THE LAST TESTAMENT OF JUSTICE SCALIA: ON AQUINAS AND LAW

STEFANUS HENDRIANTO, S.J.*

ABSTRACT

On January 7, 2016, Justice Antonin Scalia delivered his last public lecture, titled Saint Thomas Aquinas and Law. Analysts have criticized Scalia for having an anachronistic reading of Aquinas. But those analysts had missed seeing that Scalia was searching for a deeper meaning instead of chastising Aquinas's theory of law. This Article investigates whether Aquinas's theological insights and Scalia's jurisprudence show similar traits. This Article argues that although Scalia's jurisprudence is not identical with Aquinas's theology, their positions are much closer than people would immediately imagine. They shared similar views on the limits of judicial authority and the need to find a balance between the private goods and the common good. This Article postulates that in his last lecture, Scalia was expressing his fear of subjectivity in the process of judging, in which Aquinas theory of interpretation might justify the volitional status of legal interpretation. Nevertheless, Aquinas believed that a virtuous judge must not seek honor and glory, but rather to direct people toward the common good. Thus, both Aquinas and Scalia shared a similar view that a reasonable judge must avoid sentimentality and personal values in judging.

* A Jesuit and legal scholar who is affiliated with the University of San Francisco; Ph.D., University of Washington School of Law (Seattle); LLM, Utrecht University (Netherlands); LLB, Gadjah Mada University (Indonesia); MDiv, Boston College; ThM (Boston College). In recent years, he served as a visiting professor at Santa Clara University School of Law and a guest scholar at the Kellogg Institute for International Studies at the University of Notre Dame. This article was written when he was a scholar at Boston College, School of Theology and Ministry. Some ideas in this article were presented earlier in several academic conferences such as Twentieth Annual Conference of Association for the Study of Law, Culture and the Humanities, Stanford Law School; the Common Good as Common Project Conference, University of Notre Dame; and 52nd International Congress on Medieval Studies, Western Michigan University. Grateful acknowledgment is given to Cindy Searcy for her valuable insight in the early stage of the writing of this article and especially in leading me to the text of Justice Scalia's last lecture. I would also like to thank Susan Brusky for encouraging me to turn my conference presentations into a publishable article. Finally, special thanks to Jeff Pojanowski for his assistance in this project.

INTRODUCTION

On January 7, 2016, a little more than one month before his death, Justice Antonin Gregory Scalia gave his last public lecture in Washington, D.C., to celebrate the eight hundredth Jubilee of the Order of Preachers. In his final lecture, titled *Saint Thomas Aquinas and Law*, Justice Scalia took the opportunity to contrast his theory of legal interpretation with that of St. Thomas.[1] Scalia began the lecture by sharing his agreement with St. Thomas Aquinas's postulate in *Summa Theologiae: Secunda Secundae* question sixty, article five that it is necessary for a judge to issue a judgment according to the written law.[2]

But as Justice Scalia continued to read in the *Summa*, he found that Aquinas also stated that written laws that contain injustices should not be called laws, but rather the corruption of laws. Consequently, judgment should not be delivered according to their precepts. Justice Scalia described Aquinas's position as "[h]orrors! A sentiment worthy of Chief Justice Earl Warren!"[3] In other words, for Scalia, Aquinas's idea of legal interpretation represents a horror of the personal and volitional status of legal interpretation. Justice Scalia further found Aquinas posits that in a case where the written law fails to address specific issues, judgments should be delivered according to equity which the lawgiver has in view. For Scalia, Aquinas's thoughts of judging not by text but by equity are "[d]ouble horrors! . . . A sentiment worthy of Justice William Brennan."[4]

Some people have written about Scalia's last lecture, either defending Scalia's position or criticizing him for having an anachronistic reading of Aquinas.[5] None of those people, however, look more in-depth into Scalia's jurisprudence to understand how he arrived at a full-frontal attack upon the great Doctor of the Church. Moreover, those people had also missed seeing if Scalia

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1. The text of the final lecture is reproduced under a different title after his death. *See* Antonin Scalia, Address for the 800th Anniversary of the Order of Preachers (Jan. 7, 2016), *in Natural Law*, *in* ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH AND LIFE WELL LIVED 243, 243–49 (Christopher J. Scalia & Edward Whelan eds., 2017).

2. *See id.* at 244.

3. *Id.* at 245.

4. *Id.*

5. For a critique of Justice Scalia's last lecture, please see Anthony Giambrone, *Scalia v. Aquinas: Lessons from the Saint for the Late, Great Justice*, AM. MAG. (Mar. 1, 2016), http://www.americamagazine.org/issue/who-judge. For a critical reply to Giambrone's analysis, see Peter Karl Koritansky, *Thomas Aquinas and the Late Justice Scalia: A Response to Fr. Giambrone*, FIRST THINGS: BLOGS (Apr. 20, 2016), http://www.firstthings.com/blogs/firstthoughts/2016/04/thomas-aquinas-and-the-late-justice-scalia-a-response-to-fr-giambrone. For a different analysis and report about the lecture, please see Andrew Kloster, *Why Justice Scalia Disagrees with Thomas Aquinas*, DAILY SIGNAL (Jan. 8, 2016), http://dailysignal.com/2016/01/08/why-justice-scalia-disagrees-with-thomas-aquinas/; see also Ariane de Vogue, *Scalia and the Friars: A Look at His Views on Religion and the Law*, CNN POL., (Feb. 19, 2016), http://edition.cnn.com/2016/02/19/politics/scalia-religion-catholic-aquinas/index.html.

was searching for a deeper meaning in his last lecture instead of chastising Aquinas's theory of law.

This Article investigates whether Aquinas's theological insights and Scalia's jurisprudence show similar traits or if they contradict one another. This Article argues that although Scalia's methodologies of interpretation and jurisprudence are not identical with Aquinas's theology, their positions are much closer than people would immediately imagine. They shared similar views on the limits of judicial authority and adherence to the written law. They also shared an agreement on the need to find a balance between the fulfillment of private goods and the common good. Finally, they both agreed that an excellent judge must avoid sentimentality and personal opinion in judging.

More importantly, this Article postulates that Scalia in his last lecture was searching for something else instead of attacking St. Thomas. His primary concern was the fear of subjectivity. This Article argues that both Aquinas and Scalia shared similar interests on subjectivity in the process of judging. Aquinas believed that a virtuous judge must not seek honor and glory, but must direct people to relate their good to the good of others (i.e., the common good). Similarly, Justice Scalia saw that if the judiciary was only composed of self-autonomous judges defining themselves through the imposition of wills, then such a court would condone a chaotic society constituted of persons with arbitrary wills.

This Article will proceed in the following manner: after the introduction, Section one provides an analysis of Justice Scalia's objections to Aquinas's argument that in some cases judgment should be delivered, not according to the letter of the law, but according to equity. This section will compare the similarity and differences between Scalia and Aquinas on their visions of a good judge and the political contexts in which they operated. Section two proceeds with an analysis of Scalia's objection to Aquinas's proposition that law sometimes contains injustice, and, therefore we ought to not always be bound to judge according to the written law. In this section, I will explore Scalia's concerns over Aquinas's interpretation of natural law, and his thought on the role of Catholic judges in the adjudication process. Section three reviews Aquinas's thoughts on the common good and his method of legal interpretation. In Section four, the Article will test whether Scalia's methodology is contrary to the principle of common good through an overview of some of Scalia's jurisprudence. Finally, this Article concludes that despite their differences, Scalia and Aquinas shared common ground on the dangers of subjectivity in judging. Moreover, they both also agree that the antidote for the personal volitional interpretation is the virtue of prudence, which brings harmony into society by promoting "concord" among all the elements of the community.

I. SCALIA'S FIRST OBJECTION TO AQUINAS

Before I jump into a detailed analysis of Scalia's objection to Aquinas, a brief caveat is necessary because one must carefully consider Aquinas's

argument about legal interpretation in the *Summa Theologiae*.[6] First, we must remember that in the corpus of *Summa Theologiae: Secunda Secundae* Aquinas postulates that "it is necessary to judge according to the written law, else judgment would fall short either of the natural or of the positive right."[7] But then Aquinas dealt with two different objections. The first objection is that we are not bound to judge according to the written law because written laws sometimes contain injustices. To this objection, Aquinas replied, "such documents are to be called, not laws, but rather corruption of law, as stated above and consequently judgment should not be delivered according to them."[8] The second objection is that no written law that can cover every individual event (*singularibus eventibus*), and, therefore, we are not always bound to judge according to the written law. In answering this objection, Aquinas posits that "judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view."[9] In sum, Aquinas made two separate responses: the first one dealing with an unjust law and the second one is dealing with a "poorly" written law.

I.1. The Mystery of the Holy Trinity

In his last lecture in D.C., Justice Scalia addressed both of Aquinas's propositions. First, he addressed Aquinas's reply to the second objection that in some cases judgment should be delivered, not according to the letter of the law but to equity. Scalia argued that Aquinas's proposition was reminiscent of the 1892 U.S. Supreme Court case: *Church of the Holy Trinity v. United States*.[10] *Holy Trinity* is known as a turning point in the judicial use of internal legislative history to trump a statute's unambiguous text.[11]

The issue in *Holy Trinity* was the Alien Contract Labor Act of 1885, which made it illegal for employers to pay the migration costs of aliens under contract to perform "labor or service of any kind" in the United States. The United States sued the Church of Holy Trinity for hiring an English clergyman to be its rector

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6. THOMAS AQUINAS, SUMMA THEOLOGIAE, (Laurence Shapcote trans., 2012).

7. AQUINAS, supra note 6, at pt. II-II, question 60, art. 5 ("*Et ideo necesse est quod iudicium fiat secundum legis Scripturam, alioquin iudicium deficeret vel a iusto naturali, vel a iusto positivo*.").

8. *Id.* at pt. II-II, question 60, art. 5 (citation omitted) ("*Et ideo nec tales Scripturae leges dicuntur, sed potius legis corruptiones, ut supra dictum est. Et ideo secundum eas non est iudicandum*.").

9. *Id.* pt II-II, question 60, art. 5 ("*Et ideo in talibus non est secundum litteram legis iudicandum, sed recurrendum ad aequitatem, quam intendit legislator*.").

10. *See* Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

11. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 209 (1994) (calling the case a "sensation" with respect to the use of legislative history); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1835 (1998) (commenting that Holy Trinity "elevated legislative history to new prominence by overturning the traditional rule that barred judicial recourse to internal legislative history"); *see generally* Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053 (2009).

and pastor. The U.S. Supreme Court declared that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[12] The Court concluded that the church's conduct was not prohibited because Congress intended for the statute to apply only to contracts to import manual laborers—not to deals involving the importation of clergy.

Justice Scalia has addressed *Holy Trinity* in countless lectures and in his book on statutory interpretation, calling it the "prototypical" example of how a statute ought not to be interpreted and deriding it as the precedent cited "whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking."[13] In his last lecture, Scalia reaffirmed this long-held position by stating:

> I am happy to say that *Church of the Holy Trinity* has fallen into disrepute. It is not cited to us anymore. . . . Changing the text because of "equity," or "the spirit of the law," or what must have been "the intention of its makers" is fundamentally contrary to the role of the judge—which is to apply the law, not to improve it.[14]

In short, Scalia believed that a human judge would apply the principle of equity with their personal idea of what is good.

As mentioned earlier, Scalia equated Aquinas's style of legal interpretation as a horror worthy of the Warren Court. He then cited *Katz v. United States*,[15] a decision of the Warren Court, which, in his view, had far more serious consequences than the outcome of *Church of the Holy Trinity*. For liberal-leaning lawyers, *Katz* was and is a revolution to the scope of individual privacy rights and constitutional interpretative methodology.[16] Until *Katz*, the U.S. Supreme Court tended toward a literal reading of the Fourth Amendment, limiting its protective ambit to "persons, houses, papers, and effects."[17] In

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12. *Church of the Holy Trinity*, 143 U.S. at 459.

13. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 21 (Amy Gutmann ed., 1997).

14. Scalia, *supra* note 1, at 246.

15. Katz v. United States, 389 U.S. 347 (1967).

16. For a discussion about the *Katz* revolution, please see Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985 (2016); Courtney E. Walsh, *Surveillance Technology and the Loss of Something a Lot like Privacy: An Examination of the "Mosaic Theory" and the Limits of the Fourth Amendment*, 24 ST. THOMAS L. REV. 169 (2012); Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010); Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What* Katz *is Made of?*, 41 U.C. DAVIS L. REV. 781 (2008); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349 (2004); David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and Common Law*, 72 MISS. L.J. 143 (2002).

17. *See Katz*, 389 U.S. at 365.

Olmstead v. United States,[18] which was decided in 1928, the Court concluded that constitutional protection under the Fourth Amendment could not be "employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[19] The Court opined that broadening the Fourth Amendment to a situation without an actual intrusion would effectively remove a police officer's ability to use their senses when conducting investigations.

