

## I

## Introduction

*Classical and Christian Origins*

When John Adams wrote to his wife, Abigail, on July 2, 1776, to report news of the signing of the Declaration of Independence, the British North American colonists were not yet living in our secular age.<sup>1</sup> America's Declaration of Independence came a century before Friedrich Nietzsche first declared, through the mouth of a madman, that God is dead. Even then, the madman's announcement turned out to be premature, for as he realized, "[t]his tremendous event is still on its way, wandering; it has not yet reached the ears of men."<sup>2</sup> The event still on its way was not so much the death of God as the death of the theological tradition that underpinned core liberal concepts we often take for granted, such as basic human dignity, natural rights, the reality of goodness, the reliability of reason, and moral agency grounded in free will. As Kyle Harper has noted, the full realization of this tremendous event "would unravel in future time, and its consequences would be unsettling."<sup>3</sup>

The inauguration of our secular age, grounded in reductive materialistic presuppositions that harken back to the ancient worldview of Epicurus, has created a discrepancy between the framing assumptions of our public life and basic concepts we routinely take for granted. One example of this discrepancy was provided in an essay published in *The Atlantic* titled, "There's No Such

<sup>1</sup> See generally Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

<sup>2</sup> Friedrich Nietzsche, *The Gay Science*, trans. Josefine Nauckhoff (New York: Cambridge University Press, 2001), 120.

<sup>3</sup> Kyle Harper, "Human Rights and Human Dignity: The Long View" (lecture at the Kinder Institute on Constitutional Democracy, University of Missouri February 19, 2015); see also Kyle Harper, "Christianity and the Roots of Human Dignity in Late Antiquity," in Timothy Samuel Shah and Allen D. Hertzke, eds., *Christianity and Freedom* (New York: Cambridge University Press, 2016), 123–48.

Thing as Free Will.”<sup>4</sup> Philosophers and theologians, of course, have debated the question of free will for millennia. What was new was the confidence with which the article pronounced that neuroscience had settled the debate. Chemistry and physics, according to the author, can explain every thought, every hope, and every dream (and this would of course include our thoughts about free will or anything else). This is an old assertion, purportedly supported by new evidence, and the implications are indeed unsettling, for it would mean that freedom and moral responsibility are illusions. As a character in C. S. Lewis’ *That Hideous Strength* contends, such a state of affairs would mean that “[s]ocial relations are chemical relations.”<sup>5</sup> On this view, politics and law are, and can only be, applied chemistry. One unsettling implication is that the analytic distinction between freedom and tyranny, consent and coercion, persuasion and propaganda, and ultimately sanity and insanity, begins to break down. So, too, does the very notion of a moral law that governs free, rational creatures.

Nietzsche considered free will to be the “foulest of all theologians’ artifices,”<sup>6</sup> and there has been a related debate in the United States for some years about whether what Edward Corwin famously called the “higher law” background of American constitutionalism is just the foulest of all political theorists’ creations.<sup>7</sup> Is natural law, an idea that presumes within it the concept of free will and much else that modernity has purportedly rejected, something to be taken seriously? Writing around the same time that Corwin was teaching at Princeton and leading the American Political Science Association, Columbia University psychologist Edward Thorndike drew out the full logic of the modern materialistic outlook, which poses a unique challenge to the natural-law tradition. “The life of a dog or a cat or a chicken obviously consists largely of and is determined by appetites, cravings, wants, desires and the like and their gratification or satisfaction” and so “also does the life of man.”<sup>8</sup> If Thorndike was right – if our lives are determined by our appetites, cravings, and desires – then there seems to be no way for us to speak intelligibly about making choices or about being morally responsible for our actions in any meaningful sense. Our lives and identities could then be reduced to our biochemical composition, and we would at any moment be the obedient servants of our passions and appetites, since it could not be otherwise. Reason, accordingly, would not be the rightful ruler of our desires but would be merely calculative. Thomas

<sup>4</sup> Stephen Cave, “There’s No Such Thing as Free Will,” *The Atlantic* (June 2016). Accessed February 16, 2022, from [www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing-as-free-will/480750/](http://www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing-as-free-will/480750/)

<sup>5</sup> C. S. Lewis, *That Hideous Strength* (New York: HarperOne, 2003), 252.

