

## Introduction

**T**he title of this book is taken from the letter of a presbyter named Lucidus who recanted of certain doctrines condemned at the second Council of Arles (A.D. 473). Lucidus and others in southern Gaul taught that after the sin of Adam no work of human obedience could be united with divine grace, that human freedom was not weakened or distorted but totally extinguished, and that Christ did not incur death for all human beings. In the letter of retraction, the natural law is mentioned twice. The natural law is said to be the “first grace of God” (*per primam Dei gratiam*) before the coming of Christ (*in adventum Christi*).<sup>1</sup> Lucidus also affirmed that, according to Romans 2:15, the natural law is “written in every human heart.”<sup>2</sup>

The point at issue for the thirty bishops at Arles was how the human creature is located in an order of divine providence. On the one hand, the bishops wanted to avoid the heresy of Pelagius, who held that man’s natural gifts are sufficient for salvation—a position that makes the economy of divine law and revelation superfluous.

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1. Denzinger-Hünemann, *Symboles et définitions de la foi catholique* (Paris: Les Éditions du Cerf, 1997), §336.

2. *Ibid.*, §341.

Thus, Lucidus confessed that humans “were not set free from the original slavery except by the intercession of the sacred blood.”<sup>3</sup> On the other hand, the bishops worried that an overly severe doctrine of predestination would imply that God removes some creatures from the gifts of providence, leaving the human race, as Rousseau would later say of the state of nature, as “if it had been left to itself.”<sup>4</sup>

The quote from Rousseau indicates the theme of the subtitle of this collection. For, beginning with the state-of-nature scenarios imagined by Enlightenment philosophers, natural law came to mean the position of the human mind just insofar as it is left to itself, prior to authority and law. Natural law constitutes an authority-free zone. The influential jurist H. L. A. Hart accurately summarized the post-Christian estate of natural law discourse:

Natural Law has . . . not always been associated with belief in a Divine Governor or Lawgiver of the universe, and even where it has been, its characteristic tenets have not been logically dependent on that belief. Both the relevant sense of the word “natural,” which enters into Natural Law, and its general outlook minimizing the difference . . . between prescriptive and descriptive laws, have their roots in Greek thought which was, for this purpose, quite secular. Indeed, the continued reassertion of some form of Natural Law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that despite a terminology, and much metaphysics, which few could now accept, it contains certain elementary truths of importance for the understanding of both morality and law.<sup>5</sup>

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3. Ibid.

4. Jean-Jacques Rousseau, *Discourse on the Origin of Inequality* (Indianapolis: Hackett, 1992), preface, 15.

5. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 183f.

For Hart, the “core of good sense in the doctrine of Natural Law” need not be entangled in “theocratic” premises. Rather, it is reducible to certain “truisms concerning human nature and the world in which men live, [and] as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable.”<sup>6</sup> Reminiscent of Hobbes, Hart’s natural law is neither a higher law nor a lower law. It represents those contingent but pervasive aspects of the human predicament which provide the background problems and motivations for positive law.

Hart’s assertion that natural law has an “appeal” that is separable from the premises of either natural or revealed theology has its own appeal to many, if not most, contemporary proponents of natural law.<sup>7</sup> The leading American critic of legal positivism, Lon Fuller, who maintained a long-standing debate with Hart over the moral bases of law, certainly did not disagree with his foe on the need to avoid or suppress theological and metaphysical referents in understanding natural law. Fuller insisted that natural law is not a “higher law,” but one “entirely terrestrial,” and therefore ought not to be brought into the precincts of propositions about “God’s commandments.”<sup>8</sup> In his famous tract on the “higher law” background of American constitutional law, Edward S. Corwin presents as a “quaint argument” Sir Edward Coke’s oft-cited dictum in *Calvin’s Case*: “The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex aeterna*, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the

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6. *Ibid.*, 187–94.

7. Natural theology is the study of what can be affirmed or denied philosophically of a superior cause. This inquiry was traditionally distinguished not only from revealed theology, but also from the mythical theology of poets and the civil theology celebrated by municipal priests.

8. Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1969), 96.

people of God a long time governed before the law was written by Moses. . . .”<sup>9</sup> Perhaps this would be of mere antiquarian interest were it not for the fact that Coke was trying to make the point that the legal universe neither begins nor ends with the command of the human sovereign. When he referred to the eternal law—to the same law that taught the Jewish people prior to Sinai—Coke did not think of himself as making an argument to authority, but clarifying and concentrating the minds of his colleagues about an authority already recognized by a legal culture tutored by common sense and the Scriptures. Such claims today are usually regarded as rhetoric that the moralist or jurist need not, ought not, or cannot make in advancing an argument about the natural law.

The essays in this volume investigate problems that arise once natural law is understood as free-floating with regard to authority, whether human or divine. The first two chapters treat theoretical issues related to the definition of natural law, particularly in the area of theology, which is the historical matrix of natural law doctrines. In these chapters I point out that even contemporary Catholic thinkers who have no aversion to theology as such are reluctant to predicate “law” properly of natural law. For Mortimer Adler and Joseph Fuchs, to mention two examples, natural law is related to a superior cause, but not in the manner of legality. Natural law is neither a higher law nor, strictly speaking, any law at all. I test this position against the older tradition, chiefly (but not only) that of St. Thomas Aquinas, and then draw out some of the consequences for theology once one derogates from the idea that natural law is authentically a higher law. In chapters 3 through 8 I examine theoretical and practical problems that emerge when appeals are made to natural law for or against laws made by civil authority. Given the widespread demand today for

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9. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (Ithaca, N.Y.: Cornell University Press, 1955), 45 f.

justiciable natural or human rights—which is to say, their recognition by courts—the issue of authority often becomes an acute question. At one level, the questions are institutional in nature. Why, for example, should we believe that natural law is best discerned by courts in the context of litigation?

At another level, which is the deeper one, we find functional appeals to a higher law that turns out to be no higher law at all. While retaining the nimbus and residue of an older tradition that really did affirm an order of obligation prior to the positive law, contemporary appeals to natural law often subvert that order. In its most extreme (but not uncommon) form, political institutions are required to recognize and protect the immunity of individuals from *any* known source of obligation and authority. In the name of authority—the authority of some “higher law”—the individual comes to occupy an authority-free zone in the very midst of civil society.

Although the ecclesiastical and civil spheres are quite different, we should not be surprised that problems in the one look very much like problems in the other. Until recently, the “higher law” doctrine, as divinely grounded, has been accepted by both spheres. This surely was Sir Edward Coke’s point. Unless we suppose that there is more than one natural law—one for magistrates and one for churchmen—there will be a strong supposition that what is good for the goose is good for the gander. There are no theological claims completely separate from propositions about what is good for human beings and about the moral norms regulating the choice of these goods. And though sometimes camouflaged, there are no secular claims completely separate from propositions about the ultimate ground of authority. Therefore, while we must respect the differences between church and state, between revealed theology and philosophy, and between the authority of sacred Scripture and that of a human constitution, we cannot fail to recognize that natural law discourse in-

exorably migrates back and forth. Each of these contrasting pairs is relational, and it is hardly possible to know very much about one without knowing something about the other. Even in our own time this has proved true on issues of human rights, religious liberty, abortion, marriage, and euthanasia.

