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INCOMPATIBLE THEORIES: NATURAL LAW AND SUBSTANTIVE DUE PROCESS

MATTEI ION RADU*

[W]hoever hath an absolute Authority to interpret any written, or spoken Laws; it is He, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them.

—Bishop Benjamin Hoadly to King George I, 1717

I. INTRODUCTION

IN 1965, in Griswold v. Connecticut, the United States Supreme Court struck down a state ban on the use of contraceptives. Griswold is generally regarded as the clear starting point for the return of the jurisprudential doctrine of substantive due process "for [n]oneconomic [l]iberties." In that case, Justice Hugo Black dissented and accused the Court of engaging in "natural law due process" legal reasoning. Black considered this mode of analysis akin to the Court's reasoning in its infamous decision in Lochner v. New York, and he criticized the majority for engaging in such a patently illicit form of judging.

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2. 381 U.S. 479 (1965).

3. See id. at 485-86.


5. See Griswold, 381 U.S. at 511 n.3 (Black, J., dissenting) (arguing that Justice White's interpretation goes even further than "past pronouncements of the natural law due process theory").

6. 198 U.S. 45 (1905).

7. See Griswold, 381 U.S. at 514-15 (Black, J., dissenting) (asserting that Lochner supported majority's decision even though majority failed to cite it); ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 171 (2001) [hereinafter GEORGE, THE CLASH OF ORTHODOXIES] (discussing Black's be-
While Black is certainly not alone in regarding them as synonymous, the more than forty years since Griswold have shown that there are, in fact, important differences between substantive due process theory and natural law philosophy. Most traditional natural law thinkers agree that the Court’s conclusions in the substantive due process decisions were morally incorrect, in the sense that the Court’s judgments granted constitutional protection to practices that the natural law jurisprudences regard as morally evil. Among those same theorists, however, there is wide disagreement as to what the proper natural law response in those cases would have been. Specifically, they have engaged in a long-running debate about whether justices may look to the natural law in reaching their decisions.

For the purposes of this Article, a good working definition of “substantive due process” is provided by Chief Justice Rehnquist in the 1997 case of Washington v. Glucksberg. Substantive due process is the belief that “[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.” In a separate case, the Court stated that the Due Process Clause “protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.' ” Additionally, the Court has averred that “[t]he Clause provides heightened protection against government interference with certain fundamental rights and liberty interests.” Substantive due process can also be understood as the belief that “natural law” basis of Griswold decision was enough to establish Griswold’s “incorrectness”).


13. Id. at 719.


theory whereby the due process clauses of the Fifth and Fourteenth Amendments "impose substantive requirements on statutes."16

This Article begins with a review of the central cases of the substantive due process corpus. It then presents the philosophical preconceptions that are at work in those decisions, such as how the Court views the human being, the highest good, moral truth, and the political community. Thereafter, this Article offers a natural law critique of the results in the substantive due process cases to illustrate the chasm that exists between the substantive due process and natural law theories. Finally, this Article explores the divergence of natural law opinions on whether the natural law may be used in adjudicating federal constitutional cases, and offers the author's thoughts on this important intra-theory question.

II. THE RISE, FALL, AND RETURN OF SUBSTANTIVE DUE PROCESS

*Lochner v. New York* marked the clear beginning of the Court's foray into the oxymoronic field of substantive due process reasoning, although previous cases had suggested that the Court might move in that direction.17 In *Lochner*, the state of New York enacted a statute limiting the amount of hours bakery employees could work to sixty hours per week or ten hours per day.18 The defendant was a bakery owner who allowed one of his workers to log more hours than the maximum amount permitted by the statute.19

In an opinion by Justice Rufus Peckham, the Court struck down New York's "labor law" for violating the fundamental right to contract.20 Despite the lack of explicit language in the amendment, the Court found a right to contract in the Fourteenth Amendment: "Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which ex-

17. See Allgeyer v. Louisiana, 165 U.S. 578 (1897) (striking down statute prohibiting dealings with noncompliant marine insurance companies on due process grounds); Mugler v. Kansas, 123 U.S. 623 (1887) (holding that statute prohibiting manufacture or sale of liquor does not deprive persons of property without due process of law); Munn v. Illinois, 94 U.S. 113 (1877) (upholding statute regulating warehousing business on grounds that it did not "deprive persons of their property without due process of law"). For a discussion of substantive due process as an oxymoron, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' . . . '[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'").
19. See id. at 45-47 (describing defendant's violation of statute).
20. See id. at 64-65 (dismissing plaintiff's contention that statute affected employees' health, and holding that right to contract cannot be infringed upon without violating Constitution).
clude the right.”21 After recognizing this right, the Court applied a means/ends balancing test, considering whether the state's justification for abridging the right was sufficient and, if so, whether the state chose the proper means for achieving its end.22 Though the decision was ultimately discredited, this framework by which *Lochner* analyzed the due process claim remains good law.23

The thirty years following *Lochner* constituted an era of substantive due process restrictions on state economic regulations. During this time, the Court struck down numerous economic regulations on the grounds that they violated the principles and strict analytical requirements set forth in *Lochner*.24 For example, in *Adkins v. Children's Hospital of the District of Columbia*,25 the Court invalidated, on due process grounds, a D.C. statute that mandated minimum wages for female employees.26

The *Lochner* era came to a close in the 1930s, however.27 Beginning with *Newbie v. New York*,28 the Court employed a lighter standard of review for economic regulations than that articulated in *Lochner*.29 In *Newbie*, the Court acknowledged that it was wrong in *Lochner* to place individual contract rights over a state's ability to govern.30 The Court also announced that it would no longer second-guess the substantive policy decisions of

21. *Id.* at 53.
22. *See id.* at 56-57 (describing issue as whether state act is reasonable exercise of police power or whether it unnecessarily interferes with individual's liberty).
23. *See Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) (“Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling” (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960))). For an argument that, at least in certain respects, *Lochner* is still very much a part of our constitutional law, see Cass R. Sunstein, *Lochner's Legacy*, 77 Colum. L. Rev. 873, 875 (1987) (“Numerous decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to *Lochner*-like understandings.”). Sunstein's argument, however, has been challenged. *See generally* David E. Bernstein, *Lochner's Legacy*, 82 Tex. L. Rev. 1 (2003) (refuting Sunstein's historical claims).
26. *See id.* at 539, 562 (explaining statute in question and stating Court's holding).
29. *See id.* at 525 (stating that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained").
30. *See id.* at 538.
the legislature. Next, in *West Coast Hotel Co. v. Parrish* the Court further retreated from the heady days of *Lochner*-style substantive due process reasoning. In *West Coast Hotel*, the Court stated frankly:

The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. . . . Liberty under the Constitution is . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

For almost three decades, with few exceptions, this spirit of judicial restraint controlled in the area of due process adjudication. In *Griswold*, however, the Court introduced a powerful new form of substantive due process, which focused on noneconomic liberties. Because the state rarely enforced the anti-contraception law at issue in the case, Robert Bork opines that *Griswold* "was insignificant in itself but momentous for the future of constitutional law."

A. Contraception

The statute contested in *Griswold* was Connecticut's longstanding law proscribing the use of contraceptives, even by married people. The de-

31. See id. at 537-38.
32. 300 U.S. 379 (1937).
33. See id. at 400 (overruling *Adkins*, which relied on *Lochner*); see also *George, The Clash of Orthodoxies*, supra note 7, at 343 n.21 (noting that most commentators view *West Coast Hotel* as implicitly overruling *Lochner*).
34. *West Coast Hotel*, 300 U.S. at 391.
fendants held various positions with the Planned Parenthood League of Connecticut. After disseminating information on contraception to married couples, the defendants were each fined $100. There is evidence that the defendants intentionally sought this criminal sanction in order to enlist the Court's help in advancing their cultural and moral views.

Notably, Justice William Douglas began the Court's analysis in *Griswold* by expressly denying that the majority followed *Lochner* in reaching its conclusion. Instead, the Court's decision rested on the discovery of a general constitutional right to privacy that invalidated the anti-contraception statute. As the opinion explained, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. . . . [T]he right of privacy which presses for recognition here is a legitimate one." Thus, the majority opinion found a right to privacy generally associated with the first ten amendments of the Constitution. This larger right to privacy protects the marriage relationship and includes a married couple's right to use contraceptives. The Court held the Connecticut statute unconstitutional because the proscription on contraceptive use had "a maximum destructive impact upon" marriage.

Several concurrences further illuminated the thinking and rationale of the justices who revived the doctrine of substantive due process. In a concurrence joined by Chief Justice Warren and Justice Brennan, Justice Goldberg stated that "the right of privacy in the marital relation is funda-

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39. See *Griswold*, 381 U.S. at 480 (identifying one defendant as Executive Director of Planned Parenthood League of Connecticut and other defendant as Medical Director for League's New Haven Center).

40. See id. (noting that defendants were convicted as accessories because they counseled married persons about ways to prevent conception).


42. See *Griswold*, 381 U.S. at 481-82 (declining to follow *Lochner* and claiming to remain consistent with Court's opinions in several other substantive due process cases). Douglas asserted, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.* at 482.

43. See id. at 484-86.

44. *Id.* at 484-85 (citations omitted).

45. See id. at 484-86.

46. See id. at 485 (concluding that marital relationships fall "within the zone of privacy created by several fundamental constitutional guarantees").

47. See id. at 485-86 (asserting that idea of allowing police to search "sacred precincts of marital bedrooms" is "repulsive"). Ironically, at least one scholar concludes that the widespread availability of effective contraceptives played a significant role in the dramatic increase in the divorce rate between 1965 and 1975. See Robert T. Michael, *Why Did the U.S. Divorce Rate Double Within a Decade?*, in 6 RESEARCH IN POPULATION ECONOMICS 367, 367-99 (T. Paul Schultz ed., 1988); see also George A. Akerlof, *Men Without Children*, 108 ECON. J. 287, 288 (1998) (arguing that contraception had detrimental effect upon institution of marriage).
mental and basic—a personal right ‘retained by the people’ within the meaning of the Ninth Amendment. . . . [This right] is protected by the Fourteenth Amendment from infringement by the States.”

