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Repointing the Constitution

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Abstract: *"Repointing"—the process for maintaining old brick buildings that involves cleaning out and replacing the old mortar—is the perfect analogy to the task of supporting and defending the Constitution. It is a new ingredient—Progressivism—that has ruined the constitutional edifice: We must find the ingredients that made America possible. At one time, judges relied on respect for the positive law, prudence, patient and precise explication, unshakeable faith in the natural law's universal objective moral truths, and concern about the preservation of the kind of governmental structure that made liberty possible. In contrast, many modern judges see themselves as translators of the lofty generalities of the evolving Constitution. We must repoint our Constitution, renewing the legal, political, and constitutional principles that made us an exceptional nation.*

I want to thank The Heritage Foundation for asking me to deliver this year's Joseph Story Lecture. I am honored and intimidated to be in such august company.

I especially want to express my gratitude to Ed Meese for his friendship, for his many kindnesses, and for being such a mensch. For those of you who do not speak Yiddish, it means a man of integrity and honor. But for General Meese's courage and integrity, conversations like this one would be pointless. We are all indebted beyond anything we could repay because he took seriously his oath to support and defend the Constitution.

This is where I usually offer my caveats: I am not a scholar or a philosopher, and certainly not a theologian. Today I speak only as a conservative—one who has the good fortune to be particularly ill-

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Key Points

- A judge's role in interpreting constitutional text was once based on "the anchor of a fixed constitution."
- Jurists like Joseph Story reasoned that exceeding their authority under the positive law would violate the very natural law in whose name they purport to act.
- Many modern judges see themselves as translators of lofty generalities of the evolving Constitution.
- Jurisprudence that is based on the notion of elite consensus, coupled with judging based on abstract generalities, allows judges to impose subjective predispositions under the guise of an "objective" standard.
- Denying the existence of a moral law inherent in human nature that limits government coercion would be a prelude to tyranny.
- Free government is not inevitable; it is possible only when the polity is generally governed by recognized imperatives of the universal moral law.

educated. Having escaped an Ivy League education, I now find myself free to think however I like.

As a conservative, I spend my time thinking about the present evils of the world, unlike my liberal counterparts who spend their time thinking up new ones. These days I find myself echoing Gladys Knight's lament: "I've really got to use my imagination; to think up good reasons to keep on keeping on." I have developed a new appreciation for Mr. Justice Astbury's plaintive query: "Reform! Reform! Aren't things bad enough already?"

Perhaps that is why, of late, conservative discussions about the Constitution and about American constitutionalism generally have had a distinctly remedial, if not downright elegiac, tone. We speak of restoring, reviving, rehabilitating, repairing, and defending the Constitution. I do not think our sense of urgency is overblown. Our panic is justified.

The title of this speech adds my incremental bit to the theme of preserving the fortress of our liberties. My analogy is drawn from the art of the stonemason. I suggest we might also consider "repointing" the Constitution.

Some of you—those who do not live in old brick buildings—may be unfamiliar with that term. When we first moved to Washington, D.C., we purchased a row house in the District. Being from the Valley, a part of California that has little experience of row houses (or old houses), we were completely unprepared to deal with the maintenance required for structures that have been withstanding the elements for more than a century, but even as we were stacking moving boxes, our next-door neighbors dropped by to warn us to expect strong smells, noise, and dust because they were having their house "repointed."

Our response was: "What?" They explained that the failure of brick and mortar structures was more likely to result from the degradation of the mortar between the bricks than any other cause. Periodically, the old cement must be cleaned out and replaced. It is a painstaking and labor-intensive process, and as I learned more about it, I became aware of the critical importance of the replacement cement having properties similar to the original mortar. Newer and stronger cements might actually be *too* good. According to Ian Cramb, author of *The Art of the Stonemason*, modern materials can hasten the deterioration of the stone by being so unyielding that over the seasons of change, they actually crack the bricks—a calamity nothing can repair. The result is a pile of rubble.

Thus, repointing seemed the perfect analogy to our task in supporting and defending the Constitution. Is it not the new ingredient, Progressivism, the love-child of the modern Enlightenment, and its chief handmaiden, post-modernism, that has ruined the constitutional edifice and impoverished our original understandings?

So we must ask ourselves: What were the ingredients of that mortar, that binding spell, that gave us statesmen like Adams and Madison, judges like Marshall and Story, and presidents like Washington and Lincoln? What made America possible and limited government conceivable? And can we, a polity so greatly changed, recapture the optimism and certitude of the Founders in a world of Big Government and judge-made rights none of them could have imagined? Or was a republic peopled by free men a naïve and childish dream to which we wiser, more sophisticated grown-ups should bid good riddance? Though America seemed a miracle, was it only a product of its time, destined to fail as the sensibilities that produced it faded from the national conscience?

