CONSTITUTIONAL CRISIS AND AMERICA'S LOST NATURAL LAW MIND

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Why are Catholic hospitals now liable to suit by "transgender men" on whom they refuse, for religious reasons, to perform hysterectomies?[1] In part, no doubt, because courts misunderstand the nature and purpose of the Religion Clause in our First Amendment and, more generally, our Constitution and rule of law. More fundamentally, however, the current attack on religion in America stems from the loss of understanding of the nature of our constitutional order and its grounding in natural law. Our current legal crisis, often presented by lawyers as a matter of interpretation,[2] is rooted in metaphysical confusion and so cannot be resolved through interpretive reforms alone. As John Courtney Murray, S.J., pointed out in the middle of the last century, American constitutionalism is inextricably bound up with natural law understandings of the person and the social order.[3] These understandings, long maintained through a fruitful relationship between religious and secular authority, especially in the educational sphere, have been massively undermined by judicial rulings.[4] Committed to promoting an ideology of individual autonomy supported and enforced by centralized political power, judges have enforced a policy of strict separation between "church and state" that, over time, has effectively changed general understandings of the nature of the person and society. Far advanced, the deconstruction of traditional American presuppositions has made it increasingly difficult for either judges or laymen to recognize, let alone act in

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1. *See, e.g.*, Tim Fitzsimons, *Transgender Man Files Discrimination Suit After Maryland Hospital Cancels Hysterectomy*, NBC NEWS (July 22, 2020, 2:21 PM), https://www.nbcnews.com/feature/nbc-out/transgender-man-files-discrimination-suit-after-maryland-hospital-cancels-hysterectomy-n1234534.

2. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) ("Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.").

3. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 31–32 (Sheed & Ward, 1960) [hereinafter MURRAY, WE HOLD THESE TRUTHS].

4. *See, e.g.*, John Courtney Murray, *Law or Prepossessions?*, 14 L. & CONTEMP. PROBS. 23 (1949) [hereinafter Murray, *Law or Prepossessions?*].

accordance with, the reality on which American constitutionalism relies. As Orestes Brownson argued, the written Constitution is made real by an unwritten constitution of customs, beliefs, and practices, in essence the culture of the people as they live out their understanding of the person and the requirements for a good life.[5] Americans have lost the common culture of our constitutional order, leaving our ability to make sense of the Constitution's (and other laws') primary goals and presuppositions, highly if not fatally, limited.

I. FALSE HOPE

For decades now, "textualists" and "originalists" have claimed that their interpretive methods must form the core of any attempt to save the Constitution from incoherence and the American republic from a breakdown of the rule of law.[6] Often identified with political conservatism, textualists and originalists[7] seek to further democratic accountability and the rule of law by reviving adherence to the Constitution's text-based limitations on the power of actors within branches of government as well as federal powers and individual rights in the making of legal rules.[8] To accomplish such goals, the argument goes, the bench must be repopulated by judges who will enforce the law and the Constitution as written, rather than impose their own political views.[9] This may be seen as an attempt to displace the currently dominant theory of a "living constitution" and a "purposivist" mode of interpretation that involves judges' divining the abstract purposes of laws and

5. ORESTES AUGUSTUS BROWNSON, THE AMERICAN REPUBLIC 103 (2007).

6. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) (arguing that non-originalist interpretation culminates in vindication of the beliefs of particular judges rather than the will of the people).

7. I will treat the terms interchangeably, choosing to ignore the more hyper-scholastic issues of interpretivism regnant in the legal academy. The two are intimately connected. John F. Manning observes general agreement among textualists that "judges must seek and abide by the public meaning of the enacted text, understood in context" and prioritize the letter over the spirit of the law and evincing reluctance to look to legislative history as an accurate record of legislative intent. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005). As to originalism, Paul Brest's definition may serve our purposes: "By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234 (1980).

8. *See, e.g.*, Bork, *supra* note 2, at 5–6.

9. *See, e.g.*, Mike Rappaport, *The State of Originalism*, L. & LIBERTY (Apr. 3, 2020), https://lawliberty.org/the-state-of-originalism/ (giving a rundown of court decisions relying on originalist methodologies in assessing the impact of increased numbers of originalist judges).

constitutional provisions, then deciding for themselves how the law should be formulated to serve those ends.[10]

Before proceeding to argue that all forms of originalism are insufficient, by themselves, to reverse the trend toward constitutional delegitimation and social transformation, I first should point out that important distinctions exist within the movement. As Jesse Merriam has argued, the older, intent-based originalism of figures such as Raoul Berger, Robert Bork, and Antonin Scalia have been pushed into the background by a newer, more openly libertarian version claiming "original public meaning" as the proper guide to interpretation.[11] This newer "originalism," championed by figures such as Randy Barnett, has made law professors and courts (as opposed to historical analysis or the public will) the central sources of "original public meaning." The result is a theory (and ethic) of "engagement" that rejects "old originalism's" emphasis on judicial restraint in favor of reconstruction of precedents and texts to make them fit the needs of libertarian ideology. The Fourteenth Amendment in particular is transformed from a narrow grant of authority for specified purposes to a broad grant of power properly aimed at freeing individuals from various forms of tyranny.[12] Like Merriam, one might simply dismiss the "new" originalism as a non-originalism, thus preserving adherence to a kind of originalism necessary to preserve limited constitutional government.[13] But my argument, here, is that originalism always will devolve into "new" originalism of one form or another in hard cases because it does not contain within itself the means to restrain its adherents from seeking to wield the whip of judicial power in the name of (their vision of) justice. The reason for this is simple: no interpretive method can continually motivate its practitioners to come to legal answers with which they fundamentally disagree.[14] Over time, the process will lose legitimacy unless the interpreter comes to agree with the fundamental principles underlying the answers provided in the text. Thus, the only "true"

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10. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 22–25 (Robert C. Clark et al., eds., 3d ed. 2017) (comparing three foundational theories of statutory interpretation: "intentionalism," "purposivism," and "textualism").

