FINNIS-CALVIN NATURAL LAW: HOW RELIGION INFORMS THE LEGAL WEIGHT OF EMPIRICAL DATA

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ABSTRACT

Natural law (and, by proxy, religion) covertly informs the relative legal weight attached to empirical studies in the United States. To substantiate that claim, this Note establishes three subsidiary conclusions in Parts I, II, and III. Part I contends that the modern (ostensibly secular) natural law theories popularized by John Finnis and others share religious purpose and effect with Thomistic, theological natural law. To create an analytical framework incorporating that overlap, I synthesize Finnis's theory of the "common good" with the Calvinist perspective of natural law as a tool by which God mitigates anarchy ("Finnis-Calvin natural law"). Under Finnis-Calvin natural law, laws are not adjudged valid or invalid according solely to their adherence to the natural law, but they are presumptively disfavored if they counteract religious principles of Truth. Part II asserts that U.S. law is uniquely susceptible to Finnis-Calvin influence due in part to the history and structure of the United States Constitution. Part III proposes ways in which religion relates to and animates science and outlines American law's historical use of empirical studies.

These three premises, posited together, strongly suggest that American jurisprudence is uniquely susceptible to religious *influence—most prominently in (a) issues of first impression, that (b) rely heavily on empirical data, and (c) touch on precepts corollary to religious tenants. Part IV conducts a Finnis-Calvin case study on equal protection jurisprudence and environmental law to demonstrate that susceptibility. This posture demands a heightened investigation of the law's hidden use of* universal, objective, divinely ordained *norms.*

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1. A special thanks to Chad J. Pevateaux for jumpstarting my research and passion in this field. Thank you also to Madison Baker, Charlie, and Reagan for all their support.

Natural law endures a barrage of derision in modern intellectual discourse. As an interpretive juridical method, it has been largely discredited as archaic and contrary to enlightened opinion.[2] Nonetheless, it persists today. Natural law takes various forms according to context, but one universal factor is its opposition to pure legal positivism—the conceptual or descriptive theory of law that favors social relativity.[3] Conversely, natural law proposes that the fact a red light means a driver ought to stop, and a green light means a driver ought to go is intuitive. Natural law extrapolates these fundamental intuitions to supply the legal bases for prohibitions on incest, human sacrifices, or other qualitatively "unnatural" tendencies. Former Supreme Court Justice Benjamin Cardozo wrote, "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals."[4] Many scholars contend that natural law, both as an ethical and legal philosophy, animates such a "stream of tendency." Natural law is, thus, always at play but rarely acknowledged.

Critics of natural law's relevance in modern jurisprudence often prescribe alternative modes of practical or positivist legal theories. This Note seeks only to examine the forces shaping our jurisprudence from the shadows, not to establish the normative superiority of one system over another. That examination points to this ultimate conclusion: natural law (and, by proxy, religion) covertly informs the relative legal weight attached to empirical studies.

To substantiate that claim, this Note establishes three subsidiary conclusions in Parts I, II, and III. Part I contends that while the number of participants explicitly evoking natural law principles has dwindled, the theory remains prevalent amongst those who adhere to religious principles of Truth. The modern (ostensibly secular) natural law theories popularized by John Finnis, Robert P. George, Russell Hittinger, and others share religious purpose and effect with Thomistic, theological natural law. This

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2. PIERRE MANENT, NATURAL LAW AND HUMAN RIGHTS: TOWARD A RECOVERY OF PRACTICAL REASON 1 (Ralph C. Hancock trans., 2020) (ebook).

3. *See* Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivis*m, 75 NOTRE DAME L. REV. 1613, 1615–16 (2000) ("Legal positivism is the belief that it is both tenable and valuable to offer a purely conceptual and/or purely descriptive theory of law, in which the analysis of law is kept strictly separate from its evaluation.").

4. *See generally* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). Cardozo separates the judicial process into four "methods," the first of which is the "method of philosophy." He observes that "more subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious." *Id.* at 11–12. Cardozo's analysis of the philosophy of judicial decision-making emphasizes personal conscience—both implicit and explicit. In the same regard, natural law may influence positive law from the subconscious—whether or not judges and legislators refer to it as such.

