moral law (*lex natural, lex naturae*) . . . was long the accepted tradition . . . but it has now fallen on evil days, and it can no longer be accepted as in harmony with modern thought on those matters."[22]

22. John Salmond, *Jurisprudence* (1902); cited in John Courtney Murray, *We Hold These Truths*, p. 299. It may seem odd that Murray might cite this observation of Salmond's; it is done so as to point out that Salmond was, in Murray's opinion, speaking too hastily, and that the view was therefore incorrect.

LIBERTY MISCONCEIVED: HAYEK'S INCOMPLETE RELATIONSHIP BETWEEN NATURAL AND CUSTOMARY LAW*

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In contemplating a jurisprudence of liberty, F.A. Hayek cautions us to carefully separate two conceptions of order: that which is planned or imposed deliberately by man from without and that which arises spontaneously from within. An appreciation for spontaneous order drives Hayek's defense of liberty. The deliberate man-made order is often heavy-handed, incapable of the complexity of spontaneous order. Deliberately constructed orders are rigid, whereas spontaneous orders, consisting largely of abstract or general principle, are more pliable or adaptable to new circumstance. Finally, an order imposed by human deliberation has a necessary purpose, where a spontaneous order "can have no purpose, although its existence may be very serviceable to the individuals which move within such order."[1]

Hayek favors, in most circumstances, customary or common law over positive enactment because the common law arises out of an evolution of discovery of the spontaneous order. Positive law will often contend with the spontaneous order. In so doing, Hayek posits that authority or coercion displaces freedom and injects elements of instability and uncertainty which disrupt market as well as personal arrangements. For Hayek, then, positive law has at most a supporting role to play—namely, that of corrective legislation. Hayek gives as example customary laws that have grown in error because "the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice."[2] In this, however, Hayek is quick to warn against the use of positive law to seek equality of result, rather than equality of treatment.[3] Eliminating bias that has evolved into customary law does not entail the creation of new bias. Hayek sharply and properly condemns employing the positive law "to direct private activity towards particular

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1. F.A. Hayek, *Law Legislation and Liberty* (1976), p. 39.
2. *Ibid.*, p. 89.
3. *Ibid.*, p. 141.

ends and to the benefit of particular groups."[4] Once this is undertaken, government assumes control of life, liberty, and property. And once these are "administered" to the ends selected by government, there is a disregard of the spontaneous order and personal freedom.

Hayek's conception of the spontaneous order and the importance of common or customary law is congenial, though not identical, with the natural law tradition. In this, Hayek is so preoccupied with preserving liberty against the state, there is no acknowledgment that the spontaneous order is itself ordered by the one Supreme Being. Moreover, there is insufficient recognition of each person's role in community, insofar as immunities that apply against governments are too easily allowed to place man atomistically outside his or her natural context. For example, a person may well have a guaranteed "right," say to free speech, and such right is important as a limit on government or state power. In other words, the right confers an immunity against government restraint (censorship) with regard to certain personal decisions. However, it is important to realize that such rights or immunities from state interference do not leave a person in a posture of unfettered freedom. If the social or spontaneous order is to be tolerable, individual action will often need to be tempered by moral duties that a person may have by reason of being part of a community, such as a family. Unlike the state, parents may impose content limitations upon the reading or television viewing habits of children. So too, churches may obligate a tithe, or redistribution of wealth, as a matter of justice toward others. The world is not just "state vs. individual," but individual within family, church, school, employment, and social groups. Cultural order depends greatly upon each person being situated in the thick of such intermediary associations,[5] and insofar as these associations are far from "spontaneous," Hayek appears to understate their importance.

Natural law is more than a spontaneous order or an accumulation of experience over time. Cicero, for example, states that "Law is the primal and ultimate mind of God, whose reason directs all things . . . ."[6] As God has created man in His own image, it is impertinent of any man to call the result of that creation "spontaneous." So too, Aquinas reveals, that natural law is premised upon propositions that are self-evident from our very "being." Thus, "the first

4. *Ibid.*, p. 142.
5. *See* generally, D. Kmiec, *Cease-Fire on the Family & The End of the Culture War* (1995).
6. Marcus Tullius Cicero, *De Legibus* in *De Re Publica, De Legibus* (Clinton Keyes trans. 1948), pp. 379-81.

indemonstrable principle is that the same thing cannot be affirmed and denied at the same time, . . ."[7] This important precept of noncontradiction secures objective truth against modern claims of moral relativism or skepticism. That something cannot both be and not be is perhaps implicit in Hayek's praise of the spontaneous order, but it deserves more forthright recognition if man is not to become prey for statist claims driven by particular interests.