How can we begin to situate such a protean family of doctrines as “natural law”? Yves Simon has usefully proposed that the theories and ideologies of natural law seek to discover or assert the “prior premises” of human law.<sup>10</sup> Simon further suggests that the answers to “what is prior” to human law tend to coalesce around three foci: order in nature, order in the human mind, and order in the divine mind. Thinkers who defined natural law in light of metaphysical premises much disparaged today—Augustine, Thomas Aquinas, Richard Hooker, even John Austin—also believed that natural law encompasses what is prior in things and what is prior in the human mind. St. Thomas, for example, argued that the human soul receives a knowledge of divine providence in a “general sort of way” by starting “from the things themselves in which the order of divine providence has already been established in detail.”<sup>11</sup> From what is first in nature or first in the mind we can infer what is absolutely prior in the order of being. The great tradition of natural law allowed each of these foci to have its own salience, depending on the problem at hand.

We can appreciate why the first two foci have such appeal in our time. Unlike premodern thinkers, we find ourselves immersed in state-made law. The nation-states that emerged after the Napoleonic Wars have proved to have a prodigious capacity and enthusiasm for lawmaking, including constitutional, statutory, and, increasingly, ad-

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10. Yves R. Simon, *Tradition of Natural Law*, ed. Vukan Kuic, intro. Russell Hittinger (New York: Fordham University Press, 1992 reprint; orig. 1965), 129.

11. *Summa contra gentiles*, III.81 [1].

ministrative law. As state law becomes more expansive and intricate, and as customary law gives way to legal artifice, the relation of law to a prior moral order becomes an issue of some importance. Generally, the thinkers of late antiquity and the Middle Ages took it for granted that jurisprudence falls under the genus of morals. They thus set out to understand how moral reasoning is set within a cosmological order that has legal properties. Where jurisprudence, however, is by default a positivist account of the powers of the state it becomes all the more necessary to focus narrowly on how to render state law permeable to moral premises. Cosmological inquiry will strike most thinkers, as Hart said, as “grandiose.” Paradoxically, at the same time that moral argument is used to limit the law of the state, usually in favor of natural or human rights, the legal culture has the general expectation of what Laurence Friedman has called “total justice.”<sup>12</sup> Private complaints and moral desiderata are not regarded as merely private but as things (torts, entitlements) about which the state must take an interest and provide remedies. The simultaneous quest for zones of immunity from law and for the removal of barriers to works of justice on the part of the state creates a potent environment for the moral evaluation and critique of positive law.

Although unhappiness with positive law is favorable to various species of natural law thinking, argument about what is “prior” in morals often proves frustrating, especially when the moral premises are no less disputed than the estate of the black-letter law. Academic and legal professionals, it must be admitted, are of the class least likely to achieve consensus about the morality prior to law. Typically, arguments are expected to obey the (self-imposed) norm of refraining from appeal to controversial conceptions of the human good. Premises or conclusions even remotely theological (natural or re-

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12. Laurence Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985).

vealed) are unacceptable for public purposes. On the assumption that ordinary law ought to be guided by moral theory, the principle of “equal protection” must apply not only to the positive law but also to the moral theory that informs it. Moral theory then must pass the test of being equally facilitative of the life plans and beliefs of everyone subject to the law. While this norm of public reason does not necessarily reduce morality to convention, it does deploy a convention to limit and filter what can count as morals for public purposes. In this political and cultural environment, natural law thinking slips into formalisms that are not entirely false, but not entirely true. In *Ethics after Babel*, Jeffrey Stout appends a lexicon of terminology used by moral philosophers. Under “natural law,” which includes “the moral law” and “realm of values,” the entry reads: “fancy names for all the moral truths, known and unknown, that can be formulated in all the possible moral vocabularies.”<sup>13</sup> Stout’s peevish entry has a point. Almost everyone believes that there is order prior to human law, and that therefore human law ought to be made, criticized, and emended on the basis of morality.<sup>14</sup>

One may doubt that the narrowing of natural law inquiry to the first two foci has made it easier to reach consensus about what is prior to human law. What should not be in doubt is that the term “natural law” historically arose in reference to the third of Simon’s foci—order in the divine mind. It is well known that for the ancient Greeks *physis* and *nomos* are opposites. In a remarkable essay, “The Concept of Natural Law in Greek Thought,” Helmut Koester has shown that the term “law of nature” occurs fewer than six times

13. Jeffrey Stout, *Ethics after Babel* (Boston: Beacon Press, 1988), 300f.

14. Ronald Dworkin can say that if “any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law.” “Natural Law Revisited,” 34 *University of Florida Law Review* 165 (1982), 165.

in the Greek literature of the pre-Christian era. In the work of the Jewish philosopher and exegete Philo of Alexandria (c. 20 B.C.–A.D. 50), however, more than thirty occurrences of the term can be found.<sup>15</sup> As a term that meant something more than a comical union of opposites, or a merely metaphorical extension of concepts that properly reside elsewhere, natural law emerged as part of the repertoire of moral and legal thought once the Greek *logos*-metaphysics was appropriated by the biblical theology of a creating and lawgiving God. Order in things and in the human mind are not laws, but the effect of a law that is not a positive law.

Before the Council of Arles defined natural law as the “first grace,” Augustine had spoken of the eternal law impressed in the soul (*lex aeterna, impressa nobis est*).<sup>16</sup> The human soul is induced to share in the divine law, he explained, not by “locomotion but by a kind of impression. . . .”<sup>17</sup> The human mind can rule and measure action insofar as it is first ruled and measured. Thomas’s work diverged significantly from Augustine’s account of illumination and created nature,<sup>18</sup> but it did not differ from Augustine’s in its neo-Platonic motif of participation allowing natural law to be placed in the genus of law.

[A]s rule and measure, law can be in a person in two ways: in one way, as in him that rules and measures; in another way, as in that which is ruled and measured, since a thing is ruled and measured insofar as it partakes of the rule or measure. Since all things subject to divine providence are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law, insofar as from

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15. Helmut Koester, “The Concept of Natural Law in Greek Thought” in *Religions in Antiquity*, ed. Jacob Neusner (Leiden: E. J. Brill, 1968), 534–35.

16. *De Lib Arbit.* 16.

17. *De Trin.* XIV.21.

