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Natural law, the Ninth Amendment and American judicial decision-making

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**NATURAL LAW, THE NINTH AMENDMENT AND AMERICAN JUDICIAL
DECISION-MAKING**

A Thesis

Presented to

**The Faculty of the Department of Philosophy
San Jose State University**

In Partial Fulfillment

**Of the Requirements for the Degree
Master of Arts in Philosophy**

By

Eric W. Palfreyman

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ABSTRACT

NATURAL LAW, THE NINTH AMENDMENT AND AMERICAN JUDICIAL DECISION-MAKING

by Eric W. Palfreyman

This thesis examines some of the primary intersections between Natural Law and the American judicial process. Portions of the paper examine some of the applicable and fundamental principles of Natural Law as presented in the writings of Thomas Aquinas and John Locke.

Subsequent portions of the paper present examinations of the rights debates that occurred prior to the “acceptance” of the Constitution and why those arguments were so centrally focused on the issue of “pre-existing and inalienable” rights. A portion of this thesis presents summaries and examinations of the Natural Law debates that occurred between the Senate Judiciary Committee and Clarence Thomas during his nomination proceedings in 1993. The role of Natural Law in the text and meaning of the Ninth Amendment to the Constitution is analyzed. And, finally, the relationship between Natural Law, the Ninth Amendment and the decisions leading to *Roe v Wade* are examined – showing the impact Natural Law continues to exert in modern times through one of the most controversial Supreme Court decisions published in modern times.

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1. Introduction/Scope of Paper

The ultimate purpose of this thesis is to examine some of the primary intersections between Natural Law and the American Judicial process. Natural Law assumptions formed the foundation for the American Declaration of Independence and have been used, in many cases, to overrule precedent and essentially make positive law declarations of Natural Law principles in American culture. The issue of Natural Rights, for reasons reviewed throughout this paper, has been a source of controversy throughout the history of American jurisprudence. But rather than being the enemy to individual rights, as some have argued, Natural Law principles have been at the heart of the major Civil Rights advances in the history of our nation--dating back to and including the writing of the Declaration of Independence.

The impact of Natural Law philosophy on the American political and judicial system is nearly immeasurable. From the opening paragraph of the Declaration of Independence to contemporary debates with and about Supreme Court nominees, the issue of Natural Law philosophy has been on the forefront of American political and jurisprudential debate. The very opening lines of the Declaration of Independence highlight that the foundation of our nation is a

recognition that its creation and existence was based on the idea of Natural Law and Natural Rights (terms to be used interchangeably throughout this paper):

“When in the Course of human Events, it becomes necessary for one people to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, *the separate and equal Station to which the Law of Nature and of Nature's God entitle them*, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

We hold these Truths to be self-evident, that all Men are created equal, that *they are endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty, and the Pursuit of Happiness--That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that *whenever any Form of Government becomes destructive of these Ends*, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”

(Declaration of Independence, p 1. italics added)

William Peters emphasized in unapologetic form the strong connection between Natural Rights and the definition and establishment of the Constitution:

“ . . . they [the founding fathers] held in common important assumptions and beliefs that necessarily shaped their thinking about the government

they were there to improve or change. Basic to their shared assumptions was a belief that just as there were laws that governed the physical world, there were Natural Laws that governed society, laws that could be understood through reason and experience and which men ignored at their peril. The purpose of civil government, as the seventeenth-century English philosopher John Locke had explained, was to enforce these Natural Laws, the more important of which was that no man should take from another his natural rights to life, liberty, and property. A government that failed to protect these rights had lost its reason for being and deserved to be changed or overthrown by the people it governed. . . . Since man's natural state was one of freedom and equality, legitimate government represented a mutually agreed compact among equals who sought protection of their natural rights in return for their pledge of obedience to its rules.” (Peters, p 34-35)

The contemporary relevance of the debate will be indicated in chapter 4, where an examination of the panel's efforts to understand how Clarence Thomas's views on Natural Law would impact the way he would reason through his rulings as a Supreme Court Justice will show how lively an issue Natural Law can be. Although Thomas refused to engage in meaningful discussion on the matter, the issues raised by the various Senators will provide an overview of the major controversial issues involved in Natural Law and the American judicial system.

The philosophy of Natural Law has a broad and sweeping history throughout the history of western ideas—both in ethics and the related fields of Political Theory and Philosophy of Law. Any attempt to define Natural Law restrictively seems hopelessly quixotic. Nevertheless, the effort will be made to identify those elements of Natural Law thinking that are necessary to any meaningful discussion of Natural Law in American jurisprudence. From among the various expositors of Natural Law throughout history, this paper will examine the writings of Thomas Aquinas and John Locke. These are obvious selections for a paper of this nature because they are probably the most comprehensive and systematic classical writers on this philosophical school of thought. In the case of John Locke, he is additionally examined because of the intimate relationship that exists between his writings and the use of his thought made by the founding fathers. Without much academic dispute, Sanford Levinson referred to John Locke as, ". . . a major contributor to American constitutional theory. . ." (Levinson, p 132)

The paper will also examine the question of the meaning of the Ninth Amendment to the Constitution. Some have argued that the Ninth Amendment is relatively meaningless in our present society and others have claimed that the Ninth Amendment was specifically made a part of the Bill of Rights to guarantee that "unenumerated rights" are protected with the same level of constitutional protection as "enumerated rights".

The concluding part of the paper will examine three specific cases tied to Natural Law and the Ninth Amendment (Eisenstadt vs Baird, Griswold vs Connecticut and Roe vs Wade) to show how issues of Natural Law and the Ninth Amendment provide the underlying rationale for one of the most controversial and far-reaching decisions of the Supreme Court in modern times. It will also provide an overview of some of the on-going debate to try and determine the relationship between abortion and the rights of the fetus.

2. Primary Natural Law Sources: Thomas Aquinas and John Locke

In this chapter, the two primary sources of Natural Law – Thomas Aquinas and John Locke – used by the writers of the Declaration of Independence and the United States Constitution will be overviewed in those areas of their respective philosophies germane to the discussion of the impact of Natural Law thought on American judicial philosophy.

Thomas Aquinas

Aquinas starts off his discussion of Natural Law by defining several concepts:

“Law is a certain rule and measure of acts whereby man is induced to act or is restrained from acting, for law is derived from ‘to bind’ because it binds one to act. Now the rule and measure of human acts is reason, which is the first principle of human acts . . . since it belongs to reason to direct to the end, which is the first principle in all matters of action, according to the philosopher . . . law is something pertaining to reason.”

(Aquinas, On Law, p 12)

Aquinas defines law as a set of rules which measure or define actions in a manner where certain acts are encouraged and other acts are discouraged. He recognizes several characteristics of reason: reason is the rule and measure of human acts; it is the first principle of human acts; and reason functions to “direct to the end” (which is to say that reason is teleological in nature). Finally, Aquinas

indicates that law pertains to reason. As he develops his philosophy of Natural Law, he further develops the idea that law pertains to reason.

In another portion of this first section, Aquinas develops the functional relationship between reason and will:

“Reason has its power of moving from the will . . . for it is due to the fact that one wills the end that the reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the ruler has the force of law; otherwise, the ruler’s will would savor of lawlessness rather than of law.” (Aquinas, On Law, p 13)

Already, in this opening passage, Aquinas presents one of the fundamental ideas of Natural Law, which is that Law does not originate or reside in a specific office or person, but that the true source of law (or the true method of defining law) is reason. In this passage, Aquinas does not directly support the concept of overthrowing a just ruler or government, but he does define the status of a law rooted in anything other than reason as a state of “lawlessness”.

So far, Aquinas has stated that law is a set of rules, developed (or, arguably, recognized) through reason, aimed toward some chosen end. The obvious question is what might be that chosen end? He answers this in the Second Article in two parts. The first part is as follows:

“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 . . . Consequently, the law must needs regards principally the relationship to happiness.” (Aquinas, On Law, p 14)

This idea is clearly and unapologetically derived from Aristotle’s Nicomachean Ethics, where Aristotle defines the ultimate purpose of human actions:

“Since there are evidently more than one end, and we choose some of these . . . for the sake of something else, clearly not all ends are final ends; but the chief good is evidently something final. Therefore, if there is only one final end, this will be what we are seeking, and if there are more than one, the most final of these will be what we are seeking . . . we call final without qualification that which is always desirable in itself and never for the sake of something else. Now such a thing happiness, above all else, is held to be; for this we choose always for itself and never for the sake of something else, but honour, pleasure, reason, and every virtue we choose indeed for themselves (for if nothing resulted from them we should still choose each of them), but we choose them also for the sake of happiness, judging that by means of them we shall be happy. Happiness, on the other hand, no one chooses for the sake of these, nor, in general, for anything other than itself.” (Aristotle, p 941, 942)

Aristotle defines happiness as the ultimate goal of the life of the individual because that is the goal that is sought for it’s own sake and not as a means to

some other end. Aquinas restates that the “last end of human life is bliss or happiness” and then indicates that, “the law must needs regard principally the relationship to happiness.” (Aquinas, On Law, p 14)

Another important item stipulated by Aquinas in this section, immediately following the claim that law must deal with happiness, is that laws must be established that promote, “the common good”.

“Moreover, since every part is ordained to the whole as imperfect to perfect, and since a single man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness . . . since the law is chiefly ordained to the common good, any other precept in regard to some individual work must needs be devoid of the nature of a law, save insofar as it is ordered to the common good. Therefore, every law is ordained to the common good.” (Aquinas, On Law, p 14)

Again, Aquinas strongly asserts that if a government (or its laws) does not conform to his definition of what constitutes “right” government (If it is not based in reason, it is lawless) he defines it as being, “devoid of the nature of law”. If rules do not promote man’s happiness and if rules aren’t established for the common good; then the assertion of the Declaration of Independence would agree with Aquinas when it states that government is established to protect the inalienable right to life, liberty and the pursuit of happiness, and that when a government fails to protect those rights, “. . .it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such

Principles, and organizing its Powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” (Declaration of Independence) Even within the Declaration of Independence, caution is proclaimed in the alteration of forms of government:

“Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their duty, to throw off such government, and to provide new Guards for their future Security.” (Declaration of Independence)

In his Summa Theologica, Aquinas never seems to encourage open revolt, but does allow for instances where established secular authorities may be consciously disobeyed. Like the caution expressed in the Declaration of Independence, this “disobedience” is not to be undertaken lightly. Aquinas’s general view is that government ought to be obeyed, in part because it is God-ordained and in part because governments provide stability; but when government fails to fulfill its duty, and when it causes persons to disobey truly just actions (a key element of happiness) then the people are warranted in obeying a higher law:

“Now the order of justice requires that subjects obey their superiors, else the stability of human affairs would cease. Hence faith in Christ does not excuse the faithful from the obligation of obeying secular princes . . . Man is bound to obey secular princes insofar as this is required by the order of justice. Wherefore, if the prince’s authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.” (Aquinas, On Law, p 245 - 246)

Aquinas next seems to raise the question of a representative government.

“Now to order anything to the common good belongs either to the whole people or to someone who is the vicegerent of the whole people. And therefore, the making of law belongs either to the whole people or to a public personage who has care of the whole people.” (Aquinas, On Law, p 15)

The term “vicegerent” means, “A person appointed by a ruler or head of state to act as an administrative deputy” (American Heritage Dictionary, p 1989). When Aquinas says that the ability to “order” the common good belongs to the whole people, he may be referring to some kind of representative government (either a democracy or a republic); however, the text is not unarguably clear on this point. Another translation of this same passage reads, “Planning for the general good belongs to the people as a whole or to someone representing them, since those pursuing the goal must do the planning for it.” (Aquinas, Summa Theologiae: A

Concise Translation, p 280) In the first translation, the term “order anything to the common good” is used. Does the word “order” carry a connotation of coercion, or does it merely refer to putting things in order, as would be reflected in the second translation’s use of the word “planning”? Because this section also discusses the power of the state to enforce its laws, the question of the meaning of the word “order” can be seen in different ways.

Another issue that arises in this passage is the question of what Aquinas’s view would be relative to a representative government. This passage contains different terms between the two translations in this area. The first translation uses the term, “vicegerent”, which may or may not be a representative of the people in the sense that he solicits the “will” of the people he represents, and then, as a proxy, represents that will to the government. The definition of the term says the vicegerent is appointed by the head of state to act as an “administrative deputy”. In the second translation, it indicates that the person in question “represents” them. This passage does not make clear the question of Aquinas’s stand on government by representation. This passage, dealing with the important question of whether or not the people have an inherent right to a representative government is frustratingly unclear to me. It may be that in Aquinas’s mind, the question of whether or not the government is representative is unimportant relative to the question of whether or not the government establishes and enforces “just” laws.

Another important concept in this section is relative to the question of the coercive powers of a government.

“A private person cannot lead another to virtue efficaciously, for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have in order to prove an efficacious inducement to virtue . . . but this coercive power is vested in the whole people or in some public personage to whom it belongs to inflict penalties . . . therefore, the framing of laws belongs to him alone.” (Aquinas, On Law, p 16)

There is no ambiguity in Aquinas’s writings that the state has coercive power to enforce its will.

Aquinas’s Four Types of Natural Law

One of the unique characteristics of Aquinas’s Natural Law definition is that it includes four types of Natural Law: Eternal Law, Natural Law, Human Law, and Divine Law.

ETERNAL LAW

“ . . . a law is nothing else but a dictate of practical reason in the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by divine providence . . . that the whole community of the universe is governed by divine reason. Wherefore the very idea of the government of things in God the ruler of the universe has the nature of a law. And since the divine reason’s conception of things is not subject to time but is eternal, according to Proverbs 8:23, therefore it is that this kind of law

must be called eternal . . . the eternal concept of the divine law bears the nature of an eternal law insofar as it is ordained by God to the government of things foreknown by Him . . . the end of the divine government is God Himself, and His law is not distinct from Himself. Wherefore the eternal law is not ordained to another end." (Aquinas, On Law, p 18-19)

By Eternal Law, Aquinas means God's law. Given that law is the practical statement of a ruler, given that God is the ruler of the entire universe, and given that God is eternal, Eternal Law is law from God. The metaphysics of this becomes more complicated with the statement that this Eternal Law is not distinct from God. If law is a dictate of practical reason, in what sense is a law that is not distinct from God a law? Is God himself a dictate of practical reason? In Aquinas's treatise on law, there are interrelationships with religious claims of faith that are typically undefended and assumed. The effort to define and defend some of these religious and metaphysical assumptions is beyond the scope of this paper. As Buckle points out, ". . . although Aquinas's largest concerns are metaphysical and religious, his account of natural law appeals to neither metaphysical nor religious doctrines. Rather, he explains both the naturalness and law-like character of natural law in terms of reason. For Aquinas, the natural law is natural because it is in accordance with human nature and this nature is a rational nature." (Buckle, p 165) While I think Buckle oversimplifies this argument (that is, I believe Aquinas does tie reason to God at some level) I agree

with his central point which is that to understand Aquinas's theory of natural law, the focus is going to be on reason and the process of reason, rather than on some kind of revelatory activity. Other laws described by Aquinas deal with encouraging behaviors that lead to virtue and discouraging behaviors that lead away from virtue. When Aquinas says that, "... the end of divine government is God Himself", what he seems to be saying is that by "divine government" he means a system of laws leading to a life in harmony with God that will have the ultimate achievement of allowing man to live with God in a future life.

