REFLECTIONS ON *THE NATURAL LAW MOMENT IN CONSTITUTIONAL THEORY*

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"*The idea of the natural law may thus be compared to the seed which, buried under the snow, sprouts forth as soon as the frigid and sterile winter of positivism yields to the unfailing spring of metaphysics. For the idea of natural law is immortal*."

—Heinrich Rommen[1]

"*[I]n spite of all opposition, and the numerous periods of neglect and decline, Natural Law comes again into ascendancy, because it is based on man's rational and social nature and the moral order of life*."

—Robert N. Wilkin[2]

INTRODUCTION

Professor's lecture[3] is timely and thoughtful. He deftly outlines the core commitments of a distinctive intellectual trend that has been percolating in United States legal academia for several years now; namely, a renewed interest in how the classical natural law tradition can offer insights and answers to perennial questions of constitutional law and theory. Many public law scholars are taking, as their starting point for intellectual inquiry in their field, the view that "there are human objectives

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1. HEINRICH ROMMEN, NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 118 (Thomas R. Hanley trans., 1947).

2. Robert N. Wilkin, *Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 357 (1949).

3. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL'Y 307 (2025).

and ends that are dependent upon law; and there are demands of justice and social order for which law," including constitutional law, "is the only fully viable mechanism" for securing.[4] In doing so, they consciously seek to follow in the tradition of the greats mentioned in Alicea's lecture, like Cicero, Thomas Aquinas, Francisco Suárez, and Robert Bellarmine, or more recently the likes of Heinrich Rommen, Jacques Maritain, Yves Simon, John Finnis, and Robert P. George.[5]

Alicea highlights that, in the classical natural law tradition, answers to questions about how to understand Constitutions and legal practices and their point or purpose lead us on to further ethical and moral questions about human goods, our nature as rational, social, and political animals, and why—and in what ways—political and legal authority are intelligible and reasonable responses to aspects of this nature, and what states of affairs allow it to flourish. And it is in answers to these high-level and perennial questions that many jurists are, once again, eagerly seeking out guidance, rules of thumb, and insights for more specific questions common to public law scholarship like, for instance, how to think about constitutional design, judicial role morality, or legal interpretation.[6]

Unsurprisingly then, I found little to quarrel with in Professor Alicea's remarks, and I endorse wholeheartedly his concluding exhortation that public lawyers today can find many treasures in the work of the tradition's canonical thinkers.[7] Their corpus of thought is a precious intellectual inheritance that will always repay careful and renewed attention. I would merely like to add in parenthesis to Alicea's cogent remarks that the current natural law moment he documents seems to be a truly transatlantic affair, with constitutional lawyers in Canada,[8] Ireland, and the United Kingdom[9] all drawing deeply on the Aristotelian-Thomistic tradition.

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4. SEAN COYLE, NATURAL LAW AND MODERN SOCIETY, 3 (2023).

5. *See* Alicea, *supra* note 3, at 326.

6. *See id.* at 315.

7. *Id.* (manuscript at 16–17).

8. Scholars like Gregoire Webber, Kerry Sun, Stephane Serafin, Xavier Foccroulle Menard, and Bradley Miller.

9. Examples of public lawyers working in Ireland and the United Kingdom whose work is influenced by the classical natural law tradition are Gerry Whyte,

What I want to do here is build on Alicea's insights by probing the following question: what can scholars of this current natural law moment learn from past revivals? The current transatlantic revival of interest in the classical natural law tradition is merely one amongst several that has taken place within the last century. While the classical natural law tradition's influence on public law thought and practice has never fully dissipated in jurisdictions like the United States, Ireland, or the United Kingdom, there have been moments in the not so distant past where it has been more pronounced, and in the case of Ireland, even predominant.[10] But the fact we are speaking of a *current* moment means that these previous moments eventually faltered or fell away, leaving the classical natural law tradition's influence on public law thinking subdued. What sparked these previous revivals? What achievements did they enjoy? Why did they fall away? What does their ultimate fate say about the prospects of the current moment? I think these are questions worth asking.

These are big questions, and so here I will only try to give some very tentative thoughts by engaging with two past natural law moments from the mid-twentieth century, in the United States and Ireland, respectively. Both countries saw their legal cultures impacted by a broader worldwide Neo-Scholastic revival.