Note's reference to "(religious) natural law" as a uniform theory in further discussion does not conflate these two conceptually distinct theories; it affirmatively recognizes their shared religious purposes and influences. To create an analytical framework incorporating that overlap, I synthesize Finnis's theory of the "common good" with the Calvinist perspective of natural law as a tool by which God mitigates anarchy. Together, they stand for the proposition that natural law operates as a qualified prescriptive tool for positive law (hereinafter, "Finnis-Calvin natural law"). Under Finnis-Calvin natural law, laws are not adjudged valid or invalid according solely to their adherence to the natural law, but they are presumptively disfavored if they counteract religious principles of Truth.

Part II asserts that U.S. law is uniquely susceptible to (religious) natural law's influence due in part to the history and structure of the United States Constitution. Part III highlights ways in which religion relates to and animates science and outlines American law's historical use of empirical studies.

These three premises, posited together, strongly suggest that American jurisprudence is uniquely susceptible to *religious* influence—most prominently in (a) issues of first impression, that (b) rely heavily on empirical data, and (c) touch on precepts corollary to religious tenants. Part IV conducts a Finnis-Calvin natural law case study on equal protection jurisprudence and environmental law to demonstrate that susceptibility. This posture demands a heightened investigation of the law's hidden use of *universal, objective, divinely ordained* norms.

I. NATURAL LAW AND RELIGION

A. Thomistic versus Modern Natural Law

Jurisprudence law professor Brian Bix defines natural law as "claims that there are fundamental and evaluative connections between the universe, human nature, and morality."[5] Natural law's bridging of ethics, jurisprudence, and metaphysics often entails meta-ethical claims, including moral realism. By moral realism, I mean: (1) an objective reality exists, (2) humans are to some degree capable of discerning it, and (3) there are some laws or actions that everyone ought to implement in response to what they discern.[6] The legal positivist first takes issue with natural law as a classifying criterion of legal validity—that positive (human-made) laws are

5. Bix, *supra* note 3, at 1614.

6. *See* C. Scott Pryor, *God's Bridle: John Calvin's Application of Natural Law*, 22 J. OF LAW AND RELIGION 225, 226 (2006).

valid only as they conform to natural law. Thomas Aquinas, widely credited as the original patron of natural law in the West, utilized St. Augustine's "lex non est lex" in his writing: "An unjust law is no law at all."[7] This fundamental premise has fallen out of favor.[8]

Nevertheless, natural law has undergone a quasi-renaissance in legal philosophy.[9] Prominent modern natural law theorists—such as John Finnis and Robert P. George—reframed Thomistic[10] natural law for a modern landscape. Finnis's seminal work in 1980 synthesized Aquinas's original theory with modern legal jurisprudence, thrusting the idea of natural law back into the forefront of legal thought.[11] He develops his theory of natural law absent metaphysical or transcendental value claims.[12] As such, modern natural law is 'natural' in a very different way than its progenitors; it does not attempt to discover, from a theory of human nature, how humans ought to behave. Instead, it seeks to structure norms and conventions around commonly shared "human goods"—discernible through practical reason rather than divine revelation.

New insights into Aquinas's theories, however, suggest that Thomistic natural law needs no dramatic reformulation to be applied to the modern world. Shaped and guided by science and religion as society is, Aquinas's strong natural law theory holds merit as *a* classifying criterion of positive law but not *the* classifying criterion.[13]

While modern natural law is conceptually distinct from religion,[14] this

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7. *See* Andre Santos Campos, *Aquinas's "lex iniusta non est lex": a Test of Legal Validity*, 100 ARCHIVES FOR PHIL. OF LAW AND SOC. PHIL. 366 (2014).

8. *C.f.* Neil MacCormick, *Natural Law Reconsidered: Natural Law and Natural Rights by John Finnis*, 1 OXFORD J. OF LEGAL STUD. 99, 100 (1981).