<sup>6</sup> Friedrich Nietzsche, “Twilight of the Idols,” in Walter Kaufmann, ed., *The Portable Nietzsche* (New York: Penguin Books, 1977), 499.

<sup>7</sup> See Edward S. Corwin, *The “Higher Law” Background of American Constitutionalism* (Indianapolis, IN: Liberty Fund, 2008).

<sup>8</sup> Edward Thorndike, *Human Nature and the Social Order* (New York: Macmillan, 1940), 96.

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Hobbes gave voice to this conception of reason, which served as “scouts and spies” to “find the way to the things desired.”<sup>9</sup>

The American founders, chronologically caught between the neo-Epicurean materialism associated with Hobbes and the nihilistic atheism of Nietzsche, bear little resemblance to either. When John Adams wrote exuberantly to Abigail with news of the Declaration of Independence, he exclaimed:

Yesterday, the greatest Question was decided, which ever was debated in America, and a greater perhaps, never was or will be decided among Men. A Resolution was passed without one dissenting Colony “that these united Colonies, are, and of right out to be free and independent States ....” ... You will see in a few days a Declaration setting forth the Causes which have impel’d Us to this mighty Revolution, and the Reasons which will justify it, in the Sight of God and Man.<sup>10</sup>

The Declaration’s appeals to human and divine tribunals, to the “opinions of mankind” and to the “Supreme Judge of the World” were not simply rhetorical; they offer justifications in the “Sight of God and Man.” Thomas Jefferson later commented during the semicentennial celebration of the Declaration that it was a beacon of liberty to the world, an inspiration to all peoples and future generations to secure the “blessings and security of self government” and a rejection of aristocratic claims that natural inequality was divinely ordained.<sup>11</sup> For Adams and Jefferson, both the meaning and practical influence of the Declaration had a deeply theological context.

The Declaration points to questions that are ancient but not antiquated. Who is this “Supreme Judge of the World”? Who or what is “Nature’s God” whom the Declaration identifies also as the Creator who endows human beings with unalienable rights? Prominent scholars argue that the revolutionary significance of the natural-rights tradition invoked by the Declaration is that it is subtly (and intentionally) subversive of traditional biblical theology. In this framing, Nature’s God stands as an alternative to, and an emancipation from, the God of Abraham, and the early modern natural-rights theories developed by Hobbes, Locke, Montesquieu, and others are seen as part of a larger project to pour the new wine of secular liberal individualism into the old wineskins of the classical Christian natural-law tradition. Thomas Pangle describes this project as one involving a “titanic strategy of propaganda, whereby Holy

<sup>9</sup> Thomas Hobbes, *Leviathan*, ed. A. R. Waller (Cambridge: Cambridge University Press, 1904), 45.

<sup>10</sup> John Adams, *Revolutionary Writings*, ed. Gordon Wood (New York: Library of America, 2011), 91.

<sup>11</sup> Thomas Jefferson, “Letter from Thomas Jefferson to Roger C. Weightman, June 24, 1826,” *Declaring Independence: Drafting the Documents*, Library of Congress. Accessed June 28, 2021, from [www.loc.gov/exhibits/declara/rcwltr.html](http://www.loc.gov/exhibits/declara/rcwltr.html)

Writ is to be reconceived and in a sense rewritten so as to be subsumed in a vast secular revolution.”<sup>12</sup>

The suggestion that the Declaration is also part of this vast secular revolution, conceived by philosophers and implemented by strategic propaganda, provokes various questions about the American founding along theological, historical, and political lines. Theologically, does the biblical account of God’s causal relation to the world radically set apart the God of Abraham from the God of Nature? Historically, did Americans in the founding era publicly invoke the aid of the latter rather than the former? Politically, what did it matter? The focal point of analysis in the scholarship addressing this question has been the God of the biblical account of creation in contrast with the philosophers’ pantheistic God, a deity indistinguishable from the rational organizing principles of an eternal and uncreated universe. On this account, as Matthew Stewart recently argued, the “Declaration of Independence – precisely where it superficially seems to invoke the blessing of the established religion – really stands for an emancipation of the political order from God.”<sup>13</sup>

