Organic Natural Law: The Legal Philosophy of George Hugh Smith

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I. INTRODUCTION

A review of the legal philosophy of George H. Smith, a turn-of-the-century American lawyer, is instructive and insightful on certain issues currently debated in contemporary jurisprudence, such as indeterminacy in law and non-textual constitutional rights. Smith was a natural law philosopher in a time when the fashion in jurisprudence was totally opposed to natural law thinking. His view represents an incorporation of evolutionary ideas into natural law theory which received little attention at the time and is

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virtually unknown today. A review of Smith's work contributes to an understanding of the intellectual history of the late nineteenth century. Historically, his work is perhaps most significant not for its originality but for its advancement of ideas that were generally unacceptable to other thinkers of his time. As such, he represents an undercurrent of thinking that later surfaced in the twentieth century.

Smith's theory dispenses with a supernatural grounding for natural law and avoids some of the pitfalls of eighteenth century individualistic rationalism. While affected by the idea of evolution, which dominated almost all intellectual activity at the time, Smith's philosophy nevertheless keeps its evolutionary tendencies well in check. His views are subject to many serious criticisms, but his attempt to find the basis of law and legal decisions in reason and fundamental principles of morality offers insights that may be useful to those today who find moral relativism and explanations of law in terms of sheer political power unacceptable.

This Article examines Smith's personal background and traces the evolution of his intellectual philosophy. It reviews concepts of Smith's general philosophical scheme and discusses the legal and philosophical theories of Smith's contemporaries. It also examines Smith's concepts in light of other predominant legal theories. Finally, this Article examines how Smith was and is regarded by legal theorists and how his theories are applicable to legal thought today.

II. Smith's Personal Background

George Hugh Smith was born in Philadelphia in 1834. He was raised in Virginia, attended the Fairfax County Theological Seminary, and graduated from the Virginia Military Institute (VMI) in 1853. There is no record of any formal legal education, so it is likely that he briefly apprenticed in a law office—the most common way to become a lawyer in those days. In the years following graduation from VMI he became a schoolteacher, practiced law in the small town of Glenville, Virginia, became a road construction engineer in Washington Territory, and again briefly practiced law in Baltimore, Maryland. When the Civil War broke out, he received a commission in the Confederate Army by virtue of his training at VMI. Smith served

2. See Alumni Files, supra note 1.
3. See id.
with distinction for the Confederacy; he was captured and later returned in a prisoner exchange, fought in several major battles, and attained the rank of colonel.4

After the war ended, Smith spent two years in Mexico as a surveyor and cotton planter. He later moved to Los Angeles where he remained for the rest of his life practicing law. In 1870, Smith married Susan T. Glassell Patton, the widow of his first cousin, Colonel George S. Patton of the Confederate Army, and the sister of his law partner.5 Smith's step-grandson, named after him, was General George Smith Patton of World War II fame.

Smith was financially successful in his law practice. He also served as reporter of California Supreme Court Decisions in 1880-81, as state senator in 1887-88, and as Supreme Court Commissioner from 1900 to 1905. He completed his public career as Justice of the California Court of Appeals, second district, in the 1905-06 term, writing over 50 opinions.6 Apparently, he never became affiliated with any university as a law professor or legal scholar. However, in the course of his career, Smith wrote numerous law review articles, most of which appeared in the American Law Review. He also wrote four longer works on jurisprudence and legal philosophy and authored one book on logic before his death in 1915.7

III. SMITH'S INTELLECTUAL BACKGROUND

George H. Smith wrote at a time when Austinian positivism had gained ascendancy in jurisprudential circles.8 John Austin's seminal work,9 published in full posthumously in 1861, had a strong impact in England and in America. It was followed by books on jurisprudence that adopted Austin's major ideas and worked them out in various directions, modifying and changing minor points.10 This was called analytical jurisprudence and it

4. See id.
5. See id.
6. See Appendix B.
7. See Appendix A.
emphasized the separation of law from morality, the necessity for the use of rigorous terminology and logic, the identification and analysis of fundamental legal concepts, and the attribution of all law to political authority or sovereign will. Except for the rigorous use of logic, Smith was opposed to all of these ideas.

A second intellectual view influential at this time was that of historicism or legal evolution. The English pioneer of this perspective (although he also supported Austinian analysis) was Sir Henry Sumner Maine. The American advocates of legal evolution were William G. Hammond and James C. Carter. In this paradigm, law was viewed as the slowly evolving customs of the people; courts merely declared law, and law could not be deliberately changed by legislation, although legislation might be occasionally necessary to clarify the law. Smith was generally sympathetic to these ideas, although he thought that the evolutionists had missed the most important point—that cultural evolution has led, in advanced civilizations, to a close approximation of natural law by the positive legal system.

The theory of natural law had fallen out of favor during the second half of the nineteenth century. This was due in part to a general intellectual rejection of supernatural and metaphysical explanations in favor of a "scientific" explanation. The latter carried with it the notion of empirical science in England and America. Contributing to the demise of natural law in this period was the discovery and publicity of the wide range of human mores found in non-western cultures. These "strange" beliefs and practices suggested that traditional Judeo-Christian ideas were far from universal, and indeed, that there was no commonly accepted morality throughout the world. Smith, however, seemed oblivious to these influences, although his


11. Maine's first and most influential work was Sir Henry Sumner Maine, Ancient Law (London, John Murray 1861).
14. That is, that current legislation and case law reflect, for the most part, the principles of natural law. Or, put another way, the bulk of contemporary law is just.
15. However, one American who still advocated an eighteenth century view of natural rights at this time was James Dewitt Andrews. See James D. Andrews, American Law: A Treatise on the Jurisprudence, Constitution and Laws of the United States (1900).
notion of "scientific morality" perhaps made a bow toward the idol of science.

The influences on Smith were many as he was an avid reader. He apparently received a good classical education; he was fluent in Latin and almost as comfortable in Greek, and he exhibited a familiarity with many classical writings. In contrast, although he read German and French authors in translation, there is no indication that he was familiar with those languages. The main authors Smith relied on and whose ideas are reflected in Smith's writings are Aristotle, Thomas Hobbes, and Henry Sumner Maine. Of lesser influence are David Hume, Herbert Spencer, Mackeldy (German scholar of Roman Law), Joseph Story, Justinian (Institutes), French author Victor Cousin, and Blackstone. Curiously, he makes no reference to any writings of Oliver Wendell Holmes, Jr., or Roscoe Pound, the two most important American jurisprudential writers of Smith's time.

Smith criticized the philosophical view associated with Jeremy Bentham, John Austin, and Austin's follower, Thomas E. Holland. Indeed, much of the inspiration for the exposition of Smith's own philosophy is the refutation of the "erroneous and dangerous" Austinian view of the law. At least half of his work is devoted to proving the various fallacies of Austinian thinking.

Although Smith's jurisprudential writing spans a period of 28 years, from 1886 to 1914, his views did not change significantly during this period. The following discussion of his theory is taken mainly from two book-length pieces, *Elements of Right and of the Law*, and *The Theory of the State*..

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16. Late in his career, Smith also seems to have been impressed with the work of the Scotsman James Lorimer and the American William Graham Sumner.

17. For example, Smith challenges Austin's position that the sovereign's power must be unlimited. See e.g., *Theory*, infra note 20, at 310. He asserts that the actual political power of government is limited as a matter of fact, that the powers or rights of government are morally limited, and that legally government acts can be *ultra vires* as argued in the text below. See *infra* notes 63-68 and accompanying text. Smith also claims, contrary to Austin's position, that constitutional law is law, that there are natural rights, that international law is law, and that judicial precedents are not per se law. See e.g., *Theory*, *infra* note 20, at 293.

18. Although opposed to Austin's philosophy, Smith in his own works nevertheless made it a point to "analyze" in Austinian style the various kinds of rights and other legal concepts.

19. GEORGE H. SMITH, *ELEMENTS OF RIGHT AND OF THE LAW* (Chicago, Callahan & Co., 2d ed. 1887), [hereinafter ELEMENTS]. In the preface to the second edition, Smith states that the first edition, published in 1886, was consumed in a fire at the publisher's warehouse. *Id.* Therefore, the second edition is really the first (and last) to be available to the reading audience.

20. George H. Smith, *The Theory of the State*, 34 PROCE. AM. PHIL. SOC'Y 183 (Philadelphia, Mac Calla & Co. 1895), [hereinafter *Theory*]. This was the prize-winning essay in a contest sponsored by the American Philosophical Society and was published in its proceedings.
and a somewhat later article, Review of Current Theories of Jurisprudence. 21 Smith's work was known to some of the leading thinkers of the time, including John Henry Wigmore, 22 Sir Frederick Pollock, 23 and John Chipman Gray. 24 None of these theorists, however, were greatly impressed by what Smith had to say. Smith was sometimes quite polemic in his writing, calling lawyers "universally ignorant" and other scholars "foolish." 25 He was not always consistent in his use of terminology, and occasionally he flatly contradicted himself. However, these obvious slips will simply be ignored in this Article. This Article will present Smith's theory in its best light, 26 and will employ a more uniform terminology taken from Smith's most frequent ways of expressing himself.

