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# Natural Law and the Constitution of the United States

Russell Kirk\*

The literature of natural law is complex, copious, and monthly growing vaster. All I aspire to accomplish in this lecture is to offer some examination of the relationships between natural law doctrines and the Constitution of the United States; in that I must be succinct. I hope to profit, ladies and gentlemen, from your comments and questions, so as to make these remarks of mine tolerably fit for publication. I am exploring the subject with you. The present pressing question is how we are to restore a true understanding of natural law in the discussion of legislation and the decisions of the Supreme Court of the United States. I take it that most of us present today, at Notre Dame of all places, recognize the importance of the natural law.

A great deal of loose talk about natural law has occurred during very recent years. It was objected to Judge Bork's nomination to the Supreme Court that Bork did not believe in natural law. When Judge Thomas was interrogated for the same bench, the objection was raised that he *did* believe in natural law. Clearly, a good many public men and women have but a vague notion of what is meant by the term *natural law*.

However, during very recent years there have appeared serious studies of natural law, and its relationship to our present discontents, that deserve high praise. Among the more important books are Russell Hittinger's *A Critique of the New Natural Law Theory*; Graham Walker's *Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects*; and Hadley Arkes' *Beyond the Constitution*. Also there has occurred a lively exchange of opinions on such themes in a good many periodicals, among them *Public Affairs Quarterly*, *The Wake Forest Law Review*, *The Review of Politics*,

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*Crisis, Modern Age, and First Things*. But I must not permit this lecture to turn into an exercise in bibliography.

To complicate matters, although since 1938 judicial positivism has prevailed conspicuously in decisions of the United States Supreme Court, in recent decades a number of important decisions seem to have been founded, somewhat surreptitiously, upon natural law or natural rights notions in consequence of the doctrine of *stare decisis*. Was not Justice Brennan given to appealing to judges' private understanding of concepts of natural justice? But that complex question is not directly before us today.

Misunderstanding of natural law, or its misapplication, may work great mischief. Permit me to offer you a succinct definition of the general term—a sweeping definition—that I wrote some decades past for a dictionary of historical terms.

Objectively speaking, *natural law*, as a term of politics and jurisprudence, may be defined as a loosely-knit body of rules of action prescribed by an authority superior to the state. These rules variously (according to several different schools of natural law and natural rights speculation) are derived from divine commandment, from right reason with which man is endowed by his Creator, from the nature of mankind empirically regarded, from the abstract Reason of the Enlightenment, or from the long experience of humankind in community.

Today, however, I am concerned not directly with distinguishing among several schools of thought, but rather with the ancient and central tradition of natural law, with its roots in Plato and Aristotle, later and more fully expounded by Cicero, Seneca, and the Roman juriconsults; then passing from the Stoic sages to the Fathers of the Church, and presently amplified and defined by Saint Thomas Aquinas. From the Schoolmen that understanding of natural law enters into English common law, and in the sixteenth century obtains fresh expression in Hooker's *Laws of Ecclesiastical Policy*, and the later writings of other Anglican divines. This apprehension of natural law passes into America during colonial times, and in some degree survives, if often submerged, in twentieth century America. We may call it the Catholic doctrine of natural law—supposing we are aware of its classical roots; and that communicants of the Catholic Church are not the only defenders and guardians of natural law. C.S. Lewis, in his Appendix, *The Tao*, of his little book *The Abolition of Man*, shows convincingly how a recognition of natural law may be encountered in many religions and philosophies.

On the one hand, natural law must be distinguished from positive or statutory law, decreed by the state; on the other, from "laws of nature" in a scientific sense—that is, from propositions expressing the regular order of certain material phenomena. Also natural law sometimes is confronted with assertions of "natural rights" which may or may not be founded upon classical and Christian concepts of natural law.

The legacy of the classical *ius naturalis*, as baptized by Schoolmen and canonists, endured with little challenge until the seventeenth century. During those centuries, in the Christian world, the natural law was received as a body of unwritten rules depending upon common sense and universal conscience, ascertained by right reason. But the stirrings of secularism and rationalism in the seventeenth century brought about first the Protestantizing of natural law by Grotius and others, and presently its secularization by Pufendorf, Vattel, Burlamaqui, and lesser thinkers. This latter secularized notion of natural law took on flesh in the latter part of the eighteenth century, vulgarized by Thomas Paine and ferocious in the French Revolution.

