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The Place of 'Higher Law' in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys

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Patrick McKinley Brennan

Abstract

The question of the place of higher law in the ordinary practice of law is even now dogged by the brooding omnipresence caricature. This Article seeks to introduce and apply a philosophically defensible account of natural law, the one defended by Thomas Aquinas, to various problematics of contemporary law and jurisprudence. The Article argues that such higher law is not so high as to be relevant only to sexy constitutional questions, as is often supposed, but to everything we do in law. The Article argues that liberals and conservatives alike should acknowledge both the place of natural law in the positive law and the contingent/prudential limits on judges' authority to speak the natural law directly from the bench. Much of the Article is framed as a response to Steven Smith's Law's Quandary (Harvard 2004).

The Place of "Higher Law" in the Quotidian Practice of Law:

Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys

PATRICK MCKINLEY BRENNAN*

"[T]he traditional concept of participation in a higher order is not so subtly transposed into a deism in which God supplies the material but man supplies the concrete norms."
Russell Hittinger, *The First Grace*

"The pain and the shock are at most a warning and a symptom. The real objection is that if man chooses to treat himself as raw material, raw material he will be: not raw material to be manipulated, as he fondly imagined, by himself, but by mere appetite, that is, mere Nature, in the person of his de-humanizing Conditioners. We have been trying, like Lear, to have it both ways: to lay down our human prerogative and yet at the same time to retain it. It is impossible. Either we are rational spirit obliged for ever to obey the absolute values of the *Tao*, or else we are mere nature to be kneaded and cut into new shapes for the pleasures of masters who must, by hypothesis, have no motive but their own 'natural' impulses. Only the *Tao* provides

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a common human law of action which can over-arch rulers
and ruled alike."
C.S. Lewis, *The Abolition of Man*

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INTRODUCTION

My topic is the place of "higher law" in the ordinary practice of law, and what I shall argue is, first, that it is to be encouraged, including sometimes as a direct judicial contribution, in ways and to an extent that can be *roughly* delimited; and, second, that it ordinarily amounts – or should amount—to a less flashy affair than is sometimes supposed. Taking the side of higher—or natural—law today makes for strange bedfellows and odd crossovers between liberals and conservatives, but, as I shall argue, a recovery of the genuine higher law tradition is what those who care about human rights need above all else. And who can afford not to care about human rights? Or imagine that they amount to nothing more than transitory artifacts of our practical agenda?

At first blush, it would seem that conservatives, usually regarded as the faithful (if benighted) transmitters of the fruits of the central western tradition of reflection on the human situation, would be higher law's natural allies. Conservatives do like to regard themselves as the bearers of intellectual gifts from the past. In recent years, however, many conservatives have distanced themselves from the higher law, at least as something with which the exercisers of judicial power should concern themselves. Fearful that direct judicial access to natural law will operate as a license for "activism" at the price of democratically enacted statutes and the plain meaning of the Constitution, conservatives have sought to deny judges much or any opportunity directly to speak the natural law.[1]

[1] *See, e.g.*, Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 44, 77 (1983). *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: POLITICAL SEDUCTION OF THE LAW (1990).

Wary about allowing entry to centuries of theorizing about the contents of higher law when it will matter most, at the moment of judgment, conservatives have remitted the natural law task to legislatures. An optimistic frame of mind, one might think.

But not entirely: conservatives have been able to count on others to do the heavy—or is it light?—lifting. Over the last half-century or so, liberals have been the eager advocates of a higher law approach to judging—at least up until an historical point, to which we shall return. Though they have shied away from the language of "higher law" or "natural law,"[2] liberals are the ones who have time and again convinced the Supreme Court (and the lower courts) to look beyond the text of the Constitution to recognize "rights" (that are conferred by higher law). The right of privacy recognized in *Griswold v. Connecticut*, despite Justice Douglas's unconvincing attempt to find it "in penumbras, formed by emanations"[3] of the Constitution's written terms, would be a leading example of higher law's making its way into positive law through the judicial office. "We deal with a right of privacy older than the Bill of Rights . . . , "[4] wrote Justice Douglas in *Griswold*. Seven years later, in *Eisenstadt v. Baird*, Justice Brennan explained for the Court that the right of privacy that Justice Douglas thought "inhered in the marital relationship" was in fact, upon further reflection, "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[5] And with this, the stage was set for *Roe v. Wade* a year later. Paradoxical as it may seem to some, in recent American history liberals have been the greater heirs to the higher law tradition, and they have not allowed the inheritance to languish in the idle hands of pork-barrel politicians.[6]

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[2] "Invocation of natural law seems to have passed out of fashion among leaders of the movement for the extension of human right. One might have expected the opposite." R.H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 AVE MARIA L. REV. 1 (2005).

[3] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[4] *Id.* at 486.

[5] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[6] *See* Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 496 (1990). Hittinger's article, which was written in 1990, was virtually prescient with respect to where the Supreme Court was taking the right to privacy. His article has had a substantial influence on my thinking about many of the issues that are discussed in this Article. In addition, CHARLES HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE ESTABLISHMENT AND OF THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW (1958), though no longer up to date, had a pervasive influence on my thinking about the role of natural

And there is, I believe, much to be admired in liberals' stewardship of the higher law tradition and some of the fruits to which it has given birth. To stick with the example at hand, a constitutional regime that did not recognize a married couple's right to privacy in the marital bedroom would be, in my judgment, gravely deficient. But what then of the charge that said right was recognized through an exercise of judicial "activism"? The answer, I think, is nicely encapsulated in what Justice Harlan said, concurring in the judgment in *Griswold*:

> [J]udicial self-restraint will not . . . be brought about in the 'due process' area [except] by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[7]

We can suppose that "values" was how people—even very tradition-minded people—talked about higher law in the 1960s, and the point is that Justice Harlan appreciated that, in our judicial system, judges have almost always understood themselves as having some, certainly limited, opportunity directly to speak the natural law. It has been a question of degree, not kind.[8] It could have been otherwise, but that is how it has been. "Activism," it turns out, is on the side of creating a fiction according to which judges in our system cannot sometimes directly speak the natural law; the activists are those who cover over an attested and widely accepted, if controverted, practice.

The tradition's openness to natural law at the point of judicial decision has never been, until the other day, a channel for arbitrariness. In ways that will be elaborated below, it was characteristic of the long tradition of theorizing about values—*nee* natural law and natural rights—to recognize that every decision about what someone has a concrete "right" to entails the careful resolution of trade-offs; one person's right is another person's duty; claims to speak must be balanced against claims to be let alone; and so forth. It was further understood that knowledge of natural law and natural rights, the knowledge about how to do the

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law in our legal tradition. Haines's book remains indispensable on the place of natural law in English and American law over the period it covers.

[7] *Griswold*, 381 U.S. at 499 (Harlan J., concurring). The alternative means of judicial "self-restraint" under consideration was the historically unattested test proposed by Justices Black and Stewart, to wit, full "incorporation."

[8] The evidence is overwhelming. *See* HAINES, *supra* note 6, passim. One must note, however, that reliance on or reference to natural law and natural rights does not *entail* a judicial power to invalidate or replace legislative enactments. *See* MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 156–59 (1992). The question is much more nuanced and historically contingent. *See infra* at Section IX.

balancing and delimiting, is itself drawn from plural sources that mutually reinforce and limit one another.[9]

Recently, however, at the level of American constitutional decision-making (with derivative consequences for the functioning of the rest of our legal system), the long tradition of careful adjudication of higher law principles came to a screeching halt; that "historical point," mentioned above, was reached; the commitment to nuanced discriminations accumulated over centuries has been largely repudiated. As it turns out, conservatives were right to worry, though perhaps for the wrong reasons. The age-old tradition of incremental articulation by the judiciary of a host of natural rights that are to be balanced and harmonized, so as to be protected in law, has been supplanted by the reduction to one right.

It happened almost at a stroke. Though it has yet to work its way completely into the fabric of American law, the landmark judicial assertion, in *Planned Parenthood v. Casey*, of a right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[10] necessarily represents an end to the effort to discover, in order to give legal effect to, rights that belong to humans in virtue of the natural law. We need not wait for the Court to tell us that, in a world of self-definition, there is no point in trying to discover other inherent rights and the concrete conditions in which they can be realized. Taken for all it is worth, a right to self-definition is limited only by human resources for self-destruction. The Court asserted in *Casey* that "[o]ur obligation is to define the liberty of all, not to mandate our moral code,"[11] but a moment's reflection will confirm that this amounts to the sheerest sophistry. The dilemma the Court sets up is false. In truth, to say what liberties people or groups will have—or will not have—just *is* to make moral judgments.

I shall return to this all-important point below. My present concern is the practical one that a stand-alone right to self-definition suffers from the fatal flaw that it defies legal implementation, in ways that I shall elaborate. The unadministrability of this juridically generated doctrine is, I would submit, a sufficient reason to oppose it. To this extent, then, I would join the conservative pushback against the self-defeating jurisprudence of self-definition. However, one thinks of the baby in the bath water. The widespread, reactionary rejection by conservatives of a place for (genuine) higher law in judging should be resisted. As I shall argue, a working legal system that is not porous, at the point of judicial decision, to considerations of natural law and natural rights is morally

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[9] For one example, *see* Hittinger, *supra* note 6, at 498 (discussing Justice Frankfurter's approach to natural law reasoning).

[10] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[11] *Id.* at 850.

untenable, at least in the medium run. Exactly how porous it must be, is a question of prudence, not of a Platonic Form.

My thesis, then, is that, *pace* both liberals and conservatives, what is needful today is a recovery of the higher law tradition that liberals nourished until recently and that conservatives, long its champion, have been anathematizing in their contrapuntal campaign against "activism"[12] and the announced right to self-definition.

> "Despite the fact that the Constitution does not explicitly mention either natural law or natural rights, there can be no doubt that Americans expect the law to recognize and uphold natural rights. The interpretation and reform of law according to natural principles of justice represents a recurrent pattern in the history of American legal culture."[13]

In order to re-develop today a working sense of the *proper* place of higher law in the quotidian practice of law, it is necessary to start by grasping the ways in which natural law, along with the natural rights that derive from it, should drive not only constitutional law, where it is perhaps most conspicuous, but *all* that we do as we go about trying, through a working legal system, to secure what is good for humans and to avoid what is bad for them.

Caricature must be avoided. "Natural law is a multifarious concept that defies simple analysis,"[14] but on any reasonable analysis of it, natural law is not an "and now for something totally different" affair. Nor is it accessible by turning the mind's eye in the direction of a cosmic *codex*, "a sort of ghostly Internal Revenue Code in all of its magnificent detail written in the heavens."[15] Natural law and the natural rights that derive from it, I shall argue, are all about what is concretely *good* for humans and their communities, and goods are discovered through trial and error conducted and measured by practical reason. A legal regime that places humans where they belong and delivers what is *good* for them, will do so by giving effect to the natural law and the natural rights that derive from it.

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[12] In their comparative study of English and American law, P.S. Atiyah and Robert S. Summers have called attention to the origins and persistence of Americans' expectation that law have content-oriented criteria of validity (not just source- or pedigree-based criteria), including natural law and natural rights. FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 3, 238 (1987). *See also* HAINES, *supra* note 6, at 309–52.

[13] Hittinger, *Liberalism*, *supra* note 6, at 438.

[14] Hittinger, *Liberalism*, *supra* note 6, at 429.

[15] STEVEN SMITH, LAW'S QUANDARY 47 (2004).

Part I introduces the topic of higher law and the judicial role by summarizing aspects of a recent, much-discussed encounter between Justice Antonin Scalia and Professor Steven Smith. Part II begins my argument in favor of (delimited) judicial access to higher law by pointing out some ways in which the legal positivist's account fails at the level of description. Part III goes on to describe the non-positivist approach to judging that made the "common law" what it was (and could be again?): fined and refined *reason*. Part IV zeroes in on how the common law expectation of reasonableness resiliently reappears in an age of statutes and administrative law, *pace* Justice Scalia. Parts V and VI sketch an account of why, *pace* Smith and many others, a commitment to "reason" is not necessarily a sell-out or an evasion; properly conceived, a commitment to human practical reason turns out to be a commitment to truly legal governance. Parts VII, VIII, and IX move from the terrain of common law and administrative law into the realm of constitutional law and fundamental rights in order to ask what a commitment to practical reason, natural law, and natural rights will look like at this "higher" level. The Court's 2003 decision in *Lawrence v. Texas* provides the focus for asking how fundamental rights fare, as a matter of law, when what the law guarantees is a right to self-definition. In the Conclusion, I round out the discussion of judicial access to natural law and natural rights; the focus is on the sources of the parameters of judicial access to higher law. The potential jurisprudential significance of sex toys, the one element in my title that will seem not like the others, crops up throughout the Article.

Caveat lector. As will be unmistakable by now, this paper represents one contribution to a larger project of attempting to revive a perspective in jurisprudence that is associated with the Christian tradition. The effort will seem to many misplaced, for, as philosopher and social theorist Charles Taylor has recently shown in splendid detail, we live in an age when an exclusive humanism is the presumptive position, and those who would pursue a different course have to swim against the tide all the way.[16] The presumption today is that law can function as an exclusively humanistic enterprise; indeed, there is a concerted effort to demonstrate as much and seal up the conversation in one direction.[17] But with increasing frequency, one encounters efforts to make the necessary

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[16] CHARLES TAYLOR, A SECULAR AGE 19–21, 26–28, 98–99, 242–69 (2007).

