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Judicial Review and the Law of Nature

Richard H. Helmholz

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Judicial Review and the Law of Nature

R. H. HELMHOLZ*

This Lecture deals with one aspect of the history of the law of nature—an important aspect. It raises a question in which historians and practicing lawyers in the United States have long taken a special interest, most often seeking to support, but sometimes also to criticize, the institution of judicial review.¹ The Lecture begins with an outline of where things now stand in understanding the relationship between the law of nature and judicial review of legislation. It then moves to a presentation of the Lecturer's own research in European case law, which (he hopes) will shed some new light upon what that relationship meant in practice.

I. THE LAW OF NATURE

The law of nature was (and is) one approach to jurisprudence, distinctive because it posits a necessary connection between law and morality.² Traditional natural law theory began with the assumption that God had implanted certain principles of right conduct and justice in our hearts, and that these principles furnish a correct foundation for all positive

* Ruth Wyatt Rosenson Distinguished Service Professor of Law, University of Chicago. Judicial Review and the Law of Nature, Kormendy Lecture at the Ohio Northern University College of Law (Oct. 16, 2012).

1. *See generally, e.g.*, EDWARD S. CORWIN, THE 'HIGHER LAW' BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955); CARL JOACHIM FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 178-88 (2d ed. 1963); CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORD. L. REV.* 2269-70 (2001).

2. A useful and nuanced introduction is found in BRIAN BIX, *JURISPRUDENCE THEORY AND CONTEXT* 65-76 (3d ed. 2004).

human law.³ So, for example, the Ten Commandments' admonition "Thou shalt not bear false witness" was a recorded expression of one such principle.⁴ Although in practice there were exceptions to this Commandment, as there were to most natural law principles, in general it was thought to be the proper task of the positive or municipal law to put this tenet of the law of nature into concrete form—making perjury a crime, ruling out the testimony of witnesses who lied, and perhaps even invalidating contracts tainted by one party's deceit.⁵ These instances were regarded as expressions of the Commandment's larger intent.⁶ That intent was to ensure that human law worked to secure fidelity to the aims of justice and the common good.⁷ Positive law was to put those aims into effect. It might do so in various ways—that is one reason that different legal systems existed—but those ways were controlled in scope by the law of nature.⁸

Natural law's existence was accepted by virtually all Western lawyers before the mid-nineteenth century.⁹ Many of the most famous legal writers of past centuries dealt with the subject at length; indeed they created a literature on natural law that both attracts and repels by its size and complexity.¹⁰ The great names are familiar: Cicero, Thomas Aquinas, Francesco Suárez, Hugo Grotius, John Locke.¹¹ However, there were many, many others, too numerous and sometimes too obscure to count or remember. Who among modern students of the law has encountered Thomas Rutherford (1712-1771), author of *Institutes of Natural Law*?¹² Very few, it seems, but Rutherford's work was cited with surprising frequency in American case law of the early nineteenth century,¹³ and his

3. See THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS' DE JURE BELLICAC PACIS*, bk. I, ch. 1, § 1 (1754-56).

4. See generally Richard J. Ross, *Distinguishing Eternal from Transient Law: Natural Law and the Judicial Laws of Moses*, 217 *PAST & PRESENT* 79 (2012).

5. See *id.* at 82-93 (discussing the balance and relationship between the eternal laws of God and the transitory local rules, as well as the codification of eternal laws).

6. See *id.*

7. See *id.* 82-96, 103, 107 & n.62.

8. *Id.* at 91.

9. See the lists and accompanying evidence in R. H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 *AVE MARIA L. REV.* 1, 5-12 (2005) [hereinafter Helmholz, *Natural Law and Human Rights*]; R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 *U. PA. J. CONST. L.* 401, 404-08 (2007) [hereinafter Helmholz, *The Law of Nature*].

10. Helmholz, *Natural Law and Human Rights*, *supra* note 9, at 11-12.

11. See *id.* at 4, 11 & n.58, 14; Helmholz, *The Law of Nature*, *supra* note 9, at 407.

12. RUTHERFORTH, *supra* note 3.

13. At least seven times in United States Supreme Court opinions between 1780 and 1860. See, e.g., *Scott v. Sanford*, 60 U.S. 393 (1857); *Van Rensselaer v. Kearney*, 52 U.S. 297 (1851); *Livingston v. Moore*, 32 U.S. 469 (1833); *Comegys v. Vasse*, 26 U.S. 193 (1828); *L'Invincible*, 14 U.S. 238 (1816);

treatise went through at least two English and also two early American editions.¹⁴ Among other things, he dealt with the subject of this Lecture, human actions that were of no effect because they were contrary to the law of nature.¹⁵ Rutherford's *Institutes* was also only one example among many. The ubiquity of similar treatises on the law of nature is one sign of the large footprint it left in earlier centuries.¹⁶ Indeed it is difficult to discover a jurist writing before 1850 who expressed any doubts about the existence and importance of the law of nature in the regulation of human society.¹⁷

Today, things have changed. Although it still has its admirers,¹⁸ and a dramatic "come-back" is sometimes proclaimed for it,¹⁹ in reality natural law has lost its hold on the working assumptions of most lawyers.²⁰ Positivism holds sway.²¹ The legislature writes the laws according to the desires of its members. If constitutional, the courts enforce them as written. The extent of and the reasons for this change are not the topic of this Lecture, but it is important to take note that modern skepticism about the value of natural law should not fix our assessment of its place in the past. At the time of the founding of the American republic, its acceptance was as automatic and intuitive to lawyers as basic principles of human equality are

Ware v. Hylton, 3 U.S. 199 (1796); United States v. Lawrence, 3 U.S. 42 (1795). The author's name is also sometimes spelled Rutherford.