Justice Harlan contended that the anti-contraception law ran afoul of the Due Process Clause of the Fourteenth Amendment because it “violate[d] basic values ‘implicit in the concept of ordered liberty.’” Although *Griswold* is the first case in which the Court recognized a constitutional right to privacy, Michael Sandel argues that the case is not a “dramatic constitutional departure.” Sandel states that the privacy right that *Griswold* proclaimed “is consistent with traditional notions of privacy going back to the turn of the century”; importantly “the Court vindicated privacy not for the sake of letting people lead their sexual lives as they choose, but rather for the sake of affirming and protecting the social institution of marriage.” Rather than *Griswold*, Sandel points to the 1972 case of *Eisenstadt v. Baird* as the more significant case “[f]rom the standpoint of shifting privacy conceptions.”

Though technically an Equal Protection case, *Eisenstadt* revealed the considerable size of the right to privacy announced in *Griswold*. Essential to the rationale of the *Griswold* majority was the fact that the state anti-contraception statute applied to married persons. While the Court in

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49. See id. at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969)). On the other hand, Justice White’s reasons for striking down the statute were far more practical: he did not believe the law served Connecticut’s stated purpose of limiting “all forms of promiscuous or illicit sexual relationships.” See id. at 505 (White, J., concurring) (arguing that Connecticut had not explained how “ban on the use of contraceptives by married couples in any way reinforces [Connecticut’s] ban on illicit sexual relationships”).
52. 405 U.S. 438 (1972).
53. See *Sandel*, supra note 50, at 97.
54. See id.
55. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“It is true that in *Griswold* the right of privacy in question inhered in the marital relationship.”). Waxing eloquent in the *Griswold* majority opinion, Justice Douglas claimed that:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Id.* It is fair to say that Douglas’s words contrast rather sharply with his own personal conduct with regards to marriage. See Richard A. Posner, *The Anti-Hero*, The
Griswold held only that the Constitution protects married couples’ use of contraception, the Court in Eisenstadt extended this right to contraception to unmarried couples as well, holding unconstitutional a law requiring that the distribution of contraceptives be limited to married persons. Justice Brennan’s majority opinion rested on the assertion that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.” The majority interpreted Griswold’s right to privacy in very broad terms: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Importantly, after Eisenstadt, the right to privacy had as its justification the inviolability of individual desires, not the protection of marriage or other fundamental human institutions.

B. Abortion

The impact of the theoretical shift between Griswold and Eisenstadt is clearly visible in the Court’s next big substantive due process case: Roe v. Wade. Roe struck down Texas’s anti-abortion statute and, along with the companion case of Doe v. Bolton, set forth the framework by which any future abortion regulation would be judged. The Roe standard prohibited states from banning or severely restricting abortion. Under the Court’s pronouncement, state regulations adversely affecting a woman’s ability to obtain a surgical abortion were to be strictly scrutinized.

In the majority opinion, Justice Blackmun offered a review of various “right of privacy” cases. He then concluded:

NEw REPUBLIC, Feb. 24, 2003, at 27 (revealing that “Douglas was a compulsive womanizer . . . a terrible husband to each of his four wives [and] a terrible father to his two children”).

56. See Eisenstadt, 405 U.S. at 453-55 (acknowledging that “under Griswold the distribution of contraceptives to married persons cannot be prohibited,” and concluding that separate treatment of married and unmarried persons violates Equal Protection Clause).

57. Id. at 453.

58. Id.

59. See Bork, THE TEMPTING OF AMERICA, supra note 11, at 111.


62. See Doe, 410 U.S. at 179; Roe, 410 U.S. at 113. For the status of anti-abortion laws, and efforts to repeal them, between the end of the Second World War and Roe, see Joseph W. Dellapenna, DISPelling THE MYTHS OF ABORTION HISTORY 585-672 (2006).

63. See Roe, 410 U.S. at 155, 164-65.

64. See id. at 155-56.

65. See id. at 152-53.
This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. 66

Though it claimed that it “need not resolve the difficult question of when life begins,” the Court in fact did decide that the pre-born human was not a “person” within the meaning of the Fourteenth Amendment. 67 Ultimately, however, the majority concluded that neither the state’s nor the woman’s interest in the abortion question is absolute. 68 This determination allowed Blackmun to set up the famous trimester scheme for abortion adjudication. 69 Blackmun’s system provided that:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. 70

While Roe allowed for increased restrictions on abortion later in the pregnancy, states that tried to actualize this potential regulatory ability often found themselves at odds with Doe. 71 Doe permitted a postviability abortion for sufficient health reasons and, significantly, the Court defined health broadly: “We agree with the District Court that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” 72 Charles Rice submits

66. Id. at 153.
67. See id. at 156-59.
68. See id. at 154.
69. See id. at 164-65.
70. Id.
72. Id. at 192 (citation omitted).
that the de facto effect of \textit{Roe} and \textit{Doe} was "a sanction for permissive abortion at every stage of pregnancy."\textsuperscript{73}

\textit{Roe} created a firestorm of controversy.\textsuperscript{74} Since its disposition, the case has been criticized on substantive, legal, and historical grounds.\textsuperscript{75} Opponents of \textit{Roe} charge that the decision deprived pre-born humans legal protection from lethal force and that it illegitimately removed from the democratically elected state legislatures the important question of abortion policy.\textsuperscript{76} By the early 1990s, a legitimate question existed as to whether the Court would retain \textit{Roe}.\textsuperscript{77} In 1992, in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{78} the Court provided an answer that it hoped would be dispositive.\textsuperscript{79}

In \textit{Casey}, the Court considered the constitutionality of a number of Pennsylvania's abortion regulations. Though it found a majority of these statutory provisions valid, \textit{Casey} was not the victory that anti-abortion forces had sought. The Court upheld the core ruling of \textit{Roe}, that a woman's right to procure an abortion is a fundamental right under the Constitution's Fourteenth Amendment.\textsuperscript{80} To justify this conclusion, the plurality opinion of Justices O'Connor, Kennedy, and Souter contended that:

\begin{quote}
[The Court's] obligation is to define the liberty of all, not to mandate our own moral code. Our law affords constitutional protection to personal decisions relating to marriage, procrea-
\end{quote}


\textsuperscript{80} See \textit{Casey}, 505 U.S. at 844-71.
tion, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. 81

The Court did make some changes to the constitutional right to obtain an abortion, however. 82 After Casey, instead of this right being grounded in the right to privacy, the right to abortion was a "liberty interest" guaranteed by the Fourteenth Amendment. 83 Just as Eisenstadt broadened the right to privacy first announced in Griswold, the concept of "liberty as conceived in Casey is broader than privacy as conceived in Roe." 84 Erin Daly of Widener University contends:

Abortion as privacy, for instance, means that women are protected against governmental intrusion but can make no claim to governmental assistance. Abortion as a liberty issue, on the other hand, permits a broader understanding of abortion that more accurately reflects the multiple meanings of reproductive rights. ... By identifying abortion as part of a more general liberty interest, the Court raised the stature of the abortion decision, at least by implication. 85

Additionally, the Court rejected Roe's standard of strict scrutiny, providing instead that state regulations of abortion are constitutionally valid so long as they do not place an undue burden on a woman seeking a surgical abortion. 86 While the exact meaning of the undue burden standard is difficult to ascertain, several of the contested Pennsylvania restric-

83. See Casey, 505 U.S. at 846-53.
85. Id. at 122.
86. See Casey, 505 U.S. at 874.
tions in *Casey* were held constitutional under the undue burden standard, whereas they would have been invalidated under *Roe*'s standard of strict scrutiny. Thus, while *Casey* may have theoretically broadened the abortion right by terming it a "liberty interest," the effective result of the case was a narrowing of that right because states are now allowed to place more restrictions on abortion than under *Roe*. 88

C. *Homosexual Conduct*

The reach of the Court's substantive due process jurisprudence is not limited to matters concerning contraception and abortion, but also covers claims about human sexuality. In *Bowers v. Hardwick,* the Court upheld the right of states to outlaw homosexual sodomy. The majority opinion, authored by Justice White, held that homosexuals did not have a fundamental right to participate in acts of sodomy within the meaning of the Fourteenth Amendment's guarantee of due process. Justice White went so far as to assert that the challenger was unable to show any connection between homosexual conduct and "family, marriage, or procreation," which were the matters granted protection in the previous substantive due process cases.