[17] *See, e.g.*, BRIAN LEITER, NATURALIZING JURISPRUDENCE (2007). Brian Tamanaha, another influential voice in the current conversation, though not (to my knowledge) committed to a Christian perspective in law, is concerned not to let law be hijacked by ideological forces, and is willing to acknowledge that "belief" may be necessary. *See* BRIAN Z. TAMANANHA, LAW AS A MEANS TO AN END (2006). On the latter point, *see* Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN'S L. REV. 573, 600–05 (2008). Another aspect of Tamanaha's work is discussed *infra* text at notes 169 and 170.

counterargument.[18] The effort to recover a natural law perspective in a post-Christian world is the work of Christians *and others* who will insist that theirs are voices at the collective table as well;[19] natural law and natural rights are not now, nor have they ever been, the monopoly of Christians. Steven Smith (whose work will figure prominently in this Article) may well be right that it is utterly unlikely "that any full-bodied version of natural law will flourish in the contemporary American jurisprudential environment soon,"[20] but, given the resilience of natural law discourse over time, the argument on behalf of the natural law does not amount to whistling in the dark. Natural law and natural rights may be down, but in the course of American legal history, they've never been all the way out – so much so that it is legal positivism's comparative success that needs explaining.[21] In the marketplace of ideas, the traditional position remains a voice to be heard. And that position is that it is not so much that human positive law needs to be made moral (though it surely does), but that positive law is not authoritative if it does not proceed from an order of law that precedes human invention.

I. A QUANDARY IN LAW?

A recent—and really quite remarkable—encounter between Justice Antonin Scalia of the United States Supreme Court and Steven Smith will serve to introduce the questions I wish to explore. That encounter takes the form of a review by Justice Scalia of Professor Smith's much-discussed book *Law's Quandary*, published in 2004.[22] Accordingly, I begin with a brief statement of Smith's thesis (which I shall elaborate later) and then turn to what Justice Scalia had to say about it. In short order, something spectacular from the vantage point of contemporary jurisprudence will be on display.

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[18] The recently-deceased dean of American "law and religion" studies, Harold Berman, recounts that when, roughly two generations ago, he first began to work in the area of law and religion (his earlier work was on Russian law), his colleagues at Harvard Law simply ignored that part of his work. See his foreword to MICHAEL W. MCCONNELL ET AL., CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (2001).

[19] The Jewish case for natural law is made by Rabbi David Novak in NATURAL LAW IN JUDAISM (1998).

[20] Steven D. Smith, *De-Moralized: Glucksberg in the Malaise*, 106 MICH. L. REV. 1571, 1591 (2008).

[21] *See* ATIYAH and SUMMERS, *supra* note 12, at 239.

[22] Symposium volumes dedicated to consideration of Law's Quandary were published by two law reviews. The SAN DIEGO LAW REVIEW volume 44 (2007) included contributions by Steven Smith, Joseph Vining, Brian Bix, Patrick McKinley Brennan, and Lawrence Solum. The CATHOLIC UNIVERSITY LAW REVIEW volume 55 (2006) included contributions by Steven Smith, William Wagner, Justice Antonin Scalia, Joseph Vining, Lloyd Weinreb, and Patrick McKinley Brennan.

It is Smith's contention that much of what those engaged in the practice of law say and do requires, on pain of incoherence, that there *be* more than many people would be willing to affirm as a matter of common sense. Everybody has a working sense of what exists; everybody has, as Smith puts it, an everyday ontological inventory.[23] Mountains are on everybody's everyday ontological inventory; unicorns are on (almost) nobody's. Smith's iconoclastic observation is that the ontology implicated by ordinary statements of law exceeds most people's workaday inventory. In other words, what law's practitioners say or imply is "real" in law does not appear on the list of things most people regard, explicitly or implicitly, as solidly part of the furniture of the universe. Ominously, it may require more.

To pick one of Smith's examples, many or perhaps most judges—and the *smart* lawyers arguing before them—continue to act as if statements of law are *evidence* of the law, *not* the law itself. It is Smith's observation that practitioners of law still presuppose the existence of what used to be called "higher law," of which statements of law are so many pieces of evidence. Roughly a century after Justice Oliver Wendell Holmes, Jr., infamously dismissed the "brooding omnipresence in the sky,"[24] thinking that he was doing as much for posterity, it appears that practitioners of law are still saying about legal materials that they do not as such constitute the law. To take a noteworthy instance that is roughly contemporaneous with Smith's book, in *Lawrence v. Texas*, the Supreme Court of the United States used its power of judicial review to strike down a statute that criminalized consensual homosexual sodomy, and in doing so, the Court stated that its decision just seventeen years earlier in *Bowers v. Hardwick*, [25] which had refused to strike down a similar statute, was "not correct when it was decided."[26]

But by what standard, we are led to ask, was *Bowers* adjudged "not correct?" It is *concessum* that the text of the U.S. Constitution says nothing, in terms, about a right to engage in such conduct.[27] Is it the case, then, that *Bowers* was adjudged "not correct"—not just, say, unpopular or unseemly—by a *non-legal* standard? Surely it would be, at best, a-nomalous (in the etymological sense of the word) for laws to be adjudged unlawful on non-legal grounds.[28] But if, then, *Bowers* was wrong *as a*

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[23] SMITH, LAW'S QUANDARY, *supra* note 15, at 8–11.

[24] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[25] 478 U.S. 186 (1986).

[26] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[27] I say "such conduct" because, for reasons that appear below, it is not at all clear exactly what right *Lawrence* recognizes. *See infra* note 118.

[28] This is the common (though not the only possible) view. See, e.g., "It follows – since a legal decision can only be wrong if it is contrary to law – that the law must be

matter of law, what *is*—what is the ontological status of—the law that precedes both the Constitution and what the courts authoritatively say and decide? Is it what much of the Western tradition, descending from both Athens and Jerusalem, has referred to as the "natural law"? Is it of divine provenance? If it is not, then how did it get to be higher? And so forth.

It is no part of Smith's project in *Law's Quandary* to give such questions definitive answers. Clever lawyer that he is, Smith is content to rest his case with the observation that, if he is right about the recurrent evidence that the way we persist in practicing law—notwithstanding Justice Holmes and his so-called Legal Realist successors—presupposes the existence of a higher law, we are stuck living in the "quandary" that gives his book its title.[29] The alleged quandary is that while the regnant jurisprudence goes on denying the existence (and *a fortiori* the relevance) of any higher law, practitioners of law—judges, lawyers, and citizens—go on acting as if there exists a law that precedes the statements of law that abound, such that, for example, *Bowers* could be "not correct" as a matter of higher law, not just of opinion, taste, or judicial self-assertion.

Justice Scalia, for his part, is not convinced that Smith has met the burden of proof, and in reply the Justice argues in the alternative. First, Justice Scalia combs Smith's plentiful evidence and finds in it less of a commitment to "higher law" than Smith finds there.[30] Second, Justice Scalia argues that if one is practicing law the way one *ought* to practice law, there is no risk of a quandary.[31] The way we ought to practice law, according to Justice Scalia, is as textualists. Textualism, of course, is the judicial philosophy that Justice Scalia has famously championed for a generation now, the strictures of which are that judges are called upon simply to give legal texts the meaning that they would have had to an ordinary person at the time of their enactment.[32] What textualism requires appears on every sensible person's everyday ontological inventory; nothing more exotic than texts and ordinary meanings are required; no quandary looms.

Third, not willing to leave things there, Scalia goes on good-naturedly to chide Smith for not coming right out and saying that God is

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something higher than any decision." SIR JOHN BAKER, THE LAW'S TWO BODIES 5 (Oxford Univ. Press 2001). *See also* BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 29–30 (Columbia Univ. Press 1928).

[29] SMITH, QUANDARY, *supra* note 15, at 176–79.

[30] Antonin Scalia, *Review of Steven D. Smith's Law's Quandary*, 55 CATH. U. L. REV. 687, 688–90 (2006).

[31] *Id.* at 689–90.

[32] For the now-classic statement of his position, *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* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–48 (1997).

necessary *if* the practice of law is (as Smith suggests that most of us believe) not simply a matter of giving legal texts their ordinary meanings. Here is how Justice Scalia's review of *Law's Quandary* ends:

> As one reaches the end of the book, after reading [Professor Joseph] Vining's just-short-of-theological imaginings followed by Smith's acknowledgment of "richer realities and greater powers in the universe," he . . . is sorely tempted to leap up and cry out, "Say it, man! Say it! Say the G-word! G-G-G-G-God!" Surely even academics can accept, as a hypothetical author, a *hypothetical* God! Textualists, being content with a "modest" judicial role, do not have to call in the almighty to eliminate their philosophical confusion. But Smith may be right that a more ambitious judicial approach demands what might be called a *deus ex hypothesi*.[33]

Justice Scalia's positive thesis can be summarized as follows. On the one hand, a "modest" judicial role is satisfied by the rudiments of textualism, nothing more extravagant being required on the ontological inventory. On the other hand, a more ambitious judicial role would require the involvement of God. Perhaps the Almighty's role would be as the promulgator of a "higher law"—something not on the everyday ontological inventory?

There will be more to say about the details of the Smith-Scalia disagreement, but first the elephant in the room, the spectacle I alluded to at the outset of this Section. Mainstream jurisprudence, from Holmes to his contemporary off-the-rack imitators, largely ignores the possibility that something or someone "higher" plays some part in what we do in law, and when it does not ignore the higher possibility, it usually does so in order to dismiss or even ridicule it. Steven Smith, however, has thrown the higher possibility into bold relief. The Smith-Scalia exchange has done contemporary jurisprudence the favor of returning important questions closer to academic respectability. Many will mock both them and their pursuers, but the elephant remains resolutely in the room.

Smith, though, having placed the elephant, leaves things there, suggesting that while our current "[p]erplexity is not a resting place,"[34] we can at the moment do no more than "to confess our confusion and to acknowledge that there are richer realities and greater powers in the universe than our meager modern philosophies have dreamed of."[35] As Smith sees things, we are stuck in the aforementioned quandary.

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[33] Scalia, *Review*, *supra* note 30, at 694.

[34] SMITH, LAW'S QUANDARY, *supra* note 15, at 179.

[35] *Id.*

But are we? As mentioned, Justice Scalia responds by suggesting that a legal system equipped with an abstemious judicial role can get by without God or anything more than texts, but he also goes further coyly to speculate that Smith's own reticence just might be programmatic:

> Hmmm. Richer *realities* and greater *powers* than our *modern* philosophies have dreamed of. Could there be a subversive subtext here? . . . Could it be . . . that Smith is inviting, tempting, seducing his fellow academics to consider the theological way out of the quandary – the way that seemed to work for the classical school?[36]

By the time the Smith-Scalia tete-a-tete is over, academic protocol has been violated (by the mere mention of God), but neither Smith nor Scalia has made the philosophico-theological case that practicing law does entail something that involves God or higher law. In fact, Scalia-the-textualist even denies it – though perhaps, as with Smith, for programmatic reasons.

II. POSITIVE LAW, EVIDENCE OF BELIEF, AND NATURAL LAW

In puzzling out the relationship between higher law and the quotidian practice of law, we can start by noticing the single most important statement in analytic jurisprudence about what the law is. The statement is by John Austin, and its importance is a function of its combined influence and falsity. According to Austin, law is the command of the sovereign backed by the threat of punishment.[37] Period. This is one manifestation of the jurisprudential stance known as positivism, the view that what is the law is such solely in virtue of its pedigree, viz., that it has been posited – put in place – by the sovereign of a state. Justice Louis Brandeis continued in this vein when, in the landmark case *Erie v. Tomkins*, he quoted Justice Holmes as follows: "law in the sense in which courts speak of it today does not exist without some definite authority behind it . . . . The authority and only authority is the State . . ."[38] The negative pregnant of the Holmes-Brandeis thesis is that only what the state declares to be law is law, and it is law regardless of its content. One commentator captured the thesis as follows: "there can be no legal right which is not recognized or created by the sovereign power of the state."[39]

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[36] Scalia, *Review*, *supra* note 30, at 693–694.

[37] *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 18–38 (Wilfrid Rumble, ed., 1995).

[38] Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Kyhn v. Fairmont Coal, 215 U.S. 349 (1910)).

[39] C.G. TEIDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 71 (1890), *discussed by* Hittinger, *Liberalism*, *supra* note 6, at 437. Teideman summarizes the point only to criticize its accuracy as a description of American legal practice.

But this line of theorizing takes things too easily, I think—more easily than the practioners of law actually take things. Even Holmes observed that Austin knew too little English law.[40] Our legal practice defies the simplification according to which law is exactly a sovereign's commands. What gives us law that can be obeyed is not identical with the sovereign decrees and the Austinian positivist sees. There is more to the springs of law than sovereign commands. What we do in law "takes place in a field of pain and death"[41] (as the famous phrase of the late Robert Cover has it), and, with exceptions that prove the rule, we strive to get it as right as we are able because of what it, including (but not exclusively) its force, means to us and to our common and individual possibilities. In a word, the estimable achievement that is our legal system owes its greatness to a history of craftsmen committed to criticizing, according to some standard that is not an evanescent artifact of our creation, what has been laid down, in order to improve it. What gives us law is a process that itself is governed by a higher law, even if we do not call it that — although, as I shall explain, I think there are important reasons both to call it that and to have reason to mean it.

