Between Naturalistic and Positivistic Concepts of Human Rights
Professor Ken Pennington

Natural rights has become the phrase that cannot be spoken in the United States Supreme court. In the past ten years the phrase has appeared six times in Supreme Court decisions. [1] None of those six citations, however, declares that a right established by the law of nature should be recognized in that building on the corner of First and East Capitol streets. Every citation was a reference to older positions or ideas. Although the Ninth Amendment to the American constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," recent Supreme Court justices have not shown any inclination to launch themselves too far into the briar patch of unenumerated rights that might be found in the long history of European jurisprudence on natural rights.

Law professors have had no broader vision. Constitutional scholars at a conference at the University of Pennsylvania's School of Law in 2005 on unenumerated rights in American constitutional law did not discover any unenumerated rights worthy of their defense.

The Supreme Court has preferred to find its justification of unenumerated rights in penumbras created in the justices' minds by the amendments of the Constitution or by creating awkward legal neologisms like "substantive due process." The reason for their reluctance to recognize unenumberated rights that have long been a central to European jurisprudence for two millennia is the steely grip that John Austin has had on American common law and all legal systems, whether common or civil law. Austinian sovereignty has trumped two-thousand years of jurisprudential thinking about rights. The relegation of unenumerated to the Intensive Care Unit of the hospital of law also reflects a Balkanization or compartmentalization of thinking about law and rights in modern English and American jurisprudential thought. This Balkanization recapitulates and confirms the categories of "law" and "right" in our language. Unlike the words in English, the word for law and right in Latin and in most European languages is equivocal. Depending on the context, "ius," "diritto," "droit," "derecho,""Recht," and "prawo" mean law, the legal system, and right. English is the exception. In English, the concepts of law and rights are separate categories, each word having its own cluster of meanings. A reader in French, German, Italian, Spanish, and Polish is constantly reminded that the word law means more than just "the principles and regulations established by government and applicable to a people;"[2] it also the power of persons to exercise or vindicate rights. English and American law dictionaries currently used in law schools ignore rights entirely in their definitions of law.[3] In order to excavate "rights" from the word law, we must turn to older, pre-John Austin, English dictionaries where we find definitions of law that encompass the "rights and obligations of states, of individuals, and of artificial persons and local communities among themselves and to each other."[4]

Thinking about rights can be shaped by our language but also by our historical perceptions about how and where rights emerged in Western jurisprudential thought. If we presume that rights are a creation of the democratic, constitutional nation state, were invented to protect its citizens, and were graciously bestowed on the citizens of the nation state by a benevolent Leviathan, we might assume that rights are not universal but unexpected byproducts of the transition from the ancien regime to the modern world. In this construct, citizens have a greater claim to these rights than non−citizens. The nation state and it alone becomes the repository and defender of the rights of its citizens. On the other hand, one may see rights as being a web of norms that transcends the present, as having deep roots in the past, and as having an universal validity and applicability extending far beyond the Bill of Rights, the amendments to the Constitution, and the decisions the Supreme Court of the United States.

There is another aspect to this present construct: the content of legal education. Law schools have been Balkanized as well. Before the reign of legal positivism, teachers in the law schools used the same textbooks in their classrooms and used the same language of instruction: Latin. This lingua franca guaranteed that the focus of the law was universal and not particular. Liberated from the linguistic borders that limit intellectual horizons today, students could attend any law school. One consequence of the schools' curriculum was that they did not teach local law. The result of this work was the development of a common European jurisprudence. Jurists, lawyers and judges has the same intellectual background, carried the same intellectual baggage, and were guided by the same fundamental notions about rights.

The Supreme Court has not always been stuck in the confining swamp of legal positivism. Richard Helmholz has recently published an article entitled "The Law of Nature and the Early History of Unenumerated Rights in the United States."[5] He demonstrates that early American court cases were awash with references to natural rights and natural law. Three of the most important sources for ideas and natural rights and natural law were the works of Hugo Grotius, Samuel Puffendorf, and Emerich de Vattel. Helmholz found 90 citations to these three great jurists in Supreme Court opinions between 1789 and 1825. Helmholz also presents a lot of evidence that "the law of nature was cited as providing a rationale for judicial decisions" involving unenumerated rights in the early republic.[6] Helmholz was not the first to explore natural rights in early American constitutional thought. Suzanna Sherry has written that

