

THE LAW OF NATURE AND THE EARLY HISTORY OF UNENUMERATED RIGHTS IN THE UNITED STATES

*R. H. Helmholtz**

This Paper seeks to make a modest contribution to the topic of unenumerated rights in American constitutional law by examining the role that natural law played in our legal system at the time of the founding of the Republic—a period here taken, largely for the sake of convenience, to run from the 1790s through the 1820s. The Paper's focus is on case law, rather than legal theory or constitutional doctrine, although I have tried to say enough about the law of nature as it was understood at the time to put the cases into their intellectual context. Whether the evidence presented here makes any real impact on current controversies about unenumerated rights is not easy to say. Perhaps not. This, however, is a separate question, and except for a hesitant word at the end, this Paper does not address it. I have sought only to discover what role natural law played in day-to-day jurisprudence during the nation's early years and to relate this evidence to the theme of this Conference. In other words, the question being discussed is whether—and in what ways—natural law thinking had any impact on the creation and protection of civil and human rights, drawing most of the evidence from the early federal and state reports.

I. THE LAW OF NATURE C. 1800

In 1800, the law of nature held an established place in the thinking of lawyers throughout the western world, including England and the American Republic. Complexities aside, it was widely assumed that certain general principles of justice were part of human nature, formed within us by God. These principles were common to all men everywhere, they were immutable, and they provided the necessary foundation of all human law. Although the limited character of man's understanding prevented him from knowing them fully, the general principles were accessible in part through human reason, study, and observation.¹ Many were stated in venerable legal max-

* Ruth Wyatt Rosenson Distinguished Service Professor, University of Chicago Law School. The author wishes to thank his friend, Professor Al Alschuler, for help and encouragement in the preparation of this Paper.

¹ See, e.g., 1 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW DELIVERED AT THE UNIVERSITY OF OXFORD 1767-1773, at 85 (Thomas M. Curley ed., 1986) (defining natural

ims.² By 1800, these assumptions had given birth to a scholarly literature of vast proportions in which the main features of the law of nature were elaborated and some of their consequences worked out.

In practical jurisprudence, the law of nature was thought to play a basic but limited role. A common formulation held that all law could be divided into separate categories. Divine law, natural law, the law of nations, and positive law were the most widely discussed, although additions and modifications were possible—indeed inevitable—given the predilection for speculation and classification common within the learned traditions of the European *ius commune*. For purposes of this Paper, however, the significant idea was that positive law was and should always be based upon the law of nature. That is, natural law “underlay” the positive law. The positive law gave specific expression to what was stated more abstractly in the law of nature, and the positive law also added sanctions to it.³ Normally, the natural law did not dictate the actual content of positive law; that was a matter for choice on the part of the community or the legislator. But it did establish a direction. It did set limits. Any law, custom, statute, or decision could be tested against the law of nature; if that law were out of step with the tenets of natural law, then something had gone wrong. Positive law, whether based on statute or custom, should stand in harmony with the law of nature. This was a fundamental assumption of the jurists. It provided a point of reference.

Over the course of the nineteenth century, natural law lost its hold on the common assumptions of most lawyers.⁴ As one recent commentator put it, “scientific investigation did not favour vague and unprovable hypotheses,”⁵ and natural law came to be regarded as just such a hypothesis. To hard-headed lawyers, the law of nature began

law as “the will of the Creator, manifested by its conformity to reason, and by its utility to his creatures”); JAMES TYRRELL, *A BRIEF DISQUISITION OF THE LAW OF NATURE* 5 (1692) (noting that we discover the principles of the law of nature when we “contemplate this [s]ystem of [t]hings, called the [*visible [w]orld*, but more especially GOD, as its [c]reator and [g]overnour”); see also NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 60–83 (1990) (recounting the view that human law was subordinate to natural law because it was derived from divine law); KJELL Å. MODÉER, SAMUEL PUFENDORF AND THE HISTORICAL ARGUMENT 27–29 (2005) (discussing “Pufendorf’s double role as teacher of natural law and a historian”).

² See PETER STEIN, *REGULAE IURIS: FROM JURISTIC RULES TO LEGAL MAXIMS* 177–78 (1966) (discussing the development of rules and maxims in the practice of the law).

³ See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 57–58 (1823) (“The laws now in question are founded upon that great law of nature . . . [They] are but modifications of that superior law.”); Anton-Hermann Chroust, *On the Nature of Natural Law*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND* 70, 75 (Paul Sayre ed., Oxford Univ. Press 1981) (1947) (describing positive law as a “mode” in which natural law “manifests itself empirically”).

⁴ See, e.g., ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 266–72 (1984) (illustrating the rejection of natural law by practitioners and American Renaissance authors).

⁵ DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 870 (1980).

to seem no more real than a “dream” invented by men, and by the end of the century, men were awake.⁶ There have been moments since that time when it looked as though natural law might stage a comeback.⁷ But those moments passed.⁸ The law of nature still has its adherents, but at least to a (relatively) neutral observer it appears to have disappeared from the mainstream of American jurisprudence.⁹ Today, arguments similar to those that were characteristic of the law of nature are often placed under some other, seemingly sounder, legal rubric,¹⁰ and more often than not, judges seek to distance themselves from the supposition that they are applying reasoning drawn from the natural law.¹¹ No entry for “law of nature” appears in the index of most recent constitutional law treatises, or even many accounts of American constitutional history.¹²

This was far from having been the situation in 1800. Or 1830. During the early years of our Republic, the existence and relevance of natural law was taken for granted by virtually all serious writers about the law.¹³ Its reality was assumed as a matter of course. This was true among the English jurists who were most influential in the colonies. Coke, Selden, and Blackstone all subscribed to it. They also made

⁶ R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW 141 (D.E.L. Johnson trans., 1992) (1988); see also RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 250–52 (1977) (demonstrating the retreat from natural law because it necessarily incorporated extraconstitutional power).

⁷ See generally CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Thomas R. Hanley trans., 1947).

⁸ RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–97 (1999). In particular, Primus noted many articles which embraced natural law or other forms of foundational rights theory. *Id.* at 184 n.13.

⁹ The current status of natural law and some of the ambiguities inherent in the tradition are usefully discussed in Brian Bix, *Natural Law: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 61 (Jules Coleman & Scott Shapiro eds., 2002).

¹⁰ The history of “substantive due process” appears to be one example. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 48 (1985); see also Thomas L. Haskell, *The Curious Persistence of Rights Talk in the “Age of Interpretation,”* in THE CONSTITUTION AND AMERICAN LIFE 324 (David Thelen ed., 1988).

¹¹ See, e.g., Alden v. Maine, 527 U.S. 706, 734 (1999) (“[T]he dissent’s attribution of our reasoning and conclusions to natural law . . . is simply inaccurate.”); see also Stephen Presser, *Should a Supreme Court Justice Apply Natural Law?: Lessons from the Earliest Federal Judges*, 5 BENCHMARK 103 (1993) (explaining why Supreme Court Justices are reluctant to invoke natural law).

¹² See, e.g., MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (2002).

