

ARTICLES

NATURAL LAW FOR THE TWENTY-FIRST CENTURY

SANTIAGO LEGARRE*

INTRODUCTION: NATURAL LAW'S REORIENTATION

In April 1963, Harvard Law School Professor Lon L. Fuller delivered the William Storrs Lecture Series at the Yale Law School. The lectures were published in book format the following year, with the title *The Morality of Law*. In 1969, Fuller added a chapter to the book, titled “A Reply to Critics.”¹ As he finished this new, long chapter, he dealt “with a measure of reluctance” with the issue of natural law.² His words on this issue are worth quoting. Fuller evoked a time past, “certainly within living memory,” when to defend natural law was to “open oneself up to the suspicion of being an adherent of some darkly conceived, darkly motivated, metaphysical, and probably ecclesiastical”³ notion.⁴

* LL.B., Universidad Católica Argentina; M.St., Oxford; Ph.D., Universidad de Buenos Aires. Professor of Law, Universidad Católica Argentina; Principal Researcher, CONICET (Buenos Aires); Visiting Professor, Notre Dame Law School (Indiana) and Strathmore Law School (Nairobi). Many thanks to Michael Ambrosio, Shawn Dust, Thomas Duve, Janice Gordon, John Luke Hoonhout, Santiago Inchauspe, Bob Nagel, Jim Stoner, and Dennis Wieboldt for precious feedback. I also thank the participants of a workshop at Notre Dame Law School in November 2025, especially its organizer Jeff Pojanowski.

1. LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

2. *Id.* at 241.

3. My statement in the text is an implication from Fuller’s affirming that there was a time “when to speak disrespectfully of legal positivism was to open oneself up to the suspicion of being an adherent of some darkly conceived, darkly motivated, metaphysical, and probably ecclesiastical version of natural law.” *Id.*

4. Fuller’s assessment goes in line with something Finnis would note in opening *Natural Law and Natural Rights*: that in 1953 Leo Strauss “prefaced his study of natural law with the warning that ‘the issue of natural right presents itself today as a matter of party allegiance.’” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, at vi (2d ed. 2011). Discrimination against American Catholics perhaps played a role, too, in the discredit of natural law insofar as it was seen as an “ecclesiastical notion” (Fuller’s expression). See Dennis J. Wieboldt III, *The “Crusading Fanatics” of American Law: American Jesuits and the Origins of the Neoscholastic Legal Revival, 1870–1960*, 40 J.L. & REL. 80 (2025) (evidencing discrimination against American Catholics); see also John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought’s Response to Legal Realism*, 98 MARQ. L. REV. 1203 (2015) (same).

About that time, John Finnis, a young lecturer at the University of Oxford, had just begun work on what would become *Natural Law and Natural Rights*.⁵ This monograph, which radically renewed the study of natural law in the English-speaking world and beyond, was published in 1980. The Preface brings to mind Fuller's words, quoted in the previous paragraph. Finnis confessed that until he dug deeper, he would never have suspected that there could be "more to theories of natural law than superstition and darkness."⁶ His second chapter ("Images and Objections") also speaks to the same effect. One can easily spot a coincidence between Fuller and Finnis regarding the status quo—the diagnosis—of the perception of natural law in the late sixties.

When he wrote *Natural Law and Natural Rights*, Finnis was certainly aware of Fuller's book: He made *The Morality of Law* the set text in the new first-year course in jurisprudence that he established in a revised law degree programme in the University of Malawi in 1977, where Finnis taught for two years.⁷ Furthermore, one can find numerous references to *The Morality of Law* in the pages of his own book,⁸ the one that Hart commissioned him to write in late 1966, and most of which he wrote in Malawi in 1976–77.⁹

Fuller thought by 1969 that "the winds of doctrine seem[ed] to have changed their direction."¹⁰ Furthermore, "in the reorientation that seems to be taking place, one *hopes* that there will develop a little more tolerance for, and interest in, the great tradition embodied in the literature of natural law."¹¹ Jump in time and Finnis writes in 1980: "Things have changed during the last 25 years, and the debate need no longer be regarded as so polarized."¹² One may

5. "The book was commissioned by the editor of the Clarendon Law Series, H.L.A. Hart, soon after I became a colleague of his as a Fellow of University College Oxford, in the autumn of 1966." FINNIS, *supra* note 4, at 414.

6. My statement in the text is an implication from Finnis's affirming in the Preface that only late down the road he "began to suspect that there might be more to theories of natural law than superstition and darkness." *Id.* at vi.

7. Finnis was Professor and Head of the Department of Law at Chancellor College in the University of Malawi from 1976 to 1978. Santiago Legarre, *HLA Hart and the Making of the New Natural Law Theory*, 8 JURISPRUDENCE 82, 90 (2017).

8. Finnis's *Natural Law and Natural Rights* makes clear enough that the big thesis in Fuller's book is important. For example, Finnis's critique of the Razian sharp-knife conception of the Rule of Law can be read as a vindication of Fuller's distinction between managerial direction and reciprocity/fairness-directed rule of law. See FINNIS, *supra* note 4, at 273–74, 292–93; see also 4 JOHN FINNIS, *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 31, 64, 170, 281, 284, 315, 324 (2011).

9. "The book was mainly written in Africa." FINNIS, *supra* note 4, at vii. Finnis sent a letter to H.L.A. Hart dated in Malawi, July 24, 1976, accompanying a draft of a fresh chapter on "law." From Africa too, Finnis later sent Hart chapters on "obligation" and "God." Legarre, *supra* note 7, at 91.

10. FULLER, *supra* note 1, at 241.

11. *Id.* (emphasis added).

12. FINNIS, *supra* note 4, at vi.

indeed see *Natural Law and Natural Rights* as both fulfilling Fuller's hope and certifying Finnis's announced change.¹³

While Fuller had conceded that in the literature of natural law one will find "much foolishness and much that is unacceptable to modern intellectual tastes," he recognized too that "one will also find in it practical wisdom."¹⁴ He contrasted that aspect of the literature of natural law that he regretted with the teachings of Thomas Aquinas¹⁵—Finnis's favorite teacher, "because on any view he occupies a uniquely strategic place in the history of natural law theorizing."¹⁶ We can find in this preference for Aquinas another element in common between the Harvard and the Oxford professors.

The Morality of Law is considered by some to be one of the great natural law books of the second half of the twentieth century.¹⁷ To the question of whether his famous eight desiderata "represent some variety of natural law," Fuller's answer was "an emphatic, though qualified, yes."¹⁸ One may indeed read much that is true in matters of practical reason—natural law under other names—in long chunks of Fuller's book. But he seemed wary of, and perhaps ironic about, a theory that implied that one "has established contact with Absolute Truth."¹⁹ He remained agnostic about what he called "the external morality of the law,"²⁰ more focused, as he was, on a "procedural, as

13. Note that Fuller never got to see *Natural Law and Natural Rights*, as he died in 1978.

14. FULLER, *supra* note 1, at 241.

15. It is noteworthy that while Fuller refers to "St. Thomas Aquinas," Finnis refers to "Thomas Aquinas." Compare FULLER, *supra* note 1, at 241, with FINNIS, *supra* note 4, at vi.

16. FINNIS, *supra* note 4, at vi.

17. Adrian Vermeule writes that Fuller "is a natural-law theorist of a certain kind." Adrian Vermeule, *The Rule of Law, the Rule of Courts, and the Rule of the State*, NEW DIG. (May 3, 2025), <https://thenewdigest.substack.com/p/the-rule-of-law-the-rule-of-courts> [<https://perma.cc/QY9U-ZLBH>]. The true extent to which Fuller's work represents a full adherence to the natural law principles is a debate for another day—the statement in the text about the book's prominence for natural law theory is mostly one of public perception. Even more substantial doubts concerning adherence to natural law could be cast upon another book that perhaps has enough credentials to enter this (not very relevant) contest of public perception: Leo Strauss's 1953 *Natural Right and History*. But it is safe to say that Strauss is not properly classified within the natural law tradition, though his work on natural right engages deeply with the classics and is often discussed alongside the natural law tradition.

18. FULLER, *supra* note 1, at 96.

19. *Id.* at 241. Another Fullerian dictum along the same lines: Procedural natural law has "nothing to do with any 'brooding omnipresence in the skies.'" *Id.* at 96. Mind you, neither does natural law! Furthermore, one could accept Fuller's challenge and go as far as affirming that natural law is, in a relevant sense, not "higher" law. *Id.* "[I]f any metaphor of elevation is appropriate [it] should be called 'lower.'" *Id.* Insofar as the elevation metaphor might mislead the likes of Fuller to think of natural law as an abstraction, perhaps it would be best to get rid of this metaphor altogether.