I. THE ARISTOTELIAN-THOMISTIC REVIVAL IN AMERICAN LEGAL CULTURE

It is well documented that the legal thought and practice of the American Republic has, for much of its history, been heavily influenced by the natural law tradition, in both its social-contractarian[11] and classical iterations.[12] The legal traditions of the

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Maria Cahill, Leonard Taylor, Rachael Walsh, Michael Foran, Richard Ekins, Dominic Burbidge, Nick Barber, Paul Yowell, Timothy Endicott, Maris Kopcke, Veronica Rodriguez-Blanco, Sean Coyle, and Asanga Welikala.

10. *See generally* Desmond M. Clarke, *The Role of Natural Law in Irish Constitutional Law*, 17 IRISH JURIST 187 (1982).

11. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

12. Here I am thinking about the influence of jurists like William Blackstone, Richard Hooker, Matthew Hale, and Christopher St Germain—all of whom drew

colonies, the Declaration of Independence, the Preamble and Bill of Rights of the Federal Constitution,[13] and the text of many state constitutions, all bear its imprint.[14] It is also detectable in the intellectual scaffolding of the abolitionist movement and in the Reconstruction Amendments they helped spearhead and frame.[15] In a broader sense, the political theory underlying the foregoing parts of the American legal system took the *purpose* of law and source of its *legitimacy* to be profoundly moral—to secure the general welfare of the commonwealth and secure the rights of all its citizens.

The natural law tradition also had a pronounced influence on legal practice and the day-to-day work of lawyers and judges. As Professor Vermeule puts it, American lawyers were steeped in a shared "classical legal cosmology in which civil positive law gives specification to, and is interpreted in light of, general background principles of natural law and the law of nations, understood as enduring commitments of the legal order."[16]

While American law did not speak with one voice about the role natural law should play within the legal system, jurists shared a conceptual framework and vocabulary that regarded natural law precepts of eminent relevance to the construction of positive law materials and rendering justice according to law.

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on Thomistic thinking to varying degrees. These influential jurists were also familiar with Roman law and the civilian juristic side of the classical natural law tradition. *See* Ian Williams, *Christopher St. German: Religion, Conscience and Law in Reformation England*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY 69 (Mark Hill & Richard Helmholz eds., 2017) [GREAT CHRISTIAN JURISTS]; Norman Doe, *Sir Edward Coke: Faith, Law and the Search for Stability in Reformation England*, *in* GREAT CHRISTIAN JURISTS 93; David Sytsma, *Matthew Hale as Theologian and Natural Law Theorist*, *in* GREAT CHRISTIAN JURISTS 163; Wilfrid Priest, *William Blackstone's Anglicanism*, *in* GREAT CHRISTIAN JURISTS 213; *see also* KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING 11 (2022) ("The classical natural-law tradition was in the intellectual air that both the future Federalists and the future Republicans breathed.").

13. RICHARD HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142 (2015).

14. Johnathan Gienapp, *Written Constitutionalism, Part and Present*, 39 LAW & HIST. REV. 321, 339–41 (2021).

15. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 101–03 (2021).

16. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 5 (2022).

Professor Atiq reminds us that for much of the American Republic, "jurists did not explain the legality of moral principle by adverting to social facts," but treated moral laws as "self-evident, unchangeable, and applicable *ex proprio vigore*, expressly distinguishing such laws from enacted laws and customary laws."[17] Lawyers would rely on both natural and positive law in their submissions to courts and were "taught that the two laws were in harmony and should be used together."[18]

In the late nineteenth and early twentieth centuries, however, this picture of legal practice began to fall apart. For a welter of reasons -- doubtless including an increase in ethical and religious skepticism, the rise of liberalism, and a greater appetite for grounding socio-political argument on empirical and scientific methodology[19] -- *explicit* reliance on natural law reasoning became increasingly regarded as a "suspect element in professional legal discourse".[20] The natural law tradition would endure within seminaries and parts of the academy, but explicit invocation of its precepts by lawyers went from being "almost universally accepted in the legal system in 1870," to "almost completely gone by the early 20th century."[21]

Lawyers, jurists, and judges became more dismissive of the relevance of the natural law to legal practice. Lawyers might readily agree that natural law principles were of relevance to questions of personal morality, or even for guiding the actions of the legislature in making law, but they were not considered legitimate tools in the lawyer's tool-kit.[22] Other lawyers and judges began to see law in explicitly positivistic terms, as a

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17. Emad H. Atiq, *Legal Positivism and the Moral Origins of Legal Systems*, 36 CAN. J.L. & JURIS. 37, 50 (2023).

