What Happened to Natural Law in American Jurisprudence?

By Kody W. Cooper

Federalism & Separation of Powers Practice Group

A Review of:

The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped, by Stuart Banner (Oxford University Press), https://global.oup.com/academic/product/the-decline-of-natural-law-9780197556498?cc=us&lang=en&

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Other Views:

• Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law.*, The New Republic, Feb. 3, 2021, https://newrepublic.com/article/161162/originalism-dead-long-live-catholic-natural-law.

• Bruce P. Frohnen, *Lawyers, Natural Law, and the Problem of Pride,* Kirk Center, Sept. 19, 2020, https://kirkcenter.org/reviews/lawyers-natural-law-and-the-problem-of-pride/.

• Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019), https://www.cambridge.org/core/books/originalisms-promise/A5E97D3EB6CAAC72592D1A62E3691B1C.

• Robert Bork, *Natural Law and the Constitution*, First Things (March 1992), *available at* https://www.firstthings.com/article/1992/03/natural-law-and-the-constitution.

Not long after the confirmation of Supreme Court Justice Amy Coney Barrett, *The New Republic* published an essay titled "Originalism is Dead. Long Live Catholic Natural Law."[1] The header illustration portrayed Justice Barrett donning a chasuble, mitered, and enthroned as pontifex maximus. The clear implication—made explicit in the meandering, conspiratorial narrative that followed—was that Justice Barrett's confirmation was the culmination of an illiberal, shadowy Catholic plot to seize power, overthrow the Constitution, and impose traditional Catholicism from the bench.

Despite the blatant prejudice on display, the thrust of the article—that Barrett is just the most recent Justice who descends from what it calls "decades of Catholic influence on conservative legal circles"—does raise a legitimate question: just what *has been* the historical influence of natural law theory on the American legal system? And what prospects, if any, are there for its influence on jurisprudence going forward?

Happily, a book was published this year on just this topic: Stuart Banner's *The Decline of Natural Law*. Banner, a widely published legal scholar at UCLA and experienced counselor at the Supreme Court bar, traces natural law's career in the American legal system. Banner argues that natural law's influence was strong in the 18th and 19th centuries, but that over the past hundred years natural law has become increasingly irrelevant in the American legal system.

Banner's book is not a defense or critique of natural law, but an attempt to fill a gap in the scholarship by giving an objective report of the use of natural law by American lawyers and jurists in legal argument and decision. As such, it is a refreshing antidote to the anti-Catholic reactions and musings about natural law that followed Justice Barrett's nomination and confirmation. But it is more than that. His account of the influence of natural law is a significant contribution to our understanding of the history of the American legal system.

In my view, the book corroborates something that Banner may not have intended: that the American project is indebted in important ways to the classical, Christian, and even *Catholic* tradition of natural law theory. At the same time, the book reveals how natural law's actual influence on the legal system was understood to be continuous with the fundamental commitments of the polity, including nonestablishment, free exercise of religion and religious pluralism. Banner also tells a mostly compelling story explaining why the rhetoric of natural law declined in the American legal system.

I. Defining Natural Law

When G.K. Chesterton defined natural law as the "right reason in things which man with his unaided reason can see to be

1 Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law.*, The New Republic, Feb. 3, 2021, https://newrepublic.com/article/161162/originalism-dead-long-live-catholic-natural-law.

right," he drew from a tradition that preceded his own Thomistic school of Catholic philosophy.[2] The core claim of natural law philosophy is that right reason—recta ratio—can discern the functions of things, and thereby judge whether human action at an individual, social, or legal plane accords with proper human functioning. This core claim can be traced to the teleological vision of nature articulated in classical antiquity by thinkers like Plato, Aristotle, and Cicero. Thomas Aquinas's achievement was to articulate a grand architecture of natural law that synthesized the insights not only of classical Greek and Roman antiquity, but also of Jewish and Muslim philosophy, all within the revealed principles of Christian doctrine. The power of Aquinas's theory rested in part on his contention that the metaphysical and moral propositions of natural law were compatible with, but did not presuppose, Christian faith in the mind of the knower. The natural law was knowable and in fact known from a wide range of non-Christian perspectives.

Yet natural law philosophy was metaphysically *theistic*. Aristotle had identified a range of exceptionless norms that he judged to be required for living a virtuous life. And while he favorably cited Antigone's civil disobedience to Creon's unjust law, the legal status of moral norms in Aristotle's thought was ambiguous at best. The ambiguity dissipated in Aquinas's thought, which wed Aristotelian teleology to a Judeo-Christian creational metaphysic, in which the world was seen as existentially dependent upon a first cause. In the order of being, the divine pedigree of nature and human reason secured the *legal* character of exceptionless moral norms.