9. *See* J. Stanley McQuade & Richard T. Bowser, *Marketing Natural Law: An Over-Debated and Undersold Product*, 27 CAMPBELL L. REV. 187, 188 (2005) ("There has been a considerable resurgence of interest in Natural Law theory among lawyers in general….").

10. "Thomistic" refers to the school of thought pioneered by Thomas Aquinas.

11. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (H. L. A. Hart ed., 1980).

12. Scholastic (or Thomistic) natural law is discernible by its association with "metaphysical" and "transcendental" value claims. Metaphysical claims posit reality *outside* of human sense perception—and are thus not provable. Transcendental claims posit reality *beyond* human comprehension (usually associated with divine will). Pryor, *supra* note 6, at 226; *see also* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 9 (1993) ("[O]ur public culture more and more prefers religion as something without political significance, less an independent moral force than a quietly irrelevant moralizer, never heard, rarely seen.").

13. Campos, *supra* note 7, at 378.

14. *See generally* JACQUES ELLUL, THE THEOLOGICAL FOUNDATION OF LAW 18 (Marguerite Wieser trans., 1969) (outlining the natural evolution of the legal process through various stages). Ellul's four step process neatly distinguishes the various forces which shape the law. The first stage is law as religion (directly attributed to God); the second stage is increasingly secular ("Various influences contribute to this development. Above all, there is the emerging power of the state as distinct from the power of religion. At this point a second phase in the evolution of law begins, which might be called the stage of natural law."). *Id.* at 20. This process of evolution is helpful to understanding the residual influences of religion and natural law on modern positive law (the eventual fourth stage).

shared belief in moral realism unites Thomisitic (theistic) and modern (non-theistic) methods of natural law.[15] By briefly analyzing four modern natural law theorists—John Finnis, Robert P. George, Russell Hittinger, and David Novak—I demonstrate that modern natural law still aligns with a Thomistic theological approach. I then compare those theorists with John Calvin to expand their connection to religion beyond individual systems of belief. This connection implies that religion, as conventionally understood, influences the legal areas in which natural law lurks.

1. John Finnis

In *Natural Law and Natural Rights* (1980), John Finnis lays the groundwork for a comprehensive system of natural law compatible with modern analytical jurisprudence.[16] Among the foundational theories he draws from Aquinas's writings is the necessity of the common good as a legal order. Finnis describes the law as emanating from the seven basic values of life—knowledge, play, aesthetic experience, friendship (sociability, at least), practical reasonableness, and religion (or metaphysics).[17] This order is everlasting and reigns supreme but relies on subordinate makers and enforcers of the law to have practical effect. Finnis agrees with positivists that the simple-minded formula of *injusta lex, nulla lex,* is absurd.[18] But, he says, "[I]t is only a caricature version of natural law, a caricature set up by positivists the better to knock it down, which maintains any such simple doctrine about the conceptual link between law

15. *See id.*
16. FINNIS, *supra* note 11, at 59–368.
17. *See* MacCormick, *supra* note 8, at 101–02.
18. "*Injusta lex, nulla lex*" is one expression of the maxim that "*an unjust law is no law at all*." Whenever positive laws are derived from natural law by making a specific application of a general form, they supplement details to the natural law. Andre Santos Campos provides a narrative example of this.

> A positive norm stating that it is obligatory to drive on the left side of the road is binding not because it can be deduced from first principles of natural law, but only because of human enactment. But this does not mean that it does not derive indirectly from natural law. When natural laws appear in a very general and undetermined form, they only become binding the moment that they are posited and externalized by human enactment.

