rather testing the challenged governmental action under the highest and lowest levels of scrutiny. If the challenged action survives the former it must be constitutional, alternatively, if it fails the latter it cannot be constitutional; either way, the reviewing court dodges the task of actually declaring what level of scrutiny actually fits the given litigation. *E.g.*, *St. Louis Dev’l Disabilities Treatment Ctr. Parents Ass’n v. Mallory*, 591 F. Supp. 1416, 1471 (W.D. Mo. 1984) (even though strict scrutiny is not the applicable level of scrutiny, because the challenged statute would survive “strict scrutiny” review, the court need to determine what actually is the correct level of scrutiny, which relieves the court of the “more difficult” determination whether to apply rational basis or intermediate level review).

989. As noted in Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of The Marriage Debate*, 109 MICH. L. REV. 1363, 1404 (2011) (citing, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004)):

Moreover, the marriage debate casts a more general shadow of skepticism over the tiers of scrutiny themselves. ... Recall that the [lower federal and state] courts ruling in favor of marriage equality have done so under every standard of review, suggesting that the formal tiers may be of more rhetorical than substantive significance. *Romer* and *Lawrence*, both decided under a form of rational basis

may portend a welcome abandonment of the “levels of scrutiny” approach in favor of directly confronting the substantive issue in each constitutional rights case: based on the record, applying moral analysis, does the governmental action at issue respect the innate dignity of the challengers, thus is fundamentally fair, that is, neither arbitrary nor capricious?⁹⁹⁰

Although the issue of standards and levels of scrutiny are important, not surprisingly, the deepest urgency of the unusually passionate dissenting opinions centered not on procedural matters such as levels of scrutiny, but rather on *Windsor’s* and *Obergefell’s* substantive pronouncements. Chief Justice Roberts and Justices Scalia, Thomas, and Alito, dissented on the expected premise that the Judiciary lacks the constitutional competence to strike laws discriminating against same-sex marriages. Significantly but predictably given the state of modern knowledge, the dissenters’ core claim does not sound in purported societal harm from permitting same-sex marriages, but rather that defining marriage is a political question left to the *vox populae* expressed through legislation, referenda or some comparable

review, point in the same direction. All of this suggests that standard political process analysis, tied as it is to levels of scrutiny, is something of a distracting sideshow—one that might be avoided by deploying a singular standard that takes into account, as appropriate, a range of factors, including objections to the underlying political process that generated a challenged law.

990. Indirectly, the courts have experimented with abandoning technical levels of scrutiny in favor of reminding the relevant parties that resolving rights issues is a matter of constitutional morality informed by the given facts of the particular case: did the challenged conduct comport or not comport with the relevant constitutional provision. A good example is “rationality with bite.”

Traditional rational basis review only asks whether any theoretical, or hypothesized, rational relationship exists to a legitimate governmental interest; the challenger must essentially prove a negative by eliminating any real or imagined basis for the enactment. By way of contrast, under “rationality with bite,” the government bears the burden of establishing the actual reason for the law that would be advanced by applying the law on the facts presented at bar. Although the standard of judicial review ostensibly remains the same—rationality—shifting the burden of proof to the government significantly improves the odds of success for plaintiffs, as does the requirement that the government establish the actual reason for the enactment. Thus, the government’s obligation goes well beyond merely suggesting a purely theoretical interest that might or might not have actually motivated the legislative body that adopted the law in the first place.

Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1197 (2008).

This writing respectfully urges that, if it ever was useful, levels of scrutiny now engenders unnecessary complexity diverting the courts and the parties from the true task at hand: determining the constitutional *bona fides* of challenged governmental conduct.

manifestation of popular opinion.⁹⁹¹ Of course, the *dignity paradigm* debunks the argument that the meaning and extent of natural rights should be decided by public ballots rather than through the practiced, reasoned deliberations of impartial judges.⁹⁹²

The dissenters' second major substantive proposition is a weak implication that opposite-sex marriage's historical persistence implies its constitutional acceptability.⁹⁹³ Oliver Wendell Holmes' famous *dictum* well expresses the shady circularity of using any law's longstanding endurance as its own justification: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁹⁹⁴ Something more substantive must premise a judicial ruling on fundamental rights.

Turning to what once might have been expected to be the dissenters' prime substantive proposition, only Chief Justice Roberts' opinion, joined by Justices Scalia and Thomas, averred with much passion *but scant empirical support*, a presumptive correspondence between "traditional" marriage and societal welfare. Importantly, given the unassailable empirical record confirming that, "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted,"⁹⁹⁵ Roberts foreswore what formerly had been the overarching arguments underlying "disapproval" of homosexuality: that homosexuality is "unnatural," "immoral" and "destructive of society."⁹⁹⁶ Instead, the sole substantive harm urged by the

991. The dissenters angrily accented that, "[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs." *Obergefell*, 135 S. Ct. at 2612 (Roberts, with Scalia and Thomas, J., dissenting); see also, *Windsor*, 133 S. Ct. at 2714–2715 (Alito, J., dissenting).

