The Canon of Natural Law Avoidance

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The relationship between natural law and positive law represents one of the oldest unresolved questions in American jurisprudence.[1] When Thomas Jefferson wrote, "[w]e hold these truths to be self-evident, that all men are created equal," he invoked natural law principles to establish the United States' legitimacy.[2] Yet the Constitution itself has little to say about natural law.[3] Judges, lawyers, and legal scholars—unsure what to make of this discrepancy—spent much of the nation's first hundred years debating these questions: Does natural law supersede the Constitution? Does the Constitution override natural law?[4] Or does the Constitution somehow incorporate natural law into positive law?[5]

While discussion of these questions declined in the twentieth century, it is unclear whether the debate fully resolved.[6] It's obvious that references to "the natural ordering of reason" and "the common good" have become

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1. "[T]he terms 'natural law' and 'legal positivism' have no stable meaning in contemporary legal, political, and philosophical discourse." Robert P. George, *The Natural Law Due Process Philosophy*, 69 FORDHAM L. REV. 2301, 2301 (2001). While a more nuanced understanding of these terms may be necessary to appreciate the full import of Natural Law Avoidance, provisional definitions should suffice to establish the canon's existence. In short, natural law holds that principles found in nature, religion, and philosophy are the true source of law and supersede man-created law. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 69–75 (Carolina Acad. Press 8th ed. 2019). In contrast, positive law insists that law can only be understood as a descriptive, empirical, and sociological phenomenon. *Id.* at 33–34.

2. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142 (2015) ("[T]he constitution did not reject the law of nature. It simply did not use language taken from it . . . . This must have been a conscious choice."). The Bill of Rights, enacted in 1791, may have introduced natural law principles into the Constitution, but the extent remains unclear. *Id.*

4. *See, e.g.*, Calder v. Bull, 3 U.S. 386 (1798); discussion *infra* Section I.A.

5. Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1528 (2011) ("[A] discerning constitutional thinker must appreciate the extent to which the constitutional project quintessentially was an effort to codify pre-existing natural law rights.").

6. *Id.*; *see also* STUART BANNER, THE DECLINE OF NATURAL LAW 8, 246–49 (2021).

vanishingly rare in court. It's unclear, however, that modern ideas of "reasonableness," "public policy," and "substantive due process" are much different.[7] While the terms of the debate may have shifted, the underlying tension remains.[8]

Trying to solve this puzzle, a number of scholars have returned to explicit discussions of natural law.[9] Legal historians have sought to trace the relationship between the American legal system and pre-founding ideas of natural right.[10] Theorists like Germain Grisez and John Finnis have revived the study of natural law as a normative theory.[11] And others like Robert P. George have proposed applying these ideas in the American context.[12] Perhaps as a result of these efforts, some modern courts have highlighted the importance of natural law to understand the Bill of Rights and interpret discrete constitutional provisions.[13]

More recently, the scholar Adrian Vermeule has advocated a dramatic reconceptualization of our legal system in line with classical principles of natural law.[14] As his bold claims have gained a following, internal debate among natural law proponents has also increased.[15] Those who oppose Vermeule's more drastic vision have argued that natural law, in fact, *requires* adherence to positive law, since morally effective institutions require stability.[16]

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7. Justice Hugo Black famously criticized the majority opinion in *Griswold v. Connecticut*, as engaging in "natural law due process philosophy" when it struck down Connecticut's law prohibiting birth control. 381 U.S. 479, 515 (1965) (Black, J., dissenting); *see also* Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 350–51 (1969) (Black, J., dissenting); BANNER, *supra* note 6, at 205–12.

8. BANNER, *supra* note 6, at 8 ("[T]he content of the law does not depend on whether natural law is part of the legal system, because the same results can be obtained with or without it.").

9. *See infra* notes 10–13.

10. *See generally* BANNER, *supra* note 6; HELMHOLZ, *supra* note 3.

11. *See generally* Germain Grisez, *The Structures of Practical Reason*, 52 THOMIST 269 (1988); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Oxford Univ. Press 2d ed. 2011).

12. *See generally* Robert P. George, *Natural Law*, 52 AM. J. JURIS. 55 (2007).

13. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 592–95 (2008) (acknowledging that the Second Amendment codifies a preexisting "natural right of resistance and self-preservation"); *see also* O'Scannlain, *supra* note 5, at 1528.

14. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 1–25 (2022). These arguments are noteworthy, although not necessarily new. *See, e.g.*, Stephen M. Krason, *Constitutional Interpretation, Unenumerated Rights, and the Natural Law*, 1 CATH. SOC. SCI. REV. 20, 25–26 (1996).

15. *See* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 3 (2022) (challenging Vermeule's position).

16. Alicea wasn't the first to make this type of argument. *Compare id.* at 44–52, *with* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*,

This Comment attempts to reconcile and refocus these arguments by concentrating specifically on natural law and positive law in legal interpretation. Instead of beginning with a grand theory of natural law and working backward to justify positive law, this Comment travels in the opposite direction—attempting to clarify and justify the extant role of natural law in our positive law framework.

Surveying early case law, it becomes apparent that jurists would often narrow their reading of legal documents to preserve natural law or otherwise favor a plausible natural law-based reading when faced with ambiguous text.[17] Together, these interpretive practices are better understood as a concrete interpretive canon: a *Canon of Natural Law Avoidance*. This canon, moreover, remains valid.

By advancing Natural Law Avoidance as a valid canon of construction, this Comment aims to carve out a modest, albeit consistent role for natural law within the contemporary positive law framework. The canon will be especially useful for scholars who emphasize "original" interpretive conventions and strive to read the Constitution as it was initially understood.[18] It can also guide the reading of modern statutes as a "rule of application."[19]

Part I provides relevant background on natural law and summarizes how it functioned in early American jurisprudence. Part II discusses the general role of interpretive canons and explains why Natural Law Avoidance qualifies as a canon. Part III explores what relevance, if any, Natural Law Avoidance has in the modern era. And finally, Part IV concludes and proposes areas where additional research is needed.

I. NATURAL LAW IN EARLY AMERICA

The birth of the United States is, in some ways, inextricably linked to natural law.[20] When the Founding Fathers sought to secede from the British government, they invoked principles of natural law to justify their position.[21]

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69 FORDHAM L. REV. 2269, 2282–83 (2001). However, Alicea's arguments are well tailored to rebut Vermeule's theory.

17. *See infra* Section I.B.

18. *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 576–78 (2003); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism*, 103 NW. U. L. REV. 751, 751–54 (2009).

19. See *infra* Sections III.B–C for a discussion of the difference between rules of adoption and rules of application.

20. *See* HELMHOLZ, *supra* note 3, at 128.

21. *Id.*

Through rebellion, the colonists sought "the separate and equal station to which the Laws of Nature and of Nature's God entitle[d] them."[22]

Central to this position was the assertion that a higher body of unwritten law superseded the authority of a tyrannical British government.[23] Individuals in a state of nature have a right to defend themselves, but when they join a nation they entrust that right to a sovereign.[24] When the sovereign fails to uphold natural justice by protecting life, liberty, and property, those fundamental rights return to their fountainhead: the people.[25]

Critics have argued that Thomas Jefferson only invoked natural law for its rhetorical force.[26] Like a good legal advocate, he authored the Declaration as a "brief," using every argument at his disposal to persuade the American people to rebel.[27] But regardless of his sincerity there is no denying the impact of his words.[28]

Over the course of secession, the Declaration offered a rallying cry to revolutionaries.[29] Numerous state constitutions paid homage to natural law,[30] as did many of the nation's leading men.[31] The *Federalist Papers* invoked principles of natural law to justify a unified federal government.[32] And new ideas of "republicanism" advocated the reorientation of law toward the "common good" and equality of citizens.[33]

It's true that Thomas Jefferson probably had conflicting views on natural law.[34] But like a modern lawyer writing a legal brief, he likely found it difficult to renege his earlier natural law arguments after they had proven

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22. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

23. HELMHOLZ, *supra* note 3, at 128.

24. *Id.* at 129.

25. These ideas are commonly understood to have originated with John Locke's *Second Treatise of Government*; however, some scholars debate Locke's influence. *See* C. Bradley Thompson, *John Locke and the American Mind*, 8 AM. POL. THOUGHT 575, 575–76 (2019).

26. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 49 (1980).

27. *Id.*

28. HELMHOLZ, supra note 3, at 128–30.

29. *Id.* at 128.

30. *See, e.g.*, VA. CONST. art. I, §§ 1, 3.

31. HELMHOLZ, *supra* note 3, at 130 (cataloguing leading men who invoked natural law).

32. *See, e.g.*, THE FEDERALIST NO. 43 (James Madison) (invoking the "transcendent law of nature").

33. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 53–75 (1998).

34. *Id.* at 74 (discussing cognitive dissonance among the Founders in their attitudes toward social hierarchy).

successful. As a result, ideas of natural law continued to influence American law following the revolution.[35]

While the new Constitution moved away from explicit appeals to natural law, specific provisions appeared to invoke certain classical principles.[36] Article I, Section 9, for instance, stated that "[n]o Bill of Attainder or ex post facto Law shall be passed."[37] This language appears to derive from the early Roman *nulla poena sine lege*, or "no penalty without law," itself a fixture of natural justice.[38] The Bill of Rights further solidified various natural law entitlements,[39] and as a result, some early scholars claimed that the Constitution embodied natural law—fixing in definitive terms the general principles of justice that existed prior to the positive law framework.[40]

This influence of natural law is likewise seen in early American common law.[41] During the eighteenth and nineteenth centuries, many judges deciding cases of first impression understood themselves to be finding the law rather than making it.[42] These laws could be "found" either by reference to longstanding custom and tradition, through the application of practical reason, or by reference to natural law.[43] Indeed, some early jurists considered natural law and the common law to be deeply intertwined.[44] In the words of Maryland's highest court, "the common law . . . comprehends the law of nature."[45] And through this interrelationship, natural law could be used to fill

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35. HELMHOLZ, *supra* note 3, at 139–40 (collecting names of American legal scholars influenced by natural law). Indeed, the language of the Declaration has continued to influence legal scholars through the present day. *See, e.g.*, Clarence Thomas, *Toward a 'Plain Reading' of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 985 (1987) (arguing that "Lincoln, Frederick Douglass, and the Founders" all understood "the Constitution to be the fulfillment of the ideals of the Declaration of Independence").