Campos, *supra* note 7, at 373. Positive laws are, therefore, a vehicle by which natural law creates moral obligation. "Enactment," writes Campos, "is thus quite often a basic requirement of the actualization of natural law." *Id.* In this sense, the process of due enactment is a criterion of legal validity because natural law requires enactment to effectuate its purposes. Another criterion of legal validity for Aquinas is the "efficacy" of the law's administration. This again touches on the ability to effectuate natural law. Enactment and enforcement are tandem forces to actualize natural law's morality.

and morality."[19] Those who criticize natural law for its prescriptive qualities often do so with that caricature in mind.[20]

Finnis dedicates his first twelve chapters to his ostensibly secular theory. But, his conclusion reveals that he did not intend the theory to stand alone as a testament to the modern application of natural law. He wields the theory as a major premise, strongly suggesting the syllogistic conclusion of a theistic belief.[21] Finnis lists a series of facts about human nature.[22] If accepted, these facts require what Aquinas deems a "separate intellect which has the power of understanding without imperfection, and which causes in us our own power of insight, the activation of our own individual intelligences—somewhat as a source of light activates in us our power of sight."[23] Finnis shows how Aquinas crafted this concept of natural law in the shadow of Plato's theory of God's law.[24] Noting Finnis's self-professed Roman Catholic faith, subsequent theorists unsurprisingly viewed his secular theory of natural law as disguised theology.[25] Peter M. Cicchino goes further, characterizing Finnis's natural law jurisprudence as explicit theology and "essentially the same . . . as that made by the Roman Catholic Church."[26]

2. Robert P. George

Robert P. George cemented himself alongside the Finnis natural law theorists with his *In Defense of Natural Law*.[27] Positivists and natural law scholars alike acknowledge George's profound effect on American jurisprudence.[28] George's text compiles his various articles and essays

19. *See* MacCormick, *supra* note 8, at 106. FINNIS, *supra* note 11, at 365 ("The tradition goes so far as to say that there may be an obligation to conform to some such unjust laws in order to uphold respect for the legal system as a whole (what I called a 'collateral obligation').").

20. *See* C.E.F. Rickett, *Natural Law and Natural Rights by John Finnis*, 40 CAMBRIDGE L.J. 365, 366 (1981).

21. *See* MacCormick, *supra* note 8, at 106 ("Finnis shows why anyone who has found the preceding twelve chapters convincing has then strong reason to take the further step of embracing belief in an Uncaused Cause of the universe in which we find ourselves, and belief in that Uncaused Cause as an intelligent, benevolent, and personate being.").

22. Human beings have a certain range of urges; these urges correspond with "human flourishing," but tend to bring about individual and communal ruin without proper direction; and "certain biological, climatic, physical, mechanical, and other like principles, laws, states of affairs, or conditions affect the realization of human well-being in discoverable ways." FINNIS, *supra* note 11, at 380.

23. FINNIS, *supra* note 11, at 400.

24. *Id.*

25. *See, e.g.*, Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 157 (1998).

26. *Id.*

27. ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999).

28. *See, e.g.*, Gerard V. Bradley, *Morality and Legal Reasoning*, 55 REV. OF POL. 311 (1993) ("Princeton's Robert P. George is one of the most rigorous defenders of natural law theory; he also happens to

defending and applying the new natural law. Part I summarizes and responds to popular critiques of Grisez-Finnis natural law as a secular model. George argues that the starting point for natural law is human nature—conceptually divorced from theology.[29] "[T]here are goods that are intrinsically valuable for human beings and, precisely as such, provide intelligible reasons for action."[30] These reasons are non-inferential acts of understanding where humans grasp possible ends or purposes as inherently desirable. He embraces Finnis's categories of basic goods, highlighting their derivation from the "first principle of morality" from which moral norms exude.[31] This first principle, based on human rather than divine nature, establishes "fully specific moral norms" that require or forbid specific choices and "intermediate moral norms" that "structure and guide human choosing between intelligible human goods."[32]

But for all the effort George exerts placating liberalist audiences with secular language, the subsequent application of his natural law theories hints at underlying religious influences. Parts II and III focus largely on questions of law and policy respecting religion, abortion, and sex. George draws upon his work, *Legislating Morality*, to apply the new natural law theory to prevalent moral issues in American law. Laws regulating abortion, for instance, are permissible for a similar reason as laws prohibiting slavery: "[O]ne side cannot but view the other as denying the equal dignity of a class of their fellow human beings."[33] And the state is justified in instituting appropriate legislation to preserve Finnis's basic human goods. George then devotes several essays to substantiating his argument that genital intercourse within a heterosexual marriage is practically the only moral form of intercourse.[34] This is so because of the "truly unitive" nature of

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be emerging as the best young legal philosopher in the country.").