In concluding that there is no fundamental right to engage in homosexual conduct, the majority took notice of the strong history of anti-sodomy laws in the United States, stating: "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." Furthermore, Justice White expressed an unwillingness to announce new substantive rights that lacked textual support in the Constitution. The majority found unconvincing the fact that the statute in-

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87. See id. at 911-22 (Stevens, J., concurring in part and dissenting in part).
91. See id. at 196. An active homosexual challenged the Georgia statute. See id. at 188. Though the law proscribed both homosexual and heterosexual sodomy, the Court noted that "[t]he] only claim properly before the Court . . . is [t]he challenge to the Georgia statute as applied to consensual homosexual sodomy. [The Court] express[es] no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy." Id. at 188 n.2.
92. See id. at 191-96.
93. See id. at 191.
94. Id. at 194.
95. See id. at 194-95.
terfered with actions that took place within the confines of the challenger’s house, as “illegal conduct is not always immunized whenever it occurs in the home.”96 Importantly, the Court found that, by itself, morality could provide the justification needed to pass rational basis review.97

Seventeen years later, in Lawrence v. Texas,98 the Court completely turned around: it overruled Bowers and struck down a state statute that criminalized homosexual, but not heterosexual, sodomy.99 While the decision may not have had a considerable immediate effect—only thirteen states still had any sort of anti-sodomy laws on the books and these were infrequently enforced—the broad language employed by the Court suggests wide-ranging societal consequences.100

The Lawrence majority, written by Justice Kennedy, held that the state’s anti-homosexual sodomy law invalidly infringed upon the defendant’s substantive due process rights.101 The Court asserted that there was “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”102 Justice Kennedy charged that:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.103

Quite surprisingly, considering the strong historical pedigree of anti-sodomy laws, as evidenced in Bowers, the Court in Lawrence concluded that “[t]he Texas statute furthers no legitimate state interest which can justify

96. Id. at 195.
97. See id. at 196. (“The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).
99. See id. at 578.
101. See Lawrence, 539 U.S. at 578-79.
102. Id. at 572.
103. Id. at 578.
its intrusion into the personal and private life of the individual." 104 Thus, the majority found that the anti-sodomy law did not even pass the minimal judicial standard of rational basis review. 105

Passages from Lawrence also suggest that, in direct contrast to Bowers, morality alone is no longer a sufficient justification for a statute. 106 Some harm is required before a practice may be criminalized, not mere moral condemnation by the community. 107 The Court's adherence in Lawrence to the no (physical) harm principle contrasts rather sharply with, for example, Justice Goldberg's assertion in his Griswold concurrence that "protecting marital fidelity" and preventing "sexual promiscuity" were legitimate state goals. 108 Nevertheless, possibly in anticipation of criticism, Justice Kennedy was careful to point out to what conduct the Lawrence ruling did not apply. 109

D. Euthanasia and Assisted Suicide

Since 1990, the Court has had several opportunities to examine end-of-life matters through the scope of substantive due process. 110 In Cruzan v. Director, Missouri Department of Health, 111 the Court rejected a claim that a state's refusal to remove the feeding tube of a woman in a persistent vegetative state violated the woman's substantive due process rights. 112 In Cruzan, the parents of an injured woman took legal action to discontinue her life-sustaining treatment because she "would not wish to continue on with her nutrition and hydration." 113 The Supreme Court of Missouri held that the requisite "clear and convincing" standard of evidence to prove that key fact was not met. 114

104. Id. Justice Kennedy challenged some of the historical findings of Justice White in Bowers. See id. at 559.
105. See id. at 578.
106. See id. at 577-78.
107. See id.
109. See Lawrence, 539 U.S. at 578. The Court claimed that: The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.
112. See id. at 286-87.
113. See id. at 268.
114. See id. at 268-69.
Chief Justice Rehnquist's majority opinion affirmed the ruling of Missouri's highest court.\textsuperscript{115} The Court "conclude[d] that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state."\textsuperscript{116} It is important to note, however, the narrow scope of the \textit{Cruzan} holding: "For purposes of this case, it is assumed that a competent person would have a constitutionally protected right to refuse lifesaving hydration and nutrition."\textsuperscript{117} Thus, if a state so chose, it could require a lesser evidentiary standard or no standard at all for the cessation of life-sustaining treatment for a mentally incompetent person.\textsuperscript{118}

In 1997, in \textit{Washington v. Glucksberg}, the Court upheld a state statute proscribing assisted suicide against a substantive due process challenge.\textsuperscript{119} Writing for the majority, Chief Justice Rehnquist pointed out that suicide goes against the tradition of the country.\textsuperscript{120} He asserted that the Court's precedents neither created nor supported the purported right to suicide.\textsuperscript{121} Therefore, the majority concluded that the right to suicide was "not a fundamental liberty interest protected by the Due Process Clause."\textsuperscript{122} Furthermore, as the state law was "rationally related to [a] legitimate government interest," it met rational basis review.\textsuperscript{123} While \textit{Glucksberg} clearly upheld the right of states to ban assisted suicide, the Court said nothing about the constitutional status of a potential statute permitting the practice.\textsuperscript{124}

\section{III. The Philosophy of Substantive Due Process}

There is no uniform statement of what substantive due process is or what it requires.\textsuperscript{125} This reflects both the truth that the law in this area is continuously evolving and the fact that different justices wrote the opinions, each of whom had a particular view on the topic. Nevertheless, one

\begin{itemize}
  \item \textsuperscript{115} See id. at 286-87.
  \item \textsuperscript{116} Id. at 284.
  \item \textsuperscript{117} Id. at 262.
  \item \textsuperscript{119} See 521 U.S. 702, 736 (1997) (holding that right to assisted suicide is not fundamental liberty interest protected by Due Process Clause).
  \item \textsuperscript{120} See id. at 723.
  \item \textsuperscript{121} See id. at 725-28.
  \item \textsuperscript{122} Id. at 728.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{125} See Glen R. Anstine, Comment, \textit{A House Divided: Substantive Due Process in the Twentieth Century}, 62 NEB. L. REV. 316, 327-34 (1983) (looking at how substantive due process has been interpreted throughout Supreme Court's history).
\end{itemize}
can glean some broad philosophical concepts that are at work in the case law of substantive due process. It is important to note that, at times in the cases, the Court did not merely state a philosophical principle or belief in different terms, but rather posited two diametrically opposed ideas.\(^{126}\)

In making its substantive due process decisions, the Court has consistently put forth an anthropological view marked by "radical individualism."\(^{127}\) In his Bowers dissent, Justice Blackmun argued that the Due Process Clause of the Fourteenth Amendment had been used to defend personal rights surrounding the family for the benefit of the individual, not society.\(^{128}\) In other words, for the Court, "[t]he family's value is measured by its contributions to individual gratification."\(^{129}\) In Thornburgh v. American College of Obstetricians & Gynecologists,\(^{130}\) Justice Stevens went so far as to say that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"\(^{131}\) In Casey, the Court noted that "[o]ur precedents 'have respected the private realm of family life which the state cannot enter.'"\(^{132}\) It went on to assert that "[t]hese matters, involving the most intimate and personal choices a

126. Compare Griswold v. Connecticut, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring) ("Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct . . . . 'Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . .'), and Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced."). with Lawrence v. Texas, 539 U.S. 558, 578 (2003) (denying states' right to ban homosexual sodomy).

127. See Bork, Slouching, supra note 76, at 96-119. Elsewhere, Bork contends that, by and large, Supreme Court justices are members of the "New Class," which is characterized by "a passion for . . . radical autonomy for the individual (but only in a hierarchical and bourgeois culture—when that is replaced, there will be little tolerance for individualism . . . .)" Bork, Coercing Virtue, supra note 16, at 6. The Supreme Court is not the only place where such individualism has been noted. See generally Lawrence M. Friedman, American Legal Culture: The Last Thirty-Five Years, 35 ST. LOUIS U. L.J. 529 (1991); Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 TEX. L. REV. 963 (1987) (exploring role of radical individualism in modern legal ethics).

128. See Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (noting that familial rights are protected under Fourteenth Amendment "not because they contribute . . . to general public welfare, but because they form so central a part of an individual's life"), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

129. Bork, Slouching, supra note 76, at 104.


131. Id. at 777 n.5 (Stevens, J., concurring) (quoting Charles Fried, Correspondence, 6 PHIL. & PUB. AFF. 288-89 (1977)). In Bowers, however, Justice Blackmun did admit that the "Court [has] recognized . . . that the 'ability independently to define one's identity that is central to any concept of liberty' cannot truly be exercised in a vacuum; we all depend on the 'emotional enrichment from close ties with others.'" 478 U.S. at 205 (Blackmun, J., dissenting) (citations omitted).

132. Casey, 505 U.S. at 851 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (discussing constitutional protection of individual's choice in matters "re-
person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." 133 In Lawrence, this concept of autonomy played a key role in the Court's discovery of a right to homosexual sodomy and repudiation of the Bowers ruling.134

Furthermore, the substantive due process cases indicate that personal freedom is the highest good for the Court. For the Lawrence majority, one of the Constitution's primary roles was to advance citizen freedoms: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." 135 Similarly, in Griswold, the Court identified the frequently applied principle that a "'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" 136

In his Bowers dissent, Justice Blackmun approved Justice Brandeis's famous assertion that "'the most comprehensive of rights and the right most valued by civilized men [is] the right to be let alone.'" 137 Indeed, Russell Hittinger observes that Brandeis's assertion, though dictum, has become a permanent feature of our judge-made law, and is cited as "a kind of self-evident norm regulating the relationship between government and the citizens." 138 Taken at face value, this language seems incredible because certain other rights—such as the right to life or the right to be free from human enslavement—appear to be substantially more important to true human flourishing than the putative right identified by Justice Brandeis.139 As Hittinger notes:
The proposition that a comprehensive "right to be left alone" is the right "most valued by civilized men" is an odd one, since the word "civilized" derives from *civis*, or citizen. If we were to make a short list of those rights most prized by citizens, we might start with the political franchise itself; from there, one might go on to mention the right to hold office, to engage in mutual deliberation with one's fellow citizens in legislative assemblies; one might at least call attention to the First Amendment right of being able to petition the government for redress of grievances. These rights are specifically "political" because each one guarantees access to and participation in the political process. We might also mention those goods and privileges which accrue to anyone who enjoys political order: for example, protection against arbitrary violence; the ability to settle disputes in public courts according to known and standing laws; and the orderly and just distribution of common resources, such as education and healthcare.\textsuperscript{140}

Nevertheless, if one accepts the word of the Court, Justice Brandeis's assertion is what it truly believes.