20. *Id.* at 47.

distinguished from a substantive natural law,”²¹ a set of desiderata that he famously called “the inner morality of law.”²²

Nevertheless, Fuller’s discussions of the view of law he calls “interactional” are fruitful,²³ and fully in line with natural law theory. Even though he never comes out and defends natural law as such, it would be stretching his argument too much (or too little!) to see in Fuller’s approach an evasion of moral objectivity.²⁴ Instead, it is fairer to his work to reason that his path in *The Morality of Law* is a result of his lack of interest in “substantive natural law.”²⁵ This lack of interest perhaps explains too why he does not engage in any significant way the classical tradition of natural law. Rather, his references to the likes of Aristotle and Aquinas remind one of the scanty and superficial allusions to those classics by Fuller’s arch-critic, H.L.A. Hart, in *The Concept of Law*.²⁶ My preceding observations, furthermore, perhaps help one understand why Fuller tackles natural law face to face only a long way down the road, almost as an afterthought—in a chapter added when he revised his book—and “with a measure of reluctance.”²⁷

Instead, Finnis’s *Natural Law and Natural Rights* confronts the issue of natural law from its very title and carefully engages the classical tradition throughout. His references to Aristotle and Aquinas are countless. Even if, as the argument in the book progresses, the name “natural law” tends to vanish,²⁸ the discussion of the issue (in general and as applied to personal and social ethics) is never evaded: Finnis’s work is all about practical reason in action.

21. *Id.* at 96.

22. *Id.* at 43. On this and related issues, see Fuller’s posthumous article, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

23. For example, Fuller’s criticism of the managerial view of law—to which he contrasts his interactional view—is real and important. See FULLER, *supra* note 1, at 223.

24. One could hold, on the contrary, that in talking about the “interactional” (and like concepts) Fuller is hiding the moral under sociological-sounding terms, instead of coming out and talking about what is relevant. I think it is fairer, in the light of Fuller’s interests, to abstain from passing such an extreme judgment on his attempt.

25. Fuller marks a difference between his project and the one of the “thinkers associated with the natural law tradition”: “[T]heir chief concern is with what I have called substantive natural law.” FULLER, *supra* note 1, at 98.

26. See Cristóbal Orrego, *H.L.A. Hart’s Understanding of Classical Natural Law Theory*, 24 OXFORD J. LEGAL STUD. 287 (2004) (discussing Hart’s muddled references to Aquinas on natural law).

27. FULLER, *supra* note 1, at 241. It is true, however, that in his second chapter Fuller mentions natural law in the context of describing the inner morality of law as “procedural . . . natural law.” *Id.* at 96–97.

28. Throughout *Natural Law and Natural Rights*, Finnis consistently and purposefully avoids, as much as he can, using the term “natural law,” perhaps to prevent misunderstandings of the type alluded to in Chapter II of the book, tellingly titled “Images and Objections.” FINNIS, *supra* note 4, at 23; see also Cristóbal Orrego, *Natural Law Under Other Names: De Nominibus Non est Disputandum*, 52 AM. J. JURIS. 77 (2007) (maintaining that the revival of some basic tenets of the theory of natural law has sometimes come under different names).

If it is true that *The Morality of Law* added value to the natural law tradition, it is without question that *Natural Law and Natural Rights* is the single most important work on natural law ever written in English. For this reason, I will lean significantly on this book, and more generally on Finnis's scholarship, as I try to refresh the main tenets of natural law theory²⁹ for a twenty-first century audience.

Section I of this Article will distinguish natural law from other, related normativities, beginning by explaining first what natural law is not. Section II will offer an overview of what I mean by natural law, guided by the classical tradition (from Aquinas to Finnis). Section III will explore the connection between natural and positive law. The Conclusion will wave at the new challenges faced by natural law theory in the twenty-first century.

Before I get started, one word about the “new” natural law. Even if I have played with the use of the term “new natural law” in previous work,³⁰ I only did it because “natural law” has an old-fashioned ring to it that might dissuade readers.³¹ Those readers would be disenchanted, however, if they assumed they would find in my writing something greatly different from the natural law theory of Aristotle and Thomas Aquinas. Still, my presentation of the classical teachings, though by no means uniquely mine,³² is hopefully “new”: If not differing greatly, it is indeed different in many other significant ways, as I hope will become clear throughout.³³

29. Finnis has written a thorough and systematic monograph on Thomas Aquinas's practical philosophy. See JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (1998).

30. “Here, ‘new natural law’ is used only as a catchphrase.” Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 879 (2018). In the Foreword of a book by Melissa Moschella that came out while this Article was under review, Professor Russell Hittinger wrote that when he coined the expression “New Natural Law theory” he was “a callow philosopher who did not quite understand” the effects of the title of a book. MELISSA MOSCHELLA, *ETHICS, POLITICS, AND NATURAL LAW*, at ix (2025). On Hittinger's own book, in which he coined the expression, see *infra* note 33.

31. Finnis accepts the useful alternative “new classical [natural law] theory.” John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 5 (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro, eds., 2004). In 1991 Finnis had already alluded to “the new classical theory.” See John Finnis, *Contents*, in 1 NATURAL LAW, at v (John Finnis ed., 1991).

32. After years of positivism's cultural dominance there is presently a revival of natural law theory, though oftentimes under other names (many of which do not even include the label “natural law”). See Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 656 n.5 (1997) (highlighting how natural law rhetoric is nowadays less mysterious than it used to be); Orrego, *supra* note 28 (stressing that the revival of natural law sometimes comes under different names); Santiago Legarre, *Positivism and Natural Law Revisited*, 98 PRUDENTIA IURIS 1 (2024) (Argentina) (discussing the decline of the “positivist reason”); see also *supra* note 3 and accompanying text (on positivism's cultural decline according to Fuller).

33. It is well-known that in his 1987 book *A Critique of the New Natural Law Theory*, Russell Hittinger used the term “new natural law” to describe and indeed (as he hoped) delegitimate

In what follows the reader will find much of what I have taught law students on natural law since 1995, in courses *under different names*, such as “Philosophy of Law” (at Catholic University of Argentina); “Law and Morality in Contemporary Jurisprudence” (at Notre Dame Law School, in the United States); and “Jurisprudence” (at Strathmore University, in Kenya).³⁴ I have made no effort here to suppress the casual tone of my lecturing style, full of images and metaphors, with all their limitations and imperfections. Rather than apologizing for this decision I will hope that the reader of this Article will find as a result a more pleasant tour through the jungle of this difficult topic.

A final warning. As I offer the reader a basic tour of natural law—what it is not; what it is—I will not dwell extensively on natural law theories. Those interested in finding out what has been written on natural law (especially in recent times) should direct their attention to the complete guides that have been published on that topic,³⁵ or to my own, previous written work, on which I will rely hereafter.³⁶

I. DISTINGUISHING NATURAL LAW

I shall try to make clear in this section that throughout this essay “natural law” does not mean what it means in two different contexts in which the expression natural law is sometimes used. I shall make clear too in what sense

a school of thought that has in Germain Grisez its founder and architect; in John Finnis a main builder; and in Robert P. George its more recent (and most exuberant) voice. RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987). These three, however, never liked the term “new natural law theory.” Nevertheless, it would seem that Hittinger was successful to the extent that the label “new natural law theory” has remained as a shortcut to identify a certain presentation. Robert P. George, *Introduction: The Achievement of John Finnis*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 1, 6 n.15 (John Keown & Robert P. George eds., 2013).

34. Even when I teach Comparative Constitutional Law as a visiting professor (at LSU Law and at Loyola University New Orleans College of Law) I feel that I am teaching natural law under a fancy title. The opposite is true in many law schools: Not even their courses in “Philosophy of Law” and “Jurisprudence” deal with natural law. This lack or omission, regrettable as it is, is not altogether surprising. See *infra* the Conclusion of this Article. On the history of the teaching of natural law at Notre Dame Law School, see Dennis J. Wieboldt III, *Ideas With(out) Consequences?: The Natural Law Institute and the Making of Conservative Constitutionalism During the Cold War, 1947–1951*, 1 L. & HIST. REV. 29 (2025).

35. See, e.g., Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241 (2003) (state-of-the-art essay on the topic); see also Barnett, *supra* note 32 (offering a guide to natural law); J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. PUB. POL’Y 307 (2025) (covering recent work on natural law).

36. See Santiago Legarre, *Derivation of Positive from Natural Law Revisited*, 57 AM. J. JURIS. 103, 103–10 (2012) [hereinafter Legarre, *Positive from Natural*] (discussing the different connections between natural and positive law); Legarre, *A New Natural Law Reading of the Constitution*, *supra* note 30 (explaining the basics of natural law); Santiago Legarre, *What Natural Law is Not: Distinguishing Natural Law from Other, Related Normativities*, 7 STRATHMORE L.J. 15 (2023) (discussing what natural law is not).

the meaning that I will hold to be focal has something in common with each one of those other meanings of natural law, and in what respects it differs from them. In so doing I will inevitably start to define natural law.