IV. SMITH'S GENERAL PHILOSOPHICAL SCHEME

A. The Natural Society

The logical starting point of Smith's philosophy is his conception of the natural society. Unlike the natural law theories of Hobbes and Locke, Smith's theory has no need for a state of nature contrasting with a state of government created by a social contract; indeed, his conception of the natural society is not individualistic, but social. 27 Smith sees individuals as being born into a society that has carried with it from generation to generation certain ways of doing things, certain ideas of right and wrong, a common morality, and a common sense. He generally prefers to use the Greek term nomos to refer to this pervasive set of norms. 28 The rules and principles of


23. Sir Frederick Pollock, Review, 10 L. Q. REV. 99, 99-100 (1894) (refuting Smith's belief that all English lawyers implicitly accept the whole of Austin's philosophy).


26. Although I will offer some criticisms of Smith's work as the text proceeds, I will not critique his natural law philosophy as a whole. For a classic critique of natural law, much of it applicable to Smith, see HANS KELSEN, GENERAL THEORY OF LAW AND STATE 391 (Anders Wedberg trans., 1945).

27. See Theory, supra note 20, at 235-40.

28. See ELEMENTS, supra note 19, at 49-52. For an excellent history of the concept of nomos in western thought, see DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL
the nomos are, for the most part, learned through imitation, peer pressure, parental education, following examples, and trial and error. Although these mores are well known to anyone who has reached adulthood, they are known more in an intuitive sense than in a rational sense. People know what they should do in a given situation, but they may not be able to articulate the rule of action, especially in advance of the situation. Mankind's natural state is therefore not one of complete moral freedom, but one in which each individual acknowledges certain obligations and in turn believes she is entitled to certain corresponding rights.

From society to society, and from subgroup to subgroup within society, the nomos can vary. The morality of the Eskimo will be different from the morality of the New York merchant or the morality of the Australian Aborigine. Nevertheless, according to Smith, all societies observe certain fundamental principles of morality. He attributes this to a universal human nature, finding that "there is a substantial agreement as to fundamentals in the positive morality of all civilized nations, ancient and modern, and a considerable degree of conformity even among uncivilized and barbarous peoples."

The nomos, as Smith conceives it, are rules and principles that persons in a given social group follow, as seen objectively by an outside observer. But there is also a subjective side to the nomos: the conscience. As Smith states:

There is in some way generated in every man, as it were, a code of moral convictions or principles, by which in ordinary cases he instantaneously, and without reflection, judges his own actions and those of others to be right or wrong. There is also in every man a faculty—whether innate or acquired it is unnecessary here to inquire—by which he perceives the duty or moral necessity of conforming to the right. This perception is also accompanied by certain sentiments, as, for instance, the sentiment of approbation or disapprobation, with regard to his own actions or those of others, and with regard to the former, the sentiment of conscious rectitude or of remorse. The combination of these moral convictions with

Thought in the Western Legal Tradition (1990), especially chapter one entitled "Introduction: The Idea of Nomos."

29. The natural state of the human being is determined by his biological and psychological characteristics as they react against a background of scarcity of goods; however, life in society is one of the results of these basic characteristics (and hence "natural"), and life in society further modifies these characteristics so that, "modern man is almost wholly the product of the social influences to which he has been subjected." Theory, supra note 20, at 252.

30. See ELEMENTS, supra note 19, at 52; see also Theory, supra note 20, at 286; Review, supra note 21, at 838-39. See also CLIVE S. LEWIS, THE ABOLITION OF MAN (1947), for a more sophisticated argument along these lines.

31. ELEMENTS, supra note 19, at 52.
the faculty of perceiving the duty of conforming to them, and the accompanying sentiments, together constitute what is called conscience, the existence of which, whatever controversies there may be as to its nature, cannot be denied . . . .32

Thus, Smith’s natural society has its nomos, which is not a mental creation of the individual, but a product of cultural tradition. The individual’s conscience reflects that nomos from a subjective point of view. An individual may wish to exert her will in a way that injures another, and she may have the physical or economic power to do so, but her conscience will tell her otherwise, and she will not object to legal restraint as long as others are similarly restrained. The natural condition of the human being, therefore, is not one in which she is free to act as she wishes, but one in which she is obligated to act fairly and is entitled to the same from others.

B. Nomos and Scientific Morality

It might appear that the nomos is nothing more than common or popular morality and can claim no greater moral authority. Smith denies this proposition. He asserts that there are certain principles that appear in the morality of all peoples. This suggests that each society’s nomos contributes to or tends to achieve principles of universal validity, thereby establishing a case for the existence of such universal principles. Since we can observe those common principles, we are able to make inferences regarding fundamental and universal propositions.

Smith may have drawn on the thinking of Thomas E. Holland in formulating fundamental propositions deriving from universal practices. Holland says in his treatise on jurisprudence that all known legal systems display certain common characteristics and that a science of general jurisprudence must deal with these universals.33 While Holland mentions common moral phenomena, he is primarily concerned with the fundamental concepts of law or basic legal relationships, not principles of justice or natural laws.34 Smith, however, applies Holland’s line of thinking to fundamental moral principles.

32. See id. at 48-49. In discussing the conscience, Smith refers to the works of Hobbes and John Stuart Mill. See id. at 51 n.1, 52 n.1.

Suppose . . . that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods, and ideas common to every system of law.

Id.

34. Id.
Smith believes that ideally, the moral scientist would somehow first establish the basic principles of morality and then, with unfailing logic, deduce from these principles the consequences for individual cases. He thinks, however, that moral science has not reached a state in which this process is possible.\textsuperscript{35} Willing to accept half a loaf, however, Smith concludes that it is useful to distinguish two types of morality: the \textit{nomos} itself, which varies in details from society to society, and scientific or theoretical morality, which is drawn from the \textit{nomos} and is corrected by reason.\textsuperscript{36} In addition, he refers to what he calls the "philosophy of morality."\textsuperscript{37} This theoretical discourse concerns itself with metaphysical and psychological aspects of morality, matters that are not of immediate concern to Smith. He maintains that while there is much dispute among philosophers over the philosophy of morality, there is agreement about the existence and basic principles of morality itself.\textsuperscript{38}

\textit{Id.} at 9 (footnote omitted).

\textsuperscript{35} See \textit{Elements}, supra note 19, at 55. Smith makes reference from time to time to geometry and economics (political economy) as sciences that have reached this level of maturity, and presumably the science of morality should strive to approach this advanced stage where deductions and conclusions can be reached with absolute certainty. \textit{See e.g., id.}

\textsuperscript{36} See \textit{Elements}, supra note 19, at 48-55; \textit{see also Theory}, supra note 20, at 278; \textit{Review}, supra note 21, at 841-43.

\textsuperscript{37} \textit{Elements}, supra note 19, at 42 (emphasis in original). Smith says, [I]t would be necessary, in order to render our definition of rights complete, to define . . . the term "right," as used to denote a quality; but to do this would involve the solution of a problem which, in the present state of ethical science, perhaps cannot be solved; namely, the metaphysical problem as to the nature of right and duty—a question about which the theories of philosophers widely differ . . . . This problem . . . together with the psychological problem as to the nature of the faculty by which men perceive the right, and recognize the duty of conforming to it[,] belongs rather to the \textit{philosophy of morality} than to morality itself; the province of which is confined to determining the practical problem as to what things are right and what wrong . . .

\textit{Id.}; \textit{see also Review}, supra note 21, at 836. Smith attributes this point to William Whewell, the nineteenth century English philosopher. \textit{See Elements}, supra note 19, at 43 n.1. Quoted in a footnote by Smith, Whewell makes an analogy to geometry and the philosophy of geometry, one engaged in by geometers, the other by metaphysicians. \textit{See id.; see also Review}, supra note 21, at 863 n.43.

\textsuperscript{38} See \textit{Theory}, supra note 20, at 276-77. For Smith, existing moral judgments are capable of being studied and understood without reaching more abstract questions of their meaning. \textit{See id.} He states:

Similarly, men reason without understanding logic, and logic itself must be developed before the metaphysical question as to the ultimate grounds of human knowledge can arise. But, as Locke says, "God did not make man a mere two-legged
For Smith, that part of the nomos pertaining to matters of right is the law. Those principles of scientific morality that deal with matters of right are the principles of justice or natural rights. The study or scholarly discourse that addresses itself to the positive law alone is often loosely called jurisprudence, as in “medical jurisprudence,” “Supreme Court jurisprudence,” or “the jurisprudence of Colorado,” but, while recognizing this usage, Smith prefers to reserve the term jurisprudence for the scholarly treatment of scientific morality. As such, it becomes the science of justice, or the science of natural rights.

