Natural Law and the Evolution of the Modern American Political State

by

William Thurman Nutt

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Dr. Nolan Argyle

Valdosta State University

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At the end of the first decade of the Twenty-first Century, the citizens of the United States face a broad range of political issues of national importance. The Declaration of Independence, the instrument used to cast off the shackles of tyranny of the British Crown, and the Constitution, which enumerates our personal liberties and limits of our government, are themselves based on a higher authority. The foundations of these documents are pronouncements of natural law. It is essential that citizens understand the issues clearly in the context of our founding documents and use the fundamental concepts as a guide to inform our political response.

The evolution of natural law can be traced back to the beginning of western civilization with the growth in communities and the fundamental need for an equitable distribution of resources and procedures to settle disputes among its members. To promote the preservation of the group, informal agreements and commandments between members were developed into written codes. Amidst the flourishing Greek City-States, Aristotle first proposed that natural laws of the universe guide natural phenomena to progress toward its potential. Accordingly, humans achieve their potential for happiness in an honorable life in a civil society governed by natural law (Portis 2008).

The Romans further developed the concept and application of natural law as a unifying force in their expansive multi-cultural empire. With the fall of Rome, Christian monks preserved the western traditions of jurisprudence during the Middle Ages. Considered one of the greatest philosophers in western thought, St. Thomas Aquinas, a thirteenth century Dominican monk, provided much of the foundation for the understanding of natural law that has come down through the centuries. In his *Summa Theologica,* Aquinas defines natural law in broad moral terms of an individual's inherent inclination to act according to reason and virtue. Humans can achieve happiness and peace by striving to understand God's plan and natural order, or what

Aquinas refers to as "External Law". While humans cannot comprehend much of God's plan, our maker has given us the ability to reason and know right from wrong and to act accordingly. This is the essence of natural law (Portis 2008).

During the 17th Century, two English political philosophers, Thomas Hobbes and John Locke, were instrumental in developing the "social contract" theory of civil society. They were influenced by sweeping changes occurring in Europe during this time. Locke's writings were an influential part of the Enlightenment. Thomas Hobbes views were shaped by events of the Civil War in England. While both Hobbes and Locke believed that within human society the social contract is formed among members, the provisions of the contract differ substantially between the two philosophers. The primary differences concern a person's natural ability to form a just and equitable society and the capacity of people to govern themselves (Portis 2008).

Hobbes established his theories about human society in his most important book *Leviathan*, published in 1651. Hobbes main premise was that humans were born to be self-serving and violent creatures whose main motive is self-preservation, and in a world unrestrained, would exist in a hellish "state of nature". Humanity's struggle in a world of limited resources forces competition among citizens in a "war of all against all". In this view, man willingly gives up some of his freedom to a superior force in order to survive. In the world according to Hobbes, the supreme power or Leviathan is the absolute authority who, even though unchecked, will protect the peace and property of the citizens (Sommerville and Santoni 1963).

Locke believed that a person is born without any innate ideas concerning society and has no instincts that move the individual towards violent behavior. He believed that society and human nature, shaped by experience, would naturally form systems that allowed people to be free in a tolerant and rational community. Throughout his writings, Locke refers to God's "laws of nature" that govern and guide humankind's actions in establishing a just and equitable society.

According to Locke, natural law is not a natural inclination of a person, but is a consensus that is observed in nature and learned (Sommerville and Santoni 1963).

While acknowledging that humankind is capable of purely selfish and violent behavior, Locke firmly believed in the capability of human society to form governments that respected the rights of individuals to be independent and preserve life and property of their fellow citizens. In his *Treatises of Government*, Locke held that the property of citizens is intimately related to and derived from their own personal labor. Scarce resources or common goods become personal property when an individual extracts or transforms them. This limits the accumulation of wealth by any one person. Locke gives God credit for creating a bountiful existence for humans to establish a harmonious society. In Locke's society, the will of the people rule with built-in "checks and balances" and possess the supreme power and could, if conditions warranted, replace the leaders by institutional means or by force if necessary (Sommerville and Santoni 1963).