A. Natural Law and Natural Laws

Natural law is not the singular for the plural expression “natural laws,” i.e., the laws of nature, such as the laws of thermodynamics and, more generally, of physics, or chemistry, or biology, or even “laws” such as “big fish eat small fish” or “wildebeest migrate”—where gravity, for example, would be a “natural law” (one of the “natural laws”).³⁷ These differ from natural law strictly speaking in that natural laws do not apply exclusively to human agents, while natural law instead only applies to persons. Furthermore, to the extent that natural laws—the laws of physics (and chemistry, and biology, etc.)—do apply to human beings, human freedom is irrelevant for the operation of those laws. If, for example, someone jumps from the ninth floor of a building, the person will fall and eventually die, regardless of his or her hypothetical will to otherwise live.³⁸ “Natural laws” are in that sense inexorable (unlike, as we shall see, natural law).³⁹

The fact that the term “natural law” may be, and sometimes is, used to refer to each one of these singular physical natural laws invites confusion. In this sense “eternal law,”⁴⁰ the term the theistic classics used for what since the rise of experimental science we call natural laws, is less misleading; but for obvious reasons “eternal law” also has its own problems, especially in the twenty-first century, as it immediately brings to the forum the idea of God—the eternal creator of the world and its laws. Eternal law also evokes the metaphoric

37. Zuckert observes that a scientific law of nature such as gravity cannot be disobeyed, but a moral law of nature can. See Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL’Y 695, 715 (1997). Further, as explained by Orrego, “natural” in “natural law” “does not mean something related to the physical world, but rather to the rational world of human morality.” Cristóbal Orrego, *The Relevance of the Central Natural Law Tradition for Cross-Cultural Comparison: Philosophical and Systematic Considerations*, 8 J. COMP. L. 26, 32 (2013).

38. Another example is the death of living creatures, which sooner or later happens. Sometimes you hear people say: “Her grandfather died. Well, it was *natural* that he should die before her.” Again, this sense—where “natural” means statistically prevailing—is not what I mean by “natural” in natural law.

39. Some natural laws are negotiable (rather than inexorable) as applied to human beings. These are the natural laws sometimes known as “instincts.” If a lion finds a prey and is hungry, it will kill. If a person is hungry, she may stall. Same with “natural” necessities such as “going to the bathroom.”

40. See THOMAS AQUINAS, SUMMA THEOLOGICÆ I-II, q. 91, art. 1. Given that eternal law governs everything, this includes persons. The part of eternal law governing free agents was called by those classics natural law. *Id.* at I-II, q. 91, art. 2. This can of course be confusing if one keeps in mind that what the classics called “eternal law” now goes typically under the name “natural laws.”

notion of the “hand” of God governing everything—same problem in a century where agnosticism runs rampant.

The contrast between natural laws and natural law emerges too when, after having stressed that natural laws are inexorable, one focuses on the relationship between natural law and freedom. A breach of natural law is a freely chosen action or omission, not (only) a physical performance or fact. Natural law is thus *exorable*. One is free to abide or not to abide by what natural law indicates (as morally right or wrong). The latter indication is like a whisper, a quiet voice that (unless you or your people have become quite deaf to it) suggests in your metaphorical ear that you ought to do that or not do this.⁴¹ You are not forced to act under that “natural law whisper” or to act under its influence—although you will face negative moral consequences if you choose to ignore it and, if well-formed, your conscience will reprimand you.⁴²

Note, at the linguistic level, that typically one adds the article “the” to construct the singular of “natural laws”—as in “*the* natural law of gravity.” On the other hand, most of those who use the expression in the classical sense just say “natural law,”⁴³ without an article—as in “natural law requires a certain conduct” or “positive law is derived from natural law.” The preceding can be a small, trifling way to tell preliminarily what the speaker or writer in question likely has in mind when he or she uses the expression “natural law.” Along similar lines, those of us who use the term natural law in its classical, moral sense will never use the plural “natural laws”—unless we are referring to the physical laws of nature, as explained above. Our reluctance to talk of “natural laws” outside that restricted context stresses that there is only one true morality: natural, moral law—though it may have, indeed does have, several principles and precepts.⁴⁴

B. Natural Law and Religion

Next, we distinguish natural law from religion—in other words, natural law morality from revealed morality. Natural law is not Christian morality, or any other morality based in a certain faith. It is important to explain this, because when you defend natural law many tend to assert boldly things such as: “Surely what you are talking about when you discuss natural law is the

41. Lest my students forget that the idea of a whisper is a metaphor, I always stress in class that if someone else is next to them when natural law *tells* them in their conscience not to do something, that someone else will not hear a thing.

42. See *infra* III.A for more on the peculiar sanction that accompanies natural law.

43. See, e.g., ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999). Note the very interesting use of “natural laws” by Fuller. See FULLER, *supra* note 1, at 96 (speaking of “natural laws of carpentry” and of the “natural laws” of lawmaking, namely his eight desiderata; natural laws that he considered, as we know, include a procedural natural law). See generally JOHN LAWRENCE HILL, AFTER THE NATURAL LAW: HOW THE CLASSICAL WORLDVIEW SUPPORTS OUR MODERN MORAL AND POLITICAL VIEWS (2016).

44. See AQUINAS, *supra* note 40, at I-II, q. 94, art. 2.

Catechism of the Catholic Church!” Judge O’Scannlain, of the Ninth Circuit, neatly summarized the objection: “There is . . . a widespread view that the natural law is parochial, specifically, Catholic.”⁴⁵ The “widespread view,” though wrong, is quite understandable. Some of the contents of natural law morality overlap with those of Christian morality.⁴⁶ Furthermore, some of the writers in the natural law tradition have held that the Ten Commandments contain a summary version of natural law. Plus, there is also the circumstance that several of those writers, including Thomas Aquinas, the most celebrated one of all, have been canonized by the Catholic Church and are therefore called “saints.”

That some of the contents of two different normative orders coincide, however, does not make them one and the same thing. Firstly, the coincidence in question is by no means one between natural law and the morality of the Catholic religion only. Other religions too subscribe to a morality that overlaps with natural law, and the aforementioned statement that the Ten Commandments render natural law in a nutshell confirms this, for those commandments are mainly (and certainly initially) Jewish.⁴⁷ Furthermore, important Jewish scholars argue that natural law is significantly present in the (pre-Christian) Old Testament, even if under different names.⁴⁸ Secondly, any revealed religious morality (including the Jewish and Christian varieties in their different instantiations and confessions) has a prerequisite that is absent in natural law morality: faith.⁴⁹ One of the key tenets of natural law is its appeal to reason only. There is no need for God’s revealing natural law morality and no need for human beings to believe in him and his authority, for someone to be able to know what is right and what is wrong—i.e., natural law. To stress this notion, I tell my students in class that natural law is “the religion of the atheist”—an idea quite in line with St. Paul’s words to the Roman pagans: Even though they did not have the revealed religion, they “still through their own innate sense [i.e., natural law] behave as the [Jewish] Law commands They can demonstrate the effect of the [natural] Law engraved on their hearts, to which their own conscience bears witness.”⁵⁰

45. Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1514 (2011); see also Dennis J. Wieboldt III, *Our Natural Law Moment(s)*, 24 *GEO. J.L. & PUB. POL’Y* (forthcoming 2026), <https://ssrn.com/abstract=5259199> [<https://perma.cc/H27P-T93F>].

46. See AQUINAS, *supra* note 40, at I-II, q. 94, art. 6 (citing the scriptures and discussing the role of sin and grace in the indelibility of natural law on the hearts of mankind).

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

48. DAVID NOVAK, *NATURAL LAW IN JUDAISM* 31–61 (1998).

49. Faith and revelation are like the two sides of the same coin. The former resides in the believer; the latter comes from God.

50. *Romans* 2:14–15 (New Jerusalem Bible). That natural law may be considered “the religion of the atheist” is fully compatible with the predicament, defended by the classics, that natural law imposes religious obligations, mainly the duty to find out the truth about the first cause of everything and about our ultimate goal. See, e.g., AQUINAS, *supra* note 40, at I-II, q. 94, art. 2.

Of course, that pagan writers such as Sophocles, Plato, Aristotle, and Cicero accepted that there is a natural moral law (under different names and not by faith in a revelation) goes along similar lines and confirms the general sentiment of the argument in this section.⁵¹ For how can a pre-Christian concept be Christian?

