

# A New Natural Law Reading of the Constitution

*Santiago Legarre\**

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## INTRODUCTION

The title of this Article borrows from the subtitle of one of Ronald Dworkin’s last books, *Freedom’s Law: The Moral Reading of the American Constitution*.<sup>1</sup> This Article argues that the United States Constitution—or any constitution, for that matter—should be interpreted “morally,” as Dworkin posits; but, forgoing Dworkin’s company, this Article argues that the morality used in this interpretative venture, which he oddly called “interpretive,”<sup>2</sup> ought to be natural law morality.

To begin, natural law requires an explanation. To do so, it is useful to explain first what natural law is not. Given the unending confusions, both terminological and conceptual, this clarification is virtually necessary, and is tackled in Part I, which is followed by an overview in Part II of what

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1. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (Oxford Univ. Press 1996).

2. *Id.* at 12.

natural law means for the purposes of this Article. Guided by the classical tradition,<sup>3</sup> this Part also attempts to clarify how natural law connects to positive law. In light of the diverse modes of connection between natural and positive law, Part III argues that natural law can factor into constitutional interpretation in subtle but significant ways. More specifically, this Article suggests that natural law has two different levels of presence in constitutional law. The interpretation of constitutional norms, this Article argues, is more moral with regard to one of the two modes of connection and more technical with regard to the other mode. Finally, this Article offers some conclusions.

Why “new” natural law? Russell Hittinger coined the expression “new natural law theory” in his 1987 book *A Critique of the New Natural Law Theory*.<sup>4</sup> He used the term to describe and, indeed, as he hoped, delegitimize a school of thought that has in Germain Grisez its founder and architect,<sup>5</sup> John Finnis a main builder, and Robert P. George its more recent—and most exuberant—voice.<sup>6</sup> But these three scholars—as well as others who purportedly fall under the related label “new natural lawyers”—never seemed to like the term “new natural law theory.”<sup>7</sup> In an apparent compromise, Finnis accepted an alternative, not altogether different brand: the new classical natural law theory.<sup>8</sup>

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3. See *infra* note 8.

4. RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (Univ. of Notre Dame Press 1987).

5. According to a self-declared member of the “new natural law” crew, “new natural law” is “the name given a particular revival and revision of Thomistic Natural Law theory,” a revision “initiated in the 1960s by Germain Grisez.” CHRISTOPHER O. TOLLEFSEN, THE WITHERSPOON INST., *The New Natural Law Theory* 1, 4 n.1 (2012), [http://www.nlnrac.org/contemporary/new-natural-law-theory#\\_ednref1](http://www.nlnrac.org/contemporary/new-natural-law-theory#_ednref1) (last visited Oct. 16, 2017) [<https://perma.cc/MG2X-NS2Y>].

6. See ROBERT P. GEORGE, *MAKING MEN MORAL* (Oxford Univ. Press 1993).

7. After recognizing that Finnis’s work with Germain Grisez and Joseph Boyle in developing the understanding of practical reasoning has come to be known as the “new” natural law theory, Robert P. George argues, in his opening contribution to Finnis’s festschrift, that the expression “new natural law theory” is problematic. Robert P. George, *Introduction: The Achievement of John Finnis*, in *REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS* 1, 6 n.15 (John Keown & Robert P. George eds., 2013) [hereinafter *REASON, MORALITY, AND LAW*]. Finnis’s own sharp reservations regarding the label also are featured there. JOHN FINNIS, *Reflections and Responses*, in *REASON, MORALITY, AND LAW*, *supra*, at 468 n.31.

8. John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1, 5 (Jules Coleman & Scott Shapiro eds., 2002). In 1991, Finnis already had alluded to “the new

Here, “new natural law” is used only as a catchphrase.<sup>9</sup> As explained in Part I, the term “natural law” is confusing and misleading—so much so that Finnis, the leading contemporary natural law scholar, has written a lengthy book, *Natural Law and Natural Rights*, throughout which he avoids using the term “natural law” consistently and purposefully to prevent misunderstandings.<sup>10</sup> Furthermore, “natural law” has an old-fashioned ring to it that might dissuade readers. Although readers would be disenchanted if they assumed they would find in the author’s writing something substantially different from the classical natural law theory of Aristotle and Thomas Aquinas, this Article uses a phrase that alerts the readers to the fact that his presentation of the classical teachings, though by no means uniquely the author’s,<sup>11</sup> is indeed “new.”

### I. WHAT NATURAL LAW IS NOT

“Natural law” in this Article does not mean what it means in three different contexts in which the expression sometimes is used. This Article shall indicate in what respects the meaning that the author holds to be focal has something in common with and how it differentiates from the other meanings. In so doing, this Article will inevitably start to define natural law.

First, natural law in this Article is not the singular of the plural expression “natural laws,” that is, the laws of nature, such as the laws of

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classical theory.” JOHN FINNIS, *Contents*, in 1 NATURAL LAW III (N.Y. Univ. Press 1991).

9. See Santiago Legarre, *H.L.A. Hart and the Making of the New Natural Law Theory*, 8 JURISPRUDENCE 82 (2017).

10. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011). Chapter II of the book is tellingly titled “Images and Objections.” See Maris Köpcke Tinturé, *Positive Law’s Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 183, 213 (2011) (review essay) (“The important and potentially fruitful common threads between ‘natural law theories’ and [more positivist approaches] only begin to emerge . . . once the distracting quarrels about labels are set aside.”).

11. After years of positivism’s cultural dominance, there is presently a revival of natural law theory, though many times the revival of natural law theory appears under other names—many of which do not even include the label “natural.” See Cristóbal Orrego, *Natural Law Under Other Names: De Nominibus Non est Disputandum*, 52 AM. J. JURIS. 77, 77 (2007) (maintaining that in the last half of the twentieth century there has been a revival of some basic tenets of the theory of natural law); see also Randy Barnett, *A Law Professors’ Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL’Y 655, 656 n.5 (1997) (highlighting how natural law rhetoric is presently less mysterious than it used to be).

thermodynamics and, more generally, of physics—and chemistry, biology, and even “laws,” such as “big fish eat small fish” or “wildebeest migrate”—where gravity, for example, would be a “natural law.”<sup>12</sup> These natural laws differ from what natural law means in this Article in that natural laws do not apply exclusively to human agents;<sup>13</sup> instead, natural law as understood in this Article applies only to persons. Furthermore, to the extent that the laws of physics apply to humans, human freedom is irrelevant for the operation of those laws. If, for example, someone jumps from the ninth floor of a building, the person will fall and eventually die, regardless of his hypothetical will to live.<sup>14</sup> “Natural laws” are in that sense inexorable—unlike, as shall be seen, the author’s natural law.<sup>15</sup>

The fact that the term “natural law” may be, and sometimes is, used to refer to each one of these singular physical natural laws invites confusion, thus necessitating this clarification. When Doctor Strange, in the recent cinematic adaptation of the eponymous Marvel comic, is reprimanded by Mister Wong, a so-called guardian of the natural law, for violating the natural law of time, what Mister Wong means is hardly related to what the author means by a breach of natural law: the latter is a freely chosen action or omission, not only a physical performance or fact, and it is certainly not inexorable.<sup>16</sup> One is free to abide or not to abide by what is indicated to one by natural law, as morally right or wrong. The latter indication is like a whisper, a quiet voice that, unless one has become quite deaf to it, suggests in one’s metaphorical ear to do that or not to do this. The listener

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12. Zuckert observes that a scientific law of nature, such as gravity, cannot be disobeyed, but a moral law of nature can. Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL’Y 695, 715 (1997). Further, as explained by Orrego, “natural” in “natural law” “does not mean something related to the physical world, but rather to the rational world of human morality.” Cristóbal Orrego, *The Relevance of the Central Natural Law Tradition for Cross-Cultural Comparison: Philosophical and Systematic Considerations*, 8 J. COMP. L. 26, 32 (2014).

13. The whole of these natural laws was called by the Theistic classics “eternal law”: the “hand” of God governing everything—the author’s metaphor. THOMAS AQUINAS, *SUMMA THEOLOGIAE* I–II, q. 91, 1 c (Anton C. Pegis ed., Random House 1944) (c. 1265). But confusingly enough, and given that *everything* includes free persons, the part of that eternal law governing them was called by those classics, and by the author here, natural law. *Id.* at q. 91, 2 c.

14. Another example is the death of living creatures, which happens sooner or later. Sometimes people are heard saying, “Her grandfather died. Well, it was *natural* that he should die before her.” Again, this sense—where “natural” means statistically prevailing—is not what is meant in this Article by “natural” in natural law.

