



CSU  
College of Law Library

Cleveland State University  
**EngagedScholarship@CSU**

---

Law Faculty Articles and Essays

Faculty Scholarship

---

Fall 2011

## May It Please The Court

David F. Forte  
*Cleveland State University*, [d.forte@csuohio.edu](mailto:d.forte@csuohio.edu)

Follow this and additional works at: [https://engagedscholarship.csuohio.edu/fac\\_articles](https://engagedscholarship.csuohio.edu/fac_articles)



Part of the [Jurisprudence Commons](#)

**How does access to this work benefit you? Let us know!**

---

### Original Citation

David F. Forte, *May It Please The Court*, 11 *Claremont Review of Books* 50 (no. 4 Fall 2011)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact [research.services@law.csuohio.edu](mailto:research.services@law.csuohio.edu).

VOLUME XI, NUMBER 4, FALL 2011

# CLAREMONT

REVIEW OF BOOKS

*A Journal of Political Thought and Statesmanship*

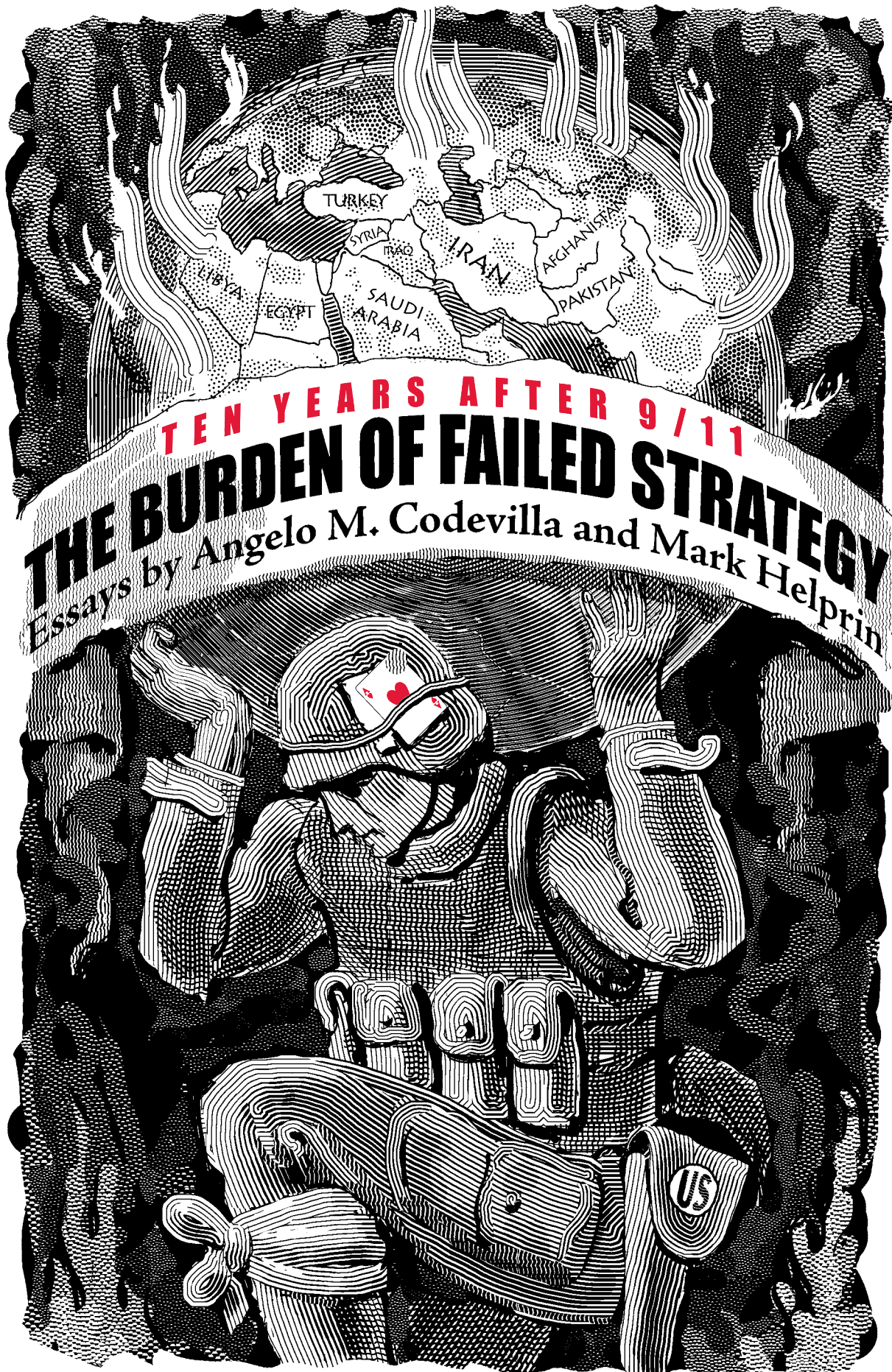
William  
Voegeli:  
**Public  
Education, Inc.**