In 1967, the Warren Court significantly altered the Fourth Amendment interpretation under *Olmstead* by establishing a new paradigm for determining whether a search is constitutionally unreasonable. The issue in *Katz* is whether a public telephone booth is a constitutionally protected area, so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth. The Court moved to introduce a fundamental change in Fourth Amendment jurisprudence by stating that, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[20] In other words, the Warren Court found that the Fourth Amendment forbade the search even though it was conducted in a public area, and without a physical penetration or some physical trespass. Accordingly, *Katz* expanded Fourth Amendment protections based on the subjective (individual) and objective (societal) expectations of privacy.[21]

Katz's liberation of the Fourth Amendment from literal constraints appears on the surface to be an unequivocal progressive victory, which broadened the scope of the Fourth Amendment. But for Scalia, one of the consequences of the departure from textual limitations in *Katz* is the concept of judicial hegemony, in which judges can be the final arbiters of the law even if they may be ill-equipped to solve the immediate subject matter. In his lecture, Scalia referred to the issue of whether the government is permitted to gather telephone records in order to protect American citizens against Islamic terrorists. Scalia lamented the fact that under *Katz*, the judicial branch became the institution that has the authority to decide whether the threat of terrorism was severe enough to justify wiretapping.[22] While in the days of *Olmstead*, it was Congress and the President who had the capability to provide the right answer to the issue of terrorist threat, Scalia believed that the judiciary had unduly seized that power.

In sum, Justice Scalia contradicted Aquinas's theory that in some cases, a judge should deliver a judgment according to equity which the lawgiver has in

18. Olmstead v. United States, 277 U.S. 438 (1928).

19. *Id.* at 465.

20. *Katz*, 389 U.S. at 351 (citations omitted).

21. *See* Kevin Emas & Tamara Pallas, United States v. Jones*: Does* Katz *Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116 (2012).

22. *See* Scalia, *supra* note 1, at 247.

view. For Justice Scalia, a judge would apply the principle of equity with his personal ideas on what is good, as was the case in the Fourth Amendment cases under *Katz*. Justice Scalia's position begs a further question, whether his Fourth Amendment jurisprudence is completely in contradiction with Aquinas's theory of law. In answering this, I will explore Scalia's Fourth Amendment jurisprudence in the later part of this Article.

I.2. A Virtuous Judge in the Mixed Government

Let us return to Justice Scalia's criticism of Aquinas's theory. Scalia believed that changing the text because of "equity" or "the spirit of the law" is fundamentally contrary to the role of a judge in *applying* the law, and not improving upon it. Justice Scalia then went further to criticize Aquinas's vision of judges. He stated:

> Who is it, I wonder, whom Aquinas envisioned as the judge applying equity and the spirit of the law, and intuiting the unexpressed intention of the lawgiver? I suppose an angel could do that pretty well—but not any of the human judges I am familiar with. Equity and spirit tend to be what the judge believes is a good idea; and the unexpressed intention of the lawgiver has an uncanny tendency to comport with the wishes of the judge.[23]

In short, Justice Scalia questioned Aquinas's ideal vision of a judge, whether the Angelic Doctor saw a judge as an angel who can transcend their personal preferences and apply the law with utter impartiality.

What is Aquinas's vision of an ideal judge? In Aquinas's mind, judges must be persons of virtue and integrity, with Aquinas immediately disqualifying those unfit in the soul, and those "who stand guilty of grievous sins should not judge those who are guilty of the same or lesser sins."[24] Furthermore, Aquinas emphasized the role of moral and intellectual virtues as prerequisites for a judge to judge correctly.[25] For Aquinas, an unjust judge not only lacks justice but also lacks the other virtues that are necessary to live a good life. Aquinas's position on the necessity of virtues for judging is evident in his discussion on whether justice is a virtue. In his reply to an objection that justice is not a virtue, Aquinas stated that:

> When a man does what he ought, he brings no gain to the person to whom he does what he ought, but only abstains from doing him harm. He does however profit himself, insofar as he does what he ought, spontaneously and readily, and this is to act virtuously. Hence it is written (Wis 8:7) that Divine wisdom ["]teache[s] temperance,

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23. *Id*. at 246.

24. AQUINAS, *supra* note 6, at pt. II-II, question 60, art. 2 ("[*D*]*icendum quod illi qui sunt in gravibus peccatis non debent iudicare eos qui sunt in eisdem peccatis vel minoribus . . . .*").

25. For an excellent analysis on the relationship between virtues and judging, please see Charles P. Nemeth, *Judges and Judicial Process in the Jurisprudence of St. Thomas Aquinas*, 40 CATH. LAW. 401 (2000).

> and prudence, and justice, and fortitude, which are such things as men (i.e., virtuous men) can have nothing more profitable in life.["][26]

In short, Aquinas envisioned a judge must be a virtuous man, and if a judge is deficient in virtues, he will be incapable of judging correctly. While Aquinas did not envision judges as angels, he did set a high bar for prerequisites for being a judge. After all, the true judge in Aquinas's mind is "a master-virtue commanding and prescribing what is just."[27]

Presumably, Justice Scalia would agree with Aquinas on the idea of a virtuous judge who must avoid sentimentality and personal opinion in judging. But a few weeks after Justice Scalia's passing, a Dominican friar named Anthony Giambrone, O.P., published an article in the Jesuit flagship *America Magazine*, in which he attacked Justice Scalia for having an anachronistic reading of Aquinas, precisely because the role of judges in the context of separation of powers did not exist in Aquinas's time. Giambrone argues that Aquinas was working with a different conception of the judge; "[f]or Aquinas, the judge was also the legislator—a plenipotentiary, like a king—not simply the hand-bound interpreter of some legislature's promulgated text."[28]

Before I move further to analyze the contradiction between the vision of Aquinas and Scalia on the role of judges, it is essential to review Giambrone's proposition that judges in Aquinas's time were working without the framework of a separation of powers. The modern notion of checks and balances signifies that the various organs of government act as mutual restraints. It has a separation of powers if the multiple political branches have differing functions. Neither of these essential ingredients of governmental structure existed in Aquinas's time. The most famous political theory at that time was the idea of a *mixed government*.[29] Essentially, the idea of mixed government is a mixture of the elements of monarchy, aristocracy, and democracy. With the translations of Aristotle's *Ethics*, *Rhetoric*, and *Politics* in the early thirteenth century, the idea of mixed government was introduced into the medieval world.[30] Brian Tierney argues that Aquinas was the first to associate the mixed government of Aristotle with the Mosaic government as described in the Bible.[31]

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26. AQUINAS, *supra* note 6, at pt. II-II, question 58, art. 3 (emphasis omitted) ("[*E*]*rgo dicendum quod cum aliquis facit quod debet, non affert utilitatem lucri ei cui facit quod debet, sed solum abstinet a damno eius. Sibi tamen facit utilitatem, inquantum spontanea et prompta voluntate facit illud quod debet, quod est virtuose agere. Unde dicitur Sap. VIII quod sapientia Dei sobrietatem et iustitiam docet, prudentiam et virtutem; quibus in vita nihil est utilius hominibus, scilicet virtuosis*.").

27. *Id.* at pt. II-II, question 60, art. 1 ("[*E*]*st sicut virtus architectonica, quasi imperans et praecipiens quod iustum est . . . .*").

28. Giambrone, *supra* note 5.

29. For an excellent analysis of the notion of mixed government, please see JAMES M. BLYTHE, IDEAL GOVERNMENT AND THE MIXED CONSTITUTION IN THE MIDDLE AGES (1992).

30. *See id.* at 5.

31. *See* BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT, 1150–1650, at 87–88 (1982).

In the *Summa Theologiae*, Aquinas advanced his idea of mixed government by linking the mixed constitution to the teachings of the Church Fathers, the Bible, and God's will. Aquinas argues that the best form of polity is:

> [B]eing partly kingdom, since there is one at the head of all; partly aristocracy, insofar as a number of persons are set in authority; partly democracy, i.e., government by the people, insofar as the rulers can be chosen from the people, and the people have the right to choose their rulers.[32]

He argued further that such form of government was established by the Divine Law, as evidenced in the Israelite governmental system under Moses.[33] First, Moses and his successors governed as the ruler of the people, so there was a kind of kingdom. But there was also an element of aristocracy with "seventy-two men chosen, who were elders in virtue."[34] Moreover, it was a democratic government as the wise men were selected from all the people as God commanded.[35]

As Aquinas proposed the idea of mixed government, one might wonder if Aquinas was entirely incoherent in his political thought because, in many instances, Aquinas exalted kingship as the best form of government.[36] Aquinas indeed argued that a monarchy is the best form of government, but only as long as it does not corrupt. The prerequisite for an excellent monarchy is that a very virtuous man must govern it, but Aquinas argued that perfect virtue is a rare quality to be found, and therefore, "from the very first the Lord did not set up the kingly authority with full power, but gave them judges and governors to rule them."[37] In other words, Aquinas believes that power had to be tempered to remove the opportunity to be corrupted.

Apart from his appeal to divine law, Aquinas also made an argument that mixed government can produce the human law in the best sense. He noted that human law is framed by the one who governs depending on the form of government. In a monarchy, when the state is ruled by one, then we have what the Romans called the "Constitution of Princes" (*constitutiones principum*). In an oligarchy, we have the "Authoritative legal opinions" (*Responsa Prudentum*) and "Decrees of the Senate" (*Senatus Consulta*). In a democracy, we have

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32. AQUINAS, *supra* note 6, pt. I-II, question 105, art. 1 ("[*B*]*ene commixta ex regno, inquantum unus praeest*; *et aristocratia, inquantum multi principantur secundum virtutem*; *et ex democratia, idest potestate populi, inquantum ex popularibus possunt eligi principes*, *et ad populum pertinet electio principum*.").

33. *See id.*

34. *Id.* (citing Deuteronomy 1:15).

35. *Id.* (citing Deuteronomy 1:13).

36. For Aquinas's argument that postulated the monarchy as the best form of government, please see THOMAS AQUINAS, DE REGNO AD REGEM CYPRI, bk. I, chs. 1, 2, 5, 9 (I. Th. Eschmann ed., Gerald B. Phelan trans.).

37. AQUINAS, *supra* note 6, at pt. I-II, question 105, art. 1 ("*Et ideo dominus a principio eis regem non instituit cum plena potestate*, *sed iudicem et gubernatorem in eorum custodiam*.").

"Decrees of the commonalty" (*Plebiscita*). Nevertheless, Aquinas argued, "there is a form of government made up of all these, and which is the best: and in this respect we have law sanctioned by the *Lords and Commons*."[38] Here Aquinas suggested that in a different form of government (unmixed), the human law only represents the interest of a specific group of ruling power, but in a mixed government, the human law is merely intended to direct human actions.

In sum, Aquinas's concept of mixed government, as Tierney argued, does not focus on the ruling class interest in the state, but rather introduces a kind of checks-and-balances model, in which the elements of mixed government temper each other's power.[39] It also offers an interpretation of the Mosaic government as described in the Bible. While it is true that a modern concept of separation of powers did not exist in his time, Aquinas emphasized the necessity of check and balances, which signifies that neither kings nor judges will have full authority to make and interpret the law.

I.3. A Judge as a King

As mentioned earlier, Giambrone criticizes Justice Scalia for having an anachronistic reading of Aquinas because he was working with a different conception of a judge, where the judge in Aquinas's time was also the legislator, who has a plenipotentiary mission like a king. In this Article, I want to propose a modest suggestion to review Giambrone's proposition from the standpoint of Aquinas's short treatise on kingship, *De Regno,* which he wrote as a gift to the King of Cyprus.[40]

In *De Regno,* Aquinas argued that a king must practice acquired virtues because it would render the ruler more receptive to the grace of infused virtues through which he might genuinely obtain the beatific vision.[41] For instance, Aquinas persuaded the king to practice the virtue of loyalty.[42] Aquinas used

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38. *Id.* pt. I-II, question 95, art. 4 ("*Est etiam aliquod regimen ex istis commixtum, quod est optimum, et secundum hoc sumitur lex, quam maiores natu simul cum plebibus sanxerunt . . . .*").

39. *See* TIERNEY, *supra* note 31, at 90.

40. *See* AQUINAS, *supra* note 36. *De Regno* is a short treatise on political rule addressed as a gift to the King of Cyprus. But *De Regno* is often overlooked by many scholars who want to learn about Aquinas's political philosophy because of its obscurity. It is generally accepted that Aquinas was the author of *De Regno,* but he never finished it, and the document was not published until after his death in 1274. One tradition says that the document was published together in four books under the title *De Regimine Principum*, and, many people believe that Aquinas's disciple Ptolemy of Lucca was the author of the last two books. Nevertheless, most manuscripts that contain both treatises do not distinguish between the two texts or note the difference in authorship.

41. For an excellent analysis of the Aquinas's theory of virtue in *De Regno,* please see Theresa Helen Farnan, Virtue and Kingship in Thomas Aquinas's De Regno, (1998) (unpublished Ph.D. dissertation, University of Notre Dame) (on file with Hesburgh Library. University of Notre Dame).

42. *See* AQUINAS, *supra* note 36, bk. I, ch. 5, § 33 ("*Sed cum dissensionibus fatigarentur continuis, quae usque ad bella civilia excreverunt, quibus bellis civilibus eis libertas, ad quam multum studuerant, de manibus erepta est, sub potestate imperatorum esse coeperunt, qui se reges a principio appellari noluerunt, quia Romanis fuerat nomen regium odiosum. Horum autem quidam*

fides (fidelity) to denote a covenant between the king and his people. Aquinas referred to the king who faithfully procures the common good as the exemplar of the good king who maintains his covenant with his subjects. Here, *fides* as loyalty is an acquired virtue rather than an infused virtue.