Joseph Story and the Anchor of a Fixed Constitution

Is there anything to be learned about constitutional repointing from a judge like Joseph Story? Perhaps. A couple of examples of constitutional interpretation based on two very different species of normative reasoning may bring the issues into clearer focus.

At one time, a judge's role in interpreting constitutional text was based on "the anchor of a fixed constitution."[1] Joseph Story was part of this tradition. He was born three years after the colonies declared their independence and a year before John Adams helped draft Massachusetts' constitution in 1780, which, in language strongly reminiscent of the Declaration, confirmed that "all men are born free and equal."

While Story was still a toddler, the high court of Massachusetts held those words were incompatible with slavery. Chief Justice Cushing admitted slavery had been an accepted usage in the colony but concluded, whatever had formerly prevailed, "a different

1. Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law 240 (1986).

idea had taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty with which Heaven (without regard to color, complexion, or shape of noses-features) has inspired all the human race."

The natural law jurists of the early period recognized the natural law as a ground of moral reasoning but reasoned that exceeding their authority under the positive law would "violate the very natural law in whose name they purport to act."

As a man, Story consistently condemned slavery "under any shape" as utterly "repugnant to the natural rights of man...."[2] Yet this Jeffersonian Republican, who professed he "was and always [had] been a lover, a devoted lover, of the Constitution of the United States, and a friend to the Union of the States,"[3] wrote an opinion in *Prigg v. Pennsylvania*[4] declaring a Pennsylvania statute making it substantially more difficult for slave-catchers to recover fugitives unconstitutional. *Prigg* placed the Supreme Court in the midst of an "intense national moral and political conflict," and the Court heard arguments reviling the Constitution as "a damnable proslavery compact."[5] But while Story recognized that the Constitution was built on a compromise that did not forbid slavery, he saw the Constitution itself and the union it sought to perfect as the means by which the wrong would be ameliorated and ultimately eradicated.

When Story says *Prigg* is a "triumph of freedom,"[6] he foreshadows Lincoln, who would cajole the Civil War Congress, saying they might "nobly save or meanly lose, the last best hope of earth."[7] Lincoln meant to preserve the union which the Constitution had brought into being. Story was prepared to exhibit whatever patience was required to support and defend that Constitution. It might be said of him, as he said of Chief Justice Marshall, that when others "despaired of the republic" and would have allowed it to succumb to "a stern necessity, he resisted the impulse, and clung to the Union, and nailed its colors to the mast of the Constitution."[8]

Thus, although the natural law jurists of the early period distinguished between the frame of government and personal rights, as we would say—natural or inalienable rights, which are emphatically not the same as the abstract rights of man—they recognized the natural law as a ground of moral reasoning but reasoned that exceeding their authority under the positive law would "violate the very natural law in whose name they purport to act."[9] Such reasoning included concern about the preservation of the kind of governmental structure which made liberty possible. Unless the framework of limited government—the constitution of liberty—was preserved, the project would fail.

Modern commentators take strong issue with Story's assessment and are sharply critical of *Prigg*. Professor Ronald Dworkin assumes, inaccurately, that Story rejected ideas of natural law entirely; otherwise, says Dworkin, he would have recognized that American constitutionalism "presupposed a conception of individual freedom antagonistic to slavery," a conception that should have informed Story's interpretation of the positive law.[10] Similarly, Professor Kent Newmyer said Story misunderstood the way in which "moral choices and political interests necessarily inform legal doctrine."[11]

2. The Miscellaneous Writings of Joseph Story 136 (William W. Story ed., 1852).
3. *Id.* at 27.
4. 41 U.S. 539 (1842).
5. Christopher L. M. Eisgruber, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism,* 55 U. Chi. L. Rev. 273, 279 (1988).
6. 2 Life and Letters of Joseph Story 392 (William W. Story ed., 1851).
7. President Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862).
8. Justice Joseph Story, Life, Character, and Services of Chief Justice Marshall 45 (Oct. 15, 1835) [hereinafter Marshall Address].
9. Robert P. George, *Natural Law and Positive Law*, in The Autonomy of Law: Essays on Legal Positivism 321, 332 (Robert P. George ed., 1996).
10. Ronald M. Dworkin, *The Law of the Slave-Catchers*, Times Literary Supplement 1437 (Dec. 5, 1975), *quoted in* Eisgruber, *supra* note 5, at 289.
11. Eisgruber, *supra* note 5, at 290 (discussing arguments in Newmyer's biography of Story).

But what Dworkin and Newmyer identify as moral reasoning has quite a different root from the natural law enterprise. For Dworkin, judicial reasoning in hard cases requires judges to identify abstract principles of justice. For Newmyer, the problem is Story's certitude. Had Story not accepted certain intellectual and historical premises, he would not have settled for the easy answer.[12] Both would probably deny that there is any source of normative authority independent of man.

