

***WE THE PEOPLE*—A DISCOURSE ON NATURAL LAW THEORY, CONSTITUTIONAL INTERPRETATION, AND MORAL REASONING**

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INTRODUCTION

*We the people.*¹ The first words of the U.S. Constitution reveal an important element of the American government: Power derives from the people. Society is governed both by man-created law and by the principles of human nature. Natural law recognizes that people are at the heart of society and, therefore, so are the principles ingrained in human nature. Natural law is essential to understanding America's founding, Constitution, and modern-day legal system. Natural law has greatly influenced the moral and philosophical foundation of the Constitution, in turn guiding judicial interpretation and legal discourse.

Understanding natural law theory and its application is important to constitutional interpretation because it provides a moral framework that guides legal reasoning beyond the text of the Constitution itself.² Fundamental rights³ could not be understood without recognizing the moral foundation of the law that they are ingrained into.⁴ Without this recognition, constitutional jurisprudence risks becoming lost in the whims of the current political atmosphere rather than tied to an analytic framework. Natural law theory helps bridge the gaps where originalism, textualism, and positivism become ambiguous, ensuring the Constitution is interpreted to uphold morality and the common good.

The application of natural law is often criticized for being overly conservative, anti-positivist, or too closely aligned with originalism; however, these concerns overlook the historical significance of natural law and its influence on the Constitution. This paper aims to challenge the negative reputation of natural law and encourage a deeper appreciation for it in the context of constitutional jurisprudence. Part I provides the historical background of natural law theory, clarifies how it is defined, and addresses common misconceptions to provide a conceptual framework for the analysis that follows. Next, Part II explores the influence of natural law principles on the drafting and foundation of the Constitution. Lastly, Part III analyzes due process

1. U.S. CONST. pmbl.

2. Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 877 (2018).

3. Referring to life, liberty, and property.

4. Legarre, *supra* note 2, at 897.

jurisprudence, focusing on the Fourteenth Amendment protections of life and liberty within the context of natural law reasoning. “[T]o interpret the Constitution faithfully, a judge need not believe personally in the natural law But . . . a discerning constitutional thinker must appreciate the extent to which the [C]onstitutio[n] . . . [i]s an effort to codify [] natural law”⁵

I. CORE PRINCIPLES OF NATURAL LAW THEORY

In its most basic form, natural law is a set of fundamental truths that identifies human needs, moral decision-making, and the connection between the two.⁶ Natural law is consistent among individuals, places, and cultures. Its universality stems from the belief that all human beings, by virtue of their rational nature, can discern basic moral truths. Natural law is man’s participation in eternal law⁷ and a guide for rational decision-making, “known to man by reason, and imposed upon man by his nature.”⁸ For example, the primary precept of natural law is to “do good and avoid evil,” a principle inherently known to all rational beings.⁹ As individuals develop, their understanding of good and evil is shaped by education and experience.¹⁰ Secondary precepts, such as prohibitions against murder, logically follow from the primary precept through reason.¹¹ Natural law is a form of moral cognitivism: The ability of human reason to understand what is right and what is wrong.¹² However, the contours and methods of natural law have evolved, shaped by historical context and philosophical perspective.

A. “Old” Natural Law Theory

In order to reach a better understanding of natural law and its influence on the modern legal system, it is important to delve into its history and origins. The foundational principles and historical roots provide insight into which versions of natural law shape legal thought and constitutional interpretation. Because it is derived from eternal law, temporal universality is one of classic natural law’s key components, making it difficult to ascertain its origin.¹³ As Antigone asserts

5. Hon. Diarmuid F. O’Sannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513, 1527–28 (2011) (emphasis omitted).

6. John M. Finnis, *The “Natural Law Tradition”*, 36 *J. LEGAL EDUC.* 492, 492 (1986) (defining “‘natural law’ (in the context of ethics, politics, law and jurisprudence) [as a] set of true propositions identifying basic human goods, general requirements of right choosing, and the specific moral norms deducible from those requirements as they bear on particular basic goods”).

7. In *SUMMA THEOLOGÆ*, Aquinas defines eternal law as God’s purpose and plan for the universe. THOMAS AQUINAS, *SUMMA THEOLOGÆ* I-II, q. 90–108 (Fathers of the English Dominican Province trans., 2006).

8. John E. McAniff, *The Natural Law—Its Nature, Scope and Sanction*, 22 *FORDHAM L. REV.* 246, 247 (1953).

9. *Id.* at 248.

10. *Id.*

11. *Id.*

12. Legarre, *supra* note 2, at 886.

13. *Id.* at 885.

in Sophocles' play bearing her name, natural laws "live for all time, And no one knows when they came into the light."¹⁴

The "beginnings" of natural law theory can be traced to ancient Greek philosophy and the works of Plato and Aristotle. In this era, philosophers began to develop early versions of natural law theory and explore the idea that moral principles exist independently of human creation.¹⁵ Plato, in works like *The Republic*, interpreted morality as being grounded in objective truths, connected to a higher order through reason.¹⁶ Plato advanced the natural law principle of universal applicability and consistency across individuals.¹⁷ Aristotle also described natural law as universal, unchanging principles that are inherent to human nature.¹⁸ While human laws vary by society and era, Aristotle believed natural law remains constant. To further illustrate this point, he compares natural law to the universal laws of physics: "Fire burns in exactly the same way in Persia as in other countries."¹⁹ His work in *Nicomachean Ethics* and *Politics* furthers the idea that natural law is rooted in reason and inherent in the order of society, making it equally important in a legal system.²⁰

Ancient Romans, much like the Greeks, embraced the principles of uniformity and universality in natural law. Cicero asserted that "[t]rue law is right reason in agreement with nature . . . [and] will not be different law[] at Rome and at Athens . . . but one eternal and unchangeable law for . . . all nations."²¹ Cicero proposed that human laws are just only when they conform to natural law, a concept that heavily influenced subsequent natural law theory.²²

With the rise of Christianity in the thirteenth century, natural law theory became important to theology, particularly through the writings of St. Augustine. Augustine also viewed natural law as a rational being's participation in the eternal law. He believed that this law is inscribed upon the rational soul, enabling individuals to discern right from wrong through conscience and divine revelation.²³ Violating natural law, in his view, is not just a transgression against divine order but a betrayal of one's own nature. This internalization of law underscores the belief that moral understanding is accessible to all rational beings, regardless of their exposure to revealed law.