Apart from the virtue of loyalty, Aquinas emphasized the virtues of magnanimity and fortitude as prerequisites for a good king. In the *Summa Theologiae*, Aquinas defines fortitude as the virtue, which denotes the strength of the soul in enduring and repelling things that make it difficult to maintain strength, especially in situations of grave danger.[43] The perfect act of fortitude is martyrdom, in which a Christian suffers physical death for refusing to forsake virtue while under assault from their persecutors.[44] Aquinas argued that the act of fortitude consists of endurance, and he identified two virtues necessary for an act of endurance. First, patience, the voluntary and lengthy suffering of difficult things for the sake of virtue or something advantageous. Second, perseverance, which enables humans to endure prolonged pain or hardships without losing courage.[45]

In *De Regno*, Aquinas noted that the duties of a king include preserving the kingdom from the threat of invasion.[46] The king must ensure that his subjects are safe from hostile countries, for maintaining peace within a kingdom is useless if the king cannot defend his kingdom from exterior threats.[47] Nevertheless, Aquinas argued that fortitude is essential for securing and protecting the common good, for if a kingdom is not protected by those who can face the dangers of death, it will not survive enemy attacks.

Aquinas then made a connection between fortitude and magnanimity. First, in *De Regno*, Aquinas noted that good men must have contempt for glory as well as for other temporal goods. If the king offers glory as a reward, good men either would not accept the offer or would have to serve the king without an adequate reward.[48] Aquinas then discusses the unsuitability of glory as a

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more regio bonum commune fideliter procuraverunt, per quorum studium Romana respublica et aucta et conservata est. Plurimi vero eorum in subditos quidem tyranni, ad hostes vero effecti desides et imbecilles, Romanam rempublicam ad nihilum redegerunt.").

43. *See* AQUINAS, *supra* note 6, at pt. II-II, question 123, art. 2. ("*Alio modo potest accipi fortitudo secundum quod importat firmitatem animi in sustinendis et repellendis his in quibus maxime difficile est firmitatem habere, scilicet in aliquibus periculis gravibus*.")

44. *See id.* at pt. II-II, question 124, art. 2–3.

45. *See id.* at pt. II-II, question 128, art. 1.

46. *See* AQUINAS, *supra* note 36, at bk. I, ch. 16, § 119 ("*Tertium autem impedimentum reipublicae conservandae ab exteriori causatur, dum per incursum hostium pax dissolvitur et interdum regnum aut civitas funditus dissipatur*.").

47. *See id.* at bk. I, ch. 16 § 120 ("*Tertio imminet regi cura ut multitudo sibi subiecta contra hostes tuta reddatur. Nihil enim prodesset interiora vitare pericula, si ab exterioribus defendi non posset*.").

48. *See id.* at bk. I, ch. 8, § 57 ("*Simul etiam est multitudini nocivum, si tale praemium statuatur principibus*: *pertinet enim ad boni viri officium ut contemnat gloriam, sicut alia temporalia bona. Virtuosi enim et fortis animi est pro iustitia contemnere gloriam sicut et vitam . . . . Non est igitur boni viri conveniens praemium gloria, quam contemnunt boni. Si igitur hoc solum*

reward for a king within the context of the virtue of magnanimity. Aquinas argued that magnanimity is one of the essential parts of fortitude. Here Aquinas discussed the desire of glory by noting what Aristotle says about the magnanimous man. The magnanimous man does not seek honor and glory as if it were something great which might suffice as a reward, but he demands nothing beyond honor and glory from men.[49] While Aquinas did not explicitly require that the king emulate Aristotle's magnanimous man, he included this reference as an instruction for the king to approach honor and glory correctly.

Aquinas's references to fortitude and the magnanimous man in *De Regno* suggest that a good king is the one who renounces the use of his power for personal interest and undertakes his throne as a service to others, to his country, as a servant-leader. Assuming that Giambrone is correct in his proposition that a judge has a plenipotentiary mission like a king, a good judge is a humble man who knows his proper role within the legal system and has great respect, but not of subservience, for the sources of authority that constrain his behavior. Such a conception of a judge is quite similar to Justice Scalia's judge who seeks to apply the law as it was passed by the legislator, without any reference to his own beliefs. Indeed, Aquinas's vision of a good king as a servant-leader is in line with Scalia's judge who understands his role in the constitutional system of government. Scalia's judge possesses the humility to know that his role is an essential but not powerful one, at least when rightly exercised.[50]

I.4 A Judge as a Humble Servant: The Case Against Legislative History

Having identified Aquinas's king as a servant-leader with Scalia's conception of a good judge, one might object that Scalia never envisions a judge as a humble servant. It is true that Justice Scalia never used the term "servant-leader" to describe a good judge. But in essence, Scalia appreciates the limited role given to a judge by the Constitution and sees that a reasonable judge must serve the law by implementing the laws passed by the political branches.

The concept of a "humble servant" is more apparent in Justice Scalia's summation against Aquinas's proposition in his last lecture, under which he reaffirmed his opposition to the legislature's intent as evidenced by legislative history. Justice Scalia stated:

> Discerning what the lawgiver "might have done" or "would have done" is a tricky business—and was so even true in the days of Aquinas, when the law was written by King Roger or whoever at the

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bonum statuatur praemium principibus, sequetur bonos viros non assumere principatum, aut si assumpserint, impraemiatos esse. ").

49. *See id.* at bk I, ch. 8, § 60 ("*Hoc autem satis exprimitur per id quod Aristoteles de magnanimo in Ethic. dicit, quod non quaerit honorem et gloriam quasi aliquid magnum quod sit virtutis sufficiens praemium, sed nihil ultra hoc ab hominibus exigit. Hoc enim inter omnia terrena videtur esse praecipuum, ut homini ab hominibus testimonium de virtute reddatur*.").

50. For an excellent discussion on Justice Scalia's originalist judicial philosophy as the exemplar of a humble servant, please see Daniel R. Suhr, *Judicial Cincinnati: The Humble Heroism of Originalist Judges*, 5 FLA. INT'L U. L. REV. 155 (2009).

> time ruled the Kingdom of the Two Sicilies. But it is a hundred times more difficult to discern the lawgiver's unenacted intent today, when laws are written by assemblies of men and women who have differing views and often enact what is a compromise.[51]

Indeed, throughout his legal career, Scalia consistently rejected the reliance on legislative intent because "legislative intent" is something not likely to be found in the archives of legislative history. Scalia argued, "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false."[52] In other words, Scalia believed that it is impossible for the legislatures to entertain any views on particular issues that will reach the Court, let alone have any preference as to how those issues be resolved by the Court.

What is the connection between Justice Scalia's rejection of legislative intent and the role of a judge as a "humble servant"? To answer this question, we have to look back at the reason behind Justice Scalia's opposition to reliance on legislative intent. For Justice Scalia, the key point was that "[n]othing but the text has received the approval of the majority of the legislature and of the President."[53] Justice Scalia believed that if judges pursued unexpressed legislative intents, they "will . . . pursue their objectives and desires."[54] Scalia added further:

> When you are told to decide not on the basis of what the legislature said, but on the basis of what it *meant* . . . your best shot . . . is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.[55]

The bottom line is that Justice Scalia believed that reliance on legislative history would pave the way for the imposition of personal preferences of judges who interpret the text. In other words, a judge who relies on legislative history will likely follow his personal values to arrive at some decisions.

A good judge, in Scalia's view, must always approach cases from the text and should not care about the legislators' intentions beyond that which is embodied in the duly enacted text. Justice Scalia once stated:

> We are governed by the laws that the Members of Congress enact, not by their unenacted intentions. And if they said "up" when they meant "down" and you could prove by the testimony of 100 bishops that that's what they meant, I would still say, too bad. Again, we are governed by laws, and what the laws say is what the laws mean.[56]

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51. Scalia, *supra* note 1, at 247–48.

52. Scalia, *supra* note 13, at 32.

53. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

54. Scalia, *supra* note 13, at 17–18.

55. *Id.* at 18.

56. Scalia & Manning, *supra* note 53, at 1612–13.

Here Justice Scalia suggested that the most significant defect of legislative history is its illegitimacy because we are governed by laws, not by the intentions of legislators. But the reliance of legislative history was merely one detail in the bigger picture. The bigger picture is that the text is the law, and a good judge must follow the text instead of relying on its legislative history.

The U.S. Supreme Court decision in *King v. Burwell*[57] provides an excellent example of Justice Scalia's opposition to the reliance on legislative intent. The issue in *Burwell* was that Congress made tax credits available only to those who buy their policies through an American Health Benefit Exchange, "established by a State" under section 1311 of the Affordable Care Act (ACA).[58] Section 1321, however, empowers the Secretary of Health and Human Service (HHS) to establish exchanges when a State elects to not establish its own.[59] The problem arose when many states—thirty-four—would not choose to create the exchanges.

With a 6–3 vote, the Court decided to look beyond the plain language of the ACA and look at the legislative purpose and context undergirding the statute to discern the proper meaning of the provision on the tax credits. The Court's majority ruled that the ACA's language involving state exchanges was ambiguous. Therefore, the purpose of the clause must be discerned by looking at the context in which the language was used. The majority ruled that reading the requirement as written would make the tax credit unavailable in thirty-four states, which "would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."[60] Thus, the Court majority ruled that they must look at the statutory language as a whole, and that this ambiguity should be resolved in favor of preserving the operation of the overall statutory plan that Congress intended to put in its place. In short, the Court's majority ruled that the statute indicates that state and federal exchanges should be the same.

Justice Scalia issued a vigorous dissent in *Burwell*, a dissent that Justices Thomas and Alito joined. Scalia pointed out that the overall statute itself drew numerous distinctions between the State-established exchanges and those set up by the federal government. Scalia argued it was plain that the statute's specific wording—"established by the State"—was meant to exclude exchanges established by the federal government.[61] He wrote, "[t]he Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State . . . ."[62] In other words, Justice

57. King v. Burwell, 135 S. Ct. 2480 (2015).

58. *See* I.R.C. § 36B (2019). Section 1311 of the ACA provides that "[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 1311(b)(1) (2010) (codified at 42 U.S.C. § 18031(b)(1) (2018)).

59. *See* 42 U.S.C. § 18041(c) (2018) (codifying section 1321(c) of the ACA).

60. *Burwell*, 135 S. Ct. at 2484.

61. *See id.* at 2496 (Scalia, J., dissenting).

62. *Id.* at 2497.

Scalia expressed his contempt that there is no way to read the exchange established by "a state" equivalent to an exchange established by the HHS.

In his dissent in *Burwell*, Justice Scalia described his colleagues' reasoning as "[p]ure applesauce."[63] One of the reasons for his strong dissent was that he believed that his colleagues had used the legislative history as a cover for the implementation of their personal agenda. As he wrote, "[o]nly by concentrating on the law's terms can a judge hope to uncover the scheme of the statute, rather than some other scheme that the judge thinks desirable."[64] In other words, Justice Scalia accused his colleagues of advancing their own particulator agendas by wrapping it with what legislators intended.

In sum, *Burwell* represents the Court's approach of taking matters into its own hands when there are unforeseen cases and asserting that it has identified what Congress intended to do on an insoluble issue.[65] But for Justice Scalia, if a statute will not work, that means the Congress wrote a lousy statute, and it is not the Court's job to improve the statute. In other words, Justice Scalia believes that Congress is responsible for what it wrote and what it wrote in the ACA did not work; so it is not a responsibility of the Court to fix it.

Having explained Scalia's opposition to legislative intent, let us now return to the connection between Aquinas's idea of a good king and Scalia's notion of a good judge. Aquinas's thoughts on magnanimity in *De Regno* refer to a king's sense of self-sufficiency and power.[66] The magnanimous man in *De Regno* is an independent man, who "has little truck for the opinion of vicious or petty men: he and not they know what virtue is."[67] The idea of the magnanimous king in *De Regno* in some sense is close to Justice Scalia's view of a good judge who does not need any outside information, such as legislative history, to determine his own sense of morality or justice. As mentioned earlier, in *De Regno*, Aquinas envisioned a magnanimous king who does not seek honor and glory. Scalia's judge is the embodiment of the virtue of magnanimity, in the sense that he does not seek glory and honor, but instead he knows his proper role in the constitutional system of government. Although he might see a defect in a statute, a good judge will not impose his version of what is good, but instead, he will defer to democratically-elected legislators to fix the defect.

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63. *Id.* at 2501.

64. *Id.* at 2503 (emphasis omitted).

65. For an excellent analysis on the statutory interpretation and the Court decision in *Burwell*, see John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017); see also Mark DeForrest, *Text and Intention in* King v. Burwell*: Araujo's Insight into Statutory Construction*, *in* PRIESTS, LAWYERS, AND SCHOLARS: ESSAYS IN HONOR OF ROBERT J. ARAUJO, S.J. (S. Hendrianto ed., 2017).

66. For an excellent analysis on the notion of self-sufficiency in *De Regno*, see William Alvin McCormick II, On the De Regno of St. Thomas Aquinas (2013) (unpublished Ph.D. dissertation, University of Texas).

67. *Id.* at 78.

II. SCALIA'S SECOND OBJECTION

As explained earlier, in the *Summa Theologiae*, Aquinas dealt with the first objection that written law sometimes contains injustice, and we ought not to always bind judges according to the written law. In his reply, Aquinas stated, "[i]f the written law contains anything contrary to the natural right, it is unjust and has no binding force . . . . Wherefore such documents are to be called, not laws, but rather corruptions of law . . . and consequently judgment should not be delivered according to them."[68] In his last lecture, Scalia did not miss a chance to express his objection to Aquinas's proposition. Scalia cynically argued that an angel could do well in grasping the natural law, but the judges are neither angels nor are they Thomas Aquinas.