18. Matthew Cuddeback, *Light and Form in St. Thomas Aquinas’s Metaphysics of the Knower*, dissertation (Washington, D.C.: The Catholic University of America Press, 1998).

its being imprinted on them they derive their respective inclinations to their proper acts and ends. Now among all others the rational creature is subject to divine providence in the most excellent way, insofar as it partakes of a share of providence by being provident both for itself and for others. It has a share of the eternal reason because it has a natural inclination to its proper act and end, and this participation of the eternal law [*participatio legis aeternae*] in the rational creature is called the natural law. Hence, the Psalmist after saying, “Offer up the sacrifice of justice,” as though someone asked what the works of justice are, adds: “Many say, Who showeth us good things?”<sup>19</sup> In answer to which question he says: “The light of Thy countenance, O Lord, is signed upon us,” thus implying that the light of natural reason whereby we discern what is good and what is evil and which pertains to the natural law, is nothing else than an imprint on us of the divine light [*impressio luminis divini in nobis*]. It is evident that the natural law is nothing else than the rational creature’s participation of the eternal law.<sup>20</sup>

On what basis does Thomas reach this definition? Given our ability to know at least some rudiments of the moral measures of action, we can reason from the effect in us to a superior cause. While the tutoring of divine revelation makes that inference easier and clearer, Thomas does not insist that it depends in principle on religious faith. For even religious faith cannot disclose, from the inside out, as it were, how God imparts the first rules and measures of conduct via his creative act. “We cannot know the things that are of God as they are in themselves,” Thomas writes, but “according to Romans 1, they are made known to us in their effects: ‘The invisible things of God are clearly seen, being understood by the things that are

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19. Psalms 4:6.

20. *Summa theologiae* I-II, 91.2.

made.”<sup>21</sup> By the same token, Thomas shows no interest in making this inference depend on a formal demonstration. To be sure, he argued that the existence of God can be affirmed by such a demonstration. Yet to my knowledge, he never argued that knowledge of a superior cause is exclusively the work of demonstration. That the moral order bespeaks a higher cause is derived, by most people, from philosophically untutored inferences from the things that are,<sup>22</sup> from tradition, and also, for Christians, from infused faith.

In answer to the objection that it is an unnecessary repetition to have two laws, one eternal the other natural, Thomas responds that “this argument would hold if the natural law were something diverse from the eternal law, whereas it is nothing but a participation thereof.”<sup>23</sup> Law is denominated chiefly by the active principle, by what mind actually rules and measures. Here, Thomas closely follows Augustine. There are not four or five kinds of law, but only two.<sup>24</sup> Law that proceeds from the divine mind and law that proceeds from the human mind; as Augustine said, one is eternal and the other is temporal.<sup>25</sup> The natural law is called natural, first, because it is by

21. *S.t.* I-II, 93.2 ad 1, citing Rom 1:20.

22. *Sg* III.38.

23. He argues that natural law “endures without change owing to the unchangeableness of the divine reason, the author of nature.” q. 97.1 ad 1.

24. For this careful, and indeed correct, reading of the enumeration of laws in *S.t.* I-II 91–93, I am indebted to Stephen Louis Brock, *The Legal Character of Natural Law According to St. Thomas Aquinas*, dissertation (Toronto: University of Toronto Press, 1988), ch. 2-C.

25. “[L]aw denotes a kind of plan [*ratio*] directing acts towards an end. Now wherever there are movers ordained to one another, the power of the second mover must be derived from the power of the first mover, since the second mover does not move except in so far as it is moved by the first. We observe the same in all those who govern, so that the plan of government is derived by secondary governors from the governor in chief. Thus, the plan of what is to be done in a state flows from the governor’s command to his inferior administrators; and again in things of art the plan of whatever is to be done by art flows from the chief craftsman to the under-craftsmen who work with their hands. Since, then, the eternal law is the *ratio* of government in the supreme governor,

the natural power of reason that we partake of the law; second, by mode of promulgation the law is instilled or indicted in us “so as to be known naturally [*naturaliter*].”<sup>26</sup>

If we ask whether natural law is first in things or in the human mind, Thomas gives the surprising answer that, properly speaking, it is neither. The order of nature and the order of the mind are law abiding but are not laws. It is true that modern philosophy abandoned the metaphysics of participation, and thus wrestled with the problem of whether law belongs properly to physical states of affairs or mental constructs,<sup>27</sup> but it is entirely anachronistic to impose this dilemma on the older tradition. For his part, Thomas denies that natural law can be reduced to what is prior as order constituted in the human species.

[J]ust as the acts of irrational creatures are directed by God, inasmuch as they belong to the species, so are man’s actions directed by God, inasmuch as they belong to the individual [*ad individuum*]. Now, in so far as they are actions belonging to the species, actions of irrational creatures are directed by God by a certain natural inclination, which is consequent to the specific nature. Therefore in addition to this something must be given to man whereby he is directed in his personal actions [*in suis personalibus actibus*]. And this is what we call law.<sup>28</sup>

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all the plans of government in the inferior governors must be derived from the eternal law. But these plans of inferior governors are laws other than the eternal law [*aliae leges praeter aeternam*]. Therefore, all laws, in so far as they participate in right reason are derived from the eternal law. On account of this, Augustine states in *I De Lib. Arbit.*: ‘in temporal law there is nothing just and lawful, but what man has drawn from the eternal law.’” *S.t.* I-II, 93.3. See also, 91.3 *sed contra*.

26. *S.t.* I-II, 90.4 ad 1.

27. On the emergence of natural law as laws of nature, see Jane E. Ruby, “The Origins of Scientific ‘Law,’” *Journal of the History of Ideas* 47 (1986): 341–59.

28. *Scg.* III.114 [1].

Natural law is not Rousseau's *la voix de la nature*,<sup>29</sup> nor Hobbes's "Laws of Nature" that conserve "men in multitudes."<sup>30</sup> For Thomas, law is the directive of reason promulgated by a competent authority for the common good, and he held that natural law preeminently satisfies these criteria. But natural law is not order embedded in the species as though individuals are moved by a kind of physical necessity. Rather, it is the communication of moral necessities to a created intellect. In this respect, among others, Thomas differs from modern philosophers who speak of inclination as mere physical appetite that provides the material for instrumental reason—reason as the slave of the passions.

The Christian tradition, in which the concept of natural law flourished for more than a millennium, expressed its understanding of "prior law" in more than one philosophical and theological vocabulary. Prior to the Reformation, scholastic opinion differed not only on the principle of divine illumination of the created intellect (whether the natural law is a create or an increate light), but also on the question of whether law is chiefly the act of intellect or will. Protestant reformers continued these debates, but with somewhat less commitment to overarching metaphysical schemes. Though Protestants of the sixteenth century questioned more deeply than the scholastics the efficacy of natural law in the human mind, as well as its place in the economy of salvation, the definition of natural law as a higher law retained its vigor in Protestant thought. As Hooker maintained, the "voice of nature is but God's instrument." It is "by her from Him we receive whatsoever in such sort we learn."<sup>31</sup> The anthropocentric turn of Hobbes (order in the species), Grotius (order in moral powers), and later Rousseau (order in a hypothetical state

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29. Rousseau, *Discourse on the Origin of Inequality*, preface, 13.

30. Thomas Hobbes, *Leviathan*, I.xv.

31. Richard Hooker, *Of the Laws of Ecclesiastical Polity*, I.8 [3].

of nature), did not convince many Christians that the first two foci of natural law should be detached from the legislative source of obligation.