In contrast to Story's close attention to the extant Constitution, many modern judges see themselves as translators of the lofty generalities of the evolving Constitution. Consider Justice William Brennan's position on the death penalty. In a 1986 speech, he describes the Constitution as a "public text" and "a sublime oration on the dignity of man," whose inherent ambiguities judges must resolve.[13]

Thus, in the process of translating the majestic generalities of the constitutional text, Justice Brennan concludes capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. He acknowledges that his interpretation is one to which neither the majority of his fellow justices nor his fellow countrymen subscribe. He ignores the fact that the text of the Constitution does not forbid capital punishment. Instead, Brennan articulates what he sees as a larger constitutional duty: "On this issue, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity for all."[14] In short, he would impose his biases to force a community into being even though the beliefs he seeks to foster contradict the text of the Constitution.

In Brennan's view, the judicial task is not the patient, painstaking work of repointing; it is wholesale renovation, much in the spirit of Dworkin's insistence that the broad normative aspirations of the Constitution license judges to identify and impose their own moral principles. Perhaps Story's activity cannot be described as repointing. The Constitution was still too new. But we can see the ingredients on which he relied: respect for the positive law, prudence, patient and precise explication, unshakeable faith in the natural law's universal objective moral truths. If we are to repoint our Constitution today, these seem to be essential ingredients.

Justice Brennan uses a different framework. He intuits from the normative ethos of the Constitution a concern about "human dignity," a phrase whose meaning in particular circumstances is highly undefined. He then purports to give meaning to those abstract values.

We can see the ingredients on which Justice Story relied: respect for the positive law, prudence, patient and precise explication, unshakeable faith in the natural law's universal, objective moral truths. If we are to repoint our Constitution today, these seem to be essential.

Surprisingly, both Justice Story and Justice Brennan are identified as natural law jurists, but it makes little sense to put judges like Story and Marshall in the same camp with judges like Brennan and Harry Blackmun, for the latter would dismiss the principles to which those early judges were devoted as "quaint, relics of a bygone age."[15] It is easy to trace the trajectory that has landed modern jurisprudence in this predicament but difficult to fathom why we act as if the transformation was seamless. What we lose by this move is incalculable.

The Grand Sez Who? Or The Great I AM

In 1977, Yale's Arthur Leff reviewed Roberto Unger's book, *Knowledge and Politics*. Leff's essay, in the form of a Memorandum from the Devil, identified the problem at the heart of any book on human action. He asked:

> How does one tell, and tell about, the difference between right and wrong? Why ought one—a person or a society—do any particular thing rather than any other? How can one ground any state-

12. *See id.* at 290–91.

13. Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438 (1986).

14. *Id.* at 444.

15. Richard Samuelson, *John Adams vs. Edmund Burke*, Claremont Rev. of Books, Summer 2014, at 66, 71.

> ment in the form "It is right to do X" in anything firmer than the quicksand of bare reiterated assertion?[16]

Leff is admirably candid not only about the near-term implications of his conclusion, but about the reason for rejecting the obvious solution. If there is no external source on which to ground normative assumptions, the answer to "Why X?" will have to be because P believes so (where P is some person or group of persons) or because P equals everyone (where P represents the general will).

It is on this idea of objective value—the belief that certain attitudes are really true and others really false—that America was established.

Here, finally, Leff explains the real stakes. If, he tells Unger, human nature is defined as the good, there can be no argument for change, and in that case, an intellectual like Unger, "rightly appalled at the world," would have no role at all. To escape that dreadful a possibility, the good has to be "not what people were now but what they were becoming or could become 'ever more perfectly,' 'ever more fully.'"[17]

It is impossible to see this comment without hearing the echo of Lincoln's warning that men of ambition, members of "the family of the lion, or the tribe of the eagle," who "thirst[] and burn[] for distinction ... will have it, whether at the expense of emancipating slaves, or enslaving freemen."[18]

Unger's book contains this passage. He says, "[m]oral discourse always presupposes the acceptance of humanity and the authority of the striving to be and to become ever more fully human."[19] He goes on: "The first assumption is that there is a unitary human nature though one that changes and develops in history. The second premise is that this human nature constitutes the final basis of moral judgment in the absence of objective values and in the silence of revelation."[20]

In 1979, Professor Leff gave us the short and sprightly academic *tour de force* on the absence of objective values. If we cannot believe in a "complete, transcendent and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously," then all premises for any system of ethical rules flounder on the problem of "the grand sez who."[21] In other words, in order for any normative evaluation to be binding and unquestionable, the evaluator must be beyond question. The "evaluator must be the unjudged judge, the unruled legislator, the premise maker who rests on no premises, the uncreated creator of values."[22] In short, the Great I AM, God.