II.1 Natural Law and Same-Sex Marriage

Scalia then pondered whether Aquinas wanted to see fallible judges going to enforce their vision on natural law, contrary to the written law. Scalia referred to *Obergefell v. Hodges*[69] and posited some questions:

> Do you not think that the five-justice majority that last term disregarded—"struck down"—numerous state laws providing that marriage was between a man and a woman, do you not think those judges believed that that is what natural law required? Do you really want judges—fallible judges—going about enforcing their vision of natural law, contrary to the dictates of democratically enacted positive law? Lord, no.[70]

In short, Justice Scalia pointed out that Aquinas's premise on upholding the natural law and disregarding written law has been used to justify the U.S. Supreme Court decision in *Obergefell* that legalized same-sex marriage.

Scalia's assertion led me to investigate whether the majority Justices believed that their decision was what natural law required. The notion that *Obergefell* adopts the natural law idea arose because of Justice Kennedy's opinion, in which he wrote that "the annals of human history reveal the transcendent importance of marriage."[71] Moreover, Kennedy argued that marriage provides an intrinsic good that other ways of living do not, as he wrote:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . [The hope of those who seek to marry] is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.[72]

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68. AQUINAS, *supra* note 6, pt. II-II, question 60, art. 5.

69. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

70. Scalia, *supra* note 1, at 248.

71. *Obergefell*, 135 S. Ct. at 2593–94.

72. *Id.* at 2608.

Justice Kennedy further argued that "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[73] Therefore, the Court's majority believed that it was necessary for the State to permit gay couples to marry. This argument can be seen as a violation of liberal state neutrality, in which the Court privileges a particular way of life above another. Thus, the *Obergefell* decision that put marriage on the highest pedestal of relationships can be perceived as a decision based on natural law with a gay spin.[74]

The issue is whether Justice Kennedy's argument is compatible with Aquinas's idea of natural law. Given the complexity of the problem and the impossibility of surveying Aquinas's thoughts on natural law in this Article, I will provide a modest overview on Aquinas's thoughts on natural law. Aquinas says that the natural law pertains to "the light of natural reason" (*lumen rationis naturalis*).[75] Aquinas's interpreter can then conclude that if God has endowed human persons with the light of natural reason, then there is no need for extra aids outside human nature to acquire the principles of natural law. But Aquinas's work is full of riddles, and in a different instance, he suggests that we need divine revelation in obtaining the principles of natural law. In the *Prima Secundae*, Aquinas states that the divine revelation comes to aid men not only when his reason is insufficient (*provideret homini in his ad quae ratio non potest*), but also when human reason has been impeded (*circa quae contingit rationem hominis impediri*).[76] This statement suggests that there is an acute problem that men by their "natural" powers are unable to grab the principles of natural law as the natural light of his intellect is so often not able to know what is proper to be pursued and what is evil to be avoided.

Why is this problem so acute? Because through being habituated to sin, man's reason has become darkened and thus it might impede his reason to know what ought to be done. Aquinas even argues among the good men, "the natural law began to be obscured on account of the exuberance of sin."[77] Aquinas explains that there is another law in human persons that fight with their reasons, which he calls "the law of the *fomes* of sin." Aquinas explains the decisive impact of the *fomes* on the natural law as follows:

> And so the law of man, which, by the Divine ordinance, is allotted to him according to his proper natural condition, is that he should act in accordance with reason: and this law was so effective in [man's first] state, that nothing either [out]side or against reason could take man unawares. But when man turned his back on God, he fell under

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73. *Id.* at 2602.

74. For a more detailed argument about *Obergefell* as a decision based on natural law with gay interpretation, *see* Sonu Bedi, *An Illiberal Union*, 26 WM. & MARY BILL RTS. J. 1081, 1119 (2018).

75. AQUINAS, *supra* note 6, at pt. I-II, question 91, art 2.

76. *Id.* at pt. 1-II, question 99, art 2.

77. *Id.* at pt. I-II, question 98, art. 6 ("[*L*]*ex naturalis obscurari incipiebat propter exuberantiam peccatorum*.").

> the influence of his sensual impulses: in fact this happens to each one individually, the more he deviates from the path of reason . . . .
>
> [Accordingly], then, this very inclination of sensuality, which is called the *fomes* . . . is [more] a deviation from the law of reason.[78]

The proposition suggests that the problem of sin is quite systematic because original sin has corrupted man's nature. Aquinas explains further that there are two aspects of human nature: first, human nature in its full integrity or wholeness (*in sui integritate*), as it was the case of the first man in the state of original justice.[79] Secondly, there is human nature that is being corrupted due to original sin (*corrupta in nobis post peccatum primi parentis*). In the state of original justice, men were able to act by the natural law. Nevertheless, after men turned away from God, men are unable to make a proper judgment through reason because the law of *fomes* has created a deviation from the law of reason.

How could men restore the order of reason? One of the answers to this question can be found in Aquinas's treatment of happiness. Aquinas addressed the issue of happiness earlier in the *Prima Secundae*. Among the conclusions that Aquinas reached: it is impossible for happiness to consist in wealth, honor, glory, power, bodily good, and pleasure.[80] Aquinas recognizes that men will always have a desire for happiness; however, men cannot find happiness in any created good (*bono creato*) as they will only find it in God. According to Aquinas, it is God alone that can satisfy the will of human persons.[81]

In his account of happiness, Aquinas stresses the need for an ordering of the human will.[82] Aquinas argues that the human will must be ordered to the last end, that is the beatific vision, and no one can obtain perfect happiness without the ordering of the will.[83] Why is there this need for an ordering of the human will? In his *Treatise on Law*, Aquinas argued that the purpose of the law is *ordinetur ad bonum commune* (ordered toward the common good).[84] The idea of "ordering" implies that something is ordered out of disorder. Here Aquinas referred to the disorder and subordination that arose after the fall of our first parent. Under this chain of argument, law then has a function to establish a new order after the original sin.

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78. *Id.* at pt. I- II, question 91, art. 6 ("*Est ergo hominis lex, quam sortitur ex ordinatione divina secundum propriam conditionem, ut secundum rationem operetur. Quae quidem lex fuit tam valida in primo statu, ut nihil vel praeter rationem vel contra rationem posset subrepere homini. Sed dum homo a Deo recessit, incurrit in hoc quod feratur secundum impetum sensualitatis, et unicuique etiam particulariter hoc contingit, quanto magis a ratione recesserit . . . . Sic igitur ipsa sensualitatis inclinatio, quae fomes dicitur . . . . magis est deviatio a lege rationis*.").

79. *See id.* at pt. I-II, question 109, art. 2.

80. *See id.* at pt. I-II, question 2, arts. 1–6.

81. *See id.* at pt. I-II, question 2, art. 8.

82. *See id.* at pt, I-II, question 4, art. 4.

83. *See id.* at pt. I-II, question 3, art. 8.

84. For an excellent analysis on Aquinas's theory on the end of law, please see JOHN A.D. CUDDEBACK, LAW AS AN EXTRINSIC PRINCIPLE OF ACTION IN AQUINAS (1997).

In sum, Aquinas envisions the need for a rightly ordered human will that must conform to the divine will, as an essential condition for perfect happiness. So, when Aquinas speaks about the end of law as an ordering toward the common good, he implicitly argues that the human must also be ordered toward the beatific vision as the way to repair their disordered will. This will eventually lead people to restore their order of reason due to their first parent's sin.

There is a significant difference between Justice Kennedy's transcendental purpose and Aquinas's supernatural end. First, by directing men toward his supernatural end, Aquinas meant to order human will toward the beatific vision. On the other hand, no evidence can support the contention that Justice Kennedy's transcendental view intended to direct same-sex couples toward the beatific vision. Second, on account of happiness, Aquinas concluded that it is impossible for happiness to consist in wealth, honor, glory, power, bodily good, and pleasure. Justice Kennedy's account of happiness in *Obergefell* is limited to bodily good and pleasure, as he reaffirmed the Court's holding in *Lawrence v. Texas*, that "[s]ame-sex couples have the same right as opposite-sex couples to enjoy intimate association."[85]

Above all, *Obergefell* is contrary to the order of reason in natural law. As Justice Scalia put it rightly in his dissent:

> These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry.[86]

Justice Scalia's argument on the lack of reason in *Obergefell* is compatible with Aquinas's theory of natural law, which aims to direct man towards his supernatural end. Aquinas said in the *Summa Contra Gentiles*, "the end for the human creature is to cling to God, for this felicity consists in this."[87] But the role of natural law is not merely to direct men to the love of God; it also aims to help men to know how to "[l]ive in relation to other men according to the order of reason."[88] *Obergefell* was, indeed, wrapped in the mantle of goodness, i.e., loving one another; nevertheless, it was not directed toward establishing a relationship based on the order of reason, but rather as Justice Kennedy said,

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85. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

86. *Id.* at 2630 (Scalia, J., dissenting) (footnote omitted).

87. THOMAS AQUINAS, SUMMA CONTRA GENTILES, bk. III, ch. 115) (Vernon J. Bourke trans.) [hereinafter SUMMA CONTRA GENTILES, Bourke]; *see also* THOMAS AQUINAS, SUMMA CONTRA GENTILES (Laurence Shapcote trans.) [hereinafter SUMMA CONTRA GENTILES, Shapcote] ("*Finis autem humanae creaturae est adhaerere Deo*: *in hoc enim felicitas eius consistit* . . . .").

88. SUMMA CONTRA GENTILES, Bourke, *supra* 87 at bk. III, ch. 128; *see also* SUMMA CONTRA GENTILES, Shapcote, *supra* note 87, at bk. III, ch. 128 ("[*U*]*t secundum ordinem rationis se habeat ad alios homines*.").

"the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[89]

II.2. Catholic Judges on Death Penalty

In his last lecture, Justice Scalia at least agreed that natural law does make its demand upon judges, but not the requirement that the judges render judgment that contradicts the positive law. Instead, Scalia argued that the natural law demands judges to recuse themselves from the case or resign from the bench if the positive law places a judge in the position of being the instrument of evil. In other words, the natural law solution for a judge in dealing with an unjust law is recusal instead of repealing the positive law. Scalia referred to the issue of the death penalty; he stated: "Natural law would require me to recuse—and probably to resign my office—if I believed (as a footnote in a papal encyclical suggested) that the death penalty is immoral."[90] Nonetheless, Justice Scalia was fond of using capital punishment, and so he did not see any need for him to recuse himself in the death penalty cases.

Justice Scalia believed that the Church has always approved the death penalty; in his extrajudicial writings, he frequently cited Saint Paul and Saint Thomas More as authorities on the morality of lawfully constituted authority to impose death as a punishment.[91] In his last lecture, he asserted: "[T]he whole story of the redemption makes no sense without the retributive imperative."[92] Apparently, Scalia openly argued against Pope John Paul II's 1995 encyclical, *Evangelium Vitae*, which viewed capital punishment as limited to "cases of absolute necessity: in other words, when it would not be possible otherwise to defend society."[93]

By the time of writing this Article, there have been significant changes in the Catholic Church's teaching on the Death Penalty. On the occasion of the twenty-fifth anniversary of the publication of the Apostolic Constitution *Fidei Depositum*, by which John Paul II promulgated the *Catechism of the Catholic Church*, Pope Francis called for a reformulation of the Church's teaching on the death penalty.[94] Pope Francis has reaffirmed that "[t]oday capital punishment

89. *Obergefell*, 135 S. Ct. at 2599.

90. Scalia, *supra* note 1, at 249.

91. *See* Antonin Scalia, *God's Justice and Ours*, FIRST THINGS (May 2002), https://www.firstthings.com/article/2002/05/gods-justice-and-ours.

92. Scalia, *supra* note 1, at 249.

93. POPE JOHN PAUL II, EVANGELIUM VITAE, § 56 (1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.

94. *See* Pope Francis, Address to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017), *in Address of His Holiness Pope Francis*

to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization, VATICAN (Oct. 11, 2017), https://w2.vatican.va/content/francesco/en/speeches/2017/october/documents/papa-francesco_20171011_convegno-nuova-evangelizzazione.html.

is unacceptable, however serious the condemned's crime may have been."[95] On August 2, 2018, the Holy See announced that Pope Francis had approved the new draft of No. 2267 of the *Catechism of the Catholic Church*,[96] which affirmed: "[T]he death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person."[97]

Would Scalia have shifted on the death penalty if he had heard the Pope's decree? I don't think so. First, and, foremost, Scalia was advocating capital punishment as part of his judicial philosophy of originalism and his opposition to the Living Constitution.[98] Scalia believed that the death penalty "is explicitly contemplated in the Constitution"—in the Fifth Amendment's Due Process Clause (which forbids the government from depriving a person of "life" without due process) and its Indictment Clause (which refers specifically to the indictment of "capital" crimes).[99] So Scalia's advocacy for capital punishment was not only based on his faith alone, but also based on his judicial philosophy.

Moreover, as explained earlier, Scalia believed that the antidote for a Catholic judge in dealing with the death penalty is to recuse himself. As the proponent of the death penalty, of course, there was no reason for Scalia to recuse himself in the death-penalty cases. But for a judge who believes the death penalty to be immoral, Scalia argued that the only choice is recusal or resignation rather than to ignore the law and to sabotage capital cases based on the ground of natural law.

Interestingly, twenty months after Scalia delivered his last lecture; the issue of recusal and the death penalty became prominent in the tense confirmation of hearing of his former law clerk, Amy Coney Barrett, who was a nominee to be a United States Circuit Judge for the Seventh Circuit. One of the hot topics during the confirmation was Barrett's 1998 law review article entitled *Catholic Judges in Capital Cases*.[100] As then a third-year law student, Barrett and her co-author, John Garvey, took issue with Justice Brennan's famous statement, during his confirmation hearing in 1957. Brennan, who was Catholic, was asked at his confirmation hearing which would prevail in guiding him as a judge: his Catholic faith, or the law of the United States. Brennan replied that he would be controlled by "the oath that I took to support the

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95. Letter from Pope Francis to Federico Mayor, President, Int'l Comm'n Against Death Penalty (Mar. 20, 2015), http://w2.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150320_lettera-pena-morte.html.

