

Article

Natural Law, Common Law, and the Problem of Historicism in American Public Life and Education

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Abstract: Recent developments within American politics have witnessed an increase in the use of history to highlight the need for social justice and civic engagement. Yet, on its own, history is an altogether impotent means of doing so, for it fails to provide the public with the moral framework necessary for evaluating past injustices on an objective basis. To remedy this problem, this essay suggests that historians and other scholars and activists who are interested in civic engagement and social justice should look to the classical and common law traditions; the answer to the theoretical need for a solution to problems within presentist activism has, in other words, been the law. Doing so would provide a more universal and shared conception of past injustices and help increase a polity's moral consciousness. Practically, this strategy can be implemented through a classical or liberal education, with the additional help of state legislatures. In all, this essay argues that history on its own is insufficient for moral education, that the best moral education is offered through the classical model, and that, as a practical matter, it is necessary for a legislative solution to mandate that education, if it will ever be possible to find an objective basis for civic engagement and social justice.

Keywords: state legislature; positive law; natural law; common law; civic engagement; social justice; history; liberal education; social science



Citation: Haines, Benjamin P. 2024. Natural Law, Common Law, and the Problem of Historicism in American Public Life and Education. *Laws* 13: 56. <https://doi.org/10.3390/laws13040056>

Academic Editors: Bolek Kabala, Casey D. Thompson and Patricia Easteal

Received: 17 April 2024

Revised: 9 August 2024

Accepted: 14 August 2024

Published: 21 August 2024



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1. Introduction

Civic engagement is impossible without history. History provides the possibility of a shared identity and a coherent vision of the future. History may help inform a citizenry about who is to blame for present problems, or who needs or deserves justice. Yet, history is not objective; it is a battleground of interpretation. Different versions of the past war with each other within competing historiographies, even on the most fundamental of issues, thereby making it impossible for there to be a universal sense of meaning and justice within a polity. History, then, is a useful but insufficient tool for creating a rational basis for motivating civic engagement or offering solutions to past injustices. History fails at supplying these solutions because of the distinction between facts and values; the facts of the past cannot in and of themselves dictate the moral imperatives of the present. History, therefore, requires a moral apparatus with which to make value judgments about the past and just solutions for the present.

If morality is not subjective but objective and situationally interpreted through custom, tradition, and reason, then the best apparatus for helping history inform the present's need for justice may be the codified expression of that morality, which is the law. Though there are many kinds of interpretations of right and law, few provide as robust a method for a universal application and understanding of reason as the natural law. Natural law, according to philosophers across the western philosophical tradition, is a set of rules which may either prescribe or describe what a man ought or ought not to do (MacIntyre 1988; Aquinas 1947, q. 94). Indeed, the simplicity and flexibility of natural law lends its application to the complexities of our increasingly pluralistic age. Natural law is “nothing other than a theory of good reasons for choice (and action)” (Finnis 1990, p. 1); it is universal, not specific to any one historical context, religion, faith, gender, race, or worldview but is

discernible, accessible, binding, and applicable to all humans of all times and places (Lloyd 2016; Triana 1999). Natural law, it has been argued, even carries significant overlaps with utilitarian calculus (Epstein 1989) and is nonpartisan, aimed simply at the “common good,” thereby rejecting “conservative” or “liberal” labels (MacLeod 2023).

The classical understanding of the natural law, the roots of which can be found in Plato and Aristotle, in particular offers a helpful way to ascertain a universal standard of right, due to its understanding that, though there is a universal standard of justice, the particulars of that standard are situational and interpreted through conventions of a city or state. In this way, the natural law remains objective, universal, and applicable to all men, while also being conventional and applied uniquely, depending upon the need of the situation (Strauss 1953). In a similar manner, another type of law which builds upon convention, yet in a more formalized way, is common law, belonging to the Anglo-American legal tradition, which offers formalized statements of traditional understandings of right through the opinions of judges (Stoner 2003).

