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Joseph Story, the Natural Law, and Modern Jurisprudence

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Abstract

As a natural law thinker, Supreme Court Justice Joseph Story believed that human nature is inherent and unchangeable. Story wrote that God fixed the laws of mankind's being, and thus it is "altogether unchangeable in its first principles." But whereas Story's philosophy appeals to truths that transcend the individual, the modern Supreme Court makes the individual the sole arbiter of what is true. Story would have disagreed with this relativistic assumption because it is precisely man's fixed nature that makes the natural law universally applicable, as our own Declaration of Independence makes clear. From Story's perspective, the Court's recent jurisprudence is at war with itself: It purports to protect universal principles of justice, yet its assumptions undercut the very idea of universal principles.

It is a singular honor to be delivering the Joseph Story Distinguished Lecture at The Heritage Foundation, and Ed Meese's presence here tonight makes this honor all the more meaningful.[1] For those of us who believe that judges are required to enforce the original meaning of the Constitution, General Meese is a real hero.

Not only was Ed instrumental in the appointment of judges who value the original meaning of the Constitution, but he also made the case for this interpretive approach in high-profile speeches during his time as Attorney General. Those speeches had a tremendous impact on legal culture, and it is fair to say that without Ed Meese, the effort to restore the original meaning of the Constitution would

Key Points

- Joseph Story believed in the primacy of natural law over positive law and in the idea that the natural law is rooted in the common nature of man.
- Story would have disagreed with the relativistic assumptions of the Supreme Court's *Planned Parenthood v. Casey, Lawrence v. Texas*, and *United States v. Windsor* decisions because it is precisely man's fixed nature that makes the natural law universally applicable.
- It is one thing for a legislator, who is buffeted by the tumultuous winds of politics and self-interest, to warp the positive law. It is quite another for a judge, who is deliberately insulated from such concerns, to break the union of natural and positive law. The former is an example of reason obscured; the latter, an example of reason ignored.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1239**

The Joseph Story Distinguished Lectures

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not have been nearly as successful as it has been. For that, all of us owe Ed our gratitude.

The name of this lecture carries with it a great legacy. Through opinions and essays, through commentaries and treatises, Justice Joseph Story's influence continues to resound through American legal thought. And rightly so. His breadth of knowledge was extraordinary, spanning subjects as varied as promissory notes, constitutional law, and even natural law.[2]

James McClellan, a legal scholar associated with Russell Kirk, once said that Story's work on natural law "stands out like a ray of light in the midnight hour of American political theory."[3] Indeed, it is Story's natural law philosophy that I wish to focus on this evening. A comprehensive analysis of Story's jurisprudence is, of course, far beyond the scope of this lecture. Rather, I offer a sketch of his views on the natural law with the modest goal of showing how some of his insights might bear on a few of today's most hotly contested legal disputes.

Story's Understanding of the Relationship Between Natural Law and Positive Law

My analysis of Story's natural law philosophy must begin by acknowledging the limits of my inquiry. To speak of Story's philosophy is to imply that Story had a consistent, coherent understanding of natural law, but the truth is that there was a good deal of confusion about natural law in the late 18th and early 19th centuries. The *natural rights* theory of John Locke and other Enlightenment thinkers was often unwittingly conflated with the *natural law* theory offered by philosophers like Thomas Aquinas,[4] and Story himself was guilty of this confusion from time to time.[5]

Fortunately, however, we need not detain ourselves with the differences between natural law and natural rights, because the aspects of Story's philosophy that I wish to examine tend to parallel fairly well—albeit imperfectly—those of the classic natural law tradition.

Let us begin, then, by examining Story's understanding of the relationship between natural law—the law that exists without any human author—and positive law—the kind of man-made law that Congress passes and that I interpret in my everyday role as a judge.

In addition to being a Justice of the Supreme Court, Story was one of the great legal scholars of his day. He was a chaired professor at my alma mater, the Harvard Law School, and it was as a professor that Story produced his famous *Commentaries on the Constitution*, which served as the textbook for his course on constitutional law.[6]

Given Story's extensive body of scholarship, it is unsurprising that he penned an encyclopedia entry on natural law, which appeared in Francis Lieber's *Encyclopedia Americanae*.[7] This encyclopedia essay remains Story's most complete exposition of his view on natural law,[8] and so it is appropriate that we focus our examination of Story's philosophy there.