14. Editions were published in London 1754-56; Cambridge 1779; Philadelphia 1799; Baltimore 1832. See Search Results for "au: Thomas Rutherford", OCLC WORLDCAT, <http://www.worldcat.org/search?q=au%3AThomas+Rutherford&qt=advanced&dblist=638> (last visited Mar. 8, 2013).

15. See RUTHERFORTH, *supra* note 3, bk. I, ch. 2.

16. See generally Helmholz, *Natural Law and Human Rights*, *supra* note 9.

17. *Id.*

18. See generally, e.g., ROBERT GEORGE, IN DEFENSE OF NATURAL LAW (1996); JAVIER HERVADA, CRITICAL INTRODUCTION TO NATURAL LAW (Mindy Emmons trans., 2006); Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035 (1994).

19. See generally, e.g., Anthony Lisska, *Natural Law*, in THE OXFORD HANDBOOK OF MEDIEVAL PHILOSOPHY 622, at 624-25 (John Marenbon ed. 2012).

20. See Christopher Wolfe, *Thomistic Natural Law and the American Natural Law Tradition*, in ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION: CONTEMPORARY PERSPECTIVES 197, 219 (John Goyette et al. eds., 2004) (describing study and use of natural law "a small backwater in contemporary intellectual life."); see also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 99 (2004) (describing the "loss of faith in natural law" and the more complex situation this has created for securing the rule of law).

21. For a useful guide marked by sympathy for the law of nature, see generally N.E. SIMMONDS, LAW AS A MORAL IDEA (2007). For some of the problems created by the loss of contact with natural law, see generally, e.g., Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491 (2009); Bruce P. Frohnen, *A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 599 (2012); Alasdair MacIntyre, *Theories of Natural Law in the Culture of Advanced Modernity*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 91 (Edward McLean ed., 2000).

to us today.²² If there were doubters about natural law's existence then, as there may well be doubters about human equality now, they kept quiet about it.

One consequence of natural law's general acceptance across generations and throughout the Atlantic world was that statutes were assumed to be concrete expressions of moral principles, and unless they were, they were not true law.²³ Herein lies the connection between natural law and judicial review, one that is often regarded as self-evident.²⁴ Most famously, Thomas Aquinas held that a human law contrary to the law of nature was not a true law, but a corruption of the law.²⁵ Statutes that violated its principles, he seemed to say, possess no binding force.²⁶

This was no private opinion of a cloistered and impractical theologian. Similar statements are to be found in the works of most writers on the law of nature, and they said so from one era to another. The basic law books of the medieval *ius commune*, the amalgam of Roman and canon laws that dominated European legal education and shaped what happened in European courts between the twelfth century and the nineteenth, routinely stated that enactments that were "contrary to reason" were not binding.²⁷ The Spanish scholastics of the sixteenth century similarly held that "[a]ll enactments civil or religious which contravened [the law of nature] were ipso facto void."²⁸ Hugo Grotius wrote that "the municipal law cannot enjoin anything which the law of nature forbids, or forbid what the law of nature enjoins."²⁹ This opinion persisted as common learning for a very long

22. See generally Helmholz, *Natural Law and Human Rights*, *supra* note 9; Helmholz, *The Law of Nature*, *supra* note 9.

23. See, e.g., DENISE MEYERSON, UNDERSTANDING JURISPRUDENCE 37 (2007).

24. See *id.* (stating flatly that according to natural law theory "unjust laws may be invalid and can be ignored.")

25. 28 SAINT THOMAS AQUINAS, SUMMA THEOLOGIAE, Ia-IIae, qu. 95, art. 2, resp. (Thomas Gilby, O.P. trans. & ed., London, Blackfriars 1966) (asserting that such a law would not have the status of law: "non erit lex sed legis corruptio").

26. *Id.* at Ia-IIae, qu. 96, art. 6, resp. (asserting that a law not ordained for the common security of men "virtutem obligandi non habet").

27. See, e.g., *Decretum Gratiani*, C. 10 q. 2 c. 6, in 1 CORPUS IURIS CANONICI 621 (A. Friedberg ed., 1959) (purporting to demonstrate the lack of binding force in any enactment made "irrationabiliter"). See also HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 143-47 (1983).

28. WILLIAM ARCHIBALD DUNNING, A HISTORY OF POLITICAL THEORIES FROM LUTHER TO MONTESQUIEU 13, 132-41 (1905). For the original language see FRANCISCO SUÁREZ, DE LEGIBUS ET DEO LEGISLATORE ch. 9, tit. 4 (1613) (stating that an iniquitous law "non est lex").

29. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, bk. II, ch. 2, tit. 5, at 192 (Francis W. Kelsey trans., 1925) (translating Grotius's original language: "Lex enim civilis quanquam nihil potest praecipere quod ius naturae prohibet, aut prohibere quod praecipit.").

time.³⁰ A chief justice of the California Supreme Court in the mid-nineteenth century stated that the law of nature was “an eternal rule to all men, binding upon legislatures as well as others.”³¹ For him as for his predecessors, “no human sanction can be valid or good against it.”³²

The best English example of this understanding of natural law’s impact on legislative action is the celebrated *Dr. Bonham’s Case*,³³ as reported by Sir Edward Coke, the great defender of the common law. The case revolved around an act of Parliament that allowed the College of Physicians to fine a doctor who sought to practice medicine without the College’s license.³⁴ Coke held that this would mean allowing the College to act as a judge in its own cause—something forbidden in the law of nature because of the obvious self-interest of the College acting both as judge and receiver of the fines.³⁵ His report goes on to state that the courts, as oracles of the law, could “contro[ll] [A]cts of [P]arliament, and sometimes adjudge them to be utterly void: for when an [A]ct of [P]arliament is against common right and reason . . . the common law will control it, and adjudge such [A]ct to be void”³⁶ This looks very like our judicial review, and it is often said to be its ancestor, perhaps even its authorization.³⁷

In the United States, the great case of *Calder v. Bull*,³⁸ decided by the U.S. Supreme Court during the first years of our Republic, also raised the possibility of using the law of nature as a measure of the validity of legislative acts.³⁹ It involved a grant of a new trial after a judicial determination in favor of Calder.⁴⁰ He challenged this act as an *ex post facto* law, asserting that it was an unlawful legislative interference with a

30. William Blackstone, for instance, wrote that the laws of nature were “binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to [it].” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1836).