The prominence of higher law thinking at the time of the American founding is too well known to warrant more than a brief comment. Whatever may have been Thomas Jefferson's theological convictions, he understood well enough that the "Laws of Nature" needed to be situated in reference to "Nature's God." Similarly, Alexander Hamilton asserted that the "Sacred Rights of Mankind are . . . written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power."<sup>32</sup> From every American pulpit, and in every legislative assembly, the higher law was a familiar coin of discourse. Within a generation of the American founding, the higher law doctrine was prominent in the debate over slavery, especially after the Fugitive Slave Act (1850). Interestingly, most of the federal judges who believed that slavery violates natural law did not use the higher law doctrine as an excuse for usurping constitutional authority.<sup>33</sup>

In his dissenting opinion in *Scott v Sandford* (1857), Justice McLean reminded the majority that the much-vexed jurisdictional question of congressional authority over the territories did not entitle the Court to claim interpretive authority over the natural law. Chief Justice Taney had contended in the majority opinion that the appeal of the Declaration of Independence to "Nature's God" should be interpreted in light of public opinion, thereby rendering the natural law inferior to human judgment. To the contrary, McLean responded, the slave "bears the impress of his Maker, and is amenable to the laws

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32. *The Works of Alexander Hamilton*, H. Lodge edition (1904), 1 at 113.

33. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, Conn.: Yale University Press, 1975).

of God and man; and he is destined to an endless existence.”<sup>34</sup> Although the Constitution gives the Court no authority to change the positive law of the Constitution, by the same token it does not hand over the higher law to the Court’s estimation of public opinion.

Writing shortly after the Civil War, Orestes Brownson could say that it was a remarkable achievement of the American polity to bring into existence a modern state that recognizes a “higher law” above itself. “This is our American boast”—one that is especially justified in contrast to the European states of that era. These states followed the Rousseauvian principle that society is *un droit sacré*, a holy right.<sup>35</sup> Americans, Brownson argued, refused to submit higher principles to lower powers. They resisted, then, the one extreme of making government an instrument of private interests, as well as the other extreme of making the state the exemplar and judge of moral and spiritual order. He was convinced that Americans had properly located the position of ruling powers because natural law had not been reduced either to order in nature or order in the mind. The natural law “is not a law founded or prescribed by nature, but the law for the moral government of nature, under which all moral natures are placed by the Author of nature as supreme law-giver. The law of nature is God’s law; and whatever rights it finds or are held from it are his rights, and ours only because they are his.”<sup>36</sup>

**A**s we have seen, H. L. A. Hart maintained that the “appeal” of natural law derives from the fact that it is “independent of both divine and human authority.” The position that we have briefly sketched here takes the opposite point of view. Without denying

34. *Scott v Sandford* (1857), 60 U.S. 393, 550. Justice McLean, dissenting.

35. Jean-Jacques Rousseau, *Social Contract*, I.1.

36. Orestes Brownson, “Church and State” (May 1870), in *The Works of Orestes Brownson*, XIII (Detroit: Thorndike Bourse, 1884), 274f.

the importance of order in nature and in human cognition, the doctrine of natural law has located those two orders under a higher authority. It is precisely from this perspective that the very phrase natural law has meant something more than a metaphorical circumlocution for “nature.” In *Venitatis Splendor*, Pope John Paul II calls it “participated theonomy.” This is not the same thing as what Hart dismisses as “theocracy.” For the usual, pejorative meaning of that term suggests an unmediated and undistributed exercise of sacral power. But when the Council of Arles spoke of natural law as the *prima gratia*, it meant an original gift, not the raw and unilateral projection of divine power in the fashion of a modern state.

At the beginning of Memorial and Remonstrance (1785), before he undertakes any public policy arguments about religion, government, and the rule of law, James Madison maintained:

It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority. Because Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is

limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents.<sup>37</sup>

Madison's circular letter was a polemic meant to sharpen a legislative debate rather than an exercise in philosophy or theology. Even so, it summarizes an important insight about the rule of law. We notice first that he makes no appeal to a state of nature bereft of authority. Men are under an order of law and duty distinct from that of civil society. The priority of this order does not imply a historical priority nor a hypothetical condition of what men might look like if left to themselves. In the second place, what is prior is not simply the innate natural power of human reason and its acts of conscience. This is not a Hobbesian picture of human nature in which human powers generate pre-moral or amoral claims of rights. Neither is it an anticipation of a Kantian notion of autonomy, of practical reason binding itself to unconditioned laws that have no ground in an extrinsic authority. The claim that society lacks by nature a jurisdiction over the higher law does not suggest that the jurisdiction falls by default to the individual. Quite the opposite. The individual's rightful liberty vis-à-vis society derives from the proposition that the individual is already under another jurisdiction. Madison, of course, argued elsewhere (e.g., *Federalist* 10) that the art of human constitutions must consider the scheme of power checking power.

Yet here in Memorial and Remonstrance he is interested in presenting another order to which the power-checking-power artifice is subordinate. In other words, the rule of law, the artful assignment of ruling powers, is not a freestanding art. We must first understand the order of things that does not fall under human political authority, and, for that reason, is not a matter of human prudence and

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37. James Madison, "Memorial and Remonstrance against Religious Assessments" (1785), reprinted in *Church and State in the Modern Age: A Documentary History*, ed. J. F. Maclear (New York: Oxford University Press, 1995), 60.

art. In chapter 9 of the present volume, I point out a potential problem with Madison's phrase "wholly exempt from its cognizance." The Supreme Court's post-*Everson* (1947) jurisprudence of the establishment clause appealed to Madison's Memorial for evidence of original intent on the part of the framers and ratifiers. In opinion after opinion, justices of the Court either suppressed or denied the full import of the passage we quoted above. The phrase "wholly exempt" was interpreted to be an independent proposition rather than the conclusion of an argument. It came to mean that human government is prohibited from taking any position on theological ideas as such. This construal makes no sense of Madison's own argument, which was meant to persuade the legislature of Virginia on the basis of an argument about divine jurisdiction vis-à-vis human conscience. It is one thing to say that human government cannot stand in judgment of the higher law, but it is quite another thing to prohibit government from recognizing the ground of its own inferior authority.

It is in light of this problem that the admittedly polemical essay in chapter 7, which deals with the Supreme Court's rather demeaning characterization of the religious liberty it is supposed to protect, can be read. First written nearly ten years ago, my report of the case law is not completely up to date. However, on the basis of more recent Court decisions and obiter dicta, I have no reason to change my characterization of the coy, and usually comical, endeavor of the Court to uphold higher law against higher law. In chapter 9, I discuss in a somewhat more serious vein how the Second Vatican Council articulated a right of religious liberty that managed *not* to suggest that governments are so theologically blind (in fact, or by norm) that they are released from obligation to act in accord with the higher law. While Madison would have agreed with most everything except the "Catholic" part, even the part objectionable to his mind better rep-

resents his argument than the Court's post-*Everson* jurisprudence.