This basic narrative about the American founding has become conventional scholarly wisdom in many circles. In contrast, the thematic chapters in this book argue, in different ways, that the background assumptions of American public life during the American founding were derived from and compatible with the Christian natural-law tradition that developed from the long engagement of Christianity with classical political philosophy, hitting its highwater mark in medieval scholasticism and retaining its influence through the dominant theological traditions in the North American colonies. Those background theological and philosophical assumptions included the following:

- (1) Natural law has a lawgiver.
- (2) The Lawgiver is the divine creator who is separate and distinct from creation. As such, nature is not divine, and the God of Nature is not a pantheistic God.
- (3) Practical reason grasps the moral content of the natural law as goods proper to human beings as rational animals and the practical necessities associated with the pursuit of such human goods.
- (4) The natural law is prescriptive, imposing moral duties or obligations, not merely descriptive, offering hypothetical imperatives.
- (5) The natural law emanates from the nature of God in which there is a unity of power and goodness. God’s sovereign authority, in which moral obligation is grounded, is therefore not a result of superior physical strength alone but also is connected to God’s goodness.

<sup>12</sup> Thomas L. Pangle, *Political Philosophy and the God of Abraham* (Baltimore, MD: Johns Hopkins University Press, 2003), 6–7.

<sup>13</sup> Matthew Stewart, *Nature’s God: The Heretical Origins of the American Republic* (New York: W. W. Norton, 2014), 7.

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- (6) Sovereignty in a rightly ordered political community is modeled after the pattern of divine sovereignty, in which power and goodness are unified. Power alone does not confer sovereign authority.
- (7) The rule of law means that the sovereign is subject to and bound by a higher moral law. Might does not make right. Absolute sovereignty understood as the imposition of the sovereign's will is analytically indistinguishable from tyranny.
- (8) Sovereignty originally resides with the whole people, but sovereignty remains subject to a higher law. The people do not exercise an unbounded absolute sovereignty based on will alone. As such, consent is a necessary but not sufficient condition for the rightful exercise of government power.
- (9) God sustains and provides for creation both through the natural law and through other exercises of divine providence that include revelation in Scripture and divine interpositions in human events.
- (10) Natural law is itself one aspect of God's providence. Reason is epistemologically distinct from revelation, but reason nonetheless remains a form of participation in God's eternal law.

Taken together, these tenets provide a basic outline of the Christian natural-law tradition, and each tenet was included among the framing assumptions of American public philosophy in the colonies in the eighteenth century. They were taught as part of the moral philosophy curriculum in the colonial colleges, affirmed by each of the dominant theological traditions in the colonies, and appealed to in public life during the revolutionary and constitutional eras. It is not the case, of course, that every individual participant in public affairs affirmed each of these tenets. Some of the founders privately expressed skeptical or religiously heterodox opinions, particularly about the divine provenance of Hebrew and Christian Scripture. Yet, as Mark Hall has demonstrated, only a very small number of founders espoused the more radical deists' creed of a distant and disinterested creator who lets the world run on its own accord.<sup>14</sup>

Rather than a general philosophical deism, specific ideas that developed within Christian theology underpinned the natural-law tradition that the founders affirmed. Of course, the promise of natural law is that it can be understood and affirmed based on our common human nature, and therefore it provides a common moral standard or measure that transcends parochial differences and partisan interests. Yet that very epistemological claim – that each human being has access to moral knowledge based on a common created human nature – rests on contested ontological and theological premises about the foundations of moral knowledge and moral obligation that have practical implications for how we understand sovereignty and the rule of law. The

<sup>14</sup> Mark David Hall, *Did America Have a Christian Founding? Separating Modern Myth from Historical Truth* (Nashville, TN: Nelson Books, 2019), 3–19.

framing assumptions of the founding era provided answers to those questions that had developed from the long Christian engagement with the natural-law tradition. Indeed, the Christian natural-law tradition was a dominant force shaping the public philosophy of the American founding, and the evidence has been hiding in plain sight. That is the animating argument of this book.