When the signers of the Declaration of Independence and the framers of the Constitution conducted their debates, they were influenced by writers of political philosophy that drew on the principals of natural law such as Hobbes and Locke. These two philosophers advanced the concept of natural law and the essential character of humankind as the basis of government and the order of society. The principal framers of the documents that founded our nation, primarily Jefferson, Hamilton, and Madison were students of lesser known but influential writers. Wolverton (2010) refers to these writers as the "Four Horsemen of American Liberty": Algernon Sidney, Samuel von Pufendorf, Jean-Jacques Burlamaqui, and Emmerich de Vattel.

It was Burlamaqui's writings that prompted Jefferson to include the "pursuit of happiness" instead of "property" as a fundamental right in the Declaration. Using Burlamaqui's logic, Jefferson felt that happiness was more certain than property. The phrase "all men are

created equal" was drawn from the writings of Pufendorf's assertion of "self-evident" natural law that "human nature belongs to all men… [and] every man should esteem and treat another man as his equal by nature…" Algernon Sidney's martyrdom at the hand of the British Crown for asserting his natural rights granted him by the Magna Charta gave resolve to revolutionary sentiment among the signers of the Declaration of Independence. Vattel, judged by Wolverton to be the most influential, was often cited by early Courts of the United States in decisions concerning matters of international law. Madison was influenced by Vattel in constructing the Constitution by his warning that constitutional law is usually destroyed gradually and covertly from within rather than by direct overt threats (Woolverton 2010).

While Madison was arguably the most able and enlightend scholar of current political literature at the Contstitutional Convention of 1789, Murphy (2009) argues that many of our founders were already expert in drafting constitutions based on their studied understanding of natural law and more importantly, they understood their limitations. In writing state constitutions, where personal liberties were established by limits on the powers of government, our founding fathers participated in creating and running the individual state governments and many had experience in the Congress under the Articles of Confederation. Their collective experience in the age of the Enlightenment produced a document that so far has withstood civil war and numerous other challenges. It remains relevant because of its strong foundation in natural law. The framers knew that future generations would have to interpret the document in light of their own conditions and realities. Quoted in Murphy, Noah Webster in his commentary on the Bill of Rights stated that "[t]he very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia".

When we discuss our fundamental rights in light of our pressing social issues, we often find ourselves quoting from the Bill of Rights and Declaration of Independence. Many experts on either side of the issues are able to inform us what the Constitution says about the limits established on the power of our government. Some "pundits" are self-appointed constitutional scholars purporting to possess exceptional insight and ability in that they are able to tell us with certainty what the Framers of the Constitution intended when drawing up the fundamental law of our nation in 1789.

The current national discussion concerning one constitutional issue surrounds the millions of individuals and families living in the United States without legal documentation. Revision of the Fourteenth Amendment to the United States Constitution is one of the possible remedies proposed. Among those that demand that the Federal government take strong action against illegal immigration, a majority believe that birthright citizenship provided for by the Fourteenth Amendment provides a major incentive for illegal immigrants to come to the United States. They contend that so called “anchor babies” who become United States citizens by being born on United States soil, ties the hands of the immigration authorities in deporting their families who are here illegally.

The Constitutional argument is complex; however, the underlying concept in natural law is not. According to Neuman (1996), the tradition in common law goes back to England during the 17th century. According to natural law, a personal relationship is established between the king and an infant at birth. The child incurs a natural debt at birth because of the king’s protection and the infant becomes a subject for his entire life. This natural law is the origin of the common law concept of *jus soli* where citizenship is a right by soil, a view that the colonies in America adopted and incorporated into many colonial charters.

Other than provisions for the exclusion of “other persons”, meaning Negro slaves, and “Indians not taxed”, the United States Constitution does not say much about how citizenship is defined. After the Civil War, the Congress had to make sure that the 1857 Supreme Court decision in *Dred Scott v. Stanford* (19 Howard 393), the case that affirmed non-citizenship of Negro slaves, would be over turned by constitutional amendment. Congress left no chance for subsequent federal or state government enactments to abridge the rights of the newly freed slaves. The wisdom and meaning of the wording of the amendment that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside” has been the main focus of the opposition. This provision has been debated and interpretations of the meaning of “subject of the jurisdiction thereof” is the main avenue of attack that opponents of birthright citizenship have used to argue that it was not the intent of the authors of the amendment to include everyone. Especially not those here illegally.