Leff candidly admits that if God is rejected—or murdered—the result is the "total elimination of any coherent, or even more-than-momentarily convincing, ethical or legal system dependent upon finally authoritative extrasystemic premises."[23] This is an academically opaque way of saying forget about constitutionalism or even a rule of law that is more than skin-deep. When man replaces God, the focus is not on God's goodness, but on his power. Here it may be useful to contemplate C. S. Lewis's succinct rejoinder to an earlier educational effort: "A dogmatic belief in objective value is necessary to the very idea of a rule that is not tyranny or an obedience which is not slavery."[24]

It is on this idea of objective value—the belief that certain attitudes are really true and others really false—that America was established. The Found-

16. Arthur Allen Leff, *Memorandum*, 29 Stan. L. Rev. 879, 880 (1977) (reviewing Roberto Mangabeira Unger, Knowledge and Politics (1975)).
17. *Id.* at 884.
18. Abraham Lincoln, *Address Before the Young Men's Lyceum of Springfield Illinois* (Jan. 27, 1838), in The Essential Lincoln 8, 15 (John Gabriel Hunt ed., 1993).
19. Roberto Mangabeira Unger, Knowledge and Politics 221 (1975).
20. *Id.* at 227.
21. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229, 1229–30.
22. *Id.* at 1230.
23. *Id.* at 1232.
24. C. S. Lewis, The Abolition of Man 81 (Touchstone ed., Simon and Schuster 1996) (1944).

ers presumably believed the statement adapted by Thomas Jefferson from the Virginia Declaration of Rights, edited and endorsed by those who founded this republic: "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."

Leszek Kolakowski proclaims Jefferson's statement the most famous single sentence ever written in the Western Hemisphere—or perhaps the second most famous, right after "Coke is it!"[25] For those of you under 30, a more recognizable choice might be, "Just do it," or for the 40-somethings, "May the Force be with you." You get the idea. And yet, as Kolakowski acknowledges, what seemed self-evident to Mr. Jefferson would appear either "patently false or meaningless and superstitious to most of the great men who keep shaping our political imagination"—men like Aristotle, Machiavelli, Hobbes, Marx, or Nietzsche.[26]

Of course, we need not go so far back to find disparagement. We could add the names of American presidents like Wilson and Roosevelt to the list of those who argued for "liberation from constitutional piety" in favor of a re-evaluation of the Constitution.[27] Natural rights and its evil twin, the rights of man, seem to move in an eerie antiphony.

Thus, the modern idea of negative rights and economic freedom grew up side by side with the rationalist refusal to accept any dogmatic belief in objective value. This is a big problem for modernity, for limited government, and for liberty. These self-evident truths represent the theoretical proposition on which this nation was founded,[28] and though these principles must be continually reinterpreted to apply to changing circumstances, what future exists for a regime founded on the *lex aeterna* if no one quite believes in it anymore?[29]

The Road to Hell

This is where the life of a conservative judge who favors limited government becomes difficult. "A legal philosophy that does not recognize absolute moral norms cannot limit the state's power."[30] Indeed, it is not clear that a legal philosophy that does recognize absolute moral norms can limit it, but "[l]aw is rooted in a series of objective value judgments about morality or 'justice' or it is about nothing."[31] To divorce the government's monopoly of force from "conceptions of what is right and wrong is ultimately to justify tyranny in its most naked form."[32]

With pure hearts and good intentions, conservatives judges—the judges most convinced of the accuracy of the Founders' intuitions and most anxious to preserve a robust constitutionalism that can effectively limit government—have, instead of defending the Constitution, unilaterally disarmed. With high hopes and grand theories, the proponents of the Living Constitution have rewritten the charter, but the result is inevitably incoherent or illiberal or both.

Leff's candor is useful in understanding this seemingly perverse result. The consequence of everyone going into business for themselves is not just the eclipse of natural law; it is the privileging of unnatural law.

Once nihilist skepticism—more accurately, moral nihilism—becomes pervasive, neither the constitutional theorist nor the judge has any place to stand: "[T]he denial of any moral reality beyond mere convention" is both "culpable" and "incoherent"[33] and leads to different but equally destructive errors. If, as the late Judge Robert Bork argued, there is no principled way to navigate competing moral claims, then

25. Leszek Kolakowski, Modernity on Endless Trial, 146 (1990).

26. *Id.*

27. David Lewis Schaefer, Illiberal Justice: John Rawls vs. The American Political Tradition 3 (2007).

28. *Id.* at 1.

29. *See* Matthew Spalding, We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future 35 (2009); Schaefer, *supra* note 27, at 2–7.

30. Charles Rice, *Natural Law, the Constitution, and the Family*, 1 Liberty Life & Fam. 77 (1994).

31. Lord Hailsham, Modern Reflections on the Natural Law: A Commemorative Lecture to the Canon Law Society of Great Britain and Ireland 3 (Oct. 19, 1978).

