

APPLYING UNJUST LAWS WITHOUT COMPLICITY IN INJUSTICE: A SYNTHESIS OF  
NATURAL LAW AND THE FEDERAL JUDICIAL ROLE IMPLIED BY ORIGINAL  
MEANING TEXTUALISM

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INTRODUCTION

The role of federal judges has been the subject of heated discussion, especially since the changes to the Supreme Court brought by the retirement of Justice Sandra Day O’Conner and death of Chief Justice William Rehnquist.<sup>1</sup> These debates have also coincided with another trend in legal academia over the last quarter of the twentieth century—the revival of natural law jurisprudence.<sup>2</sup> Although unquestionably the natural law tradition had an influence on the framers of the Constitution,<sup>3</sup> its role in judicial decision-making has been a source of controversy.<sup>4</sup>

The revival of natural law jurisprudence has created uneasy allies and strange adversaries. For example, Robert Bork, championed by many religious conservatives for his commitment to originalism and judicial restraint, has decried use of natural law by the judiciary.<sup>5</sup> Similarly, in

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<sup>1</sup> Compare Sandra Day O’Conner, Op-Ed., *The Threat to Judicial Independence*, THE WALL STREET JOURNAL, Sept. 27, 2006, at A18 (“The ubiquitous ‘activist judges’ who ‘legislate from the bench’ have become central villains on today’s domestic political landscape . . . [U]sing judges as punching bags presents a grave threat to the independent judiciary.”) with William H. Pryor, Jr., Op-Ed., *‘Merely Judgment’: American Courts are not above public criticism*, THE WALL STREET JOURNAL, Oct. 8, 2006, at A19 (“Judges must do more than respond to criticisms; we must exercise restraint. Judges have a unique responsibility to safeguard our independence. It is not too much for us to look in the mirror and ask whether some criticisms are fair.”).

<sup>2</sup> See generally ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (2d prtg. 2004); Colloquium, *Natural Law, the Constitution and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001); Symposium, *Natural Law v. Natural Rights: What Are They? How Do They Differ?*, 20 HARV. J.L. PUB. POL’Y 627 (1997); Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992); JOHN FINNIS (ed.), NATURAL LAW (1991); Symposium, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

<sup>3</sup> Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME L. REV. 258 (1950).

<sup>4</sup> Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2269-70 (2001) (“Throughout the Twentieth century, however, a lively debate has existed regarding the question of whether the Constitution incorporates natural law in such a way as to make it a source of judicially enforceable, albeit unwritten, constitutional rights and other guarantees”).

<sup>5</sup> ROBERT H. BORK, THE TEMPTING OF AMERICA 66 (1990) (“I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us. Judges, like the rest of us, are apt to confuse their strongly held beliefs with the order of nature.”). The “legal positivism” Bork appears to embrace does not require denying the existence of objective human goods and moral requirements in jurisprudential theory, like some positivists such as Hans Kelsen espouse.

*Griswold v. Connecticut*,<sup>6</sup> Justice Black accused the majority of relying on what he characterized as the “natural law due process philosophy,” used in *Lochner v. New York*,<sup>7</sup> to justify striking down a law forbidding the use of contraceptives based on a right of marital privacy.<sup>8</sup> The “penumbras and emanations” of *Griswold* were eventually relied on to justify legalized abortion.<sup>9</sup> Similar obtuse language that could be construed as an appeal to natural law principles appeared in the joint opinion of Justices O’Conner, Kennedy, and Souter in *Planned Parenthood v. Casey*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>10</sup> Furthermore, the Court’s appeal to an “emerging awareness that liberty gives substantial protection . . . in matters pertaining to sex” was used to justify striking down a statute criminalizing sodomy in *Lawrence v. Texas*.<sup>11</sup> Professor Paulsen notes “[t]he nearly unanimous consensus today” that the infamous *Dred Scott v. Sandford*<sup>12</sup> decision was also “a capricious judicial frolic into natural law.”<sup>13</sup>

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Robert P. George, *The Natural Law Due Process Philosophy*, 69 *FORDHAM L. REV.* 2301, 2302 (2001). Professor George argues that “the natural law itself confers no authority on judges, to go beyond the text, logic, structure, or original understanding of the Constitution to enforce principles of natural justice as they understand them.” *Id.* at 2304. George also notes that the natural law “does not forbid free wheeling judicial review” either. *Id.* at 2305.

<sup>6</sup> 381 U.S. 479 (1965).

<sup>7</sup> 198 U.S. 45 (1905).

<sup>8</sup> *Griswold*, 381 U.S. at 514-16. Although the majority in *Griswold* specifically repudiated relying on *Lochner*, 381 U.S. at 482, it grounded a right to privacy in a finding that the “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” *Id.* at 484, a passage heavily criticized by conservatives, including Bork. See BORK, *supra* note 5, at 98-99.

<sup>9</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right to privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”). Professor Michael Paulsen has noted that “*Roe*’s defenders have candidly acknowledged” it represented a “natural law methodology of decision.” Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 *J. L. & RELIGION* 33, 68 (1989) (citing Thomas Grey, *Do We Have an Unwritten Constitution?*, 25 *STAN. L. REV.* 703, 707-09 (1980)).

<sup>10</sup> 505 U.S. 833, 851 (1992).

<sup>11</sup> 539 U.S. 558, 572 (2003).

<sup>12</sup> 60 U.S. (19 How.) 393 (1856).

<sup>13</sup> Paulsen, *supra* note 9, at 65. It has been argued that the reasoning exhibited in *Griswold*, *Casey*, and *Lawrence* cannot satisfy the elements of a “law,” see text accompanying note 24 *infra*, in the Thomistic tradition and therefore cannot fairly be described as “natural law” opinions. See, e.g., Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 *REGENT UNIV. L. REV.* 33, 49 (1997) (arguing *Griswold* was wrongly decided because “natural law cannot be the foundation for recognizing a ‘natural’ right that is incompatible with a fundamental law of nature”). True application of natural law, so the argument goes, is an exercise of “right” reason not the arbitrary reasoning exhibited in these decisions. However, one can accept this caveat without

Ironically, among the chief evils conservative proponents of judicial use of natural law wish to combat is the specter of abortion on demand.<sup>14</sup> In fact, Professor Paulsen, while arguing that “natural law provides *no* principled limitations on judicial discretion,”<sup>15</sup> has advocated that judges should “under-rule” controlling precedents such as *Roe* if narrow construction will not prevent an unjust result.<sup>16</sup>

Christian judges<sup>17</sup> should determine in advance how they will confront the ethical questions arising when faced with an unjust precedent while discharging their oath to administer justice and faithfully discharge the duties imposed by the Constitution and laws of the United States.<sup>18</sup>

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endorsing broad authority for federal judges. A believer in natural law, such as this author, could accept the criticism of *Griswold* and its progeny as inherently flawed reasoning while holding to the prudence of limiting judicial discretion for the very reason that fallen humanity is prone to grievous, and sometimes willful, error. *See, e.g., Romans* 1:18-20 (explaining that, humanity is without excuse for its wickedness because the truth is available but it is “suppress[ed]”). When individuals, or an unelected federal judiciary, are vested with broad discretion, but left completely unaccountable for the exercise of that discretion, the potential for error seems compounded. *See THE FEDERALIST NO. 47, 373-74* (James Madison) (John C. Hamilton ed., 1871) (“The accumulation of all powers legislative, executive and judicial in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny”); Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887) (“Power tends to corrupt and absolute power corrupts absolutely.”), *reprinted in* J. DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER*, 328, 335 (Gertrude Himmelfarb ed., 1972).

<sup>14</sup> *See* Charles E. Rice, *Some Reasons For a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 542 (1989) (arguing legal positivism was used to justify abortion on demand and proposing natural law’s “constructive” and “critical” function to guide and limit the civil law).

<sup>15</sup> Paulsen, *supra* note 9, at 71 (emphasis in original).

<sup>16</sup> *Id.* at 73-88. Paulsen suggests a judge facing enforcement of an unjust precedent should follow a four step process: (1) narrowly construe the unjust precedent, (2) when it is unavoidable “under-rule” the higher court’s ruling, (3) recuse oneself from the case with a detailed criticism of the higher court’s precedent, and finally (4) resign rather than apply an unjust precedent. *Id.* at 37.