11. Jesse Merriam, *Originalism's Legal Turn as a Libertarian Turn*, L. & LIBERTY (May 8, 2018), https://lawliberty.org/libertarian-originalism/.

12. *Id.*

13. *Id.*

14. *See, e.g.*, Leon Festinger, *Cognitive Dissonance*, SCI. AM., Oct. 1962, at 93 (laying out the psychological theory that humans attempt to reduce the stress produced by acting in ways that go against their deeply held values).

originalist, over time, will be the one who, in general terms, shares the basic understandings underlying the texts he interprets.

At several points over decades of interpretive conflict, there has been a majority on the Supreme Court made up of Justices appointed by Presidents insisting that their goal is textualist, originalist judicial interpretivism; the results have been, to say the least, disappointing.[15] The Supreme Court itself continues to make law from the bench, twisting statutory and constitutional text to mean what is convenient for given policy ends.[16] Religious believers and Catholics in particular have reason to be concerned about this development because so much of the activist courts' jurisprudence undermines religious practice and family integrity,[17] and because the reason for this continuing failure of imagination is rooted in hostility to the metaphysical understanding at the heart of Catholic Social Thought, namely natural law.[18] Textualism and originalism have failed because they lack metaphysical content and they lack metaphysical content because they are practiced today in ignorance of the natural law and, not coincidentally, the cultural and philosophical assumptions that underlie the American constitutional order.[19]

The promise of textualism and originalism as originally understood was that neutral principles can bind down the government to the original meaning of the Constitution, taking policy considerations out of judicial decision making and producing simple, known laws in accordance with the democratic expectations of the people.[20] Yet all law is rooted in policy in at least the limited sense that it relies on common assumptions concerning what is right (and wrong) to pursue as persons, associations, and society. Moreover, all legal interpretations require the definition and application of

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15. *See, e.g.*, Linda Greenhouse, *Souter Anchoring the Court's New Center*, N.Y. TIMES, July 3, 1992, at A1.

16. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (reclassifying the individual mandate of the Affordable Care Act as a tax rather than a penalty so that it might be held constitutional under Congress' taxing power without expanding its power to regulate commerce to include regulation of commercial inactivity).

17. *See generally* Bruce P. Frohnen, *Liberation Jurisprudence: How Activist Courts Have Torn Family and Society Asunder*, FAM. POL'Y, May–June 2001, at 1.

18. MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 186–90 (2009) (dismissing natural law as unscientific and childish in light of modern scientific theories).

19. *See generally* PETER AUGUSTINE LAWLER & RICHARD M. REINSCH II, A CONSTITUTION IN FULL: RECOVERING THE UNWRITTEN FOUNDATION OF AMERICAN LIBERTY (2019) (detailing Orestes Brownson's understanding of the cultural grounds of the American constitutional order).

20. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 859–60, 862–64 (1989).

key terms (e.g. "murder" or "person"). Such definitions emerge from a combination of tradition (e.g. cultures differ substantially in their definition of licit killings, including those in self-defense) and acceptance or rejection of objective truths such as each person's possession of human dignity as a being created in the image and likeness of God, as opposed, for example, to racial theories denying the humanity of members of some groups.[21]

Unfortunately, textualist judges have joined their more overtly activist brethren in using judicial interpretation to further policy goals rooted in assumptions inconsistent with a natural law understanding of man and society.[22] Textualism and originalism have failed to rein in judicial lawmaking because they are practiced by judges whose legal prejudices have been shaped by the same vision of individual authenticity and centralized political power that spurred the anti-constitutional revolution of the mid-twentieth century. It has been pointed out that more recent "public meaning" forms of originalism leave massively more room for judicial reinterpretation than do more traditional forms of "original intent" jurisprudence.[23] But, while "new" public meaning originalism may be more overt in its rejection of the common, natural law mind at the core of American constitutionalism, the "neutral" principles of even traditional original intent jurisprudence, because they are mere rules of interpretation, can themselves provide no substantive context preventing reinterpretation according to a radically individualistic ideology that requires, on its own logic, the fundamental reconstruction of our Constitution and society; such context can exist only in the common mind, the traditions and practices of the people, which must be taken as true by judges if they are to do their job of interpreting rather than making law.

II. WHERE WE ARE

One of the greatest shocks in recent years to those putting their faith in textualism was Supreme Court Justice Neil Gorsuch's majority opinion in *Bostock v. Clayton County*.[24] Gorsuch, hailed previously as a strict

21. *See* Scott v. Sandford, 60 U.S. (19 How.) 393, 412 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

22. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting) (accusing the majority of misinterpreting legislative intent).

23. *See, e.g.*, Merriam, *supra* note 11 (distinguishing the genuine textual grounding of original intent from the creative interpretivism of original public meaning).

24. *Bostock*, 140 S. Ct. at 1737.

textualist, declared that Title VII of the Civil Rights Act of 1964 forbids employer discrimination against homosexual or transgender employees. Contemplated and debated for several years, homosexual and transgender rights against employment discrimination had not been enacted into law. But Gorsuch claimed to find them within Title VII's prohibition on discrimination "because of . . . sex." The issue in *Bostock* was whether homosexuality ("sexual orientation") and transgenderism ("sexual identity") are, for civil rights purposes, matters of sex akin to (and in effect superseding) the biological distinction between male and female. Gorsuch found that they are, arguing that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[25] An employer discriminating against a person for being homosexual or transgender is discriminating for reasons "it would not have questioned in members of a different sex."[26] In discriminating against a male employee on account of his being attracted to men, for example, an employer "discriminates against him for traits or actions it tolerates in his female colleague."[27]

Both dissents criticized Gorsuch for being inauthentically textualist. Justice Alito pointed out that the Court opinion's effective definition of "sex" directly contradicts the ordinary meaning of that term at the time of Title VII's adoption in 1964 for the simple reason that, in 1964, no dictionary accepted Gorsuch's definition and no appreciable part of the public or scientific community accepted the notion that sex means sexual orientation or sexual identity.[28] Justice Kavanaugh argued that the Court was imposing a "literal" interpretation of sex discrimination—a meaning radically de-contextualized in time and linguistic understanding—and so treating the actual, common understanding of the nature and meaning of biochemical differences underpinning Title VII as irrational.[29] Such charges show the limitations of textualism: as an interpretive method it relies on the assumptions of the interpreter concerning what is rational or irrational. Gorsuch essentially found that it is irrational to define sex in terms of "mere" biology because one's identity is bound up, not with one's biological sex but rather with one's sexual preferences and personal identification.

