Natural Law, Constitutional Adjudication and Clarence Thomas

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The Senate Judiciary Committee hearings on the nomination of Judge Clarence Thomas to the United States Supreme Court seem to me to lack clarity regarding a central and often-heard term that has been bandied back and forth since the opening day of the hearings. That term is "natural law." Hence my purpose in these remarks is to suggest that a term so prominent or fundamental in the proceedings, and so apparently divisive, ought at least to be clarified and given its place.

I have listened on television long and hard to the proceedings. For the most part, I observe that members of the Judiciary Committee who tend to disfavor Thomas' nomination are wary of natural law, an idea cited or alluded to in Thomas' past writings; whereas members who tend to favor Thomas' nomination are less wary of the term. But it does not arise much in their discourse because they sense that natural law disturbs their opponents. All the Committee members questioning Thomas, however, referred to natural law, when they did so, in such a way as to show a very thin understanding of what this moral philosophy means and its ramifications for judiciality. Or they show ignorance regarding how or whether it is relevant to the debate. They do recognize its mention in the American Declaration of Independence; and they do give token acknowledgment of its broad influence on the Framers and hence its appropriateness to the way the American government is perceived and ought to conduct itself. However, the traditional criteria of natural law that define what this moral

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philosophy is all about have not at all been applied or even carefully described. Instead, certain associations have fastened themselves to the term; and it is these, I believe, and not much else that dispose proponents and opponents to the view they take toward Thomas as an alleged natural law advocate.

It is not here possible or even necessary to do a philosopher's job on natural law. Rather, I'd like to set out six criteria that I think central and veridical to natural law as a theory of moral obligation. And regardless of whether we take an ideological position on law, government, and policy-making, I would like to show that natural law is an ideologically neutral theory that we all share. Whether we know it or not, we have, all of us, as heirs to the Western cultural heritage absorbed the philosophy of natural law obligation, just as we all share and absorb the air without being conscious of it. Natural law comprehends the central tenets of our basic approach to morality, to political equality, and to charity and compassion toward those whom we do not know. Natural law really is, I believe, the common morality of the common man.

Briefly, I'd like to state six defining criteria of natural law and try to show at least their at-large pertinence to legal adjudication. But equally, I'd like to show that such criteria are wholly innocent of the implications and innuendoes placed on this philosophy by some of the questioners at the hearings. My purpose in doing this is not only to render its due to an idea that has played a sensitive role in the proceedings while yet remaining fuzzy and elusive. It is also to try to relieve members of the Judiciary Committee of doubts they may have. These doubts circulate round the question whether or not natural law is adjudicatively mischievous or would intercept in a pernicious way legal judgments that, in accordance with our common law tradition, must, for good reason, respect written law and precedental interpretation.

But before indicating these six definitional criteria of natural law ethics, I'd like to make some general remarks. One pertains to the various branches of natural law philosophy, the different directions it can, with integrity, take. Another comment pertains to the nonreligious sources and tenor of natural law ethics despite later religious accretions that logically can be severed from this moral philosophy, *for the most part and in many contexts*. A final remark regards a tangential issue that appeared during the hearings: namely, Justice Oliver Wendell Holmes' attitude toward natural law.

I. Narrow and Broad Interpretations of Natural Law

Thinkers who construe natural law narrowly as a theory only of personal moral obligation would argue it has nothing at all to say about law and government. And especially, they argue, it has nothing to say about moral or legal *rights* because these define a tradition quite distinct from that of natural law. In contrast, thinkers who construe natural law more broadly may well believe it implies a few things about law and government. It implies these things when we hold law and government to moral standards. The right of civil disobedience, for example, issues from holding law and government to moral standards; and civil disobedience is a practice nearly all of us endorse. But broad-construal natural law thinkers may also believe, with consistency, that one's *personal* conscience, even about such matters as national policy, capital punishment, the role of legal sanctions, the right to dissent, and other law-related things, does not necessarily govern one's *official* conscience.

These more modern thinkers insofar as they take natural law to include natural rights (or believe that rights historically and logically emerge from natural law and are in any case independent of political manipulation) may associate natural law with the obligation to resist tyrannous political authority, as with the recent coup attempt in the Soviet Union. Or they may understand the moral law as exhorting us to resist illicit legal demands however authoritative, as with Socrates' refusal to stop speaking the truth as he saw it. Or they may think its principles serve to excoriate certain evils even though the recognized, positive law, as with the Nazis in Germany, may be declared authoritative, efficable, and legitimate. The Nuremberg Trials, for example, were so based; for natural law is an effective ground on which to argue that certain positive laws, because they exhort us to evil actions, may rightfully be disobeyed. As everyone knows, these trials were explicitly conducted on the basis of natural law, principles that in being universally justified transcend the positive law of sovereign nations.