The simplifiers and excluders, the soft positivists and the hard positivists are all of them voices in the conversation, to be sure, and they have their points. Law to live by does need to be stable so as to be knowable and reliable.[42] However, the simplifiers and excluders arrive on the scene when what we do in law is already more layered than they would allow. In the words of Professor Joseph Vining, whose work Smith explores: "[L]aw is evidence of belief far stronger than academic statement and introspection can provide."[43] And that evidence is that, whatever the normative point of the legal positivist, to which we shall return, the practitioners of law, with exceptions that prove the rule, find ways of making the law what it should be. As Vining says, "[l]egislation is the arbitrary that we allow – but also limit. To make the point in its strongest form, it could be said that legislation is lawless behavior, except that by a paradoxical trick we make legislative statutes materials we use in

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[40] Oliver Wendel Holmes, Jr., *The Path of the Law*, 110 HARV. L. REV. 991, 1006 (1897) ("The trouble with Austin was that he did not know enough English law").

[41] Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

[42] This is not to say, and I neither suggest nor argue, that law's content is or should be uncontroversial. Indeed, I do not regard "agreement" as a necessary condition of law's legitimacy. *See* Patrick McKinley Brennan, *Equality, Conscience, and the Liberty of the Church: Justifying the* Controversiale per Controversialius, VILL. L. REV. (forthcoming 2009) (symposium on the work of Martha Nussbaum). *See also* Hittinger, *Liberalism*, *supra* note 6, at 432–35, on the appearance of the expectation that law be agreeable to all.

[43] JOSEPH VINING, FROM NEWTON'S SLEEP 5 (1996).

determining what the law is."[44] Although destined to be imperfect in its results, the quest to bring a higher law to bear in the ordinary practice of law is conspicuous for its intransigence.

In articulating the relationship between higher law and the law we create, it is easy to get too high too fast. It is even a fair question whether "higher law," the term I have favored so far (because of its currency owing to its place in the title of the famous study by Edward Corwin), is inevitably too misleading to be serviceable. "Higher" may connote inaccessibility or, even more extreme, otherness. Corwin himself considered the higher law position "quaint."[45] The near-ubiquity of Holmes's "brooding omnipresence" caricature makes it nearly impossible to recall that most of the traditional partisans of "higher law" had in mind nothing of the sort Holmes dismissed.[46]

A similar sinkhole of confusion lurks near this kindred term "natural law." For example, "law of nature" was historically often used as a synonym for natural law. To the modern ear, however, laws of nature denote the deliverances of Newtonian physics, not an ordinance of reason that humans can freely follow or flout.[47] Likewise, the expression "natural law" is sometimes understood to denote the theory according to which nature herself "legislates" for us. But in that case, then, natural law would be lower rather than higher, a mere biologism. And there is the related fact, further, that even among those theorists whose natural law *bona fides* cannot be questioned, from Thomas Aquinas in thirteenth century to John Finnis in the twenty-first, there is considerable disagreement about how to define the natural law. For Aquinas, it is truly law; for Finnis, it is law only in an analogous sense.[48]

For reasons to which I shall come in due course, I regard the issue of definition as exceedingly important, but I also believe that one can go a very long way without getting it altogether settled. In a jurisprudential world in which the legal positivist dominates, almost—though not quite—all non-positivist positions can usefully be grouped under a "natural law" umbrella. What those under the umbrella have in common is the judgment

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[44] *Id.* at 253.

[45] EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 45 (1955).

[46] Holmes, it is worth recalling, had been reading German idealists, not the theorists of the natural law who were themselves innocent of Geist. Hittinger, *Liberalism*, *supra* note 6, at 469 n.192.

[47] On the shift from natural law to the laws of nature, *see* Jane E. Ruby, *The Origins of Scientific 'Law"*, 47 J. OF THE HISTORY OF IDEAS 341–59 (1986).

[48] On this issue in Aquinas, far and away the best source is Stephen L. Brock, The Legal Character of Natural Law According to St. Thomas Aquinas (1988) (unpublished Ph.D. dissertation, University of Toronto). For Finnis's position, *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 276–81, 294 (1981).

that posited legal materials do not exhaust the legal universe; in other words, what we have produced, and what we do, in law remain permeable to objective moral evaluation. For example, the statute that is palpably unjust may or must in certain circumstances be denied effect; likewise, the rights articulated in a written constitution do not necessarily exhaust people's fundamental rights in law, such that it is at least possible that *Bowers* was "not correct" when it was decided.

But what cannot be grouped under the capacious natural law umbrella are all those moral theories that boil down to variations on the theme of self-projection or emotivism. The natural law tradition has as a core plank that there exists a moral order not of our own creation, and those who regard morality as something to be created *ex nihilo*, either individually or collectively, necessarily cannot abide that claim. Therefore, postponing the question of the correct definition of natural law for the moment, I would suggest the following working definition or placeholder: "Natural law is an order that: (1) reason does not make, in the sense that it is not an artifact of our practical agenda; (2) is presupposed by legal and moral deliberation, and is brought to light by theory and reflection; and (3) is in some way normative for conduct and for our legal artifacts."[49]

III. TRADITION AND REASON IN THE LAW

What, then, has been the relationship between natural law thus understood and the practice of law? First the canard, because it has had wide purchase. Sir William Blackstone famously taught that the law of England was the custom of the realm from time immemorial, and adjudication was a process of oracular law-finding and declaration.[50] Blackstone's image of the judge as a ventriloquist has enjoyed lots of play, and was especially appealing to those late-nineteenth century common law judges who wanted little credit for innovating at a rate that would keep up with the breakneck speed of the Industrial Revolution and its collateral social consequences.[51]

Blackstone's portrayal of the judicial role, however, was inadequate, first, to what English judges actually did and, second, to how they understood what they were doing. The genius of the common law was not that Englishmen in time immemorial already had everything all figured out, such that all of us who came later could live by their perfect

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[49] Hittinger, *Liberalism*, *supra* note 6, at 429.

[50] WILLIAM BLACKSTONE, COMMENTARIES *69 (1765–69).

[51] Blackstone's Commentaries went through dozens of editions, and in the United States became the single most used source by judges and lawyers in search of the doctrines of the common law (in an environment short on case reporters). On the Janus-faced character of Blackstone's legal and political theory, *see* Duncan Kennedy, *Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 247 (1979).

rules set out in an exhaustive set of precedents. Writing more than a century before Blackstone, Lord Coke said it best: "Reason is the life of the law; nay, the common law itselfe is nothing else but reason."[52] Crucially, what Coke meant by reason, as he proceeded to explain, was not the achievement of a single individual, but the temporally extended achievement of a group: the "artificial perfection of reason, gotten by long study, observation and experience, . . . fined and refined over centuries by generations of grave and learned men. . . ."[53] Not just because of Blackstone, but in all kinds of ways, through all manner of fictions, and in varying degrees, judges in the common law tradition have masked themselves and covered over their creativity.

Though they seem rarely and perhaps admirably to have called attention to the fact, the judges of England were part of a practice of creative but bounded innovation.[54] The process has been analogized to playing a game of Scrabble.[55] There are some things you can do and some you cannot, the options change as things go forward, and there is a premium on cleverness. Whereas Blackstone had judges ventriloquizing for a mythical past, the common law judge as understood by Coke is a contributor to a dynamic tradition, what philosopher Alasdair MacIntyre has described as a "historically extended, and socially embodied"[56] process which sets the conditions for its own continuous growth and development.

Tradition here is not the process of recapitulating the past, but rather, as Mary Ann Glendon has explained, the crucible of creativity in which the current generation can add a layer of intelligence to what has been handed down, thus meeting the challenge of a world that has never before existed.[57] As Justice Scalia acknowledges, siding with Coke against Blackstone,

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[52] THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *97b (1628).

[53] *Id.*. For a compendious but example-rich statement of the method of common law judges, *See* SIR JOHN BAKER, THE LAW'S TWO BODIES, *supra* note 28, at 1–32, 59–186.

[54] "One need not seek far in English case law to find impressive examples of the use of the doctrine of reason or reasonableness, though the law of nature connotations of these phrases may be inadvertently or purposely concealed." HAINES, REVIVAL, *supra* note 6, at 41. *See also* Helmholz, *Natural Law*, *supra* note 2.

[55] Scalia, *Common-Law Courts*, *supra* note 32, at 8.

[56] ALASDAIR MACINTYRE, AFTER VIRTUE 206 (3rd ed. 2007). *See also* Patrick McKinley Brennan, *"What's the Matter with You Catholics?" Soundings in Catholic Social Thought: A Review of "Traditions in Turmoil" by Mary Ann Glendon*, II J.L., PHIL. & CULTURE 291, 293–94 (2008).

[57] Mary Ann Glendon, *Knowledge Makes a Noisy Entrance: The Struggle for Self-Appropriation in Law, in Fred Lawrence*, ed., 10 LONERGAN WORKSHOP J. 119, 123–35 (1994).

> from an early time – as early as the Year Books, which record English judicial decisions from the end of the thirteenth century to the beginning of sixteenth – any equivalence between custom and common law had ceased to exist . . . The issues coming before the courts involved, more and more, refined questions to which customary practice provided no answer. . . . [58]

Over and over one finds the students of the common law commending it for being a great system of reason.[59] Indeed, as legal historian A.W. Brian Simpson has explained, "[i]n the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution."[60] J.N. Figgis puts the point succinctly: "Common Law is the perfect ideal law; for it is natural reason developed and expounded by the collective wisdom of many generations."[61] Likewise Charles Fried: "When we say of a judge or lawyer that he is learned in the law, we assume that there is a body of knowledge to be learned in, and that such learning increases wisdom, judgment, and justice."[62]

In the long history of the common law, there have been periods of greater and lesser fertility, creativity, and success in developing natural reason so as to achieve the fair, just, or *right* solutions. The American legal theorist Karl Llewellyn described the peculiar greatness of America's early common law judges in these terms:

> The tone and mark consist in an as-of-courseness in the constant questing for better and best law to guide the future, but the better and best law is to be built on and out of what the past can offer; the quest consists in a constant reexamination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow.
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> It is a way of on-going renovation of doctrine, but touch with the past is too close, the mood is too craft-conscious,

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[58] SCALIA, *Common-Law Courts*, *supra* note 32, at 4.

[59] *See* HAINES, REVIVAL, *supra* note 6, at 39–43.

[60] *The Common Law and Legal Theory*, *in* A.W.B. SIMPSON, OXFORD ESSAYS IN JURISPRUDENCE, SECOND SERIES 77, 79 (1973).

[61] J. N. FIGGIS, DIVINE RIGHT OF KINGS 229 (1896).

[62] Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 58 (1981).

> the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform.[63]

And it was precisely these qualities that led Justice Scalia himself to concede that the common law method "has proven to be a good method of developing the law in many fields – and perhaps the very best method."[64]

IV. LEGAL LESSONS FROM ADMINISTRATIVE LAW

This high praise from Justice Scalia, though, came as a concession in the context of a sustained argument *against* the continued use of that very method today in the U.S. Justice Scalia's stated objection to the common law method stems from several related sources, which come down to this: democracy. All that the common law judges achieved "would be an unqualified good," says Justice Scalia, "were it not for a trend in government that has developed in recent centuries, called democracy."[65] Justice Scalia continues: "[T]he Mr. Fix-it mentality of the common-law judge"[66] is inconsistent with the demands of democracy.

But surely this is not *necessarily* the case. It is perfectly competent to the people, is it not, for them to decide that they wish to have judges adding, as I have said, a layer of intelligence to what has been handed down? If this is what the *demos* wants, then why should "democracy" stand in the way of it? I understand that sometimes judges do otherwise than what they have been charged to do, but that would be a separate problem – not an argument from democracy *simpliciter*.

Whatever the verdict on this question, however, it is overshadowed by the undeniable fact that by now, the people, through their elected representatives, have enacted vast bodies of statute law, rafts of positive law that were unknown in the period in which the common law judge was at his stride. These enactments supplant the wide fields of legal territory once cultivated by the common law judges in their creative but careful way. We live in an age of statute law.

But even statutes are not self-interpreting. The question then arises: What are judges to do not with precedents but with statutes? Guido Calabresi famously suggested that we need a common law for the age of statutes, a common law approach to statute law.[67] Other suggestions have

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[63] KARL LLEWELLYN, THE COMMON LAW TRADITION 36 (1960) (discussed by Glendon, *Knowledge Makes a Noisy Entrance*, *supra* note 57, at 130).

[64] SCALIA, *Common-Law Courts*, *supra* note 32, at 12.

[65] *Id.* at 9.

[66] *Id.* at 14.

[67] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

included "dynamic statutory interpretation."[68] Justice Scalia's response to these and cognate suggestions, of course, is textualism. With the possible exception of scrivener's errors, the textualist judge just goes ahead and implements the legislature's will as expressed in the statute as understood by an ordinary hearer at the time of enactment (though stopping short, for example, of giving effect to scrivener's errors)[69]—so long, of course, as it is "constitutional," a judgment the nature of which we are coming to.

So far, then, the picture is one of judges removing their common-law wigs and donning their statutory-interpretation visors. This picture is staggeringly misleading, however, because it leaves nearly everything out. Yes, we live in an age of statute law, but, correlatively, we also live in an administrative state. Most statutes are made to be given effect by administrative agencies.