992. See *supra* notes 845–63 and accompanying text.

993. *Obergefell*, 135 S. Ct. at 2612 (Roberts, with Scalia and Thomas, JJ., dissenting); *Windsor*, 133 S. Ct. at 2714–15 (Alito, J., dissenting).

994. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Indeed, the Seventh Circuit quoted Holmes as part of its *pre-Obergefell* rationale striking as unconstitutional Wisconsin's statute banning same-sex marriages. *Baskin v. Bogan*, 766 F.3d 648, 666–67 (7th Cir. 2014); see also, e.g., *Price v. Stevedoring Services of Am., Inc.*, 697 F.3d 820, 842 (9th Cir. 2012) (*en banc*) (quoting Holmes regarding issues arising under the Longshore and Harbor Workers' Comp. Act, 33 U.S.C. § 901 *et seq.*).

995. *Obergefell*, 135 S. Ct. 2584 (citing Brief for Gary J. Gates as Amicus Curiae In Support of Petitioners, *Obergefell*, 135 S. Ct. 2600 (Nos. 14-556, 14-562, 14-571, and 14-574) at 4).

996. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J., 459, 548–49 (1990). Perhaps most dominate among the now well and fully debunked professed dangers attendant to homosexuality is, "the concern with the 'predatory

Chief Justice concerns children, but not that children raised in same-sex households endure physical, developmental or psychological harm intolerably disproportionate to that suffered in the aggregate by children raised in opposite-sex households. Rather, Roberts claimed that, pursuant to principles of procreation, *the better environment* in which to raise a child is within a marriage of the child's two birth parents.⁹⁹⁷ The Chief Justice wrote:

[Marriage] arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. ...

The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.⁹⁹⁸

Chief Justice Roberts, with Justices Scalia and Thomas, may believe that the superiority of opposite-sex marriage over same-sex marriage is so obvious that it "rarely require[s] articulation."⁹⁹⁹ Of course, a Supreme Court

homosexual,' who was synonymous with the 'sexual psychopath' and, for many law enforcement officers, the 'child molester.'" William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1059 (1997).

997. *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting). Somewhat similarly, in *Windsor*, Justice Alito asserted the non-controversial generality that, "The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects." *Windsor*, 133 S. Ct. at 2715 (Alito, J., with Scalia and Thomas, JJ., dissenting).

998. *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting) (emphasis added). Although sources one might have expected a lengthy litany of authority, in support the Chief Justice G. QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988), J.Q. WILSON, THE MARRIAGE PROBLEM 41 (2002) and denoted M. Cicero, DE OFFICIIS 57 (W. Miller transl. 1913).

999. That very lack of specifics supports Prof. Marc Spindelman's reproach that Robert's argument comprises an unfortunate attempt to resurrect the notion that marriage's prime legitimacy is fusing the individuals comprising the marital couple into a single entity, specifically, a characterless copulation machine to assure the continuance of Humankind through procreation. Marc Spindelman, *Obergefell's Dreams*, 77 OHIO STATE L.J. 1039, 1096 (2016). In Spindelman's description,

justice's written opinion, even if dissenting, extolling the purported constitutional *bona fides* of governmental discrimination against same-sex marriages surely is an extraordinarily suitable occasion for the comprehensive "articulation" that the Chief Justice declined to supply.¹⁰⁰⁰ Rather, there is an unbecoming timidity in his prose for such an important proposition, implying perhaps his own recognition of his argument's insipidness.¹⁰⁰¹

As just quoted, Roberts opined, "When sexual relations result in the conception of a child, *that child's prospects are generally better* if the mother and father stay together rather than going their separate ways."¹⁰⁰² Stating

Within the dissent's mindset, heterosexual coitus is an essential, maybe the most essential, feature of what marriage symbolizes and secularly sacralizes. A vision of the two-in-one-flesh union of man and woman that operates through their sexual conjunction as a single reproductive force that, for so long as it lasts, is made up of them both, is imbedded in the dissent's normative structure. The conjugal couple at marriage's core is, like *Obergefell*, a man-woman, male-female, but also greater than the sum of its parts.

Id. (footnotes omitted).