18. Sytsma, *supra* note 12, at 176–77.

19. Early twentieth century "skepticism, cynicism, and negation toward the moral and ideal concepts of Natural Law philosophy found a very congenial climate of opinion in the intense scientism, materialism, and secularism which followed World War I." Robert Wilkins, *The Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 345–46 (1949).

20. Steven D. Smith, *Presently Absent, or Absently Present? The Curious Condition of Natural Law*, 67 AM. J. JURIS. 119, 119 (2022).

21. STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 167 (2021); *see also* John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism*, 98 MARQ. L. REV. 1203, 1217–19 (2015).

22. Breen & Strang, *supra* note 21, at 1271–74.

product of human will,[23] and not an ordinance of reason with a telos towards objective human goods.[24] It was, to put it lightly, a gloomy time to be a classical natural lawyer.

From the 1930s to the late 1950s, however, the legal culture of the United States once again became open to natural law thinking. The reasons for this development are many and complex, but they are partly linked to a worldwide revival in interest in Aristotelian-Thomistic thought and Catholic social teaching, which took on a greater sense of urgency with the rise of Communism and Fascism, the outbreak of the deadliest conflict in history, and the unspeakable barbarities committed by Nazi Germany and its allies during the Holocaust. Spearheaded in the United States by expatriates like Heinrich Rommen[25] and Yves Simon,[26] this classical revival eventually penetrated the law schools and professoriate.

This period, which has been documented in invaluable detail by scholars like Lee Strang, John Breen,[27] and Dennis Wieboldt,[28] saw an impressive outpouring of scholarship rooted in the classical natural law tradition. Natural law jurists produced a rich body of work touching upon many important questions of public law theory: the normative foundations of legal and political authority, the principles guiding the limits of legitimate state

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23. Steven D. Smith, *A Bleak Future for Legal Education?*, LAW & LIBERTY (Sept. 1, 2023), https://lawliberty.org/forum/a-bleak-future-for-legal-education/ [https://perma.cc/QYZ5-6HPE].

24. *See* VERMEULE, *supra* note 16, at 70.

25. *See* HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Thomas R. Hanley trans., 1947).

26. *See* YVES SIMON, AQUINAS LECTURE 1940: NATURE AND FUNCTIONS OF AUTHORITY (1940).

27. *See e.g.*, Breen & Strang, *supra* note 21; John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J. LEGAL HIST. 553 (2011).

28. *See* Dennis Wieboldt, *Natural Law for the Laity: A Case Study in Catholic Education on the Airwaves*, *in* THEOLOGY AND MEDIA(TION): RENDERING THE ABSENT PRESENT (Stephen Okey & Katherine Schmidt eds., 2023); Dennis Wieboldt, *Our Natural Law Moment(s)*, (unpublished manuscript) (on file with author); Dennis Wieboldt, *Ideas With(out) Consequences?: The Natural Law Institute and the Making of Conservative Constitutionalism During the Cold War, 1947–1951*, LAW & HIST. REV. (forthcoming 2025) (on file with author).

action,[29] the nature of the political common good and its antonyms in liberal individualism and authoritarian collectivism,[30] the dangers of moral relativism and positivism to sound legal practice,[31] the relevance of natural law principles to legal reasoning,[32] and the deep dependence of the common good upon the positive law and prudential *determinatio* through law-making and adjudicative institutions that specify and give concrete shape to natural law's broad and general first principles.[33] Much of this scholarship also included the same call that Alicea would make in his lecture some 80 years later—for a rediscovery of the greats like Aquinas, Gratian, Suárez and the application of their thought to contemporary legal debates.[34]

Many of the scholars at the spear tip of this revival—such as Walter B. Kennedy,[35] Miriam Theresa Rooney,[36] Brendan Brown,[37] Francis Lucey, S.J.,[38] and Harold McKinnon[39]—also en-

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29. Wendell Phillips Dodge, Jr., *Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty*, 33 A.B.A. J. 1013 (1947).

30. *See generally* Ben W. Palmer, *Defence Against Leviathan*, 32 A.B.A. J, 328 (1946); John C. H. Wu, *The Natural Law and Our Common Law*, 23 FORDHAM L. REV. 13 (1954); Ben W. Palmer, *Groping for a Legal Philosophy: Natural Law in a Creative and Dynamic Age*, 35 A.B.A. J. 12 (1949).