32. *Id.*

33. Graham Walker, Moral Foundations of Constitutional Thought 114 (1990).

the only option is for proponents of judicial restraint to remain silent.[34] His position at least has the virtue of being consistent. As Lewis puts it: If your mind is open on ultimate questions, at least let your mouth be closed![35]

On the other side, moral nihilists, believing nature has no moral content, fill the void with surrogates of their own design. These reconstructions are admittedly devoid of any normative authority and range from "'generally accepted' standards and idiosyncratic conceptions of 'democracy' to radically 'personal' conviction."[36] It is worth considering where these theories, translated into styles of constitutional interpretation, lead.

Judicial quietism and judicial adventurism are both problematic. The result is either democratic despotism or judicial supremacy. Neither bodes well for the sustainability of American constitutionalism.

For example, Aharon Barak, the former President of the Israeli Supreme Court,[37] argues judges must defend democracy by defining ultimate values. He suggests "a process of 'common conviction' must take place among enlightened members of society regarding the truth and justice of ... norms and standards [that people cherish], before we can say that a general will has been reached that these should become binding...."[38] Presumably, when the elite's consensus changes, so does the law. Coupled with judging based on abstract generalities stated in a single word like "dignity," this approach allows judges to impose subjective predispositions under the guise of an "objective" standard. A very similar defense of judicial subjectivity can be found in Justice Stephen Breyer's book *Active Liberty*.[39]

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On this record, it is hard not to sympathize with the proponents of judicial restraint. It is a principled position, and there are good reasons to fear arbitrary discretion in the courts and to promote what Bork called the morality of the jurist, a discipline that requires judges to "abstain from giving their own desires free play." Self-restraint is part of judicial prudence, but the Founders clearly believed human nature provided a standard by which to judge political institutions. The arguments for ratification marshalled in the *Federalist Papers* were framed in terms of presumptively real moral considerations and recognition of the real failings inherent in human enterprise.

The Bill of Rights or the Rights of Man?

James McClellan, Story's biographer, focuses on perceived inconsistencies in Story's natural law jurisprudence, wondering whether his approach owes more to Burke or Adams, whether it is Hobbesian or Lockean or more indebted to the classical Christian tradition. Finding some precise correlation seems beside the point.[40]

Story was a child of the American Revolution. Ideas about liberty, duty, and sacred honor were part of the air he breathed. He had in common with the Founding generation a deep understanding of the way the axioms and first principles of moral reasoning were integral to the telos that defined American constitutionalism. He, like the drafters of our constitutional documents, assumed that any good regime must respect the nature of the creature to be governed. Man was a creature of the logos whose rational nature, created by the God of the logos, was guided by the moral law engraved in every human heart.

"The obligatory force of the law of nature," said Justice Story, "is derived from its presumed coinci-

34. *See id.* at 118.

35. Lewis, *supra* note 24, at 59.

36. Walker, *supra* note 33, at 117.

37. This title is equivalent to chief justice.

38. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 87 (2002) (quoting President Shimon Agranat of the Supreme Court of Israel).

39. Justice Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005).

40. James McClellan, Joseph Story and the American Constitution 65–82 (1971).

dence with the will of [the] creator." Yet he begins his discourse by observing that the law of nature "is that system of principles, which human reason has discovered."

These reflections illustrate a very fundamental distinction between the vision of natural law embraced by the Founders and revered by American conservatives and the Progressive idea of inevitable, transformative progress. American conservatism "highlights the difference between progress in science and technology, which can be cumulative, and progress in morals and politics, which in practice must start over again with every generation."[41]

There is a deep paradox in the Progressive insistence that the nature of history is settled and the nature of man open to any definition that captures the imagination of the moment. To install this view of humanity is to take away precisely what the Constitution sought to preserve.

John Adams said he always viewed the "settlement of America with Reverence and Wonder—as the Opening of a grand scene and Design in Providence, for the Illumination of the Ignorant, and the Emancipation of the slavish Part of Mankind all over the Earth."[42] He was not alone in this view. Those who pledged their lives, their fortunes, and their sacred honor in those revolutionary times repeatedly gave credit to a beneficent Providence, to divine intervention, to being in the hands of a good Providence. In fact, even now, hardly anyone who reads about the harrowing days of the Revolutionary War escapes the intuition that America's success was something more than serendipity.

In retrospect, there must be more than a frisson of awareness that something extraordinary was afoot. Phyllis Tickle hypothesizes that the hinge of history shifts dramatically roughly every 500 years.[43] Five hundred years backward takes us to the Great Reformation.

Leszek Kolakowski's long view of history echoes, in a shorter time frame, some of the same elements of mythic struggle. He invokes St. Augustine's poetic trope in *The City of God,* recalling how God enriches history by the same kind of antithesis that gives beauty to poetry: "[T]here is beauty in the composition of the world's history arising from the antitheses of contraries—a kind of eloquence in events instead of words."[44] Thus, he concludes, the devil often tries with great success to "convert good into evil," but the battle is never ceded to him.[45] God, Kolakowski says, may "reforge evil, havoc, and destruction into instruments of his own design."[46]

The point of his essay is that the Reformation, which was intended to purify Christianity, morphed into the Enlightenment, which began by seeking to free politics from the fetters of religion and matured by insisting "the progress of humanity consisted in forgetting [] religious tradition altogether."[47] This flaw, this twisting of light into darkness, had the potential to turn politics into a sheer struggle for power.