1000. Courts traditionally pride themselves on demanding empirical and logical proof while, concurrently, eschewing as manifestly improper, ruling in favor of parties' unproven assertions of law or fact. For example, in 2005, the Supreme Court noted, "Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the 'clearest showing' to justify discriminatory state regulation ... this is not enough." *Granholm v. Healed*, 544 U.S. 460, 490 (2005) (quoting *C & A Carbone, Inc.*, 511 U.S. 383, 393 (1994)); *see also, e.g.*, Prot. Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 438-39 (1968) ("[T]he record contains solid facts ... point[ing] to the probable existence of valid and valuable causes of action. Balancing these facts are nothing but bald assertions to the contrary and general conclusions for which foundations nowhere appear."); *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (quoting *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978) ("[B]ald assertions of ultimate facts are ordinarily insufficient to support summary judgment."); *Yufa v. TSI, Inc.*, 652 Fed. Appx. 939, 947 (Fed. Cir. 2016) ("unsupported assertions are insufficient to defeat summary judgment. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (a party may not avoid a motion for summary judgment by resting on "conclusory allegations of the complaint" or by answering "with conclusory allegations of an affidavit." (citation omitted))."); Michael J. Garrisona & J. David Reitzel, *Zoning Restrictions and Marketability of Title*, 35 REAL EST. L.J. 257, 278 (2006) ("The courts' failure to articulate a cogent legal theory for the 'existing violation' exception creates uncertainty in its application.").

1001. I raise here some rebuttals that likely would spring to the mind of any reasonable person reviewing Robert's opinion. I claim no originality and, given the multitude of articles written in support of the *Obergefell* decision, too many reasonably to review prior to drafting one's own work, I in no matter assert that any idea now presented has not already been heavily explored by others.

1002. *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting) (emphasis added).

that a “child’s prospects” are “generally better” if raised by both birth parents within a traditional marriage “damns,” as they say, “with faint praise.” It is not that, with scant exception, the “child’s prospects” are considerably improved or that absent the care of married birth parents the “child’s prospects” are considerably jeopardized. Rather, according to the Chief Justice, overall life for children likely will be better – perhaps a little bit, perhaps somewhat more, Roberts never elucidates – but not exceptionally improved in a married household consisting of her birth parents.

Of course, conscientious parents want their offspring to enjoy every available advantage. Still, even assuming the Chief Justice’s proposition to be true,¹⁰⁰³ reasonable minds crave more constitutional justification than some inexact, unsubstantiated likelihood that children’s “prospects are generally better” if they happen to be raised by their married birth parents. Given its status as a fundamental right, reflecting its importance as a societal institution,¹⁰⁰⁴ denying civil marriage to otherwise eligible same-sex couples should be indisputably warranted, not merely the preferences of even a majority of the population ostensibly to enhance children’s happiness in some vague capacity. If unacceptable harm to children is a reason, then proponents should be able to demonstrate palpable, significant harm that reasonably cannot be avoided except by banning same-sex marriages. Extraordinarily, Roberts cited nothing whatsoever to support his anemic premise that States rationally may ban same-sex marriages simply to better, not to salvage the lives of children. The relatively slight purported disadvantage to children of same-sex marriages, even if true, seems categorically inadequate to justify the deep, manifold and multifaceted harms bans on same-sex marriages inflict.

Indeed, *Palmore v. Sidoti*¹⁰⁰⁵ calls the Chief Justice’s entire constitutional premise into grave doubt. Therein, after the parties’ divorce, a Florida court awarded custody of their then-three-year-old daughter, Melanie, to the mother, Linda Palmore. However, roughly a year later, the court reversed, granting custody to the father, Anthony Sidoti, because Ms. Palmore was cohabitating with an African-American male whom she married shortly thereafter. The Florida court based its revised custody order in large

1003. Prof. Dent, for instance, tries to salvage the Chief Justice’s dissent by noting that, “The literature substantiating [that c]hildren generally fare best when raised by their biological mother and father ... is voluminous” George W. Dent Jr., *Meaningless Marriage: The Incoherent Legacy of Obergefell v. Hodges*, 17 *Appalachian J.L.* 1, 57 and note 12 (2018) (citations omitted; quote combines phraseology from Dent’s page 57 and note 12).

1004. See *supra* note 976 and accompanying text.

1005. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

part on its belief that, “that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.”¹⁰⁰⁶

Explaining why Florida had violated the Equal Protection Clause of the Fourteenth Amendment, fully consistent with but not mentioning the *dignity paradigm*, the *unanimous Palmore* Court unequivocally stated that, even acknowledging, “the reality of private biases and the possible injury they might inflict” on young Melanie, “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. ‘Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.’”¹⁰⁰⁷

Controversially and arguably inaptly, courts interpret *Palmore* to permit considerations of race in family law proceedings so long as race is not the sole factor reviewed.¹⁰⁰⁸ Regardless, although the *Obergefell* majority did not cite *Palmore* in response, *Palmore*’s logic should negate Chief Justice Robert’s assertion that the mere possibility that children of same-sex marriages might be somewhat “better off” growing up in opposite-sex marriages is a legitimate basis to deprive same-sex couples of the right to marry. Surely, if nothing else, *Palmore* warns us that if purely hypothetical “better off” were a permissible constitutional standard, children raised in any form of “mixed marriage” could be relocated to non-mixed-marriage environments so that they likely will be “better off.” Indeed, even if the law raised a strong presumption in favor of present family conditions, courts would be empowered on a case-by-case basis to scrutinize every “non-

1006. *Id.* at 431.