36. O'Scannlain, *supra* note 5, at 1515 ("[I]n many important respects, the natural law is woven into the fabric of the Constitution . . . .").

37. U.S. CONST. art. I, § 9, cl. 3.

38. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165–93 (1937).

39. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017).

40. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 309 (Hillard, Gray ed., 1833) (recognizing that rights in the Constitution were "a solemn recognition and admission of those rights, arising from the laws of nature"); *see also* Jones v. Robbins, 74 Mass. (8 Gray) 329, 340 (1857); Blanchard v. Maysville, Wash., Paris and Lexington Tpk. Co., 31 Ky. (1 Dana) 86, 91 (1833).

41. BANNER, *supra* note 6, at 63–68.

42. *Id.* at 46.

43. *Id.* at 46–68.

44. *Id.* at 63–68.

45. Griffith v. Griffith's Ex'rs, 4 H. & McH. 101, 115 (Md. 1798).

gaps in the common law or address novel legal issues in the absence of legislative guidance.[46]

Through these historical circumstances, pockets of natural law became deeply embedded in positive law jurisprudence.[47] And as tension between the two legal frameworks amplified,[48] the significance of natural law *in legal interpretation* became increasingly important.[49]

A. The Unresolved Debate: Can Natural Law Invalidate Written Law?

Much of the early debate regarding natural law concerned the relationship between natural law and the new Constitution.[50] The American judicial system had derived from the English system where courts at times acknowledged the authority of natural law.[51] But unlike American courts, English courts had no power to second-guess the legislature.[52] The development of "judicial review" in America, therefore, broke new ground and raised new questions.[53] Because American courts had power to invalidate statutes as unconstitutional, some jurists began doubting whether natural law was necessary to provide an additional backstop.[54]

Opponents of natural law argued that judicial review rendered natural law obsolete because the Constitution itself provided a "higher" authority.[55] In response, proponents of natural law argued that it provided a second limit to legislative action in addition to the Constitution.[56]

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46. BANNER, *supra* note 6, at 27; *see also* Pierson v. Post, 3 Cai. 175, 177–79 (N.Y. Sup. Ct. 1805) (applying natural law ideas expounded by Samuel von Pufendorf and Hugo Grotius to determine when an animal *"feræ naturæ"* becomes human property).

47. HELMHOLZ, *supra* note 3, at 151–70 (discussing the influence of natural law on discrete areas of law including procedural law, property law, and family law).

48. BANNER, *supra* note 6, at 109 (outlining early debate over Christianity in the common law).

49. *See infra* Sections I.A–C.

50. *See* BANNER, *supra* note 6, at 71.

51. *See, e.g.*, Somerset v. Stewart (1772) 98 Eng. Rep. 499, 502–03 (KB).

52. 1 WILLIAM BLACKSTONE, COMMENTARIES 91 ("[T]here is no court that has the power to defeat the intent of the legislature . . . .").

53. *See* BANNER, *supra* note 6, at 73; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803).

54. BANNER, *supra* note 6, at 75–81.

55. *See id.*

56. *Id.* at 149–50. These conflicting attitudes were part of the reason some founders were skeptical of the Bill of Rights. If natural law superseded the constitution, then the Bill of Rights would be superfluous. But if the constitution superseded natural law, then the Bill of Rights risked foreclosing other unenumerated rights. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 548–54 (Oxford Univ. Press 2016).

The national debate over these issues crystalized in the famous case of *Calder v. Bull*.[57] A court in Connecticut had determined a decedent's will invalid, but a subsequent statute reopened the issue and allowed the parties to appeal.[58] The Supreme Court needed to decide whether the statute violated Article I, Section 9 of the Constitution prohibiting ex post facto laws.[59] The four Justices unanimously agreed that ex post facto laws are only those that retroactively impose *criminal* punishment—not civil liability.[60] But despite their central agreement, two of the Justices sparred over natural law's role in the discussion.[61]

In extensive dicta, Justice Samuel Chase asserted the limits of legislative authority beyond the Constitution.[62] Acknowledging that these limits were beyond the scope of the Court's inquiry, he believed it to be "a question of very great importance."[63] Arguing in favor of natural law, he wrote:

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power . . . . An ACT [sic] of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[64]

Chase then detailed specific instances where he thought a legislative act might be declared void.[65] These examples include laws that punish innocent action, impair private rights to contract, or take property from one individual and give it to another.[66] Many of these issues have since been adjudicated on constitutional grounds.[67] But at the time of Chase's opinion, the Bill of Rights hadn't been incorporated against the states.[68] And, even if it were incorporated, Chase argued that these legislative acts would be invalid

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57. Calder v. Bull, 3 U.S. 386, 386–88 (1798).
58. *Id.* at 386.
59. *Id.* at 387, 389.
60. *Id.* at 390, 398–99.
61. *See id.* at 390–91, 399–400.
62. *Id.* at 387.
63. *Id.* at 387.
64. *Id.* at 388.
65. *Id.*
66. *Id.*
67. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).
68. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment . . . are among the fundamental personal rights and 'liberties' protected by the due process clause . . . .").

regardless.[69] It would be "against all reason and justice[] for a people to entrust a Legislature with SUCH [sic] powers."[70]

In an equally emphatic counter-opinion, Justice Iredell disagreed with Chase's natural law reasoning.[71] Articulating a position that foreshadowed twentieth-century attitudes, Iredell explained that a properly enacted law would necessarily stand, regardless of whether it contradicted natural law.[72] Even if the law were manifestly unjust, Iredell wrote, "I cannot think that, under such a government [as ours], any Court of Justice would possess a power to declare it so."[73]

Iredell also worried that the dictates of natural law were indeterminate and vulnerable to manipulation.[74] In his words, "[t]he ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject."[75] And because there can be no definitive natural law, a judge's conclusions are apt to reflect his or her personal preferences, no more valid than the legislature's.[76]

Together, Chase and Iredell's opinions presented two sides of what would continue as a lively debate among early American scholars.[77] Legal treatises often paid homage to Chase's more idealistic position.[78] But on controversial issues like slavery[79] and Indian law,[80] courts frequently refused to overrule

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69. BANNER, *supra* note 6, at 75.
70. *Calder*, 3 U.S. at 388.
71. *Id.* at 398–99.
72. *Id.*
73. *Id.* at 398.
74. *Id.* at 399.
75. *Id.*
76. *See id.*; *see also* BANNER, *supra* note 6, at 78 ("It is possible, although there is no direct evidence for it, that Iredell was influenced by Jeremy Bentham, one of the earliest English critics of natural law.").
77. A few years later, in *Terrett v. Taylor*, 13 U.S. 43 (1815), Justice Story would imply that he held a position consistent with Justice Chase. However, the Supreme Court's role in the debate was limited. *See* BANNER, *supra* note 6, at 80.
78. *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 447 (1826) ("It is said in the books[] that a statute contrary to natural equity and reason . . . is void . . . .").
79. The Antelope, 23 U.S. 66, 120–21 (1825) ("That [slavery] is contrary to the law of nature will scarcely be denied . . . . [But] a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made."); *see also* Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510 (KB) ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law . . . .").
80. Johnson v. M'Intosh, 21 U.S. 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

positive law, regardless of what natural justice required.[81] Over time, this unresolved tension paved the way for Natural Law Avoidance and other principles of statutory interpretation.[82]

B. Beyond the Debate—Natural Law Guiding Statutory Interpretation

The debate over natural law's power to abrogate positive law continued for another hundred years, primarily at the state level.[83] Because the Bill of Rights had not yet been incorporated against the states, the federal courts had limited opportunities to address the relationship between natural law and enumerated rights.[84] The opinions expressed by state courts, however, largely mirrored those put forward by Chase and Iredell in *Calder v. Bull*.[85]

By the middle of the nineteenth century, disagreement remained.[86] Some judges believed that laws contrary to natural law were automatically invalid.[87] Others believed that positive law was limited only by the Constitution.[88] Common ground was difficult to find, and many judges simply preferred to avoid the question.[89]

As a result of this tactful judicial tendency, more subtle applications of natural law developed under the banner of statutory interpretation.[90] Judges could often, without controversy, use natural law as a means of understanding and interpreting text.[91] This worked, they argued, because the Constitution and other statutes "declared" natural law.[92] Some of these judges we might now call "purposivist" used natural law to equitably construct statutes and alter their meaning.[93] Other judges we might call "textualist" used natural law to narrow the meaning of text or resolve vague and ambiguous phrases.[94]

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81. BANNER, *supra* note 6, at 20.

82. *See infra* Sections I.B–C.

83. BANNER, *supra* note 6, at 81–92, 94 ("Could judges use natural law to strike down statutes? The question endured as long as natural law remained a working part of the legal system.").

84. *Id.* at 74.

85. *Id*. at 81–82.

86. *Id.* at 81–92.

87. State Bank v. Cooper, 10 Tenn. (2 Yer.) 599, 603 (1831).

88. Tipton v. Harris, 7 Tenn. (Peck) 414, 418 (1824).

89. BANNER, *supra* note 6, at 92–93.

90. HELMHOLZ, *supra* note 3, at 165–68.

91. BANNER, *supra* note 6, at 19; HELMHOLZ, *supra* note 3, at 165.

92. 1 STORY, s*upra* note 40, at 309; *see also* BANNER, *supra* note 6, at 19.

93. HELMHOLZ, *supra* note 3, at 167–68.

94. *See, e.g.*, *infra* notes 133–144 (discussing City of Philadelphia v. Spring Garden Comm'rs, 7 Pa. 348 (1847)). Some scholars "suggest there is no real difference between interpretation and construction." ILAN WURMAN, A DEBT AGAINST THE LIVING 21 (2017). But, for

1. *Riggs v. Palmer*

The famous case of *Riggs v. Palmer* presents one of the earliest examples of these two interpretive philosophies.[95] In *Riggs*, a sixteen-year-old boy, who feared he would be disinherited, poisoned his grandfather.[96] The grandfather never revoked his will, and so under the law's letter the murderous grandson retained his inheritance.[97] The majority, however, rejected this conclusion, drawing from principles of natural law.[98]

Analyzing the case, the court cited a classic example from the *ius commune*, a historic system of Roman laws.[99] In this famous example, a surgeon charged for "letting blood in the streets" was excused from punishment when he opened a sick man's vein to save his life.[100] The majority argued that, in this same spirit of natural justice, a statute governing lawful inheritance could not be interpreted to allow a murderer to profit from his crime.[101] To support this position, the court referenced natural law texts including Aristotle, Matthew Bacon, Pufendorf, and the Bible.[102] Under this more expansive natural-law interpretation, written, positive law must yield to injustice resulting from the law's specific application.[103]

The dissenting opinion in *Riggs* likewise strained to apply natural law principles, but ultimately found the majority's position untenable.[104] As the dissenting judge explained, "if I believed that the decision . . . could be affected by considerations of an equitable nature, I should not hesitate to assent."[105] But, he continued, "[w]e are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of the question is confined."[106] So while he acknowledged the majority's legitimate natural law aims, he found the application of natural law impossible. "[S]trict and systematic statutory rules" governed the

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the purposes of this comment, "interpretation" is determining what a written text means and "construction" is determining the legal effect of a written text. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95 (2010).