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25. *Id*. at 1741.
26. *Id*. at 1737.
27. *Id*. at 1741.
28. *Id*. at 1756 (Alito, J., dissenting).
29. *Id*. at 1825 (Kavanaugh, J., dissenting).

Gorsuch's fundamental assumption regarding sex is that it is a matter of individual choice. The real point of jurisprudential contention in *Bostock* was whether the law should be interpreted to vindicate individual choice *qua* choice or to uphold the person's dignity as a person and member of society with an intrinsic nature and corresponding goods. This latter, natural law understanding is in stark contrast with the *Bostock* decision. The natural law understanding begins from the metaphysical conviction that each person "has a nature that he must respect and that he cannot manipulate at will."[30] On this view, human nature is inescapably "gendered." The universe is by nature designed for persons who are male or female, and this biological nature accords to each their humanity, dignity, "and also the clear sign of the interpersonal communion in which man fulfills himself through the authentic gift of himself."[31] That is, natural law sees each person as constituted in significant measure by his sex and his sociability, most fundamentally with the opposite sex. Body and soul are a unity, not just as a matter of biology, but as a matter of essence, of the intrinsic purpose of the person's being. His nature is "in the unity of his spiritual and biological inclinations and of all the other specific characteristics necessary for the pursuit of his end."[32] That end—communion with other persons and, most importantly, God—is possible only on the basis of one's full identity as man or woman and, from there, as a member of a multitude of associations including, most concretely, the natural family.[33]

Bostock decreed that law and the social order be reconfigured in a manner opposed to natural law. As Alito's dissent pointed out, the legality of single-sex sports, the ability of a person to refuse to be naked in a locker room with a person with the reproductive organs of the opposite sex, religious organizations' ability to uphold their beliefs in regard to sexual morality, and free speech regarding issues of sexual orientation and identity all could be called into question by the Court's new definition of sex.[34] Gorsuch dismissed all such objections. Relatedly, he also left unmentioned the basis of a central claim under consideration in *Bostock*, namely the discriminatory nature of a sex-based employee dress code.[35] A male plaintiff

30. CONGREGATION FOR CATH. EDUC., "MALE AND FEMALE HE CREATED THEM" 17 (2019).

31. *Id.* at 18 (quoting John Paul II, *General Audience*, 1 INSEGNAMENTI IV, 904 (Apr. 8, 1981)).

32. *Id.* (quoting John Paul II, Encyclical Letter, *Veritatis Splendor*, 48, 50 (Aug. 6, 1993)).

33. *Id.* at 20–21.

34. *See Bostock*, 140 S. Ct. at 1778–83 (Alito, J., dissenting).

35. Thomas Ascik, *Gorsuch's Textual Revolution*, L. & LIBERTY (June 24, 2020), https://lawliberty.org/gorsuchs-textual-revolution/.

had been forbidden from wearing a dress to carry out his duty as a funeral home employee charged with helping console bereaved mourners.[36] Mourners' potential discomfort at being placed in emotionally intimate engagement with a biological male wearing clothes traditionally reserved for females is effectively, though silently in Gorsuch's opinion, taken to be irrational animus ineligible for consideration by employers.

In declaring irrational the assumptions regarding the nature of sex as a category that were essentially universal at the time of Title VII's enactment, the Court precluded effective opposition to a host of radical changes in public life.[37] Gorsuch's opinion took the definition of sex as including sexual orientation and sexual identity regardless of biology as the only one acceptable in law. From now on, then, anyone denying that sex means all these things—that sex is a matter of individual choice rather than biology and essence, making one's choice of sexual partner and/or identity a matter of right, can only be seen as acting on the basis of animus or some other irrational motivation.[38] Legally speaking, sex in the United States is no longer a biological term but a matter of self-identification and individual choice—a choice now seen as the essence of human dignity.

III. HOW WE GOT HERE

A. Caselaw

The *Bostock* decision, though it goes to the metaphysical heart of what it means to be a person, in practice is the culmination of decades of jurisprudence stripping from that person his social and biological nature—a jurisprudence negating "the male-female duality of human nature, from which the family is generated. The denial of this duality . . . erases the vision of human beings as the fruit of an act of creation."[39] It also propagates an understanding "of the human person as a sort of abstraction who 'chooses for

36. *Id.*

37. *Id.* As this early commentator noted, while the Gorsuch opinion expunged all direct references to the underlying case, it also upholds an appellate decision specifically forbidding sex-based dress codes and specifically requiring same-sex bathrooms; "this case explicitly stands as a precedent forbidding dress codes based on sex." *Id.*

38. This is already the case, for example, in regard to laws forbidding special protections for homosexuals. *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

39. CONGREGATION FOR CATH. EDUC., *supra* note 30, at 19.

himself what his nature is to be.'"[40] Such choices are individualistic to the point of being anti-social; they are made by and for individuals separated from social concerns, ends, and understandings, including self-understandings.