While Aquinas's description of Eternal Law can make it sound like it is far removed from day-to-day activities, he says that, "... knowledge of the eternal law is imprinted on us." (Aquinas, On Law, p 35) It is eternal law which forms the basis for all knowledge, at any level.

"Every rational creature knows it [eternal law] in its reflection, greater or less. For every knowledge of truth is a kind of reflection and participation of the eternal laws . . . Now, all men know the truth to a certain extent, at least as to the common principles of the natural law, and as to the others, they partake of the knowledge of truth, some more, some less, and in this respect are more or less cognizant of the eternal law." (Aquinas, On Law, p 36)

Rather than being something theoretical, remote and irrelevant to man, the eternal law is the foundation of all true knowledge, and each rational being

participates in this truth to the extent that he applies reason to an understanding of his life situation.

Eternal law, in addition to being the foundation of true knowledge, is the basis for all law: “. . . all laws proceed from the eternal law.” (Aquinas, On Law, p 37) Aquinas sees all lesser laws as derivative of the eternal law. Since the eternal law is the plan of government of the “Chief Governor”, then all lesser laws must be derived from the eternal law. “All laws, insofar as they partake of right reason, are derived from the eternal law.” (Aquinas, On Law, p 37) Again, Aquinas ties human law to eternal law if it is derived from right reason:

“Human law has the nature of law insofar as it partakes of right reason, and it is clear that, in this respect, it is derived from the eternal law. But insofar as it deviates from reason, it is called an unjust law and has the nature, not of law, but of violence.” (Aquinas, On Law, p 38)

NATURAL LAW

“. . . all things subject to divine providence are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law insofar as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to divine providence in a more excellent way, insofar as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the eternal reason, whereby it has a natural inclination to its proper act and

end, and this participation of the eternal law in the rational creature is called the natural law . . . the light of natural reason, whereby we discern what is good and what is evil, which pertains to the natural law, is nothing else than an imprint on us of the divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law. . . But because the rational creature partakes thereof in an intellectual and rational manner, therefore the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason." (Aquinas, On Law, p 20)

Aquinas characterizes Natural Law by making several distinct claims. The first is that everything is based on the Eternal Law(s) and, to a varying extent, participates in that Eternal Law. Natural Law, Human Law and Divine Law, all depend on the reality of Eternal Law for their existence and structure. Man, as a rational being, participates in eternal law at a very high level in that he has a "... share of eternal reason". Man has a "natural inclination" to work toward his "proper act and end" because he participates in the Eternal Law. A part of the definition of Natural Law for Aquinas is that man, as a rational, reasoning being, participates in the Eternal Law. Aquinas states that, "... the light of natural reason enables us to know what is good and what is evil." (Aquinas, On Law, p 20) This claim is central to an understanding of Aquinas's understanding of the impact of Natural Law. The underlying idea is that man's use of reason is what

enables him to understand how to act to meet proper teleological objectives. This reliance on reason as the means to truth is one of the fundamental elements of Natural Law that both Locke and many of our founding fathers saw as fundamental. In many cases, the claim that man ought to rely on reason to discern truth includes the analysis of religious claims as opposed to strictly secular ones. John Locke was explicit and unyielding on this point when he wrote:

“Reason is natural revelation, whereby the eternal father of light, and fountain of all knowledge, communicates to mankind that portion of truth which he has laid within reach of their natural faculties: revelation is natural reason enlarged by a new set of discoveries communicated by God immediately, which reason vouches the truth of, by the testimony and proofs it gives, that they come from God. So that he that takes away reason, to make way for revelation, puts out the light of both . . . He therefore that will not give himself up to all the extravagancies of delusion and error, must bring this guide of his light within to the trial. God, when he makes the prophet, does not unmake the man. He leaves all his faculties in the natural state, to enable him to judge of his inspirations, whether they be of divine original or no. When he illuminates the mind with supernatural light, he does not extinguish that which is natural. If he would have us assent to the truth of any proposition, he either evidences that truth by the usual methods of natural reason, or else makes it known

to be a truth which he would have us assent to, by his authority; and convinces us that it is from him, by some marks which reason cannot be mistaken in. Reason must be our last judge and guide in everything.”

(Locke, Human Understanding, p 397, 402)

Thomas Paine, in his book, The Age of Reason, makes the same assertion:

“The most formidable weapon against errors of every kind is Reason. I have never used any other, and I trust I never shall.” (Paine, p 665)

For both writers – writers central to the ideas of those who participated in the development of the Declaration of Independence and Constitution – the role of reason in determining truth is central and is not to be supplanted by anything. Aquinas’s version of the relationship between eternal law and natural law is that natural law is a participation in eternal law through the auspices of reason. This is why I can’t fully concur with Buckle when he tries to argue that Aquinas’s natural law theory does not appeal to religious or metaphysical claims. For Aquinas, there is a necessary connection between the two – natural law being defined by its relationship to eternal law (God’s law). But I agree with Buckle in the sense that the “doing” of natural law as it relates to man’s actions and governments does not require an examination or a dependence on the specifics of the idea of eternal law -- other than the recognition that natural law assumes the existence of essentially unchanging principles. But the complete resolution of whether or not we believe these principles come from a God or from within the

nature of man himself doesn't appear to be required for the development of "just" laws within a natural law framework.

HUMAN LAW

"... a law is a certain dictate of practical reason. Now it is to be observed that the same procedure takes place in the practical and in the speculative reason, for each proceeds from principles to conclusions . . . Accordingly, we conclude that just as, in the speculative reason, from naturally known indemonstrable principles we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to certain particular determinations of the laws. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed . . . on the part of practical reason, man has a natural participation of the eternal law according to certain general principles but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human reason to proceed further to particular legal sanctions . . . The practical reason is concerned with practical matters, which are singular and contingent, but not with necessary things, with which the speculative

reason is concerned. Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of sciences. Nor is it necessary for every measure to be altogether unerring and certain but according as it is possible in its own particular genus." (Aquinas, On Law, p 21 - 22)

Human law involves "individual cases". By contrast, the eternal law deals with "certain general principles" but does not deal with discrete individual instances. The determination of just human laws is a process that "proceeds from principles to conclusions" and that we are able to develop conclusions from principles through "the efforts of reason". In other words, human law is created by reasoning humans to meet particular instances of human interactions at any given moment in history. Eternal law is outside history and time. Human law deals with the particulars of our day to day existence. It does not deal with "necessary" matters, but with things that are "singular and contingent". Aquinas accepts that there are limitations in human law. The primary limitation is that it is not "unerring and certain". This allows for both change and disagreement in a system of human law(s). I believe Aquinas anticipates one of the major criticisms of Natural Law theory, which is that it does not account for variables in society, and that if it does allow for variables then it violates the premises of eternal and fixed principles. This criticism is stated by Wollheim as follows:

"It has been argued that natural-law theory cannot admit that the demands of justice may be relative to time and place so that what ought to

be positive law in one society ought not to be in another. Kelsen thus contrasted the static character of natural-law theory with the dynamic character of positivism . . . Perhaps, however, it could be held that a natural-law theorist who admitted very freely that circumstances change the ethical character of actions had departed considerably from the original inspiration of the theory. The theory of 'natural law with variable content' certainly seems to transgress the first requirement laid down above for a natural-law theory." (Wollheim, p 453)

Wollheim, in his criticism, apparently does not recognize the distinctions Aquinas makes between eternal law, natural law and human law. While the eternal law consists of eternal principles, human law is derivative and, as Aquinas points out, accommodating to individual instances. Natural law theory, as defined by Aquinas, is not static at the level of human law. While human law is based on eternal law, it is defined to meet the unique, individual nature of human existence. The idea Aquinas stresses, that variable human laws are logically derived from eternal and necessary law, is fundamentally important to the idea that a natural law theory could ever be usefully applied to the human condition. Locke presents a similar interpretation when he states, "The obligation of this law [natural law] never changes, although the times and circumstances of the actions by which our obedience is defined might change". (Locke, Questions, p 221)

DIVINE LAW

"Besides the natural and the human law, it was necessary for the directing of human life to have a divine law. And this for four reasons. First, because it is by law that man is directed how to perform his proper acts in view of his last end . . . since man is ordained to an end of eternal happiness which is inproportionate to man's natural faculty . . . Secondly, because, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts, whence also different people form different judgments on human acts, when also different and contrary laws result. In order therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err . . . Thirdly, because man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements that are hidden but only of exterior acts which appear, and yet, for the perfection of virtue, it is necessary for man to conduct himself aright in both kinds of acts. Consequently, human law could not sufficiently curb and direct interior acts, and it was necessary for this purpose that a divine law should supervene. Fourthly, because, as Augustine says, human law cannot punish or forbid all evil deeds, since, while aiming at doing away with all evils, it would do away with many

good things and would hinder the advance of the common good, which is necessary for human intercourse.” (Aquinas, On Law, p 23 – 24)

The final of the four types of law Aquinas defines, is what he called divine law. This one is the least connected to the United States Constitution. The divine law, as Aquinas defines it is, “. . . a law given by God”. In the following sections, Aquinas makes it clear that this is Biblical revelation which was revealed (in Aquinas’s view) directly from God to man. Because it is a revelation directly from God without any intermediate interference from man it has several capacities required to bring man to an end which is beyond his own power to achieve. The ultimate end of man, according to the catechism, is a joyful and eternal life in the existence of God. Because this is not something man can achieve strictly through his own reason and action, divine law is made available. In contrast to human law, the divine law is without error. In addition, the divine law deals with the “interior” life of the individual. Human law, Aquinas asserts, cannot directly impact the interior life, it can only directly influence the exterior life (actions) of man. The human law can make man virtuous in his actions, but it cannot make him a virtuous being in the soul. Aquinas’s position is that the interior man must also be subject to a law and that law is the divine law. The law is divided into two parts, the Old and New Testament. The Old Testament was not fully developed, and full reconciliation with God is only obtained through the New Testament. Aquinas cites Augustine in saying that, “The promise of temporal goods are contained in the Old Testament, for which reason it is called

old, but the promise of eternal life belongs to the New Testament.” (Aquinas, On Law, p 26) Aquinas also states that, . . . the Old Law restrains the hand, but the New law controls the mind . . . it belongs to the law to induce men to observe its commandments. This the Old Law did by the fear of punishment, but the New Law by love, which is poured into our hearts by the grace of Christ . . .”

(Aquinas, On Law, p 26)

Aquinas and Property Rights

Because the question of property is so fundamental to John Locke’s system of Natural Law as it relates to the role of government, it will be worthwhile to present Aquinas’s position on this. Aquinas recognizes that God has sovereign dominion over all things, but grants to man the following:

“ . . . man has a natural dominion over external things because, by his reason and will, he is able to use them for his own profit, as they were made on his account, for the imperfect is always for the sake of the perfect . . .” (Aquinas, On Law, p 177)

For Aquinas, the fact that man is required and able to use external goods to preserve and enhance his own life, the ability to use external goods is natural to man. Aquinas argues that man also has a natural right to procure and dispense external things and provides three reasons for this. First, if man owns a thing, he tends to take better care of it and uses it with more discretion. Aquinas assumes that man would not take proper care of things if he did not own them. Second, if each person takes care of personal property, there is increased efficiency and less

duplication of labor than if there were one item that were relocated with every use. Third, Personal ownership of needed property leads to a contentedness that is a major contributor to peace and stability in a community. (Aquinas, On Law, p 178-179)

Aquinas makes an interesting reply to an objection that Natural Law would seem to indicate that community property was better than personal property. Rather than argue the issue, Aquinas makes the following statement:

“Community of goods is ascribed to the natural law, not because the natural law dictates that all things should be possessed in common, and that nothing should be possessed as one’s own, but because there is division of possessions, not according to the natural law, but rather according to human agreement, which belongs to positive law . . . the ownership of possessions is not contrary to the natural law but an addition thereto devised by human reason.” (Aquinas, On Law, p 179)

For Aquinas, the possession of personal property is neither inferior to Natural Law nor outside its definition, but is a portion of Natural Law in that man has established – through the use of reason – rules that govern the ownership of personal property to accommodate the needs of a given culture.

John Locke

In his Second Treatise on Government, Locke starts off with a definition of what he describes as political power:

“Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good.” (Locke, Second Treatise, p 404)

While the government entails multiple objectives, the fundamental objective of government is in the accomplishment of the “public good”. The question of property is an important one in Locke’s philosophy of government, and so he stipulates preserving property as one of the fundamental objectives of government. His definition of government includes the powers of coercion or enforcement, from minor penalties and punishments up to death. Another function of government is to protect the sanctity of the borders of a community from encroachments and violence from outside cultures. But all activities of government are required to be targeted toward the public good.

In setting out his political theory, Locke first defines (above) what he believes the role of government to be, and then he immediately presents his fundamental understanding of the philosophy of Natural Law. Locke begins this discussion by describing the condition of man in what he refers to as a “state of nature”.

The first condition of the state of nature is one of perfect freedom (perfect freedom is not total license to do anything without consequences!):

“To understand political power aright, and derive it from its original, we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.” (Locke, Second Treatise, p 404)

The second condition, closely related, deals with a state of total equality:

“A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection. . .” (Locke, Second Treatise, p 404)

These two conditions, freedom and equality, are Locke’s fundamental conditions in a state of nature. The absence of equality is incompatible with full freedom. In a passage that carries a lot of ethical import, Locke states: “ . . . there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.” (Locke, Second Treatise, p 405) The mandate against destroying others is buttressed with the implication that we are not made to be used one by another for our own ends. This statement recognizes, in a very real sense, the issue of equality. If individuals are equal, then we cannot subordinate

another's well-being to that of our own. To do so would be inconsistent with the recognition of the equality of each person.

Even in a state of nature, laws apply that govern our relationships with one another:

“ . . . though this be a state of liberty, yet it is not a state of license . . . The state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.” (Locke, Second Treatise, p 405)

Locke makes several important statements in this passage of the Second Treatise.

One is that liberty and license are not the same thing. Liberty operates within a system of laws, consequences and checks and balances. License, on the other hand, seems to include the idea that an individual's actions are completely free of rules, any consideration of consequences or any kinds of checks and balances. As the state of nature is the condition prior to the establishment of governments, the fact that there is a law of nature to guide that condition, indicates Locke's acceptance of the idea that this law pre-exists man-made governments and is not dependent on them. Locke views this law of nature as being binding on all. As he writes in Questions Concerning the Law of Nature: “ . . . the law of nature is binding on all men, before any other law, both of itself, and by its own force.” (Locke, p 222) This law of nature is both binding and, in certain senses, unchanging:

“For this is not a private or positive enactment which has arisen to meet a particular circumstance and a present advantage, but a fixed and eternal rule of conduct, dictated by reason itself, and for this reason something fixed and inherent in human nature.” (Locke, p 227)

Like Aquinas, Locke identifies the fundamental principles that form the foundation of Natural Law as being unchanging. The underlying principles of Natural Law form the basis for decisions to be made that deal with “particular circumstances and present advantages”. In the section of the Second Treatise where Locke discusses the principles of punishment, he makes the following statement, “ . . . truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of nature, by which they are to be regulated and interpreted.” (Locke, Second Treatise, p 408) The unchanging principles of Natural Law are used in determining whether or not the “local” laws determining specific laws and punishments are just. Because these laws will be varied and will be different from one community to another, they are evaluated based on how they align with the underlying principles in Natural Law. It is not asserted anywhere in Locke’s political philosophy that every law in a community is unchanging and common to any given system. Individual laws and regulations are variable based on circumstances of history and culture and responsive to the will of the majority – as long as they are consistent with the Natural Law.