Nevertheless, the older understanding of natural law—which we may call, I repeat, the Catholic understanding—was not extinguished. It was ringingly asserted by Edmund Burke, in his distinction between the "real" and the "pretended" rights of men and in his prosecution of Warren Hastings. For this and for a lucid distinction between "natural law" and "natural rights" ideas, see Peter Stanlis' book *Edmund Burke and the Natural Law*. Through the disciples of Burke, and through the influence of the Church, the classical and Catholic natural law has experienced a renewal of interest in the latter half of the twentieth century.

It should be understood that natural law does not pertain merely to states and courts of law. For it is a body of ethical perceptions or norms governing the life of the person and the life of people in community, quite aside from politics and jurisprudence. When many people flout or ignore this law for human beings, the consequences are ruinous—as with the unnatural vices that result in the disease called AIDS, or with the ideological passions, defying the norms of justice, that have so disastrously ravaged most nations since the beginning of the First World War—during what Arnold Toynbee calls our "Time of Troubles."

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Let us pass from these general considerations to the relationship between natural law and American beliefs, and between natu-

ral law and the American Constitution framed in 1787. When Associate Justice Joseph Story adorned the Supreme Court from 1811 to 1845, much was said in judicial decisions about natural law. Until the defeat of President John Quincy Adams by General Andrew Jackson, the executive branch of the government of the United States from time to time acknowledged the suzerainty of natural law. But only occasionally, during the twentieth century, have justices and presidents forthrightly affirmed their reliance upon natural law. Let me attempt to compress an analysis of all this into a few minutes of comment.

The reality of natural law was taken for granted by Americans of the Revolutionary era and of the years in which the Constitution was framed and ratified. Generally speaking, theirs was what we may venture to call the Catholic apprehension of natural law, fundamentally. It should be remembered that the Church of England had been the church established by law in most of the Thirteen Colonies; so the natural law teachings of Richard Hooker and other Anglican divines were imparted from American pulpits. It should be remembered, also, that Hooker's *Laws of Ecclesiastical Policy*, with its exposition of natural law, had the endorsement of Pope Clement VIII: "There is no learning that this man hath not searched into," wrote Clement. "This man indeed deserves the name of an author; his books will get reverence by age, for there is in them such seeds of eternity that if the rest be like this, they shall last until the last fire shall consume all learning."

A more immediate influence upon Americans' understanding of natural law during the closing quarter of the eighteenth century was Sir William Blackstone's *Commentaries on the Laws of England*, published between 1765 and 1769, during heated disputations between the Thirteen Colonies and the Crown. As Edmund Burke would inform the House of Commons in 1775, nearly as many copies of Blackstone's *Commentaries* had been sold in America as in Great Britain, despite the disparity in population. Blackstone commenced his great work with an affirmation of the natural law. In Blackstone, two streams of natural law thought mingle: that of Cicero, the Schoolmen, and the Anglican divines; and that of the seventeenth century scholars Grotius and Pufendorf and the Swiss jurist Burlamaqui. "This law of nature," Blackstone wrote:

being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, and all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as

are valid derive all their force, and all their authority, mediately or immediately from this original.

American political leaders and lawyers and jurists at the time of the Constitutional Convention in 1787 were disciples of Blackstone; while in the formative years of the new Republic, the two chief American writers on jurisprudence and authors of textbooks on American law—Justice Joseph Story and Chancellor James Kent—affirmed doctrines of natural law in the form presented by Blackstone. I need not labor the point that the Framers of the Constitution in 1787—most of them, incidentally, Anglicans in religion—accepted the concept of natural law presented by Blackstone.

Is the Constitution of the United States, then, a natural law document? No, it is not a philosophical treatise at all, but instead a practical instrument of government. We are safe in saying, nevertheless, that the Framers, with few conceivable exceptions, believed in the reality of natural law and had no intention of contravening natural law by the instrument they drew up at Philadelphia; nor did anyone suggest during the debates over ratification that the Constitution might in any way conflict with the old truths of the natural law.

Of course it is quite true, as Robert H. Bork puts it, that “if the Founders intended judges to apply natural law, they certainly kept quiet about it.”<sup>1</sup> But also the Founders, as Bork next remarks, kept quiet in the Constitution about judicial review—and about much else, including relationships between the Constitution and common law (within which is much natural law doctrine), the existence of political parties, and commercial navigation by steamboats. John Marshall’s Supreme Court subsequently supplied some of those deficiencies.