96. *See* Letter from Luis Francisco Ladaria Ferrer, Cardinal/Prefect, Congregation Doctrine Faith, to the Bishops (Aug, 2, 2018), https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802b.html.

97. *Id.* at para. 6 (quoting Pope Francis, *supra* note 94).

98. *See* Scalia, *supra* note 13, at 46.

99. For an extensive analysis on Justice Scalia's line of reasoning in the death penalty, see J. Richard Broughton, *The Death Penalty and Justice Scalia's Lines*, 50 AKRON L. REV. 203 (2016); see also Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U. L. REV. ONLINE 1 (2016).

100. *See* John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

Constitution and laws of the United States and . . . that alone."[101] Barrett and Garvey argued against Brennan by saying, "We do not defend this position as the proper response for a Catholic judge to take with respect to abortion or the death penalty."[102] In their article, Barrett and Garvey posited that the solution for a judge who anticipates a religious conflict with the law of the land is recusal—to withdraw from hearing the case she was assigned.

Democrats on the Senate Judiciary Committee expressed concerns about Barrett's religious commitments, suggesting that her devout Catholicism may preclude her from discharging her judicial duties. In response to Democrats' concerns, Barrett emphasized that the set of circumstances considered in the article were narrow, it only addressed the obligation of a trial judge who is a conscientious objector, on how he should proceed if he enters the order of execution.[103] Barrett explained that the article did not address how an appellate judge should behave if he or she is a conscientious objector. Moreover, Barrett asserted that she routinely participated in death-penalty cases as a law clerk of Justice Scalia at the U.S. Supreme Court. Nevertheless, Barrett continued to believe in the core proposition of the article that whenever there is a conflict between a judge's personal convictions and her duty under the rule of law, a judge shall recuse herself rather than following her personal conviction. In sum, Barrett was echoing Scalia's position that a solution for a judge who anticipates a religious conflict with the law is recusal.

II.3. Catholic Judges on Abortion

While Justice Scalia believed that natural law demands a Catholic judge to recuse himself if he thinks that death penalty is immoral, nonetheless, he argued that there is no obligation for Catholic judges to recuse themselves in the case of abortion. In his last lecture he stated: "They in no way participate in the killing of the baby. They merely hold, in accordance with the Supreme Court's determination of what natural law requires, that the government cannot prevent that killing."[104] Indeed, Scalia had long argued that a judge bears no moral responsibility for the laws society has failed to enact because the moral obligation weighs heavily upon the voter and legislator who is supposed to pass the laws that restrain abortion.[105]

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101. *Nomination of William Joseph Brennan, Jr.: Hearings Before the S. Comm. on the Judiciary*, 85th Cong. 34 (1957); *see also* Garvey & Coney, *supra* note 100, at 347 (discussing the interchange between Justice Brennan and the United States Senate during Justice Brennan's confirmation hearing).

102. Garvey & Coney, *supra* note 100, at 347.

103. *See Judicial and Justice Department Pending Nominations*, C-SPAN (Sept. 6, 2017), https://www.c-span.org/video/?433501-1%2Fsenate-judiciary-committee-takes-judicial-nominations.

104. Scalia, *supra* note 1, at 249.

105. *See* Scalia, *supra* note 91.

Three years after the death of Scalia, in January 2019, the State of New York legislature passed the so-called Reproductive Health Act (RHA),[106] which removes abortion in its entirety from the state penal code and it guarantees a woman's right to abortion in the first twenty-four weeks of a pregnancy or when the fetus is not viable, or when the abortion is necessary to protect the patient's life or health. Governor Andrew Cuomo defended the legislation by arguing that the legislation "does not allow abortions minutes before birth, nor does it allow third-trimester abortions 'for any reason.'"[107] Nevertheless, Cuomo neglected to mention that according to *Doe v. Bolton*,[108] "health" can be interpreted to mean almost any reason. By passing the RHA, New York is leading the way in expanding abortion rights. Virginia House Delegate Kathy Tran has introduced the Repeal Act that will expand abortion rights.[109] The State of Vermont then joined the abortion bandwagon with the so-called Freedom of Choice Act.[110] By the end of spring 2019, Illinois became the latest place to advance legislation that aims to remove certain restrictions on later-term abortions.[111] If Justice Antonin Scalia were still alive, he would definitely disagree with the expansion of abortion rights across the country, but he would not change his view that a judge bears no moral responsibility for those legislations, and that the blame should lie with the legislatures who chose to remove restrictions on certain late-term abortions and scrap criminal penalties from the penal code.

Scalia was a staunch opponent of abortion rights, but his opposition to abortion is based on legal reason rather than moral or religious reasons. For instance, in *Stenberg v. Carhart*,[112] he wrote a dissenting opinion against the Court's majority decision to hold that Nebraska's statute criminalizing the performance of "partial birth abortion[s]" violates the U.S. Constitution, as interpreted in *Roe v. Wade*[113] and *Planned Parenthood v. Casey*.[114] Scalia wrote that "[t]he notion that the Constitution of the United States . . . prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."[115] He wrote further, "[T]he Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed."[116] Under this line of reasoning, if a state were to permit abortion

106. N.Y. PUB. HEALTH LAW § 2599-bb (McKinney 2019).

107. Andrew M. Cuomo, *Trump's Assault on Abortion Rights Must Be Rejected*, N.Y. TIMES (Feb. 6, 2019), https://www.nytimes.com/2019/02/06/opinion/cuomo-roe-abortion-trump.html.

108. Doe v. Bolton, 410 U.S. 179 (1973).

109. *See* H.D. 2491, 2019 Sess. (Va. 2019).

110. *See* H.R. 57, 2019 Reg. Sess. (Vt. 2019).

111. S. 25, 101st Gen. Assemb. (Ill. 2019).

112. Stenberg v. Carhart, 530 U.S. 914 (2000).

113. Roe v. Wade, 410 U.S. 113 (1973).

114. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

115. *Stenberg*, 530 U.S. at 953 (Scalia, J., dissenting).

116. *Id.* at 956.

on demand, Scalia asserted: "I would and could in good conscience vote against an attempt to invalidate that law, for the same reason that I vote against invalidation of laws that contradict *Roe v. Wade*; namely, simply because the Constitution gives the federal government and, hence, me no power over the matter."[117] Scalia's line of reasoning in *Stenberg v. Carhart* shows that his position on abortion has nothing to do with adhering to his religious beliefs. Moreover, Scalia did not attach any moral consequence to other judges' decisions to uphold abortion rights on the grounds laid out in *Roe*. As Scalia noted, if the legal analysis had produced the conclusion that the Constitution guaranteed a woman's right to abortion, he would have come out the other way, regardless of the religious view concerning abortion.[118] Thus, for Scalia, a ruling on abortion was an issue that could be distinguished from one's religion and instead is related to one's profession as a lawyer.

Scalia had gone to great pains to distinguish his duties as a Justice from his faith as a Catholic. But many people were not convinced that Scalia's Catholic faith did not affect how he interpreted the law, especially about the abortion rights. Seven years after *Stenberg*, the new Roberts Court revisited the issue of partial-birth abortion in *Gonzales v. Carhart*.[119] After *Stenberg*, President George W. Bush signed the federal Partial-Birth Abortion Act of 2003. Every federal court that considered the constitutionality of this statute held it unconstitutional because it did not contain an exception that permitted the procedure when necessary to protect the health of the woman. The U.S. Supreme Court ruled by a 5–4 vote that Congress's ban on partial-birth abortion was not unconstitutional and did not impose an undue burden on the right to an abortion. Justice Anthony Kennedy wrote the opinion for the majority, and Justice Scalia joined. The decision in *Gonzales* immediately raised a big concern about the influence of religious belief in judicial decisions. The fact of the matter was that five Justices who voted to uphold the federal ban on partial-birth abortion were Catholics. This fact gave rise to the speculation that their Catholic faith might have influenced their judicial decision.

Justice Scalia was immediately involved in a bitter confrontation with those who raised a concern about Catholic bias in *Gonzales*. Not long after *Gonzales*, Geoffrey Stone published an op-ed in the *Chicago Tribune* criticizing the Court's opinion. Stone, lambasting the Catholic judges, ran the story as follows:

> Here is a painfully awkward observation: All five justices in the majority in Gonzales are Roman Catholic. The four justices who

117. Antonin Scalia, Address at University of Chicago Divinity School Conference (Jan. 25, 2002), *in A Call for Reckoning: Religion and the Death Penalty* (Jan. 25, 2002), http://www.pewforum.org/2002/01/25/session-three-religion-politics-and-the-death-penalty.

118. *See* Antonin Scalia, Address for the Thirtieth Anniversary of the *Long Island Catholic* Newspaper (Oct. 1992), *in Faith and Judging*, *in* ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH AND LIFE WELL LIVED 148,152 (Christopher Scalia & Edward Whelan eds., 2017).

119. Gonzales v. Carhart, 550 U.S. 124 (2007).

> are not all followed clear and settled precedent. It is distressing to have to point this out. But it is a fact that merits attention . . . .
>
> Of course, that all of the Catholic justices voted as they did in Gonzales might have nothing to do with their personal religious beliefs. But given the nature of the issue, the strength of the relevant precedent, and the inadequacy of the court's reasoning, the question is too obvious to ignore.[120]

Justice Scalia took Stone's critique personally and called it a "damn lie" to insinuate that his Catholicism influenced his vote in *Gonzales*.[121] Scalia referred to the fact that Justice Kennedy, as a Catholic, had endorsed *Roe v. Wade* through his vote in supporting *Casey*.[122] Moreover, Scalia also referred to Justice Brennan, who was a Catholic and at the forefront of the struggle for reproductive rights.[123] In sum, Justice Scalia stood his ground and insisted that his view about abortion is consistent with his judicial philosophy rather than his Catholic faith exclusively.[124]

Stone had not anticipated that his criticism would strike Scalia's nerve. In his defense, Stone replied that what made *Gonzales* noteworthy was that the governing precedent was so clear. Stone posited:

> But what was jarring about *Gonzales* was that these five justices felt compelled even to hear the case, in light of the recent decision *Stenberg* and the unanimous judgments of the lower courts, all of which had invalidated the challenged federal law. Ordinarily in such

120. Geoffrey R. Stone, *Our Faith-Based Justices*, CHIC. TRIB. (Apr. 30, 2007), http://articles.chicagotribune.com/2007-04-30/news/0704290277_1_partial-birth-four-justices-abortions.

121. *See* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 204 (2009).

122. *See id.*

123. Justice Brennan joined the majority in Griswold v. Connecticut, 381 U.S. 479 (1965), a landmark case about access to contraception.

124. In summer 2019, the Supreme Court decided the case, Box v. Planned Parenthood, 139 S. Ct. 1780 (2019*),* which involves a challenge to two provisions of an Indiana law regulating abortion that was signed by then Indiana Governor, Mike Pence. Justice Clarence Thomas filed a twenty-page concurring opinion, in which he devoted most of his opinion to a history of the eugenics movement in the United States. Justice Thomas argued that the Supreme Court's decision not to weigh in on the constitutionality of Indiana's ban on abortions based on the race, sex, or disability of the fetus "should not be interpreted as agreement with the decisions" striking down the ban. *Id*. at 1793 (Thomas, J., concurring). Justice Thomas concluded that, "[e]nshrining a constitutional right to an abortion based solely on the race, sex, or disability of an unborn child, as Planned Parenthood advocates, would constitutionalize the views of the 20th-century eugenics movement." *Id*. Justice Thomas is a devout Catholic, but he did not receive much criticism that his Catholicism influenced his opinion. Part of the reasons is that Justice Thomas's opinion comes with the argument that abortion has nothing to do with the autonomy or equality of women but is instead a racist practice to control the size of the black population. *See id.* at 1788–91.

> circumstances, even with a change in the makeup of the Court, one would expect the Court simply to follow its own recent precedent.[125]

Stone was puzzled as to why those five justices decided to avoid following a recent and controlling precedent in *Stenberg*. He thus suspected that the decision was a product of something more powerful: a profound moral revulsion to follow the precedent. So he felt it was appropriate and necessary to raise the question.

Indeed, Stone's piece helped ignite renewed interest in the discussion on the relationship between a judge's religious conviction and precedent. Ten years after Scalia feuded with Stone, the issue of a Catholic judge and precedent became prominent in Amy Coney Barrett's confirmation hearing. Democrats on the Senate Judiciary Committee—notably Senator Dianne Feinstein—questioned Barrett closely on her views about Catholic faith and abortion in her confirmation. Although that line of questioning has drawn heated criticism, we shall briefly review Barrett's reply. In many ways, it echoes her former boss's position on the matter. During the hearing, Senator Feinstein asked Barrett whether she will follow *Roe v. Wade* as a super precedent. Barrett stunningly replied, "I would commit, if confirmed, to follow unflinchingly all Supreme Court precedent."[126] When Senator Feinstein pressed Barrett to evaluate *Roe v. Wade* as a super precedent, Barrett replied:

> *Roe* has been affirmed many times and survived many challenges . . . and it is more than forty years old, and it is clearly binding on all courts of appeals. So it's not open to me or up to me, and I would have no interest in, as a court of appeals judge, challenging that precedent. It would bind.[127]

As Democrats remained unpersuaded by Barrett's answer, she asserted that "[i]t is never appropriate for a judge to impose that judge's personal convictions, whether they derive from faith or anywhere else other than the law." Moreover, she stressed that "my personal church affiliation or my religious belief would not bear in the discharge of my duties as a judge."[128]

Barrett's position echoed Justice Scalia's position on how a Catholic judge should deal with an issue like abortion. Scalia repeatedly warned that a judge who happened to be a Catholic should not impose his or her faith convictions in a judicial matter. As he once said: "My religious faith can give me a personal view on the right or wrong of abortion; but it cannot make a text say yes where it in fact says no, or a tradition say 'we permit' where it in fact has said 'we forbid.'"[129] The bottom line is that Justice Scalia had a great fear of subjectivity, and, in his last lecture, he expressed his great dismay that Aquinas's postulate

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125. GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 427 (2017).