The anti-social nature of contemporary jurisprudence was made clear in the Court's opinion in *Obergefell v. Hodges*[41] on same-sex marriage. Justice Kennedy's majority opinion reads into law "the right to personal choice regarding marriage" supposedly "inherent in the concept of individual autonomy."[42] According to Kennedy, "The Constitution promises . . . to all within its reach . . . specific rights . . . to define and express their identity," including the right of "marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex."[43] "Choices about marriage shape an individual's destiny," Kennedy averred, such that "the decision whether and whom to marry is among life's momentous acts of self-definition."[44]

Marriage, according to the *Obergefell* Court, is a tool, a derivative relationship by which individuals secure companionship, support, and a means by which "to define themselves by their commitment to each other."[45] Society, public opinion, and reason itself must be rearranged to support this redefined marriage right in order to better secure the material and especially the dignity interests attached to "self-definition" of individuals who choose to partake of it:

> Excluding same-sex couples from marriage . . . conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[46]

While Kennedy was no textualist, the dissent by the sometime-textualist Justice Roberts shows the limits of that methodology: "Although the policy

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40. *Id.*
41. Obergefell v. Hodges, 576 U.S. 644 (2015).
42. *Id.* at 646, 665.
43. *Id.* at 651–52.
44. *Id.* at 666 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).
45. *Id.* at 667 (quoting United States v. Windsor, 570 U.S. 744, 763 (2013)).
46. *Id.* at 668 (citing *Windsor*, 570 U.S. at 772–73).

arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage."[47] Here, Roberts seems to stick to a functional textualism, eschewing consideration of policy goals in favor of legal formalism. But he immediately admits such formalism's severe limits by asserting that "a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational."[48] While it may have been true for Roberts at the time of *Obergefell* that "our Constitution does not enact any one theory of marriage[,]"[49] one wonders whether such a conclusion would stand for textualists once the law is read to enshrine only individual identity interests, as in the *Bostock* case—a case in which Roberts joined the majority. If the nature of marriage, or sex, is irrelevant in and of itself, then it is only a matter of time before the considered opinions of the people underlying a given law or constitutional provision may be deemed to have been irrational all along because they are inconsistent with a proper understanding of the individual and its identity interests. This is, after all, precisely what happened in *Bostock.*

At issue is the nature of the person. Law inescapably is about persons because it is persons who are entitled to or responsible for rights and actions. A person incapable of reason cannot be held responsible or given responsibility. Likewise, a person who is not by nature social cannot have an interest in social associations *per se*. Associations, for a society of such persons, are merely disposable tools for individuals' ends of the moment, and the law has no rational basis for protecting them against individual will. Not surprisingly, this line of reasoning was made clear in a case, prior to *Obergefell*, regarding abortion.

The Court in *Planned Parenthood v. Casey*[50] declared that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[51] Previous cases had recognized that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime,

47. *Id.* at 686 (Roberts, C.J., dissenting).

48. *Id.*

49. *Id.*

50. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

51. *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

choices central to personal dignity and autonomy, are central to . . . liberty."[52] And "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[53] Such self-creative actions, being the "heart" of liberty, must be kept free from political, social, and economic costs so that the individual may use them to "define the attributes" of its personhood.[54]

Such a vision could not be more opposed to the natural law understanding of the person as constituted for self-giving and fulfilled through the act of forming relationships, most fundamentally the natural family. On the natural law view, "[o]ne's identity as a human person comes to authentic maturity to the extent that one opens up to others."[55] Within this social understanding of the person, that person "becomes himself only with the other."[56] The biological reality of sexual difference is a necessary starting point for development of the human personality:

> Man and woman constitute two modes of realising, on the part of the human creature, a determined participation in the Divine Being: they are created in the "image and likeness of God" and they fully accomplish such vocation not only as single persons, but also as couples, which are communities of love. Oriented to unity and fecundity, the married man and woman participate in the creative love of God, living in communion with Him through the other.[57]

The alternative to such an understanding is what we have now in American law, namely an ideal and a rule of action according to which "the individual should be able to choose his or her own status, and that society should limit itself to guaranteeing this right, and even providing material support, since the minorities involved would otherwise suffer negative social discrimination."[58] The Court in *Casey* drew from a philosophy "denying the existence of any original given element in the individual, which would precede and at the same time constitute our personal identity, forming the

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52. *Id.*

53. *Id.*

54. *Id.*

55. CONGREGATION FOR CATH. EDUC., *supra* note 30, at 18.

56. *Id.* at 19.

57. *Id.* at 18 n.31 (quoting *Sacred Congregation for Catholic Educational Guidance in Human Love: Outlines for Sex Education* ¶ 26 (Nov. 1, 1983), http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19831101_sexual-education_en.html).

58. *Id.* at 9.

necessary basis of everything we do."[59] Such a philosophy assumes that "the only thing that matters in personal relationships is the affection between the individuals involved, irrespective of sexual difference or procreation which would be seen as irrelevant in the formation of families."[60] Such a vision cannot help but undermine traditional family institutions because it sees relationships as "purely contractual and voluntary."[61] It assumes we are isolated, then ensures, through political and legal action, that we be so.

B. Philosophy

Contemporary jurisprudence's alternative to natural law is the philosophy of John Rawls in that Rawls' *A Theory of Justice* has become paradigmatic in legal discourse, serving as a primary source for conceptions of the individual, its duties, and its rights.[62] In it, Rawls seeks to discover "the most appropriate moral conception of justice for a democratic society wherein persons regard themselves as free and equal citizens."[63] That is, the goal is a conception of justice appropriate for independent members of a political community.

In the *Stanford Encyclopedia of Philosophy*'s article on Rawls' "Original Position," Samuel Freeman places Rawls' philosophy within the Enlightenment tradition, specifically referencing David Hume's theory that "in making moral judgments individuals abstract in imagination from their own particular interests and adopt an impartial point of view from which they assess the effects of their own and others' actions on the interests of everyone."[64] Much of modern philosophy can be taken as an attempt to abstract from the individual, de-contextualizing this monad from its specific preferences to find "what is essential to the activity of moral reasoning."[65] Yet, after pointing to Rawls as the culmination of this individualistic approach, Freeman paints such abstraction from individual preferences as

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. Martha C. Nussbaum, *The Enduring Significance of John Rawls*, CHRON. OF HIGHER EDUC. (July 20, 2001), https://www.chronicle.com/article/the-enduring-significance-of-john-rawls/.

63. Samuel Freeman, *Original Position*, STAN. ENCYCLOPEDIA OF PHIL. § 1 (Apr. 3, 2019), https://plato.stanford.edu/entries/original-position/.