We all, in this country, know about and share these quasi-legal concerns. They are very familiar to us. But we do not all know that it is this modern branch of natural law thought, absorbed into what Thomas rightly referred to as our political philosophy, that commits us to respecting the noble and courageous practice

of civil disobedience, and indeed of all criticism of government on moral grounds.

A mature natural law thinking would clearly have justified resisting the Dred Scott decision, a judicial holding that permitted slavery, even though natural law language may have unfortunately been used to justify the iniquitous decision. Moral language is often used to justify evil. The reasoning and terminology were deviant in this notorious decision; for property as such is not an absolute natural law value. Additionally, perhaps the times were not ready for a natural law decision to hold fast—to be legally effective. And this, I suppose, is why some thought we had to have the Civil War.

And poor Huck Finn in the novel of that name by Mark Twain! If he had been able to think clearly about natural law as a set of universal principles of right conduct, he would instinctively have been able to resolve his painful moral struggle about helping the slave Jim to escape from his owner. He would have *known* he was doing right to help Jim. He would have *known* freedom of the person is morally antecedent to the positive laws of property. Clarence Thomas has been quite right to emphasize the equality principle of natural law. Taking such a principle seriously after the Civil War turned this country politically and legally around in establishing the theory for the later struggles to enact and enforce what the theory requires.

II. Natural Law Need Not Be a Religious Doctrine

Its origins in classical Greek thought and its mainline philosophical continuities are fully compatible with secularity. I emphasize this point because there seems to be some fear that our great tradition of separation of church and state might be jeopardized by a justice who believes in natural law. That certain religions have used the doctrine or pinned to it their own concept of God as its "transcendent source" is a contingency of history. And I suppose it is also a common sense idea, certainly shared by many of my students, that the source of morality—of *any* morality—comes from God. This may be true. But the continuing interest in natural law as a *moral* philosophy and the debates within its scholarly tradition can carry on effectively without this assumption, depending upon their starting point and purpose.

We are not, after all, doing moral theology when we study natural law. We are doing moral philosophy, a reasoned discipline.

That certain important utterances about natural law may spring from a prominent religious scholar does not imply that the ideas so expressed are colored by her doctrinal preferences. Is it ever correct, or even meaningful, to say that a Hispanic doctor does only Hispanic medicine? In logic, we call this foolishness the genetic fallacy. Or that a Presbyterian architect must build Presbyterian houses? Unless all our ideas are sociologically determined and there is no reason and no objectivity in anything, such thinking is incoherent. The very notion of an ethnically or religiously determined science, and this includes moral science, can never be proved. The universality of natural law principles is compatible with religious partisanship.

As the founding and executive editor of the only international journal on natural law, VERA LEX, I am in a good position to observe that articles sent to me on the subject are generally nonsectarian—so much so, in fact, that I have felt it necessary to arrange for a future, special issue in order to solicit articles bearing on its "sacred" tradition. Such articles have not, to date, flooded my office!

III. NATURAL LAW AND UTILITARIANISM

As for Oliver Wendell Holmes' derision of natural law as a "brooding omnipresence in the sky," his rhetoric results, I think, from an incomplete, perhaps a hasty, understanding of natural law. Quite likely it mainly results from his utilitarian slant on morals and the tremendous influence on our government of the legislative philosophy of the English utilitarian Jeremy Bentham. What this influence illustrates is simply that *law is not indifferent at all to morality—it is only, in this instance, that Holmes' moral philosophy was a different one from natural law*. Or so he thought.

But interestingly, the essential difference between these two moral philosophies—natural law and utilitarianism—that is crucially relevant to our subject is precisely a difference regarding the nature of justice! A utilitarian commitment has no way to argue for justice in the individual case when the good of the social whole may not be served by it. But *individual justice*, minority rights, is exactly what our legal system seeks to protect. Hence in contrast to utilitarianism, natural law oriented obligation stresses individuation in the doing of justice. "Give to each her due" is a precept of right action, not of political calculation.

Both these moral orientations, in their places, serve a valid pur-

pose; for justice as we know it is a multivaried concept with a 3000-year old history. But one may wonder why the utilitarian moral philosophy of, say, Justice Holmes, is acceptable as a judicial influence but natural law morality, one of our explicit, foundational philosophies, is not. Is it because utilitarianism seems empirical whereas the norms of natural law are reasoned and intangible? But what, then, are enacted law and judicial judgment all about but reasoning with, and about, intangibles? In fact, the utilitarian mandate to aim for the "most good for the most persons" is the most highly abstract exhortation I can imagine. And, as well, it is the most idealistically impossible; although from a legislative point of view, its respect for the public interest is admirable when taken in contrast to lobbied, compromised, political interests. In contrast to utilitarian abstractness, natural law principles are more direct and substantive. Properly instantiated, they tell us what and what not, in our personal lives, to do.

