

September 2016

Justice Holmes, Natural Law, and The Supreme Court

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Recommended Citation

John J. Regan, C.M. (1962) "Justice Holmes, Natural Law, and The Supreme Court," *The Catholic Lawyer*.
Vol. 8 : No. 3 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol8/iss3/10>

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BOOK REVIEWS

JUSTICE HOLMES, NATURAL LAW AND THE
SUPREME COURT
By *Francis Biddle*

The MacMillan Company, New York,
1961. Pp. 77.

Reviewed by
JOHN J. REGAN, C.M.*

Three lectures given at the University of Texas in December, 1960, at the invitation of the Permanent Committee for the Oliver Wendell Holmes Devise, form the contents of this short book by the former Attorney General of the United States. He addresses himself to a lay audience "who often cannot understand the approach of judges to the controversial problems of constitutional law which they are called on to 'administer.'"¹

The rather broad title of the book suggests the outline followed by the author. The first lecture reviews in enthusiastic and admiring terms the personality and thought of Holmes, particularly as they affected his views on the judicial process. Mr. Biddle then takes up the sword in his second lecture to do battle with the "crusading fanatics," Jesuit Fathers Ford, Lucey and Kenealy, who have criticized the philosophy of Holmes.² His final lecture

is little more than a summary of general principles of constitutional interpretation expressed by the participants in the "Marshall Conference" at Harvard University in September, 1955, published under the title "*Government Under Law*,"³ and will not be reviewed here.

The picture of Holmes which emerges from the first lecture is a traditional one. We see the energetic Yankee conservative full of inconsistencies and contradictions: "his faith and skepticism; his personal arrogance, and the humility with which he approaches his own credo; his Puritanism—and his taste for improprieties coupled with his impulse to shock; his distrust of theories and his habit of indulging in them."⁴ We are reminded of Holmes' restraint in exercising judicial review of legis-

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¹ Author's note, page not numbered.

² See Ford, *The Fundamentals of Holmes' Juris-*

tic Philosophy, 11 *FORDHAM L. REV.* 255 (1942); Lucey, *Jurisprudence and the Future Social Order*, 16 *SOCIAL SCIENCE* 211 (1941); Kenealy, *The Majesty of the Law*, 5 *LOYOLA L. REV.* 101 (1950).

³ Harvard University Press, 1956.

⁴ BIDDLE, *JUSTICE HOLMES, NATURAL LAW AND THE SUPREME COURT* 23 (1961).

lation⁵ and his emphasis on "experience" in the formation of law.⁶ No new insight into Holmes' thought results from this portrait.

The second lecture, however, reveals many serious flaws in the author's presentation. Seldom has more insulting language been used in what purports to be a serious legal writing, albeit directed to laymen. The highly personal and abusive terms aimed at the intelligence, reputation and competence of the Jesuit critics of Holmes leads one to question, at the very least, the objectivity of the author.⁷

In addition to his lack of good manners, Mr. Biddle is guilty of the charge he repeatedly hurls at Holmes' critics. He misunderstands the thought of his opponents. His knowledge of natural law theory, and in particular Scholastic natural law, is singularly inadequate. Natural law for him is a system of moral absolutes created by the Catholic Church⁸ with "an existence of their own, outside the mind of man,"⁹ a view which readers familiar with Greek and Stoic philosophy would challenge. These "dogmatic" absolutes are capable of solving all human problems, and therefore the judge and the lawyer need only bring them into focus to decide all cases presented to them.¹⁰ The natural law theory of Blackstone¹¹ and the various "natural rights" philosophies¹² are part of this Catholic dogma, a rather amazing discovery after the work done by Thomist scholars in recent years to separate these theories.¹³

⁵ *Id.* at 11-13.

⁶ *Id.* at 16.

⁷ *Id.* at 31, 33, 34, 36, 37, 39, 47, 48.

⁸ *Id.* at 43.

⁹ *Id.* at 41.

¹⁰ *Id.* at 17.

¹¹ *Ibid.*

¹² *Id.* at 32.