C. Natural Rights

Exactly what does Smith mean when he talks of natural rights? He tells us:

[T]he law . . . is composed of two elements, the rational or scientific, and the historical. Of the comparative extent of these, and whether the one or the other predominates at any given time in any system, we say nothing. All that is insisted on is that the law . . . must always consist of these two elements, which are in their nature inseparable. There is no system of law, however technical or barbarous, that is not, to a large extent, simple natural right: no system, however rational, that is not marred by human imperfection.39

This notion originates with Aristotle, and Smith’s version of it corresponds to that of the Philosopher in most respects.40 Smith points out that justice requires that the law be obeyed because it is morally right. This includes obedience to that part of the law that conforms to justice and that part of the law (particular, special, historically contingent) that is morally indifferent.41 According to Smith, there is no obligation, however, to obey any statute, custom, or other rule which is contrary to justice or natural right. Smith does not quarrel with the proposition that such rules may be called law; he is not interested in making definitions or in critizing word usage. The term he

animal and leave it to Aristotle to make him a reasonable creature.” And with like reason it may be said that fortunately it has not been left to the metaphysicians to make him a moral being.

Id. at 277.

40. See ELEMENTS, supra note 19, at 259-67.
41. For example, laws requiring drivers to drive on the right side of the road, laws requiring certain contracts to be in writing, or laws requiring a certain number of witnesses to a will. Such rules of law have no ethical content in themselves, but they provide a rule where a rule is needed. A different rule might work just as well, but whatever the rule is, it carries moral obligation because it is necessary to carry out the purposes of the law which are morally justified.
uses himself is right. "[T]he rights treated of in the Law are rights in the ordinary and proper sense of the term. These are sometimes called natural rights; but redundantly. For according to this conception, all rights are natural rights; nor are there any others." A law that is contrary to justice is a quasi-right or a pseudo-right.

Natural rights arise in the course of history as societies develop from primitive beginnings. People repeat patterns of behavior that maintain their well being. These patterns become rules, are sometimes associated with religion or myth, and gradually become obligatory. Although false starts and errors are made, over time a people develop principles of justice, and they attempt to state them as the law. The law (nomos) therefore embodies natural rights, along with some morally indifferent rules and principles, and perhaps some mistakes. When mistakes are made, i.e., rules inconsistent with natural right are proclaimed or applied, they must be and usually are rectified by the application of reason. This historically has been done in western society by great judges and jurists. Smith points out that in advanced civilizations, at any given time, the actual stated and observed law (nomos) corresponds to a high degree with natural rights.

Smith offers four arguments, long articulated by jurists, in support of the proposition that natural rights (principles of justice) are known. Most persuasive for Smith seems to be the inductive argument. He maintains that common principles can be found in every legal system, and, as civilization progresses, these common principles become more numerous and obvious. Many particular legal rules and doctrines, apparently unrelated, demonstrate applications of more general precepts. These precepts themselves may be instances of broader principles. Since these principles are inevitably found in all societies, it may be inferred that they exist because human nature requires them. As Smith notes:

[W]e may, by a process of induction, ascertain what are the fundamental principles upon which the common moral convictions of mankind in fact rest; and these, having been determined and accurately defined, may at least provisionally be accepted as the first principles of morality. As to the nature and sufficiency of the proofs upon which these principles rest, it does not fall within the scope of our work to inquire; but our task will be sufficiently ac-

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42. Review, supra note 21, at 832. Smith uses the singular term "right," as in "science of right" or "principles of right," to mean the order or regime of natural rights—again, equivalent to justice.
43. See ELEMENTS, supra note 19, at 162. See also Review, supra note 21, at 833.
44. Theory, supra note 20, at 286.
45. ELEMENTS, supra note 19, at 173-74; Theory, supra note 20, at 295.
46. ELEMENTS, supra note 19, at 53-54.
complished if we show that the principles of morality . . . are in fact derived from certain fundamental principles, or notions of right, established in the common moral convictions of mankind.\textsuperscript{47}

A second rather Kantian argument is that natural right is impossible to doubt, that it is profoundly rooted in the belief and sentiments of mankind.\textsuperscript{48} Knowledge of right and wrong is a necessary attribute of the human mind. The possibility or existence of moral choice leads necessarily to the recognition of natural rights. To admit that a choice with respect to the treatment of one or another human being is right or wrong is to concede that one or the other has a right.\textsuperscript{49}

Third, Smith also argues that natural rights can be derived from the principle of self-ownership (personal liberty and security).

This right is obviously essential, not merely to the welfare or happiness, but even to the existence of the individual, and is therefore to be admitted; nor can it be denied, without absurdity; for the question, in its ultimate analysis, may be reduced to this simple dilemma: Does a man belong to himself, or to somebody else?\textsuperscript{50}

Thus, if one person has a right to personal liberty and security, others do as well. Consequently, a basic division of rights is created from which other rights may then be derived.\textsuperscript{51}

Finally, Smith presents a familiar natural law argument that laws cannot have validity unless supported by natural right.\textsuperscript{52} By validity, Smith means "binding" or "authoritative," or that those subject to the law recognize that it should be controlling. Obligation to obey the law can only mean moral obligation. Since everyone concedes that laws are binding, they must be supported by natural right; hence the existence of natural right is established.\textsuperscript{53}

What are some of these "universally admitted" principles or rights upon which there is a consensus? Smith gives us some examples, differing slightly in his various writings. In his \textit{Theory of the State} he lists four as illustrative:

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{48} \textit{Theory, supra} note 20, at 290.
  \item \textsuperscript{49} \textit{Id.} at 291. Smith makes an interesting and telling criticism of the utilitarians based upon this point. Since the utilitarians recognize that moral choices must be made based upon natural phenomena (the pleasure-pain principle), they have in effect recognized natural rights, although they (erroneously according to Smith) are unwilling to equate legal rights with moral (natural) rights. \textit{Id.} at 291-92.
  \item \textsuperscript{50} \textit{Id.} at 291.
  \item \textsuperscript{51} \textit{Id.} Smith thought that slavery was contrary to natural right, perhaps an unexpected view from a former confederate colonel. \textit{Elements, supra} note 19, at 316-17.
  \item \textsuperscript{52} \textit{Theory, supra} note 20, at 292.
  \item \textsuperscript{53} \textit{Id.} at 292-93.
\end{itemize}
Organic Natural Law

(1) "[T]he law of equal liberty" . . . [A] right cannot be affirmed unless it can be equally affirmed of all others standing in the same jural relations . . . [:]

(2) [R]estitution in case of delict . . . where one is deprived of his property, or liberty, or other right, he should be restored to its enjoyment . . . in kind . . . [or] in value . . . [:]

(3) [Reasonable] custom must be considered in the determination of rights . . . [A] violation of custom must result in a disappointment of men's legitimate expectations . . . [:]

(4) "[C]ompacts are to be observed."54

In Review of Current Theories of Jurisprudence, Smith presents three additional universal principles of natural law recognized by Roman authorities: "To live decently, not to injure another, and to accord to every one his own."55

D. Organic Growth of Government

Smith, like Hobbes, observes that human beings have a tendency to dispute with one another, that they will fight over scarce goods, and that they have a psychological tendency to push their self interest to extremes, (all this, of course, while still recognizing the nomos).56 Because these characteristics are widespread, society creates institutions of control that prevent aggressive behavior, and the violation of one person's rights by another. In simple societies these institutions are the family, the clan, or the tribe. In more advanced societies some form of government takes over this function. All of these institutions are natural and inevitable, that is, they come about without deliberate design or planning, yet they necessarily appear because of the universal physical and psychological characteristics of human beings.57 These institutions perform a necessary function—the justice function.

Smith argues that government as such cannot be done away with, although particular governments can be removed and replaced or remodelled. The inevitability of government, he posits, is due to the justice function it necessarily performs.58 That this function must be performed is dictated

54. Theory, supra note 20, at 283-85. Smith hastens to point out that these principles as formulated are imperfect generalizations because there are exceptions to them. If it were possible to formulate like principles that had no exceptions, we would, indeed, have grasped the true and eternal principles of justice. However, Smith maintains that as a practical matter these generalizations or similar expressions are the next best thing and that they are sufficiently well established and formulated to be jurisprudentially useful.
55. Review, supra note 21, at 850. For Smith, every legal right is also a natural right or the local realization of a natural right. Id. at 832.
56. See Theory, supra note 20, at 233-34.
57. See id. at 235-40.
58. Elements, supra note 19, at 23.
by the nature of human beings. Smith tells us that the sole essential function of government is to “protect the rights of individuals from aggression, either foreign or domestic.”

Rights of individuals, of course, derive from the nomos; they are not created by government.

The fact that government evolves naturally does not mean that there is no element of rationality in its creation. As in the case of reason acting upon the nomos to modify it, reason also can be applied to the institution of government, changing and improving it. Written constitutions are examples of the redesigning of government.

According to Smith, because government must perform the justice function it must necessarily possess certain powers. Among these powers are taxation, judicature (operation of a court system), legislation, punishment, and national defense. Government may also perform other functions providing they do not interfere with the justice function.