Locke believes that, in order to preserve the rights inherent in the principles of Natural Law, man may voluntarily join to create communities:

“Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreeing with other men to join and unite into a community for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.” (Locke, Second Treatise, p 441)

These communities would recognize – typically in a formal way – the retention of the Natural Law (or, specifically, State of Nature) rights they enjoyed as individuals, but would, by mutual agreement and the establishment and enforcement of laws, create a safer environment wherein those rights are protected by a body and not just by themselves as individuals. This gives them greater strength, and, in theory at least, reduces the risk of them living in a state of war with others. The state of war, Locke defines as: “. . . force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war. . . ” (Locke, Second Treatise, p 411). The state of war is in direct contrast to a state of nature, which Locke defines as follows: “Men living together according to reason, without a common superior on earth with authority to judge between them, is properly the state of nature.” (Locke, Second Treatise, p 411) Prior to established governments, then,

one of two conditions exists: either a state of nature or a state of war. Men voluntarily unite into these political communities to provide a safer environment for the protection of their rights. Once in these communities, an individual has obligations to adhere to the laws established and enforced by these communities. There are two criteria discussed by Locke required in order for a community to be a viable community. The first of these is that it will be governed by majority rule, the second is that if a given political body ceases to protect rights, but instead begins to consistently take away rights, it loses its authority to compel submission on the part of its citizens.

For Locke, a dependence on the will of the majority is as much about practical issues as it is about the enforcement of rights. In a state of complete independence, an individual can act with full and autonomous discretion, as long as the individual lives a life guided by reason and the principles of Natural Law and does not enter into a state of war with others. This means that, within these parameters, the individual acts when and how he wants. When individuals join together, however, a complete unanimity of will is unlikely, and yet, communities must act. If a community cannot act unless it has unanimous agreement by all members, it will be paralyzed. When a majority agrees with a direction, then the community may act.

“And therefore we see that in assemblies empowered to act by positive laws, where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course

determines, as having by the law of nature and reason, the power of the whole. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society, to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free and under no other ties than he was in before in the state of nature." (Locke, Second Treatise, p 441-442)

The obvious danger here is that there could be some risk that a majority may trample on the rights of the minority. In such a circumstance (for example, religious persecution that drove the Mormons from United States borders in the 1850's) what protection exists for those minority members? Locke, like Aquinas, recognizes an inalienable right to disobey a government that consistently violates the rights of its own citizens.

"For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which everyone designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making, whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any further obedience, and are left to the common refuge which God hath

provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society . . . by this breach of trust they forfeit the power the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of the new legislative . . . to provide for their own safety and security, which is the end for which they are in society.” (Locke, Second Treatise, p 493-494)

Another point he makes is that the nature of this law is reason. Reason does not create the law, but discovers it:

“ . . . law of nature, by which term [we] understand a law of this sort: a law which each individual can discover by that light alone which is implanted in us by nature; to which too he ought to show himself obedient in everything, and which he perceived as demanding a rational account of his duty; and this is that famous precept ‘live according to nature’ which the Stoics urged upon us so insistently . . . This law of nature can, therefore, be so described as a law because it is the command of the divine will, knowable by the light of nature, indicating what is and what is not consonant with a rational nature, and by that very fact commanding or prohibiting. Less accurately it seems to me, some say it is a dictate of reason; for reason does not so much lay down and decree this law of nature as it discovers and investigates a law which is ordained by a

higher power and has been implanted in our hearts. Nor is reason the maker of this law, but its Interpreter . . . ” (Locke, Questions, p 99-101)

For Locke, natural law was implanted in each person. We do not create the natural law by coming up with reasons to support it, or by developing a complex logical structure in which we “make” natural law real. Natural law, for Locke, is given to each man by God. It is implanted in each person’s soul. Man does not “think” the natural law into existence. Through the use of reason, man discovers the natural law.

In the passage above, Locke states that reason teaches the natural law to all, “. . . who will consult it.” Many, however, choose not to consult it. One of the arguments against a natural law theory is that if it were true, everyone would end up with the same principles by which to establish laws and guide our lives. In fact, Locke cites this issue as follows:

“ . . . some object to the law of nature, claiming that no such law exists at all, since it is discovered nowhere; for the greatest part of mankind lives as if there were no guiding principle to life at all, nor any law of the kind that all men recognize . . . if there were, in fact, a law of nature, knowable by the light of reason, how does it happen that all men who are endowed with reason know it not?” (Locke, Questions, p 109)

Locke’s argument is that, although the natural law is implanted in each person’s soul, many do not seek it out. This is not the fault of natural law, it is simply that many persons, for a variety of reasons, do not do the work that needs to be done

to truly understand natural law. In some cases they are lazy, steeped in a self-indulgent lifestyle, or are simply incapable of the kind of mental work it would take to sort out natural law issues. "How rare is the man in a commonwealth who knows the laws of his city, which have been published, displayed in public places, easy to read and comprehend, and obvious to every eye? How much rarer is he who knows the hidden and unperceived laws of nature? In this question, therefore, we must consult not the majority of mankind, but the sounder and more perceptive part . . . the obligation of the law of nature is the same everywhere, only the condition of life varies." (Locke, Questions, p 211, 227.)

Locke makes a distinction between two conditions in the state of nature that exists prior to an organized political body. "Men living together, according to reason without a common superior on earth with authority to judge between them, is properly the state of nature." (Locke, Second Treatise, p 411) When there is no living according to reason, and where there is violence or the threat of violence, a state of war exists. " . . . force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war." (Locke, Second Treatise, p 411) When a state of war exists, man is allowed to take actions to preserve his life when his own existence is threatened by another. " . . . it is reasonable and just I should have a right to destroy that which threatens me with destruction. For by the fundamental law of nature, man being to be preserved as much as possible (sic), when all cannot be

preserved, the safety of the innocent is to be preserved; and one may destroy a man who makes war on him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because they are not under the ties of the common law . . .” (Locke, Second Treatise, p 409-410)

Locke’s political theory is essentially that persons in a state of nature may band together and establish communities wherein they agree to protect each other’s natural rights. The first point he makes is that everyone in a state of nature is free and that that freedom cannot legitimately be taken away without the person’s explicit permission.

“Men being . . . by nature all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another in a secure enjoyment of their properties, and a greater security against any that are not of it.” (Locke, Second Treatise, p 441)

Locke’s overall view of the natural right to property is very similar to Aquinas’s:

“God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being.” (Locke, Second Treatise, p 413)

From this general statement arises the specifics of Locke's theory of property. All of nature, in its original state is held to be in common. Man lays claim to it when he mixes his labor with it.

"The labor of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others." (Locke, Second Treatise, p 413-414)

The mixture of an individual's labor with the "common" resources, means it is now personal property and not common.

Locke brings up a crucial point, which is that this is a fine theory when there is plenty available to all. But when there are not sufficient resources, what happens? He gives two responses. The first is that there are limits to what man may "own" by his labor. Locke's principle is that man is entitled only to what he can use to his advantage. "How far has he [God] given it to us? As much as anyone can make use of to any advantage of life before it spoils, so much may he by his labor fix a property in; whatever is beyond this, is more than his share,

and belongs to others. Nothing was made by God for man to spoil or destroy . . . [man was to restrain what he claimed] within bounds set by reason, of what might serve for his use . . . there could be then little room for quarrels or contentions about property so established.” (Locke, Second Treatise, p 415) This provision prevented persons from hoarding and would prevent any egregious imbalances of possessions.

Locke’s second response to the question of limited resources was solved in the same way that people banded together and voluntarily created agreements, whereby possessions could be equitably distributed without – it is hoped – the violation of anyone’s natural right to those possessions:

“ . . . and then, by consent, they came in time to set out the bounds of their distinct territories, and agree on limits between them and their neighbor, and by laws within themselves, settled the properties of those of the same society. (Locke, Second Treatise, p 418)

As societies and industries became more complex, laws would be made, based on the fundamental principles of the natural right to the possession of what your labor created or improved, the assure that those rights would be protected in the best way possible. Man would still have the ability to influence the possessions he had by his own efforts, ingenuity and labor.

With the introduction of money, Locke is able to allow for the circumvention of the apparent limitations cited above (the fact that you can only

retain what your direct labor can produce and that there must be equal availability for all):

“And thus came in the use of money – some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life. And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them . . . But since gold and silver, being little useful to the life of man in proportion to food, raiment, and carriage, has its value only from the consent of men, whereof labor yet makes, in great part, the measure, it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth . . . (Locke, Second Treatise, p 422)

Although Locke provides for money and its associated potential for an unequal access to and control of property, he does not seem completely content with it. It seems that the ideal for Locke was the simpler allocation of property based on a “direct labor” criteria.

“ . . . it is very easy to conceive without any difficulty how labor could at first begin a title of property in the common things of nature, and how the spending it upon our uses bounded it; so that there could then be no reason of quarrelling about title, nor any doubt about the largeness of possession it gave. Right and conveniency went together; for as a man had

a right to all he could employ his labor upon, so he had no temptation to labor for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others; what portion a man carved to himself was easily seen, and it was useless, as well as dishonest, to carve himself too much, or take more than he needed." (Locke, Second Treatise, p 422-423)

The introduction of money and its accompanying complexities, is seen by Locke as being problematic in the sense that it creates an environment that could encourage greed, selfishness and dishonesty.

3. The Ninth Amendment and Natural Law

As will be shown in this chapter, when the Constitution was written, there was a great deal of disagreement over its lack of written confirmation of what many felt to be rights they were “naturally” entitled to. Many opposed ratification of the Constitution without a clearly stipulated delineation of those rights identified in Natural Law ideas prevalent at the time. The Ninth Amendment was James Madison’s answer to those concerns.

The text of the Ninth Amendment appears to be very simple and straightforward. It simply states:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

(United States Constitution)

Like most simple, declarative statements, the Ninth Amendment appears simple, but it has engendered considerable controversy throughout American judicial history. Patterson, in “The Forgotten Ninth Amendment”, argues for a simple, straightforward reading of the Ninth Amendment:

“There should really be little or no doubt with respect to the intended meaning of the Ninth Amendment, because from its language, its purpose and intent are obvious. The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual. On its face this amendment states that there are certain unenumerated rights that are

retained by the people. . . Nothing could be clearer than this statement. It is a declaration and recognition of individualism and inherent right. . .”

(Patterson, p 107)

But in spite of Patterson’s claim for a simple interpretation, there appear to be three fundamental issues raised by opponents: 1) Do these kinds of rights exist at all? 2) Even arguing that these rights exist, since they are not enumerated, how do we correctly and uniformly identify them? 3) Do we dare give such broad and undefined (and hence unrestricted) power to the judicial branch?

One of the most visible protests to a broad definition of the Ninth Amendment was raised during the Robert Bork Supreme Court nomination hearings (1987) – hearings that, until the Clarence Thomas hearings, were the most controversial hearings on a Supreme Court nominee in United States history. Bork opposed a broad definition of the Ninth Amendment because he was afraid that government officials could create rights that never existed – even in the minds of the framers of the constitution. Without a specific enumeration of rights, Bork resisted granting judges the right to “create” rights because they, as individuals, felt that such rights “should” exist. In response to questioning by the Senate Judiciary Committee, Bork stated:

“I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says ‘Congress shall make no’ and then there is an inkblot, and you cannot read the rest of it, and that is the only copy you have, I do not think the

court can make up what might be under the inkblot.” (Barnett, “Ninth Amendment”, p 591)

Robert Bork’s fear was of a governmental abuse of power that could be constitutionally upheld if it could be successfully argued that a “new” or “created” right was included within the penumbra of the Ninth Amendment. The risk arises for the obvious reason that there are not stipulated rights being defended. It would not necessarily be the case that such a right needed to be proven to have been a part of the original intent of the writers of the Constitution. Should such a judicial process be possible, the rights of the people would be at risk anytime some group or individual could persuade the Supreme Court that their position was an unenumerated protected right. Because new rights typically involve restrictions or mandates on human behavior, they impact levels and types of freedoms previously held to be protected. Many of the Senators (and many groups of people in the general populace) were frightened that Bork’s apparent view that only specifically enumerated rights were entitled to Constitutional protection would lead to an overthrow of the Roe vs Wade decision. In large part, Bork’s failure to recognize the Constitutional validity of the unenumerated rights the court had already recognized (primarily in the question of a right to privacy) Bork’s nomination was not accepted. Bork’s testimony highlighted the first two issues stated above: the fear that we could not reasonably and consistently define these rights, and that, because of this exposure, excessive and almost unrestrained power to create rights (and

conversely, impose restrictions) could create a judicial branch that was too powerful.

The third objection to the Ninth Amendment and its possible Natural Law affiliation, is that many claim there are no Natural Laws or Natural Rights. This is not a legal question as much as it is a philosophical one.

“The Ninth Amendment refers to unspecified rights ‘retained by the people’ - rights that the people had before forming a government. One of the sources of intellectual resistance to a justiciable interpretation of the Ninth Amendment today is not constitutional, but philosophical.”

(Barnett, James Madison’s Ninth Amendment, p 31)

Many claim that there are no Natural Rights, but that all rights are vested in governments - which create rights. For those who claim that there are no rights antecedent to government, the claim that rights not defined by government, are protected is meaningless. John Ely (being quoted by Barnett) argued that,

“... the reference in the Ninth Amendment to unspecified retained rights is no different from a constitutional prohibition of discrimination against ghosts. ‘Suppose, there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions.’” (Barnett, James Madison’s Ninth Amendment, p 32)

As Barnett goes on to explain, given the assumption that there are no Natural Rights, the Ninth Amendment was simply “a mistake” and should be ignored.