### 1.1 CONTRIBUTION AND DISTINCTIVE APPROACH

The interconnections between theology, natural law, and the American founding have been the subject of scholarly study going back a hundred years. These are old topics, yet they remain fresh and relevant today. Twentieth-century scholars analytically grouped natural-law doctrines into two basic traditions. “The older and once dominant traditional natural law,” James McClennan observed, “encompassing the classical and Christian schools, subscribed to the view that a Divine Being, ruler of the universe through an eternal and universal law, is the supreme lawgiver, and that natural law is an emanation of God’s reason and will,” a tradition since supplanted by “the modern natural rights concept, which is essentially a secular, individualistic assertion of the claims of man in a world naturalistically conceived.”<sup>15</sup> Utilizing this basic dichotomy, there has been a considerable amount of scholarship in the last seventy years claiming that the American founders were steeped in modern thought where such thought is said to embody a rejection of both Aristotelian political philosophy and classical Christianity, including the Christian natural-law tradition. On this interpretation, the political philosophy that undergirds the Constitution represents a rupture with ancient and medieval ideas about the nature of political order and instantiates distinctly modern ones.<sup>16</sup> At the same time, there has also been a body of scholarship underscoring the pervasive influence of classical sources directly upon American founding thought.<sup>17</sup> From multiple angles, a number of scholars in recent decades have also argued for the biblical – for the Hebraic and Christian – roots of the American political

<sup>15</sup> James McClennan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1971), 70.

<sup>16</sup> See, e.g., Frank M. Coleman, *Hobbes and America: Exploring the Constitutional Foundations* (Toronto: University of Toronto Press, 1977); Walter Berns, “Judicial Review and the Rights and Laws of Nature,” *Supreme Court Review* 49 (1982): 49–82; Paul A. Rahe, *Republics Ancient and Modern* (Chapel Hill: University of North Carolina Press, 1994); Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1990); Michael P. Zuckert, *The Natural Rights Republic* (Notre Dame, IN: University of Notre Dame Press, 1997); Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010).

<sup>17</sup> See, e.g., Eric Nelson, *The Greek Tradition in Republican Thought* (New York: Cambridge University Press, 2004); David Bederman, *The Classical Foundations of the American Constitution: Prevailing Wisdom* (New York: Cambridge University Press, 2008).

## 1.2 *Natural Law and the Rule of Law*

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order.<sup>18</sup> There is therefore a real dispute as to how we should understand and interpret the American founding and its significance. Most scholars have adopted a multiple traditions solution to the problem, arguing that the American founding is, as one scholar recently put it, a blended scotch with no single origin.<sup>19</sup> But this leaves open questions concerning the degree of influence and whether some traditions are more fundamental than others.

A careful analysis of the founding period reveals that ideas central to American founding thought are not only compatible with but presuppose classical natural law and natural theology. One strong piece of evidence for this is the colonists' consistent rejection of absolute and arbitrary power both in theology and in politics. The classical political tradition begins with the rule of law, but the characteristic doctrine of modern political philosophy and the modern state is the arbitrary rule of will. Early modern philosophers who broke from the classical tradition conceived of the sovereign as unlimited by the people below or by God above. As the supreme fountain of all law, the sovereign could not be constrained by the law.<sup>20</sup> The American founding's reaffirmation of the rule of law, combined with its emphasis on republicanism and consent as the necessary efficient cause of government, was a rejection of the modern turn to arbitrary power. Put another way, both the divine right of kings and the modernist doctrine of the absolutely sovereign state were conceived as a rejection of the classical natural-law tradition's assertion that the king is established by law and is under law. The rule of law in this sense found an example and archetype in the Christian doctrine that God rules through the wisdom of his eternal law, not through power alone. To the revolutionary generation in America, it seemed that the Crown had rejected the rule of law in favor of arbitrary and absolute sovereignty, and so the Continental Congress argued in the Declaration of Independence. As the American colonists rejected arbitrary rule and reaffirmed the rule of law, they did so from within the conceptual framework of the Christian natural-law tradition.

### 1.2 NATURAL LAW AND THE RULE OF LAW

Over and against the notion that sovereign power stands above the law, the American founders embraced the idea that those who exercise political authority should be ruled by law. These arguments were embedded in a theological

<sup>18</sup> See, e.g., Donald Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988); Russell Kirk, *The Roots of American Order* (Wilmington, DE: ISI Books, 2003); Barry Alan Shain, *The Myth of American Individualism* (Princeton: Princeton University Press, 1996).

<sup>19</sup> Robert P. Kraynak, "The American Founding as a Blended Scotch: A Reply to Thomas West," *American Political Thought* 9(1) (2020): 115–43.