I should clarify, just in case, that St. Paul's words about the Gentiles or my saying that natural law is the religion of the atheist by no means suggests that natural law is irrelevant for the believer: A believing person may also engage in *merely* natural, moral reasoning (abstaining momentarily from using his or her faith). For example, that person could do so in the context of public discourse in a secular state because he wants to engage believers and non-believers alike.⁵²

Having made clear that there is an essential difference between natural law and the morality of any revealed religion, I must stress again that, other than overlapping contents, there is another similarity between natural law and religion, and in particular between natural law and Catholic morality: that both natural law morality and Catholic morality (as well as some other religious moralities)⁵³ presuppose freedom. In this respect, natural law is closer to Catholic morality than it is to "natural laws." For the purposes of these latter laws freedom is quite irrelevant, as we know: They are inexorable. Nevertheless, Catholic morality is still different from natural law, not only because it requires faith but also because its normative order is of a much higher and more exacting character than natural law's. Indeed, Catholic morality aspires to guide the faithful to heaven by promoting their identification with Christ through the operation of supernatural grace, for which purposes it creates for the faithful obligations that are foreign to natural law. Cases in point would be the obligations of attending Mass on Sunday and of fasting during Lent: clear instances of religious duties that are not in themselves natural moral law obligations insofar as their direct source is religious authority, not reason. The

(discussing the natural inclination to religion). But natural law religious obligations do not speak to a revealed religion in particular.

51. The "central tradition of natural law," explains Kirk, has "roots in Plato and Aristotle, [is] later and more fully expounded by Cicero, Seneca, and the Roman jurists; then passing from the Stoic sages to the Fathers of the Church." Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994).

52. Novak offers an example on point regarding some aspects of Judaism: "Jews can speak persuasively in secular public space about the prohibition of murder." NOVAK, *supra* note 48, at 18.

53. It would seem that there are (and there were) religions and religious moralities that make little of freedom. An extreme case is when, in the name of religion, someone is forced to do something against that person's conscience. If they tell you "convert or die," that is borderline with the inexorable. But it is doubtful that a religion that forces persons like that could qualify as religion. At most it would be a watered-down version of religion—like an unjust law would be a watered-down version of law. See FINNIS, *supra* note 4, at 9–11 (discussing the idea of central case vs. watered-down version).

same could be said about Jewish obligations such as eating kosher or keeping the Shabbat.⁵⁴

II. NATURAL LAW: AN OVERVIEW

A. Temporal and Spatial Universality

After centuries, Antigone's words to her uncle Creon, in Sophocles' celebrated play, are still the most apt way to introduce natural law. Although she refers to the laws of Hades—the terminology “natural law” came into use later—her words apply to the reality of natural law: “[These laws] are not of today nor yesterday, But live for ever, nor can man assign When first they sprang into being.”⁵⁵

These words underline one of natural law's main traits: its temporal universality.⁵⁶ Natural law, unlike human law, is indeed not of today or yesterday, but from all time. What is currently inherently wrong was wrong in the past and will be wrong in the future. Circumstances may change; but once circumstances are clearly defined and circumscribed the morality or immorality of an act will remain the same.

There is a further universality implicit in Antigone's dialogue with Creon: By way of contrast with human, domestic laws (the laws of Thebes; Creon's edict), natural law is the same everywhere. This idea was formulated early on by the pagan philosopher Cicero when, explaining “true law” (what he also called “right reason in agreement with nature”⁵⁷; another name for natural law), he wrote that this law “will not be different in Rome and in Athens . . . but is one, eternal and unchangeable law for all nations.”⁵⁸ In other words, murder, for instance, was wrong in Rome but also in Athens, Thebes, or anywhere in the world. Customs, conventions and positive enactments—human laws—may (and do) vary; natural law remains.⁵⁹

54. Santiago Legarre, *Natural Law in Judaism Revisited*, 82 PRUDENTIA IURIS 239, 247–49 (2016) (explaining how in one and the same religion some precepts are more susceptible to reasoning than others and arguing that the former are expressions of the wisdom of God and the latter of the will of God).

55. Sophocles, *Antigone*, in 8 THE HARVARD CLASSICS 243, 257 (Charles W. Eliot ed., E.D.A. Morshead trans., 1909).

56. On natural law's universality, see FINNIS, *supra* note 4, at 81–90.

57. CICERO, DE REPUBLICA III.22 (author's translation).

58. *Id.* (author's translation). Along similar lines, Novak stresses the distinction between what is not to be done *simpliciter* and what is not to be done “in our place.” See NOVAK, *supra* note 48, at 48.

59. Both dimensions of natural law's universality are somehow present in the modern term *mala in se*, which could be loosely translated as “inherently wrong.” See *infra* note 106 (contrasting *mala in se* with *mala quia prohibita*: what is wrong only locally).

B. Challenges Flowing from Relativism

The contemporary expression “objective critical morality”⁶⁰ captures well the twofold universality of natural law. By holding that natural law is “objective,” the term excludes from its meaning the type of relativism that affirms that there are only subjective moral utterances or preferences—judgments without any real, true moral value: “What is true is true only because someone holds it to be so,” the skeptic’s phrase would go.⁶¹ In rejecting this relativism the classical conception of natural law thus adheres to moral cognitivism: a certain (if limited) optimism concerning the ability of human reason to understand what is right and what is wrong, at least in its basic core.⁶² For natural law is about the acceptance of “the objective value of human reason and the objectivity of what is good or evil regarding at least certain things that are basic human goods for all persons, regardless of time or culture.”⁶³

By holding that natural law is “critical,” the expression “objective critical morality” stresses that we are not talking about a merely conventional morality. It regulates (and passes judgment on) changing mores rather than reflecting them uncritically—though of course this affirmation does not entail the denial of the existence of conventional morality: If it is true that natural law does not supplant positive law,⁶⁴ it is also true that it does not supplant conventional morality (which is, after all, like a primitive or incipient form of positive law).⁶⁵

60. “[T]he distinction between merely conventional morality and critical morality also captures the basic idea that some things may be morally good, and just, regardless of social conventions to the contrary.” Orrego, *supra* note 37, at 32. The modern contrast between *mala quia prohibita* and *mala in se* (*supra* note 58 and *infra* note 106) also helps illuminate the difference between conventional morality (wrong because legally prohibited) and critical morality (legally prohibited because wrong).

61. Skepticism was one of the distinctive traits of the Greek sophists. On the relativism and skepticism of most sophists, see generally R.E. ALLEN, *THE DIALOGUES OF PLATO* (1984), and *The Sophists*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/sophists/> [<https://perma.cc/AB5R-R68C>] (last visited June 5, 2025). On the Sophists’ rejection of natural law’s normativity and their refutation by Socrates, see John Finnis, *Natural Law and the Ethics of Discourse*, 43 AM. J. JURIS. 53, 62 (1998).

62. In MacIntyre’s words, for the classical tradition there is “a crucial distinction between what any particular individual at any particular time takes to be good for him and what is really good for him as a man.” ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 150 (3d ed. 2007).

63. Orrego, *supra* note 37, at 34.

64. See *infra* Section III.A.

65. “Positive,” in the expression “positive law,” has nothing to do with the opposite of “negative.” Rather it means “posited.” In most contexts “positive law” also means “written law” (as opposed to natural law, which is unwritten). The exception is custom, a type of unwritten positive law. On the legal normativity of custom, see FINNIS, *supra* note 4, at 238–44.

C. The Core of Natural Law and Its Intelligibility

What is the basic core of natural law, and what are the basic human goods? Thomas Aquinas identified several “natural inclinations” crucial to our understanding of morality and then and there called the various naturally discernible objects of those various inclinations “human goods.” These goods, he said, are identified by first principles of practical reason and natural law. Hence, they are “basic” goods—Finnis’s term—by transference from “first” principles.⁶⁶

Relatedly, what is the precise extent of natural law theory’s optimism about our capacity of understanding what is truly right and wrong and where, instead, do the boundaries of true natural law appear blurred as a result of our limited perception of truth in moral matters? Aquinas held that the most general principles of natural law are known to all: self-evident (*per se nota*) universally. Still, in the course of deriving more specific moral precepts from the first moral principles, even “where there is the same rectitude in matters of detail, [what is right] is not equally known to all.”⁶⁷ This happens either as a result of simple error in the reasoning process from general principles to specific precepts or due to one’s own vices.⁶⁸

Of course, the questions posed in the previous paragraphs require more thorough answers. I will simply add here that the hurdles inherent in coming to right conclusions in difficult moral questions do not in themselves pose an insurmountable burden for natural law theory. For starters, the theory has a meta-ethical dimension to which the substance of moral claims is quite irrelevant. One person may disagree with another about the rights or wrongs of abortion, for example, but the two will be engaging in some form of natural law theory (at a meta-ethical level, that is) if they both accept that there is a right answer to the question of abortion, even if they disagree as to which that answer is.⁶⁹ Their agreement places them on the same side of the divide, on the other

66. See AQUINAS, *supra* note 40, at I-II, q. 94, art. 2. Following Aquinas’s lead Finnis famously listed seven basic goods (and ten “requirements of practical reasonableness”). See FINNIS, *supra* note 4, at 59–97. For the “basic goods,” instead of “basic values,” terminology, see *id.* at 442–43. Justice Gorsuch, one of Finnis’s former students, further noted that “there are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been suggested by Aristotle, argued by Aquinas, and defended by contemporary natural law thinkers.” Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599, 697–98 (2000) (footnotes omitted).