31. *See* Edward S. Dore, *Human Rights and the Law*, 15 FORDHAM L. REV. 3 (1946); Miriam Theresa Rooney, *Natural Law Gobbledygook*, 5 LOY. L. REV. 1 (1946); Walter B. Kennedy, *Law Reviews As Usual*, 12 FORDHAM L. REV. 50 (1943); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942).

32. *See* Brendan F. Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TUL. L. REV. 491, 530 (1956–1957); Brendan F. Brown, *Natural Law Norms*, 9 CATH. LAW. 57 (1963); Miriam T. Rooney, *Law without Justice — The Kelsen and Hall Theories Compared,* 23 NOTRE DAME L. REV. 140 (1948); David C. Bayne, *The Natural Law for Lawyers–A Primer*, 5 DEPAUL L. REV. 159 (1956).

33. *See generally* Harold R. McKinnon, *Natural Law and Positive Law*, 23 NOTRE DAME L. REV. 125 (1948); Brendan F. Brown, *The Natural Law Basis of Juridical Institutions in the Anglo-American Legal System*, 4 CATH. U. L. REV. 81 (1953).

34. *See, e.g.*, Linus Lilly, *Possibilities of a Neo-Scholastic Philosophy of Law in the United States Today*, 12 PROC. AM. CATH. PHIL. ASS'N 111 (1936); Miriam Theresa Rooney, *The Movement for a Neo-Scholastic Philosophy of Law in America*, 18 PROC. AME. CATH. PHIL. ASS'N 185, 187 (1942).

35. Professor and Dean of Fordham University School of Law.

36. Professor and first Dean of Seton Hall University School of Law.

37. Professor and Dean of Catholic University of America Columbus School of Law.

38. Professor and Regent of Georgetown University Law Center.

39. Attorney and Member of the American Law Institute.

gaged in institution building, with a view to establishing permanent forums for the study and dissemination of the classical natural law tradition.[40] Some of the fruits of this attempt remain with us today, including several flagship law reviews and the international legal journals like the *American Journal of Jurisprudence* based at the University of Notre Dame, which began life as the *Natural Law Forum*,[41] and the *Journal of Catholic Legal Studies*,[42] which started as the *Catholic Lawyer*.[43]

This was generally a period of great optimism for classical natural law jurists. Writing in 1949, Judge Robert Wilkin of the United States District Court for the Northern District of Ohio captured something of this attitude when he remarked, with evident satisfaction, that the legal culture of the United States was showing "unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism" and "very definite indications of a revival of Natural Law philosophy."[44]

This intellectual revival, unfortunately, would not translate into serious practical influence on the course of American public law.[45] Instead, in the following decades, American constitutional jurisprudence would be alternatively dominated by an autonomy-centered social liberalism and, more recently, by forms of originalism whose foremost proponents were, in Alicea's words, "wary of making moral truth claims in constitutional theory"[46] and who justified their legal methods by appeal to democratic self-government and moral neutrality.

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40. *See* Rooney, *supra* note 34, at 185.

41. *Natural Law Forum*, NOTRE DAME LAW SCHOOL, https://scholarship.law.nd.edu/nd_naturallaw_forum/index.5.html#year_1957 [https://perma.cc/363N-9EVN].

42. *Journal of Catholic Legal Studies*, ST. JOHN'S UNIV. SCH. OF L., https://scholarship.law.stjohns.edu/jcls/ [https://perma.cc/2YCW-3NN9].

43. *See* Joseph T. Tinnelly, *The Catholic Lawyer: An Idea and a Program*, 1 CATH. LAW. 3, 3 (1955).

44. Robert N. Wilkin, *The Status of Natural Law in American Jurisprudence*, 24 NOTRE DAME L. REV. 343, 344 (1949).

45. *See* Wieboldt, *Natural Law Moment(s)*, *supra* note 28, at 19–20.