31. *Billings v. Hall*, 7 Cal. 1, 11 (1857).

32. *Id.* at 11.

33. (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107 a.

34. *See generally id.*

35. *Id.* at 652; 8 Co. Rep. at 118 a.

36. *Id.*

37. The academic literature on the case is enormous; most recent are: Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Allen Dillard Boyer, *Understanding, Authority, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L. REV. 43, 82-91 (1997); Joseph C. Cascarelli, *Is Judicial Review Grounded in and Limited by Natural Law?*, 30 CUMB. L. REV. 373 (2000); Ian Williams, *Dr Bonham’s Case and ‘Void’ Statutes*, 27 J. LEGAL HIST. 111 (2006). The Lecturer has given his own understanding of the case in R.H. Helmholz, *Bonham’s Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325 (2009).

38. 3 U.S. 386 (1798).

39. *Id.* at 399-400. *See generally* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 41-49 (1985).

40. *Calder*, 3 U.S. at 386-87.

legal right established by the first judicial decision.⁴¹ It was, he said, equivalent to taking a right that belonged to A (himself) and granting it to B (his opponent) and thus a violation of a right protected by the law of nature and the U.S. Constitution.⁴² The justices of the U.S. Supreme Court agreed on the outcome, holding in favor of Bull.⁴³ But they did not agree fully about the reasons.⁴⁴ Justice Chase wrote:

There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.⁴⁵

This was straight natural law. Chase was able to reach an outcome favorable to Bull only because, in his view, this particular act of the legislature did not fall within the scope of the natural law's prohibitions of retrospective legislation.⁴⁶

Justice Iredell, by contrast, upheld the legislature's action under a different theory, the one that ultimately prevailed: if the legislature enacted a law within their power to enact, courts could not "pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."⁴⁷ "If the Legislature[s] pursue the authority delegated to them," he concluded, "their acts are valid."⁴⁸ Only if a statute contravened the terms of the Constitution itself could courts step in, and the ex post facto clause in the Republic's Constitution applied only to the criminal law.⁴⁹ The legislature's action thus might have offended against principles of morality, but it was constitutional. Therefore, it would be enforced.

The natural law doctrines mentioned in these two cases had consequences for English and American law. However, it was not the consequence that natural law would be used as a test of the validity of a

41. *Id.* at 387.

42. *See id.* at 387-88.

43. *See id.* at 388-400.

44. *See generally Calder*, 3 U.S. 386.

45. *Id.* at 388.

46. *See id.* at 388-95. The Roman law on this subject was far from a blanket prohibition of retrospective legislation. *See* CODE JUST. 1.14(17).7 and the *Doctores ad id.*

47. *Calder*, 3 U.S. at 399.

48. *Id.*

49. *See id.*

statute.⁵⁰ Coke's words in *Dr. Bonham's Case*, if they ever stated the generally accepted law,⁵¹ gave way to legislative supremacy after the Glorious Revolution of 1688.⁵² The English rule came to be established that courts were without power to overturn acts of the legislature, and in the United States it was Iredell's opinion that prevailed.⁵³ *Calder v. Bull* had raised the possibility of using natural law in constitutional adjudication, but in the end that possibility was rejected in favor of the narrower position Justice Iredell had expressed.⁵⁴ At least in theory, only violation of the Constitution rendered a statute invalid, not a conflict with the norms of morality.⁵⁵ Thus, it has been concluded, the courts of the two great nations of the common law tradition have rejected granting any place to the law of nature in their fundamental law.⁵⁶ When Justice Clarence Thomas was asked in his confirmation hearings in the U.S. Senate whether he espoused the use of natural law, he admitted that he felt some attraction to the traditions of natural law, but maintained, "I did not—I would maintain that I did not feel that natural rights or natural law has a basis or has a use in constitutional adjudication."⁵⁷ That was the prudent answer, and he gave it.

II. THE HISTORICAL EVIDENCE OF THE *DECISIONES*

The account of the law of nature just recited does not give a complete account of the law of nature, and it is the purpose of this Lecture to add to it by giving a fuller and account of the purposes natural law actually served in the centuries when it was accepted as a valid source of law. Those purposes are not well captured by Coke's forceful language in *Dr. Bonham's Case*.⁵⁸ A fuller account will also put the history of judicial review into a somewhat different context.⁵⁹ It should allow us to understand and perhaps to appreciate what we have formally rejected.

50. See *infra* notes 53-54 and accompanying text.

51. See generally *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107 a. The most common opinion is that of J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 210 (4th ed. 2002) (describing Coke's words "more as an overstatement than as a statement of orthodox doctrine.")

52. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 337 (5th ed. 1956).

53. *Calder*, 3 U.S. at 398-401. See generally BAKER, *supra* note 51.

54. See generally *Calder*, 3 U.S. 386. But *cf.* the evidence from early state courts, which made use of the law of nature—it is described by Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-78 (1992).