Richard A.  
Epstein:  
**Rehabilitating  
Lochner**

Stanley  
Kurtz:  
**Fukuyama's  
History**

Ross Douthat:  
**The World  
According to  
Irving Kristol**

Kathleen  
Arnn:  
**Kinder,  
Gentler  
Boy Scouts**



Hadley Arkes,  
David F. Forte,  
&  
Michael M.  
Uhlmann:  
**Natural Law:  
An Exchange**

Charles  
Horner:  
**Kissinger's  
China**

Charles  
Murray:  
**On  
David  
Brooks**

Algis  
Valiunas:  
**The Way We  
Built Then**

Michael  
Anton:  
**Wine  
Country**



PRICE: \$6.95  
IN CANADA: \$6.95

---

---

# MAY IT PLEASE THE COURT

by David F. Forte

**M**AY IT PLEASE THE COURT. So the advocate begins...with a prayer. What is it that the counselor prays may please the court? We know that what pleases a legislator is having enough votes. What pleases a governor or president is having his orders obeyed. But what pleases a court is its being convinced of the rightness of the cause. The court wants reason, reason that persuades.

In the Anglo-American scheme of justice, more than any other, courts must give reasons for their judgment. They have to justify their conclusions before all. They are obliged to be transparent in reaching the conclusion that will change the lives or fortunes of those before them. Having enough votes is not a sufficient justification. Having the prerogative of executive decision is not enough for the judges. As Alexander Hamilton noted, judges have no power of the purse. They have no army. Their only weapon is the reasons they proffer.

Hadley Arkes offers a brilliant manifesto for natural law. In it, he suggests that judges do not pay enough attention to reason, that their realm of reason is too circumscribed—and he levels the criticism at both modern liberal and conservative judges. He urges them to reach out specifically to the principles of the natural law. Yet the judges resist the invitation. They seem always to have resisted the invitation.

Why is that so? Why are natural law reasons resisted? Arkes asks. Why do judges not seek a proper grounding of their judgment in natural law?

## Two Kinds of Natural Law

**W**HEN ARKES SPEAKS OF NATURAL LAW, he does so in two forms, though in his narrative, he seems to collapse the two. In one, which we may call “right reason,” Arkes speaks to the “nature of the thing.” Thus, he says, John Marshall reasoned in *McCulloch v. Maryland* (1819) that the power given by the Constitution to the federal government to establish something must necessarily and logically include the power to preserve it. Article I, Section 8 provides Congress with the power “To establish Post Offices and Post Roads.” One does not need an explicit grant of the power in the Constitution to say that Congress has the power to protect the mails, through punitive legislation. It inheres in the nature of the grant of power, that is, “in the

nature of the thing.” This form of demonstration, or right reason, is implicit in the art of judging. In fact, this form of demonstration does often please the court, and it should.

Arkes himself notes that even the conservative justices, whom he otherwise criticizes, often correctly use this form of natural law, i.e., right reason. So, for example, Arkes applauds Justice Scalia’s employment of principles of “propositional logic” when he disputes Justice Kennedy’s definition that whatever “affects” waters is itself “waters within the United States” (as defined in the Clean Water Act and its subsequent regulations and judicial interpretations).

