12. Ibid.
16. Ibid., 22.
18. Precisely such a baby is presently being cared for by a Catholic couple in Harrisburg, Pennsylvania.
19. The Fifth and Fourteenth Amendments’ references to “life” do not state protections against private actions but only against governmental action. Our statutes against murder arise from the common law (and hence from Scriptural tradition).

**Constitutional Interpretation, Unenumerated Rights, and the Natural Law**
–by Stephen M. Krason

The topic of this symposium is a broad one, which can be approached from many different angles. My contribution shall be to address the following question: Should American judges rely on natural law to adjudicate constitutional cases, especially involving questions of individual rights, when provisions of the U.S. Constitution do not give them a clear answer? My answer to this long controversial jurisprudential question is yes, and my aim shall be both to argue the reasons why and to respond to the typical arguments to the contrary.

There is no question for the Catholic that human law must be shaped by the natural law. As Pope Leo XIII said in the encyclical *Libertas Praestantissimum*, “Nature herself proclaims the necessity of the State providing means and opportunities whereby the community may be enabled to live properly, that is to say, according to the laws of God.” As St. Thomas Aquinas writes, “every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” Indeed, this Catholic tradition is no different from other elements of the Western heritage, going back to the ancient Greeks, which have held that law and government must be shaped by principles of justice not
fundamentally of human making. How could we expect our constitutional law to be any different?

Our constitutional tradition itself was shaped by the natural law, as great thinkers such as Russell Kirk and Edward S. Corwin demonstrated. To be sure, it was not completely fashioned by the classical-Christian part of this tradition (the real natural law, or what ethicist Fr. Thomas J. Higgins, S.J. designates with capital letters—the “Natural Law”). It was somewhat influenced by the Enlightenment version of natural law (i.e., an individualistic notion of natural rights, which essentially robbed natural law of its character as a source of moral obligation which was tied to man’s attainment of either natural or supernatural ends).

Even if we accept the natural law background of our Constitution and concede that its provisions reflect it, the question we face here is what to do in the case where the provisions are silent about some issue. That is, can a judge use a putative principle of the natural law to resolve the dispute before him? Clearly, a claim of rights sometimes comes up which the black-letter Constitution (including the Bill of Rights and other amendments) does not address, but which seems to be legitimate. Parental rights would be one such example; privacy in at least some of its permutations would probably be another. How do judges uphold such seemingly reasonable rights when human law—i.e., the Constitution or legislation—does not, if they do not resort to natural law?

Constitutional scholars generally identify four different methods that courts typically use to interpret the Constitution: 1) literalism and “clear meaning” (where nothing more than the black-letter Constitution is referred to); 2) adaptation (determining basic principles embodied in the Constitution, then applying them to contemporary circumstances); 3) original intent (determining what our Founding Fathers or an amendment’s framers believed a particular provision meant); and 4) structuralism (where the framework of the entire document or the relationship of different provisions is examined). It is clear, however, that sometimes none of these methods will yield an answer. When confronted with a case which presents a definite, serious question of human rights and dignity, should we not then have recourse to the natural law?

If the true natural law is not turned to in cases such as the above, what will the courts do? Either they will simply defer to legislatures, which seems to be the preferred course of, say, Robert Bork and Antonin Scalia (even on a question like abortion, which involves the most basic of rights—the right to life), or they will have recourse to some other standard apart from the positive law of legislation to make their decision. The latter in an earlier time in American history was some false notion of the natural law (i.e., one not truly in conformity with man’s nature or promotive of his end), such as that which we saw in the heyday of substantive due process regarding economic rights. Today it is ever changing cultural standards, especially as shaped by the opinionmaking strata of our political society.
(i.e., those in the universities, the media, major professional organizations, various interest groups, and other leading institutions).

As to the former of these alternatives, deferring to the legislatures, there is much to be said for it—most of the time. Our Founding Fathers seem to have embraced the notion of legislative supremacy—that is, the legislative branch was to be the first among co-equal branches—and a centerpiece principle of American politics has always been rule by the majority. The corollary of the latter, of course, is that minority rights must be maintained, so that whenever there is some question of a threat to basic rights the majority either cannot be allowed to prevail or the minority must be insulated in some way from it. Sometimes the conflict between majority rule and minority rights will occur when rights other than those clearly stated in the black-letter Constitution are involved, so there must be a recourse to natural law or some higher standard.

Further, it must be said that people have an innate sense of justice. If this is not taken into account in adjudication—i.e., if courts believe it is their business just to defer to legislatures notwithstanding—then one can reasonably expect that popular respect for the law and the institutions enforcing it will be eroded and social discord will increase.

