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Ideology and History

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Philosophical argument runs certain unavoidable risks in language, definition, logic, and presumptions. The practicing philosopher constantly struggles with these risks. Understandably, one may seek alternatives. One gambit often employed to avoid the pitfalls of philosophy is to pursue one's argument by means of history (presuming, of course, that history carries its imperatives into the present). Finding the prescriptive in the descriptive is, however, an even riskier business, for if the actuality and the ideology do not mesh, one or the other must give way. Such is the occurrence in the article by Dr. Edwin Vieira, Jr.

I do not dispute the philosophical validity of the theory of natural rights. Indeed, I support much, if not most, of the principles embodied in that theory. What I wish to discuss is that to which Dr. Vieira claims to have limited his discussion, *viz.*, the belief that history, specifically American constitutional history, provides a sufficient base to support a natural rights theory. His attempt to find historical support is an instructive example of how ideology can distort the data of history and cause it to be portrayed in a strange and unreal light. Beyond that, Vieira's historical method also weakens the logical framework of his argument.

In his introductory paragraph, Vieira eschews a defense of natural law on philosophical grounds: "[I]t is unnecessary to prove that those people who adopted the Constitution correctly assessed the relationship between rights and positive law . . . ."[1] All Vieira shows in his article is that "in historical fact, the Constitution rests upon the principles of 'natural law,' " rather than legal positivism.[2] Vieira seeks only to tell us what the framers believed and not whether their belief was justifiable. He excoriates Holmes and other justices whose opinions, he asserts, do not uphold the true content of the Constitution. For Vieira, because the Constitution is a law that contains principles of natural law, the Supreme Court justices

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[1] Vieira, *Rights and the United States Constitution: The Declension from Natural Law to Legal Positivism*, 13 GA. L. REV. 1447 (1979).

[2] *Id.*

are bound to apply those principles. Clearly then, Vieira asserts the legitimacy of natural law, not based on a philosophical argument, but because it is found in the Constitution. That is to say, natural law is binding in America because it has been enacted into positive law, not because it is independently valid.[3]

There is always a danger in seeking to justify natural law solely by history. It should be remembered that the school of historicism in legal thought first began as an alternative to natural law. Indeed, the originators of the historical school had a dedicated antipathy to the natural law tradition.[4] To use their tools in defending natural law is to risk self-contradiction in one's argument. In the case of Vieira's article, the author demands that the country observe the dictates of natural law not because they are valid and above all positive law, but because they have been enacted in the supreme positive law, *i.e.*, the Constitution. Thus, the legal validity of the norms of natural law rests, in the American case, on the positivistic theory of law, a theory which Vieira himself finds unacceptable. The basis on which the author asks us to accept the controlling authority of natural law is the very basis which he asserts is unauthoritative.[5]

There are further logical difficulties. Even if the author had not disparaged the positive law tradition, his attempt to co-opt positivism in the legitimization of natural law would remain self-defeating. If it turns out, upon historical investigation, that the framers did not enact the particular forms of natural law that Dr. Vieira suggests they did, then there is no justification for denying the validity of current, American positive legislation, no matter how much it may offend the imperatives of natural law. If, on the other hand, natural law has a transcendent authority, then the question of whether the framers emplaced natural law norms in the Constitution is irrelevant. A positive law gains no more authority by being in the Constitution. A natural law norm is no less valid because it is outside of the Constitution.

Dr. Vieira's argument could work only if he adopted the following structure: 1) the Constitution is a supreme law because it is the positivistic ground norm; 2) the ground norm, by reference, includes substantive norms drawn from the natural rights tradition; 3) sub-

[3] This point was initially voiced at the symposium by Professor Lawrence Alexander of the University of San Diego School of Law.

[4] C. Szladits, European Legal Systems, 54-57 (1972) (unpublished: Parker School of Foreign and Comparative Law, Columbia University).

[5] Vieira, *supra* note 1, at 1469, 1493-94.

sequently enacted positive laws in contradiction to the above substantive norms are invalid, not because the later positive laws are at variance with natural law but because they are at variance with the formally higher positive law of the Constitution. Because Vieira rejects any legitimizing role for positive law, however, even this schema becomes unavailable to him.