1007. *Id.* at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61(1971) (White, J., dissenting)).

1008. In re Marriage of Gambla and Woodson, 367 Ill. App. 3d 441, 467 (Ill. App. 2006) (citing cases), *abb. on other grnds.*, *People v. McKown*, 236 Ill. 2d 278 (2010). Indeed, critics who feel it failed to go far enough lament, “Unfortunately, the narrow language and brief analysis in the *Palmore* opinion do not reveal the extent of the Court’s holding.” Eileen M. Blackwood, *Race As A Factor in Custody and Adoption Disputes: Palmore v. Sidoti*, 71 CORNELL L. REV. 209, 221 (1985). In fact, while cobbling together a unanimous court, *see*, Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 558-72 (2014), commentators aver that, “*Palmore* was narrowly written precisely because Chief Justice Burger wanted to leave open the possibility that race could continue to be a factor in family law cases.” Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 231 (2017) (discussing, Blackwood at 575).

traditional" family to discern whether, in each instance, children therein would be "better off" transferred into a "traditional" husband-wife environment. Such intrusions into families' stability, not to mention the propensity for erroneous court ordered transfers based on prejudice, witlessness, and stupidity, promise to offend routinely the dignity of such families as a whole, and the dignity of their members individually. Accordingly, its purported reticence and imprecision notwithstanding, *Palmore's* principles discredit Chief Justice Robert's reasoning.¹⁰⁰⁹

Equally, Roberts' dissent, expressing the sentiments of a third of the Court, fails to account for why civil law permits divorce, marital separations, adoptions and other common conditions where children are not raised by both, sometimes not by either, of their birth parents.¹⁰¹⁰ Under the Chief Justice's theory, divorce, separation, and like impingements on marriage ought to be prohibited if the affected children would be "better off" under the *status quo*. Nor do the dissenters explain why the Law refuses to mandate

1009. Although jurists could interpose some doctrine to the contrary, and *Palmore v. Sidoti*, 466 U.S. 429 (1984) notwithstanding, the premise of the Chief Justice's dissent plausibly should apply as well to inter-racial marriages and marriages of mixed religions or of mixed ethnicities, all of which could provide cause for state officials to relocate happy, well-adjusted children into non-mixed environments on the supposition that, despite their perfectly decent upbringings, such children would be "better off" outside of the mixed-marriage environment. If Chief Justice Roberts and Justices Scalia and Thomas believe that enhancing the possible happiness or comfort of children is a sufficient basis to justify banning same-sex marriages, then the same deference to children's welfare should vindicate as well comparable bans on interracial, interreligious, interethnic, and similar mixed-marriages.

Of course, the dissenters dare not make any such argument, not could they plausibly do so. See, David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 258 (1995) ("Diverse families produce diverse individuals, individuals who experience intimate associational relationships outside of the state sphere from the very beginning of life and who acquire the basic associational skills necessary to form powerful groups outside the state sphere."). If pressed, they might well interpose some formalistic legal distinction based on "levels of scrutiny," that race, religious and ethnicity discrimination claims are or should be reviewed under a more exacting standard than claims based on homosexual *animus*. But, if the happiness -- indeed, the *dignity* -- of children is at stake as these justices claim, then regardless of the applied level of scrutiny, such children's welfare ought to trump the selfish marriage preferences of parents or guardians who put their personal predilections ahead of their innocent and hapless offspring's well-being.

Based on the principles of Deontological Originalism wherein levels of scrutiny cannot be used to distort the meaning of *dignity*, Robert's appeal to enhancing the welfare of presumably already well-cared-for children is unavailing.

1010. "[A]s high divorce rates in the United States attest, permitting different-sex couples to marry does not guarantee that the children will be raised in a family setting by those parents." Mark Strasser, *Obergefell, Dignity, and the Family*, 19 J. GENDER, RACE & JUSTICE 317, 337 (2016) (footnote omitted).

the marriages of recalcitrant unmarried parents who fail to acknowledge the harm remaining single, or marrying other persons, might inflict on their children. Similarly, death tragically may prevent children from growing up with both of their original parents. In such cases, under Robert's logic, the law should mandate that, if the single parent does not remarry shortly, a same-sex married couple may intervene to adopt the child if the record indicates that the child might be "better off" with two same-sex adoptive parents than with only one original parent.