Stanley Rosen says the Enlightenment led to the repudiation of reason.[48] By reducing all that is not objectively verifiable to the realm of rhetoric, rationalism reduces truth to a matter of perspective and makes all perspectives equal, and since our choices can only be justified rhetorically—that is, by reference to compassion or philanthropy or utility—even equality is debased, reduced to the equal right of all desires to be satisfied.[49] In this brave new world, the assertion of a perspective becomes its justification. The claim is that a particular perspective serves the general welfare. What is really served is the will to power.

This rationalist branch of the Enlightenment provided the impetus for the French Revolution. John Adams contrasted what the French Philosophes called reason with "reason rightly understood." The

41. Samuelson, *supra* note 15, at 67.

42. 1 Charles Francis Adams, Works of John Adams, Second President of the United States 66 (1865).

43. Phyllis Tickle, The Great Emergence: How Christianity Is Changing and Why 19–31 (2008).

44. *See* Kolakowski, *supra* note 25, at 191 (quoting St. Augustine, The City of God 11.18).

45. *Id.* at 179.

46. *Id.*

47. *Id.* at 185.

48. Stanley Rosen, *Rethinking the Enlightenment*, 7 Common Knowledge, Winter 1998, 104, 105.

49. *Id.* at 106.

American Revolution rejected an ideal of reason that made war on human nature.[50] The mistake of the French revolutionaries, in Adams's view, was not contempt for tradition; it was contempt for man.[51] Natural rights "rightly understood" were a framework for governance that respected man's immutable nature. In the words of the poet, "two roads diverged," and we "took the one less traveled by," and now we know "ages and ages hence" that "has made all the difference."[52]

Natural law cannot always produce easy answers, and sometimes it cannot produce any. It is a response to a hard question: In the words of the psalmist, "what is man that you made him a little lower than the angels"? This is both glory and curse, and in trying to design a government of the people, for the people, and by the people, we must relish the tension that is an inherent part of our humanity. We are not brutes; we are not gods.

Or at least for about 150 years it seemed that it would, but liberty is hard. Free government is not inevitable; it is only a possibility—a possibility that can be fully realized when the polity is generally governed by the "recognized imperatives of the universal moral law."[53] It requires self-control and self-restraint, people capable of understanding that, in Lord Acton's words, liberty is "not the power of doing what we like, but the right of being able to do what we ought."[54]

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Before architects had structural steel and rebar to allow buildings to extend easily upward, early builders invented a partial solution: flying buttresses. It was this innovation that made the soaring naves of Gothic cathedrals possible. Thus, the building stood and the spaces reached heavenward not in spite of the tensions generated by opposing forces, but because of them.

Human beings are similarly designed, so the longings of our hearts and the destiny of our souls are forever straining against each other. What Leff and Unger see as the "devastating 'antinomies' of modern human thought—those basic positions about reality that are simultaneously necessary and contradictory," the Framers would easily have recognized. Did not St. Paul voice the same antinomy in Romans 7: "I have the desire to do what is good, but I cannot carry it out ... [and] so I find this law at work: when I want to do good evil is right there with me"?

The Naturalness of Natural Law

For thousands of years, the idea of natural law played a dominant role in both philosophy and history. "It was conceived as the ultimate measure of right and wrong, as the pattern of the good life.... It provided a potent incentive to reflection, the touchstone of existing institutions, the justification of conservatism as well as revolution."[56] "Natural law was the outcome of man's quest for an absolute standard of justice."[57] The breach between law and morals, the assertion that one has nothing to do with the other, is the essential feature of modern jurisprudence.

50. Samuelson, *supra* note 15, at 69.
51. *Id.* at 70.
52. Robert Frost, *The Road Not Taken*, in The Poetry of Robert Frost 105 (Edward C. Lathem ed., 1969).
53. John Courtney Murray, S.J., We Hold these Truths: Catholic Reflections on the American Proposition 36 (1988).
54. *See id.* (quoting Lord Acton).
55. *Psalm* 8:5.
56. Alessandro P. D'Entrèves, Natural Law: An Introduction to Legal Philosophy 7 (London, Hutchinson Univ. Lib. 1951).
57. *Id.* at 95.