<sup>17</sup> This Note is aimed at self-identified Christian judges because the author assumes this audience will have a foundational commitment to certain moral values that impact their professional lives. *See* Larry O. Natt Gantt, II, et. al., *Professional Responsibility and the Christian Attorney: Comparing the ABA Model Rules of Professional Conduct and Biblical Virtues*, 19 REGENT UNIV. L. REV. 1 (2007). The author assumes without argument the immorality of taking innocent human life. Others give a more comprehensive defense of this position. *See* FRANCIS J. BECKWITH, *POLITICALLY CORRECT DEATH: ANSWERING ARGUMENTS FOR ABORTION RIGHTS* (1993); RANDY ALCORN, *PRO-LIFE ANSWERS TO PRO-CHOICE ARGUMENTS* (2d ed. 2000).

<sup>18</sup> The judicial oath is codified at 28 U.S.C. § 453 (2004). This Note is chiefly concerned with judges in legislatively created Article III courts, e.g., United States Court of Appeals and District Court level judges. It is beyond the scope of this Note whether state court judges have more freedom to reason to the natural law. There is at least a credible argument that state courts have more freedom in this arena for two reasons. First, the Constitution expressly limits the federal government. *See* U.S. CONST. art. I, § 8 (enumerating powers of the national government); U.S. CONST. art. III (prescribing limitations on the federal judicial branch of government). Second, state courts enjoy broader powers in the development of substantive rights through the common law than do their federal counterparts. *See generally* Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951); P.S. Atiyah, *Common Law & Statute Law*, 48 MOD. L. REV. 1 (1985).

To that end, this Note seeks to synthesize the dilemma with the following principles: Part I explains that the natural law tradition allows a system of government limiting the interpretive ability of judges for prudential reasons. Part II argues that the text and logic of the Constitution prescribing original meaning textualism limits the interpretive role of judges as a matter of positive law. This limitation should be followed in conjunction with natural law mandates to follow justly enacted positive laws. Part III applies these natural law ethical theories, including the doctrine of the Double Effect, arguing that a judge in certain circumstances may apply an unjust precedent without violating conscience. This final principle is tested on the Partial Birth Abortion cases<sup>19</sup> arising since the Supreme Court's ruling in *Stenberg v. Carhart*<sup>20</sup> and Congress's passage of the Federal Partial Birth Abortion Ban.<sup>21</sup>

#### I. THE NATURAL LAW TRADITION ALLOWS A SYSTEM OF GOVERNMENT LIMITING THE INTERPRETIVE ABILITY OF JUDGES

To demonstrate that no tenet of the natural law prevents positing a system of government forbidding freewheeling judicial recourse to higher law, it is necessary to present an overview of the classical and “new” natural law theories popular in analytical jurisprudence today.<sup>22</sup>

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<sup>19</sup> Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), *aff'd in part by* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278, 312 (2nd Cir. 2006). *See also* Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd by* Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), *cert. granted* Gonzales v. Carhart, 126 S. Ct. 1314 (2006); Planned Parenthood Fed'n of Am., Inc. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd by* Planned Parenthood Fed'n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *cert. granted* Gonzales v. Planned Parenthood Fed'n of Am., Inc., 126 S. Ct. 2901 (2006).

<sup>20</sup> 530 U.S. 914 (2000).

<sup>21</sup> The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003) [hereinafter “the Partial-Birth Abortion Ban” or “the Ban”].

<sup>22</sup> This brief natural law survey is not intended to be all-inclusive as other authors have given more comprehensive treatment. *See* Germain Grisez, Joseph Boyle, & John Finnis, *Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 148-151 (1987) (annotated bibliography for the new natural law theory); JOHN FINNIS (ed.), NATURAL LAW (1991) (two volume set surveying both the classical and new natural law theories and their effect on contemporary jurisprudence); ST. THOMAS AQUINAS, 2 SUMMA THEOLOGICA Pt. I-II, Q. 90-108, at 993-1119 (Fathers of the English Dominican Province trans., Christian Classics 1981) (St. Thomas' *Treatise on Law*).

### A. Overview of the Classical Natural Law Tradition

Thomas Aquinas is recognized as the seminal architect of the classical school of natural law jurisprudence.<sup>23</sup> He holds that law “is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”<sup>24</sup> Within this general definition Aquinas identifies four types of law.

First, Eternal Law is the wisdom of God by which He rules the universe.<sup>25</sup> Because God’s wisdom is manifested by his *governance*, it “has the nature of law.”<sup>26</sup>

Second, Divine Law is subsumed within Eternal Law<sup>27</sup> and is the “reflection of eternal law in special revelation.”<sup>28</sup>

Third, Natural Law is “the rational creature’s participation of the eternal law.”<sup>29</sup> Because Aquinas explains that the “precepts of natural law are fully contained in Scripture[,]”<sup>30</sup> they are categorically contained within the Divine Law.<sup>31</sup> However, the Natural Law concerns principles accessible to all (general revelation), not just those who read and understand the Scriptures.<sup>32</sup> The Natural Law includes the “first principle” of “practical reason” that “*good is to be done and pursued, and evil is to be avoided.*”<sup>33</sup>

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<sup>23</sup> See, e.g., Michael Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 634-35 (2004).

<sup>24</sup> AQUINAS, *supra* note 22, Q. 90, Art. 4, at 995.

<sup>25</sup> *Id.* Q. 91, Art. 1, at 996.

<sup>26</sup> *Id.*

<sup>27</sup> Hernandez, *supra* note 23, at 634.

<sup>28</sup> J. BUDZISZEWSKI, NATURAL LAW FOR LAWYERS 39 (2006).

<sup>29</sup> AQUINAS, *supra* note 22, Q. 91, Art. 2, at 997.

<sup>30</sup> Hernandez, *supra* note 23, at 634.

<sup>31</sup> AQUINAS, *supra* note 22, Q. 94, Art. 4, Reply 1, at 1011 (“whatever belongs to the natural law is fully contained in them [referring to the scriptures]”).

<sup>32</sup> *Id.* Q. 91, Art. 2, at 996-97.

<sup>33</sup> *Id.* Q. 94, Art. 2, at 1009 (emphasis in original).

Fourth, Human Law is the smallest category and “has the nature of law in so far as it partakes of right reason[.]”<sup>34</sup> Human law is intended to include “the application of natural law, by public authority, to the circumstances of particular human societies.”<sup>35</sup> Although Human Laws have “just so much of the nature of law” as they are derived from the Natural Law, laws that “deflect[] from the law of nature, [are] no longer a law but a perversion of law.”<sup>36</sup>

Human Law may be derived from the Natural Law in either of two ways: (1) “conclusion from premises,” and; (2) “determination of certain generalities.”<sup>37</sup> The first method is “by a kind of deduction,” such as sanctions for murder or theft based on the conclusion that such acts are criminal.<sup>38</sup> These conclusions “have some force from the natural law also.”<sup>39</sup> However, the second method provides greater room for freedom and creativity by the lawgiver to lay down reasonable rules for the coordination of society. Aquinas uses the analogy of an architect constructing the shape of a home to demonstrate the creativity the lawgiver has in this arena.<sup>40</sup> According to Aquinas, these laws “have their force ‘from human law alone.’”<sup>41</sup>

Over time, Aquinas’ classical synthesis of the Natural Law came to be interpreted by some as inferring an “ought,” i.e., specific moral obligations, from an “is,” i.e., descriptions of the

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<sup>34</sup> *Id.* Q. 93, Art. 3, Reply 2, at 1005.

<sup>35</sup> BUDZISZEWSKI, *supra* note 28, at 47.

<sup>36</sup> AQUINAS, *supra* note 22, at Q. 95, Art. 4, at 1016.

<sup>37</sup> *Id.*

<sup>38</sup> JOHN FINNIS, AQUINAS 266 (1998).

<sup>39</sup> AQUINAS, *supra* note 22, at Q. 95, Art. 2, at 1015.

<sup>40</sup> *Id.* at 1014-15.

<sup>41</sup> FINNIS, *supra* note 38, at 267. However Professor Finnis observes:

This last statement really goes further than the analysis itself warrants. (More accurate is another of Aquinas’ descriptions: such laws have their binding force not only from reason, but [also] from their having been laid down. [AQUINAS, *supra* note 22, Q. 104, Art. 1, at 1088]) The precise requirements imposed in laws made by *determinatio* would indeed have no moral force but for those laws’ enactment, and the lawmaker had no moral duty to make precisely those laws. But once such a law has been made, its directiveness derives not only from the fact of its creation by some recognized source of law . . . but also from its rational connection with some principle or precept of morality.