Nor does the Constitution make reference to Christianity; nevertheless, all but three or four delegates to the Constitutional Convention professed themselves Christians, and the old tradition of natural law comes down from Christian divines. Presumably the Founders did not doubt that judges—who would know the common law—like other public men in America, would be cognizant

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1 ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 209 (1990); see also Robert H. Bork, *Mr. Jaffa’s Constitution*, NAT’L REV., Feb. 7, 1994, at 61 (his overwhelming devastation of Harry Jaffa’s notions of natural law in the Declaration of Independence as binding upon the Constitution).

of the ethical principles called "natural law" although Congregationalists and some others preferred the term "Divine Law."

Now Mr. William Bentley Hall—that redoubtable counsel at law to religious associations and church schools, successful often in courtrooms—and some other champions of natural law doctrines as applied to the judiciary, retort upon Mr. Bork that even though the Constitution itself does not mention natural law specifically, still natural rights are affirmed by the Declaration of Independence, which they take to be a preamble to the Constitution's Preamble. They have my sympathy, but that particular argument will not stand. They are confused about the history of ideas, for the Declaration is not part and parcel of the Constitution. The eighteenth-century Enlightenment's doctrine of "natural rights" is not at all identical with the venerable Catholic and Anglican doctrine of natural law, nor with Blackstone's version of natural law. Moreover, the Declaration and the Constitution were drawn up under different circumstances for quite different purposes: the first in the enthusiasm of revolution, the second in the restoration of order, and the men of 1787 were not the men of 1776. The Declaration in intent was an appeal to France for help against the British forces in America; it therefore was expressed in Gallic Enlightenment terms, including Enlightenment doctrines of natural rights, as Carl Becker points out convincingly, at some length, in his famous little book *The Declaration of Independence*.<sup>2</sup>

The Continental Congress chose to draft the Declaration through a committee of three, two of them Francophiles—Jefferson and Franklin—who could be trusted to phrase the American plea in terms that would please French philosophers and even the French court. The abstract "natural rights" of life, liberty, and pursuit of happiness had slight relationship to the "chartered rights of Englishmen" claimed by the colonial leaders in petitions to the Crown; for the French were not interested in securing the prescriptive rights of Englishmen.

So to quote the Declaration as signifying the Constitution's recognition of natural law is to have confidence in a frail need. Still, it does not follow that, Bork notwithstanding, natural law has no rightful place in the reasoning of federal courts.

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2 CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1942) (particularly Chapter VI).

As I have implied already, natural law is not primarily an instrument intended for use in common courts of law; rather, it is a body of precepts helping you and me to govern ourselves. Incidentally, rather than primarily, it is of help to magistrates. This natural law should not be taken for graven tables of Governance, to be followed to job and title; such moral law must be appealed to in different circumstances, and applied with prudence. We must remind ourselves that natural law is not a kind of inflexible code set up in deliberate opposition to the positive laws of every state. The natural law does offer guidance for magistrates, especially when they sit in equity, as it offers guidance to all of us in our private lives. As Alessandro D'Entreves writes, "[T]he doctrine of natural law is simply in fact nothing but an assertion that law is a part of ethics . . . . The lesson of natural law . . . [is] simply to remind the jurist of his own limitations."<sup>3</sup>

The question having been raised, we may turn to an historical example and to the judgment of a leading Catholic political and religious writer in these United States, Orestes Brownson, who instructs us that public men ought to be guided always by respect for the natural law; but that magistrates, appointed or elected, are bound ordinarily by Constitution and statute, and ought not to set up their private interpretations of natural law in opposition to the positive laws they are supposed to enforce.

I refer to the "higher law" controversy of 1850 and to Orestes Brownson, the Catholic scholar and polemist. In March 1850, on the floor of the United States Senate, William Henry Seward made his famous declaration that there exists "a higher law than the Constitution." He was referring to proposals for the emancipation of slaves. At once a heated controversy arose. In January 1851, Brownson published his review essay entitled *The Higher Law*, in which he refuted the claim of Seward, the Abolitionists, and the Free Soilers to transcend the Constitution by appealing to a moral "higher law" during debate on the Fugitive Slave Bill. Brownson agreed with Seward that

there is a higher law than the Constitution. The law of God is supreme, and overrides all human enactments, and every human enactment incompatible with it is null and void from the beginning, and cannot be obeyed with a good conscience, for

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3 A. P. D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 108-116, 120 (1951).