Today, nearly all authoritative guides to primary conduct, which if necessary will be given coercive effect in court and then with the help of the sheriff, are of administrative origin: the rules and orders made by administrative agencies pursuant to statutes that create the agencies and give them their specific regulatory tasks to perform. However, and this is the rub: although agencies do indeed create rules and decide adjudications, their doing so does not, as such, assure those outputs will carry *the force of law*.[70] No, administrative outputs are subject to a complex web of potential forms of judicial review under a wide range of statutorily prescribed and judicially fashioned standards. And judicial review of administration, I want to suggest, is where the common law's virtually inexorable insistence on "fined and refined" reasonableness reenters through the side door. We can recall here Joseph Vining's observation that "legislation is the arbitrary that we allow—but also limit."[71]

To take a concrete example, the statute setting forth the standards according to which courts review administrative action, section 706 of the Administrative Procedure Act of 1946, provides that the "court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious." There are historically interesting reasons why the statute sought by its terms to set the reasonableness bar so very low ("arbitrary,

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[68] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

[69] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (confessing that he is a "faint-hearted" originalist); *see also* Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

[70] *See* Patrick McKinley Brennan, *Giving Effect to the Natural Law: Thoughts from the Catholic Tradition on Delegation, the Good, and Authority*, __ MICH. ST. L. REV. __ (forthcoming 2009) (symposium volume) (discussing how administrative outputs attain "the force of law" by being the product of deliberation and fairness).

[71] VINING, *supra* note 43, at 253.

capricious"),[72] but one should not be deceived by the mere words of the statute. As Vining suggested, what we *do* in law is far more powerful evidence of belief than is what we say. When confronted with "the argument that the arbitrary and capricious standard," as it is called,

> mandates only that an agency exercise the minimum rationality required of a legislature by the due process clause [of the U. S. Constitution], the Court replied, "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." Rather, the Court held, an agency must articulate a "satisfactory" explanation for its actions that does not "run[] counter to the evidence before the agency" and that demonstrates a "rational connection between the facts found and the choice made."[73]

The case from which the commentator quotes is one of the small number of Supreme Court decisions that vie to define judicial review of administrative outputs in the U.S. today.[74]

To be sure, there is no end of to'ing and fro'ing on precisely how demanding courts should be when reviewing agency action. There is no end of effort to chop the onion ever finer, and sometimes one hears stark claims that courts should back off and let agencies pretty much do what they will. And, to be sure, one sometimes finds courts imposing their own will to the exclusion of agencies' reasoned results. But Justice Felix Frankfurter caught the thrust of the expectation of the American legal system when he said that "[r]eviewing courts must be influenced by a feeling that they are not to abdicate *the conventional judicial function*," and that in adopting a "phraseology" governing review Congress "express[es] a mood,"[75] not something mechanical. And what stands out about the mood as appropriated by the U.S. courts is, I think, the pervasive insistence that reason prevail, and this by "the conventional judicial function" of adding a layer of intelligence to what has been handed

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[72] "When we recall that the APA was essentially New Deal legislation that made some compromises with conservative anti-conservative anti-big government sentiment, we can see why 'arbitrary and capricious" was a lunacy test. Liberals and Democrats in general, and the New Deal in particular, had had a lot of trouble with the courts in the 1920s and thirties." MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION 56 (1988).

[73] Merrick Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 545 (1985).

[74] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

[75] Universal Camera Corp. v. NLRB, 340 U.S. 474, 487–490 (1951) (emphasis added).

down.[76] One of the great American administrative law scholars of the last generation put the matter this way:

> I have suggested that normally the courts should tolerate agency law making which does not in the courts' opinion seem clearly contrary to the statutory purposes as the courts understand them. But the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "common law," and the ultimate guarantees associated with the Constitution.[77]

This is artfully said, right up to and including at the end: not the ultimate guarantees given by the Constitution, but those "associated" with it. There are guarantees that precede and bid to control written, positive law in its myriad and diverse phases and forms, a point to which we shall return.

I said above that when discussing the bearing of higher law on the practice of law, it is easy to get too high too fast. What I have just been describing – bread-and-butter judicial review of routine administrative activity—may strike some as irrelevant to my announced topic "higher law." Both proponents and opponents of higher or natural law sometimes suppose that a working legal system that respects the natural law will, in a blaze of cosmic glory, authorize Solomonic judges to speak the natural or higher law directly, without benefit of any preceding positive law sources or restrictions. But, with qualifications to be added in due course, quite the opposite is the case. Higher law receives its due only if it works its way into the particulars, and it rarely reaches the particulars without a lot of wind-up, revisions, corrections, and recalibrations. Workaday judicial review for reasonableness is one, though by no means the only, example in our legal system of (what I shall refer to as) higher law in its ordinary mode, making a slow and labored entrance.

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[76] *See* Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135 (1991) (discussing how responsible agency investment in the questions that come before it becomes the ground for courts to recognize the "force of law" in agency outputs).

[77] LOUIS J. JAFFE, JUDICIAL CONTROL OF ADMINISTRATION 589–90 (1965). I do not suggest that Professor Jaffe was deliberate about leaving the way open to "higher law" in the sense I intend it here, only that his formulation does leave the way open beyond posited statements of law.

V. DIALECTIC AND PRACTICAL REASON

Before turning to the question of higher law in (what I shall refer to as) its extraordinary mode of entrance, we should pause and ask why our legal system's demand for reasonableness, which I have been tracing, should count as a manifestation of "higher law" at work. Related to this question is another: who in the world is opposed to reasonableness anyway. In other words, have I set up an anti-reason straw man in order to install a weak "higher law" that is nothing more than garden-variety practical reason? To put a slightly different question: Does the inveterate insistence upon reasonableness meet the test set out in the deliberately broad-church placeholder definition I postulated at the outset?

There are several points that need to be made. First, the assault on reason in the legal academy has been nothing short of riotous. It has taken legion forms (from so-called Critical Legal Studies, which sees only power, to legal pragmatism which recognizes only an instrumental role for reason), but Holmes himself had pretty much said it all before. "You will find some text writers telling you that law is a system of reason,"[78] wrote Holmes, but that, he went on to say, is sheer nonsense. According to Holmes, law is (as Austin taught us) no more than the command of the sovereign backed by the threat that the state will bring its arm to bear; reasonableness is not a condition. As for "reason" as it was traditionally understood, Holmes wrote: "I have no faith that reason is the last word of the universe. I know nothing about it."[79] The only sort of reason Holmes seems willing to admit is instrumental reason (e.g., if I want *x*, I better do *y* to get it). Thus, "[r]eason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on [certain] terms. But that seems to me the whole of the matter."[80] And, for Holmes, "natural law" turns out to be no more than the run of mankind's "Can't Helps," that is, those things we find our selves having to believe.[81]

Holmes's rejection of non-instrumental reason was thoroughgoing and, in its Nietzschean way, profound. There is also, though, an element of silliness (which became more pronounced in his imitators) in the rejection of the place of non-instrumental reason in the life of the law, and it is important to spot the following point of entry. In the famous opening lines of his book *The Common Law*, Holmes opined that "[t]he life of the

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[78] Holmes, *The Path of the Law*, *supra* note 40, at 994.

[79] HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935 1314–15 (Mark DeWolfe Howe ed., 1953).

[80] OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 313 (1921).

[81] *Id.* at 311.

law has not been logic: it has been experience."[82] The logic-or-experience dilemma, however, is false.

On the one hand, it is true that, as the nineteenth century thundered along, the judges who grew increasingly self-effacing gave their opinions ever more of a logical form. Holmes knew what he was talking about when he observed that "[t]he language of judicial decision is mainly the language of logic. And," as he went on to say, "the logical method and form flatter that longing for certainty and for repose which is in every human mind."[83] However, Holmes was not right that the alternative to logic is brute experience. In the realm of human affairs, it is, rather, reflection (upon experience) leading to judgment, or, in the traditional phrase, practical reason.

As the central tradition of moral philosophy understood until recently, "'[p]ractical reason' is reasoning . . . about what *to do*."[84] Historically, it stood opposed to theoretical reasoning about what *is*. Confidence in theoretical reason operating in the modes of science has grown in inverse proportion to the moral philosophers' confidence that, when it comes to what *to do*, there is anything to "reason" about, except perhaps instrumentally.

In the tradition of which the common lawyers and judges were a part, however, it was the essential function of practical reason to be able to identify goods, that is, acts worth performing and states of affairs worth bringing into existence; e.g., learning is an act worth doing, self-mutilation is not; a just and reliable system of food distribution is a state of affairs worth bringing into existence, a system that reliably allows foods to spoil or be stolen is not. Now, there is no gainsaying the varied nature of the philosophical disputes about how all this works or does not work at the level of epistemology, but this much is clear: the traditional view was that there are goods, that we can know them, and what it is to know a good is exactly to know that it should be done or pursued.

Furthermore, as Mary Ann Glendon has observed, "[t]he common law method was never," despite what the common-law judges (caricatured by Holmes) typically said,

> a system of deductive and inductive logic; nor was it mere praxis unchastened by theory; nor was it just a system of reasoning by analogy with the principles of choice more or less up for grabs. Lawyers do, to be sure, employ all of those forms of reasoning, but the mode of analysis that is the hallmark of the Anglo-American common-law tradition is one that dates back to antiquity – dialectical reasoning.

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[82] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

[83] Holmes, *The Path of the Law*, *supra* note 40, at 998.

[84] Gerard Bradley, *Overcoming Posner*, 94 MICH. L. REV. 1898, 1905 n. 15 (1996).

Glendon continues:

> Dialectical reasoning, which came into disrepute among philosophers starting with Descartes, begins with controversy – with premises that are doubtful or in dispute – rather than with known or irrefutable givens. It does not aim at certainty, but at determining which of opposing opinions supported by strong arguments should be accepted. That should not lead one to regard dialectical reasoning as a mere form of rhetoric however (unless one is prepared to understand rhetoric as more than the art of persuasion). For dialectic at its best involves a "groping for truth." In the human sciences, we inch our way toward such glimpses of truth as are available to us, using the means of investigating facts, critical inquiry, dialogue, disputation, and defense of one point of view against another.[85]

Though we merely grope our way toward knowledge of what it would be truly good for us to do, incrementalism is *toto caelo* apart from indifferentism or skepticism.

The traditional view, then, despite the protestations of the legal logicians, did not suppose that practical reason knew its objects with the certainty associated with physics or mathematics. What is good, always is particular. It may in general be good to restore things to their rightful owners, but it would not be good to restore a borrowed axe to a now-insane neighbor. What is good is learned to be such through trial and error, and the experiments take place in the laboratory of life, where things are messy and precision is not always possible. As Aristotle taught, one should not seek in an area more precision than it allows. "Practical reason is a leaky vessel," but, as Glendon has observed, "it's the one we've got."[86]

The thesis, then, is this: beneath and generative of the probabilistic premises of the common law is practical reason working in its dialectical mode. We inch our way toward "glimpses of truth" about how we ought to order our conduct, including through law, to realize goods. To return to my placeholder definition, the common law insistence upon reasonableness presupposes "an order that: (1) reason does not make, in

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[85] Glendon, *Knowledge Makes a Noisy Entrance*, *supra* note 57, at 132. For extensive references regarding the nature of dialectic as a method of human knowing, see Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B. C. L. REV. 227, 286–87, 300–01 (2002).

[86] MARY ANN GLENDON, A NATION UNDER LAWYERS (1994). *See* LARRY ALEXANDER AND EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING (2008) (arguing that legal reasoning is the same sort of reason all people use in their practical affairs).

the sense that it is not an artifact of our practical agenda; (2) is presupposed by legal and moral deliberation, and is brought to light by theory and reflection; and (3) is in some way normative for conduct and for our legal artifacts."[87]

VI. NATURAL LAW AS REAL LAW

Now, before moving on, I want to pause to anticipate several possible objections or questions, which in turn will provide a bridge to considering natural law in its extraordinary mode of entrance. The first concerns the relationship between practical reason and "the law" we practice; the second concerns practical reason's relationship to natural or higher law.

In tackling the first issue, we can return to Steven Smith's *Law's Quandary*. One aspect of the story he tells about the quandary today concerns what people do when, first, they discover that law is not the self-contained geometry that some sometimes claimed that it was, but then, second, refuse to follow Holmes and the Legal Realists to the extravagant claim that "law" is simply a cover for the strategic, organized expression and wielding of power by another name. As Smith explains, one popular strategy for meeting this challenge has been "law and" – the move to supplement or correct the inherited legal materials with the insights of other disciplines. Candidates for this role have included economics, policy, philosophy, or even, "practical reason."[88] In the end, Smith rejects the "law and practical reason" strategy, and, for reasons to which I now turn, I think he is both right and wrong to do so.

As I have already suggested, individuals turning to precedents, statutes, and other sources in order to come to judgment on what the law is on a particular point just are looking for distilled practical wisdom, that is, they are reasoning about what *to do* in light of, though not exclusively in view of, what has been handed down for the community's authoritative guidance. If we were to describe this with the help of Venn diagrams, I would say, with two qualifications to be introduced in due course, that what we have is not practical reason *supplementing* law, but, rather, law itself as a *subset* of practical reasoning. Law is that subset of practical reasoning that is *either* promulgated to the community *or* generated by the community itself for itself, and potentially given coercive effect by him or them who have care of the community, for the common good of that community.