But there is another aspect to the natural law that Arkes describes, which we may call moral axioms. It is here where he finds the conservative justices falling short. He regrets it when a court has an opportunity to base its decision on moral axioms and instead turns to original understanding or other devices. Thus in *District of Columbia v. Heller* (2008), establishing the right to bear arms as an individual right under the Second Amendment, Arkes criticizes Justice Scalia for considering the right of self-preservation not as a moral axiom applied to the human person as such, but as a principle that was in the positive law of the Constitution. The right of self-preservation can be a ground for the decision, according to Scalia, because it is part of the original understanding, not because it is a principle that supervenes the Constitution itself.

Scalia recoils from the use of moral first principles as a basis for judicial decision-making. He has opined,

Maybe my very stingy view, my very parsimonious view, of the role of natural law and Christianity in the governance of the state comes from the fact that I am a judge, and it is my duty to apply the law. And I do not feel empowered to revoke those laws that I do not consider good laws. If they are stupid laws, I apply them anyway, unless they go so contrary to my conscience that I must resign.

And so, here, Arkes is correct in the observation that forms the basis of his regret. It is the enunciation of moral axioms as the ground of decision that does not please the court. Justice Scalia, of course, is not alone. In

fact, he is heir to a long and articulate tradition, which Professor Arkes knows very well. But what animates this tradition? Why are otherwise wise, intelligent, and morally acute judges so averse to going outside the positive law to search for first principles, as Arkes urges them to do? The answer is that the positive law itself binds the judge within a moral framework, and Anglo-American judges find that moral framework sufficient unto itself.

## The Nature of Positive Law

**T**O UNDERSTAND THE TENSION BETWEEN the moral imperatives of the natural law and the way judges come to actual decisions, we need to complete our picture. We need to see what the actual moral experience of judging is, not just what it would be if confined to propositional logic.

Of all the founders, Hamilton best understood the nature of judging. In *Federalist* 78 he described the Constitution’s tripartite division of powers. He ascribed “FORCE” to the executive, “WILL” to the legislature, and the more circumspect “JUDGMENT” to the judiciary. He said that the judiciary would be the least dangerous branch. Why would it be the least dangerous branch? As Hamilton’s Anti-Federalist opponents asked, do not judges in robes have the same passion for power as do congressmen in frock coats?

Hamilton agreed with James Madison that mere parchment barriers would not keep the judges from abusing the rights of others. Nor did he rely upon the force of philosophic logic to restrain the judge. And Hamilton and the framers intentionally left the courts free from most of the checks placed on the other departments of government, precisely to leave the judiciary independent. If not parchment rules, if not the force of philosophical logic, if not checks and balances, what then can we rely upon to restrain judges?

Hamilton, joined by the other framers, has an answer: it is virtue. *The particular kind of virtue that inheres in the positive law of the court.* Through the moral matrix of the positive law, the judge learns the art of virtue, literally the Aristotelian habit of acting rightly. Everywhere a judge turns, he is bound by the instructive moral limits of his craft. Let us consider them.

There is, to begin, the *positive law of statutes*, of administrative regulations, and of



executive orders. Quoting St. Augustine, St. Thomas Aquinas writes that “In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them.” Thus the courts are bound by rules of statutory interpretation. By respecting the authority of the legislature and the executive, the courts affirm the political legitimacy of those branches that have a closer accountability to the people. Courts that are faithful to the positive law of statutes thereby strengthen the legitimacy of the polity.

A second element in the moral matrix of positive law is *the law of the court*, or the rules of precedent or *stare decisis*. Precedent operates as a form of judicially created statute, which, like a legislative statute, is binding but which still must be interpreted. There is, to be sure, a lively contemporary debate over whether incorrect interpretations of the Constitution should be maintained under the rule of *stare decisis*. Whatever the correct resolution of that conflict should be in particular cases, it is nonetheless telling that the debate would have no traction at all if precedent did not have a binding function on courts.