67. AQUINAS, *supra* note 40, at I-II, q. 94, art. 4. As noted by a contemporary secular constitutional scholar in a similar vein, “to say that [something] is self-evident does not imply that it is necessarily uncontroversial. People may, for various reasons, not understand an idea that is self-evident, or may dispute what they know to be true.” Christopher L.M. Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273, 319 n.114 (1988).

68. See AQUINAS, *supra* note 40, at I-II, q. 94, art. 4; q. 94, art. 6.

69. In this sense (and in this sense only) Ronald Dworkin’s is a “natural law theory.” See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFFS. 87 (1996)

side of which stands the relativist who denies the very possibility of affirming anything but preferences in moral matters.⁷⁰ The relativist's argument would go more or less like this: "It is not that you are right and I wrong; you just happen to feel that that is the best path and I do not. There is nothing to argue about because there are no reasons at stake; only beliefs."

Furthermore, and as to natural law considered as an ethical theory (i.e., a substantive philosophy of the good and the right), one can concede that there are many difficult moral questions regarding which rational understanding, devoid of religious tools (as natural law reasoning, by definition, is),⁷¹ certainly proves difficult; and, therefore, one can concede too that in those types of questions rational argument and persuasion are oftentimes virtually doomed to failure in practice—in the practice of conversations between friends and, even more so, among the members of a legislature or court. But this concession—which I am happy to make—is fully compatible with the claim that there are many other moral questions whose right answer is readily accessible to everyone, as simple moral experience attests.

D. The Promulgation of Natural Law

On a different but related note, Antigone also contrasts Creon's written statute with an "unwritten" law.⁷² Natural law is indeed not written, and this is what is meant by its not being "positive" law. Nevertheless, natural law is rationally accessible and therefore somehow promulgated. If we would not be able to know the contents of natural law we could neither choose to act upon it nor be held accountable for its breach.

The way natural law is promulgated is expressed by Aquinas's metaphor: It is "written on [our] hearts."⁷³ The metaphor—embedded in his creation account of nature—surely aims to stress the idea that natural law is so ingrained in us that it cannot be easily erased—but in the twenty-first century I have to struggle to answer my students' related question: "If that is the idea that wanted

(speaking of "objective truth" in the context of morality), and, earlier in time, but less on point (despite its title), see generally Ronald Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

70. MACINTYRE, *supra* note 62, at 19.

71. See *supra* notes 49–52 and accompanying text (arguing that natural law is "the religion of the atheist").

72. See Sophocles, *supra* note 55.

73. THOMAS AQUINAS, *SUPER ROMANS* ch. 2, l. 3, nn. 218–19. Aquinas, of course, in employing this metaphor is not suggesting that the human person's vital organ is inscribed with inky markings. In his commentary on St. Paul's letter to the Romans (a letter on which, see *supra* notes 41–47), Aquinas makes clear what he understands Paul to mean: The natural law "can be likened to a law presented to man from without and which it is customary to deliver in writing on account of the memory's weakness; whereas, those who observe the law without externally hearing the law show that *what the law requires is written* 'not with ink, but' first and chiefly 'with the Spirit of the living God' (2 *Corinthians* 3:3), and secondly through study: 'Write them on the tablet of your heart' (*Proverbs* 3:3)." AQUINAS, *supra*, ch. 2, l. 3, n. 218.

to be stressed, why mention the heart?" Dodging the question, I always insist that, the reference to the heart being only a metaphor, they should not attempt cardiac surgery on any classmate to check there for any natural law inscription!

III. NATURAL LAW AND POSITIVE LAW

A. *Natural Law Needs Positive Law*

Another characteristic of natural law, partly derived from its unwritten character, is that it constitutes an incomplete normative order. At least this is so for classical understandings of natural law,⁷⁴ as opposed to seventeenth- and eighteenth-century rationalistic accounts that see natural law pretty much as a refined, fully articulated moral code, not needing any positive complement.⁷⁵ These accounts are now out of fashion and rightly considered decadent, but it is still worth mentioning them and distinguishing them from classical natural law, to avoid confusions and misleading implications—especially given that so-called “natural law jurisprudence”⁷⁶ has much in common with rationalistic natural law theories insofar as *Lochner*-era natural law jurisprudence too makes positive (constitutional) law virtually superfluous and redundant.⁷⁷ Classical natural law, on the other hand, is perfectly compatible with (and indeed requires) respect for the positivity of man-made, written laws. Indeed, positive laws must be in place because natural law’s promulgation of what is right and what is wrong is, in communication terms, insufficient: You do not want anyone arguing that the person “did not hear the whisper!”⁷⁸

Natural law is also incomplete in a different way: It does not provide effective sanctions for its breach. Note that I am not arguing that natural law

74. Aquinas argues that “many things for the benefit of human life have been added over and above natural law, . . . by human laws.” AQUINAS, *supra* note 40, at I-II, q. 94, art. 5. Taking the Constitution as the paramount instance of human law, Pojanowski and Walsh rightly point to what could be considered an example of what Aquinas had in mind: In order for the “Constitution to accomplish as positive law what it purports to do as positive law, the decisions it reflects must be durable until changed on the terms the Constitution provides or the legal system ordered by the Constitution ends.” Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 100 (2016).

75. “Particularly in Germany, natural law was taken—of course in the secular sense which Grotius had given it—to be a material from which whole systems of municipal law could be fashioned.” J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 260 (1992) (also commenting on the work of Pufendorf, Wolff, Vattel, and others).

76. Legarre, *A New Natural Law Reading of the Constitution*, *supra* note 30, at 884–85 (discussing “natural law jurisprudence” in the U.S., and explaining why it is a distortion of classic natural law).

77. *Id.* at 884 (discussing the *Lochner* era and its purported revival under substantive due process theories during the Warren Court years).

78. On the “whisper,” see *supra* at note 41.

provides for no sanction at all. On the contrary, as argued by Sophocles⁷⁹ and Cicero,⁸⁰ among others in the classical tradition, conscience—the silent reproach experienced internally—can prove a significant sanction for the trespasser of natural law obligations. But this sanction is not one of a coercive nature, and in a society of normal people (not angels) the possibility of coercion is morally required (by natural law) for the common good of that society. Joseph Raz rightly argues that “for *human beings as they are* the support of sanctions, to be enforced by force if necessary, is required to assure a reasonable degree of conformity to law and prevent its complete breakdown.”⁸¹ Some will undoubtedly not experience the reproach of conscience. As a result of having trespassed natural law so often, they will have something similar to a thick skin,⁸² a deafness morally speaking. Others who do experience the reproach of conscience will still go ahead and indulge in the wrongful conduct out of pleasure, convenience, or weakness; and when that wrongful conduct has also been made a legal crime by a given community, there needs to be a way to stop the criminal which is somehow more efficient and inescapable than one’s own conscience.⁸³ Hence the moral need for some sort of coercive sanctions—a need

79. Antigone clearly refers to this reproach of conscience when she dramatically explains to her uncle Creon that she ought rather to disobey his law than the laws of Hades (i.e., natural law):

For whoso lives, as I, in many woes, How can it be but death shall bring him gain? And so for me to bear this doom of thine Has nothing painful. But, if I had left My mother’s son unburied on his death [which would have been the result of abiding by Creon’s edict,] I should have given them pain.

Sophocles, *supra* note 55, at 257.

80. Cicero famously wrote about obedience to natural law that “whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.” CICERO, *supra* note 57, at III.22 (author’s translation).

81. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159 (2d ed. 1990) (emphasis added). Raz rightly concedes that “yet we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions.” *Id.* Enter the hypothesis of a “society of angels” (James Madison’s phrase in *Federalist* No. 51). Angels, by definition, would not need sanctions, but, Raz argues, they still “may have a need for legislative authorities to ensure co-ordination,” i.e., positive law. *Id.* Writing before Raz (but obviously after Madison), Fuller also argued against the idea that “in a society of angels there would be no need for law.” FULLER, *supra* note 1, at 55 (introducing useful nuances regarding angels).

