

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

COMMON LAW AND NATURAL LAW IN AMERICA

Speaking to today's flourishing conversations on both law, morality, and religion, and the religious foundations of law, politics, and society, *Common Law and Natural Law in America* is an ambitious four-hundred-year narrative and fresh reassessment of the varied American interactions of "common law," the stuff of courtrooms, and "natural law," a law built on human reason, nature, and the mind or will of God. It offers a counter-narrative to the dominant story of common law and natural law by drawing widely from theological and philosophical accounts of natural law, as well as primary and secondary work in legal and intellectual history. With consequences for today's natural-law proponents and critics alike, it explores the thought of the Puritans, Revolutionary Americans, and seminal legal figures including William Blackstone, Joseph Story, Christopher Columbus Langdell, Oliver Wendell Holmes, and the legal realists.

Andrew Forsyth is Lecturer in the Department of Religious Studies, and Assistant Secretary in the Office of the Secretary and Vice President for Student Life, at Yale University. A Cambridge law graduate, he studied theology and religious studies at Glasgow, Harvard, and Yale. He has recently published articles in the *Yale Journal of Law & the Humanities*, *Soundings: An Interdisciplinary Journal*, and *Scottish Journal of Theology*.

Cambridge University Press
 978-1-108-47697-3 — Common Law and Natural Law in America
 Andrew Forsyth
 Frontmatter
[More Information](#)

LAW AND CHRISTIANITY

Series Editor

John Witte, Jr., Emory University

Editorial Board

Nigel Biggar, University of Oxford
 Marta Cartabia, Italian Constitutional Court / University of Milano-Bicocca
 Sarah Coakley, University of Cambridge
 Norman Doe, Cardiff University
 Rafael Domingo, Emory University / University of Navarra
 Brian Ferme, Marcianum, Venice
 Richard W. Garnett, University of Notre Dame
 Robert P. George, Princeton University
 Mary Ann Glendon, Harvard University
 Kent Greenawalt, Columbia University
 Robin Griffith-Jones, Temple Church, London / King's College London
 Gary S. Hauk, Emory University
 R. H. Helmholz, University of Chicago
 Mark Hill QC, Inner Temple, London / Cardiff University
 Wolfgang Huber, Bishop Emeritus, United Protestant Church of Germany / Universities of
 Heidelberg, Berlin, and Stellenbosch
 Michael W. McConnell, Stanford University
 John McGuckin, Union Theological Seminary
 Mark A. Noll, University of Notre Dame
 Jeremy Waldron, New York University / University of Oxford
 Michael Welker, University of Heidelberg

The Law and Christianity series publishes cutting-edge work on Catholic, Protestant, and Orthodox Christian contributions to public, private, penal, and procedural law and legal theory. The series aims to promote deep Christian reflection by leading scholars on the fundamentals of law and politics, to build further ecumenical legal understanding across Christian denominations, and to link and amplify the diverse and sometimes isolated Christian legal voices and visions at work in the academy. Works collected by the series include groundbreaking monographs, historical and thematic anthologies, and translations by leading scholars around the globe.

Books in the series

Under Caesar's Sword: How Christians Respond to Persecution
 edited by Daniel Philpott and Timothy Samuel Shah

God and the Illegal Alien

Robert W. Heimbürger

Christianity and Family Law

John Witte, Jr. and Gary S. Hauk

Christianity and Natural Law

Norman Doe

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

Agape, Justice, and Law

Robert F. Cochran, Jr. and Zachary R. Calo

Great Christian Jurists in English History

Mark Hill, QC and R. H. Helmholz

Great Christian Jurists in Spanish History

Rafael Domingo and Javier Martinez-Torron

Calvin's Political Theology and the Public Engagement of the Church

Matthew J. Tuininga

God and the Secular Legal System

Rafael Domingo

How Marriage Became One of the Sacraments

Philip Reynolds

Christianity and Freedom (Volume I: Historical Perspectives, Volume II: Contemporary Perspectives)

edited by Timothy Samuel Shah and Allen D. Hertzke

The Distinctiveness of Religion in American Law

Kathleen A. Brady

Pope Benedict XVI's Legal Thought

Marta Cartabia and Andrea Simoncini

The Western Case for Monogamy over Polygamy

John Witte, Jr.

Church Law in Modernity: Toward a Theory of Canon Law Between Nature and Culture

Judith Hahn

Care for the World: Laudato Si' and Catholic Social Thought in an Era of Climate Crisis

Frank Pasquale

Common Law and Natural Law in America: From the Puritans to the Legal Realists

Andrew Forsyth

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

Common Law and Natural Law in America

FROM THE PURITANS TO THE LEGAL REALISTS

ANDREW FORSYTH

Yale University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108476973

DOI: 10.1017/9781108576772

© Andrew Forsyth 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-47697-3 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

FOR J.R.G.