29. *See* Justice Buckley Dyer, *Lewis, Barth, and the Natural Law*, 57 J. CHURCH AND ST.1 (2015) ("The starting point for natural law is human nature, which some contemporary scholars [including George] insist can be understood and studied apart from the claims of theology.").

30. GEORGE, *supra* note 27, at 24.

31. *Id.* at 45 (affirming the Grisez-Finnis perspective on basic human goods).

> In *Natural Law and Natural Rights*, Finnis categorizes them as: life (and health); knowledge; play; aesthetic experience; sociability (friendship); practical reasonableness; and 'religion.' Are these, as some (including Russell Hittinger) have charged, mere intuitions? Is the claim that they are 'self-evident' nothing more than a piece of rhetoric masking naked conviction? Or, as Grisez and Finnis claim, does the practical intellect grasp the basic human goods in non-inferential acts of understanding by picking out intelligibilities in the data that human experience presents? Well, let me tell a little story designed to demonstrate how Grisez and Finnis suppose we can grasp first practical principles that refer to basic human goods.

Id.

32. *Id.* at 49.

33. *Id.* at 323.

34. *Id.* at 276–300; *Accord* David Archard, *In Defense of Natural Law by Robert George*, 109 MIND 907, 910 (2000).

sexual acts oriented to reproduction.[35] George's perspective mirrors Finnis's, who writes that accepting the idea that "homosexual acts can be a humanly appropriate use of sexual capacities . . . is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages."[36] Both Roman-Catholic theorists base their conclusions on secular ideals of public welfare. Regardless of the intellectual premises, modern natural law reaches the same teleological[37] conclusions as Thomistic natural law and the Catholic Church.[38]As such, while Finnis's and George's natural law theories may not *rely* on an inherently religious source of authority, they strongly point toward one.[39]

Note the unmistakable similarities between those modern natural law theories and arguments from modern theologians like C.S. Lewis. Lewis states, "[humans] cannot disobey those laws which [they] share[] with other things; but the law which is peculiar to [our] human nature, the law [we do] not share with animals or vegetables or inorganic things, is the one [we] can disobey if [we] choose[]. This law [is] called the Law of Nature. . . ."[40] Lewis asserts that a universal moral conscience exists that transcends time and culture, is knowable by reason, and points to a divine creator.[41] He writes, "[t]he good is uncreated; . . . it lies, as Plato said, on the other side of existence. . . . God is not merely good, but goodness; goodness is not merely divine, but God."[42] Lewis's theory thus relies on an ontological

35. GEORGE, *supra* note 27, at 276–86.

36. John Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049, 1070 (1994); *see* Cicchino, *supra* note 25, at 161 (observing the commonalities between Finnis's and George's arguments).

37. In philosophy, teleology explains subjects by the purpose they serve rather than the cause by which they arise. Scholastic (Thomistic) natural law is inherently teleological in that it perpetually maintains as the purpose of law the connection and adherence to the Divine.

38. *Accord* Catholic Church. 2357. Catechism of the Catholic Church. 2d ed. ("Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered.' *They are contrary to the natural law*. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.") (emphasis added). It is, therefore, noteworthy that George and Finnis both subscribe to Roman Catholicism and have functioned as bastions of Catholic legal reformers. *See generally* JOHN FINNIS, *Catholic Positions in Liberal Debates*, *in* RELIGION AND PUBLIC REASONS, VOL. V (2011).

39. *See* Pryor, *supra* note 6, at 253–54 (analyzing J. Budziszewski's *Written on the Heart: The Case for Natural Law* (1997) and Russell Hittinger's, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (2003)). These are modern natural law works framed explicitly through the context of religion. Hittinger and Budziszewski make explicit what is implicit in natural law: that religion is inextricable.