¹³ See, e.g., ERNEST BARKER, *Natural Law and the American Revolution*, in TRADITIONS OF CIVILITY 263 (1948); BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW (1931).

use of it. Natural law laid its hand on some of the most famous treatises and decided cases of the common law.¹⁴

In the new American Republic, as in England, natural law was readily accepted as a valid source of law. It appeared in a variety of circumstances. The law of nature was referred to as a source of rights in the *Declaration of Independence* and *The Federalist*.¹⁵ It appeared in early state constitutions.¹⁶ It was mentioned with approbation by many of our Founding Fathers and leading lawyers of the time—John Adams (1735–1826),¹⁷ John Quincy Adams (1767–1848),¹⁸ Samuel Adams (1722–1803),¹⁹ Nathaniel Chipman (1752–1843),²⁰ Alexander Hamilton (1757–1804),²¹ David Hoffman (1784–1854),²² John Jay (1745–1829),²³ Thomas Jefferson (1743–1826),²⁴ James Kent (1763–1847),²⁵ Hugh Swinton Legaré (1797–1843),²⁶ James Madison (1751–

¹⁴ See FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 107–38 (1904) (dedicating a section to the law of reason); J. W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS* 72–76, 159 (2000) (analyzing the authority of natural law); R. H. HELMHOLTZ, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1, 5–11 (2005) (listing jurists who described natural law as a legitimate basis for English common law); D. J. IBBETSON, *Natural Law and Common Law*, 5 EDINBURGH L. REV. 4 (2001) (discussing the “fervour” of natural law thought in the seventeenth and eighteenth centuries).

¹⁵ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (asserting that colonists were called upon by “the Laws of Nature and of Nature’s God” to separate from Great Britain); THE FEDERALIST, No. 43, at 297 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (referring to “the transcendent law of nature” that declares the aim of all government to rest on the self-preservation of society). See generally Dieter Grimm, *Europäisches Naturrecht und Amerikanische Revolution*, 3 IUS COMMUNE 120 (1970).

¹⁶ See, e.g., VA. CONST. art. I, § 1 (asserting “[t]hat all men are by nature equally free and independent and have certain inherent rights”).

¹⁷ See 1 LEGAL PAPERS OF JOHN ADAMS 3 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (concerning Adams’s study of *Lex Naturae* as a young man).

¹⁸ See JOHN QUINCY ADAMS, *THE SOCIAL COMPACT, EXEMPLIFIED IN THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS* 25 (1842) (discussing marriage and marital contracts as founded upon the law of nature).

¹⁹ See 1 THE WRITINGS OF SAMUEL ADAMS 46–47 (Harry Alonzo Cushing ed., 1904) (asserting that “[t]he Rights of Nature are happily interwoven in the British Constitution”).

²⁰ See NATHANIEL CHIPMAN, *PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS* 158–70 (1833) (devoting this chapter to the law of nature).

²¹ See Alexander Hamilton, *The Farmer Refuted*, in *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 21 (Morton J. Frisch ed., 1985) (claiming a natural right to liberty).

²² See DAVID HOFFMAN, *SYLLABUS OF A COURSE OF LECTURES* 14–16 (1821) (defining and outlining the law of nature).

²³ See 2 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1781–1782, at 396, 406 (Henry P. Johnston ed., 1970) (claiming Americans’ right to Western lands and navigation of the Mississippi to be “deducible from the laws of nature”).

²⁴ See Thomas Jefferson, *A Bill for Establishing Religious Freedom*, in *THOMAS JEFFERSON: WRITINGS* 346–47 (Merrill D. Peterson ed., 1984) (asserting a natural right to religious freedom).

²⁵ See 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 3 (photo. reprint 1986) (1826) (describing the law of nations as at least in part based upon “the principles of natural law [and] equally binding in every age and upon all mankind”).

1836),²⁷ John Marshall (1755–1835),²⁸ George Mason (1725–92),²⁹ Gouverneur Morris (1752–1816),³⁰ James Otis (1725–83),³¹ Robert Treat Paine (1731–1814),³² Josiah Quincy (1772–1864),³³ Tapping Reeve (1744–1823),³⁴ Joseph Story (1779–1845),³⁵ St. George Tucker (1752–1827),³⁶ Daniel Webster (1782–1806),³⁷ Henry Wheaton (1785–1848),³⁸ and James Wilson (1742–98).³⁹

These leaders were followed by many lesser lights among early American lawyers who wrote about the law of the Republic: William Barton (1754–1817),⁴⁰ Jesse Bledsoe (1776–1836),⁴¹ H. H. Bracken-

²⁶ See 1 THE WRITINGS OF HUGH SWINTON LEGARÉ 276 (1845–46) (noting observance by sovereigns of the law of nations and nature, despite there being no positive law to bind them).

²⁷ See James Madison, *Address to the States*, in 6 THE PAPERS OF JAMES MADISON 493–94 (William T. Hutchinson & William M.E. Rachal eds., 1969) (stating that rights contended for in the American Revolution were “the rights of human nature”).

²⁸ See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J., dissenting) (referring to “writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages”).

²⁹ See *The Virginia Declaration of Rights*, in NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 247 (Robert P. Davidow ed., 1986) (asserting that “by nature” men have “certain inherent rights”).

³⁰ See OBSERVATIONS ON THE AMERICAN REVOLUTION PUBLISHED ACCORDING TO A RESOLUTION OF CONGRESS 50 (1779) (attributed to Morris) (proclaiming that rights of American colonists are due by the law of nature and the English constitution).

³¹ See JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764) (rights guaranteed to the colonists “by the law of God and nature, by the common law, and by act of parliament”).

³² See ROBERT TREAT PAINE, THE EMPIRE OF CHARITY ESTABLISHED BY THE REVOLUTION OF THIS CENTURY 14 (1895) (claiming “laws of Nature and of Nature’s God” to be the source of Paine’s views about society and the duties of government).

³³ See JOSIAH QUINCY, MEMOIR OF THE LIFE OF JOHN QUINCY ADAMS 372–73 (1858) (discussing the troubled relation of law of nature to slavery).

³⁴ See TAPPING REEVE, THE LAW OF BARON AND FEMME 283 (Lucius E. Chittenden ed., 2d ed. 1846) (finding the duty of parents to support their children to be founded on the law of nature).

³⁵ See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1375, at 245–46 (1833) (stating constitutional prohibition of impairment of obligation of contracts based upon “general principles of natural, or (as it is sometimes called) universal law”).

³⁶ See St. George Tucker, *Appendix to Volume First. Part First*, in WILLIAM BLACKSTONE, 1 COMMENTARIES app. 11 (1803) (arguing that “the laws of nature and of moral obligation” continue in force under all circumstances).

³⁷ 3:2 THE PAPERS OF DANIEL WEBSTER 879 (Andrew J. King ed., 1989) (stating that “rights acquired by invention stand on plainer principles of natural law”).

³⁸ See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 3–4 (George Grafton Wilson ed., 1936) (describing the law of nature as the source of the law of nations).

³⁹ See 1 WORKS OF JAMES WILSON 126–47 (Robert Green McCloskey ed., 1967) (allocating a chapter to the law of nature).

⁴⁰ See WILLIAM BARTON, A DISSERTATION ON THE FREEDOM OF NAVIGATION AND MARINE COMMERCE 16 (1802) (stating that “the Law of Nature comprehends all the Laws promulgated to mankind by right reason”).