95. *See generally* Riggs v. Palmer, 115 N.Y. 506, 509–20 (1889).
96. *Id.* at 508–09.
97. *Id.* at 509.
98. *Id.* at 510–12.
99. *Id.* at 511; *see also* HELMHOLZ, *supra* note 3, at 70–71, 166.
100. *Riggs*, 115 N.Y. at 511.
101. *Id.* at 511, 514.
102. *Id.* at 510–11.
103. *See id.* at 511–12.
104. *See id.* at 515–20.
105. *Id.* at 515.
106. *Id.* at 515–16.

administration of wills,[107] and these rules must be "*at least, substantially*, if not exactly, followed to insure validity."[108] Natural law, in other words, might inform the court's judgment, but it could not justify the statute's wholesale revision.[109]

Riggs v. Palmer is often presented as a case outlining differences between purposivism and textualism;[110] but this portrayal superimposes a modern framework of statutory interpretation and ignores the background operation of natural law.[111] It's easy to imagine how, adopting a modern version of textualism, scholars might read the dissenting opinion to eschew any principles of natural law.[112] However, the dissenting judge's position is more nuanced. The tone of the opinion suggests that, but for the strict and precise statutes governing wills, a solution in conformity with natural law would have been greatly preferred. It is still an example of natural law informing judicial interpretation, but it is an instance where the text could not sustain a more equitable reading.

2. Other Early Case Law

This more subtle application of natural law combined with textualism can be seen in other cases decided around the same time as *Riggs*.[113] In *State v. Reilly*, for instance, the government charged a man pursuant to a Missouri statute that made it illegal for any person to "embezzle or convert to his own use . . . make way with, or secrete, with intent to embezzle or convert to his own use . . . any money, goods, rights in action, or valuable security or effects whatsoever."[114] On one hand, the word "embezzle" could be read to contain all the elements of criminal conversion, including mens rea.[115] However, "the disjunctive expression, 'or convert to his own use,' taken literally, might be

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107. *Id.* at 516.

108. *Id.* (emphasis added).

109. *Id.* at 519–20.

110. *See, e.g.*, Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676, 680–90 (1979). Abraham does not use the word "purposivist," but instead puts textualism in contrast to "contextualism." *See id.* at 685. He acknowledges, however, that a contextualist "underst[ands] the limits of the statutory language, not by reading the words of the statute, but by isolating its *purpose*." *Id.* at 687 (emphasis added).

111. VERMEULE, *supra* note 14, at 72.

112. *Cf.* Abraham, *supra* note 110 (discussing the textualist perspective in *Riggs* and making no mention of natural law).

113. *See, e.g.*, State v. Reilly, 4 Mo. App. 392, 397 (1877).

114. *Id.* at 396.

115. *Id.*

supposed to define the crime as consisting of any act of conversion . . . however innocent might be the intent."[116] As a result, the trial court refused to issue a jury instruction requiring "felonious intent" and precluded the jury from considering the defendant's possible good faith.[117]

Reviewing the lower court's decision, the appellate court applied principles of natural law to narrow the meaning of "convert to his own use."[118] As it explained, "[t]he universality of the natural law . . . deems no one to merit punishment unless he intended evil."[119] The words "convert to his own use," therefore should have been read with the same mens rea requirement as embezzlement, and the jury should have considered the defendant's good faith.[120] In this case, the court did not apply natural law to equitably construct meaning, but merely used it to clarify an otherwise ambiguous phrase.

The influence of natural law interpretive methods was also apparent in early cases addressing water rights.[121] In *City of Philadelphia v. Spring Garden Commissioners*, the Pennsylvania legislature granted a corporation the right to use the Schuylkill River's "water-power" for manufacturing.[122] Later, the legislature also granted certain nearby districts the right to erect waterworks along the river and supply water to nearby inhabitants.[123] The corporation argued that this subsequent grant was invalid because the legislature's original conveyance of "water-power" included a right to all water in the river as chattel.[124]

Under one plausible reading of the grant, water-power necessarily contains all water, since diminishing the amount of water also diminishes the amount of power that can be produced.[125] The court rejected this reasoning, however, and chose instead a narrow reading based on natural law.[126]

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116. *Id.*

117. *Id.* at 397–98.

118. *Id.* at 397.

119. *Id.*

120. *Id.* at 399. A similar result would likely be reached using modern principles of statutory construction. *See, e.g.*, MODEL PENAL CODE § 2.02 (3)–(4); United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994) ("[S]ome form of scienter is to be implied in criminal statute even if not expressed . . . ."). However, this coincident outcome does not make Natural Law Avoidance superfluous, but rather confirms its importance. *See infra* Section aa.2.

121. *See generally* City of Philadelphia v. Spring Garden Comm'rs, 7 Pa. 348, 363–68 (1847).

122. *Id.* at 364.

123. *Id.* at 348.

124. *See id.* at 367–68.

125. *Id.* at 362.

126. *Id.*

The right of common people to access water "lies at the bottom of all natural and indefeasible rights springing from physical necessity."[127] Notwithstanding those rights, a legislature might overrule natural law "where the question is one of power and not of right."[128] But in cases of *statutory interpretation*, "the protection of such a right from violation by a superior force, must always turn the scale."[129]

The *Spring Garden* court acknowledged, as a practical matter, that legislatures can violate natural law through "superior force."[130] However, the court's duty is to preserve natural law when interpreting statutes, either by reading them narrowly or resolving ambiguities in favor of natural law—"[n]othing but the most clear and imperative expression of the legislative will could prevent it."[131] Because the legislature had not "undisputably" banned the nearby inhabitants from drinking water from the Schuylkill river,[132] the *Spring Garden* court read the grant of "water-power" narrowly, in conformity with natural law.[133]

In each of the instances detailed above, judges went out of their way to avoid violation of natural law. Judges like the majority in *Riggs*, who we now call "purposivist," claimed authority to equitably construct statutes and preserve natural law.[134] But more frequently, early textualist judges, like those in *Reilly* and *Spring Garden*, avoided violation of natural law by narrowing the meaning of terms or favoring a natural law reading of an ambiguous text.[135] In each case, natural law proved an indispensable tool for statutory interpretation—a tool, this Comment argues, that deserves to be called a legal canon.

C. The Canon of Natural Law Avoidance

In summary, there were at least three ways that early American jurists thought about natural law in statutory interpretation:

(1) As a superseding force, capable of invalidating positive law;
(2) As a flexible tool for equitable construction; and

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127. *Id.* at 361.
128. *Id.* at 363.
129. *Id.* at 363–64. However, the majority opinion uses the word "construction" instead of "statutory interpretation." *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 364.
133. *Id.* at 368.
134. *See supra* text accompanying notes 95–103.
135. *See supra* text accompanying notes 113–133.

(3) As a refined textualism respecting natural law's influence.[136]

As explained above, position (1) never gained universal acceptance and was often met with dissent. Critics worried that judges would superimpose their policy preferences under the banner of "natural law" to undermine legislative authority.[137] Position (2) limited the scope of natural law's application, but it still raised many of these same concerns.[138]

The third interpretive principle, however, provided a moderate compromise between (1) and (2). Judges applying (3) placed primary emphasis on positive law and acknowledged the primacy of legislative authority. But keeping with the era's intellectual climate, they respected natural law's influence insofar as the text allowed.[139] As a result, they *avoided interpreting statutes so as to violate natural law*.

This third position—here called "Natural Law Avoidance"—represents the lowest common denominator for jurists incorporating natural law in legal interpretation. Judges applying interpretive methods (1) and (2) could sidestep controversy by applying more restrained interpretive methods.[140] In theory, these more extreme interpretive methods went far beyond mere Natural Law Avoidance. In practice, however, their applications overlapped significantly.

On this fertile common ground, the seeds of Natural Law Avoidance took root. More analysis is needed, however, to explain why this interpretive principle should be considered a legal canon.

II. SUBSTANTIATING THE AVOIDANCE CANON

The historical record shows that natural law figured prominently in legal interpretation over the first one hundred years of American independence.[141] But did these interpretive methods rise to the level of an interpretive legal canon? The answer to this question requires a more precise definition of "canon." Like other forms of law, canons require secondary rules of recognition.[142] And because Natural Law Avoidance satisfies the same rules of recognition as other well-established canons, it has the same claim to legitimacy and the same value.

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136. *Supra* Section I.A–B.
137. *Supra* Section **Error! Reference source not found.**.
138. *Supra* Section aa.1.
139. *See supra* Section aa.2.
140. BANNER, *supra* note 6, at 92–95.
141. *See generally supra* Part I.
142. BIX, *supra* note 1, at 40–42 (discussing the positivist legal philosophy of H.L.A. Hart).

A. What Is a Canon of Interpretation?

At base, an interpretive canon is an authoritative legal rule or principle that either guides or determines the interpretation of a legal document.[143] When confronted with a contract, statute, or constitution, the primary role of the judiciary is to interpret the text and apply the law.[144] Judges must first understand what the written words *mean*, then determine how that meaning *applies* in each situation.[145]

While this process can appear simple, it has inspired longstanding debate.[146] Judges often disagree over the meaning of statutes. And, even when they agree on meaning, they might still disagree on the words' legal impact. Canons of interpretation mediate these disputes by resolving ambiguity and limiting judicial discretion.[147] In short, they help judges understand primary written rules and ensure that the application of those rules conforms with the corpus juris.[148]

Critics of the canons point out that they can sometimes add unnecessary difficulty and "bind judges to a clear but misleading text that sits in obvious tension with what the legislature wanted."[149] But despite these challenges, textualists, purposivists, and pragmatists all appear to acknowledge the authority of canons to a varying degree.[150] The canons, moreover, have

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143. Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 629 (2022).

144. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

145. *See* Solum, *supra* note 94, at 95–96. Solum uses the term "interpretation" for determining a document's meaning and "construction" for determining the legal effect of a document. *Id.*; s*ee also* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480 (2013).

146. M'Culloch v. Maryland, 17 U.S. 316, 414 (1819) ("Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea.").

147. *See, e.g.*, Yates v. United States, 574 U.S. 528, 539–46 (2015).

148. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082–84 (2017).

149. Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), http://yalelawjournal.org/forum/the-costs-of-consensus-in-statutory-construction [https://perma.cc/RK4J-LPD3] ("[I]nterpretive consensus might streamline some of the easy cases, but it will not necessarily aid in all of them . . . in some instances, it might bind judges to a clear but misleading text that sits in obvious tension with what the legislature wanted.").

150. Zoldan, *supra* note 143, at 623–24.

become increasingly prominent in the Supreme Court's jurisprudence,[151] and influential in state judicial bodies.[152]

Still, despite the growing importance of interpretive canons, there remains disagreement over their character and scope.[153] As one scholar lamented, "[t]here is no agreed-upon list of canons—the corpus of interpretive rules considered canonical changes over time—and there is no generally accepted criteria for determining whether a principle is a canon."[154] Certain bedrock canons are more or less universally recognized, but ambiguity remains at the fringe.[155]

Some uncertainty will likely remain so long as scholars disagree. However, by combining two different frameworks for identifying legal canons—one proposed by William Baude and Stephen Sachs,[156] and the other proposed by Evan C. Zoldan[157]—this Comment will aim to establish a functional definition of "canon." Based on this definition, it will become clear that Natural Law Avoidance satisfies the core criteria.

B. Identifying Canons of Interpretation

To identify a canon of interpretation, it is first necessary to distinguish whether the proposed canon is primarily linguistic or legal. Second, it is necessary to identify appropriate rules of recognition. These preliminary considerations will determine how Natural Law Avoidance is justified.

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151. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 924 n.16 (collecting cases); *see also* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (employing the ordinary meaning canon to determine the legal effect of the Second Amendment); Lockhart v. United States, 577 U.S. 347, 355–56 (2016) (applying the "series qualifier" canon to a 1998 child pornography statute).

152. Recent cases in Arizona and Texas include *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 307 (2019) (Bolick, J., concurring), and *Ex parte K.T.*, 645 S.W.3d 198, 206 (Tex. 2022). This growing relevance may be attributable to Justice Antonin Scalia and Bryan Garner's influential book, ANTON SCALIA & BRYAN A. GARNER, READING LAW (2012). *See, e.g.*, State v. Mixton, 250 Ariz. 282, 290, 302 (2021) (citing *Reading Law* in both the majority and dissent).

153. Zoldan, *supra* note 143, at 624; *see also* Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 167 (2018); Shapiro, *supra* note 151, at 936–37.

154. Zoldan, *supra* note 143, at 648; *see also* Baude & Sachs, *supra* note 148, at 1121 ("[T]here are a great many canons, and indeed no single authoritative list of them all.").

155. For instance, Professor William Eskridge argues for an expansive list of interpretive canons with diminished authority. His list includes "any judicial principle or method of reasoning that the Supreme Court can use, should use, or has used (even once) in construing a statute." Krishnakumar & Nourse, *supra* note 153, at 168 (citation omitted).

156. *See* Baude & Sachs, *supra* note 148.

157. *See* Zoldan, *supra* note 143.

1. Linguistic vs. Legal Canons

According to Professors William Baude and Stephen Sachs, there are two different categories of interpretive canons that function independently and follow different paths to validity.[158] First, there are purely linguistic canons, like the "series-qualifier" and the canon against surplusage.[159] These canons govern expected language use by lawmakers and parties drafting legal documents.[160] They are akin to rules of grammar or legal style, and help judges to understand legal documents' linguistic content.[161] Each canon "stands or falls on its use. If it accurately describes how certain people speak, then it's a valid canon of usage."[162]

There are also, however, purely legal canons, like the rule of lenity or the canon of constitutional avoidance.[163] These canons operate independent of language.[164] They have nothing to do with usage and are unaffected by the communicative intent of drafters.[165] Instead, they are designed to help judges understand the meaning of written documents *as law*, and not merely as language.[166] As a consequence, they "stand on their own authority as a form of common law."[167] And like common law, their value depends on "the general standards for the validity of legal rules, as supplied by the appropriate theory of jurisprudence."[168]

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158. Baude & Sachs, *supra* note 148, at 1084.

159. *Id.* at 1125. The series-qualifier canon holds that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." SCALIA & GARNER, *supra* note 152, at 147. The canon against surplusage holds that, if possible, "every word and every provision [in a statute] is to be given effect." *Id.* at 174.

160. Baude & Sachs, *supra* note 148, at 1124–27.

161. *Id.* at 1124 ("Linguistic canons are designed to handle *communications*, so their validity turns directly on the linguistic practices of those who write and read legislation.").

162. *Id.* at 1126 (citing Lockhart v. United States, 577 U.S. 347, 364 (2016) (Kagan, J., dissenting) (explaining that the series-qualifier canon "reflects the completely ordinary way that people speak and listen, write and read")).

163. *See id.* at 1110, 1127.

164. *Id.* The rule of lenity holds that "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." SCALIA & GARNER, *supra* note 152, at 269. The canon of constitutional avoidance, or "the constitutional-doubt canon," holds that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Id.* at 247.

165. Baude & Sachs, *supra* note 148, at 1123 ("If anything, the lack of knowledge about a canon *reinforces* the strength of that canon: what legislators were unaware of, they're unlikely to have displaced.").

166. *Id.* at 1085 ("Coming to a right understanding of interpretation means carefully distinguishing language from law."); *cf.* Solum, *supra* note 94.

167. Baude & Sachs, *supra* note 148, at 1122.

168. *Id.* at 1122, 1125.

Sachs and Baude provide a starting point for identifying interpretive canons; however, they leave the exact determination open for debate.[169] They assert that canons are "the product of secondary rules yielded by our rule of recognition," but they do not flesh out the exact character of these secondary rules.[170]

2. Rules of Recognition for Legal Canons

Rules of recognition are an integral part of any society: "a set of criteria by which the officials determine which rules are, and which rules are not, part of the legal system."[171] They can be different for different types of law,[172] and under different jurisprudential theories.[173] So, to make an effective case for Natural Law Avoidance, more precise rules of recognition are needed.

Another scholar, Evan Zoldan, has proposed a universal test for identifying interpretive canons.[174] Zoldan argues that interpretive canons must satisfy three criteria to be legitimate: (1) they must reflect use by legal interpreters; (2) they must affect interpretive outcomes or serve a rule-like function; and (3) they must claim a theoretical justification.[175] These criteria are essentially a proposal for rules of recognition in the context of canons.

The first criterion is empirical: "[L]egal interpreters use an interpretive principle within the meaning of this criterion if they rely on it sufficiently frequently so that it would be considered effective advocacy for a party to invoke it in an actual legal dispute."[176] In other words, practitioners must observe the canon used effectively in legal discourse.[177]

The second criterion is pragmatic: The canon must affect interpretive outcomes by making a possible interpretation more or less persuasive,[178] or it must perform a rule-like function useful for determining legal outcomes.[179] The third criterion is conceptual.[180] Zoldan does not require that the

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169. *Id.* at 1125.
170. *Id.*
171. BIX, *supra* note 1, at 38.
172. *See id.* at 39.
173. Baude & Sachs, *supra* note 148, at 1125 ("[A]pplications of your own preferred theory are left as an exercise for the reader.").
174. Zoldan, *supra* note 143, at 652.
175. *Id.*
176. *Id.* at 658.
177. *See id.*
178. *See id.* at 658–59.
179. *Id.* at 661–62.
180. *See id.* at 667–70.

theoretical foundations for a canon are "undisputed."[181] But he requires legitimate canons to make a prima facie case for validity based on accepted jurisprudential theories.[182]

Because canons of interpretation are largely analogous to common law, a more thorough analysis of the rules of recognition governing common law would help better substantiate Natural Law Avoidance. That more robust inquiry, however, is beyond the scope of this Comment. Zoldan's framework provides a useful shorthand and satisfies an intuitive understanding for what makes a canon into law. The definition is not perfect, but it provides an approximation sufficient for a preliminary defense of Natural Law Avoidance.

C. Natural Law Avoidance as a Legal Canon

Properly framed, the historic use of natural law could be advanced as either a linguistic or a legal canon of interpretation. However, these two categories are not mutually exclusive,[183] and some authors argue there is no distinction.[184] No doubt, using Natural Law Avoidance makes certain linguistic applications more or less plausible.[185] But, for simplicity, this Comment will focus on the operation of Natural Law Avoidance as a purely legal canon.

Natural Law Avoidance qualifies as a legal canon because it meets all the criteria suggested by Zoldan. It also gains credibility as a canon because it overlaps with other well-recognized, legal-interpretive canons. In this way, Natural Law Avoidance fits within the established interpretive framework, supplementing the application of other interpretive principles and causing minimal disruption.

1. Criteria for Identifying Natural Law Avoidance

Under Zoldan's framework, Natural Law Avoidance satisfies the first empirical criterion for a legal interpretive canon because it reflects "actual

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181. *Id.* at 669.

182. *Id.* at 670 ("I would still require a *claim* of theoretical justification, even if *proof* is lacking that a justification is warranted.").

183. Baude & Sachs, s*upra* note 148, at 1125 ("Often a canon is plausible only on one path or the other; but either is sufficient to validate its use.").

184. *See* Shapiro, *supra* note 151, at 925.

185. As a possible linguistic canon, natural law and Natural Law Avoidance are particularly useful for understanding the meaning of certain words and phrases taken from natural law and incorporated in our founding documents. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3.

use" by legal practitioners. As detailed in Part I, judges in the early republic would go far out of their way to avoid violation of natural law.[186] Purposivist judges, like the majority in *Riggs*, would equitably construct statutes and modify their meaning consistent with natural law.[187] Textualist judges, like those in *Reilly* and *Spring Garden*, would either narrow the reading of certain words or favor a plausible natural law reading of an ambiguous text.[188] Sometimes, a more radical judge would even claim authority to invalidate statutes to preserve natural law precepts.[189] Each of these interpretive phenomena reenforces the validity of Natural Law Avoidance by demonstrating "actual use."