Unlike the laws that are passed by Congress, natural law does not change. Story says that God has "fixed the laws of [mankind's] being" and "has the supreme right to prescribe the rules, by which man shall regulate his conduct."

Story's essay opens by defining natural law as "that system of principles, which human reason has discovered to regulate the conduct of man in all his various relations."[9] Immediately, we should notice that Story sees natural law as "something pertaining to reason," to use the words of Aquinas.[10] It is something we can all access through reason rather than something known only by revelation.[11]

But unlike the laws that are passed by Congress, natural law does not change. Story says that God has "fixed the laws of [mankind's] being" and "has the supreme right to prescribe the rules, by which man shall regulate his conduct."[12] Again, we see the agreement between Story and Aquinas, who wrote that the natural law is "altogether unchangeable in its first principles."[13]

It is important for us to pause here and to understand that the natural law applies to man because of the *nature of man* and that natural law thinkers, including Story, believe that man's nature is, in important respects, *inherent and unchangeable*. This is critical to grasping why it has been said that the natural law is universally binding on mankind. Indeed, our Declaration of Independence explicitly assumes a fixed human nature from which we can derive certain principles. The Declaration says that we are "endowed by [our] Creator with certain

unalienable Rights," such as "Life, Liberty, and the pursuit of Happiness," but those rights derive from the premise that "all men are created equal."[14] In other words, it is only because of the nature of man—our fundamental equal dignity—that certain principles are binding upon all mankind.

These conclusions lead directly into Story's account of man-made law—sometimes called positive law. In classic natural law theory, positive law is derived from and implements the natural law. As the Reverend Martin Luther King, Jr., explained in his Letter from a Birmingham Jail, to the extent that a positive law conflicts with natural law, there is no obligation to obey such a law because, in the words of Augustine, it is "no law at all."[15]

Story was in agreement with Dr. King's description of the relationship between natural and positive law and uses the example of marriage to illustrate his view. He observes that marriage "arise[s] from the law of nature" because it channels otherwise-dangerous sexual appetites toward the mutual good of the spouses and the responsible procreation and rearing of children.[16] From these premises, Story concludes: "If marriage be an institution derived from the law of nature, then, whatever has a natural tendency to discourage it, or to destroy its value, is by the same law prohibited."[17]

In other words, Story believed that positive law must conform to natural law. Remarkably, for Justice Joseph Story, as for other classic natural law thinkers, positive law that conflicts with natural law is not law at all.[18]

La Jeune Eugenie. Having examined Story's general philosophical framework, let us see how he applied his views to concrete cases. Story has gained some popular notoriety for his opinion in the *Amistad* case,[19] which inspired the Oscar-nominated movie, but it was in *La Jeune Eugenie*, an 1822 admiralty case, that we see his natural law philosophy applied most directly.

In *La Jeune Eugenie*, an American public-armed vessel seized an allegedly French ship it suspected of engaging in the trafficking of slaves. The American captain asserted that the trafficking of slaves from Africa to a foreign port violated the law of nations, and therefore, the confiscation of the ship was the appropriate penalty.[20]

Story's opinion begins by claiming that the law of nations rests on "the eternal law of nature."[21] This law of nature is "deduced by correct reasoning from the rights and duties of nations[] and the nature of moral obligation."[22] Natural law, for Story, is the basis for the law of nations. Story is careful to note, however, that he, as a judge, only has the authority to enforce the law of nations if it has not been "relaxed or waived by the consent of nations" as seen in their "general practice[s] and customs."[23] Indeed, Story was willing to enforce the Fugitive Slave Law of 1793 in his opinion in *Prigg v. Pennsylvania*, despite his strong view that slavery was unjust.[24]

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Thus, even Story, an ardent proponent of the natural law, recognized that the judicial office placed limits on his ability to apply natural law. In another setting, I have expressed a similar view about the power of the American judiciary to enforce natural law,[25] but I will leave that issue to one side for our purposes this evening.

Turning to the practice of slave trafficking, Story writes that "it cannot admit of serious question that [such exploitation] is founded in a violation of some of the first principles[] which ought to govern nations. It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."[26] And here is the key line: "When any trade can be truly said to have these ingredients[] it is impossible[] that it can be consistent with *any* system of law[] that purports to rest on the authority of reason or revelation."[27]

Remember that Story believes that positive law is only law insofar as it conforms to natural law, and natural law is derived from reason. Having concluded that natural law prohibits slave trafficking, Story explains that *no system* of law that purports to be *based on reason* can sanction such activity. Therefore, Story writes: "[I]t is sufficient to stamp any trade as interdicted by public law[] when it can be justly affirmed[] that it is repugnant to the general principles of justice and humanity."[28]

And so the court held in that admiralty case that slave trafficking violated the law of nations and refused to order return of the vessel to its owners.[29] Nevertheless, for reasons of comity, the court did hand the vessel over to the French consul,[30] despite the court's skepticism about the true nationality of the ship.[31] Story's interpretation and application of the natural law was thus decisive to the outcome of the case.