The purposeless nature of Hayek's conception of spontaneous order also understates man's ultimate purpose, namely, to seek that which is good and compatible with his nature, and to avoid that which is incompatible, evil, or destructive of that nature. Thus, for natural lawyers the focus is not Hayek's thinner (albeit important) proposition that freedom will prosper where custom and spontaneous order are allowed to flourish, but whether the customs that are undertaken in law coincide with a person's nature or war against it. Again, to quote Thomas Aquinas, "man is directed to an end of eternal happiness which exceeds man's natural abilities . . . . It is necessary that man should be directed to his end by a law given by God."[8]

God has given man a purpose. While these purposes become more evident out of the common law traditions that Hayek extols, they pre-exist even his spontaneous order in ways that he ignores or denies. The natural purposes or inclinations include all that "makes for the preservation of human life, and all that is opposed to its dissolution."[9] Like other animals, man, too, has an inclination to "sexual relationship, the rearing of offspring, and the like."[10] Finally, man is intended "to live in society," and from this is derived all related inclinations such as the need for knowledge.[11]

The importance of living in society—a free society—allows natural law and Hayek to coincide in matters of some importance. Thus, Hayek's conception of spontaneous order distinct from that which is deliberately fashioned by persons with administrative or political power is an echo of the important natural law distinction between living in society and being a mere subject of the state. What is more, Hayek's powerful insights concerning the propensity of the state to be concerned with itself, suggests strongly that Aristotle's claim that "the state is by nature clearly prior to the family and to the

7. St. Thomas Aquinas, *Treatise on Law*, q. 94, a. 2. (Gateway Ed.)
8. Aquinas, q. 91.
9. Aquinas, q. 94, a. 2.
10. *Ibid.*
11. *Ibid.*

individual"[12] cannot be taken at face value. While Aristotle conceived of man's social inclination as an ever-expanding structure of self-sufficiency from individual to family to village to community to communities united as a state, Hayek's work reminds us that there are social as well as economic scale economies. Put more bluntly, as the state grows in size and scope, it tends to lose sight of the purposes that not only are better accomplished, but perhaps only accomplished, in the complex, "spontaneous" orders of a smaller sovereign such as the family.

James Wilson, a signer of both America's Declaration of Independence and its original constitution, was also America's most erudite natural law scholar at the time of the founding. Wilson clearly recognizes that the state or government exists for individual and family, not the other way around. Wilson writes: "[g]overnment was instituted for the happiness of society: how often has the happiness of society been offered as a victim to the idol of government!"[13] Wilson's distinction between government and society also mirrors that later taken up by Hayek. Like Hayek's spontaneous order, Wilson comments, "civil society must have existed, . . . before civil government could be regularly formed and established. Nay, 'tis for the security and improvement of such a [condition], that the adventitious one of civil government has been instituted."

But Hayek's understanding of liberty is misconceived insofar as it is built on an incomplete relationship between natural and customary law. To complete the relationship, individual liberty and the corresponding immunity from state directive must be reconciled with the social inclination of human nature to live in society. From living in society arise the natural obligations between parent and child, husband and wife, employer and employee, and even neighbor and neighbor. As Professor David Forte has thoughtfully written, "If we have too weak a theory of rights, the individuality of the person could be swallowed up in an enforced obligation to assist others and society. If we have too strong a theory of rights, we divide and separate humans from one another, break essential connections between them, and indeed, make weaker, not stronger, the individual human identity."[14] To make this concrete, Forte, like Hayek, praises the law when it maximizes freedom. But with more vigor than Hayek,

12. Aristotle, *The Politics* in *The Great Legal Philosophies* (Morris, ed.), pp. 26-27.
13. *The Works of James Wilson* (McCloskey, ed. 1967), p. 239.
14. David F. Forte, "Nurture and Natural Law," 26 *U.C. Davis L. Rev.* (1993), pp. 691, 703-04.

Forte draws upon the natural law tradition to find in this freedom its essential purpose: namely, multiplying the number of opportunities for individual nurturing of others, and thus ourselves as well, to proper ends.

But how active a role can a state take in creating opportunities for individuals to undertake such nurturing activities? Hayek speculated that some appropriate social legislation may be enacted for the provision of "certain services which are of special importance to some unfortunate minorities, the weak or those unable to provide for themselves."[15] Admitting that this would increase taxation, Hayek thought this tolerable so long as the funds were raised uniformly and did not make "the private citizen in any way the object of administration;"[16]

The natural law tradition is similar, but arguably more generous, than Hayek's grudging concession. Aquinas writes, "in a case of extreme need, . . . that which [a man] takes for support of his life becomes his own property by reason of that need."[17] In this, Aquinas is not supporting a right based merely upon need, a proposition that would greatly expand the modern welfare state and coincide with the headiest dreams of the Clinton presidency in the United States. Rather, the right that Aquinas describes is premised upon what is good, objectively defined in terms of human nature. Property is thus understood as an important instrumental device to the security of happiness and the natural end of man, not an end in itself. Further, property ought not be used to defeat a person's natural law end. It is doubtful whether Hayek would agree.