64. *Id.*

65. *Id.*

"social."[66] It is highly sociable, according to Freeman, because it posits a community settling on terms by which to determine what is just for all, assuming that justice is only achievable in community, and that the person cannot really exist outside that community because on its own it is merely a set of unrealized capacities.[67]

The claim of Rawlsian sociability is undermined by the methodological tool at the root of Rawls' project: the original position. According to Rawls, to determine what is just we must put ourselves in a hypothetical position that will yield principles by which we may determine whether constitutions and economic and social arrangements are or are not just.[68] Individuals in this original position are to be taken as having set the standards by which to judge the basic structure of society, encompassing the political constitution, principles, and practices of economic production, exchange, and consumption, and what Freeman terms "norms that define and regulate permissible forms of the family."[69] The original position's capacious reach is taken to indicate the social nature of Rawls' philosophy because the basic structure's elements "are all necessary to social cooperation and have such profound influences on our circumstances, aims, characters, and future prospects."[70] In effect, the "community" defined as a collection of individual selves is given suzerainty over "the totality of conditions that we are ready upon due reflection to recognize as reasonable in our conduct with regard to one another."[71] What is not necessary, on this view, is religion because it is "not generally necessary to social cooperation among members of society."[72] Thus, on Freeman's own reading, within Rawls' schema, the basic structure of society is political, to be arranged according to a political conception of justice, and outside of (and superior to) religious understandings and norms; it is a specifically political construct positing a powerful central state designed to order all of society, including its treatment of the most fundamental social institution, the family, according to specifically political criteria, subjugating religious considerations, norms, and institutions to its own designs.

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66. *Id.*
67. *Id.*
68. JOHN RAWLS, A THEORY OF JUSTICE 587 (1971).
69. Freeman, *supra* note 63.
70. *Id.*
71. RAWLS, A THEORY OF JUSTICE, *supra* note 68, at 587.
72. Freeman, *supra* note 63.

Rawls' theory is aggressively anti-social in its individualism in that it strips persons of their essentially social human characteristics. In the original position, individuals are to deliberate on proper principles of justice behind a "veil of ignorance."[73] They are to abstract themselves from their gender, race, class, economic status, natural abilities, conceptions of the good, personal history, and even the structure and history of their own society, as well as their religious faith, if any. The claim is that, as Freeman puts it, such classifications are "not good reasons for depriving people of their equal political rights or opportunities to occupy social and political positions."[74] A central assumption, here, is that Rawls' artificial construct of a disembodied choice maker provides a proper model by which an individual may make decisions appropriate for itself and others—that one is capable of making such choices without knowing anything about itself or its society other than that it is somehow abstractly human and, presumably, that its society is made up of humans.

Such a vision is in direct contradiction to natural law, which recognizes the political community as "the last stage in a development that starts with male and female[,]" who naturally seek out one another to form families, by which they secure many of life's basic goods, but which further lead them to forge relationships with other families and found villages, which in turn form relationships with other villages to form larger communities.[75] This natural law vision of politics begins from an understanding of the person as fully human with duties prior to the state.[76] On the natural law understanding, the political institutions of the state have only limited legitimate powers, resting on other more primary associations and virtues.[77] As important, the hypothetically pre-political individual abstracted from its constitutive attributes and history in natural law terms is not a person; it is a being without the capacity to know its duties, hence incapable of giving proper consent. As to society, it comes, not from hypotheticals, but from experience; "[c]ivil society is a need of human nature" that comes before any object of

73. RAWLS, A THEORY OF JUSTICE, *supra* note 68, at 12.

74. Freeman, *supra* note 63.

75. MICHAEL P. KROM, JUSTICE AND CHARITY 125 (2020).

76. *See* MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 37; *see also* THOMAS AQUINAS, COMMENTARY ON THE POLITICS ¶ 40 (Ernest L. Fortin & Peter D. O'Neill trans., The Free Press of Glencoe 1963) ("[T]here is in all men a certain natural impulse toward the city, as also toward the virtues.").

77. MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 37, 285–86.

choice, it grows from the soil, from history and experiential loyalties, requiring members with self-restraining virtues to survive and flourish.[78]

Both persons and societies are by nature social, shaped by their understandings of what is true, good, and virtuous.[79] The United States in particular was founded on a consensus among its people that it was under God and natural law.[80] Our constitutional order is rooted in the very conception Rawls' original position is designed to rule out. That order further limits the role of government, placing it in a sphere separate from the social and depending for its continued legitimacy on its limitations and service to social ends.[81] The political sphere, on the natural law understanding, evinces and relies on a set of virtues distinctly more limited than those provided by family and religion and, just as the virtues of religion and family cannot be made to order the whole of life, including the political, neither can those of politics be made to order social life.[82]

Rawls, meanwhile, constructs from his original position a set of universal principles commanding the character and function of all our basic structures. His "difference principle," for example, dictates that inequalities be permitted only if they benefit the least well-off.[83] This eminently "fair" rule is no mere guide to individual moral action but one by which all of society is to be reconstructed. What this means in legal practice is that the decisions in *Casey*, *Obergefell*, and *Bostock*, that is, the extension of new rights to individuals, require redefining traditional understandings, including those of life, marriage, and sex. Such new understandings then require changes in the basic structures of society so that individuals may pursue their own meaning of life free from any legal or social costs.[84] The individual, conceived of as an abstraction, is a choice maker whose humanity is defined by its free choices and whose dignity relies on its empowerment by the state to make choices concerning its own nature and the nature of reality as well as what actions to follow in accordance with these choices; it must be free from

78. *Id*. at 7–8.

79. *See id*. at 15.

80. *See id*. at 30–32.

81. *Id*. at 35.

82. *Id*. at 286.

83. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 64 (Erin Kelly, ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

84. *See generally* BRUCE P. FROHNEN, THE NEW COMMUNITARIANS AND THE CRISIS OF MODERN LIBERALISM 18–56, 150–76 (1996).

any pre-existing social duties or subsequent political, social, or economic costs not captured by the relentlessly secular difference principle.