14. SOPHOCLES, *ANTIGONE* 19 (Paul Woodruff trans., 1984).

15. Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994).

16. Hans Kelsen, *Plato and the Doctrine of Natural Law*, 14 VAND. L. REV. 23, 26 (1960).

17. *Id.* at 46.

18. Max Salomon Shellens, *Aristotle on Natural Law*, 40 NAT. L.F. 72, 78 (1959) (citing ARISTOTLE, *RHETORIC*, I.13).

19. *Id.* at 82.

20. *See id.*

21. CICERO, *DE REPUBLICA* III 33 (C.W. Keyes trans., Attalus ed. 1928).

22. *See* Thomas G. West, *Cicero's Teaching on Natural Law*, 55 ST. JOHNS REV. 74, 77 (1981).

23. Anton-Hermann Chroust, *St. Augustine's Philosophical Theory of Law*, 25 NOTRE DAME L. REV. 285, 301 (1950).

Comparatively, St. Thomas Aquinas had a more complex approach to his interpretation of natural law theory. In *Summa Theologiae*, Aquinas distinguished between eternal law, natural law, and human law, asserting that morality is human reason through participation in a divine order.²⁴ Aquinas asserted that any “law” contradicting natural law is no law at all, emphasizing that moral and legal obligations are objective truths accessible through human reason.²⁵ Although Aquinas was influenced by religion, he believed natural law was accessible to all rational beings, regardless of faith.²⁶ This made Aquinas’ version of natural law particularly influential in shaping modern natural law theory.

During the Enlightenment, natural law theory underwent reinterpretation. The Enlightenment philosophers sought to secularize natural law. This version of natural law was the most influential on America’s founding because of its temporal relativity and social impact. For one, Hugo Grotius grounded natural law in human reason and argued that it would retain its validity even if God did not exist.²⁷ Additionally, in his work, *Leviathan*, Thomas Hobbes introduced the concept of the social contract, contending civil society is the escape from pre-political chaos and conflict.²⁸ Forming a government creates security and order, but individuals must also surrender certain freedoms. This accentuates the tension between natural law and positivism; laws can exist even if they are immoral, but the two theories are continually at odds.

Notably during this period, John Locke characterized the idea of unalienable natural rights: life, liberty, and property. Locke believed individuals are born with these rights and government is designed to protect them.²⁹ His influence is evident in the Declaration of Independence’s assertion that “all men are created equal” and endowed with “certain unalienable Rights.”³⁰

Although the two concepts are interconnected, natural rights and natural law are not synonymous.³¹ Natural law does not rely on the idea of a state of nature; it is based on moral reasoning about human nature and universal principles of justice.³² Natural law serves as a broader moral framework that guides legal and ethical reasoning.³³

24. See Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 561–62. (1989) (citing THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, q. 91.1)

25. *Id.* at 564.

26. *Id.* at 558–59.

27. See Mark Cartwright, *Natural Rights & the Enlightenment*, WORLD HISTORY ENCYCLOPEDIA (Feb. 13, 2024), <https://www.worldhistory.org/article/2375/natural-rights—the-enlightenment/> [https://perma.cc/A34M-SDGP].

28. See *id.*; see generally THOMAS HOBBS, LEVIATHAN (Noel Malcolm, ed., 2024) (arguing mankind forms the social contract by ceding natural liberties in exchange for protection against the harms of a lonesome, nasty, brutish, and short life).

29. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 16 (Lester DeKoster, ed., 1978).

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

31. Legarre, *supra* note 2, at 895.

32. *Id.*

33. *Id.*

The evolution of classical natural law theory, from ancient philosophy to Aquinas and the Enlightenment, shapes modern natural law theories and today's legal system. The Constitution was drafted during a time when thinkers like Hobbes, Locke, and Grotius were shaping legal and political discussions, so principles of natural law theory are embedded in the American legal framework. These historical roots give background to the moral structure of the law and adapt classic principles to modern contexts in the wave of "new" natural law thinking.

B. "New" Natural Law Theory

In the mid-twentieth century, natural law began adapting in response to modern philosophical, ethical, and legal challenges. This movement, known as "new" natural law theory, sought to modernize classical interpretations while preserving its core principles. In the 1960s, Germain Grisez published a reinterpretation of Aquinas' natural law theory, where he argued that morality was grounded in basic, self-evident goods, which human beings recognize through reason and freely choose to pursue.³⁴ Grisez's work marked a shift from the traditional religious foundation of natural law to one that focused on practical reason and autonomy in moral decision making. In the 1980s, John Finnis built upon this framework and further removed natural law theory (and Aquinas' work) from theology.³⁵ Finnis argued there are seven basic goods³⁶ that provide the basis for moral decision-making; moral laws are derived from the pursuit of these goods rather than fulfilling a predetermined or divine calling.³⁷

Other scholars further applied natural law to contemporary ethical, political, and legal issues. Joseph Boyle refined natural law theory by finding that moral norms derived from the basic goods could be formulated as exceptionless moral absolutes, meaning some actions, like intentional killing of innocent human beings, are always morally wrong.³⁸ Robert P. George further applied natural law to constitutional law and personal liberty. In his work, he argues the objective moral order is a necessary foundation for the legal and political system.³⁹ George acknowledges the influence of natural law on the Founding Fathers and the complexity of originalist constitutional interpretation.⁴⁰ "New" natural law theory presents a rational, non-theological

34. See Germain G. Grisez, *First Principle of Practical Reason: A Commentary on the Summa Theologiae, I-2, Question 94, Article 2*, 10 NAT. L.F. 168 (1965).