A further reason for our courts to rely on natural law for constitutional interpretation is that the common law tradition from which our constitutional tradition sprung is based on it. As Russell Kirk states, “Natural-law concepts, owing much to Cicero, came to be a mainstay of both common law and equity.” By referring to natural law to help interpret the Constitution when the document or related sources are unclear is keeping within the tradition, not stepping outside of it and not doing anything that would have been foreign to our Founding Fathers. As Russell Kirk’s writing makes clear, our written Constitution presupposed a substantial unwritten constitution which was, in fact, the political, philosophical, and legal tradition that America emerged from and the natural law—especially in its classical-Christian conception, as noted—was a crucial part of that.

The final argument for the judicial recourse to natural law is that the framers of both the Constitution document and the Bill of Rights—there was a considerable overlap between these two groups—seemed to anticipate it by particular provisions they inserted. I have elsewhere called attention to the Article I, Section 8 provision which gives Congress the authority “[t]o define and punish... Offenses against the Law of Nations,” and argued that it refers not only to the positivistic modern notion of international law but also to an older, natural law-based notion which harks back to Cicero. The term “law of nations” is, in effect, the English translation of just gentium, which was used by thinkers such as Cicero and St. Thomas Aquinas to mean the common rules and norms found in the laws of all nations. They embodied or came to embody natural law principles. It is true that in the century before the Founding Fathers, the “law of nations” had shifted more toward its current consen-
sual notion—contemporary international law—under the influence of thinkers such as Hugo Grotius. Still, the break with the previous conception was not total. In other words, the natural law-based notion continued to be somewhat in place.

Moreover, there is also the matter of the Ninth Amendment. While some prominent writers have challenged the claim that the Amendment permits the enforcement of any unenumerated rights against government, the fact remains that it is there. Its language suggests unmistakably that the listing of rights in the first eight amendments should not be taken as exhaustive. What were these other rights “retained by the people”? They were almost certainly common law rights, with a natural law basis.

Furthermore, there is sufficient evidence in the legal history of the century and a half just prior to the 1787 Constitutional Convention—which was a significant influence on the Constitution—that Americans were quite amenable to an appeal to natural law. Examples are the colonists’ hearkening back to Lord Coke’s dictum in *Dr. Bonham’s Case* and James Otis’s argument in the *Writs of Assistance Cases*.

Having made the argument as to why the courts should use the natural law for constitutional interpretation, we must now respond to the common objections raised to it. One of these is that judges lack the authority to do this. The answer to this follows. By precedent—and probably by the intention of the Founding Fathers—our judges exercise the power of judicial review, or declaring acts of legislatures unconstitutional. The natural law, as stated above, must be the foundation of all human law (including constitutions, the fundamental law of nations) and in fact, as we have noted, stands behind our Constitution. It is the basic task of judges to enforce and apply the law—this is what judges do. In American constitutional interpretation, the law that they are enforcing and applying is simply our fundamental law, the U.S. Constitution—which is bound as human law to follow natural law and avowedly does in our tradition. Since, then, our judges have the authority to exercise judicial review they have the authority, by both the nature of things and by our particular tradition, to rely on natural law which is inevitably tied up with the human law called our Constitution.

A second objection is that judges have no greater access to the natural law than anyone else, so why should we expect them to be the ones who apply it. Clearly, judges are not the only ones who must shape their actions according to natural law. Legislators should be guided by it when enacting statutes, regulatory agency officials when deciding how to fairly enforce and administer statutes, and, for that matter, parents when teaching and disciplining their children. The point, again, is that it is judges who have the task of adjudicating and, to clearly a greater degree than the other branches, of interpreting the Constitution, so it is logical that we should expect them to apply the natural law in that domain as others should in their domains. It is they who, if our constitutional order worked the way it should,
would for the most part be the most capable of applying the natural law to the par-
ticular complexities of the human law—at least as it is present in the American political order. Hamilton explained why this is so: The judges should be chosen from the very small number of men who combine extensive knowledge of legal precedents, solid integrity and character, and a strong public-spiritedness which will move them to give up the lucrative practice of law to sit on the bench. In other words, the combination of great knowledge of the law and moral, intellectual, and civic virtue would commend them above others to this task.

Obviously, our constitutional order has not worked this way for much of its history, and is probably farther away from it today than ever. Still, are we to dispense with reliance on the natural law, perhaps the cornerstone of that constitutional order, and preclude the possibility of truly good and capable judges utilizing it because there are bad judges who would abuse it?