There is an additional parallel between the law of statutes and the law of precedents: both direct a judge’s attention to what has gone before. Both testify to the fact that the law that comes to the judge is *de lege lata*, something already laid down, as opposed to *de lege ferenda*, law as it ought to be. Thus do both the law of statutes and the law of the court channel the judge away from subjective preferences. We should mention here that part of the law of the court is the law of judicial system, by which lower courts follow the rules laid down by superior courts within their jurisdiction. The system provides consistency and coherence in the law throughout the country in its thousands of applications.

A third element is *the law of process*, which limits what a court can hear, what evidence may be admitted, and how a court may dispense legal justice. As every law student learns—and what every lawyer and judge knows—courts may not choose what issues to decide. They are limited to cases, which means that there must be a plaintiff (or petitioner), a defendant (or respondent) and a legal cause of action. The parties must have standing, the issue must be ripe, must not be moot, and the court must have jurisdiction.

A fourth element of the law is *the positive law of the subject*, or legal doctrine. Every legal dispute is brought in one or more subject area, each of which has its own complex concepts, standards, and history. Each subject—whether it be contract law, tort law, anti-trust law,

tax law, bankruptcy law, divorce law, corporation law, or any of the other myriad substantive subjects taught at law school and continued on in the practice of lawyers—has a coherent and definable content, known in legal studies as “doctrine.” The vast detail and the motivating principles in every area provide a positive law of direct relevance to the resolution of each particular legal dispute.

A fifth element is *the positive law of the case*, or *res judicata*. Once a case has been fully and completely decided, no court may revise or reopen the litigation. Although the legislature may change the underlying law and affect the legal rights of the parties even in an ongoing case, once the dispute has been resolved judicially, not even a legislative act can change the rights and duties of the parties decisively determined by the court.

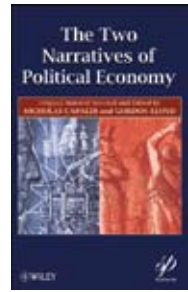
A sixth constraint is *the positive law of the judge*, or judicial ethics. The appropriate behavior of judges has been part of Western legal concern for centuries. In the United States, the American Bar Association first adopted Canons of Judicial Ethics in 1924. In 1972, the Canons were revised and redacted into a Code of Judicial Conduct that served as the basis for nearly all state codes of judicial conduct. The Code covers such areas of judicial conduct as compliance with the law, diligence and impartiality, conflict of interest, and electoral activities. In addition, federal statutes cover disqualification and recusal of judges.

A seventh element is the *positive law of law*, or what makes an enactment truly binding. For law must have certain internal elements for it to be law, and not just an arbitrary or absurd act. The principle of legality was helpfully illuminated in the famous 1958 debate between Leon Fuller and H.L.A. Hart in the pages of the *Harvard Law Review*. Although Fuller referred to his theory as “internal natural law,” his view is more of a delineation of the nature of positive law, *qua* law, and the outer moral limits of what a judge can enforce as true positive law. For positive law to be legal, argues Fuller, it needs to have certain internal attributes: the rules must be general, publicly promulgated, prospective, clear and understandable, consistent, capable of being complied with, relatively stable, and administered faithfully. Without these elements, an enactment would be void for vagueness, or for arbitrariness. It simply would not be law.

An eighth ingredient of the moral fabric of positive law is *the law of reason*, or more exactly, *the law of reasons*. As noted, the Anglo-American legal system’s hallmark is the judge’s moral accountability for his decision, particularly at the appellate level. He must give reasons, publicly stated, justifying his decision, open for criticism and rational impeachment. It is

## The Two Narratives of Political Economy

Nicholas Capaldi and Gordon Lloyd



The editors argue that political economy from the 17th century to the present can be framed as a battle between the liberty narrative and the equality narrative. These narratives originate in the works of Locke and Rousseau and were expanded later by Smith and Marx and they still hold sway to this very day. Generous portions of original textual material are provided.

“I recommend this volume highly both to the individual interested in learning about the intellectual and political history of political economy and to the professor in search of a one-volume anthology on political economy for use in courses on economic thought.”