To show the usefulness—and the reasonableness—of both the natural law and common law traditions, this essay is divided into three parts: two theoretical and one practical. The first part deals with the problem of presentism within recent treatments of modern history, which have failed to appropriately recognize the inadequacy of history to offer objective moral solutions to past injustices, thanks to certain assumptions within its methodology (Hannah-Jones 2022; Dunn 1969; Skinner 1969; Sweet 2022). The second part deals with how to avoid that presentism: historians and jurists must be honest about the limitations of history and search instead for a clear moral framework with which to filter the facts of the past, a filter which may be found within the tradition-based accounts of morality expressed in natural and common law. Only after doing so will history be at all able to offer a reasonable and consistent foundation for civic engagement and public activism. The third part of this essay suggests a practical solution to the problem of presentism within history, following the theoretical argument laid out in parts one and two. The best way to instill a public consciousness of natural and common law, i.e., a custom-based morality, may be through a classical or liberal education. Since it is the aim of that pedagogical model to cultivate virtue within its practitioners—along identical lines to the natural law, that is, human flourishing—it is a liberal education that offers an actionable solution to the problem of presentism. As recent developments within higher education have shown, however, implementing such a mission has proven to necessarily be the work of state legislatures, not institutions of education themselves, which have largely been captivated by presentism and retributive conceptions of justice.

2. Presentism in History

Presentism in history may take several forms, each with varying degrees and points of impact. Presentism affects historical memory, other scholarly disciplines, certain jurisprudential theories, and even the field of history itself. The defining theme of presentism within its disparate manifestations is that it isolates the past from its proper use—to better understand human nature—in one of three ways: as a weapon with which to win political battles; as a way to cordon off the past from the present; or to project the present’s interest back onto history. In each of these three iterations, presentism molds historical phenomena into a tool for its own needs, distracting the past from its proper use and end.

Recent popular accounts of American history have either revised or refashioned American history to serve the needs of the present. The leader of one of these revisionist movements, Nikole Hannah-Jones, has declared that former narratives of the American Founding have rendered Black Americans in particular as “inconsequential at best” and “invisible at worst”; the true “origin point” of the United States was the arrival of Africans to North America in 1619. This “reframing” might, says Hannah-Jones, “change how we understand the unique problems of the nation *today*” (Hannah-Jones 2022, pp. xvii, xii). Other, more whiggish accounts of the history of the United States, such as the 1776 Commission, seek to reassert older accounts of America’s past to remedy a perceived failure

of education and lack of patriotism—in the process committing the same presentist mistake as Hannah-Jones by projecting contemporary crises onto an interpretation of the past ([The President’s Advisory 1776 Commission 2021](#)). In both popular narratives, history is not history as such but is a tool of the present to justify calls for civic engagement along varying ideological ends.

Beyond the polemical use of the past, some scholarly disciplines are harmed by presentism. One of the clearest examples of this occurrence is in the study of political philosophy and political thought. Many historians of political thought have come to rely on a methodology that has broadly been termed “contextualism”. Contextualism generally claims that even the abstract ideas of philosophers are historically conditioned, mainly by language, and cannot be fully understood outside their particular historical circumstances. For example, contextualism asserts that the true meaning of the early modern philosopher John Locke’s thought can only actually be understood within the confines of his seventeenth-century context. Locke’s philosophy, in other words, as Locke himself understood it, can only apply to the unique historical circumstances out of which it arose. Locke’s ideas, therefore, cannot be useful to the present, because the issues he sought to address were uniquely tied to the specific situation out of which he was motivated to write and the specific problems he intended to address. As one contextualist put it, it is inconceivable to “construct” any analysis of “any issue in contemporary political theory around the affirmation or negation of anything which Locke says about political matters” ([Dunn 1969](#), pp. x–xi).

The contextualist approach carries the appearance of sound historical practice but is in fact an inverted presentism. Contextualism believes that the only things relevant for public life are those which belong to the here-and-now. The best way to solve present issues—issues, say, of injustice, criminality, or public policy—is to find solutions based on present ideas, for present ideas are the only kinds of ideas that are uttered for the express purpose of solving present problems. Whatever “timeless element” or “dateless wisdom” that might exist within a work of philosophy does not apply to contemporary issues, since timelessness and datelessness are altogether incomprehensible concepts ([Skinner 1969](#), pp. 4–5).