I do not wish to suggest that history is unrelated to natural law. Natural lawyers frequently enlist history in their cause, despite the difficulties in bridging the descriptive-prescriptive gap. There are many ways in which history has been used to justify natural law: 1) natural law is a function of history; 2) natural law progressively works its way into existence through history; 3) history provides evidence of the universally felt injustices that occur when natural law is rejected; 4) conversely, history shows that societies are good when they follow natural law; or 5) history is a data source, giving evidence that certain similar fundamental values arise "naturally" in nearly all societies.

Vieira uses history for a different purpose. In his article, history becomes an argumentative tactic. Failing to convince positivists that natural law has an independent validity, one can try to trap the positivists using their own premises. By asserting that natural law is a fundamental positive law, the positivists are forced to accept the enacted precepts of natural law. That much makes sense. But then to suggest that the positivist must therefore accept the independent validity of natural law and *a fortiori* the invalidity of the theory of positive law is to play a logical shell game.

There are additional difficulties beyond the structure of such an argument. Vieira's search for an historical justification for the theory of natural rights becomes so single-minded that he excludes parallel values which also may be historically justifiable.

Vieira begins by arguing that natural law lay at the very base of the founders' view of the legitimacy of government and of law in general.[6] This comment cannot review the rich and lengthy debate over whether natural law was merely a rhetorical device the revolutionaries used to unseat the establishment, or whether it was the substantive basis of their legal and political beliefs.[7] Although still vigorously debated, it is fair to say that the evidence Vieira and others have marshalled makes a plausible, and for many, a

[6] *Id.* at 1448-53.

[7] *Compare* B. WRIGHT, AMERICAN INTERPRETATION OF NATURAL LAW (1931), *with* Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 22-25 (1978).

convincing case that natural law norms carried beyond the Revolution into the formation of the constitutional system in 1787-1791.[8]

Admittedly, the question still remains — what was the content and the extent of the natural law norms in the Constitution? It is a question of great difficulty. In the late 1780's, a number of intellectual movements began to modify the continuing concern with natural rights. For example, by 1787 Blackstone was in competition with Coke as the authoritative expositor of English law in America. Though most of the founders continued to prefer Coke, Blackstone was gaining in influence.[9] Even though Blackstone nods to natural law as his legitimizing source, he finds in it no mechanism of limitation on the legislature, save its own conscience, and no right of disobedience to statutes contrary to natural law.[10] Something of the Blackstonian influence is evident even in the limited Constitution of 1787. Although the framers granted only limited powers to the new central government, they explicitly declared that government supreme in its allotted sphere.[11]

Nevertheless, it is incontestable that the framers sought to protect liberty and property by the structure of the Constitution, by its prohibitions, and later, by its list of rights. That, however, is not all that they were doing. There were other objectives, even other natural law norms, they sought to accomplish. When Vieira reaches the point in his argument where he must define the content of the constitutional natural law framework, he relies more heavily on the words of John Locke and somewhat less so on the specific definitions of contemporaneous observers.[12] Vieira limits his normative sources even further by focusing on that part of Locke that recognizes "only *defensive* powers in individual men."[13] Vieira is partially correct, but at this point, a partially correct but limited reading of history skews our perspective of the Constitution.

First, Locke was not the sole natural law authority for the founding fathers. They also relied upon writers such as Grotius and Pufen-

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[8] *See* Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113 (1976).

[9] McDonald, *A Founding Father's Library*, LITERATURE OF LIBERTY, Jan.-March 1978, at 11.

[10] 1 W. BLACKSTONE, COMMENTARIES 42, 91 (1765).

[11] U.S. CONST., art. VI, cl.2. Blackstone was influential enough for a Supreme Court Justice to take his views far beyond the intention of the framers. Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) (opinion by Iredell). Justice Chase in *obiter dictum* in the same case also went beyond the intention of the framers when he suggested that the federal judicial power could nullify state laws on the basis of natural law (though in his holding, he pulled back to the more solid ground of textual interpretation). *Id.* at 386.