Several salient features of Story's natural law philosophy stand out in the opinion. The primacy of natural law over positive law is prominent, as is the idea that the natural law is rooted in the common nature of man, such that the natural law is universal to all mankind. We will revisit these themes later, but first we must examine Story's philosophy of positive law.

Joseph Story and Edmund Burke. As many of you know, Story was a self-proclaimed disciple of Edmund Burke.[32] Like Burke, Story emphasized the importance of tradition and experience in the formulation of positive law. It was Burke who said: "We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages."[33]

When he surveyed the list of men in the National Assembly at the start of the French Revolution, Burke observed that "[t]he best were only men of theory," lacking in all practical experience.[34] As Burke put it: "From the moment I read the list, I saw distinctly, and very nearly as it has happened, all that was to follow."[35] In Burke's view, the chaos and barbarism of the French Revolution so chillingly depicted by Charles Dickens in *A Tale of Two Cities*[36] was a direct result of the revolution's attempt to divorce itself from France's history, customs, and experience.

Burke's emphasis on experience and tradition derived from his understanding of human nature. He believed that "the nature of man is intricate" and that "no simple disposition or direction of power can be suitable either to man's nature or to the quality of his affairs."[37] Therefore, a "deep knowledge of human nature" was required of statesmen,[38] and history and traditions are the best way of knowing what institutions and laws are best suited to human nature.

Joseph Story was of the same mind. In the introduction to his *Commentaries on the Constitution,* Story wrote: "A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation."[39] He believed it was essential for any public official "to distrust theory, and cling to practical good; to rely more upon experience, than reasoning; more upon institutions, than laws; more upon checks to vice than upon motives to virtue."[40] It is quite clear, then, that Story embraced Burke's approach to government and lawmaking, one that prizes experience and tradition over theory and novelty.

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This Burkean theory of lawmaking accords with Story's view of natural law. As Professors Robert George and Russell Hittinger have reminded us, natural law theory distinguishes between two kinds of positive law: those that follow as logical conclusions from natural law—such as the laws against homicide—and those that are not required by natural law but are *consistent* with it.[41] These latter types of laws are called *determinationes,* and they include laws like the one requiring drivers to drive on the right side of the road.[42] Hittinger estimates that the vast majority of positive laws are *determinationes;*[43] they require lawmakers to make practical judgments about the best way to achieve some end rather than deducing these laws directly from natural law principles. Thus, *determinationes* derive their binding nature from the fact that they were promulgated by a recognized, competent legal authority rather than being compelled by the natural law.[44]

Aquinas says that in the creation of *determinationes,* lawmakers should follow Aristotle's advice and "pay as much attention to the undemonstrated sayings and opinions of persons who surpass us in experience, age and prudence, as to their demonstrations."[45] Aristotle argued that "law has no power to command obedience except that of habit," and so laws should not be lightly changed.[46] Justinian's *Digest* incorporates this view of positive law when discussing the enactments of emperors, cautioning that new laws must have some "clear advantage in view, so as to justify departing from a rule of law which has seemed fair since time immemorial."[47]

So, then, Story's natural law philosophy fits comfortably with his Burkean approach to positive law. The crucial point of similarity between these two theories is this: Both assume that mankind has a fixed nature. The modern idea of a malleable and socially constructed human nature is alien to Aquinas and Burke, and therefore, it is alien to Story.

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As we will now see, Story's view of man's nature was cast aside by our own Supreme Court as it exited the 20th century and entered the 21st. How different our constitutional jurisprudence would be today had this not been so.