Presentism has even struck at the heart of the discipline of history itself. Historians are becoming more and more interested in the present and the very recent past at the expense of the ancient and medieval worlds. Between 2003 and 2013, the number of Ph.D. graduates who worked on topics in the post-1800 “modern” period rose by eighteen percent, while the number of graduate students who worked in the “pre-modern” period, before 1800, decreased by four percent. Moreover, those graduate students belonging to the latter category increasingly use contemporary or anachronistic analytical terms to study the pre-modern past, such as race, gender, sexuality, and the like. Indeed, such critical lenses have dominated the various fields of historical inquiry to such a degree that leaders within the profession have begun asking an important question: If one does not study history with these present issues in mind, is one really doing relevant work ([Sweet 2022](#))?

The presentism currently plaguing the academic discipline of history also appears within a prominent theory of constitutional interpretation: originalism. Originalism, in its simplest form, is an “approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters” ([Brest 1980](#), p. 60). Originalism presupposes that “the constitutional text is authoritative and that the judicial duty in particular is to interpret that text” ([Whittington 2004](#), p. 612). Developed as “a reactive theory motivated by substantive disagreement with recent and then-current actions of the Warren and Burger Courts” of the mid-twentieth century, originalism blossomed in the 1980s and 1990s as the preeminent conservative counter to progressive judicial legislation of the decades immediately prior. The intended end of the creation of originalism, in the words of one scholar, was “judicial restraint”: to create “some mechanism to redirect judges from essentially subjective consideration of morality to objective consideration of

legal meaning. By rooting judges in the firm ground of the text, history, well-accepted traditions, and the like, originalists hoped to discipline them" (Whittington 2004, pp. 601–2).

Originalism is well-intentioned in its attempts to ground constitutional interpretation in something more solid than a judge's—or even a court's—jurisprudential outlook. Yet, originalism's efficacy in offering a more objective interpretation of the Constitution, not to mention a coherent vision of the past, is hampered by an epistemic problem inherent within its methodology. It is not at all clear whether it is possible to acquire sufficient knowledge of the history surrounding any given constitutional utterance to truly know what the true or intended historical "public meaning" of an article or an amendment is (Dworkin 1990). It is virtually impossible, as the critics of originalism have variously noted, to know for certain the full intentions of the Constitution's framers, or its ratifiers' intentions (Solem 2011, pp. 8–11).

To save itself from this issue, originalism assumes a presentist model of historical inquiry by taking on certain "normative assumptions" and "high-order principles of political morality" based upon premises foreign to its historical subjects. Those normative assumptions—that is, the methods by which originalists claim to understand the Constitution—are rooted in conservative reactions to the Warren and Burger Courts. Originalism, in other words, was created to address a political need of a time wholly separate from the period it claims to understand. In effect, then, history, in the originalist sense, is used as a legal tool, if not a political weapon, with which to defeat progressive jurisprudence; the facts of the past are filtered through present values, i.e., certain assumed high-order principles of political morality (Vermeule 2022, pp. 91, 94–95; Arkes 2023, pp. 9–14).

The criticisms here leveled at originalism are not in principle to suggest that originalism is incompatible with universalist moral theories such as natural law (Alecia 2023), but rather to highlight that originalism is not the objective jurisprudential method it aims to be. It is not only impossible to prove certain historical facts surrounding a given legal interpretation; it is also impossible to arrive at a truly objective understanding of the past when, as is the case with originalism, one of the express intentions of a historical methodology is to apply its findings to present problems. As will be shown in the following section, the facts of the past are, simply, the facts—they cannot tell one what to do or how to live.

3. Natural Law and Common Law as Alternatives to Presentism and Historicism

The presentism practiced by originalism and the discipline of history is the bedrock of the notion and practice of historicism. Historicism as a twentieth- and twenty-first-century phenomenon fundamentally "demands that each generation reinterpret the past on the basis of its own experience and with a view to its own future." Historicism makes the modern historical discipline "no longer contemplative, but activist" in that "it attaches [the] study of the past" to that "which is guided by the anticipated future" (Strauss 1959, p. 59). Instead of studying history for the sake of learning about the truth of human nature, historicism demands that the past be studied to better understand the problems of the present, molding the facts of the past into a tool to fit its particular needs and address its unique concerns.