As Banner points out, William Blackstone provided an influential definition of natural law that encapsulated the commonplace view of 18th and 19th century Anglo-American lawyers and judges. Blackstone defined law in the abstract as a "rule of action" imposed upon animate and inanimate matter alike. Blackstone sourced physical laws governing inanimate matter and moral laws governing rational animals in the same divine pedigree:

> When the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all movable bodies must conform . . . Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being . . . so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.[3]

Blackstone's definition manifests what Yves Simon, one of the most influential 20th century Thomistic theorists of natural law, referred to as the three orders identified in classical natural law theory: order in the divine mind, order in nature, and order in the human mind.[4] Classical natural law theory saw these three orders, which spanned the orders of being and knowledge, as inherently connected, since nature and man were seen as existentially dependent upon an all-good and all-powerful God who created it and impressed his plan upon it. An analogy to the home can help illustrate this idea. Imagine a father of a home who is also the architect and builder of it. The order in the divine mind is like the blueprint of the home in the mind of the architect-father. The order in nature is like the house constructed with all of its particular parts—brick, wood, sheetrock, furniture, appliances, etc.—arranged according to the plan. The order in the human mind is apparent in each child in the home, who shares in the reason of their architect-father by grasping the reasons of things and persons who constitute the domicile, including both vertical relationships of child to parent and horizontal relationships amongst siblings, in light of his or her own desire for happiness.

Classical natural law conceived of human beings as members of a natural ecology that involved membership in social wholes—from the primordial cell of the family, up into more expansive concentric circles of membership, which progressively expanded the bonds of love and order toward the common good. The practical necessities that attached to the pursuit of the human good had the character of *laws* of nature.

Banner assembles wide and deep evidence that early American lawyers and jurists believed in classical natural law along the lines of the three orders. Was the natural law divinely pedigreed? Yes, said Boston lawyer Benjamin Oliver: "the only sure foundation of all right, is the will of the great Creator." Were human beings part of a world that is teleologically ordered? Yes, said lawyer-poet William Hosmer, who inferred from basic human needs of nourishment and community that the practical necessities attached to the pursuit of the goods of life and community were natural *laws* that regulated human conduct. Were the precepts of natural law—which direct human action to the common good—grasped by reason? Yes, said Cambridge professor Thomas Rutherford, author of the influential *Institutes of Natural Law*: "Although his own particular happiness be the end, which the first principles of his nature teach him to pursue; yet reason, which is likewise a principle of his nature, informs him, that he cannot effectually obtain this end without endeavoring to advance the common good of mankind."[5]

Hence, Americans recognized natural law as a pretheoretical *fact* that was grasped and presupposed by the common man. But they also taught and learned it *as theory* in the universities. Banner shows that natural law theory was pervasive in legal education. When Joseph Story began lecturing at Harvard, he announced he would begin with natural law, voicing the commonly held

2 G.K. Chesterton, *A Mild Remonstrance*, The American Rev., Sept. 1935, at 455.

3 2 William Blackstone, Commentaries 38-40 (J.B. Lippincott Co. 1893).

4 Yves Simon, The Tradition of Natural Law: A Philosopher's Reflections 139; 142 (Vikan Kuic ed. 1992). For an illuminating discussion, see Russell Hittinger, The First Grace: Rediscovering Natural Law in a Post-Christian Era, xvi ff., 4-8 (2003).

5 Stuart Banner, The Decline of Natural Law, 12-13, 16 (2021).

view that natural law "constitutes the first step in the science of jurisprudence."[6]

Because it was believed that all men were created equal, it followed that all persons with a functioning power of reason both knew and were bound by the unchanging principles of natural law. It is regarding this axiom of natural law that an objection is frequently raised: how could there be a universal common standard accessible by reason in the face of wide cultural, moral, and legal differences? The objection gets to the heart of the relationship of natural law to positive law.

II. The Relationship of Natural Law to Positive Law in the Early Republic

Some contemporary relativist philosophers infer from cultural and legal difference that natural law does not exist—but they often ignore Aquinas's solution to this puzzle.[7] Aquinas made two distinctions. First, between primary and secondary precepts. And second, between deductive and determinative relations between the precepts and positive human laws.

With regard to the first distinction, Aquinas pointed out that all human beings really know and are bound by the primary precepts. No one can claim not to know at least implicitly that good is to be done and evil is to be avoided; nor can anyone deny knowing the precepts that seem to follow nearly immediately upon it, such as do no harm, do not murder, etc. But secondary precepts can fail to be known and reflected in the positive law, due to erroneous theoretical beliefs or due to vicious customs and habits. For example, Aquinas pointed out that some Germanic tribes had been so corrupted by vicious habits and beliefs that they held that theft was morally acceptable. This is the first distinction that Aquinas deployed to make sense of how some tribes and even civilizations had social and legal requirements or permissions contrary to natural law precepts.

The second distinction also helps explain such differences, while also clarifying the relationship of natural law to positive law. Some positive laws are straightforward deductions from natural laws. From the moral precept *do not steal*, it is an easy deduction to denominate theft of expensive property as a felony. But how shall property theft be punished, and according to which specific amounts? This is a matter left to human freedom and prudence, in light of circumstances: the realm of determinatio.