15. See FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 10, at 420–21.

16. DOCTOR STRANGE (Marvel Studios 2016).

is free to ignore that “natural law whisper” or to act under its influence—although he will face negative moral consequences if he chooses to ignore the whisper and, if well formed, the listener’s conscience will reprimand him.<sup>17</sup>

Incidentally, the likes of Mister Wong typically add the article “the” to construct the expression “the natural law,” as singular of “natural laws”; whereas, the author—and most of those who use the expression in the classical sense—just say “natural law.”<sup>18</sup> This indication can be a small, trifling way to tell *ab initio* what the speaker or writer in question likely has in mind when he uses the expression. Along similar lines, those scholars who use the term “natural law” in its classical, moral sense will never use the plural “natural laws,” a terminological choice that stresses that only one true morality exists: natural, moral law—though it has several principles and precepts.<sup>19</sup>

Secondly, natural law is not Christian morality. In 2016, the author gave a lecture at Cornell Law School on the topic of the natural law foundations of comparative constitutionalism. The first question, or rather remark, received was, “Surely what you are talking about when you discuss natural law is the *Catechism of the Catholic Church!*”<sup>20</sup> This observation was the object of several questions too in 2017 when the author presented on natural law and constitutional law at the Paul M. Hebert Law Center, Louisiana State University.<sup>21</sup> Judge O’Scannlain, of the Ninth Circuit put it neatly: “There is . . . a widespread view that the natural law is parochial, specifically, Catholic.”<sup>22</sup> The “widespread view,” though wrong, is quite understandable. Some of the contents of natural law morality overlap with those of Christian morality.<sup>23</sup> Furthermore, some of the writers in the

17. See *infra* note 72.

18. See ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (Oxford Univ. Press 1999).

19. AQUINAS, *supra* note 13, at I–II, q. 94, 2 c.

20. The lecture took place on November 21, 2016, and it was graciously sponsored by the American Constitution Society. Professor Santiago Legarre, Professor of Law, Universidad Católica Argentina, Presentation at Cornell Law School (Nov. 21, 2016), [https://www.youtube.com/watch?v=3gFEcpwZOc0&list=PLj8\\_LAnn8CZc\\_fAI3kaSkohn2V8ybGys](https://www.youtube.com/watch?v=3gFEcpwZOc0&list=PLj8_LAnn8CZc_fAI3kaSkohn2V8ybGys) [<https://perma.cc/A7Q2-82A9>].

21. The lecture took place on January 24, 2017, and it was graciously sponsored by the Eric Voegelin Institute. Professor Santiago Legarre, Professor of Law, Universidad Católica Argentina, Presentation at Paul M. Hebert Law Center (Jan. 24, 2017), [https://www.youtube.com/watch?v=hRMo1sSSIJw&index=2&list=PLj8\\_LAnn8CZc\\_fAI3kaSkohn2V8ybGys](https://www.youtube.com/watch?v=hRMo1sSSIJw&index=2&list=PLj8_LAnn8CZc_fAI3kaSkohn2V8ybGys) [<https://perma.cc/ADN8-VXDF>].

22. Hon. Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1514 (2011).

23. AQUINAS, *supra* note 13, at I–II, q. 94, 6 c.

natural law tradition have held that the Ten Commandments contain a summary version of natural law;<sup>24</sup> plus, there is also the circumstance that several of those writers, including Thomas Aquinas, the most celebrated one of all, are canonized by the Catholic Church and therefore are called “saints.”<sup>25</sup>

That some of the contents of two different normative orders coincide, however, does not make them the same thing. First, the coincidence in question is by no means one between natural law and the morality of the Catholic religion only. Other religions, too, subscribe to a morality that overlaps with natural law, and the aforementioned statement that the Ten Commandments render natural law in a nutshell confirms this different overlap—those commandments are mainly, and certainly initially, Jewish.<sup>26</sup> Furthermore, important Jewish scholars argue that natural law is significantly present in the Old Testament, even if under different names.<sup>27</sup> Secondly, any revealed religious morality, including the Jewish and Christian varieties in their different instantiations and confessions, has a requisite that is absent in natural law morality: faith. One of the key tenets of natural law is its appeal to reason only. There is no need of God’s revealing natural law morality and no need for human beings to believe in Him and His authority to be able to discern between what is right and what is wrong—that is, natural law.<sup>28</sup> To stress this notion, when the author teaches jurisprudence, he tells his students that natural law is “the religion of the atheist”—an idea quite in line with Saint Paul’s words to the Roman pagans: even though they did not have the revealed religion, they “still through their own innate sense [that is, natural law] behave as the [Jewish] Law commands . . . They can demonstrate the effect of the [natural] Law engraved on their hearts, to which their own conscience bears witness.”<sup>29</sup> Of course, the fact that pagan writers, such as Sophocles, Plato, Aristotle, and Cicero all accepted that there is natural moral law—under different names and not by faith in a revelation—confirms the general sentiment of

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24. FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 10, at 101.

25. See JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (Oxford Univ. Press 1998).

26. *Exodus* 20:1–17 (New Jerusalem Bible).

27. DAVID NOVAK, *NATURAL LAW IN JUDAISM* 31–61 (1987). The author is no scholar of Judaism but has written on the subject. See Santiago Legarre, *Natural Law in Judaism Revisited*, 82 *PRUDENTIA IURIS* 239, 240–44 (2016).

28. FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, *supra* note 10, at 88.

29. *Romans* 2:14–15 (New Jerusalem Bible).

the argument in this Part.<sup>30</sup> For how can a pre-Christian concept be Christian?

Saint Paul's words about the gentiles or the author's claiming that natural law is the religion of the atheist by no means suggests that natural law is irrelevant for the believer: he also can engage in natural, moral reasoning—abstaining momentarily from using his faith—if he, for whatever reason, so wishes. Having made clear that an essential difference exists between natural law and the morality of any revealed religion, it is worth stressing, again, that, other than overlapping contents, another similarity exists between them and, in particular, between natural law and Catholic morality: both natural law morality and Catholic morality, as well as some other religious moralities, presuppose freedom.<sup>31</sup> In this respect, natural law is closer to Catholic morality than it is to “natural laws.” For natural laws, as already explained, freedom is quite irrelevant. Nevertheless, Catholic morality still differs from natural law—not only because it requires faith but also because its normative order is of a much higher and more exacting character than that of natural law.<sup>32</sup> Indeed, Catholic morality aspires to guide the faithful to heaven by promoting their identification with Christ through the operation of supernatural grace, for which purposes it imposes on Christians obligations that are foreign to and sometimes more exacting than natural law.<sup>33</sup> Case in point, the obligation of attending Mass on Sunday and of fasting during Lent are clear instances of religious duties that are not in and of themselves moral, natural law obligations insofar as their direct source is the Church's authority and not reason.<sup>34</sup>

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30. The “central tradition of natural law,” explains Kirk, has “roots in Plato and Aristotle, [is] later and more fully expounded by Cicero, Seneca, and the Roman jurists; then passing from the Stoic sages to the Fathers of the Church.” Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1993).

31. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 420–21.

32. FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY, *supra* note 24, at 226.

33. For an example, see *Matthew* 6:1–2 (New Jerusalem Bible).

34. The first precept, “You shall attend Mass on Sundays and holy days of obligation,” requires the faithful to participate in the Eucharistic celebration when the Christian community gathers together on the day commemorating the Resurrection of the Lord. *Catechism of the Catholic Church*, n.2042, THE HOLY SEE, [http://www.vatican.va/archive/ENG0015/\\_P75.HTM](http://www.vatican.va/archive/ENG0015/_P75.HTM) (last visited Feb. 28, 2018) [<https://perma.cc/69K8-9LMP>]. The fifth precept, “You shall observe the prescribed days of fasting and abstinence,” ensures the times of asceticism and penance which prepare us for the liturgical feasts; they help us acquire mastery over our instincts and freedom of heart. *Id.* n.2043.