Cicero, Justice Story's favorite among the ancient writers, tells us: "True law is Reason, right and natural.... Its validity is universal; it is immutable and eternal."[58] Calvin Coolidge approved similar sentiments in a wonderful speech given in 1926 to celebrate the 150th anniversary of the Declaration of Independence. He lamented that most of those who clamor for reform are "sincere but ill-informed." Were they more knowledgeable, he believed they would realize America's foundation was spiritual, not material, and the Founders were people influenced by "a great spiritual development" who acquired "a great moral power."[59]

To Coolidge, only the exercise of God's providence seemed adequate to explain the Declaration of Independence, and he did not believe it should be discarded for something more modern. He concludes:

> If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just power from the consent of the governed, that is final. No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth and their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction cannot lay claim to progress. They are reactionary.[60]

Coolidge is exactly right, but now his insight seems counterintuitive. Less than a decade after Coolidge uttered these stirring words, they seem to have been forgotten. Franklin Roosevelt began the reign of political government, substituting the expertise of social planners and technocrats for the will of the people, inventing preference politics and fostering the growth of the administrative and the welfare state.

But even after the Great Depression, the spell had not been entirely broken. Speaking to a conference of Ninth Circuit judges in San Francisco in 1946, Harold McKinnon anticipated Arthur Leff by three decades, warning of the essentially antidemocratic and totalitarian political and legal philosophies gaining ground in American universities. Such teachings, McKinnon believed, denied the essential elements of a regime devoted to the preservation of natural rights. He argued that denying the existence of a moral law inherent in human nature which limits government coercion would be but a prelude to tyranny:

> If there is no natural law, there are no natural rights, and if there are no natural rights, the Bill of Rights is a delusion, and everything which a man possesses—his life, his liberty and his property—are held by sufferance of government, and ... if there are no eternal truths, if everything changes, everything, then we may not complain when the standard of citizenship changes from freedom to servility and when democracy relapses into tyranny.[61]

McKinnon could make such a forceful statement because he and his audience shared a common understanding. They accepted the necessary connection between natural law and natural rights and the centrality of the natural law consensus to any effective scheme of limited government.

Remarkably, our regime never made the unnecessary choice between truth and reason and, for a time, rejected the strict separation between what is just and what is legal. It is this thread—a conviction that there is such a thing as human nature, it is fixed and cannot be changed, and that this same nature provides a standard by which to judge political institutions—that unites John Adams, Joseph Story, and Calvin Coolidge. To turn away from the "principles of 1776 and 1787, we are turning back toward arbitrary government."[62]

That is why the idea of repointing the Constitution is a useful analogue, as it suggests not only

58. Cicero, De Re Publica, Bk. III, § 33.

59. President Calvin Coolidge, Speech on the Occasion of the One Hundred and Fiftieth Anniversary of the Declaration of Independence (July 5, 1926), *available at* http://teachingamericanhistory.org/library/document/speech-on-the-occasion-of-the-one-hundred-and-fiftieth-anniversary-of-the-declaration-of-independence/.

60. *Id.*

61. Harold R. McKinnon, The Higher Law: An Address delivered Before the Conference of Federal Judges of the Ninth Circuit 16 (Sept. 3, 1946).

62. Samuelson, *supra* note 15, at 72.

repairing, but repenting and reorienting. In the early days of the republic, patriots hoped fervently for the perpetuity of the Constitution. They were exquisitely sensitive to the fragility of free institutions. Story expressed his well-founded fears in a powerful metaphor. In our government, he said, "the centrifugal force is far greater than the centripetal." Thus, the danger was not that we would "fall into the sun; but that we may fly off in eccentric orbits, and never return to our perihelion."[63]

What he feared came to pass. The nation's Faustian bargain could not be sustained. The Civil War and the Civil War Amendments shifted the balance from the states to the national government and from the sovereignty of sovereigns to the sovereignty of individuals. America was granted what Lincoln called "a new birth of freedom." The Declaration became an explicit part of the Constitution.

But our time is different; our task is different. In our age, the sun has collapsed, becoming a dark star—a cosmic phenomenon, sometimes called a black hole, with a gravitational pull so strong it can bend light and hold time hostage. Our peril is not that we will fly too far from the sun; rather, it is that we are already so close that liberty may be entirely extinguished by a centripetal force that overwhelms even the idea of limits.

Perhaps in a liberal democracy, government cannot *be* limited. The constitutional republic is bound only by a law of laws and, being a monopolist on all law enforcement, can always untie itself.[64] Indeed, in contemporary parlance, liberalism no longer has anything to do with limited government. The regulatory state has expanded its reach to encompass education, social welfare, and even the transmission of culture.

Judge and legal scholar Michael McConnell borrows, without embracing, a distinction articulated by John Rawls between "political" liberalism and "comprehensive" liberalism. A "political" conception of justice applies to the "framework of basic institutions," whereas a "comprehensive" doctrine is one that addresses all aspects of life, including conceptions of what is of value, ideals of personal character, and ideals of friendship and mediating institutions.[65]

The constitutional principles of early American history limited the way the government could conduct the public business but did not purport to tell citizens how they should live their lives.[66] The First Amendment followed exactly this approach. The American Constitution, McConnell writes, "was an attempt to create a government strong enough to keep the peace and promote economic prosperity without the power to affect or coerce the ordinary lives or beliefs of a heterogeneous people."[67]

It is this thread—a conviction that there is such a thing as human nature, that it is fixed and cannot be changed, and that this same nature provides a standard by which to judge political institutions—that unites John Adams, Joseph Story, and Calvin Coolidge.