While Banner does not discuss Aquinas's second distinction explicitly, his enlightening discussion of how natural law was deployed by legislators, lawyers, and jurists shows how they distinguished the modes of deduction and determination. The lawyer William Rawle in his *View of the Constitution of the United States in America* implicitly identified and distinguished the modes of deduction and determination this way: "When the period arrives for the formation of positive laws, which is after the formation of the original compact, the legislature is employed, not in discovery that these acts are unlawful, but in application of punishments to prevent them."[8] Banner finds extensive evidence that Americans distinguished between "fundamentals and details" in translating natural justice into positive right.

The widespread understanding of legislation as grounded on natural law also colored the use of natural law in courts. Banner persuasively argues that judges were "far more likely" in earlier centuries to interpret legislation in light of natural law principles and construe it accordingly, since judges supposed that legislators intended to secure natural rights. Judges thus rarely struck down legislation in the realm of determinatio because they respected the will of the legislature when primary precepts were not at stake.

Another way judges used natural law in the early republic was to fill in the gaps left by positive law's silence. Banner relates several examples of state and local courts directly appealing to natural law in cases touching on family, the rights of criminal defendants, property rights, and contract rights. For example, in *Wightman v. Wightman*, a New York chancery court had to decide whether a marriage was valid when one party to the marriage was insane, without statutory guidance. The court appealed to natural law to declare the marriage void.[9]

The pervasive influence of natural law on the early American legal system was also apparent in the common law. Banner convincingly shows that the later legal realist account or critique of the common law as a body of law created by judges was not how judges understood the common law in the 19th century. Rather, the common law, "based on both custom and reason," was the *discovery* of judges, rather than their invention. While jurists often saw custom and reason as harmonious, they did sometimes conflict, particularly when old English common law principles did not fit American circumstances. Reasonableness was the sieve by which the common law would be filtered into American jurisprudence. Since, as we have already seen, the heart of natural law is recta ratio, it isn't surprising that common law was understood to be the natural law applied by judges. As James Kent put it, the common law was "the application of the dictates of natural justice, and of cultivated reason, to particular cases."[10]

III. The Dispute over Juridical Appeal to First Principles

Following the failed nomination of Robert Bork to the Supreme Court, an interesting debate broke out between Bork and a few of his critics.[11] Bork defended a positivistic originalist approach in which judges have no authority to strike down legislative acts absent a clear violation of a specific textual provision of the Constitution as it was publicly understood by reasonable people when it was ratified. Hence, Bork opposed appeals to principles of natural justice in jurisprudence as ultra

6 *Id.* at 38 (citing Joseph Story, A Discourse Pronounced Upon the Inauguration of the Author, as Dane Professor of Law in Harvard University 42 (1829)).

7 *See, e.g.*, Jesse Prinz, *Morality is a Culturally Conditioned Response*, Philosophy Now (2011), *available at* https://philosophynow.org/issues/82/Morality_is_a_Culturally_Conditioned_Response.

8 Banner, *supra* note 5, at 21 (quoting and discussing William Rawle, A View of the Constitution of the United States 260 (1825)).

9 *Id.* at 27.

10 *Id.* at 65 (quoting Kent).

11 *See* Robert Bork, *Natural Law and the Constitution*, First Things (March 1992), *available at* https://www.firstthings.com/article/1992/03/natural-law-and-the-constitution; Hadley Arkes, William Bentley Ball, Robert H. Bork, Russell Hittinger, *Natural Law and the Law: An Exchange*, First Things (May 1992), *available at* https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange.

vires and therefore a dereliction of judicial duty. Meanwhile, his natural lawyer critics contended that language in the Constitution points to deep moral principles beyond the text itself, and that the historic understanding of the Founders and practice of early American judges justifies appeal to first principles in judging. Echoes of that debate a generation ago can be heard today in the discussion and debate over "common good constitutionalism" and "common good originalism."[12]

Banner's book provides helpful historical context for anyone interested in assessing this debate. It turns out that the dispute over the authority and scope of judges' appeal to first principles has deep roots in the republic. It is well known that Samuel Chase and James Iredell debated whether judges were authorized to appeal to natural law to strike down legislation. Chase argued that legislative enactments contrary to first principles did not meet the essential moral conditions to *be* law and so were void. Iredell replied that jurists differed over the content and application of first principles, and that judges had no greater claim to competence than legislatures.[13]

Chief Justice John Marshall is an example of a judge who seemed to feel the pull of both perspectives. In *Fletcher v. Peck*, he intimated that a law annulling contracts was unlawful in part because it was contrary to natural law—but he ultimately relied on the Contract Clause for his ruling.[14] Meanwhile, in *The Antelope* case, Marshall acknowledged that slavery was contrary to natural law, but he held that the positive law of the Constitution permitted it to exist as a state institution, and that the Court's judgment was bound by the positive law notwithstanding its contravention of first principles.[15]

One of the signal achievements of Banner's book is to throw light on how judges and lawyers debated the question in state courts during the 19th century. Were there principles of natural right that limited state legislatures, even if not explicitly stated in the state constitutions? State judges came down differently as to whether unwritten principles of natural law limited state legislatures. One Tennessee judge struck down a retroactive statute, appealing to the "eternal principles of justice which no government has a right to disregard." Meanwhile, a California supreme court justice contended that judicial appeal to first principles amounted to a "usurpation of legislative power." Banner discusses a wide range of cases that raised the question, including "class legislation" granting special favors, and a variety of property rights cases. In short, across the 19th century republic, one could find "ample precedents on both sides" of the question debated by Chase and Iredell.[16]