Thirdly, natural law should be differentiated from so-called “natural law jurisprudence”—a tag sometimes attached to a certain theory of interpretation of the United States Constitution.<sup>35</sup> That theory has been traced to early decisions of the United States Supreme Court that regularly relied on supposed natural law concepts, sometimes at the expense of the Constitution.<sup>36</sup> When the theory was revived during the *Lochner* era,<sup>37</sup> disguised as substantive due process jurisprudence,<sup>38</sup> and revived again with the Warren Court and in more recent cases, too,<sup>39</sup> it triggered similar criticisms of resurrecting natural law.<sup>40</sup> In a nutshell, natural law jurisprudence posits the substitution of the text of the Constitution by abstract notions of justice, that is, “natural law.” This natural law jurisprudence has rightly been criticized.<sup>41</sup>

But this natural law jurisprudence is not the natural law this Article contemplates. Indeed, as Professor Roger P. Alford has remarked, some versions of natural law jurisprudence as constitutional theory are compatible with a certain relativism that denies moral truth.<sup>42</sup> Nothing could be further

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35. As the Wall Street Journal put it recently, “[N]atural law, . . . in the 19th and early 20th century influenced Supreme Court decisions invalidating progressive legislation.” Jess Bravin, *Gorsuch has Strong Tie to Proponent of Morality-Based ‘Natural Law’*, WALL ST. J. (Mar. 15, 2017, 4:42 PM) (on file with author).

36. Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 660–63 (2005) (citing Supreme Court decisions from the early years relying on “natural law” concepts at the expense of the written constitution); see also Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 118 (2016) (“Many associate natural law with things like Justice Chase’s purportedly antiformal opinion in *Calder v. Bull*”) (internal citations omitted).

37. Justice Black, dissenting in *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965), famously stated by way of criticism that what the majority was embracing was “the same natural law due process philosophy found in *Lochner v. New York* [198 U.S. 45 (1905)].”

38. It has sometimes been labeled “natural law due process philosophy” or “natural law due process theory.” *Griswold*, 381 U.S. at 524, 511 n.3 (Black, J., dissenting).

39. For examples, from *Griswold* onwards, see Alford, *supra* note 36, at 667–73.

40. Justice Black is worth quoting again: the reasoning of the majority in *Griswold*, he argued critically, “was the same natural law due process philosophy which many later opinions repudiated.” *Griswold*, 381 U.S. at 516.

41. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS, [http://legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp) (last visited Mar. 14, 2017) (arguing against the revival of natural law jurisprudence) [<https://perma.cc/EN4A-8BGD>].

42. Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 19 (2005).



from the view supported in this Article than *that* natural law. Not only does the author's classical conception of natural law adhere to moral cognitivism, but it also is perfectly compatible with, and indeed requires, presumptively, respect for man-made, written laws in all their positivity.<sup>43</sup> Unlike natural law jurisprudence, which favors the use of natural law by judges "to strike down all state laws which they think are unwise, dangerous, or irrational"<sup>44</sup> and seems to invoke a "mysterious and uncertain natural law concept as a reason for striking down . . . state law,"<sup>45</sup> the new classical natural law theory defended in this Article denounces that jurisprudence as a judicial misuse of natural law and advocates, instead, respect for positive law as a requirement precisely of natural law itself.<sup>46</sup>

Finally, by way of contrast with natural law jurisprudence, which is a parochial doctrine—a theory of interpretation in the United States—the author's natural law is, in a way, the opposite: a universal concept that transcends boundaries not only of geography but also of time.

## II. NATURAL LAW FOR DUMMIES

After centuries, Antigone's words to her uncle Creon in Sophocles's celebrated play are still the most apt way to introduce natural law. Although she refers to the laws of Hades—the terminology "natural law" came into use later—her terms apply *mutatis mutandis* to the reality of natural law: "[The] life [of these laws] is not of today or yesterday, but from all time, and no man knows when they were first put forth."<sup>47</sup> These words underline one of natural law's main traits: its temporal universality.<sup>48</sup> Natural law, unlike human law, is indeed "not of today or yesterday, but from all time."<sup>49</sup> What is currently inherently wrong was wrong in the past and will be wrong in the future. Circumstances may change, but once

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43. See discussion *infra* Part III.

44. *Griswold*, 381 U.S. at 517 n.10 (Black, J., dissenting). Along similar lines, and also noting the Lochnerian roots of this jurisprudence, see Justice Stewart's dissent in the same case. *Id.* at 528 (Stewart, J., dissenting).

45. *Id.* at 522 (Black, J., dissenting).

46. This topic is revisited *infra* Part III when dealing with the strengths and limits of the positions of Robert P. George and Samuel Gregg.

47. SOPHOCLES, *ANTIGONE* pt. 6, l. 500 (E. H. Plumptre trans., Harvard Classics c. 1909-1914) (c. 441 B.C.).

48. For an explanation of natural law's universality, see FINNIS, *Contents*, *supra* note 8, § IV.1-2.

49. SOPHOCLES, *supra* note 47.

circumstances are clearly defined and circumscribed, the morality or immorality of an act will remain the same.

There is a further universality implicit in Antigone's dialogue with Creon: by way of contrast with human, domestic laws—the laws of Thebes, Creon's edict—natural law is the same everywhere.<sup>50</sup> The pagan philosopher Cicero formulated this idea early when, explaining “true law,” what he also called “right reason in agreement with nature” and the author calls “natural law,” he wrote that this law “will not be different in Rome and in Athens . . . but is one, eternal and unchangeable law for all nations.”<sup>51</sup> In other words, murder, for instance, is wrong in Rome, Athens, Thebes, and everywhere else in the world. Although customs, conventions, and positive enactments—human laws—may vary, natural law remains constant regardless of location.<sup>52</sup>

The contemporary expression “objective critical morality”<sup>53</sup> captures this twofold universality well. By holding that natural law is “objective,” the term excludes from its meaning the type of relativism that affirms that there are only subjective moral utterances or preferences—judgments without any real, true moral value: “What is true is true only because someone holds it to be so” is the relativist's motto. In rejecting this relativism, the classical conception of natural law thus adheres to moral cognitivism—a certain, if limited, optimism concerning the ability of human reason to understand what is right and what is wrong, at least in its basic core.<sup>54</sup> It might be useful to borrow from one of natural law theory's recent proponents, according to whom natural law is about the acceptance of “the objective value of human reason and the objectivity of what is good or evil regarding at least certain things that are basic human goods for all persons, regardless of time or culture.”<sup>55</sup> By holding that natural law is critical, the above definition stresses that this discussion does not concern

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50. FINNIS, *Contents*, *supra* note 8, § IV.1–2.

51. CICERO, *DE REPUBLICA* III.33 (Niall Rudd trans., Oxford Univ. Press 2009) (c. 54–51 B.C.). The translation from Latin is the author's.

52. FINNIS, *Contents*, *supra* note 8, § IV.1–2.

53. “[T]he distinction between merely conventional morality and critical morality also captures the basic idea that some things may be morally good, and just, regardless of social conventions to the contrary.” Orrego, *The Relevance of the Central Natural Law Tradition for Cross-Cultural Comparison*, *supra* note 11, at 32.

54. In MacIntyre's words, for the classical tradition there is “a crucial distinction between what any particular individual at any particular time takes to be good for him and what is really good for him as a man.” ALASDAIR MACINTYRE, *AFTER VIRTUE* 150 (Notre Dame Press 2007).

55. *Id.* at 34.

a merely conventional morality; it regulates and passes judgment on changing mores rather than reflecting them uncritically.

What the “basic core” just alluded to is and which those “basic human goods” are<sup>56</sup>—in other words, what is the precise extent of natural law theory’s optimism about the human capacity of understanding what is truly right and wrong and where, instead, the boundaries of true natural law appear blurred as a result of a limited perception of truth in moral matters<sup>57</sup>—these are problems that exceed this Article’s purposes. Note that the hurdles inherent in coming to right conclusions in difficult moral questions do not in themselves pose an insurmountable burden for natural law theory. For starters, the theory has a meta-ethical dimension to which the substance of moral claims is quite irrelevant.<sup>58</sup> One person may disagree with another about the rights or wrongs of abortion, for example, but the two persons will be engaging in some form of natural law theory—at a meta-ethical level, that is—if they both accept that there is a right answer to the question of abortion, even if they disagree as to which that

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56. Thomas Aquinas identified several “natural inclinations” crucial to the understanding of morality and then there called the various naturally discernible objects of those various inclinations “human goods.” These goods, he said, are identified and directed to by first principles of practical reason and natural law. Hence, they can be called “basic” goods, by transference from “first” principles. AQUINAS, *supra* note 13, at I–II, q. 94, 2 c. Following his lead, John Finnis famously listed seven basic goods and ten requirements of practical reasonableness. *Id.* at III–V. Justice Gorsuch, one of Finnis’s former students, further noted that “there are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been suggested by Aristotle, argued by Aquinas, and defended by contemporary natural law thinkers.” Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599, 697–98 (2000) (footnotes omitted).