Neuman manages to refute each point of the argument and is especially convincing when he counters the claim that the framers of the Fourteenth Amendment did not have to deal with illegal immigrants. Opponents contend that the United States had open borders up until the Civil War and could not have foreseen our current predicament. Neuman argues that actually, there were many illegal immigrants at the time of the passing of the Reconstruction Civil Rights Amendments. Furthermore, their situation was considered and indeed the blanket birthright citizenship was purposeful. With the support of the Constitution, states made it illegal to import slaves after 1808. It was widely believed that tens of thousands of slaves were imported illegally to fuel the growth of the cotton economy of the South up to the Civil War. The status of these slaves and their children was uncertain at the time of the passing of the Fourteenth Amendment. Congress’s purpose was to make sure these persons were included in the granting of citizenship.

As was the case with the *Chinese Exclusion Act of 1882*, Congress has the right to limit who is allowed to be a resident and deny citizenship to any alien regardless of status. In a reaffirmation of the birthright citizenship clause of the Fourteenth Amendment, the Supreme Court held in 1898 in *United States v. Wong Kim Ark* (169 U.S. 649) that a child born of Chinese parents residing in the United States becomes a citizen of the United States.

In 1982 in *Plyler v. Doe* (457 U.S. 202) the Supreme Court struck down a Texas law that restricted and effectively denied education to children who were brought to the United States illegally by their parents. These students were indeed "persons" and consistent to the equal protection clause of the Fourteenth Amendment, could not be denied a free education that was given to children of citizens or lawfully admitted aliens. Once again, the "within the jurisdiction thereof" defense of the discriminatory law was dismissed. The high court held that for a state to take the phrase "within the jurisdiction thereof" and attempt to use it to single out a class of individuals and invalidate the equal protection clause would undermine the fundamental purpose of the Fourteenth Amendment. The majority opinion of the Supreme Court in this case states, "These [due process and equal protection] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the protection of the laws is a pledge of the protection of equal laws." The opinion went on to say that for whatever cost savings the state may realize in denying education to children of illegal immigrants, it would not outweigh the long-term social cost to the state in increased crime and welfare payments. The majority opinion stated, "Without an education, these undocumented children, already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest socio-economic class."

The Reconstruction Amendments granted full civil rights to former Negro slaves. In addition to overturning the Dred Scott Decision, these amendments over turned state enacted discriminatory statutes or "Black Codes." Before the Civil War these laws, enacted by states in the North and South, prohibited migration and restricted other freedoms of Negroes, both slave and free. Immediately after the war, similar laws were reinstated by the states to provide for a stable workforce of former slaves. These laws effectively made segregation based on race legal. In many southern states, these laws were essentially the same as those in effect when slavery was a legal institution before the war. (Murphy 2009).

Even though full civil rights was given to freed slaves, as southern states regained full sovereignty after Reconstruction, they were able to bring about a system of legal segregation of whites and the "colored races" with "Jim Crow" laws. The Supreme Court decision in 1896 in *Plessy v. Ferguson* (163 U.S. 537) upheld these laws as long as segregated facilities were equal. It was obvious that these facilities were seldom equal. This was especially true in education. After World War II it became apparent that Negro citizens were indeed equal with whites in the effort to overthrow Fascism. In the subsequent fight to counter the growing Communist threat, the segregated systems in the United States represented a basic hypocrisy in American society. After President Truman integrated the Armed Forces in 1948, the Supreme Court overturned *Plessy* in 1954 in the landmark decision of *Brown v. Board of Education* (347 U.S. 483), thereby invalidating the "separate but equal" doctrine. As expected, desegregation was not well received in the South and resistance resulted in increased violence against blacks at the hand of white segregationists (Tyndall and Shi 2004).

Open conflict reached a high point in Birmingham, Alabama, when demonstrators of Negro civil rights groups were met in the streets with police brutality in the form of police dogs, fire hoses, and billy clubs. In his "Letter from Birmingham Jail", civil rights leader Dr. Martin

Luther King, Jr., one of the leaders of the demonstration incarcerated during the event for parading without a permit, described in terms of natural law the moral basis of the fight for racial equality. Referencing the natural law theories of St. Thomas Aquinas, Dr. King argued that unjust laws are not laws and need not be obeyed. Human laws that are not based in natural law such as the segregation laws are dehumanizing and destroy the soul. It is immoral to obey them. Specifically Dr. King contends in his letter that the majority enacts laws and established other means of intimidation that effectively abridge the Negros' right to vote resulting in a minority that has no voice in making the law. Clearly, such laws are entirely without any natural law foundation and cannot be tolerated by a just society. Fundamentally, laws that compel the minority to act in a way that is not applicable to the majority cannot be considered just laws (King 1963).