As a matter of practical politics, what does this authorize the state to do? Health care reform is the issue of the day in America. On the one hand, the President and Mrs. Clinton advocate directing every employer in America to provide basic health care coverage for their individual employees. In contrast, various amalgams of small and large businesses argue that the way to contain health costs is to place more directly the responsibility for health expenditures upon the individual. Clearly, Hayek would be appalled by the employer mandate. It would destabilize long established business relationships and expectations and curtail economic and personal freedom in the most egregious manner. Yet, for different reasons, it is important to realize that the natural law would also acknowledge Hayek's concern,

15. *Law and Legislation and Liberty*, pp. 141-42.
16. *Ibid.*, p. 142.
17. Aquinas, *Summa Theologica*, q. 66, a. 7.

especially as the mandate would be interfering with individual opportunities [and obligations] to provide nurture. But in saying this, the natural law would not take the position that the state could not arrange for incentives for these individually-directed nurturing opportunities to occur. Thus, while it may be best to leave the individual responsible for his or her health care, tax deductions or credits might facilitate a son or daughter providing for the health care costs of an elderly parent.

Along similar lines, Professor Forte comments that the early welfare practice in American practice "required a personal relationship between the giver and receiver, the distribution of assistance for special needs, and the requirement that the recipient 'do something' if at all possible in exchange for help."[18] How different this is from the present-day statist programs of food and housing assistance that are anonymously administered in accordance with census and financial data. These programs not only encourage a culture of poverty on the part of the recipient,[19] they impoverish the taxpayer donor by separating the donor and donee, thereby breaking the bonds of the natural law community.

Hayek's misconception of liberty fails to realize, or chooses to ignore, that the spontaneous order can be either one of pursuit of virtue and the good or the pursuit of greed (or lust or fame) and evil. It is natural law that answers this omission by both preserving free will or liberty and recognizing the purpose of that liberty as the pursuit of the good. Building in prudence and notions of limited enforceability, natural law—like Hayek—cautions against the enforced virtue of the state. Persons are to be brought to virtue, not suddenly, but gradually. But natural law, unlike Hayek, explicitly recognizes that it is virtue that is being pursued. Yet, virtue is not—as Hayek sometimes seems to imply—a naked choice between coercion and freedom. Virtuous habits are learned within families with a good deal of parental coercion. So too, the state must play this role where life, itself, is subject to attack, as in the murder of human beings, born or unborn.

But the state is more than a fail-safe device against extreme evil. From a natural law perspective, the state —at least in its limited form—is part of man's search for the good. The state performs a coordinating function, and at its best, it permits those with outstanding talents to create conditions for the individual pursuit of the good.

18. "Nurture and Natural Law," p. 724.
19. *See generally*, Marvin Olasky, *The Tragedy of American Compassion* (1992).

In this, the state is not merely the result of man's fallen or sinful nature or some deliberately planned order originating solely in man, it is part of the society known to, and prefigured by, God. Man has only one end: his reunification with God. It is to that end, that individual and state action ought to be directed. As Father Copleston comments, "St. Thomas does not say that man has, as it were, two final ends, a temporal end which is catered for by the State and a supernatural, eternal end which is catered for by the Church: he says that man has one final end, a supernatural end, and that the business of the monarch, in his direction of earthly affairs, is to facilitate the attainment of that end."[20]

If the state is to carry out this proper function, it must respect the freedom of the spontaneous order, but only as that is understood in terms of natural law. In this, the Catholic principle of subsidiarity is instructive: "a community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good."[21] The principle of subsidiarity is an important, if judicially disregarded,[22] portion of the American Constitution's Tenth Amendment that reserves to the state, or to the people, "powers not delegated to the United States by the Constitution."[23] The principle of subsidiarity looms large on the international scene as well, with individual European nations referencing this principle as a source of restraint in the face of the economic submersion of the common market.