46. Alicea, *supra* note 3.

II. THE ARISTOTELIAN-THOMISTIC REVIVAL IN IRISH LEGAL CULTURE

Ireland also saw a revival in Aristotelian-Thomistic thought around the same time period.[47] A vibrant literature grew in the 1930s that urged for a closer alignment of Irish political and legal life with classical natural law thought.[48] Happily for its authors these sentiments were shared by the then-Prime Minister Éamon de Valera, the most influential Irish statesman of the century. A keen student of the natural law tradition and Catholic social teaching, de Valera and his talented drafting team[49] had a key role in spearheading the integration of natural law thinking into the text of the 1937 Constitution.[50]

Many readers will be aware that the 1937 Irish Constitution is a document suffused in Aristotelian-Thomistic thought, committing the State to promote the "the common good" as its proper end, guided by values of "prudence, justice, and charity" so that the "freedom and dignity" of the individual and inalienable and imprescriptible rights of the family can be secured.[51] But readers will perhaps be surprised to learn that the enactment of this Constitution did not immediately spark a classical natural law revival in legal thinking and practice. Far from it. In fact, until the 1960s many of the Constitution's classically influenced provisions were simply rarely deployed by lawyers and not commented upon by judges.[52]

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47. *See* Thomas Mohr, *Natural Law in Early Twentieth-Century Ireland*—State (Ryan) v. Lennon *and Its Aftermath*, 42 J. LEGAL HIST. 1 (2021).

48. *See generally* EDWARD CAHILL, THE FRAMEWORK OF A CHRISTIAN STATE (1932); Edward Coyne, *The Inadequacy of Christian Politics*, 64 IRISH MONTHLY 240 (Apr. 1936); Alfred O'Rahilly, *The Constitution and the Senate*, 25 STUD.: IRISH Q. REV. 1 (Apr. 1936); Vincent Grogan, *Irish Constitutional Development*, 40 STUD.: IRISH Q. REV. 385 (1951); Vincent Grogan, *The Constitution and the Natural Law*, 8 CHRISTUS REX 201 (1954).

49. Particularly the lawyer and diplomat John Hearne, the architect-in-chief of the drafting process. *See* Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* 110–47 (2017).

50. For unrivalled accounts of the drafting process, see DONAL K. COFFEY, DRAFTING THE IRISH CONSTITUTION, 1935–1937: TRANSNATIONAL INFLUENCES IN INTERWAR EUROPE (2018); GERARD HOGAN, THE ORIGINS OF THE IRISH CONSTITUTION, 1928–1941 (2012).

51. CONSTITUTION OF IRELAND, July 1, 1937, pmbl., art. 41.

52. *See* Conor Casey, *The Irish Constitution and Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 1064–65 (2023).

In some respects, the rather dull impact of the Constitution in this domain was unsurprising. Its jurisprudential commitments and those of its drafters were quite at odds with the prevailing outlook of the legal academy, bench, and bar, whose members were largely ambivalent or confused about the natural law tradition's relevance to legal practice.[53] The Constitution, and the underlying scholastic intellectual movement that helped shape its text, thus initially did little to alter the mindset of a judiciary and legal profession steeped in the presuppositions of positivistic late-nineteenth-century English jurisprudence.[54] The fact that most Irish judges and lawyers of the time were Catholic—and so in their personal lives presumably thought natural law precepts where of immense *moral* relevance—clearly had little impact on their jurisprudential views as to their *legal* relevance.

The modest impact of the Constitution would have come as no surprise to the likes of Edward Cahill, S.J., a Jesuit and political theorist who provided input and suggestions during its drafting. During the drafting process, Cahill had unsuccessfully urged De Valera to insert an interpretative clause explicitly stating that the Constitution's provisions would be interpreted harmoniously with the dictates of natural law. Cahill's motivation for inserting this provision stemmed from his fear that terms in the Constitution like "common good" "social justice", "personal rights" and "property rights" were in real danger of being interpreted inconsistently with the natural law tradition that underpinned them. Cahill feared they would either be treated as dead letters or, alternatively, construed in light of the "individualistic and liberal principles" of English jurisprudence in which most Irish judges and lawyers at that time would have been schooled.[55]

This picture of Irish legal culture would change utterly, and with remarkable speed, in the 1960s when a new generation of lawyers and judges well-versed in the natural law tradition, rose to prominence. This group included some of the most acclaimed Irish jurists of the twentieth century, including Donal

53. *Id.*

54. *Id.*

55. GERARD HOGAN, ORIGINS OF THE IRISH CONSTITUTION, 571–74 (2012).

Barrington,[56] Declan Costello,[57] Seamus Henchy,[58] Cearbhall Ó Dálaigh,[59] John Kenny,[60] and Brian Walsh.[61]

All of these jurists were educated at University College Dublin (UCD) in the 1940s and 1950s, and were the first generation of Irish law students to be exposed to the natural law tradition. Many of the jurists of Ireland's classical legal revival were deeply impacted by the instruction of the likes of Professors Daniel Binchy and Patrick McGilligan, both of whom were committed natural lawyers. More generally, this new generation were also impacted by the totalitarian horrors of the early twentieth century and believed that the reaffirmation of natural law thinking represented a critical bulwark in protecting human dignity from both the dangers of *laissez faire* liberalism and state authoritarianism.