E. Limitations on Government

In reviewing Smith's general philosophic scheme, it should be obvious that the powers of government are limited. Those powers exercised in the administrative function of government are limited by natural rights, or put another way, the administrative function is subordinate to the justice function. Smith maintains that the “natural right” of the state, or natural power, is the power to perform the justice function. Thus, in performing administrative functions the state is limited by both the natural rights of individuals and the natural power of the state.

With respect to its exercise of the justice function, a well-run government is actively implementing and vindicating natural rights. In fact, there rests upon the government an affirmative duty to do justice through its legislative and judicial organs; it is government's essential and natural function. Failure to perform this function, either through nonfeasance or misfeasance, re-
sults in a deterioration of the government's position in public opinion, and in an extreme case, the dissolution of the government and its replacement. As Smith notes:

[T]he obvious limit is in the common sentiment of rights which measures at once... [government's] rightful and its actual power; or, in other words, both its right and its might. With regard to the right of government... the limit thus imposed is the rightful one, or, in other words, the State has no right to violate it. With regard to its actual power, or might, this limit is equally effective; for it is itself backed by the superior force, and it takes from the government, when this limit is exceeded, the only force upon which it rests, viz., that of popular opinion. Nor is it necessary, except in extreme cases, that this limit should be enforced by actual resistance or revolution. The fear of such resistance is in general sufficient...66

The right (power) of government and the rights of individuals are natural rights, derived from the nomos, although they may be articulated, perfectly or imperfectly, in statutory or constitutional provisions. The constraints on government are therefore not limited to written constitutional provisions. Using "Leviathan" to mean the government and "Nomos" to mean justice or natural right as practically realized, Smith's favorite metaphor is: Nomos is king, Leviathan his vicegerent, and Reason his counsellor.68

F. Law and Justice

Smith conceives justice and law as a part of the more general subject of morality.69 Affection for others, charity, kindness, self-sacrifice, and other subjects are included within the general purview of morality. But these are not matters of right. Smith is concerned with those aspects of morality in which individuals are entitled to certain treatment by others, so to speak, as a matter of right.70 Smith does not give us a clear standard to determine which moral norms are merely "imperfect" rights, and which are perfected. This distinction appears to be identical to that made by Lon Fuller many

66. Id. at 310.
67. Id. at 309-11. See also infra text accompanying notes 121-26, for a discussion of "non-textual" rights.
68. Theory, supra note 20, at 311; see also ELEMENTS, supra note 19, at 50-51; Review, supra note 21, at 843. Smith says further, "Leviathan... like other subordinate ministers, may, within certain limits, abuse the powers entrusted to him, but, if he undertakes to resist and defy the will of the true king, is sooner or later made to know and submit to his power." Theory, supra note 20, at 311. The idea of "King Nomos" goes back to Herodotus. KELLEY, supra note 28, at 33.
69. Theory, supra note 20, at 276.
70. ELEMENTS, supra note 19, at 49-51.
years later between the “morality of aspiration” and the “morality of duty.” 71 In a perfect society, all moral (natural) rights are enforceable through the courts or other agencies of the state. In this view all moral rights should be legal rights, 72 and all legal rights are moral rights. 73 Securing these rights is the primary and necessary function of the state. 74 Rights are not recognized because they are enforceable, but they are enforceable because they are rights.

Recognizing the distinction between principles of justice (scientific morality) and law (nomos) does not indicate, however, that these two are separate and distinct entities. The law incorporates within itself the principles of justice. Ideally, law and justice would be synonymous. Law attempts, not always successfully, to realize justice in concrete situations. Courts and legislatures may fall into error, or the rules applied in a particular situation may or may not be generalized to other situations. Smith asserts that the law, or at least the common law, is always rectifying itself through continuous refinement. 75 The authority of law, or the basis of its binding effect, lies in the fact that it brings principles of justice to bear on particular situations, in other words, law should be and usually is the realization of natural rights. 76

While Smith admits that erroneous or unjust law will occasionally emerge, he asserts that people are nevertheless under a general obligation to obey the law, (i.e., the nomos, codified into law by legislation or judicial decision). Smith gives three reasons for this. 77 First, there is a presumption that the law correctly reflects natural right. This presumption originated over hundreds of years in western society in which jurists have struggled to realize what Smith calls scientific morality, to arrive at the true principles of natural right through the application of reason. Second, mankind does accept and submit to the standard of public morality incorporated in the law. Finally,

71. LON L. FULLER, THE MORALITY OF LAW 5-8 (rev. ed. 1964). “Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules . . . of an ordered society . . . .” Id. at 5.

72. Smith recognizes that there are some imperfections in any legal system, and therefore all moral rights do not necessarily get translated into legal rights. See ELEMENTS, supra note 19, at 197-205 (discussing the practical aspect of administering justice and the reliance on precedent).

73. Review, supra note 21, at 832. (“All rights are moral rights; nor, properly speaking, can there be an unjust right, or a right lacking rectitude, any more than there can be a crooked straight line, or a round square”).

74. By this Smith means that the state arises naturally to perform the justice function.

75. ELEMENTS, supra note 19, at 186-92, 205-06 (pointing out the fact that judges will exercise their power of overruling precedent when it is deemed erroneous).

76. Review, supra note 21, at 841.

77. Theory, supra note 20, at 237.
the law is and must be subjected to continuing rational development so that a consensus is maintained as to its justice. As Smith asserts,

[N]o reason . . . can be assigned why the conscience of one man or set of men should be forced upon others of different convictions; and, hence, in political affairs, there is no alternative between the acceptance of this standard, or of submission to arbitrary power; and hence, also, free government is possible only to the extent that this general conscience, or consensus of moral conviction, is developed . . . .78

We are thus presented with a scheme in which true law consists of an unwritten body of common morality, the nomos, and justice consists in certain common principles, also called natural rights, abstracted from the nomos. What, then, is the place of what Austinian positivists consider true law—statutes and, in the common law system, judicial precedents?79

G. Legislation

To understand Smith’s view of legislation, one must first examine his division of governmental functions into two areas—justice and administration. As noted above, Smith contends that the justice function is the essential one—arising naturally as government evolves.80 The administrative function is subordinate, according to Smith, consisting of making and carrying out rules for the running of government.81 Although administrative legislation is commonly called law and is enforceable in the courts when appropriate, it stands on a different and inferior footing from the law that serves the justice function. The justice function is performed by both courts and legislatures.82 Smith notes that:

[T]he function of . . . [legislation exercising the justice function] is merely supplemental to natural functions; that it does not extend

78. Id.

79. The status of written constitutions gave the Austinian positivists some trouble. Austin himself concluded that constitutional law was not law, merely positive morality. Smith would consider written constitutions to be law in the same way that statutes are law. See supra note 51 and accompanying text.

80. See supra notes 56-68 and accompanying text.

81. See supra notes 66-70 and accompanying text. This would include, for example, legislation and executive rulemaking dealing with the organization of government, such as acts creating the department of state, the post office, and the army. It would also include the procedures of governmental agencies, such as administrative procedure acts, city council rules of order, rules for applications for veteran’s benefits, as well as provisions for various welfare projects such as enactments concerning public schools, libraries, water, and sewage. Finally, the administrative function includes provisions for financing all of these activities through property tax and other appropriations.

82. Courts decide individual cases by applying rules and principles of law. Legislatures establish rules for the decision of classes of cases.
to the abrogation of the principles of natural justice, but merely to protecting them, and to encouraging and directing their natural development to such extent as necessity may demand, and no further. . . . [T]here are many matters that are within the right of the legislator to determine, and as to these, when its will is declared, justice requires it should be observed, and hence the function of administering justice necessarily includes the obligation or duty to observe all valid laws. 83

Smith offers as an example, the right to intestate succession as an illustration of the legislature's proper function and limit. 84 He explains that there is an indeterminate right on the part of a deceased's family to inherit the deceased's property. 85 Presumably this is a principle of justice or natural right. The legislature may enact a law prescribing exactly which family members inherit the property under various circumstances and in what shares. In so doing, the legislature is "encouraging and directing" the natural development of this principle of justice. Such a statute would clearly be law with full binding authority in every detail. The legislature could not, however, enact a statute giving the deceased's property to a complete stranger. This would violate the natural rights of the deceased's family. 86

H. Judicial Precedents

Smith's treatment of judicial precedent is similar in reasoning to his treatment of statutory law. 87 Courts also legislate when performing the justice function. Their legislation is, however, in the form of judicial opinions that state rules or principles applied to the individual case. These principles may be the court's particular articulation of the law, or even of a principle of justice, and the rules announced are usually specific applications of broader precepts. The principles and rules, however, are not law by virtue of being announced and invoked (unlike statutes which are enacted by the legislature). These principles and rules are law because they direct and apply principles of justice. As a result, wrongly decided cases carry no weight as precedent.