The error made by historicism, however, is not simply that it makes history a polemical weapon for the present but that it mishandles and thereby obscures the fact-value distinction—an obfuscation that has plagued the social sciences for well over a century. The discipline of history is in a particularly difficult position to navigate the differences between facts and values, due to its location at the intersection of the social sciences and humanities. While the sciences, theoretically, are interested in observation, data collection, and induction, the humanities are broadly interested in discovering what it is to be a human person and are necessarily deductive. Both the hard and social sciences claim a level of objectivity within their various inquiries: they are only interested, so they say, in the facts. The humanities, on the other hand, rest more comfortably with the abstract and openly engages in speculative theories to discover the more intangible bases of human experience.

In modern academia, the sciences are treated as superior. Science has effectively done away with the assumption of the existence of abstract principles or standards, since even the most basic understanding of the material world shows the non-existence of universal or timeless principles outside the physical laws of nature. History has one foot in the scientific world and one foot in the humanistic world. On the one hand, history is a science that collects data about the past to produce a report on that data and may be inductive insofar as it can draw general conclusions from specific observations. On the other hand, history is also an art, in that it is always presented in narrative and in that the narrative is always and unavoidably embedded with certain theoretical assumptions based upon unempirical notions. A historical narrative may be deductive in that an argument may be constructed by first assuming general principles and arriving at narrow conclusions.

While historians today are quick to acknowledge the fact that their discipline is an imperfect science—that there is no such thing as a truly “objective” history—they tend at the same time to be ignorant of the various theoretical assumptions that always undergird their work (Moyn 2014, p. 114). That theoretical blindness has left them with the *de facto* assumption that it is sufficient for history to approximate a social science while inexplicably piercing the veil of human nature. This blurs the distinction between fact and value, in that the historicist effectively thinks that it is possible to describe human events in the realm of fact without appropriately addressing the values that undergird the interpretation of those facts. Yet, for the historian to truly be a social scientist, he or she would have to avoid all presently informed value judgments; one could not speak of past moral standards, religion, or conceptions of science. To accurately represent the past, a historian would have to assume for himself the same epistemic premises as his historical subjects. To create virtually any degree of critical distance is to fail to fulfill the historian’s alleged vocation: to understand the past as it understood itself. But to fully assume the perspective of any given historical context removes the possibility of making moral judgments about the past, from calling “a spade a spade” (Strauss 1953, pp. 61–62). The historical discipline, therefore, seems to be caught between two contradictory ideals: to remain “objective” and assume as fact the beliefs of its subjects, or to suspend that objectivity in favor of the present’s concerns and use history as a tool to address them.

Historicism threatens history in that it places it within a restricting binary. Either history must be understood only for the sake of interest in the past, with no regard for the present, or history must be fashioned into a weapon for competing ideologies to use against their opponents. History either becomes publicly useless, or it may become an object of public suspicion or even ire. In the case of the former, history falsely becomes an end-in-itself. In the case of the latter, history ceases to be history. It need not be this way. Saving history from its current presentism within popular imagination and academia does not require redefining the uses of history from one with public utility to one with no political application. Rather, it requires a paradoxical, non-historical, and non-scientific turn—away from history and science and toward philosophy and a philosophical understanding of moral law.

Philosophy is distinct from science insofar that philosophy is the quest for truth and the love of wisdom, whereas science is the quest for genuine knowledge of natural things. For science, knowledge is an end-in-itself; for philosophy, knowledge is a means to the end of acquiring wisdom or truth. Philosophy is a superior means of determining the basis for civic engagement and the need for social justice because philosophy does not simply consider the fact of the matter but the quality—the value—of it. Science, particularly social science, tries and fails to observe social phenomena without making value judgments a clear and necessary part of its calculus. Philosophy—well understood and applied—is concerned not with an aggregation of facts but a filtration of them through the lens of values in accordance with reason. Philosophy, properly defined, bridges the fact–value distinction by concerning itself not only with what is but also with what ought to be.

This conception of philosophy began with Socrates, Plato, and Aristotle and is best applied to public life and justice through what the twentieth-century philosopher Leo

Strauss called the classical natural right teaching. Classical natural right teaching is based upon classical philosophy's understanding of natural law, which in turn provides the moral apparatus necessary for supplementing the facts of history and informing civic engagement and social justice.