⁴¹ See JESSE BLEDSOE, AN INTRODUCTORY LECTURE ON THE STUDY OF THE LAW, DELIVERED IN THE CHAPEL OF TRANSYLVANIA UNIVERSITY, ON MONDAY, NOVEMBER 4, 1822, at 9 (1822) (identi-

ridge (1748–1848),⁴² Daniel Chipman (1765–1850),⁴³ Thomas Cooper (1759–1839),⁴⁴ Nathan Dane (1752–1835),⁴⁵ William John Duane (1780–1865),⁴⁶ John Dunlap (c.1793–1858),⁴⁷ Thomas Herttell (1771–1849),⁴⁸ Joseph Hopkinson (1770–1842),⁴⁹ Charles Humphreys (c.1775–1830),⁵⁰ Charles Ingersoll (1782–1862),⁵¹ Benjamin James (1768–1825),⁵² Edward Livingston (1764–1836),⁵³ William Rawle (1759–1836),⁵⁴ Jesse Root (1736–1822),⁵⁵ William Sampson (1764–1836),⁵⁶ James Sullivan (1744–1808),⁵⁷ Zephaniah Swift (1759–1823),⁵⁸

fying “[t]he Great Author of Nature” as the source of rules regulating conduct between people and nations).

⁴² See HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* 122–24 (1814) (calling the law of nature the source of any man’s claim to land).

⁴³ See DANIEL CHIPMAN, *AN ESSAY ON THE LAW OF CONTRACTS* 61 (1822) (asserting basic property rights to be in accord with “a principle of the common law, founded on the law of nature”).

⁴⁴ See THOMAS COOPER, *A TREATISE ON THE LAW OF LIBEL AND THE LIBERTY OF THE PRESS* 59 (1830) (defining libel to encompass offenses against the law of nature).

⁴⁵ See 6 NATHAN DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* 626–28 (1823) (collecting legal maxims containing the law of nature).

⁴⁶ See WILLIAM JOHN DUANE, *THE LAW OF NATIONS INVESTIGATED IN A POPULAR MANNER* 7 (1809) (“[U]nless the law of nature sanctions the artificial law of men or states, the latter is of no force nor effect.”).

⁴⁷ See JOHN A. DUNLAP, *THE NEW YORK JUSTICE* 171 (1815) (explaining that wives are not to be prosecuted for crimes committed under coercion by their husbands, except for crimes that contravened the law of nature).

⁴⁸ See THOMAS HERTTELL, *REMARKS ON THE LAW OF IMPRISONMENT FOR DEBT* 13–14 (1823) (evaluating the status of imprisonment for debt under the laws of nature). Herttell also believed that the common law restrictions on the ability of married women to hold property violated the law of nature. Cf. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 116–20 (1982).

⁴⁹ See JOSEPH HOPKINSON, *AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA AT THE OPENING OF THE SESSION 1826–1827*, at 9 (1826) (proclaiming Americans’ defense of their rights “as established and protected by the laws of nature and nations”).

⁵⁰ See CHARLES HUMPHREYS, *A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY* 488 (1822) (stating that homicide in self-defense is not to be punished because it is authorized by the law of nature).

⁵¹ See CHARLES JARED INGERSOLL, *A VIEW OF THE RIGHTS AND WRONGS, POWER AND POLICY OF THE UNITED STATES OF AMERICA* 78 (1808) (arguing that actions of France on the high seas amounted to crimes against the law of nature).

⁵² See BENJAMIN JAMES, *DIGEST OF THE LAWS OF SOUTH CAROLINA* 548 (1822) (asserting trespass to be a crime against the law of nature).

⁵³ See *COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 65 (1873) (observing that the law of nature is described as “innate in the mind of man” and used to test the legality of human conduct).

⁵⁴ See WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 252 (1825) (“[T]he law of nature . . . is implanted in us by nature itself . . . and though not always observed, never is forgotten.”).

⁵⁵ See 1 JESSE ROOT, *REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS, FROM JULY A.D. 1789 TO JUNE 1793*, at ix–x (1798) (describing the common law of the state of Connecticut in the same terms used to describe the law of nature).

⁵⁶ See WILLIAM SAMPSON, *SAMPSON’S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS UPON THE HISTORY OF THE LAW* 9 (1826) (outlining the connection between American law and the law of nature).

Harry Toulmin (1766–1823),⁵⁹ Timothy Walker (1802–56),⁶⁰ and Samuel Whiting (fl. 1815).⁶¹

This list should not be read to imply that all, or even any, of the men on it had planted themselves within the traditions of Grotius, Pufendorf, and Vattel. Still less does it show that American lawyers rivaled the eminent Continental jurists in learning. They were common lawyers and they varied in erudition. The list shows only that most American lawyers accepted the existence of natural law and accorded it a legitimate place in their own thinking. Their acceptance seems to have been a matter of course at the time—the existence of the law of nature was a fact of legal life not open to serious doubt.

On the whole, Americans were consumers of juristic literature on the law of nature, rather than its producers. Their appetite for such literature is shown by the number of American editions of treatises on natural law by Continental writers. Vattel's work, for example, was printed in at least six American editions between 1780 and 1830.⁶² There was a market for works on natural law; it claimed a place in many law libraries of the new Republic. Thomas Rutherford's *Institutes of Natural Law* was widely read, or at least widely owned.⁶³ The works of Grotius, Vattel, and Pufendorf were cited at least ninety times in U.S. Supreme Court cases between 1789 and 1825.⁶⁴ Ameri-

⁵⁷ See JAMES SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 282 (1801) (claiming that air, water, and sea were "given to man by the law of nature").

⁵⁸ See 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 7 (1795) (describing law of nature as consisting of "general laws resulting from the original principles and fitness of things" and established by God).

⁵⁹ See HARRY TOULMIN & JAMES BLAIR, *A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY* 3 (1804) (maintaining that "felonious homicide is the highest crime against the law of nature").

⁶⁰ See TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS* 390 (Clement Bates ed., 1895) (concluding that property rights derive from occupancy based upon the law of nature).

⁶¹ See SAMUEL WHITING, *THE CONNECTICUT TOWN-OFFICER* 114 (1814) (noting that the law of nature dictates parents' duty to support their children).

⁶² See 2 *BIBLIOGRAPHY OF EARLY AMERICAN LAW*, Nos. 7186–96, at 803–06 (Morris L. Cohen ed., 1998). Vattel's work was *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*; by 1860 it had been printed five more times in the United States. See also *id.* at Nos. 7809–14, at 988–89 (listing six editions of Jean Jacques Burlamqui's *The Principles of Natural and Politic Law*). See generally JUDITH HILKER, *GRUNDRECHTE IM DEUTSCHEN FRÜKONSTITUTIONALISMUS* 31–32, 66–70 (2005); Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403 (1966), reprinted in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 411 (1988).

⁶³ See Gary L. McDowell, *The Limits of Natural Law: Thomas Rutherford and the American Legal Tradition*, 37 AM. J. JURIS. 57, 58 (1992) (stating that Rutherford was "widely read and cited among those of the Founding generation").

⁶⁴ Lexis search undertaken Oct. 21, 2005; the search includes citations to statements made by counsel as well as by the Justices. See 3–4 G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 291 (1988) ("[A]rguments of counsel were regarded as themselves sources of law[.]").

can judges, federal and state, did not hesitate to cite foreign writers on the law of nature.⁶⁵ These indications of interest and knowledge, inconclusive as they may be singly, invite us to look more closely at the evidence. Doing so—discovering something more about the place of natural law in American jurisprudence and what it meant for the history of our law and human rights—is the subject of the rest of this Paper.