“If rights antecedent to government are mere illusions or ghosts, then judicial enforcement of these alleged ‘rights’ can only be wholly subjective and arbitrary. Courts, in effect, would be ‘making up what might be under the inkblot’. Decisions that are unavoidably based on subjective preferences, the argument continues, ought to be made by the representative branch of government so as to reflect the preferences of the majority. I reject the premises of this argument.” (Barnett, James Madison’s Ninth Amendment, p 32)

Barnett goes on to assert that, not only is it possible to define -- to a functional extent -- the material “under the inkblot”, but argues that any consistent interpretation of the Constitution requires an understanding of the original intent (what is under the inkblot) of the writers of the Constitution. “If the Framers intended that unenumerated rights be protected by the judiciary, then to honor that intent requires that we make some effort to discern and protect at least the kinds of rights the Framers had in mind when they ratified the Ninth Amendment.” (Barnett, James Madison’s Ninth Amendment, p 33) It could be argued that in modern times we don’t need to worry about the original intent of the Framers because they had no way of knowing what directions society would take in the future, but Barnett argues that intent is a fundamental portion of consistently and coherently interpreting the Constitution. Barnett sees the

Constitution in contractual terms and asserts that it needs to be interpreted in similar terms. "Determining the consensual terms or original meaning of any agreement requires that one take into account the background assumptions of the parties." (Barnett, James Madison's Ninth Amendment, p 33)

While it is not the intent of this paper to provide a detailed historical account of the addition of the Bill of Rights, it is important to understand how fundamentally important this document was to those who had to make the decision to ratify the Constitution. Most of the states' Constitutions included stipulated lists of rights that government could not intrude upon. Many states were not comfortable with the fact that the proposed Federal Constitution did not include a list of protected rights, and ratification was, in some cases withheld until a commitment was made to draft and include a provision of rights. Without a list of protected rights, there was a fear of the abuse of power by the Federal government. The debates for and against the ratification of the new Constitution took place largely in speeches and newspaper editorial debates. James Wilson, one of the representatives in the convention to draft the Constitution, defended the lack of a Bill or Declaration of Rights in the Constitution in a speech he gave in Philadelphia on October 6, 1787:

"Hence it is evident, that in the former case [state constitutions] every thing which is not reserved is given, but in the latter [federal constitution] every thing which is not given is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a

bill of rights a defect in the proposed constitution: for it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence.” (Wilson, The Debate on the Constitution, p 64)

While this argument was commonly used by proponents of a constitution without a bill of rights, it was constantly rejected by those who felt that the tendency of government was to usurp natural rights that inhered in individuals, and thus wanted a list of rights that would stand as a protection against unjust intrusion on personal liberty. A typical response is reflected in this newspaper editorial that appeared ten days after James Wilson’s speech as a rebut to that speech:

“Mr. Wilson pretends to point out a leading discrimination between the State Constitutions, and the Constitution of the United States. In the former, he says, every power which is not reserved is given, and in the latter, every power which is not given is reserved: and this may furnish an answer, he adds, to those who object that a bill of rights has not been introduced in the proposed Federal Constitution. If this doctrine is true, and since it is the only security that we are to have for our natural rights, it ought at least to have been clearly expressed in the plan of the government.” (Wilson, The Debate on the Constitution, p 70)

Those who felt a Bill of Rights was not required, felt that the Constitution was a document specifically designed to limit government's power and that, as a result, there was no need to stipulate additional restrictions – the only rights the Constitution gave to the government were stipulated in the Constitution. (This is a “charitable” interpretation – it is probably the case that some who opposed a Bill of Rights really were interested in leaving the door open for a stronger central government.) Those who demanded a Bill of Rights felt that these rights were so fundamentally important that they could not support the creation of a government that did not stipulate the protection of those rights.

But even those who favored a Bill of Rights were afraid that it would be over-interpreted in the following way: that the inclusion of particular rights in the Constitution with “protected” status, could be interpreted as meaning that no other rights would enjoy the same level of protection. The fear was that at some future point, government could restrict rights that “exist” because they were not covered in the Bill of Rights. This was the position argued by Alexander Hamilton (an unapologetic federalist) in Federalist Paper No. 84:

“I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . . They might

urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights." (Hamilton, p 559)

Many contemporaries disputed Hamilton's position, and some doubted the good faith effort of his intent. The issue of a Bill of Rights needed to be addressed in order to secure a solid base of support for the new government. The proponents of a Bill of Rights felt that the issue of stipulated, protected individual rights was their right and inhered in their nature as persons. They were not willing to give these up. The Ninth Amendment was James Madison's proposal to accommodate the need for a Bill of Rights against the fear of a Hamiltonian interpretation of those bills. A stipulation that protected unenumerated rights could protect those rights with the same level of protection that was extended to the enumerated rights. (See Barnett, James Madison's Ninth Amendment, p 20 - 34)

Returning to the view of the Constitution as a contract, Barnett points out that in interpreting any contract, an understanding of the assumptions and negotiations is critical to understanding the meaning of the contract. The same

would apply to the Constitution. Barnett reiterates the historical fact, that in the negotiations for ratification of the Constitution, the Bill of Rights (including the Ninth Amendment) was a significant portion of the requirements of the contract.

“The Ninth Amendment was offered precisely to ‘compensate’ . . . critics for the absence of an extended list of rights. Putting this in contract terms, the Ninth Amendment ‘clause’ served as the ‘consideration’ for not insisting on a more elaborate statement of rights.” (Barnett, James Madison’s Ninth Amendment, p 35)

With this in mind, any attempt to interpret the Constitution without a recognition of the Ninth Amendment would violate the conditions that were required to establish the contract in the first place.

According to arguments presented by Patterson, the reason the Ninth Amendment was included was to allow the law to accommodate and respect new understandings of human “rights” as society developed in moral and intellectual sophistication. By this argument, unenumerated rights would not be “new” rights, they would be “newly recognized” rights. The Ninth Amendment provides for the protection of rights that were not fully recognized in 1776.

“. . . the Ninth Amendment was intended to protect the unenumerated rights, not only as they have now appeared, but also as such rights may appear as history and the future shall unfold. As the race becomes more evolved, and as the respect for the dignity of human life increases; as we become more intelligent and spiritual human beings, then we shall learn

more of the fundamental truths about human nature. . .the philosophy of the Ninth Amendment is a living and growing philosophy. . . It was never intended that civilization in other phases of life should progress, but that human liberty and rights of natural endowment can only be defined as they existed almost two centuries ago, and that however apparent such a right may become in the light of current history, such a natural right could never be recognized . . . We should not attempt to harness our rights to a civilization as it existed one hundred and sixty-five years ago, and it was not the intention of the framers of the bill of Rights that we should do so.” (Patterson, p 122, 123)

Charles Black argues a similar point when he states:

“The Ninth Amendment language was put where it is by people who believed they were enacting for an indefinite future. . . Even the dogmata of the Catholic Church have unfolded gradually; we can scarcely expect any more of our constitutional law – and the history of that law amply shows that it is utterly idle to think all questions can be answered at once.” (Black, p 337, 346)

To Bork’s argument that the Ninth Amendment’s protection of unenumerated rights is an inkblot, Barnett simply asserts that we can apply traditional exegetical and legal practice, and that the need to interpret the text of the Ninth Amendment in an effort to apply it is not different – in kind – from the requirement to do the same thing in reference to the main body of the

Constitution itself. Barnett proposes that the determination of original intent can be satisfactorily dealt with by going back to documents such as: The Federalist Papers, the Constitutions of the various states (which had stipulated rights), the arguments at the Constitutional Convention, correspondence between various major contributors to the convention (Jefferson and Madison, primarily) and other sources.

Barnett also points out that throughout our history, the courts have defended a variety of unenumerated rights already, and that these provide another basis for determining the application of the Ninth Amendment. Barnett provides a partial list of unenumerated rights already established by the courts as follows: The right to retain American citizenship, the right to receive equal protection from the states and federal government, the right to vote, the right to a presumption of innocence and the demand for proof beyond a reasonable doubt, the right to have access to Federal Courts, the right to associate with others, the right to a zone of privacy, the right to travel within the United States, the right to marry or not to marry, the right to make one's own choice about having children, the right to educate one's children (some restrictions apply), etc. (Barnett, James Madison's Ninth Amendment, p 39) As Barnett summarizes:

"There is, then, no shortage of textual materials contemporaneous with ratification of the Ninth Amendment that would permit an elaboration of the rights retained by the people. These materials are comparable in every respect to those traditionally used to interpret the original intent of other

provisions, and there is no inkblot that prevents us from reading them.”

(Barnett, James Madison’s Ninth Amendment, p 37)

Barnett points out that another important function of the Ninth Amendment is that it helps underscore the fact that the presumption of the role of government by the founding fathers was that in the conflict between excessive government power and individual rights, the preference was to be given to individual rights.

“Instead of authorizing a search for particular rights, the Ninth Amendment can be viewed as establishing a general constitutional presumption in favor of individual liberty. . . As a practical matter, we must choose between two fundamentally different constructions of the Constitution, each resting on a different presumption. We either accept the presumption that in pursuing happiness persons may do whatever is not justly prohibited or we are left with a presumption that the government may do whatever is not expressly prohibited. The presence of the Ninth Amendment in the Constitution strongly supports the first of these two presumptions.” (Barnett, James Madison’s Ninth Amendment, p 41, 43)

4 The Clarence Thomas Hearings: A Modern Debate on an Ancient Philosophy

The Clarence Thomas hearings, held in 1991, offer a vigorous challenge to those who claim that Natural Law is a philosophy that has no current relevance. This chapter will overview some of the fundamental issues relevant to Natural Law during those hearings and, in the process, show how current and relevant those ideas are in contemporary jurisprudential processes and ideas.

The Clarence Thomas hearings provided a fascinating forum in which the question of the relationship--both historical and philosophical--between the American government and Natural Law philosophy was vigorously aired. Clarence Thomas, the nominee, had published widely and with considerable controversy his views on Natural Law as it relates to the way courts ought to arrive at rulings that reflect the will of "The People". From the opening statements throughout much of the hearings the question of Natural Law was a preeminent issue that drew attention and concern from the senators on the committee and initiated a national debate on the role of Natural Law on the American legal system. An examination of some of the discussion at these hearings serves two useful functions: First, it shows the powerful effect of this ancient philosophy on a very modern culture. And, second, it provides a good introduction and overview of some of the main issues that Natural Law has had to wrestle with from its very beginnings.

Before the Anita Hill scandal, the Chairman of the Senate Judiciary Committee, Joseph Biden, Jr., felt that the most important part of the Clarence Thomas hearings was the pursuit of an understanding of Judge Thomas's views on the application of Natural Law principles or processes on legal decision making. His interest in this was compelling and manifest itself again and again throughout the hearings. In his opening statement, Biden indicated why he saw Thomas as such an important judicial nominee with two observations. The first observation was not specific to Clarence Thomas:

“Because of [recent] changes, many of the most basic principles of constitutional interpretation of the meaning that the Supreme Court applies to the words of the Constitution are being debated in this country, in a way they haven't for a long time, in a manner unlike anything seen since the new deal.” (Biden, p 1.)

Because of changes in the bench and conflicts between a relatively liberal Democratic Congress and pretty conservative Republican Presidents, Biden was concerned that the nature or personality of the Supreme Court was altering in such a way that individual social and personal liberties protected by the Supreme Court in recent years were increasingly at risk by appointees who held different philosophical views about the role of government and the place of civil rights within that government. Biden felt that part of his job was to be sure this portion of the court's activities would not be harmed by an appointee who

understood the role of government in the protection of civil rights differently than had been the case on the court in the recent past.

Biden's second concern was of a nature that involved Judge Clarence Thomas's personal philosophical understanding about the subject of this paper: In what way would Clarence Thomas apply Natural Law thinking to his adjudication of cases that came before him? Biden's question is very clearly concerned about this issue *above all others before the committee* in reference to this nominee:

"Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that Natural Law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the Natural Law philosophy to the Constitution is, in my view, *the single most important task of this committee. . .*" (Biden, p 2. italics mine)

The question of Thomas's philosophical views was a central issue with the Democratic senators, in general.

Senator Kennedy raised the specter that recent ("conservative", one would suspect he means) appointees have "...not hesitated to overrule earlier decisions with which the new majority disagrees." (Kennedy, p 35) He cited outgoing Justice Thurgood Marshall's warning that the "new currency" of the court's

decision-making is power, not reason. And then pointedly stated that the views of the person who replaces Thurgood Marshall could well "...determine the very nature of our democracy and the future of the Bill of Rights". (Kennedy, p 36)

One element of Thomas's "alleged" natural rights views was that, "Judge Thomas has stated that the Constitution protects economic rights as much as any other rights." (Kennedy, p 36) Kennedy's typically understated warning was that, "Until the 1930's, a similar doctrine was used by the Supreme Court to strike down attempts by Congress and the States to protect the rights and very health and safety of workers against unfair abuses of power by unscrupulous employers and corporations." (Kennedy, p 36) Clearly, Kennedy was concerned about how Clarence Thomas would apply Natural Law principles to his judicial reasoning. In other words, his concern, like Biden's, was whether or not Thomas's use of Natural Law assumptions would comport with his own understanding of constitutional interpretation.

Senator Leahy, in his opening statement, raised one of the central problems of Natural Law philosophy. Looking over the desk at Clarence Thomas, Senator Leahy pointedly stated:

"You often allude to what the Declaration of Independence calls the laws of nature and of nature's God. Well, Natural Law, we all know, is an elastic concept. It can be used to defend but also to deny basic rights. In a case alluded to already at this hearing today, the famous case from the 1870's, one Supreme Court Justice would have upheld a law in Illinois that

barred a Vermont woman from becoming a lawyer. And why would this Vermont woman be barred from becoming a lawyer? Because under the laws of nature, according to this Justice, women were granted the noble and benign offices of wife and mother, and that was it. He wanted to make certain we knew that Natural Law would never accept a woman as a lawyer. Now, that might seem like a very quaint and dated reference, but the Natural Law problem is anything but dated. It can be used to argue for or against rights like abortion and privacy. I want to know what Natural Law means to you, Judge. How would you use it to interpret the Constitution and the Bill of Rights? And I will ask questions along that line." (Leahy, p 54)

One of the significant problems with defining Natural Law Philosophy is in "holding it still" long enough to define it. Leahy, in his opening statement, raised one of the fundamental problems with the application of Natural Law principles to judicial decision making, which is that it is so variously defined, it is almost impossible to arrive at a definition that has any significant meaning at all. This problem may be insurmountable in reference to attempting to define Natural Law Philosophy and its application to Judicial decision making. In attempting to write about the process of applying Natural Law principles to ethics (if one removes the question of precedent, this problem is almost exactly the same in judicial decision making) Stephen Buckle begins his article on applying Natural Law to Ethics with this statement:

"The idea of Natural Law in ethics has had a long and varied history--so much so, in fact, that it is difficult to pick out the essential ingredients in a Natural Law ethic. For the same reason, some attempts at exposition are very misleading, typically because they oversimplify: it is tempting to pick out one version of Natural Law and generalize from its particular features, in the hope that it is representative. . . An important implication of recognizing the necessary generality of the idea of Natural Law is its limited value as a practical ethic, in the sense of providing specific maxims to govern human conduct." (Buckle, p 161)

Leahy indicates that he will want to know exactly what Clarence Thomas means when he says "Natural Law" and what process of reason (and what assumptions) Thomas would apply in his efforts to adjudicate using these principles.