Classical natural law teaches that natural right is identified through reason and expressed in custom; the interpretation of right belongs to the city first and the individual second. Classical philosophy understood human nature as selfish and avaricious; left to their own devices, humans will pursue their own ends to the detriment of others. To subvert that selfishness, classical philosophy denied people their inclinations and gave a city the power to make laws contrary to individual desires and in alignment with human flourishing. The good life, then, according to classical philosophy, was the process of forming human behavior in increasing alignment with convention, which in some sense was the "perfection" of human nature and the cultivation of virtue. Life according to nature was the "life of human excellence or virtue, the life of the 'high-class person', and not the life of pleasure as pleasure" (Strauss 1953, p. 127).

Much like civil law, classical philosophy said that the understanding of natural right may be changed upon need and circumstance. The application of natural law as expressed in natural right, according to Aristotle, was "mutable" and defined in accordance with society's needs in order to combat the "inventiveness of wickedness" and to arrive at "a just decision based on full consideration of all the circumstances, a decision demanded by the situation." Classical natural law derived its conceptions of right and wrong from "concrete decisions rather than general rules." The method of ascertaining and defining natural right only deviated from normality "reluctantly" and "only in order to save the cause of justice and humanity itself" (Strauss 1953, pp. 159–61).

Common law functions in a similar way to classical natural law but deviates slightly from it, in that it is clearly and explicitly reliant on individual opinions collected over time in order to arrive at a codified expression of right and wrong. While natural law and common law both fall under the broader umbrella of a conventionalist standard, insofar as both look to tradition and custom to arrive at a practical conclusion, common law is expressly based upon citations of specific interpretations of the law, through the opinions of judges, to determine what is just and what is unjust. Common law offers a more tangible and even "satisfying" way to discover similar truths as natural law (Stoner 2003, pp. 133–36).

Classical understandings of the good life and the common law interpretation of justice pertain to the public application and appropriation of history, not only in that they offer a mechanism for an objective moral code, but also in that they offer the possibility of a universal (or at least national) basis for applying the facts of the past to present public interests and present public needs. If human beings naturally possess reason, if nature in some sense is synonymous with reason, and if the codified expression of that reason is the law, then one only needs to accumulate the facts of history and filter them through the lens of natural or common law in order to understand what constitutes injustice and what properly justifies civic engagement and activism. In this schematic, one may take the facts of the past and compare them to the customary understandings of right and wrong in the present, thereby helping the present's determination of which past injustices need to be addressed and which do not. Natural and common law, in other words, can serve as the moral apparatus history needs to remain relevant to public life.

Natural and common law save history from presentism in two primary ways. First, they shelter history from presentist polemics by providing a clear standard against which to judge alleged injustices. They may also help determine, using custom or precedent, what constitutes adequate or lacking patriotism. In a similar way, natural and common law inform the discipline of history itself by offering a clear standard by which to determine if activist research is warranted. If there are legitimate concerns over past violations of gendered, racial, or sexual wrongs, those concerns should be considered within the context of the law—the law according to reason and understood by society—in order to determine the degree to which violations occurred. Second, common law in particular

insulates history from inverted presentism, expressed in contextualism, by in fact requiring the consideration of past ideas and events and making them relevant for the present. If past ideas are only relevant in the particular historical contexts in which they are uttered, then common law makes them relevant for the present by making them a part of a living—not past or dead—sequence of jurisprudential decisions.

4. On Praxis: Using the Law to Teach Freedom and Protect History

Natural and common law and history are interrelated. Natural and common law and history are similar in that they both rely on tradition: history in that tradition itself is built upon knowledge of the past, and natural and common law in that accepted modes of behavior are based upon shared conceptions of human flourishing which develop over time. But natural and common law and history are not dependent. History can theoretically remain in the face of radical societal change, while shared conceptions of natural and common law are easily destroyed in the face of such redefinition, qua the French Revolution. History may be created spontaneously; natural and common law can only be developed over generations.

Yet, natural and common law are, in essence, theoretical and philosophical and require practical means of protecting themselves from radical change. Only after such means are identified is it possible to protect history, and by consequence historically motivated civic engagement and activism, from presentism or other methodological pitfalls within the current historical discipline and some forms of jurisprudence.