By far the most vigorous objection to courts having recourse to natural law is that, since there are so many different views of its content, it will open the door to judicial whim. The first response that must be made to this is that even without having recourse to natural law or unenumerated rights—and mostly without such recourse—too many judges are already acting according to their whim. They do this by interpretations they give to even clearly written statutes or to black-letter constitutional phrases such as “life, liberty, and property” and “interstate commerce.”

Still, this fact hardly answers the criticism. Would the judges not likely be even more inclined to bring their own predilections into their decision making if they were permitted to rely on principles or a law which is not even written down?

The basis for this criticism, of course, is that there are many conceptions of what is meant by natural law and what its substance is. This argument in turn is based on the view that the natural law is really not determinable or discernible. This view betrays the modern epistemological perspective—which is possibly at the core of the waywardness of modern thought—that either there is no reality or if there is the mind, in any event, cannot know it with certainty. To say, however, that theft or murder or genocide is not real, and not really evil, is foolish. To say that man cannot know the precepts of the natural law is simply not true. C.S. Lewis shows in his great, little book *The Abolition of Man* that all different kinds of cultures at all periods of human history have held similar views on the most important areas of morality. As philosopher Daniel J. Sullivan states, the differences among peoples on moral questions are relatively limited and appear against the backdrop of mostly commonly held beliefs. Higgins writes that, even apart from Revelation, man (barring serious mental deficiency) can reason out the natural law’s primary principle of do good and avoid evil, its secondary principles (essentially the mandates of the Decalogue), and, by “a more involved process of reasoning” from the primary and secondary principles, its tertiary principles. In fact, Higgins says that we can so readily derive these principles, that only in the
case of the tertiary ones can a normal man ever be said to be invincibly ignorant of them (due to cultural environment, deficient upbringing, etc.). The principles of the natural law are available to men; if men do not wish to acknowledge this availability or to follow the natural law, the problem is one of their will.

All this means that there is really only one natural law. Many other formulations might go by the name of “natural law,” but they are merely human concoctions. They may conform in part to the real natural law, but are fatally flawed in other ways.

Some people obviously will become judges who do not subscribe to the true natural law and will indeed follow their whim in asserting certain unenumerated rights, etc. in cases. Their rejection of the natural law does not point to the necessity of excluding a recourse to natural law, but rather—to return to Hamilton’s point—to that of selecting the right judges. It also points to the fact that the natural law should be resorted to in judicial decision making only in limited circumstances, when it absolutely has to be. We mentioned that the Constitution is based on the natural law tradition; as Charles E. Rice says, it and the various state constitutions “incorporate natural law principles.” Thus, generally laws contrary to these principles could be rendered unenforceable by referring simply to the pertinent phrase or passage of the Constitution where they are enunciated. Moreover, the possibilities of judicial abuse would be yet further limited if we returned anew to what Tocqueville once said was one of the hallmarks of American judges: they “pronounce[d] on particular cases and not on general principles.” Nowadays, what mostly happens in constitutional cases is that lawyers litigate the statute (i.e., they seek to have it declared unconstitutional). Instead, they should be carrying out their professional function to their clients of seeking to have the application and enforcement of the statute to them declared invalid on the grounds that it causes them a harm—which the lawyers have established through the building of a solid prima facie case. Judges oblige the lawyers in their desire to litigate statutes, partly because they have come to think of themselves as fashioners of new general principles—like legislators or delegates at a constitutional convention.

The quintessential example frequently given of how judicial whim takes over when courts have recourse to unenumerated rights—i.e., a putative notion of higher law—is the Roe v. Wade abortion decision. The point to keep in mind, however, about Roe v. Wade (and its companion case, Doe v. Bolton, which must always be considered in conjunction with it) is that they did not represent the real natural law. They were pure positivism, with the Supreme Court’s views apparently shaped by the relativistic thinking about reproductive rights that characterized the secularized opinionmaking strata in American political society. Contrary to what, say, columnist and presidential candidate Patrick J. Buchanan contended in his speech at the Heritage Foundation prior to the 1996 New Hampshire primary, it would not have been an overreaching of judicial power for the Court to have
decided *Roe v. Wade* and *Doe v. Bolton* exactly the opposite as it did (i.e., to have held the unborn child to have a constitutionally protected right to life, so that abortion would be legally impermissible). As I have argued elsewhere, this application of the right to life was part of our Constitution because, as one can see when consulting Coke and Blackstone (both of whom were enormously influential in shaping the American constitutional tradition), it was part of the common law.\(^{35}\) Thus, the only truly constitutional decision in *Roe v. Wade* and *Doe v. Bolton*—or, at least, in a case like them which had not been rendered moot, as they were\(^{36}\)—would have been to have declared legalized abortion to be unconstitutional.