Notably, much of the evidence indicates that there was widespread agreement as to the *existence* of natural law. The debate was more over the capacity of the judge to apply it. Banner contends that the upshot of the century of debate was that it laid the premises for later critiques of natural law, which included arguments that it was "too subjective, too ambiguous, too susceptible of multiple interpretations . . . [and] too close to policymaking, too close to legislation."[17]

For the sake of ease, let us call the former set of arguments regarding subjectivity, ambiguity, and susceptibility to multiple interpretations, the *multiplicity objection*; we can refer to the latter set of arguments about natural law judging as resembling policymaking as the *superlegislation objection*. We shall return to consider them in more detail below.

Banner thus shows that, even as natural law was woven into the legal fabric of 19th century jurisprudence, one of the causes of its decline was also sewn in. Banner identifies several other factors that contributed to natural law's decline in practical influence: the separation of law and religion, the explosion of law publishing, and the disputes over the content and application of natural law in matters of fundamental justice and public policy such as slavery.

IV. Natural Law's Decline

Christianity had been widely believed to be part of the common law in the 18th century, Thomas Jefferson's attacks on this idea notwithstanding. The *Ruggles* case is illustrative. After John Ruggles shouted in public that "Jesus Christ was a bastard, and his mother must be a whore," he was convicted of blasphemy, fined, and jailed. New York Supreme Court Chief Justice and former Columbia law professor James Kent contended that Christianity's role in the common law was to provide foundational religious justification for virtue, and that unpunished blasphemy would undermine the ground of moral sentiments necessary for the support of law.[18]

Yet, notice how Ruggles' speech act could not be adjudged by *unaided* reason to be or not be blasphemy against God. For the Christian belief in the Incarnation of the Second Person of the Trinity is a belief held by supernatural faith. Of course, Anglo-American jurisprudence inherited natural law from a long tradition in Christendom of theorizing and teaching from within a specific revelational tradition. Classical natural law conceived the natural virtue or duty of religion as requiring that the Creator

12 *See* Adrian Vermeule, *Beyond Originalism*, The Atlantic (March 2020), *available at* https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/; Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 4 Harv. J. L. & Pub. Pol'y 917 (2021), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/06/Hammer-Common-Good-Originalism.pdf; Hadley Arkes, Josh Hammer, Matthew Peterson, & Garrett Snedeker, *A Better Originalism*, The American Mind (March 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/. For critiques, see Lee Strang, *Rejecting Vermeule's Right Wing Dworkinian Vision*, Law & Liberty (April 2, 2020), https://lawliberty.org/rejecting-vermeules-right-wing-dworkinian-vision/; John O McGinnis, *Adrian Vermeule: Unwitting New Originalist*, Law & Liberty (April 9, 2020), https://lawliberty.org/adrian-vermeule-unwitting-new-originalist/; John Grove, *The Bad History of Common Good Originalism*, The Public Discourse (July 25, 2021), https://www.thepublicdiscourse.com/2021/07/76750/; John Grove, *Against a Flight 93 Jurisprudence*, Law & Liberty (March 31, 2021) https://lawliberty.org/against-a-flight-93-jurisprudence/.

13 Calder v. Bull, 3 U.S. 386 (1798).

14 Fletcher v. Peck, 10 U.S. 87 (1810).

15 The Antelope, 23 U.S. 66 (1825).

16 Banner, *supra* note 5, at 81-83.

17 *Id*. at 95.

18 *Id*. at 99 (quoting People v. Ruggles, 8 Johns. 290, 291 (N.Y. 1811)).

be honored—but the details were left unspecified.[19] Kent thus did not offer an independent apologia for the Incarnation, but appealed to the de facto beliefs of the supermajority. Yet he also maintained that such an appeal was compatible with the principles of liberty of conscience, free exercise of religion, and religious pluralism:

> The free equal and undisturbed, enjoyment of religious opinion, whatever it may be, and free of decent discussions on any religious subject, is granted and secured . . . but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community is an abuse of that right.[20]

In other words, the *reason* Kent gave for upholding the blasphemy conviction was not the eternal good and the way thereto per se, over which, properly speaking, the church and not the state has direct cognizance. It was rather the temporal common good, which depended upon a religious "root of moral obligation," which strengthened "the security of social ties."[21] Indeed, as I have argued in these pages, the Founders' robust natural law theory of morality animated their view of free exercise of religion in a way that permitted states to proscribe conduct widely thought to be licentious and subversive of virtue and civil society in a republican form of government.[22] This "civic republican" view of the relationship of religion to virtue had broad support among the Founders.