126. *Judicial and Justice Department Pending Nominations*, *supra* note 103.

127. *Id.*

128. *Id.*

129. Scalia, *supra* note 118, at 152.

on the principle of equity will justify the rise of subjectivity in the judicial making process.

III. AQUINAS'S "REPLY" TO SCALIA'S OBJECTION

Having reviewed Scalia's objection to Aquinas, let's evaluate Aquinas's position and see whether the Angelic Doctor could have been in the same camp with Chief Justice Earl Warren and Justice Brennan as Scalia accused him or whether Aquinas was in fact in Scalia's camp all along. As mentioned earlier, a few weeks after Justice Scalia's death, Anthony Giambrone, O.P., attacked Scalia's judicial philosophy in the Jesuit flagship, *America Magazine*. Giambrone scorns Justice Scalia's textualism as not serving the common good. Giambrone offers his concerns as follows:

> In our common law system, precedent itself is a form of legislation. This means that judges are indeed effectively lawmakers. It is true, the court is not the right instrument for deciding every issue; but it will not serve the *common good* if Catholics in this country concerned about crucial issues like abortion and same-sex marriage rally around the illusion that judges have no share in legislating.[130]

The bottom line is that Giambrone believed that Justice Scalia's textualism is insufficient to serve the common good because of its overemphasis upon the plain meaning of the text, which merely leads judges to take the text as the settled law.

The term "common good" is frequently heard in law, politics, theology, philosophy, literature and even the media. But different people have different ideas when they are using the term "common good." So, the term "common good" needs content and context. Moreover, there is a pressing question on what exactly the connection is between the common good and the issue of subjectivity, which became a primary concern of Justice Scalia.

III.1. Aquinas on Common Good and the Danger of Subjectivity

St. Thomas Aquinas's *Treatise on Law* is a good start for us to investigate the issues of common good and subjectivity. One of the main inquiries in Aquinas's *Treatise on Law* concerns "the end of the law," (*de fine legis*). In the discussion of "the end of the law," Aquinas used the term "*ordinetur ad bonum commune*," (ordered toward the common good). The Latin expression that St. Thomas uses to describe the common good is *bonum commune*, which can be translated as "the good of the community." The term "the good of the community" is easily said to be "opposed" to the private or particular good. In *Summa Theologiae*, Aquinas immediately deals with the objection that the law is not always directed to the common good but also towards the private good of an individual.

130. Giambrone, *supra* note 5 (emphasis added).

Here I would like to cite Aquinas's reply to the objection in its entirety so that later we can analyze his thought on the relationship between the common good and law.

> As stated above, the law belongs to that which is a principle of human acts, because it is their rule and measure. Now as reason is a principle of human acts, so in reason itself there is something which is the principle in respect of all the rest: wherefore to this principle chiefly and mainly law must needs be referred. Now the first principle in practical matters, which are the object of the practical reason, is the last end: and the last end of human life is bliss or happiness, as stated above. Consequently, the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to common happiness. Wherefore the Philosopher, in the above definition of legal matters mentions both happiness and the body politic: for he says that we call those legal matters just, which are adapted to produce and preserve happiness and its parts for the body politic: since the state is a perfect community, as he says in *Polit.* i, 1.[131]

Aquinas made an essential point in this passage, a person who wants to have a well and flourishing life must not live as an isolated individual, but instead as a member of the community. Aquinas explained the need for ordering the human will in the context of original sin. But the question remains: what precisely is the necessity of the ordering of the human will in the contexts of political and legal rule? To answer this question, we need to look at the second point of his argument that a person who wants to have a well and flourishing life must not live as an isolated individual, but rather as a member of a community.

The best starting point to explore Aquinas's approach to citizenship, law, political authority, and the common good is an article in *Prima Secundae* entitled *Of the Goodness of the Interior Act of the Will* (*de bonitate actus*

131. AQUINAS, *supra* note 6, at pt. I-II, question 90, art. 2 (emphasis omitted) (citations omitted) ("[*S*]*icut dictum est, lex pertinet ad id quod est principium humanorum actuum, ex eo quod est regula et mensura. Sicut autem ratio est principium humanorum actuum, ita etiam in ipsa ratione est aliquid quod est principium respectu omnium aliorum. Unde ad hoc oportet quod principaliter et maxime pertineat lex. Primum autem principium in operativis, quorum est ratio practica, est finis ultimus. Est autem ultimus finis humanae vitae felicitas vel beatitudo, ut supra habitum est. Unde oportet quod lex maxime respiciat ordinem qui est in beatitudinem. Rursus, cum omnis pars ordinetur ad totum sicut imperfectum ad perfectum; unus autem homo est pars communitatis perfectae, necesse est quod lex proprie respiciat ordinem ad felicitatem communem. Unde et philosophus, in praemissa definitione legalium, mentionem facit et de felicitate et communione politica. Dicit enim, in V Ethic., quod legalia iusta dicimus factiva et conservativa felicitatis et particularum ipsius, politica communicatione, perfecta enim communitas civitas est, ut dicitur in I Polit.*").

interioris voluntatis).[132] Aquinas states, "[b]ut a man's will is not right in willing a particular good, unless he refer it to the common good as an end: since even the natural appetite of each part is ordained to the common good of the whole."[133] In this passage, Aquinas posits that a man's will to a particular good is bound to the will of the common good of the whole.

The term "whole" is vital to understand Aquinas's notion of the common good.[134] The whole can only be the whole if the parts of the whole come to be what they are. In the context of the common good of human society, the society is made up of elements, each of which is a part of a substantial whole. Jacques Maritain explains the relationship between the whole and parts as the mutual relations of the person and society.[135] Maritain argues that the common good by its very essence directs itself to the persons in a two-fold way:

> [F]irst, in so far as the persons are engaged in the social order, the common good by its essence must flow back over or redistribute itself to them; second, in so far as the persons transcend the social order and are directly ordained to the transcendent Whole, the common good by its essence must favor their progress toward the absolute goods which transcend political society.[136]

In other words, there must be a redistribution of the common good to differing parts of society because these parts are persons. Here the law of transcendence applies, in which the transcendence of the person over the society is manifested.

But the notion of human persons as "part" of the "whole" has its problems. To be a person meant to be independent of anything, except oneself. The conception of a self-autonomous person meant that one could choose whatever content that she or he put into the definition of a person. Charles De Konnick, in his essay on the common good, explained the danger of personalism. To explain the danger of the conception of a person that is based on autonomy, De Konnick used the example of the fallen angels. De Konnick wrote, "[t]he sin of the [fallen] angels was practically a personalist error: they preferred the dignity of their own person to the dignity which they would receive through their subordination to a good which was superior but common in its very superiority."[137] In other words, De Konnick sees the fallen angels as the enemy

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132. *Id.* at pt. I-II, question 19, arts. 1–10. For an excellent analysis on Aquinas's approach to citizenship, law, political authority, and the common good, please see MARY KEYS, AQUINAS, ARISTOTLE AND THE PROMISE OF THE COMMON GOOD (2008).

133. AQUINAS, *supra* note 6, at pt. I-II, question 19, art. 10 ("*Non est autem recta voluntas alicuius hominis volentis aliquod bonum particulare, nisi referat illud in bonum commune sicut in finem, cum etiam naturalis appetitus cuiuslibet partis ordinetur in bonum commune totius*.").

134. *See* JAMES SCHALL, THE HUMAN PERSON AND A CULTURE OF FREEDOM 193 (Peter A. Pagan Aguiar & Terese Auer eds., 2009).

135. *See* JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 76 (John J. Fitzgerald trans., 1947).

136. *Id.* at 66.

137. Charles De Koninck, *On the Primacy of the Common Good: Against the Personalists and the Principle of the New Order*, 4 AQUINAS REV. 1, 13 (1997).

of the common good because they preferred their particular good to the common good—they refused the common good because it was, by essence, common.

Through the analogy of the fallen angels, De Konnick criticized the notion of personalism of the autonomous man that gives himself his dignity and rights. The fallen angels knew that they were not God; not only had they refused to subordinate themselves to God, but also, they refused to participate in any good but their own. Similarly, the autonomous persons declined to receive rights and dignity because of their nature of human persons. But they installed the rights and dignity to themselves. Thus, dignity and rights of autonomous persons are purely their wills instead of what they received by nature.

Is that true that self-autonomous persons are genuinely the adversaries of the common good? Is it wrong to assume that self-autonomous persons could also love the common good? To answer this question, one must turn to Aquinas's treatment of the good citizen. Aquinas believed that "when man becomes a citizen of a state and is admitted to participating in the good of some state, certain virtues are suitable, necessary even, for doing those things which are a citizen's duty and for loving the good of the state."[138] Aquinas further argues that one can love the city in two ways: first, one could love the good of some city to possess and to own it, and, second, one could love the good of a city to preserve and defend it. The former, however, is not the love of the common good as common good, but rather a love, which identifies the common good with that of the singular person.[139] Self-autonomous persons love the values, rights, and dignity that they attached to themselves and they could quickly identify those particular goods to the common good.

In short, the "whole" (society) can only be the whole if the parts (persons) are allowed to fully be what they are. A society cannot constitute persons who love their private good above common good or who identify with the private good. If a society only composed by self-autonomous persons defines themselves through the imposition of wills, then such society will end up as a chaotic society constituted of persons with arbitrary wills.

Aquinas shared something that is quite similar to Scalia in evaluating the law, which is the danger of personal volition. Aquinas believed that the end of the law is to foster the common good. But there is a delicate act to balance between the private good and the common good. A society cannot constitute persons, who love their private goods, but a man's will to a particular good is bound to the will of the common good of the whole. I will come back to revisit the issue of similarity between Aquinas and Scalia on subjectivity in judging and common good in a later part of this Article.

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138. THOMAS AQUINAS, QUAESTIONES DISPUTATAE DE VIRTUTIBUS: DISPUTED QUESTIONS ON THE VIRTUES, question 2, art. 2 (Ralph McInerny trans., 1999); *see also* THOMAS AQUINAS, QUAESTIONES DISPUTATAE DE VIRTUTIBUS, HTTPS://AQUINAS.CC/LA/LA/~QDEVIRT ("*Si autem homo, in quantum admittitur ad participandum bonum alicuius civitatis, et efficitur civis illius civitatis*; *competunt ei virtutes quaedam ad operandum ea quae sunt civium, et ad amandum bonum civitatis* . . . .").

139. *See* De Koninck, *supra* note 137, at 23.

III.2. Aquinas and Legal Interpretation

As mentioned earlier, in his last lecture, Justice Scalia became "uncomfortable" with Aquinas's statement that a judge may keep aside an unjust or poorly written law.[140] So let's revisit Aquinas's argument that a judge may keep aside the written law in the *Summa Theologiae*. We must examine this issue with Aquinas's two hypothetical cases. The first case is about the law, which requires that the gates of the city be kept closed to protect the city during a siege.[141] What happened if the enemies of the city are pursuing some defenders of the city who are outside the wall? Shall the gates be opened to save the lives of those soldiers? Aquinas argues that in that case, the gates ought to be opened contrary to the letter of the law, and this decision is compatible with the intention of the lawgiver to maintain the common benefit (*utilitas communis*) of the citizens. The second case is about the law that requires that a deposit be restored.[142] What happened if a madman were to put his sword in deposit, and demand its delivery while in a state of madness, or if a man were to seek the return of his sword to fight against his country? Aquinas believes that it is bad to follow the law in such cases; thus, it is better to set aside the written law and to follow the dictates of justice and the common good.

Aquinas concluded in those two cases based on the consideration that there is a limit to what lawmakers can legislate in the written law. The bottom line is that the lawmaker cannot lay down rules of law that would apply to every single case. Legislators, in framing laws, attend to what commonly happens, and there is likelihood that the law could be applied to some instances where it will be contrary to the common good, which the lawmaker must have the intention to protect. In the case of the law failing to cover specific issues, Aquinas suggests that a judge follow the principle of *epikeia* and give equity (*aequitas*). Aquinas further posits that legitimate judgments based on equity must always follow the intentions of the lawmaker.[143] In other words, a judge must give the equity that the lawmaker has in view.

Despite his insistence on a judgment of equity, Aquinas never suggests that a judge could deliver a judgment contrary to the written law (*contra legem*), but instead could judge *praetermissis verbis legis*—outside the written law.[144] Furthermore, Aquinas never argued for a judge to pass judgment on the written law itself or even declare the law is poorly made. Aquinas stated, "It would be passing judgment on a law to say that it was not well made; but to say that the letter of the law is not to be observed in some particular case is passing judgment

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140. *See* AQUINAS, *supra* note 6, at pt. II-II, question 60, art. 5.

