A Revival of Natural Law?

A Survey of Recent Articles

"There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal," declared Cicero (106–43 B.C.). Had the ancient orator—or Aristotle or Thomas Aquinas or John Locke or Thomas Jefferson or Abraham Lincoln or Martin Luther King, Jr.—testified before the Senate Judiciary Committee on the nomination of Judge Clarence Thomas to the Supreme Court, the concept of natural law that he shares with them might have received more respectful treatment from the senators and other critics.

Harvard's Laurence H. Tribe, writing in the *New York Times* (July 15, 1991), maintained that Thomas's "adherence to 'natural law' as a judicial philosophy could take the court in an even more troubling direction" than the rightward one in which it was headed. Yet a few years before, in criticizing Robert H. Bork, an earlier nominee to the Court, for his belief that constitutional interpretation must be based on the original intent of the Framers, Tribe had expressed pride in our "200-year-old tradition establishing that people retain certain unspecified fundamental rights that courts were supposed to discern and defend."

"When liberal justices still had a shot at five votes," notes recent Yale Law School graduate Jeff Rosen in the *New Republic* (Sept. 9, 1991), "liberals encouraged them to discover rights not explicitly listed in the Constitution.... Now that the conservatives are in control, the prospect of judges pulling natural rights out of a hat suddenly has liberals scared." Earlier in this century, after all, conservative justices invoking natural rights restrained unions, struck down minimum-wage laws, and resisted FDR's New Deal.

Amherst's Hadley Arkes maintains in *Policy Review* (Spring 1992) that those "laissez-faire" jurists—including Rufus Peckham (1895–1909) and George Sutherland (1922–1938)—were "grand expounders of natural rights" in the great tradition of the American Founders. Despite their bad-guy image, Arkes says, the conservative judges seldom "failed to sustain regulations of business that were aimed at the safety of workers and the health of the public." Thus, although Peckham wrote the oft-derided opinion in *Lochner v. New York* (1905), wherein the court struck down a New York law that limited bakery employees to a 60-hour work week, he was nevertheless willing to act to protect workers in more hazardous occupations. In an 1898 case, he upheld regulations limiting working hours in underground mines to eight hours a day. "It was precisely because the judges understood the moral ground for the rights of property that they understood, with the same precision, the moral limits on the uses of property," Arkes says.

There are good reasons to question individuals' or institutions' claims of objectivity. Biases of various sorts do exist. "To believe in objectivity is not... to believe that anyone is objective," Lichtenberg says. But we must assume "both the possibility and value of objectivity," if we have any hope of understanding the world.

Modern Islam

"Is Islam the Odd-Civilization Out?" by Michael M. J. Fischer, in *New Perspectives Quarterly*, (Spring 1992), 10951 W. Pico Blvd., 2nd Floor, Los Angeles, Calif. 90064.

Often depicted as medieval, patriarchal, and unchanging, the Islamic world is beginning to experience dramatic cultural shifts.

Less than two decades ago, notes Fischer, director of Rice University's Center for Cultural Studies, music and sculpture and even chess were forbidden for Shi'ite believers in Iran; radio, television, and movies were considered instruments of corruption. Today, all those views have been swept away. Iran's Islamic government has supported classical Persian music and promoted public sculpture; chess is no longer condemned as a form of gambling. Film is an accepted and popular medium, and even Islamic fundamentalists are making use of modern communications technologies.

Fischer also sees signs of an emerging Muslim feminism. As literacy among women increases, more and more of them are coming to be able "to read the Koranic and *hadith* ('saying' that indicates authoritative precedent for Islamic law) literature for themselves and [to]

Ironically, one of the critics who is most concerned about a possible revival of natural-law jurisprudence is Thomas's fellow conservative Robert Bork, now a scholar at the American Enterprise Institute. "Having endured for half a century a court that seized authority not confided to it to lay down as unalterable law a liberal social agenda nowhere to be found in the actual Constitution of the United States," Bork writes in *First Things* (Mar. 1992), "conservatives must decide whether they want a court that behaves in the same way but in the service of *their* agenda."

In *Beyond the Constitution* (1990), Bork notes, Hadley Arkes "contends that moral reasoning not only illuminates the proper reach of existing constitutional principles but may properly be employed by judges to create new constitutional principles." Natural law could lead to judicial decisions that are not only arbitrary but contrary to the Constitution itself—slavery, to cite an obvious example, violated natural law, but was permitted under the Constitution. Making positive laws out of a natural-law judge's own perceptions, says Bork, "is where we legal positivists get off."

At the Senate hearings last year, Thomas seemed to get off there, too. He told the senators that he did not see "a role for the use of natural law in constitutional adjudication," although he did maintain that it was important to understand the belief of the Founding Fathers in natural law, or natural rights. In a sense, Russell Hittinger, a philosophy professor at the Catholic University of America, writes in *First Things* (May 1992), the controversy over natural-law jurisprudence "rests upon what can be included in, or excluded by, this discernment about the intent of the Framers and ratifiers." A judge should not read his private theory of "nature" or "justice" into the Constitution, but a judge who "focuses on the natural law *intent* of the Framers" (emphasis added), Hittinger argues, ought not to be deemed a judicial activist.

For the first generation of American jurists, Hadley Arkes says, "the axioms of reason" were not mere "perceptions"—they were "part of the 'principles of law' and the discipline of judging," and they were "necessary and binding, regardless of whether they had been set down in the Constitution."

Over the centuries, of course, judges and philosophers have altered the understanding of what natural law requires. "It took humankind a very long time to recognize that slavery is contrary to [human] nature . . . ," Rutgers' Paul Sracic notes in *Commonweal* (Oct. 25, 1991). But to natural-law advocates, that just indicates the limitations of human understanding. The proponents, he says, regard the theory "not as an answer machine but as a way of thinking that is 'connatural' to the human mind—and easily recognized as such by Americans, with their Jeffersonian conditioning to the concepts of 'unalienable rights' and 'self-evident truths.'" If so, then perhaps Justice Thomas did his fellow Americans a service by reminding them of the natural-law tradition.

show that patriarchal interpretations have been distorted and can be challenged on quite Islamic grounds." Some Islamic women have begun to insist on having their "right" to get further education or to have a say in where the family lives spelled out in their marriage contracts. "Through contract, and through the reinterpretation of traditional texts, Islam is being fundamentally reworked from a feminist and egalitarian point of view," Fischer maintains.

The dissolution of the Soviet Union is also likely to have an impact, as Muslims in Central Asia and elsewhere regain their religious identity. Turkey, Iran, and Saudi Arabia are all jockeying for alliances with the new republics, with Western-oriented Turkey apparently having more appeal than Shi'ite Iran in the eyes of Shi'ite but Turkish-speaking Azerbaijan. "A predominantly secularist, modernizing set of Muslim states," Fischer observes, would be a significant new factor in the Muslim world.

But perhaps the most important modernizing force, he says, is the migration of large numbers of Muslims to Europe and America to work, and to different countries within the Muslim world. Algerians and Moroccans are working in France, and there are Turks in Germany, Lebanese Shi'ites in West Africa and Brazil, Egyptians in Iraq and the Persian Gulf, Palestinians and Jordanians in Kuwait, Pakistanis in Saudi Arabia, and Afghans in Pakistan. Non-Muslim residents in the Middle East—e.g., the Americans, Indians, Filipinos, and Koreans working in Saudi Arabia—also are bound to affect Muslim views.

"[T]here is no doubt that fundamentalist movements in the Islamic world are strong and growing," Fischer concludes, but "at the same time dramatic cultural change [is] pervading these societies." That, he suggests, may be the more important fact for the Islamic future.