Natural Law Avoidance was also frequently invoked by early advocates.[190] In Zoldan's words, "legal interpreters use an interpretive principle within the meaning of [the first] criterion if . . . it would be considered effective advocacy for a party to invoke it in an actual legal dispute."[191] In the case of *Pierson v. Post*, for instance, advocates on both sides framed their arguments in terms of natural law.[192] The plaintiff argued that a person chasing a fox could not gain legal title to the animal because "whatever is not appropriated by positive institutions, can be exclusively possessed by natural law alone."[193] And, in nature, the only means of acquiring property is "occupancy."[194] In response, the defendant cited Pufendorf's *Law of Nature and of Nations* to argue that pursuit and sustained intention to acquire are equivalent to occupancy.[195] Both advocates invoked natural law because they knew it would determine the court's final decision.

Natural Law Avoidance likewise satisfies Zoldan's second criterion because it provides a rule-like function affecting more predictable outcomes. This rule-like formulation can be illustrated by analogy to another well-known canon: the canon of constitutional avoidance, or the "constitutional-doubt canon."[196] This canon was articulated by Justice White in *United States ex rel. Attorney General v. Delaware & Hudson Co.*[197] As he explained: "[W]here a statute is susceptible of two constructions, by one of which grave

186. *See supra* Section I.B–C.
187. Riggs v. Palmer, 115 N.Y. 506, 510 (1889); Abraham, *supra* note 110, at 680–90.
188. HELMHOLZ, *supra* note 3, at 142–72; *supra* Section I.B.
189. *See supra* Section I.A.
190. *See, e.g.*, City of Philadelphia v. Spring Garden Comm'rs, 7 Pa. 348, 354–61 (1847).
191. *See* Zoldan, *supra* note 143, at 658.
192. Pierson v. Post, 3 Cai. 175, 175–77 (N.Y. Sup. Ct. 1805).
193. *Id.* at 176.
194. *Id.*
195. *Id.* at 176–77.
196. SCALIA & GARNER, *supra* note 152, at 247–51.
197. *See id.* at 247.

and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[198] In other words, the court should adopt a narrow reading of a statute or resolve ambiguity in a way that avoids constitutional questions.

As a historical matter, the constitutional-doubt canon shares only an attenuated relationship to Natural Law Avoidance; however, its form and function are similar.[199] When a statute is susceptible to two constructions, and one violates the natural law and the other does not, the court should prefer the latter. In this way, Natural Law Avoidance almost certainly satisfies Zoldan's second criterion for legal interpretive canons. Zoldan acknowledges the legitimacy of the constitutional-doubt canon, and explains, "[The second criterion] I propose would easily be satisfied by most well-accepted linguistic and substantive canons."[200] Because Natural Law Avoidance mirrors the rule-like operation of the constitutional-doubt canon, it also satisfies Zoldan's criterion.

Finally, Natural Law Avoidance satisfies Zoldan's third criterion as an interpretive canon because it claims independent theoretical justification as positive law. Because positivists seek to apply the law as it exists, no additional justification is needed beyond empirical description.[201] It is enough that the legal canon is a matter of "social fact"[202] and that "the canon[] exist[s] within the thousands of law reports scattered through a law library."[203] Through explicit conduct and implicit reliance, judges have developed and recognized Natural Law Avoidance as an authoritative overlay to written law.[204] Like the common law, it stands on its own authority *as law*, even though it remains unwritten.[205]

In addition to this positive law justification, Natural Law Avoidance also enjoys independent theoretical justification based purely on natural law. First, natural law theory reinforces the positive law framework articulated above.[206] It recognizes that certain figures, like judges, must be given authority to

198. United States *ex rel*. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909).

199. *See infra* Section II.C.2 for a discussion of natural law's influence on the development of various interpretive canons.

200. *See* Zoldan *supra* note 143, at 659, 666.

201. *See* BIX, *supra* note 1, at 34.

202. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 825 (2015) (quoting Brian Leiter, *Legal Realism, Hard Positivism, and Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE 'CONCEPT OF LAW' 355, 356 (Jules Colmen ed., 2001)).

203. SCALIA & GARNER, *supra* note 152, at 9.

204. Baude & Sachs, *supra* note 148, at 1121–22.

205. *Id.* at 1105, 1122.

206. Alicea, *supra* note 15, at 22–23.

maintain a well-ordered society.[207] This authority allows leeway and room for disagreement on many aspects of natural law.[208] It acknowledges that systems built by people are flawed, but that stable institutions ultimately require someone to have the final say.[209]

In addition to supporting the positive law framework, natural law theory also justifies Natural Law Avoidance by recognizing and reinforcing the inevitably moral character of law.[210] All laws derive at least some of their force from extra-legal ideas.[211] And, as a result, enacted laws can impute principles of morality on otherwise morally neutral conduct.[212]

Natural Law Avoidance helps judges maintain the balance between positive law and extra-legal morality by steering them away from controversy. This canon of interpretation recognizes that not all laws are moral edicts,[213] while also acknowledging that moral hazard and confusion develop when positive law violates natural law. By encouraging judges to avoid legal interpretations that violate natural law, Natural Law Avoidance reduces these risks.

2. Overlap with Other Canons of Interpretation

The existence and authority of a Natural Law Avoidance canon is further supported by its overlap with other commonly recognized canons of interpretation. This overlap is a consequence of natural law's prominence in

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207. *Id.*

208. Even applying natural-law interpretation wholesale, some legal issues are not "inexorably dictated by reason and will vary according to circumstances." *Id.* at 22. The process of resolving these discrepancies is called "*determinatio.*" *Id.*

209. *Id.* at 23.

210. Even the staunchest legal positivists recognize that laws would be pointless if they did not, to some degree, preserve human societies. H.L.A. HART, THE CONCEPT OF LAW 189, 193 (2d ed. 1961) ("[W]ithout such a [minimum content of natural law,] laws and morals could not forward the minimum purpose of survival which men have in associating with each other."). Most positivists, however, minimize Hart's concession. *See* BIX, *supra* note 1, at 46 (explaining Hart's position as "showing that law and morality often *do* overlap, without there being any necessary connection between the two").

211. *See* John Finnis, *Law and What I Truly Should Decide*, 48 AM. J. JURIS. 107, 107–09 (2003) (explaining how the question "why is law?" logically proceeds the question "what is law?").

212. According to Joseph Raz, the law does not, in fact, create moral reasons for action, but only *purports* to create moral reasons for action. BIX, *supra* note 1, at 75 (citing JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 199 (1994)). However, so long as following or not following the law has a moral connotation in society, this subtle distinction will be lost on the average American.

213. *See, e.g.*, 21 U.S.C. §§ 331, 333, 343 (making it a crime to misbrand food).

early America and its far-reaching influence on American jurisprudence.[214] One commentator remarked that "what we now call canons of construction were often said to be principles of natural law."[215]

It's unsurprising then that canons like the "doctrine of absurdity," "the presumption against change in common law," and the "mens rea canon" all bear some derivative relationship to Natural Law Avoidance. These canons might even be considered a species of Natural Law Avoidance, since, by their very function, they help avoid the violation of natural law. It is beyond the scope of this Comment to analyze the full catalogue of interpretive canons, but there are likely many others that further these same principles.

a. The Absurdity Doctrine

One of the better-known canons of interpretation, the absurdity doctrine, allows a judicial interpreter to disregard or correct a statute if a literal reading of the text would produce unreasonable results.[216] This canon derives in part from the common sense need for judges to remedy obvious legislative mistakes and "scrivener's error[s]."[217] But, even beyond typographical issues, the canon allows judges to ignore or correct a statute when it "produces a disposition that makes no substantive sense."[218]

In addition to being grounded in common sense, this canon traces its lineage to natural law.[219] For instance, in the 1832 Missouri case of *Jim v. State*, the parties argued that "where some collateral consequence arises out of the general words of a statute, which is unreasonable and contrary to natural law, the courts . . . are at liberty to expound the statute by equity and *quoad hoc* disregard it."[220] Applying this early formulation of the absurdity doctrine, the court found that a slave-owning judge could not decide his own case by presiding over the murder trial of his slave.[221] Despite conflicting statutes that created doubt about the court's ability to change venue, the court found an alternative natural-law-based outcome consistent with "the common law and a sound construction."[222]

In one sense, Natural Law Avoidance is just the absurdity doctrine, expanded and watered down. In cases like *Jim v. State*, a clear violation of

214. BANNER, *supra* note 6, at 243–44.
215. *Id.* at 244.
216. *See id.* at 234.
217. SCALIA & GARNER, *supra* note 152, at 234.
218. *Id.* at 235.
219. *See* HELMHOLZ, *supra* note 3, at 166.
220. Jim v. State, 3 Mo. 147, 158–59 (1832).
221. *Id.* at 177.
222. *Id.* at 178.

natural law helped the presiding judge to conclude that the offending statute was absurd.[223] Natural Law Avoidance goes beyond this doctrine by giving an expressly moralistic version of absurdity. But Natural Law Avoidance is also watered down because, unlike the absurdity doctrine, it does not permit a judge to revise an "absurd" statute.[224] If a statute is absurd, as in nonsensical or self-contradictory, the courts are free to amend.[225] But if a legislative statement is "absurd" in a moralistic sense, Natural Law Avoidance only allows a narrow reading or a resolution of ambiguity in favor of natural law.

b. Presumption Against Change in Common Law

According to this canon, "statutes in derogation of the common law are to be strictly construed. . . . [They] will not be interpreted as changing the common law unless they effect the change with clarity."[226] On one hand, this canon might be understood as deriving from principles of stability and continuity.[227] However, it can also be fairly read as a principle supporting natural law.

Eighteenth-century judges applying the common law understood themselves to be *finding* the law as opposed to making new law.[228] One of the most common ways these laws could be "found" was by reference to natural law.[229] While our understanding of natural law might vary at different times, the natural law itself is supposed to be unchanging.[230] In this way, the laws of nature and the common law were deeply interwoven.

The presumption against change in common law therefore overlaps substantially with Natural Law Avoidance. So far as the common law formalizes numerous rules that have been derived from natural law, the

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223. *Id.*

224. Scalia and Garner caution against an expanded definition of absurdity because judges are sometimes tempted to superimpose their own view of what is "reasonable." SCALIA & GARNER, *supra* note 152, at 237. Natural Law Avoidance, however, is different because it does not allow judges to "correct" statutes and, more importantly, because natural law ideas can be criticized more readily than personal notions of "reasonableness."