Senator Simpson raises the same point--the ambiguity that seems to be inherent in Natural Law discussions--when he says, ". . . Natural Law is an inherently vague concept." (Simpson, p 190) Senator Simpson states that that is part of what makes these particular hearings so divided and argumentative. On the same page of the hearing transcripts, Simpson says that the fact of the ambiguity of Natural Law is being used as a political mallet by Thomas's enemies because they can start with the unclear concept of Natural Law and then, ". . . your detractors can conjecture all kinds of things about you and your philosophies without being taken to task for the obvious inaccuracies and vagueness." (Simpson, p 190) Simpson feels that the lack of clarity in reference to

Natural Law is/was being used by his political enemies to set up straw man positions that would be hard to knock down because of the lack of a consistent definition of Natural Law.

Natural Law had been involved in another nominee's hearing—that of Judge Robert Bork. Senator Hatch (in trying to defend Thomas) stated that, ". . . Judge Bork was criticized because he did not particularly endorse the principle of Natural Law in constitutional adjudications, and now you [addressing Judge Thomas] are being criticized because you purportedly do. Frankly, it is a double standard, and, I might add, by the same committee. . .many who criticize you today for acknowledging the existence of Natural Law were the most vociferous critics of judge Bork four years ago for not acknowledging the existence of Natural Law. I just want to make that point." (Hatch, p 171, 172)

Returning to Biden's opening statement, he (Biden) provided three views of what he felt Natural Law consisted of and stated his own belief. While his belief seems so colored by his own preferences and so lacking in systematic analysis and exposition as to render them intellectually useless; his opening statement and subsequent follow-up created some of the most intellectually dramatic moments of the hearings (prior, of course, to the entrance of Anita Hill's testimony). Biden indicated that if Natural Law were used by the courts as a means of establishing and enforcing a standard moral code on people such that individual rights would be curtailed, then he did not feel the American people were willing to support that (nor could he). His second concern, one that

Kennedy reiterated, was the question of which rights should get priority. Do we give priority to individual civil rights (assuming economic rights do not directly underlie civil rights) or do we give priority to economic rights or property rights—which are also stipulated as natural rights. The fear of giving priority to economic rights, of course, is that laws like child labor, anti-discrimination and environmental laws could be struck down on the grounds that they interfere with the natural rights of free contract and control of one's property. Biden's third category was described as follows:

“It is the one [category] that mirrors how the Supreme Court has understood our Constitution for the bulk of this century, and it is the one that I believe most Americans subscribe to. It is this view of Natural Law that I believe—I personally, to be up front about it, think is appropriate. In this view of Natural Law, the Constitution should protect personal rights falling within the zone of privacy, speech, and religion most zealously. Those rights that fall within that zone should be most zealously protected. These personal freedoms should not be restricted by a moral code imposed on us by the Supreme Court or by unjust laws passed in legislative bodies.” (Biden, p 2-3)

Biden's view of Natural Law is that it is a law that protects rights that he deems central to what constitutes a democratic form of government whose powers are curtailed by a Constitution and a Bill of Rights. He has not systematically defined what he means by Natural Law, but he knows he wants some rights to be given

priority over others. His question for Thomas, baldly stated, is, "which category of rights to you want to protect over which others?" To Biden's credit, this seems like a legitimate topic of conversation at a judicial hearing.

Senator Kohl, perhaps less informed on the issue than Senator Biden, had this to say:

"You have been an outspoken admirer of Natural Law, *a doctrine largely dismissed for the past half-century*. In fact, you have suggested that, and I quote, 'it provides the only firm basis for a just, wise, and constitutional decision'. . . And since you said that Natural Law is the only basis for constitutional decision, why wouldn't you overturn rulings which you believe conflict with Natural Law principles?" (Kohl, p 81 italics mine)

Based on the speeches and books alluded to and the rancorous nature of much of the debate in the hearings, Kohl seems to be out of touch in this area of American jurisprudence in reference to its contemporary relevance. Nevertheless, his expressed concern is that Thomas, as a Supreme Court justice, would overrule precedent in order to align positive law with his version of Natural Law.

Because there had been so much interest in Thomas's views on Natural Law theory and its application to the function of the judiciary, one of the most disappointing and surprising aspects of the Thomas hearings was his complete refusal to discuss the possibility of applying Natural Law reasoning to constitutional adjudication. In his first denial, he alluded to his comments to the committee when he was nominated as a Federal Judge:

"As I indicated, I believe, or attempted to allude to in my confirmation to the Court of Appeals, I don't see a role for the use of Natural Law in constitutional adjudication. My interest in exploring Natural Law and natural rights was purely in the context of political theory. I was interested in that." (Thomas, p 112)

This brought on a firestorm of protest in the press and among the committee members — some of whom apparently had been hoping to beat Thomas up with this Natural Law philosophy throughout the hearings . But Thomas stayed with it and repeated his position (parroted it, some might say) almost verbatim throughout the hearings.

"I think I have indicated in my confirmation to the Court of Appeals that I did not see a role for the application of natural rights to constitutional adjudication, and I stand by that." (Thomas, p 114)

"At no point did I or do I believe that the approach of Natural Law or that natural rights has a role in constitutional adjudication. I attempted to make that plain or to allude to that in my confirmation to the Court of Appeals. And I think that is the position I take here." (Thomas, p 114)

"My interest in natural rights were purely from a political theory standpoint and as a part-time political theorist. I was not a law professor, nor was I adjudicating cases. And as I indicated and have indicated, I do not think that the natural rights or Natural Law an appropriate use in constitutional adjudication." (Thomas, p 116)

Because of criticism (highlighted crassly by Senator Metzenbaum) that Thomas was manifesting a "Confirmation Conversion" on the question of the use of Natural Law in the adjudication of cases before the court, it was politically important to Thomas and his supporters on the committee to try to show that his views on this subject preceded his nomination to the court. Hence, Thomas's insistence on constantly bringing up his former confirmation hearings. Senator Simpson, following Senator Metzenbaum's attack, had read into the record Thomas's stated position on this question as given at the hearing held a year and a half prior to the time of these hearings:

"But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents." (Thomas, quoted by Simpson, p 189)

This question of attempting to resolve Thomas's apparently inconsistent viewpoints on this subject was important for two reasons: one was for a clearer understanding of Thomas's views on proper adjudication, but the other reason it was important to try to solve this apparent contradiction went back to the question of integrity. Heflin, in again raising the term "confirmation conversion", stated this:

"I have done a good deal of reading and I tried to listen to testimony. Of course, it has entered into my mind from your testimony, as opposed to some of the spoken and written words that you have given in the past, an appearance of confirmation conversion. Now, this term is a term that came from the mouth of my colleague Senator Leahy here in the Bork hearings, which would indicate that the confirmation processes cause one to change his mind or to give answers that will hurt him in regards to seeking the confirmation. But it also can raise issues that can affect the evaluation that members of the committee may give as to integrity and temperament." (Heflin, p 236)

The question of Thomas's integrity, which became such a crucial part of the debate after the Anita Hill accusations, is highlighted here, in reference to Thomas's answers on Natural Law. Are his expressed views reconcilable to his earlier views? Is it just a matter of perspective or semantics? Because of the appearance that Thomas gave during the hearings that he was "running away" from earlier views on Natural Law, The question of Thomas's integrity became an issue in the hearings long before the Anita Hill assertions.

The last element of the Thomas hearings that bears on this paper is the question of getting from Natural Law theory to the realities of everyday life. Thomas consistently argued that it was appropriate to look "behind" the Constitution to understand the principles guiding the founding fathers as they

debated and wrote this document, but that you should not "use" Natural Law to decide cases:

"My view is that I have been consistent. . . I have not advocated or suggested that it [Natural Law] should be used in constitutional adjudication. Our Founders and our drafters did believe in Natural Law, in addition to whatever else, philosophies they had, and I think they acted to some extent on those beliefs in drafting portions of our Constitution, for example, the concept of liberty in the 14th amendment.

I think that knowing what their views are is a context for understanding the separation of powers or perhaps even understanding the notion of limited government and the rights of individuals.

But when the rights are in the Constitution, then one resorts to constitutional adjudication. Now, the beliefs of the Founders could be a part of the history or tradition to which we look, but you do not make an independent search of Natural Law, and I have not suggested that. I think my writings have made clear that Natural Law is the background of our Constitution, that it does not move to the front and that it is not positive law. They are two separate Things.

. . . Now our Founding Fathers took bits and pieces of what they believed may have been Natural Law, and they placed that in the Constitution. But once it is in the Constitution, it is no longer required that

anyone refer to Natural Law. It is a part of our positive law. And I think that that is the appropriate distinction." (Thomas, p 237-238, 241)

Thomas worked vigorously throughout his hearings to make this distinction between a theoretical background of Natural Law and the use of Natural Law to make individual judgments on any particular case. Another of the tactics (I'm not implying it is dishonest by using the word "tactic") is that Thomas makes a sequential distinction between Natural Law and positive law. If you take a Natural Law principle and put it in the context of a written constitution, it is no longer Natural Law, but becomes positive law.

Another area of concern among the senators (at least the Democrats among them) was in the area of natural rights in the context of economic rights. Several excerpts from speeches Judge Thomas had made over the years on this area were made a part of the record of the hearings. He had vigorously argued that natural rights included the right to earn and control what one "earned" through his (or her) labor and what was owned by the individual. In extreme cases, Thomas was alleged to feel that the government did not have the kind of regulatory rights they claim for environmental and safety issues. Some of his comments suggested that he held economic rights to have equal claims to civil rights. That the right to enter freely into contracts had equal status with, for example, the right to vote. A couple excerpts will show that this concern seemed reasonable, given his published writings:

“... our current explosion of rights--welfare rights, animal rights, children's rights and so on--goes to the point of trivializing them. Furthermore, economic rights are considered antagonistic to civil or human rights--the former being materialistic and dirty while the latter are lofty and noble. The split has evolved in such a way that some who consider themselves great champions of human rights contrast themselves with advocates of property rights or economic rights.

[There needs to be] . . . a renewed understanding that the founders' constitution intended to protect individual rights--the full indivisible range, economic and civil. The Father of the Constitution, James Madison, put it succinctly: 'As a man is said to have a right to his property; he may equally be said to have a property in his rights!.'” (Thomas, p 122-123)

In a paper delivered before the Pacific Research Institute in 1987, Thomas had this to say on the subject of economic rights:

“... consider the attack on the wealthy, or 'the Rich.' We see it in intellectuals like John Kenneth Galbraith or in popular depictions of American business. Franklin Roosevelt denounced the 'malefactors of great wealth.' His latter-day political heirs simply denounce the corruption of the wealthy. But in fact what the critics really want to do is attack the sources of wealth, even including the right to acquire wealth. And the attack on economic rights is an attack on all rights. Or as James Madison put it in his famous Federalist Paper Number 10: The first object

of government is the 'protection of different and unequal faculties of acquiring property.' Notice he does not say that government should protect an already existing, unequal distribution of property. Madison looks forward to a dynamic economy which would unleash human capabilities, destroying old aristocracies, and erecting new ones, which in turn would be supplanted. Hence it is, that socialists and their apologists have to attack the notion of individual rights and replace it with notions of 'group rights' and 'social man' and all sorts of principles justifying economic redistribution. As Nobel laureate Friedrich Hayek succinctly put it, 'The striving for security tends to become stronger than the love of freedom. . . with every grant of complete security to one group the insecurity of the rest necessarily increases'." (Thomas, p 156-157)

This question about the status of economic rights verses the status of personal or civil rights was highlighted in an exchange that surprised many members of the panel. In his questioning, Senator Brown began by building a case that economic, or property rights, should have the same level of "scrutiny" as civil rights. That is, in order for the government to intrude on an individual's right to acquire or dispose of his property (or any other wealth or earning capability), there should be the exact same hurdles to government intervention as exist in the realm of personal rights (to freely worship, to speak without prior restraint, to vote, etc.). Senator Brown complained that this was not the case. He summarized the reasoning behind his position as follows:

"... our courts protect personal rights like abortion and others with a standard called 'strict scrutiny'--that is, the Government has to have a compelling Government interest for any restrictions on those rights--but that a different standard applies for the protection of property rights, called the 'rational basis test,' 'rational relationship test,' protected by requiring some rational relationship between the legitimate, not necessarily compelling, purpose and means chose to achieve that purpose.

At least in my mind, I think there are a number of reasons why this distinction between personal rights and property rights simply doesn't hold water, is artificial.

First, it strikes me that the property rights are of obvious concern to the Framers of our Constitution. They are named specifically in the Constitution with explicit references both to contracts and property.

Second, I believe that property is simply an extension of personal rights and vice-versa, that to separate them, to assume that they are different somehow, really reflects, I think, a distorted view of how our society works.

Third, the political and moral values that we all hold dear strike me as dependent upon private property and the freedom to contract. . .for the courts or this country to pretend that somehow your right to property is inferior or isn't integrated with your personal rights, I think is ignoring the reality of our society. I must say I am troubled by the artificial

distinction that has been discussed. To provide a lower level of protection for property rights, I think endangers personal rights, and perhaps the opposite is true.” (Brown, p 371-372)

While Senator Brown practically begged Thomas to argue with the present court distinction between the two kinds of rights, Thomas surprised the panel by indicating that he "had no quarrel" with the present court rulings on the matter. In other words, in spite of his speeches on economic rights, he claimed to agree with the distinctions the courts recognized and accepted two levels of scrutiny in reference to personal and property rights. In fact, Biden was so surprised by Thomas's position as stated in his discussion with Senator Brown that he revisited it later to be sure he understood Thomas's position. (See: Thomas, p 370-372 and 394-397) When Thomas affirmed his position, and that there had not been a misunderstanding of his statement, Biden emphasised that there is, in U.S. legal theory today, a group of legal theorists asserting that we should apply a strict scrutiny standard to government efforts to intercede in property rights. This was a concern because with the higher standard, environmental, safety equal access regulations would all be very difficult to defend under a higher scrutiny test. This would, in the view of those who have put regulations in place, set America back hundreds of years in terms of the protection of the environment, children, women, workplace safety, etc. Biden, who appears to be well-read in this school of thought (he frankly admitted throughout the hearings that he accepts a Natural Law world view) pointed out that this question of

economic rights is a central natural rights theme--contrary to the less-informed press:

"I might add that a couple newspaper articles that have written about this thesis said it has nothing to do with Natural Law. Let me quote from the book, so they are informed, quote from Mr. Epstein: 'Thus, the political tradition in which I operate and to which the Takings Clause itself is bound rests upon a theory of natural rights.' I read from a very informed newspaper that natural rights had nothing to do with this theory. It is the thing upon which this theory is based." (Biden, p 397)

As has been seen, both Aquinas and Locke made rights of possession integral parts of their Natural Law theories.

Heflin, in perhaps the most spirited exchange over the Natural Law question throughout the hearings challenges what he views to be the glaring inconsistency of Thomas's adherence to the beauties of Natural Law on the one hand, and his refusal to apply it to the real world of the adjudication of cases on the other. His challenge is that Natural Law theory does not affect our lives and if it does not affect our lives and our society, why does Thomas praise it so much? In a sense Heflin's challenge to Thomas is that he should either accept responsibility for applying Natural Law to our lives or shut up about it:

"You have indicated that your writings and speeches were directed toward Natural Law more as a political theory and you have used the

illustration dealing with slavery. How is slavery related to a political theory?