The fact that the Court values personal human freedom above everything else is perhaps best illustrated by its treatment of abortion.\textsuperscript{141} In *Roe*, the Court explicitly claimed not to make the determination of when human life begins.\textsuperscript{142} It did hold, however, that a woman has a fundamental right to seek an abortion, and that any state regulation of abortion must pass strict judicial scrutiny.\textsuperscript{143} This paradox led Robert P. George to

\textbf{Pope John Paul II, The Gospel of Life} 9-11 (1995) (describing "right to life" as "fundamental"). For a distinction between authentic and spurious rights, see John Finnis, *Natural Law and Natural Rights* 198-230 (1980); William E. May, *Catholic Bioethics and the Gift of Human Life* 174-75 (2000) (discussing difference between "right" and "liberty"). *See generally* Hadley Arkes, *Natural Rights and the Right to Choose* (2004). Followers of Justice Brandeis might be surprised to learn that in Russia there is evidence that, even after the collapse of the Soviet Union, the population values "order" much more than "freedom." \textsuperscript{144}

\textsuperscript{140.} See Hittinger, *supra* note 138, at 135-36.


\textsuperscript{142.} See Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary...is not in a position to speculate as to the answer."). For a view that such sidestepping must be avoided, see Sandel, *supra* note 50, at 100-03.

\textsuperscript{143.} See Roe, 410 U.S. at 164 (asserting that abortion statute "that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment").
conclude that Justice Blackmun, who authored the majority opinion in Roe, "implicitly . . . resolve[d] precisely this question quite against the proposition that 'life begins' anytime prior to birth." More importantly, by failing at the outset to resolve the threshold question of when life begins, the Roe Court strayed from its self-constructed judicial duty to resolve factual and structural disputes of federal constitutional issues. It is illustrative of the Court's ideology that it erred on the side of the woman's purported "liberty . . . to abort," rather than the pre-born human being's right to life or "claim right that his or her mother (and others) forbear from aborting it." The Court's treatment of abortion contrasts sharply with that found in a number of European countries that have been much more willing to recognize pre-born rights. While the plurality's reasoning in Casey was not identical to Justice Blackmun's in Roe, it nonetheless determined that "the essential holding of Roe v. Wade should be retained and once again reaffirmed."

It is also clear that, under the Court's substantive due process view, the majority has definite limitations in the political community, especially as concerns the promotion of morality. Critical of the path that the Court has taken, Robert Bork comments that:

The Court in modern times has regularly maximized individual rights against the corporate rights of all intermediate institutions. In the adversarial relationship between the individual and society posited by Mill's 'one very simple principle,' the Court in matters of morality and social discipline has sided with Mill far more often than the Constitution warrants.

144. GEORGE, THE CLASH OF ORTHODOXIES, supra note 7, at 143-44.
146. MAY, supra note 139, at 175.
150. BORK, SLOUCHING, supra note 76, at 96-97.
For example, in his concurrence in *Skinner v. Oklahoma*, a predecessor of the modern substantive due process cases, Justice Jackson asserted that "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes." What's more, in the wake of *Lawrence*, it is quite possible to doubt that morals legislation will ever again pass constitutional muster. In expressly overruling *Bowers*, Justice Kennedy quoted Justice Stevens's dissent in *Bowers*: "‘Our prior cases make . . . abundantly clear [that] . . . the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. . . .’"154

Finally, it is important to stress that the Court’s substantive due process rulings exhibit a philosophy of moral relativism, the belief that "den[ies] the capacity of reason to know objective moral truth." The paradigm of the Court’s embrace of this ideology is the famous “mystery passage” in *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.” Critics of *Casey*’s “mystery passage” have identified its relativism and the problems that accompany such a philosophical tenet. James Schall retorts that “[t]he justifying principle stated in . . . [Casey] makes it quite impossible, as an intellectual principle, to distinguish between a Hitler and a Mother Teresa, between a monster and a wise man.” Robert Bork adds that “[t]he words [of the ‘mystery passage’]

151. 316 U.S. 535 (1942).
152. *Id.* at 546 (Jackson, J., concurring) (noting that statute failed constitutional test before reaching issue of limits of government intrusion on natural rights).
155. See *Rice, The Winning Side*, supra note 73, at 91; see also JOHN FINNIS, *Fundamentals of Ethics* 56-79 (1983) (exploring objectivity of moral propositions and moral agents, and arguing that “[r]easonableness . . . requires us to reject radical skepticism as both unjustified and literally self-refuting”).
158. *Schall*, supra note 81, at 49.
are devoid of any ascertainable meaning. They could as easily be used to protect the unborn child's right to define his or her concept of existence." Furthermore, some suggest that the undue burden standard—the basic framework that Casey set forth to judge abortion regulations—reflects the Court's general sympathy towards moral relativism.

IV. THE THEORY OF THE NATURAL LAW

The natural law has enjoyed a long history in Western thought. In different forms, it has been defended by Plato, Aristotle, Cicero, St. Paul, St. Augustine, John Locke, Thomas Jefferson, James Madison, and Martin Luther King, Jr. Though various accounts have been offered as to the essence and requirements of the natural law, the most influential has arguably been that of St. Thomas Aquinas. This Article largely follows

160. See, e.g., Curtis E. Harris, An Undue Burden: Balancing in an Age of Relativism, 18 Okla. City U. L. Rev. 363 (1993). In Casey, the Court characterized the undue burden standard as a woman's right to be free "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 505 U.S. at 874.
Aquinas's view, both in his own words and in the writings of his modern interpreters.164

Aquinas taught that reality contained four different types of law: eternal, natural, human, and divine.165 According to Aquinas, law "is nothing else than an ordinance of reason for the common good, made by him who has the care of the community."166 He defined eternal law as "the Divine Reason's conception of things."167 Alternatively, St. Augustine called the eternal law "the reason or the will of God, who commands us to respect the natural order and forbids us to disturb it."168

Aquinas saw human law as grounded in the natural law: "[I]t is from the precepts of the natural law, as from general . . . principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed . . . ."169 In Aquinas's understanding, a human law is legitimate only to the extent that its authors derive it from the natural law.170 Like Augustine, Aquinas contended that an unjust law is, in reality, not a law.171 For Aquinas, the divine law is synonymous with divine revelation (i.e., the Catholic Bible).172 Aquinas believed that the divine law serves an


164. See generally ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION: CONTEMPORARY PERSPECTIVES (John Goyette, Mark S. Latkovic & Richard S. Myers eds., 2004). Followers of Aquinas sometimes disagree dramatically on aspects of his theory. See, e.g., JANET E. SMITH, HUMANAE VITAE: A GENERATION LATER 348-52 & n.28 (1991). This Article does not focus on this debate, but instead concentrates on the substantive answers to moral questions, where modern Thomists usually agree. See, e.g., Germain Grisez, A New Formulation of a Natural-Law Argument Against Contraception, THOMIST, 1966, at 343; Germain Grisez, Joseph Boyle, John Finnis & William E. May, "Every Marital Act Ought to Be Open to New Life": Toward a Clearer Understanding, THOMIST, 1988, at 365 (arguing for moral correctness of conclusion of papal encyclical, but offering alternative justification for such conclusion).

165. See F.C. COPESTON, AQUINAS 219-42 (1991); RICE, FIFTY QUESTIONS, supra note 76, at 50.

166. ST. THOMAS AQUINAS, 8 THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS, PRIMA SECUNDÆ PARTIS 8, q. 90, a. 4 (Fathers of the English Dominican Province trans., 1927) [hereinafter S.T. I-II] (discussing "whether promulgation is essential to a law").

167. Id. at 9-10, q. 91, a. 1 (answering "whether there is an eternal law").

168. RICE, FIFTY QUESTIONS, supra note 76, at 50 (quoting Augustine).

169. S.T. I-II, supra note 166, at 12-14, q. 91, a. 3 (ascertaining "whether there is a human law").

170. See FREDERICK COPESTON, 2 A HISTORY OF PHILOSOPHY: MEDIEVAL PHILOSOPHY 418-19 (1962) (explaining that human law is derivative of natural law, and that function of legislature is to define and apply human law that is compatible with natural law).

171. See S.T. I-II, supra note 166, at 69-71, q. 96, a. 4 (discussing whether "human law binds a man in conscience").

172. See RICE, FIFTY QUESTIONS, supra note 76, at 54.
essential role in human flourishing, one complementary to those played
by the natural and human laws.\textsuperscript{173}

As to the natural law, Aquinas stated:

[S]ince all things subject to Divine providence are ruled and
measured by the eternal law . . . it is evident that all things par-
take somewhat of the eternal law, in so far as, namely, from its
being imprinted on them, they derive their respective inclina-
tions to their proper acts and ends. Now among all others, the
rational creature is subject to Divine providence in the most ex-
cellent way, in so far as it partakes of a share of providence, by
being provident both for itself and for others. Wherefore it has a
share of the Eternal Reason, whereby it has a natural inclination
to its proper act and end: and this participation of the eternal law
in the rational creature is called the natural law . . . [T]he light
of natural reason, whereby we discern what is good and what is
evil, which is the function of the natural law, is nothing else than
an imprint on us of the Divine light. It is therefore evident that
the natural law is nothing else than the rational creature’s partici-
pation of the eternal law.\textsuperscript{174}

In articulating this conception of natural law, Aquinas essentially asserted
that “by using our reason and reflecting on our nature as people, we can
come to formulate general principles of action.”\textsuperscript{175} He rejected the argu-
ment that there is only one natural law precept.\textsuperscript{176} Yet Aquinas did spell
out what constituted the first precept of the natural law, which, according
to him, is self-evident: “[G]ood is to be done and pursued, and evil is to be
avoided.”\textsuperscript{177} Every other natural law precept flows from this principle, “so
that whatever the practical reason naturally apprehends as man’s good (or
evil) belongs to the precepts of the natural law as something to be done or
avoided.”\textsuperscript{178}

Practically, for Aquinas, the moral correctness of an action depends
on the nature or essence of human beings.\textsuperscript{179} Aquinas believed that basic
human inclinations reflect human nature. Furthermore, “all those things

\textsuperscript{173. See S.T. I-II, supra note 166, at 14-15, q. 91, a. 4 (assessing “whether there
was any need for a Divine law”).