225. *Id.* at 234–35.

226. *Id.* at 318.

227. *See id.*

228. BANNER, *supra* note 6, at 46; *see also supra* Part I.

229. BANNER, *supra* note 6, at 46–68.

230. *See* R. D. Lumb, *Natural Law—an Unchanging Standard?*, 6 CATH. LAW. 224, 224–25 (1960) (describing how natural law can be added to or "perfected," but not diminished); THOMAS AQUINAS, SUMMA THEOLOGIAE I-II 94.5 (Fathers of the English Dominican Province trans., 2d and rev. ed. 1920, online ed. 2017), https://www.newadvent.org/summa/2096.htm [https://perma.cc/D5NV-3ZBC] (stating that "natural law is altogether unchangeable in its first principles," but acknowledging that it may be applied differently to specific circumstances).

presumption against change in common law requires judges to perform a nascent version of Natural Law Avoidance. By preserving the common law, they are also preserving the natural law as it was previously understood. More explicit use of Natural Law Avoidance would expand the stabilizing benefits of the presumption against change in common law by also protecting natural law principles that have not been formalized.

c. Mens Rea Canon

In recent cases, the Supreme Court has read a state-of-mind component into a criminal statute that was otherwise silent on the issue of mens rea.[231] The use of this canon can be traced directly to ideas of natural law.[232] For instance, the Missouri court in *State v. Reilly* invoked principles of natural law to justify an interpretation similar to the mens rea canon.[233] As they explained, a man cannot be found guilty or innocent of accidental embezzlement without violating "[t]he universality of the natural law which deems no one to merit punishment unless he intended evil."[234] This principle itself can be traced back to the roman maxim *actus non facit reum nisi mens sit rea*—"an act does not constitute a crime unless there is criminal intent."[235]

The mens rea canon might be understood to derive from the pre-existing Natural Law Avoidance canon. And, even more significantly, the mens rea canon sometimes still requires Natural Law Avoidance for its execution. This is because certain crimes do not require a mens rea and "[no court] has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not."[236] Therefore, courts applying the mens rea canon must often look elsewhere for guidance.[237] Principles like "the canon of imputed common law meaning" can sometimes provide the necessary supplement.[238] But Natural Law Avoidance can also help.

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231. *See, e.g.*, Dean v. United States, 556 U.S. 568, 574–75 (2009); United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994).

232. *See* BANNER, *supra* note 6, at 244 ("[The mens rea canon] also began as a principle of natural law.").

233. State v. Reilly, 4 Mo. App. 392, 396–99 (1877); *see also supra* Section I.C.

234. *Reilly*, 4 Mo. App. at 397.

235. SCALIA & GARNER, *supra* note 152, at 303.

236. Morissette v. United States, 342 U.S. 246, 260 (1952).

237. *See* SCALIA & GARNER, *supra* note 152, at 304–12 (discussing the various factors that courts consider when deciding to apply the mens rea canon).

238. *Id.* at 306, 320.

d. Criticism of the Overlap with Other Canons

Some critics might claim the use of natural-law-derivative canons makes Natural Law Avoidance unnecessary. However, the opposite is true. Like other canons of interpretation, Natural Law Avoidance is a small part of the unified interpretive law.[239] It's not surprising then that some overlap is seen among other better recognized canons. The desuetude canon, for instance, states that a statute is not generally repealed by nonuse.[240] The presumption against implied repeal builds on this principle to further stabilize legislative enactments.[241] Both canons insist upon legislative clarity and favor legislative continuity over change, but the canons are not identical. In a similar way, the absurdity doctrine, the presumption against change in common law, and the mens rea canon all build on Natural Law Avoidance to achieve a unified result.

These canons, and many others, are derived directly from Natural Law Avoidance. All of them developed to help judges avoid the violation of natural law. And many go even further than avoidance, allowing direct judicial intervention. In one sense, these canons are species of Natural Law Avoidance—however, they are also independent. Their natural law pedigree helps justify the principles behind Natural Law Avoidance. But their differences demonstrate the need for an independent Natural Law Avoidance canon. Together with these other canons, Natural Law Avoidance adds cogency and depth to the larger pattern of interpretive law.

III. THE CANON OF NATURAL LAW AVOIDANCE IN CONTEMPORARY AMERICA

The record shows that Natural Law Avoidance existed historically. And a thorough analysis of these interpretive methods suggests that it rose to the level of a "legal canon." But does this canon still apply? Or is it merely a historical artifact? Answering these questions will require investigating the rules of change that govern legal canons and situating Natural Law Avoidance within a broader interpretive philosophy.

Because of its historical character, Natural Law Avoidance will be most accessible for those jurists who apply originalism. As an "original interpretive method" it provides insight into the original meaning of historic

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239. *See id.* at 59 ("No canon of interpretation is absolute. Each may be overcome by the strength of differing principals that point in other directions.").

240. *Id.* at 336.

241. *See id.* at 327.

documents, including the Constitution.[242] In addition, as an "adoption rule," it may have been incorporated in older statutes at the time of their enactment.[243]

But even scholars who disavow originalism might support Natural Law Avoidance if it is conceived as an "application rule." Application rules provide a common-law-like legal doctrine that dictates how judges should read future statutes.[244] Like other forms of common law, they remain valid if no rules of change modify their authority. Examining how these rules apply to Natural Law Avoidance, it becomes clear that the canon remains valid.

A. Interpreting Older Laws Under Natural Law Avoidance

In its simplest form, originalism is a philosophy of judicial interpretation holding that the Constitution, and other early legal documents, retain their original meaning.[245] Understanding and applying original meaning requires special focus on the intentions of drafters and the public understanding of legal documents at the time of their enactment.[246] And because modern jurists owe a debt to previous generations, this original meaning is *binding*.[247]

Beyond these basic principles there is substantial debate about the best way to "do" originalism.[248] Scholars disagree, for instance, on the most effective way to parse original intentions and define original public meaning.[249] But even without addressing these nuances, early interpretive principles like Natural Law Avoidance can provide useful guidance.

The scholars John McGinnis and Michael Rappaport have advocated a particular form of originalism they call *Original Methods Originalism*.[250]

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242. *See generally* McGinnis & Rappaport, *supra* note 18 (defending the use of "original methods originalism" to interpret the Constitution based on the "content of the interpretive rules in place when [it] was enacted").

243. *See* Baude & Sachs, *supra* note 148, at 1133.

244. *Id.* at 1133–34.

245 *See* WURMAN, *supra* note 94, at 11.

246. *Id.* at 11.

247. *See id.* at 2–3.

248. *Compare* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971) (focusing on the intention of the drafters), *with* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 56 (2006) (focusing on the original perspective of a hypothetical reasonable observer).

249. *See, e.g.*, WURMAN, *supra* note 94, at 110 (arguing that original public meaning (the "sense" of the words) is distinct from its application to real world facts (the "reference" or "referent")).

250. *See generally* McGinnis & Rappaport, *supra* note 18, at 751–52.

Under this variation, canons of interpretation hold the key to understanding both original public meaning and original intent.[251] As they explain:

> To find the original intent of the Constitution's enactors, one must look to the interpretive rules that the enactors expected would be employed to understand their words. Similarly, to find what an informed speaker of the language would have understood the Constitution's meaning to be, one must look to the interpretive rules that were customarily applied to such a document.[252]

So, regardless of how originalist thinkers define original intent and original meaning, interpretive methods like Natural Law Avoidance provide invaluable insight.[253]

This framework is primarily applicable to the Constitution, but it has parallel implications for statutory interpretation and textualism.[254] Legislatures and other legal bodies are presumed to author legal documents with an awareness of unwritten legal rules that govern interpretation. It's fair then to assume that early legislatures would have been conscious of the potential natural law implications of early laws. [255]

Related to this broader understanding of originalism is the concept of adoption rules.[256] In general, new legal rules operate upon the legal facts present when they are enacted. So, for instance, when the legislature passes an enabling act to establish a new administrative body, that act incorporates the bulk of existing administrative law.[257] Until those rules are affirmatively modified or revoked, they are absorbed in the enabling act as defaults.[258] This incorporation function includes preexisting default rules in the same way that

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251. *Id.* at 752.

252. *Id.*

253. *See id.*

254. While some scholars are careful to draw a sharp distinction between originalism and textualism,

> if originalism means looking at the text, the historical background, the historical purposes, the intent of the authors, linguistic conventions, and so on to try to assess what the words of the Constitution (or any legal text) *mean*, and subsequently what legal effect that meaning has, then that seems no different than textualism.

WURMAN, *supra* note 94, at 131.

255. *See* Baude & Sachs, *supra* note 148, at 1123.

256. *Id.* at 1133.

257. *See id.* at 1133–34 (outlining similar examples).

258. *See id.*

a contract automatically incorporates provisions of the Uniform Commercial Code.[259]

Like contractual provisions or default administrative rules, it is possible to conceive interpretive canons as another background legal principle incorporated at the time of enactment.[260] If this is true, then "the version of the [interpretive] rule relevant to a particular text is the one that governed at the time the text was adopted and made its impact on the law."[261] And unless that interpretive principle is explicitly revoked or removed from the legal landscape, it will continue to operate under the laws where it was adopted.[262] If this is the case, then all laws enacted during the heyday of natural law are rightly interpreted using Natural Law Avoidance.

B. Interpreting New Laws Under Natural Law Avoidance

Unfortunately, conceptualizing Natural Law Avoidance as a principle of originalism or a rule of adoption has certain limitations. First, it isn't clear that every interpretive canon qualifies as a rule of adoption.[263] And an argument can be made that *only* linguistic canons are properly understood this way since they directly impact the law's written meaning.[264] To the extent that Natural Law Avoidance is properly defined as a "legal" and not a linguistic canon, it may be disqualified as an adoption rule.[265]

Second, jurists who do not subscribe to originalism might be skeptical of Natural Law Avoidance. In contrast to originalism, "living constitutionalism" is the idea that the Constitution is a dynamic document that has evolved over the centuries to reflect contemporary social norms.[266] Jurists subscribing to this philosophy are less likely to care about original interpretive methods and

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259. *Id.* at 1094–95.

260. *Id.* at 1133.

261. *Id.*

262. *See id.* ("[O]ur legal rules persist over time, until something legally significant happens to alter them.").