*Id.*

natural world.<sup>42</sup> This led many to dismiss natural law theories as committing a fallacious leap.

Professor George describes the dilemma:

[S]ome natural law theorists purport to deduce information about what human beings ought and ought not to do from knowledge of human nature considered in abstraction from any prescriptive principles. In other words, they propose to ‘derive an “ought” from an “is.”’ They view ‘practical’ (including ‘moral’) knowledge as entirely derivative of ‘theoretical’ or ‘speculative’ knowledge of human nature drawn from such fields as metaphysics, anthropology, sociology, political science, history and theology. It is also true, as critics maintain, that, strictly speaking, no such derivation is logically possible.<sup>43</sup>

An example of the problem with this reasoning is one author’s satisfaction that the conclusion “Joe ought to go on a diet” was proven by the premises “Joe weighs two hundred and fifty pounds” and “it is not healthy to be overweight.”<sup>44</sup> Missing was the needed reason for action that “[health] is a good to be pursued and protected.”<sup>45</sup> This led to the “new” natural law theory conceived by Germain Grisez<sup>46</sup> and clarified by collaborators, John Finnis and Joseph Boyle.<sup>47</sup>

### B. The “New” Natural Law Theory

The “new” Natural Law theory allows that one cannot make a “valid deduction of a normative conclusion without a normative principle, and thus that *first* practical principles cannot be derived from metaphysical speculations.”<sup>48</sup> Therefore, the natural law must be derived

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<sup>42</sup> See, e.g., David Smolin, *The Enforcement of Natural Law by the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 381, 387 (1991) (“Given the premise that human nature has an inherent telos or purpose, it becomes possible to reason that acts which further this telos or purpose are lawful, and acts that denigrate this telos or purpose are unlawful”). This has been called the “fact/value” merger. For a discussion of its origin, see JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 33-49 (1980).

<sup>43</sup> GEORGE, *supra* note 2, at 2.

<sup>44</sup> For the initial justification of the syllogism, see Ralph McInery, *The Principles of Natural Law*, 25 AM. J. JURIS. 1, 12 (1980).

<sup>45</sup> John Finnis & Germain Grisez, *The Basic Principles of Natural Law: A Reply to Ralph McInery*, 26 AM. J. JURIS. 21, 24 (1981).

<sup>46</sup> See Germain Grisez, *The First Principle of Practical Reason: A Commentary on the Summa theologiae, 1-2, Question 94, Article 2*, 10 NATURAL LAW FORUM 168 (1965). The “new” natural law theory will be identified as such or as the “Grisez-Finnis” theory because other academics refer to it by this nomenclature. See, e.g., GEORGE, *supra* note 2, at 1.

<sup>47</sup> See Grisez, Boyle, & Finnis, *supra* note 22.

<sup>48</sup> Finnis & Grisez, *supra* note 45, at 24.

in a different manner than merely examining nature. Proponents of the new theory maintain that this can be done with complete fidelity to the text of the *Summa*.<sup>49</sup> There are essentially three steps of the Grisez-Finnis formulation.<sup>50</sup>

First, one must identify basic principles supplying reasons for action “toward intelligible purposes, i.e., basic human goods.”<sup>51</sup> The Finnis-Grisez theory postulates that a purpose which provides a rational interest in action in conformity with that purpose is a good.<sup>52</sup> “Achieving the purpose will *instantiate* the good which is the reason one is interested in acting for that purpose.”<sup>53</sup> A good that, in itself, needs a further reason for acting is an “instrumental good,” while a good which needs no further reason for acting is, in Finnis & Grisez’s terminology, a “basic good.”<sup>54</sup>

An easy way to discover a basic good is to inquire into an individual’s purported reason for acting. For example, Professor George inquires why his graduate assistant has taken a part time job.<sup>55</sup> If the student replies that he desires money for its own sake and not for any other end, the rational individual would be quite confused. Rationally, money is of no use apart from what one does with it. This is, of course, why economists refer to money as a “medium of exchange.”<sup>56</sup>

Furthermore, if the student says he wishes to purchase medicine because it is worth owning for its own sake, his rationale seems similarly puzzling. Medicine is of no use apart from its

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<sup>49</sup> *Id.* at 31.

<sup>50</sup> GEORGE, *supra* note 2, at 102.

<sup>51</sup> *Id.*

<sup>52</sup> Grisez, Boyle, & Finnis, *supra* note 22, at 103.

<sup>53</sup> *Id.* (emphasis in original).

<sup>54</sup> *Id.*

<sup>55</sup> GEORGE, *supra* note 2, at 46-48.

<sup>56</sup> See WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 622 (8th ed. 1999). Ordered society would be entirely possible in a barter economy, however most modern countries use money as a medium of exchange to solve problems in individual preferences. This does not make money a “good” in the sense of providing basic reasons for action. Rather, the utility of money can only be explained in terms of the goods one can acquire or achieve with its purchasing power. Even Scrooge McDuck, the Disney cartoon character based on Charles Dickens’ Ebenezer Scrooge, who liked to occupy himself by swimming in pools of gold coins, cannot claim money is a basic good. Rather, McDuck is using money as an instrumental good to instantiate the basic good of achieving some degree of excellence in play. See note 60, *infra*.

ability to instantiate the basic goods of life and health.<sup>57</sup> However, if the student explains that he desires to purchase the medicine for an illness, the justification is inherently satisfactory. We know this answer is satisfactory because of the first principle of practical reasoning—good is to be done and pursued.<sup>58</sup> This principle eliminates pointlessness and coordinates action toward human fulfillment.<sup>59</sup> Therefore, we have identified health as a basic good to be “done and pursued.”<sup>60</sup> The basic goods are self-evident, that is, true without reference to a middle term, “[t]aken together, they exclude as unchoiceworthy only pointless activity.”<sup>61</sup> Therefore, the basic goods and first principle of practical reasoning cannot provide a basis for moral decisions because they do not exclude morally bad actions that “have their point.”<sup>62</sup> Another normative principle must supply the morality of such acts.

Second, immoral acts are those that do not respond to the first principle of practical reasoning (good is to be done and pursued) as perfectly as a “moral” act does.<sup>63</sup> This is a “stronger” demand than the first principal of practical reasoning because it makes “right,” or “unfettered,” reason normative.<sup>64</sup> “[T]o be morally good is precisely to be completely reasonable.”<sup>65</sup> Right reason will dictate what the Finnis-Grisez theory refers to as “modes of responsibility”—intermediate principles from which specific moral norms can be deduced.<sup>66</sup>

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<sup>57</sup> For a list of the basic goods, see *infra*, note 60. A placebo also might assist in instantiating the good of inner peace.

<sup>58</sup> Grisez, Boyle, & Finnis, *supra* note 22, at 119-20.

<sup>59</sup> *Id.*

<sup>60</sup> Grisez, Boyle, and Finnis articulate a number of basic goods including: (1) Life (and health), (2) Knowledge, (3) Some degree of excellence in work and play, (4) harmony among individuals and groups of persons, (5) inner peace, (6) peace with God. *Id.* at 107-08.

<sup>61</sup> GEORGE, *supra* note 2, at 49.

<sup>62</sup> Grisez, Boyle, & Finnis note 22, at 121. For example, stealing cars for sport of the type found in the movie GONE IN 60 SECONDS (Touchstone Pictures 2000) may satisfy the first practical principle in that it is logically related to play (a basic good) and is therefore not pointless activity.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 127. Examples of these “modes” are the “requirements of practical reasonableness which demand fairness [e.g., The Golden Rule], forbid revenge, [and] exclude doing evil to achieve good [e.g., the Pauline

Thus, the first principle of morality can be stated: “In voluntarily acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with a will toward integral human fulfillment.”<sup>67</sup>

Finally, one must highlight “fully specific moral norms which require or forbid . . . certain specific possible choices.”<sup>68</sup> Professor George notes examples in this category include norms “forbidding such specific possible choices as willfully refusing to return borrowed property to its owner upon his request (which is a good example of a moral norm which admits of exceptions) and directly killing an innocent person (which is a good example of an exceptionalness moral norm).”<sup>69</sup>

### C. *The Problem of the Unjust Law*

Aquinas, in answering the question “Whether Every Human Law is Derived from the Natural Law?” opines,

As Augustine says (De Lib. Arb. i. 5 ), that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice . . . . Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.<sup>70</sup>

This brief passage has caused so much angst that one legal positivist has called Aquinas’ articulation “stark nonsense.”<sup>71</sup> However, Professor Finnis, has argued that in the natural law

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Principle, *Romans 3:8*].” *Id.* at 265. See also FINNIS, *supra* note 42, at 100-33 (discussing the basic requirements of practical reasonableness).