—Steven D. Ealy, Senior Fellow, Liberty Fund, Inc.

ISBN: 978-0-470-94829-3 • Hardcover • 473 pages  
November 2010 • \$49.95 \$39.96

Use Promotion Code **SCR99**  
at Wiley.com to save 20%



To shop at your preferred site visit:  
[www.wiley.com/buy/978-0-470-94829-3](http://www.wiley.com/buy/978-0-470-94829-3)

## @transaction

### American Political Cartoons

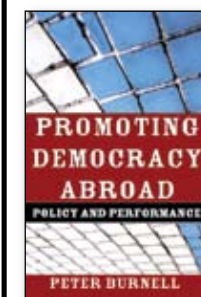
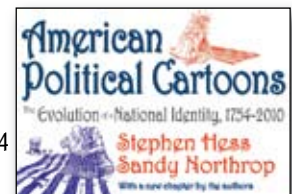
The Evolution of a National Identity, 1754-2010

Stephen Hess and Sandy Northrop

With a new chapter by the authors

ISBN: 978-1-4128-1119-4 (paper)

2010 203 pp. \$24.95



### Promoting

### Democracy Abroad

Policy and Performance

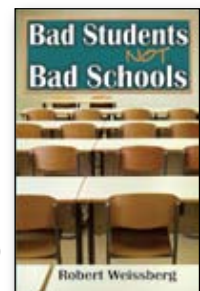
Peter Burnell

ISBN: 978-1-4128-1842-1 (cloth)  
2011 296 pp. \$49.95

### Bad Students, Not Bad Schools

Robert Weissberg

ISBN: 978-1-4128-1345-7 (cloth)  
2010 315 pp. \$39.95



## Transaction Publishers

To order visit [www.transactionpub.com](http://www.transactionpub.com)  
or call toll-free 888-999-6778 (in the US) or 732-445-1245



not enough for the judge to follow the various elements of the positive law, as outlined above. He must demonstrate to the people and the polity that he has been faithful to the positive law. Not only, therefore, is the judge bound by the moral constraints of the positive law, he must be transparently bound.

All of the above impels a judge in the American legal system to adhere to *the law of the Constitution*, which provides the moral basis for originalism. Professor Arkes has criticized originalism, partly because it is indeterminate and there are multiple disagreements about what the original understanding is. But if disagreement about the principles of natural law are no logical barrier to there being a right interpretation of natural law, so too disagreement about the original understanding of the Constitution is no barrier to there being a right understanding of what the founding generation meant by the words they so laboriously put into the Constitution.

Besides, the moral suasion of originalism is necessary to the virtue of the judicial craft. In *Marbury v. Madison* (1803), Marshall insisted that “[t]he Framers of the Constitution contemplated [i.e., intended] that instrument as a rule for the government of courts, as well as of the legislature.” In words that judges

and academics might well contemplate today, Marshall said,

Why, otherwise, does the Constitution direct judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official behavior [i.e., their judicial craft]. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments for violating what they swear to support.”

### Judicial Craft

**T**HE JUDGE WHO FAITHFULLY ABIDES BY the positive law in all the ways outlined above performs a rationally moral task without the need to refer to natural law principles that lie at the base of law’s function, and, in many cases, of law’s substance. This is the *phronesis* of the judge, the practical wisdom, the virtue of prudence. Prudence does not mean, “let’s compromise until the time is ripe for getting what we want.” Prudence is the ability to do what is optimally right in a situation of contingent variables. It is not what is temporarily right. It is right in the moment of deciding what is right. Abraham Lincoln, let it be remembered, practiced prudence, while William

Lloyd Garrison would not let anything contingent stand in the way of his categorical imperative. Garrison was the advocate of moral absolutism, while Lincoln was the true originalist.

Many of us are familiar with a scene in Robert Bolt’s play *A Man for All Seasons*, in which Thomas More engages his son-in-law William Roper in a debate over the problem of too many positive laws standing in the way of getting at what’s right.

Roper: So, now you give the Devil the benefit of law!