Whatever the merits of Kent's argument, in fact, some courts began to express more doubts over time about Christianity's place in the common law. Exemplifying this shift was Associate Supreme Court Justice William Strong, who in 1875 adopted the civic republican reasoning of Kent to defend blasphemy laws, but asserted that such reasoning need not rest on any claim about Christianity being part of the common law. There were other signs of the separation of law and religion, such as the disestablishment of the remaining established churches and the decline in religious assessment of witnesses in court. These trends suggested religion was more and more seen as a private matter.[23]

Meanwhile, appeal to natural law principles increasingly was being replaced by appeals to precedent. There was simply less case law in the early republic for lawyers to appeal to in cases and controversies, so it was more likely that they would appeal to relevant natural law principles. Banner plausibly argues that the explosion of case law in the 19th century—by the 1830s there were around 500 volumes of case reports; by the end of the first decade of the 20th century there were approximately 8,000—led to "a shift in the profession's argument style . . . lawyers started emphasizing the precedents at the expense of the principles."[24] This tracked the transformation of the term "case-lawyer" from a term of opprobrium into the standard practice of the profession.

Banner provides some interesting evidence that could be taken to substantiate the success of the multiplicity objection to legal appeals to natural law principles. One could find appeals to natural justice on both sides of debates over the death penalty, private property rights, slavery, and women's rights.

Take the case of slavery, "among the most politically salient topics which natural law was applied in the 19th century, and . . . among the most contested."[25] It was characteristic of abolitionist arguments that slavery violated natural law. For example, John Quincy Adams famously argued before the Supreme Court in the Amistad case regarding his clients, the Mende people who had been kidnapped from their homes in Africa by Spanish slavers, had mutinied, and found themselves on American shores: "I know of no other law that reaches the case of my clients, but the law of nature and of Nature's God on which our fathers placed our own national existence."[26] But the content of the law of nature was contested. Adams took as one of his targets the proslavery argument from natural right:

> that property in man has existed in all ages of the world, and results from the natural state of man, which is war . . . This universal nature of man is alone modified by civilization and law. War, conquest, and force, have produced slavery, and it is state necessity and the internal law of self preservation, that will ever perpetuate and defend it.[27]

Adams replied:

> That DECLARATION says that every man is "endowed by his Creator with certain inalienable rights," and that among these are "life, liberty, and the pursuit of happiness." if these rights are inalienable, they are incompatible with the rights of the victor to take the life of his enemy in war, or to spare his life and make him a slave. If this principle is sound, it reduces to brute force all the rights of man. It places all the sacred relations of life at the power of the strongest. No man has a right to life or liberty, if he has an enemy able to take them from him. There is the principle. There is the whole argument of this paper.[28]

Adams went on to trace this idea to Hobbes's theory of natural law, which he believed was "utterly incompatible with any theory of human rights." As the words of Adams' interlocutor suggest—and as Banner recounts from other sources from antebellum Southern courts—the antislavery natural law tradition was contested by proslavery natural law arguments that sourced the institution in

19 *Cf.* Thomas Aquinas, Summa Theologiae, II-II, 81.1; James Madison, *Memorial and Remonstrance Against Religious Assessments*, §1, *available at* https://founders.archives.gov/documents/Madison/01-08-02-0163.

20 Quoted in Banner, *supra* note 5, at 100.

21 *Id.*

22 Kody W. Cooper, *How the Founders' Natural Law Theory Illuminates the Original Meaning of Free Exercise*, 22 Federalist Soc'y Rev. 42 (2021), *available at* https://fedsoc.org/commentary/publications/how-the-founders-natural-law-theory-illuminates-the-original-meaning-of-free-exercise.

23 Banner, *supra* note 5, at 111, 116.

24 *Id.* at 128, 121-22.

25 *Id.* at 159.

26 Oral Argument at 9, United States v. The Amistad, 40 U.S. 518 (1841), *available at* https://avalon.law.yale.edu/19th_century/amistad_002.asp.

27 *Id.* at 88.

28 *Id.* at 88-89.

power politics, war, its de facto prevalence, and/or a racist account of the supremacy and subordination of the white and black races.

Banner's takeaway is that "natural law appeared to be ambiguous enough to support the argument that slavery was forbidden *and* the argument that slavery was compelled," and this contributed to its decline as useful in the legal system. "If everyone had his own version of natural law, what good was it?"[29]

Banner deserves credit for finding evidence in the mid-19th century of lawyers and judges questioning the use of natural law because of its apparent susceptibility to multiple interpretations. And he makes a respectable case that the multiplicity problem contributed to natural law's decline in legal argumentation. Still, there are two points that need to be made, which help fill out the story more completely.

First, prominent Americans deployed classical natural law argumentation to offer a plausible explanation of the multiplicity problem. It was recognized that the capacity of human beings to proffer reasons to justify vicious institutions and practices was as natural as the law they purport to exposit. This was apparent at the Founding and in the next generation. Madison had identified passions and interests as principles in the human soul that could obscure right reason and produce faction, i.e., groups that threatened the rights of others and the common good. Thomas Jefferson wrote poignantly about the corrupting effects of slavery upon the souls of its practitioners and their children:

> The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. Our children see this, and learn to imitate it; for man is an imitative animal . . . The man must be a prodigy who can retain his manners and morals undepraved by such circumstances.[30]

Reflecting on John Calhoun's justification of slavery as the basis of white equality, John Quincy Adams wrote that "it is among the evils of slavery that it taints the very sources of moral principle . . . [and] [i]t perverts human reason." For "what can be more false and heartless than this doctrine which makes the first and holiest rights of humanity depend on the color of skin?"[31] In another place, he assessed the Southern conscience as "a perpetual agony of conscious guilt and terror attempting to disguise itself under sophistical argumentation and braggart menaces."[32] As Justin Dyer has argued, Adams believed that the defense of slavery required "suppression of moral knowledge and a prevarication of conscience."[33] The *capacity* of persons and societies to pervert their consciences to justify vicious passion and interest was a key feature of the classical natural law philosophical anthropology and its account of moral, cultural, and legal differences.