From Madison we should not expect a refined metaphysics of natural law. Indeed, his penchant for the power-checking-power scheme of politics notably departs from the understanding of human polity avowed by classical and medieval thinkers. It is enough for us to see that, despite this, Madison retained a common sense tutored by the old tradition of higher law. At the Constitutional Convention, he understood that compromise on the question of slavery had a limit beyond the immediate institutional issue of allocating powers. Though a slaveholder himself, he argued that it would be "wrong to admit in the Constitution the idea that there could be property in men."<sup>38</sup> His point in this regard was similar to the one he made in Memorial and Remonstrance. Government has no natural right to bind or loose from the natural law, for such a right would engender not a plurality of jurisdictions but a contradiction between those rights and duties immediately derived from higher law and those affirmed in the Constitution.

In his debates with Stephen A. Douglas, Abraham Lincoln conceded that it was permissible to view the problem of slavery very narrowly, as "a mere negative declaration of a want of power in Congress to do anything in relation to this matter in the territories."<sup>39</sup> He continued: "I know the opinion of the Judges states that there is a total absence of power; but that is, unfortunately, not all it states. . . . Its language is equivalent to saying that it is embodied and so woven into that instrument that it cannot be detached without breaking the constitution itself."<sup>40</sup> In the order that belongs to human law, a constitution is a kind of "higher" law, for it establishes the

38. Max Farrand, ed., *The Records of the Federal Convention of 1787*, rev. ed. 4 vols. (New Haven, Conn.: Yale University Press, 1937), II, 417.

39. Speech at Columbus, Ohio (16 September 1859), in *Lincoln: Speeches and Writings 1859-1865* (New York: The Library of America, 1989), 53.

40. Speech at Columbus, 53.

rules and measures for the making, administering, and adjudicating of law by particular authorities embraced within that constitution. Lincoln was correct to see the gravity of perverting a constitution, which is all the more dangerous when undertaken in the name of natural rights.

The reader will see that several of the essays in this collection wrestle with issues raised by the Supreme Court's decision in *Planned Parenthood v. Casey* (1992) and by Pope John Paul II's encyclical *Veritatis Splendor* (1993). Coming within a year of one another, these two documents are striking when read in tandem not only because of their different positions on abortion (in these essays I spend relatively little time commenting upon or arguing about the morality of abortion) but also because of what they say respectively about the situation of authority.

The authors of the joint opinion in *Casey* (Justices Souter, O'Connor, and Kennedy) proposed, reasonably enough, that it is "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."<sup>41</sup> So far forth, without further detail or elaboration, the Court states nothing especially controversial. Even St. Thomas argued that natural law prescribes limits to the authority of one human being over the body of another:

[M]an is bound to obey his fellow-man in things that have to be done externally by means of the body: and yet, since by nature all men are equal, he is not bound to obey another man in matters touching the nature of the body, for instance in those relating to the support of his body or the begetting of his children. Wherefore servants are not bound to obey their masters, nor children their parents, in the ques-

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41. *Planned Parenthood v. Casey* (1992) 505 U.S. 833, 847.

tion of contracting marriage or of remaining in the state of virginity or the like.<sup>42</sup>

With respect to some matters, such as the choice to be married or not, the human person is “immediately under God, by Whom he is taught either by the natural or by the written law.”<sup>43</sup> Thomas, of course, did not include in this list any rightful liberty to work some injustice contrary to the moral order. Nor did he think that the negative liberty from human authority cast one into a pre-moral condition of liberty from every authority. Even the Supreme Court, from time to time, is capable of understanding that an argument for liberty is not an argument against authority. As Justice Douglas once observed, albeit in a dissenting opinion, 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.”<sup>44</sup>

The authors of the joint opinion in *Casey*, however, say more. “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>45</sup> This is not a straightforward proposition about the absence of authority on the part of some institution or sector of government. Apropos of Lincoln’s characterization of the situation of positive law with respect to slavery in the territories—“a mere negative decla-

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42. *S.t.* II-II, 104.5.

43. *S.t.* II-II, 104.5 ad 2.

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

45. *Planned Parenthood v. Casey*, 847. Of course, the Court’s discovery of a right to abortion did not begin in *Casey* but in *Roe v. Wade* (1973). I spend more effort criticizing *Casey* for the good reason that it displays the philosophical and jurisprudential issues much more fully than *Roe*.

ration of a want of power in Congress”—the Casey Court folds the positive law into the principle of a natural right. The absence of legislative power is established by the right of the individual to be self-norming. The measures of justice regarding the killing or preserving of the unborn are not drawn from the order of nature, the common law, the positive laws of the several states, or the absence of power on the part of some sector of government, much less, need it be said, from the revealed law. The individual in this matter is under neither a higher nor a lower law, but is a law unto himself. It takes only a little historical imagination to consider the problems Madison might have encountered in late-eighteenth-century Virginia had he attempted to mount a higher law argument for religious liberty on the basis of a lawless conscience.

What makes the joint opinion especially reminiscent of the Dred Scott case is the purported authority of the Court to assert natural justice as a summary of public opinion. “The root of American governmental power,” the Court maintains, “is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. . . . The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”<sup>46</sup> This notion of the Court as the basal or “root” power, functioning as a vicar of public opinion, tallies almost exactly with what Justice McLean attributed to Justice Taney. The Court claims a special mandate to decide issues of higher law, even while reducing that law to public opinion vicariously represented by the Court.

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46. *Ibid.*, 865. And, on p. 866: “Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is *sufficiently plausible* to be accepted by the Nation.” [emphasis added]

As I point out in some of the essays in this volume, this perversion of the rule of law is not easily contained. In 1996, the issue of physician-assisted suicide reached the Supreme Court from two circuit courts that deployed the *Casey* opinion to uphold a natural right of private parties to use lethal force to vindicate justice in dying. If the individual has a right to use lethal force against the unborn, it would seem that such a right implicitly contains the liberty to employ a third party to kill oneself. In *Washington v. Glucksberg* (1997), the Court refused to take this step. According to Justice Rehnquist, physician-assisted suicide is not so “deeply rooted in our history and traditions.” How and why the personal autonomy doctrine of *Casey* is more deeply rooted in the matter of abortion than in physician-assisted suicide is neither explained nor justified. Nor is it explained how the Court has authority to give or deny remedies based on natural justice. Once the principle that the individual has a rightful dominion over life and death is admitted at constitutional law, it is difficult to see how such a principle can be contained. The options are threefold: (1) claim that for contingent reasons of history and precedent individual dominion over life and death is a fundamental value when one wishes to kill an unborn child, but not in the contract with a third party to kill oneself; (2) claim that the state has a compelling interest to override a fundamental value; (3) deny the rightfulness of the principle itself. The Supreme Court has hovered between the first two on the issue of physician-assisted suicide.