"we must obey God rather than men." This is the great truth statesmen and lawyers are extremely prone to overlook, which the temporal authority not seldom practically denies, and on which the Church never fails to insist . . . .

But the concession of the fact of a higher law than the Constitution does not of itself justify the appeal to it against the Constitution, either by Mr. Seward or the opponents of the Fugitive Slave Law. Mr. Seward had no right, while holding his seat in the Senate under the Constitution, to appeal to the higher law against the Constitution, because that was to deny the array authority by which he held his seat . . . . After having taken his oath to support the Constitution, the Senator had, so far as he was concerned, settled the question, and it was no longer for him an open question. In calling God to witness his determination to support the Constitution, he had called God to witness his conviction of the comparability of the Constitution with the law of God, and therefore left himself no plea for appealing from it to a higher law.<sup>4</sup>

We cannot be bound, Brownson continued, to obey a law that is in contravention of the law of God.

This is the grand principle held by the old martyrs, and therefore they chose martyrdom rather than obedience to the state commanding them to act contrary to the Divine law. But who is to decide whether a special civil enactment be or be not repugnant to the law of God? Here is a grave and perplexing question for those who have no divinely authorized interpreter of the Divine law." The Abolitionists and Free Soilers, adopting the Protestant principle of private judgment, claim the right to decide each for himself. But this places the individual above the state . . . and is wholly incompatible with the simplest conception of civil government. No civil government can exist, none is conceivable even, where every individual is free to disobey its orders whenever they do not happen to square with his private convictions of what is the law of God.<sup>5</sup>

The Church, Brownson writes, is the authoritative interpreter of the Divine law. He reminds his readers that the state is ordained by God; but the state is not the supreme and infallible organ of God's will on earth.

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4 O. A. BROWNSON, *The Higher Law*, in *ESSAYS AND REVIEWS* (New York, D & J. Sadlier 1870) 349, 355-56.

5 *Id.* at 357.

Now it is clear that Mr. Seward and his friends, the Abolitionists and the Free Soilers, have nothing to which they can appeal from the action of government but their private interpretation of the law of God, that is to say, their own private judgment or opinion as individuals; for it is notorious that they are good Protestants, holding the pretended right of private judgment, and rejecting all authoritative interpretation of the Divine law. To appeal from government to private judgment is to place private judgment above public authority, the individual above the state, which, as we have seen, is incompatible with the very existence of government, and therefore, since government is a divine ordinance, absolutely forbidden by the law of God,—that very higher law invoked to justify resistance to civil enactments . . . . No man can ever be justifiable in resisting the civil law under the pretence that it is repugnant to the Divine law, when he has only his private judgment, or, what is the same thing, his private interpretation of the Sacred Scriptures, to tell him what the Divine law is on the point in question, because the principle on which he would act in doing so would be repugnant to the very existence of government, and therefore in contravention of the ordinance, therefore of the law, of God.<sup>6</sup>

Brownson's argument—which we have not time enough to analyze in full today—in substance is this, in his own words: “Mr. Seward and his friends asserted a great and glorious principle, but misapplied it.”<sup>7</sup> It was not for them to utter commands in the name of God. Their claims, if carried far enough, would lead to anarchy. The arguments of some of their adversaries would lead to Statolatry, the worship of the state.

The cry for liberty abolishes all loyalty, and destroys the principle and the spirit of obedience, while the usurpations of the state leave to conscience no freedom, to religion no independence. The state tramples on the spiritual prerogatives of the Church, assumes to itself the functions of schoolmaster and director of consciences, and the multitude clap their hands, and call it liberty and progress!<sup>8</sup>

Brownson advocated compliance with the Fugitive Slave Law, which clearly was constitutional; indeed, obligatory under article

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6 *Id.* at 359-60.

7 *Id.* at 363.

8 *Id.*

IV, section 2 of the Constitution. It was his hope to avert the Civil War which burst out ten years later.