Rawls' is no mere political program but an entire philosophy in that it includes a vision of the person, of metaphysics (i.e. it rejects any relevant higher order goods) and the nature of reason itself. The last point is most important for us here because Rawls' reason, encapsulated in the notion of "public reason," shapes jurisprudence down to the standards for proper reading of legal texts.[85] When important political issues are under discussion, according to Rawls, we all must use "public reason."[86] Consensus, for Rawls, is the sole legitimate basis of decisions regarding public policy and justice (including the shape of the basic structure of society).[87] This means that such discussions must take place on the basis of shared assumptions. Yet, according to Rawls, consensus is impossible to obtain where any important, constitutive beliefs are concerned. Thus, public discussions must be kept free from religious reasons and faith claims, as well as all systemic conceptions of the human good that cannot be explained in terms accessible to people holding different moral values.[88] Thus, the consensus must be a thin one, relating only to abstract goals, but also a very stringent one, ruling out forms of argument and expressions of belief in the political arena that go beyond a kind of "commonsense" for a liberal democratic people.[89]

Rawlsian public reason is no less rooted in assumptions regarding human nature and the social order than is natural law. It is a formalized version of values and assumptions that have lain deep within liberalism for some time, summing up rather than providing a source for liberal reason.[90] But, where natural law seeks the truth of nature in human reason applied to history and circumstance, Rawls looks only to "liberal" convention. Freeman seeks to paint Rawls' reason as rooted in science as opposed to superstition or religious belief. But Rawls himself is careful to claim only common prejudice as the ground for public reason. Still, the effect is the same in that

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85. RAWLS, JUSTICE AS FAIRNESS, *supra* note 83, at 89–93.

86. *Id.*

87. JOHN RAWLS, POLITICAL LIBERALISM 134 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

88. Freeman, *supra* note 63. Note in particular Freeman's discussion of "science" in his treatment of the original position.

89. RAWLS, POLITICAL LIBERALISM, *supra* note 87, at 139.

90. *See, e.g.*, Ronald S. Beiner, *Introduction: The Quest for a Post-liberal Public Philosophy*, *in* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 11–12 (Anita L. Allen & Milton C. Regan, Jr. eds., Oxford Univ. Press 1998).

views rooted in deeper understandings of what is true and good are ruled out of court. This is made most clear in Supreme Court decisions concerning "substantive due process." According to these decisions, laws, to be constitutional, must not be "arbitrary and capricious"; they must be supported by a "reasonable" legal justification. Moreover, these laws must protect our "fundamental rights." That is, constitutional laws are those that accomplish "reasonable" ends while imposing so little on individual moral choice that all rational citizens would say they are consistent with their own freedom and equality.[91]

The resulting moral theory is so thin as to be arguably nonexistent.[92] But there is a moral content of sorts that is persistently imported into public reason, namely individualism. As shown by the *Casey*, *Obergefell*, and *Bostock* decisions, contemporary moral theory is the pursuit of policies empowering authentic individual choices, including by rearranging fundamental institutions to reduce their political, economic, and social cost. The very words by which we navigate social reality are changed in meaning to accomplish this end by encapsulating an understanding of person and society in keeping with this moral theory.

C. Politics

Dwight Eisenhower's statement that "our form of government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is" has been subject to mockery.[93] Courts take generalized religious statements, like "In God We Trust" on the coinage, as meaningless, legally irrelevant "ceremonial deism."[94] In fact, however, such statements may

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91. *See* Edward C. Lyons, *Reason's Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 181–82 (2007).

92. It has been argued that the logic of substantive due process is "vacuous as a standard for devising any actual, concrete public order." *Id.* at 193. Assuming the goodness of liberal democracy as defined and upheld in terms of mere overlapping consensus, the thin strictures of public reason cannot provide workable criteria by which to judge concrete burdens on individual liberty legitimate or illegitimate. "[A]ny rational principle that *could* be forwarded as a valid *specific* limitation of autonomy would" be dismissed as a "comprehensive, idiosyncratic view[] of what is good or bad." That is, any genuine reason sufficient to motivate any actual person would "violate the demands of public reason." *Id*.

93. Criticism on this subject often lacks discipline and coherence. *See, e.g.*, Patrick Henry, *"And I Don't Care What It Is": The Tradition-History of a Civil Religion Proof-Text*, 49 J. AM. ACAD. RELIGION 35, 35–45 (1981) (allegedly misquoting Eisenhower's "famous/notorious remark" in charging Eisenhower with engaging in American Civil Religion).

94. Lynch v. Donnelly, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (citing Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964)).

reference the traditional understanding that our nation is rooted in religious practices that vary by locality but undergird a natural law understanding of the purposes of government and the nature of our constitutional order.[95]

For most of its history, the United States' basic structure was rooted in a public consensus of limited government, social equality, the rule of law, and the importance of human sacredness—our creation in the image and likeness of God—as the basis of human rights.[96] Early court opinions made clear the religious roots of the common law,[97] and defended the traditional family as essential to America's religion-grounded culture.[98] But for the most part simply did not address issues relating to the First Amendment's religion clause because there was no reason to do so, until the Court in *Everson v. Board of Education*[99] and *McCollum v. Board of Education*[100] announced a new rule of law on the subject, banning any aid of any kind to any religion.[101] Deeply-embedded precedents are rejected since *Everson* and *McCollum* on the mistaken, if not far-fetched, grounds that the Establishment Clause dictates a strict separation of religion from public life.[102]

The Progressive ideology evinced by these opinions is directly opposed to the natural law vision, which sees freedom as resting on law, which itself is an outgrowth of custom, whose history is the unfolding of human nature.[103] The natural law vision also recognizes that custom is rooted in religion—that culture comes from the cult.[104] Etymologically, both words share a common latin root, *colere*, meaning to cultivate, not just one's garden, but one's character or soul.[105] And so the habits formed by a people in worship, in showing respect for their God in a specific way, shape the

95. MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 31.

96. *Id.* at 81.

97. *See, e.g.*, People v. Ruggles, 8 Johns. 290 (N.Y. Sup. Ct. 1811) (stating that Christianity is a part of the common law).

98. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (upholding anti-bigamy statute as essential for protection of American civilization).