While the Court acted as a legislature in declaring anti-abortion statutes unconstitutional (actually, its action of depriving the unborn of natural rights was beyond what even a legislature can do), this would not have been the case if the exact opposite decision would have been handed down. The Court would simply have been doing what we always expect courts to do: protect people’s legitimate rights. (*In Roe v. Wade* and *Doe v. Bolton* it protected an illegitimate right—one without any basis—and took it upon itself with its trimester analysis to, in effect, write a statute.) It could have employed a traditional equitable remedy in doing this: enjoining physicians by court order from performing abortions and leaving government officials bound to enforce that order. In a case such as this one, a court would be crossing into the legislative domain only if it tried, say, to prescribe penalties for abortionists (apart from any appropriate punishment for contempt).

One can discern in some critics’ raising of the specter of judicial whim in resorting to the natural law a faint echo of the notion that “after all, the Constitution is what the Supreme Court says it is.” Surely, many justices have treated it that way, but accepting that this has to be or is necessarily so is the pathway to true judicial arbitrariness. Rather, we must insist that judges stay fixed on the intent of the Framers about a constitutional provision (wherever possible), the fundamental principles embodied in the Constitution, and the tradition of the true natural law behind the Constitution.

One cannot agree with those who would say, as a corollary of the judicial whim argument, that a reliance on natural law should be criticized because it leads to a result-oriented jurisprudence. If the courts are relying on the true natural law, with attention to the requisite prudence, the results will be good. There is no principle of the true natural law which is bad for man; it is, after all, given to man by God so that he can live a good, ordered life in this world and achieve his supernatural end. Abiding by the natural law is not a choice, it is a requirement; it is a “result oriented jurisprudence” we are not free to reject.

I said above that there needs to be a requisite prudence. Sometimes, we witness judges who think of themselves not only as platonic guardians but empire builders, as well. They try to tackle serious, deep-seated, intractable social problems and apparently genuinely believe they can provide a solution. Slavery, racial integration,
educational inadequacy, and political inequality are some areas that we have seen this happen in. It seems that contemporary judges continue to ride the crest of nineteenth century social science and the Progressive Movement in believing that questions which deeply involve the political life of a nation can be solved without reference to politics (i.e., by removing issues from the political branches and elected officials). Indeed, as Tocqueville observed, the very nature of democratic republics may create an inherent tendency for this avoidance of politics to happen.\(^7\) Obviously, this is judicial excess. Judges need to have enough of a sense of prudence—and humility—to recognize that most things are necessarily and appropriately handled by the political branches and must be subjected to the give-and-take and less-than-perfect solutions that politics produces. On this practice, there can be no better guide than Lincoln’s understanding of the tension between principle and expediency, which basically holds that a true statesman must always keep sound principles before him as an absolute, use them for educative purposes, and seek as best as he can to further them but be aware that, while not letting them be officially surrendered, he must be prepared to compromise on their application or realization. If he is not willing to follow this way, the consequences for his political order may be disastrous.\(^8\) This is an expression of the old classical virtue of prudence, one of the uniquely political virtues. In being directed by this, however, judges do not surrender their basic function of protecting legitimate rights—even if they are part of a bigger social problem. This practice, again, is what courts do. To return to abortion, the courts can and should protect the right to life of the innocent unborn, even if we cannot possibly expect them to remedy the social conflict surrounding the issue or make people want to behave morally so that they would not think of having or taking part in abortions. Courts cannot tell a legislature specifically how to address some problem with their enactments, nor order money to be appropriated for it. The impact they have on a social problem by and large must come about indirectly, through their act of protecting legitimate rights. They might—and almost certainly will, at times—act like or have the effect of moral teachers or statesmen in doing this, but essentially this should happen only incidentally when they are carrying out the basic judicial function. They cannot remedy every wrong or injustice, though their decisions will sometimes have an effect on them. Indeed, a natural law-based jurisprudence will recognize that that cannot possibly be achieved through judicial decree or even legislative enactment. As St. Thomas Aquinas says, human law ought not seek to forbid all vices, but only the worst ones, particularly those “without the prohibition of which human society could not be maintained” (e.g., “murder, theft and suchlike”). Otherwise, most men could not live up to the law’s expectations and would actually “break out into yet greater evils.”\(^9\)

Nevertheless, it is not out-of-line to think that courts should play a special role in helping particularly disadvantaged groups in society to seek greater justice in
the manner of Justice Harlan Fiske Stone’s famous footnote #4 in *U.S. v. Carolene Products Co.*—so long as this is done within the context of their seeking to protect legitimate, justiciable rights (enumerated or not). It is not enough to say that people can just turn to the ballot box to change things. Sometimes that tactic will not work, often it will not work to the degree necessary, and for some groups of people it does not work at all. And, of course, some never even see the ballot box—like the unborn. In any event, fundamental rights—as Lincoln well knew—should not have to depend on the ballot box to be upheld. People expect nothing less than that the courts are going to come to the aid of those who need it. Again, a view of deferring everything to legislatures will simply not wash.

