FREEDOM'S ANCHOR: AN INTRODUCTION TO NATURAL LAW JURISPRUDENCE IN AMERICAN CONSTITUTIONAL HISTORY

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In *Freedom's Anchor*, Andrew P. Napolitano, the well-known American jurisprudent, vigorously demonstrates that the Natural Law is the very lifeblood of the United States—and without it the nation cannot truly and fully exist. The strength of the book lies in its rich array of caselaw, from Colonial America down to the present-day, in which the Natural Law has functioned as the dynamic "logic" for the rulings rendered. This book will not disappoint, so do make sure to get a copy.

Judge Napolitano is a graduate of Princeton University and the University of Notre Dame Law School. He is the youngest life-tenured Superior Court judge in the history of the State of New Jersey. He sat on the bench from 1987 to 1995 and presided over more than 150 jury trials and thousands of motions, sentencings, and hearings. Judge Napolitano taught constitutional law and jurisprudence at Delaware Law School for one and a half years, at Seton Hall Law School for 11 years, and at Brooklyn Law School for four years. He was often chosen by the students as their most outstanding professor. As Fox News's Senior Judicial Analyst from 1997 to 2021, Judge Napolitano gave 14,500 broadcasts nationwide on the Fox News Channel and Fox Business Network. He is nationally known for watching and reporting on the government as it takes liberty and property. His newspaper column is seen by millions every week. He is an internationally-recognized expert on the U.S. Constitution and a champion of personal freedom. *Freedom's Anchor* is his tenth book.

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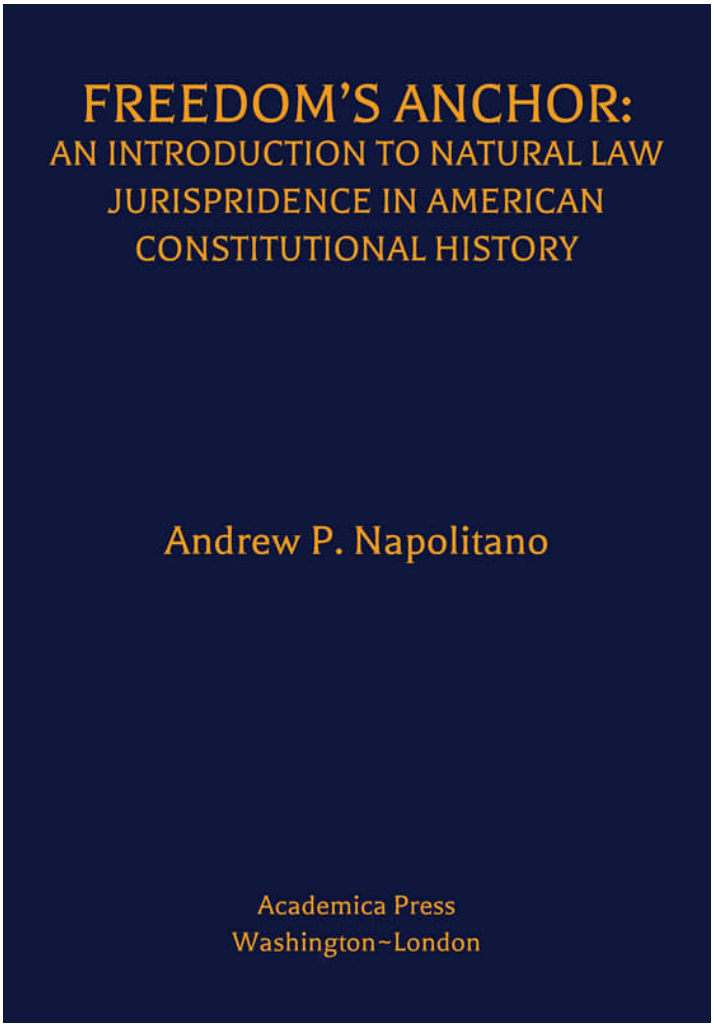
What is the Natural Law Tradition? Is the natural law related to the medieval church and the nature of man as a divine creation? Or is it a philosophical methodology linked to Enlightenment ideas of personhood? Perhaps it is a legal rule with specific form and content incorporated by the Ninth Amendment to the U.S. Constitution? The truth is that the natural law is often confounded among many of these questions, and as such, we must look backwards throughout history to discern its complete meaning if we are to look forward and see how we may use it to achieve the best form of government.