[12] Vieira, *supra* note 1, at 1457.

[13] *Id.*

dorf whose views of natural law envisaged not only immunities and rights but collective and enforcable obligations to the common weal.[14] Vieira suggests the same when he writes: "Now, what distinguishes society from a mere agglomeration of men is that its members cooperate among themselves for their general benefit, rather than dividing into mutually hostile groups of aggressors and victims."[15] Yet he neglects the communitarian factor that was prevalent in the minds of the framers and the ratifiers. The primary objective of the framers was to establish a government with enough powers to operate as the expression of the nation, but with sufficient limitations to prevent the government from becoming a threat to those that make up the nation. They did not perceive themselves as creating a civil society out of a collection of separated individuals, but as constructing a nation out of already existing groups and communities with often conflicting loyalties. Edmund Randolph wrote: "[W]e are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states."[16] Nearly all the internal compromises of the convention were motivated by the need to bring disparate regions and groups together in a setting where both tyranny was frustrated and cooperation could ensue. The framers thought they were operating on something more than a bare social contract. Even the desire to have men of property elected as representatives in the halls of Congress was motivated by the belief not merely of obvious self-interest, but also because such men were thought to be able to transcend sectionalism and operate in the interests of the larger community. In short, natural law not only imparted a basis of fundamental human rights and liberties that the new government was bound to observe, but it also informed the government of its communitarian nature and its obligations to individuals in their larger relational capacity. From that successful synthesis grew our sense of nationhood, once the flush of victory in the Revolution had passed. An important fact to remember is that the ratification debates centered over whether the quest for nationhood in the Constitution would restrict unduly the states and invade

[14] McDonald, *supra* note 9, at 10-11. *See, e.g.* H. GROTIUS, THE LAW OF WAR AND PEACE, Prolegomena §§ 8-23 (1625). Locke himself emphasized the cooperative and social nature of man living under the rule of reason, though civil government was not a necessary mechanism to engender sociability. J. LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE §§ 15, 19 (1960).

[15] Vieira, *supra* note 1, at 1461.

[16] Quoted in B. WRIGHT, *supra* note 7, at 127 (emphasis in original).

the rights of the citizens. Once the federalists prevailed in the ratification battles, the nation as a whole rallied to the Constitution as a symbol of legitimacy and unity.[17]

Having asserted that the Constitution is solely a Lockean social compact designed to protect men in the defensive exercise of their rights, Vieira posits a most active enforcing role by the Supreme Court.[18] He does not review the historical research of judicial review — that in itself would require an unwieldy digression — but the issue remains complex and controversial. Whether the framers or ratifiers intended the Supreme Court to have a negative over unconstitutional legislation today remains a matter of debate. Nearly all observers, however, have accepted judicial review either as compelled by history or by the logic of our constitutional structure.[19] A more difficult issue is whether the Supreme Court has the power to strike down substantive Congressional legislation on the basis of a general rights theory rather than solely on the basis of the specific text of the Constitution.[20] Once again, however, a body of evidence supports Vieira's viewpoint, and it is unnecessary for him to reargue the entire controversy.

A far more difficult presumption that the author seems to embrace is that the Supreme Court had authority under the original Constitution to negative *state* legislation that regulated the state's own citizens and that violated their natural rights.[21] Such a proposition flies against the very structure of the federal union. The only hints of such a power occur in cases brought on diversity of citizenship grounds where one state allegedly violated the rights of citizens of another state.[22] In other words, the courts were concerned with the integrity of the federal structure rather than undermining it by interposing its power between state governments and the people who made up those governments. Even if we concede that the federal government was created as a narrow Lockean compact, there remain the vast residual powers left to the states. The colonies and the states had lived for a century and a half under charters that

[17] *See* G. WOOD, CONSENSUS AND CONTINUITY: 1776-1787, at vii-xv (1958).

[18] Vieira, *supra* note 1, at 1462-63.

[19] *See* L. HAND, THE BILL OF RIGHTS (1958).