<sup>67</sup> Grisez, Boyle, & Finnis, *supra* note 22, at 128.

<sup>68</sup> GEORGE, *supra* note 2, at 102.

<sup>69</sup> *Id.* at 111, n. 3. For more discussion of “direct” versus “indirect” killing see discussion of the Double Effect, Part III.B., *infra* .

<sup>70</sup> AQUINAS, *supra* note 22, at Q. 95, Art. 2, at 1014.

<sup>71</sup> JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 185 (H.L.A. Hart, ed., Weidenfeld and Nicholson 1954) (1832). Professor George has noted that this particular tenet of the natural law has caused confusion:

It is often supposed that belief in an objective moral law entails the proposition that judges should enjoy a more or less free wheeling authority to, in effect, nullify positive laws that they believe to be incompatible with it. After all, was it not the teaching of not only Augustine and Aquinas, but also of

tradition, it is appropriate to pass and uphold unjust laws under certain circumstances.<sup>72</sup> What Aquinas is really talking about is the effect of injustice on obligation in a certain sense. There are four senses of the effect of injustice upon obligation: “(1) sanction-based obligation, (2) internal legal obligation, (3) primary moral obligation to obey one’s legal obligations, and (4) secondary or collateral moral obligation to obey one’s legal obligations.”<sup>73</sup>

First, Aquinas could be speaking of empirical liability to be subjected to sanction in the event of non-compliance. Professor Finnis argues this is the least likely because “[s]omeone who asks how injustice affects his obligation” to obey the law is not usually asking, “Am I or am I not likely to be hanged for non-compliance . . . ?”<sup>74</sup> In his *Letter from the Birmingham Jail*, Dr. Martin Luther King, Jr. also notes that the empirical liability question is of little import when he teaches that one breaking an unjust law must do so “openly, lovingly, and with a willingness to accept the consequences.”<sup>75</sup>

Second, Aquinas could be speaking of what Professor Finnis refers to as legal obligation in an “intrasystemic” sense, or the internal legal sense—which has to do with whether the law has been “stipulat[ed] in accordance with rules of stipulation.”<sup>76</sup> Professor Finnis notes that

[t]hose who doubt or minimize the presence of open-ended principles of justice in professional legal thought will usually be found, on close examination, to be making a constitutional claim, viz. that the judiciary ought to leave change and development of law to the legislature. Conversely, those who stress the pervasiveness of such principles and minimize the coverage of practical problems by black-and-white rules will usually

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Cicero, Plato and other[] figure[s] of important[ce] in the natural law tradition, that ‘an unjust law is not a law?’

GEORGE, *supra* note 2, at 4.

<sup>72</sup> According to Professor Finnis, there are four types of injustice in law: (1) lack of structural authority, (2) failure of form or procedure, (3) improper intent, and (4) substantive violation of a moral norm. FINNIS, *supra* note 42, at 354.

<sup>73</sup> Jack Wade Nowlin, *Constitutional Violations By the United States Supreme Court: Analytical Foundations*, 2005 U. ILL. L. REV. 1123, 1174 (2005) (citing FINNIS, *supra* note 42, at 233-37, 354-66).

<sup>74</sup> FINNIS, *supra* note 42, at 355.

<sup>75</sup> Letter from Martin Luther King, Jr., to Fellow Clergymen (Apr. 16, 1963), in MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 83 (1964).

<sup>76</sup> FINNIS, *supra* note 42, at 355.

be found to be advancing the contradictory constitutional claim . . . . On the other hand, since there is little point in meditating about the legal-obligation-imposing force of normative meaning-contents which are not treated as having legal effect in the principal legal institutions of a community (viz. the courts), it is idle to go on asking the question in this sense . . . after the highest court has ruled that in its judgment the disputed law is not unjust or, if unjust, is none the less law, legally obligatory and judicially enforceable.<sup>77</sup>

This jurisdictional concern appears to be the embodiment of Aquinas' requirement that the entity enacting laws "have care of the community."<sup>78</sup> A ruler not following the proper procedural channels for enactment of laws has exploited opportunities to affect people's conduct "by making stipulations which stray beyond his authority" and has committed an abuse of power.<sup>79</sup>

Third, Aquinas could be speaking of legal obligation in the moral sense, that is the moral obligation flowing from intrasystemic legal obligation.<sup>80</sup> This sense is most relevant when the highest court has ruled as explained in sense number two above. Professor Finnis phrases the question as follows: "Given that legal obligation presumptively entails a moral obligation, and that the legal system is by and large just, does a particularly unjust law impose upon me any moral obligation to conform to it?"<sup>81</sup> He argues that if a ruler makes stipulations against the common good or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have by virtue of being the ruler's stipulation.<sup>82</sup> However, this argument is subject to a limiting instruction. The unjust motives of a ruler do not render an act otherwise compatible with justice lacking in moral obligation. Further, those not unjustly burdened by the law are not exempt from compliance.<sup>83</sup>

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<sup>77</sup> *Id.* at 356-57.

<sup>78</sup> *See supra* text accompanying note 24.

<sup>79</sup> FINNIS, *supra* note 42, at 352.

<sup>80</sup> *Id.* at 357.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 360.

<sup>83</sup> *Id.*

Fourth, Professor Finnis raises the concern of collateral obligation to follow unjust laws not deriving from the legality of the stipulation.<sup>84</sup> For example,

if I am seen by fellow citizens to be disobeying or disregarding this ‘law,’ the effectiveness of other laws, and/or the general respect of citizens for the authority of a generally desirable ruler or constitution, will probably be weakened, with probable bad consequences for the common good. Does this collateral fact create a moral obligation? The obligation is to comply with the law, but it should not be treated as an instance of what I have called ‘legal obligation in the moral sense.’ For it is not based on the good of being law-abiding, but only on the desirability of not rendering ineffective the just parts of the legal system. Hence it will not require compliance with unjust laws according to their tenor or ‘legislative intent,’ but only such degree of compliance as is necessary to avoid bringing ‘the law’ (as a whole) ‘into contempt.’ This degree of compliance will vary according to time, place, and circumstance; in some limiting cases (e.g., judges or other officials administering the law) the morally required degree of compliance may amount to full or virtually full compliance, just *as if* the law in question had been a just enactment . . . . The ruler still has the responsibility of repealing rather than enforcing his unjust law, and in this sense has no right that it should be conformed to. But the citizen, or official, may meanwhile have the diminished, collateral, and in an important sense extra-legal, obligation to obey it.<sup>85</sup>

Essentially, Professor Finnis argues, the natural law tradition “accords iniquitous rules legal validity” on either or both of two grounds: (1) that the “laws” are accepted judicially as rules of decision; or (2) “they satisfy the criteria of validity laid down by constitutional or other legal rules.”<sup>86</sup> In either or both of these circumstances there may be the collateral obligation to obey the law, even if unjust, especially if one is a public official, such as a judge.

#### *D. The Natural Law’s Implications for the Role of Federal Judges*

The preceding discussion has at least four important implications for federal judges.

First, the separation of powers within a government as a matter of human law falls within the second mode of “positing” that Aquinas identifies—determination.<sup>87</sup> “[N]atural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any

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<sup>84</sup> *Id.* at 361.

<sup>85</sup> *Id.* at 361-62 (emphasis in original).

<sup>86</sup> *Id.* at 365.