In fact, assuming the Chief Justice is correct, his conclusion actuality would seem to delegitimize familial arrangements other than the marriage of birth parents lest society condones arrangements that are not "better" for the affected children. Robert's crabbed constitutional standard threatens to shunt aside as "non-traditional" all domestic settings except for the one that most closely mimics a two-opposite-sex-parent household. As Prof. Strasser chastised, "Roberts should be well aware that nontraditional families can provide a setting in which children might flourish."¹⁰¹¹ Indeed, both the *Obergefell* dissents and majority might be accused of "marriage exceptionalism," meaning, insensitivity to the many non-marital setting in which children can and do flourish.¹⁰¹²

1011. *Id.* at 338 (citing, Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629, 642 (2004)). For instance, as one student note explained, in addition to "biological families (or an individual's family of origin),"

Th[e] standard scheme constructed along marriage and blood relationships conflicts with the assertion of many lesbian and gay men that "families should not be confounded with genealogically defined relationships." Instead, many gays and lesbians subscribe to a broader definition of family, which encompasses "fictive kin," meaning family members that are "chosen" outside of blood relationships. These nontraditional families, made up of chosen members, include friends, lovers, former lovers, co-parents, adopted children, children from previous heterosexual relationships, and children conceived through insemination.

Annick Persinger, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L. J. 137, 148 (2010) (note) (quoting, Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* 2, 106 (1991) and citing Weston at 3); see also, e.g., Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J. L. & PUB. POL.'Y 1, 3 note 2 (2015) ("Nontraditional families would include divorced families, remarried families with children by different parents (blended families), same-sex families, unmarried cohabiting families, children raised by relatives, stepparent families, and the like. See A Generation at Risk, GRIEF SPEAKS (May 19, 2014), <http://www.griefspeaks.com/id113.html>"); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL.'Y 107 (1996) (broad definition of family).

1012. E.g., Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 168 (2015); Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 29 (2015).

Along such lines, one cannot deny that the *Windsor-Obergefell* Court does not offer comprehensive explications of the many propositions that it rightly engaged to support their singular and magnificent application of the *dignity paradigm's* clear if unattributed Kantian morality. Put kindly, the majority opinion (and the dissents as well) comprise, "underdeveloped line[s] of argument ..."¹⁰¹³ Most particular is the question of how the justices conceive homosexuality. As the foregoing discussion of the "homosexual rights cases" show, there surely remains no doubt that, contrary to the uninformed claims stemming from the lengthy history of untoward prejudice,¹⁰¹⁴ LGBTQ individuals and their associated sexual practices portend neither new nor unique dangers not already tolerated for heterosexuals and heterosexual sexual practices. Nonetheless, important works such as Ann B. Goldstein's fascinating article explain how courts and commentators often, "oversimplify[] and distort[] a complex historical record ... [and] misuse[] the relatively modern concept of 'homosexuality' to depict the past."¹⁰¹⁵ Even so, the empirical and logical proofs detailed in scholarly

1013. Mark Starsser, *Obergefell, Dignity, and the Family*, 19 J. GENDER, RACE & JUSTICE 317, 318 (2016). One may suspect that *Obergefell's* lack of clarity and precision was due more to timorousness -- fear that being too explicit and detailed would reveal all the more that the Court believes in deontological Kantian morality -- than to a lack of intellectual ability to elucidate nebulous ideas; but, such merely is speculation.

1014. As the Second Circuit rightly if curtly concluded, "It is easy to conclude that homosexuals have suffered a history of discrimination. [Appellant Edith] Windsor and several amici labor to establish and document this history, but we think it is not much in debate." *Windsor v. U.S.*, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd.*, *U.S. v. Windsor*, 133 S. Ct. 2675 (2013). Certainly, commentary confirms the Second Circuit's conclusion. *E.g.*, Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J., 89, 123-29 (1997); Dov Berger, *Separating Civil Unions And Religious Marriage--A New Paradigm For Recognizing Same-Sex Relationships*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 163, 169 (2007) (footnote omitted) (student note arguing, *inter alia*, "The history of homosexuality is a long and unfortunate one, filled with significant bigotry and danger."). Scholarship has noted the "historical process by which the homosexual identity was labeled perverse by those in the fields of science, medicine, psychology, and media [and one may well add, the law] over the last century." Margaret Bichler, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167, 168 (2008) (note) (citing, Michel Foucault, 1 *The History of Sexuality: An Introduction*, 42-43, 97-101, 105-06 (1990)).

1015. Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073, 1081-89 (1988) (quote at 1086). For instance, "In classical Greece and Rome, sexual practices between men were not uniformly condemned, and some were widely accepted; under Roman rule, even marriage between men was possible until at least 342 A.D." *Id.* at 1086-87 (footnotes omitted); *see also, e.g.*, Berger, *supra* note 1014, at 168-69 (student note discussing, *inter alia*, various marriage-like same-sex unions throughout history).

literature¹⁰¹⁶ provide sufficient bases to show that the Supreme Court's "homosexual rights" jurisprudence properly has determined that discrimination based on homosexuality (and, one would presume any LGBTQ status)¹⁰¹⁷ is motivated by "a bare desire to harm" the "politically unpopular group" of LGBTQ individuals and, thus, unconstitutionally treats those individuals merely as means to promote immoral prejudices.¹⁰¹⁸

1016. *E.g.*, Christopher R. Leslie, *Dissenting from History: The False Narratives of the Obergefell Dissents*, 92 IND. L.J. 1007 (2017); Kevin M. Barry, Brian Farrell, Jennifer L. Levi, and, Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507 (2016); Larry Mutz, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 WOMEN'S RTS. L. REP. 69 (2006); Polikoff, *supra* note 996, at 549-61 (detailed discussion refuting claims that homosexuality is unnatural, immoral and dangerous); articles cited *supra* at note 1011.