Hayek makes a substantial contribution to the understanding of law by reminding his reader that "[a]s late as the seventeenth century, it could still be questioned whether parliament could make law inconsistent with the common law. The chief concern of what we call legislatures has always been the control and regulation of government."[24] In the modern age, where the substance of a person is the substance of legislative rights—e.g., welfare entitlements,

20. Frederick Copleston, S.J., *A History of Philosophy*, p. 416.
21. Pope John Paul II, *Centesimus Annus*, art. 48, 4th paragraph.
22. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (holding that the constitution, including the Tenth Amendment, does not substantively affirm state sovereignty as a limit on federal commerce authority; rather, states must fend for themselves in the political process); cf. *U.S. v. Lopez*, 115 S. Ct. 1624 (1995) (suggesting some limit to federal or centralized power).
23. U.S. Const. Amend. X.
24. *Law Legislation and Liberty*, p. 124.

minimum wages, housing assistance, pension mandates, hiring [affirmative action] preferences—it is important to be reminded of how recently legislatures have usurped the power to displace what Hayek calls the "rules of just conduct," or more precisely the natural law. It is useful to examine Hayek's contribution from both an institutional and individual standpoint. Institutionally, of course, Hayek's observation goes to the relationship between the legislature and the Court. Individually, it concerns what standards or methodology governs an individual judge.

At the institutional or structural level, Hayek, as before, does not fully appreciate the natural law significance of democratic checks and balances and the separation of powers. His main task again is to defend the common law and the spontaneous order from an overbearing positive law state. With that task in mind, he is most concerned with shrinking the conception of enacted or positive law. He writes, "[w]hat is important for our purposes is that . . . to conceive of legislation as a distinct activity presupposes an independent definition of what was meant by law."[25] The proper historical account, Hayek argues, is that except for Benthamites who demanded an "omnicompetent legislature," the accepted British view was that the scope of positive enactment was necessarily constrained not only by the requirement that statutory law be general in form and application, but also that it not upset the common law. Of course, modern legislatures do not fully observe such limitations on their substantive lawmaking power, and it is here that the utility of the separation of powers is made apparent. It is also here where the separation of powers should be clearly linked with the natural law.

Part of Hayek's shortcoming is again his unwillingness to see the common law, not as merely spontaneous, but as the necessary outgrowth of a Divine law giver. Without due acknowledgement of the Almighty, Hayek is left to defend the common law as a matter of tradition or expectation. Important matters to be sure—at least, that is, for those who are predisposed to conserve or maintain the established order. It is no answer, however, to those who wish to subvert it. On a structural level, it leaves Hayek to maintain that written constitutions are "essentially a superstructure erected over a pre-existing system of law to organize the enforcement of that law."[26] Again, Hayek's purpose is to exalt the common law, even as against modern positivist claims that such must give way to the primary or

25. *Ibid.*, p. 128.
26. *Ibid.*, p. 134.

supreme constitutional charter. But if all that supports the common law is that it pre-exists, and not that it is also consistent with the pursuit of goodness or human nature as designed by God, the defense of the common law is weak. Only when the common law is seen in the natural law tradition do structural limitations on lawmaking such as the separation of powers become embodiments of principle, not merely useful props for the status quo.

The best illustration of the structural, natural law importance of the separation of powers can be located in the history of the American founding. Roscoe Pound, who lectured widely on the natural law at the University of Notre Dame, commented that just as English common law lawyers utilized the principles underlying the Magna Carta to contest with the Stuart monarchs, so too, colonial American lawyers used Coke to justify the American separation from England.[27] But Coke, unlike Hayek, was not bashful about locating the significance of common law in the hand of God. Coke writes: "[t]he Law of nature was before any judicial or municipal law [and] is immutable. 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 the eternal law, 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 people of God a long time governed . . . before any laws written and before any judicial or municipal laws."[28]

Coke's writing, of course, gets restated in Blackstone. The 1765 publication of Blackstone's commentaries, and a subsequent 1771 edition printed especially for the American colonies, reiterated the relationship between the common law and the will of the Creator. To Blackstone, "[God] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual that [happiness] cannot be attained but by observing the former; and if the former be punctually obeyed it cannot but induce [happiness]."[29] And as Dean Manion in this century correctly concludes, Blackstone not only interweaves the natural law with the pursuit of happiness, but also finds the natural law to be "the inspiration of the common law of England."[30] It is because this is

27. Roscoe Pound, "The Development of Constitutional Guarantees of Liberty," 20 *Notre Dame Lawyer* (1945), pp. 347, 348.
28. Calvin's Case, 7 Coke Rep. 12 (a), 77 Eng. Rep. 392.
29. William Blackstone, *Commentaries* (Lewis, ed.), pp. 27-31.
30. Clarence Manion, "The Natural Law Philosophy of Founding Fathers," 1947 *Natural Law Institute Proceedings*, p. 11.

so that the common law is respected. It is not, as Hayek puts it, merely that the common law is a better reflection of useful social arrangements that have evolved through time to be accepted as rules of just conduct. No, it is also that the common law derives its validity from the natural law "dictated by God himself."