> "Th<e> profoundly positivist attitude towards fundamental law, however, is a relatively modern invention. We tend to forget that the same John Marshall who wrote Marbury also wrote Fletcher v. Peck,[7] in which the written constitution vied with unwritten principles of natural law for pride of place among the sources of fundamental law."[8]

There is no doubt that the Founding Fathers of the American Republic had a very different conception fundamental law. They believed that fundamental law was found in many cupboards as Sherry and Helmholz have shown. But their views are not uncontested. A number of scholars have "recently suggested that the view that the founding generation believed in enforceable unwritten rights is mistaken."[9] Some of these critics would label the founding fathers as positivists before the letter. Their attempts to cleanse American constitutional law of any notions of natural law or natural rights have had consequences. As Sherry points out Justice Clarence Thomas was forced to recant his views on the importance of natural law for determining individual rights that he expressed during his confirmation hearing. Thomas' critics leapt upon his acceptance of higher norms as a source of law and accused him of being "outside the mainstream of American constitutionalism."[10] As far as I can tell from my Westlaw searches, Justice Thomas has not dared since to bring "Ius naturale" into his opinions. I would argue that Thomas and others who might be inclined to use the jurisprudence of the past as a source for defending or articulating individual rights cannot do so because they understand that they do not have the background to make a compelling arguments. I say this because very few jurists or scholars understand the role that the Ius naturale played in European jurisprudence for centuries. Ius naturale was not statutory law, it was not a list of objective duties and rights, and it can not be quantified and enumerated by a satisfying set of precise citations that a copyeditor for a law review can check on Westlaw. The jurisprudence of the Ius naturale was the product of centuries of argumentation about which institutions, norms, principles, and rights were fundamental for a just human society. These dialectical discussions created a consensus about which institutions, norms, principles, and rights were fundamental. They were produced by a system of legal education and of thought written primarily in Latin. Even if Supreme Court judges and their clerks were inclined to venture into this thicket of thought, they would have no hope of penetrating this arcane literature. Consequently, it is not surprising that they find any argument based on this tradition alien and outside the mainstream of positivistic thought. They are absolutely right. It is far outside and alien to their educational background and their positivistic assumptions about law.

From my point of view this narrow view of constitutional rights has led to lamentable decisions. Take the rights of due process. For centuries jurists had considered the rights of defendants to be summoned, present evidence, call witnesses, and to be tried publicly in a courtroom with legal counsel to be an absolute right founded on reason and the Ius naturale. Every human being had an absolute right to a fair and just trial. There were no exceptions. There were no groups of human beings that had greater or lesser rights of due process. Treatises on procedure proclaimed these rights until the eighteenth century. The jurists repeated again and again the proverb: et etiam diabolo, si in iudicio adesset, non negaretur (even the devil himself must be given his rights of due process). This fundamental right was not plucked out of the Old or New Testaments; it was not found in Christian theology. Rather it was the result of several centuries of reflection on the central role that courtroom procedure should have in a just and equitable society.[11]

Today, by way of another example, I would like to explore another right that was long considered a fundamental right of the Ius naturale that never made it into the enumerated rights of the Constitution: the rights of indigenous peoples. In the United States the question has been debated since the early Republic. In 1832 Justice John Marshall famously declared in Worcester v. Georgia that "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power."[12] Where did Marshall get his ideas about native Americans' natural rights and what were they? He certainly did not find them in the American Constitution.

Marshall also did not get them from the law of the ancient Romans. Roman law distinguished between Roman citizens and non-Romans that they conquered. The Romans never found a people whom they thought had a natural right to be free of Roman domination. The Romans simply conquered non-Romans. They did not extend equal legal rights to all non-Romans until 212 A.D. but not because they recognized those indigenous peoples as having natural rights.

The first juristic discussions of the rights of indigenous, non-Christians arise during the thirteenth century. Two distinguished canonists adopted two contrary positions. Pope Innocent IV held that the infidels' had rights; Henricus de Segusio (Hostiensis) denied that this was so. Pope Innocent IV maintained that the government of the infidel was just, while Hostiensis, asserted that there was not any legitimate secular power outside of the Christian Church. During the next two centuries Innocent IV's opinion became the common coin of European jurisprudence. However, it was purely theoretical coin. There were no practical situations in which the rights of non-Christians became a legal issue until the beginning of the fifteenth century.