In chapters 3 and 4, I examine one of the most important but convoluted disputes about natural law, namely, its justiciability in courts. The issue is not only hampered by the vehement and often ugly politics of nominations to the federal bench; it is also beclouded by a very simplistic framing of the problem. For example, in *Democracy and Distrust* John Hart Ely lays out two alternative views of judicial review. According to the doctrine of interpretivism, it is the

sole business of judges to interpret the positive law received from a competent legislative authority. According to the doctrine of noninterpretivism, judges may introduce moral values in deciding cases. Ely then proposes that “[t]he interpretivism-noninterpretivism dichotomy stirs a long-standing debate that pervades all of law, that between ‘positivism’ and ‘natural law.’ Interpretivism is about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism.”<sup>47</sup>

This confuses two quite distinct questions: (1) whether jurisprudence presupposes something prior in the order of morals, and (2) whether a particular system of positive law authorizes judges to render verdicts immediately on the basis of the morality prior to law. All natural law theorists affirm the first proposition, but not necessarily the second.<sup>48</sup>

I show in some detail in these chapters that a natural law theorist like St. Thomas would look more like an interpretivist than a noninterpretivist. But these terms are so misleading that they ought to be abandoned. For to put the issue in this way leads us into the cul-de-sac of choosing between two unacceptable options. If natural law permits or requires judges willy-nilly to appeal to moral norms or fundamental values outside the positive law, then natural law underwrites private judgment parading as public authority. If, on the other hand, judicial restraint means obedience to written law because that law is the only measure of justice, then we fall into positivism. This is the Hobbesian option, to be sure. But from the

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47. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), 1.

48. My position on natural law and judicial review is virtually the same as that of Robert P. George, with whom I have sometimes differed on other aspects of natural law theory. See Robert P. George, “Natural Law, the Constitution, and the Theory and Practice of Judicial Review,” in *The Clash of Orthodoxies* (Wilmington, Del.: ISI Books, 2001), 168–209.

standpoint of the traditional concept of natural law, each of these options, in its own way, introduces a kind of lawlessness.

On the assumption that natural law signifies a participation in a higher law, all human judgment about the measures of action are set within a broader legal order. This was Madison's point in Memorial and Remonstrance. Individual judgments of conscience are personal but are not merely "private." That an individual, association, or church enjoys an immunity from the jurisdiction of the state is a real, but nonetheless restricted, notion of privacy. Parents are private agents with respect to the state, but in possessing authority to render judgment according to the natural law in matters affecting their domestic societies they are public agents. When Martin Luther King Jr. appealed to the eternal law in his famous Letter from Birmingham Jail he did not think of himself as making a merely private judgment.<sup>49</sup> Rather, he appealed to an order more public than the positive law, a supra-public law. At the same time, he did not suggest that he was vested with power to displace the order of authority allocated by the positive law. His understanding of civil disobedience recognizes both principles: While the state should not pervert the higher law, the individual ought not to usurp the authority of the state.

For his part, St. Thomas argues that participation in the eternal law includes individual judgment, social judgment, and political judgment. In each sphere, the human mind receives a rule and measure of acts and goes on to form judgments about action. In each sphere, the judgment enjoys, analogously, a kind of legality. According to the traditional perspective, the parent who uses prudence to make the natural law effective in the domestic society does so by a God-given right; he or she does not merely proceed from a moral

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49. Martin Luther King Jr., *Why We Can't Wait* (New York: Harper and Row, 1963), 77–100.

power, but from a jurisdictional title higher than that of the state. Political authority draws from the same source, but participation at this level involves making new law for the entire community, and, in so doing, renders the natural law effective in something more than individual or domestic life. Natural law is not an authority-free zone. Typically, natural law is invoked on issues of parental rights not merely to clarify the moral norms of parenting, but rather, indeed primarily, to locate the origin of the jurisdiction of parents.

In any relatively well-developed polity, the human political authority participates in the natural law not only by issuing legal precepts, but also by fashioning different forms of order that we would call constitutional. This is nothing other than the prudential distribution of lawmaking, law-enforcing, and law-adjudicating powers. In a surprisingly direct and sophisticated way, Thomas contended that, constitutionally, the judgment of judges ought to be regulated by the written law. For as it bears upon the entire political community, natural law is best made effective if human law is not generated on a case-by-case basis. As I show in chapter 4, his position on judges exercising *iustum animatum* (animated justice, judgment unregulated by written law) seems to fit rather nicely with contemporary criticisms of “living constitutionalism.”

But this has nothing to do with legal positivism. Rather, it is in respect of the entire system of positive law as a participation in natural law, including the proximate measures of legal authority that govern and mark the bounds of different offices, that Thomas favored the legislative office. For reasons that I discuss in chapter 4, obedience to the natural law might require a judge to render no judgment according to an unjust positive law, but he may never subvert the order of authority by imposing a law *ultra vires*. Usurpation of positive law is a violation of the natural law. This idea was not unfamiliar to Lincoln, who held that while the *Dred Scott* decision was a per-

version of both the higher law and the Constitution, the positive law gives the president no judicial power to retry the case or unilaterally to impose upon the polity a new positive law. The tradition of higher law doctrine has been the great matrix rather than the dissolvent of the rule of law.

Chapter 8—which contains two essays—originated in the much-publicized, and much-criticized, *First Things* “End of Democracy?” symposium. On my last count, the symposium had generated more than 175 reviews and comments in periodicals and books. Some of our most determined critics were on the political Right; these men and women were dismayed that anyone should suggest that the Court’s assertions about natural justice could raise genuine philosophical and theological questions. Speaking here only for myself, and not for the other contributors to the symposium, my quarrel with the Court’s imposition of a perverse higher law doctrine should be read in tandem with the first seven chapters in this volume, which defend a natural law ground for the rule of law and judicial restraint. The default positivism of the political Right is at odds with its commitments on many other issues. At the time of the American founding, during the crisis leading to the Civil War, and once again during the crises brought about by the Court’s uncritical adoption of a “fundamental values” jurisprudence after World War II, the best friends of judicial restraint in obedience to the rule of law were those who had a very substantive understanding of natural law. The reason is clear: Obedience to properly constituted authority is not a mere side-piece of the higher law tradition. Positive law tells us who has authority under specific institutional constraints. Therefore, whether any branch or officer of government has usurped authority is a question of positive law. But usurpation is forbidden by the natural law. Presumably, this is why the Constitution does not have to include a precept forbidding its officers from transgressing the positive law.

*Veritatis Splendor* (1993) is the first papal encyclical devoted exclusively to moral theology. Unlike other recent encyclicals that treat particular issues of human conduct—e.g., *Humanae Vitae* (contraception), *Sollicitudo rei Socialis* (distribution of wealth), and *Evangelium Vitae* (abortion and euthanasia)—*Veritatis* has relatively little to say about the application of moral norms to disputed problems, the situation of positive law, or the agenda of public policy. The subtitle alerts us that the encyclical intends to turn us back to the sources of moral theology: *De Fundamentis Doctrinae Moralis Ecclesiae*, “On the Fundamentals of the Church’s Moral Teaching.”<sup>50</sup> Natural law figures prominently among the “fundamentals.”