57. Aquinas held that the most general principles of natural law are known to all: self-evident—*per se nota*—universally. Still, in the course of deriving more specific moral precepts from these first moral principles, even “where there is the same rectitude in matters of detail, [what is right] is not equally known to all.” AQUINAS, *supra* note 13, at I–II, q. 94, 4 c. This happens either as a result of simple error in the reasoning process from general principles to specific precepts or because of one’s own vices. AQUINAS, *supra* note 13, at I–II, q. 94, 4 c, 6 c. Furthermore, as noted by a contemporary, secular constitutional scholar in a similar vein, “To say that [something] is self-evident does not imply that it is necessarily uncontroversial. People may, for various reasons, not understand an idea that is self-evident, or may dispute what they know to be true.” Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 319 n.114 (1988).

58. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, § III–IV.

answer is.<sup>59</sup> Their agreement places them on the same side of the divide, on the other side of which stands the relativist, who denies the very possibility of affirming anything but preferences in moral matters:<sup>60</sup> “It is not that you are right and I wrong; you just happen to feel that that is the best path and I do not. That is it: there is nothing to argue about because there are no reasons at stake; only emotions.”

Furthermore, and as to natural law considered as an ethical theory—that is, a substantive philosophy of the good and the right—it is important to draw a distinction. One can concede that there are many difficult moral questions regarding which rational understanding, devoid of religious tools—as natural law reasoning, by definition, is—certainly proves difficult;<sup>61</sup> therefore, one can concede, too, that in those types of questions, rational argument and persuasion are oftentimes doomed to failure in practice—in the practice of conversations between friends and, even more so, among the members of a legislature or court.<sup>62</sup> But this concession—which the author happily makes—is fully compatible with the claim that there are many other moral questions, the right answers to which are readily accessible to everyone, as simple moral experience attests.

On a different but related note, Antigone also contrasts Creon’s written statute with an “unwritten” law.<sup>63</sup> Natural law is not written, which means it is not “positive” law; rather, to borrow from Aquinas’s metaphor, it is “written on our hearts.”<sup>64</sup>

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59. In this sense and in this sense only, Ronald Dworkin’s is a “natural law theory.” Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUBLIC AFF. 87, 88–89 (1996) (speaking of “objective truth” in the context of morality). And, for a work earlier in time, but less on point—despite its title—see generally Ronald Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

60. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 19 (Notre Dame Press 2007).

61. AQUINAS, *supra* note 13, at I–II, q. 94, 4 c (holding that although the most general principles of natural law are known to all, the understanding of the more specific moral precepts derived from those first moral principles is not equally known to all).

62. A good example is offered by the contrasting positions held by Justice Scalia and Justice White on nude dancing in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

63. SOPHOCLES, *supra* note 47, at l. 500.

64. THOMAS AQUINAS, COMMENTARY ON THE LETTER OF ST. PAUL TO THE ROMANS, cap. 2 l. 3 nn.218–19 [hereinafter AQUINAS, SUPER ROM.]. Aquinas, of course, in employing this metaphor is not suggesting that the human person’s vital organ is inscribed with inky markings. In his commentary on St. Paul’s letter to the Romans—see *supra* Part I, at note 28—Aquinas makes clear what he understands Paul to mean:

Another characteristic of natural law, partly derived from its unwritten character, is that natural law is an incomplete normative order.<sup>65</sup> At least this characteristic holds true for classical and the so-called “new” or “new classical” understandings of natural law,<sup>66</sup> as opposed to seventeenth- and eighteenth-century rationalistic accounts that see natural law as a refined, fully articulated moral code not needing any positive complement.<sup>67</sup> These accounts are out of fashion now and rightly considered decadent.<sup>68</sup> But they are still worth mentioning and distinguishing from the concept defended in this Article to avoid confusions and misleading implications, especially given that “natural law jurisprudence” alluded to in the previous Part of this Article has much in common with rationalistic natural law theories insofar as *Lochner*-era natural law jurisprudence, too, makes positive, constitutional law virtually superfluous and redundant.<sup>69</sup> The author’s natural law, on the other hand, is perfectly compatible with and actually requires respect for the positivity of man-made, written laws.<sup>70</sup> Indeed, positive laws must be in place because natural law’s promulgation of what is right and what is wrong is insufficient:<sup>71</sup> no one should argue that he “did not hear the whisper!”<sup>72</sup>

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[It] can be likened to a law presented to man from without and which it is customary to deliver in writing on account of the memory’s weakness; whereas, those who observe the law without externally hearing the law show *that what the law requires is written* ‘not with ink, but’ first and chiefly ‘with the Spirit of the living God’ (2 Cor. 3:3), and secondly through study: ‘Write them on the tablet of your heart’ (Pr. 3:3).

AQUINAS, SUPER ROM., *supra*, cap. 2 l. 3 n.218.

65. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 260 (Clarendon Press 1992) (contrasting classical natural law theory with rationalistic accounts according to which natural law is a complete normative order).

66. Aquinas argues that “many things for the benefit of human life have been added over and above the natural law, . . . by human laws.” AQUINAS, *supra* note 13, at I-II, q. 94, a. 5c.

67. KELLY, *supra* note 65, at 260 (“Particularly in Germany, natural law was taken—of course in the secular sense which Grotius had given it—to be a material from which whole systems of municipal law could be fashioned . . . .”) (commenting on the work of Pufendorf, Wolff, Vattel, and others).

68. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 43–48 (criticizing some of the rationalistic accounts of natural law).

69. See discussion *supra* Part I.

70. See discussion *infra* Part III.

71. AQUINAS, *supra* note 13, at I-II, q. 95, 1 c (arguing that natural law requires positive laws).

72. As explained *supra* Part I, natural law is like a quiet voice that suggests in one’s metaphorical ear to do that or not to do this. Positive law provides for

Whereas rationalistic accounts of natural law defend the existence of two separate legal orders—one natural, one positive—the new classical natural law theory holds instead that in normal cases, natural law exists in the positive law of a state, in a way similar to that in which a fluid—natural law—is contained in a vessel—positive law.<sup>73</sup> But in these normal instances, which correspond to just positive enactments,<sup>74</sup> natural law also continues to exist as a normative order independent of the legal order, both in the practical reasoning of the citizens of that state and the intelligence of the creator of that natural law.<sup>75</sup> In pathological instances like unjust laws, when the positive law of a state violates a relevant natural law precept, natural law will not exist in that positive law—this result is what is meant by the otherwise confusing tag “unjust laws are not laws”<sup>76</sup>—but, again, natural law will subsist independently of the unjust positive law and provide the citizens with a moral reason to react critically, in one way or another, against the unjust law.<sup>77</sup> Furthermore, the pathology also shows the practical effects of the coexistence of that unjust legal order with the natural law insofar as that unjust order may still generate legal obligations that do not derive from the moral content of the positive law.<sup>78</sup>

The reference in the previous paragraph to “just positive enactments” and its contrast with “unjust laws” indicates truly just positive enactments and truly unjust laws. Of course, anyone who thinks a law is just makes that assessment because he really thinks that law is just and anyone who thinks a law is unjust makes that assessment because he really thinks that law is unjust. Though, indeed, it will sometimes be true that someone will honestly hold to be just what is unjust and unjust what is just. But, again, this scenario shows only the possibility of human mistake; it does not

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those situations in which, for one reason or another, a person has become deaf to that metaphorical whisper.

73. According to John Finnis, the notion that “[human, positive] law *includes* natural law” was found by Aquinas in the works of Aristotle and Cicero. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 294.

74. For Professor Corwin, one example of such just enactment is the United States Constitution, of which he said that it “is, still, in important measure, [n]atural [l]aw under the skin.” Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 23 NOTRE DAME L. REV. 258, 258 (1950). Insofar as this is correct, it will be relevant for the considerations developed *infra* Part III, as it should become apparent.

75. AQUINAS, *supra* note 13, at I–II, 90, 1 ad 1.

76. For Finnis’s fundamental clarification of “*lex iniusta non est lex*,” see FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at ch. XII.4.

77. AQUINAS, *supra* note 13, at I–II, q. 96, 4 c (elaborating on the different ways in which a law can be unjust and on how they affect the obligation to obey them).

78. *Id.*

preclude the ability sometimes to judge correctly when it comes to justice and, more generally, to morality.