1017. *E.g.*, *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018), *cert. filed*, (NO. 18-658), Nov 19, 2018, (affirmed that, "the District Court correctly refused to enjoin the defendant School District from allowing transgender students to use bathrooms and locker rooms that are consistent with the students' gender identities as opposed to the sex they were determined to have at birth."); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (equal protection violation to discharge a transgendered individual based on sexual stereotyping. Firing of Ms. Glenn from her job as an editor in the Georgia General Assembly's Office of Legislative Counsel "because of her gender non-conformity" was predicated on no legitimate governmental interest but rather reflected "a bare desire to harm" a member of a politically unpopular group); *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) (transgendered students have standing to sue and likely will prevail on the merits in suit claiming sexual stereotyping discrimination in violation of the Equal Protection Clause and 20 U.S.C. § 1681, *et seq.* (popularly referred to as "Title IX")); *G.G. v. Gloucester County School Board*, 654 Fed. Appx. 606, 607 (Mem) (4th Cir. 2016) (Davis, S.J., concurring, "The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution." (citations omitted)); *see generally*, Barry *et al*, *supra* note 1016.

1018. This writing notes in passing that even accepting that the *Windsor-Obergefell* explication of rights may be incomplete and shallow, any arguable dearth if analysis cannot validate what must be one of the most ridiculous and puerile substantive due process actions ever conceived. *Burdick v. Kennedy*, 700 Fed. Appx. 984 (11th Cir. 2017) (*per curiam*) rightly dismissed attorney Austin Burdick's Fifth Amendment due process claim against the five justices in the *Obergefell* majority (yes, defendant Kennedy is Justice Anthony M. Kennedy whose co-defendants are Justices Breyer, Ginsburg, Sotomayor, and Kagan). The Court ruled that Burdick lacked standing because he alleged only "vague" and "abstract assertions" to support his claim that, "he suffered a concrete injury when the Justices 'rendered the Constitution a nullity' in *Obergefell*, preventing him from making certain arguments to 'protect his clients' constitutional rights' and depriving him of his interest in his law license." *Id.* at 987, 985.

This amazingly bizarre suit is worth detailing just because it *is* so bizarre. Based on a "thorough review" of the record, *id.* at 986, in a meticulous opinion for which none of the judges take credit as the author, after carefully recounting the doctrine of constitutional standing, the unsurprisingly unanimous Court explained,

This is not to claim that the Court's explications (such as they are) expounding the intricate nature and dynamics of being LGBTQ are wholly or even predominantly correct aside from the legal conclusion that there is no sufficient justification to withhold from same-sex couples the right to marry on terms identical to those available to opposite-sex couples.¹⁰¹⁹

On this record, we cannot say that the district court erred — much less “belittle[d]” Burdick’s claim — by concluding that Burdick’s general proposition that he anticipates he will lose arguments that are based on legal theories that the Supreme Court rejected in *Obergefell* does not implicate a “legally protected interest.” Indeed, at the hearing before the district court, Burdick acknowledged that he has not lost his law license, and his participation throughout this case has revealed that he is still able to practice law and make arguments in the federal courts. His only complaint, it seems, is that the arguments he makes on behalf of his clients will not be successful in light of *Obergefell*. But because there is no constitutional provision, statute, or other authority to suggest that a court must accept a party’s arguments, a lawyer has no legally protected interest in winning those arguments.

Id. at 987 (citations omitted).

As though that were not enough to answer Burdick’s inane complaint, the Court added, “And even if Burdick had a legally protected interest in winning his constitutional arguments — and plainly he did not — the district court did not err in concluding that Burdick’s allegations are ‘vague,’ ‘abstract assertion[s]’ that were insufficient to establish a concrete injury. Burdick’s complaint identifies no specific legal argument he has lost or will imminently lose as a result of *Obergefell*. Nor does it identify any factual basis for his allegation that *Obergefell* will cause him to lose income.” *Id.* Having lavished substantial efforts resolving the standing issue, the Circuit determined it did not have to address the matter of absolute judicial immunity, an alternative basis the Northern District of Alabama used to dismiss Burdick’s action. See, *Id.* at 988 (declining to review, Burdick Kennedy, 2016 WL 7974648 at *1-2 (N.D. Ala. 2016) (judicial immunity argument)).