35. See Sean Coyle, *Natural Law Theory, "New" and Old*, 68 AM. J. JURIS. 33, 34–35 (2023).

36. Life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 85–90 (1980).

37. Coyle, *supra* note 35, at 50.

38. See, e.g., Germain Grisez, Joseph Boyle, & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99 (1987).

39. See Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2270 (2001).

40. *Id.* at 2282.

foundation for morality and its influence on positive law, unlike classical natural law theory, which seemed to rely on religion or metaphysics.

C. Common Misconceptions About Natural Law Theory

While natural law theory has evolved over time, there are fundamental traits that remain consistent across philosophers and eras.⁴¹ It is important to the following conversation on jurisprudence to define what natural law theory is *not*.

Natural Law Is Not a Written Code.

First, natural law exists independently of legislation. It is not a set of statutes or rules written by a legislature, but a moral order discernible through reason. Natural law does not derive its authority from being written down. Its legitimacy precedes human legal systems. Natural law exists as part of a rational order.

Natural Law Violations Are Not Punished by a Political Body.

Natural law does not rely on punishment by a political body for its enforcement, unlike human law, which imposes sanctions like execution for murder.⁴² “[A]s argued by Sophocles, Cicero, and countless others in the classical tradition, conscience—the reproach experienced internally—can prove a significant sanction for the trespasser of natural law obligations.”⁴³ The power and authority of natural law is derived, in part, from its ability to shape the moral conscience of individuals and evoke remorse for immoral wrongdoings.⁴⁴ These “punishments” are then strengthened by the codification of natural law into positive law. “Even though murder and perjury are wrong in themselves and are forbidden by the Natural Law, we need the added and specific sanctions supplied by human positive laws” to promote enforcement and ensure accountability.⁴⁵

The conscience can provide a range of “punishments” to the violator of natural law. In a religious context, such a person might be subject to karmic consequences, divine judgment, or eternal condemnation.⁴⁶ Additionally, the transgressor might also experience inner remorse of conscience or a disruption in the relationship with oneself.⁴⁷ Lastly, in harmony with the works of Aristotle and Aquinas, a wrongdoer may alienate himself from his natural end, suffering

41. See, Legarre, *supra* note 2, at 885–92 (discussing what is consistent in natural law across time).

42. Scott J. Roniger, *Is there a Punishment for Violating the Natural Law?*, 94 AM. CATH. PHIL. Q. 273, 289 (2020).

43. Legarre, *supra* note 2, at 891 (internal citations omitted).

44. Roniger, *supra* note 42, at 289.

45. McAniff, *supra* note 8, at 253.

46. Roniger, *supra* note 42, at 277.

47. *Id.* (“simply being a vicious person, or being the kind of human agent who performs malevolent deeds, is itself the punishment”).

the deprivation of a fundamental good and an inability to live in harmony with others.⁴⁸ Thus, in contrast to positive law, “(1) the remorse of conscience, (2) the inner dissolution caused by disordered appetites, and (3) the inability to be a friend to others work in concert as punishments proper to the natural law.”⁴⁹

Natural Law Is Not Conservative Ideology.

Natural law is not inherently conservative. Natural law theory is often mistakenly equated with conservatism, particularly because many of its proponents advocate for traditionalist or originalist principles.⁵⁰ However, it does not derive its validity from political ideology but rather from its rational foundation. Finnis is a strong advocate for political neutrality, maintaining that a core feature of natural law theory is its ability to transcend conventional political labels.⁵¹ Natural law theory is not bound to any political philosophy; it is simply a framework for evaluating the law. “To employ natural law [does] not brand a lawyer as conservative; it merely brand[s] him as a lawyer.”⁵²

Natural Law Is Not Religion.

Despite an overlap in early natural law theory and religion, natural law does not require a subscription to faith or any particular faith.⁵³ Natural law and morality are not exclusive to Catholicism or any other religion; while religion is grounded in faith, natural law relies on reason.⁵⁴ Natural law is accessible to all through rational reasoning, regardless of religious belief. The shift that sparked the emergence of a “new” natural law theory moves natural law toward a moral decision-making framework grounded in reason rather than a metaphysical order.

Natural Law Theory Is Not Any Other Theory of Legal Interpretation.

Finally, natural law should not be confused with originalism or any other specific theory of statutory or constitutional interpretation. While natural law theory can inform legal interpretation, it is not itself a method of interpreting texts. For example, natural law might support an originalist view, but only when that document has a natural law influence. Natural law is a moral framework used to evaluate laws, which overlaps with other theories.

48. *Id.* at 295 (“A political animal’s social interactions are naturally harmed by vicious conduct, and, if these socially destructive actions are a result of the dictates of his conscience, then this fact can motivate him to reconsider how his conscience is formed.”).

49. *Id.* at 301.

50. Note, *Justice Breyer: The Court’s Last Natural Lawyer?*, 136 HARV. L. REV. 1368, 1369 (2023).

51. See John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687, 687 (1994).

52. See, Note *supra* note 50, at 1371 (quoting STUART BANNER, *THE DECLINE OF NATURAL LAW* 3 (2021)).

53. Legarre, *supra* note 2, at 881–83.

54. FINNIS, *supra* note 36, at 88.

D. Natural Law vs. Legal Positivism

Natural law is often misconstrued as directly conflicting with positivism or positive law.⁵⁵ Unlike natural law, which is based on moral principles and universal reason, positive law consists of formally enacted statutes and regulations that are legally binding on society. However, the two must be considered in tandem, not independently. “Natural law . . . is present in positive laws—a claim not altogether different . . . from an unobjectionable Supreme Court dictum included in an otherwise objectionable decision: ‘The law[] . . . is constantly based on notions of morality.’”⁵⁶

The idea that positive law “includes natural law” originates in the works of Aquinas, Aristotle, and Cicero.⁵⁷ Even in statutes and other positive laws, “some words and concepts . . . are morally charged, such as ‘equal,’ ‘cruel,’ ‘freedom,’ ‘right,’ and so on.”⁵⁸ Even when these concepts are encoded in positive law, “their content or part thereof remains ‘natural,’ that is, moral.”⁵⁹ Natural law scholars argue that “just and good positive law, including constitutional law, is always in some sense derived from the . . . natural law.”⁶⁰ The majority opinion in *Bostock v. Clayton County*⁶¹ makes apparent the inseparability of positive and natural law in constitutional interpretation.⁶² “If you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism . . . don’t mean much at all.”⁶³ This suggests that formal interpretive methods, when stretched to accommodate social norms, may lose their grounding in objective legal meaning. In such cases, the line between positive law and moral reasoning becomes blurred. When strict reliance on positive law leads to an outcome that undermines justice, equality, or morality, the need for an approach that incorporates moral reasoning to guide its application arises. In this way, the intersection of natural law and positivism is not one of strict opposition.

