

## The Breakfast Club

### Constitutional Minute for 14 November 2023

#### Natural Law, A Primer

My responsibilities at the Foundation for American Christian Education (FACE) are quite varied: I coordinate this year's Lessons in Liberty lecture series, I manage the Hall-Slater Library, I help with technology at special events and, lastly, I'm the Managing Editor of a book project to produce the third volume in the Christian History of the Constitution (CHOC) series: entitled *The Biblical Foundations of the Constitution*. The volume will be a compilation of excerpts from primary sources from the founding period and a collection of essays from about a half dozen present day Christian writers and thinkers. I'm writing one of the essays which explores the connection between Natural Law and the U.S. Constitution. When I mention this subject to people today it is not unusual to hear the question: "What's Natural Law?" I thought it might be helpful to share a brief primer on that subject as my next contribution to Constitutional Minute.

#### What is Natural Law (aka The Law of Nature)?

You have no doubt heard law described many ways, such as eternal law, divine law, natural law, revealed law, common law, international law, human law, statute law and/or civil law, etc. I will distinguish these terms in a moment but first let's be clear about what law itself is.

*"Law,"* according to the great English barrister, Sir William Blackstone, is *"a rule of action dictated by some superior being."*<sup>1</sup>

Simple enough, right? Law identifies or describes what we should or should not do, it is a rule related to our action (or inaction).

**Eternal law (lex aeterna).** The eternal law can best be described as the "mind" of God or the expression of the mind of God in the created universe. God is eternal, He has no yesterday or tomorrow, no beginning, no end. He is the Alpha and Omega. He is omnipresent and omniscient. His mind or will, as we can call it, has order, has reason, and is discoverable, at least to the extent our feeble, sin-labored minds can comprehend.

**Natural Law (jus naturale).** Natural law is God's eternal law as it relates to God's creation, whether animate or inanimate. Physical laws which govern the movement of objects in time and space are a portion of the natural law. The other portion of the natural law concerns those creatures capable of moral action. This is sometimes also called the moral law or higher law.

Blackstone explains natural law this way: *"Man, considered as a creature, must necessarily be subject to the laws of his Creator... [A]s man depends absolutely upon his Maker for everything,*

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<sup>1</sup> William Blackstone, *Commentaries on the Laws of England*, Section the Second, Of The Nature of Laws in General.

*it is necessary that he should in all points conform to his Maker's will...This will of his Maker is called the law of nature. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws."*

The natural law is both "written upon our hearts"<sup>2</sup> and is also discoverable by investigation, reason, and experience. Before sin entered God's creation, the natural law would have been fully knowable, fully known by all human beings. But sin clouded the reasoning of mankind, and the natural law became less discoverable, more elusive.

**Common Law (jus commune).** Common law is today routinely called "judge-made law"<sup>3</sup> since it is comprised of the cumulative decisions of judges in cases where a statute law did not apply to the particulars of the case before the judge. But this is not the view of America's Founders. They held to the traditional view that judges did not make the common law, they "discovered" it. As judges faced cases where no statute, man-made law applied, they had to determine a just outcome for the case. They thought about the principles of natural law and "found" or "discovered" which of them most applied to the circumstances of the case before them. Over time, the collective judgements of Common Law judges became the custom of the society. A better term for Common Law is therefore "Customary Law."

**Revealed Law.** In his *Commentaries on the Laws of England*, Blackstone explains that portions of the natural law, those which God decided should not escape our clouded reason, have been revealed to man through Holy Scripture, becoming the Revealed Law or Divine Law, the Ten Commandments being a prime but not exclusive example.

**Civil, Municipal or Statute Law (aka Positive Law).** Laws made by human beings, i.e., legislators assigned the task of lawmaking, are called civil laws or statute laws. To distinguish civil law from natural law, Englishmen Jeremy Bentham, John Austin and others in the mid-nineteenth century originated the concept of "positive law" and "legal positivism."<sup>4</sup> Legal Positivism holds that man-made law is the only relevant law affecting humans. Natural law, if it exists (they say) is irrelevant to modern man.

I can summarize the various types of law thusly: The eternal law is God's plan for his creation. Natural Law consists of principles/laws designed to produce peace and harmony in human society. Common Law is natural law applied to specific circumstances brought before a judge or

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<sup>2</sup> Romans 2:15 and Hebrews 10:16.

<sup>3</sup> Wikipedia begins its article on Common Law with the statement: "In law, common law (also known as judicial precedent, judge-made law, or case law) is the body of law created by judges and similar quasi-judicial tribunals by virtue of being stated in written opinions." More at: [https://en.wikipedia.org/wiki/Common\\_law](https://en.wikipedia.org/wiki/Common_law).

<sup>4</sup> <https://plato.stanford.edu/entries/legal-positivism/>.

jury where no statute law applies. God revealed a portion of Natural Law in the Bible, making this Revealed Law. Positive Law or Statute Law is purely man-made law.

In Blackstone's view, the relationship between natural law and positive, man-made law is as follows: *This law of nature, [existing as long as mankind] and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this [law of nature]; and [whatever human laws] are valid derive all their force, and all their authority, ..., from this original.*

In short, man-made law in conflict with natural law, has no force and should be declared null and void. For instance, if a legislature were to pass a law declaring murder to be legal, this "law" should have no effect and should not command our obedience.