Now there is a right and a wrong way of defending the truth, and it is always easier to defend the truth on sound than on unsound principles. If men were less blind and headstrong, they would see that the higher law can be asserted without any attack upon legitimate civil authority, and legitimate civil authority and the majesty of the law can be vindicated without asserting the absolute supremacy of the civil power, and falling into statolatory,—as absurd a species of idolatry as the worship of sticks and stones.<sup>9</sup>

In Brownson's argument—particularly memorable here at Notre Dame, where Brownson's bones lie beneath the Basilica, and his papers in the archives—may be found much highly relevant to our own era of startling or contradictory interpretation of natural law. Permit me to conclude by touching summarily on such matters.

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Professor Russell Hittinger, in a long and learned and illuminating article entitled *Liberalism and the American Natural Law Tradition* published three years ago in the *Wake Forest Law Review*, distinguishes three chief phases of recourse to natural law in America's history. The most recent—very recent—of these is "the emergence in our day of a natural law of lifestyle choices."<sup>10</sup> Let me offer some desultory observations on the tendency of federal courts toward this socially destructive "lifestyle" perversion of natural law doctrine.

As Brownson remarks, the natural law (or law of God) and the American civil law are not ordinarily at swords' points. Large elements of natural law entered into the common law of England—and therefore into the common law of the United States—over the centuries; and the Roman law, so eminent in the science of jurisprudence, expresses the natural law enunciated by the Roman jurisconsults. No civilization ever has attempted to maintain the bed of justice by direct application of natural law doctrines by magistrates. Necessarily, it is by edict, rescript, and statute that any state keeps the peace through a system of courts. It simply will not do to maintain that private interpretation of

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9 *Id.* at 364.

10 Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429 (1990).

natural law should be the means by which conflicting claims are settled.

Rather, natural law ought to help form the judgments of the persons who are lawmakers—whether emperors, kings, ecclesiastics, aristocratic republicans, or representatives of a democracy. The civil law should be shaped in conformity to the natural law—which originated, in Cicero's words, "before any written law existed or any state had been established."

It does not follow that judges should be permitted to push aside the Constitution, or statutory laws, in order to substitute their private interpretations of what the law of nature declares. To give the judiciary such power would be to establish permanently what might be called an *archonocracy*, a national domination of judges, presumably sophocrats, supplanting the constitutional republic. Also surely it would produce some curious and unsettling decision, sweeping away precedent, which might be found highly distressing to friends to classical and Christian natural law.

Only the Catholic Church, Brownson reasoned, has authority to interpret the natural law, but the Supreme Court of the United States takes no cognizance of papal encyclicals. Left to their several private judgments of what is "natural," some judges indubitably would do mischief to the person and the republic.

The Supreme Court's majority decision in *Roe v. Wade*—in which, as in a few other recent cases, a deathly sort of "right to privacy" was discovered—amounted to a declaration of the "natural rights" of a mother to destroy her offspring. This is a fierce blow at the family, the most fundamental of human institutions. Such are the "lifestyle" individualistic natural rights being developed at law nowadays. This being done in the green tree, what shall be done in the dry, when the Supreme Court may be totally dominated by ideological militant secularism?

Such is the clear and present danger of turning to a radicalized concept of natural law, as determined by politicized judges. Today, as in the past, we ought to remind ourselves that the true natural law is not a mere congeries of appetites, and that it is not from the vagrant *doxa* of the hour's judges that the natural law derives its high authority.

I repeat that we have recourse to natural law, as opposed to the letter of the Constitution, only as a last resort, ordinarily. My only service as a jurist occurred in Morton Township, Mecosta County, Michigan, some decades ago, when for two consecutive terms I was elected—unanimously—justice of the peace. When

determining a boundary dispute between two farms, a justice of the peace does not repair to theories of natural law, meditating upon which of two claimants is the more worthy of judicial compassion. Instead, the justice of the peace, fulfilling his ancient and honorable office, turns to statute, common law, possibly to local custom, and initially to the files of the recorder of deeds at the county seat. So it is with the ordinary administration of law at every level. Statute, charter, and prescription ordinarily suffice to maintain the rule of law—the end of which, we ought not to forget, is to keep the peace.

Yet to guide the sovereign; the chief of state; the legislator; the public prosecutor; the judge when in effect, he sits in equity—to guide you and me, indeed, there endures the natural law, which in essence is man's endeavor to maintain a moral order. During the nineteenth century, natural law concepts were overshadowed by the powerful utilitarian system of Jeremy Bentham, by the theories of John Austin and the Analytical Jurists, by legal positivism, and later—especially in the United States—by legal pragmatism. Yet appeals to the “natural law” or a “higher law” have recurred often in American politics and jurisprudence; both radicals and conservatives, from time to time, have invoked this law of natural justice.