<sup>87</sup> *See supra* notes 37-41 and accompanying text.

particular polity to insure that the positive law conforms to natural law and respects natural rights.”<sup>88</sup> Believers in classical and new Natural Law may, and in fact do, embrace wildly different ideas about the prudence of expansive judicial review.<sup>89</sup>

Second, because the natural law has little if anything to say about the structural requirements of a system of government, the question is essentially “textual and historical,” i.e., what implications do the text, structure, and logic of the Constitution infer for the role of judges in an independent judiciary (if “independent” is an appropriate term at all)?<sup>90</sup>

Third, the natural law requires adherence to just and legitimate positive law.<sup>91</sup> Therefore, although the natural law has little to say about the particular structural requirements of a generally just system of government, once that system is posited the natural law requires it be followed.<sup>92</sup>

Courts . . . can usurp . . . legislative authority under the guise of protecting individual rights and liberties from legislative encroachment. And courts can usurp, and have usurped, legislative authority in good as well as bad causes. Whenever they do so, however, even in good causes, they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government (even if that power could, rightly, have been allocated to them). And respect for the rule of law is itself a requirement of natural justice.<sup>93</sup>

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<sup>88</sup> George, *supra* note 4, at 2279.

<sup>89</sup> Compare BUDZISZEWSKI, *supra* note 28, at 80 (proposing that judges ought to be able to reason to the “basic” principles of the natural law but not the “remote” implications), with Jack Wade Nowlin, *Natural Law, the Constitution, and Judicial Moral Expertise: An Epistemic Analysis*, 2 VERA LEX 71, 71 (2002) (endorsing “moral realism” and “moral rationalism” but concluding “the judicial moralist’s argument for expansive judicial power based on some form of ‘judicial moral expertise’ ultimately fails”) (emphasis in original). See also Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, May 2002, at 18 (“a judge . . . bears no moral guilt for the laws society has failed to enact”).

<sup>90</sup> George, *supra* note 4, at 2280-81 (“There is no reason in principle why a Constitution cannot . . . confer such authority [to invalidate legislation by appeal to natural law] on Courts. It is merely to indicate that the question whether a particular constitution in fact confers it is . . . one of positive, not natural, law.”).

<sup>91</sup> See *supra* notes 84-86 and accompanying text.

<sup>92</sup> However, Aquinas does suggest that democracy is a necessary condition for a society being ordered in the best possible way. See AQUINAS, *supra* note 22, Q. 105, Art. 1, at 1091-92.

<sup>93</sup> George, *supra* note 4, at 2282.

Fourth, the natural law may prohibit the violation of even unjust positive laws in those cases where the violation may call a generally just constitutional or legal authority or system into question. Professor Nowlin states that

the selective assertion that certain constitutional provisions lack binding authority might be thought in many instances to undermine the constitution more generally, creating a potential collateral obligation to obey even unjust or imprudent provisions of a given constitution if the constitution as a whole is worthy of moral recognition as legally binding.<sup>94</sup>

These four observations make the question of what the law “is,” the subject of the next section, especially relevant.

## II. CONSTITUTIONALLY PRESCRIBED ORIGINAL MEANING TEXTUALISM LIMITS THE ROLE OF JUDGES AS A MATTER OF POSITIVE LAW

Substantial scholarship has been devoted to the proposition that the Constitution prescribes originalism<sup>95</sup> as the proper mode for its interpretation.<sup>96</sup>

### *A. Textual Arguments<sup>97</sup> for Originalism: The Constitution*

The first textual argument in favor of originalism is based on the Supremacy Clause:<sup>98</sup> “This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary

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<sup>94</sup> Nowlin, *supra* note 73, at 1178.

<sup>95</sup> As used herein, the term “originalism” includes the broad category of theories holding that the Constitution should be interpreted according to either its original intent, understanding, or meaning. The term “original public meaning textualism” and “textualism” are used to identify the view, shared by the author, that the Constitution should be interpreted in light of the objective public meaning that a reasonably educated individual would have held at the time of the ratification of the Constitutional provision in question.

<sup>96</sup> See, e.g., Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L. J. 1113, 1124-48 (2003) (discussing the “evolution and purification” of originalism); Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 72-76 (2005) (discussing originalism).

<sup>97</sup> There are other arguments for textualism which will not be expounded, such as the failure of other theories to provide a coherent or desirable theory of Constitutional interpretation implies originalism as the proper theory, notwithstanding difficulties in its application. See generally, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>98</sup> U.S. CONST. art. VI, cl. 2.

notwithstanding.”<sup>99</sup> Textualists hold that this provision demonstrates that the Constitution itself “purports to be authoritative written law”—thus, the meaning of the text is of ultimate importance.<sup>100</sup> Professors Kesaven and Paulsen note:

Any other interpretive principle cuts off its own legs. To invoke the Constitution as authoritative requires that the Constitution be taken on its own terms. To reject the basis on which the Constitution purports to be authoritative and its own specification of what constitutions “this Constitution” is to reject any basis for invoking the Constitution as authoritative.<sup>101</sup>

The Amendments Clause also seemingly supports textualism.<sup>102</sup> The elaborate process that the Constitution delineates to change it seems to indicate that its original text had a fixed meaning. This begs the question of when the meaning was established, which textualists argue is logically the meaning understood by the reasonably educated person at the time of the clause’s enactment.<sup>103</sup> When the “plain meaning” of a word or phrase is not apparent this essentially becomes an “exercise in historiography.”<sup>104</sup> Therefore, contemporaneous secondary sources can illuminate the linguistic understand as a kind of make-shift dictionary of interpretation.<sup>105</sup>

*B. “It is emphatically the province of the judiciary to say...what?” Implications of Textualism for the Judicial Role*

One prominent contemporaneous source that illuminates the original meaning of the role of judges is *The Federalist*, where Hamilton postulated that “[t]he courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would . . . be the substitution for their pleasure to that of the legislative body.”<sup>106</sup> Similarly,

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<sup>99</sup> *Id.*

<sup>100</sup> Kesavan & Paulsen, *supra* note 96, at 1127.

<sup>101</sup> *Id.* at 1129.

<sup>102</sup> U.S. CONST. art V.

<sup>103</sup> See Kesavan & Paulsen, *supra* note 96, at 1130.

<sup>104</sup> Baker, *supra* note 96, at 73, n.88.

<sup>105</sup> See Kesavan & Paulsen, *supra* note 96, at 1146.

<sup>106</sup> THE FEDERALIST NO. 78, at 579 (Alexander Hamilton) (John C. Hamilton ed., 1871).

Chief Justice Marshall paraphrased a passage from *The Federalist* when he declared, “It is emphatically the province of the judicial department to say what the law is[.]”<sup>107</sup> Hamilton also pronounced that

[t]here can never be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations [via the impeachment power].<sup>108</sup>

In arguing that textualists and originalists are “nearer the mark” of identifying the proper role of judicial use of natural law, Professor George states that judges should

exercise judicial restraint in the absence of a clear constitutional warrant for overturning duly enacted legislation. This is because the Constitution . . . places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts, in circumstances in which nothing in the text, its structure, logic, or original understanding dictates an answer to a dispute as to proper public policy. It is primarily for the state legislatures, and, where power has been duly delegated under the Constitution, to the Congress to fulfill the task of making law in harmony with the requirements of morality (natural law), including respect for valuable and honorable liberties (natural rights).<sup>109</sup>

If Professor George is correct, and the quotations above from *The Federalist* suggest that he is, the positive law of the Constitution, prescribing textualism as an interpretive norm, inherently limits federal judicial recourse to natural law unless the text of the document specifically authorizes it.

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<sup>107</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). This particular phrase has become a popular mantra with the Federalist Society for Law and Public Policy studies to which they add “not what it should be.” The Federalist Society for Law and Public Policy Studies Homepage, [www.fed-soc.org/aboutus/ourpurpose.htm](http://www.fed-soc.org/aboutus/ourpurpose.htm) (last visited Mar. 24, 2007).

<sup>108</sup> THE FEDERALIST NO. 81, at 599 (Alexander Hamilton) (John C. Hamilton ed., 1871).

<sup>109</sup> George, *supra* note 4, at 2282.

