Dr. Shankman’s paper is in conflict with Dr. Holloway’s paper on the most important issue raised by the two of them. Dr. Holloway interprets Madison, the father of the Constitution, to teach that man is nothing more than a clever animal, and that man by reason can know only things that relate to his bodily desires and his longing for economic well-being. Dr. Shankman, on the other hand, asserts that the founders based the Constitution on natural law principles—immutable moral principles of right and wrong that can be known by the light of human reason. It appears that the reader is forced to choose between Dr. Holloway’s understanding of the founding and Dr. Shankman’s.

Dr. Shankman says—rightly I believe—that the Constitution was intended to reflect the principles of natural law, and, by doing so, to eliminate the need for an appeal to natural law. While Dr. Shankman argues that the Constitution was intended to eliminate the need for an appeal to natural law, she nevertheless searches the text of the Constitution in an effort to find in an effort to find a provision that authorizes judges to invalidate legislation that is contrary to natural law. She offers three texts as candidates for such authority—the due process clause, the privileges and immunities clause, and the ninth amendment. The most important of these is the due process clause, which has often been invoked as the authority for the courts to invalidate legislation.

Due process relates to procedure—the noun is process, which is modified by the adjective due. In its simplest expression, it means a fair trial. A state can deprive a person of his life, liberty, and property, but only if he is convicted of a crime after a fair trial. It may well be that greater procedural safeguards are due when a life is at stake than when property is at stake, but the guarantee still is one of process, not of substantive rights. The process that is”due” relates to the judicial process, not the legislative process, so the examples Dr. Shankman gives regarding the legislative process miss the mark. In short, Dr. Shankman fails to prove that the text opens the door to “substantive due process” and, hence, to natural law.

The privileges and immunities clause, likewise, gives no opening for an appeal to natural law. The privileges and immunities that are protected are the
privileges and immunities of citizens, not (as in the due process clause) of persons. Whereas the due process clause protects persons *qua* persons, the privileges and immunities clause protects citizens *qua* citizens, which means that the source of the privileges and immunities is positive law, not natural law.

The ninth amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. This leaves open the question of what other rights are retained by the people and how shall they be enforced. Dr. Shankman offers no guidance on this question. The one natural right mentioned in the Declaration of Independence but not in the Constitution is the right of revolution; but that right, even if it is a natural right, can hardly be enforced through the judicial process. No one would argue that a court should declare unconstitutional a law prohibiting revolution, not even those who believe that the right of revolution is a natural right.

While Dr. Shankman’s paper is in conflict with Dr. Holloway’s on the fundamental issue of whether the founders thought human beings were capable of knowing moral truth by the light of natural reason, her paper also has something in common with his. Dr. Holloway conflates the Tenth Federalist with the philosophy of Thomas Hobbes and then argues from texts written by Hobbes that the Tenth Federalist is “starkly incompatible” with *Rerum Novarum*. Likewise, Dr. Shankman conflates the Lochner decision with the philosophy of John Locke and then argues from texts written by Locke that the Lochner decision is based on principles that are “radically different” from those of *Rerum Novarum*.

Consider the following statement:

> It is surely undeniable that, when a man engages in remunerative labor, the impelling reason and motive of his work is to obtain property, and thereafter to hold it as his very own. If one man hires out to another his strength or skill, he does so for the purpose of receiving in return what is necessary for the satisfaction of his needs; he therefore expressly intends to acquire a right full and real, not only to the remuneration, but also to the disposal of such remuneration just as he pleases. Thus, if he lives sparingly, saves money, and, for greater security, invests his savings in land, the land, in such case, is only his wages under another form; and consequently, a working man’s little estate thus purchased should be as completely at his disposal as are the wages he receives for his labor.

Hence, a man’s labor necessarily bears two notes or characters. First of all, it is *personal*, inasmuch as the force which acts is bound up with the personality and is the exclusive *property* of him who acts and, further, was given to him for his advantage. Secondly, man’s labor is *necessary*; for without the
result of labor a man cannot live, and selfpreservation is a law of nature, which it is wrong to disobey. [Underlining added, italics in the original.]

These two passages seem clearly to defend the “right to purchase and sell labor.” Both are taken from *Rerum Novarum*, the first from paragraph 5, and the second from paragraph 44.

Consider also the following quotation:

[I]f health were in danger by excessive labor . . . in such cases, there can be no question but that, within certain limits, it would be right to invoke the aid and authority of the law. The limits must be determined by the nature of the occasion which calls for the law’s interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.

This quotation is as concise a statement of the rationale of Lochner as can be found; it is taken from paragraph 36 of *Rerum Novarum*.

My point is not to defend Lochner; my point is that Dr. Shankman surely exaggerates when she says we have here “two radically different understandings of the natural basis of property rights, and thus two radically different conclusions regarding the legitimacy of state power in limiting or regulating the use of property.” Dr. Shankman’s exaggeration of the differences between *Rerum Novarum* and the Lochner decision is akin to, though less serious in its implications than, Dr. Holloway’s exaggeration of the differences between *Rerum Novarum* and the Tenth Federalist.

Finally, we should note that it is a mistake to equate substantive due process with natural law, which Shankman (following Justice Black’s dissent in *Griswold*) seems to do. In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Court found a substantive right to abortion in the fourteenth amendment, but did so by appealing to history rather than to nature. Both Roe and Casey constitutionalize the theory of moral relativism, which is the antithesis of natural law. Hence, Roe begins by quoting Justice Holmes’ dissent in *Lochner*, “[The Constitution] is made for people of fundamentally differing views . . .” and concludes that the state may not adopt “one theory of life” so as to prohibit abortion. Likewise, Justice O’Connor’s opinion in Casey defines the issue as “whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter” and concludes that the State cannot do so because “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of life.” This is substantive due process, but it is not natural law; it is the rejection of natural law.