¹³ See generally DAVITT, *THE ELEMENTS OF LAW* (Little, Brown and Co. 1959); ROMMEN, *THE*

Many basic concepts in St. Thomas' treatise on law have been ignored by Mr. Biddle. Aquinas clearly recognized, for example, the variability of natural law conclusions in particular cases¹⁴ and the necessity for positive law to give detailed content to the otherwise general principles of natural law.¹⁵ The author goes so far as to state: "Father Ford had been brought up . . . on St. Thomas Aquinas and his doctrine that all law is based on natural law implanted by God in man,"¹⁶ an oversimplification of Aquinas' thought about the modes of derivation of human law from natural law.¹⁷

The author thus summarizes the charges which his Jesuit opponents have leveled against Holmes:

[H]e was a skeptic and a cynic who believed in no God and had no principles; he considered that law was nothing but the use of force, and that might makes right; he discarded all absolutes, including natural law, and defined truth as the vote of the majority; and he described morals as nothing but a curb on the normal human inclination to get your feet in the trough.¹⁸

Yet Mr. Biddle himself admits in many places that Holmes was a skeptic—indeed he traces the origin of his skepticism to his military service in the Civil War.¹⁹ He nowhere claims that Holmes believed in a personal God. He praises Holmes for his rejection of absolutes and his preference for subjective "can't helps" over objective truth.²⁰

NATURAL LAW (B. Herder 1947).

¹⁴ *SUMMA THEOLOGICA*, I, II, q. 91, art. 3, ad 3; q. 100, art. 1.

¹⁵ *Id.*, I, II, q. 95, art. 1 and art. 2.

¹⁶ BIDDLE, *op. cit. supra* note 4, at 35.

¹⁷ *SUMMA THEOLOGICA*, I, II, q. 95, art. 2.

¹⁸ BIDDLE, *op. cit. supra* note 4, at 34.

¹⁹ BIDDLE, *JUSTICE HOLMES, NATURAL LAW AND THE SUPREME COURT* 13-14 (1961).

²⁰ *Id.* at 21, 42, 49.

The logic of Mr. Biddle's refutation is difficult to follow. Holmes, he says, had a sense of the "mystery of the universe."²¹ He shared with other men of his time "acceptance of the ordinary decencies—courtesy, abstinence, truth, a sane mind in a healthy body, honesty, and loyalty."²² Mr. Biddle's reasoning thus seems to say: Holmes was a good man; therefore his philosophy was true.

A detailed analysis of Mr. Biddle's other charges and refutations is beyond the scope of this review. Two impressions, however, emerge from a close reading. The author seems ill-equipped for philosophical argumentation, and his admiration for Holmes has blinded him to the implications of his hero's thought.

Mr. Biddle has done a disservice to

²¹ *Id.* at 19-23.

²² *Id.* at 34.

Holmes in this book, for there is much of value in Holmes' thought for the natural law advocate. The Justice's cautions against excessive reliance on logic and history in the judicial process²³ and his insistence that judges recognize their duty of weighing the competing "considerations of social advantage"²⁴ are certainly in the spirit of Aquinas' definition of law²⁵ and the place accorded by him to "equity" in the judicial process.²⁶ Perhaps future lecturers in this series will have more to contribute to an understanding of Holmes' thought in relation to the natural law tradition. Mr. Biddle has not done the job.

²³ HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 180, 187 (1920).

²⁴ *Id.* at 181.

²⁵ SUMMA THEOLOGICA, I, II, q. 90, art. 4.

²⁶ *Id.*, II-II, q. 60, art. 5; q. 120, art. 1. St. Thomas here adopts the Aristotelian concept of *epikeia*.

CITIZENSHIP STATUS

(Continued)

statement in referring to the Administrative Procedure Act: ". . . these statutes appear clearly to permit an action such as was brought here to review the final administrative determination of the Secretary of State." *Rusk v. Cort*, 369 U. S. 367, 372 (1962). In distinguishing the *Pedreiro* and *Shung* cases, the dissent said: "unlike this case the relief sought in those cases were sought only after the administrative process had run its full course, and a 'final' determination had been made by the At-

torney General." *Id.* at 397 (dissenting opinion). The Court apparently felt the exhaustion point was reached when the plaintiff came to his choice of judicial review, whereas the dissent apparently contends that there being no alternative relief, the plaintiff must apply for the certificate of identity and pursue habeas corpus after a "final" denial of admission. See generally *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); WASSERMAN, *IMMIGRATION LAW AND PRACTICE* 130-32b (1961); Schwartz, *Jurisdiction To Determine Jurisdiction In Federal Administrative Law*, 38 GEO. L.J. 368 (1950).



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Published Winter, Spring, Summer and Autumn by

*The St. Thomas More Institute for Legal Research
of St. John's University School of Law.*

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