Professor Binchy was a former ambassador and famed scholar of legal history, jurisprudence, and Roman law. In a lecture entitled "The Law and the Universities" published in 1949, Professor Binchy gave an insight into his views on the point of legal education.[62] He argued that jurisprudence was the "lynchpin" of all higher legal studies and its purpose was to provide a "*trait d'union* between the profession of law and the philosophical and ethical principles from which alone legal systems derive their ultimate validity."[63] As the Irish ambassador to Germany in 1932, Professor Binchy was a first-hand witness to the rise of National Socialism and their brutal disregard for law and justice. Binchy feared that unless lawyers and legislators cleaved to the classical concept of positive law (one he says runs from "Plato and Aristotle, through the Roman jurists and the mediaeval Schoolmen, down to the neo-Scholastic philosophers of

56. Justice of Supreme Court of Ireland.

57. President of High Court of Ireland.

58. Justice of Supreme Court of Ireland.

59. Chief Justice of Ireland and later Judge of European Court of Justice.

60. Justice of Supreme Court of Ireland.

61. Justice of Supreme Court and later Judge of European Court of Human Rights.

62. Daniel Binchy, *The Law and the Universities*, 38 STUD.: IRISH Q. REV. 257, 262–64 (1949).

63. *Id.* at 262.

our own day"[64]) whose "ultimate sanction lies not in a command of the State but in its conformity to a transcendental idea of justice"[65] then the risk of disastrous consequences following for law and politics would inevitably spike. For Binchy, the legal order could only thrive and contribute to the common good if "professional lawyers (and our legislators) are equipped with a sound theory of law on which to base their approach to concrete problems."[66]

Patrick McGilligan was UCD's Professor of Constitutional Law from 1934 to 1959. McGilligan was a firm proponent of natural law reasoning in constitutional adjudication, dubbing principles of natural law the 1937 Constitution's "sheet anchor" and not something that could be considered irrelevant to legal practice. Writing extrajudicially, the current Chief Justice of Ireland Donal O'Donnell has noted how "almost all of the judges in the High Court and the Supreme Court during the 1970s and 1980s were taught constitutional law by McGilligan"[67] and that McGilligan's views on the relevance of natural law thinking to adjudication would have a profound effect on their work.

Some of this new generation would add their own valuable contributions to natural law scholarship in Ireland.[68] But perhaps the most revolutionary contribution made by the generation of judges and lawyers educated at UCD during this time was their spearheading of the use of natural law precepts and the Constitution's background principles of legal justice during constitutional adjudication, to better determine the meaning of its posited text and structure in a way that ensured harmony between the positive law and intentions of the lawmaker and enduring principles of natural law. This contribution would precipitate serious shifts in Irish legal practice whose effects are still felt today.[69]

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64. *Id.*

65. *Id.*

66. *Id.*

67. Donal O'Donnell, *Irish Legal History of the Twentieth Century*, 105 STUD.: IRISH Q. REV. 98, 112 (2016).

68. *See* Declan Costello, *The Natural Law and the Irish Constitution*, STUD.: IRISH Q. REV., 403 (1956); Seamus Henchy, *Precedent in the Irish Supreme Court*, 25 MOD. L. REV. 544 (1962).

69. *See* Casey, *supra* note 52, at 1082, 1089–90.

That is not to say that the natural law tradition remains dominant in Irish legal culture—it is not. Skepticism toward natural law reasoning has been growing stronger since the late 1990s. In his lauded 1992 work *A Short History of Western Legal Theory*,[70] the leading Irish constitutional scholar J.M. Kelly could justly observe with confidence that Ireland was the only place in the Western world where natural law thinking was thriving in legal practice.[71] Thirty years on, however, Irish law is undoubtedly witnessing a serious weakening of the grip of the natural law tradition on mainstream legal thinking in the law faculties, in the bar, and on the bench.