The encyclical is an authoritative teaching about moral theology and therefore ought not to be confused with the quotidian investigations and arguments of secular philosophers who do not recognize this authority. Yet it would be a mistake to read the encyclical as asserting propositions grounded merely in the teaching authority of the Church. To be sure, the encyclical maintains that human practical reason should be understood within the setting of divine wisdom. However we distinguish the objects of faith or reason, the “fundamentals” of which the encyclical speaks are not the work of the Church. The Church has no more power to change the natural law than does the state, public opinion, or the professional guild of moral philosophers.

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50. The English translation renders it “Regarding Certain Fundamental Questions of the Church’s Moral Teaching,” which is not only a bad translation, but introduces a perspective that the encyclical sets out to refute. Even more curious was the advertisement of the National Conference of Catholic Bishops summarizing the encyclical as follows: “It reverses pre-Vatican II legalism by speaking of the good and the bad rather than the forbidden and permitted, and by speaking about the invitation to live a moral life in God rather than the enforcing of laws or norms.” Since the encyclical wishes to overcome the dichotomy of the good and law, obedience and freedom, the NCCB advertisement typifies the very problem treated by the encyclical.

In its discussion of natural law, *Veritatis* introduces some interesting terminological changes. The first is the “natural moral law” (*lex moralis naturalis*).<sup>51</sup> This was used once in the encyclical *Humanae Vitae* (1968) and once a few years later in the instruction *Donum Vitae* issued by the Congregation for the Doctrine of the Faith (1987).<sup>52</sup> In the *Catechism of the Catholic Church* (1994), written at the same time as *Veritatis Splendor*, the section on natural law is titled the “natural moral law.”<sup>53</sup> Why alter the traditional rubric by inserting “moral” between “natural” and “law”? Apparently, Rome wished to make it clearer that natural law is not to be reduced either to order in things or to order in the human mind. In *Donum Vitae*, for example, we read that: “The natural moral law expresses and lays down the purposes, rights and duties which are based upon the bodily and spiritual nature of the human person. This law cannot be thought of as simply a set of norms on the biological level; rather it must be defined as the rational order whereby man is called by the Creator to direct and regulate his life and actions and in particular to make use of his own body.” Here, the insertion of *moralis* is clearly intended to obviate the depiction of natural law as a lower law that bears no legal or moral predicates whatsoever.

In *Veritatis Splendor* the “natural moral law” cuts in the other direction, reminding the reader that the natural law is something more than order in the human mind:

Some people, . . . disregarding the dependence of human reason on Divine Wisdom and the need, given the present state of fallen nature, for Divine Revelation as an effective means for knowing moral truths, even those of the natural order, have actually posited a “complete

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51. *Veritatis Splendor* (1993), §36.

52. *Humanae Vitae* (1968), §4; *Donum Vitae* (1987), III.

53. *CCC* (1994), §§1954–60.

sovereignty of reason” in the domain of moral norms regarding the right ordering of life in this world. Such norms would constitute the boundaries for a merely “human” morality; they would be the expression of a law which man in an autonomous manner lays down for himself and which has its source exclusively in human reason. In no way could God be considered the Author of this law, except in the sense that human reason exercises its autonomy in setting down laws by virtue of a primordial and total mandate given to man by God. These trends of thought have led to a denial, in opposition to Sacred Scripture (cf. Mt 15:3–6) and the Church’s constant teaching, of the fact that the *natural moral law* has God as its author, and that man, by the use of reason, participates in the eternal law, which it is not for him to establish. (§36)

If we turn to the *Catechism*, issued just a few months after *Veritatis*, the natural moral law (*lex moralis naturalis*), the old law (*lex vetus*) and the new law (*lex nova seu evangelica*) are organized under the genus “moral law” (*Lex Moralis*). The purpose here is the integration of all three foci in the ancient doctrine of participation. The “moral” is not bereft of law, nor law of morals, though the modes of promulgation and reception, as well as the precepts, differ according to the economy of divine providence. As I see it, the rubric “natural moral law” highlights issues that are at once theological and anthropological. Whether we speak of the order of nature, the Covenant, or the Gospel, the creature is not in a condition in which morals and law have to be brought together *ab initio* by the human mind—*fiat lex*. The terminology of *Veritatis* and the *Catechism* is somewhat novel, but the definitional scheme is virtually the same as that of St. Thomas, who, relying on St. Augustine, distinguished all law proceeding from the divine mind from laws promulgated by the human mind. The moral order remains within the setting of divine wisdom, though our

location in, and participation in, this order differs in each case.

The second novel term in *Veritatis* is “participated theonomy.”

Others speak, and rightly so, of “theonomy,” or “participated theonomy” [*de theonomia participata*], since man’s free obedience to God’s law effectively implies that human reason and human will participate in God’s wisdom and providence. By forbidding man to “eat of the tree of the knowledge of good and evil,” God makes it clear that man does not originally possess such “knowledge” as something properly his own, but only participates in it by the light of natural reason and of Divine Revelation, which manifest to him the requirements and the promptings of eternal wisdom. Law must therefore be considered an expression of divine wisdom: by submitting to the law, freedom submits to the truth of creation. (§41)

The phrase “participated theonomy” is borrowed perhaps from the Swiss thinker Martin Rhonheimer.<sup>54</sup> But the term “theonomy” seems to have been coined originally by nineteenth-century Protestant theologians (mostly Lutheran) who wanted to overcome Kant’s dichotomy of autonomy and heteronomy.<sup>55</sup> That dichotomy, of course, expressed a completely anthropocentric setting of ethics. Either human practical reason acts according to a merely conditional maxim drawn from instinct, or practical reason acts according to an unconditional maxim grasped *a priori* by the mind. Protestant theologians of the era well understood that, on this view, obedience to divine law of any kind would prove heteronomous. Hence, they proposed a third term, *theonomie*, to make clear that the human drama

54. For the phrase, “participated autonomy,” see Martin Rhonheimer, *Natural Law and Practical Reason: A Thomistic View of Moral Autonomy*, trans. Gerald Malsbary (New York: Fordham University Press, 2000).

55. For the Protestant antecedents, I am indebted to the unpublished M.A. thesis by Stefan Reuffurth, OMV, “Theonomy: The Historical Origins and Development of a Theological Term and Its Use by John Paul II in *Veritatis Splendor*,” St. Johns Seminary, Boston, 1998.

of autonomy versus heteronomy is relative to God's law as revealed in Scripture. *Veritatis Splendor* adds the traditional term "participated," which brings the idea back around to the patristic tradition and the speculative language of the medieval schools.