A spontaneous order without God is not liberty, but license. Such order can be as much driven by lust as by the pursuit of the good. The only true liberty is that which is necessarily constrained by the natural law. Animals without the power of reason have no choice in this; "[their] existence depends on [] obedience," says Blackstone. Endowed with reason, man has a choice, and in this, a natural liberty. But it is a natural liberty that can only be meaningfully exercised if it is understood as necessarily dependent upon the will of God. Again, Blackstone instructed the American colonists and all of us who follow:

> The absolute rights of man considered as a free agent endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general explanation and denominated the natural liberties of mankind. This natural liberty consists properly in a power of acting as one thinks fit without any restraint or control *unless by the law of nature*, . . .[31]

In comparison, Hayek's conception of the common law and its judicial discernment is paltry, or certainly incomplete. Hayek sees the judge not in pursuit of right reason, but in the maintenance and improvement of "a going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody's will, but on the expectations becoming mutually adjusted."[32] If this is all that anchors the common law, it is not surprising that modern skepticism can dispense with it for sport. An order that no one designed is subject to redesign at will. An order with no principle of right conduct, other than that which is "mutually adjusted," is an order that ultimately sees no relationship between conduct and character. It is, in short, modern life, where the subscript for "pluralism" and "multiculturalism" and "diversity" is "anything goes." And tragically, for Hayek and his libertarian

31. *Commentaries*, pp. 108-09.
32. *Law Legislation and Liberty*, p. 119.

followers, it is an order subject to repeal not only by positive enactment, but also by unilateral executive order.

The seeds of Hayek's hollowness unfortunately were planted long ago. Blackstone, himself, would compromise the common law to positive enactment, writing: "if there arise out of [acts of Parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions: I know it is generally laid down more largely, that acts of Parliament contrary to reason are void. But if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with authority to control it."[33] With this, Blackstone separated himself from Coke. Roscoe Pound in his Notre Dame lectures speculated that Blackstone accepted legislative supremacy because of the English Revolution of 1688, but that this acceptance was not transferred to colonial America. Pound writes unequivocally of America's rejection of an "omnicompetent" legislature: "The Seventeenth Century polity as set forth in Coke's doctrine, was the one we accepted at our Revolution and put into our Constitution."[34]

Pound is right that the American Constitution was fashioned to be subservient to the natural law, but we also know that this keen insight is modernly greatly disputed. And the dispute comes not only from the totalitarian troops feared by Hayek, but also Hayek's philosophic, and nominally conservative, successors, who view the positive enactment of the Constitution as supreme. Curiously, however, Hayek speculates that judicial decisions "have shocked public opinion" most when judges have "had to stick to the letter of the written law."[35] This is, of course, directly contrary to the litany of "judicial restraint" espoused by Robert Bork and his fellow conservative originalists.[36] Something is obviously amiss.

To untangle this confusion, Hayek gives us a half-useful postulate that he, himself, knows is not observed: namely, that a constitution is better understood as a rule of organization, rather than just conduct. Hayek labors for this postulate because it leaves room for the spontaneous order of the common law. This is all well and good,

33. *Commentaries*, p. 79.
34. "The Development of Constitutional Guarantees of Liberty," p. 367.
35. *Law Legislation and Liberty*, p. 117.
36. *See* Douglas W. Kmiec, *The Attorney General's Lawyer* (1992), pp. 35-38. Judge Bork's argument is contained in Robert Bork, *The Tempting of America* (1990).

but just as predicted, those dissatisfied with the status quo and such order have not hesitated to utilize every positive law source, including the Constitution, to overturn it. Without any meaningful claim that his spontaneous order is premised upon the objective good to which we are inclined by the Creator, Hayek's order and preference for the common law thus becomes a matter of historical curiosity. Recognizing Hayek's dilemma, modern advocates of judicial restraint have sought to avoid the displacement, or at least the distortions, of the common law by making a small concession that Hayek would resist; specifically, that democratic majorities under the constitution do have substantive power to displace the common law so long as its all written down. Reminiscent of Blackstone, not Coke, this version of judicial restraint and blind acceptance of majoritarianism is hardly in the historical tradition of the American founding. What is more, this "small" concession, of course, is the proverbial nose of the camel. Indeed, given what this concession allows to be enacted into positive law, from preferences for disordered conditions such as homosexuality to oppressive laws that take private property by regulation, it is fair to say that the tent has been given over to the camel.