55. See, e.g., Sherry, *supra* note 54, at 207.

56. See generally Sherry, *supra* note 54.

57. See *Nomination of Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 112-13 (1991).

58. See generally *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107 a.

59. Scholarly views of the place of judicial review based upon examination of writing within the traditions of natural law have varied. See, e.g., CHRISTOPHER WOLFE, JUDICIAL REVIEW, IN NATURAL

Most of the evidence used here to open up this fuller history has been taken from the records of judicial decisions from early European courts, in which there can be no doubt about the participants' acceptance of the law of nature. Conclusions have been drawn from cases found in books of *decisiones*. *Decisiones* are reports of specific cases decided by courts in Germany, France, Italy, the Low Countries, and Spain. Almost innumerable numbers of them were compiled. Although recent years have witnessed some awakening of interest in their contents, for years these reports were scarcely touched by legal historians.⁶⁰ Only the briefest of accounts of their existence are to be found in most handbooks of European law,⁶¹ but in fact they furnish excellent evidence, perhaps the best we have, of what was said and decided in European courts before the modern era.⁶² They are rough equivalents of contemporary English reports. Among many other things, they allow us to put some meat on the dry bones of natural law theory. Although they do not always contain the sentences given by the judges, they almost invariably give the arguments advanced in the course of litigation. These could not have been insubstantial arguments—at least when lawyers made them repeatedly in the *decisiones*—and some of them dealt with the practical impact of the law of nature.⁶³ What do they show?

A. Interpreting Legislation

They show, first, that the law of nature was invoked much more frequently to understand and interpret statutes than it was to overturn them. Its purpose in everyday usage was to allow judges to align their

LAW AND CONTEMPORARY PUBLIC POLICY, 157, 158 (1998) (that natural law was “open to a wide variety of political institutions”); Robert George, *Natural Law and Positive Law*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW, 151-68 (Edward B. McLean ed., 2000) (arguing that the question was a matter of positive law and therefore subject to variation according to local custom or enactment); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844-45 (1978) (natural law supported judicial review based upon rights unenumerated in the Constitution); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of ‘Unwritten’ Individual Rights?*, 69 N.C. L. REV. 421, 424 (1991) (concluding that judicial review of legislation was no part of the jurisprudence of the law of nature); D. O. Wagner, *Some Antecedents of the American Doctrine of Judicial Review*, 40 POL. SCIENCE Q. 561, 561-62 (1925) (treating natural law as one of the factors used to justify judicial review).

60. See MARIO ASCHERI, *TRIBUNALI, GIURISTI E ISTITUZIONI DAL MEDIOEVO ALL'ETÀ MODERNA* 211-35 (1989); SERGE DAUCHY & VÉRONIQUE DEMARS-SION, *LES RECUEILS D'ARRÊTS ET DICTIONNAIRES DE JURISPRUDENCE (XVI-XVIII^e siècles)* (2005); DOLORES FREDA, *LA DOTTRINA DEI LAWYERS 1-25* (2009).

61. See, e.g., 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE* 849-56 (Helmut Coing ed., 1973) [hereinafter *HANDBUCH*].

62. See MARCO MILETTI, *STYLUS JUDICANDI: LE RACCOLTE DI ‘DECISIONES’ DEL REGNO DI NAPOLI IN ETÀ MODERNA* (1998).

63. See *supra* notes 60-62 for examples of some of the *decisiones*.

interpretation of legislative acts with the dictates of the law of nature.⁶⁴ For example, many cities and states in the late Middle Ages passed statutes authorizing most legal process to be conducted summarily, *simpliciter et de plano ac sine strepitu iudicii et figura*, that is, simply and plainly without the noise and form of full legal process.⁶⁵ Even the church endorsed this abbreviated procedure, enacting a rule that its courts could lawfully act so that only discovery of the truth was to matter, not compliance with the strict formalities of legal process.⁶⁶ Perhaps this was not an admirable development. But it happened, and it is not difficult to understand the reasons that lay behind it. Full compliance with the *ordo iuris*⁶⁷ could be a millstone around the neck of a conscientious officer of justice. It could stretch out the length of hearings, increase costs, facilitate evasion of court orders, and in the end allow bad men and scofflaws to escape their just desserts. A procedural system should not encourage these results. Therefore, the real question was not whether these statutes were permissible. It was assumed that they were. They served a legitimate purpose. The real question was, rather, how they were to be interpreted. They were vague, seemingly purposefully so. Directing a judge to act “simply” did not tell him what to do. And here the law of nature helped fill the gap.⁶⁸ It furnished a measure for deciding exactly how much abbreviation of process these statutes permitted.⁶⁹

The law of nature, it was assumed, guaranteed to all persons that they would not be condemned or their property taken unless they had had a fair chance to defend their rights. This was an aspect of the right to self-defense that had existed from the beginning of time. Compliance with it was an obvious test of the justice of any procedural system. Accordingly, natural law was invoked to decide whether legal proceedings without prior citation of a party could be justified under such statutes.⁷⁰ Generally, it was held that they could not; a citation was necessary.⁷¹ Without being present, no person could hold any but an illusory right to establish his claims. A legitimate citation was thus “the first and the essential part of legal

64. See generally, e.g., KNUT W. NÖRR, *NATURRECHT UND ZIVILPROZESS* (1976).

65. See *id.*

66. See, e.g., Clem. 2.1.1, in 2 *CORPUS IURIS CANONICI* 1143-44 (A. Friedberg ed., 1959).

67. *Ordo iuris* is described as the “order of natural right.” See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* 39 (1997).

68. For examples of *decisiones* and how judges interpreted the statutes, see *supra* notes 60-62.

69. For examples of *decisiones* and how judges interpreted the statutes, see *supra* notes 60-62.

70. See generally ASCHERI, *supra* note 60; DAUCHY & DEMARS-SION, *supra* note 60; FREDA, *supra* note 60; see also HANDBUCH, *supra* note 61, at 849-56; MILETTI, *supra* note 62.