Contrast that thought with today's new vision that the state should force citizens to be neutral, tolerant, egalitarian, and open-minded. Or consider the even more ominous view that government should force citizens to accept a singular, secular vision of the good. This is where I think deference to the enlightened elite will take us: to a sterile, secular, uniformly dull, and featureless vision of the future where we will all be "democrats," but democrats who lack any sort of faith worth fighting for.

While the earlier natural rights tradition filled gaps in a way that strengthened the charter of freedom, the newer understanding constrains, constricts, and reduces. This new mortar does not strengthen; it shatters the whole edifice.

Limited government should mean limited judges too, but so long as we have unlimited government, we may need a less limited view of the legitimate role of judges. Judges may need to intervene for the sake

63. Marshall Address, 46.

64. *See* Anthony de Jasay, The State 211 (1998).

65. Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1258 (2000) (discussing John Rawls, Political Liberalism 29–35, 62, and passim (1993)).

66. *Id.*

67. *Id.*

of individual liberty, and they must sometimes do so with reference to ultimate values. But is there any principled way to limit the source of value?

Respecting the Writtenness of the Constitution

Western civilization's great achievement has been to discover and synthesize a network of principles that jointly undergird individual liberty. That achievement owes fealty to both rationality and sacredness, both Athens and Jerusalem. Somehow, those two sources of value jointly should and must inform the act of judging. The solutions offered by Holmes and Rawls and theorists like Dworkin, Unger, and Leff end either in might making right or in a coerced virtue based on an unnatural law that seems contrary to Athens and Jerusalem both—to the entire network of principles undergirding individual liberty.

While it would take chutzpah to suggest an exhaustive answer to the question of how to define the ultimate values that inform responsible judging in a constitutional democracy, there is some usefulness in saying "no" to obvious errors: the error of taking the perceived opinion among a certain social group and mistaking it for democratic consensus; the error of any construction of the Constitution that authorizes unlimited government—positive rights—when the clear import of the Constitution—its text, context, and history—is the creation of a government of limited powers aimed at protecting negative rights; the error of indifference to the writtenness of the Constitution.

Writtenness has two sides. Conservative judges have vigorously resisted the importation of extratextual ideas. They have been much less adept at effectuating limits that are in the text. This is the point of recent books challenging judicial abdication, and their criticism of excessive deference has some validity. It is no more principled to permit actual limits to be written out of the Constitution than it is to insert obligations.

This is a modest proposal. No theory of everything is in the offing. In fact, I think Daniel Farber is right that "'brilliance' ... refer[ring] to new ideas that turn conventional thinking on its head" should "count heavily against ... a legal theory.[68] Neither the reason that has destroyed divine authority nor the untrammeled will that destroyed self-government can be endured. We must live with our tensions, for the true way is in the middle.[69]

Politics is downstream of culture, and the cultural problem will always turn out to be a religious problem. Rather than fleeing from the sacred, perhaps we must embrace it. In the orthodox Jewish tradition, the world is filled with God's glory. Protestants secured a law-free space in which to encounter God. In the City of Man, governed by the Grand Sez Who, the world is filled with law. In other words, the source of our differences may well be religious, for a person's or a nation's relationship to liberty is a spiritual matter.

Still, we really cannot have it both ways. For the promise of the permissive cornucopia offered by the unlimited state, we give up freedom. Earlier, I acknowledged that if the state is to be limitless, maybe judges must be too, but that's second-best. The unlimited state is never a mere instrumentality. It cannot remain neutral to the good.

The question is not whether we will change with the times. We will. The question is whether we can repoint our Constitution so that we may preserve the fortress stones, renewing the legal, political, and constitutional principles that made us an exceptional nation, a wonder to the world, the land of the free.

It turns out that if we would be free, the unjudged judge is a logical necessity. Some widespread consensus must exist. Even Hayek concedes the preservation of a constitution of liberty requires commitment to a metanarrative privileging ordered liberty. Otherwise, liberty loses to expediency every time.

The Grand Sez Who is not grand enough. If you want liberty, something more awesome, powerful, glorious, worthy of reverence and unquestioning obedience is required. Something like the Spirit that moved upon the deep and spoke the world into being—the one who lit the sun and laid Earth's cornerstone "[w]hen the morning stars sang together,"[70] the God of the Logos: The Great I AM.

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68. Daniel Farber, *The Case Against Brilliance*, 70 Minn. L. Rev. 917, n.1 (1985).
69. Harvey Mansfield, Manliness 237 (2006).
70. *Job* 38:7 (King James).