Like Hayek's misconception of liberty, Bork's version of originalism overlooks that certain constitutional provisions are themselves a product of the natural law. As Dean Manion observed, "[j]ust as firmly as [the founders] believed in natural law and natural rights, therefore, they believe in practical as well as theoretical checks upon the possibility of governmental violation of those rights. It was not enough . . . to belabor sovereignty with sound philosophy. Sovereignty had to be split and checked and degraded to the point where it was obviously a servant of the people's God-given rights."[37] In this, the specifications of the American constitution were not ends, but means to man's intended natural law purpose. Thus, the separation of powers not only secures liberty from overbearing positive law, it also reflects man's fallen condition, and his inability to fully grasp objective truth. A recent commentary on the natural law of St. Augustine puts it nicely: "The Augustinian attitude thus has doubts not about the existence of an ultimate, supralegal moral goodness but about the possibilities of its embodiment in human law . . . [This attitude] supplies a compelling justification for an American constitutional

37. "The Natural Law Philosophy of Founding Fathers," p. 22.

system that fragments both the power to define the good and the power to do it."[38]

Court-watchers in the United States well know that Hayek is wrong that judicial opinions have shocked the public most when they have stuck to the written law. The mention of the U.S. Supreme Court's decisions transforming the crime of abortion into a constitutional liberty is sufficient to make the point. But Bork's prescription for curing this judicial misbehavior, textualism uninformed by natural law, is as unsatisfactory as Hayek's embrace of the common law without God. As noted above, natural law is embodied in the very structure of the American Constitution. It exists in substantive provision as well. For example, the Ninth Amendment recites that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[39] Here is the positive law directly adverting to the "pre-existing system of law," to use Hayek's terminology. But it is a pre-existing system that is transcendent in nature, not merely spontaneous as Hayek would have it. In this regard, legal historian Edward Corwin found natural law to be the essential purpose of the Ninth Amendment. The only difference noted Corwin is phraseology, since "the principles of transcendental justice have been [there] translated into terms of personal and private rights."[40] Corwin is clear that the founders' intent was not to confer legitimacy on these personal rights by their incorporation into the Constitution, but to confer legitimacy on the Constitution by not assuming the pretense that natural rights can be legislatively limited. Corwin thus writes that these transcendental rights "owe nothing to their recognition in the Constitution—such recognition was necessary if the Constitution was to be regarded as complete."[41]

The rights derived from natural law have been stated differently over time, but chiefly they are "[t]he 'rights' revealed by nature, 'animate and inanimate,' includ[ing] a right to be, and therefore includ[ing] a right to continue to be (from which [is] derive[d] the right of self-defense and a duty of protecting from wanton destruction human, animal and vegetable life); [and] these imply 'a right to the conditions of existence,' from which [is] implie[d] the right to the

38. Graham Walker, *Moral Foundations of Constitutional Thought* (1990), p. 150.

39. U.S. Const. Amend. IX.

40. Edward Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 *Harv. L. Rev.* (1928), pp. 149, 152-53.

41. *Ibid.*, p. 153.

exclusive ownership and possession of property."[42] These same sentiments are captured by the shorthand employed by the American founders' concern for "life, liberty and property or the pursuit of happiness"[43] known to every school child. Fundamentally, then, the natural law of the American Constitution prescribes the right of self-preservation or life as well as the right to live and develop in community.[44]

As thus stated, natural law cannot be relied upon to either create "new" social rights or entitlements of concern to Hayek or result in the general subversion of democratic choices that troubles Bork. With respect to the containment of the modern fabrication of rights, natural law as a source of authority has an obvious and immutable limitation: the fixed character of human nature that exists as a matter of Divine, not human, specification. As for Bork's majoritarian preference, "natural law . . . is not a hunting license empowering judges to impose their own morality to invalidate legislative decisions in genuinely debatable cases."[45] Economic regulation that does not threaten personal existence or disregard private property, subject of course to the explicit textual constraints of other provisions of the Constitution like the taking clause,[46] would not be subject to challenge on natural law grounds. Thus, the state could take one's property

42. E. Patterson, *Jurisprudence* (1953), p. 368 [citing Lorimer, *The Institutes of Law* (2d ed. 1880)].

43. Professor Antieau reports that from this the framers derived the following natural rights: "(1) freedom of conscience, (2) freedom of communication, (3) the right to be free from arbitrary laws, (4) the rights of assembly and petition, (5) the property right, [and] (6) the right of self government, . . ." Chester Antieau, "Natural Rights and the Founding Fathers—the Virginians," 17 *Wash and Lee L. Rev.* (1960), pp. 43, 45.

44. Charles Rice, "Some Reasons for a Restoration of Natural Law Jurisprudence," 24 *Wake Forest L.J.* (1989), pp. 539, 562.
In summarizing the work of Thomas Aquinas, another commentator describes the basic inclinations of man as follows:

1. To seek the good, which is ultimately his highest good which is eternal happiness.
2. To preserve himself in existence.
3. To preserve the species, that is, to unite sexually.
4. To live in community with other men.
5. To use his intellect and will, that is, to know the truth and to make his own decisions.