This interplay becomes more evident in the constitutional jurisprudence surrounding abortion rights. In *Dobbs v. Jackson Women’s Health*

55. “Positive law typically consists of enacted law—the codes, statutes, and regulations that are applied and enforced in the courts. . . . [T]he phrase *positive law* literally means law established by human authority.” *Positive law*, BLACK’S LAW DICTIONARY (12th ed. 2024).

56. Legarre, *supra* note 2, at 893 (alteration in original) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

57. FINNIS, *supra* note 36, at 294 (emphasis in original).

58. Legarre, *supra* note 2, at 899.

59. *Id.*

60. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 236 (Oxford U. Press ed. 1999).

61. 590 U.S. 644 (140 S. Ct. 1731) (2020).

62. See Christopher Goffos, *The Natural Law Thirty Years Later: Clarence Thomas’s Constitutionalism*, THE PUBLIC DISCOURSE (Nov. 7, 2021), <https://www.thepublicdiscourse.com/2021/11/78854/> [https://perma.cc/3CJK-EX2A].

63. *Id.* (quoting Sen. Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUBLIC DISCOURSE (June 16, 2020)).

Organization,⁶⁴ the Court reconsidered *Roe v. Wade*⁶⁵ and *Planned Parenthood v. Casey*.⁶⁶ In each of these decisions, the Court balanced positivism, by analyzing the text and plain meaning of the law, with moral reasoning to address what constitutes a fundamental right. However, natural law scholarship warns against overreliance on positivism. A positivist approach to abortion creates a slippery slope for laws regulating selective reproduction and assisted suicide, raising concerns where the denial of personhood in one context extends to others.

The dominant legal philosophy practically invites these results. The denial of personhood . . . explicit in *Roe* . . . with respect to the unborn child, is implicit in the allowance of starvation and dehydration of the incompetent and the predictable legitimization of active euthanasia of some target classes. If your life is subject to termination at the discretion of another, you are, to that extent, a non-person.⁶⁷

Legal positivism alone, as Charles Rice argues, “is unacceptable as a jurisprudential framework because it provides no inherent limits on the power of the state and no basis for determining what is just. In contrast, the . . . natural law provides a jurisprudential framework that both guides and limits . . . civil law.”⁶⁸ The judiciary must strike a careful balance between a deference to positive law and the morality of natural law. This “balance” requires that judges remain faithful to the letter of the law while not ignoring its moral context. “Judges [do not] have the freestanding authority to enforce the natural law,” but this does not mean natural law should be absent from legal framework and judicial reasoning.⁶⁹

II. FORMATION OF THE CONSTITUTION

“[N]atural law is woven into the fabric of the Constitution” because it played an essential role at the founding of the United States.⁷⁰ The Declaration of Independence explicitly reflects this influence: “‘All men are created equal’ . . . ‘They are endowed by their Creator with certain unalienable Rights.’ That’s natural law in a nutshell: if all men are created equal, then no man can own another man, and we can only be governed by our consent.”⁷¹

“We hold these Truths to be self-evident” further highlights that moral reasoning, accessible to all, is the foundation of the American legal system.⁷² The invocation of self-evident truths reflects natural law theory, which holds

64. 597 U.S. 215 (142 S. Ct. 2228) (2022).

65. 410 U.S. 113 (1973).

66. 505 U.S. 833 (1992).

67. Rice, *supra* note 24, at 550.

68. *Id.* at 539.

69. O’Sannlain, *supra* note 5, at 1522.

70. *Id.* at 1515.

71. CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 289 (2007) (*citing* THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

72. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

that there is a “higher law” of right and wrong from which to derive positive law and against which to judge that law.⁷³ The Declaration of Independence established this abstract truth of morality, applicable to all men and all times, that all men are created equal.⁷⁴ And “if the Constitution embodies principles of natural law . . . that . . . entails that judges should interpret and enforce those principles.”⁷⁵

Post-Declaration, during the Constitutional Convention, the Framers strived to create a system that would balance the needs of a new country with moral guidelines. In the Federalist Papers, Alexander Hamilton posits, “there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.”⁷⁶ These first principles “contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.”⁷⁷ The Framers aimed to create a document that would be an expression of natural law; James Madison described it as the product of “the transcendent law of nature.”⁷⁸

Natural law, as a key principle of the new American government, was upheld by Congress, the President, and the Supreme Court alike.⁷⁹ “Many such constitutional enactments [including the Bill of Rights] consist of rules and principles closely corresponding to natural law requirements.”⁸⁰ Throughout the first century of U.S. history, the Court was to decide cases by exercising the “understanding which Providence has bestowed upon them.”⁸¹ Law was based on “the preexisting and higher authority of the laws of nature,”⁸² and the Court was to rely on “eternal justice . . . to guide the conscience of the Court.”⁸³ The judiciary could not separate the Constitution from natural law, because its creation is so heavily influenced by natural law theory. “The Constitution . . . uses morally laden concepts that inexorably demand a moral interpretation by anyone, including judges”⁸⁴

73. See, e.g., *Letter from Abraham Lincoln to Henry L. Pierce* (Apr. 6, 1859).

74. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see also LOCKE, *supra* note 29 (“[A]ll mankind . . . being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions”).