### III. NATURAL LAW ETHICAL THEORY ALLOWS A FEDERAL JUDGE TO APPLY AN UNJUST PRECEDENT WITHOUT VIOLATING CONSCIENCE

#### A. *Unjust Derivations of Positive Law*

Professor Finnis notes the American pluralistic society presents new challenges to natural law ethical theory:

To the extent that our societies are firmly and increasingly committed to the radical injustice of asserting that some people do not *count*, the classic presumption that laws are just and create serious obligations of compliance becomes increasingly weak and defeasible. The classic theology—indeed the doctrine—of Christian conformity to human law remains unchanged, but the facts in which it must find its application are in some significant ways radically new.<sup>110</sup>

Regrettably, Professor Finnis stops there without providing further guidance for the Christian judge.<sup>111</sup> However, he provides legislators some insightful commentary.<sup>112</sup> Professor Finnis argues that there are some situations where a legislator can assist in the passage of a law that would, in the abstract, violate the natural law. Using the example of a country where abortion is available up to 24 weeks gestation, Professor Finnis postulates that it would not violate the natural law to support a bill proposing that, “Abortion is lawful up to 16 weeks.”<sup>113</sup> He argues that to support passage of the bill is “formal cooperation in making a just change in the law, but not in retaining of the unjust denial of legal protection to unborn children up to 16 weeks.”<sup>114</sup> However, support of the bill constitutes material cooperation in injustice.<sup>115</sup> The

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<sup>110</sup> John Finnis, *Unjust Laws in a Democratic Society: Some Philosophical & Theological Speculations*, 71 NOTRE DAME L. REV. 596, 598-99 (1996).

<sup>111</sup> *Id.* at 599 (“But it is very difficult to work out the implications of that thought. So I turn instead to some less difficult issues.”).

<sup>112</sup> Professor Finnis purports that his example of “legislators” includes “judges . . . responsible for making interpretations of constitutional, statutory, and/or common law.” *Id.* However this seems to conflict with his earlier statements regarding the high duty of judges to avoid calling into question a generally just legal system by open defiance of the law. *See supra* notes 84-86 and accompanying text.

<sup>113</sup> Finnis, *supra* note 110, at 600-01.

<sup>114</sup> *Id.* at 601 (“One cooperates ‘formally’ with A’s action X just to the extent that one intends or chooses—not merely accepts as a side-effect—that A shall accomplish something that A intends or chooses in choosing to do X.”).

<sup>115</sup> “‘Material cooperation’ with action X is any cooperation (participation, assistance, etc.) which does not constitute formal cooperation . . . .” *Id.* at 601 n.15.

legislator's choice is made “as an act of *making a just change in the law*, [while] accepting as a bad side-effect the simultaneous *continuation of unjust law*.”<sup>116</sup> Although Professor Finnis notes “serious reasons for considering [this act] unjustified” such as concerns over scandal (leading people into sins), he argues that supporting such a law is a good choice if one has (1) taken all reasonably available steps to avoid the bad side effects and (2) avoided the potential for scandal by earnest public attempts to repudiate the unjustness of the law.<sup>117</sup> The concerns Professor Finnis enunciates with this example closely parallel the Doctrine of the Double Effect in its maxim to avoid direct killing.

### *B. Doctrine of the Double Effect*

Double Effect “proposes that under certain circumstances, it is permissible unintentionally to cause foreseen ‘evil’ effects that would not be permissible to cause intentionally.”<sup>118</sup> The history of the natural law doctrine of the Double Effect can also be traced back to Thomas Aquinas. In the *Summa*, in the context of discussing killing in self-defense, Aquinas notes,

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention . . . .<sup>119</sup>

The Supreme Court relied on Double Effect reasoning in *Vacco v. Quill*,<sup>120</sup> when it held that New York's prohibition on assisting suicide did not violate the Equal Protection clause of the Fourteenth Amendment. *Quill* rejected the argument made by terminally ill patients and physicians that withholding of life support and pharmacologic palliative care was no different

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<sup>116</sup> *Id.* at 601 (emphases in original).

<sup>117</sup> *Id.* at 602.

<sup>118</sup> Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV 469, 471 (2005).

<sup>119</sup> 3 AQUINAS, *supra* note 22, Pt. II-II, Q. 64, Art. 7, at 1465.

<sup>120</sup> 521 U.S. 793 (1997).

than assisted suicide because the result—death—was often the same.<sup>121</sup> The Court reasoned that a physician withdrawing life support or providing palliative care to reduce pain may foresee the hastening of death without intending it while a doctor assisting in suicide or a patient committing suicide with a doctor’s aid “must necessarily and indubitably, intend primarily that the patient be dead.”<sup>122</sup>

It is generally accepted that the Double Effect principle has four tenets:

1. The act of the agent causing the good effect must be at least ethically neutral, if not praiseworthy, considered in itself (i.e., prior to assessment under Double Effect).
2. The good effect must follow causally from the act in such a way that the intended good effect cannot be regarded as “caused by” the evil effect.
3. The reason(s) for performing the act—the intended good effect—must be of sufficient importance to justify causing the evil effect.
4. The evil effect caused by the act must not in fact be willed as a means or as an end of the agent.<sup>123</sup>

The rationale underlying the Double Effect incorporates several biblical guidelines including: avoiding every kind of evil;<sup>124</sup> not using evil as a means to a good end;<sup>125</sup> the need to attempt to separate from evil,<sup>126</sup> with the knowledge that we can never fully achieve complete separation from evil;<sup>127</sup> overcoming evil with good;<sup>128</sup> and seeking wisdom.<sup>129</sup>

The Double Effect principle is also a “mode of responsibility.”<sup>130</sup> It is an intermediate principle from which specific moral norms can be deduced. A choice that satisfies the Double Effect will be one that is “compatible with a will toward integral human fulfillment.”<sup>131</sup>

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<sup>121</sup> *Id.* at 807-09.

<sup>122</sup> *Id.* at 802 (internal quotation and citation omitted).

<sup>123</sup> Lyons, *supra* note 118, at 482. Lyons has developed a shorthand for these elements that will be used in analyzing the Partial-Birth Abortion cases: (1) Intention & Foreseeability; (2) Commission/Omission; (3) Reasonability of Choice; (4) No Instrumental Intention of Harm. *Id.* at 470.

<sup>124</sup> *I Thessalonians* 5:22.

<sup>125</sup> *Romans* 3:8.

<sup>126</sup> *Romans* 12:9.

<sup>127</sup> *I Corinthians* 5:9-10.

<sup>128</sup> *Romans* 12:21.

<sup>129</sup> *James* 1:2-5.

<sup>130</sup> See *supra* text accompanying notes 66-67.

If the rationale of the Double Effect can be applied when a judge is faced with a mandate to enforce an unjust law, then (according to this natural law doctrine) the judge need not choose between conscience and a principled textualist view of the judicial role.

### C. Application – The Partial Birth Abortion Cases

Application of Double Effect to the judicial role can be illustrated using the challenges to the federal Partial Birth Abortion Ban. In *Stenberg v. Carhart*,<sup>132</sup> the Supreme Court struck down by a 5-4 majority a Nebraska statute banning “partial birth abortion” on the grounds that (1) it did not provide an exception for when the procedure was necessary, in appropriate medical judgment, for the health of the mother;<sup>133</sup> and (2) it imposed an “undue burden” on a woman’s ability to choose an abortion because it could apply to the abortifacient method of “dilatation and evacuation” as compared to “dilation and extraction.”<sup>134</sup> Justices Kennedy, Thomas, Scalia and Chief Justice Rehnquist all wrote separate dissenting opinions.<sup>135</sup>

In response to *Stenberg*, the United States Congress passed a federal ban on partial birth abortions.<sup>136</sup> Congress defined the procedure more explicitly than the Nebraska statute in *Stenberg* so as to address the second ground the *Stenberg* majority articulated.<sup>137</sup> Congress also included findings of fact that a partial birth abortion is “never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and

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<sup>131</sup> See Grisez, Boyle, & Finnis, *supra* note 22, at 128.

<sup>132</sup> 530 U.S. 914 (2000).

<sup>133</sup> *Id.* at 938.

<sup>134</sup> *Id.* at 938-39.

<sup>135</sup> *Id.* at 919.

<sup>136</sup> The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003).

<sup>137</sup> [T]he term "partial-birth abortion" means an abortion in which the person performing the abortion-- (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .

18 U.S.C. § 1531(b)(1).

is outside the standard of medical care.”<sup>138</sup> These findings were intended to address the second ground upon which *Stenberg* held the Nebraska statute unconstitutional.<sup>139</sup>

After the passage of the Partial Birth Abortion Ban, three constitutional challenges were mounted in federal district courts.<sup>140</sup> Although all of the district judges found the Ban unconstitutional, of particular interest are the opinions arising out of the Second Circuit, particularly the district court opinion written by Judge Richard Conway Casey.

Judge Casey appeared extremely reluctant to overturn the ban as evidenced by his written opinion and questioning of expert witnesses through the trial. For example, Judge Casey wrote several “Findings of Fact” which strongly indicated he found the practice despicable:

The Court finds that the testimony at trial and before Congress establishes that D & X is a gruesome, brutal, barbaric, and uncivilized medical procedure . . . . Furthermore, the Government’s expert witnesses reasonably and effectively refuted Plaintiffs’ proffered bases for the opinion that D & X has safety advantages over other second-trimester abortion procedures . . . . After hearing all of the evidence, as well as considering the record before Congress, the Court does not believe that many of Plaintiffs’ purported reasons for why D & X is medically necessary are credible; rather they are theoretical or false.<sup>141</sup>

During the trial, Judge Casey seemed to be concerned about fetal pain. For example, he quizzed an expert witness on whether babies cry during the procedure.<sup>142</sup> He also allowed Dr.

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<sup>138</sup> Pub. L. 108-105 § 2, Nov. 5, 2003, 117 Stat. 1201.

<sup>139</sup> Congress opined that:

[T]he United States Congress is not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the 'clearly erroneous' standard. Rather, the United States Congress is entitled to reach its own factual findings--findings that the Supreme Court accords great deference--and to enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence.

*Id.*

<sup>140</sup> See *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff’d* by *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *cert. granted* *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006); *Nat’l Abortion Fed’n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff’d in part* by *Nat’l Abortion Fed’n v. Gonzales*, 437 F.3d 278, 312 (2nd Cir. 2006); *Planned Parenthood Fed’n of Am., Inc. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff’d* by *Planned Parenthood Fed’n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *cert. granted* *Gonzales v. Planned Parenthood Fed’n of Am., Inc.*, 126 S. Ct. 2901 (2006).

<sup>141</sup> *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 479-480.

<sup>142</sup> *Judge Quizzes Doctor on Whether Babies Ever Cry During Abortion*, PRESS OF ATLANTIC CITY, Apr. 3, 2004, at A4, available at 2004 WLNR 17425492.

Kanwaljeet S. Anand to testify on behalf of the government as to the existence of fetal pain during the procedure despite the National Abortion Federation's claims that the testimony was irrelevant and unreliable.<sup>143</sup> Judge Casey determined that Dr. Anand's testimony would assist him in determining whether "Congress' factual findings that partial-birth abortion is a 'brutal and inhuman procedure' and that 'during the partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.'"<sup>144</sup> In his opinion, Judge Casey determined that Dr. Anand's testimony "went un rebutted" and seemed distressed that "some of [National Abortion Federation's] experts testified that fetal pain does not concern them, and that some do not convey to their patients that their fetuses may undergo severe pain during a D & X."<sup>145</sup>

Judge Casey also asked one Manhattan abortionist, "Did you tell them you were sucking the brains out of the same baby they desired to hold?"<sup>146</sup> Judge Casey's questioning made Gloria Feldt, President of Planned Parenthood, uneasy. Feldt reported that her organization was "on pins and needles on this one" because she thought "judge [Casey] was very aggressive in his questioning and very transparent in his articulation of his personal views on the matter."<sup>147</sup>

Judge Casey was also the only judge in the Partial Birth Abortion cases to grant a controversial Justice Department request for abortion records.<sup>148</sup> Notwithstanding objections from abortion providers that granting the request would infringe on privacy considerations,

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<sup>143</sup> *Judge to Let Witness Say Fetus Feels Abortion Pain*, N.J. RECORD, Mar. 23, 2004, at A05, available at 2004 WLNR 3215581.

<sup>144</sup> *Id.*

<sup>145</sup> *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 479.

<sup>146</sup> Larry Neumeister, *Partial-birth Abortion Ban Rejected: District Judge Calls Procedure Brutal But Rules the Law is Unconstitutional*, STAR-LEDGER, Aug. 27, 2004, at 10, available at 2004 WLNR 20259953.

<sup>147</sup> *Id.*

<sup>148</sup> Susan Saulny, *Foes of Federal Ban on Abortion Method Are to Argue Their Cases in Courts in Three States*, N.Y. TIMES, Mar. 29, 2004, at A17, available at 2004 WLNR 5603644.

Judge Casey reasoned they could redact information identifying patients.<sup>149</sup> He also made clear that he might lift his temporary injunction preventing enforcement of the Ban if his order was not obeyed.<sup>150</sup>

However, despite this evidence of his severe reservations, Judge Casey ultimately enjoined enforcement of the Ban under *Stenberg*.<sup>151</sup>

The Supreme Court in *Stenberg* informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any woman could potentially benefit from it. A division of medical opinion exists, according to *Stenberg*, according to this Court, and even according to the testimony on which Congress relied in passing this law. Such a division means that the Constitution requires a health exception.

*Stenberg* obligated this Court and Congress to defer to the expressed medical opinion of a significant body of medical authority. While medical science and ideology are no more happy companions than *Roe* and its progeny have shown law and ideology to be, *Stenberg* remains the law of the land. Therefore, the Act is unconstitutional.<sup>152</sup>

The Second Circuit ultimately affirmed in part but not without its own expressions of reservation. In his concurring opinion, Chief Circuit Judge Walker opined that

*Stenberg v. Carhart*, [citations] effectively held that the deeply disturbing—and morally offensive—destruction of the life of a partially born child cannot be banned by a legislature without an exception for the mother’s health . . . . [I]t is my duty to follow

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<sup>149</sup> *Id.*

<sup>150</sup> Eric Lichtblau, *Defending '03 Law, Justice Dept. Seeks Abortion Records*, N.Y. TIMES, Feb. 12, 2004, at A1, available at 2004 WLNR 4783178; Eric Lichtblau, *Appeals Court Backs Privacy of Hospital Abortion Records*, N.Y. TIMES, Mar. 27, 2004, at A8, available at 2004 WLNR 5543705. The New York Times ran a consensus editorial condemning Casey’s ruling. Editorial, *Privacy in Peril*, N.Y. TIMES, Feb. 14, 2004, at A18, available at 2004 WLNR 5401021. The Department of Justice eventually dropped the records request, citing evidence from other judges that they were irrelevant. See Susan Saulny, *Justice Department Drops Demand for Hospital’s Abortion Files*, N.Y. TIMES, Apr. 27, 2004, at A22, available at 2004 WLNR 5482889.

<sup>151</sup> Judge Casey considered other legal arguments for upholding the ban including a claim that the Court should defer to Congressional findings of fact. *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 487. This argument was ultimately considered by the Supreme Court and may end up being a ground for upholding the ban. See Transcript of Oral Argument at 3, *Carhart*, 126 S. Ct. 1314 (No. 05-380), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-380.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-380.pdf); Transcript of Oral Argument at 49, *Planned Parenthood Fed’n of Am.*, 126 S. Ct. 2901 (No. 05-1382), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-1382.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1382.pdf). However, for purposes of this Note, the author assumes Judge Casey’s analysis was correct and *Stenberg* demanded the result he ordered.

<sup>152</sup> *Nat’l Abortion Fed’n*, 330 F. Supp. 2d at 492-93.

that precedent no matter how personally distasteful the fulfillment of that duty may be.<sup>153</sup>

Further, Judge Straub dissented, noting that “the current expansion of the right to terminate a pregnancy to cover a child in the process of being born [is] morally, ethically, and legally unacceptable.”<sup>154</sup>

The other two district court rulings on the constitutionality of the law were also upheld by the Eighth and Ninth Circuits,<sup>155</sup> albeit without the expressed concern occurring in the Second Circuit. The Supreme Court subsequently granted the government’s application for writ of certiorari and oral argument was held on November 8, 2006.<sup>156</sup>

The Second Circuit Partial Birth Abortion Ban cases are relevant for this article because the judges identified and expressed deep moral reservations about allowing such a procedure to continue but ultimately deferred to *Stenberg*. The verbiage of these judges, however, indicates that they may have thought *Stenberg* wrongly decided, most likely on moral grounds. Although it is unclear whether these judges attested to any form of natural law, natural law reasoning should have resulted in the same moral outrage expressed in the pages of the Federal Reporter in these cases.<sup>157</sup> Can these judges actions be justified on a natural law basis?