II. FUNDAMENTAL RIGHTS IN THE LAW OF NATURE

There can be little doubt that natural law recognized the existence of some basic human rights. The literature on this subject is extensive,⁶⁶ and I see little reason to enlarge it. I will therefore accept this proposition as established, deferring for the moment the question of the precise character of the rights. However, to raise the question in terms appropriate for this Conference—Were there unenumerated rights in the natural law tradition?—is evidently a *question mal posée*. This is so, because although natural law thinkers affirmed the importance of human and civil rights in various ways, they kept no authoritative list of what those rights were.⁶⁷ Some rights recurred in the treatises, but there was no catalogue. In other words, because there was no definitive statement of enumerated rights, there could scarcely be a compilation of unenumerated rights. It will be both fairer and more efficient, therefore, to undertake a general investigation of the status of rights within the natural law tradition as it appeared in early American cases. The early reports, both state and federal, in fact provide a substantial amount of evidence on this subject.

III. AMERICAN CASES AND NATURAL LAW

Basic search services make it easier than it once was to find early cases in which natural law was cited as being of relevance in the decision. Granted, it is impossible to be sure that it was decisive in the

⁶⁵ See, e.g., *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 162 (1806) (referring to English law). See generally M. H. Hoeflich, *Comparative Law in Antebellum America*, 4 WASH. U. GLOBAL STUD. L. REV. 535, 537 (2005) (“Early American legal culture was awash with foreign law and interest in foreign law.”).

⁶⁶ See generally KENNETH PENNINGTON, *THE PRINCE AND THE LAW, 1200–1600*, at 119–64 (1993); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150–1625* (1997); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1979); Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37 (1991).

⁶⁷ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 54–60 (2004) (explaining that “the framers did not include a complete list of natural rights in the Constitution. . . . [because] they thought it would be impossible to do so.”).

outcome of litigation, but that uncertainty exists with almost every citation to past precedents and other authorities. We rarely know what “really counted” with the judge. Perhaps it is right to be suspicious of references to the law of nature. Felix Frankfurter once described early citation of natural law as “not much more than literary garniture” in John Marshall’s opinions,⁶⁸ and it is true that one cannot be certain what authority weighed most heavily with him—or with any individual judge. But Justice Frankfurter’s scoffing remark mirrors his own opinion. It enables him to dismiss the evidence untested.⁶⁹ It is fairer to begin by taking note of situations where the law of nature was cited and then investigate whether it seemed to do any work in the cases. Having done so, I can also say something about *how* it was used—what difference it appears to have made in the outcome of individual cases. From this survey, three conclusions of possible relevance to the theme of unenumerated rights have emerged.

IV. USES OF THE LAW OF NATURE IN THE PROTECTION OF RIGHTS

A first finding is that the law of nature was cited as providing a rationale for judicial decisions with a fair degree of regularity, including cases where what we would describe as human rights were at stake.⁷⁰ For instance, the principle that no one should be condemned without being adequately summoned was ascribed to natural law and used in attempting to quash a default judgment in a Louisiana case of 1820.⁷¹ That a person could not be compelled to swear an oath by which he might be compelled to forfeit his own interests was ascribed to “[s]elf-preservation . . . the first law of nature” in a Tennessee case of 1808.⁷² The right of an illegitimate child to inherit from her mother was buttressed by citation to the law of nature in a Connecticut case of 1824.⁷³ A guarantee of permission to leave a country in

⁶⁸ Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 225 (1955); see also JEROME FRANK, *LAW AND THE MODERN MIND* 60 (1963 ed.) (describing natural law as “meaningless”); John Philip Reid, *The Ordeal by Law of Thomas Hutchinson*, 49 N.Y.U. L. REV. 593, 603 (1974) (reviewing BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* (1974)) (describing natural law as “nonsense”).

⁶⁹ But see CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 100–07 (1996) (describing Marshall’s dissent in *Ogden v. Saunders* as a careful examination of a case reaching a different conclusion).

⁷⁰ See Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 182–222 (1992) (providing examples of judicial enforcement of natural rights in Virginia, Massachusetts, New York, and South Carolina state courts).

⁷¹ *Astor v. Winter*, 8 Mart. (o.s.) 171, 178 (La. 1820); see also *State Bank v. Seghers*, 6 Mart. (o.s.) 724, 726 (La. 1819) (invoking “the first principles of natural law”); *Bourke v. Granberry*, 21 Va. (Gilmer) 16, 25 (1820) (“[A]dopt[ing] . . . the golden principle, that no man ought to be bound by a decisions to which he was not, substantially, a party.”).

⁷² *Cook v. Corn*, 1 Tenn. (1 Overt.) 340, 342 (1808).

⁷³ *Heath v. White*, 5 Conn. 228, 234–35 (1824).

time of war was said to be accorded by the law of nature in a Massachusetts decision of 1806.⁷⁴ The principle that a man could not twice be tried for the same crime was ascribed to the law of nature in a Pennsylvania case of 1818.⁷⁵

As the essay in the previous volume by James Ely demonstrates,⁷⁶ rights involving real and personal property rights were also a frequent venue for the citation of natural law. The protection of established property rights against injury through retrospective legislation was accomplished, sometimes under the banner of the U.S. Constitution, sometimes under that of natural law, sometimes under both.⁷⁷ Fair payment for property taken by eminent domain for public purposes was secured by invocation of the law of nature.⁷⁸ The right of navigation in public waters was attributed to the law of nature.⁷⁹ So were the rights of the master of a ship to a share of the cargo where he had wrecked the ship in order to save its contents.⁸⁰

Some unusual cases involving property rights arose in American practice. One example is a case involving a man who, at the time of the American Revolution, acted in defense of his family's interests by transferring property to them in order to avoid its forfeiture when he adhered to the enemy. When the legality of the alienation was tested in court, the law of nature was used to justify the act. It may have been in literal violation of the statute against fraudulent conveyances, the judge reasoned, but the result of enforcing the statute would have been to allow "an unjust invasion" of the party's right to own property

⁷⁴ *Kilham v. Ward*, 2 Mass. (1 Tyng) 236, 239 (1806) (considering "the rules of reason, and the principles of natural law").

⁷⁵ *Simmons v. Commonwealth*, 5 Binn. 617, 623 (Pa. 1813) (stating that it "would be a plain violation of the great principle of natural law").

⁷⁶ James W. Ely, Jr., "To Pursue Any Lawful Trade or Avocation": *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917 (2006).

⁷⁷ See, e.g., *Dash v. Van Kleeck*, 7 Johns. 477, 500–07 (N.Y. 1811) (referencing English common law, natural law principles, and the constitution of New Hampshire). See generally Edward S. Corwin, *The Extension of Judicial Review in New York: 1783–1905*, 15 MICH. L. REV. 281 (1917) (constitutional grounds); J. A. C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1930) (natural law); Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257 (1924) (both natural law and constitutional grounds). The law of nature could also work the other way, justifying legislation impairing a contract in order to bring the law into line with the provisions of natural law. See *Jones v. Jones*, 2 Tenn. (2 Overt.) 2, 3–5 (1804).

⁷⁸ *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 161, 166 (N.Y. 1816) (citing works by Grotius, Pufendorf, and Bynkershoeck); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 265 (1828) (finding the principle "laid down by writers on Natural Law, Civil Law, Common Law, and the Law of every civilized country").