75. James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285, 2294 (2001).

76. THE FEDERALIST NO. 31 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

77. *Id.*

78. THE FEDERALIST NO. 43 (James Madison) (Jacob E. Cooke ed., 1961).

79. Earl Taylor, Jr., *Natural Law: The Basis of Moral Government*, NAT'L CTR. CONST. STUD. (Apr. 19, 2023), <https://nccs.net/blogs/weekly-constitution/natural-law-the-basis-of-moral-government?srsltid=AfmBOooumOcZj-mpsA-QxYScXHBCmDAjs2VzKYQpCdrEeUME1DTWB-va> [https://perma.cc/8GWH-6DTV].

80. Legarre, *supra* note 2, at 895.

81. *Gibbons v. Ogden*, 22 U.S. 1, 186 (1824).

82. *West River Bridge Co. v. Joseph Dix*, 47 U.S. 507, 532 (1848).

83. *Rhode Island v. Massachusetts*, 39 U.S. 210, 225 (1840).

84. Legarre, *supra* note 2, at 899.

The judicial enforceability of natural law is furthered by the exchange between Justices Samuel Chase and James Iredell in *Calder v. Bull*.⁸⁵ In writing for the majority, Justice Chase holds that an act that goes against natural law is unconstitutional because it exceeds the scope of legislative authority.⁸⁶ “The obligation of a law in governments established on . . . republican principles, must be determined by the nature of the power, on which it is founded.”⁸⁷ By contrast, Justice Iredell argues the court does not have the authority to strike down a law just because it conflicts with natural law.⁸⁸ The line between moral reasoning and legal authority, as exemplified by the disagreement between Justices Chase and Iredell, remains blurred, illustrating the tension between natural law and legal positivism, a foundational debate in American constitutional jurisprudence.

Natural law remains prominent as a basis for constitutional interpretation. “[B]y 1868, the year the Fourteenth Amendment was ratified,” a majority of the states abided by “‘Lockean Natural Rights Guarantees,’ provisions protecting life, liberty, and property and guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.”⁸⁹ The application of natural law principles to the Constitution evolved significantly with the ratification of the Fourteenth Amendment, which expanded constitutional protections to safeguard life, liberty, and due process against state encroachment.⁹⁰ While the Framers’ reliance on natural law shaped the Constitution’s structure, the Fourteenth Amendment sparked debate regarding the relationship between morality and legal interpretation, particularly in the realm of substantive due process.⁹¹ “When we debate whether there are rights that the state cannot infringe, we are engaging in natural law reasoning”⁹² This influence is evident in the Fourteenth Amendment, which extends life, liberty, and property to all citizens, setting the stage for the Court’s analysis in due process cases where societal pressure is high and questions of morality are at stake.

III. JURISPRUDENCE AND THE JUDICIARY

Amid current ethic and legal debates, scholars and judges are using natural law reasoning to depict “the relationship between reason and emotion in the human person, and the moral obligations of jurists, lawmakers, and citizens in

85. 3 U.S. 386 (1798).

86. *Id.* at 388.

87. *Id.* (referring to the power of the people and natural law).

88. George, *supra* note 39, at 2278.

89. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1299 (2015).

90. See U.S. CONST. amend. XIV.

91. See generally Fowler V. Harper, *Natural Law in American Constitutional Theory*, 26 MICH. L. REV. 62, 66 (1927).

92. Michael Hayes, *Why We Cannot Avoid Natural Law in Constitutional Debates*, ANCHORING TRUTHS (Mar. 31, 2023), <https://www.anchoringtruths.org/why-we-cannot-avoid-natural-law-in-constitutional-debates/> [https://perma.cc/GJ9Z-KV6C].

relation to law.”⁹³ A legal discourse on constitutionalism and morality is most effective when framed through the lens of modern controversial issues. The Court’s recent⁹⁴ substantive due process jurisprudence highlights the tension between precedent, textualism, and moral reasoning. In cases involving issues such as assisted suicide and abortion, legal argument bypasses the text of the Fourteenth Amendment and utilizes more abstract concepts like liberty and personal autonomy.

At their core, arguments in favor of rights such as bodily autonomy, privacy, and reproductive choice are philosophical in nature—rooted in the belief that individuals should retain sovereignty over deeply personal decisions.⁹⁵ Because such rights are not explicitly enumerated in the Constitution, courts must rely on historical context and a coherent moral framework to avoid adjudicating these matters solely based on shifting social or political trends. The influence of natural law, both in the Constitution’s founding and in its modern interpretation, is critical to understanding the contours of the Fourteenth Amendment.

Even in a well-developed legal system, discussion in courts and among lawyers and legislators will need to engage in moral debate to determine which particulars should be applied to general natural law principles.⁹⁶ The debate involving constitutional interpretation and morality is evident when examining the tension created by the rights to life and liberty. Chief Justice Rehnquist held that the Due Process Clause only protects fundamental liberty rights that are “objectively, deeply rooted in this Nation’s history and tradition,” the governing standard for Fourteenth Amendment analysis.⁹⁷ Being deeply rooted reflects the notion that natural law is woven into the Constitution and strikes a balance with positive law. Justices O’Connor and Kennedy describe the Due Process Clause as a protection of liberty as a transcendental concept that includes “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁹⁸ The ongoing debate of how to reconcile moral reasoning with constitutional boundaries is central to Fourteenth Amendment jurisprudence, particularly in cases involving privacy, personhood, and bodily autonomy.

In substantive due process cases, precedent compels the Court to follow a two-step analysis: first, assessing whether the fundamental right is objectively and deeply rooted in this nation’s history and tradition and, second, providing a

93. Joel Alicea, “*We Are Living Through a Natural Law Moment in Constitutional Theory*,” HARVARD LAW TODAY (Apr. 16, 2024) <https://hls.harvard.edu/today/we-are-living-through-a-natural-law-moment-in-constitutional-theory-says-scholar-in-vaughan-lecture/> [https://perma.cc/B44P-P9WQ].

94. For the purposes of this paper, ‘recent’ refers to the last 30 years or so, following the Supreme Court’s decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997).

95. Hayes, *supra* note 92.

96. FINNIS, *supra* note 36, at 283–84.

97. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (internal quotation marks omitted)).

98. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

description of the asserted fundamental liberty interest.⁹⁹ To say that a right is “deeply rooted” acknowledges the role of natural law in the creation and interpretation of that right. “[T]he Declaration of Independence expressly affirms the fundamental right and sanctity of human life encapsulated by the substantive due process clause of the Fourteenth Amendment.”¹⁰⁰ A right cannot be “deeply rooted” without some foundation in natural law because morality is so deeply intertwined into our history, Constitution, and positivist law. The second prong of substantive due process analysis requires “determining and applying the historical traditions specifically related to the fundamental right claims.”¹⁰¹ This process requires an examination of legal precedent, the text of the Constitution itself, and the social landscape. The remainder of this paper will analyze the Court’s findings on the right to physician-assisted suicide and abortion with this two-prong test, emphasizing the impact of natural law, moral reasoning, and society on the Court’s decisions.

A. Right to Assisted Suicide

“[T]here are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been suggested by Aristotle, argued by Aquinas, and defended by contemporary natural law thinkers.”¹⁰² Central to morality is the right to choose when we live and die.¹⁰³ A fundamental principle of natural law provides “good is to be done and pursued, and evil avoided.”¹⁰⁴ It follows, then, that life is to be pursued and interference with life is to be avoided. Therefore, suicide, as an act of interference in one’s living, violates this principle of natural law.¹⁰⁵ An individual who takes his own life acts in violation of the moral law; suicide—and, by extension, assisted suicide—are therefore wrong because personhood is being denied.

99. Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U. L. REV. 67, 71 (2001), (citing *Washington*, 521 U.S. at 720–21) (internal citations omitted).

100. *Id.* at 72–73.

101. *Id.* at 77.

102. Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599, 697–98 (2000).

103. *See id.* at 700–01.

Others might object that if human life is a basic good, people would want to remain alive always and under all circumstances. However, to classify something as a basic good does not mean that one always chooses it over other options. Multiple good ways of life compete for human attention, and people must often favor one at the expense of others. Indeed, choice is the inevitable consequence of the fact that people do not live like the Man in the Pit, but in a world where many and varied “good lives” exist. Thus, the soldier who accepts an assignment leading to certain death does not deny the basic goodness of human life; such sacrificial choices only affirm the existence of other worthwhile ends.

Id.

104. *See* Jason T. Eberl, *Aquinas on Euthanasia, Suffering, and Palliative Care*, 3 NAT’L CATH. BIOETHICS Q. 331, 334 (2003), (quoting THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, q. 94.2).

105. *Id.* at 334–35.

The American Medical Association's Code of Medical Ethics defines physician-assisted suicide as occurring "when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act."¹⁰⁶ This section will examine how the Court has approached physician-assisted suicide, particularly through the lens of *Washington v. Glucksberg*. The Court's opinion in *Glucksberg* birthed the two-prong test for analyzing substantive due process cases and assumed controlling authority in subsequent substantive due process cases.¹⁰⁷

In 1997, the Court held that the right to physician-assisted suicide is not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment, leaving the regulation of the issue to the states.¹⁰⁸ The Court began its analysis by framing the liberty interest at stake. Rather than broadly deeming the interest a "right to die," the Court narrowed this to whether there exists a constitutional right to assistance in committing suicide.¹⁰⁹ It then turned to a historical and legal examination of the nation's treatment of that specific right.¹¹⁰ Emphasizing the consistent criminalization of both suicide and assisted suicide, the Court distinguished *Glucksberg* from its earlier decision in *Cruzan*, which involved the refusal of life-sustaining treatment rather than an affirmative act to end life.¹¹¹ The Court's historical inquiry traced bans on assisted suicide back to the common law and through the period surrounding the ratification of the Fourteenth Amendment; there is a "deeply rooted" tradition in favor of preserving life.¹¹² Lastly, the Court rejected the precedent established in *Casey*, which emphasized personal autonomy, and clarified that although substantive due process protects certain personal and intimate decisions, not all such choices qualify as fundamental rights.¹¹³ Therefore, the

106. *Physician-Assisted Suicide: Code of Medical Ethics Opinion 5.7*, AM. MED. ASS'N (current, Sept. 2026) <https://code-medical-ethics.ama-assn.org/ethics-opinions/physician-assisted-suicide> [https://perma.cc/8V2Q-HT7Q].

107. See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1557–60 (2000).

108. See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

109. See *id.* at 705.

110. See *id.* at 710.

111. See *id.* at 722–23; *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279–80 (1990) (holding competent individuals have a constitutional right to refuse medical treatment under the Due Process Clause and states could require "clear and convincing evidence" that an incompetent person would want their life-sustaining treatment withdrawn).

112. *Glucksberg*, 521 U.S. at 715 (citing *Cruzan*, 497 U.S. at 294–95 (Scalia, J., concurring)) ("By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide."); *Martin v. Virginia*, 37 S.E.2d 43, 47 (Va. 1946) ("The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable" (quoting 26 AM. JUR. Homicide § 103)).

113. *Glucksberg*, 521 U.S. at 726 ("At the heart of liberty . . . [is] to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." quoting *Casey v. Planned Parenthood*, 505 U.S. 833, 851 (1992)), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)).

Court found that because assisted suicide was not deeply rooted, there was no Fourteenth Amendment protection to such a right.

This historical analysis reflects the morality ingrained in American legal tradition and the Constitution. If a law or prohibition is longstanding and continues because that's the way it always was, it likely reflects moral truths rather than social shifts. In a way, natural law has become an architect of the legal system, especially in a context that relies on the history and tradition of a right to be constitutionally protected. The Court declining to recognize assisted suicide as a right mirrored the natural law principle that life must be preserved, and that the intentional taking of human life, even one's own, is contrary to moral good.