71. See *infra* notes 72-74 and accompanying text.

process.”⁷² When, for instance, a court in Florence was faced with the question of whether, under a statute of 1473, minor children had to be cited in a case that affected their inheritance, the argument was that natural law required that those affected by a decision be given the chance to appear to defend their rights.⁷³ Adam himself had been given a chance to speak for himself in the Garden of Eden. So should this statute be read to give minor children the chance to protect themselves and their property. This construction of the law was, as another *decisio* put it, “the more equitable and humane” alternative.⁷⁴

Similarly, natural law was invoked to decide whether the right to appeal against a sentence convicting a person of a crime could be curtailed or even eliminated under similar statutes. Julio Claro, the Italian proceduralist (d. 1575), noted that “an appeal was a form of self-defense granted by the law of nature, and consequently should not in any event be taken away by law or statute.”⁷⁵ Despite this argument, common European custom came to allow appeals to be abridged, and pretty drastically.⁷⁶ Unlike citations, abridgement, though not total elimination, of the right to appeal was found consistent with the requirements of natural law. In some sense the argument from the law of nature was simply outweighed by the perceived need not to leave crimes unpunished.⁷⁷ The *glossa ordinaria* to the canon law put it neatly: “Appeals were not invented to permit the defense of iniquity.”⁷⁸ It was said to be “in the public interest that convicted criminals be punished at once.”⁷⁹ Objections to abridgement of the right to appeal nonetheless

72. See, e.g., FRANCISCUS DE CLAPERIUS, DECISIONES, Causa 35, quaest. 2, no. 1 (Lyon 1602) (“Non valet statutum vel consuetudo ut quis non citetur . . . nam citatio est prima ac potissima pars iudicii sine qua tollitur defensio de iure naturali inducta.”). See also CAESAR BARZIO, DECISIONES ALMAE ROTAE BONONIENSIS, Dec. 15 (Venice 1610).

73. JOANNES ACCARISIUS, DECISIONES ROTAE FLORENTINAE, Dec. 8 (Florence 1713). The counter argument was that citation of the children’s guardian should be treated as sufficient under the statute, at least where they had adequately presented the children’s legal position.

74. JOANNES BAPTISTA FENZONIUS, ANNOTATIONES SIVE IUS MUNICIPALE ROMANAE URBS, Cap. 195, no. 27 (Rome 1636) (“tanquam aequiorem ac humaniorem”).

75. JULIUS CLARUS, PRACTICA CRIMINALIS, Quaest. 94, no. 3 (Venice 1595) (“[A]ppellatio est species defensionis quae est de iure naturali et consequenter a lege seu statuto tolli posse non debet.”).

76. STEPHANUS GRATIANUS, DECISIONES ROTAE PROVINCIAE MARCHIAE, Dec. 92, no. 2 (Rome 1619) (stating that appeals were permitted, but that they could be prohibited by statute or custom).

77. See, e.g., JOANNES PETRUS FONTANELLA, DECISIONES SACRI REGII SENATUS CATHALONIAE, Dec. 120, nos. 3-4 (Barcelona 1639) (allowing this interpretation of the local law as “convenient, necessary, and useful,” although also criticizing its inconsistency with natural law, at no. 9).

78. *Glossa ordinaria to Liber Sextus*, 2.15.5, v. *deferendum*, in 2 CORPUS IURIS CANONICI, *supra* note 66, at 1016-17. I have used the edition of the *Liber Sextus* printed in Venice in 1615.

79. LORENZO MATHEU Y SANZ, TRACTATUS DE RE CRIMINALI SIVE CONTROVERSIARUM, C. II, no. 5 (Lyon 1702) (“quoties publice interest quod statim rei puniantur appellatio recipienda non est.”). See generally Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: ‘Rei publice interest, ne crimina remaneant impunita’*, 1984 U. ILL. L. REV. 577, 578 (1984).

continued,⁸⁰ and alternative ways of reviewing allegedly wrongful sentences were found.⁸¹ It remained true, nonetheless, that most of the direct challenges failed. The alternatives also remained incomplete as a means of overcoming a denial of a right of appeal that was protected by the law of nature.

We should soon be in deep waters if we were to enter further into the details of arguments about natural law found in these cases. The important point, however, is relatively simple. Here were statutes enacted to expedite justice. They required interpretation. Since it was assumed that the legislature had intended to follow the dictates of the law of nature in enacting them, the law of nature was an appropriate tool to be used in their interpretation. In practice, the results varied. The need and advantages to society were weighed against moral precepts. In any event, there was little about judicial review in these decisions. The judges would probably have said that they were simply aligning “open-ended” legislative enactments with the requirements of justice as established by the law of nature and as intended by the sovereign.

B. Evaluating Legislation

If regular use of natural law in statutory interpretation is the most prominent showing of the *decisiones*, a second shows that it could also be called upon to challenge legislation. Interpretation was not always enough to secure a just outcome in litigation. Some of the *decisiones* involved statutes that were not at all vague or “open-ended”.⁸² Some were quite clear—not easy to interpret in the service of standards of natural justice. They might in fact be “odious” or “contrary to natural equity” in character. What happened then?

What happened then was argument. Of course, with lawyers, what else would one expect? As happens today, each side argued that their interpretation of existing law was correct. There was a difference from modern judicial review, however, and this difference mattered. Today, judges ask whether a statute conflicts with the Constitution. If it does, it is invalid. Then, once a statute was admitted to stand in conflict with natural

80. See, e.g., FRANCISCUS MERLINO PIGNATELLI, *CONTROVERSARUM FORENSIUM IURIS COMMUNIS ET REGNI NEAPOLITANI*, Cent. I, cap. 18 (Turin 1657) (distinguishing between final and interlocutory appeals).