More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: Yes, I’d cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned ’round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man’s laws, not God’s! And if you cut them down, and you’re just the man to do it, do you really think you could stand upright in the winds that would



### Beauty Pays

Why Attractive People Are More Successful  
*Daniel S. Hamermesh*

“If there was ever any doubt that Dan Hamermesh is the dean of beauty—of explaining beauty, at least—this book should put that to rest. He writes so lucidly and charmingly about such a compelling subject that you will never again look at a beautiful face (or an ugly one) without thinking of the many economic consequences. Bravo!”

—Stephen J. Dubner, coauthor of *Freakonomics*

Cloth \$24.95 978-0-691-14046-9



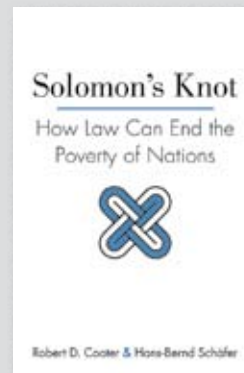
### Beyond Our Means

Why America Spends While the World Saves  
*Sheldon Garon*

“This will be a unique and important book for historians, for policymakers, and for the general public. *Beyond Our Means* issues an important challenge to cultural explanations that will resonate far beyond the topic of savings. I learned a tremendous amount.”

—Lawrence B. Glickman, author of *Buying Power*

Cloth \$29.95 978-0-691-13599-1



### Solomon’s Knot

How Law Can End the Poverty of Nations  
*Robert D. Cooter & Hans-Bernd Schäfer*

“This book distills and presents in a lucid and often even entertaining way the main insights and contributions of law and economics to meeting the challenges of growth for developing countries. Cooter and Schäfer argue that market freedom is the key to growth, but that it needs to be sustained by the appropriate legal rules and institutions.”

—Robert Howse, coauthor of *The Regulation of International Trade*

*The Kauffman Foundation Series on Innovation and Entrepreneurship*  
Cloth \$29.95 978-0-691-14792-5



blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!

What would happen if we cut down the positive laws of the judge to get at the moral axioms? What would happen if we put the axe to the rules of statutory interpretation, or to *stare decisis*, or to *res judicata*, or to the rules of due process, or to judicial and legal ethics, or to legal doctrine, or to the principle of legality, or to the justification by reason, or to originalism? What would happen if we did that? What would we do then when the Devil turned 'round on us?

We'd get the wages of what the legal realists did to the traditional moral constraints of judging, when they urged judges to follow WILL and not JUDGMENT. We'd get *Roe v. Wade* (1973) and over 40 million dead human beings.

The problem with *Roe v. Wade* is not that it violated the norms of natural law. Cer-

tainly it did so manifestly. The true problem with *Roe v. Wade* is that it did not follow the ethical norms of *positive law* of the court. In that case, Justice Blackmun violated *the law of the court* by ignoring the tradition of cases opposed to such an innovative "right." He violated *the principle of legality* by proposing a rule that had little internal consistency. He violated *the law of reason*, for the opinion was simply a diktat declaring a result that had no colorable reasoning behind it with a flippant disregard of the norms of justification and transparency. Blackmun violated *the positive law of the Constitution*, for there was no privacy right encompassing abortion in the original understanding of liberty or in any reasonable application of the original understanding.

*Roe v. Wade* is not just censurable because it violates natural law. It is censurable because Justice Blackmun violated the most fundamental moral norms of the positive law,

prompting the famous observation of John Ely, "It is...a very bad decision...because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."

The natural law song has many notes. Thus I suggest that the renewed natural law project can succeed if we take the categorical imperatives of Kant, and place them in the practical wisdom of Aristotle, within the prudence of Aquinas, and come to see the phenomenological vibrancy of the morality of the judicial craft itself.