Additionally, the Court explicitly addressed the social climate and conflicting viewpoints regarding suicide. While noting “[a]ttitudes toward suicide itself have changed,” the Court agreed that “laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decision making, we have not retreated from this prohibition.”¹¹⁴ While public sentiment might shift, such changes do not dictate constitutional rights. As also emphasized by the Court in *Dobbs*, the Court “permits . . . [moral] debate to continue [amongst the people], as it should in a democratic society.”¹¹⁵ As will be prevalent in the analysis on abortion, the two-prong *Glucksberg* test allows the Court to determine how tradition and morality intersect and when “moral judgment” is better left to the states.¹¹⁶ The Court's deference to democratic processes preserves judicial neutrality while honoring the moral structure rooted in the foundation of our nation.

The Court's decision in *Glucksberg* affirms the importance of historical tradition and moral reasoning in determining the scope of substantive due process. By denying constitutional protection to assisted suicide, the Court preserves natural law principles upholding the sanctity of human life. In reaching its decision, legal tradition is honored and morally charged liberty interests are left to the discernment of the people.

B. Right to Contraception and Abortion

“Abortion presents a profound moral issue on which Americans hold sharply conflicting views.”¹¹⁷ Abortion implicates not only questions of individual autonomy and privacy, but also deeper moral principles. From a natural law perspective, the deliberate and direct termination of innocent human life is inherently wrong. Abortion, therefore, cannot be morally justified by appeals to personal autonomy or liberty when such liberty is exercised at the

114. *Id.* 719.

115. *Id.* at 735.

116. Or left by the state to individuals. “There can be no stronger claim to a physician's assistance than at the time when death is imminent, a moral judgment implied by the State's own recognition of the legitimacy of medical procedures necessarily hastening the moment of impending death.” *Id.* at 781 (Souter, J., concurring).

117. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 223 (2022).

expense of another human being's right to exist. In the same way that natural law deems suicide immoral, it logically follows so too is abortion.

Black's Law Dictionary defines abortion as the "artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus."¹¹⁸ Abortion is morally distinct from contraceptives (conception prevention) and from emergency procedures (removal of the child to prevent serious harm to the mother's life or health). "It is the intention in the action that defines [its] moral character . . . and the intentions in elective abortion and in emergency . . . procedures are utterly different."¹¹⁹ This natural law framework, derived from both "old" and "new" natural law theory, holds that good must be pursued and evil avoided, and that positive law should reflect the morality embedded in natural law. It also reveals the dangers of a strictly positivist legal system in the context of abortion, where law risks becoming detached from objective moral truths. This detachment highlights the need for a legal framework that is grounded in both moral reasoning and procedural legitimacy.¹²⁰

In 2022, the Court overturned *Roe* and *Casey*, finding the Constitution does not confer a right to abortion. The *Dobbs* opinion deemed *Roe* "egregiously wrong from the start" because "[t]he Constitution makes no reference to abortion," nor is such a right "implicitly protected by any constitutional provision."¹²¹ The Court found abortion is not a right that is "deeply rooted" in history, tradition, or Fourteenth Amendment jurisprudence. In part, this decision was supported by historical analysis, emphasizing that abortion was prohibited in three-quarters of the states when the Fourteenth Amendment was adopted, thirty states still prohibited the procedure when *Roe* was decided.¹²² And *stare decisis alone* is not enough to uphold precedent.¹²³ The Court conferred that abortion is not a right protected by substantive due process and moral issues, such as abortion, are better left to the people and the states, a standard "the Constitution and . . . rule of law demand."¹²⁴

The majority in *Dobbs* contends that the analyses in *Roe* and *Casey* are flawed because the Courts failed to cite any precedent addressing the moral dimensions of abortion.¹²⁵ *Roe* and *Casey* placed abortion within a broader category of liberty interests, such as contraception and sexual intimacy, which do not address the same moral concerns.¹²⁶ In contrast, *Dobbs* aligns more closely with natural law theory by grounding its reasoning in tradition, morality,

118. *Abortion*, BLACK'S LAW DICTIONARY (9th ed. 2009).

119. David Albert Jones, *Roe v. Wade, Abortion, and the Natural Law*, CATH. HERALD (Feb. 11, 2026), <https://thecatholicherald.com/roe-v-wade-abortion-and-the-natural-law/> [https://perma.cc/AU6V-5YJX].

120. *See* Rice, *supra* note 24, at 550.

121. *Dobbs*, 597 U.S. at 231.

122. *Id.* at 228, 231.

123. *Id.*

124. *Id.* at 232.

125. *Id.* at 257.

126. *Id.* at 295 ("[R]ights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter . . . uniquely involves what *Roe* and *Casey* termed 'potential life.'").

and the state's interest in protecting life. While the *Dobbs* opinion does not explicitly use the term "natural law," its rejection of *Roe*'s moral relativism makes it a comparatively moral and neutral decision. In *Roe* and *Casey* "[t]he Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."¹²⁷ Both *Roe* and *Casey* run afoul of the deeply rooted prong, as natural law holds that intentionally taking an innocent human life is morally wrong, and no substantive right can be recognized under the Fourteenth Amendment's Due Process Clause unless it is grounded in history and natural law. While the Court does not explicitly enact natural law into its abortion jurisprudence, it did leave moral decision making in the hands of the people, a choice that avoids undue bias and upholds the nation's history and tradition. Returning power to the states and the people upholds a deference to democracy and a system that prioritizes self-governance in preserving personal autonomy.

In his concurring opinion, Justice Kavanaugh affirms that *Roe* was wrongly decided and should be overruled, but is wary of the future implications of the Court's decision.¹²⁸ Specifically, Justice Kavanaugh emphasizes the Constitution is neither pro-life nor pro-choice; the Constitution is neutral and, therefore, the Court should also be.¹²⁹ However, respectfully, I am inclined to disagree with Justice Kavanaugh that the issue in this case is *not* morality.¹³⁰ The very fact that abortion was historically viewed as immoral calls into question the deeply-rootedness and tradition of abortion in our nation. While the Court's decision should not be morally charged, its analysis is inherently moral due to natural law's prevalence in our nation's history and founding.