99. *See* Everson v. Bd. of Educ., 330 U.S. 1, 5, 15 (1947).

100. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 204–05, 209–11 (1948).

101. Murray, *Law or Prepossessions?*, *supra* note 4, at 23.

102. *Id*.

103. MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 38.

104. Russell Kirk, *Civilization without Religion?*, ORTHODOXY TODAY (July 24, 1992), http://www.orthodoxytoday.org/articles/KirkCivilization.php?/articles/KirkCivilization.htm.

105. *Culture*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/culture (last visited Nov. 23, 2020).

common mind and the laws that uphold their norms.[106] American law was committed to maintaining and carrying out a religion-based morality: "Blue laws" enforced sabbath observance;[107] laws against extra-marital sex protected the family;[108] and laws against various "quality of life crimes" aimed to guard the civic square's role as a place for respectful engagement.[109]

Obviously, such a vision is inimical to the ideology of individual autonomy. But it is important to note that natural law is in fact much less capacious in its claims on human action than is Rawlsian public reason and its political offshoots. In America there was no sense of a "code" of natural law dictating all of the people's lives because natural law itself provides guidance only to establish the minimum morality necessary for a decent human life.[110] The good life, a full human life filled with love for one's neighbor, promising beatitude in the next life, can be gained only when the Christian builds on the rational life of natural law toward higher understandings, goals, and virtues.[111] What was necessary to maintain the American constitutional order was less than this, namely, respect for the freedom of the Church within its separate jurisdiction[112] and its central role in the culture, and especially in education.

This understanding was what Murray saw under attack in the Supreme Court's decisions in *Everson* and *McCollum* establishing a principle of "no aid of any kind to religion in any form."[113] In declaring a Constitutional "wall of separation between church and state," the Court in these cases made a pronouncement "on a fundamental principle, not only of national policy but of our civilization and way of life."[114] This principle against any aid of any kind to religion from the state would alter "the very quality of American society by altering the traditional friendly, cooperative attitude of government toward religious forces, especially in the field of education"

106. Kirk, *supra* note 104.

107. McGowan v. Maryland, 366 U.S. 420, 454 (1961) (upholding the constitutionality of blue laws, albeit, by this time, on secular grounds).

108. Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B01 (providing an overview of adultery laws still in force in 2004).

109. George L. Kelling, *How New York Became Safe: The Full Story*, CITY J. (SPECIAL ISSUE) (2009), https://www.city-journal.org/html/how-new-york-became-safe-full-story-13197.html.

110. MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 297.

111. *Id.* at 297–98.

112. *See id.* at 68.

113. Murray, *Law or Prepossessions?*, *supra* note 4, at 23.

114. *Id.* at 23, 26 (quoting 34 A.B.A. J. 483 (1948)).

which itself touches on the most intimate, important relationship of human life, namely that between parent and child.[115]

It should, though it does not, go without saying that these decisions went against the overwhelming weight of evidence regarding the original meaning of the relevant Constitutional text, the Establishment Clause.[116] That original meaning was a limited rule forbidding only federal laws favoring or disfavoring preferential status in law for the doctrines, practices, or modes of worship of a particular religious group.[117] To argue otherwise, before the accretion of precedents provided camouflage, was, according to Murray, simply not believable—the Justices knew better.[118] Moreover, *Everson* and *McCollum* were inconsistent with one another. In the first decision the Court argued that "[a]bsolute separation always was the meaning of the First Amendment, as determined by the Founding Fathers."[119] In the second it argued that "[a]bsolute separation has become in time the meaning of the First Amendment, as determined by the whole experience of our people."[120]

Sadly, such inconsistencies matter little in the face of presuppositions dictating a misreading of the text. Murray finds these presuppositions rather openly stated in the Court's endorsement of James Madison's theology, which held that religion is a purely private affair—between the individual and that individual's God.[121] In effect, the Court established "a deistic version of fundamentalist Protestantism."[122] Like Rawlsian assumptions, the result is an established philosophy guiding reconstruction of society on grounds opposed to the reality recognized by natural law and against the traditions, and traditional constitutional understanding, of the United States.[123]

The central problem with this new establishment, besides its not-so-minor violation of the Constitution, was its undermining of the juridical status of religious schools in the American educational system.[124] Long

115. *Id.* at 24.

116. *Id.* at 25; *see also id.* at 41–43 (discussing relevant texts of the era supporting separation of federal government from religion).

117. *Id.* at 25.

118. *Id.* at 27–28.

119. *Id.* at 26.

120. *Id.*

121. *Id.* at 29–30.

122. *Id.* at 31.

123. *Id.*

124. *Id.* at 33, 36.

before Rawls had written *A Theory of Justice*, progressives already viewed the state as the proper ordering force in society, taking from parents the right to educate their children and even to have an effective voice in what government schools should do with them.[125] Indeed, in a move presaging Rawls, progressive reformers promoted public schools as a universal symbol of "secular unity" empowering teachers of a civil religion of secular democracy.[126] The drive to eliminate "pressures" on students supposedly forcing them into a religious mold itself was the exertion of a pressure to secularize,[127] to use government schools to teach presuppositions regarding the nature of the person and the social order in keeping with a secular democratic civil religion whose principles we have seen fully laid out in Rawls' theory and principles of public reason.

IV. PRINCIPLES, CIRCUMSTANCES, AND LIMITATIONS

Thomas Aquinas famously defined law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[128] His formulation captures the complexity of the problem of law—that is, the need for a community to have "ordinances" that come from the proper source, are properly formulated, and properly announced to help its members achieve the common good. What is more, anyone, it seems, may see himself as having "care" of the community. The rule of law, and specifically our Constitution, is intended to address the problem of jurisdiction (e.g. the limits of legal authority); indeed, its emphasis on judicial authority to "make" law remains one of the strongest arguments for textualism today.

But why limit oneself? Why accept that judges should only do what law says? Because law-abidingness, including that form that entails abiding by the limits on one's authority and jurisdiction provided by the Constitution and by the common law, is a virtue.[129] And why be virtuous, or, at any rate, why accept that law-abidingness is a virtue in the face of the various things one believes are unjust and that happen in spite or even because of law?