174. Id. at 10-12, q. 91, a. 2 (answering “whether there is in us a natural law”).


176. See S.T. I-II, supra note 166, at 42-44, q. 94, a. 2 (discussing “whether the
natural law contains several precepts, or only one”).

177. Id. Aquinas further explained: “[T]he precepts of the natural law are to
practical reason, what the first principles of demonstrations are to the speculative
reason; because both are self-evident principles.” Id.

178. Id.

179. See RICE, FIFTY QUESTIONS, supra note 76, at 52. For a contemporary look
at Aristotle and Aquinas on human nature, see Thomas S. Hibbs, INTRODUCTION TO
to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.”180 In Aquinas’s understanding, “human beings are fulfilled or made happy in ways which can be seen by noting what they are (including how they act and what they are drawn to) and that practical reason can therefore be used to indicate how, in general, they should behave.”181

In the Thomistic system, the order of the natural inclinations forms the order of the natural law precepts.182 Aquinas derived the following list of fundamental goods from his observations of basic human inclinations: 1) human life and its preservation, 2) procreation and rearing of children, 3) gaining knowledge of truth, specifically about God, and 4) living with other humans in society.183 In striving to attain these goods, however, humans must act reasonably, responsibly, and deliberately.184 As Ralph McInerny states:

Natural Law is a dictate of reason. Precepts of natural law are rational directives aiming at the good for man. The human goods, man’s ultimate end, is complex, but the unifying thread is the distinctive mark of the human, i.e., reason; so too law is a work of reason. Man does not simply have an instinct for self-preservation. He recognizes self-preservation as a good and devises ways and means to secure it in shifting circumstances. Man does not merely have a sexual instinct. Recognizing the desirability of sexual companionship, reproduction, offspring, he consciously directs himself to those goods as goods without which he would not be complete.185

In Aquinas’s understanding, God placed such inclinations into people’s human nature to assist them in attaining their greatest good: eternal happiness.186

Modern commentators interpret Aquinas’s work on the natural law in different ways.187 According to Janet E. Smith, “[a] very simple summary” of Aquinas on the natural law would be the following three foundational truths:

1. Man, by the power of his reason, is capable of discerning some moral truths. “Natural law” refers both to Man’s inherent desire to seek the good and avoid what is evil and to his ability to dis-

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180. S.T. I-II, supra note 166, at 42-44, q. 94, a. 2.
181. Davies, supra note 175, at 246.
182. See S.T. I-II, supra note 166, at 42-44, q. 94, a. 2.
183. See id.
184. See McInerny, supra note 163, at 4.
185. Id. at 5.
186. See Rice, Fifty Questions, supra note 76, at 52.
187. See, e.g., id. at 51 (“The natural law is therefore a rule of reason, promulgated by God in man’s nature, whereby man can discern how he should act.”).
cern what is good and thus to be sought, what is evil, and thus to be avoided. . . . 2. The workings of nature, the “laws” of nature, are not the same as the natural law—for natural law includes Man’s ability to reason as well as his natural inclinations. But the laws of nature are, nonetheless, important guides in Man’s process of discernment. Included in the category of “nature” is the nature of Man in all his physical, psychological, and spiritual dimensions. The better Man knows his natural inclinations, the better he can act, and ultimately such action should promote human well-being and happiness. . . . 3. Nature is an important guide to truth because God is the author of nature, and, thus, in some sense respect for nature manifests a respect for God. Moreover, nature is designed in accord with reason, for God governs the universe. Thus, to act in accord with nature is to act in accord with reason and to act in accord with reason is to act in accord with nature. Most understandings of natural law, however, do not require that the recognition that God is the author of the natural law be a conscious element in reasoning well about moral matters. 188

Robert George, who follows the thought of John Finnis and Germain Grisez, describes the natural law as “consist[ing] of three sets of principles”:

[F]irst, and most fundamentally, a set of principles directing human choice and action toward intelligible purposes, i.e., basic human goods which, as intrinsic aspects of human well-being and fulfillment, constitute reasons for action whose intelligibility as reasons does not depend on any more fundamental reasons (or on sub-rational motives such as the desire for emotional satisfactions) to which they are mere means; second, a set of “intermediate” moral principles which specify the most basic principles of morality by directing choice and action toward possibilities that may be chosen consistently with a will toward integral human fulfillment and away from possibilities the choosing of which is inconsistent with such a will; and third, fully specific moral norms which require or forbid (sometimes without exceptions) certain specific possible choices. 189

188. SMITH, supra note 164, at 71. See generally RALPH McINERNY, ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS (1982).

V. NATURAL LAW CRITICISMS OF SUBSTANTIVE DUE PROCESS

From this basic review, it is clear that the philosophical tenets of natural law theory differ sharply from those of substantive due process. Recall that in its substantive due process rulings, the Supreme Court has consistently stressed the autonomous nature of human beings and has promoted what critics refer to as "radical individualism." Conversely, Aquinas identified living well in a community as one of the basic human goods, which reflected his belief that humans are by nature social.

The substantive due process corpus indicates that personal freedom is the most important good for the Court. In contrast, Aquinas asserted that man's "highest good . . . is eternal happiness with God." Freedom is not even listed among his fundamental goods, though he certainly acknowledged that humans possessed it. Instead, Aquinas viewed freedom as a means, not an end in itself. Additionally, George contends that "[w]e need not embrace the idea of a moral right to do moral wrong in any strong sense to ensure that people will have available to them valuable opportunities to test their moral mettle and (further) develop their moral character."

Finally, in its substantive due process decisions, the Court has largely espoused an ideology of moral relativism. Traditional natural law philosophy has always affirmed the existence of absolute moral principles. Indeed, Aquinas stated: "It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude

190. For a summary of the Supreme Court's emphasis on the autonomous nature of human beings, see supra notes 127-48 and accompanying text.

191. See S.T. I-II, supra note 166, at 44, q. 94, a. 2; see also John Finnis, Aquinas' Moral, Political, and Legal Philosophy, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), http://plato.stanford.edu/entries/aquinas-moral-political/.

192. For a discussion of personal freedom in the context of substantive due process, see supra notes 135-48 and accompanying text.


197. For an overview of moral relativism in the context of the Supreme Court's substantive due process decisions, see supra notes 155-60 and accompanying text.

198. See JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 2 (1991) [hereinafter FINNIS, MORAL ABSOLUTES]. Finnis makes the point that "[a] good label for the disputed absolutes would be exceptionless moral norms." Id. at 3; see also WILLIAM E. MAY, AN INTRODUCTION TO MORAL THEOLOGY 127-32, 139-43 (1994); Ralph McInerny, Thomas Aquinas and Moral Relativism, in THE EVER-ILLUMINATING WISDOM OF ST. THOMAS AQUINAS 85, 85-98 (1999).
is the same for all, and is equally known by all." 199 Furthermore, according to Rice, the "fact that people are in error in their perception of the natural law may reduce or eliminate their subjective culpability. But whether or not such people are culpable, some acts are always objectively wrong." 200

Applying traditional natural law analysis, one often comes to different moral conclusions than the Court reached in its substantive due process cases. In other words, the particular practice that the Court has declared constitutionally protected is found illicit under a natural law inquiry, although admittedly, constitutional is not synonymous with moral. Nevertheless, the words will be used interchangeably in the sense just described, not in the sense that a justice's vote in a particular case equals his or her personal opinion on the legitimacy of the action in question. 201 This Article will now examine the major substantive due process cases and their moral conclusions from a traditional natural law perspective.

A. Contraception

In Griswold, the Court ruled that a state could not proscribe the use of contraceptives by married people. 202 In Eisenstadt, the Court clarified that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." 203 In contrast, contraception has long been viewed as violative of the natural law. 204 "Thomas Aquinas spoke of contraception as wrong . . . because it was an act against nature; his became the more common justification for the condemnation of contraception. His view rested on the premise that God was the author of nature and that respecting the order of nature was respecting God's will." 205 Furthermore, in 1968, when Pope Paul VI reaffirmed the Catholic Church's longstanding prohibition on contraception, he explicitly appealed to the natural law as a basis for his decision. 206


200. Rice, Fifty Questions, supra note 76, at 53.

201. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.").

202. For the holding and rationale of Griswold, see supra notes 38-47 and accompanying text.


204. See Finnis, Moral Absolutes, supra note 198, at 85-86.

205. Smith, supra note 164, at 4-5.

There are several main natural law arguments against the use of contraception. According to Janet Smith, three such arguments are:

[1.] It is wrong to impede the procreative power of actions that are ordained by their nature to the generation of new human life. ... Contraception impedes the procreative power of actions that are ordained by their nature to the generation of new human life. ... Therefore, contraception is wrong. [2.] It is wrong to impede the procreative power of actions that are ordained by their nature to assist God in performing His creative act that brings forth a new human life. ... Contraception impedes the procreative power of actions that are ordained by their nature to assist God in performing His creative act that brings forth a new human life. ... Therefore, contraception is wrong. [3.] It is wrong to destroy the power of human sexual intercourse to represent objectively the mutual, total self-giving of spouses. ... Contraception destroys the power of human sexual intercourse to represent objectively the mutual, total self-giving of spouses. ... Therefore, contraception is wrong.