The most tried-and-true means of instilling common knowledge of custom-based morality is education, specifically liberal education. Broadly defined, a liberal education is a pedagogy that has its roots in classical philosophy and is designed to provide its practitioners with the knowledge and intellectual skills needed to be truly free. A classical or liberal education has long been considered integral for the maintenance of a free society's norms and values. In the context of the United States, for instance, a liberal education was identified by the Founding Fathers as a “keeper of the republic”, for it was a liberal education that created citizens capable of public leadership and civic engagement by showing them what it meant to not simply be free, but also what it meant to be just and fair (quoted in [Thomas \(2023, p. 331\)](#)).

A liberal education supplements and protects traditional understandings of law (read: customary right and wrong) from radical, sudden change, in that it informs one generation to the next the principles upon which the natural and common law are discovered or articulated. Moreover, one who is educated according to the classical model is better equipped to understand how to interpret the facts of history, because he or she has been given a clear moral framework and the necessary intellectual tools needed to understand what constitutes human flourishing, in accordance with reason and thus with natural law. In so doing, one becomes familiar with natural law and may have a strong ability to apply that understanding to the codified expressions of it, such as the common law.

Despite these benefits, liberal education has in recent decades fallen on hard times. It has been largely neglected, particularly in the United States. Classics departments, for example, which house those instructors and scholars most familiar with the principles of liberal education, are among the first to be axed from financially strapped universities and secondary schools ([Howe 2011](#)). This phenomenon has at least in part led to a reduction in one of the express goals of classical pedagogy—“to better understand the ideas and institutions of [one’s] own culture which have grown out of classical roots” ([Bayon 2003, p. 195](#))—as well as, in turn, a predictable decrease in general civic knowledge ([Annenberg Public Policy Center 2016](#)).

American universities seem especially incapable or unwilling to offer a corrective to the reduction in classical education and civic knowledge. This incapability or unwillingness might in part be due to a recent and sharp increase in political polarization ([Ben-Porath 2023, pp. 7–24](#)), but certainly also has to do with a newfound commitment to critical theory, a twentieth-century school of thought which rejects the assertions that “there is only one

truth, and the possibility of honesty, internal consistency, reasonableness, and striving for peace". Critical theory has as its express intention the liberation of "oppressed humanity"—oppression that derives from core Marxian economic and social critiques of bourgeois life but may also be applied to any perceived category of persecution (Horkheimer 1972, pp. 222–24). Since critical theory emerged, it has split into a variety of sub-disciplines, such as critical race theory, critical gender studies, fat studies, critical sexuality studies, as well as others. These sub-disciplines (with the help of another twentieth-century theory, poststructuralism) apply critical theory's same goal of liberation, but to all of society and its institutions, leading some to criticize it as not simply relativist, but radically revolutionary (Pluckrose and Lindsay 2020).

Critical theory's influence on American education has significantly increased in recent years. Critical race theory, for example, has also provided a methodological basis for a new generation of historical scholarship aimed at answering questions of racial injustice, even when such questions do not present themselves within the relevant primary sources (for example, see Fuentes 2016). Critical theory and its various iterations also threaten traditional understandings of traditional communitarianism by seeking to liberate human beings, not from individualist avarice, but by way of deconstructing conventional mores and customs along the lines of a postmodern and neo-Marxist morality (Pluckrose and Lindsay 2020).

Critical theory has gained such significant traction in American academia that it has fundamentally changed the original goal of higher education—away from traditional modes of academic inquiry and towards a retributive sense of justice. As the social psychologist Jonathan Haidt has recently argued, in the last decade or so, universities have become so fixated on past injustices along racial, sexual, bodied, or gendered lines that they have radically changed the traditional *telos* of the university away from the pursuit of truth and towards the addressing of past wrongdoings, even if those wrongdoings are empirically disprovable. So captured is modern academia by critical theory, Haidt claims, that it is no longer capable of governing itself and requires external pressure and guidance to properly reform (Haidt 2024).

If Haidt is correct that universities cannot fix themselves on their own, how can higher education be saved, and how can the study of the past be insulated from critical theory and other present-minded interpretations of history? One readily available means is to fall back on the law, that codified expression of reason: universities which fall under the public purview must be regulated by their elected representatives, who should in turn seek to go back to the university's pedagogical roots—a classical education.