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

Contents

<i>Preface</i>	<i>page</i> xi
<i>Acknowledgments</i>	xv
1 Puritan Natural Law: Early New England and the Colonial Colleges	1
2 Modern Natural Law: Revolutionaries and Republicans	24
3 Organizing Common Law: William Blackstone in America	46
4 Subsuming Natural Law into Common Law: Joseph Story	70
5 Law as Science: Christopher Columbus Langdell	105
6 Breaking with Natural Law: Oliver Wendell Holmes and the Legal Realists	125
Epilogue	146
<i>Index</i>	149

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)

Preface

Invocations of natural law in contemporary legal circles are almost guaranteed to generate more heat than light. Proponents frame natural law as essential to the defense of civilization and its critics as perversely denying universally accessible truths; critics regard natural-law discourse as a Trojan horse for the imposition of a minority's conservative religious convictions on an increasingly pluralistic nation. The idea that common law – the stuff of quotidian courtrooms in America – might be in fundamental harmony with natural law, or even structured and justified by it, is accordingly fantastical or nightmarish.

This was not always so. Despite today's prevailing wisdom that common law and natural law are separate and distinct ideas, in reality, a centuries-long stream of American legal thought presupposed – sometimes tacitly, sometimes explicitly – that natural law and common law are intertwined. Natural law, in short, undergirded the development of American jurisprudence. Contemporary debates on law, morality, and religion lack this historical memory and suffer accordingly.

What the concepts of “natural law” and “common law” meant to those who invoked them, however, requires careful delineation. We cannot generalize. The Puritans' “natural law,” we shall see, was not the Revolutionaries'. Nor was the “common law” of Joseph Story, the fabled nineteenth-century jurist, altogether that of William Blackstone, its chief eighteenth-century organizer.

Still, we must start somewhere, and initial definitions will be helpful.

By “common law,” I mean the system of laws in England and the United States in which laws – whatever their seeming source in a constitution, statutes, orders, or cases – are made explicit through interpretation by judges; judicial decisions in individual cases expound and develop the law.¹ To speak

¹ “Common law” also has narrower meanings. For instance, it can refer to the body of law distinct from “equity,” or those areas of the law – contract, torts, and property, etc. – which

of common law is to invoke, too, the institutions, procedures, and conventions that allow for the functioning of a system of case law. For instance, common-law jurisdictions typically have adversarial court proceedings in which lawyers prosecute or defend, a judge impartially determines the law, and a jury decides the facts in a case. These institutions, procedures, and conventions set England and the United States apart from continental Europe's various civilian systems, in which court proceedings are inquisitorial rather than adversarial, with judges playing an active role in the collection of evidence and interrogation of witnesses.

This definition of common law is uncontroversial today. But its easy familiarity – at least to lawyers – is more obscuring than illuminating of certain historical aspects of the common-law tradition. Far from the creation of judges, in our seventeenth- through early twentieth-century story, American common law was understood as deeper rooted: the custom of the people perhaps, or even nothing less than common reason. The common law was to be interpreted by judges, yes, but as *found*, not created, in interpretation.² Indeed, it was wholly orthodox, we shall see, for judges and jurists – sharing the same intellectual worlds as philosophers and theologians – to treat natural law as a source or justification for common law.

What, then, is natural law? For its proponents, “natural law” is law that proceeds from or is grounded in – variously – the mind or will of God, nature, or human reason. In the broadly shared Western tradition of moral reflection found in the centuries we will explore, “natural law” is the understanding that there is a *universal morality naturally accessible to all rational people*. Among contemporary common-law legal practitioners and Anglophone legal philosophers, “natural law” often simply refers to any approach that treats law as necessarily having a connection to morality. This meaning is essentially the converse of “legal positivism,” which is often defined, minimally, as the contention that law has no necessary connection with morality.³

How the details of natural law are further specified matters acutely for its relationship to common law. What is natural law's source and content? How is it perceived and enacted? These details are spelled out differently by the Puritans, Revolutionary Americans, and the seminal legal figures we will

having no initial legislative source are instead formed, most proximately, by the reasoned judgments of courts.

² See Gerald Postema, “Philosophy of the Common Law,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2004), 588–623.

³ H. L. A. Hart, “Positivism and the Separation of Law and Morals,” in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), 54.

encounter, whether Blackstone, Story, or Christopher Columbus Langdell, the creator of the modern law school.

Ultimately, our story ends with the rejection of natural law by Oliver Wendell Holmes and the “legal realists,” a loose group of early twentieth-century jurists and practitioners skeptical about whether legal rules are rational or even coherent. But the narrative of the following pages is not simply a story of the concretion of natural law within common-law thought, followed by the erosion of its significance, even its outright rejection.⁴ It is also a story of the history of natural-law reflection not as a linear novel, but as overlapping essays of differing quality and durability, written by common lawyers who – consciously or otherwise – recognized or ignored or fudged the differences between natural law’s varied expressions.