263. *Id.* at 1135–36.

264. Some legal canons may also be rules of adoption, but these appear to be the exception. *Id.* at 1136 ("Adherence to the Constitution requires adherence to the original adoption rules (which happened to fix both the original linguistic rules and *some* of the nonlinguistic rules) . . . ."). It's uncertain, but not impossible that Natural Law Avoidance is one of these exceptions.

265. It is possible that Natural Law Avoidance is also a linguistic canon. *See supra* Section I.C.

266. *See* Gompers v. United States, 233 U.S. 604, 610 (1914) ("[T]he provisions of the Constitution are not mathematical formulas . . . they are organic, living institutions . . . .").

how they interact with original intent and original public meaning.[267] However, even under this more flexible interpretive framework, it is possible Natural Law Avoidance is still relevant.

Rather than an adoption rule, Natural Law Avoidance can also be conceived as an "application rule."[268] These are interpretive rules that provide forward-looking instructions similar to common law rules; unlike adoption rules, they are not limited to specific laws enacted at specific times.[269] Rather, they apply to *all* laws, provided they *remain in effect*.[270]

Unless a rule of application is incorporated into the Constitution at the time of founding,[271] it is mutable and changeable in the same way as other black letter law.[272] Framing Natural Law Avoidance in this way, the question becomes: Has anything happened to change the legal status of Natural Law Avoidance?

1. Secondary Rules of Change Governing Legal Canons

The legal status of Natural Law Avoidance as a rule of application will depend on the secondary rules of change governing interpretive canons.[273] Like the rules of recognition discussed in Section II.B, secondary rules of change overlay and govern the operation of primary "substantive" legal rules.[274] Where rules of recognition help identify what counts as primary law, rules of change articulate how legal devices evolve over time.[275]

Identifying rules of change is relatively simple in most areas. The Constitution, for instance, has Article V amendments that allow deliberate

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267. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 43–46 (2010) ("It is one thing to be commanded by a legislature we elected last year . . . [but] quite another to be commanded by the people who assembled in the Constitutional Convention and the state ratifying conventions in the late eighteenth century.").

268. *See* Baude & Sachs, *supra* note 148, at 1133–34.

269. *See id.*

270. Sachs, *supra* note 202, at 840 ("[U]ntil something happens to trigger [rules of change], everything that's already in the system is supposed to stay the same.").

271. One example of a constitutionally incorporated rule of application is stare decisis. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1865 (2012). It's possible that Natural Law Avoidance was a common law rule incorporated at the founding, however, discussion of that possibility is beyond the scope of this Comment.

272. *See* Baude & Sachs, *supra* note 148, at 1136 ("[A]n interpretive rule's force turns on whether or not it was good law, and if so, of what kind.").

273. Sachs, *supra* note 202, at 840–41.

274. *See id.*

275. *Id.*; *see also* Zoldan, *supra* note 143, at 648 (acknowledging that "the corpus of interpretive rules considered canonical changes over time").

changes under certain circumstances.[276] Statutes, likewise, can be repealed or modified by the legislature.[277] And changes in the common law can occur through changes in custom, court precedent, or express repeal.[278]

It appears self-evident that rules of interpretation can likewise change, but it is less obvious who has the power to change them and under what circumstances.[279] While Natural Law Avoidance and other interpretive canons are similar to common law, their secondary rules of change are more complicated.[280]

Some commentators have argued that the legislature has unbridled power to modify and replace canons of interpretation.[281] This makes sense to the extent that canons resemble common law; however, there appear to be exceptions to the ordinary rule.[282] For instance, the legislature cannot modify rules of adoption and other interpretive principles incorporated in the text of the Constitution.[283] And the rules against legislative entrenchment likely prevent Congress from abolishing doctrines like implied repeal that impact the power of future legislatures.[284]

The power of judges to modify interpretive rules also appears somewhat limited.[285] As a matter of principle, if courts have unbridled authority to change the way they read important documents, it might undermine the separation of powers.[286] And, even when the Supreme Court appears to develop and promulgate new interpretive doctrine, the act is rarely accomplished in a single decision.[287]

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276. U.S. CONST. art. V. Whether there are other unauthorized ways to change the Constitution is subject to some debate. *See* Sachs, *supra* note 202, at 868 (citing BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014)).

277. *See, e.g.*, National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568, 577 (repealing the national maximum speed limit). Congress may also repeal statutes by implication, although implied repeal is "very much disfavored." SCALIA & GARNER, *supra* note 152, at 327.

278. *See* Sachs, *supra* note 202, at 839.

279. *See* Baude & Sachs, *supra* note 148, at 1133–40.

280. *See id.*

281. *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

282. Sachs, *supra* note 271, at 1865; Baude & Sachs, *supra* note 148, at 1118–19.

283. *See* Sachs, *supra* note 271, at 1865.

284. Baude & Sachs, *supra* note 148, at 1140.

285. *Id.* at 1138–39; *see also* Zoldan, *supra* note 143, at 637–38.

286. *See* Baude & Sachs, *supra* note 148, at 1138–39.

287. Some scholars have proposed that "somewhere in the range of seven to ten Supreme Court cases is usually appropriate" to establish an interpretive principle as a canon. Zoldan, *supra* note 143, at 657 (citing Krishnakumar & Nourse, *supra* note 153, at 183–84, but acknowledging that an exact number of decisions may be impossible to determine).

The constitutional-doubt canon, for instance, first appeared at the end of the nineteenth century.[288] But it wasn't until the late twentieth century that the canon was described as "beyond debate."[289] It's unclear from a legal perspective what happened in these intervening years. Did the Supreme Court really invent a canon, or did it simply crystalize existing ideas about the law?[290]

These limitations on the rules of change governing the law of interpretation have led some scholars to define interpretive canons as "general law."[291] General laws differ from ordinary common law in that they "emerge[] from patterns followed in many different jurisdictions."[292] These general laws are not confined to the power of a single legal body, but derive instead from longstanding legal tradition, varying across different legal bodies.[293] They are, as a consequence, both easier and more difficult to modify than ordinary common law.

Take for example the surplusage canon.[294] The Sixth Circuit has recognized several limiting principles to this rule.[295] For instance, it has held that redundancy in a statute can sometimes be a way of indicating emphasis.[296] It has also held that the court will not consider surplusage in an isolated provision, but only in the context of the entire statute.[297] Each circuit

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288. *See, e.g.*, Grenada Cnty. Supervisors v. Brown, 112 U.S. 261, 269 (1884) (citing a legal treatise and the Mississippi Supreme Court to support the proposition that "if possible, a construction should be given to [a statute] that will render it free from constitutional objection").

289. SCALIA & GARNER, *supra* note 152, at 247.

290. *See* McGinnis & Rappaport, *supra* note 18, at 775 ("There is evidence that, in the early republic, when two interpretations were equally plausible, judges were required to assume the constitutionality of the legislation."). A similar phenomenon may be taking place with the Major Questions Doctrine. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

291. Baude & Sachs, *supra* note 148, at 1137.

292. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006).

293. Baude & Sachs, *supra* note 148, at 1137 (citing Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842)).

294. SCALIA & GARNER, *supra* note 152, at 174 ("If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

295. Squire Patton Boggs*, Sixth Circuit Precedent Offers Responses to Four Common Interpretive Canon Arguments*, SIXTH CIR. APP. BLOG (Nov. 11, 2015), https://www.sixthcircuitappellateblog.com/news-and-analysis/sixth-circuit-precedent-offers-responses-to-four-common-interpretive-canon-arguments/ [https://perma.cc/Y2ZW-3FVU].

296. Doe v. Boland, 698 F.3d 877, 881 (6th Cir. 2012) ("[T]he presumption against surplusage does not apply to doublets—two ways of saying the same thing that reinforce its meaning." (citing Freeman v. Quicken Loans, Inc., 566 U.S. 624, 634–36 (2012)).

297. *See* Ford Motor Co. v. United States, 768 F.3d 580, 592 (6th Cir. 2014) (declining an interpretation that would "rescue one sentence from surplusage" while "that reading would frustrate or violate other provisions").

can make these types of modifications and specifications, but not even the Supreme Court can abolish the surplusage canon completely.[298]

In this way, the validity of Natural Law Avoidance will depend on the "regular course of decisions."[299] Canons of interpretation will develop or disappear over years and generations, being "slowly absorbed or rejected as general law, rather than imposed through the fiat of a single majority."[300] Certain canons, like Natural Law Avoidance, might fall out of fashion. But, if they do not disappear entirely, "[s]o long as judges are taking existing rules off the shelf, so to speak, no issue of creative authority arises."[301] Understanding the modern status of Natural Law Avoidance, therefore, requires a more holistic look at changes in the American legal tradition.

2. Changes in the Law Concerning Natural Law Avoidance

It is "a common assumption of legal systems, that the law stays the same until it's lawfully changed."[302] So, like other unwritten laws, "legal" canons of interpretation continue in effect unless "something legally relevant happen[s] to change them."[303]

As far as the author of this Comment is aware, there has not been a legislative act banning Natural Law Avoidance or other considerations of natural law in statutory interpretation. This may be unsurprising since the interpretive practices incorporated in "Natural Law Avoidance" have not been previously collected under one name. But, because canons of interpretation are substantive law, they do not disappear simply because they haven't been used.[304] And the strong presumption against statutory changes to common law provides additional protection against implied repeal.[305]

Therefore, to the extent that interpretive canons are a species of common law, the legislature would need to "effect the change with clarity" if it wanted

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298. *Cf.* Zoldan, *supra* note 143, at 655 (explaining that the Supreme Court is "uniquely positioned to influence interpretive methodology," but acknowledging that interpretive principles are part of the "same transjurisdictional common law ecosystem").

299. Baude & Sachs, *supra* note 148, at 1137 (quoting Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 15 (2001)).

300. *Id.*

301. *Id.* at 1138.

302. Sachs, *supra* note 202, at 818.

303. *See id.* at 819; *see also* Sections II.A–B, discussing "legal" vs. "linguistic" canons of interpretation.