⁷⁹ *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821) (concluding that the air, water, and sea are common property).

⁸⁰ *Eppes v. Tucker*, 8 Va. (4 Call) 346, 351 (1790) (basing the decision on "the rules of general equity arising out of the laws of nature and nations").

established under the law of nature.⁸¹ In other words, it seems that the law of nature had an impact on the outcome of the case.

Probably the most poignant example of rights recognized under the law of nature occurred in cases involving slaves. Slavery was contrary to natural law; this was the common learning of the jurists.⁸² Yet it existed in many parts of the world, certainly including the American Republic. Long had it been so. Roman law provided proof of the institution's antiquity. Like the Bible itself, Roman law stood as an impediment to abolition. The jurists sought to bring the theory into tolerable harmony with the facts in several ways,⁸³ but it was obvious to them all that the natural right to freedom was being daily abridged in quite dramatic fashion.

This being said, the natural law's recognition of the inherent right to freedom did actually play a role in American case law. It was not a nullity. It meant, for example, that a master could not kill his slave and pretend that he was only destroying a chattel. He must stand trial for murder.⁸⁴ No positive law existed in the State that extended the master's control to life and death, it was said, and in the absence of such a law, the natural law's presumption of human equality came into play. The presumption came into play equally in cases involving the movement of slaves across state lines into free territory—the situation that would be tested in the *Dred Scott* case,⁸⁵ and that had earlier given rise to *Somerset's Case* before Lord Mansfield in England.⁸⁶ Where the slave whose domicile had been changed chose to

⁸¹ *Den ex dem. Chews v. Sparks*, 1 N.J.L. 56, 64 (1791) ("The law of nature justifies every resistance to an enemy."). A similar example is *Den ex dem. Heirs of Campbell v. McArthur*, 4 N.C. (Car. L. Rep.) 552, 555–56 (1815) ("[B]y the great laws of nature, . . . whenever a new kind of government shall be adopted, those who acquire property upon the faith of the old one, may dispose thereof and remove their persons.").

⁸² See J. INST. 1.3.2. (Thomas Collett Sandars trans., 5th ed. 1876) ("Slavery is an institution of the law of nations, by which one man is made the property of another, contrary to natural right."). For an explicit American recognition of the conflict, see *Seville v. Chretien*, 5 Mart. (o.s.) 275, 288 (La. 1817). The American cases on the subject are discussed at greater length in ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 8–30 (1975).

⁸³ See RUDOLF WEIGAND, *DIE NATURRECHTSLEHRE DER LEGISTEN UND DEKRETISTEN VON IRNERIUS BIS ACCURSIUS UND VON GRATIAN BIS JOHANNES TEUTONICUS* 64–78, 259–82 (1967).

⁸⁴ *State v. Jones*, 1 Miss. (1 Walker) 83, 85 (1820) ("The right of the master exists not by force of the law of nature or nations, but by virtue only of the positive law of the state . . ."). No positive law existed making such killing lawful, hence the court's conclusion; see also *State v. Reed*, 9 N.C. (2 Hawks) 454, 455 (1823) ("[T]he killing a slave . . . is murder."); *Fields v. State*, 9 Tenn. (1 Yer.) 156, 164 (1829) (regarding "Christianity [as] part of the law of the land"); Alice Dana Adams, *THE NEGLECTED PERIOD OF ANTI-SLAVERY IN AMERICA, (1808–1831)* 243–46 (reprint 1964) (1908) (reviewing these and similar cases).

⁸⁵ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 452–54 (1856) (deciding that a slave transported into a free state is no less a slave and not a citizen).

⁸⁶ *Somerset v. Stewart*, (1722) 98 Eng. Rep. 499 (K.B.). On the contemporary significance of this case, see generally Edward Fiddes, *Lord Mansfield and the Somerset [sic] Case*, 50 L.Q. REV. 499 (1934) (exploring what Mansfield actually said in his statement), and William M.

sue to establish his free status and was declared free, as happened, one reason given for the result was that slavery was “without foundation in the law of nature.”⁸⁷ No positive law recognized slavery in the destination state, the argument went, and hence the rule favoring freedom drawn from the law of nature applied. Lord Mansfield said that only positive law could make lawful an institution that was contrary to natural law, and this argument was sometimes applied to secure the freedom of the former slave.⁸⁸

Of course, the law of nature did not provide a one-way street for the vindication of human rights. It served several functions in the American cases. Although it could be, and was, cited as a means of protecting human rights, it could also be used to do the reverse. The coverage of the law of nature was not limited to individuals,⁸⁹ and indeed it could serve to justify the diminution of individual rights. It was held, for example, that a fundamental tenet of the law of nature was self-preservation, and this was applied to states as well as individuals. One important goal of the law of nature was to secure peace and security among individuals. This could entail the diminution of rights of individual citizens as well as their protection, because the government had a duty to establish good order, sometimes even at the expense of the rights of individuals.⁹⁰ It was, for example, the justification given for confiscating the goods of a traitor, although confiscation harmed the traitor’s innocent children, depriving them of

Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974) (describing the modern understanding and impact of *Somerset* on multiple areas of law).

⁸⁷ *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820) (arguing that Lydia, a slave moved from Kentucky to Indiana, was deemed free); see also *Stanley v. Earl*, 15 Ky. (5 Litt.) 281, 285 (1824) (“No man can, by the laws of nature, have dominion over his fellow-man; and property in slaves, therefore, can only exist when the necessary means is afforded by law to enforce the right of the master . . .”); *Harry v. Decker & Hopkins*, 1 Miss. (1 Walker) 36, 42–43 (1818) (presuming that the slave’s natural right to liberty prevails when a question of jurisdictional provision of freedom is complicated by treaties and land transfers); COVER, *supra* note 82, at 93–99 (discussing antislavery and the judicial process).

⁸⁸ See Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 78–79 (1971) (examining Mansfield’s decision); see also *Fulton v. Shaw*, 25 Va. (4 Rand.) 597, 599 (1827) (voiding an attempt to emancipate a slave while retaining her future offspring as slaves as “monstrous both in the eye of reason and of law”).

⁸⁹ See Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 789–90 (2005) (advancing the argument consistent with history that there are group rights in addition to individual rights).

⁹⁰ *New York v. Connecticut*, 4 U.S. (4 Dall.) 3, 6 (1799) (“It is a fundamental principle of the law of nature and of nations, that every government is bound to preserve peace and order, to protect individuals . . .”); see also *Broh v. Jenkins*, 9 Mart. (o.s.) 526, 528–30 (La. 1821) (considering first “the laws of nature and of nations” regarding possession of property); *Dulany v. Wells*, 3 H. & McH. 20, 23 (Md. 1790) (determining debt obligations during the American Revolution).

property they would inherit except for their parent's fault.⁹¹ It required men to give up the right, one which they had by the law of nature, to recover property owed to them.⁹²

Some of its negative effect was indirect. The law of nature was thus cited to dismiss the claims of American Indians to lands they used for hunting, it being held by the natural lawyers that dominion over land required more than such intermittent use.⁹³ The law of nature was cited to restrict a right to marry,⁹⁴ since there could be no right to contract a marriage that itself violated natural law. It could also be invoked indirectly in denying a right to devise, alienate or inherit land, since it was assumed that "[t]he right of transmitting property by descent . . . is not derived from the law of nature; but from the positive and arbitrary laws of civil society[.]"⁹⁵ The very indeterminacy of the law of nature could be used to demonstrate the legitimacy of social legislation.