81. For example, the so-called “beneficium revisionis.” See, e.g., TOBIAS J. REINHARTH, *SELECTAE OBSERVATIONES AD PAULI CHRISTIANEI DECISIONES AD USUM FORI GERMANIAE*, Vol. I, Obs. 16, nos. 8, 17 (Erfurt 1742) (permitting recourse to the higher tribunal, “aequitate et aequalitate suadente”).

82. See generally ASCHERI, *supra* note 62; DAUCHY & DEMARS-SION, *supra* note 60; FREDA, *supra* note 60; see also HANDBUCH, *supra* note 61, at 849-56; MILETTI, *supra* note 62.

law principles, judges went on to ask whether it might nevertheless be enforced because it was founded on a sufficient justification. In other words, the question became: Did the circumstances justify some deviation from the principles of the law of nature? That could occur. The normal assumption was that natural law was meant to align the positive law with the requirements of justice and the legitimate needs of human society.⁸³ It might happen that those needs required enforcing a statute even though the statute violated a tenet of natural law.⁸⁴ A statute providing a remedy for spoliation, for instance, might validly replace the natural law's right to recover one's property by force. Judges would not "strike down" such a statute as a violation of the law of nature.

This approach can best be understood by taking an example or two. One comes from the city of Naples. A statute enacted there punished, by immediate death, anyone taken in the act of climbing a ladder set up under the window of a house in which maidens dwelt, presumably to make an assault on their chastity.⁸⁵ Miscreants could be executed by the magistrate with only the barest of legal process.⁸⁶ Exact adherence to the *ordo iuris* was not necessary, and no appeals were permitted. This decree was put into effect, and in one such instance the statute was challenged as contrary both to the law of nature and to provisions in the established *ius commune*⁸⁷ that built upon that law. The argument was that by the law of nature all men had the right to defend themselves, including a right not to be condemned without a fair trial. It was a right that could not be taken away. By so drastically abridging it, the defendant's lawyers contended, this Neapolitan decree had offended against the natural law. The decree should not stand. It should not be applied against their client. That was their argument, but it failed. The *decisio* held that the enormity of the crime, the alarming increase in the frequency with which it was being committed in Naples, and the defendant's undoubted aim in first setting up his ladder and then climbing it—taken together—were sufficient to uphold the statute's validity

83. See generally ASCHERI, *supra* note 62; DAUCHY & DEMARS-SION, *supra* note 60; FREDA, *supra* note 60; see also HANDBUCH, *supra* note 61, at 849-56; MILETTI, *supra* note 62.

84. This has been recognized by some historians of the subject, who have devised various ways of describing it. See, e.g., OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 76 (Frederic William Maitland trans., 1913) (speaking of "the very elasticity of the limiting idea"); WOLFE, *supra* note 59, at 162 (holding that "[i]f natural law was not an independent ground for judicial review, it was the foundation for the Constitution, itself the ground for judicial review").

85. THOMAS GRAMMATICUS, *DECISIONES SACRI REGII CONCILII NEAPOLITANI*, Dec. 36, nos. 51-35 (Venice 1588) ("[I]n criminalibus defensio tolli non potest, . . . , nam iuris naturae est ut in crimine quis se defendat.").

86. See *id.*

87. The expression "ius commune" meant the common law of Europe, a law based upon a combination of the Roman and canon laws.

in the case before the court. The defendant was rightly condemned. A hard result for the libidinous young men of Naples, no doubt, but one they would have been prepared for if they had worked their way through the *decisiones*.

Such an outcome proved surprisingly frequent in the *decisiones*. The law of nature did not serve as a trump card, but rather as one factor in evaluating the validity of a statute. Sometimes, of course, the balance weighed against the statute, in practice as well as theory. For instance, a sixteenth century statute of the Italian city of Genoa denied the losing party in litigation the right to rely upon a particular point on appeal unless he furnished proof of its force within twenty days. This statute was held not to bar one appellant when the other litigant had interposed a technical objection during the twenty-day period, making it difficult for the appellant to meet the deadline. It did not matter, the *decisio* held, that the statute forbade any exceptions to the strict time limit. It should not be read “to open the way to the malice and trickery of litigants.” This would be contrary to natural justice, and no good reason for permitting that to happen had been offered. Today, we might reach the same result through invocation of the doctrine of estoppel. Then, the court reached it through invocation of the law of nature, untempered by any adequate justification for enforcing the statute according to its apparent meaning.

Note also one other difference between what happened in this case and modern judicial review. The consequence of the Genoese *decisio* was not to invalidate the statute.⁸⁸ The judges did not “strike down” the legislative act. They simply did not enforce it in the case that was before them. Their reasoning was something like this: a statute cannot have been meant to work injustice.⁸⁹ The whole purpose of the positive law was—indeed must be—to do justice.⁹⁰ If enforced exactly as written, this statute would frustrate that purpose, its own purpose.⁹¹ No overriding justification for such a mechanical reading has been suggested, and therefore we will assume the statute does not apply. We will allow this appellant to proceed. Other cases may be different, of course, and there may be situations where there is good reason for enforcement of the statute according to its letter. The Genoese senate itself might provide some further justification, particularly if it were to modify the statute’s reach. However, in this case we will permit the

88. FLAMINIO CHARTARIO, DECISIONES ROTAE CAUSARUM EXECUTIVARUM REIPUBLICAE GENUENSIS, Dec. 121, no. 15 (Mainz 1604) [hereinafter FLAMINIO CHARTARIO, DECISIONES] (“Non obstat quod statutum intelligi debeat prout iacet quia debet tamen intelligi ne absurdum contineat et ne via malitiis et calumniis litigantium aperiatur.”).