The first qualification would be that, obviously, sometimes people engaged in practical reasoning in law, as elsewhere, draw on the products of theoretical reasoning, as when a bureaucrat at the Environmental Protection Agency relies on scientific data when drafting a rule regarding

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[87] Hittinger, *Liberalism*, *supra* note 6, at 429

[88] SMITH, LAW'S QUANDARY, *supra* note 15, at 74–96.

treatment of whitefish so as to reduce the risk of botulism.[89] The rule is a piece of practical reasoning for the good of the potential white-fish eating community, and its quality is in part a function of whether the science behind it is sound. Law was never bereft of the learning of theoretical reason, otherwise it could not distinguish between, say, night and day, and the difference between night and day makes a difference in terms of what we should decide *to do*.

My reason for rejecting the "law and practical reasoning" strategy, then, is that human/positive law already was or is a piece of practical reasoning: there's no "and" about it.

Smith's principal reason for rejecting this strategy is different and instructive. Smith concedes that practical reason is at work in law, but suspects that what we do in law cannot adequately be accounted for as an exercise in practical reason. Smith points to ways in which some of what we do in law is ill-adapted for solving our practical problems. He points, specifically, to the "practical inefficacy of law's distinctive discourse."[90] To one scholar's observation that precedents carry "a wealth of data for decision-making" (what I have referred to as distilled practical wisdom), for example, Smith replies that there are or might be better ways of transmitting apt data for decision-making in law.[91] But of course, the imperfection of our methods of transmitting data through a temporally extended dialectical conversation is not evidence that they not methods of practical reasoning.

Another of Smith's reasons for rejecting the thesis that what we do in law can be adequately explained as practical reason in action is that people use practical reason all the time, as "business executives, arbitrators, school teachers and principals, coaches, [and] parents," but in no other field do we witness "the specific and extraordinary treatment of precedent and text that is so conspicuous in legal discourse."[92] Smith is certainly right that law's methods are unique; but then, our purposes in law are *sui generis*. Coaches, parents, business executives, whatever their authority and responsibility within their respective spheres, have neither the responsibility for the common good of all nor the coercive power of the state behind them. The *common* good's depending, as it does, on *both* stable rules *and* the capacity for disciplined, creative adjustment goes a long way in justifying the common law method. And again, the imperfection of our legal methods hardly subtracts from their being, in

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[89] *E.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

[90] SMITH, LAW'S QUANDARY, *supra* note 15, at 92–93.

[91] *Id.*

[92] *Id.* at 95.

fact, methods of practical reasoning.[93] If our memories were better or our legal communities small and simple enough, we might get along fine without text and with only a limited universe of precedents committed to memory.

Which brings me to the second objection I want to anticipate. I would call it the weak broth objection, and it states simply that practical reason, even if one grant all that I have said about it, does not rise to the level of law, let alone of higher or natural law. This is an altogether important objection, and my response is to admit the objection. But this is not the end of the matter, because I have not yet given the adequate explanation of practical reason that will bring out the element of higher law in it. Practical reason is not its own measure.

To be sure, you will find many proponents of natural law theory, such as John Finnis and those who follow his lead, maintaining that what we traditionally refer to as the natural law is – and is less misleadingly referred to as – practical reason, *with its own non-legal first principles*. As I mentioned earlier, Professor Finnis is among those who regard the "natural law" as law only in a qualified or analogical sense.[94]

The core of the central tradition descending from Thomas Aquinas, however, took a quite different view of the matter, specifically that natural law is law in the full sense of Aquinas's definition of law, to wit, an ordinance of reason for the common good, made by him or them who have care of the community, and promulgated.[95] And this is because the natural law is in us as a participation in the eternal law, that is, the Divine Mind providentially disposing all things to their natural and supernatural ends.

Mercifully, it is not my purpose here to give a full-dress account of the metaphysics of the traditional Thomistic doctrine of natural law.[96] My goal is only to indicate how, in the traditional doctrine, the natural law is truly law, and to indicate as much requires the introduction of a few scholastic distinctions that will risk exhausting the contemporary reader's patience. Aquinas's approach is unlike those that are current today. He does not arrive at his definition of natural law "simply by examining the

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[93] The preceding four paragraphs are adapted from my, *A Quandary in Law? A (Qualified) Catholic Denial*, 44 SAN DIEGO L. REV. 97, 105–06 (2007).

[94] *See supra* note 48.

[95] SUMMA THEOLOGIAE I-II 90.4 c.

[96] The best and most comprehensive treatment on Aquinas on the natural law is BROCK, *supra* note 48. Also excellent are RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD (2003), and RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY (1987), and Steven A. Long, *Natural Law or Autonomous Practical Reason: Problems for the New Natural Law Theories*, *in* ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION 165–96 (John Goyette et al. eds., 2004). On the metaphysics that subtends Aquinas's account of law, *see* FRAN O'ROURKE, PSEUDODIONYSIUS AND THE METAPHYSICS OF AQUINAS (2005).

meaning of the concept of law"[97] or baldly asserting—a la Austin—a novel definition. Instead, Aquinas proceeds by attending to "what is absolutely first in the order of being."[98]

Doing so, Aquinas discovers the Divine Mind governing the entire community of the universe. God rules irrational creatures solely by moving them from potency to act, but his rational creatures he rules both by sustaining the inclinations that move them toward their ends and – with this we come to the natural law—impressing upon their minds precepts of law.[99] "By the impression of created light God induces the creature to share in the rules and measures of the eternal law."[100] The decisive point is this, that practical reason is not *ab initio* self-norming: the natural law has been promulgated within the human practical reason, and it is man's share or participation in the eternal law.

The weak broth objection thus fails because human practical reason is governed by a share in the Divine Mind itself. God almighty has legislated in the human mind. The natural law is natural in terms of how it is received and held in the human mind, but the natural law's source and pedigree are supernatural.

Furthermore, the precepts of the natural law track and govern our given natures. As Aquinas explains, "the first precept of the natural law is that good is to be done and pursued and evil avoided," and, he continues,

> Since . . . good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law.[101]

The natural law, then, is a species of divine law that is held naturally in the human practical reason, and it legislates that humans are to act according to their natures, that is, to do and pursue what is good for them. When natural law is treated as a form of rationalism, without regard to the fact that what is legislated is what is good for humans and their communities, legalism is the result; when God the legislator is left out of the picture of the natural law, there is no lawgiver and, therefore, no

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[97] HITTINGER, FIRST GRACE, *supra* note 96, at 61.

[98] *Id.* at 61.

[99] *See* Long, *supra* note 96, at 178–92.

[100] HITTINGER, FIRST GRACE, *supra* note 96, at 98.

[101] SUMMA THEOLOGIAE, I-II 94.2 c.

law.[102] When, however, what God commands is what is by nature good for the creature, such higher law is not "now for something totally different."

Again, this sketch is hardly a complete account or defense of the traditional doctrine of natural law; indeed, it is only the most tendentious summary. Still, it is sufficient to my present purpose, which is to explain why a commitment to live according to the demands of practical reasonableness might – *just might* – itself be a commitment to higher law, whether we recognize it as such or not. If impressed upon practical reason are precepts of divine law, living according to practical reason is not to be self-norming but to be (so to speak) normed from above.

The second qualification I would add to my earlier argument that law is a subset of—not an add-on to—practical reason relates to this: practical reason can proceed to make law only by judging in conformity with the natural law. The natural law never enters our human living *ex proprio vigore*; it depends, for its entrance into human living, on the exercise of practical reason and the antecedent free choice of the will to follow the precepts of the natural law.[103] Natural law in its ordinary mode of entrance is just practical reason working itself out in our contingent system of governance, subject to the demands of the natural law. And this, believe it or not, is all part of the divine, providential governance of the universe. To define the natural or higher law correctly is important, above all, because it is God's law.[104]

VII. FUNDAMENTAL RIGHTS AND OUR CONSTITUTION

I turn now from the ordinary mode of the natural law's entrance, to its extraordinary mode. I refer to constitutionalism, the project of creating, possessing, and giving effect to the fundamental human law of a polity, and here my focus will be on the uniquely American problematic of living under the *written* Constitution that was ratified in 1789, and, specifically, on the role of the courts in exercising "judicial review." In mediating among a written constitution, a duly enacted congressional statute, and higher law, the courts, apart from the possibility of constitutional amendment, have the last word on how, as a matter of human law, we are going to live. To telegraph where I am going, I would say that when the natural law enters in its extraordinary mode, it does so on a continuum with the ordinary mode. That is to say, it is the work of practical reason,

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[102] HITTINGER, FIRST GRACE, *supra* note 96, at 62.

[103] Patrick McKinley Brennan, *A Quandary in Law? A (Qualified) Catholic Denial*, 44 SAN DIEGO L. REV. 97, 112 (2007).

[104] "Once divine providence is stripped of the predicates of law (a command of reason, on the part of a proper authority, moving a multitude toward a common good), moral theology is reduced, at best, to deism (which posits a creating but not a commanding God)." HITTINGER, FIRST GRACE, *supra* note 96, at 62.

under natural law, functioning in an historically extended conversation. After all, what tools other than practical reason and natural law and tradition do we have for figuring out what to do and what not to do? And, after all, constitutions are about what *to do* and what *not to do*.

From the Constitution's being a product of practical reason, however, it does not follow necessarily that the Constitution should be treated in the same way as our other legal artifacts. It is obvious that there exists a hierarchy among legal materials. As Chief Justice John Marshall famously wrote, "We must never forget that it is a *constitution* we are expounding."[105] But what are we to remember? Marshall's own answer is not the only one that has been offered.[106] Paradoxically, a constitution that is brought into being in order to allow the natural law to govern human living, can itself become a barrier to natural law's entry into the positive laws. But this is to get ahead of things.

As everyone knows, the amended U.S. Constitution enumerates certain rights, but these enumerated rights do not exhaust the rights that the Constitution is understood to guarantee.[107] As one learns in the introductory course in constitutional law, the principal vehicle for articulating, recognizing, vindicating, defining—it is hard to know the correct gerund to name the phenomenon—of unenumerated "fundamental" rights by the courts has long been known by the oxymoron "substantive due process." Once upon a time in American jurisprudence, in the era now captured under the epithet "Lochnering," the nontextual fundamental rights sounded in terms of property and economic interests.[108] Today, they include the rights to marry;[109] to have children;[110] to direct the education and upbringing of one's children;[111] to marital privacy;[112] to use contraception;[113] to bodily integrity;[114] and to abortion.[115] A lower federal court recently found a fundamental right to use sex toys.[116]

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[105] McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[106] On the Marshall Court and its style, *see* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888 61–200 (1985).

[107] *See generally* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (answering the title question in the affirmative); Thomas C. Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843, 863–64 (1978).

[108] Lochner v. New York, 198 U.S. 45, 61 (1905).

[109] Loving v. Virginia, 388 U.S. 1, 2 (1967).

[110] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942).

[111] Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

[112] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[113] *Id.*

[114] Rochin v. California, 342 U.S. 165, 172 (1952).

Plainly, this is a mixed bag, and some will gravitate more toward some items in the bag than toward others. For present purposes, however, I am going to stipulate that any constitution that did not recognize and protect the liberties to maintain bodily integrity, to marry, to marital privacy, to have children, and to direct the education and upbringing of one's children would be *pro tanto* untenable. Why? Such liberties are necessary if human persons are to be free to meet the demands of the natural law, that is, to pursue the goods commanded by the natural law and the conditions necessary for their realization.

But there is more—or, rather, less—going on here than what I have just said about the importance of protecting such liberties for the sake of satisfying the demands of the natural law. The Court does not state its claims as I have stated them; the Court does not indicate which liberties *should* be protected and *the natural law reasons* for protecting those liberties. Instead, with an exception that will shortly swallow the rule, the Court talks in terms of fundamental *rights*. What we need to inquire into, then, is what is the source – the ontological status—of such unenumerated fundamental rights.

The Supreme Court set out to clarify the bases for the recognition of a putative fundamental right in the 1997 case *Washington v. Glucksberg*, in which the argument was pressed that the Court should recognize the fundamental right of a mentally competent, terminally ill adult to commit physician assisted suicide. "Our established method of

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[115] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). For a listing of all the unenumerated rights found by the Supreme Court through 2003, *see* MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 1360–61 (3rd ed. 2003).

[116] Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008) (holding that Texas statute banning the sale of sex toys impermissibly burdened customers' substantive due process right to engage in private, intimate conduct of their choosing). *Cf.* Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007) (upholding a similar statute against due process challenge). *See also* Williams v. Pryor, 220 F. Supp. 2d 1257, 1295, 1298 (N.D.Ala. 2002) ("Does this fundamental right of sexual privacy between married and unmarried adults in private, consensual, sexual relationships encompass a right to use sexual devices like the vibrators, dildos, anal beads, and artificial vaginas distributed by the vendor plaintiffs in this action? Plaintiffs' substantial and undisputed evidence demands an affirmative response to that question . . . [T]his court accordingly concludes Alabama's prohibition on the sale of sexual devices imposes a significant burden on the right of married and unmarried persons to sexual privacy, in that it severely limits their ability to access, and thus to use, sexual devices within their sexual relationships."), *rev'd* Williams v. Pryor 378 F.3d 1232 (11th Cir. 2004). The district court that found the fundamental right had earlier invalidated the Alabama statute at issue on rational basis grounds (41 F. Supp. 2d 1257, 1293 (N.D. Ala. 1999)), a decision that the Eleventh Circuit also overruled (in relevant part), Williams v. Pryor, 240 F. 3d 944 (11th Cir. 2001). *See* Angela Holt, *From My Cold Dead Hands: The Constitutionality of Alabama's Anti-Vibrator Statute*, 53 ALA. L. REV. 927 (2002).

substantive-due-process analysis," the Court explained, "has two primary features." The Court continued:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed" . . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[117]

Summing up, the Court stated: "Our nation's history, legal traditions, and practices thus provide the 'crucial guideposts for responsible decision-making,' . . . that direct and restrain our exposition of the Due Process Clause."[118] If a fundamental interest is at issue, a state may not interfere with it "*at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest."[119]

Unsurprisingly, employing this test the *Glucksberg* Court concluded that there exists no "fundamental right" to physician-assisted suicide. On that point *Glucksberg* is still the law of the land.