Finnis, Grisez, and their collaborators additionally contend "that while contraception is wrong for several reasons, it is wrong primarily and essentially because it is contralife." Plainly, according to the traditional understanding of the natural law, the use of contraceptives is morally unacceptable. Because the Court found such use constitutionally protected in Griswold and Eisenstadt, it would seem that the moral conclusion of substantive due process is in direct opposition to that of natural law. Despite his strict condemnation of contraception as a moral matter, however, Germain Grisez approves of the Griswold decision: "I think that the Connecticut statute was, in fact, unjust. ... [This] view ... is based not on a morally favorable judgment of contraception, but on the view that the use of contraceptives does not violate any person's rights nor in any clear and proximate way injure common purposes of civil society." Grisez's statement illustrates a tenet that natural law thinkers have traditionally held: the government should not criminalize every immoral practice. Aquinas argued that the state should not proscribe all vicious

207. See Smith, supra note 164, at 98-128.
208. Id. at 99.
210. See Rice, Fifty Questions, supra note 76, at 114 (condemning Griswold decision as reflecting "latitudinarian approach" to constitutional interpretation).
212. See George, Making Men Moral, supra note 196, at 19-47.
activity, but only the most nefarious actions—"chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained... murder, theft and suchlike." In modern times, on the matter of public morality, John Finnis contends that the power of the government is limited by its essential purpose, namely to facilitate individual and communal well-being.

B. Abortion

While its ruling in Casey may have given states somewhat greater latitude in regulating abortion, the Court’s pronouncements on the subject have played a substantial role in bringing widespread abortion to America. In Casey, the Court stressed that a woman’s right to procure an abortion is a fundamental constitutional right. As in the case of contraception, this conclusion runs afoul of traditional natural law analysis, insofar as the Court provided a constitutional guarantee to something that is illicit under the natural law.

The natural law argument against abortion is relatively straightforward. The natural law proscribes the direct, intentional killing of innocent persons. Aquinas declared that "therefore it is in no way lawful to slay the innocent." Grisez explains that:

Historically, many natural law theories have proceeded on a conviction that respect for human life is a primary moral principle. Each man by nature desires to preserve his own life, and no one can reasonably expect others to respect his life except on the basis of a universal principle that human life as such has a dignity in virtue of which it should be respected and protected. We can easily imagine a society in which only the lives of those strong enough to cause trouble would be respected, but such a society,

213. S.T. I-II, supra note 166, at 66, q. 96, a. 2.
219. S.T. I-II, supra note 166, at 207, q. 64, a. 6.
based on exploitation of the weak, would necessarily fall short of the justice necessary for genuine community.\textsuperscript{220}

Consequently, abortion is never morally acceptable if the being destroyed by the act is in fact an innocent human person. It is beyond the scope of this Article to answer fully that extremely important moral question.\textsuperscript{221} It is enough to point out that an overwhelming majority of current natural law thinkers agree that abortion is the killing of an innocent human person and is therefore illicit.\textsuperscript{222} For example, Charles Rice goes so far as to say: "Roe v. Wade, by sanctioning the violent execution of innocent unborn children, by their own mothers at the scalpel-wielding hands of professionals ostensibly dedicated to preserving human life, has contributed in a unique way to the cycle of violence and the unraveling of our social order."\textsuperscript{223} Russell Hittinger charges critically that \textit{Casey} bestowed upon citizens "a moral or constitutional right to kill the unborn."\textsuperscript{224} Hittinger also includes \textit{Casey} in what he calls "a long train of court rulings that constitutionalize principles contrary to rightly formed conscience."\textsuperscript{225} Thus, evidence overwhelmingly indicates that the natural law tradition stands firmly opposed to the abortion license granted by the Court in \textit{Roe} and \textit{Casey}.

C. Homosexual Conduct

In \textit{Lawrence}, the Court overturned its previous ruling in \textit{Bowers} and held that states could not constitutionally proscribe homosexual sodomy.\textsuperscript{226} In contrast, classic natural law teaching has condemned such homosexual activity as immoral.\textsuperscript{227} For example, Aquinas asserted that

\textsuperscript{221} For thoughtful philosophical examinations of abortion, see Patrick Lee, \textit{Abortion and Unborn Human Life} (1996); Stephen Schwarz, \textit{The Moral Question of Abortion} (1990).
\textsuperscript{224} Hittinger, supra note 138, at 183.
\textsuperscript{225} Id. at 195.
\textsuperscript{226} For a discussion of the \textit{Lawrence} holding, see supra notes 98-109 and accompanying text.
"certain special sins are said to be against nature; thus contrary to sexual intercourse, which is natural to all animals, is unisexual lust, which has received the special name of the unnatural crime."228 According to Rice, "[h]omosexual acts are intrinsically wrong."229

Additionally, Harry V. Jaffa contends that "sodomy and lesbianism . . . are unnatural acts and, being unnatural, the very negation of anything that could be called a right according to nature."230 Finally, Robert George states the main natural law argument against homosexual sodomy:

Although not all reproductive-type acts are marital, there can be no marital act that is not reproductive in type. Masturbatory, sodomitical, or other sexual acts that are not reproductive in type cannot unite persons organically: that is, as a single reproductive principle. Therefore, such acts cannot be intelligibly engaged in for the sake of marital (i.e., one-flesh, bodily) unity as such. They cannot be marital acts. Rather, persons who perform such acts must be doing so for the sake of ends or goals that are extrinsic to themselves as bodily persons: Sexual satisfaction, or (perhaps) mutual sexual satisfaction, is sought as a means of releasing tension, or obtaining (and, sometimes, sharing) pleasure, either as an end in itself, or as a means to some other end, such as expressing affection, esteem, friendliness, etc. In any case, where one-flesh union cannot (or cannot rightly) be sought as an end-in-itself, sexual activity necessarily involves the instrumentalization of the bodies of those participating in such activity to extrinsic ends.231

Thus, the practice the Court sanctioned in Lawrence runs counter to the great weight of natural law thinking on the subject. This is not to say, however, that all natural law theorists supported the anti-sodomy statute in question. As Justice Clarence Thomas, who has been linked to the natural law tradition, wrote in his Lawrence dissent:

[T]he law before the Court today "is . . . uncommonly silly." If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.232

228. S.T. I-II, supra note 166, at 46, q. 94, a. 3 (emphasis added).
231. George, The Clash of Orthodoxies, supra note 7, at 78.
D. Euthanasia and Assisted Suicide

The natural law analysis of the Court's end-of-life cases relies on the same principle seen in the abortion context, namely that the direct killing of an innocent human person is always immoral. Traditional natural law thinkers contend that any type of euthanasia or assisted suicide violates this rule. Though Cruzan did allow states to apply "clear and convincing evidence . . . in [cases] where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state"—which can be construed as a narrow victory in the effort to protect innocent human persons from lethal force—natural law criticisms can nevertheless be made as to the Cruzan decision.

First, Cruzan stands for the proposition that states may validly mandate a "clear and convincing" evidentiary standard for situations like the one seen in that case, not that they must. Second, in Cruzan, the Court assumed, without deciding, that substantive due process would guarantee a person not in a persistent vegetative state the right to refuse food and water. Thus, Cruzan allows for several important ways in which innocent human life could be violated, in contravention of the natural law teaching on murder.

In important respects, the Court's ruling in Glucksberg accords with the traditional understanding of the natural law. In Glucksberg, the Court held that states could validly proscribe assisted suicide. That portion of the decision, which gave states maximum power to protect innocent human life in the assisted suicide context, met the natural law requirements concerning murder. Because the Court left open the question of whether states could constitutionally allow assisted suicide, however, Glucksberg is arguably not a perfect decision according to natural law standards. The fact that Oregon has a statute, ratified by a popular referendum, that permits assisted suicide makes this defect of Glucksberg all the more acute.

Charles Rice echoes a common natural law criticism of the Court's end-of-life cases:

233. For a review of natural law moral principles concerning murder, see supra notes 218-22 and accompanying text.
234. See, e.g., HITTINGER, supra note 138, at 135-62; MAY, supra note 139, at 235-82; RICE, Fifty Questions, supra note 76, at 362-72.
236. For a summary of the holding of Cruzan, see supra notes 111-18 and accompanying text.
237. See Cruzan, 497 U.S. at 279.
238. For a discussion of the holding of Glucksberg, see supra notes 119-24 and accompanying text.
Legalized abortion put the nation on a slippery slope to euthanasia, which is merely postnatal abortion. While the Supreme Court held in 1997 that there is no "right to die," this decision is pro-life only in a narrowly tactical sense. The "right to die" cases confirmed that the Supreme Court allows the states to permit the intentional killing of innocent persons.241

VI. THE DIVERGENCE OF NATURAL LAW THINKING

As has been shown, current natural law theorists, at least those who follow in the path of Aquinas, are largely in agreement as to the morality or immorality of the practices before the Court in its substantive due process cases. There is wide disagreement, however, among those same thinkers as to the proper answer to the following question: To what extent, if at all, should a justice of the Supreme Court use traditional natural law analysis? This Article will examine a number of relevant responses given to this question by natural law thinkers and then offer some reflections on this intra-theory debate.

Aquinas argued that, practically speaking, it is better for a political community to have a set of written laws than to leave all matters to the adjudication of individual judges.242 He justified his conclusion as follows:

First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge a right of each single case. Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment of things present, towards which they are affected by love, hatred, or some kind of cupiditas; wherefore their judgment is perverted.243

For Aquinas, the natural law does not intrinsically bestow upon anyone the authority of judgment.244 Russell Hittinger explains that, in Aquinas's understanding, "[o]nce ... natural law is made effective in the form of positive laws ... the judge ... must judge according to the dictates of whoever has authority to make law.... [Otherwise, he] subvert[s] not only justice as determined by positive law, but also the natural justice that the positive law sought to make effective."245 Thus, Aquinas contended that a

241. RICE, THE WINNING SIDE, supra note 73, at 23.
242. See S.T. I-II supra note 166, at 53-55, q. 95, a. 1.
243. Id.
244. See Hittinger, supra note 138, at 76-77; S.T. I-II, supra note 166, at 5-7, q. 90, a. 3.
245. Hittinger, supra note 138, at 77.
law can be illicit because of its author, "as when a man makes a law that
goes beyond the power committed to him." Finally, in answering
"Whether he who is under a law may act beside the letter of the law?"
Aquinas stated:

Wherefore if a case arise wherein the observance of that law
would be hurtful to the general welfare, it should not be ob-
served. . . . [I]f the observance of the law according to the letter
does not involve any sudden risk needing instant remedy, it is not
competent for everyone to expound what is useful and what is
not useful to the state: those alone can do this who are in author-
ity, and who, on account of such like cases, have the power to
dispense from the laws.