Smith recognizes that there are two additional reasons why precedents are considered law as a practical matter. 88 First, the opinions of learned judges are accorded respect. There may be a presumption that the court first decid-

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83. Theory, supra note 20, at 268-69.
84. ELEMENTS, supra note 19, at 83.
85. Id.
86. Id. at 84-85.
87. Theory, supra note 20, at 269-70.
88. Id.
ing a certain type of case has reasoned correctly and should therefore be followed in subsequent similar cases. Second, a precedent, even if initially wrongly decided, once established may be followed by the people subject to it, to the point that it becomes the customary rule. In this case, considerations of justice may dictate that the originally erroneous rule be continued to avoid further injustice to those who have relied upon it. Nevertheless, Smith explains that these practical considerations should not lull us into thinking that precedents are law merely because of their authority; nomos and reason still trump authority.89 “[S]tatutes and judicial precedents . . . are mere elements in the problem of private right, and ultimately depend for their validity upon the principles of natural right, and can have no other foundation, and hence, to assert their validity is, in effect, to assert the existence of natural right.”90

V. SMITH, HAYEK, RAWLS, AND DWORKIN

There are similarities between Smith’s views and those of several contemporary legal philosophers that raise questions about the relationship of their philosophies to Smith’s. The nearest kindred soul must be Friedrich A. Hayek, the Austrian-born Nobel prize winner who has revived the historical paradigm.91 Hayek’s theory incorporates the “invisible hand” type of explanation made famous by the economist Adam Smith together with the idea of cultural evolution. Rules of law “grow” as society adapts to new circumstances, and these rules have survival value.

Hayek and Smith share many important ideas. First, each has a conception of law that is based, not upon authority, but upon the spontaneous evolution of rules of right and wrong among the people in any given society. Hayek calls these the “rules of conduct,” and Smith sometimes calls them “common morality.” Both scholars like to use the original Greek term, nomos.92 Neither Smith nor Hayek makes much of a distinction between law and morality, although both are willing to acknowledge that the word “law”

89. Id. at 270.
90. Id. at 293.
91. For the best source of Hayek’s legal philosophy, see 1-3 FRIEDRICH A. HAYEK, LAW LEGISLATION AND LIBERTY (1979); see also JOHN E. GRAY, HAYEK ON LIBERTY (1984); THE ESSENCE OF HAYEK (Chiaski Nishiyama & Kurt R. Leube, eds., 1984); Alan Thomson, Taking the Right Seriously: The Case of F. A. Hayek, in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 68 (Peter Fitzpatrick ed., 1991).
92. 1 HAYEK, supra note 91, at 36-46, 72-82. Smith also uses the term “spontaneous.” ELEMENTS, supra note 19, at 206-07.
as commonly used has taken on an Austinian positivistic meaning. They are both, of course, strongly anti-positivist.

Both scholars recognize an important distinction between the law that arises naturally in the course of cultural evolution—the true law—and administrative law or the law of organizations. The latter consists of the rules deliberately promulgated to order the running of government or to perform welfare functions. Both Smith and Hayek regard administrative law as subordinate to the justice function. Hayek explicitly states that the idea of "social justice" that welfare programs purport to achieve is not a kind of justice at all, but a perversion of justice. Both theorists agree that the good society is one in which individuals are allowed to pursue their own ends within a framework of naturally evolved rights and duties. They also agree that government is inevitable or arises naturally—to enforce those rights. Some institution must perform the justice function because people cannot be expected to act consistently in an altruistic manner. Hayek and Smith agree that the ultimate limitation on government is public opinion.

In addition, Smith and Hayek agree that the restrictions placed upon people's behavior by the claims of others—based upon the nomos—do not amount to coercion or a deprivation of freedom. These obligations are not coercive because they are not commanded by other persons or the government. Rather, they arise naturally, becoming a part of one's conscience. Both authors also recognize the special importance and necessity of private property in any system of justice.

93. See supra note 79.
94. Hayek strongly opposes "constructivist rationalism," especially the views of Bentham. 1 HAYEK, supra note 91, at 22.
96. See supra notes 81-82 and accompanying text.
97. 2 HAYEK, supra note 91, at 62-85.
98. 1 HAYEK, supra note 91, at 47. Hayek notes: Although it is conceivable that the spontaneous order which we call society may exist without government, if the minimum of rules required for the formation of such an order is observed without an organized apparatus for their enforcement, in most circumstances the organization which we call government becomes indispensable in order to assure that those rules are obeyed.

This particular function of government is somewhat like that of a maintenance squad of a factory, its object being not to produce any particular services or products to be consumed by the citizens, but rather to see that the mechanism which regulates the production of those goods and services is kept in working order.

Id.

99. Id. at 92. ELEMENTS, supra note 19, at 323. Theory, supra note 20, at 310.
100. See Thomson, supra note 91, at 80-82.
101. 1 HAYEK supra note 91, at 107. Hayek recognized that:
One of the most important similarities between Hayek and Smith lies in their conception of what jurisprudence is all about. Hayek advances his idea of "immanent criticism," which requires that a critical evaluation of law must take place from within.\textsuperscript{102} According to this theory there is no Archimedean point from which one can critique the true law (rules of conduct) from outside. Whatever moral position criticism of a particular rule or policy starts from, that position is one imbedded in the overall moral order. Similarly, for Smith, the business of jurisprudence is to correct the nomos through the application of reason. In Smith's view, principles of justice (natural right or scientific morality) can be approximated by looking to the nomos and abstracting fundamentals through a rational process. For both theorists, the critical scholar is engaged in a process of setting one part of the normative order against another with a view to harmonization. This means that jurisprudence plays only a modest role compared to the grander philosophical speculations of some of the other schools of thought.\textsuperscript{103} Justice is to be sought in the harmonization process, not in the creation and application of abstract philosophical principles to the law or legal system.

Although both Smith and Hayek have faith in progress, neither tells us what progress means. Hayek argues that the rules of just conduct should not be interfered with, except for the best of reasons, because their observance by members of society creates a spontaneous order that has survival value for the society.\textsuperscript{104} This survival value, at the very least, creates a presumption that these rules should continue to be followed. The principles of justice are thus the result of progress over time in a Darwinian way, although such progress is not intended or planned in any society.\textsuperscript{105} Smith's view is somewhat different, giving more leeway to the power of rational thought. Courts, legislators, and legal scholars accept the nomos as given and attempt to implement and correct it as they become aware of its deficiencies when applied to concrete situations. These corrections then become

\begin{itemize}
\item Property, in the wide sense in which it is used to include not only material things, but (as John Locke defined it) the 'life, liberty and estates' of every individual, is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Law, liberty, and property are an inseparable trinity.
\item \textit{Id.}
\item \textsuperscript{102}. \textsc{2 Hayek, supra} note 91, at 24-27. Hayek defines "immanent criticism" as the "sort of criticism that moves within a given system of rules and judges particular rules in the terms of their consistency or compatibility with all other recognized rules" in creating an order of actions. \textit{Id.} at 24.
\item \textsuperscript{103}. \textit{E.g.,} utilitarianism, Kantianism, Rawls's theory of justice.
\item \textsuperscript{104}. \textsc{2 Hayek, supra} note 91, at 31-35.
\item \textsuperscript{105}. \textit{Id.}
\end{itemize}
part of the nomos. But the nomos is never perfect because changing circumstances require new adaptations. Nevertheless, there is always progress.

The two scholars also have similar views with respect to common law decisionmaking. Both think that judges must constantly resort to principles and reshape them as new cases arise. Formulations of rules by judges in particular cases are viewed as "imperfect expressions" of the true law. Both scholars agree that reliance by judges solely on the rules stated in precedents or in explicit legislation leads to less predictability in judicial decisions than the rational resort to principles of justice.

The greatest difference between the jurisprudence of these two thinkers is in their interpretation of the status of the principles of justice. As noted, Smith believes these principles are natural law—common to all societies, universally valid, and obligatory because of human nature. For Hayek these principles are culturally relative, and obligation stems from the survival value of the overall order of which they are a part.

Some comparisons also can be made between contemporary philosopher John Rawls and Smith. The priority of equal liberty, reflected in Smith's position that the justice function takes priority over organizational and welfare functions, is also reflected in the priority of Rawls' two principles of justice; the guarantee that basic individual rights must come before welfare

106. ELEMENTS, supra note 19, at 84, 186-92.
107. 1 HAYEK, supra note 91, at 87. Hayek argues:
   What must guide [the judge's] decision is not any knowledge of what the whole of society requires at the particular moment, but solely what is demanded by general principles on which the going order of society is based.
   It seems that the constant necessity of articulating rules in order to distinguish between the relevant and the accidental in the precedents which guide him, produces in the common law judge a capacity for discovering general principles . . . . The common law judge is bound to be very much aware that words are always but an imperfect expression of what his predecessors struggled to articulate.

Id.
108. Id. at 116. Hayek notes:
   Although legislation can certainly increase the certainty of the law on particular points, I am now persuaded that this advantage is more than offset if its recognition leads to the requirement that only what has thus been expressed in statutes should have the force of law. It seems to me that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.