Its appropriate for our meeting today that the very first European jurist to charge the barricades in defense of non-Christians was a Pole and an extraordinary jurist, Paulus Vladimiri (Paw a W odkowica). Paulus was born in Brudze during the 1370's. He studied law at the universities of Prague and Pavia. While at Pavia he was the student of one of the most famous jurists of the time Francesco Zabarella. He had a stellar career. By 1414 he became the rector of the University of Krakow. When the Council of Constance was called in 1415 Paulus joined a group of Poles who went to Constance to participate in the Council. Over the course of the next two years he became embroiled in a vitriolic dispute with the defenders of the depredations of the Teutonic Knights. The Knights had been invading Polish lands under the pretext of having papal privileges that granted them the right to launch military campaigns against pagan Slavs. They argued that the conversion of the many Poles and Lithuanians were false, and war broke out in 1409. The Lithuanians and the Poles joined forces. Vytautus the Great and Jagie o met the Teutonic Knights at Tannenberg, also known as Grunwald, and inflicted a crushing defeat on the order in 1410. At the Council of Constance the Teutonic Knights vigorously defended their right to attack the Polish-Lithuanian kingdom.[13]

Paulus wrote a series of tracts at the Council of Constance to defend non-Christians within the Polish-Lithuanian realm. He drew upon two centuries of jurisprudence that established the natural rights of indigenous, non-Christians to their political power, jurisdiction, and property. By the law of nature, he argued, all men are free. Non-Christians can possess political power and property because God endowed all rational creatures with those rights. Paulus asserted that non-Christians can be punished or attacked only if they violate the laws of nature. The Teutonic Knights can never claim to wage a just war against peaceful pagans because it is against Christian Roman law, canon law, natural law, and divine law. Finally, Vladimiri concluded that pagans cannot be forced to convert to Christianity. Christians who supported the Teutonic Knights and participated in their campaigns against peaceful pagans commit mortal sins. It is worth noting that these norms that the jurists created to define and regulate the relationship between Christian and non-Christians did not depend upon a specifically Christian doctrine or theology. Reason more than theology was the creative force behind these norms of the Ius naturale.

Vladimiri was vilified at Constance by Johannes Falkenberg, Johannes of Bamberg and other supporters of the Teutonic Knights.[14] He was accused of heresy and other doctrinal crimes. The dispute created enormous rancor between the Polish and German delegations, but eventually a committee appointed by the Council decided that according to law, Vladimiri and the Poles were right. The rights of indigenous pagans could not be usurped without cause.

The discovery of the New World and new peoples in the sixteenth century raised the same legal issues more than a century later. A number of Spanish thinkers confronted the same problems of "rights" that Paulus Vladimiri had. The discovery of lands populated with pagan peoples sparked another debate about their rights. Some of the best minds of the sixteenth century asked hard questions: Could native peoples have a just title to their lands? Could their lands be taken from them? Could they be enslaved?

You probably know the names of these Spaniards who carried on Vladimiri's fight. While Spanish conquistadors plundered the New World, Francesco Vitoria explored the moral and legal ramifications of their conquests. The key issue was dominium, or lordship. Could the American natives justly possess property and rightfully rule over their lands? Vitoria used the jurisprudence that had been developed as a part of the Ius naturale and theological doctrine to construct a lucid, clear argument for the natural rights of native Americans. They did possess just dominium, and their lands could not be taken from them without cause.

Vitoria was a bloodless academic who dissected the meanings of rights in his laboratory. Bartolomé de Las Casas labored among the Indians in the New World for twenty years. He saw the atrocities on the natives committed by the Spanish. Like Vladimiri Las Casas was "inspired by a conviction that the Indians could be converted to Christianity only by peaceful persuasion without any violence or coercion(Tierney)." Las Casas preached the brotherhood of man and the natural rights of all humans and argued vehemently that the Indians had a natural right to liberty, could exercise dominium. Most importantly they must consent to any claim of Europeans to rule over them.