...Well, you use the words 'higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges'. Now, how can higher law through a political theory serve as a protection against willfulness of run-amuck majorities or run-amuck judges?

How does Natural Law as a political theory provide protection for limited government or for judicial restraint if that political theory excludes constitutional adjudication?"

Finally, in apparent frustration, Heflin asked:

Well, if it became positivism or the positive law of the Constitution, then why is Natural Law being advocated? The concept that if it is constitutional law, if Natural Law has progressed to the extent that it is positivism, it is a part of the Constitution, then why all the great discussion today on Natural Law?" (Heflin, p 238, 239, 242)

Heflin's question is one of the greatly debated issues revolving around Natural Law. Even if you assume Natural Law is true, how does one get from the theoretical principles derived therefrom to applying them in a consistent way to the world of law and or ethics?

At the end of the hearings (I'm precluding the Anita Hill portion) no one was satisfied. The conservatives argued that Thomas had been held to a higher standard than other nominees and was being held to a litmus test. The abortion

question was asked -- in various ways -- over and over again throughout the hearings. Hatch and Simpson both argued against this method of interrogating a nominee on specific issues:

“[Hatch] Let me just say in closing of my questioning that I don't think that we should have a single litmus test to exclude somebody from serving on the Court. And I frankly don't think that it is fair to keep bombarding you [he was speaking directly to Thomas] with questions about abortion when you have said you are undecided on that issue. . . I think there is a point where it is overdone, and in your particular case, I think you have been singled out. And I have even heard some Senators say that unless you answer the question the way they want you to answer it, they may not vote for you. . . I think it is an abominable approach. Because I don't think anybody should be rejected or should be voted against for the Supreme Court of the United States on a single issue or a single litmus test. I just don't. And if we get to that point where this becomes a politicization of the courts, we are all going to lose.” (Hatch, p 303)

Several times during the hearings, conservatives interrupted to protest the heavy-handedness of the "liberal side" of the room--especially against Metzenbaum and Kennedy. Simpson, in fact, quoted Metzenbaum and Kennedy both, who, in previous hearings had categorically denied that any single issue ought to influence the committee in their evaluation of a nominee. The quote

from Kennedy (from the Sandra Day O'Connor hearings) was: "It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single issue interest group. The disturbing tactics of division and distortion and discrimination practiced by the extremists of the new right have no place in these hearings and no place in the nation's democracy." (Simpson, p 312) Simpson, after reading the quote, said, "Now, I just happened to think, as I looked at that, that what is true for the new right is also true for the old left." (Simpson, p 312)

On the more liberal side of the room, frustration (or, at least postured frustration) was high as represented by these remarks from Senator Kennedy regarding Thomas's elusiveness throughout the hearings:

"Judge Thomas, I continue to have serious concerns about your nomination. In your speeches and articles, you have taken many strong positions, but again and again you have asked this committee to ignore the record you have compiled over a decade.

On Natural Law, despite your previous clear advocacy of using Natural Law in construing the Constitution, you now tell us that you don't see a role for the use of Natural Law in constitutional adjudication.

On the right to privacy, you have walked away from your record and statements. You now say that you support a right to privacy, but you refuse to comment on its controversial applications.

On abortion, you have explained away your strong praise for Lewis Lehrman's extreme article supporting the right-to-life position, and said you just mentioned the article in the hope that the right-wing audience would be more inclined to support enforcement of civil rights.

You ask us to believe that an intelligent and outspoken person like yourself has never discussed Roe v. Wade with another human being. . .

The vanishing views of Judge Thomas have become a major issue in these hearings. If nominees can blithely disavow controversial positions taken in the past, nominees can say those positions are merely philosophical musings or policy views, or advocacy. If we permit them to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role in the advise and consent process. . .

When ideology is the paramount consideration of the President selecting a nominee, the Senate is entitled to take ideology into account in the confirmation process and reject any nominee whose views are too extreme or outside the mainstream." (Kennedy, p 452)

Metzenbaum's frustration was expressed plainly and with no attempt to mitigate his feelings:

"Our only way to judge you is by looking at your past statements and your record. And I will be frank; your complete repudiation of your past record makes our job very difficult. We don't know if the judge Thomas who has been speaking and writing throughout his adult life is the same

man up for confirmation before us today. And I must tell you it gives me a great deal of concern.” (Metzenbaum, p 178)

Immediately after this portion of the hearings, of course, Natural Law took a back seat to allegations of sexual harassment and counter-allegations that the media and portions of the Judicial committee were engaged in a “high-tech lynching of an uppity black man”.

Before these startling events, however, the Clarence Thomas hearings involved perhaps the highest level of public debate on Natural Law principles and premises since the writing of the Declaration of Independence and the Constitution. The question of the use of Natural Law principles for adjudication was debated (and denied), the writings of contemporary Natural Law and libertarian writers were quoted and argued, the question of whether economic rights had equal status with personal rights, and several other questions regarding the role of Natural Law in American history, thought and law were vigorously engaged in.

Senator Biden argued consistently, not only that Natural Law was an inherent part of our Constitution and its driving force, but that it was the underlying justification for many of the rights we have acquired throughout the years since the Constitution. He pointedly made the following closing remarks to a feminist committee who had strongly opposed the confirmation of Clarence Thomas--in large part because of his belief in Natural Law. I believe his comments here are accurate, and that in many civil rights cases, the reasoning

involved and the sources to authority (in many cases to override precedent) derive from Natural Law ideas.

“Let me leave you all with the following concern. Beware of being too critical of the notion of Natural Law, for if you are too critical of the notion of Natural Law, you will find it incredibly more difficult to find the notion of unenumerated rights within the Constitution, and you may find that you have to swallow a concern that I don't think you may have thought through. And there is all kinds of Natural Law, but if you blanketly criticize the notion of Natural Law being any part of our historical and constitutional tradition, then I challenge you to find where you are going to find unenumerated rights, the very things that are the essence of what you believe most deeply in, for if there are no unenumerated rights, there is no privacy and there is no choice.” (Biden, p 263. V. 3)

5. The Abortion Question, the Ninth Amendment and Natural Law

This chapter consists of two parts. The first part looks at the question of Natural Law and abortion in reference to the privacy question. The second part overviews some of the major debates involved in the question of the moral status of the fetus. These kinds of arguments are an important part of how Natural Law is to be played out in society. Reasoned debate is part of the process of working out ethical and legal issues in a system based on or including Natural Law assumptions.

The question of the legality and morality of performing abortions or allowing abortions to be performed is one of intense complexity. This complexity is further complicated by the strong emotional intensity most partisans of either side have in resolving the question. In 1973, the Supreme Court decision in the Roe versus Wade decision defined its position in reference to the abortion question. The Roe versus Wade (hereinafter Roe v Wade) decision recognizes the powerful emotional feelings on either side of the abortion question:

“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral

standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.” (Roe v Wade, p 156)

There are two fundamental issues the court wrestled with in reference to the abortion question: The first is the question of a right to privacy and the pregnant woman, the second is the legal and/or moral status of the fetus in reference to a right to life. The question of the moral status of the fetus was left unresolved by the courts in the Roe v Wade decision. This is a different question from that determined by examining the legal status of the fetus. The legal status of the fetus is established by law -- which is currently enshrined in the decision set forth in the landmark Roe v Wade decision.

If one's conclusion is that the fetus ought to be recognized as a person in the full moral sense of the word, it would seem to follow that the law ought to recognize it with full legal status. For this reason, the majority of the arguments about the legal status of abortion center around the status of the fetus--does it have full moral standing as a person?

Abortion and the Right to Privacy

One of the most important parts of Roe v Wade is in responding to the claim that the question of abortion is really a question of privacy and not one of the life of the fetus. The three fundamental Supreme Court rulings that develop this right to privacy are: Griswold v. Connecticut (1965), Eisenstadt v. Baird (1972) and Roe v. Wade (1973). The Ninth Amendment became a fundamental

part of this debate as the court wrestled with whether or not a general right to privacy existed, and what limitations would be affixed to that right.

In *Griswold v. Connecticut*, the court cited several instances where rights specifically stated had been broadened through Supreme Court decisions.

“The association of people is not mentioned in the Constitution nor in the Bill of Rights, The right to educate a child in a school of the parents choice – whether public or private or parochial – is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.”

(*Griswold v. Connecticut*, p 513)

Building on the idea that there are rights that are not specifically stated in the Constitution, the *Griswold* decision goes on to provide a definition and Constitutional justification:

“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First amendment is one, as we have seen . . . The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people’.” (*Griswold v. Connecticut*, p 514-515)

The Griswold decision than summarizes several rulings showing the application of the 4th and 5th amendment provisions being applied to support a right to privacy relative to birth control activities within a marriage due to a penumbra of privacy rights. In the end, the court overturned a lower court decision that found Planned Parenthood and a physician guilty of participating in birth control activities in violation of state laws on the bases of the constitutional protection of privacy laws with the following statement:

“We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” (Griswold v. Connecticut, p 516)

The court’s ruling supported the idea of a right to privacy that existed prior to the establishment of the written Bill of Rights. In a concurring opinion, Justices Goldberg, Rehnquist and Brennan emphasized the role of the Ninth Amendment in their support of the decision. They were not convinced the Fourteenth Amendment provided for this penumbra of rights in this case, and argued that the Ninth Amendment was a more solid basis:

“I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the bill of rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of the court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights . . . The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments. . . [the opinion offers a history of the Ninth Amendment, including quotes by Madison and Story] . . . These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.” (Griswold v. Connecticut, p 516-518)

Although the majority of justices supported the Griswold decision, the dissent was both broadly based and strongly worded. Justices Black and Stewart found that the court’s overruling of the Connecticut law was inappropriate and felt that

the Supreme Court did not have authority to create laws based on subjective feelings of right and wrong and then force states to follow them. They argued this to be a usurpation of the rights of states and the responsibility of the legislative branch of government. They also argued against a broad penumbra of ill-defined privacy rights:

“Privacy is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many other things . . .”

(Griswold v. Connecticut, p 530)

In addition to arguing against the vagueness of language in the use of the word privacy, Black and Stewart argued against the vagueness of the concept of Natural Justice, calling it subjective:

“If these formulas based on ‘natural justice,’ or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body . . . I cannot rely on the due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law . . . The Court also quotes the Ninth Amendment, and my Brother Goldberg’s concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do

with this case is to turn somersaults with history.” (Griswold v.

Connecticut, p 530-532, 537-538, 542)

Blackmun and Stewart also criticize the court decision for misusing and over-interpreting the Ninth Amendment in such a way that it broadened the power of the Federal Courts. Douglas’s response to the Dissent is swift and comprehensive. He begins by indicating, in an almost patronizing tone, that the dissent, “. . . misses the import of what I am saying”. (Griswold v. Connecticut, p 519) He defends his use of the Ninth Amendment stating that all it does, and all the court has used it to do is to recognize what the Constitution’s authors wanted recognized, which is that, “. . . fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive”. (Griswold v. Connecticut, p 519-520) The Ninth Amendment was placed there to be sure that, “. . . other fundamental personal rights should not be denied such protection [fundamental] or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.” Douglass then states, “I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights. Nor am I turning somersaults with history. . .” and goes on to defend his understanding of the relationship between the Ninth Amendment and the Fourteenth Amendments as tools to protect personal rights by abuse of government’s intrusions into those rights – whether stipulated or not. (Griswold v. Connecticut, p 520) He argues

against the idea that the Court has created a capricious and arbitrary legal process by saying that:

“In determining which rights are fundamental, judges 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. The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ . . . I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating ‘from the totality of the constitutional scheme under which we live’.”

(Griswold v. Connecticut, p 520)

These passages make it obvious that the question of Natural Law and the Ninth Amendment were fundamental issues in reference to the Griswold v. Connecticut decision.

In reference to this paper, the Eisenstadt v. Baird decision is important for a very restricted reason. The Court ruled that fundamental rights to privacy that are extended to married persons must also be extended to single persons. This had direct bearing on the Roe v. Wade decision, as the applicant was an unmarried, pregnant woman. The ruling of the court was stated as follows:

“If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” (*Eisenstadt v. Baird*, p 362)

Largely on the basis of the *Griswold*-defined privacy rights in reference to “reproductive freedom” based largely on the Fourteenth and Ninth Amendments and Natural Law considerations cited by the decision, and the expansion of these privacy rights to unmarried persons, the *Roe v. Wade* decision was published.

Roe v. Wade applied the rights to privacy as it related to birth control in *Griswold* and *Eisenstadt* to the issue of abortion, but saw abortion as being much more complex because of the involvement of the fetus. Although some proponents of an absolute privacy right in the area of abortion felt their victory was complete, Blackmun recognized that an absolute application of the right to privacy would not fully satisfy the demands of justice, and he indicated in his ruling that the woman, because she has a life or potential life in her, cannot be

granted the right to abortion strictly on the basis of protecting her rights to privacy because there is the life of another to consider:

"The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. . . As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." (Roe v Wade, p 180)

The right to privacy, then, is recognized as being partially dependent on the question of whether and/or when the fetus is entitled to a right that is more compelling than the woman's right to privacy. Interestingly, Blackmun's terminology allows that even if the fetus is only defined as a "potential" life, it may be afforded, at some level, a right-to-life protection at some point in the pregnancy. In either case, Blackmun consistently refers to the fetus and embryo as a life.

In his concurring opinion, Justice Stewart manifests a careless disregard for the status of the fetus in reference to the question of abortion. Stewart seems to be unable to recognize the difference between a married couple deciding not to have a child and a married couple deciding to end the life of a "child":

“...in Eisenstadt v Baird we recognized 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.” (Roe v Wade, p 194)

To his credit, Blackmun spends a good portion of his time in the Roe v Wade ruling considering the status of a fetus. One does not have to agree with the ruling to recognize his deep and good faith efforts to identify whether or not the fetus has any inherent right to life or if there is some period in its development where that right to life must be recognized. However, to dismiss the question out of hand, as Stewart does, seems to manifest an inability to assess relevant differences that is frightening to see on the Supreme Court. Concurring with Blackmun's recognition of the problem, this distinction is highlighted in an Amicus Curiae, Webster v. Reproductive Services, wherein it states:

“Even assuming that the various 'privacy' cases relied upon by Roe establish a generalized right to privacy, it does not follow that the abortion decision is encompassed within such a right. Abortion involves the destruction of the fetus, and is therefore 'different in kind from the decision not to conceive in the first place'.” (Webster v. Reproductive Services, p 190)

Given the consideration applied to trying to determine the point at which a right to life might be recognized, one of the most important sections of the ruling is where Blackmun seems to almost abdicate responsibility to define this--an abdication based on an inability to answer a question he has already recognized as being crucial. Blackmun explains that the Texas statute indicates that, "... life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception." (Roe v Wade, p 633) The implication here is that the right to life is tied to the determination of when life begins, which is defined as being at the point of conception. (At least, this is the opinion of the Texas law.)

Because the Roe v Wade decision brought the abortion question to the forefront of national consciousness, it is important to understand what this decision had to say on the subject of the status of the fetus.