Id.; see infra notes 127-43 and accompanying text (discussing Smith's approach to the question of predictability of judicial decisions).
109. See supra notes 33-38 and accompanying text.
110. 1 HAYEK, supra note 91, at 117.
111. See supra notes 63-67 and accompanying text.
considerations. Both Smith and Rawls also place high value on the power of human reason to lead to the selection of correct principles of action, especially when the corrupting influence of self-interest is eliminated. Smith recognizes that reason, exercised by impartial judges and scholars, is the tool through which the nomos is constantly corrected. Rawls states that reason, in the form of philosophical argumentation, is the way that persons in the original position are led to choose the best principles of justice. Both admit the possibility of error, but argue that error must be discovered through better reasoning.

Rawls' philosophy differs from that of Smith in important ways. The evolutionary element in Smith's theories—the idea that rights can grow over time as a part of institutional arrangements—is entirely foreign to Rawls. Indeed, Rawls' approach tracks that of the eighteenth century rationalists. For Rawls the obligations that can legitimately be placed upon persons in society are the result of carefully calculated choices, not of inherited tradition. Rawls maintains that the "naturalness" of rights and their consequent obligatoriness depends solely upon the exercise of rational choice in the context of known human characteristics and capacities, not upon their having come into existence unconsciously.

The work of leading jurisprudent Ronald Dworkin also bears resemblance to some of Smith's writings. Dworkin's notion that there are principles of law that lie behind the express rules set forth in statutes and precedents parallels Smith's view. Both scholars argue that these principles, ascertained through argumentation against the whole political-legal-cultural background, can and should override express law where they come in conflict. They also agree on where these principles come from—not from the specula-

112. John Rawls, A Theory of Justice 60-64, 195-257 (1971). This idea is also similar to the position of the contemporary philosopher, Robert Nozick. See Robert Nozick, Anarchy, State and Utopia 28-35, 160-166 (1974). Some other ideas of Nozick, a libertarian, are also similar to Smith's.

113. See supra note 75-78 and accompanying text.

114. Rawls, supra note 112, at 60-64. Rawls's method of argumentation, called "reflective equilibrium," seems similar to Smith's idea of correcting the nomos through reason, although Smith never explains what this means with the detail and clarity that Rawls does. For Rawls, persons in the original position are hypothetical representatives of everyone in society. They survey various proposed principles of justice, and, through rational argument, arrive at an agreement as to which are best.

115. Id.

116. Rawls does not generally use the term "natural rights," probably to avoid the confusion of unwanted connotations. Rawls, supra note 112, at 505 n.30.

117. Id.

tions of philosophers, but from the cultural development of the society. Both also argue that popular morality (nomos) sometimes needs to be corrected through rational argumentation. They maintain that there are right answers even though a Hercules may be needed to think them through.\textsuperscript{119}

Dworkin does not, however, claim that his principles are natural law or principles of justice in any absolute sense. Indeed, it seems to follow from his position that the principles of a legal system are very much tied to the culture in which that system exists. Hence, the moral validity of law is watered down becoming a principle of merely being true to the system or true to the larger cultural values of the society.\textsuperscript{120} This would not be enough for Smith. As a practical matter, however, because Smith acknowledges only approximation to natural right, the two thinkers may not be as far apart on this point as first appears.

**VI. NON-TEXTUAL CONSTITUTIONAL RIGHTS**

The United States Supreme Court’s practice of invoking constitutional rights not found in the text of the constitution has bothered many scholars in recent times. However, such a practice would not bother Smith. In his jurisprudential scheme, it is clear that rights exist quite independently of their articulation or application by courts, legislatures, or constitutional conventions.\textsuperscript{121} According to Smith, all rights are non-textual unless and until expressly formulated by an appropriate organ of government or by a private jurist.\textsuperscript{122} The recognition and articulation of particular rights by organs of government allow for classifying the rights so recognized as judicial (or precedential), statutory, or constitutional according to their textual source. The possibility, however, always exists that the formulation of rules or principles in any of these categories may not conform to the natural right involved. If so, it is a quasi-right or pseudo-right that must be corrected.\textsuperscript{123}

\textsuperscript{119} RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 118, at 105-30; RONALD DWORKIN, LAW’S EMPIRE, supra note 118, at 239, 276, 380, 411. Hercules is the superhuman figure that Dworkin uses to illustrate the difficulty of making good judicial decisions. It may be questioned whether Dworkin has chosen the right Greek god.

\textsuperscript{120} Id.

\textsuperscript{121} See supra notes 39-54 and accompanying text.

\textsuperscript{122} For Smith the reasoned articulation of the law by jurists such as St. Germaine, Coke, Story, or some of the Roman authorities was entitled to even more respect than a statute passed by a state legislature or Congress because the jurists’ opinions were based upon reasoning from basic principles.

\textsuperscript{123} Review, supra note 21, at 833.
In this view then, the invalidation of a statutory provision by a court on the basis of a non-textual right is but one kind of legal correction. A court can "correct" or "invalidate" prior judicial precedents, legislation, or explicit constitutional provisions on the basis of their failure to conform to natural right. A legislature can do the same, as can a constitutional convention. This does not upset the normal priority of constitution over legislation and legislation over judge-made law. According to Smith, most normative propositions contained in constitutional provisions, statutes, and precedents either conform to natural right, effect a specific application of natural right in concrete detail, or are indifferent to natural right. It is the very exceptional case in which a previously formulated legislative provision, rule, doctrine, or custom is recognized to run contrary to justice. In these exceptional cases, of course, it is the duty of the courts to administer justice, not to follow pseudo-law.

While the true principles of natural right must remain unchanged as long as human nature remains unchanged, the way that those principles bear upon particular circumstances or relationships may change as society changes. Advances in technology, for example, typically require adjustment of the law. Illustrations more modern than those which were available to Smith come readily to mind. The advent of the automobile necessitated speed limits and traffic signals, quite unnecessary in the days of horse-drawn wagons. Traffic laws, of course, implement the long recognized natural right to security of body and property. The invention of radio brought regulation of broadcast frequencies to prevent interference with natural rights of property and perhaps even a natural right of communication. Congress' natural power of self defense, expressed as a power to raise and maintain armies and navies, was extended to include air forces. The technological power of electronic eavesdropping has necessitated laws protecting privacy, a natural right previously unchallenged.

Smith recognizes that "[i]n the progress of society, however, new questions as to the jural relations of men continually arise, many of which, until settled by custom, are more or less indeterminate in their nature; and thus it devolves upon the state, in the exercise of its judicial function, to determine them." The "determination" of right in the American system of government might be undertaken by legislature, by constitutional convention, or by

126. ELEMENTS, supra note 19, at 84-85.
127. Id. at 84.
courts. Because of the way these institutions operate, it is more likely that courts will be the ones making the determinations.

The changing conditions of society therefore dictate that what was good law in past times may have to be altered to fit new circumstances. This kind of change can and should occur through invalidation of previous statute or precedent (or express constitutional provision) by courts. Not only do courts have the power to make the law conform to natural right, but they also have the duty to do so. The power and the duty are, in their roots, non-textual.

VII. INDETERMINACY IN THE LAW

Much has been written in the past dozen years about "indeterminacy" in the law.\(^{128}\) One way to describe indeterminacy is that the decisions of courts are often unpredictable. This has been a matter of concern for legal scholars for at least a century and a half. The Austinian positivists thought that its solution would be found in careful definition, terminological rigor, and scientific organization.\(^{129}\) Based upon this theory, the American Law Institute was created to write the Restatements, thereby clarifying the law and eliminating "uncertainty."\(^{130}\)

Smith's response to the problem was quite different. He joined an intellectual debate started by Thomas Cooley, eminent constitutional scholar and judge of the Supreme Court of Michigan. Cooley insisted that, in spite of criticisms, the law was quite certain.\(^{131}\) Writers in the Maryland Law Record and the Albany Law Journal took issue with Cooley.\(^{132}\) Smith came to


\(^{129}\) See Herget, supra note 8, at 63-116.

\(^{130}\) Id. at 67-81.


\(^{132}\) George H. Smith, Of the Certainty of the Law and the Uncertainty of Judicial Decisions, 23 AM. L. REV. 699, 700 (1889). Smith quotes the position of the Albany Law Journal as follows:

"The law is so uncertain, contradictory, obscure and fluctuating, that from the rising of the citizen in the morning, till his lying down at night, although he is amenable to law, and held to know it, there is not a single transaction of his life in regard to which he can be sure of the law . . . . [T]his fact is what gives employment to 70,000 lawyers, and causes the publication of 100 volumes of judicial reports in this country every year, to say nothing of the cloud of textbooks. There were doubtless wise men in Noah's time, who insisted that the downpour was only a shower, but they were not more seriously mistaken than the wise men who insist that the law is not uncertain."