304. SCALIA & GARNER, *supra* note 152, at 336 ("A statute is not repealed by nonuse or desuetude.").

305. *Id.* at 318 ("A [canon] will be construed to alter the common law only when that disposition is clear.").

to remove Natural Law Avoidance from the interpretive canon.[306] That has not happened. "If anything, the lack of knowledge about a canon *reinforces* the strength of that canon: what legislators were unaware of, they're unlikely to have displaced."[307]

Opponents of Natural Law Avoidance might argue that courts' changing attitude toward natural law presents a shift in general law and obviates Natural Law Avoidance. This argument deserves some attention, but it ultimately fails. Generalized concerns about natural law as a normative theory are not enough to overrule Natural Law Avoidance. And even though it has fallen out of fashion, natural law continues to be legally relevant.

a. Changing Attitudes Towards Natural Law

Criticism of natural law was rare at the time of founding, but it slowly became more prominent over the next one hundred years.[308] The widespread adoption of written constitutions made judges doubtful about the authority of natural law to overrule statutes, since a "higher" written law already provided guidance.[309] And, at the same time, the separation between law and religion widened,[310] and a dramatic increase in legal publishing made arguments invoking natural law less effective than arguments invoking precedent.[311]

Specific debates about controversial issues further undermined natural law's authority as a jurisprudential theory.[312] It was routinely invoked to support both sides of contentious issues like slavery, segregation, and the death penalty,[313] and by the 1870s, discussions of natural law in court began to disappear.[314] In recent decades, some jurists have become openly hostile to natural law, and it is difficult to imagine a modern advocate using it to justify his position.[315]

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306. *See id.*

307. Baude & Sachs, *supra* note 148, at 1123.

308. BANNER, *supra* note 6, at 167–69 ("[N]ear-consensus on the appropriateness of using natural law rested on a foundation that had slowly been cracking for much of the nineteenth century . . . ."). Iredell's opinion in *Minge v. Gilmour* is one of the earliest public expressions of these concerns. *Id.* at 76–78.

309. *See id.* at 71–95.

310. *See id.* at 96–118.

311. *See id.* at 119–36.

312. *See id.* at 160–63.

313. *See id.* at 137–63.

314. *See id.* at 169.

315. *See, e.g.*, *On the Nomination of Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 111 (1993).

But, notwithstanding these changes, most of the skepticism and hostility toward natural law concern natural law's power to override the Constitution and *not* more subtle interpretive applications.[316] Take, for example, Justice Black's famous use of "natural law" to criticize his colleagues.[317] In *Adamson v. California*, he chided the majority opinion for using "boundless power under 'natural law' [to] periodically . . . expand and contract constitutional standards."[318] But, even as he disparaged this natural law "due process," he also endorsed the importance of interpretation in expounding the Constitution.[319] As he explained, "[judicial review], of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision thereby affecting policy."[320]

The problem, as Justice Black framed it, wasn't natural law per se, but natural law decoupled from Constitutional text.[321] His criticism was aimed less at natural law than at judicial whim and the Court's expanding power. These criticisms, therefore, have little to do with Natural Law Avoidance.

b. Failed Substitutes for Natural Law

Following the popular decline of natural law in court, legal academics and practitioners eagerly sought a replacement.[322] "Natural law had occupied a significant place in the legal system. As it slipped away, it left a big hole."[323] However, the attempts to find a replacement almost universally failed, and natural law was left as an important, albeit understated part of our legal tradition.[324] It is unclear that these attempts to overthrow natural law have undermined the general law concerning Natural Law Avoidance.

The first attempt to replace natural law was "Historical Jurisprudence."[325] Scholars began delving more deeply into the origins of common law doctrine

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316. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 387–90 (1798).

317. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 515 (1965) (Black, J., dissenting).

318. Adamson v. California, 332 U.S. 46, 69 (1947), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

319. *Id.* at 77, 90–91.

320. *Id.* at 90–91.

321. *See also* George, *supra* note 1, at 2302 ("[N]o proposition central to [Justice] Black's criticism of the opinion for the Court in *Griswold* contradicts any proposition I hold or have asserted in defending natural law.").

322. BANNER, *supra* note 6, at 189.

323. *Id.* at 188.

324. *Id.* at 241–49; *id.* at 241 ("Despite the expulsion of natural law from the explicit discourse of the American legal system, natural law has continued to exert some influence.").

325. *Id.* at 191.

to find answers to difficult legal questions.[326] This historical analysis, however, was a largely formalistic departure from natural law given the interrelationship between natural law and common law and the influence of early Roman law on American jurisprudence.[327] In the words of Roscoe Pound, historical jurisprudence "preserved the method of [its] predecessors, merely substituting new premises."[328] By the early twentieth century, historical jurisprudence had fizzled out.[329]

Around that same time, scholars introduced the so-called Law and Economics theory.[330] Natural law had always acknowledged that natural phenomena held certain clues about what the law is and should be.[331] The new economic theories focused instead on purely "scientific" and mathematical phenomena, eschewing other principles of natural law philosophy.[332] Instead of the "common good" they invoked "the great laws which govern the industrial growth," and the "natural law of supply and demand."[333] And while the more general use of economics still figures prominently in American jurisprudence, these grandiose attempts to substitute economic theory for natural law faded soon after their inception.[334]

Last in the series of attempts to replace natural law was substantive due process.[335] Under this doctrine, courts extrapolated the Fifth Amendment's guarantee of "due process" to incorporate ideas that largely resembled natural law.[336]

The rhetorical parallels between substantive due process and natural law are striking. Thomas Cooley, a Michigan Supreme Court justice and early proponent of substantive due process, explained that "[t]here is no rule or principle known to our system under which private property can be taken

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326. *Id.*

327. *Id.* at 194.

328. *See* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 600 (1911) (referring not to natural law, but to the "philosophical school" of jurisprudence).

329. BANNER, *supra* note 6, at 194.

330. *Id.* at 195.

331. *See* BIX, *supra* note 1, at 71 (explaining that Cicero and other Greek and Roman writers sometimes referred to natural law as those laws "derived from or . . . expressed in nature, that is, the physical world about us").

332. *See* BANNER, *supra* note 6, at 195.

333. *Id.* at 195–96 (citations omitted).

334. *Id.* at 197.

335. *Id.* at 205; Banner discuses additional theories that sought to replace natural law including "Classical Orthodoxy" and legal realism. The examples above the line are meant to be illustrative rather than exhaustive.

336. *See id.* at 207.

from one man and transferred to another for private use."[337] His words echoed Justice Chase in *Calder v. Bull* when he described a "flagrant abuse of legislative power" under natural law.[338] Like laws that violate substantive due process, laws that violate natural law "take away that security for personal liberty, or private property, for the protection whereof the government was established."[339]

These various theories suggest that, even if natural law has fallen out of fashion, the general law has not changed. Indeed, substantive due process arguably sought to resurrect a version of natural-law interpretation much more expansive than the humble Natural Law Avoidance proposed here.[340] These changes, therefore, are unlikely to have undermined the interpretive canon.

c. The Continued Relevance of Natural Law

In addition to inspiring various copy-cat jurisprudential theories, natural law has had a lasting impact on substantive legal doctrine.[341] Various ideas in property law, family law, and civil procedure have all derived directly from natural law.[342] And, as discussed in Part II, natural law has inspired various canons of interpretation that continue to guide judicial decisionmakers.[343]

Even if we no longer invoke natural law explicitly, these legal rules and principles are thoroughly engrained in our system.[344] In the words of one commentator:

> To a great extent, courts are still doing what they always did when positive law offers little guidance. Courts try to discern

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337. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357 (Leonard W. Levy ed., De Capo Press 1972) (1868).

338. Calder v. Bull, 3 U.S. 386, 388 (1798).

339. *Id.*; *see also* BANNER, *supra* note 6, at 207. Depending on how one views substantive due process, it may be possible to develop a canon similar to Natural Law Avoidance based instead on a combination of substantive due process and the constitutional-doubt canon. *Cf.* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 861–64 (2020) (suggesting that Thomas Cooley's original idea of substantive due process may be better understood as a principle of statutory construction). But given substantive due process's own tenuous position in modern jurisprudence, the natural-law-historical justification is likely preferable. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 330–37 (2022) (Thomas, J., concurring).

340. *See supra* Section I.A, discussing the power of natural law to invalidate written laws.

341. HELMHOLZ, *supra* note 3, at 151–70.

342. *Id.* at 151–61.

343. *Supra* Section II.C.2.

344. *See* BANNER, *supra* note 6, at 241–46.

> conventional practices, and they try to assess the policy implications of the decision. Ultimately, they reach the result they find most reasonable. We no longer use the term "natural law" to describe this process, but it is similar . . . .[345]

It is true that popular support for natural law has waned, and most academics have attempted to "replace" natural law with other jurisprudential theories. But, if these occurrences have changed the general law, then courts have a more serious problem. Not just Natural Law Avoidance, but other canons of interpretation would be deemed suspect. Bedrock principles of property law and civil procedure would also be called into question.

Rather than refigure our legal system, the more logical conclusion is that natural-law-derived legal rules remain intact. Natural Law Avoidance may have fallen out of fashion, but nothing legally significant has modified it *as substantive, unwritten law*. Consequently, there is nothing to stop judges from taking up Natural Law Avoidance and applying it once again.[346]

IV. CONCLUSION

Natural Law Avoidance carves out a narrow but noteworthy space for judges to apply natural law to contemporary legal problems. Given the limits of language and logic, close cases are inevitable. But, even when the law leaves ambiguity, judges are still accountable to something beyond personal preference.[347] Looking to interpretive canons is the first step. And Natural Law Avoidance adds another useful canon to judges' repertoire.

Exploring new moral spheres might be appropriate in the legislature, but the judiciary's role is less flexible. In those rare instances when judges look to normative principles to help decide cases, Natural Law Avoidance helps judges to maintain the balance between positive and natural law by steering them away from controversy.

Additional research is needed to understand how Natural Law Avoidance intersects with natural law as a jurisprudential theory. A purely historical understanding of natural law will prove useful for judges applying originalism. But it's also possible that contemporary ideas of natural law can

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345. *Id.* at 249.

346. *See* Baude & Sachs, *supra* note 148, at 1138.

347. *Id.* at 1145 ("[T]o the extent that normative commitments form part of our theories of the world, judges who make different normative judgments may well interpret the same texts differently. But these are 'normative' judgments in the sense that they're *judgments about norms*—particularly those held by other people—not in the sense that they involve first-order normative reasoning . . . .").

guide statutory interpretation insofar as they remain consistent with natural law's bedrock principles.[348] Extended consideration of this topic is, unfortunately, beyond the scope of this Comment. Hopefully, the analysis provided here can serve as a starting point for further discussion.

348. *See* Lumb, *supra* note 230, at 224–25.