Finally, natural law is also incomplete in a different way: it does not provide effective sanctions for its breach.<sup>79</sup> Note that the author is not arguing that natural law provides no sanction at all. On the contrary, as argued by Sophocles,<sup>80</sup> Cicero,<sup>81</sup> and countless others in the classical tradition,<sup>82</sup> conscience—the reproach experienced internally—can prove a significant sanction for the trespasser of natural law obligations.<sup>83</sup> But this sanction is not one of a coercive nature; in a society of normal people, not angels, coercion is morally required by natural law for the common good of that society. Joseph Raz argues rightly that “for *human beings as they are* the support of sanctions, to be enforced by force if necessary, is required to assure a reasonable degree of conformity to law and prevent its complete breakdown.”<sup>84</sup> Some people undoubtedly will not experience the reproach of conscience: as a result of having trespassed natural law so often, they will have something similar to a thick skin—a deafness, morally speaking.<sup>85</sup> Others who do experience it will still go ahead and

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79. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 260–65 (arguing for the moral need of positive sanctions).

80. Antigone clearly refers to this reproach of conscience when she explains dramatically to her uncle, Creon, that she would rather disobey his law than the laws of Hades, that is, natural law:

When any one lives, as I do, compassed about with evils, can such a one find aught but gain in death? So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death an unburied corpse [which would have been the result of abiding by Creon's edict], that would have grieved me.

SOPHOCLES, *supra* note 47, at l. 500.

81. Cicero famously wrote about obedience to natural law, stating, “Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.” CICERO, *supra* note 51, at III.33.

82. A paramount example can be found in FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 260–65.

83. CICERO, *supra* note 51, at III.33.

84. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159 (Oxford Univ. Press 1990) (1975) (emphasis added). Raz, rightly again, concedes that “yet we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions.” *Id.* at 159. Enter Raz's hypothesis of a “society of angels”: Angels, by definition, would not need sanctions, but they still “may have a need for legislative authorities to ensure co-ordination,” that is, positive law. *Id.*

85. The idea of thick skin recalls the whisper metaphor. *See supra* note 72.

indulge in the wrongful conduct out of pleasure, convenience, or weakness; when that wrongful conduct also has been made a legal crime by a given community, there needs to be a way to stop the criminal—a way that is more efficient and inescapable, up to a point, than one's own conscience.<sup>86</sup> Hence, there is a moral need for some sort of coercive sanctions; a need that is perfectly compatible with the understanding that coordination, not sanctions, is at the core of the meaning of what it is to have a legal system, as Professor H. L. A. Hart successfully argued against several forms of legal positivism.<sup>87</sup>

### III. THE CONSTITUTION IN THE LIGHT OF NATURAL LAW

Many scholars within the natural law tradition, including some who hold that “reflection on the natural law tradition” is “critical to a proper analysis of the most difficult issues of our day,”<sup>88</sup> consider, however, that natural law has no traction in the interpretation of constitutional law.<sup>89</sup> For example, Judge O’Scannlain concludes, “I therefore do not believe that judges have an inherent right to interpret the natural law in a way that is binding on the rest of the country.”<sup>90</sup> Although, like Judge O’Scannlain, “[the author] do[es] not believe that judges have the freestanding authority to enforce the natural law,”<sup>91</sup> nevertheless, natural law has a distinctive role in constitutional interpretation—a role from which follows not only the right but also the duty to adhere to natural law in interpreting the Constitution in a way that, inevitably, is “binding on the rest of the

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86. In a way, conscience is the most inescapable of all sanctions, but the common good requires some form of external punishment.

87. H.L.A. HART, *THE CONCEPT OF LAW* 199–200 (Oxford Univ. Press 2012) (1961) (discussing the minimum content of natural law). Other than these pages that actually deal with the minimum content of *positive* law, the whole book makes a cogent argument in favor of the position mentioned in the text—a position followed by Raz, as his hypothesis of the society of angels shows. *See supra* note 84.

88. O’Scannlain, *supra* note 22, at 1513.

89. A notable exception seems to be Professor Michael Moore, whose approach appears to grant great traction to natural law, but his “realist” theory, though called “a natural law theory of interpretation,” has little in common with this author’s natural law theory. *See, e.g.*, Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087, 2088 (2001) (arguing that a “‘natural law’ or ‘realist’ theory of constitutional interpretation” makes possible “a comfortable accommodation of judicial activism and full fidelity”).

90. O’Scannlain, *supra* note 22, at 1522.

91. *Id.*



country.”<sup>92</sup> To try to define the contours of that role, some general clarifications and reminders are in order.

Natural law under the classical and the “new classical” tradition is present in positive laws<sup>93</sup>—a claim not altogether different, if rightly understood, from an unobjectionable Supreme Court dictum included in an otherwise objectionable decision:<sup>94</sup> “The law [] is constantly based on notions of morality.”<sup>95</sup> The tradition also claims that natural law is present in positive laws in two different ways with two different intensities: one greater, one lesser.<sup>96</sup> Enter Thomas Aquinas’s theory of “derivation of positive from natural law” and its revisit by the “new natural law theory.”<sup>97</sup>

In effect, Aquinas’s account of the relationship of natural law to positive law consists of a general theory—every just human law is derived from and traceable to the law of nature<sup>98</sup>—and two subordinate theorems.<sup>99</sup> Derivation is always either *per modum conclusionum* or *per modum*

92. *Id.*

93. As this Article moves to a more legal portion, where the relevance of natural law in constitutional adjudication appears, it is worth recollecting that, notwithstanding that relevance, “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.” Kirk, *supra* note 30, at 1041.

94. Santiago Legarre & Gregory J. Mitchell, *Secondary Effects and Public Morality*, 40 HARV. J.L. & PUB. POL’Y 320, 355–57, 357 n.206 (criticizing *Bowers v. Hardwick*’s misconceived characterization of public morality and arguing that natural law theory is the crux of the concept of public morality in constitutional law).

95. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). *Bowers* would be overturned in *Lawrence v. Texas*, 539 U.S. 558 (2003), an unobjectionable decision full of objectionable reasoning and rhetoric, but the proposition that “[t]he law [] is constantly based on notions of morality” as such states a general idea and is independent from the context in which it was proclaimed in *Bowers*.

96. See generally Santiago Legarre, *Derivation of Positive from Natural Law Revisited*, 57 AM J. JURIS. 103, 103–10 (2012) (discussing the different connections between natural and positive law).

97. In the words of a prominent “new natural lawyer,” “just and good positive law, including constitutional law, is always in some sense derived from the natural law.” GEORGE, IN DEFENSE OF NATURAL LAW, *supra* note 18, at 236.

98. In the sixteenth century, the English lawyer Christopher St. Germain announced the following, similar dictum, which was later popularized by Finnis: “In every law positive well made is somewhat of the law of reason.” FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 281.

99. The idea of a general theory and a subordinate theorem is borrowed from Finnis. *Id.* at 285.

*determinationis*.<sup>100</sup> According to the first theorem, positive law “may be derived from the natural law . . . as a conclusion from premises.”<sup>101</sup> For example, “that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man.’”<sup>102</sup> According to the second theorem, positive law may be derived from natural law “by way of determination [*determinatio*] of certain generalities.”<sup>103</sup> For example, “the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.”<sup>104</sup> As Finnis suggests, “There seems to be no happy English equivalent of ‘*determinatio*’”—the word used by Aquinas.<sup>105</sup> Kelsen’s “concretization,” he adds, “would do; implementation is more elegant.”<sup>106</sup>

Those parts of any legal system derived from natural law by way of conclusion “consist of rules and principles closely corresponding to requirements of practical reason.”<sup>107</sup> Therefore, as Finnis argues, “Discussion in courts and amongst lawyers and legislators will commonly, *and reasonably*, follow much the same course as a straightforward moral debate.”<sup>108</sup> This similarity is precisely the case with regard to substantial chunks of constitutional law, especially when it comes to the Bill of

100. Both the theory and the two sub-theorems are compressed in AQUINAS, *supra* note 13, at I–II, q. 95, 2c, titled “*Whether every human law is derived from the natural law?*”; *see also id.* at I–II, q. 95, 4 c.

101. *Id.* at I–II, 95, 2 c.

102. *Id.* Lee Strang, a thinker in the natural law tradition, offers an interesting elaboration on intermediate moral principles and other related topics. Lee Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 B.Y.U. L. REV. 1729, 1771 (2010) (attempting to reconcile originalism with natural law theory).