<sup>20</sup> See generally Francis Oakley, *The Watershed of Modern Politics: Law, Virtue, Kingship, and Consent* (1300–1650) (New Haven and London: Yale University Press, 2015).

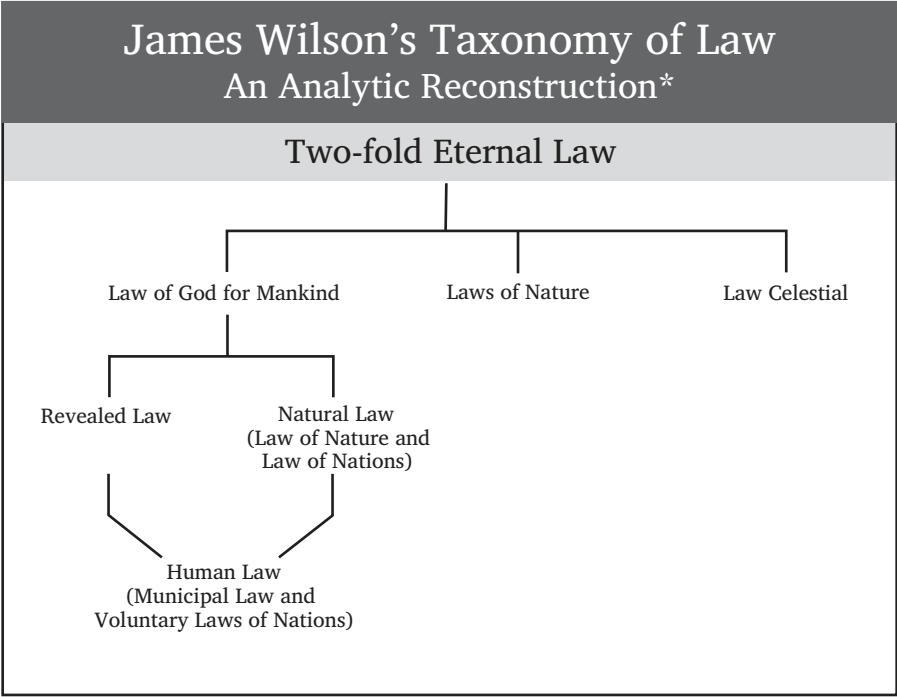


FIGURE 1.1. James Wilson’s taxonomy of law: An analytic reconstruction.  
Source: James Wilson, *The Collected Works of James Wilson*, eds. Mark David Hall and Kermit L. Hall (Indianapolis, IN: Liberty Fund, 2007), vol. 1, 497–98.

context and are fully comprehensible only in light of the persistent influence of the classical Christian natural-law tradition and its emphasis on the rule of law in theology and in politics. According to the natural-law tradition that was a common cultural inheritance of the founding generation, God created everything in existence and provided the rules by which each part of his creation would be governed. Nature, in one of its eighteenth-century usages, referred simply to the whole of creation, and the predominant view in the founding era was that each part of creation is purposeful. In continuity with a typology of law that developed from the medieval Christian natural-law theories of Thomas Aquinas and Richard Hooker, early modern jurists such as William Blackstone and James Wilson asserted that the purposes of creation emanated from God’s twofold eternal law. The eternal law is the divine reason that both structures God’s own actions and by which God governs creation, hence its twofold dimension. Beneath the eternal law are the laws that govern angels and spirits made just; the laws of inanimate matter; and the laws that apply to embodied, rational human beings. The analytic reconstruction in Figure 1.1 found with

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more commentary in Chapter 7, shows how James Wilson described this typology of law in his early lectures at the College of Philadelphia. It is remarkable for being an otherwise unremarkable replication of Christian natural-law theory by one of America's most influential constitutional framers and one of the founding era's most eminent jurists.