I think some of the concern shown at the hearings regarding natural law reflects an uncertainty we suffer from today about whether morals are objective and so can be rationally justified at all, or whether they are culture-limited or subjective and idiosyncratic. If they are rational on any level, then natural law and its recommended substantive moral goods are on steady ground and can be argued for. But if all moral principles are relative to individuals or cultures, then both moral and legal debate come to an end. For the philosophy of subjective moral value, if it is even consistent, represents nothing but personal preference and raw "now-I-want" narcissism and hedonism. Its conceptual friend, cultural relativism, represents transient social norms that presuppose—what is not true—clear culture boundaries and culture isolation, implying impossibility of reasoning or agreement between members of different cultures, and implying that we can never meaningfully criticize on moral grounds a social rule or custom. All one can ever say is: "This is how we act in Timbuktu." But if we lack transindividual or transcultural reasons on which to settle differences or to point to a clearer, maturer way toward enlightened civilization, we are in a state of moral anarchy. Moral anarchy spells force—what the Greek sophist Thrasymachus called "the interest of the stronger." In these days of global communication, I scarcely think moral relativism can stand, either on rational or pragmatic grounds.

I assure the Judiciary Committee that Clarence Thomas cannot, as a natural law thinker, endorse the view that morals are subjec-

tive in that his personal conscience is idiosyncratic. We do not, therefore, need to fear that he possesses something called a personal conscience that is dangerous or different from our own.

IV. Defining Natural Law

What, then, are the six criteria, or tenets, that I think are central to the natural law philosophy of moral obligation? It would be good if the reader could ask whether she recognizes within herself the influence of the natural law. I believe that natural law morality admits itself into our reflection through the scarcely avoidable concepts and perspectives with which it has so richly endowed our civilization, and of whose legacy every educated person has therefore unconsciously partaken.

A. Reason and Reflection as the Procedural Source of Right Conduct Within Our Understanding of the Orders of Nature

Since Socrates' more or less systematic treatment of morality and the good life for man, and through his students Plato and Aristotle the developments of human reason, the critical dialogue of reason and argument among persons of good will, rather than force, has been the prevailing *lingua franca* of that vast enterprise which we call knowledge—and also of those associated enterprises which we call the moral and social orders. Merely to mention reason and its operations as the extraordinary possession of the human species and the governor of its capacity to raise the quality of life is to acknowledge the first principle of natural law: the search, through reason, for moral knowledge. The Greeks *defined* man as the rational animal; reason could not thereafter disappear from the tradition.

I need say nothing more about reason as the principal norm of the legal process. Or argue about its essentiality to government and politics—and to all of education and to all of life. Our culture presupposes the rationality of legal proceedings, and this very judicial search presupposes the critical dialogue that defines the heart of the discursive element in natural law philosophy. Reason is the only antidote against incoherence and arbitrariness in the social polity as against political and military force which public incoherence and confusion invariably deliver in their wake.

B. Virtue as an Indispensable Individual Characteristic

Unless individuals are virtuous, society and government cannot

be virtuous. Just as the model and paradigm for power is the energy and capacity to change things that arise originally in individuals who are agents and who act, so is the just and fair individual the paradigm for justice and fairness in society, government and law at large. Just social and political institutions could not last long unless the individuals who govern and participate in them maintain justness and righteousness in their characters.

How an individual *becomes* virtuous is for the sciences of human development to work through. But it seems clear that children learn to be just through having just and fair parents, teachers and friends and in observing how individuals and their groups behave, and not through some esoteric capacity to sense "the just society" or to soak in some indirect influence about "legal justice" or some other abstract concept. As *living* models for virtuous conduct, individuals must sustain their capacity for transmitting to children examples of personal character.

And so I think that with this fundamental tenet of natural law morality, no one can argue, namely, that real, living individuals manifest and set in motion the "original text"—the source and font—of virtue. And this would be true even if we require laws to be just and "the state" to do good things. For if the officials running the state are not virtuous and if a judge running her adjudicative office is not just and fair, how can we even think that the impersonal collectives which we refer to as "the bench" or "the nation" or "the law" can be virtuous and just and fair?

Much has been made at these hearings about the personal character of Clarence Thomas, and this concern is not ill-founded. No one has impugned his integrity, although some, like myself, have found some of his remarks on natural law vague and disparate. But I suggest that the emphasis on his integrity represents our belief that character comes first in a public official, before the rules, before the law, before the judgments. Character comes first in everyone. This tenet of virtue in the person is the second criterion of what constitutes natural law philosophy.