89. *See id.*

90. *See id.*

91. *See id.*

defendant to raise his substantive matter notwithstanding the statute's words.⁹²

There were, it is true, possible statutes that would not pass muster under any juristic analysis—the textbook example in the Middle Ages was a statute commanding all citizens to abandon the worship of God. No European court should enforce a statute that made atheism mandatory; no one should obey it. So far, however, no such statute has come to light in working through continental *decisiones*, and none seems likely. Perhaps one close to it will emerge from further research. There were certainly statutes that seemed to offend against principles of legal morality. Lawyers would not have invoked the law of nature as a test of their validity as often as they did if they had no hope of success. But successful invocations seem to have been quite infrequent in the case law.

C. Discovering the “Mind” of Legislation

What has been presented, though representative as far as it goes, does not fully describe the ways in which the law of nature made itself felt in the courts. It is too schematic. It sounds too much like the “balancing tests” that are characteristic of modern American law. It does not do justice to the importance of the law of nature in the work of the courts. In some cases, natural law served as a spur to enlarging the meaning of statutes. It helped judges search for a way to decide cases equitably even when the wording of a statute itself would scarcely admit of such an enlargement.

Again, this can most easily be seen through examples. A telling instance comes from the common law—an English case that illustrates the potential difference natural law could make. That decision is a maritime opinion delivered by Lord Mansfield in 1771.⁹³ The plaintiff in the case had shipped twenty hogsheads of tallow on a ship from Cork to Liverpool.⁹⁴ The ship had been lost at sea, but some of the tallow washed up on shore.⁹⁵ There was no doubt that it was part of the plaintiff's shipment. The question was whether the hogsheads belonged to the King under the law of wreck or instead to the plaintiff, who had been the owner.⁹⁶ This was a harder case than it now seems. A thirteenth century statute had enacted that after a shipwreck if a man, a dog, or a cat from the ship had escaped drowning, the owner of any of the shipwrecked goods could later claim the

92. *See id.*

93. *Hamilton and Smythe v. Davis* (1771) 5 Burr. 2732, 98 Eng. Rep. 433 (K.B.).

94. *Id.* at 2732, 98 Eng. Rep. at 433.

95. *Id.* at 2732-35, 98 Eng. Rep. at 433-35.

96. *Id.*

goods as his own.⁹⁷ Otherwise the goods belonged to the Crown under the law of wreck.⁹⁸

This statute then seemed (and now seems) quite nonsensical. Why should it matter whether a cat or a dog had survived the shipwreck? Most previous explanations—of which there were a few—had interpreted the statute literally.⁹⁹ The king was kindly conceding some (but not all) of his rights to goods under the law of wreck.¹⁰⁰ The owner of the goods might get lucky. A dog or cat might have survived. He should therefore be grateful for the statute, and if there had been no survivors—human or animal—he was no worse off than he would have been without the statute. This was the situation in Lord Mansfield’s case; the statute did not cover the plaintiff’s claims, since no one—no man, no dog, no cat—had survived this particular ship’s loss at sea.¹⁰¹ The Crown seemed the clear winner under the statute.

Lord Mansfield, however, was not satisfied with this outcome. It would be “contrary to the principles of law, justice, and humanity,” he wrote, to deprive an owner of his goods that belonged to him.¹⁰² “The very idea of it is shocking.”¹⁰³ He therefore searched for a better understanding of the statute. Requiring the survival of a man, a dog or a cat, he surmised, must have had a purpose rooted in natural justice.¹⁰⁴ It could not have been an idle or perverse whim of the legislature.¹⁰⁵ Fully considered, the sensible purpose must have been to provide a way of identifying the true owner of the goods.¹⁰⁶ It worked this way: if a surviving dog wagged its tail or if a surviving cat purred at the approach of the claimant, then one would know that he was also the owner of the shipwrecked goods. The statute had merely given one example of how such identification could occur, and there could be others.¹⁰⁷ For Lord Mansfield, this interpretation made perfect sense. Other animals—cattle for instance—could not be used to identify their owners. Cows neither moo nor wag their tails when their owner approaches. So this must have been what the statute had intended by using

97. Statute Westminster I (1275) 3 Edw. I, c. 4.

98. *Id.*

99. See John Spelman’s Reading on Quo Warranto delivered in GRAY’S INN (Lent 1519), 26-42 (113 Selden Soc, J. H. Baker ed. 1997).

100. *See id.*

101. *See id.*; *see also* Davis, 5 Burr. at 2734-40, 98 Eng. Rep. at 434-37.

102. Davis, 5 Burr. at 2738, 98 Eng. Rep. at 436.

103. *Id.*

104. *Id.* at 2739-40.

105. *See id.*

106. *Id.* at 2738-40.

107. Davis, 5 Burr. at 2739, 98 Eng. Rep. at 437.

the examples of the dog and the cat. So concluded Lord Mansfield and so he ruled in the case.¹⁰⁸ The claimant prevailed.¹⁰⁹ Justice did too.

Whatever one thinks of this ingenious outcome, it shows clearly the potential in natural law ways of thought. The judge assumed that the legislature had intended to enact a statute that was in line with the principles of natural justice.¹¹⁰ Natural justice dictated that property owners should not be deprived of their goods without good cause. The judge's duty was to find a reading of the statute that would harmonize the two, and this is exactly what Lord Mansfield did.¹¹¹ He searched for a meaning within the statute that would accord with "clear principles of justice and humanity" and he found one.¹¹² Doing so required him to go far beyond the words of the statute, but the "mind" of the legislators was what mattered, not the particular words they had used, and it was safe to conclude that their "mind" conformed to the tenets of the law of nature.