From Joseph Story to *United States v. Windsor*: Shifting from "Inherent and Unchangeable" to a Malleable View of Human Nature

Planned Parenthood v. Casey. In the 1992 abortion case, *Planned Parenthood v. Casey*, the plurality opinion famously—or perhaps infamously—asserted the following: "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."[48] This statement, which Justice Scalia has called *Casey*'s "sweet-mystery-of-life passage,"[49] has been much criticized. Indeed, Professor Hittinger has said: "This right, so stated, could mean virtually anything."[50]

But regardless of whether one believes that the passage is banal, its fundamental philosophical premise is clear: The law cannot assume that human nature has an objective reality. The passage does not necessarily deny that there is an objective human nature, but it insists that the law cannot reflect *a particular conception* of human nature. As the *Casey* passage says, each of us is to decide *for ourselves* what defines our existence and the mystery of life. Story, by contrast, believed that man's nature gave rise to specific institutions, duties, and principles of morality that can be embodied in law. Whereas Story's natural law philosophy appeals to truths that transcend the individual, *Casey*'s dictum "presumes an autonomy of self"[51] that makes the individual the sole arbiter of what is true.

Moreover, it is important to understand that this passage makes a claim about the nature of liberty and rights. It purports to be construing Supreme Court precedent, but its language is far broader—and its theoretical implications far more ambitious—than the Court's canonical descriptions of liberty had been prior to *Casey*. Its implications are profound, because if the law cannot protect an objective view of human nature, it necessarily protects a subjective one. *Casey* thus places a malleable conception of human nature at the heart of the liberty protected by our Constitution.

Lawrence v. Texas. This view of liberty also found its way into the Court's 2003 decision in *Lawrence v. Texas*, which struck down a Texas criminal prohibition on homosexual sodomy.[52] *Lawrence* stated that liberty "as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[53] In doing so, it discounted the significance of history predating the sexual revolution, as when the Court said: "[W]e think that our laws and traditions in the past half century are of most relevance here."[54]

All of this is quite consistent with *Casey*'s relativism. After all, human nature serves as the basis for human relationships and sexuality, and a subjective view of the former will lead inexorably to a subjective view of the latter. It was no accident that the example Story chose to illustrate the connection between natural law and positive law was marriage: Story's belief in a fixed human nature logically entailed a fixed conception of marriage. Having adopted the subjectivist assumptions of *Casey*, *Lawrence* extends them to protect a relativistic conception of human sexuality.

United States v. Windsor. And now comes *United States v. Windsor* this past term.[55] *Windsor* invalidated the section of the Defense of Marriage Act that defined marriage as the union between a man and a woman for purposes of federal law,[56] a definition that accords with what I would call the conjugal view of marriage.[57] Commentators have noted that it is difficult to determine the precise rationale of *Windsor*,[58]

a confusion reflected in the contrast between Chief Justice Roberts' characterization of *Windsor* as a federalism decision[59] and Justice Scalia's view that *Windsor* inevitably will lead to the invalidation of state conjugal marriage laws.[60]

Notable scholars such as Professor Hadley Arkes interpret *Windsor* as standing for the proposition that the conjugal definition of marriage is *per se irrational*.[61] As Justice Alito's dissent pointed out, supporters of DOMA—who sounded very much like Joseph Story—argued that there are unchangeable truths about human nature that have implications for sexuality and mandate the conjugal definition of marriage.[62] This argument has been most prominently advanced by Professor George, Sherif Girgis, and Ryan Anderson in their recent book, *What is Marriage?*[63]

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If *Windsor* rejects the conjugal definition—and I am not saying that it does as a legal matter—then it does so on the basis that there is no objective reality to what marriage is. The opinion repeatedly implies that marriage is not a pre-political institution "aris[ing] from the law of nature,"[64] to use Story's words, but is instead subject to change by the state. For instance, *Windsor* says that the conjugal view has been discarded by some states in favor of "a new perspective, a new insight," and that these states had "enlarge[d] the definition of marriage."[65] But if marriage has a fixed meaning derived from man's nature, then it cannot be "enlarge[d]."

If my friend Professor Arkes is right about the scope of *Windsor*'s holding, then our constitutional jurisprudence not only protects a relativistic conception of marriage; it affirmatively declares that there is no objective reality to marriage and that any contrary view is irrational. This goes a long way toward ultimately declaring that the objective view of human nature is itself devoid of reason.

Abandoning Tradition and the Nature of Man. By now it should be quite apparent to all of us that there is a great chasm between Justice Story's philosophy and that of recent Supreme Court cases. Before I elaborate on this point, I want to note briefly that my discussion of these cases has focused on their philosophical assumptions, *not* on their holdings. I take no position here about the scope of these cases or their application to future ones; I only wish to describe the deep tension that exists between the philosophy undergirding decisions like *Lawrence* and *Windsor* on one hand and Justice Story's on the other.