[20] *Compare* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), *with* Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1 (1979).

[21] Vieira, *supra* note 1, at 1463.

[22] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 431-32 (1978).

granted their respective governments enormous substantive power.[23] Of course, the newly independent states also had constitutions imbued with many natural rights precepts, but this was a choice the people of the states had a right to make or to modify. Perhaps the founders expected the states to monitor their own citizens' enjoyment of natural rights. In any event, the founders left it to the people of the states to decide what kinds of limitations or what kinds of powers to vest in their respective governments.[24]

We must not mistake Locke for history. The people of the United States were not living in a state of nature in 1787. The people had already organized into existing states and had at their pleasure vested these states with various powers. In the Constitution of 1787, the people did not take their rights and powers in an unorganized state of nature and grant a few enforcement powers to the central government. They merely took some powers *already in the states* (such as the power to control incoming and outgoing commerce) and gave those powers to the central government. A few powers were denied across the board to the states, but outside of that, all remaining powers, including the power to legislate for the general welfare, were left with the states. The eighteenth century values of natural rights never totally supplanted the seventeenth century American belief in a community held together by substantive values reflected in moral legislation. All the prohibitions against state action in the 1787 Constitution, even if given their most broad interpretation, do not turn pre-existing polities into Lockean compacts supervised by the federal Supreme Court. All of the state legislation restricting interstate commerce may have fallen of its own weight after the Constitution went into effect,[25] but virtually none of its police or moral legislation did so. In his attack on the Alien and Sedition Acts, Jefferson illustrated the sense of residual state power felt by most observers of the day.

> Nor does the opinion of the unconstitutionality & consequent nullity of that remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue. The power to do that is fully possessed by the several state legislatures . . . . While we deny that Congress have a right to con-

[23] *See, e.g.*, The Mayflower Compact, in W. BRADFORD, PLYMOUTH PLANTATION 69 (Wish ed. 1967).

[24] U.S. CONST., amend. X.

[25] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 226 (1824).

> trol the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so . . . .[26]

It may be that residual police powers in the states and the Lockean theory of natural rights are mutually contradictory. It may be that the framers were inconsistent when they sought to protect liberty and property while still giving the central government enough power to act for the nation. But if we rely on history to define our legal values, however, we have to accept all of it, and not just the part we may like.

The Bill of Rights is of course an additional factor. Most scholarly opinion backs Chief Justice Marshall's view that the Bill of Rights was enforceable only against the federal government and not against the states.[27] Of course, the problem could be solved by an expansive reading of the privileges and immunities clause (or less justifiably, the due process clause) of the Fourteenth Amendment. That is the most hotly disputed issue in American legal scholarship today.[28] But Vieira mentions in his article neither the Fourteenth Amendment nor the historians that could support his cause. He confines himself to a discussion of the Thirteenth Amendment, which he terms the "most important."[29] The author suggests that the Amendment was designed to make enforceable against the states the entire gamut of Lockean natural rights, and attaches a number of statements by Congressmen at the time of its enactment (as well as a few non-contemporaneous statements) in support.[30] This becomes simply an issue of persuasion on the evidence. I find nothing in the text of the Thirteenth Amendment nor in Vieira's history of it to suggest that it was doing more than constitutionally correcting what had been a constitutional wrong, *viz.*, the reduction of human beings to chattels. The Amendment made freedom from being possessed as property an absolute right, but the evidence does not show that it and its enforcement legislation were designed to keep the states from regulating property or other relationships so long as the regulation was applied equally to all races.[31] The objective of the Amendment

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[26] VIII THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed. 1897), *quoted in* N. DOWLING & G. GUNTHER, CONSTITUTIONAL LAW 24 (8th ed. 1970).

[27] Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

[28] *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); C. FAIRMAN, RECONSTRUCTION AND REUNION (1972).

[29] Vieira, *supra* note 1, at 1469.

[30] *Id.* at 1469-74.