C. Certain Substantive Values Are Without Qualification Good

Natural law philosophy encompasses a theory of values. Broadly, the values that it claims are life, sustenance, and health; reason, education and knowledge; the morally equal dignity of individuals; beneficence, family life, charity and friendship. In other words, some ends are better than others, more worthy to

pursue. Through critical exchange of rational dialogue and illustration—and I would add, experience—reflective judgment can help bring us to see this. While these substantive goods are constancies in all social life, they tolerate plurality and qualification in their applications. They cannot be absolute or dogmatic because pursuit of one value occasionally conflicts with pursuit or exemplification of another. In their application, too, relevant facts must be garnered and considered; and the respective weights and importance of the values themselves must be pondered by deciding agents. There is room, therefore, for authentic difference.

This diversity in its vision and grasp of what ordinary people hold to be good is quite unlike the utilitarian moral philosophy, the major contrast view to natural law. Utilitarian moral philosophy urges us not to consider values we should aim at, the level of our aspiration toward personal growth and betterment, or the stance of our character, but what consequences and externalities we should try to bring about. And on the utilitarian view, a single, abstract imperative is to dominate our life and our choices in every respect: Act so as to benefit society as a whole (or whatever collective it is relevant to benefit). Now whereas the enunciation of some of the moral goods that natural law argues for is necessarily vague (as also are, for instance, the legal principles of equity such as "give to each her due" or "the law lets no one profit from her evil"), their concrete derivations—that is, what exactly in practice they definitively entail—are often arguable. And hence reasoning must always be engaged, in order to provide rational support for the details as to how the general goods, how the basic values, are to be instrumented, how in particular they shall play themselves out with respect to our personal and social lives. What we have here in the natural law model, just as in the positive law, are broad concepts, or rules or reasons, to be applied to particular situations. And this process, this *praxis* joining idea and action, illustrates the typical cases and the typical processes that confront both morals and law. I find it hard to imagine that the basic natural law values cited above would not furnish *everyone's* mind with enough obligation to keep it busy throughout one's life! And this includes deliberating about good law.

Of course in applying agreed-to values to life's situations, we encounter problems and criticism, unmovable facts, the need to qualify, sometimes to negotiate or compromise. But no more so than with *any* ethical position or general precepts of action that require intelligence to implement. In helping us determine what

particular rules, actions, institutions or policies derive from, or are made determinate by, the substantive goods that natural law endorses, two important, and rational, methodological adjuncts appear relevant. Both these methods are compatible with natural law, and the second one originated within natural law thinking as it historically evolved. These methods for thinking about morality and for acting morally are called "universalizability" and "the law of double effect." Both are employed in legal adjudication, as well. Universalizability is a principle of impartiality: no one's partisan self-interests are allowed to count more than another's when similarities in their cases or situations are being reflected upon for the purpose of doing justice or imparting to each what is her due. And double effect is a principle of reasonable judgment when it seems likely that both good and bad consequences will result from a given action. The rule of thumb, then, is to do the lesser evil. Are these methods of reasonableness in any way anathema to the law?

D. The Principles of Natural Justice, Which No One Repudiates, First Arise Within the Natural Law Tradition

* No one shall be judge in his own cause.
* Dispute settlers should have no private interest in the outcome.
* Evidence should be heard on both sides.
* Terms of settlement should be supportable by reasons relevant to the arguments and evidence presented.

No more need be said here either. Law would not be law as we know it without these intuitively clear natural law principles of fair judgment, so clear, in fact, that to reject them is tantamount to a contradiction.

Also a procedure essential to doing justice when rules of law are inadequate or wooden and would do injustice if applied, equity was given its first systematic formulation and defense by Aristotle in his *Nicomachean Ethics*, and later echoed in his *Politics*. Equity principles are derivative of natural law, for their aim is to do justice in the individual case.

As for the place of equity in the common law whose legal forms America borrowed on behalf of our belief in liberty, equity entered English common law through its Canon law heritage (and into the latter from the classical Greek and Roman traditions of natural law). The moral principles of equity are, in short, a natural law contribution to the enforcement of positive law in a just

manner. We, in our law, use these principles all the time; and we do not stop nervously to ask ourselves: Is this proper law, or is this the intrusion of natural law morality? Here is what Milton Konvitz writes. He is author of an entry, "Equity in Law and Ethics" in the *Dictionary of the History of Ideas*.

> [L]egislators and courts generally have learned from equity the need constantly to reform the law, substantively and procedurally, and they do so, though the bench and bar remain on the whole conservative. But judges no longer speak of the demands of conscience. They use formulas more acceptable to a secular, democratic society, and to a learned profession. . . . Anglo-American judges and lawyers speak equity on many occasions without knowing it—when they protect victims of fraud; when they protect married women in their separate property rights; when they seek relief from distress, mistake or misfortune; when they seek an injunction or an order for specific performance of a contract; when they argue that substance is more important than form; when they try to evade the technicality of the law in the interest of the intent of the law; when they seek to compel a party to do that which he should have done . . . .