The idea of "participated theonomy" is also similar to the neo-Calvinist understanding of "sphere sovereignty," propounded by Abraham Kuyper, Prime Minister of a Dutch Protestant-Catholic coalition from 1901 to 1905.<sup>56</sup> Kuyper's social theory was developed at the same time that Pope Leo XIII (for whom Kuyper expressed admiration) adopted a high concept of natural law in order to defend a structured plurality of human authorities, each participating in its own way in the natural law.<sup>57</sup> Like Leo XIII, whose pontificate lasted from 1878 to 1903, Kuyper insisted that authority does not arise originally through a social contract or the state. "[H]igher authority," he wrote, "is of necessity involved" if we are to make sense of plural spheres of society that have real authority not reducible one to the other.<sup>58</sup> "In a Calvinistic sense we understand hereby, that the family, the business, science, art and so forth are all social spheres, which do not owe their existence to the state, and which do not derive the law of their life from the superiority of the state, but obey a high authority within their bosom; and authority which rules, by the grace of God, just as the sovereignty of the State does."<sup>59</sup>

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56. For my understanding of the concept of sphere sovereignty, I am indebted to Jonathan Chaplin, James Skillen, and Keith J. Pavlischek. For an introduction to Kuyper, see Peter Heslam, *Creating a Christian Worldview: Abraham Kuyper's Lectures on Calvinism* (Grand Rapids, Mich.: Eerdmans, 1998), and James D. Bratt, ed., *Abraham Kuyper: A Centennial Reader* (Grand Rapids, Mich.: Eerdmans, 1998). Kuyper's most widely read English work is published as *Lectures on Calvinism* (Grand Rapids, Mich.: Eerdmans, 1931).

57. Leo XIII almost always uses natural law in relation to the origin of authority. See for example *Immortale Dei* (1885), §§4, 18, 24; *Libertas* (1888), §§3, 7–9, 13; *Tametsi futura* (1900), §7; *Sapientiae Christianae* (1890), §8; *Arcanum* (1880), §32; *Dioturnum* (1881), §11.

58. Kuyper, *Lectures on Calvinism*, 91.

59. *Ibid.*, 90.

Kuyper and his disciples spoke of higher law, but kept the phrase natural law at arm's length. This was due in part to the fact that Kuyper was alarmed that the orders of nature and mind had been reduced to what he called "pantheism"—a spontaneous order unstructured with regard to authority. The Catholic doctrine of "participation" and the Reformed position on "sphere sovereignty" differ in important ways. The model of "participation" emphasizes mediation, whereas "sphere sovereignty" emphasizes a more direct constitution of authority. Both, however, account for a structured pluralism of authority in a theonomic principle.

Until recently, natural law as a "fundament" of moral theology has not been an issue much disputed in the Catholic tradition. Leo XIII, Pius XI, Pius XII, and John XXIII were careful to orient the discourse of natural law in terms of a higher law.<sup>60</sup> That Pope John Paul II felt it necessary to write an encyclical clarifying the matter indicates that the situation has changed. The change is due in part to the intra-ecclesial dispute sparked by the magisterial teaching on contraception promulgated in *Humanae Vitae*, which appeared in 1968. Since that time, many theologians have complained that the "official" concept of natural law is based on an outmoded understanding

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60. If we take, for example, Pope John XXIII's *Pacem in Terris* (1963), we find some twenty-five discrete rights listed in §§11–27. It would be a mistake, however, to think that this "liberal" pope jettisoned the theory of participation in higher law. "Hence, representatives of the State have no power to bind men in conscience, unless their own authority is tied to God's authority, and is a participation in it," §49. "But such an order—universal, absolute and immutable in its principles—finds its source in the true, personal and transcendent God. He is the first truth, the sovereign good, and as such the deepest source from which human society, if it is to be properly constituted, creative, and worthy of man's dignity, draws its genuine vitality. This is what St. Thomas means when he says: 'Human reason is the standard which measures the degree of goodness of the human will, and as such it derives from the eternal law, which is divine reason. . . . Hence it is clear that the goodness of the human will depends much more on the eternal law than on human reason.'"

of nature. Obedience to natural law, it is said, requires human liberty and prudence to submit to something lower than itself. Without here rehearsing the details of this dispute, the charge of “biologism” was the least important challenge to the tradition, among other reasons because it was the one most easily answered. The more interesting issue is whether natural law includes an order of obligation, whether natural law is an authority-free zone.

The report submitted to Pope Paul VI by a special commission instituted to study the question of contraception strongly criticized what it understood to be the older tradition of natural law. “[T]he concept of the natural law, as it is found in the traditional discussion of this question, is insufficient: for the gifts of nature are considered to be immediately the expression of the will of God, preventing man, also a creature of God, from being understood as called to receive material nature and to perfect its potentiality. Churchmen have been slower than the rest of the world in clearly seeing that this is man’s vocation.”<sup>61</sup> This characterization misrepresents the Catholic tradition by making the natural law an expression of divine voluntarism. Putting that problem to one side, the important thing is that the authors of the report set up a dichotomy between what we have been calling the first two foci of natural law, order in nature and order in the mind. If the natural law is order in nature, then man is prevented from exercising his own natural gift of prudence. Given this opposition—nature or prudence—the latter would seem higher than the former, for as the report notes, even Genesis considers man “as the prudent administrator and steward of the gifts of nature.”<sup>62</sup> But then the central question comes clearly into view: What is the norm of prudence?

Classically understood, the virtue of prudence requires a situation in which there is a gap between a precept and an end. Whenever there is more than one legitimate way to achieve an end pru-

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61. “The Argument for Reform,” *The Tablet* (May 6, 1967), 511.

62. *Ibid.*, 510.

dence must be exercised. There can be no prudence, however, concerning an action already forbidden by a precept. While there might be a range of options about how to murder, for example, there is no prudence about such means. The authors of the report mean by prudence the liberty of intelligent choice about the so-called gifts of nature without a prior precept. The concrete norms are entirely the work of the human mind. The authors concede that there is something “sacred in nature,” for God is the creator of the “totality of created nature.”<sup>63</sup> But there is no law, no precept. Prudence in this respect is indistinguishable from what modern philosophers understand as instrumental reason—the human mind at work on pre-moral measures of nature.

Hence, the traditional concept of participation in a higher order is not so subtly transposed into a deism in which God supplies the material but man supplies the concrete norms. From this perspective, it follows that binding law can emerge only after the fact of human dominion. As in various state-of-nature scenarios of the Enlightenment, we have here a depiction of Genesis 2 without a norm. Undoubtedly, this is not the *prima gratia* affirmed by the Council of Arles. Pope Paul VI must have found it odd that a commission of his own moral theologians was asking him to authoritatively declare a human dominion free of higher law, or, for that matter, of any law. The Pope refused on grounds of faith and reason to admit the existence of a zone of absolute human dominion. Regrettably, the secular polity with the greatest tradition of higher law thinking allowed its Court in *Casey* to transfer dominion over life and death to self-norming persons.

The problem of natural law cannot be understood adequately as an argumentative exercise pointing to, or issuing from, moral premises. Such an exercise is important, but it does not touch and

63. *Ibid.*, 511.

therefore cannot resolve the deeper issue of the original situation of human practical reason. When the Pope's commission of moral theologians argued for the priority of a human dominion in which human practical reason supplies the concrete norms, or when the Supreme Court declared in *Casey* that the individual has natural immunity from positive law in the matter of abortion, it is important to understand that these are not moral arguments but claims about what is prior to arguments. The answer to this question is entirely relevant to morals, but nothing in the logic of moral argument *per se* can win the case. The question turns upon considerations of anthropology and theology. To attempt to rediscover the natural law in a post-Christian world we must pick up the discussion precisely at this point.