V. THE CHARACTER OF RIGHTS IN THE LAW OF NATURE

A second finding is that the law of nature did not lend itself to a clear statement of individual rights. It furnished statements of fundamental principles that could serve as the source of human rights, but there was no definitive list of what the rights were, neither in the cases nor in the treatises. Natural law's application to specific cases could therefore present uncertainties. It spawned disagreement among contemporary lawyers. The rights found in natural law treatises were usually stated in quite general terms—the right to preserve one's self or to alienate property, for example. And the law of nature admitted the legitimacy of regulation and limitation of the rights it granted, at least where a plausible reason existed. The exact legal ef-

⁹¹ *E.g.*, *Lessee of Pemberton v. Hicks*, 1 Binn. 1, 18 (Pa. 1799) ("[A]s self-preservation is the first law of nature, so it is likewise the first law of society.").

⁹² *Blair v. Williams*, 14 Ky. (7 A.K. Marsh.) 34, 36–41 (1823) (determining that "the legal obligation of a contract . . . is the mere creature of civil institutions . . . and may be taken away at pleasure by human laws").

⁹³ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 569 (1823) ("The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants and their capacity of using it to supply them."); *see also* *Thompson v. Johnston*, 6 Binn. 68, 76 (Pa. 1813) ("[F]or the cultivation of the soil will support a greater population, than a life by hunting, and therefore this mode of life is less according to the law of nature.").

⁹⁴ *Greenwood v. Curtis*, 6 Mass. (5 Tyng) 358, 378–79 (1810) (dictum) (prohibiting marriages "incestuous by the law of nature"); *see also* *Jones v. Jones*, 2 Tenn. (2 Overt.) 2, 5–6 (1804) (granting a divorce).

⁹⁵ *Jackson v. Wood*, 7 Johns. 290, 293–94 (N.Y. 1810). *See generally* SAMUEL PUFENDORF, 2 *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO* 37–38 (William Abbott Oldfather trans., 1931) (1692) (explaining how goods are to be divided among sons).

fect of some of them was subject to disagreement among the jurists.⁹⁶ Usury was said to be contrary to the law of nature, for instance, but influential jurists thought that a taking of a reasonable rate of interest might nevertheless be justified.⁹⁷ So it appeared in American cases.⁹⁸

To take an example important at the time of the American Revolution, it was asked: Did the law of nature guarantee a right of expatriation and emigration? It might be so read, but the answer was far from certain. Grotius could be cited in support of a general rule allowing freedom of movement, but he also admitted the existence of exceptions to it.⁹⁹ American cases themselves did not provide a clear answer; some regulation by the state was clearly admissible and even the existence of the underlying right was subject to dispute.¹⁰⁰

The situation was not unusual.¹⁰¹ One cannot help feeling some sympathy with the exasperated federal judge faced with an argument that the natural law required him to ignore the positive law's distinction between transitory and local actions in defining the reach of federal jurisdiction. "Who yet," he said, "has been able to find where the law of nature has defined what a civil action is, or directed the mode of proceeding in it, or in what court it should be brought[?]"¹⁰² He was not prepared to deny natural law's existence, but he did not

⁹⁶ One *locus classicus* in the medieval law was provided by the papal decretal, *Raynutius*, placed in the *Decretales Gregorii IX* (X 3.26.16) in 2 CORPUS IURIS CANONICI 544 (Aemilius Friedberg ed., 1879) (concerning the dispute over the validity of depriving the heir of a portion of the estate due by the law of nature).

⁹⁷ 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* Lib. II, c. 12, § 20, at 355 (Francis W. Kelsey trans., 1925) (stating the "generally accepted opinion that interest is forbidden by the law of nature"). See generally CARLO GAMBA, *LICITA USURA: GIURISTI E MORALISTI TRA MEDIOEVO ED ETÀ MODERNA* (2003).

⁹⁸ E.g., *Dunham v. Gould*, 16 Johns. 367, 377–78 (N.Y. Sup. Ct. 1819) (citing the opinion of Grotius).

⁹⁹ GROTIUS, *supra* note 97, c. 5, § 24, at 253–54. The source of this reference was Professor Kenneth Pennington.

¹⁰⁰ *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 138–46 (1795) (considering disputes about the extent of expatriation as a natural right in time of war); *Brooks v. Clay*, 10 Ky. (3 A.K. Marsh.) 545, 549 (1821) (containing the judge's refusal to be drawn into discussion of disputed question, as invited by litigant); *Ainslie v. Martin*, 9 Mass. (8 Tyng) 454, 461 (1813) (stating that "no subject can expatriate himself"); *Read v. Read*, 9 Va. (5 Call) 160, 201 (1804) (comparing English common law with "a great natural right; I mean the right of expatriation").

¹⁰¹ See, e.g., *Baldwin v. Hayden*, 6 Conn. 453, 457 (1827) (specifying that the right of self-defense was a "primary law of nature" but subject to many qualifications).

¹⁰² *Livingston v. Jefferson*, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8411). The District Judge was John Tyler, father of President John Tyler. See also *Livingston v. Heerman*, 9 Mart. (o.s.) 656, 667 (La. 1821) (posing "[q]uestions which the general and immutable law of nature cannot always solve"); *Martin v. Woods*, 9 Mass. (8 Tyng) 377, 381 (1812) (commenting by lawyer about rejection of "whatever fanciful theories the writers upon natural law may have invented on the subject" of citizenship); *Pierson v. Post*, 3 Cai. 175, 181 (N.Y. 1805) (*Livingston, J.*, dissenting) (having "great difficulty in determining" the role of natural law in a property dispute concerning hunted animals).

think it of much help to him in reaching a result in the case before him.

Even in places where there was evident compatibility, the exact reach of natural law's principles could be quite uncertain. A textbook example was the duty to fulfill one's promises. The duty was held to be part of natural law, and the corresponding right in the promisee to secure enforcement of the contract was undoubted. Common lawyers admitted, however, that this was a duty that might legitimately be modified by the law's requirement of valuable consideration to make a promise enforceable.¹⁰³ Exactly that had happened in the common law. Similarly, the natural law held that parents had a duty to support and bring up their children. Even the behavior of most animals showed that care for one's offspring was a natural duty. The children had a corresponding right to be supported by their parents. However, this was simply a very broad statement of principle. What did it mean in practice? Jurists held that additional circumstances could justify diminishing the scope of this right. Assuming a good reason, a statute might validly cut down the amount of support owed to children without running afoul of the law of nature. Jurists, therefore, held that the natural right to parental support was not absolute. It could give way to necessity, convenience, or even long-established custom.¹⁰⁴ And so it was with many of the rights found in the law of nature.¹⁰⁵

This did not mean that natural law was meaningless, or that it had no possible effect in practice, only that it was not very specific and was subject to limitations.

¹⁰³ *Schoonmaker v. Roosa*, 17 Johns. 301, 304 (N.Y. Sup. Ct. 1820) (“[E]very man is, by the law of nature, bound to fulfil his engagements. It is equally true that the law of this country supplies no means . . . to compel the performance of an agreement made without sufficient consideration.” (quoting an English case, *Rann v. Hughes*, (1778) 7 Term. Rep. 350); see also *Sumner v. Williams*, 8 Mass. (7 Tyng) 162, 188 (1811) (also citing the preceding passage from *Rann v. Hughes*).