Did John Marshall know of Paulus Vladimiri, Vitoria, or Las Casas? Undoubtedly not. The jurisprudence of the norms of Ius naturale came to him from later writers who incorporated it into their works. The main conduit though which the concept of natural rights flowed was not another theologian or canonist, but most likely through the Dutch Protestant jurist, Hugo Grotius. He defended the rights of indigenous peoples and borrowed his definitions of rights from the sixteenth−century Spanish theologians,[15] but because of his Protestantism and that of his readers, he hid his sources in a thicket of classical quotations. Grotius influenced "all the major rights theorists of the next century, Selden and Hobbes and Locke in England, Pufendorf and Leibniz and Thomasius in Germany, Domat and Pothier in France" and Vattel in Switzerland. Marshall got his notion that native Americans had rights derived from Ius naturale from Grotius or somewhere else in that group of thinkers. Would the sorry plight of native Americans be different if American courts had consistently recognized their natural rights that were not enumerated in the Constitution or the Bill of Rights? I would like to think that it might have made a difference. However, without an educational system that constantly reflected upon, expounded and explicated the complexities of 600 years of jurisprudence on the content of the Ius naturale I think it unlikely that the norms of liberty Vladimiri, Vitoria, Las Casas, Grotius, and Vattel embraced could have flourish in American common law. This is certainly true of the John Marshall's assertion that indigenous peoples had natural rights. Whatever Marshall thought those rights were, they have been opaque to his successors in the Supreme Court. As our legal system has become more and more the prisoner of legal positivism, the legal path to justice for native Americans has been strewn with enumerated rights that do not come close to touching upon their fundamental rights. Paulus Vladimiri would be puzzled.

Endnotes

[1] McCreary County, Ky. v. American Civil Liberties Union of Ky, 545 U.S. 844 (2005) [Display of Ten Commandments]; Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004) [Pledge of Allegiance]; U.S. v. Lara, 541 U.S. 193 (2004) [Double jeopardy]; Alden v. Maine, 527 U.S. 706 (1999) [State sovereignty]; Saenz v. Roe, 526 U.S. 489 (1999) [Right to travel]; New Jersey v. New York, 523 (1998) [Ellis Island].

[2] *The Random House Dictionary of the English Language: The Unabridged Edition* (New York: 1967) 812.

[3] E.g. *Black's Law Dictionary with Pronunciations*, edd. Joseph R. Nolan and Jacqueline M. Nolan−Haley (6th Ed. St. Paul: 1990) 864−865, gives a purely positivistic and institutional series of definitions and never mentions rights of individuals or groups.

[4] *Bouvier's Law Dictionary and Concise Encyclopedia*, ed. Francis Rawle (3rd Ed. Kansas City−St. Paul: 1914) Vol. 2, p. 1876.

[5] *University of Pennsylvania Journal of Constitutional Law* 9 (2007) 401-421.

[6] Ibid. 409-413.

[7] Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

[8] "Natural Law in the States," *University of Cincinnati Law Review* 61(1992) 171-172. This essay should be read in conjunction with her essay "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54 (1987) 1127-1177 .

[9] Sherry, "Natural Law" 172, citing the work of Thomas B. McAffee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90 (1990) 1226–1227; Helen K. Michael, "The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?" 69 *North Carolina Law Review* 69 (1991) 421.

[10] Sherry, "Natural Law" 173.

[11] Kenneth Pennington, "Due Process, Community, and the Prince in the Evolution of the Ordo iudiciarius," *Rivista internazionale di diritto comune* 9 (1998) 9–47 and "Innocent Until Proven Guilty: The Origins of a Legal Maxim," *The Jurist* 63 (2003) 106-124.

[12] Worcester v. State of Georgia 31 U.S. 515 (1832) 519.

[13] For a biography of Vladimiri and an edition of his works, see Ludwik Ehrlich, *Pisma Wybrane Paw a W odkowica* (3 vols. Warszawa: Instutut Wydawniczy Pax, 1968).

[14] Hartmut Boockmann, *Johannes Falkenberg der deutsche Orden und die polnische Politik: Untersuchungen zur politischen Theorie des späteren Mittelalters* (Veröffentlichungen des Max-Planck-Instituts für Geschichte 45; Göttingen: Vandenhoeck & Ruprecht, 1975) 225-238.

[15] Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Emory University Studies in Law and Religion 5; Atlanta, Georgia: Scholars Press, 1997) 339-340.