These essentials of justice derive from natural law thinking. Would we dispense with any one of them? How easy it is to forget, to take for granted, the sources of the commonplace!

E. Teleology Is the Natural Striving of Every Being to Improve Herself and Her Condition

Teleology, from the Greek root *telos* which means purpose, end, objective, was the natural law's way of describing what was thought to be natural because it is characteristic of the rational human individual to decide in accordance with bettering her condition. A teleological morality posits and pursues purposes which reason can approve because, on balance, selecting our purposes by using reason leads us to improve our condition ever upward toward ideals of excellence. Such are the unavoidable inclinations of the human individual.

Legal systems in free societies not only share this natural law assumption about the human inclination attached to the pursuit of the ends it deems good. Legal systems in free societies where liberties and rights define the purpose, also provide opportunities for individuals to be more effectively purpose-driven. Our culture as a whole rewards the effort and yield of purposive lives; this endorsement is reflected in our frequent allusion to such ideas as what is merited or deserved, what corrections and improvements

can be made, aiming at what is best. The paradigmatic example of our comprehensive institutionalization of the teleological, self-aspiring philosophy is education. And within education, standards carry forward the theme of excellence: testing, scoring, and grading; scholarships, merit, choosing the best school one can afford, and so on. Education and its corollaries demonstrate institutionalized practices that are consonant with the natural law philosophy of individual responsibility in the pursuit of betterment. Again, in our economic life—which is everything if defined as personal choices that we believe improve our lot: entrepreneurship, research and development, competition, "getting to the top," promotion—reside still further examples of the natural law emphasis on teleology. Contests and games are still others: prizes, rewards, standards of excellence, "may the best person win." The natural law inheritance in our Declaration of Independence demands equality of individuals—we cannot think of it in any other way. The rule of law allows everyone the liberty to pursue her betterment as each defines it for herself. In the positive law punishment viewed as deterrence reflects the teleological perspective on life as our desire to improve the social condition by eliminating wrongdoing. And legal punishment viewed as therapeutic correction reflects our efforts to improve the mind-set of the wrongdoer. Importantly, our vast network of charitable organizations reflects the desire to improve things, here with an emphasis on another natural law value, that of care and concern for the stranger.

Where did we get these values which our law assumes and respects, and on whose behalf it protects our liberty? Basically, from the principles and ideas set out and argued for from within the natural law morality of the early Greek, Roman, and Stoic philosophers and their students (and onto which later was grafted both the heritage of our Judeo-Christian religious ethic and the secular ethic of our common law tradition). They are so much an integrated part of our social, economic, and legal approaches that we do not recognize anymore that the moral obligation to "do better" is an identifiable product of this teleological, natural law philosophy. Clarence Thomas is trying to bring more people into this "do better" ethic of virtue, self-choice and responsibility. And both modern liberals and conservatives agree that some governmentally contributed realignments in the social environment (some attention to externalities) are sometimes necessary to do this.

F. A Larger Perspective on Natural Law Philosophy, As Indicated in My General Remarks, Applies Moral Obligation to a Scrutiny of Law and Politics

Here we observe a direct relationship, if we care to draw it, between our moral obligations and the positive law. Circulating around the substantive values we are inclined and obliged to pursue are judgments upon those legal rules and upon the governmental offices and practices we think worthy to establish or to correct.

Here, once again, we are concerned with the application of principles to facts. Hence, reason and critical argument have to make room for differences as to what aspects of law and government are necessary and proper, and which among these are worthy. Put differently, which aspects of law and government must we alter or eliminate? But all this is par for the course in a constitutional democracy. We know all about this business of taking our law and our governmental personnel and institutions to task for breaches of common morality, of dysfunction, and of excesses of power. We well recognize in this ethical cleansing process the face of the federal design whereby individual states retain autonomy, of checks and balances, polity criticism and debate, election and judicial censure and impeachment. Centrally it was Aristotle's *Politics* that examined "the mixed polity" (which America adopted), not as an ideal but as the best we can do. And it was modern political philosophy that brought us the notion of individual and minority rights to be zealously and vigilantly guarded against coercive encroachments, including those from oppressive majorities.

In any case, the *morality* of political and legal criticism both within the system and transcendent of it is a natural law product of the philosophy that Socrates, Plato and Aristotle introduced. It is so much a part of us, as the very existence of these hearings attests to, that its genesis in natural law thought has become obscured, absorbed into the mainstream of American morality, law and politics. This is inherently good, but unfortunately absorption carries the risk of forgetting.