¹⁰⁴ An example, with judicial acknowledgement, is found in *Wilkes v. Rogers*, 6 Johns. 566, 579 (N.Y. 1810), which explains that if a parent seeks to extinguish her duty of maintenance to her children out of necessity it can be recognized by the court. See also *Heath v. White*, 5 Conn. 228, 232 (1824) (repeating the convenient law that “the rights of an illegitimate child are very few”); *Steele v. Thacher*, 22 F. Cas. 1204, 1207 (D. Me. 1825) (No. 13,348) (explaining the custom that a parent may generally prohibit others from contracting with their child, but that this rule was inapplicable when the parent no longer honors the child's natural right of parental support).

¹⁰⁵ Other examples include:

(1) The law of usury. It was held to be contrary to the law of nature, but lenders were allowed to receive interest nonetheless “provided their exactions do not become oppressive.” *Bank of Utica v. Wager*, 2 Cow. 712, 765 (N.Y. Sup. Ct. 1824);

(2) The power of alienating property. It was said that “the right of disposing of property *inter vivos* is derivable from the law of nature . . . yet the extent in which it may be exercised in different countries is not settled[.]” *Dawes v. Head*, 20 Mass. (3 Pick.) 128, 132 (1825).

The Golden Rule proves useful in our own lives, even if it is stated broadly and contains exceptions. It was the same with the law of nature. For instance, natural law was commonly cited, and apparently with good effect, as a legitimate tool of statutory interpretation. Following the same theme of a child's rights to parental support, for instance, a statute favoring the rights of dependent children would be given an expansive construction, whereas one restricting those same rights was to be given a narrow reading. At least in the world of the European *ius commune*, judges had quite considerable freedom in interpreting statutes, and crediting the law of nature, as they did, they had freedom to apply natural law to the statutes they interpreted. Much the same can be said about the interpretation of contracts that came before them, for it was assumed by the natural lawyers that "[e]very contract must be subjected to, limited, and interpreted by the law of nature[.]"¹⁰⁶ By such means natural law made itself felt in the decision of cases.

VI. NATURAL LAW RIGHTS AND POSITIVE LAW

A third result of this survey is finding that the law of nature normally played a subsidiary role in the American cases. For the most part, it was cited to support other sources of law, or at least in conjunction with them, rather than to oppose or invalidate them. True enough, natural law could be used to test the validity of a specific law, custom, or statute. It could challenge positive law.¹⁰⁷ In other words, it could serve as the U.S. Constitution generally does today: a rubric under which courts determine whether a statute passes muster.

However, this is not the role the law of nature normally played in early American case law. Mostly it was cited to buttress other sources of law, not to overturn them. Thus, we read that a legal position was endorsed "by the law of nature, as well as the municipal law,"¹⁰⁸ or that another was supported "by the principles of common law, as well as the law of nature."¹⁰⁹ A North Carolina judge asserted that his

¹⁰⁶ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 155 (1819).

¹⁰⁷ For example, that is the role it played in the *Doctor and Student* of Christopher St. German (c. 1460–1540). See *St. German's Doctor and Student*, 91 SELDEN SOC. PUB. 77, 79 (T.F.T. Plucknett & J.L. Barton eds., 1974) ("So in lyke wyse the generall groundes of the lawe of Englande/ hede more what is good for many/ than what is good for one synguler person only."). For further scholarly discussion, see Mark D. Walters, *St. German on Reason and Parliamentary Sovereignty*, 62 *CAMB. L.J.* 335 (2003).

¹⁰⁸ *Wilkes*, 6 *Johns.* at 579. This finding accords with that of R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 262–64 (2001), which discusses how "judicial references to natural law" were often "harnessed to specific constitutional provisions" in a "mix of natural and positive law."

¹⁰⁹ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 167 (1820) (Livingston, J., dissenting); see also *Canaan v. Salisbury*, 1 *Root* 155, 156 (Conn. 1790) ("[T]he laws of [the] state . . . [are]

views were confirmed by “the Common Law, [which is] founded upon the law of nature, and confirmed by revelation.”¹¹⁰ The substantive identity of the law of nature with the law of nations was frequently asserted.¹¹¹ Such recitations could go to considerable lengths; in an 1804 U.S. Supreme Court case, the Court declared that the lawyer’s position was endorsed by “the divine law, the law of nature, the law of nations, or the constitution of the state of New Jersey.”¹¹²

This third finding may seem surprising, even disappointing, in the context of a study concerning the status of unenumerated rights in the early American Republic. One expects the normal case to be one in which a statute or other local law was tested against the natural law. But on looking, one finds the reverse: the normal case was one in which a statute was supported by the law of nature. The U.S. Constitution’s provisions were, of course, sometimes assumed to overlap with those of the law of nature,¹¹³ but so too were the rules of the common law and even the provisions of statutes. In other words, the lawyers citing natural law seem to have *assumed* congruity between it and other sources of law.

In fact, this finding should not be wholly surprising. It made good sense at the time, when the ordinary assumption of the natural lawyers was that positive law was consistent with the natural law. The former added specificity and sanctions to the latter. This left ample room for choice as to specific provisions, but natural law was meant to underlie positive law. Ordinarily it did. The assumption of sub-

agreeable to the law of nature”); *Haven v. Foster*, 26 Mass. (9 Pick.) 112, 119 (1829) (finding that “the law of nature, the civil law, and [the state law]” all favor the same result); Page v. Pendleton, Wythe 211, 214 (Va. 1793) (citing remedies provided by the legislative authority which the laws of nature permit).

¹¹⁰ *State v. Reed*, 9 N.C. (2 Hawks) 454, 455 (1823).

¹¹¹ *E.g.*, *Thirty Hogshead of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (“The law of nations is the great source from which we derive those rules . . . which are recognized by all civilized and commercial states”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 94 (1804) (referring to “the law of nature and nations”); *Hinchman v. Clark*, 1 N.J.L. 340, 361 (1795) (noting the “government professedly founded upon the rights of human nature”). Joining the two was encouraged by the jurists. *See generally* 2 J. J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW*, 151–61 (Nugent trans., 5th ed. 1791); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960*, at 30–33 (2002).

¹¹² *M’Ilvaine v. Coxe’s Lessee*, 6 U.S. (2 Cranch) 280, 324 (1804); *see also* *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 14 (1794) (contemplating lawful regulation “by common law, by statute law, and by the law of nature and nations”); *Griffith v. Griffith’s Ex’rs*, 4 H. & McH. 101, 115 (Md. 1798) (“The common law is grounded upon the general customs of the realm, and comprehends the law of nature, the law of God, and the principles and maxims of the law.”); *The Charge to the Grand Jury* (1765), in JOSIAH QUINCY, JR., *REPORT OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY* 110, 113 (Boston 1865) (“Common Law, Natural Law, that is, the Law which every man has implanted in him, [and] directly against a Law of this Province[.]”).