Second, the mere fact of multiplicity did not in and of itself indicate that there was not a specific argument available that was *truer* to the natural law tradition that informed the Founders. This was certainly a contested question. Southern courts that offered arguments for slavery's compatibility with natural law appealed to the Founders. For example, after citing Justice Roger Taney's opinion in *Dred Scott*—which held that the Declaration's principles "were not intended" to include "the enslaved African race"—Mississippi's High Court of Errors and Appeals declared that Southern chattel slavery was in accord with the law of nature, because blacks were "in the order of nature, an intermediate state between the irrational animal and the white man."[34]

But the abolitionists' claim that the Declaration tradition of natural law and natural rights included all persons regardless of skin color was at the heart of John Quincy Adams' antislavery argument—and Lincoln's. And that argument not only in fact won out but was decidedly more sound.[35]

Still, Banner convincingly shows that by the late 19th and early 20th century, natural law's career in American courts had reached a sort of senescence. One of the foremost critiques of natural law in this period was advanced by legal realism, and one of its greatest exponents was Oliver Wendell Holmes.

V. From Legal Realism to the Echoes of Natural Law in Substantive Due Process

For Holmes, diachronic and synchronic multiplicity, manifested in differences of values and the democratically enacted laws that reflect them, was evidence that there was no natural law. For Holmes, individual values and preferences were the product of pre-rational experiences, which differ from person to person. The error of the natural law theorist was rooted in a form of pride: a desire to make his own preferences into a transcendent standard. Objective truth was instead purely the product of social construction that grew out of an aggregation of subjective preferences, the "majority vote of that nation that could lick all others."[36]

Holmes conceded that certain commonalities across legal systems can be observed: "some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person." But the individual desire for preservation or the general desire for preservation of the species were "arbitrary." Such desires were on par with a subjective love of granite rocks and barberry bushes. The rules that attached in legal systems in which collectively felt values were manifest were thus merely hypothetical imperatives: *if* you have such desires, *then* you must do such and such.[37]

Holmes thus adopted an instrumentalist account of practical reason, which had been characteristic of modern critics of natural law at least since David Hume. Practical reason could no longer

29 Banner, *supra* note 5, at 160.

30 Thomas Jefferson, Notes on the State of Virginia, Query XVIII.

31 5 John Quincy Adams, Memoirs of John Quincy Adams 11 (1875).

32 9 *Id.* at 349 (quoted in Justin Buckley Dyer, Natural Law and the Antislavery Constitutional Tradition 82 (2012)).

33 Dyer, *supra* note 32, at 82.

34 Banner, *supra* note 5, at 155 (discussing Dred Scott v. Sandford, 60 U.S. 393, 410 (1856); Mitchell v. Wells, 37 Miss. 235, 263 (1859)).

35 *See* Dyer, *supra* note 32, at 74-101.

36 Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 40 (1918).

37 *Id.* at 41.

grasp non-instrumental or basic reasons for action that were objectively constitutive of human flourishing, because of the kind of being man is. Reason could only calculate the means to get whichever ends it happened to desire.

On this account, positive law came to be seen not as a deduction or determination from a prior objective moral reality that directed one's conduct toward ends constitutive of one's happiness. Rather, it was a blunt instrument of majority will, demanding conduct *if* one happens to desire to "live with others." "A right is only the hypostasis of a prophecy"—that is, law becomes simply a prediction of what the courts—the instruments of the majority's instrumental reason—will in fact do.[38]

Accordingly, the judge's work was not primarily a formalistic identification of legal principles and their logical application. Its work was better understood as ultimately attitudinal—and for Holmes, the question in *Lochner v. New York* was whether the judge would give effect to the preferences of the majority or to his or her own contrary preferences, when a reasonable man could see them as socially advantageous: "A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."[39] And since a judge's assessment about the reasonability of a person's opinion on the social utility of some measure depended on the judge's own perception of social utility, this implied that judges at least implicitly weigh social utility in judging. Prominent legal realists writing in subsequent decades like Roscoe Pound, Karl Llewelyn, and Jerome Frank would argue that judges should embrace the truth that they were policymakers, filling in the penumbras of legal rules with their policy preferences. In short, lawyers and judges in practice were *making* the law rather than *finding* it.