T. Davitt, "St. Thomas Aquinas and the Natural Law" in *Origins of the Natural Law Tradition* (Harding, ed. 1954), pp. 26, 30-31.

45. "Some Reasons for a Restoration of Natural Law Jurisprudence," p. 568.

46. The Fifth Amendment of the U.S. Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

for public use upon the payment of just compensation, and the state could also regulate that property ownership without compensation, so long as it performed its task in evenhanded and proportionate ways directed at the prevention of harm. What the state cannot do, because the natural law against theft would preclude it, is redefine property ownership in ways that would render the taking clause and the due process clause meaningless. Property being in part a natural law concept cannot be wholly subject to state redefinition.

Natural law thus does far more than Hayek's mere perpetuation of an order that nobody has designed and that has just grown. Natural law has the intellectual power to reject not only spurious social entitlement claims, but also claims for "new" rights that are destructive of human nature itself. Obviously, a judicial decision striking down state laws protective of human life can have no natural law foundation. Indeed, a decision like *Roe v. Wade* which manufactured the right to kill the unborn, is perhaps the best example of where the natural law context of the American Constitution has been most seriously offended.[47] So too, a claim that the Constitution guarantees individuals the "right" of homosexual practice would have no natural law foundation. Insofar as homosexual behavior undermines the societal interest in procreation and the stable transmission of cultural values within families, and is one of the primary ways in which the deadly HIV or AIDS virus is transmitted, a law limiting that behavior promotes natural law by safeguarding existence and promoting health. The Court's conclusion in *Bowers v. Hardwick* that "to claim that a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious"[48] is an echo of this natural law understanding.

Properly understood, natural law accords respect for positive law, and thus recognizes that government—even legislative government—kept within natural law bounds is a necessary part of man's pursuit of the good or happiness. This is missing from Hayek, yet it is apparent, for example, in Aquinas.[49] Of course, respecting the

47. Professor Rice comments: "Only rarely would a judge be entitled or obliged to rely on supra-constitutional principles to refuse to uphold or enforce an enacted law. As the German courts indicated after World War II, judges should take this step only when the conflict between the law or precedent and justice is 'intolerable' or 'unendurable.' Such a conflict could occur in the context of *Roe v. Wade*, since that ruling authorizes the execution of a certainly innocent human being." "Some Reasons for a Restoration of Natural Law Jurisprudence," p. 569.

48. 478 U.S. 186, 194 (1986).

49. *Treatise on Law*, q. 95, a. 1, reply objection 2.

legislative process to an extent greater than Hayek's characterization of it as one of the gravest inventions of man more "far-reaching in its effects even than fire and gun-powder,"[50] does not require approval of all its manifestations.

This proper relationship between natural and positive law was outlined long ago by Aristotle, and it has been restated more recently by the respected American philosopher, Dr. Mortimer Adler. Adler, like Aristotle, observed that "[o]f political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent."[51] Thus, there are distinct, immutable principles of natural law such as to seek the good, and precepts such as not killing, stealing, or committing adultery, but "many things [are left] undetermined which must be determined by the conventions of political or civil law."[52]

To fully understand how natural law gives wide, but not unlimited, berth to the operations of positive law, it is necessary to comprehend the fundamental differences between natural and positive law.[53] If one wanted to learn the law of a particular state, Adler commented, one would not ask someone to teach us this law by demonstrating rational conclusions from sound premises. "The law of [a state] can only be taught by statement and it can only be learned by memory. This is due to its arbitrary character as positive law."[54] In contrast, natural law is discovered by the individual through rational inquiry and it can be taught by others through rational instruction. Adler highlighted other differences, too: positive law compels obedience through force and fear; there is no such temporal, external force with natural law; positive law involves a free choice among several options (indifferent possibilities as the philosophers would say), whereas with natural law, as with an accurate mathematical answer, there is no choice; positive law is binding only within the limited sphere of temporal political authority; natural law is binding on everyone.

50. *Law Legislation and Liberty*, p. 72.
51. Mortimer J. Adler, "The Doctrine of Natural Law Philosophy," 1947 *Natural Law Institute Proceedings*, p. 69 (A. Scanlan, ed. 1947) [hereinafter 1947 Proceedings].
52. *Ibid.*, p. 70.
53. Adler relies for this distinction on the definition of law supplied by St. Thomas Aquinas: law is an "ordinance of reason, for the common good, promulgated by him who has charge of the community." *Ibid.*, p. 76.
54. *Ibid.*, p. 79.