*May it please the court.*

*David F. Forte is a professor of law at the Cleveland-Marshall College of Law and an acting municipal judge in Lakewood, Ohio. Portions of this essay were drawn from an article in A Second Look at First Things: A Case for Conservative Politics, edited by Francis J. Beckwith, et al. (St. Augustine's Press).*

---

## THE NEED FOR NATURAL LAW

by Michael M. Uhlmann

IN HADLEY ARKES'S "MANIFESTO" WE HAVE an elegant restatement of the case for natural law and an elegant summary, as well, of the ideas that have informed Arkes's thinking over four decades. It is a fitting inaugural to the establishment of the Claremont Institute's new center for the study and application of natural law principles. The Center has many godfathers, but none more influential than Harry V. Jaffa. Natural law, it has been said, always returns to bury its pallbearers, and few in our time have done more than Professor Jaffa to revive interest in the subject.

We have in David Forte's response an equally elegant commentary on why judges—even judges who are friendly to the idea of natural law as a philosophical proposition—may be indisposed to acknowledge the authority of natural law as a guide to adjudication. Professor Forte, no less than Professor Arkes, recognizes the limits of legal positivism; but he also reminds us that positive law has moral virtues that natural law enthusiasts are sometimes prone to disregard. As Forte puts it, "We need to see what the actual moral experience of judging is, not just what it would be if confined to propositional logic."

Because I recently wrote at some length, and favorably, about Professor Arkes's effort to in-

still a deeper appreciation for the moral logic that necessarily undergirds all law ("Natural Law Man," Winter 2010-Spring 2011 CRB), I will not further dwell on the matter here. Instead, I would like to offer some observations on Professor Forte's response, and then follow that with a few suggestions regarding the new center.

Forte suggests that many judges are reluctant to venture beyond the confines of positive law, not because they abjure the importance of morals, but because "the positive law bounds judges within a moral framework, and Anglo-American judges find that moral framework sufficient unto itself." That moral framework, he says, may be found by examining various criteria of positive law that guide judges in their work: the binding authority of statutory enactments and executive orders; respect for precedent, the formalities of legal process, and prevalent legal doctrine; the finality of decisions once rendered; the authority of judicial ethics; "the positive law of law," by which is meant certain internal attributes (such as public promulgation, clarity, and stable administration) that distinguish law as such from arbitrary diktat; and, finally, what Forte calls "the law of reasons," or the duty to explain, publicly and usually in writ-

ing, the rationale behind decisions. He argues that these criteria, taken together and rightly understood, enable a judge to "ply his craft in consonance with natural law without needing to give it formal judicial notice."

There is much to what Forte says, and he is right that most of these criteria, consciously or unconsciously, derive from or rely upon principles of natural-law reasoning. His list delineates the necessary moral conditions for the rule of law that binds, or ought to bind, judges. The question, however, is whether his list is sufficient. I think it is not, which is why I am attracted to Arkes's argument that we need to be more explicit about the moral ground of legal reasoning.

### The Limits of Positive Law

TOWARD THE END OF HIS RESPONSE, FORTE quotes a famous passage in Robert Bolt's *A Man for All Seasons* in which Thomas More instructs his well-meaning but somewhat impetuous son-in-law about heeding the commands of positive law. I know the passage well; indeed, *A Man for All Seasons* is a staple of one of my courses. More's statement is a moving and eloquent defense of the rule of law, one redolent with themes articulated

The CLAREMONT REVIEW OF BOOKS is a publication of the CLAREMONT INSTITUTE  
FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY.

Subscribe to  
the *Claremont Review of Books*

*“The Claremont Review of Books fills a  
crucial gap in the journalism of the Right,  
bringing criticism to the overblown and  
unsound, and needed attention to the  
worthy and uplifting.”*

—Steven F. Hayward  
author, *The Age of Reagan*

Subscribe to the *CRB* today and save 25%  
off the newsstand price. A one-year  
subscription is only \$19.95.

To begin receiving America’s premier  
conservative book review, visit  
[www.claremont.org/crb](http://www.claremont.org/crb)  
or call (909) 621-6825.

CLAREMONT  
REVIEW OF BOOKS  
937 W. FOOTHILL BLVD.  
SUITE E  
CLAREMONT, CA  
91711

NON PROFIT ORG.  
U.S. POSTAGE PAID  
PERMIT No. 504  
CLAREMONT, CA