However, a mere six years after *Glucksberg*, the Court decided *Lawrence*, the case that asserted that *Bowers* was "not correct" when it was decided, and it did so without so much as a mention of *Glucksberg*. How could it, and still come to the same conclusion? *Glucksberg* called for a "careful description" of the novel liberty being claimed, but in what terms would one give a careful description of the right claimed in *Lawrence*? An index of the difficulty of answering the question is the following heading introducing the subsection that includes *Bowers* and *Lawrence* in one of the leading American constitutional law casebooks:

> WHAT SHALL WE CALL THIS SEGMENT – THE RIGHT TO ENGAGE IN HOMOSEXUAL SODOMY? ADULT, CONSENSUAL SEXUAL CONDUCT IN THE HOME? THE AUTONOMY OF PRIVATE SEXUAL CHOICES? SEXUAL EXPRESSION AND CONTROL OF ONE'S BODY? UNCONVENTIONAL SEXUAL LIFESTYLES? THE RIGHT TO CONTROL ONE'S INTIMATE ASSOCIATIONS? THE RIGHT TO MAKE

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[117] Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997).

[118] *Id.* at 721.

[119] *Id.*

CHOICES ABOUT THE MOST INIMATE ASPECTS OF ONE'S LIFE? THE RIGHT TO BE LET ALONE?[120]

Which among these is or are, in the form stated, "deeply rooted in this Nation's history and tradition," let alone (because the test is conjunctive, not disjunctive), "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed?"[121]

In the end, *Lawrence* does not hold that any one of them is. The *Lawrence* Court held unconstitutional a statute that made it a crime to engage in "deviate sexual intercourse, namely anal sex, with a member of the same sex (a man)," but it did so without saying whether it was doing so, first, because there was a fundamental right at issue and the statute could not withstand the called-for "strict scrutiny" or, second, because no fundamental right was at stake and there was no rational basis for the criminal statute. As Justice Scalia wrote in dissent, "the Court simply describes petitioners' conduct as 'an exercise of their liberty' – which it undoubtedly is."[122] As would, equally undoubtedly, engaging in "prostitution, adult incest, adultery, obscenity, child pornography,"[123] bestiality, the torturing of (innocent) babies, same-sex marriage, and the use or distribution of sex toys.

If we cannot imagine our constitutional regime's recognizing a fundamental right to all nine of these exercises of "liberty," we have to ask on what principled basis the refusal would be made. Especially in a culture, such as our own, that expects "total justice"[124] from law, the question cannot be evaded.

VIII. NATURAL RIGHTS, NATURAL LAW, AND SELF-DEFINITION

To return, then, to the question about the source of the fundamental rights that vie for judicial recognition as part of our fundamental positive law, what I want to suggest is that *Lawrence* represents, like *Casey* (of which it is, relevantly, merely an application), an end to an authentic

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[120] CHOPER ET AL., CONSTITUTIONAL LAW 489 (10th ed. 2006). *See also* Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

[121] Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997).

[122] Lawrence v. Texas, 539 U.S. 558, 586 (2003), (Scalia, J., dissenting).

[123] *Id.* at 598.

[124] "Modern legal culture insists on a single, unified domain of fairness and legality and demands a single standard of justice. To satisfy this demand, every institution has to fall into line." LAWRENCE FRIEDMAN, TOTAL JUSTICE 91 (1985). *See also* Hittinger, *Liberalism*, *supra* note 6, at 441 n.51.

jurisprudence of natural rights.[125] *Lawrence* and *Casey* are not just wrong in terms of their specific results: they are wrong inasmuch as they abandon the project of identifying and giving legal effect to human rights. Some of this was almost inevitable; some of it was purely willful.

What I mean by "almost inevitable" is that the attempt to identify and spell out natural rights, as such, is an inherently incomplete enterprise. Although international declarations of human rights appear with ever greater frequency, the ontological status of human rights remains deeply and widely contested. There are philosophers who defend the proposition that humans have rights by nature, in the sense that individuals are by nature endowed with metaphorical but metaphysically-secure swords and shields in aid of their possessors' progress and protection. These rights are said to be possessions of individual human subjects as such, which is why they are sometimes also known as "subjective" rights. These natural human rights—individual or subjective—are said to be parts of the very furniture of the universe.[126] This is a not-uncommon view. But the better view, it seems to me, is that of Alasdair MacIntyre:

> [T]he truth is plain: there are no such [natural or human] rights, and belief in them is one with belief in witches and unicorns.
>
> The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.[127]

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[125] For the post-*Griswold* history of "privacy" up to 1990, *see* Hittinger, *Liberalism*, *supra* note 6, at 457–66. "[I]n little more than twelve years, the Court transformed privacy into an all-purpose natural right of the individual to be emancipated not only from statutory law, but also from the ordinary moral and cultural norms." *Id.* at 460.

[126] For an example of this, see the next footnote. On the notion of "subjective" right of an individual, as opposed to "objective" right, that is, what is right/correct under the circumstances, *see* RICHARD TUCK, NATURAL RIGHTS THEORIES 7–8 (1979); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS (1997).

[127] MACINTYRE, AFTER VIRTUE, *supra* note 56, at 69–70. MacIntyre continues: "The eighteenth century philosophical defenders of natural rights sometimes suggest that the assertions which state that men possess them are self-evident truths; but we know that there are no self-evident truths. Twentieth-century moral philosophers have sometimes appealed to their and our intuitions; but one of the things that we ought to have learned from the history of moral philosophy is that the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with the argument. In the United Nations declaration on human rights of 1949 what has since become the normal UN practice of not giving good reasons for *any* assertions whatsoever is followed with great rigor. And the latest defender of such rights, Ronald Dworkin concedes that the existence of such rights cannot be demonstrated, but remarks on this

The reason that the attempt to identify and spell out natural rights is, as I say, "an inherently incomplete enterprise," is that there are no good reasons to be believe that "natural rights" are part of the furniture of the universe. Obviously, this point is contestable, but for present purposes I simply assert it.[128]

I do so because, even if this is so, it does not necessarily follow that we should give up (what I have referred to as) "the project of identifying and giving legal effect to human rights." This is because it may be possible to derive natural rights from the natural law. Though (by my stipulation for purposes of the present discussion) natural rights are not part of the primordial furniture of the universe, it just may be that they are, as I think, derivable from it. By derive I mean not only that natural rights are not inconsistent with the natural law; not only that they can but need not necessarily follow as conclusions from the natural law; but, rather, that a doctrine of natural rights follows necessarily from the content of the natural law. This is so, I think, because if I say, *per* the natural law, that "it is not good for Brennan to be murdered," it would seem to be equivalent (at this level) to saying, "Brennan has a natural right not to be murdered." It is not *right* that Brennan be murdered.

In other words, "rights" are statements of the right/correct relationships among human persons and their communities. Insofar as natural rights describe such relationships between persons considered as free moral agents, those relationships are both a product of and subject to the whole of the natural law. Innocent persons have a right to life because the natural law establishes that the taking of innocent human life is an evil to be avoided, not a good to be done and pursued. The natural law grounds rights; it also conditions them. One might say that rights are the recipient's view of the relations established by the natural law, and it may be useful to speak about the natural law in the terms of the recipient's perspective, that is, in terms of natural rights.[129]

But even if this is true, still it is not the end of the matter. The tradition of natural rights discourse stretching back several millennia affirms that humans possess certain rights as a matter of higher law; these are what the natural law requires. Though there have been disagreements

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point simply that it does not follow from the fact that a statement cannot be demonstrated that this is not true. Which is true, but could equally be used to defend claims about unicorns and witches. Natural or human rights then are fictions . . . ." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (1976).

[128] For the argument, *see* MacIntyre, *supra* note 56, at 66–70. My own exploration of the issue is in Patrick McKinley Brennan, *The "Right" of Religious Liberty of the Child: Its Meaning, Measure, and Justification*, 20 EMORY INT'L L. REV. 129 (2006).

[129] This paragraph and the preceding one track closely and in some places paraphrase the analysis developed by Bradley Lewis in "Theory and Practice of Rights: Ancient and Modern," __JOURNAL OF LAW, POLITICS, AND CULTURE __ (forthcoming 2009). I thank Professor Lewis for sharing the article with me in draft form`..

about what these rights are, there has been remarkably much agreement at a high level of generality, such as life, liberty, property, and the pursuit of happiness. On the other hand, however, the tradition of natural rights discourse has not been content to rest at such a level of abstraction or generality. Nor could it.

The reason for this is that no one lives – no one has her rights vindicated or violated – in the abstract.[130] So, for example, the right to direct the upbringing and education of one's children is limited by the right of the state to protect the child's right not to be abused. The engagement of practical reason will come at the level of deciding, say, when parental discipline crosses the line and becomes child abuse. If justice is to be done, a judgment will be called for on this question, and what we think natural law and natural rights require will be material to reaching that judgment.[131]

Long is the historical list of those who have tried, at the level of theory, to put meat on the bones of human rights. It includes Roman jurists, a host of mediaeval philosophers and theologians and canonists, the Spanish scholastics of the post-Reformation period (such as Francisco Suarez, Robert Bellarmine, and Francisco Victoria), and in the early modern period such names as Samuel Pufendorf, Hugo Grotius, Emer de Vattel, Jean-Jacques Burlamaqui, Adam Smith, Francis Hutcheson, and many more. And to this list one would need to add all the twentieth and twenty-first century advocates of human rights, both individuals and groups, such as the U.N.[132] And to all these theorists, one would have to add the names of all the judges who have labored, mostly in anonymity, to make the natural law and natural rights effective where they matter most, that is, in particular judgments.

By the time *Lawrence* is over, however, the Court has taken itself (and its subjects) out of the millennia-long conversation, with all of its sub-conversations, by which persons, groups, and their governments have

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[130] "No one practically deliberates about, or debates, general values. . . . . In the real world, we deliberate about values in their particularity – as they conflict with other values, or as they are to be ordered according to a hierarchy, situation, or particular purpose." Hittinger, *Liberalism*, *supra* note 6, at 491.

[131] I say "material," rather than dispositive, because even a robust theory of the natural law such as the one I have suggested does not hold that prudence will not be required to resolve matters left underdetermined by the natural law. It is the "brooding omnipresence in the sky" caricatures that would eliminate the need for prudence.

[132] On the history of theorizing about the natural law and/or natural rights, *see*, e.g., TUCK, *supra* note 126; TIERNEY, *supra* note 126; KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT (1996); MICHAEL BERTRAM CROWE, THE CHANGING PROFILE OF THE NATURAL LAW (1977); LEO STRAUSS, NATURAL RIGHT AND HISTORY (1950); JACQUES MARITAIN, THE RIGHTS OF MAN AND THE NATURAL LAW (Doris C. Anson, trans., 1943); and FINNIS, NATURAL LAW, *supra* note 48.

discerned what rights humans have by nature, which among these should be given effect by government through positive law, and in which particular configurations. *Lawrence* works an evacuation, and in this it was only an application of that truly revolutionary idea first advanced by the Court in 1992 in *Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[133] This is the exception that swallows the rule: Self-definition supplants discovery of the moral order.

My immediate concern is not that this position is in error as a matter of philosophy or theology, but that it leaves the jurist with too little to work with. It is no wonder that *Lawrence* did not bother to try to claim that there is a fundamental right, or even a right *simpliciter*, to anything in particular. In a legal universe populated by self-defining people, there is no tradition, of natural law and natural rights discourse, to look back to with a view toward corroborating, extending, refining, or correcting it. Nor is there any predicting what such self-defining folk are going to demand next. "If what the Constitution protects is a general and abstract right of making self-defining decisions, then the Court must commit itself to the business of vindicating an indeterminate field of individual rights."[134] The unworkable result is that

> [t]hrough its judicial organ, government will always appear either to be in arrears on the scope of liberty (always catching up to latest revisions and concepts of free selfhood), or to be arbitrary in the way it sets determinate limits (the very purpose of which is to make power predictable). . . [A]s to rights, the Court is caught in a perpetual cycle of being over- and under-inclusive.[135]

To be adequate to the right, a legal regime would have to be clairvoyant. Failing that, "plastic and revisable selves need a plastic and revisable law."[136] As Russell Hittinger explains:

> There may well be a kernel of moral truth in the *Casey* dictum, but as it stands the "right" is under-specified. Until it is further specified, no one can know who is bound to do (or not do) *what* to *whom*. And so long as that condition persists, there is no *limit* to the government. On the one hand, we have a principle of unbounded individual liberty;

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[133] 505 U.S. 833, 851 (1992).