Currently, on one side of the spectrum sit those natural law juris-
prudences who do not think that the natural law should play any role in Su-
preme Court decision making. Robert Bork states his opinion on the
matter succinctly: "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." According to Bork:

In a constitutional democracy[,] the moral content of law must
be given by the morality of the framer or the legislator, never by
the morality of the judge. The sole task of the latter—and it is a
task quite large enough for anyone’s wisdom, skill, and virtue—is
to translate the framer’s or the legislator’s morality into a rule to
govern unforeseen circumstances. That abstinence from giving
his own desires free play, that continuing and self-conscious re-
nunciation of power, that is the morality of the jurist.”

Robert George shares a similar view. He argues that the question
of whether judges may use the natural law in the adjudication of cases is
not decided by the natural law but rather by the positive laws that have
bestowed the power of judicial review upon judges in the first place.
Although he believes that the drafters intended that the Constitution em-
body principles of natural law and natural rights, George contends that
the document bestows upon Congress and the state legislatures the “pri-

246. S.T. I-II, supra note 166, at 70, q. 96, a. 4 (describing ways in which laws
may be unjust).
247. Id. at 73, q. 96, a. 6.
249. Id. at 318.
250. See Robert P. George, Natural Law and Positive Law, in COMMON TRUTHS:
NEW PERSPECTIVES ON NATURAL LAW 151, 166 (Edward B. McLean ed., 2000)
("[S]ubject, perhaps, to one or two minor qualifications, I am prepared to believe
that [Bork’s position] is sound.").
251. See GEORGE, THE CLASH OF ORTHODOXIES, supra note 7, at 180.
mary authority for giving effect to natural law and protecting natural rights.”

In George’s understanding, judges should stick to the “text, . . . structure, logic, or original understanding” of the Constitution in making decisions. What’s more, George is not only critical of those times that the Court, in going beyond the Constitution, has reached a substantively unjust result. He asserts that “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. . . . And respect for the rule of law is itself a requirement of natural justice.”

Russell Hittinger agrees with George that the theory of the natural law cannot intrinsically answer the question of who is to enforce the natural law in a particular polity. He further contends that “there is nothing contradictory in arguing . . . for a natural law basis of government, and indeed positive law itself, while at the same time holding that judges ought, whenever possible, to be bound by written law.” It is on this basis that he takes to task those who “suggest that the existence of a natural right necessarily binds a judge apart from any consideration of the positive law.”

Hittinger does indicate, however, that there may be times when judges can permissibly reference the natural law, insofar as they are discovering the moral intent of a law and there is evidence that the drafters of that law sought to affect a natural law or natural rights principle. He cites the first section of the Fourteenth Amendment as an example of where judges might validly consider the natural law in interpretation. Hittinger offers the following criteria for the use of the natural law in constitutional adjudication:

First, claims about natural law require one to articulate which actions are more or less essential to human personhood. Vague rhetoric about “self-definition” is insufficient legally, politically, and morally for determining what is due, by nature, to human persons. Second, claims must be measured against the written Constitution. Do they explicitly contradict the Constitution? If so, then natural law is not being used to interpret, but rather to reconstruct the Constitution. Third, the natural law claim must be assessed in the light of judicial precedents in order to see whether it fits, and whether it reasonably articulates a pattern of judicial decisions. Fourth, the natural law claim ought to com-

252. See id. at 182.
253. Id.
254. Id.
255. See Hittinger, supra note 138, at 69-70, 72.
256. Id. at 78-79.
257. Id. at 83.
258. See id. at 71-72, 90.
259. See id. at 88.
port with the tradition and conscience of the people. . . . A juris-
prudential theory of natural law would have to guide judgments
about how strongly the natural law claim is congruent with these
four criteria.\textsuperscript{260}

Harry Jaffa takes an interesting position on the question of whether
the natural law may be used by the Court.\textsuperscript{261} Like Bork and George, he is
"devoted to the principle that the justices of the Supreme Court are
bound unqualifiedly by the positive law of the Constitution, and that the
positive law of the Constitution is to be understood in terms of the original
intent of those who framed and those who ratified it."\textsuperscript{262} Jaffa departs,
however, from those two scholars in important ways. Jaffa contends that "a
genuine jurisprudence of 'original intent' . . . would have to recognize the
principles of the Declaration of Independence as the principles of the
Constitution."\textsuperscript{263} According to Jaffa, to suggest "[t]hat judges should be
neutral interpreters of the law is one thing: but to say that the law itself is
essentially neutral—that it is mere process without purpose—is an-
other."\textsuperscript{264} For Jaffa, the philosophy of the Declaration is the philosophy of
natural right.\textsuperscript{265} Elsewhere, Jaffa explicitly refers to the "natural law and
natural rights doctrine of the Declaration."\textsuperscript{266}

Further, Jaffa argues that the very words of the Constitution necessa-
rially presuppose the natural law.\textsuperscript{267} In his understanding, the American
people could not have rebelled against the United Kingdom and estab-
lished a wholly new government unless they were, by nature, created
equal.\textsuperscript{268} Jaffa stresses that the authority of the people to do either action
was grounded in their natural rights.\textsuperscript{269} Consequently, Jaffa contends that
natural law must exist in order for the Constitution, which was nominally

\begin{itemize}
\item \textsuperscript{263} Harry Jaffa, \textit{The Closing of the Conservative Mind: A Dissenting Opinion on Judge Robert H. Bork}, in \textit{Jaffa, supra} note 11, at 3.
\item \textsuperscript{264} \textit{Id.} at 4.
\item \textsuperscript{266} \textit{Harry V. Jaffa, A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War} 84 (2000).
\item \textsuperscript{267} See generally \textit{Jaffa, supra} note 11, at 39-43.
\item \textsuperscript{268} See \textit{id.} at 40-41.
\item \textsuperscript{269} See \textit{id.} at 41 ("The origin of the authority of the people, taken as a whole, lies in the rights with which each individual has been 'endowed by [his] Creator' . . . .").
\end{itemize}
authored by the American people, to be legitimate. Because the people authorized the government, and the people are subject to the natural law, the Constitution and the government it created must conform to the precepts of the natural law.

In summary, Jaffa's view seems to be that the Court should use the natural law in reaching its decisions, not because judges have authority to go beyond the text of the Constitution or the will of those who drafted it, but rather because natural law ideas are contained within the document and the principles of the natural law animated the Founders. Responding directly to the arguments offered by Bork and similar thinkers, Jaffa writes:

The natural law doctrines to which constitutional interpreters ought to turn are not any that anyone might turn to, as Judge Bork suggests. They are the principles endorsed by the generation that framed and ratified the constitution itself. The positive law of the Constitution cannot be understood without them because they are the ground of that positive law.

Charles Rice takes the position that, in certain limited circumstances, the Court may look to the natural law in its adjudication. In his account, a judge confronted with an unjust statute should first attempt to remedy it through constitutional analysis. According to Rice, this is often a feasible solution, especially because there are several parts of the Constitution that "incorporate natural law principles," including the due process clauses.

Nonetheless, Rice believes that if a judge is confronted with an injustice that is condoned by the Constitution, he must appeal to the natural law. Rice explains:

Judges are bound to follow the original intent, as far as it can be determined, and they have no right to amend the Constitution according to their own conception of natural law. But this restriction is subject to the fact that although it is the highest enacted law of the nation, the Constitution is itself a form of human law and is therefore subject to the higher standard of the natural law. That standard is supra-constitutional. It sets limits to what the legal system, however it is structured, can do even through constitutional provisions.

270. See id. at 40-41.
271. See id. at 42.
272. Id. at 43. For some of Bork's criticisms of Jaffa, see Robert H. Bork, Mr. Jaffa's Constitution, Nat'l Rev., Feb. 7, 1994, at 61.
273. See RICE, FIFTY QUESTIONS, supra note 76, at 115-21.
274. See id. at 116.
275. See id. at 117.
276. See id. at 116-17.
277. Id. at 115.
Rice is quick to point out that this extreme remedy of invalidating a statute or precedent because it violates the natural law should only be used in very rare cases. 278 He cites Brown v. Board of Education, 279 Dred Scott v. Sanford, 280 and Roe v. Wade as cases in which the Court could have legitimately used the natural law in making its decision. 281

VII. Reflections

The question of whether natural law analysis may, or should, be employed by the Court in adjudication is a difficult one. Credible arguments have been made by both sides in the debate. Nevertheless, the evidence suggests that it is in the overall best interests of those who wish to promote natural law principles to advance originalism, even though such a conception of constitutional interpretation does not allow for the employment of natural law judicial reasoning. 282 While currently there does not seem to be a perfect solution to this problem, originalism represents—from the natural law perspective—"The Lesser Evil." 283 The desire to combat an injustice through any means possible is certainly understandable. Appealing to the natural law certainly appears to be a proper way of ensuring that goodness reigns in the polity. For prudential reasons, however, those who want to see an America guided by natural law principles should refuse judges the ability to utilize the natural law in deciding cases under the United States Constitution.