I have tried in this brief analysis of the fundamentals of natural law to take out its sting, its undeserved taint, and mystery. I have tried to show that natural law is, today, *commonplace* in our ordinary ways of thought, even if its everyday articulation has been obscured. It should therefore give no pause whatsoever to those

who in these proceedings are deciding on Clarence Thomas' confirmation to the Supreme Court. I wish natural law had been made clearer in these proceedings. But because, in my view, it was not, I hope I have contributed to the belief that natural law plays a positive, but ever essential, role in legal judgment, yet a role that is innocent of partisan politics and legal ideologies.

My ultimate point has been that the confirmation of Clarence Thomas because of natural law philosophy, which as I have tried to show any articulate person conscious of our moral tradition can hardly help endorsing, should not, on that account, be withheld.

POSTSCRIPT: PARADOXES AND FEARS IN THE THOMAS CONFIRMATION

Does it make a difference whether a legal positivist or a *jusnaturalist* occupies a seat of justice on the Supreme Court of the United States? That is, can the question of nonlegal theory in judicial decision-making be settled? Below, I set forth two paradoxes that invade the question. Then I articulate a psychological component regarding what I think has not sufficiently been noted: Deep-seated fears lodge behind central questions arising from reflection on what a judicial philosophy should be.

In retrospect, one may discern that the arguments used by Senators both for and against the confirmation of Clarence Thomas to Justice of the Supreme Court were often biased in advance and even irrelevant. The Senators probed for Thomas' precise decisions which they had already determined were right or wrong. Their assumptions about the values inherent in the Constitution seemed unduly altered or contradictory. Accordingly, paradoxes muddied the arguments of proponents and opponents. The paradoxes concern the Senators' perception of Thomas as a conservative, and especially their puzzlement about what it means to be a "natural law conservative."

In what follows, I make some general remarks about the structure of judicial philosophy and the varying concepts it endorses. But I do this with reference to the Thomas hearings and his subsequent confirmation, keeping in mind the individuals who broadly represent these differing structures and concepts. Clarence Thomas on the one hand represents the school of judiciality called *jusnaturalism*. The conservative Justice Antonin Scalia on the other hand represents a counterview called legal positivism.

And Senator Edward Kennedy represents the judicial philosophy inherent in modern liberalism.

A. Thomas the Natural Law Conservative

Both natural law advocates and those who do not endorse this moral philosophy as judicially proper agree on the principles of liberty, equality and the dignity of individuals. And they understand that these insuperable moral and social values pervade our highest legal documents: the Declaration of Independence and the Constitution. There is no argument, therefore, that the spirit of the Framers may be invoked as a context and tradition supplying validity to interpretations of the meaning of a statute or precedent. Thomas was right to stress these values at his hearing.

But the contemporary liberal looks at these same values and concludes that they were used historically as the basis of dissent against tyranny; and they do not see Thomas as a dissenter or rebel. On the contrary, they see him as a supporter of the status quo when viewed against their up-to-date utilitarian orientation, appropriately represented by Oliver Wendell Holmes' "felt necessities of the times." Our times, liberals argue, require movement away from the minimum state and untrammeled economic exchanges. In not recognizing this, Thomas is a conservative, living in the past. The "greatest good for the greatest number" requires governmental intervention. The causes for dissent to which our forebears brought natural law, equality, and the dignity of individuals are conquered. A new day has dawned; the problem of tyrannous power is over. To emphasize the philosophy that justified moral and political dissent is to be out of touch with the felt necessities of the times. If Thomas is a representative of natural law, natural law has changed its colors from a philosophy of radical rebellion to a philosophy of the status quo.

But is this true? If "liberal" means free from interference ("liber," free), then it is liberals who have changed colors; for they endorse, as the natural law conservative does not, the growth of the liberty-interfering state. Per contra, natural law dissenters still disdain the excessive power of the state, against which they believe there is perennially a pressing need. Antistatism as a conservative theme remains consistent both with the founding ideals and with Thomas' continuing philosophical preoccupation: The state exists to preserve freedom under the rule of law. The power of the state as a monopoly of coercion requires eternal vigilance.

Natural law is the moral chord that silences the dissonance of political power.

How to explain this paradox in the liberal position, this apparent shift of orientation among those who point to liberty, equality, and the dignity of individuals as high moral and political goals? I believe we can explain it as follows.

Modern liberals have refocused their attention; they have realigned their configuration of values. In so doing, they have moved from reflection on a polity of good ends to an emphasis on means. But means to what? The dignity of the individual, and especially the dignity long denied to "the disadvantaged."