[134] Hittinger, *Liberalism*, *supra* note 6, at 431.

[135] *Id.* at 494.

[136] *Id.* at 492.

> on the other, a government responsible for enforcing that principle in a very arbitrary manner.[137]

Unbounded government is a perverse and illusory vindicator of personal liberty.

To look at this from another angle, up until *Lawrence*, those seeking to challenge government regulation bore the burden of demonstrating that their fundamental rights were being violated, in other words, that government was (as I would put it) getting in the way of their meeting the demands of the natural law. Under *Lawrence*, there would now seem to be a "presumption of liberty," with the result that, where there is a plausible claim to an exercise of liberty, government must justify the regulation.[138] But, according to its own profession, the Court is without resources to do so, because, as it said in *Lawrence* (quoting *Casey*): "Our obligation is to define the liberty of all, not to mandate our moral code."

To be sure, this idea, of defining liberty *without* making moral judgments, is incoherent and unworkable – and that is exactly the point that needs making. It is not possible "to define the liberty of all" without making judgments that are *moral*, that is, about what *should* or *should not* be done. And this just is the perennial domain of practical reason and natural law. In the same breath with which it claimed not to be reaching moral judgments ("not to mandate our moral code"), the *Lawrence* Court enacted *sub silentio* its preferred moral theory. No rational person can fail to see that a vindication of liberty still requires distinguishing it from license; the "liberty" to torture (innocent) children is not going to be conferred as a matter of legal "right," no matter how "essential" someone may think it is to her self-definition. To take a recent example, in arguing for "boundless respect" for individual conscience and consequent liberty, Martha Nussbaum quickly adds: "this principle does not imply that all religions and views of life must be (equally) respected by government. . . . If people seek to torture children . . . citing their religion as their reason, their claims must be resisted even though they be sincere."[139] In sum, "no one will consent to have their freedom bound in the civil order by someone else's idiosyncracies."[140]

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[137] HITTINGER, FIRST GRACE, *supra* note 96, at 130.

[138] Randy Barnett, *Justice Kennedy's Libertarian Revolution*: Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 35–36 (2002–2003).

[139] MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 19, 24 (2008).

[140] Hittinger, *Liberalism*, *supra* note 6, at 490. Hittinger continues: "To be sure, we may tolerate each others' idiosyncrasies, but this is not the same thing as being legally or morally bound to do so." *Id.*

In distinguishing between liberty and license/idiosyncrasy, the Court not only adopted the harm principle,[141] but also preferred a remarkably narrow definition of harm and causation.

> In *Lawrence* . . . the Court in effect held, in agreement with and at the urging of the libertarian Cato Institute, that the Constitution . . . enact[s] John Stuart Mill's *On Liberty*. The result, if consistently followed, would be to presume unconstitutional all laws limiting "liberty," i.e., substantially all laws, and put on the states or national government the burden of justifying them. As a corollary of this philosophic position and illustrating its potential, the Court explicitly rejected traditional standards of morality as a means of meeting the government's burden of justification.[142]

One reason we (presumably) cannot imagine our constitutional regime's recognizing a fundamental right to all nine of the acts mentioned above is that at least some of them violate the harm principle (which is now the unwritten moral "law" of the land) *as well as other moral doctrines that now have been excluded from constitutional jurisprudence*.[143] Instead of giving moral reasons, the Court pretends that it flies above morality—but in the belly of the plane a theory of morality that is inconsistent with natural law and natural rights is smuggled in. The

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[141] Here is the classic formulation of the harm principle by John Stuart Mill: "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . . That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport, ed., 1978) (1859). Although Mill himself later adopted a more complex version of the principle (that led to "a blueprint for a highly regulated society"), liberal theorists starting in the 1950s revived the original formulation. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 121–23 (1999).

[142] Lino Graglia, Lawrence v. Texas: *Our Philosopher-Kings Adopt Libertarianism as our Official National Policy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1140 (2004). As a side point, one might note that, ironically, just as the Supreme Court was adopting the simple version of the harm principle, others were realizing its inability to do the work being asked of it. "The original harm principle was never equipped to determine the relative importance of harms. Once a non-trivial harm argument has been made, the harm principle itself offers no further guidance. It is silent on how to weigh the harms, balance the harms, or judge the harms." Harcourt, *supra* note 141, at 193.

[143] On the traditional principles of the criminal law, see ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995).

harm principle is just as much a moral theory as the one developed by Aristotle in the *Nicomachean Ethics* or the one developed by Immanuel Kant in *The Groundwork of the Metaphysics of Morals*, only it is deeply impoverished. "The absence of legislative power is established by the right of the individual to be self-norming. . . . The individual . . . is under neither a higher nor a lower law, but is a law unto himself."[144]

As I said at the outset, taken for all it is worth, a right to self-definition is limited only by the human resources for self-destruction. But, to borrow a familiar phrase from another context, the Constitution is not a suicide pact. By focusing attention on the traditions of the American people, *Glucksberg* had been an attempt to stave off this result, which had been foreshadowed by *Casey*: The American moral tradition is not simply Millian. But if, therefore, *Glucksberg* is to be commended for refusing to allow the Court unilaterally to promote its own preferred moral theory (to the exclusion of other strands in the tradition), we should notice that *Glucksberg* is itself a symptom of our collective problem. The *Glucksberg* opinion says nothing about the existence of natural law or the natural rights that derive from it, nothing about what humans are and what is good for them, nothing about anything with ontological punch.[145] The *Glucksberg* test is positivistic, in the sense that it takes our society's given morality as far as we can go for purposes of legal justification—there is, in other words, no possibility of having a conversation about what is in fact *good* for humans *to do*. *Lawrence* promptly made *Glucksberg* its prey[146], but *Glucksberg* had already rendered human rights prey to the contingency of the past. Under *Glucksberg*, the source—and limit—of our rights is what our history happens to give us.

But one would not want to press this criticism of *Glucksberg* too far. For the reasons developed above,[147] the opinion's unwillingness to call attention to the pre-historical, ontological status of rights was an exercise in prudence; its refusal to leap to an imagined ahistorical meeting with the objects of its inquiry was a piece of moral realism. We never stand face to face with the natural law or natural rights in all their resplendence; as I have argued, knowledge of the natural law and rights enters historically, in the same history as the one in which we do our deliberating and deciding. History and tradition, though not the last word,

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[144] HITTINGER, FIRST GRACE, *supra* note 96, at xxxii. Some of the remote philosophical and theological sources of sovereign, self-defining selves are developed in JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE AND SELF (2008) (The Gifford Lectures).

[145] Smith, *Glucksberg*, *supra* note 20, at 1589–91.

[146] "[T]he rejection of the *Glucksberg* test [in *Lawrence*] is not only unacknowledged and unexplained, but it is a total rejection." Nelson Lund and John O. McGinniss, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1579 (2004).

[147] *See supra* sections II-IV.

are our point of entry to knowledge of whatever is not historically contingent. Though the tradition may stand in need of correction and revision going forward, these will not be possible if we live every day, as Descartes set out to do, as if it were our first. The dialectical argument must go forward, the conversation must bring the past to bear in order to face questions about the future in an informed way.

The question is how to discipline and guide inquiry when novel questions of natural law and right are pressed, a question on which the *Glucksberg* Court considered itself incompetent to offer any guidance. I have suggested that the common law method of dialectical reason adding a layer of intelligence is the *ordinary* road to giving temporal effect to natural law and the natural rights that derive from it. "[A]judication under the Due Process Clauses is like any other instance of judgment dependent on common-law method, being more or less persuasive according to the usual canons of critical discourse."[148] One cannot, I think, rule out *a priori* that there will be moments when genius or prophetic intervention will prompt conspicuous strides forward (or what appears to be forward), but these will be the exception. Natural law and the derivative natural rights are about what is *good* for individuals and their communities, and the discoveries of goods are ordinarily the deliveries of temporally extended discussions that can engage, as necessary, in a process of self-correction. "Natural or fundamental rights [are] not derived by a kind of Cartesian reasoner who only consults his own mental geometry,"[149] as Justice Douglas demonstrated he understood in *Griswold*:

> We deal with a right of privacy other than the Bill of Rights: older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[150]

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[148] Washington v. Glucksberg, 521 U.S. 702, 769 (1997). (Souter, J., concurring in the judgment) (discussing and endorsing the rationale of Justice Harlan's dissent in *Poe v. Ullman*).

[149] Hittinger, *Liberalism*, *supra* note 6, at 452.

[150] Griswold v. Connecticut, 381 U.S. 479, 486 (1965). The *Glucksberg* Court formalized and organized an approach to "tradition" for purposes of deciding what rights to recognize under the "substantive due process" heading. However, for the reasons I have developed, tradition is ordinarily the only – not just one possible – source of insight into the rights that people by nature possess, *assuming* that the object of inquiry via tradition is what precedes tradition, to wit, natural law and natural rights. Until recently, it went without saying that tradition was the courts' entrée to resolving novel questions

IX. SPEAKING THE NATURAL LAW

My argument has been that what we do in creating, sustaining, and developing a legal system is, ought to be, and ought to be understood to be the work of discovering and making effective, in our common and individual living, the natural law and the natural rights that derive from it. That work falls variously to citizens who elect legislatures, legislators who draft and pass laws, administrators who implement such laws, and so forth. And it will also fall to judges, those whose work has been my principal focus in this Article, in various modes, including "common law" judging, statutorily prescribed judicial review of administrative action, and, most conspicuous, the judicial recognition of unenumerated human rights in the exercise of constitutional judicial review.

But in arguing that the judicial office should be both created to be and understood to be a contributor to the project of making the natural law effective in our living, I do not invite a free-for-all. For government to be subject to the natural law alone, and to no intermediate laws, "is the core of political absolutism or tyranny."[151] I have argued that at every point the exercise of the judicial function should be, as I have put it, porous to pre-positive law sources, but I have stressed that the question of "how porous" is not to be answered by consulting a Platonic Form. But how, then, are the metes and bounds of the judicial office to be determined? A complete answer to this question would require more space than I have available here, but a suggestive, skeletal answer will serve to draw the threads of my argument together. The answer lies in the people's duty of self-governance.

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regarding rights. The Court's recent, more self-conscious attention to tradition has generated an interesting, largely critical literature. Judge Michael McConnell commends a tradition-minded approach (as opposed to freewheeling philosophical approach), but perhaps McConnell's analysis suffers from insufficient attention to what precedes history. *See* Michael W. McConnell, *The Right to Die and the Jurisprudence of History*, 1997 UTAH L. REV. 665, 668 (1997). Likewise, Justice Scalia's adherence to the narrowest possible tradition with respect to a proposed right (*see* Michael H. v. Gerald D., 491 U.S. 110 (1989)) begs the question as to whether the inherited position is the result of reasoning or, say, prejudice. *See* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1989); Laurence Tribe and Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). *Cf.* David M. Wagner, *The Man Who Declines to Be Socrates: Justice Scalia, Truth, and the Jurisprudence of Tradition*, 12 WIDENER L. REV. 473 (defending the Court's position on MacIntyrean grounds, but concluding, *pace* the analysis of the present Article, that our courts have no role in developing tradition). On what the *Glucksberg* Court was trying to accomplish by hide-bound refuge in tradition and formalism, *see* Smith, *Glucksberg*, *supra* note 20, at 1589–91.

[151] JACQUES MARITAIN, MAN AND THE STATE 31 n.12 (1951). Justice Scalia puts it this way: "[A] rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all." Michael H. v. Gerald D., 491 U.S. 110, 127 (1989).

One of the recurrent missteps in the contemporary jurisprudential battle between liberals and conservatives about the judicial function is bald assertion—from both sides, though with different content—about what judges can and cannot properly do. It is the *baldness* of the assertions that is the principal trouble. To take a leading example, Ronald Dworkin has famously developed a theory of an ambitious judicial role, but he has done so without apparent regard for the possible difference between the federal judicial role, on the one hand, and the respective judicial roles of the fifty states, on the other.[152] These roles have been created by different bodies politic, at different times, and, at least potentially, for different purposes. The created roles may in fact turn out to be the same, but determining what the respective roles are would be, I maintain, a matter of determining what the people who set up those various governments in fact did.

I maintain that this is the question – *what the people have in fact done* – because, as nearly everyone in our culture believes, the people are possessed of a right to engage in self-government. Discharging their right to govern themselves, the people create structures of governance that necessarily include offices. What the metes and bounds of those offices are, is a question of what the people decided. As Paul Bator has explained, "The judicial power is neither a Platonic essence nor a pre-existing legal classification. It is a purposive institutional concept, whose content is a product of history and custom distilled in the light of experience and expediency."[153] The question presented, in figuring out what given judges can and cannot do (as a matter of constitutional law), is the question of how wise and smart the framers have *in fact* been. Not all framers or groups of framers are created equal, but it would be a usurpation of the people's common right for individual judges or courts to take more (or less) than the people had allotted to them.[154]

This is one part of the equation, what follows from the people's right to govern themselves. The other part, which is the part that is more readily overlooked, is ontologically prior: the people's undoubted right to govern themselves derives from—and is therefore governed by—the natural law. The right to self-government is not an exception to the

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[152] Brennan, *Realizing the Rule of Law*, *supra* note 85, at 322–23.