40. C.S. LEWIS, MERE CHRISTIANITY 5 (Rev'd ed. 2001).

41. *See* Dyer, *supra* note 29, at 6 ("A defense of objective moral principles, universal in application and knowable by reason, would become a central theme in nearly all of Lewis's writings."). In such writings, Lewis demonstrates a profound connection between modern natural law and Protestant theology as understood by its leading proponents.

42. C.S. Lewis, *The Poison of Subjectivism* (1943), https://williamwoodall.weebly.com/uploads/1/0/2/2/10226906/the_poison_of_subjectivism.pdf.

claim about divine nature rather than pointing toward it, as with Finnis and George. Nevertheless, their underlying assumptions and practical effects parallel remarkably.

3. Russell Hittinger

Some theorists directly utilize Finnis's and George's modern natural law as a foundation for explicitly religious natural law theories that echo Lewis's sentiment. Russell Hittinger, for example, commends their efforts to reframe natural law as an inherent norm of autonomous human reason appropriate for modern religious pluralism—but ultimately advocates for a return to natural law understood as God-given law "for the direction of human conduct in pursuit of common goods."[43] Hittinger cites Finnis's *Natural Law and Natural Rights* for its central assertion that law is bound up with the principles of universal practical reasonableness.[44] Similarly, for Hittinger, natural law ought to inform the problem of "the original situation of human practical reason."[45] This original reason, however, not only points to a divine source but logically requires one. Hittinger thus utilizes Finnis-George's modern natural law as a conceptual steppingstone for the re-unification of religion and natural law—again highlighting the conceptual overlap between modern natural law and religion.

4. David Novak

David Novak differs from the previous modern natural law scholars in that he ascribes to Judaism. He is renowned for his work on Jewish ethics, in which he conceptualizes a religious foundation for modern natural law. In *Searching for a Universal Ethic*, Novak argues that natural law requires a belief in God, which necessitates a commitment to natural law.[46] He is still closely aligned, however, with the Finnis-George model of modern natural law. Like them, his natural law foundations allude to precepts not unlike those dictated by the Catholic Church: "the prohibition of incest, homosexuality, adultery, bestiality, abortion, murder, blasphemy, idolatry, and so on; these all advance goods in our life together."[47]

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43. Mary M. Keys, *The First Grace: Rediscovering the Natural Law in a Post-Christian World, Russell Hittinger*, 7 MARKETS AND MORALITY, 135, 135–36 (2004).

44. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD, n. 57, 294 (2003).

45. *Id.* at xlvi.

46. JOHN BERKMAN ET AL., SEARCHING FOR A UNIVERSAL ETHIC: MULTIDISCIPLINARY, ECUMENICAL, AND INTERFAITH RESPONSES TO THE CATHOLIC NATURAL LAW TRADITION (2014).

47. Vincent Lloyd, *New Directions in Natural Law*, 31 J. OF LAW AND RELIGION 367, 375

How one views the amorphous integration between modern natural law and religion depends partly on how one defines each term. At their broadest, the overlap is nearly absolute.[48] One may also draw strong comparisons between these modern natural law theorists and quintessential religious figures.

5. John Calvin

Aquinas bound scholastic natural law to Roman Catholicism. Partly as a result, many Protestant theorists have eschewed natural law.[49] Professor C. Scott Pryor seeks to reconcile this division in his work, *God's Bridle*, by evaluating Protestant reformist John Calvin's approach to natural law.[50] Calvin's *Institutes* exemplifies natural law's shared ideological basis with Christian reformers. "Since man is by nature a social animal," writes Calvin, "he tends through natural instinct to foster and preserve society."[51] Finnis's theory of the common good, derived from factual observations of human nature, is indiscernible from Calvin's sentiment. Calvin argued that all humans understand the necessity of an ordered society but disagreed with other philosophers who argued that such order can be discovered and grounded in nature—or the "desire of man himself."[52] Instead, he shared Finnis's belief that civil society ought to be organized in such a way that positive laws shape this natural order. Natural law, therefore, does not provide the details of positive law but the contours. Lord MacMillan once observed that "even the title of [Calvin's] work ["*Institutes*"] was borrowed

(2016). It is worth clarifying that these scholars may not represent the mainstream perspectives from their respective theological traditions. Their inclusion in this Note merely highlights vignettes demonstrating parallels between modern natural law and religion.