The modern liberal retains this goal of equal moral dignity. But the rule of law now is viewed as inept in implementing this goal. Liberty and equality must be rethought, redefined. The Constitution as highest law is sacred; but its valid interpretation must comport with a positive, succoring role for law and government. We have "a growing Constitution." Instead of "What did the Framers mean when they wrote . . . ?" the modern liberal asks, "What would the Framers write about liberty and equality today if they believed . . . ?"

Within the liberal philosophy of government, therefore, liberty no longer means freedom from the state as the primary objective of the rule of law and of economic noninterference as our forebears conceived it. In modernity, liberty means empowerment, effectiveness in realizing one's potential; it means actual achievement. Accordingly, the function of the state is to assist in the fulfillment of this goal.

Equality changes its meaning too. Not legal but social and economic equality interprets this value; for these terms describe the social conditions that actively promote, cause, help bring about, empower the realization of the fuller human dignity of individuals. The appropriate means, then, are new sets of rights, "positive" rights, rights to material resources and services which we call entitlements. And on behalf of their instrumentation, the state becomes an agency of supportive reinforcement; hence its efficacy and power have to grow.

The natural law conservative rejects this realignment of values and its consequent reinterpretation of liberty and equality. As constancies in moral life, they do not bear tampering with. Natural law conservatives see a paradox here: inconsistency,

mental dissonance—and danger—in the liberal philosophy of government.

First, under the modern liberal philosophy the power of coercion is no longer seen as threatening. And yet, inconsistently, under this philosophy of government, the state is more powerful than ever before. Second, freedom of the individual ceases to function as a medium for responsible effort and the development of moral character. As a result, the moral conscience of individuals as a source of right conduct on personal, group, and corporate levels degenerates. This is what we are witnessing in our society now. Third, it is the moral conscience of the individual and the manifold social associations fertilized by liberty (the charitable and research foundation, the religious institution, the trust, the corporation, the school) that is source and font of benevolence, of sharing and neighborly support, and of education. These are the efficacious means by which individuals, even "disadvantaged" individuals, can lift themselves to a more fulfilling quality of life. Fourth, weakening of the spontaneous orders of economic freedom diminishes prosperity. A generalized prosperity helps everyone. Finally, significantly, liberty rights and entitlements conflict in theory and practice; for to secure liberty contradicts the use of the powerful state to redistribute the product of individuals' efforts when they are further weakened by obstructions to personal choice.

It is clear to me that theorists of government and judiciality as different as those of the modern liberal and the modern *jusnaturalist* will, if consistent, rule differently. And if they hold fast, what the state idealizes for itself and what it becomes depends in part upon these rulings.

A second type of paradox plagues our question as to whether a *jusnaturalist* can make a difference in the law. Important to recognize is that there are two kinds of legal conservatives, divergent in species. One is a positivist, like Supreme Court Justice Antonin Scalia. The other is a naturalist, like Thomas, who follows the "gentle conservatism" of Edmund Burke in requiring his decisions to comport with natural law.

Legal positivism is a procedural jurisprudence; it follows forms and precludes substantive values. And so the positivist conservative answers, "no" to our question whether value theory should inform judicial decision-making. Conversely, the *jusnaturalist* answers, "yes": Substantive values of natural law should inform decisions, although not make them.

Natural law, argues the Scalia-type positivist, is too vague and unpredictable a principle to guide enforceable law. Decisions must follow precedent and "the plain meaning of the legislator." It is legislation, not judiciality, that expresses by democratic consensus the values of the people.

In contrast, Thomas believes a higher morality should guide judicial judgment lest the latter succumb to value-empty formalism, to legalism, and fail to realize equity and justice. Importantly, the Court should stand, when necessary, as the safeguard of liberty from the coercive mandates of the state.

The positivist conservative abjures improper judiciality expressed in radical activism by the Court. Judicial activism awakens the administrative particularism that necessarily follows upon large-scale social policies designed to "bring the disadvantaged up to par." It abandons general and equal law for political will decreeing the choices of others. Procedural strictness can correct this imbalance.

But Thomas is a conservative for a different reason. He is a conservative because he abjures the loss of liberty and the misappropriation of moral energy in which the collective replaces the individual.

I see contradictions inherent in positivist legal theory, just as dissonance inheres in the liberal program. For if the positivist conservative holds firm to precedent and to the "plain meaning of the legislator," then if applying these procedures happens to result in a liberal social policy, the procedural positivist, conservative or not, must go along. The positivist is caught in a bind. Her covert and personal values may be offended by the requisites of her official philosophy. Such a purely discursive and methodological judiciality as positivism makes the procedural conservative a moral chameleon, dipping into values willy-nilly as she goes along or as she sees are an unavoidable outcome of her value-neutrality left to be filled in by objectives or goals she may disdain.