* * *

A word on my choices may be helpful. My focus is a connected set of American conceptions of natural law and common law that form a specific tradition of moral and legal inquiry, from the seventeenth-century Puritans to the early twentieth-century legal realists. I do not replicate available studies – for example, on Revolutionary era discussions of natural law and natural rights (its sometime cousin) – but dust off lesser known discourses and debates.⁵ I do so not for antiquarian reasons, but because contemporary proponents and critics of natural law alike miss the potent materials at hand by too readily accepting the distinctions between natural law and common law drawn by the legal realists. Otherwise vibrant twentieth-century visions of natural law – whether the rise of universal human rights discourse, Martin Luther King, Jr.’s appeals to natural law, or the “new natural law” of John Finnis and others – spend little if any time on the sweep of American legal reflection before the realists. Those who care about the relationship of law, morality, and religion in contemporary America will benefit from knowing how natural law and common law were connected and parsed over four hundred years of

⁴ Earlier critiques of this narrative include Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge, MA: Harvard University Press, 1930).

⁵ For studies of natural law and natural rights in the thought of the founding fathers, see, e.g., Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, Brace, 1922); Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights* (Norman: University of Oklahoma Press, 1992); Michael Zucker, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Princeton, NJ: Princeton University Press, 1996); Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1792* (Columbia: University of Missouri Press, 1997).

American history, as, too, will those who study the history of moral philosophy or who seek to advance or critique religious arguments for natural law.

I do not argue, to be clear, that readers adopt a natural-law interpretation of American law, of whatever variety. This is not a political tract or religious pamphlet. Instead, I show how and why Americans appealed to natural law. Some appeals may convince you. Others will not. Needless to say, natural law has its detractors and opponents across disciplines and topics. Many philosophers reject wholesale the idea that the goodness of actions relates to claims about human nature and flourishing. Many lawyers see no need to talk of law beyond the social fact of its existence. Many theologians dismiss natural law for a perceived lack of emphasis on the authority of God's will and commands. The chapters that follow are not shaped to convince them – or you – otherwise.

Nor will I convince many contemporary advocates of natural law – including in the legal academy – that what we find in American common law's recourse to natural law is necessarily worth their attention. This is a consequence of refusing to appeal to or incorporate a predetermined standard for “natural law.” I do not take for granted, for instance, that the natural law of Thomas Aquinas is normative and then judge all other expressions against it. Instead, by giving proper attention to the changing connections between American law both common and natural, I show the pitfalls and trade-offs of embracing any particular historical appeal to natural law. The Puritans' natural law, for instance, was chastened by their belief that human reason is necessarily corrupted by sin. Blackstone's influential rooting of common law in natural law shared this basic assumption, at least to some degree. This is missed by many contemporary champions of Blackstone, who assume he shares the more epistemologically ambitious natural law of Hugo Grotius and Samuel Pufendorf that was influential at the time of the Revolution.

And so, even as we recognize that American understandings of common law, natural law, and their relationship have changed, whether for good or ill, we can see that for much of American history it was assumed that common law – far from wholly detached from moral considerations – was, indeed, not just in fundamental harmony with natural law, but structured and justified by way of reference to it. Or put another way: When we consider law, morality, and religion in America today, we can freshly pull upon or push against the long-standing if variegated tradition of lawyers and legal thinkers who said that to know or interpret our laws is first to determine how things ought to be.

Acknowledgments

It is a pleasure to record my thanks to the Louisville Institute for fellowships in 2016–17 and 2013–15, and to recognize its funder, the Lilly Endowment, Inc.

Jennifer Herdt has read well-nigh everything I have written, at least since 2011. Her comments have improved papers and presentations and this book a good deal. She is both generous and precise, a model to emulate. I thank her.

I am grateful, too, for careful readings of earlier versions of this text, not least from Jerry McKenny, Olivia Stewart Lester, Kathy Tanner, and, particularly, Cathy Kaveny, whose comments helped frame and focus the project. Judicious advice was received from Marie Griffith and other participants in the 2017 Louisville Institute winter seminar. Chapter One was honed in conversation with members of a 2015–16 Yale law and humanities working group.

My thanks to John Berger and Cambridge University Press for shepherding this project to print. I am pleased to be counted in the Law and Christianity series edited by John Witte.

In New Haven, Rona Gordon was a sterling editor. Josh Goodbaum's edits have been essential and his patience remarkable. He likely knows this project too well by now. I have accepted *nearly all* his counsel. The book, however, is dedicated to him and not to Mungo, the dog.

Cambridge University Press
978-1-108-47697-3 — Common Law and Natural Law in America
Andrew Forsyth
Frontmatter
[More Information](#)