48. For expansive, and widely cited, definitions of religion, *see, e.g.*, PAUL TILLICH, THE SHAKING OF THE FOUNDATIONS (1948) (framing one's religion as "the source of [their] being," and their "ultimate concern."); ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD, 191–92 (1925) ("Religion is the vision of something which stands beyond, behind, and within, the passing flux of immediate things; something which is real, and yet waiting to be realized; something which is a remote possibility, and yet the greatest of present facts; something that gives meaning to all that passes, and yet eludes apprehension; something whose possession is the final good, and yet is beyond all reach; something which is the ultimate ideal, and the hopeless quest.").

49. *See* Pryor, *supra* note 6, at 227 (citing Karl Barth, *Church Dogmatics*; Samuel W. Calhoun, *Grounding Normative Assertions: Arthur Leff's Still Irrefutable, But Incomplete, "Sez Who?" Critique*, 20 J. L. & RELIGION 31 (2005); William J. Stuntz, *Book Review: Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003)).

50. Pryor, *supra* note 6, at 227.

51. *Id.* at 248 (quoting JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION II.ii.13 (John T. McNeill ed., Ford Lewis Battles trans. (1559)).

52. *Id.* at 249 (citing SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 205 (CH. & W.A. Oldfather trans.) (1688)).

from the law . . . [and] his whole system of religious doctrine was essentially legal."[53]

For Calvin and modern natural law theorists, natural law operates not as the *sole* classifying criterion of legal validity—*injusta lex, nulla lex*—but as *a* tool by which God mitigates anarchy. The term "Finnis-Calvin natural law" represents my synthesis of Finnis's theologically adjacent theory of the common good and Calvin's expression of natural law as Divine intervention—a marriage of modern natural law and religion, consummated by the practical results of each. I create this term as an operative analytical framework to neatly apply this synthesized concept to the law. The bottom line is this: Finnis-Calvin natural law, and therefore, religion, presently informs American law in various ways. The following sections explain how.

II. (RELIGIOUS) NATURAL LAW AND THE AMERICAN LEGAL SYSTEM

R. H. Helmholz's study in *Natural Law in Court* analyzes all American federal and state case law expressly implicating natural law in the eighteenth and nineteenth centuries. He highlights many examples of "unstinted praise for the law of nature" throughout the reports.[54] Areas that regularly invoked natural law sentiment to adjudicate controversial issues were property law, family law, slavery, legislative construction, and restraints on judicial power.[55] The law has changed. But just as many seemingly outdated common law doctrines remain in force, so too do many of the natural law sentiments that informed them. Those sentiments make American law uniquely susceptible to Finnis-Calvin natural law influence.

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53. John W. Morden, *An Essay on the Connections between Law and Religion*, 2 J. OF LAW AND RELIGION 7, 14 (citing MacMillan, *Law and Other Things*, 55 LAW AND RELIGION 64 (1937)).

54. R. H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 150–51 (2015).

> One federal judge described it as 'of origin divine' and 'obligatory upon individuals,' finishing with the encomium 'How great, how important, how interesting are these truths! They announce to a free people how solemn their duties are.' [Henfield's Case, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793).] Another described it as 'paramount to all other laws.' [Worcester v. Georgia, 31 U.S. 515, 59 (1832).] A California judge similarly described natural law as 'an eternal rule to all men, binding upon legislatures as well as others.' [Billings v. Hall, 7 Cal. 1, 11 (1821).] A judge in a New Jersey case saw fit to describe it as 'the only true foundation of all the social rights.' [Arnold v. Mundy, 6 N.J.L. 1, 11 (1821).] A Tennessee judge expressed the opinion that 'all human laws depend' on 'the foundations of the law of nature and the law of revelation.' [Bell v. State, 31 Tenn. (1 Swan) 42, 44 (1851) (citing Blackstone).].