82. My analogy in class is that because a gardener spends so many hours outdoors, he may not even notice that a mosquito has stopped on his arm. But a baby, whose skin is thin and pure, notices instantly the same mosquito on his own baby arm.

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

that is perfectly compatible with the understanding that coordination, not sanctions, is at the core of the meaning of what it is to have a legal system.⁸⁴

B. Just and Unjust Positive Laws

While rationalistic accounts of natural law defend the existence of two *separate* legal orders (one natural, one positive),⁸⁵ classical natural law theory instead holds that in normal cases natural law exists in the positive law of a state, in a way similar to that in which a fluid (natural law) is contained in a vessel (positive law).⁸⁶ But in these normal instances, which correspond to just positive enactments,⁸⁷ natural law also continues to exist as a normative order independent of the legal order, both in the practical reasoning of the citizens of that state and in the intelligence of the creator of that natural law.⁸⁸

In pathological instances (unjust laws), where the positive law of a state violates a relevant natural law precept, natural law will not exist in that positive law—this is what is meant by the otherwise confusing tag *lex iniusta non est lex* (“unjust laws are not laws”)⁸⁹—but, again, it will subsist independently of the unjust positive law (in the ways just explained) and it will provide citizens with a measure in the light of which to evaluate that unjust law and with a moral reason to react critically, in one way or another, against it.⁹⁰ Furthermore, the

84. See H.L.A. HART, *THE CONCEPT OF LAW* 199–200 (3d ed. 2012) (on the minimum content of natural law). Other than these pages, which actually deal with the minimum content of *positive* law, the whole book makes a cogent argument in favor of the position mentioned in the text (a position followed by Raz, as his hypothesis of the society of angels shows).

85. Rationalistic accounts of natural law typically go hand in hand with chronological accounts of law and society, according to which positive law follows in time a state of nature, in which persons are only bound by natural law. See KELLY, *supra* note 75, at 203–43 (discussing seventeenth-century social theory).

86. John Finnis argues that the notion that “(human, positive) law *includes* natural law” was found by Aquinas in the works of Aristotle and Cicero. FINNIS, *supra* note 4, at 294. As I will explain later, this *inclusion* has two types of intensity or “modes of derivation.” See *infra* III.C.

87. Professor Corwin held that one example of such just enactment is the U.S. Constitution, of which he said that it “is, still, in important measure, [n]atural [l]aw under the skin.” Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME L. REV. 258, 258 (1950).

88. See AQUINAS, *supra* note 40, at I-II, q. 90, art. 1.

89. See Finnis’s fundamental clarification of *lex iniusta non est lex*. FINNIS, *supra* note 4, at XII.4. In his most recent writing, Finnis carefully showed how his late colleague Joseph Raz had initially misunderstood *lex iniusta non est lex* to mean what it meant for Hans Kelsen, i.e., “that there are ‘natural law theorists’ who think it ‘a necessary truth that law, every law, has moral worth.’” In his later work, Raz dropped this false accusation against natural law theory, Finnis argues. See John Finnis, *Joseph Raz*, in *BIOGRAPHICAL MEMOIRS OF FELLOWS OF THE BRITISH ACADEMY* 307, 318–19 (2025), <https://www.thebritishacademy.ac.uk/publishing/memoirs/22/raz-joseph-1939-2022/> [<https://perma.cc/4JEV-PKFC>] (citing RAZ, *supra* note 81).

90. The functioning of natural law explained in the text (as a measure of the justice of positive enactments and a reason to somehow react against a law deemed below that measure) is what justifies calling natural law “critical morality.” Kirk, *supra* note 51. That functioning is surely

pathology also shows the practical effects of the coexistence of that unjust legal order with the natural law insofar as that unjust order may still generate legal obligations that do not derive from the moral content of the positive law.⁹¹

When I refer in the previous paragraph to “just positive enactments,” and contrast them with “unjust laws,” I mean *truly just* positive enactments and *truly unjust* laws. Of course, anyone who sincerely thinks a law is just will make that assessment because that person finds that law to be really just, though indeed it will sometimes be the case that someone will honestly hold to be just what is indeed unjust. But, again, this only shows the possibility of human mistake; it does not preclude the ability to judge correctly when it comes to justice and, more generally, to morality.⁹²

C. Modes of Derivation of Positive from Natural Law

Natural law, claims the classical tradition, is present in positive laws⁹³—a claim not altogether different, if rightly understood, from a famous Supreme Court dictum: “The law, however, is constantly based on notions of morality.”⁹⁴ The tradition further claims that natural law is present in positive laws in two different ways, with two different intensities: one greater, one lesser. Enter Thomas Aquinas’s theory of “derivation of positive from natural law”⁹⁵—in which “derivation” means something like “connection” (and the corresponding verb “derive,” something like “ratify” or “determine”⁹⁶).

also what purportedly justifies calling it “higher law,” but in the light of objections such as Fuller’s (see FULLER, *supra* note 1) it is perhaps a good idea to get rid of that metaphor of elevation.

91. See AQUINAS, *supra* note 40, at I-II, q. 96, art. 4. Elaborating on Aquinas’s thought, Finnis argues that unjust laws may still generate an obligation to obey, deriving not from the content of the law “but from some ‘collateral’ source.” FINNIS, *supra* note 4, at 354. This “collateral source” has to do with “the ‘probable bad consequences for the common good’ of disregarding the unjust law. *Id.* at 361.

92. See Sophocles, *supra* note 55.

93. In George’s words, “just and good positive law, including constitutional law, is always derived in some sense from the natural law.” GEORGE, *supra* note 43, at 236. Notwithstanding the relationship between natural and positive law, “natural law is not primarily an instrument intended for use in common courts of law; rather, it is a body of precepts helping you and me to govern ourselves.” Kirk, *supra* note 51, at 1041.

94. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). *Bowers* was overturned in *Lawrence v. Texas*, 539 U.S. 558 (2003), but the proposition that “the law is constantly based on notions of morality” states a general idea and is independent from the context in which it was proclaimed in *Bowers*. See Santiago Legarre & Gregory J. Mitchell, *Secondary Effects and Public Morality*, 40 HARV. J.L. & PUB. POL’Y 320, 355–58 (2017) (criticizing *Bowers v. Hardwick*’s misconceived characterization of public morality and arguing that natural law theory is the crux of the concept of public morality in constitutional law).

95. Legarre, *Positive from Natural*, *supra* note 36 (discussing derivation of positive from natural law).

96. Some verbs work better for one mode of derivation, some for another. See *infra* notes 100 and 102.

Aquinas's account of the relationship of natural law to positive law consists of a general theory—that every just human law is derived from (and traceable to) the law of nature⁹⁷—and of two subordinate theorems⁹⁸: derivation is always either *per modum conclusionum* or *per modum determinationis*.⁹⁹ According to the first theorem, positive law “may be derived from the natural law . . . as a conclusion from premises.”¹⁰⁰ For example, “that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man.’”¹⁰¹ According to the second theorem, positive law may be derived from natural law “by way of determination [*determinatio*] of certain generalities.”¹⁰² For example, “the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.”¹⁰³ As Finnis suggests, “There seems to be no happy English equivalent of ‘*determinatio*’”—the word used by Aquinas; Kelsen’s “concretization,” he adds, “would do; ‘implementation’ is more elegant.”¹⁰⁴

Those parts of any legal system derived from natural law by way of conclusion “consist of rules and principles closely corresponding to requirements of practical reason.”¹⁰⁵ Therefore, “discussion in courts and amongst lawyers and legislators will commonly, and reasonably, follow much

97. In the sixteenth century, the English lawyer Christopher St. Germain announced the following, similar dictum, which was later popularized by Finnis: “In every law positive well made is somewhat of the law of reason.” FINNIS, *supra* note 4, at 281.

98. The idea of a general theory and a subordinate theorem I borrow from Finnis. *Id.* at 285.

99. Both the theory and the two sub-theorems are compressed in AQUINAS, *supra* note 40, at I-II, q. 95, art. 2, titled “Whether every human law is derived from the natural law?” See also *id.* at I-II, q. 95, art. 4.

100. AQUINAS, *supra* note 40, at I-II, q. 95, art. 2. The verb “ratify” works best with derivation by way of conclusion. In this first sub-theorem, a precept of positive law *ratifies* a precept of natural law.

101. *Id.*

102. *Id.* Verbs like “implement” or “concretize” work best with derivation by way of determination. In this first sub-theorem, a precept of positive law *implements* or *concretizes* a precept of natural law. Of course, the verb “determine” also does the job.