The decision handed down in Roe v Wade recognized the centrality of the question of the moral and legal status of the fetus. It seems to me that one of the exposures in the Roe v Wade decision--the exposure that causes many to feel the law is at risk of being overruled by a more conservatively inclined court--is that the question of whether or not the fetus is a person who is entitled to all rights awarded a post-birth person is only partially addressed in the ruling. The Roe v Wade decision recognizes the claimants' position with the following:

"The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of

this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." (Roe v Wade, p 179)

The ruling recognizes that if the fetus is a "person" with rights protected by the Constitution, the right to life would supersede other rights, i.e., freedom of choice, rights to privacy, etc.

It is typically the case that law will attempt to follow precedent whenever it seems possible to apply a previous relevant ruling in a reasonable way. One of the more important assertions of the Roe v Wade decision is made in a very short (and, in my mind often over-looked) claim: "The Constitution does not define 'person' in so many words." (Roe v Wade, p 179) Given this assertion, it becomes, in part, the responsibility of this ruling to provide an attempt to understand the status of the person--when is a person a "person" in a Constitutional sense? The Roe v Wade ruling then cites several specific sections in the Constitution where the term "person" is used and then draws the conclusion that,

"... in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application." (Roe v Wade, p 179)

The conclusion that this is applicable to the broader question of when any human life is considered a person, however, seems hasty to me, because Justice Blackmun fails to show that the use of "person" in instances talking about adults

has any relevance to the question of establishing a beginning point for a right to life. In each of the citations, a specific question is being addressed, i.e., When can a person be a citizen? When can a person be a Senator? When can a person be a President? The use of the term "person" in these instances is far too specifically applied to allow for a general conclusion as to the status of the fetus in reference to a right to life.

Blackmun then makes the following assertion:

"We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." (Roe v Wade, p 181)

If, as Blackmun previously stated, the fetus has a right to life that would take priority over any other right; and if, as the Texas law stated, the right to life exists at the point of conception; then it seems that the question of when life begins is the central question. If Blackmun had refuted Texas' claim that the right to life was tied to when life begins, or if he refuted the idea that a right to life takes priority over any other right, then he could rule as he ruled. But without denying either of these claims, the decision of Roe v Wade to "decide not to decide" on this fundamental question puts the conclusions of the ruling at risk. In this case, the Supreme Court claimed that a question was too difficult for them to answer and then made a ruling that impacts over two hundred and

eighty million people. If the Supreme Court could not decide when life begins (and hence when a right to life begins) it could have abstained from making a ruling at all and left this decision in the hands of the legislatures of either the United States or the individual states. In my mind, it is this exposure that makes Roe v Wade a law at risk, and not the perceived threat of the religious right or some other minority view.

The tumultuous debates that have been ongoing since the Roe v Wade decision stand as stinging rebuke to the almost cavalier comment by Blackmun that, "There has always been strong support for the view that life does not begin until live birth." (Roe v Wade, p 633) If this strong support existed prior to the Roe v Wade decision, it quickly vanished in its aftermath. In the Amicus Curiae from the Webster v Reproductive Services, cited earlier, the ridiculous assertion that the nation's views on abortion are settled is taken to task:

"Roe v. Wade, as the Court is well aware, has been intensely controversial from the day it was decided. That controversy is more than simply a reflection of the deep divisions in American society over the underlying question of abortion. Rather, the controversy has, in substantial measure, been a product of the decision itself. Roe rests on assumptions that are not firmly grounded in the Constitution; it adopts an unworkable framework tying permissible state regulation of abortion to particular periods in pregnancy; and it has allowed courts to usurp the function of legislative bodies in weighing competing social, ethical, and scientific factors in

reaching a judgement as to how much state regulation is appropriate in this highly sensitive area.” (Webster v. Reproductive Services, p 190)

Blackmun's assertion that the controversy is settled by the majority of Americans also seems contradicted by his own statement (cited at the beginning of this chapter) acknowledging the "vigorous opposing views" and "seemingly absolute convictions" this subject inspires. This is a far cry from a statement of national unanimity on the abortion question.

The question of a national policy on abortion and the status of the fetus may ultimately be insoluble. As a matter of public policy, no issue seems as capable as abortion in stirring up such strong feelings in such morally complicated areas. There appears to be no middle ground that could conceivably satisfy both sides of the extremes of the issue (although Sumner has attempted to define one). Indeed, in discussing this paper with others, it has been almost impossible to find areas of compromise among individuals who are concerned with morality—either with the morality of the life of the fetus or the morality of a woman having an absolute right to choose in regards to her body. Granting a right to choose and leaving this decision in the individual's hands exclusively does not satisfy the pro-choice side because, whatever the status of the fetus, something dies when an abortion is committed. Establishing laws that limit the woman's right to choose does not satisfy proponents of abortion rights, because it is argued that a religious minority is then imposing its will on women.

Natural Law and the Debate on the Status of the Fetus

One of the fundamental claims of the Natural Law system of philosophy is that we ought to use the rational characteristics unique to man to attempt to resolve questions of "ought". In the realm of abortion and the question of the status of the fetus in reference to a right to life question, I believe that "rational debate" is ongoing and is significant. There is an on-going dialogue wherein the attempt is being made to establish criteria that would allow us, as a culture, to define when human life begins and what impact that should have on our legal system. Within the context of trying to establish these definitions, it is not the case that all participants would view themselves as Natural Law adherents. Many would not want that label applied to them. Some are Libertarians (many of which are Natural Law adherents), Utilitarians, Social Contract theorists, Religious Leaders, etc. I would argue that the debates occurring in our time on these issues are very much in line with the kind of reasoning process that natural law adherents would like to see. As we go through this process, the question of what constitutes human life in reference to a right to life, may become more clear – at least to a point where acceptable compromise might be reached by reasonable people debating in good faith. Some of those arguments follow.

In what is perhaps the most important essay attempting to define the question of what constitutes a human being, Mary Anne Warren ("On the Moral and Legal Status of Abortion") encapsulates most of the primary arguments on

the side of not conceding a right to life to a fetus. Her essay is a central essay in the argument because it is so comprehensive and because it has engendered a considerable amount of response.

She begins her essay with the statement that, ". . . it is impossible to show that, on the basis of intuitions which we may expect even the opponents of abortion to share, a fetus is not a person, and hence not the sort of entity to which it is proper to ascribe full moral rights." (Warren, p 226) The question she then puts forth is stated as follows:

The question which we must answer in order to produce a satisfactory solution to the problem of the moral status of abortion is this: How are we to define the moral community, the set of beings with full and equal moral rights, such that we can decide whether a human fetus is a member of this community or not? What sort of entity, exactly, has the inalienable rights to life, liberty and the pursuit of happiness?

(Warren, p 226)

In her essay, she provides five criteria a being must satisfy to be a full member of the moral community. Her list includes the following five traits: (1) Consciousness, in particular the capacity to feel pain, (2) Reasoning, (3) Self-motivated activity, (4) The capacity to communicate on an indefinite variety of topics, and (5) The presence of self-concepts and self-awareness. She indicates that it is not necessary to possess all of these to have a right to life, but that if the fetus possesses none of these then it does not have a right to life. (Warren, p 228-

229) One of the problems in her argument is that she fails to show why these five criteria define personhood in a moral sense. Merely asserting it won't do because the argument revolves around the question of what constitutes personhood. She has not defended her position, she has merely asserted it. She gets around trying to have to defend these assertions with the claim that they are so self-evident that anyone disagreeing with her position doesn't have a reasonable position: ". . . I think anyone who denied it [that these five criteria were required to establish moral person-hood] and claimed that a being which satisfied none of [the five criteria] was a person all the same, would thereby demonstrate that he had no notion at all of what a person is--perhaps because he had confused the concept of a person with that of genetic humanity". (Warren, p 229) She has asserted a definition of the requirements for moral personhood and then asserted that if opponents disagree, they don't understand what it means to have moral personhood. But their lack of understanding is based on their disagreement with her definition, which is the central moral question of the debate.

Her next move is to posit the idea of a gradually increasing right to life based on the physical development of the fetus:

It does seem reasonable to suggest that the more like a person, in the relevant respects, a being is, the stronger is the case for regarding it as having a right to life, and indeed the stronger its right to life is. (Warren, p 230)

This assumes that having a right to life is a gradually developing process--which is a reasonable deduction if you accept her five criteria for moral personhood. It seems reasonable to accept the idea that if reason, for example, is required for a right to life, and if reason is developed gradually and in stages, then there may be a gradually enlarging right to life as the reasoning capacity enlarges. The result being that a person like Albert Einstein would have a greater right to life than an uneducated street sweeper. And, obviously, an adult would have a greater right to life than an adolescent, who would have a greater right to life than a child, who would have a greater right to life than a fetus. The problem coming out of this, of course, is that we must eventually have one of two things: First, we must have a standard that indicates a point at which a right to life exists in order to get around this need to have a constant hierarchy of moral statuses based on reasoning skills; or second, we must have a very complicated (and potentially chilling) hierarchy defining a priority scale indicating various right to life levels. The chilling element of this idea comes with the recognition that Hitler's hierarchy was based on the idea that some classifications of people enjoyed a higher right to life than did others. This evolving scale of various right to life levels is also what is at the foundation of sex selection infanticide in some cultures and in the establishment and sustaining of slavery economies. Warren provides no idea of how to avoid either the arbitrariness of the first division or the social evils that potentially stem (and historically have stemmed) from the

second. Warren separates a “person” from a “potential person” and assigns a higher priority of rights for one over the other:

“ . . . even if a potential person does have some prima facie right to life, such a right could not possibly outweigh the right of a woman to obtain an abortion, since the rights of any actual person invariably outweigh those of any potential person, whenever the two conflict.”

(Warren, p 232)

This argument only has relevance if you have accepted her assertion that a “potential” person is less valuable than an “actual” person. If you don't accept her assertion that an “actual” person has a greater claim on moral rights than a “potential” person, the argument she presents here has no power to convince.

But back to Warren's five criteria for personhood. Each one of these is problematic in its own light.

Her first requirement for something to be considered a person with full rights is that it have consciousness and that it be able to feel pain. But what is the role of the question of the potentiality of consciousness verses the actuality of the state of consciousness? If consciousness and the feeling of pain are essential, and without them, one does not have a full right to life, what is the argument against killing an irritating spouse or child while they are asleep or anesthetized? They are not conscious--they are only potentially conscious.

The question of fetal pain is not a closed one. It is not the case that all authorities consider the question of fetal pain to be settled. In his book Abortion and the Conscience of the Nation, Ronald Reagan wrote the following:

“Doctors today know that unborn children can feel a touch within the womb and that they respond to pain. But how many Americans are aware that abortion techniques are allowed today, in all fifty states, that burn the skin of a baby with a salt solution, in an agonizing death that can last for hours?” (Reagan, p 31-32)

Putting aside Mr. Reagan's use of the loaded term “child” when he refers to the fetus, and that he simplifies the kinds and levels of pain experienced, and that he does not highlight the controversy over the claim of fetal pain by some neurologists, the question of fetal pain is a potent one. Rick Kaufman, in an article titled "Fetal Pain", points out that:

“This is a good point for an opponent of abortion to raise because given a basic moral sentiment against the infliction of pain, it seems that any suffering by a fetus being aborted can be taken as a prima facie reason against the permissability of that abortion. This moral injunction against the infliction of pain is commonly taken to apply to sentient beings in general, not just to persons. So the issue of fetal pain does not hinge on questions about the personhood of the fetus.” (Kaufman, p 305)

Kaufman goes on to argue other points, but the relevance of Kaufman's article to Ms. Warren's assertion about consciousness and pain is that she has included

perception of pain as a capability she thought would preclude the inclusion of the fetus into the realms of "personhood". Kaufman, in citing the dispute over whether or not a fetus can feel pain, challenges her ability to state categorically that the fetus does not feel pain. If the fetus does feel pain, then even if her criteria for personhood were universally accepted (and it is not) it is possible that the fetus would qualify as a true person based on the possibility that it feels pain.

Her second condition to qualify for personhood is the ability to reason. The problem here is that Warren has neglected to provide any standards to this criteria. How much reasoning capability is required? What kind of reasoning capability is required? What processes could determine what these minimal levels are? And, if we have levels that keep animals out of being considered humans, then do we have to set a high enough threshold that we could possibly endorse infanticide? How much reasoning capability does a 2 day old child have? Two weeks old? Two months old?

Michael Tooley raises this problem in his books and articles on infanticide and the abortion question. He argues that it is difficult to separate the two questions for someone adhering to a pro-choice position:

"What reason is there for raising the question of the morality of infanticide? One reason is that it seems very difficult to formulate a completely satisfactory pro-abortion position without coming to grips with the infanticide issue. For the problem that the liberal on abortion encounters here is that of specifying a cutoff point which is not arbitrary:

at what stage in the development of a human being does it cease to be morally permissible to destroy it, and why?" (Tooley, p 400)

Tooley defines a minimum requirement for the possession of a right to life, in stating that the being must have an interest in whatever right it is that he is claiming. Tooley argues that if we accept the arguments posited to protect abortion rights, there seems to be nothing short of an arbitrary line that can allow us to deny the practice of infanticide on the same grounds that we use to allow for the practice of abortion. The arbitrary line is birth. What difference can mere geography have on a right to life? (Note: The argument that this is not merely a geographical move relies on the connection of the fetus to the placenta. But the placenta provides food and oxygen, both of which are available to the child when outside the womb. At this late stage, the fetus is not dependent on the placenta since it can breathe and eat outside the womb.)

The next criteria necessary to personhood is listed as self-motivated activity. Warren describes this as, "an activity which is relatively independent of either genetic or direct external control" (Warren, p 228). Like some of the other criteria, this is difficult to define. One would presume that Warren is not speaking of an absolute ability to transcend one's physical conditions or prisoners would lose their right to life because they have very little control over their ability to carry out self-directed activities. The question of sleep occurs again, as well. While asleep, we are not capable of self-directed activity. I could accept the argument that in the future, the person who is asleep will wake up

(unless there is a catastrophe in his sleep) and will then have a relatively high level of autonomy in choosing his movements, but this is an argument from potentiality and would also apply to the fetus. The argument that they have had occasion to indulge in self-motivated activity in the past seems to be an issue of history and not present moral status. There is also the question of what level of self-consciousness must be involved in order for there to be said to be self-motivated activities? If a fly buzzes by my ear, I will swat at it without even thinking. I presume this level of activity is not what is meant by self-directed activity, or does ear-swatting grant me status as a full person?