141. *See id.* at pt. I-II. question 96, art. 6.

142. *See id.* at pt. II-II, question 120, art. 1.

143. *See id*. at pt. I-II, question 96, art. 6. Jean Porter interprets Aquinas theory as the duty for a judge, in any case, to recover the actual intent of the lawgiver. *See* JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 269–70 (2010).

144. *See* AQUINAS, *supra* note 6, at pt. II-II, question 120, art. 1.

not on the law, but on some particular contingency."[145] Furthermore, Aquinas insists that whenever a legislative intent is doubtful, a judge's responsibility is to "consult those in power," (*vel superiores consulere*).[146]

J. Budziszewski in his *Commentary on Thomas Aquinas's Treatise on Law* explains that Aquinas does not want his principle of equity to be used as a pretext for substituting one's own reasoning, so that the judicial officials may take matters in their own hands and set aside the law.[147] Budziszewski argues that Aquinas's principle of equity can only be applied in the case of emergencies under a maxim of *necessitas legem non habet* (necessity has no law), but in other cases, a judge must consult the authorities.[148]

Moreover, Budziszewski points out that Aquinas's advocacy of the principle of equity was a reply to the *sed contra* of St. Hilary of Poitiers in his work, *On the Trinity* (*De Trinitate*), "the meaning of someone's statement must be gathered from what caused him to make it. If so, then we should pay attention to the causes that move lawmakers to make laws, rather than to the words that they put in them."[149] Budziszewski then makes a bold statement that *Church of the Holy Trinity v. United States* is a very Hilarian example of a judge who looks beyond the words to the motivation of the lawmakers.[150] Apparently, Aquinas and Scalia shared a common conviction in fighting against the Hilarian approach and *Church of Holy Trinity*.

In sum, Aquinas's response to the second objection is not about the matter of unjust or poorly written law. Aquinas was dealing with a valid law that was passed by the legislator, and the law was not contrary to the principle of natural justice. The real issue is there is always a limit on what a legislator could legislate, and, therefore, a judge should apply the principle of equity whenever it is necessary. But Aquinas insisted that a judge must obey the written law and that he must never issue a judgment that is contrary to the law. Moreover, Aquinas would have shared a similar cause with Scalia in fighting against a judge who wants to take a matter into his own hands by second-guessing the intention of lawmakers regarding the problem that he was facing. Is that true that Aquinas's position on legal interpretation is truly similar to Justice Scalia's

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145. *Id.* at pt. II-II, question 120, art. 1 ("[*I*]*lle de lege iudicat qui dicit eam non esse bene positam. Qui vero dicit verba legis non esse in hoc casu servanda, non iudicat de lege, sed de aliquo particulari negotio quod occurrit*.").

146. *Id.* at pt. I-II, question 96, art. 6; *see also id.* at pt II-II, question 120, art. 1.

147. *See* J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S *TREATISE ON LAW* 414 (2014).

148. *See id.* The maxim originates in canon law; Budziszewski admits that the maxim is rather dangerously worded and at some points in history, it has been twisted by some people seeking pretexts for vile injustices such as targeting non-combatants in time of war. *Id.*

149. *Id.* at 410 (quoting AQUINAS, *supra* note 6); *see also* AQUINAS, *supra* note 6, at pt. I-II, question 96, art. 6 ("[*I*]*ntelligentia dictorum ex causis est assumenda dicendi, quia non sermoni res, sed rei debet esse sermo subiectus. Ergo magis est attendendum ad causam quae movit legislatorem, quam ad ipsa verba legis*.").

150. *See* BUDZISZEWSKI, *supra* note 147, at 410.

philosophy? To answer this question, I will turn to analyze Justice Scalia's methodology of interpretation in the following section.

IV. SCALIA'S "CONCURRING" WITH AQUINAS

IV.1. Scalia's Methodology of Interpretation

Scalia's methodology, known as textualism, directs judges to focus on the direct words of a statute or regulation. Nevertheless, Scalia made it clear that text should neither be construed strictly nor leniently, but instead, it should be construed reasonably; that is, the text should be accorded the ordinary meaning that would have made sense to the legislature that passed the law and to the people who would have been subjected to it.[151] At the core of Scalia's textualism is his belief that the Constitution is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[152] Scalia believed that the texts that make up the Constitution are definable and "they have meaning enough" for purposes of judicial decision-making.[153]

Scalia's version of originalism informed his textualism.[154] The core tenet of originalism requires judges "to ascertain and give effect to the original intentions of the framers and ratifiers of the Constitution."[155] Scalia, however, distinguishes his version of originalism with the old originalism by crafting the notion of "original meaning."[156] For Scalia, the "original meaning" approach begins and ends with the text of the Constitution.[157] In other words, it is the final text of the Constitution that counts instead of the actual intention of the drafters or ratifiers of the Constitution.

Scalia's methodology is left with the problem of how to determine the "original meaning" when the meaning of the words is not immediately clear. The original meaning, however, is different from the legislature's intent as

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151. *See* Scalia, *supra* note 13, at 23–24.

152. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

153. *Id.* at 856.

154. For general discussions of textualism and its relation to originalism, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

155. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991).

156. *See Nomination of Judge Antonin Scalia: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 108 (1986) ("I use the term 'original meaning' rather than 'original intent,' which is maybe something of a quibble, but I think that one is bound by the meaning of the Constitution to the society to which it was promulgated.").

157. *See id.* ("The starting point, in any case, is the text of the document and what it meant to the society that adopted it. I think it is part of my whole philosophy, which is essentially a democratic philosophy that even the Constitution is, at bottom, at bottom, a democratic document.").

evidenced by legislative history. As explained earlier, Scalia rejected the reliance on legislative history because "legislative intent" is something not likely to be found in the archives of legislative history. For Scalia, searching the original meaning meant that "it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day."[158] Thus, Scalia grounded his "original meaning" in the original understanding of the text at the time it was drafted or ratified instead of the statements or writings of the Framers.

The third pillar of Scalia's methodology is the clear rule principle, which was a criticism of the common law approach. For Scalia, the common law approach leaves judges free to decide the next case according to their preferences.[159] Scalia insisted on the adoption of a clear rule principle as the basis of the Court's decision, which not only constrains lower courts but the Supreme Court as well.[160] So the judges will commit themselves to the governing principle instead of indulging their preferences in the future cases. Here, Scalia asserted that he stood by Aristotle who once said, "personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable . . . to make an exact pronouncement."[161] In short, the clear rule principle, if adopted by the Court, would help to define the meaning of constitutional text or statutes for all related cases in the future.

Having explained Justice Scalia's judicial philosophy, this Article will move to address whether textualism is insufficient to correct an injustice or to improve the law if it overemphasizes the text's plain meaning. The question will then be raised as to whether textualism is capable of fostering the common good. To answer this question, I will analyze some key opinions of Justice Scalia in some prominent cases in the following section of this Article. For the sake of this Article's limits, I will only focus on two areas of jurisprudence—specifically the First and Fourth Amendments.

IV.2. The First Amendment Cases

Justice Scalia was an active participant in First Amendment issues (both freedom of religion and freedom of speech). His essential opinion in the area of religious liberty is in *Employment Division v. Smith*.[162] In *Smith*, Justice Scalia wrote the Court's majority opinion and ruled that the State of Oregon could deny benefits to Native Americans who have been dismissed from their

158. Scalia, *supra* note 152, at 856–57.

159. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

160. *See id.*

161. *Id.* at 1182 (quoting ARISTOTLE, THE POLITICS OF ARISTOTLE ch. XI, § 19, at 148 (Ernest Barker trans., Oxford University Press 1948)).

162. *See* Emp't Div. v. Smith, 494 U.S. 872 (1990).

jobs because of their religiously-inspired use of peyote, a hallucinogenic drug, in violation of the State's drug laws.[163] Scalia argued that the Free Exercise Clause only protects religion from attacks by law or government policy.[164] By contrast, Scalia considered that "[t]here [was] no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[165]

Furthermore, Scalia argued that "[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[166] In Scalia's view, the Court is not equipped to determine the place of a particular belief in a religion or the plausibility of a religious claim. Therefore, the Court must leave the decision in the hands of the political process through its elected officials.[167]

Justice Scalia's *Smith* opinion provoked the ire of religious-freedom advocates and almost unanimous criticism from Congress and the President in the form of the Religious Freedom Restoration Act (RFRA). On the surface, this decision looks like one of our nation's greatest tragedies, a scar upon the common good. But if we look carefully, in this decision, Scalia tried to find a balance between the private good and the common good. Basically, in *Smith*, Scalia argued that the use of peyote is a private good for Native Americans, but it does not automatically make it the common good that must be protected.

Scalia's position in *Smith* is quite similar to Aquinas's position regarding the need to find a balance between a private and common good, especially about worship. In the *Summa Contra Gentiles*, Aquinas argued that "[t]here is also a type of human good which does not lie in the community, but pertains to one[] person as such; whose profit is not confined to one but is available to many. Examples are the things to be believed and practiced by all and sundry, such as items of faith, of divine worship, and the like."[168] Here, Aquinas argued that even though religious faith and worship are private goods for many people, this does not automatically convert them into the goods of the community. Apparently, Aquinas's position is quite similar to Scalia's opinion in *Smith*, that a private good (the use of peyote for Native Americans) does not automatically become part of the common good that must be protected.

Apart from the "infamous" *Smith* opinion, Justice Scalia contributed to First Amendment cases through his dissents, concurring opinions, and majority opinions. Scalia's contribution in this area must be seen from the general

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163. *See id.* at 890.

164. *See id.* at 877.

165. *Id.* at 882.

166. *Id.* at 890.

167. *See id.*

168. SUMMA CONTRA GENTILES, Bourke, *supra* note 87, at bk. III, ch. 80; *see also* SUMMA CONTRA GENTILES, Shapcote, *supra* note 87, at bk. III, ch. 80 ("*Est etiam aliquod humanum bonum quod non in communitate consistit, sed ad unum aliquem pertinet secundum seipsum, non tamen uni soli utile, sed multis*: *sicut quae sunt ab omnibus et singulis credenda et observanda, sicut ea quae sunt fidei, et cultus divinus, et alia huiusmodi*.")

approach of the Rehnquist Court, which took religious-speech rights a step further and strengthened the given protections to religious speech. First, the Rehnquist Court characterized the exclusion of religious speech as not just the exclusion of religion as a category of speech, but rather as the exclusion of religious viewpoints on a variety of broader social issues.[169]

In *Lamb's Chapel v. Center Moriches Union Free School District*, the issue at hand was whether a school district could prohibit the Lamb's Chapel Evangelical church from using the school property after hours to show a series of family lectures on child-rearing.[170] The Court majority found that the school district violated freedom of speech by refusing Lamb's Chapel's request to show movies at school, and the showing of the films after school had ended did not constitute a violation of the Establishment Clause. Justice Scalia agreed with the Court's free speech conclusion, but also wrote a concurring opinion that relied on his textualism. In this opinion, he criticized the notion that the Constitution forbade the endorsement of religion in general. He wrote, "[t]hat was *not* the view of those who adopted the Constitution, who believed that the public virtues inculcated by religion are a public good."[171] Moreover, he referred to the *Northwest Territory Ordinance* that the Confederation Congress had adopted in 1787 which stipulates: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[172] Here Justice Scalia's textualism led him to balance between the role of religion as the common good and the private good, and he concluded that the value of religion is part of the common good.

A second case that illustrates how the Rehnquist Court treated the exclusion of religious speech as the exclusion of religious viewpoints on a variety of broader social issues is *Good News Club v. Milford Central School*.[173] In this case, a school district adopted regulations identifying several purposes for which local schools could be open to public use.[174] A Christian organization for young children, the Good News Club, sought permission to use the building after school.[175] The school refused permission for the Good News Club to use the building because of the religious nature of the group's meetings.[176] The Supreme Court held that excluding religious groups from a State-created public forum violated the Free Speech Clause and permitting the group to use the building on the same terms as other groups did not violate the Establishment

169. In the early 1990s, there were some primary religious speech cases: *see* Bd. of Educ. v. Mergens, 496 U.S. 226 (1990); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995).

170. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993).

171. *Id*. at 400.

172. *Id*. (emphasis omitted) (quoting AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO § 14, art. 3 (1787)).

173. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

174. *See id*. at 102.

175. *See id*. at 103.

176. *See id*.

Clause.[177] Justice Scalia issued a concurring opinion and argued that the school had opened its facilities for any use concerning the welfare of the community.[178] Keeping the Good News Club's objective to shape the moral and character development of children certainly "pertain[s] to the welfare of the community."[179] Here again, Justice Scalia tried to balance between the private good of the members of the club and the common good of the community. Scalia saw that the private good (the club) was based on biblical values and could be converted to the common good to shape moral character of children, even for those who do not know Jesus Christ as their savior.[180]

In summation, the Rehnquist Court, with Justice Scalia as its intellectual quarterback, viewed religion as a full co-participant in American public life, with the same opportunity to influence the direction of this country as any other set of values. Religion is not intended to be merely a private affair but has a public dimension to it. Moreover, as long as government treats religion equally and neutrally, religion is not a danger or threat to society. Nevertheless, in its *Smith* decision, the Court recognized that neutrality requires that religion must not be constitutionally released from the obligations and burdens that come with being a co-participant in American public life.