#### 1.3 WHAT IS NATURAL LAW?

Founding era thought developed out of the perennial natural-law tradition, which identifies natural law as the moral law for human beings known to reason through rationally apprehended goods, rationally discerned moral obligations, and the freedom of the will to choose to obey or disobey this law. It is *natural* because it rooted in reason, which is the highest aspect of our nature, and it is *law* because it imposes moral obligation. To act in accordance with our nature means to act consistently with the way we are designed to function. It is proper to human nature to act according to reason, that is, for reason to order our passions and appetites to appropriate ends. When reason rules, it does so by identifying what is good according to our nature (i.e., the kinds of things we are and are designed to be) and pursuing it. These, then, are the foundational questions of ethics: What kinds of things are good for human beings? How do we attain these goods through our actions? Natural law, however, is not a law of necessity, and human beings may, individually and in societies, deliberately act against their natural moral obligations to the detriment of their own happiness or flourishing.

That some things are good and that we ought to pursue what is good in our day-to-day lives, are axiomatic. These truths are foundational to practical reason in the way that axioms are foundational to mathematics. This is what we mean by “self-evident.” If you know what it means to be parallel, then you will agree that parallel lines do not touch. If you do not apprehend the truth of this axiom, however, no one will be able to prove it to you. In the same way, ethics will rest on some very basic axioms that are indemonstrable and underived. From those axioms we reason about how to live well, but in order to apprehend the axioms – to understand what is noble and just, as Aristotle says – we must first be brought up in good habits, because vice mars our moral vision.<sup>21</sup> Happiness is the term Aristotle used to describe the result of a life well lived, but we cannot achieve happiness on our own. This is why Aristotle famously said that man is by nature a political animal – not because men spontaneously engage in politics but because living well as human beings requires them to live in political communities. A man who can flourish on his own, Aristotle thought, would be either a beast or a god.<sup>22</sup>

<sup>21</sup> Aristotle, *Nicomachean Ethics*, ed. and trans. Roger Crisp (Cambridge: Cambridge University Press, 2000), 6.

<sup>22</sup> Aristotle, *Politics*, trans. Benjamin Jowett (Kitchener, Ontario: Batoche Books, 1999), 6.

With Aristotle, we are not yet at the natural-law tradition, but we are close. Other theorists soon identified the principles that lead to human happiness as law. As the Roman statesman and philosopher Cicero wrote in the voice of Laelius, “[t] here is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil.”<sup>23</sup> There is nothing distinctly Christian about what the ancient tradition taught, but many Christians thought it was for the most part correct: our universe is imbued with purposes; human beings should act according to reason; we are by nature political animals; these principles do impose themselves on us as law. Christians, however, have qualified or at least emphasized a few things about the ancient tradition. First, the natural law has a lawgiver. It is the product of the mind of God, part of the divine reason, or what Aquinas, Hooker, and James Wilson each called the eternal law. Second, law is an ordinance of reason made for the common good by someone with authority, and it is made known to those who are morally obligated to obey.<sup>24</sup> Natural law fits this description. It is an ordinance of reason made by God for the care of the human community and promulgated through the deep structure of the human psyche. Human law, to be truly law (and not simply an act of violence or coercion), must also fit this description: It must be reasonable, made for the common good by someone with authority to make law, and made known. If it is not, then it is defective as law to the degree that it deviates from the natural archetype.

The seventeenth-century English common lawyer Thomas Hale offered this short summary of the law of nature: “It is the Law of Almighty God by him to Man with his Nature discovering the morall good and morall evill of Moral Actions, commanding the former, and forbidding the latter by the secret voice or dictate of his implanted nature, his reason, and his conscience.”<sup>25</sup> These broad claims informed the Anglo-American legal tradition and influenced the way the American founders thought about law. To take just one example, consider the often-cited excerpt from twenty-year-old Alexander Hamilton’s defense of the American revolution against criticism from the royalist Episcopalian Bishop Samuel Seabury. Drawing his argument largely from Blackstone’s *Commentaries*, the young Hamilton asserted that “Good and wise men, in all ages . . . have supposed that the deity, from the relations we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human

<sup>23</sup> Marcus Tullius Cicero, *The Political Works of Marcus Tullius Cicero*, trans. Francis Barham (London: Edmund Spettigue, 1841–42), vol. 1, 270. Accessed June 30, 2021, from <http://oll.libertyfund.org/titles/cicero-treatise-on-the-commonwealth-5>

<sup>24</sup> Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (Chicago: Encyclopedia Britannica, 1952), I–II.90.4.

<sup>25</sup> Matthew Hale, *On the Law of Nature*, ed. David S. Sytsma (Grand Rapids, MI: Christian’s Library Press, 2015), 41.