[153] Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264–65 (1990).

[154] "Obedience to properly constituted authority is not a mere side-piece of the higher law tradition. Positive law tells us who has authority under specific institutional constraints. Therefore, whether any branch or officer of government has usurped authority is a question of positive law. But usurpation is forbidden by the natural law. Presumably, this is why the Constitution does not have to include a precept forbidding its officers from transgressing the positive law." HITTINGER, FIRST GRACE, *supra* note 96, at xxxvii.

derivative status of natural rights vis-à-vis the natural law. It is because the people are under a duty to obey the natural law that they are *both* required to *and* competent to set up government: *required*, because the duty to live by the natural law is not delegable, and the natural law itself does not include all the legal content, let alone the enforcement mechanisms, that are necessary to successful human living; *competent*, because the natural law gives them a standard of judgment that assures the possibility that their governance can avoid arbitrariness by being *legal*.[155]

I should elaborate this last point, about avoiding arbitrariness by being legal, because it really is the heart of the matter. On the natural law account that I sketched above, every human being is possessed of a real law—the natural law—according to which he can reach legal judgments. Moral judgments, whether by individuals in private capacities or by individuals in public office, have the potential—the exigence—to be in accord with law. By returning to the insight that morality itself is legal, that the natural law is real law, we will be saved from the worry that judicial introduction of morality into law is inevitably a legally ungoverned enterprise.[156] Equipped with a real law according to which they can reach judgments, the people need not be the victims of official arbitrariness or institutionalized self-definition; they can and should call for rule according to the natural law. And, one might add, if they are forced to live under a regime that is characterized by arbitrariness, "law" that represents a gross or systematic deviation from the natural law, they will possess, under that same natural law, a legal, ontologically rooted ground of resistance, perhaps even revolution.[157]

Prescinding from the situation of revolution, different peoples and their respective cultures will reach different decisions about how to make the natural law effective in their living, and, as I have already argued, the first question for a sitting judge will be what decisions the people, in setting up (or later amending, in the required way) their government, made regarding the judicial office. To the extent that the people left the judicial way open to the natural law, then it will be a question of discretion or

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[155] "The right of the people to govern themselves proceeds from Natural Law: consequently, the very exercise of their right is subject to the Natural Law. If Natural Law is sufficiently valid to give this basic right to the people, it is valid also to impose its unwritten precepts on the exercise of this same right." MARITAIN, MAN AND THE STATE, *supra* note 151, at 48.

[156] *See*, e.g., SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13–44 (1990) (arguing that constitutional interpretation is a political, not a legal, act). *Cf.* Dean Alfange, Marbury v. Madison *and Original Understandings of Judicial Review*, 1993 SUP. CT. REV. 329, 342–49 (arguing the opposite).

[157] HITTINGER, FIRST GRACE, *supra* note 96, at xxvii ("The individual's rightful liberty vis-à-vis society derives from the proposition that the individual is already under another jurisdiction."). *See also* 2 ALASDAIR MACINTYRE, *Natural law as subversive: the case of Aquinas*, in SELECTED ESSAYS 41, 49 (2006).

prudence on the part of the judge or court. But, drawing upon the argument of the early part of this Article, I want to make a further point, which goes to why, in general, it will be wise for people to set up judicial offices that, at least to some extent, allow judges "directly to speak the natural law."[158]

By "directly to speak the natural law," I mean exactly that judges should be allowed to make law (in accordance with the natural law and in the way delimited by relevant positive law), and the principal reason is that, at least ordinarily, judges will be in a better position to engage in the dialectical argument by which the natural law can be discovered and implemented. Of course, at the level of human biological potential and limit, legislatures and the legislators that constitute them are in the same epistemic boat as judges are in: the leaky vessel that is practical reason. No more than a seat on the bus does a seat on the bench give the seated one special access to moral truth. But there are better and worse conditions in which to use and develop practical reason, and the typical judicial circumstances fall on the better end of the spectrum.

The reason for this is complex, but the core of it as follows: in our legal culture, judges, unlike legislators and legislatures, are required to give reasons. It is true that legislators often give explanations for what they are up to in proposing or supporting legislation, but there is little by way of culture that demands that their reasons be argued rather than asserted. Legislators can often get by with progandistic, half-hearted explanations for their decisions. As Vining observed, legislation is "the arbitrary that we allow – but limit."[159] Judges have the last word, and, in our legal system, they must ordinarily give words and arguments in favor of that last word. All of which underlines the point that judges' words—their reasons—must be given both honestly and out of respect for the judicial office and tradition of this culture.[160] Sometimes judges fall short, and sometimes they are criticized for their failures.[161] *Glucksberg* worried

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[158] This phrase, which I have used throughout, is from HITTINGER, FIRST GRACE, supra note 96, at 83.

[159] VINING, *supra* note 43, at 253

[160] Some of the best of this considerable literature are H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM (1993); JAMES BOYD WHITE, THE EDGE OF MEANING (2001); JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE (2006). *See also* KEITH E. WITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (discussing the political construction of judicial responsibility to maintain the Constitution).

[161] *See* WHITE, LIVING SPEECH, *supra* note 160, at 74–75 ("As for judges, the need to be present in one's speech and writing is even more crucial, for there are serious public consequences. The judge who simply articulates phrases, concepts or ideas in an

that judicial "'guideposts for responsible decisionmaking . . . are scarce and openended'"[162] in the context of unenumerated rights. But this would be true only in the abstract. Tradition offers the starting points of many and sometimes competing arguments from which to add a layer of intelligence.[163] If this sounds banal, it's the banal that we are or can hope to be.

CONCLUSION

To the conservative worry that the risk of judicial manipulation of the natural rights inquiry is sufficient reason to deny legal appeals to the natural law in the judicial process, I reply that that such a denial will inevitably eventuate in a barrier to the basic project of making the natural law effective in our human living.[164] No written instrument can be complete or exhaustive of the scope of the natural law that we come to know only incrementally. Nor is it enough to say that the people can amend the Constitution. As Aquinas notes, the act of judgment is "like a particular law regarding some particular fact,"[165] and, consistent with the concomitant demands for predictability, stability, accountability, and non-usurpation, judgment should be as right as our reasoning powers will allow. Again, "law is evidence of belief far stronger than academic statement and introspection can provide," and what it reveals is that, though it has been a question of degree and kind, there has never been a time when American constitutional decision-making has been immune to the claims of natural law and natural rights. In the words of the first Justice Harlan:

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unmeaning way can likewise not be attended to, for he is not present as a mind or person. This means that his opinion cannot be read with the care and attention lawyers are trained to give authoritative texts in the law; it means, too, that he in a real way cannot be responsible for what he is doing. This kind of writing, to use the distinction made prominent by my colleague Joseph Vining, is authoritarian, not authoritative. It is part of what Simone Weil would call the empire of force.").

[162] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (quoting Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992)).

163 Justice Cardozo captured the process as well as anyone: "[I am not] concerned to vindicate the accuracy of the nomenclature by which the dictates of reason and conscience which the judge is under a duty to obey, are given the name of law before he has embodied them in a judgment and set the *imprimatur* of the law upon them. I shall not be troubled if we say with Austin and Holland and Gray and many others that till then they are moral precepts, and nothing more. What really matters in this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133 (1922).

[164] HITTINGER, FIRST GRACE, *supra* note 96, at xxxv ("The default positivism of the political Right is at odds with its commitments on many other issues.").

[165] *Id.* at 75.

> [T]he courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.[166]

Evidence of what we do in law is evidence far more probative than what we say in law. And with respect to what we do in law, it remains always a question of degree, and perilously.

As H.L.A. Hart observed some years back, no legal system could long survive if it did not give effect to at least a minimum of the natural law.[167] Hart himself was in favor of making a strong and clear distinction between positive law and the natural law (or morality), and, as I have stressed, the virtue of not collapsing the distinction between positive law and morality is that the conceptual clarity about what morality demands in turn allows one a critical perspective on the positive law.[168] No functioning legal system is perfect, but a legal system that is not calibrated to introduce natural law and rights into human living, as circumstances allow or require, is unworthy of creatures who are under the natural law.

This is just the hitch, however—the widespread and expanding belief that we have liberated ourselves from the natural law, the source of our natural rights. The natural rights content of our laws is leaking or, rather, being squeezed out. And this is why I have insisted that a recovery of the tradition of natural law and natural rights discourse must insist upon the claim that the natural law is true, divine law – not just one moral theory among many others on a menu from which a selection can be made at will. Brian Tamanaha has worried at length that law as we practice it has become a means to an end, a mere tool for bringing to pass people's transitory preferences.[169] But what Tamanaha seems not to see is that what *alone* can save this from happening is the possibility, as described in this Article, that the creation of positive law is the mandated extension and implementation of higher *law*: It can be law all the way down, because it's law all the way up. Formalism, along with the other allegedly non-

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[166] Monongahela Bridge v. United States, 216 U.S. 177, 195 (1910) (discussed in Hittinger, *Liberalism*, *supra* note 6, at 456 n.128).

[167] H.L.A. HART, THE CONCEPT OF LAW 185–89 (2d. ed. 1994). As Hittinger points out, however, "Hart's natural law is neither a higher law nor a lower law. It represents those contingent but pervasive aspects of the human predicament which provide the background problems and motivations for positive law." HITTINGER, FIRST GRACE, *supra* note 96, at xiii.

[168] *See* SIR NEIL MACCORMICK, H.L.A. HART 160 (1981)

[169] TAMANAHA, *supra* note 17.

instrumentalist possibilities that Tamanaha explores, is itself an "empty vessel" that lacks the legal backbone that can arrest the instrumentalist slide in its tracks.[170]

But if, as I have argued, the solution is a recovery of the traditional understanding of the natural law, the question must be faced: Does one have to believe in God to know the contents of the natural law? Aquinas thought not; as he saw things, we humans need only know what is good for us. Understanding that the natural law is about what is good for us, not merely a legalistic intrusion or a ghostly code of commands, is the key: We have privileged access to ourselves and to what reflection upon experience shows to be good for us and those like us.

Aquinas also thought that it was a matter of simple inference that God legislates that we must do what is good for us, but few today are prepared to make the inference that Aquinas thought was easy.[171] Are we therefore stuck in Smith's quandary? Do we, as Justice Scalia suggests, need to postulate—or perhaps even believe in—God if we are to have a legal system that is porous with respect to the contents of the natural law?

What I have tried to suggest is that *if* we are still capable of reasoning as our forebears did about what is *good* for us, then the answer is no. But that is a big if.[172] The contemporary scene is long on rights, thin on goods.[173] As a result, belief in a God who orders us to seek and to do what is good just might turn out to be, if you will, the incentive we need in order to stop pretending that we are infinitely pliable, self-norming, self-definers,[174] whose lives can be "define[d]" without

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[170] TAMANAHA, *supra* note 17, at 1; *see also id*, at 11–23 (discussing "non-instrumentalist" views of law). Tamanaha never pauses to explicate the traditional view according to which the natural law is a true law; his discussion of the "Medieval period" remains on the level of platitudes. Tamanaha's unsuccessful partial longing for non-instrumentalist law (that is not rooted in higher law) has been aptly described as "esoteric legalism." Adrian Vermeule, *Instrumentalisms*, 120 HARV. L. REV. 2113, 2125 (2007) (book review).

[171] "Make no mistake—St. Thomas thinks that a human agent ought to know, not just by argument, but by simple inference, that moral norms bind by virtue of something other than our own mind . . . . [T]he movement of the mind from the effect (moral truth) to the cause (God) is something that, in principle, falls to human reason." HITTINGER, FIRST GRACE, *supra* note 96, at 54.

[172] The now-classic denial is by ALASDAIR MACINTYRE, AFTER VIRTUE, *supra* note 56, at 263, but MacIntyre maintains that there can be exceptions. A tradition of accountable judicial reasoning might be one. *See id. But cf.* G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY: THE JOURNAL OF THE ROYAL INSTITUTE OF PHILOSOPHY 1 (1958) (arguing that it is impossible to do moral philosophy in the present age).

[173] *See* Hittinger, *Liberalism*, *supra* note 6, at 482.

[174] Thereby overcoming John Hart Ely's dilemma that "there isn't any impersonal value source out there to tap into." JOHN HART ELY, DEMOCRACY AND DISTRUST 72 (1980).

authority's making moral judgments. Belief in God can be hard work, and so is self-definition, at least as "difficult as what was required of the *homo oeconomicus* of the nineteenth century to lay transcontinental railroads."[175] But is it not easier to believe that there exists a God who made friends, play, Biber's *Missa Salisburgensis*, puppies, sunrises, willing sacrifice, love, lovers, procreation, and every other good thing possible in the first place, than it is to believe that there exists, as a freestanding feature of the furniture of the universe, a right to use sex toys?[176] Either way, God help us.[177]

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[175] Hittinger, *Liberalism*, *supra* note 6, at 486.

[176] "It should not be surprising that in a consumer-based economy, individuals come to expect large doses of freedom to choose their futures in the fashion of consumers. If the cultural and economic system lay upon us the burden to be rational shoppers – not theological enquirers – then it is reasonable to demand the liberty to enact these choices. Previous generations of Americans have claimed natural rights to whatever they deemed important. Why should we be any different?" *Id.* at 495.

[177] This last sentence is meant to evoke the end of the "prayer" that concludes Arthur Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979).