For all its detail, the Eleventh Circuit did not explain why it expended precious resources, much less why it gave any credence whatsoever, to Burdick’s patently meritless lawsuit. One might have thought a *per curiam* memorandum affirming without further explanation the District Court’s dismissal would have been all this appeal was worth, except possibly to remand for a hearing on sanctions for frivolous litigation. As noted, among the facts evincing his lack of standing, the Court mentioned that, “Burdick ... has not lost his law license.” Perhaps that state of affairs should be revisited in light of what Mr. Burdick thinks is a sufficiently pleaded complaint. Even without the specter of sanctions, presumably since July 28, 2017, the date *Burdick* was announced, the *Obergefell* majority, indeed judges throughout America, are sleeping more securely.

1019. Indeed, some absorbing scholarship applauds the judicial recognition of LGBTQ dignity while both worrying about and proposing solutions to the problem that relevant opinions, particularly *Obergefell*, “describe[] sexuality as binary and suggests that sexual orientation [exclusively] is immutable, normal, and constitutive of individual identity. As scholars from Kenji Yoshino to Elizabeth Glazer have shown, the kind of binary definition of sexuality articulated by *Obergefell* promises to exclude those with more fluid sexual identities and experiences.” Mary Ziegler, *Perceiving Orientation, Defining Sexuality after Obergefell*, 23 DUKE J. GENDER L. & POL.’Y 223, 224 (2016) (citing, *inter alia*, Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 998-1026 (2012) and Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000)).

Consistent with the principles of Deontological Originalism espoused in this article, the *homosexual rights cases*' application of the *dignity paradigm* foretells, one may hope, a larger, equally apt constitutional holding that because LGBTQ individuals and classes deserve the same respect bestowed on "heterosexual" individuals and classes, governmental LGBTQ discrimination however manifest is unconstitutional unless such discrimination respects the dignity of LGBTQ individuals, an eventuality unlikely in the extreme.¹⁰²⁰

For the purposes of this article, the Court's prevailing "homosexual rights" decisions are correct in their most fundamental premise: whatever its authentic nature and descriptors, LGBTQ discrimination treats those individuals and classes not as ends in themselves, but rather, merely as means, likely to promote untoward bigotry. Therefore, it would distort, indeed pervert the *dignity paradigm* to use some immaterial aspect of *Obergefell* to suggest that Government may treat as merely means "those with more fluid sexual identities and experiences."

1020. See, e.g., *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017) (*per curiam*) (district court judge abused his discretion thus depriving homosexual criminal defendant a fair trial, by rejecting defendant's motion that as part of the court's *voire dire* inquiry, the judge determine whether any perspective jurors harbor discriminatory bias against gay or homosexual individuals).

In that regard, evincing that *Obergefell* ought not be read narrowly, a short while ago, the Supreme Court overturned an Arkansas law that refused, "to issue birth certificates with the female spouse's name as a parent along with the birth mother's name." *Pavan v. Smith*, 137 S.Ct. 2075 (2017) (*per curiam*) (citation to Ark. Statutes omitted). The Court found that, "As a result, same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school." *Id.* at 2078 (citing, *Pet. for Cert.* 5–7 (listing situations in which a parent might be required to present a child's birth certificate)). Accordingly, the disparate rules concerning birth certificates offend *Obergefell*'s determination that under the Due Process Clause of the Fourteenth Amendment, States may not "exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.* (quoting, *Obergefell*, 135 S.Ct. at 2605, and, citing *id.* at 2601 (specifically mentioning birth certificates among relevant "rights, benefits and responsibilities" of civil marriage)).

Rejecting the State's argument that birth certificates are unrelated to the marital status of children's parents, the Court concluded, "Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition." *Id.* at 2078–79. Moreover, as a separate basis for invalidation under *Obergefell*, the discriminatory birth certificate law could stigmatize the offspring of same-sex couples as different or less from those of opposite-sex couples, married or not. *Id.* at 2078.

Thus, the Court is continuing the Deontological Originalist premises of *Obergefell*. "Indeed, the holding in *Pavan* is consistent with Justice Kennedy's observation in *Obergefell* that 'just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.'"