Her next condition has a great deal of stipulations in it. It's almost like she said one thing, then noticed that it could be argued that a fetus could do that, and then added another condition and realized that a fetus could do that, until she came up with a condition that a fetus couldn't meet. In reaching these stages, she seemed to be stretching for a definition that alluded to language, but didn't use the term. The danger of saying that a right to life requires the use of language, of course, is that infants and the severely retarded (and the sleeping) are typically incapable of using language in a meaningful way. Her fourth condition for personhood is stated as follows:

"The capacity to communicate, by whatever means, messages of an indefinite variety of types, that is, not just with an indefinite number of possible contents, but on indefinitely many possible topics. . . " (Warren, p 228)

As you can see by the circuitous nature of the definition, there is a very careful effort here to resort to an indefinite number of communication topics. This step precludes the use of memorized motions or sounds used by the infant to communicate its needs to the adult. When a child is wet, it will cry when it becomes uncomfortable. But it can be argued that even if that is a form of communication, it is not possible that a child will actually use language that covers innumerable conditions in a wide variety of ways. Of course, it is probably arguable that the average adult can communicate an "indefinite variety of types of ideas on an indefinitely many possible topics". Many adults, through lack of interest or education or whatever, are lucky to be able to communicate the most mundane topics in a very limited way. I'm not sure what kinds of communication are acceptable to Warren as granting a right to life, and I would imagine this is one of the criteria that Michael Tooley would use to indicate that it could just as easily apply to infanticide.

The last of the criteria she presents as necessary to a right to life is, "The presence of self-concepts, and self-awareness, either individual or racial or both". (Warren, p 229) I don't even know what she means by racial self concepts. If a person is unaware of his or her ethnicity, is this a cause for disqualification? On what grounds can this kind of group self-consciousness be a criteria for personhood? Again, this criteria, however it's defined, seems to open the door to infanticide, unless one accepts the argument that being inside the womb is

different from being outside the womb in a morally compelling way. That this is the case is not a self-evident truth.

Warren recognizes that she has not provided any kind of clear criteria when she says, "Admittedly, there are apt to be a great many problems involved in formulating precise definitions of these criteria, let alone in developing universally valid behavioral criteria for deciding when they apply." (Warren, p 229) But then, if she has not provided clear direction for applying standards for defining when a being has a right to life, she has failed to do what she originally set out to do, which was to provide a series of criteria based on "intuitions" which even opponents of abortion would accept as being definitionally valid conditions for denying full human (or personhood) status to fetuses. (Warren, p 226) It is difficult to entertain the possibility that her moral opponents will accept these ill-defined criteria based on her intuitions alone. Although Mary Anne Warren sets out the basic criteria that are often the subject of debate in the abortion argument (and hence her essay is very important to this debate), she has not closed out the argument in any definitive way. She has completely (by her own admission) failed to define her terms specifically enough for them to be applied consistently and she has provided neither citations of authority nor compelling reasons to accept her five criteria as being binding to the debate and the assignment of personhood. Her assertions of her intuition are not enough to compel the rest of the participants of the debate. On the plus side, she has

engendered considerable discussion and debate on these subjects – which should lead to clearer thinking as further discussions continue.

Paul Ramsey attempts to come to terms with a "line" where we can say that at a specific given point we have a human being with a right to life. He argues against the Mary Anne Warren types of criteria on the grounds that, given her criteria, the killing of many classes of persons that are precluded by her requirements could justifiably be slain. In his essay, Ramsey comes up with what I think is the cleanest argument as to when we have a uniquely defined human being.

"Indeed, microgenetics seems to have demonstrated what religion never could; and biological science, to have resolved an ancient theological dispute. The human individual comes into existence first as a minute informational speck, drawn at random from many other minute informational specs his parents possessed out of the common human gene pool. This took place at the moment of impregnation. There were, of course, an unimaginable number of combinations of specks on his paternal and maternal chromosomes that did not come to be when they were refused and he began to be. Still (with the single exception of identical twins), no one else in the entire history of the human race has ever had or will ever have exactly the same genotype. Thus, it can be said that the individual is whoever he is going to become from the moment of impregnation. Thereafter, his subsequent development may be described

as a process of becoming the one he already is. Genetics teaches that we were from the beginning what we essentially still are in every cell and in every human and individual attribute. " (Ramsey, p 62)

While this is not satisfactory to many, it has the advantage of being a clean dividing point. The first time we have a human being that is fully defined genetically, is at the moment of conception. At this point, the genetic code defines the organism as human. Prior to conception, the sperm and egg contain only half the required genetic code that defines an organism as human, and therefore, neither of them by themselves provide a fully defined human. At the point of conception, the two half-complete chromosomes join and we have a human being. Until genetics was able to uncover this, there was no clean point at which one could say a human being came into being, but once a fully established genetic code exists, then, by genetic definition, a human being exists. Ramsey points out that the determination of when the fetus was ensouled was insoluble by the theologians who tried to define when a life came into being based on scripture and definition. This inability to close the gap of exactly when, from conception to quickening (movement of the fetus), life came to be was a matter of hot dispute. As Ramsey writes, "It is the modern science of genetics and not theology that theoretically closes this gap completely." (Ramsey, p 64)

What we do with this criteria if we accept it is, of course, another matter. It is not the case that defining the question of when human life begins solves the subsequent problem of when it has rights, but it does create a climate in which

we understand that the being whose fortune is being debated and considered is a human being in genetic structure. A completed genetic code does establish a point of personhood where the chromosomes that provide the definition of the individual human being exist. If we attempt to define this organism as not human, it is very difficult to assign some kind of definitional label to it. Ramsey recognizes that this does not solve the question of rights:

“One can, of course, allow this and still refuse to affirm that the embryo is as yet in any sense the bearer of human rights. In that case, however, one would have to provide himself with some account . . . of how by stages or degrees a human offspring approaches sacredness [a right to life status].”

(Ramsey, p 65)

If we assume the existence of a human being, then we have to carefully consider our justifications for allowing it to be destroyed, and Ramsey closes his essay with a clear call to give a high level of priority to the sacredness of life in considering the question of abortion. Warren and Tooley, of course, have not argued that a fetus is not a person biologically, just that that definition alone does not necessarily confer a moral status demanding an absolute right to life.

This kind of scenario, the relationship between a fully developed life and a developing life, is what leads to what L. Wayne Sumner has called "The Third Way solution for Abortion". Sumner wants us to look at abortion in exactly the way Tooley says it is difficult to view it. Sumner wants us to attempt to find a graduated response to the abortion question, such that the fetus has a gradually

developing right to life. Sumner is unwilling to accept either of the extreme positions which he describes as being too cavalier in regards to the rights of a clearly human fetus on the one hand, and too quick to call murder the extermination of unrecognizable tissue mass on the other. He finds both extremes as being problematic. He also recognizes that two moral states are at issue in the abortion debate. The first is in the realm of personal morality and the other in the realm of social morality--the political problem of abortion.

Sumner starts his argument out like many others: "The central issue in the morality of abortion is the moral status of the fetus". (Sumner, p 195) But he wants to argue that both sides of the argument place far too much emphasis on finding a particular spot at which full rights are granted and before which no rights are granted. What Sumner wants to argue is that, because of the developmental nature of the fetus, there is no magic moment at which full rights are granted or withheld. He believes that rather than arguing over a threshold point, there needs to be a threshold "period or stage". (Sumner, p 195) Sumner castigates the "uniform approach" for being too simplistic and for failing to recognize the reality of fetal development:

"A consequence of the uniform approach adopted by both of the established views is that neither can attach any significance to the development of the fetus during gestation. Yet this development is the most obvious feature of gestation. A view that avoids this defect will base the (differential) moral standing of the fetus at least in part on its level of

development. It will thus assign undeveloped fetuses a moral status akin to that of ova and spermatozoa, whereas it will assign developed fetuses a moral status akin to that of infants." (Sumner, p 195)

This seems, from a practical perspective, to make sense. He gets into trouble, however, for the same reasons Warren got into trouble in her argument. The problem is that it is very difficult to assign a threshold at which to change the right to life status of a fetus without being arbitrary. Sumner, in fact, sounds very much like Warren in sections of his essay. He provides a similar list of criteria that define when we can say that a right to life exists, which is very similar to Warren's: "There are four [attributes] that appear to be the most serious: we might attribute full moral standing to the paradigm person on the ground that he/she is (i) intrinsically valuable, (ii) alive, (iii) sentient, or (iv) rational". (Sumner, p 198) But the problem here is exactly the same one Warren runs up against. Sumner cites no authority to indicate that these criteria are, indeed, necessary components in the definition of a person with a right to life, and he provides no definitions of exactly what any one of them may mean when applied to a fetus. At what point, for example, does a fetus become "intrinsically valuable"? To a religious fundamentalist, or a conservative humanist, a fertilized egg is intrinsically valuable. Given the absence of authoritative (or logical) justification for his criteria, and given his failure to define rules of application to a developing fetus, he has provided no more direction than did Warren in her essay.

Sumner does want to try and focus on one of his criteria as providing a better means of application than the others. He says that the possession of life is too broad as we would then need to afford a right to life status to all life forms, i.e., mushrooms, plants, lower forms of animals, microscopic organisms, etc. He also recognizes that rationality precludes infants and "flawed" persons. He feels that a better and more reliable barometer of measuring right to life status is in the characteristic of sentience.

"Like rationality, and unlike life; it makes sense to think of sentience as admitting of degrees. Within any given mode, such as the perception of pain, one creature may be more or less sensitive than another. But there is a further sense in which more developed (more rational) creatures possess a higher degree of sentience. The expansion of consciousness and of intelligence opens up new ways of experiencing the world, and therefore new ways of being affected by the world. . . The animal kingdom presents us with a hierarchy of sentience. Non-sentient beings have no moral standing; among sentient beings the more developed have greater standing than the less developed, the upper limit being occupied by the paradigm of a normal adult human being. . . The evolutionary order is one of ascending intelligence. Since rationality expands a creature's interests, it is a reliable indicator of the degree of moral standing which that creature possesses. Creatures less rational than human beings do not altogether lack standing, but they do lack full standing. " (Sumner, p 205-206)

Here, however, Sumner is subject to accusations of species prejudice from animal rights activists, who do not accept this kind of hierarchy of moral standing throughout the animal kingdom. He is also subject to the problem of defining where, in this gradually developing life form, one can begin to ascribe a right to life. Sumner wants to say that when in doubt, we don't assign a right to life:

“Because there is no quantum leap into consciousness during fetal development, there is no clean and sharp boundary between sentient and nonsentient fetuses. There is therefore no precise point at which a fetus acquires a moral standing. . . We are therefore inevitably confronted with a class of fetuses around the threshold stage whose sentience, and therefore whose moral status, is indeterminate. ” (Sumner, p 209-210)

This is a debatable proposition in the sense that if there is a right to life on the part of a sentient human being, and if we have an instance where it cannot be concretely proven that a sufficient level of sentience exists, then it seems that you have a choice: you can either decide to deny it a right to life on the basis of the ambiguity of the status of the fetus (the liberal view) or you could assign a right to life to that organism reasoning that if there is any doubt, we ought to protect the life of the fetus (the conservative view).

In the end, Sumner comes to essentially the same conclusion that the Roe v Wade decision reached. In the first trimester, there is no right to life. In the third trimester, the state may have a compelling interest in protecting the right of

the fetus. And in the second trimester, things will have to be handled on a case by case basis. The wording of the Roe v. Wade decision follows this quite closely:

“1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy state and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

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

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

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

* * *

The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. . . Up to those

points [viability, primarily] the abortion decision in all its aspects is inherently, and primarily, a medical decision and basic responsibility for it must rest with the physician." (Roe v Wade, p 183-194)

Like the philosophical dispute, the Roe v Wade decision is not satisfactory to many persons. To some, it still allows too much state control of abortion. To others, it legalizes something they consider to be murder. To others, it seems to be a reasonable compromise on a subject of significant debate in a pluralistic society. This is a problem that will not go away and continues to remain in the forefront of the conscience of America (except for Clarence Thomas, who apparently has never thought about it or discussed it). Blackmun had begun the Roe v Wade ruling with a recognition that the central question was the status of the fetus. The Roe v Wade decision closes with a dissent authored by Byron White, joined by William Rehnquist, bemoaning that the central question of the matter--the right of the fetus--was relegated to a position behind that of a mother's right to choose:

"With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the fifty States are constitutionally disempowered to weigh the relative importance of the

continued existence and development of the fetus, on the one hand,
against a spectrum of possible impacts on the mother, on the other hand. .
. The court apparently values the convenience of the pregnant mother
more than the continued existence and development of the life or
potential life that she carries. Whether or not I might agree with that
marshaling of values, I can in no event join the Court's judgment, because
I find no constitutional warrant for imposing such an order of priorities on
the people and legislatures of the States. In a sensitive area such as this,
involving as it does issues over which reasonable men may easily and
heatedly differ, I cannot accept the Court's exercise of its clear power of
choice by interposing a constitutional barrier to state efforts to protect
human life and by investing mothers and doctors with the constitutionally
protected right to exterminate it. This issue, for the most part, should be
left with the people and to the political processes the people have devised
to govern their affairs. (Roe v Wade, p 195-196)

6. Conclusion

It has not been the purpose of this paper to attempt to provide a systematic history of Natural Law philosophy, nor to provide a treatise on the Philosophy of judicial adjudication. Nor has this paper tried to argue that Natural Law ought to be used in every instance of legislation or judicial decision-making.

The fact is that Natural Law assumptions have been integrated into our governmental system and operation from before it was instituted. This paper has tried to provide an overview showing Natural Law's involvement in the origins of our Constitutional government and the important role it has played in our judicial activities throughout our history.

Aquinas and Locke formed the primary basis for the type of Natural Law adhered to by the writers of the Declaration of Independence and the Constitution. Their belief in the existence of inalienable rights and in the use of reason to determine and understand those rights were fundamental elements of the philosophical foundations of the United States government they defined.

The Ninth Amendment, written by James Madison, incorporated the idea of unenumerated inalienable rights into the body of the Constitution – insuring that undefined rights would still have place in the body of positive law and that the assumption of government was in favor of the rights of the people rather than in the self-propagating power of government.

While some critics of Natural Law philosophy have claimed it is an outdated and essentially useless framework for driving government in the 20th century, the Clarence Thomas hearings provided a powerful showcase of the present relevance of Natural Law to our judicial system.

Finally, the Roe v Wade decision, and the court decisions leading up to it, show the powerful role the Ninth Amendment and its Natural Law assumptions have had on one of the most important and compelling Supreme Court decisions in our day. The reasoned debate leading up to and following that decision show the present reality that moral issues are often analyzed and developed within the context of the application of reason to these issues, with the hope that there will ultimately be an understanding and consensus on morally compelling issues.

Should Natural Law assumptions be factored in to our legislative and judicial processes in today's society? I think that if several conditions are met, we would not be ill served as a nation by an attempt to follow the intent of our founding fathers.

First, I think we need to recognize the two propositions established by Locke and supported by the Declaration of Independence which government needs to recognize: As much as possible, man must be free, and all persons must have equal access to any rights available to anyone else.

Second, I believe the process envisioned by Aquinas and Locke, could provide both stability and flexibility. Through careful reason, underlying principles would be sought to form the basis of decisions about specific issues at

any given time. Legislation and judicial decisions would be based on a good faith application of reason to these principles to be sure they would be applied equitably throughout society.

While it is true that this could leave government somewhat open-ended, it also provides a framework where persons of good will can navigate the history of their nation with the flexibility needed to adjust to on-going changes in culture.

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