Even those who question or reject the existence of a Creator can embrace the concept of natural rights, for they can accept that our exercise of human reason leads us to discern right from wrong, and in turn, discover truth. An atheist will agree that there are certain basic values acknowledged everywhere, in all times and circumstances. After all, even a person deprived of senses has the ability to reason.

The Boston Massacre Trial: Self-Defense as a Natural Right for All

Indeed, “it was not uncommon for colonial lawyers and colonial courts to regard Natural Law and ancient principles of the common law as superior to ordinary legislative acts.” For instance, during the Boston Massacre trial of 1770, in which John Adams and Josiah Quincy II *defended* British soldiers accused of killing innocent colonial civilians, Adams asserted a self-defense justification. Adams was advised, Roscoe Pound maintained, by Jeremiah Gridley, “the father of the Boston bar, […] that [the] study of the natural, i.e. ideal, law, set forth in the Continental treatises on the law of nature and nations, if unnecessary in England, was important for the American lawyer.” Quincy argued for one of the soldiers by dispelling the notion forwarded by the Crown, that “the life of a *soldier* was of very little value; of much less value than others of the community.” Quincy argued that “we all reluct at death […] God and Nature hath implanted this love of life.—Expel therefore from your breasts an opinion so unwarrantable by any law, human or divine[.]” He then quoted Blackstone, who… unmistakably invokes the natural law: The law by which the prisoners are to be tried, is a law of mercy—a law applying to us all—a law, judge Blackstone will tell us “*founded in principles that are permanent, uniform and universal, always comfortable to the feelings of humanity and the indelible rights of mankind*.”

Quincy was quick to remind the jury of the earlier natural law claim he asserted with Adams, including a citation to John Locke. Adams, in his closing discussion of justifiable homicide, also invoked Blackstone and “the laws of nature,” signaling the powerful sway of natural law arguments on juries and the bench at the time.

Of course, as any trial attorney will attest, judges and juries often decide cases on many factors beyond the persuasiveness of the attorneys and compassionate presentation of the defendants or victims. A colonial Boston jury, some scant three-and-a-half years before the signing of the Declaration of Independence, was not sympathetic to a cadre of British soldiers who had just killed or injured several of their fellow Bostonians. However, the natural law appeals of Adams and Quincy were rational rather than sympathetic; and they won the day resulting in the acquittal of six of the soldiers, and convictions for manslaughter, instead of murder, for the remaining two.

Madison, in crafting the Bill of Rights, needed to manage two competing arguments: the disingenuous argument of Alexander Hamilton, that any enumeration of rights “could be used to justify any unwarranted expansion of federal power” as the government is of enumerated powers, and to enumerate rights implies areas of rights the government can reach into beyond those enumerated, on

the one hand; and, the Madisonian argument that "any right excluded from enumeration would be jeopardized," on the other hand. Madison, in this initial proposal to the House "ran together both of these concerns."

His proposals went to a select committee (of which he was a member) for consideration, and "[e]ventually, the two ideas were unpacked" into the Ninth and Tenth Amendments, which deal with "rights" and "powers," respectively. That is the Barnett-libertarian view of the Ninth and Tenth Amendments, which Professor Randy Barnett… termed as power-constraint: The two amendments act to constrain the federal government from either expanding its own powers at the expense of individual persons and of the States, or from infringing on the other unenumerated natural rights of individual persons.

Such a bundle of amendments dispels any argument that the founders disavowed natural law and natural rights.

Why else would such a clause exist? What other rights could there be? Of course, there were the state bills of rights, but Madison addressed that concern too! "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." So, after setting up the Bill of Rights to contain a provision to protect non-enumerated rights, Madison returned to protect the rights of the states which created the Constitution and to emphasize that the Constitution provided government only with the powers that the states ceded to it, and nothing more.

Whereas legal positivism dominated the judicial landscape of the nineteenth and early twentieth centuries, natural law theory jurisprudence began to reemerge and win small victories starting in the middle of 1946 and persisting through today. That is not to say that the Supreme Court adopted a doctrinal approach that examined matters before it with strong deference to natural law and natural rights, but rather that activist and conservative Courts alike ruled on matters in such a fashion as to incorporate into lofty stare decisis certain natural law principles. All of this occurred much to the chagrin of simple fairweather positivists, who grumbled about statutory law, and so-called legal realists, who believe in the importance and primacy of judicial precedent, though, it seems, only when such reliance suited their ends.