Perhaps, the time will come when for LGBTQ matters in particular as well as for the entire panoply of conceivable due process claims, the Court at last propounds the fullness of its *dignity paradigm* rather than hiding it. Nonetheless, for the purposes of Deontological Originalism, the Court at least provided the *minima*. Because it showed that there is no serious basis to aver that the challenged laws protect Society from truly harmful conduct, that is, governmental proscriptions against same-sex marriage enforced nothing better than, “a bare desire to harm a politically unpopular group,” *Obergefell* rightly concluded that same-sex marriage is not immoral, and, therefore, must be treated equally with opposite-sex marriage. *Accordingly, based on the Kantian morality implicit in the Court’s dignity paradigm, official discrimination against same-sex marriages treats the couples seeking to marry and their offspring not as ends in themselves -- human beings whose*

Michael J. Higdon, *Biological Citizenship and the Children of Same-Sex Marriage*, 87 GEO. WASH. L. REV. 124, 158–59 (2019) (citing, “*Obergefell*, 135 S. Ct. at 2601 (emphasis added)”); *see also*, Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169, 173–74 (2017) (“What the Court did in *Pavan* ... was no small thing, ... [T]he Court genuinely scrutinized the government’s ostensibly biological justifications for treating the sexes differently in contexts where it has traditionally declined to do so. ... the Court broke with this tradition. It did not give the government a free pass, as it might have in the past, because the litigants challenging the laws were gay, ...”); Billy Corriher, *Putting Equality to A Vote: Individual Rights, Judicial Elections, and the Arkansas Supreme Court*, 39 U. ARK. LITTLE ROCK L. REV. 591, 611 (2017) (quoting, *Cooper v. Aaron*, 358 U.S. 1, 17 (1958), “In *Pavan*, the High Court again made it clear that its marriage equality ruling ‘can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them’”) *see, e.g.*, *McLaughlin v. Jones in & for Cty. of Pima*, 243 Ariz. 29, 31 (2017), cert. denied sub nom. *McLaughlin v. McLaughlin*, 138 S. Ct. 1165 (2018) (“1 Under A.R.S. § 25–814(A)(1), a man is presumed to be a legal parent if his wife gives birth to a child during the marriage. We here consider whether this presumption applies to similarly situated women in same-sex marriages. Because couples in same-sex marriages are constitutionally entitled to the “constellation of benefits the States have linked to marriage,” *Obergefell v. Hodges*, 135 S.Ct. 2584, 2601 (2015), we hold that the statutory presumption applies. We further hold that Kimberly McLaughlin, the birth mother here, is equitably estopped from rebutting her spouse Suzan’s presumptive parentage of their son.”); *Appel v. Celia*, 98 Va. Cir. 140 (2018) (at *1, single judge’s ruling in the form of a letter, “[T]he Court must address two matters of first impression in Virginia. First, should a child born through assisted conception to a woman in a same-sex marriage be considered a child “born of the parties” for purposes of a final decree of divorce? Second, should a child born through assisted conception to the other woman in the same-sex marriage be considered a child “born of the parties” for purposes of a final decree of divorce if the child was born while the couple was joined by a civil union? The Court answers both questions in the affirmative.”); *In re Marriage of Hogsett & Neale*, 2018 COA 176 (CO. Ct. App. 2018) (requirements for common law marriage applies equally to same-sex and opposite-sex claimed marriages).

innate dignity makes them worthy of respect, -- but rather, merely as means to perpetrate unjustified bigotry.

Based on the foregoing discussion, as exemplified by the “homosexual rights” decisions, the *dignity paradigm*, not the *deeply rooted principles* approach, fulfills the moral imperatives of Deontological Originalism’s enforcement through the Constitution of the Declaration of Independence’s theory of natural rights derived from natural law as explicated by Kantian morality. Nearly 250 years after the signing of the Declaration of Independence, *Obergefell-Windsor* is a stunning, bravura yet frustratingly incomplete culmination-to-date of Deontological Originalism, the vindication of individuals’ natural rights discerned through neutral reason and enforced *via* the Constitution as America’s highest law.

VII. CONCLUSION --

This article, finished just after the thirtieth anniversary year of my first law review publication,¹⁰²¹ is the culmination of over four-decades of law study, law practice and law teaching. It captures much of what I know -- or at least what I think I know -- about, to purloin H.L.A. Hart’s book title, *the concept of law*.¹⁰²² I end this work, then, by re-quoting from Part 1, *Originalism and Deontology*, Oliver Wendell Holmes:

Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. ... The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.¹⁰²³

Based on the aggregation of law and philosophy presented herein, I believe that for all the political pragmatism and egotistic drives that haunted their acts, the Framers *circa* 1776, 1787, 1791 and 1864, and us their successors, share that same romanticism -- the faith that a “nation of laws”

1021. Bayer, *supra* note 980 (*Mutable Characteristics etc.*).

1022. H.L.A. Hart, *The Concept of Law* (Penelope A. Bullock & Joseph Raz eds., 2d ed. 1994) (1961). I am borrowing Hart’s excellent book title, but, certainly not his stance on positive law.

1023. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

can and must elevate morality as its highest law, enforce that highest law earnestly and successfully, and, by so doing, fulfill the promise of moral comportment, in Holmes' elegant prose, "[to] connect ...with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." That is what Deontological Originalism is: the quest for "the right," not "the good," as the utmost law of the Constitution and the noblest endeavor of Humankind.