103. *Id.* Gregg gives a simple example that has always been quite popular among natural law theorists:

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

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

104. FINNIS, *supra* note 4, at 284.

105. *Id.* at 282.

the same course as a straightforward moral debate.”¹⁰⁶ This is precisely the case with regard to substantial chunks of constitutional law, especially when it comes to the Bill of Rights. Many such constitutional enactments consist of rules and principles closely corresponding to natural law requirements. This is a general claim, applicable to any constitution declaring or recognizing human rights, and thus it is also a specific claim about the American Constitution insofar as (in its interpretation by the U.S. Supreme Court) it does declare and recognize rights—which is not to say that every single right declared in the U.S. Constitution (or in any other constitution) is derived from natural law by way of conclusion.¹⁰⁷

That those rights have been called “natural rights” by the American tradition is telling from the point of view of natural law theory, as it highlights that these rights preexist, morally speaking,¹⁰⁸ positive, even constitutional, law.¹⁰⁹ But the “natural rights” tradition is partly and relevantly different from the classical natural law tradition,¹¹⁰ and, in some of its versions, it can even be partially inconsistent with the latter.¹¹¹ I will not elaborate further here on the former, but I will point out one significant difference between the two traditions. While in the American tradition of natural rights, natural law was “based on assumptions about humans and human freedom in the state of nature,”¹¹² and a natural right was simply a portion of a more general liberty enjoyed in the so-called “state of nature,”¹¹³ the classical natural law tradition, as it is well known, excludes (and is incompatible with) the notion of a “state of nature.”

106. *Id.* The distinction between “conclusions” and “determinations” is very much in line with a modern distinction: the one between *mala in se* and *mala quia prohibita*—which is also linked with the contrast between the universal, on the one hand, and the local and the domestic, on the other hand. The idea is that some things are “not to be done” (*mala in se*) while others are merely “contrary to our local ordinance” (*mala quia prohibita*). For familiar examples, see NOVAK, *supra* note 48, at 50 (contrasting the Jewish law of rape with the law that prohibited giving the younger daughter before the older one in marriage).

107. Constitution-makers have the ability—which they often exercise—to create rights that morality does not strictly require.

108. Unless one buys chronological theories of state of nature, the “preexistence” of natural rights is not “in time.” See AQUINAS, *supra* note 40, at I-II, q. 94, s.c. Moral “preexistence” really means “preeminence.” See also FINNIS, *supra* note 4, at 282, 284.

109. See O’Scaannlain, *supra* note 45, at 1514 (pointing out the significance of the preexistence of constitutional rights).

110. Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 172 n.7 (1993) (arguing that there is “a subtle distinction between “natural rights” and “natural law”).

111. Kirk, *supra* note 51, at 1040 (explaining that the eighteenth-century Enlightenment’s doctrine of natural rights is “not at all identical” with the classical tradition of natural law).

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

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

D. Modes of Derivation and Constitutional Interpretation

Before we proceed, it is important to clarify that even if we were to conclude that natural law should be important for the interpretation of positive law, it would still be necessary to keep in mind that positive norms derived from “principles of natural law” are filtered, so to speak, by the language and the technique of the (positive) law. This circumstance ought certainly to condition and modulate judicial interpretation of those norms.¹¹⁴ It also explains why, absent unequivocal violations of fundamental human rights, “very little of wide generality can be said to resolve determinately the many issues of interpretation.”¹¹⁵ Still, the act of interpreting positive law is always “an act which can and should be guided by ‘moral’ principles and rules; [and] . . . those moral norms are a matter of objective reasonableness, not of whim, convention, or mere ‘decision.’”¹¹⁶ For this reason, it follows that the interpretative theory called “originalism”¹¹⁷ (with the definitively controlling role that, in its many variants, this theory gives to history) has inevitable shortcomings. To borrow again from Finnis: “In adjudication and the practice of law, interpretation of constitutional and statutory texts and statements can never reasonably be exclusively historical. Constitutions and statutes arise for consideration—indeed, exist as law—only in a context of the interpreter’s intention to serve persons and their well-being, the common good.”¹¹⁸

114. Finnis sheds light: “[E]ven those parts of [positive law] which reproduce the requirements of morality are conceived of, and can be studied, as parts of a genuine whole which in its entirety and in each of its parts, most of which neither reproduce nor are deducible from morality’s requirements, can be studied as the product of human deliberation and choice.” John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW* 195, 195 (Robert P. George ed., 1996).

115. John Finnis, *Natural Law: The Classical Tradition*, *supra* note 31, at 59.

116. FINNIS, *supra* note 4, at 290.

117. For a comprehensive guided tour of contemporary originalist constitutional theory, see Professor Lawrence Solum, Regula Lecture at the University of Akron School of Law Center for Constitutional Law (Apr. 4, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175412 [<https://perma.cc/A8TT-JS5K>].

118. FINNIS, *supra* note 31, at 289; *see also* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1418–25 (2021) (pointing at originalism’s shortcomings from a natural law perspective); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 91–116 (2022) (arguing that originalism is an illusion); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103 (2022) (advancing the idea that originalism’s superiority is, from the point of view of the “classical legal tradition,” a misconception); Legarre, *A New Natural Law Reading of the Constitution*, *supra* note 30, at 900–03 (holding that mere originalism is incompatible with natural law). For an argument, with a natural law basis, in favor of originalism, *see generally* LEE J. STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (2019) (arguing that originalism is compatible with natural law); Pojanowski & Walsh, *supra* note 74 (offering an account of originalism anchored in the classical natural law tradition of legal thought); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022) (critiquing Vermeule’s (supposedly) natural law-based rejection of originalism).

The two modes of derivation of positive from natural law alluded to in the title of this subsection have different relevance when it comes to the interpretation of positive law. Let us start with a constitutional norm derived by way of conclusion from natural law. The interpretative process seeking to define the contours of the right to life, as recognized by countless constitutions (and international conventions), involves a type of reasoning that is fundamentally moral.¹¹⁹ As Finnis explains, by way of further specification of the right to life example, “our law against euthanasia and assisting suicide appropriately has virtually the same content as the natural moral law against such choices and actions, and debates about its positing (about enacting or retaining it) substantially track moral debate about the morality of those kinds of choice and act.”¹²⁰

More generally, it is true that in issues concerning fundamental rights the moral reasoning on both sides will be similar in every jurisdiction. In such cases legal reasoning and moral reasoning overlap to a significant extent, rendering less relevant—which is not to say “irrelevant”—the technicalities of each given legal system.¹²¹

Constitutions also include many instances of derivation by way of determination: lots of implementation and concretization, without which human rights would be inoperative. This *determinatio* includes constitutional arrangements such as the separation of powers and federalism. These more technical parts and aspects of constitutional law are, to borrow from Justice Breyer, more “arcane”¹²² matters. It seems to make sense that natural law would be less relevant when it comes to their interpretation and, conversely, more

119. For other constitutional law examples, different from the right to life, see Brennan Buhr, *Making Judges Moral: Originalism and the Practice of Common Good Constitutionalism*, 37 NOTRE DAME J.L. ETHICS & PUB. POL’Y 582, 595 (2023) (analyzing First Amendment cases according “to a moral reading of the Constitution in line with common good principles”).

120. John Finnis, *Coexisting Normative Orders? Yes, but No*, 57 AM. J. JURIS. 111, 112–13 (2012). In line with Finnis, Buhr argues that “moral reasoning is an inevitable aspect of judicial decision-making in certain areas of law.” So-called “common good constitutionalism” is not necessarily in tension with originalism, “because the original public meaning of constitutional texts depends upon and requires judges to consult the moral principles that grounded the text when it was ratified.” Buhr, *supra* note 119, 582; see also Josh Hammer, *Common Good Originalism*, 4 HARV. J.L. & PUB. POL’Y 917, 917 (2021) (taking an in-between stance upon originalism and common good constitutionalism).

121. This is why, incidentally, comparative constitutionalism is justified; it is also why it makes even more sense when it comes to fundamental rights. See Santiago Legarre, *Cruel and Unusual Existence: Comparative Constitutionalism Revisited*, 71 LOY. L. REV. 257 (2025) (discussing the scope and limits of these claims, and distinguishing legislative from judicial comparative constitutional analysis).