We see now that around the end of the second World War a return to Natural Law theories emerged with renewed vigor. During this time, the Third Reich had revealed to humanity the devastation and atrocities of which contemporary society became capable when deploying modern methods of engineering, science, and manufacturing to sinister, horrific and protracted ends and grounding them in positivism. We have also observed the means by which societies sought to safeguard against future abuses through the passage of laws and rules holding government more accountable, such as the Federal Tort Claims Act in 19462 in the United States, which allowed injured persons to sue the federal government in certain limited circumstances, and the Crown Proceedings Act in 1947 in England, which granted English "subjects" (how I loathe the word when referring to persons) the right to sue the Crown without first obtaining a royal fiat.

Though typically at loggerheads, Natural Law theory and legal positivism can find common purchase through soft-hearted approaches to Originalism that factor in the principles behind the Ninth Amendment to the U.S. Constitution. Justice Antonin Scalia, one of the most significant figures in the spread and modern development of Originalism, brought what he believed to be a greater sense of order and consistency to the bench by calling for judges to restrict their decisions in a narrow fashion by adhering to Originalism, a philosophy he believed would lead toward more authentic and honest interpretation of laws and the Constitution itself.

As time passes, language can undergo semantic shift in which the popular meanings of words change. So, in order truly to understand a statute, some argued, one needed to seize the mantel of the historian and endeavor to determine what was meant by a statute at the time of its passage rather than interpreting the statute according to the contemporary meaning of its words. In 1982, Paul Brest, then a professor at Stanford Law School, coined the term "Originalism" which he defined as "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intention of its adopters." According to Brest, "[a]dherence to the text and original understanding arguably constrains the discretion of decision makers [i.e., judges] and assures that the Constitution will be interpreted consistently over time."

Different flavors of Originalism focus on different original elements involved in the drafting, creation, adoption, and passage of various elements of the Constitution, its amendments, and legislation written under its authority. The textualists look to the language of the text in question.5 "The plain meaning of a

text is the meaning that it would have for a 'normal speaker of English' under the circumstances in which it is used."6 Though textualists focus mainly on the words of the text in question, they will occasionally consult outside sources to determine exactly what a word or a term of art meant to the general public at the time the particular provision was adopted or passed. In other words, they may look to newspapers, other legislation, books, speeches, circulars, broadsides, treatises, or treaties contemporaneous to the particular language they seek to understand. However, such an approach looks to extratextual material only in so far as it clarifies the meaning of the words involved in the piece in question and is not used to try to understand what may have been the intent of those who adopted the law. The textualists care only about the plain public meaning of the words at the time they were written, not the intent of the authors.

Intentionalists, on the other hand, seek to divine the intentions of those who adopted or passed a piece of legislation or provision. They endeavor to do so by considering the text of the law or provision as a persuasive—though not controlling—authority.

Intentionalists will look to a nearly endless variety of sources related, directly, or even imaginarily, to the piece in question. The camps of intentionalists diverge or sometimes disagree over whose intent they should consider. Some believe that the intent of the drafters of a piece should carry more weight when it comes to its interpretation, while others argue for heavier consideration of the intent of those who adopted it. Further wrinkles arise when others advocate for the inclusion of ideas of legal structuralism, calling for evaluation of the relationships between the various branches of government at the time of the passage of language in question to determine how different organs of government relate to and interact with one another.

Was Jefferson partly right about the tree of Liberty occasionally, and only when absolutely necessary, soaking up the blood of patriots and tyrants in order to survive? Or was he right when he observed that in the long march of history, governments grow and liberty shrinks? Or, were intellectual giants from Aquinas to Rothbard right when they argued that so long as we can reason, we will have liberty?

But to exercise reason, we must have free will. Both free will and natural law principles have been imprinted in us. Positive law not faithful to the natural law principles is an artificial fabrication of humans, usually for their own good or tenure in power. Yet all rational adults have natural inclinations to know

good from evil.

The issues this work addresses are not those of individual fidelity to natural law principles, but government infidelity to them. Government fidelity to natural law principles assures individual choices, personal autonomy, and authorship of one's own life. Isn't that the definition of personal liberty – freedom bounded, as Jefferson said, only by the natural rights of others? Isn't that the pursuit of happiness?

Short of a government committed to the preservation of natural rights, there is darkness and chaos.

Featured: *The Tontine Coffee House*, New York City, by Francis Guy; painted in 1797.