Dr. King's letter was written to white clergy who recommended that rather than protesting in the streets, a more non-confrontational approach should be used and, as usual, suggested fighting the unjust laws in the courts. The white clergy generally acknowledged that there were racial injustices that must be addressed, but advised that the Negro must be patient and in time, they will receive their civil rights. Dr. King countered that engaging in non-violent direct action may be a form of extremism, but in the tradition of the extremism of Thomas Jefferson when he asserted the basic rights of humanity in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal". Dr. King goes on to say that, "One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. An individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law" (King 1963).

The non-violent demonstrations created the tension and precipitated the crisis that Dr. King had anticipated. The police brutality, shown on national television, created a sense of urgency that pushed southern leaders who held moderate positions on the segregation issue to support sweeping civil rights and voting rights legislation that Congress passed the following year in 1964.

The two forgoing illustrations of the application of fundamental natural law as expressed in the Constitution and the Declaration of Independence, follow important social issues down through our history and are current to the present day. We are fortunate to live in a country where our rights as citizens are preserved by law and if need be, we can assert our rights in peaceful direct demonstrations if our conscience so directs us. Upon summary analysis, the two issues presented here are the most self-evident rights and privileges established by our founders based on natural law, but they have been troubling and disruptive of our society historically and continue to frame major national debates today.

In reflecting on the writings of Hobbes and Locke and the terms of the social contract that we have committed ourselves to, on one side of the political debate, some believe our society is on the verge of slipping into the chaotic state of nature Hobbes foresaw. Others optimistically believe in our capability of achieving great things in a just and equitable society that Locke anticipated.

The national issues are important because they deal with the fundamental direction that our country will take and will affect the future of generations that follow us. Our well funded political parties and their elected representatives seem dysfunctional at times in finding solutions to big issues involving environmental and energy security policy, social security, immigration reform, and health care to name a few. The system of checks and balances between the major

branches of our government and the federalism built in to our Constitution by our founders must bear much of the responsibility for the intransigence of our government.

The natural law basis for the freedoms built into our founding documents has resulted in a diversity of beliefs and ways of living found in no other country on earth. The basic protections allow us to form our communities in the way that best suits our needs and has resulted in dichotomies and contradictions that to the outsider must seem confusing. Most Americans' jobs involve interaction with a diverse group of individuals all working toward common goals in a spirit of friendly cooperation. Many will return home after work to segregated neighborhoods and communities. Small bands of vigilante "minutemen" patrol the border with Mexico believing that their direct action will make a difference in stemming the tide of illegal immigration. Cities across the United States are accused of being "sanctuary cities" providing services to residents regardless of immigration status believing that the respect in the basic human dignity of individuals is their highest civic duty. Our astounding progress thus far has not been the result of good fortune or historical accident. Our success and prosperity as a nation is the direct result of our foundation in and respect for the natural law of humankind.

REFERENCES

King, Martin Luther, Jr. 1963. *Letter from a Birmingham Jail.* (April 16). The Martin Luther King, Jr., Research and Education Institute at Stanford University. http://mlk-kpp01.stanford.edu/index.php/resources/article/annotated_letter_from_birmingham/ (October 15, 2010).

Murphy, Walter F. 2009. **"**Designing a Constitution: Of Architects and Builders." *Texas Law Review* 87 (June): 1303 -35. Academic Search Complete (October 8, 2010).

Neuman, Gerald L. 1996. *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law.* Princeton, NJ: Princeton University Press, http://site.ebrary.com/lib/valdosta/Doc?id=10035791&ppg=175.

Portis, Edward B. 2008. *Reconstructing the classics: Political Theory form Plato to Weber.* Washington: CQ Press.

Somerville, John, Ronald E. Santoni, eds. 1963. Social and Political Philosophy.: Readings from Plato to Gandhi. New York: Anchor Books.

Tindall, George B. and David E. Shi. 2004. *America: A Narrative History.* 2 vols. New York: W.W. Norton and Company.

Wolverton II, Joe. 2010. "Forgotten Influences on the Founders." *New American* 26 (January 4): 34-5. Academic Search Complete (October 8, 2010).