Natural law reasoning retains some vibrancy within Irish constitutional law, especially in jurisprudence concerning the rights and autonomy of the family unit vis-à-vis the State, and the State's duty to protect the integrity of the human person from unjust attack. This is why I have argued elsewhere a classical flavor remains in Irish constitutional adjudication, even while the explicit use of natural law terminology dwindles.[72] However, it *is* to say that below the surface of Irish public law doctrine there is increasing uncertainty about its ultimate normative foundations—like what the point and purpose of public power and the source of constitutional rights are.

Judicial skepticism about the use of natural law principles began to spike roughly around the time that the ascent of economic and social liberalism in Irish politics and culture became increasingly dominant. It is likely several interlocking factors played a role in the rapid erosion of the natural law tradition in legal and political life, including rapid secularization, the erosion of the Catholic Church's moral authority, Ireland's deep reliance on global corporate investment and good-will, and the Irish State's increasingly deep integration into the European Union liberal legal order. All of these socio-political developments have helped push the classical natural law tradition, whose metaphysical and moral claims are in many ways deeply

70. JOHN KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY, 424–25 (1992).
71. *Id.* at 424.
72. Casey, *supra* note 52, at 1082.

antithetical to Ireland's emerging liberal orthodoxy, to the margins of its legal culture.[73]

III. LESSONS

How do these short vignettes speak to our current natural law moment? Bearing in mind all the (many) caveats that must attend any comparison of the legal culture of a small island nation and a sprawling superpower, I want to offer the following thoughts.

These previous revivals showcase how significant shifts in legal culture can be aided by small, dedicated groups of jurists. The Irish and American revivals of Thomistic thought in their respective legal cultures began humbly enough: in debates and discussions in lecture halls and seminar rooms and in the pages of legal periodicals. Small but enthusiastic bands of classically minded scholars and teachers were able to introduce new generations of scholars, lawyers, and students to the axioms and presuppositions of the natural law tradition—a tradition that up until that point had been moribund in the public law thought of both countries.

In Ireland, when those students and lawyers eventually made their way onto the bench, they were able to transform Irish public law by bringing to the judicial role the jurisprudential commitments and worldview that were central to their legal formation. The tradition did not penetrate legal practice as far in the United States, but the Trojan work of Thomistic jurists throughout the 1930s to the 1950s helped keep the tradition alive, leaving an important scholarly and institutional legacy from which American natural lawyers continue to profit today.

Today, then, while we may regret that the classical tradition in both the United States and Ireland lacks the vitality it previously had, we should take heart from the fact there are many legal minds that are hungry for, and curious about, legal approaches more intellectually and morally satisfying than positivism or legal realism. The examples of these previous revivals suggest to me that if this hunger can be met, and curiosity satisfied, then the results can be profound.

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73. *Id.* at 1087–88.

The differing degrees of success natural lawyers in Ireland and the United States had in influencing legal practice is likely due to background sociopolitical conditions in the former which were ultimately much more receptive to the classical tradition. In a predominantly Catholic country, the Irish bar, bench, and professoriate of the 1940s and 1950s were more receptive to hearing novel arguments that sought to ground constitutional law and theory on the rich metaphysical and normative foundations of Aristotelian-Thomism. Note, too, that the natural law tradition's relevance to Irish constitutional law started to come under pressure at about the same time Ireland's wider culture and politics became increasingly dominated by liberalism.

Another necessary lesson for natural law jurists today, then, is that the longevity or influence of this moment is bound up in a wider political contest over what kind of moral vision society should be oriented toward, and what the good life consists of. If the wider political sentiment within a country is suspicious of claims that man is governed by an objective—God-given—moral order whose basic precepts are accessible by reason but independent of human will, then convincing lawyers and judges of the merits of the natural law tradition will be far more difficult. This is a sobering fact, but one we cannot sensibly ignore.

Finally, these previous revivals remind us that our lot as natural law jurists might be to sow the intellectual seeds of fruit we will never live to see reaped. There is every possibility that this particular natural law moment may pass without influencing the ways in which most lawyers or judges think about constitutional law. Our predecessors working within the tradition were alive to and undeterred by this possibility, and it is one that should not deter us today from articulating answers to public law issues that we think rest on true, good, and reasonable foundations. Nor should we shrink from passing the natural law tradition onto the next generation of jurists to the best of our ability. As we hope that this natural law moment will bear rich fruit, we should nonetheless gladly accept, as our juristic forebears did, that it "may be ours to sow that others may reap."[74]

74. Lilly, *supra* note 34, at 117.