\(Id.\)
his rescue, if rescue was needed, and claimed that both sides were really
correct and not in contradiction. According to Smith, the law was certain,
but the administration of law was uncertain.\footnote{133}{Id.}

The root of the problem, maintained Smith, is that the poisonous ideas of
Bentham and Austin have led lawyers and others to conceive of the law as
being constituted simply of the rules contained in authoritative statutes and
judicial precedents.\footnote{134}{Id. at 715. Smith stated that in holding statutes and judicial precedents to be the law
the Austrians have "stricken from the conception of the law that for which alone it exists, and
reduced it, as far as in them lay, to a form much like that of the play of Hamlet with Hamlet
omitted." Id. See supra text accompanying notes 69-90.} Statutes are fragmentary, often poorly written, and
occasionally even contradictory. Judicial precedents are worse; they are
often poorly reasoned, obscure, and also contradictory. If these sources are
truly the law, then the law is quite uncertain. But if the law is what Smith
conceives it to be—Coke's "artificial reason" applied to the body of prin-
ciples worked out by jurists over the centuries\footnote{135}{Theory, supra note 20, at 294-95.}—then it will be found, to use
Cooley's words, "to have more elements of certainty about it, and to be more
worthy of trust, than anything else, even in physical nature, or in the realm
of mind or of morals, that concerns, to the same extent, the every-day life of
mankind."\footnote{136}{Id. See supra text accompanying notes 69-90.}

In Smith's view, what others see as the problem of uncertainty in the law
is really a problem of mistaken philosophy. Once the ideas of Bentham and
Austin are jettisoned, and lawyers are educated to understand the true basis
of right, judicial opinions will improve, legislative drafting will become more
scientific, and the multitude of discordant voices representing blind adher-
ence to precedent and literally-read statutes will fade away. The answer is in
the reform of legal education; the prevailing positivist approach must be
eliminated, and the training of the lawyer must be grounded upon a full
understanding of the true nature of right.\footnote{137}{Id. at 699 (quoting Cooley, supra note 131).}

Besides the unpredictability of court decisions, there is another, more so-
plicated meaning of indeterminacy in the law. This is the idea that the
rules and principles of law at every level of abstraction contain conflicting or
contradictory policies, and the process of judging is one in which judges
favor a particular policy, perhaps unconsciously, on the basis of their own
moral or political views. The judges then fashion a justification for their
decisions from the materials and arguments at hand in the law that fit their
side of the dispute, making it appear that the impartial structure of the law

\footnote{133}{Id.}
\footnote{134}{Id. at 715. Smith stated that in holding statutes and judicial precedents to be the law
the Austrians have "stricken from the conception of the law that for which alone it exists, and
reduced it, as far as in them lay, to a form much like that of the play of Hamlet with Hamlet
omitted." Id. See supra text accompanying notes 69-90.}
\footnote{135}{Theory, supra note 20, at 294-95.}
\footnote{136}{Id. at 699 (quoting Cooley, supra note 131).}
\footnote{137}{For Smith's views on legal education, see George H. Smith, The True Method of Legal
Education, 24 Am. L. Rev. 211 (1890).}
dictates the result in the case. This type of indeterminacy was first recognized in America by the legal realists and has since been adopted by critical legal scholars and others.\(^\text{138}\)

Smith did not have the opportunity to confront this argument for indeterminacy in the law, but, given his philosophy it is clear he would have rejected it.\(^\text{139}\) Smith would argue that this indeterminacy argument is effective against positivist versions of law based upon the false assumption that there is something called “law” that is different from “morality” or “politics.” When the indeterminists have proven that the formal rules of law recognized by positivists are often contradictory, they can properly conclude that “law” in this sense is indeterminate. But this argument does not refute Smith’s theory. As noted, for Smith law is a subcategory of morality.\(^\text{140}\) Therefore, it is not illegitimate for a judge to reason from basic principles of morality to reach his conclusions; indeed, a good judge should do this often. For example, he should always subject the stated rules of law to examination by reason and interpret them in the light of first principles. Smith might agree with the “indeterminists” that judges often fail to do this explicitly.

Smith would also not agree that the fabric of moral argument is fraught with contradictory principles contending against each other. He would argue that the potential contradictions have been largely resolved. These principles and their relationship to each other have been worked out over the centuries in Western society. Other societies, however, have not yet reached this level of civilization, although some are adopting Western ways.\(^\text{141}\) As Smith contends, what is mine and what is thine is not a new question—the answer to it has been constantly refined and developed.

That development itself . . . consists merely in the logical definition and development of principles of natural right universally recognized in all systems of law. And though this development has been obstructed . . . by a lack of philosophical knowledge, and of logical consistency and scientific method, yet, on the whole, it has gone on with reasonable and ever-increasing consistency; and even where it has erred, its errors have been quickly made apparent, and generally corrected, by the necessity of testing the deductions arrived at,

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\(^{138}\) For an excellent recent work attempting to expose the underlying indeterminacy in legal argument, see Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *The Fate of Law* 160 (Austin Sarat & Thomas R. Kearns eds., 1991).

\(^{139}\) Smith did talk of indeterminate rights, but his meaning is different from what has been described above. *See supra* text accompanying notes 80-90.

\(^{140}\) *See supra* text accompanying notes 33-38.

\(^{141}\) Smith notes that among the Asians, only the Japanese have made progress in this direction. *Review*, *supra* note 21, at 842 n.20.
by applying them to actual practice, or have quietly been eradicated by the establishment of some inconsistent principle.\footnote{142.} It can be inferred from Smith’s position that he regards the principles of natural right—and their specification to particular contexts through statute and case law—as well-settled at any given time in our society. In most situations, in court and out, the applicability of the law, and therefore of natural right as well, is clear. The possibility of contradiction can only arise in new contexts, requiring \footnote{143.} rethinking, but the contradictions are subsequently eliminated through a process of reasoned choice.

Smith would also point out a second assumption implicit in the argument of the indeterminists: that morality is subjective, or at least relative to one’s culture, background, or class. That assumption allows the conclusion that the judge, in applying her own personal morality to her decisions, is illegitimately flaunting the will of the people, the legal policy determined by duly elected representatives, or indeed is making decisions arbitrarily. Smith’s position is that principles of justice are known, that there is a body of natural right, that this body of principle is objective and independent of particular individual prejudices, that it is generally reinforced by conscience, and that the conscientious judge strives to implement right, not some abberational hunch.\footnote{144.}

VIII. CONCLUDING OBSERVATIONS

Smith wrote a great deal, much more than more famous nineteenth century theorists like John Austin or Justice Holmes, for example. His theory, although certainly not entirely original, was not noticeably inferior to those of later natural law thinkers who attracted considerable attention.\footnote{145.} Some of his criticisms of Austin were valid and were accepted when restated by

\footnote{142.} \textit{ELEMENTS}, \textit{supra} note 19, at 169-70 (footnote omitted).
\footnote{143.} See text preceeding note 127, for an explanation how such rethinking should operate.\footnote{144.} For Smith’s arguments for the objectivity and universality of natural right, see \textit{supra} notes 39-55 and accompanying text. It must be admitted, however, that Smith fails to give a convincing explanation of just how natural right is known. He supplies the same rather weak answer that natural law philosophers often do: mistakes in reasoning will be made; judges must improve their skills; they must strive for greater understanding of the principles of justice; they must become moral scientists; perhaps they should read more books, perhaps Smith’s books. Smith’s impatience with the ignorance and ineptness of judges and lawyers is captured by his quotation, approvingly, in several of his writings of an observation about lawyers (and presumably judges) made by the author Pantagruel: “Seeing . . . that the law is excerpted from the very bowels of moral and natural philosophy, how should these people know the law?—who . . . have read no more in philosophy than my ass . . .” \textit{ELEMENTS}, \textit{supra} note 19, at 280 n.1. \textit{Review}, \textit{supra} note 21, at 831.\footnote{145.} See the discussion of Jerome Hall, Edmond Cahn, and F.S.C. Northrop in \textit{HERGET}, \textit{supra} note 8, at 239-53.
later scholars. Why, then, was he ignored? One reason appears to be that his kind of thinking did not fit in with the intellectual temper of the times. From the standpoint of intellectual history it may be worth exploring this point briefly.

By the last quarter of the nineteenth century, the leading jurists had practically turned all responsibility for questions of morality over to the non-lawyers. Theologians, proponents of natural religion, and just plain bible-thumpers, all of whom were keenly concerned with questions of morality, had no use for natural law theory. American philosophers and other academics were concerned with developing Hegelianism, Kantianism, utilitarianism, or its cousin, pragmatism. The followers of the Germans had departed in their discourse from anything resembling traditional natural law or natural rights theory. Natural rights were anathema to utilitarians, and an immutable natural law was the object of scorn to pragmatists. It is not an accident that in discussing morality and natural rights, Smith cites no contemporary legal authorities, and indeed, relies on Aristotle, Hobbes, and other non-lawyers. Yet the audience for whom Smith was writing was essentially lawyers and judges. They may well have thought that Smith's work was none of their concern.