Paradoxically, this makes the positivist conservative as unpredictable and vague in practice as she charges the natural law philosopher with. The *jusnaturalist* at least has a material set of values to work with and appraise, set out in the open, in public, reliable, and practicably knowable in advance. In applying these values, she does not have to contradict herself or endorse the opposite of what she believes; she risks only the ordinary necessity that all

decision-makers risk: the need at times to compromise or to reassess what is already at hand.

In sum, it cannot be true that a *jusnaturalist* is prey to the charge of "discovering legal rights and obligations that legislatures and constitutional conventions have not endorsed." The *jusnaturalist* believes in a set of enduring values worthy of enacting, those same values the Framers had faith in when they composed our Declaration and established the Constitution as the basis for justice and liberty under law.

How wrong is Senator Edward Kennedy when he wrote in his statement opposing the confirmation of Thomas:

> [We must be] confident that he possesses a clear commitment to the fundamental rights and individual freedoms at the heart of our democracy . . . if we confirm a nominee who has not demonstrated a commitment to core constitutional values. . . . [He] is outside the mainstream of Constitutional interpretation.

We see in this false report retention of the elevating and inspiring language of our founders. But because for liberals the meanings of the terms have changed, using this language for this purpose becomes rhetorical and deceptive, exacerbated by the perverse innuendo that Thomas no longer represents a commitment to the founders' values!

B. The Psychology of Fear

Apart from fears on the level of currently articulated norms, namely, that Thomas' Supreme Court decisions will abrogate advances in social policy, abortion rights, and reverse discrimination, policies designed to instrument the liberal view of freedom and to bring the disadvantaged up to par, deeper and more comprehensive fears prevailed at the hearings. They may continue to haunt advocates of the three judicial philosophies we have examined.

Liberals and Scalia conservatives fear that natural law ideals admit into law values of the subjective conscience. But we have seen that natural law is an objective morality. Conversely, it is value-neutrality by the legal positivist that opens the doors to the private conscience of the prevailing powers. So, too, may the liberal philosophy, in substituting administrative particulars for general, statutory law, flirt with subjectivity. For administrative decisions are discretionary; and directing from the center how individuals should act and what they may or may not acquire

exacts great power that must exercise its will. Liberal programs invite conflict and competition, too, as who gets what becomes the persuasive cry of political action committees. Under these conditions, Madison's worst fears of divisive factions come true.

Liberals and positive conservatives often fear what they see as excessive individualism in the natural law philosophy of economic freedom. But this is countered by the natural law requirement that personal virtue must be developed before community can be moral, and that the social sector freely, not coercively, tends to the frailties of those who are in need. Community is a voluntary fraternity of virtuous individuals, or it is nothing.

Liberals fear conservatives will set back the clock on social advance. The conservative positivist and *jusnaturalist* reply that without the rule of law there is something worse: moral degeneracy. Loss of personal responsibility is a greater deterrent to social advance than the fair and even justice served only by the rule of law. And social or economic advance is obstructed by the overregulation of economic contract and free exchange.

The *jusnaturalist* fears that overregulation diminishes a generalized prosperity; this gives us little chance to help raise the level of the handicapped and the poor. And overregulation defines excesses in the power of the state. But liberals take this chance. Their vision of dignity for all as a quality of life overrides an historic, situation-embedded fear—political oppression—that they have put behind. The state can, we have learned, be generous and good.

Liberals fear religious dogma lies behind the natural law. The conservative *jusnaturalist* can reply that religions of any persuasion can adopt the natural law as their ethical component; in no way does this association weld natural law conceptually to religious doctrine.

Conservatives fear ideological utopianism in the liberal mandate for change—leading from this to social chaos, and from social chaos to tyranny. Liberals believe their programs are sound and efficable. Since they are backed today by majority support, social chaos is not inevitable.

I propose that if natural law is understood as a reliable set of judicially instantiable values, which it is intended to be, then at minimum it is compatible with the felt necessities of *any* society's times. I see the *jusnaturalist* philosophy of Thomas as midway between the norm-empty positivism of Scalia-conservatism and

the inconsistent, controversy-provoking programs of modern liberalism. Natural law is an antidote to the value chaos, confusion, cynicism, demoralization of our times. This is not the time to abandon its judicial philosophy. In my view, its values, objectives and instrumenting means are perennial.

We have to make certain though that the problems are coherently formulated and the divergent issues joined. Judicial philosophies will continue to express themselves in one way or another—they will not wait for fact finding and fundamental value reorientations. We can only hope the wrong one does not go in the wrong direction too far to turn back. In the meantime, Thomas' residence on the bench of the Supreme Court makes it plausible to think that the controversy between our competing schools of legal philosophy can be looked at again long and hard, and may one day be resolved.