Still, Banner argues persuasively that, while Holmes and the Legal Realists were prominent and influential scholarly expressions of this view of law, it had already become widespread among the educated legal class—even if they weren't as metaphysically and morally skeptical as Holmes. He provides ample evidence that, in the several decades leading up to the height of Legal Realism's prominence in the 1920s and 30s, legal professionals were already thinking about judges as makers of the law. By the 20th century, this had become "the conventional way lawyers think about the legal system."[40]

Banner throws light on what he calls the various other 20th century "substitutes" for natural law, including "historical jurisprudence," natural laws of economics, classical orthodoxy, and substantive due process. Here we only have space to focus in on substantive due process.

As Banner points out, *Lochner* was the "synecdoche" for substantive due process in what is sometimes called the "Laissez-faire Era" of the Court, between the 1870s and mid-1930s. Of heightened concern to the Court in this period was to check what it perceived as legislative threats to individual rights of property and contract. As Banner points out, "judges could implement natural law through the medium of due process, now that natural law, by itself, was no longer an acceptable vehicle."[41]

As is well known, various of FDR's New Deal policies conflicted with the Court's substantive due process precedents. The so-called "switch in time that saved nine," in which Justice Owen Roberts joined the liberal justices to uphold New Deal legislation, was occasioned by a due process case. Roberts voted to overturn precedent and uphold a minimum wage law as compatible with the 5th amendment's Due Process Clause.[42] The *Lochner* era was over.

Or was it? In 1965, the Supreme Court struck down a Connecticut law that banned the use of contraceptives. The Court differed over the textual ground for the holding. The majority opinion found it in the "penumbras formed by emanations" from the first eight amendments.[43] Yet Justices Harlan and White explicitly grounded their judgment in the Due Process Clause. And Justices Goldberg, Brennan, and Warren looked for additional support in the 9th Amendment in conjunction with the 14th.

Justice Black famously lambasted this reasoning as "natural law due process" philosophy. He echoed Justice Iredell's critique of appealing to extratextual principles, to a "mysterious and uncertain natural law concept."[44] Black channeled the superlegislation objection:

> The due process argument . . . indicate[s] . . . that this Court is vested with power to invalidate all state laws . . . that it considers to be [lacking a] "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body . . . no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies . . .[45]

Banner chides Justice Black insofar as his critique implied that the Court had revived old-timey natural law reasoning. Banner argues that the Court *did not* suggest that "a right to use contraception exists in nature or that such a right was created by God or that the right exists at all times and places."[46] Hence, Banner contends that Justice Black's use of the language of "natural law" did not imply his brethren had achieved a genuine revival of natural law jurisprudence. Rather, Black used natural law as a pejorative shorthand term to object to "interpretive methods that the critic

38 *Id.* at 42.

39 Lochner v. New York, 198 U.S. 45, 76 (1905).

40 Banner, *supra* note 5, at 190.

41 *Id.* at 210.

42 West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

43 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

44 *Id.* at 524, 522.

45 *Id.* at 512.

46 Banner, *supra* note 5, at 233.

believes gives judges too much leeway" to effectively legislate their private notions of justice.[47]

It isn't altogether clear that Banner is right that Black's brethren had jettisoned theistic natural law and natural rights. For example, Justice Douglas had at least rhetorically conceded in *McGowan v. Maryland* that

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.[48]

Hence, it is possible that Douglas indeed did conceive of the right of privacy as a *natural* right.[49] What Banner does admit is that the language of the new wave of substantive due process cases in the areas of sexuality and personal lifestyle sometimes did echo the older natural law *style* of reasoning in appealing to first principles.

I would argue that there is evidence of this even in *Griswold*. The Court declared that marriage was a "sacred" institution for a "noble purpose," which preceded our written constitution. To a classical natural lawyer, this sort of reasoning looks like natural law without nature—an appeal to first principles of human freedom shorn of their setting within a teleological order of being. Indeed, the echoes of natural law have become fainter. Once severed from this prior order, the content of liberty was now to be filled in by the autonomous, expressive self and courts that are solicitous of psychological man.[50] This is apparent in the language of *Griswold*:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.[51]

The "way of life," elucidated by the terms "harmony in living" and "bilateral loyalty," indicated the traditional *unitive* feature of marriage. But the expressive self that chooses to marry does not choose a unitive bond that is permanent (which was also traditionally thought be a feature of the marital bond). It is now merely "hopeful" that the bond would endure because marriage is always subject to the changing desires of the expressive self. Meanwhile, terms like "political faith" and "commercial and social projects" seem to be not-so-cryptic allusions to the other purpose traditionally considered to be an essential feature of marriage (and promoted in various ways traditionally by the institutions of church, civil society, and the state): the *procreative* function. Marriage has thus become a transitory contract, entered and exited at will by autonomous individuals looking for companionship, with no *essential* connection to permanence or procreation.

Did the author of these words, Justice Douglas, thus conform the fundamental law to his own predilections regarding the marital bond? Banner does not consider this question. But a cursory glance at Douglas' biography—he was on his second of three childless marriages and the third of four total when he wrote the decision—leads one to at least suspect the affirmative.[52] Indeed, as Banner argues, Justice Black does not seem entirely off base to suspect the members of the Court were legislating their own "personal senses of justice."[53] Black channeled the spirit of the Holmesian critique in *Lochner*: the judge was bound to vindicate the majority will of state legislatures absent a plain violation of the constitutional text. In his view, the judge may very well have reasonable grounds to doubt the wisdom of the means selected by legislatures to advance orderly baking and the orderly reproduction of society over time—but *constitutionalizing* such conceptions was ultra vires.