122. Justice Breyer’s word in his famous debate with Justice Scalia on the use of foreign materials in constitutional adjudication, on which see Norman Dorsen, *The Relevance of Foreign Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT. J. CONST. L. 519, 519–520, 529 (2005), which includes a lightly edited transcription of the discussion, approved by the two Justices.

relevant when it comes to the interpretation of those chunks of constitutional law with more moral flesh,¹²³ so to speak: those parts of constitutional law related to morality “by way of conclusion.”¹²⁴

But one ought not to press this point too far. While structural arrangements are indeed technical, they are, in the end, devised precisely in the service of the fundamental rights of those living in the relevant community; for in the final analysis political and legal institutions—structures—are there precisely to protect and foster fundamental human rights.¹²⁵ So if Samuel Gregg is right in affirming that “constitutional design occurs by way of what Aquinas called in his *Summa Theologiae* ‘determination [*determinatio*] of certain generalities,’”¹²⁶ it does not follow from this that natural law has no traction whatsoever for purposes of interpreting those more technical parts of the Constitution.¹²⁷ To

123. In the alluded-to debate, Justice Breyer made an analogous point: Borrowing foreign materials makes more sense when it comes to fundamental rights than regarding so-called “arcane” matters. I pursue this avenue further, and introduce some tweaks, in Santiago Legarre, *Towards a New Justificatory Theory of Comparative Constitutional Law*, 1 STRATHMORE L.J. 90, 106–07 (2015). Ever since writing that article I have avoided the use of the term “comparative constitutional law” in favor of the more precise term “comparative constitutionalism.” Legarre, *Cruel and Unusual Existence: Comparative Constitutionalism Revisited*, *supra* note 121, at 263 n.13.

124. O’Scainnlain, *supra* note 44, at 1524. Note that, though it may seem otherwise, my suggestion is different from Judge O’Scainnlain’s. In effect, though he argues that “the natural law is useful when interpreting provisions of the Constitution that were themselves efforts to codify pre-existing natural law rights,” he hastens to clarify that “there, the judicial inquiry is an *historical* one, not a philosophical one.” *Id.* at 1523 (emphasis added).

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

126. Gregg rightly continues: “The constitutions of the United States, France, and Australia all involve, for instance, the separation of powers. But they do not realize this goal in exactly the same way. Each, however, is a reasonable way of realizing the same end.” Samuel Gregg, *Neil Gorsuch, Natural Law, and the Limits of Judicial Power*, PUB. DISCOURSE (Mar. 15, 2017), <http://www.thepublicdiscourse.com/2017/03/18766/> [<https://perma.cc/NKM2-NMSV>].

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

repeat, constitutional arrangements are there to serve the common good (and human rights)¹²⁸ whose fundamental intelligibility natural law theory affirms and explains.

If it is true that one should not overstress the idea that natural law is less relevant when it comes to interpreting constitutional structure, it is also true, conversely, that one ought not to exaggerate the degree to which natural law has more traction when it comes to interpreting fundamental rights. For, as explained by Finnis, implications and definitions of these rights “will carry legislators or judges *beyond* the point where they could regard themselves as simply *applying* the intrinsic rule of reason, or even as deducing conclusions from it. Hence the legal project of *applying* a permanent requirement of practical reason will itself carry the legislator into the second of the two categories of human or positive law.”¹²⁹ If we translate Finnis’s words to the technical terms coined by Aquinas, the idea would be that, more often than not, the legislator will engage almost simultaneously in both modes of derivation: *per modum conclusionis* and *per modum determinationis*. When the legislator aims at ratifying a certain natural law precept (derivation by way of conclusion), he will often find himself introducing all sorts of necessary details in order to make that precept work (derivation by way of determination).

The softening of the claim that natural law ought to be accorded a varying importance depending on the type of constitutional norm whose interpretation is at stake is therefore the result of a more fundamental softening. For there is indeed not a clear-cut difference between the two types of derivation, and even less so is it true that some constitutional norms are one hundred percent derived from natural law by way of conclusion while the connection of other norms to natural law is one hundred percent one of *determinatio*. This softening is beautifully and metaphorically expressed by Finnis, whom I shall paraphrase, supplement, and quote, while applying his words (which refer to law in general) to the Constitution:

The derivation of constitutional law from objective critical morality “has indeed the two principal modes identified and named by Aquinas; but these are not two streams flowing in separate channels.”¹³⁰ While the central principle underlying each constitutional right may be a straightforward application of

ANCHORING TRUTHS OF THE CONSTITUTION (2023). Consider also the work of Michael Moore, whose approach appears to grant great traction to natural law; but his “realist” theory, though called “a natural law theory of interpretation,” has little in common with classical natural law theory. *See, e.g.,* Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087, 2088 (2001) (arguing that a “‘natural law’ or ‘realist’ theory of constitutional interpretation” makes possible “a comfortable accommodation of judicial activism and full fidelity”).

128. *See* ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 65–66 (1989) (discussing the relationship between principles of power allocation and constitutional rights).

129. FINNIS, *supra* note 4, at 284 (first emphasis added).

130. *Id.* at 289.

universally valid (natural law) moral requirements, the effort to integrate them into the constitutional order will certainly require a lot of implementing and concretizing. Likewise, the *determinationes* implied in the several constitutional arrangements and structures are not fully arbitrary; if reasonable they instantiate, in one way or another, a discernible common good.

A final word of caution, as I conclude this section dealing with natural law and constitutional interpretation. The application of sound moral principles (natural law principles) to matters such as constitutional governance involves contingencies and circumstances about which reasonable people holding firmly to the principles can reasonably reach differing conclusions.¹³¹ This is why it would be wrong to talk about “*the* natural law reading of the Constitution,”¹³² as if there would always exist one right, natural law answer to every matter of constitutional order.¹³³ It is also worth making clear that defending natural law’s traction in the context of constitutional interpretation is not equivalent to endorsing the “living instrument interpretation” of the Constitution, i.e., all kinds of judicial updating of a constitution on the basis of all sorts of moral considerations which may, on occasion, go under the name “natural law” (but more commonly under the names “human rights” or “common good”). More often than not, under the guise of certain moral readings of the Constitution, one finds a project of reforming the Constitution in violation of the responsibility to follow established processes of constitutional amendment, while neglecting the onus of discharging the responsibility which alone could make constitutionally justifiable the *judicial* reform of the Constitution: namely, the responsibility of demonstrating, carefully and even-handedly, that the Framers of the Constitution were certainly committing a moral error—introducing an injustice—when drafting a certain provision.¹³⁴ Fidelity to established law (be it constitutional or otherwise) ought indeed to cede in the extreme circumstance where one can establish that the law is unjust in a respect in which it is one’s own constitutional responsibility to reform it or violate it. But this extreme circumstance that could make natural law relevant in an extraordinary way is less frequent, and in that sense less important, than the myriad instances in

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

132. Compare with the title of one of Dworkin’s books: RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996). I titled my first investigation of these matters, *A New Natural Law Reading of the Constitution*. See *supra* note 30. The indeterminate article in the title of my work intends to signal a nuance.

133. In his rather successful attempt to debunk the alleged antinomy between “originalism” and “common good constitutionalism,” Buhr manages to identify “examples from contemporary American case law which point toward a moral reading of the Constitution,” without prejudice to originalism. Buhr, *supra* note 118, at 589.

134. See John Finnis, *Judicial Law-Making and the “Living” Instrumentalisation of the ECHR*, in LORD SUMPTION AND THE LIMITS OF THE LAW 73 (2016).

which what is at stake is the interpretation of a just constitutional provision,¹³⁵ derived from natural law by way of conclusion or by way of determination. In these more common instances (and cases) too natural law should have traction, with the differing intensities identified in this section of this Article.

CONCLUSION: NEW IMAGES AND OBJECTIONS

On the one hand, there is a common assumption in the twenty-first century: that outside natural science there is nothing but subjective assertions and beliefs. In the fields of ethics, political theory, and philosophy of law one has indeed to expect that most participants in those fields (whether scholars or students) will all or almost all share this skeptical assumption, more often than not as a position that they picked up from their schoolteachers and/or the media and have never considered deeply and critically.

On the other hand, until the reorientation summarized in this Article, the natural law tradition did not offer the average, skeptic scholar or student an appealing alternative to relativism. Finnis himself, reading his way into the natural law tradition as a final-year law student in Australia and then during his doctoral studies in Oxford, was disconcerted by the inability or unwillingness of the writers in the natural law tradition “to meet modern secular students as and where they are—equipped by schoolteachers and journalists with views derivative from Hume and Russell or other varieties of modern skepticism about good and bad, right and wrong in human action.”¹³⁶

The new classical natural law theory purports to offer scholars and students in the twenty-first century just what the young Finnis and the contemporary likes of him needed but lacked: an approach to ethics that speaks accurately about perennial things to a new audience. Like any other audience, the audience of the twenty-first century may resist the splendor of truth. No presentation of natural law is immune to the possibility of a conversation that ends in failure: It takes two to tango. The new challenge of natural law theory is to be up to the task, minimizing misunderstandings and confusions. Success is in the hands of the participants in this wondrous enterprise.

135. This is how I understand Brennan Buhr’s invitation for constitutional interpreters “to recognize the elements of the Constitution’s internal morality of the common good that are contained within [contemporary cases].” Buhr, *supra* note 118, at 603.

136. FINNIS, *supra* note 4, at 415.