Fortunately, this solution is already being enacted across the United States. New so-called "civic institutes" have begun to spring up across the United States, in an effort to fill the "massive need for better civic knowledge among our citizenry and aspiring citizens", as well as to fill the "massive need to restore space in our public universities for serious liberal arts education and intellectual diversity". Civic knowledge and liberal education, in the words of Paul Carrese, the founding director of the first civic institute in the United States, the School of Civic and Economic Thought and Leadership (SCETL) at Arizona State University, may help bring about a "new birth of freedom" in both "American civic life and our educational culture and institutions" (Carrese 2023, p. 2). Carrese has noted, too, that the call for civic education is not uniquely a right-wing phenomenon, though it is thus far only conservative legislatures that have funded civic institutes; academics and administrators from Johns Hopkins University, Stanford University, and Yale University have all identified that the decrease in civic and classical education have demonstrably negatively affected the American political order (Carrese 2024).

What is particularly noteworthy about these civic institutes, however, is not that they are in and of themselves responsible for reinserting liberal education back into national conversation. They are not. Rather, what is noteworthy about them is that they were created and now exist because of *legal* action and deliberation. It has been state legislators that have ultimately ordered and instigated the re-injection of liberal education into their

respective states' institutions of higher education (Carrese 2023, pp. 1–4). The answer to the theoretical need for a solution to problems within presentism has, in other words, been the law. This law is not simply a positive law but a prescriptive law; it tells people what they must do and what must happen.

The legal development of an answer to the problem of presentism and historicism provides a schematic on which to base future solutions to problems posed by presentism and may lead to the following conclusion: when seeking to solve problems posed by bad ideas, it is not enough to rely upon a rights-based, positive law devoid of moral judgment. It is not sufficient, for example, to rely on that truism that “the answer to bad speech is always more, not less, speech”, but rather to make a prescriptive law that provides an actionable, or constructive, solution.

If it is true that presentism and critical theory cause problems within the discipline of history, liberal education, and civic knowledge; if the solution to presentism and historicism in public life is a traditionalist, custom-based moral law, expressed in the natural or common law; if the best way to communicate that law is a liberal or classical education; and if positive law is insufficient for ensuring that this is implemented in society, then it should follow that an alternative legal means—outside the ones already seen in the positive law—is necessary for history itself to be insulated from the bad ideas and theories within that discipline and from the negative implications they carry to civic engagement and ideas regarding how to properly diagnose social justice.

5. Conclusions

History is the primary means by which a polity understands itself. Without history, there is no possibility of joint narratives or shared experiences within a polity. History is the primary means by which informed citizens determine how and when to civically engage, and what does or does not constitute social justice. Yet, on its own, history is morally impotent—it cannot determine right or wrong—and thus requires an apparatus by which to determine the rights and wrongs of the past, and whether those rights and wrongs have been appropriately addressed in accordance with civil code. The best apparatus by which to decide such questions is through natural and common law, which are custom-based expressions of public reason. Natural law is primarily understood philosophically, while common law is primarily understood through jurisprudential precedence. Natural law provides the moral apparatus history needs to be publicly relevant, in that it subverts the presentism inherent in contemporary usages of history and informs the present what past injustices need addressing.

The practical expression of natural law may be understood in some sense to be common law. If natural law is the conventionally or traditionally understood expression of the basis of human flourishing, then common law is the codified expression of that law, as stated through the formal legal opinions of judges; common law offers a tangible and clear expression of convention. Natural and common law, in this way, may serve as a more objective and tangible and universal statement of morality that history—and other social sciences, for that matter—may need to address past and present wrongdoings and decide on how to solve them.

The way to ensure the knowledge of the natural law in particular has traditionally been understood to be a liberal education, which gives individuals the ability to discover for themselves their public and private duties in accordance with the customs of the *polis*. In recent years, however, public life in the United States has been barren of such systems of liberal education. It has therefore been proven necessary to legislate the creation of institutes in higher education to offer the means to achieve a liberal education and cultivate a civically and morally informed citizenry. Though this exceeds beyond the express (though extremely limited) confines of positive law, doing so—that is, creating a conventional and prescriptive legal solution—has proven necessary in order to potentially fend off the philosophically erroneous ideas and practices of presentism within history and to preserve more coherent ways of discerning the proper basis for civic engagement and social justice.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: The original contributions presented in the study are included in the article. Further inquiries can be directed to the corresponding author.

Conflicts of Interest: The author declares no conflicts of interest.

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