What *wasn't* logically necessary to Holmes' and Black's critique was skepticism about the existence of natural law. For the natural lawyer could plausibly argue that natural law itself does not dictate a particular arrangement for translating principles of natural justice into positive law—and that in fact under our constitutional structure the *authority* to legislate over such matters was primarily reserved to legislative bodies.[54] Banner's book shows that such a view could find support in a tradition of jurisprudence going all the way back to Justice Iredell's opinion in *Calder v. Bull*.

As Banner suggests, the subsequent path of substantive due process in the area of personal sexual lifestyle rights was that the echoes of the *content* of natural law became fainter even as the *style* of first principles-based reasoning reverberated. A possible exception to this trend is *D.C. v. Heller* and its progeny, which appealed to a natural right of self-defense—but this was primarily invoked to flesh out the historical understanding of the Second Amendment.

VI. Conclusion

Is there any middle way between the judge who freewheelingly appeals to first principles and the strict constructionist who forswears any appeals beyond the four corners of the text and its historical understanding?

At one point, Banner relates one historical attempt to articulate such a way. Boston lawyer Joel Bishop argued that there were "pretty plainly" unwritten limitations on state legislatures, but also that "it is neither the province nor the right of a judge to decide any cause on his individual, private views." As Banner puts it, "Bishop, struggling to find a middle ground, had to distinguish

47 *Id*. at 234.

48 McGowan v. Maryland, 366 U.S. 420, 562 (1961).

49 For an argument along these lines, see Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 Wake Forest L. Rev. 429 (1990).

50 For a recent account of the rise of the expressive self, see Carl Trueman, The Rise and Triumph of the Modern Self: Cultural Amnesia, Expressive Individualism, and the Road to Sexual Revolution (2020).

51 *Griswold*, 381 U.S. at 486.

52 Douglas had two children with his first wife Mildred Riddle, but then cheated on her, divorced her, and remarried Mercedes Hester Davidson in 1954. Continuing this pattern, he cheated again, divorced, and married a third time to Joan Martin in 1963. He had no children with his second and third wives. He was on his third marriage when he wrote *Griswold*—and only shortly thereafter he divorced yet again and married his fourth wife, Cathleen Heffernan, who was forty-five years his junior, and with whom he also had no children.

53 Banner, *supra* note 5, at 234.

54 *See* Robert P. George, A Clash of Orthodoxies ch. 10 (2014).

between natural law, which could invalidate a statute, and a judge's own understanding of natural law, which could not."[55] Banner assesses Bishop's attempt to find a middle way:

> But this was not middle ground at all. The content of natural law, like the content of any kind of law, could be identified only by human beings, so every assertion of the law was merely an assertion of the speaker's understanding of the law.[56]

Here is where the classical natural lawyer would disagree. It is of course trivially true that the content of a proposition known and asserted is in the mind of person who understands it. But it simply does not necessarily follow that it is *merely* his understanding of it. Take the law of noncontradiction (a law of logic). A thing cannot be and not be at the same time and in the same respect. I understand (and affirm) this law to entail something. It entails that the previous sentence cannot affirm and not affirm that I understand it to entail something, at the same time and in the same respect. Once *you*, *the person reading this sentence*, grasp this, you have grasped a principle that is common to human reason, not merely my understanding of it. Classical natural law theory stands or falls on the notion that that which governs the theoretical order, the principle of noncontradiction, has its analogate in the practical order, the first principle of practical reason: that good is to be done and evil avoided. If this principle is also common to human reason, it follows that theoretical, self-evident truths that presuppose the law of noncontradiction—"a whole is equal to the sum of its parts" and the like—are on par with practical truths that presuppose the self-evident first principle of practical reason—*primary* precepts like "do not murder," "don't punish the innocent," etc.

It seems then that Banner's assessment leaves undisturbed this possible middle way: judges are only authorized to appeal directly to first principles when the provision was historically understood to ratify the constitutional provision on the basis of natural justice *and* the law in question contravenes a *primary* precept. Meanwhile, legislation regarding *secondary* precepts and/or more remote deductions of the precepts are deserving of greater presumptive judicial deference.[57]

Banner's book is a tour-de-force, chock-full of supporting evidence for its contentions and rich with more interesting insights than I could possibly do justice to here. The ultimate conclusion—that natural law's decline dovetailed with the transformation of the role of a judge as a finder into a maker of law—is substantiated. This book should be considered a major achievement and singular contribution to the literature on natural law and American constitutionalism.

55 Banner, *supra* note 5, at 94-95 (quoting and discussing Joel Prentiss Bishop, The First Book of the Law 69-71 (1868).

56 *Id.* at 95.

57 For an argument along these lines, see J. Budziszewski, Natural Law for Lawyers 62-68 (2006).