Despite moral objection to the initial *Stenberg* decision, and moral objection to the outcome of applying its unjust holding to invalidate a Congressional act, if there is no legally valid theory to rely on for a lower court judge, application of the Double Effect seems to allow such a holding.

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<sup>153</sup> Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278, 290 (2d Cir. 2006) (Walker, Chief Circuit Judge, concurring).

<sup>154</sup> Nat’l Abortion Fed’n v. Gonzales, 437 F.3d 278, 312 (2d Cir. 2006) (Straub, Circuit Judge, dissenting).

<sup>155</sup> Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005); Planned Parenthood Fed’n of Am., Inc. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006).

<sup>156</sup> Gonzales v. Carhart, 126 S. Ct. 1314 (2006); Gonzales v. Planned Parenthood Fed’n of Am., Inc., 126 S. Ct. 2901 (2006).

<sup>157</sup> See Rice, *supra* note 14, at 567 (arguing that one utility of natural law, as compared to legal positivism, is its ability to criticize an action of the state as unjust).

## 1. Intention and Foreseeability

Judge Casey could apply the *Stenberg* precedent without intending the evil results of its application. Here, his specific intent is not to allow infanticide,<sup>158</sup> rather it is to fulfill his role as a judge in a hierarchy of federal courts.<sup>159</sup> The act itself of fulfilling that role by applying a precedent is ethically neutral. Furthermore, the act of following precedent could be considered morally praiseworthy in that it adheres to the collateral moral obligation arising from role of a judge to respect the rule of law.<sup>160</sup> Although a judge may foresee the evil results of applying *Stenberg*, as long as the judge does not intend such results, an ethically neutral or praiseworthy act does not proscribe the application of precedent. As noted earlier, it is this lack of respect for the collateral obligation of the rule of law that resulted in the Supreme Court's abortion jurisprudence, including *Stenberg*.<sup>161</sup> Professor Finnis argues that the natural law tradition "explicitly (by speaking of 'unjust laws') accords to iniquitous rules legal validity . . . [and] goes so far as to say that there may be an obligation to conform to some such unjust laws in order to uphold respect for the legal system as a whole."<sup>162</sup>

## 2. Commission/Omission

The intended good effect here, respect for the rule of law, follows causally from the act of applying the laws uniformly. The evil effect of abortion, as described before, has resulted from not faithfully adhering to the written law,<sup>163</sup> so it cannot be demonstrated that the good effect is

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<sup>158</sup> See *supra* text accompanying note 141.

<sup>159</sup> See U.S. CONST. art. III § 1 ("The judicial power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") (emphasis added); 28 U.S.C. § 43 (2000) (providing for the creation and composition of the United States Courts of Appeal); 28 U.S.C. § 132 (2000) (providing for the creation and composition of the United States District Courts).

<sup>160</sup> See *supra* notes 84-86 and accompanying text.

<sup>161</sup> See *supra* notes 6-13 and accompanying text.

<sup>162</sup> FINNIS, *supra* note 42, at 365.

<sup>163</sup> See *supra* notes 6-13 and accompanying text.

caused by the evil effect. Furthermore, any act of infanticide would not be a direct result of Judge Casey's action, but rather of the immoral act of an abortionist.

### 3. Reasonability of Choice

The requirement that the reason for acting be of sufficient import to justify causing the evil effect is admittedly more problematic. Life is a natural good, and a principled and limited judiciary is merely an instrumental good coordinated to the common good. Additionally, the reasonability of choice constraint is normally applied when an act is more logically related to the act that actually causes the evil effect. For example, Aquinas uses the Double Effect principle to justify killing in self-defense—an act that is more proximate than a judicial decision. He opines that, “though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end.”<sup>164</sup>

Here, Judge Casey's decision to apply an unjust precedent is closer to Professor Finnis' example of a legislator voting for an unjust law initially to keep the procedural option open to defeat the unjust law when his vote “counts” later.<sup>165</sup> A pro-life judge may apply abortion precedent but do so in a manner that logically undercuts judicial activism.<sup>166</sup> Since unfettered judicial discretion is the foundation upon which *Roe* stands, then material cooperation in applying an unjust precedent to undermine this foundation appears to be a much more reasonable, or moral, choice.

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<sup>164</sup> AQUINAS, *supra* note 22, Pt. II-II, Q. 64, Art. 7, at 1465.

<sup>165</sup> See Finnis, *supra* note 110, at 601.

<sup>166</sup> To undercut the foundation of unfettered judicial discretion will require more widespread acknowledgement, beyond principled Christian judges, of the limited judicial role. This may only happen if the other branches of government take a more active approach to limiting the political proclivities of some judges. Methods for this sort of oversight are beyond the scope of this Note, however some scholars have suggested: use of the impeachment authority, Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT UNIV. L. REV. 111 (1998); term limits for judges, Steven Calebrisi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. PUB. POL'Y 769 (2006); and removing the precedential effect of stare decisis by statute, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L. J. 1535 (2000).

One could object that, if the proponents of abortion are willing to use the judiciary to advance their philosophy, fire should be fought with fire.<sup>167</sup> This argument, however, is flawed because it assumes political victory in the courts is necessary for returning morality to law. *Roe* and *Lawrence* reveal that willingness to politicize the judicial process appears to be symptomatic of declining morality rather than a cause or solution for it.<sup>168</sup> Christians cannot hope to accomplish by an oligarchy of judges what they are unable to achieve at the ballot box,<sup>169</sup> or even more importantly, in churches. Such a belief ignores the primacy of changing hearts and minds.<sup>170</sup> “Fighting fire with fire” will only lead to further denigration of the rule of law and politicization of the judiciary. Reform will be a long-term project but, as Aquinas astutely observed, the purpose of law “is to lead men to virtue, not suddenly, but gradually.”<sup>171</sup>

#### 4. No instrumental intention of harm

It seems clear from Judge Casey’s and some of the Second Circuit’s opinions applying *Stenberg* that they did not intend to use the evil effects of the application of *Stenberg* (abortion) as a means or an end. However, the line between instrumental intention of harm and legitimate intent to uphold the rule of law could be blurry unless a judge articulates reasons for action. To avoid scandal, a judge who upholds an unjust law under the auspices of the Double Effect should

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<sup>167</sup> See, e.g., Kennedy, *supra* note 13, at 57-60 (arguing judicial use of natural law is necessary “given the constitutional close-out of legislative attempts to protect unborn life”).

<sup>168</sup> See *supra* text accompanying notes 6-13.

<sup>169</sup> Even if *Roe* were overruled, proponents of the right to life would likely face a state-by-state battle, similar to the pre-1973 status of abortion, as well as the complex question of regulating the out-of-state conduct of a state’s citizenry. See Steven Bradford, *What Happens if Roe is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87 (1993).

<sup>170</sup> See *Matthew* 28:16-20; *Mark* 16:14-18.

<sup>171</sup> AQUINAS, *supra* note 22, Q. 96, Art. 2, Reply 2, at 1018.

make it clear he or she is utilizing the critical function of natural law. The judge should write a detailed opinion articulating respect for life and moral outrage at the unjust precedent.<sup>172</sup>

#### CONCLUSION

As the moral relativism of American society is increasingly affecting and infecting the legal system, a proper understanding of the role of a Christian judge has become more crucial than ever. Judges must delicately balance their moral obligations flowing from the natural law and positive law. The natural law allows positive laws that restrain the interpretive recourse of the judiciary to the natural law. Further, the text and logic of the Constitution establish such a permissible limitation on the role of judges. When the Double Effect principle can be utilized, the natural law allows a judge to apply an unjust precedent without violating conscience.

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<sup>172</sup> See *supra* text accompanying note 117. Cf. Paulsen, *supra* note 9, at 76-85 (arguing a judge should “engag[e] in public criticism of the *Roe* decision, and the incompatibility [sic] of abortion with natural law” but should ultimately choose recusal or “underruling” an unjust precedent followed by resignation if necessary to avoid personally applying it); Rice, *supra* note 14, at 567-69 (arguing a judge should not only criticize an unjust precedent but strike it down).