That tension is manifested in numerous ways. Most fundamentally, Story would have disagreed with the relativistic assumptions of *Casey*, *Lawrence*, and *Windsor* because it is precisely man's fixed nature that makes the natural law universally applicable, as our own Declaration of Independence makes clear.

Go back to Story's opinion in *La Jeune Eugenie*, in which he declares slave trafficking to be "repugnant to ... the eternal maxims of social justice" based on natural law philosophy.[66] If there are universal principles of justice, as Story believed there were, then those universal principles must exist by virtue of *what it means to be human*, and if there is no such thing as a stable human nature, then there can be no such universal principles. And without universal principles, it makes no sense to speak, as *Windsor* does, of the need to protect "personhood and dignity,"[67] since these words appeal to concepts inherent in *all* human beings. From Story's perspective, the Court's recent jurisprudence is at war with itself: It purports to protect universal principles of justice, yet its assumptions undercut the very idea of universal principles.

Story would also object to the willingness of these decisions to depart from history and tradition, which he regarded as essential guides for positive law. You will remember that *Lawrence* was content to minimize the importance of pre–sexual revolution history.[68] *Windsor*, after acknowledging that the conjugal definition of marriage has existed literally "throughout the history of civilization,"[69] minimizes this highly significant fact[70] in order to discuss the "new perspective" of same-sex marriage.[71]

When one reads these passages, one is confident that Story would reiterate his warning: "[T]he rage of theorists to make constitutions a vehicle for the conveyance of their own crude, and visionary aphorisms of government, requires to be guarded against with

the most unceasing vigilance."[72] Story might say that the vigilance he urged has been replaced by the philosophical blindness of abstract theory detached from experience, tradition, and the very nature of man.

As a Burkean, Story probably would not have been surprised by the Court's tendency—like all human institutions—to fall into what he perceived to be grave error. But from Story's perspective, the damage these cases have done to the law, however predictable, is compounded by their source.

Story's faith in the law stemmed from his belief that the common law tradition was "the just application of principles to the actual concerns of life."[73] It is one thing for a legislator, who is buffeted by the tumultuous winds of politics and self-interest, to warp the positive law. It is quite another for a judge, who is deliberately insulated from such concerns, to break the union of natural and positive law. The former is an example of reason obscured; the latter, an example of reason ignored.

Conclusion

Allow me to conclude with this thought. In one of the most powerful passages in Burke's *Reflections*, he assails the French revolutionaries for their disregard of their own history. He sketches for them an image of the future they might have had, harvesting the wisdom of their ancestors to produce a future worthy of their ideals. As Burke said, "Respecting your forefathers, you would have been taught to respect yourselves."[74]

But they had not chosen that path. Instead, their "extravagant and presumptuous speculations," in Burke's words, led them "to despise all their predecessors, and all their contemporaries, and even to despise themselves, until the moment in which they became truly despicable."[75] Burke believed that we are constituted by our past, and by destroying their past, the French had destroyed themselves.

Justice Joseph Story poses a similar challenge to us. We must ask whether the denial of our past is the denial of ourselves. We must ask whether the abolition of nature is the abolition of man. I leave the answers to these questions to your own reflections. Thank you very much.

—The Honorable Diarmuid F. O'Scannlain *serves as a judge on the United States Court of Appeals for the Ninth Circuit.*

Endnotes:

1. The views expressed herein are my own and do not necessarily reflect the view of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I wish to acknowledge, with thanks, the assistance of Joel Alicea, my law clerk, in preparing these remarks.
2. R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 281 (1985).
3. James McClellan, Joseph Story and the American Constitution 83 (1971).
4. *Id.* at 69–72.
5. *Id.* at 73.
6. Newmyer, *supra* note 2, at 255–56.
7. Christopher L. M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. Chi. L. Rev. 273, 299 (1988).
8. *Id.*
9. Joseph Story, *Natural Law*, *in* McClellan, *supra* note 3, at 313.
10. *Summa Theologiae* I-II, 90.1.
11. *See Romans* 2:14–15 ("[14] For when the Gentiles, who have not the law, do by nature those things that are of the law; these having not the law are a law to themselves: [15] Who shew the work of the law written in their hearts, their conscience bearing witness to them, and their thoughts between themselves accusing, or also defending one another."); *Summa Theologiae* I-II, 91.2 (describing the natural law as imprinted on mankind and accessible through "the light of natural reason").
12. McClellan, *supra* note 3, at 313.
13. *Summa Theologiae* I-II, 94.5.
14. The Declaration of Independence para. 2 (U.S. 1776).
15. Martin Luther King, Jr., *Letter from a Birmingham Jail* (April 16, 1963), *in* A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 293 (2003).
16. McClellan, *supra* note 3, at 316.
17. *Id.*
18. *See* Eisgruber, *supra* note 7, at 273–86.
19. The Amistad, 40 U.S. 518 (1841).
20. 26 F.Cas. 832, 845 (2 Mason 409) (1822).
21. *Id.* at 846.
22. *Id.*
23. *Id.*
24. *See* Eisgruber, *supra* note 7, at 273–86.
25. *See generally* Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 Fordham L. Rev. 1513 (2011).
26. *La Jeune Eugenie*, 26 F.Cas. at 846.
27. *Id.* (emphasis added).
28. *Id.*
29. *Id.* at 850.
30. *Id.* at 850–51.
31. *Id.* at 840–42.
32. McClellan, *supra* note 3, at 79 ("A perusal of the public addresses … will reveal almost without exception at least one significant reference to the Great Whig.").
33. Edmund Burke, Reflections on the Revolution in France 76 (1987).
34. *Id.* at 35.
35. *Id.* at 37.
36. *See generally* Charles Dickens, A Tale of Two Cities (1998).
37. Burke, *supra* note 33, at 61.
38. *Id.* at 60.
39. 1 Joseph Story, Commentaries on the Constitution of the United States vi (1833).
40. Joseph Story, *Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University* 34–35 (1829).

41. Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269, 2279–80 (2001); Russell Hittinger, *Distinguishing Between Constitutional Art and Morals*, 4 S. Cal. Interdisc. L.J. 567, 570–71 (1995).
42. Hittinger, *supra* note 41, at 570.
43. *Id.*
44. *Id.*
45. *Summa Theologiae* I-II, 95.2 (emphasis added).
46. *Politics* II, 5 (1269a20–24).
47. *Digest* I, title 4, law 2.
48. 505 U.S. 833, 851 (1992).
49. Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).
50. Hittinger, *supra* note 41, at 577.
51. *Lawrence*, 539 U.S. at 562.
52. *Id.* at 578–79.
53. *Id.* at 567.
54. *Id.* at 571–72.
55. 133 S.Ct. 2675 (2013).
56. *Id.* at 2695–96.
57. *See* Sherif Girgis, Ryan T. Anderson, and Robert P. George, What Is Marriage? Man and Woman: A Defense (2012).
58. *See, e.g.*, Eric Posner, *Entry 19: There was no clear constitutional reason to strike down DOMA, but the court did it anyway*, Slate (June 26, 2013, 12:48 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/kennedy_s_doma_opinion_and_supreme_court_there_was_no_strong_constitutional.html; Matthew J. Franck, *The Struggle Continues*, Bench Memos (June 26, 2013, 2:49 PM), http://www.nationalreview.com/benchmemos/352102/struggle-continues-matthew-j-franck.
59. *Windsor*, 133 S.Ct. at 2697 (Roberts, CJ, dissenting) ("[I]t is undeniable that its judgment is based on federalism.").
60. *Id.* at 2709–11 (Scalia, J, dissenting).
61. *See* Hadley Arkes, *Worse Than It Sounds, and It Cannot Be Cabined*, Bench Memos (June 26, 2013, 3:42 PM), http://www.nationalreview.com/benchmemos/352114/worse-it-sounds-and-it-cannot-be-cabined-hadley-arkes.
62. *Windsor*, 133 S.Ct. at 2718 (Alito, J., dissenting).
63. *See generally* Girgis, *supra* note 57.
64. McClellan, *supra* note 3, at 316.
65. 133 S.Ct. at 2689.
66. *La Jeune Eugenie*, 26 F.Cas. at 846.
67. 133 S.Ct. at 2696.
68. 539 U.S. at 571–72.
69. 133 S.Ct. at 2689.
70. *See* Perry v. Brown, 681 F.3d 1065, 1067 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of rehearing en banc).
71. 133 S.Ct. at 2689.
72. Quoted in Hittinger, *supra* note 41, at 578.
73. Newmyer, *supra* note 2, at 245.
74. Burke, *supra* note 33, at 36.
75. *Id.* at 37.