Continually, the Court in *Dobbs* explicitly addresses the political climate at the time the opinion was written, consciously resisting social pressures.¹³¹ The Court's decisions depict an awareness of public perception, yet a commitment to judicial neutrality and the Constitution. While *Dobbs* created an opinion grounded in sound legal and moral principles, *Roe* and *Casey* appear to respond to perceived social necessity and evolving norms. "We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly."¹³² The Court's approach mirrors the logic of natural law theory, which maintains that moral truths exist independently of positivism, public opinion, or cultural trends. By rejecting the idea that controversial precedents should be retained for the sake of public favor, the Court reaffirms a moral framework that prioritizes objective reasoning over subjective pressures. The decision in *Dobbs* can be seen as restoring moral

127. *Id.* at 268–69.

128. *Id.* at 336 (Kavanaugh, J., concurring).

129. *Id.* at 338.

130. *Id.* at 337 ("The issue before this Court, however, is not the policy or morality of abortion.").

131. *Id.* at 290 (majority opinion) ("The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not 'social and political pressures.'" (quoting *Casey v. Planned Parenthood*, 505 U.S. 833, 865 (1992)), *overruled by Dobbs*, 597 U.S. 215.)).

132. *Id.* at 292 (emphasis omitted).

clarity to the Court's precedent, in line with the principles governing natural law theory.

The Court's development of abortion jurisprudence reflects a reliance on moral reasoning rooted in natural law principles, particularly in its interpretation of substantive due process. While *Dobbs* does not explicitly invoke natural law, it recognizes the moral gravity of abortion and distinguishes it from other liberty-based rights. By refraining from judicial lawmaking, the Court affirms the significance of historical moral understanding and constitutional tradition. In doing so, it returns the authority over abortion to the people and their elected representatives, signaling a constitutional realignment grounded in moral deliberation.

IV. CONCLUSION

The framework by which the Court guides Fourteenth Amendment interpretation is deeply intertwined with natural law, even when not explicitly stated. The *Glucksberg* decision affirms that the Due Process Clause protects only those rights that are "deeply rooted" in history and tradition, assisted suicide not being a protected liberty interest. Similarly, in *Dobbs*, the Court used this same historical analysis to determine whether abortion qualified as such a right. The Court concluded that neither historical tradition nor natural law reasoning supports the recognition of immoral "rights" under the Constitution.

As an eternal and universal principle, natural law is embedded into every era and guides the formation of laws across time. Thus, when the Court evaluates whether a liberty interest is "deeply rooted," it evaluates whether that right has natural law influence. "The reasoning of natural law is just woven through everything [a judge] does, even when he doesn't call it natural law; and so fundamental is it, so woven into our habits, that he may be hardly aware that he is using it."¹³³ While modern opinions might avoid naming natural law outright, its influence remains central to Fourteenth Amendment jurisprudence.

Still, the *Glucksberg* test is not used with perfect consistency. While this paper focuses on assisted suicide and abortion, in other cases (like *Lawrence v. Texas* and *Obergefell v. Hodges*), the Court revealed a departure from the "deeply rooted" prong. In those decisions, greater deference was given to political and social climates. However, while rights involving marriage and intimacy are important, they do not implicate the same moral values as taking a human life. Natural law *should* remain central to due process cases involving life, even if its role is more limited outside said right. Natural law theory holds that life possesses intrinsic dignity and worth, and that its preservation is a foundational moral principle. Abortion and assisted suicide, both of which involve the deliberate ending of human life, stand apart from other substantive due process cases because they touch the core of what natural law identifies as objectively good and universally binding. In such contexts, moral reasoning cannot be left to cultural or political trends, which are often transient and

133. Hadley Arkes, *Natural Law and Originalism*, LAW & LIBERTY (June 27, 2023), <https://lawliberty.org/natural-law-and-originalism-what-is-the-argument-really-about/> [https://perma.cc/F23M-MZB5].

morally ambiguous. Rather, natural law provides a foundation through which the judiciary can assess the legitimacy of asserted rights that would otherwise conflict with the basic moral order.

In *Obergefell*, Justice Kennedy resisted historical analysis, stating that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.”¹³⁴ Citing Justice Harlan, Justice Kennedy described the identification of fundamental rights as “‘an enduring part of the judicial duty to interpret the Constitution,’” even if not “‘reduced to any formula.’”¹³⁵ Similarly, in *Lawrence*, the Court acknowledged that society’s views can evolve and the people should “‘invoke [the Constitution’s] principles in their own search for greater freedom.’”¹³⁶ These opinions reflect a tension between traditional moral reasoning and reliance on the present social atmosphere. “The judiciary will always be confronted with situations where constitutional rights appear inconvenient or even dangerous. It is [the Court’s] job to protect these rights against the passion of the times.”¹³⁷ The Court should fear becoming overly legislative or political when analyzing liberty interests under the Fourteenth Amendment. As Justice White warned, the judiciary “is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.”¹³⁸

The issue, then, is straying too far from judicial neutrality and legislation from the bench, not the use of natural law and moral reasoning. The Court cautions future members to “exercise the utmost care whenever . . . asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of [the] Court.”¹³⁹ “[J]udges ‘are not left at large to decide cases in light of their personal and private notions. Rather, they must’ ‘look to the ‘traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there) . . . as to be ranked as fundamental.’”¹⁴⁰ This “collective conscience,” at its core, represents moral reasoning.

While critics claim natural law cannot be applied without being subjective, partisan, religious, etc., this is a misunderstanding of what our Constitution represents and what morality demands. “Natural law is not a law outside or beyond justice.”¹⁴¹ It is the moral framework embedded into our Constitution and a recognition that the law should be for the good of the governed. Natural

134. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

135. *Id.* at 663–64 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)). (Harlan, J., dissenting)).

136. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

137. O’Scannlain, *supra* note 5, at 1527.

138. *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

139. *Glucksberg*, 521 U.S. at 720 (quoting *Moore*, 431 U.S. at 502).

140. *Griswold v. Connecticut*, 381 U.S. 479, 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (parentheses added by Mr. Justice Goldberg)).

141. Max Salomon Shellens, *Aristotle on Natural Law*, 40 NATURAL LAW FORUM 72, 87 (1959).

law is not only compatible with constitutional interpretation: it is indispensable to it.