As Dr. Russell Hittinger remarks in his article *The Natural Law in the Positive Laws*: “[T]here is nothing contradictory in arguing, on the one hand, for a natural law basis of government, and indeed of positive law itself, while at the same time holding that judges ought, whenever possible, to be bound by written law.”<sup>11</sup>

The Catholic tradition of natural law, to borrow a phrase from Sir Ernest Barker, holds that “law—in the sense of last resort—is somehow above lawmaking.” This understanding, in effect, still prevails among many Americans, not all of them Catholics; they agree with Justice Frankfurter that natural law is “what sensible and right-minded men do every day.”

Yet often the public's apprehension of the teachings of natural law is much decayed, in part because of the total secularization of instruction in public schools. Most judges—indeed most lawyers—are taught little about natural law in schools of law; for that matter, jurisprudence is a forgotten science in many such schools. The apprehension of natural law displayed by Mr. Robert Bork in his book, *The Tempting of America*, is confusing; the references

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11 Russell Hittinger, *The Natural Law in the Positive Laws*, 55 REV. POL. 5, 22 (1993).

thereto by Justice Thomas are timid and dubious. Where might we search for those Sophocrats who might decree a new infallible natural justice for the American nation and perhaps the world?

The champion of natural law knows that there is law for man, and law for thing, and that our moral order is not the creation of coffee house philosophers. Human nature is not vulpine nature, leonine nature, or serpentine nature. Natural law is bound up with the concept of the dignity of man, and with the experience of humankind ever since the beginning of social community.

I repeat that it will not do to substitute private interpretations of natural law for the rule of common law or civil law, any more than it would have been well for England, in Elizabeth's time, to have obeyed the "Geneva Men" by sweeping away common law and the whole inherited apparatus of parliamentary statutes, to substitute the laws of the ancient Jews. Positive law and customary law, in any country, grow out of a people's experience in community; natural law could not conceivably supplant judicial institutions. Yet were natural law concepts to be abandoned altogether—why, then, indeed, the world would find itself governed by the doctrine of survival of the fitter:

*Because the good old rule  
Sufficeth them, the simple plan  
That they should take, who have the power,  
And they should keep who can.*

Ordinarily, natural law is applied through positive law. Russell Hittinger points out that we ought not to create a patchwork theory of natural law's meaning out of a congeries of Supreme Court decisions over the years. What natural law provides is the *authority* for positive law, not an alternative to positive law. Hittinger writes:

The business of a judge is litigation, and, on the whole, litigation is not the best context for taking stock of what the natural law requires . . . . [P]reoccupation with judicial uses of natural law provides not only a very narrow, and probably misleading *theoretical* picture of natural justice, but it also furnishes an unsteady *practical* approach to how a body of positive law is to be made congruent with the natural law.<sup>12</sup>

Thus, although belief in natural law lies back of the shaping of the Constitution, is in no way inconsonant with the

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12 *Id.* at 27-28.

Constitution, and ought to be accepted by everybody in public office—why, we are not to expect a day to arrive when the nine justices of the Supreme Court of the United States might convert themselves into “a kind of *ius gentium* court in perpetual session,” an infallible and omniscient body of moral authorities elevated to the Court in some nonpartisan fashion. It would be absurd to fancy that the American democracy would accept such a regime.

No, it will not do to imply that justices of the Supreme Court are entitled to turn when they will to some “higher law” rather than to be bound by the text of the Constitution, by *stare decisis*, and by the original intent of the Framers. It may become necessary, on the contrary, for the legislative and executive branches of the federal government to exert some restraint, in obedience to natural law, upon the prejudices and whims of a Court that exceeds or abuses its constitutional authority and powers. Although in such a contingency the resort to genuine natural law would be extreme medicine, occasions have occurred in various lands and times in which no other satisfactory restoration of justice was to be found.

When the time is out of joint, it is possible to repair to the teachings of Cicero, Aquinas, and Hooker about the law of nature, in the hope that we may diminish man’s inhumanity to man. The natural law lacking, we may become so many Cains, and every man’s hand may be raised against every other man’s.