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125. *Id.* at 34, 36.

126. *Id.* at 37–38 (quoting McCollum v. Bd. of Educ., 333 U.S. 203, 217 (1948)).

127. *Id.* at 39.

128. THOMAS AQUINAS, SUMMA THEOLOGIAE I-II.90.4 (Fathers of the English Dominican Province trans., 2d ed. rev. 1920) (2017), https://www.newadvent.org/summa/2090.htm.

129. *See generally*, PHILLIP A. HAMBURGER, LAW AND JUDICIAL DUTY 2, 9 (2008) (detailing the tradition of limited judicial power dominant in early United States history).

Such questions are ethical, in that to answer them requires a basic understanding of what is to be done and what is to be avoided, and metaphysical in that to understand what is to be done and avoided requires a basic understanding of what we are and what is good (and bad) for us. Aquinas, of course, provides a relevant discussion rooted in the fundamental principle that we are to do good and avoid evil. He further points out that to do good means following three fundamental principles: to preserve our bodily existence, to propagate our species, and to live harmoniously in society and seek to know the truth about God.[130] It is the determination to cast off these principles, or to substitute for them a truncated theory of "justice as fairness" without basis in an understanding of the good, that we find ourselves ruled by judges who, whatever their purported choice of methodology, end by making laws designed for isolated individuals.

Whatever the conceits of judges and legal academics, the basics of jurisprudence are eminently manageable. Without benefit of training in textualist originalism, Murray managed to piece together a proper reading of the separation of church and state within the American constitutional tradition, namely one that recognizes the instrumental nature of separation as a tool for maintenance, not of a secular democracy, but of the free exercise of religion.[131] Such a juridical structure would be rooted in the distinction between "ecclesiastical and civil jurisdictions, the immunity of conscience from coercion by civil authority in the free exercise of religion, the principle of political equality, the legitimate demands of political unity in a religiously divided society, [and] the general requirements of the common good," including that the society be good.[132] Such an understanding would promote a limited national unity in which citizens' characters are shaped by an understanding of natural law and common history but which "has nothing to do with an artificial, government-promoted levelling of differences, especially religious differences," let alone a secular democratic civil religion.[133]

Unfortunately, as Murray observed, the natural law ethic that formed our constitutional order is dead, at least among America's judicial elites; it no longer sustains our constitutional structure.[134] Our current juridical order—

130. KROM, *supra* note 75, at 129–30.

131. Murray, *Law or Prepossessions?*, *supra* note 4, at 40.

132. *Id.* at 32.

133. *Id.* at 38.

134. MURRAY, WE HOLD THESE TRUTHS, *supra* note 3, at 293.

the precedents and legal practices that determine legal outcomes—rests on prejudices utterly hostile to our constitutional order. It is self-evident that the anti-social jurisprudence that underlies both contemporary textualism and contemporary liberal philosophy is unsustainable in the long run. It already has resulted in rule by decree, whether issued by judges, Presidents, or regulators.[135] As Murray noted decades ago, it also has resulted in construction of an intrusive state that undermines religious free exercise and education of the young in the tradition of natural law even as it has helped forge a new, civil religion. But the resulting national, ersatz community, while politically powerful, lacks legitimacy because it is hostile to our very nature. The campaign of reconstructing society to make it serve only isolated individuals in their pursuit of autonomous choice undermines itself and the constitutional order it seeks to transform. The result is the chaos we witness around us during this time of "antifa" riots, supported by a professional class with pedigrees in various branches of "critical studies" that reduce law to power, decreeing that power must be used to destroy what it deems an irremediably unjust order.

There is no grand, new philosophy that can answer such nihilism. There is only the possibility of a return to order, a return, step by painful step, to a system in which the common, natural law mind is allowed to reform. Such a re-formation will not be spontaneous, it will require decades of hard-won battles to reclaim education for common sense. But it must begin with a return to respect for and protection of the symbols of reverence for God and His order in the person and the community against the constant encroachment of the political state.

Aristotle famously referred to political science as the architectonic—as the master science concerned with the human good of happiness, therefore ordering the other sciences and society itself, especially through the education of citizens.[136] But politics does not order itself; it is ordered by persons who have good or bad, right or wrong, opinions and character. This is why moral philosophy is crucial: it is about the formation of good character.[137] And such opinions and character are not the products of de-contextualized choice but of persons formed in communities, most

135. *See* BRUCE P. FROHNEN & GEORGE W. CAREY, CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW 12–13 (2016).

136. ARISTOTLE, NICOMACHEAN ETHICS bk. 1 (W.D. Ross trans., EBSCO Publishing 2000) (c. 384 B.C.E.).

137. KROM, *supra* note 75, at 119–20.

fundamentally the family.[138] The inescapable trials of lawmaking arise from the fact that the basic principles of our nature—that we should preserve our bodily existence, propagate the species, and live in harmony with others as we seek to know God—must be put into action through secondary principles and in the face of varying circumstances and human weakness and sin.[139] Human law must, if it is to serve its natural end (to be just and therefore truly law) take account of circumstance and sin as it aims to secure these goods. That means following custom as much as possible, for in this way law meets the expectations of the people wherever possible, guiding them only where they are unsure or acting against fundamental goods.[140] All this means that law and law makers do their duty when following customs and pre-existing rules (including rules of jurisdiction) whenever possible. It also means that we must understand our own customs and our tradition as rooted in objective truths. Such an understanding does not produce a pre-defined code of conduct, particularly given the proper limits of governmental power, but it does indicate that our current legal culture is unhinged from metaphysical reality. To take three obvious examples, killing the unborn, undermining natural families, and working to ostracize those who seek knowledge about God are all wrong. To end such wrongs requires regeneration, as much as rethinking, so that those in positions of authority can again recognize their duty to abide by the rules of their position within the context of a legal order serving the natural ends of the human person.

138. *Id*. at 125.
139. *Id*. at 130.
140. *Id*. at 133–34.