103. *Id.*

104. *Id.* In the twenty-first century, Samuel Gregg gives a simple example that has always been quite popular among natural law theorists:

Legislators will understand . . . that . . . responsibility to protect human life requires them to implement a traffic system that protects motorists’ lives. But a uniquely correct traffic system *cannot* be derived from the natural law. A number of arrangements, each of which has incommensurable advantages and weaknesses, may be consistent with the natural law. Hence, governments and courts must move here, *not by deduction*.

SAMUEL GREGG, MORALITY, LAW, AND PUBLIC POLICY 34 (2001) (second emphasis added).

105. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 284.

106. *Id.*

107. *Id.* at 282.

108. *Id.* (emphasis added).

Rights: many such constitutional enactments consist of rules and principles closely corresponding to natural law requirements. This is a general claim, applicable to any constitution declaring or recognizing human rights. Thus, it is also a specific claim about the United States Constitution insofar as, in the Supreme Court's interpretation, it does declare and recognize rights—which is not to say that every single right declared in the United States Constitution, or in any other constitution, is derived from natural law by way of conclusion.

That the aforementioned rights have been called “natural rights” by the American tradition is telling from the point of view of the new natural law theory, as it highlights that these rights preexist, morally speaking, positive and even constitutional law.<sup>109</sup> But the “natural rights” tradition is partly and relevantly different from the classical and the new natural law tradition,<sup>110</sup> and, in some of its versions, it can be partially inconsistent with the latter. For this reason, the former will not be elaborated further, but one significant difference between the two traditions is worth noting. Although natural law in the American tradition was “based on assumptions about humans and human freedom in the state of nature”<sup>111</sup> and a natural right was simply a portion of a more general liberty enjoyed in the so-called “state of nature,”<sup>112</sup> the classical and the new natural law tradition, as it is well known, excludes and is incompatible with the notion of “state of nature.”<sup>113</sup>

Consider the following example of a constitutional norm derived by way of conclusion from natural law. The interpretative process seeking to define the contours of the right to life, as recognized by countless constitutions and international conventions, involves a type of reasoning that is fundamentally moral. As Finnis expands in his more recent work, by way of further specification of the right to life example, “Our law against euthanasia and assisting suicide appropriately has virtually the same content as the natural moral law against such choices and actions,

109. See O’Scannlain, *supra* note 22, at 1514 (pointing out the significance of the preexistence of constitutional rights).

110. Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 172 n.8 (1993) (arguing that there is “a subtle distinction between ‘natural rights’ and ‘natural law’”).

111. Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 923 (1993).

112. *Id.* at 908, 918, 937. Later, Hamburger insists that “natural law consisted of reasoning about humans in the state of nature.” *Id.* at 926.

113. Kirk, *supra* note 30, at 1040 (explaining that the eighteenth-century Enlightenment’s doctrine of natural rights is “not at all identical” with the classical tradition of natural law).

and debates about its positing (about enacting or retaining it) substantially track moral debate about the morality of those kinds of choice and act.”<sup>114</sup> More generally, it is true that in issues concerning fundamental rights, the moral reasoning on both sides will be similar in every jurisdiction.<sup>115</sup> In such cases, legal reasoning and moral reasoning overlap to a significant extent, rendering less relevant—which is not to say “irrelevant,” as shall be seen—the technicalities of each given legal system.<sup>116</sup>

Constitutions also include many instances of derivation by way of determination: they include much implementation and concretization without which human rights would be inoperative. This *determinatio* includes, of course, constitutional arrangements, such as the separation of powers or federalism.<sup>117</sup> These more technical parts and aspects of constitutional law, to borrow from Justice Breyer, are more “arcane”<sup>118</sup> matters. Additionally, it makes sense that natural law is less relevant when it comes to the interpretation of those parts and, conversely, more relevant when it comes to the interpretation of those chunks of constitutional law with more moral flesh,<sup>119</sup> so to speak: those parts of constitutional law related to morality “by way of conclusion.”<sup>120</sup>

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114. John Finnis, *Coexisting Normative Orders? Yes, but No*, 57 AM. J. JURIS. 111, 113 (2012).

115. See Santiago Legarre, *Towards a New Justificatory Theory of Comparative Constitutional Law*, 1 STRATHMORE L.J. 90, 106 (2015) (arguing that comparative constitutional analysis is especially meaningful in the determination of the scope of fundamental rights).

116. This is why, incidentally, comparative constitutional law is justified; it is also why it makes even more sense when it comes to fundamental rights. See *id.* at 107–12 (discussing the scope and limits of these claims and distinguishing legislative from judicial comparative constitutional analysis).

117. See *infra* note 123.

118. “Arcane” is Justice Breyer’s word in his well-known debate with Justice Scalia on the use of foreign materials in constitutional adjudication. See Norman Dorsen, *The Relevance of Foreign Materials in U.S. Constitutional Cases: a Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT. J. CONST. L. 519, 519–20 (2005), which includes a lightly edited transcription of the discussion, approved by the two justices.

119. In the alluded debate, Justice Breyer made an analogous point: borrowing foreign materials makes more sense when it comes to fundamental rights than it does regarding “arcane” matters, such as, he argued, some aspects of the law of contracts. *Id.* The author pursues this avenue further, and introduces some tweaks, in Legarre, *Derivation of Positive from Natural Law Revisited*, *supra* note 96, at 106–07.

120. Note that, though it may seem otherwise, the author’s suggestion is different from Judge O’Scannlain’s. In effect, though Judge O’Scannlain argues that “the natural law is useful when interpreting provisions of the Constitution that

Indeed, the main contribution of this Article may be to introduce this distinction.<sup>121</sup> Natural law is more relevant when the interpretation of those constitutional norms that derive from natural law by way of conclusion is at stake—that is, the interpretation of fundamental rights, for the most part—and has less traction when it comes to interpreting constitutional provisions derived from natural law by way of determination—that is, the interpretation of fundamental structure.

But one should not press this point too far. Although structural arrangements are technical, they are ultimately devised precisely in the service of the fundamental rights of those living in the relevant community. In the final analysis, political and legal institutions—structures—exist precisely to protect and foster fundamental human rights.<sup>122</sup> So if Samuel Gregg is right in affirming that “constitutional design occurs by way of what Aquinas called in his *Summa Theologiae* ‘determination [*determinatio*] of certain generalities,’”<sup>123</sup> it does not follow that natural law has no traction

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were themselves efforts to codify preexisting natural law rights,” he hastens to clarify that “[t]here, the judicial inquiry is an *historical* one, not a philosophical one.” O’Scannlain, *supra* note 22, at 1523 (emphasis added).

121. That natural law should be relevant when it comes to constitutional interpretation in general has already been argued but, as far as one can tell, with a different focus and with different consequences. HADLEY ARKES, *CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW* (2010); *see also* HADLEY ARKES, *BEYOND THE CONSTITUTION* (Princeton Univ. Press 1990).

122. The Declaration of Independence’s language is telling: “to secure these [natural, preexisting] rights, Governments are instituted among Men.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This has been rightly noted in a law review article: “The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.” Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155 (1992). In recent times, the United States Supreme Court also has noted this connection between structure and rights with regard to one particular structural device: federalism. “Federalism secures the freedom of the individual.” *Bond v. United States*, 564 U.S. 211, 221 (2011). In a similar vein, Judge Gorsuch, when on the Tenth Circuit Court of Appeals, dissented from a denial of rehearing *en banc*, stating that “the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people’s liberty.” *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015).

123. Gregg continues rightly, “The constitutions of the United States, France, and Australia all involve, for instance, the separation of powers. But they do not realize this goal in exactly the same way. Each, however, is a reasonable way of realizing the same end.” Samuel Gregg, *Neil Gorsuch, Natural Law, and the Limits*

whatsoever for purposes of interpreting those parts of the Constitution. Constitutional arrangements exist to serve the common good—and the human rights—the fundamental intelligibility of which natural law theory affirms and explains.<sup>124</sup>

If it is true that one should not overstress the idea that natural law is less relevant when interpreting constitutional structure, it is also true that one should not exaggerate the degree to which natural law has more traction when interpreting fundamental rights. This is so because, as Finnis points out, implications and definitions of these rights “will carry legislators and judges *beyond* the point where they could regard themselves as simply applying the intrinsic rule of reason, or even as deducing conclusions from it.”<sup>125</sup>

So James Fleming is right in arguing that if “the Constitution embodies principles of natural law,”<sup>126</sup> it follows that judges who have authority to interpret the Constitution also have authority, to that extent, to interpret the requirements of natural law.<sup>127</sup> It is still necessary to keep in mind, however, that those constitutional norms derived by way of conclusion—and *a fortiori* those derived by way of determination—from “principles of natural law” are filtered, so to speak, by the language and the technique of the positive, constitutional law. This circumstance certainly ought to condition and modulate judicial interpretation of those norms.<sup>128</sup>

By affirming the salience of natural law for constitutional interpretation—that is, by defending a moral reading of the Constitution: one in the light of objective critical morality—the author does not intend to deny that all public officials in a reasonably just regime have “a duty in justice to

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*of Judicial Power*, PUBLIC DISCOURSE (Mar. 15, 2017), <http://www.thepublicdiscourse.com/2017/03/18766/> [<https://perma.cc/VAR6-KHVC>].