As Smith noted, the intellectual lawyers, on the other hand, mostly had been captured by the thinking of Bentham and Austin. In the Benthamic view there were two sciences of law: censorial (or the science of legislation) and expository. By Smith's time, legislation had been left to politicians and preachers, and the legal theorists had taken up expository jurisprudence à la Austin. A cardinal feature of the Austinian view was the separation of law and morality. Law needed to be analyzed, organized, and clarified; this included distinguishing it from morality in all of the latter's forms. Hence, "scientists" of the law like Thomas E. Holland, the young Oliver Wendell Holmes, Jr., Henry T. Terry, Christopher Columbus Langdell, and others would have been unsympathetic, if not openly hostile, to Smith's natural rights discourse. To these "scientists" of law, including many practicing lawyers, Smith's work would have seemed irrelevant at best.

146. See id. at 46-47. One suggestion might be that Smith was ignored because he had no academic standing or credentials. This seems unlikely since other nonacademic writers were acknowledged as meritorious. Among these were Henry T. Terry, John F. Dillon, James DeWitt Andrews, and Oliver Wendell Holmes, Jr. See id. at 37-46, 53-54, 73-74.
147. Presumably, there were some Thomistic thinkers at Catholic institutions at this time. However, Smith's secular theory may not have had any appeal to them.
The legal evolutionists are the remaining group of thinkers who might have been a receptive audience for Smith. However, they, too, had rejected natural law for cultural plurality; if there was any moral content in their theory, it was captured by the phrase "survival of the fittest." In addition, while Smith recognized the "organic state," the role of evolution in his theory was not central enough to merit notice by the evolutionists. Again, his message fell on deaf ears.

Except for the emergence of the evolutionists, whose views died out shortly from their own infirmities, what happened in Smith's time is exactly what he fought against. Bentham had successfully divided the worlds of law and morality. Moralists were not interested in law, lawyers were not interested in morality. Neither were interested in Smith's theory. Thus, his work died like a flower in the desert. Despite its bulk, Smith's jurisprudence became so obscure by the late 1930's that the new proponents of natural law were not even aware of it and consequently, were unable to build upon or improve it. This failure to recognize Smith's work suggests a generalization that worthwhile scholarly efforts are likely to be forgotten unless they are a part of current trends in thinking. A negative corollary might also be implied: that scholarly work within the confines of current trends will receive attention and have influence that may be disproportionate to its merits.

Before the merits of Smith's contribution can be discussed, some very obvious difficulties with his theory must be noted. His exposure to legal systems seems to have been confined to the Roman and the Anglo-American, with some lesser knowledge of contemporary continental law. The two later systems borrowed much in the way of terminology and concepts from the Roman, and they shared the same cultural development. It is not surprising, therefore, that similar moral principles appear in all three. As a result, Smith's arguments for the universality of "natural right" are quite weak. In addition, by distinguishing between morality and the philosophy of morality, Smith avoids at least two questions that must be dealt with by any natural

149. Smith's theory would have been helpful to those turn-of-the century judges who were injecting laissez-faire theories into constitutional law. His thinking would certainly have supported this kind of judicial activism as well as the egalitarian activism of the Warren court at a much later date. However, there is no evidence that any judges were familiar with Smith's work.

150. To follow this hypothesis where it leads would involve finding answers, apart from the convenient legal theories mentioned here, as to why lawyers were not interested in the relationship between morality and law as well as what other social and economic perspectives and concerns may have made Smith's work seem irrelevant. Those inquiries are, however, far beyond the scope of this work and may already have been pursued in other works on the intellectual history of the time.

151. For discussion of the revival of natural law in the thirties and forties, see HERGET, supra note 8, 228-61.
law philosophy: the ontological status of natural rights and the explanation of moral obligation. Related to this, he also commits what is often called the "naturalist fallacy" in that he makes an inference from what normative behavior is to what it ought to be. Smith does not recognize this problem and consequently does not present any ways to get around or avoid the fallacy. Finally, in common with many natural law philosophers, Smith fails to explain the process of reasoning that allows us to correct faulty normative principles. It is perhaps possible that contemporary theorist have made or could make stronger arguments or positions on these points.152

On the positive side, there is much to be learned from Smith's work. First, his theory provides a basis upon which fundamental rights (e.g., right of privacy, right to procreate or not, right to vote and participate in the political process) can be justified. Starting with the notion of the justice function of government, Smith characterizes all positive legal rules and principles as specific determinations of the natural law.153 The legal institutions of court, legislature, and constitutional convention all perform the function of determining the specific form of natural right for a particular context. Since these attempts to articulate the principles of natural right are subject to human error, they are in need of revision and restatement when it appears that their formulation is erroneous. Thus, precedents and statutes that run afoul of natural right in a given context can and should be revised or repudiated. In Smith's view, this is also true of explicit constitutional provisions. Written or positive rules are always tentative to some degree.

Second, Smith's conception of law contains a historical dimension absent in positivist and some natural rights theories. It explains law as reason acting upon a substratum of traditional cultural norms. Law is always partly new reasoning and partly accepted principle. Although Hayek is today the principal proponent of a historical view of the law, this insight is perhaps not fully appreciated even by him. Hayek distinguishes between "grown" law and "made" law and relegates all constitutional and administrative law to

152. For example, Rawls's reflective equilibrium may be an account of the operation of Smith's "reason." See supra note 114 and accompanying text. Likewise, the problem of the naturalist fallacy has been attacked anew by John Finnis in NATURAL LAW AND NATURAL RIGHTS (1980).

153. A similar idea is an important feature of the "pure theory of law" espoused by Hans Kelsen. Kelsen maintains that every act of legal decisionmaking involves both creation and application. A legislature "individualizes" a constitutional grant of power when it legislates. A court individualizes that legislation when it makes it applicable to a particular case. A sheriff further individualizes the law when he executes the order of the court. See HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 135-36 (Wedberg trans. 1945). For Kelsen, the individualization or determination is from a norm or law higher in the formal hierarchy; for Smith, the individualization or determination is from natural right to written rule.
the latter category. Smith recognizes that these fields of law also consist of reason acting upon traditional principles. Theories that provide a historical dimension offer explanations of the role played by concepts and procedures developed in the past in the determination of the present law. Indeed, in this respect, Smith’s view offers support to recent “interpretive” approaches to law. It is conceivable that much of Smith’s philosophy could be reworked into an interpretive mold.

Smith also offers something for today’s thinkers in the dispute between critical legal scholars and traditionalists on the indeterminacy of law. Smith sides with the former on the proposition that law is not autonomous, but is intimately tied to moral and political beliefs. However, he sides with traditionalists in the view that law is objective and often determines the outcome of legal decisions. This is, of course, because the morality that the law incorporates is objective, traditional, and known. The dispute over indeterminacy is thus shifted to the question of moral objectivity, either within the context of a particular cultural tradition or universally.

Finally, it should be noted that Smith’s philosophy, or an improved version of it, presents a serious natural law approach that dispenses with any need for a deity. For those who have found the necessary postulation of a deity to be a stumbling block toward accepting a natural law approach, Smith offers an alternative. For those inclined to an evolutionary approach but with doubts about the universal validity of “natural right,” Smith still offers much grist for the mill of thought. His contribution to jurisprudence, long unnoticed, should be recognized as significant.

IX. APPENDIX A
SCHOLARLY WORKS OF GEORGE HUGH SMITH

BOOKS:

Logic, or the Analytic of Explicit Reasoning (1901), 266 pp.

ARTICLES:

The English Analytical Jurists, 21 Am. L. Rev. 270 (1887).
The True Method of Legal Education, 24 Am. L. Rev. 211 (1890).
Hammond's Blackstone, 25 Am. L. Rev. 376 (1891).
The Unwritten Constitution of the United States, 27 Am. L. Rev. 52 (1893).
Nicaragua Canal Legislation, 27 Am. L. Rev. 475 (1893).
The New Departure in English Jurisprudence, 28 Am. L. Rev. 867 (1894).
The Pacific Railroad Companies and the People of the Trans-Mississippi States, 29 Am. L. Rev. 189 (1895).
Following Trust Funds, 1 Penn. L. Series (1895).
Of the Historical Development of the Law, 38 Am. L. Rev. 801 (1904).
The Old Law of Real Property as Modified in this Country, 39 Am. L. Rev. 1 (1905).
Of Actions Old and New, 39 Am. L. Rev. 223 (1905).
Of the Subject-Matter of Jurisprudence, 39 Am. L. Rev. 531 (1905).
Of the Nature of Rights; and of the Principles of Right or Jurisprudence, 40 Am. L. Rev. 58 (1906).
Of Logic, and Its Uses; A Lawyer's View, 42 Am. L. Rev. 229 (1908).
X. APPENDIX B

JUDICIAL OPINIONS OF GEORGE HUGH SMITH

California Court of Appeals
Second Judicial District

Armantage v. Superior Court of Los Angeles County, 81 P. 1033 (Cal Ct. App. 1905).
Ballerino v. Superior Court of Los Angeles County, 84 P. 225 (Cal. Ct. App. 1906).
In re Estate of Casner, 81 P. 991 (Cal. Ct. App. 1905).
Organic Natural Law

People v. Taggart, 82 P. 396 (Cal. Ct. App. 1905).