As a final point, we might ask where the Church comes into all of this. We have said that men can know the natural law by their reason, but it is known “in the form of broad general precepts.” Further specification of these precepts occurs as we work our way down to the tertiary principles. Still, men are often not certain about how to apply the principles. At the most specific level, that of the everyday situations that men find themselves in, conscience is our guide (though for it to work as well as it should, it has to be properly formed). What was said above indicates that at the level of tertiary principles men often need guidance and help in understanding the natural law—more so as one goes in the direction of having to further and further reason out implications of these principles and when one considers that most men do not have the time or philosophic training or temperament to do it effectively. The latter problems apply even to judges—even the best judges. We must add to that the fact that the natural law tends anyway not to be as readily grasped by men—even if they are capable of this understanding—outside of a religious context. This defect is why Rice says that “[T]he Magisterium of the Church provides further specification of those principles and objectives”; that is, “[T]he Magisterium is the arbiter of the meaning of the natural law on specific issues.” The Magisterium is the special cushion of protection given by Christ to men so that they will not go off into the false conceptions of natural law alluded to above. Since philosophical reasoning and all the evidence of human experience has proven the Magisterium’s teachings correct, isn’t it about time that all people—Catholic or not—look seriously at its interpretations and try to be guided by them? The courts—essentially following the formulation of Marsilius of Padua long ago, that the state and not the Church is the interpreter of natural law—have in effect made themselves a kind of secular magisterium. They have not done a very good job of it. Maybe it’s time for the American political order to recognize that the law of God—the true natural law—is higher than and governs the law of the state, even the Constitution itself, and that Christ endowed the Magisterium with the unique task of interpreting it for us. The Supreme Court should have recourse to the natural law in making its decisions, and should have recourse to the Magisterium in helping it to understand that natural law.
Notes

15. In spite of Grotius’ efforts in helping to establish international law on the new, consensual basis, it is worth noting that Corwin states that Grotius was responsible for a “revival of the Ciceronian idea of natural law” (Corwin, *The ‘Higher Law’ Background*, 58).
18. Corwin, *The ‘Higher Law’ Background*, 72-78. Coke’s dictum was as follows: “And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.”
19. Corwin, *The ‘Higher Law’ Background*, 74, 77. Otis argued in court in colonial Massachusetts against the Stamp Act on the grounds that it was against “natural equity,” and so was void.
20. This question was decisively resolved, of course, by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137.
23. I am aware of the departmental notion of constitutional construction which was advanced earlier in American history and embraced, to some degree, by such luminaries as Madison and Jackson. It held that, essentially, the three branches of the national government have the equal right, when carrying out their particular functions, to authoritatively interpret the Constitution. In fact, many members of Congress and other legislators and political executives routinely probably do weigh whether the proposals they consider conform to the natural law. There may be some merit to the departmental notion of constitutional construction, but nevertheless the judiciary is by its very nature the branch most suitable and competent to carry out constitutional interpretation.


31. For this analysis and the particular terminology, I owe credit to W. Howard Mann, retired professor of constitutional law at the State University of New York at Buffalo.

32. 410 U.S. 113 (1973)


34. See Krason, *Abortion*, Chapter One.

35. Ibid., pp. 138-140. For a discussion of how influential Coke and Blackstone were on American constitutional law and law generally, see Kirk, 191-192, 368-370, 373-374; Corwin, 72-77.

36. In both *Roe v. Wade* and *Doe v. Bolton*, neither of the female plaintiffs was pregnant at the time of the Supreme Court decisions, thus in my judgment the actions should have been dismissed under the traditional rule of mootness. Actually, I am not convinced that a *prima facie* case was presented in either action because I do not agree—despite the rhetorical claims of the feminist movement—that bearing a child and, for that matter, childrearing in any reasonable belief system constitute a harm. It is additionally hard to see how this would be so with simple childbearing—i.e., bringing a pregnancy to term—since the option of adoption is readily available. Perhaps the only real *prima facie* case on abortion that could have been brought to the Supreme Court would have been one challenging liberalized or legalized abortion laws such as had been enacted in some states before 1973, on behalf of unborn children.


40. 304 U.S. 144 (1938).

41. Sullivan, *An Introduction to Philosophy*, 180

42. See *Catechism of the Catholic Church*, Secs.1783-1785.