124. See *infra* note 125.

125. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 284 (emphasis added). This passage continues by rightly stressing that “the legal project of *applying* a permanent requirement of practical reason will itself carry the legislator into the second of the two categories of human or positive law.” *Id.*

126. James Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2285, 2294 (2001).

127. *Id.*

128. Finnis sheds light once more:

[E]ven those parts of it [positive law] which reproduce the requirements of morality are conceived of, and can be studied, as parts of a genuine whole which in its entirety and in each of its parts, most of which neither reproduce nor are deducible from morality’s requirements, can be studied as the product of human deliberation and choice.

John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW* 195 (Robert P. George ed., Oxford Univ. Press 1996).

respect the constitutional limits of their own authority”;<sup>129</sup> nor does the author intend to reject the view that “respecting a community’s just *determinatio* of constitutional order[] is itself a requirement of natural law.”<sup>130</sup> These statements are correct statements of natural law theory by two of John Finnis’s former students, Robert P. George and Samuel Gregg, respectively; but again, it does not follow that natural law should be ignored or cast aside when interpreting the Constitution. George, Gregg, and other “new natural law theorists” who seem to be wary of natural law in the area of constitutional interpretation adamantly stress that the American constitutional system restricts the ability of judges to apply moral concepts.<sup>131</sup> Although such an observation is reasonable, stressing that fact should not lead to overlooking a related one. the Constitution—and any law for that matter but especially the Constitution—uses morally laden concepts that inexorably demand a moral interpretation by anyone, including judges, even if one concedes, as one should in a separation of powers system like the American systems, that judges have more interpretative restrictions than legislators.<sup>132</sup>

Whatever a given constitutional regime restrictively determines regarding the ability of judges “to apply natural law”—under whatever name—it will still be true that judges in constitutional regimes will have a moral duty to interpret some words and concepts that are morally charged, such as “equal,” “cruel,” “freedom,” “right,” and so on. Though these concepts are included in a human enactment—they are, in that sense, positive law—their content or part thereof remains “natural,” that is, moral; therefore, one cannot do without natural law by means of merely arguing, “Ah, but the Constitution is a positive law!” Also, it is “a notable failure of judicial reasoning, of intellectual and moral responsibility in face of the law’s most fundamental point and meaning[—]the service of

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129. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2283 (2001).

130. Gregg, *supra* note 123.

131. The concern of the likes of George and Gregg has much in common with Justice Black’s ideas, discussed *supra* notes 36–40. In fact, George has noted that, in the context of constitutional interpretation, “[Justice] Black [in *Griswold*], Bork, Scalia, and other ‘textualists’ and ‘originalists’ are nearer the mark.”). George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, *supra* note 129, at 2282.

132. See Paul Yowell, *Empirical Research in Rights-Based Judicial Review of Legislation*, in *CURRENT PROBLEMS IN THE PROTECTION OF HUMAN RIGHTS: PERSPECTIVES FROM GERMANY AND THE UK* (P.M. Huber & K. Ziegler eds., Hart Pub., Oxford, 2000).

persons”<sup>133</sup>—to treat matters of constitutional interpretation as merely historical questions of meaning.

The softening of the claim that natural law ought to be accorded a varying importance depending on the type of constitutional norm whose interpretation is at stake is in the end the result of a more fundamental weakening. No clear-cut difference exists between the two types of derivation; even less so is it true that some constitutional norms are 100% derived from natural law by way of conclusion and the connection of other norms to natural law is 100% one of *determinatio*. This softening is beautifully and metaphorically expressed by Finnis, whom the author shall paraphrase, supplement, and quote, while applying his words, which refer to law in general, to the Constitution: the derivation of constitutional law from objective critical morality “has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels.”<sup>134</sup> Although the central principle underlying each constitutional right may be a straightforward application of universally valid, natural law moral requirements, the effort to integrate them into the constitutional order certainly will require much implementing and concretizing. Likewise, the *determinationes* implied in the several constitutional arrangements and structures are not fully arbitrary; if reasonable, they instantiate, in one way or another, a discernible common good.

Unlike George<sup>135</sup> and Gregg,<sup>136</sup> who seem suspicious of natural law when it comes to constitutional interpretation,<sup>137</sup> Finnis argues—rightly in the author’s view—that the act of interpreting the Constitution is always “an act which can and should be guided by ‘moral’ principles and rules; [and] that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere ‘decision.’”<sup>138</sup> Justice Scalia’s famous

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133. John Finnis, *The Priority of Persons*, in OXFORD ESSAYS IN JURISPRUDENCE 1, 8 (Jeremy Horder ed., Series 4, 2000). Finnis exemplifies this failure with the Supreme Court’s jurisprudence on the meaning of “persons” under the due process clause, from *Dred Scott v. Sandford*, 60 U.S. 393 (1857) to *Roe v. Wade*, 410 U.S. 113 (1973).

134. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 289.

135. Robert P. George, *Natural Law*, 31 HARV. J.L. & PUB. POL’Y 171, 191–92 (2008) (stressing the limits of natural law’s relevance in constitutional adjudication).

136. Gregg’s reluctance to award natural law relevance in constitutional interpretation perhaps springs from the risks inherent in “natural law jurisprudence,” which he rightly denounces. GREGG, *supra* note 104, at 34.

137. Judge O’Scannlain has aptly summarized the usual reasons of this suspicion: “Those who believe in judicial restraint are skeptical of natural law because, to them, it conjures up the judicial adventurism of the *Lochner* era and the Warren Court.” O’Scannlain, *supra* note 22, at 1515.

138. FINNIS, NATURAL LAW AND NATURAL RIGHTS, *supra* note 10, at 290.



version of “originalism” is therefore an insufficient interpretative technique.<sup>139</sup> The late justice treated matters of constitutional meaning as mere historical investigations, without seeming to realize that, like any other law—or, again, even more than any other law—the Constitution exists to serve a people here and now and not only the “original” people.<sup>140</sup> This reluctance to read the text in the light of natural law is especially patent and regrettable in the abortion cases<sup>141</sup>—most notably in *Planned Parenthood v. Casey*<sup>142</sup>—in which Justice Scalia’s “leave it to the States” approach<sup>143</sup> made little of the powerful protection afforded by the federal Constitution to persons—a concept, the one of “persons,” that in justice—that is, in the light of natural law—ought to include unborn children whether or not this was within the original public meaning.

The author is not the only natural law scholar to criticize Justice Scalia’s originalist view.<sup>144</sup> In a 1998 piece, after criticizing the apparent

139. See Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Antonin Scalia ed., Princeton Univ. Press 1998).

140. See *infra* note 151 and accompanying text.

141. But the reluctance to read the Constitution in the light of natural law is regrettable not only in the abortion cases. Finnis notes the “Court’s radical failure” earlier, in the infamous *Dred Scott v. Sandford*, 60 U.S. 393 (1857),

to approach its duty of doing justice according to law without recognizing that law, the whole legal enterprise, is for the sake of persons, and that the founders’ intentions were therefore to be interpreted . . . in favor of the basic interests and well-being of every person within the jurisdiction so far as was possible without contradicting the Constitution’s provisions.

Finnis, *The Priority of Persons*, *supra* note 133, at 7–8.

142. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

143. *Id.* at 1002 (“We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.”).

