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Why should a Supreme Court justice care about natural rights?

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Elena Kagan, President Obama's nominee for the Supreme Court, seemed to shock many people when she dodged questions about the Declaration of Independence during her testimony before the Senate Judiciary Committee.

Her seeming dismissal of the Declaration shouldn't have come as a surprise. Kagan is a progressive, and progressives have long been impatient with limitations on government power, such as those enshrined in the Declaration of Independence and the Constitution.

For instance, our first progressive president, Theodore Roosevelt, declared: "I don't think any harm comes from the concentration of power in one man's hands."

Historian Sidney M. Milkis observed that "TR and his political allies proposed to emancipate public opinion from the restraining influence of the Declaration and the Constitution."

The immortal opening lines of the Declaration affirm that individuals have rights to life, liberty and the pursuit of happiness because they're human beings, regardless what a law might say. This, the philosophy of natural rights, is crucial because throughout history laws have suppressed liberty. Natural rights provide a moral standard, independent of law, for judging the legitimacy of law.

The most fundamental idea of natural rights goes back to the ancient Greeks. For instance, in Sophocles' play *Antigone*, the heroine defied her father the king, saying:

Your edict, king, was strong. But all your strength is weakness itself against the immortal unrecorded laws of God. They are not merely now: they were and shall be, operative for ever, beyond man utterly.

The English apprentice John Lilburne, writing during the mid-17th century English Revolution, was the first person to develop a recognizable natural rights philosophy. In some 80 pamphlets, he attacked intolerance, taxes, censorship, trade restrictions and military conscription. He championed private property, free trade, freedom of association, freedom of religion, freedom of speech, freedom of the press, a rule of law, a separation of powers and a written constitution to limit government power. These incendiary ideas crossed the Atlantic where they were taken up by Thomas Paine, Thomas Jefferson and others, and Lafayette — who played a key role in our Revolution and in the overthrow of two kings and an emperor — championed the ideas in Europe.

Critics have claimed that natural rights are too vague to be meaningful, and they have promoted the doctrine of "positive law." This basically means laws are legitimate when made by legal processes. But slavery was legal around the world. Nazism was legal. What is one to do when laws support slavery, mass murder and other practices we consider morally unacceptable? Democracy is no help, since majorities have supported terrible things at one time or another.

When William Lloyd Garrison energized the American abolitionist movement during the 1830s, he didn't make a legal case for emancipation, because provisions of the Constitution supported slavery. He had to make a case independent of law. He drew on the natural rights principles expressed in the Declaration of Independence to launch his great moral crusade. He frequently cited the Declaration in his speeches. "Black children," he insisted, "possess the same inherent and unalienable rights as ours..."

In July 1847, when housewife Elizabeth Cady Stanton visited four friends in Waterloo, New York, they decided to hold a meeting about women's rights. They needed some kind of statement explaining what they wanted. They realized they could do no better than the natural rights philosophy expressed in the Declaration of Independence. Stanton drafted what became known as the *Declaration of Rights and Sentiments* and went on to launch the movement for women's rights.

When, during the 1950s, Martin Luther King began leading peaceful protests against state-enforced racial segregation, he couldn't make a legal argument, because the legal system supported compulsory segregation. He, too, had to look outside the law and develop a natural rights case. In August 1963, at the March on Washington, King appealed to the principles of the Declaration of Independence when he said:

I have a dream that one day this nation will rise up and live out the true meaning of its creed —we hold these truths to be self-evident: that all men are created equal.

Surely it's not asking too much to have a prospective Supreme Court justice understand and affirm the principles of the Declaration of Independence.

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