[31] *See* The Civil Rights Act of 1866, 14 Stat. 27.

was to secure the freedman in the equal enjoyment of common law privileges, which was no mean accomplishment. To suggest that it was a vehicle for reducing the states into bare Lockean social compacts, however, seems to be unjustifiable.

According to Vieira, George Fitzhugh's intellectual defense of slavery represented slaveholding opinion best in the late antebellum period.[32] That position is well-supported in the field.[33] Vieira's categorization of the late abolitionist debate as one of natural rights versus positivism hits the mark. The guarantee of emancipation of the Thirteenth Amendment is unquestionably a natural rights victory that no person should ever legally be the property of another. The earlier debate over slavery, however, was phrased more in terms of contending theories of natural rights. The Constitution which Vieira claims was designed for the protection of natural rights itself recognized and protected slavery.[34] Even James Madison believed that the abolition of slavery would deprive slaveowners of their natural right to property, something government was powerless to do.[35] This illustrates that the original Constitution was not unambiguous on the issue of natural rights. Even if we define the Constitution as a natural rights document, we find that the framers were unclear as to what were fundamental rights, such as whether one man could possess another as chattel.

Finally, Vieira does not shirk from applying his perception of American legal history to the Supreme Court. He heaps praise on the pre-1937 Court and rejects both the reasonable basis test used by the modern Court in judging economic legislation as well as the balancing test used in a large area of First Amendment adjudication.[36] If I understand the implications of his criticism, Vieira would have all economic legislation, by necessity both state and federal, subjected to strict scrutiny to determine whether the legislation furthered or hindered the defensive natural rights of individuals in our society. Similarly, it seems he would have the Supreme Court void even "incidental" restrictions on free speech. Not even the pre-1937 Court went as far as that. He leaves us with a vision of the Supreme Court rigorously enforcing an ideology of natural rights

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[32] Vieira, *supra* note 1, at 1466.

[33] *See* E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE (1969); W. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH (1935, 1960); B. WRIGHT, *supra* note 7, at 210-41.

[34] U.S. CONST., art. I, §§ 2, 9; art. IV, § 2; art. V.

[35] Lorenzo, Natural Law, Natural Rights, and the United States Constitution 29 n.182 (1979) (unpublished).

[36] Vieira, *supra* note 1, at 1480-99.

against all the political units of our federated and separated governmental structure. Obviously, when we see the massive amount of legislation that would require judicial annihilation, we have to conclude that, in practical effect, the political checks in the legislative and executive branches have failed and that the judicial arm must take on the prime responsibility for keeping us free.

Thus, Vieira gives us a picture of a governmental structure as far removed from the intentions of the framers as one can imagine. The independence of the states is gone. The political checks are unreliable. The ability to pass moral legislation is removed, and the nation is denied the option of developing economic and social mechanisms to contend with the problems of a modern technological society. We are brought to this impasse when we fail to see that this nation in 1789 and even in 1866 was a mix of values and structures. In the mix were some natural rights, some procedural rights inherited from the English, others developed in opposition to the English, residual state police powers, other natural law values of the communitarian sort, the ability of the federal government to act in a national capacity in many ways, and a healthy respect for a free people to govern themselves individually and corporately within a protective structure.

An ideological approach to history, even in pursuit of commendable values, is rarely ever successful. What is outside the ideology becomes by definition outside of reality, and such definitions cannot stand the test of experience. Since the Constitution remains quasi-sacred in our system, all of us are tempted to read into it our own theories of substantive law. Activist judges are often asked to emplace their deeply believed social theories into the Constitution and upon the shoulders of us all. We do ourselves no favor by adopting the same tactic for our own beliefs.

The Constitution goes a long way in protecting the procedural rights of the individual, and some substantive rights as well. The primary mechanism we have for removing the substantive excesses of government, however, is what it always has been: the political process. The founders placed most of their trust in the limiting structure of the political process and far less on external substantive prohibitions. To the extent that we can revivify the structures of separation of powers, delegated powers, and federalism, most of the problem of governmental excess can be undone. As for the rest, we shall simply have to rely on the wisdom and experience of a free people in the exercise of their democratic prerogatives.