After the end of the Rehnquist Court's era,[181] Justice Scalia's role was much less central in the area of First Amendment cases. With the coming of Chief Justice John Roberts and Associate Justice Samuel Alito, there were some changes in the role of the intellectual quarterback for conservatives' views in the areas of religious freedom and freedom of speech. Both Chief Justice Roberts and Justice Alito played a more significant role in shaping the Court's First Amendment jurisprudence under the Roberts Court.[182]

IV.3. The Fourth Amendment Cases

As explained earlier, one of the pillars of Justice Scalia's methodology of interpretation is the clear rule principle of constitutional interpretation, which was a criticism of the common law approach. The Fourth Amendment cases are apt examples of how Scalia applied the clear rule principle. Scalia argued

177. *See id*. at 102.

178. *See id.* at 123 (Scalia, J., concurring).

179. *Id.*

180. *See id.* at 124 (Scalia, J., concurring).

181. It is important to note that in one of the last cases at the end of the Rehnquist Court, McCreary Cty. v. ACLU, 545 U.S. 844 (2005), Justice Scalia issued a dissent arguing that the Constitution does not require government to be neutral between religion and irreligion. Based on his textualism, he came to a conclusion that neutrality is not rooted in the history of the United States.

182. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 706 (2010) (Alito, J., dissenting); Snyder v. Phelps, 562 U.S. 443 (2011) (Chief Justice Roberts writing for the Court and Justice Alito, dissenting); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (Chief Justice Roberts writing for the Court); Burwell v. Hobby Lobby Stores, 573 U.S. 682 (2014) (Justice Alito writing for the Court).

that it is not always clear what constitutes a seizure under the Fourth Amendment's prohibition of unreasonable searches and seizures.[183] It was clear that an individual has been seized if he was forced into the back of a police car, but what if a suspect was running away from a police car and then he dropped a packet of illegal drugs, which the police recovered?[184] In such a case, Justice Scalia joined an opinion that held police conduct does not constitute a seizure until it has had "a restraining effect."[185] Justice Scalia argued that this rule would help the Court to define what constitute seizures in all future related cases. In Scalia's view, such clear rules will ensure that American citizens will receive equal and consistent treatment and not be subjected to ideological preferences of the judges or popular opinions on subject matters.

For the sake of this Article 's limits, I will focus on two significant cases of the Fourth Amendment in the Roberts Court. I selected these two cases because they involved the application of technology on law enforcement's efforts to fight crime. These cases posed some questions as to how to interpret a text when the law itself fails to cover specific issues, such as the use of technology in a search-and-seizure process. Moreover, these cases were decided under the Roberts Court, in which the Court issued a substantial number of Fourth Amendment decisions in its first decade.[186]

In *United States v. Jones*, the Court dealt with a case of a defendant (Antoine Jones) who was arrested for drug possession after police attached a tracker to his jeep without judicial approval.[187] Did the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violate his Fourth Amendment rights?[188]

Justice Scalia wrote the majority opinion and held that the government's installation of a GPS device on a target's vehicle and its use of that device to monitor the vehicle's movements constituted a "search."[189] Justice Scalia argued that there is no doubt that physical intrusion, like the installment of GPS on Jones's vehicle, would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[190] Justice Scalia then referred to *Entick v. Carrington*, a leading case in English law,[191] which has been considered as a necessary motivation for the adoption of the Fourth Amendment

183. *See* Scalia, *supra* note 159, at 1181.

184. *See id.* at 1184 (citing Michigan v. Chesternut, 486 U.S. 567 (1988)).

185. *Id.*

186. For a detailed analysis of the Roberts Court decision on the Fourth Amendment, see MICHAEL C. GIZZI & R. CRAIG CURTIS, THE FOURTH AMENDMENT IN FLUX: THE ROBERTS COURT, CRIME CONTROL, AND DIGITAL PRIVACY (2016).

187. *See* United States v. Jones, 565 U.S. 400, 402–03 (2012).

188. *See id.* at 402.

189. *See id.* at 404–05.

190. *See id.*

191. *See id.* at 405 (citing Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765)).

in the United States. Justice Scalia cited Lord Camden, who expressed in plain terms the significance of property rights in the search-and-seizure analysis.[192]

Moreover, Justice Scalia linked the understanding of the Fourth Amendment to common-law trespass doctrine. Here, Justice Scalia resurrected the trespass doctrine from *Olmstead v. United States*, in which the Court held that wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because "[t]here was no entry of the houses or offices of the defendants."[193] Justice Scalia argued that a vehicle is an "effect" as that term is used in the Fourth Amendment, and, therefore, the installment of GPS on Jones's vehicle constituted trespassing.[194]

In the case *Florida v. Jardines*, Justice Scalia continued to use the trespass doctrine to invalidate the use of a K9 dog sniff at the front step of a home.[195] The issue was whether police officers' taking of a drug-sniffing dog to the accused's porch, where dogs gave narcotics alert—after which officers obtained a warrant for search—constitutes a search under the Fourth Amendment.[196] Justice Scalia began his argument by reaffirming that at the very core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[197] He then addressed the question of whether the front porch is considered as "home." Justice Scalia relied on Blackstone's *Commentaries on the Laws of England*, which stated the "'curtilage or homestall,' for the 'house protects and privileges all its branches and appurtenants.'"[198] Justice Scalia concluded that the front porch is the classic exemplar of an area adjacent to the home.[199]

Justice Scalia argued that ordinary citizens might "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[200] Thus, a police officer without a warrant may approach a home and knock as any private citizen might do. But "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" is different because it requires a broader license than the one commonly given to the general public.[201] Without such a

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192. Lord Camden expressed in plain terms:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law.

Entick, 95 Eng. Rep. at 817.

193. Olmstead v. United States, 277 U.S. 438, 464 (1922).

194. *See Jones*, 565 U.S. at 404.

195. *See* Florida v. Jardines, 569 U.S. 1 (2013).

196. *See id.* at 3–4.

197. *Id.* at 6 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

198. *Id.* at 6–7 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223, 225 (1769)).

199. *See id.* at 7.

200. *Id.* at 8.

201. *Id*. at 9.

permit, the police officers were conducting an unlawful search in violation of the Fourth Amendment.

In sum, in these two cases, Justice Scalia used his judicial philosophy to interpret the missing piece of the puzzle in the Fourth Amendment, especially on the application of technology in search and seizure. More importantly, Scalia used his textualism (informed by originalism) to correct injustice for the defendants. On a surface-level glance, one might presume that Scalia was simply a tough-on-crime conservative, but he placed his originalist interpretative philosophy ahead of his personal ideological preferences. So, far from what his critics imagined, Justice Scalia showed that the textualism could correct injustice and foster the common good as the end of the law.

CONCLUSION

St. Thomas Aquinas was not a lawyer, but rather a philosopher-theologian, and his *Treatise on Law* was addressed to theological students instead of lawyers. By contrast, Justice Scalia was a modern American judge who saw legal issues purely from a legal standpoint. Each of them had two distinct approaches to law, which resulted in two different visions of law. Although their positions are not identical, nevertheless, they share something that is quite similar in evaluating the law. First, they both observe the limits of judicial authority. Aquinas lived in a time of mixed government, which did not operate under a modern conception of a separation of powers. Nevertheless, Aquinas believed that a judge must obey the laws made by human legislators. Justice Scalia operated under a strict separation of powers, and he held that a judge must abide by the written law, in which often he deferred to the elected officials to make key decisions instead of the Court.

Secondly, Aquinas and Scalia shared a similar vision on what constituted a good judge. Aquinas saw a judge as a virtuous person who must avoid sentimentality and personal opinion in judging. A good judge in Aquinas's view is a magnanimous man who does not seek honor and glory. Justice Scalia's originalist judge is one who seeks to apply the law as it was passed by the legislator, without any reference to his personal beliefs. Rather than imposing their versions of "justice" and "good," these judges follow the rule of law as the rule of democratically-elected legislators. Scalia envisioned an excellent judge as a humble person who knows his proper role within the legal system and has great respect, but not subservience, for the sources of authority that constrain his behavior. In sum, Aquinas's vision of a good judge as a humble servant is quite similar to Scalia's originalist judge who understands his role in the constitutional system of government. Scalia's judge possesses the humility to know that his role is essential but not powerful, at least when rightly exercised.

Thirdly, there is also a point of contact between Justice Scalia and Aquinas on the issue of the common good. Aquinas believed that the end of the law is to foster the common good. But there is a delicate act to balance between the private good and the common good. A society cannot constitute of persons who love their private goods exclusively, but a man's will to particular good is bound

to the will of the common good of the whole. Scalia also believed that there is always a need for balancing between the private good and the common good. His jurisprudence in the aforementioned First Amendment cases was the exemplar of his effort to find a balance between the private good and the common good.

Through the promotion of the common good, Aquinas envisioned that human law would secure justice and peace among citizens. Scalia with his textualism (informed by originalism) tried to promote justice, in which American citizens would receive equal treatment instead of being subjected to judge's ideology or public pressure. His jurisprudence in the Fourth Amendment cases showed that the textualism could correct injustice and promote the common good.

Finally, Justice Scalia was critical towards the Angelic Doctor in his last lecture, arguably because of his concern about the danger of subjectivity. In his lifetime, Scalia was the opponent of aggressive judges who subjectively "discover" rights and refuse to be bound by precedents that are seemingly out-of-date. What is the antidote to aggressive judges who merely invoke their subjective volitional interpretation? Despite his critical approach towards Aquinas, presumably, Scalia would concur with Aquinas on the importance of the virtue of prudence as the antidote to a subjective volitional interpretation in judging.

In the *Prima Secundae* of his *Summa Theologiae*, Aquinas presented his general theory of law. He defined law as rules or measures of acts whereby individuals are induced to act or are restrained from acting. How do judges come to discover what it is that will constitute the restraint from acting? It is through prudence. Aquinas exhorted, "Prudence is a virtue most necessary for human life. For a good life consists in good deeds."[202] Aquinas further explained:

> [I]n order to do good deeds, it matters not only what a man does, but also how he does it; to wit, that he do it from right choice and not merely from impulse or passion. And, since choice is about things in reference to the end, rectitude of choice requires two things: namely, the due end, and something suitably ordained to that due end. . . .And to that which is suitably ordained to the due end man needs to be rightly disposed by a habit in his reason, because counsel and choice, which are about things ordained to the end, are acts of the reason. Consequently an intellectual virtue is needed in the reason, to perfect the reason, and make it suitably affected towards things ordained to the end; and this virtue is prudence. Consequently, prudence is a virtue necessary to lead a good life.[203]

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202. AQUINAS, *supra* note 6, at pt. I-II, question 57, art. 5 ("[*D*]*icendum quod prudentia est virtus maxime necessaria ad vitam humanam*. *Bene enim vivere consistit in bene operari*.").

203. *Id.* at pt I-II, question 57, art. 5 ("*Ad hoc autem quod aliquis bene operetur, non solum requiritur quid faciat, sed etiam quomodo faciat*; *ut scilicet secundum electionem rectam operetur, non solum ex impetu aut passione*. *Cum autem electio sit eorum quae sunt ad finem, rectitudo*

Thus, prudence enables us to act in the right way, for the right reasons, and at the right time. It seeks to discern what is to be done now or in the future by knowledge of the present situation and experience. Prudence gives one a sense of moral perspective.

Russell Hittinger reaffirmed Aquinas's stance by arguing that before a judge can render a judgment, he must exercise twofold obedience; first, he must obey the natural law and second, he must abide by the law made by the human legislator.[204] Here, Hittinger sees that a judge is a subordinate of the lawmaker who needs political prudence (*prudential politica*); the free and intelligent disposition, which will direct him to the common good.[205] The bottom line is that a judge needs the virtue of prudence to exercise practical reasonableness in determining how law could aid the common good.

Based on the virtue of prudence, one can find the antithesis of subjective judges in Aquinas's work. Prudential judges are those who understand their role within the legal system and respect the sources of authority that constrain and guide their behavior. The virtue of prudence will enable judges to avoid sentimentality, personal preference, and opinion, and to be unafraid of issuing unpopular decision to serve the common good.

Justice Scalia closed his last lecture with a quote from Grant Gilmore that, "[i]n Heaven, there will be no law, and the lion will lie down with the lamb. . . . In Hell, there will be nothing but law, and due process will be meticulously observed."[206] Having quoted Gilmore, Justice Scalia finally stated, "[m]eantime, we live in an imperfect world that is best governed by the text of laws."[207] A few weeks after making that statement, Justice Scalia joined St. Thomas Aquinas in the beatific vision. Even if he continued to disagree with the Angelic Doctor, they could now have a continuing discussion on their dispute in front of the entire heavenly court.

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electionis duo requirit, scilicet debitum finem; et id quod convenienter ordinatur ad debitum finem. Ad debitum autem finem homo convenienter disponitur per virtutem quae perficit partem animae appetitivam, cuius obiectum est bonum et finis. Ad id autem quod convenienter in finem debitum ordinatur, oportet quod homo directe disponatur per habitum rationis, quia consiliari et eligere, quae sunt eorum quae sunt ad finem, sunt actus rationis. Et ideo necesse est in ratione esse aliquam virtutem intellectualem, per quam perficiatur ratio ad hoc quod convenienter se habeat ad ea quae sunt ad finem. Et haec virtus est prudentia. Unde prudentia est virtus necessaria ad bene vivendum.").

204. *See* RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 100–01 (2003).

205. *See* AQUINAS, *supra* note 6, at pt. II-II, question 50, art. 2. ("[*D*]*icendum quod per prudentiam communiter dictam regit homo seipsum in ordine ad proprium bonum, per politicam autem de qua loquimur, in ordine ad bonum commune*.").

206. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

207. Scalia, *supra* note 1, at 249.