Now, before we go further, you should know there is a "branch" of natural law thinking which posits that there is a "natural law" which is inherent in the human condition, and which exists even if God does not. This atheistic natural law was expounded in Greece and Rome ( by Aristotle and Cicero, respectively) before the birth of Christ; it largely died off while the Christian Church was ascendent in society, and then was "rediscovered" during the Enlightenment.

**Did America's Founders Believe in Natural Law?** You bet they did! Thanks to the research of the eminent historian Forrest McDonald, we know the founders purchased and thought highly of the standard books on natural law of the time.<sup>5</sup> Although most founders held to a theistic source for natural law, you can find bits and pieces of atheistic natural law thinking in the founding period as well.

In his *Lectures on Law*, James Wilson, one of six men to sign both the Declaration of Independence and the Constitution, described natural law this way: *"That our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles.... There is only one source of superiority and obligation. God is our creator: in him we live, and move, and have our being; from him we have received our intellectual and our moral powers: he, as master of his own work, can prescribe to it whatever rules to him shall seem meet."*<sup>6</sup>

In *"An Address to the Committee of Correspondence in Barbados"* John Dickinson described it this way: *"Kings or parliaments could not give the rights essential to happiness... We claim them from a higher source - from the King of kings, and Lord of all the earth. They are not annexed to us by parchments and seals. They are created in us by the decrees of Providence, which establish the laws of our nature. They are born with us; exist with us; and cannot be taken from us by any human power without taking our lives."*<sup>7</sup>

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<sup>5</sup> <https://oll.libertyfund.org/page/founding-father-s-library>.

<sup>6</sup> *The Works of the Honourable James Wilson*, 1804

<sup>7</sup> <https://quod.lib.umich.edu/e/evans/n08059.0001.001?rgn=main;view=fulltext>.

In a newspaper debate with Reverend Samuel Seabury in 1774, nineteen-year old Alexander Hamilton wrote: *“Good and wise men, in all ages, have ... supposed, that the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensibly, obligatory upon all mankind, prior to any human institution whatever...This is what is called the law of nature...Upon this law, depend the natural rights of mankind.”*<sup>8</sup>

**Is there a connection between Natural Law and the Constitution?** The U.S. Constitution is itself a natural law document since the right of self-government, i.e., the right of a society to create a government for itself, is a natural law principle (see the Declaration of Independence). “We the People” have an inalienable right to build a government and then substitute that government with another when we think necessary to our happiness and safety. The Constitution directly references natural law once with a mention of the Law of Nations (in Article 1, Section 8) and Common Law (in the Seventh Amendment). Most of the rights secured by the Bill of Rights are natural, unalienable rights produced by natural law.

**Why Don’t You Hear Much About Natural Law Today?** In the late 1800s, Christopher Columbus Langdell, the Dean of Harvard Law School, incorporated Legal Positivism into Harvard’s curriculum, which up to that time had recognized natural law. Other American law schools soon followed suit. Today, outside of about six law schools in America<sup>9</sup> natural law, if it is studied at all, is presented as a quaint remnant of a bygone era. American judges will typically not allow natural law arguments in their courtrooms. In 1991, Clarence Thomas was criticized by Senator Joe Biden in his (Thomas’) confirmation hearing for having previously written that judges could and should consider natural law in their decisions.<sup>10</sup>

**Why Continue to Promote Natural Law?** Natural Law is the only logical source for natural, unalienable rights. Any theory of atheistic natural law as a source for unalienable rights doesn’t explain why these rights are unalienable. “Because we (humans) say so!” “Why does that make them unalienable?” I would then ask. “Because we say so!” See where this is going?

Without the support of natural law, all our rights are simply alienable, civil rights created by civil law by civil government; here today, gone tomorrow. The Progressive Left thinks of rights this way, which explains why they insist your right of free speech, for example, should be restricted to suppress any speech that makes them uncomfortable or puts them on the defensive.

There are many good books on Natural Law; anything by J. Budziszewski is a good place to start. Others include:

- A Biblical Case for Natural Law, 2012, David VanDrunen
- A Brief History and Critique of Natural Law Theory, 2003, Robert E. Fugate

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<sup>8</sup> Alexander Hamilton, *The Farmer Refuted*, accessed at: <https://founders.archives.gov/documents/Hamilton/01-01-02-0057>.

<sup>9</sup> Notre Dame Law, Regent Law, Liberty U. Law, and a few others.

<sup>10</sup> [https://en.wikipedia.org/wiki/Clarence\\_Thomas\\_Supreme\\_Court\\_nomination](https://en.wikipedia.org/wiki/Clarence_Thomas_Supreme_Court_nomination)

- A Concise History of the Common Law, 2010, Theodore F. T. Plucknett
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- The Common Law, 1998, Herb Titus
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- The Natural Rights Republic: Studies in the Foundation of the American Political Tradition, 2016, Michael P. Zuckert
- The Ten Commandments and the Influence on American Law, 2013, William Federer
- The World Under God's Law, 1964, T. Robert Ingram
- We The People, Keepers of Liberty; Biblical Law and the United States Constitution, 2015, Foundation for American Christian Education
- What We Can't Not Know: A Guide, 2011, J. Budziszewski
- Written on the Heart: The Case for Natural Law, 1997, J. Budziszewski

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