¹¹³ *E.g.*, *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 90 (1823) (rejecting a possible reading of the “obligation of contracts” clause because it would conflict with tenets of natural law).

stantive compatibility between natural law and positive law is something legal historians should have noted more often than they have. However, they began by asking whether a lawyer's arguments were based upon the common law *or* on natural law. One may recall, for example, the strenuous efforts made to determine whether Sir Edward Coke's famous account of *Bonham's Case* depended upon application of traditional rules of English law or instead of a supranational, higher law.¹¹⁴ At first sight, that approach seems to make sense.¹¹⁵ From the perspective of the natural lawyers of Coke's day, however, it would not have been a necessary choice. They assumed that the two sources of law were in harmony. Certainly Coke did. He thought the English common law was the embodiment of reason. It would have seemed entirely natural to him to use both in supporting the result of the case. Thus, modern writers have seen the necessity for choice where Coke and lawyers in the new Republic saw none, requiring no artifice to "blend" the dual doctrines.¹¹⁶ To do so was characteristic of the thought of lawyers schooled in the law of nature.

Of course, conflict *could* exist between natural law and positive law. There is language in the tradition proclaiming the invalidity of any law not in harmony with the law of nature, and some of it seems to invite judicial review of legislation. But judicial review was not part of the traditions of natural law¹¹⁷ and in practice it rarely served that function in the new Republic. Judges did not invalidate statutes simply because they did not accord with the dictates of natural law. What Justice Iredell said in *Calder v. Bull* is confirmed by a survey of the cases that cited the dictates of natural law: Judges may not declare a legislative act "to be void, merely because it is, in their judgment, contrary to the principles of natural justice."¹¹⁸ That had been the rule in

¹¹⁴ E.g., S. E. Thorne, *The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham*, in THE CONSTITUTION RECONSIDERED 15, 21 (Conyers Read ed., 1938) (concluding that "[f]ar from 'evincing a receptive and candid attitude toward natural law ideas . . .', the argument is derived from the ordinary common-law rules of statutory interpretation"). For a strong example in the American context, see John Phillip Reid, *The Irrelevance of the Declaration*, in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 46, 47-87 (Hendrik Hartog ed., 1981).

¹¹⁵ This approach is encouraged by the influential work of J. G. A. POCKOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (Cambridge Univ. Press 1987) (1957) (discussing the history of English common law and stating that the English people, quite differently than the French, believed in the existence of this one type of law alone).

¹¹⁶ J. A. C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 82-83 (1930) (discussing how courts combined "the doctrines of natural law and due process").

¹¹⁷ This reading of the evidence accords with the conclusions of Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 427-35 (1991) (arguing that judicial review was traditionally never viewed as a check on governmental infringement of the individual rights granted by natural law).

¹¹⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798).

England where the judges did not stand above the King in Parliament.¹¹⁹

It might conceivably be otherwise in the new American republic. Indeed, it would come to be different, and some believed that it should be so from the outset. A written constitution laid out rules and principles that bound legislatures and courts alike. Surely, it could be said, the Constitution ought to prevail over statutes, and judges were empowered to see that this principle prevailed. This is a change made possible by what the Germans call *Positivierung des Naturrechts*. It altered the rules from those that had prevailed under the law of nature before it was put into written, constitutional form and led slowly to judicial review as we know it.

However, the origins and history of judicial review in the United States are not the subject of this Paper. It is a complicated question.¹²⁰ From the perspective of the law of nature dominant at the turn of the nineteenth century, it would have been too great a leap for a judge to have “struck down” an act of the legislature simply because he regarded it as inconsistent with principles derived from the law of nature.¹²¹ Doing so would have been inconsistent with prevalent understanding of what the law of nature authorized, and American judges do not appear to have taken that step. They needed more. The most that can be said is that, when our written Constitution was added to the mix, acceptance of the tenets of the law of nature may have contributed to an expanded role in the protection of civil rights played by American judges. In this sense, natural law helped in paving the way for the protection of constitutional rights in our Republic.

¹¹⁹ See WILLIAM BLACKSTONE, 1 COMMENTARIES *91 (asserting that to give judges the power to reject a statute would be “subversive of all government”).

¹²⁰ Gordon S. Wood, *Judicial Review in the Era of the Founding, in IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 153, 153 (Robert A. Licht ed., 1993) (comparing influence of the founding era and the post-Civil War period); see also William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457 (2005) (presenting “a view of judicial review in the founding era that is sharply different from all the varying schools of thought, both with respect to the frequency of judicial review and with respect to when it was exercised”). The author has had the advantage of reading a draft of the forthcoming book by Philip Hamburger, *LAW AND JUDICIAL DUTY*, which makes a significant contribution to understanding this subject in the new United States.

¹²¹ See, e.g., *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 46, 50–52 (1823) (contrasting the nature of government in the United States with that of lands without a written constitution); *Bennett v. Boggs*, 3 F. Cas. 221, 227–28 (C.C.D. N.J. 1830) (No. 1319) (rejecting the possibility of applying “general principles” to declare a law void unless the right could be found in the words of the Constitution).

VII. CONCLUSION

A conclusion appropriate for a Symposium devoted to unenumerated rights based on the evidence presented in this Paper must be a modest one. There are two points worth making. The first is that the traditions of natural law did contain rights that were not (and are not) found in American constitutions and amendments to them. For example, the right to parental support, a staple of the natural law, is not found in the U.S. Constitution. The right to self-preservation, another accepted part of learned traditions, also was regarded as the source of natural rights that did not appear expressly in our constitutions. Of course, there was a considerable overlap between the law of nature and American constitutions. There was bound to be. And as Mark Tushnet's contribution points out, much depends on how specifically one defines the right.¹²²

Rights to due process of law furnish an example of this relationship. Overall, one must say that the U.S. Constitution was more detailed about them than was the law of nature. The right to a jury trial guaranteed by the Seventh Amendment, for example, granted a specific right the natural lawyers would have said might be consistent with natural law, and perhaps founded upon it, but they would not have said trial by jury was required by the law of nature. Only procedural fairness was. The "fit" between the law of nature and the American Constitution was always imperfect. It can be said that rights existed within the natural law tradition that are nowhere mentioned in the Constitution, and that rights were stated in the Constitution that were debatable under the law of nature. To this extent the history of natural rights gives a certain amount of encouragement to the future recognition of unenumerated rights as they are not a wholly new feature of our law.

The second conclusion seems at least partially at odds with the first. The rights endorsed in the law of nature, as it was understood in the first quarter of the eighteenth century, were considerably weaker than American constitutional rights have turned out to be.¹²⁵ They were stated with greater generality, admitted more exceptions and limitations, and served as the source of judicial invalidation of statutes only in the most extreme and unusual situations. The natural lawyers argued that the law of nature was a fundamental law. In a sense it was thus a "higher law" than was positive law. Sometimes they

¹²² Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006).

¹²⁵ See Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 159, 169–70 (J. Barlow et al. eds., 1988) (distinguishing between "fundamentalizing" individual rights, as was done in the English tradition, and the American tradition of "constitutionalizing" of rights so that they "cannot be abrogated or changed by normal legislative procedure").

did speak of statutes that ran afoul of this principle as unlawful and not to be obeyed, at least in the forum of the individual's conscience. But more often they found room for positive law's place within the spacious chambers of the natural law traditions, and they recoiled from the conclusion that individual judges could themselves take the part of a legislator and decide exactly what specific results the rule of law demanded.

To this extent, the history of rights in the natural law tradition actually gives less encouragement to judicial recognition of unenumerated rights than appears at first sight. The rights that can be supported by the natural law standards so widely recognized at the time of our Republic's founding were indeed not identical with all of those enumerated in our Constitution. However, they were different in character from what most people today mean when they speak of fundamental rights guaranteed by the exercise of judicial review.