144. Other than Finnis, at least two natural law theorists have expressed some reservation, along perhaps a not altogether different line as his and the author’s. Kmiec says that his own “natural-law originalism” “is at odds with some of Justice Scalia’s broader claims accepting democratic result without qualification.” Douglas W. Kmiec, *Natural-Law Originalism – Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL’Y 627, 628 (1997). Later in the same text he implicitly criticizes Justice Scalia’s handling of the abortion question. *Id.* at 634–35, 635 n.28 (arguing that Justice Scalia’s “stating that ‘if [the positive] law is abortion, ‘the state should permit abortion, in a democracy’” overlooks that “reasoning from the natural-law meaning of person, precludes any government from authorizing abortion”). In a similar vein, Krason argues that the correct decision in *Roe* was not the one Justice Scalia favored dissenting in *Casey* but

refusal of the Supreme Court in *Roe v. Wade*, and later in *Casey*, to answer the question, “Who counts as person for the Constitution?” Finnis commented:

This refusal has been made possible partly by the position of minority Justices such as Justice Antonin Scalia, who for clearly inadequate reasons would leave to the states the fundamental question of who is and who is not entitled to the protection of the United States Constitution’s guarantees against deprivation of life without due process of law.<sup>145</sup>

In 2004, Finnis reiterated his critique of “judges, such as Justice Scalia, who interpret the Fourteenth Amendment’s unelaborated references to ‘persons’ as permitting states to treat as non-persons and to authorize the killing, or the enslavement (in embryo banks), of the unborn.”<sup>146</sup>

By way of contrast, Finnis’s perhaps most important disciple, Robert P. George, holds a position rather close to Justice Scalia’s. Although he cautiously concedes that “it is not so clear to me that the American people have not, by ratification of the equal protection clause, committed themselves to a principle that is incompatible with laws that generally permit the killing of such human beings by abortion,”<sup>147</sup> in the end, he defers the question to whatever was “the publicly understood meaning of the principle of equal protection that was ratified in the post-Civil War period.”<sup>148</sup> To reach the right interpretation, his inquiry will start and end

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rather a solution recognizing the constitutional right to life of the unborn child and “declar[ing] legalized abortion to be unconstitutional.” Stephen M. Krason, *Constitutional Interpretation, Unenumerated Rights, and the Natural Law*, 1 CATH. SOC. SCI. REV. 20, 26 (1996).

145. John Finnis, *Public Reason, Abortion, and Cloning*, 32 VAL. U. L. REV. 361, 373 (1998). In a short column, Hadley Arkes recently made a point similar to Finnis’s. See Hadley Arkes, *The Moral Turn*, FIRST THINGS (May 2017), <https://www.firstthings.com/article/2017/05/the-moral-turn> (criticizing Justice Scalia’s stance in *Casey* and also hypothesizing that if the dissents in *Roe* and *Doe* had addressed the moral issues at stake—instead of “leaving it to the states”—the majority’s attitude in those cases would likely have been different) [<https://perma.cc/4RBX-JBLR>].

146. Finnis, *Natural Law: The Classical Tradition*, *supra* note 8, at 59.

147. Robert P. George, *The Natural Law Due Process Philosophy*, 69 FORDHAM L. REV. 2301, 2308 (2001).

148. *Id.* Compare and contrast with what Finnis says about the *Dred Scott* case, which is equally true of the abortion cases, as is clear from Finnis’s own argument, quoted elsewhere in this Article:

The basic error of the Supreme Court . . . was to approach the interpretation of the Constitution’s provision . . . without a strong

with a “rigorous and historically informed reading of the equal protection clause.”<sup>149</sup> Although a historic inquiry should be the starting point,<sup>150</sup> for the reasons offered in this Article, a historic inquiry certainly should not be the end. Professor Finnis expresses this view of this matter in a more perfect way:

In adjudication and the practice of law, interpretation of constitutional and statutory texts and statements can never reasonably be exclusively historical. Constitutions and statutes arise for consideration—indeed, exist as law—only in a context of the interpreter's intention to serve persons and their well-being, the common good . . . .<sup>151</sup>

With Professor Finnis’s clear guideline in mind, the author considers it time to wrap up the general argument in this Article.

#### CONCLUSION

This Article has offered a scheme that scholars within the natural law tradition might develop in future explorations. It is true that this scheme lacks precision and might be a bit scanty at times. Perhaps this feeling is the result of the author heeding a wise idea: absent unequivocal violations of fundamental human rights, “very little of wide generality can be said to resolve determinately the many issues of interpretation.”<sup>152</sup> With those potential explorations in mind, it is important to keep in mind that the application of sound moral principles—natural law principles—to matters like constitutional governance involves contingencies and circumstances about which reasonable people holding firmly to the principles can reasonably reach differing conclusions. Thus, the title to this Article is “A

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presumption that, whatever the assumptions and expectations of its makers, every constitutional provision must, if possible, be understood as consistent with such basic human rights as to recognition as a legal person.

FINNIS, *Natural Law: The Classical Tradition*, *supra* note 8, at 59. This is certainly far from George’s idea that the publicly understood meaning settles the question.

149. FINNIS, *Natural Law: The Classical Tradition*, *supra* note 8, at 59.

150. “Constitutions and statutes call for historically accurate understanding, so far as it is possible. To say otherwise is to deny their authority to settle any of the questions of social life which need to be settled by law.” *Id.* at 58.

151. *Id.*

152. *Id.* at 59.

New Natural Law Reading of the Constitution” instead of “*The New Natural Law Reading of the Constitution.*”

With the future and the past in mind, this Article has attempted to make clear that defending natural law’s traction in the context of constitutional interpretation is not equivalent to endorsing what is sometimes called the “living instrument interpretation” of the Constitution, that is, all kinds of judicial updating of a Constitution on the basis of all sorts of moral considerations, which may, on occasion, go under the name “natural law” but more commonly under the names “human rights” or “common good.” As it has been shown, more often than not, under the guise of certain moral readings of the Constitution but not according to the natural law, moral reading suggested in this Article, one finds a project of reforming the Constitution in violation of the responsibility to follow established processes of constitutional amendment<sup>153</sup> while neglecting the onus of discharging the responsibility which could make constitutionally justifiable the *judicial* reform of the Constitution: namely the responsibility of demonstrating, carefully and even-handedly, that the founders of the Constitution were certainly committing a moral error—introducing an injustice—when drafting a certain provision.<sup>154</sup> Fidelity to established law—be it constitutional or otherwise—ought to cede in the extreme circumstance that one can establish the law as unjust in a respect in which it is one’s own constitutional responsibility to reform it or violate it. But this extreme circumstance that could make natural law relevant in an extraordinary way is less frequent and, in that sense, less important than the myriad instances in which what is at stake is the interpretation of a just constitutional provision derived from natural law by way of conclusion or by way of determination. In these more common instances, natural law should track with the differing intensities identified in this Article.

There are many gaps in the argument that need to be filled. The precise result of interpreting various constitutional rights in the light of natural law is not something that this Article has even come close to articulating in detail. Even less so has the author been able or willing to prove effectively what the consequences would be of a natural law reading of the structural

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153. Pojanowski and Walsh rightly point out that in order for the “Constitution to accomplish as positive law what it purports to do as positive law, the decisions it reflects must be durable until changed on the terms the Constitution provides or the legal system ordered by the Constitution ends.” Pojanowski & Walsh, *supra* note 36, at 100.

154. See John Finnis, *Judicial Law-Making and the “Living” Instrumentalisation of the ECHR*, in LORD SUMPTION AND THE LIMITS OF THE LAW 73–120 (Nicholas Barber, Richard Ekins & Paul Yowell eds., 2016).

parts of the Constitution and the extent to which the intention of the authors of the Constitution is relevant for purposes of arriving at a morally just reading.<sup>155</sup> The author also has not been able or willing to answer how much natural law factors into those parts of the Constitution with more moral flesh. The author also did not address the ways in which this kind of inquiry is related with what others have called “the question why.”<sup>156</sup>

Nevertheless, the map drawn here should be clear enough; hopefully in the future, a new and simultaneously old version of natural law will lead to a similarly new, moral reading of the Constitution.

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155. Although in constitutional interpretation the intent of the author(s) ought to matter, “as the very concept of authority to make or declare law entails,” “a properly juridical interpretation will not be as ready to consider authoritative an unjust as it will a just meaning.” Furthermore, although a historian will be “quick to detect, and not too ready to overlook their interlocutors’ vicious purposes and deficiencies of personal character,” the constitutional interpreter will always bear in mind that his guiding principle is the common good of the people rather than an infeasible fidelity to the past. The intermediate quotations are from Finnis, *The Priority of Persons*, *supra* note 133, at 13, whom the author partly paraphrases here for the purpose of expressing a personal idea.

156. See Grégoire Webber, *Asking Why in the Study of Human Affairs*, 60 AM. J. JURIS. 51 (2015) (elaborating on the importance of asking why persons of a time and place acted the way they did and arguing for the relevance of determining the goal of a legislator when introducing law in a community).