This contrast between the words and the "mind" of a statute was a theme found in many of the Continental *decisiones*. "Statutes are to be taken not according to the outward form of words, but according to reason."¹¹³ Even a statute with wording that expressly excluded judicial interpretation was held not to exclude "a good and reasonable" interpretation.¹¹⁴ This was a refrain in many of the cases in which the law of nature was invoked. Thus, a prince's decree that had the effect of invalidating his prior promise must have contained an unstated promise to compensate the promisee; otherwise it would be contrary to principles of right conduct founded upon the law of nature.¹¹⁵ In other words, the assumption with which the jurists began was something like the opposite of the public choice theory of legislative behavior now popular among economists.¹¹⁶ They assume and prove to their own satisfaction that legislators are motivated by economic self-interest; by the need to secure re-

108. *See id.* at 2738-40, 98 Eng. Rep. at 436-37.

109. *Id.* at 2740, 98 Eng. Rep. at 437.

110. *See id.*

111. Mansfield's general approach to statutory interpretation is explored in C. H. S. FIFOOT, LORD MANSFIELD 221-25 (1936); JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 31-34 (2004).

112. *Davis*, 5 Burr. at 2739, 98 Eng. Rep. at 437.

113. JOHANNES BRUNNEMANNUS, DECISIONUM CENTURIAE V, Cent. I, dec. 95, no. 2 (Frankfurt 1704) ("[S]tatuta non secundum corticem verborum sed secundum rationem accipienda sunt.").

114. SERAPHINUS OLIVARIUS RAZZALIUS, AUREAE DECISIONES, Dec. 496, no. 12 (Cologne 1595) ("Nec obstat quod statutum excludat interpretationem, quia non excludit bonam et rationabilem.").

115. FRANCISCUS ROCCUS, RESPONSORUM LEGALIUM CUM DECISIONIBUS CENTURIA PRIMA, Cent. I, resp. 49, no. 20 (Naples 1655) (describing the prince as "iustitia animata in terris").

116. *See, e.g.*, BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 172 (2004); JAMES BUCHANAN & GORDON TULLOCK, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, in 2 THE SELECTED WORKS OF GORDON TULLOCK 253-81 (Charles K. Rowley ed., 1962).

election and the desire to feather their own nests.¹¹⁷ The jurists of the earlier centuries would have regarded this conclusion as iniquitous and false. They thought that, in enacting statutes, the legislators must have intended to serve justice and the common good; that they had meant to act consistently with principles of natural law. They carried that assumption into the task of statutory interpretation.

Put another way, the difference between modern judicial review of legislation and the approach of the jurists of earlier centuries was that the normal use today amounts to seeking to invalidate legislation that is out of harmony with the Constitution. The normal practice in earlier centuries was to use natural law to understand statutes and to enforce their underlying moral purpose, even if that purpose was not articulated in the statute. Of course, in some ways this is a much less dramatic change than it seems. Today we read statutes to construe them as constitutional, if possible. Judges in earlier centuries did something like the same thing, although they sometimes went further and the reasons they gave for doing so differed from our own.

Perhaps this picture is a little too rosy. There was also a “downside.” What may be said against the use of the law of nature in dealing with statutes was that it allowed, perhaps even encouraged, judges to disregard the plain language found in them. What one sees in Lord Mansfield’s opinion is an appealing example, but it had disadvantages too.¹¹⁸ It encouraged judges to go far beyond the words of statutes, discarding them in favor of a supposed “mind of a statute” that might have been very far from what the legislature actually intended. It might even have been used to serve the personal interests of the judges themselves.¹¹⁹ Moreover, it could leave many honest judges in a real quandary when seemingly unjust legislation was specific enough to close off recourse to correction by an interpretation based upon the law of nature. Not every judge was as resourceful as Lord Mansfield. On the whole, invocation of the law of nature seems to have served the purposes for which it was intended, but there can be little doubt that the “mind” of the legislature could be misread or even subverted. Sometimes that must have taken place.

117. BUCHANAN & TULLOCK, *supra* note 116, at 253-55.

118. *Davis*, 5 Burr. at 2738-40, 98 Eng. Rep. at 436-37.

119. The potential for abuse is a criticism that can even be made against Lord Mansfield. See RONAN DEAZLEY, *The Second: The Lawyers’ Tales*, in ON THE ORIGIN OF THE RIGHT TO COPY 138-47 (2004). This potential was brought home to the Lecturer as the result of an acute intervention by Professor Liam O’Melinn of Ohio Northern University.

III. CONCLUSION

The principal conclusion, derived from study of European records of litigation during the centuries when natural law was regarded as a valid source of law, comes to this. Accepting natural law as a valid source of law and practice did raise the possibility of judicial review in something like the modern sense of the term. It did not, however, do so necessarily or very often. Where it does turn out to have been used that way in European *decisiones*, the process rarely, if ever, had the effect of “striking down” the considered acts of a sovereign legislator. It merely mollified their effect.

What the law of nature did more often was to affirm an assumption that all legislation was meant to fulfill essentially moral purposes and to encourage judges and lawyers to uncover such purposes in statutory language, even sometimes when they were hidden from sight. That is the tradition of natural law that we set aside (except sometimes by using other means) when we broke free from the traditions of natural law thought. That tradition was different in approach, although not always in result, from the regime under which we now live. The law of nature was a coherent theory and it led to coherent results, even if they were not always results today’s jurists would embrace. It is not the purpose of this Lecture to suggest that we return to this *ancien régime*. It has been its purpose, however, to contend that we should understand more about the law of nature and to appreciate what it meant in practice.