The differences Adler highlighted between natural law and its positive counterpart should not be taken to mean that they are irrelevant to each other. Quite the contrary, as Adler instructed: "[p]ositive law without a foundation in natural law is purely arbitrary. It needs the natural law to make it rational. But natural law without positive law is ineffective for the purposes of enforcing justice and keeping the peace." [55]

Over time, lawyers have sought to further elaborate the natural law/positive law difference by drawing a distinction between principles or precepts and rules. Principles and precepts—like the injunction to seek the good or the proscription against killing or theft are not capable "by themselves of governing action—for different reasons, . . .: in the case of principles, because they specify only one end, and action depends on specification of means; in the case of precepts, because they specify the means only generally and without reference to the contingent circumstances which are always involved in action."[56]

It is the contingent circumstances that make rules, the usual stuff of positive law, far different from principle and precept. Two consequences flow from the introduction of contingent circumstances, or facts: "[t]he first is that since facts are infinite in number, they cannot all be comprehended by human reason. Therefore any rule which is based upon them must be based upon the generality of experience and will be defective to the extent that it fails to provide for the unknown or the unusual case. The second is that facts change, and therefore laws must change, to preserve a reasonable relation to facts."[57] In short, natural law principles and precepts are immutable, whereas rules are "relative, contingent and changeable."[58]

Hayek views the legislative process as a latter-day invention that poses grave danger to individual liberty. He would confine the process to "definite limited tasks required to bring about the formation of a spontaneous order."[59] The bulk of the work is to be performed by judges articulating abstract rules of conduct or principles that do not disappoint expectations. Thus, the small corrective role that Hayek assigns to positive law does not provide any significant guidance to judges who occupy positions where legislatures are not largely inert—that is, in most places. These judges face real conflicts that are largely finessed by Hayek's yearning for modern nation-states

55. *Ibid.*, p. 83.
56. McKinnon, 1947 *Proceedings*, p. 97.
57. *Ibid.*, p. 98.
58. *Ibid.*
59. *Law Legislation and Liberty.*, p. 6.

where judge-made law predominates. Confronted with prolix federal statutes that not only weaken individual liberty, but more troublingly, displace the sovereign authority of smaller natural law communities such as families and churches, one can readily agree with Hayek's utopian desires. But what is a judicial officer, not resident in utopia, to do in the face of these positive enactments? It is not enough to say that it would be better if legislatures would defer to the common law or adopt its methodology.

One further significant consequence, therefore, of a proper recognition of natural law is that it does not leave real-life judges instructionally adrift. In particular, natural law judges are not generally directed to second-guess the legislative process, but contrary to Blackstone and Bork, that power is reserved. When the legislative process yields a true conflict between the explicit text of the Constitution or a natural law principle or precept, a judge is duty bound to act to set a statute aside. Thus, natural law is capable of harmonizing a judge's duty to follow the law as written with the judge's duty to do justice: to insure that the positive law is not itself an injustice. Natural law, unlike the positivism of Bork or the weaker spontaneous order of Hayek, does not respond to Nazi atrocity with the shrug that "well, the law is the law." Hayek feebly claims that his spontaneous order-based conception of law surmounts the positivist's dilemma with respect to atrocity,[60] but his claim ultimately drowns in abstraction and the lack of content of what he ascribes to the order, itself. What morality is reflected in the law of the spontaneous order is merely a function of "rules to which the recognized procedure of enforcement by appointed authority ought to apply."[61] This is either a weaker, more inchoate form of positivism, or it begs the question.

At bottom, the jurisprudence of liberty that Hayek prescribes fails to deal with the world as we know it. But more profoundly, Hayek's philosophic search flounders because he asserts that "there can be no justification for representing the rules of just conduct as natural in the sense that they are part of an external and eternal order of things, or permanently implanted in an unalterable nature of man,. . . ."[62] Why not? Where is his positive proof of the denial of God? Hayek is correct to warn us against the perils of modern day legislation with its mistaken burdens, mandates, and impositions. He

60. *Ibid.*, p. 56.
61. *Ibid.*, p. 58.
62. *Ibid.*, pp. 59-60.

is right that the common law process would give greater liberty. Yet, because of Hayek's incomplete appreciation for the natural law base of customary law, the greater liberty he extols would still be subject to ill-purpose, abuse, and misdirection. Thus, in his warning to us, Hayek gives us no adequate defense against powerful attacks on social order. Ultimately, Hayek seeks to recast as "objective truth," not man's God-created nature, but "the views and opinions which shape the order of society, as well as the resulting order of that society."[63] "Views and opinions" antagonistic to God's plan, whether fashioned in legislative enactment or "spontaneously" over an extended period of time in judicial decree, are hardly immutable first principles and they have led, and continue to lead, to the defeat of our happiness.

63. *Ibid.*, p. 60.