278. See id. at 121 ("[J]udges should take this step only when the conflict between the law or precedent and justice is 'intolerable' or 'unendurable.'").
280. 60 U.S. 393 (1856), superseded by U.S. Const. amend. XIV.
283. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989) ("The inevitable tendency of judges to think that the law is what they would like to be will . . . cause most errors in judicial historiography . . . so that as applied . . . originalism will . . . end up as something of a compromise.").
To allow a justice to appeal to the natural law in making his or her rulings is frankly a gamble. Philip Hamburger makes the point that:

Natural rights and natural law are ideas that frequently seem to have something in common with the elusive shapes of a Rorschach test. They are suggestive of well-defined, recognizable images, yet they are so indeterminate that they permit us to see in them what we are inclined to see. Like Rorschach's phantasm-inducing ink blots, natural rights and natural law are not only suggestive but also indeterminate—ideas to which each of us can plausibly attribute whatever qualities we happen to associate with them. For this reason, we may reasonably fear that natural rights and natural law are ideas often used to legitimate what are, in fact, our individual preconceptions and desires.

Natural law adjudication can have quite positive results, if the judge properly grasps the true principles of the natural law. Given the flawed nature of humans, however, there is an equal if not greater chance that the judge will misperceive the requirements of the natural law and natural justice. Such misperception, coupled with broad interpretive power, could have extremely deleterious consequences.

Stephen M. Krason argues that the solution to this dilemma is to appoint judges who subscribe to "the true natural law." This answer, however, is open to criticism. According to Robert Bork:

The question of why most judges impose New Class attitudes is simply answered. [The views of the New Class are in opposition

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284. For example, despite the fact that all three authors concur that the federal Constitution needs a moral interpretation, vastly different analyses are offered in Hadley Arkes, Beyond the Constitution (1992); David A. J. Richards, Tolerance and the Constitution (1986); Ronald A. Dworkin, "Natural" Law Revisited, 34 U. Fla. L. Rev. 165 (1982).

285. Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L.J. 907, 907 (1993); see also Russell Hittinger, Distinguishing Between Constitutional Art and Morals, 4 S. Cal. Interdisc. L.J. 567, 568 (1995) ("As everyone knows, the idiom 'natural law' is subject to the most dissimilar, even contradictory usages.").


287. See Robert P. George, Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage, 17 Regent U. L. Rev. 21, 21 (2004-2005) ("Judicial power can be used, and has been used, for both good and ill."); Russell Kirk, Natural Law and the Constitution of the United States, 69 Notre Dame L. Rev. 1035, 1036 (1994) ("Misunderstanding of natural law, or its misapplication, may work great mischief.").


289. See, e.g., Bork, Coercing Virtue, supra note 16, at 9-10 (noting potential tendency of judges to shift their views and attitudes).
to those held by most if not all natural law thinkers.] Those attitudes are congenial to them, and the adoption of such attitudes is important to their reputations. Judges, having passed through colleges and law schools, are themselves certified members of the intelligentsia. The ideas and values of the New Class are part of the furniture of most judges' minds and seem self-evident. Beyond that, the prestige of a judge depends on being thought well of in universities, law schools, and the media, all bastions of the New Class. . . . Whether a judge deliberately caters to these organs of the New Class or is unconsciously conditioned by praise and criticism to behave in accordance with the class's tenets, the effect is to move him to the cultural left.\footnote{90}

From the natural law perspective, the main danger in nominating Supreme Court justices who have displayed a belief in "the true natural law" is that, even if such candidates could be found and confirmed, their jurisprudential views might be altered once they have taken their seats on the Court.\footnote{91}

Perhaps the most striking example of how a Krason-like strategy might go wrong is the case of Justice Anthony Kennedy.\footnote{92} When Kennedy joined the Court, he was thought to have a judicially conservative legal philosophy and there was evidence of some anti-abortion credentials.\footnote{93} Such an assessment suggested that Kennedy would be a justice who would advance natural law interests, even if he would not explicitly refer to the natural law in reaching his conclusions. In fact, however, Kennedy has worked against the propagation of decisions that are in accord with natural law principles: he was a member of the plurality in \textit{Casey} and wrote the majority in \textit{Lawrence}.

For natural law adherents, the alternative approach, advocated by Bork and George, of requiring judges to stick to the strict text of the Constitution on matters envisioned by the Founders and leave any other questions of public policy to Congress and the state legislatures seems to be far safer.\footnote{94} For believers in the Thomistic natural law, this methodology is not supreme in the abstract. It would be a bad approach if, for instance, a polity's constitution explicitly allowed abortion or slavery. Nevertheless,

\begin{footnotesize}
\begin{enumerate}
\item \footnote{90. \textit{Id.} (explaining rationale for judges' shift towards more liberal perspectives).}
\item \footnote{91. \textit{See generally Mark Silverstein, Judicious Choices: The Politics of Supreme Court Confirmations} (2d ed. 2007).}
\item \footnote{93. \textit{See, e.g., Jason DeParle, In Battle to Pick Next Justice, Right Says, Avoid a Kennedy, N.Y. TIMES, June 27, 2005, at A1.}}
\item \footnote{94. \textit{See Russell Hittinger, Natural Rights and the Limits of Constitutional Law, in Common Truths: New Perspectives on Natural Law, supra note 250, at 169-92.}}
\end{enumerate}
\end{footnotesize}
the amended United States Constitution is a basically just document, so long as it is narrowly construed. Denying justices the ability to appeal to the natural law in their adjudication may well prevent some very good developments from taking place, but such a policy ensures that the substantial harm a judge might cause by misinterpreting or misapplying the natural law will not occur.

In other words, under the Bork-George approach, citizens know what they are getting: a basically just system because the Constitution is a basically just document. If judges are allowed to use an abstract concept like the natural law in deciding cases, the resulting system is far from certain and has the chance of suffering from substantial injustices. Considering how high the stakes can be in a case that reaches the Supreme Court, natural law advocates cannot afford the risks inherent in allowing the justices the ability to look to the natural law in reaching their conclusion.

295. See George, The Clash of Orthodoxies, supra note 7, at 344 n.52; Rice, The Winning Side, supra note 73, at 117.

296. Although, it must be acknowledged that other situations would certainly call for different analyses and, possibly, different conclusions. Two salient cases are Germany under Nazism and the Soviet Union under Communism. In Nazi Germany, the regime routinely issued laws and other official government pronouncements that, on their face, violated the most basic human norms. See generally Rolf-Dieter Müller & Gerd R. Ueberschär, Hitler’s War in the East 1941-1945: A Critical Assessment 210 (Bruce D. Little trans., 2d ed. 2002); 3 Nazism 1919-1945, 389-629 (J. Noakes & G. Pridden eds., 2001) (describing Nazi persecution of Jewish population); Harry Reicher, Holocaust Law: Materials and Commentary (forthcoming); Harry Reicher, The Day Evil Became the Rule of Law, Forward, Sep. 23, 2005, at 13, available at http://www.forward.com/articles/2830 (describing Nuremberg Laws that were “the very antithesis of everything normally connoted by the notion of law”).


In Hitler’s Germany, attempts to appeal to the natural law to extricate the country from its nightmare were quashed by the government. See Heinrich Rommen, Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany, 4 Nat. L.F. 1, 5 (1959). For the standard work on German opposition to Nazism, see Peter Hoffmann, The History of the German Resistance 1933-1945 (Richard Barry trans., 3d ed., McGill-Queen’s Univ. Press 1996) (1977). After the Second World War natural law thinking experienced a renaissance, especially in Germany and Austria. See Johannes Messner, Note, The Postwar Natural Law Revival and Its Outcome, 4 Nat. L.F. 101 (1959); Ernst von Hippel, Note, The Role of Natural Law in the Legal Decisions of the German Federal Republic, 4 Nat. L.F. 106, 111 (1959) (noting that Germany’s 1949 Bonn Constitution empowered judges to consider “higher legal orders against the rule of mere positive law”). For one view on how natural law-minded judges in Nazi Germany might have re-
It is granted that legislatures can also cause significant evil. It is easier, however, to correct a mistake made by a legislature than one made by a court, especially the highest court in the land. 297 The legislators who advanced the unjust legislation can be replaced at election time with ones who oppose it. New laws can be passed that correct the wrongful statute. Skilled lobbyists may be employed to convince legislators of the benefits of voting for morally sound legislation. Most importantly, natural-law-minded citizens may directly contact their legislator, voice their concerns, and urge him or her to do the right thing. A legislator may well react to this pressure, even if it is for no other reason than re-election concerns. In contrast, the Supreme Court only handles concrete "cases" and "controversies." 298 Furthermore, the Court does not have constituents and is often wary to overturn its previous cases under the doctrine of stare decisis. 299

To summarize, it is in their own best interests for natural law proponents to deny justices the ability to look to the natural law in adjudication and to support the judicial approach advocated by Bork and George because such a strategy ensures that the judiciary will cause only a minimal amount of harm. At the same time, it leaves a significant avenue for legislatures to do positive good. It is the safest way to realize an America guided by natural law principles.

The record makes clear that Justice Black was mistaken when he used "[substantive] due process" synonymously with "natural law." 300 Under a traditional natural law analysis, one finds illicit many of the practices that the Supreme Court has granted constitutional protection under the doctrine of substantive due process. Furthermore, most of the philosophical presuppositions that are at work in the Court’s substantive due process cases clash directly with the fundamental tenets of natural law theory. 301

While traditional natural law theorists are largely uniform in their moral condemnation of the actions given constitutional guarantees by the substantive due process decisions, they disagree significantly about whether, and to what extent, the Court may refer to the natural law in making its decisions. 302 Although there are good points made by each

sponded, see Russell Hittinger, Aquinas and the Rule of Law, in The Ever-Illuminating Wisdom of St. Thomas Aquinas, supra note 198, at 116-17.


301. For a further discussion of natural law and the Court’s substantive due process practices, see supra notes 190-241 and accompanying text.

302. For a summary of the dispute over whether judges should reference the natural law when deliberating, see supra notes 242-81 and accompanying text.
side in the intra-theory debate, the policy of denying judges this right—and forcing them to stick to the strict text of the United States Constitution—is the most sound from a natural law perspective.