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https://www.100test.com/kao_ti2020/226/2021_2022_2008_E5_B9_B4_E6_96_87_c73_226343.htm 第六篇 Judges, Democracy, and

Natural Law 海文考研：08年数学复习要领 越基础越重要(1)

Though people on both sides regret for them, these annual summer disputes over Supreme Court nominees can be valuable exercises in civic education. The Robert Borkathon of 1987 forced millions of Americans to think about the role of a constitution in a democracy: the proper way to interpret 200-year-old phrases, the conflict between majority rule and individual freedom, and so on. 分阶段 分专题:备战08考研英语复习全程规划(2) This summer President Bush ' s _____ of Clarence Thomas has unexpectedly plunged the nation even deeper into the pool of first principles. America finds itself debating natural law. An enthusiasm for something called “ natural law ” is one of the repeated themes in Thomas ' slim collection of writings and speeches. What he means by natural law and what uses he would put it to as a life-tenured? Supreme Court Justice are not clear. This justifiably alarms some people, who are worried that “ natural law ” could become an excuse for a conser-vative judge to impose his political agenda just as conservatives have accused liberal judges of using “ pri-vacy ” to do the same thing. (3) In fact, though, the two questions can be separated. Is there something called natural law? And is it a le-gitimate basis for judges to overrule the wishes of the majority as expressed in laws of a less elevated sort? (4) At this point in American

history, the answer to the first question is beyond challenge. Yes, as far as the U.S. is concerned, natural law exists. The “Laws of Nature” are right there in the first sentence of the Declaration of Independence. The second and most famous sentence provides a perfect definition of natural law: human beings are “endowed by their Creator with certain inalienable Rights,” including “Life, Liberty and the pursuit of Happiness.” (5) Where do these rights come from? Some may have trouble with the concept of a divine creator. Others may find it overly metaphysical to insist that every human being has these rights in a world where most people are plainly unfree to exercise them. But few can doubt that life, liberty and the pursuit of happiness are what a civilized society ought to strive to provide its members. As the Declaration says, that is the reason “Governments are instituted.” It is “self-evident.” That’s good enough for me. (6) But just because rights exist, this does not mean it is the role of judges to enforce them. The _____ of judicial review—the power of unelected judges to overrule the democratic branches of government—is a funny business. Judges do not have that power in other major democracies, and it is not explicitly authorized in the U.S. Constitution. It emerges, rather, from the structure of our government. As Justice John Marshall first reasoned in *Marbury vs. Madison* (1803): faced with a conflict between a law and a constitutional provision, judges must honor the Constitution. All government officials should do the same. The Supreme Court’s interpretation of the Constitution is definitive only because procedurally it comes last. (7) The Constitution lists

certain rights, and others (such as the right to vote) are implied in the structure of government it sets up. But nothing in the constitutional structure of the government gives the Supreme Court authority to overrule the other branches on the basis of unwritten natural law. Judicial review, a bold claim at first, is now so well established that we've come to feel that a right doesn't exist unless a judge can enforce it. But enforcing a right means interpreting it, and exclusive power to interpret a concept as vague as natural law should not be given to the unelected branch of government. The job of protecting our nonconstitutional rights belongs to those who most directly "derive their just powers from the consent of the governed," as the Declaration has it: elected officials. (8) The Declaration speaks of "Life, Liberty and the pursuit of Happiness." The Constitution refers more literally to "life, liberty, or property." It's an illuminating difference. Furthermore, the Constitution does not guarantee these values in absolute terms. It protects them only from deprivation by the government itself, and even in that regard it promises only procedural fairness and equal treatment. The authors were surely wise to narrow the focus. What would be left of democracy if judges could roam the landscape striking down anything that in their opinion interfered with somebody's pursuit of happiness? (9) All this is not to say that natural-law concepts have no role to play in constitutional interpretation. Many people, for example, find it hard to understand why freedom of speech must be extended to Nazis and others who do not believe in free speech themselves and would deny it to others if they could. The answer is

that the Bill of Rights is based on the theory of natural law, not on the alternative theory of a social contract. You are _____ to these rights simply because you are a human being, not because you have agreed, literally or meta-phorically, to honor them. (10) Majestic phrases like “ due process of law ” require analysis. Even the strictest constructionists would accept that the natural-law thinking of the 18th century is useful in divining the framers ’ “ original intent. ” (11) Some enthusiasts see the Ninth Amendment which provides that the list of rights in the Constitution “ shall not be interpreted to deny or disparage others retained by the people ” as a direct incorporation of natural law. The fact that these enthusiasts include would-be judicial activists of both the left and the right ought to dim the enthusiasm of both groups. The point is that the people do have rights not derived from the Constitution natural rights, if you will but judges have no special authority to enforce those rights. (12) Clarence Thomas may well be claiming no special authority for judges when he invokes? natural law and natural rights. In that case, there is no problem. If he has more ambitious notions, there is a serious problem. And the fact that liberal Justices may have had overreaching notions of their own in the past is mere irony.