Id.

55. *Id.* at 153–70.

A. American Constitutional Law

1. Introduction

Natural law in American jurisprudence is controversial. After all, the direct incorporation of (religious) natural law into American law may be understood as antithetical to the Establishment Clause of the First Amendment.[56] As polarizing as this subject is, it warrants consideration to illuminate the present relevance of modern natural law, and thus religion, in American jurisprudence. It is widely held that the written Constitution was "not declaratory of any new law but confirmed … ancient rights and principles."[57] That natural law influenced the Founding Fathers of the Constitution is nearly irrefutable—but the extent to which it influenced the Constitution's text remains a subject of scrutiny. A brief investigation of the text and the historical and political context surrounding the Constitutional Convention implicates the presence of "higher law" strongly.[58] The Preamble, the Bill of Rights, and the Fourteenth Amendment offer salient examples of this implication and elevate this subject's contemporary relevance.

2. Historical Context

The Constitutional Convention's historical context and philosophical milieu suggest the considerable influence of natural law. Historian Forrest McDonald notes that by the late eighteenth century, natural law had developed "into a large, systematic, and respectable body of legal theory that had gained some standing even in the courts of England."[59] One prevalent example includes the laws of nations and laws of war between sovereign states that endured outside of sovereign positive laws. That

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56. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The First Amendment's prohibition of laws respecting an establishment of religion rests on the belief that a union of government and religion tends to destroy government and to degrade religion, and upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand."). *But see* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (reframing Establishment Clause jurisprudence to focus on the historical treatment of religious activity in America—treatment which has always permitted religious expression in various governmental settings). As I discuss later, the present Court's proclivity for reevaluation of legal tests and its commitment to history spotlight the increasing relevance of natural law.

57. Helmholz, *supra* note 54, at 148 (citing Lapsley v. Brashears & Barr, 14 Ky. (4 Ltt.) 47 (1823)).

58. Historically, the "higher law" is often used interchangeably with what modern commentators refer to as "natural law." "Higher law" today means divine law derived directly from God, while natural law is discernible by humans either through experience or through reason.

59. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 58 (1985).

sentiment appeared in the Declaration of Independence, in the phrase "the laws of nature and of nature's God."[60] Some scholars thus argue that appeals to natural law played a pivotal role in revolutionary thought.[61]

Aristotelian and scholastic natural law, beginning with classical philosophers and culminating with Aquinas, differs from Enlightenment natural law in elevating the "higher law" of a religious source. The Framers existed in an Enlightened intellectual world, but they understood the natural law as comporting with a "higher law"—that universal, eternal law applies to all persons across all times.[62] The most frequently cited Enlightenment philosophers at the Convention were Montesquieu and Locke.[63] Montesquieu explicitly subscribed to the natural law tradition,[64] and Locke indirectly affirmed the natural law philosophers who drew from Aquinas.[65] Locke further implemented natural law philosophy into his concept of natural rights—namely, the rights to private property, the social contract, and the right to revolt.[66]

A brief sampling of Alexander Hamilton's Federalist Paper 31 and James Madison's Federalist Paper 10 elucidates the effect of such Thomistic natural law. Hamilton's Federalist Paper 31 attempts to justify federal taxing power. Featuring heavily in this argument are appeals to Locke's natural law epistemology (the philosophy of how we know what we know).

> In disquisitions of every kind, there are certain primary truths, or first principles upon which all subsequent reasonings much depend. . . . Of this nature are the maxims in . . . ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the ends; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. [These are] so agreeable to the natural and unsophisticated dictates of common sense that they challenge the assent of a sound and unbiased mind

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60. *See* Andrew J. Reck, *Natural Law in American Revolutionary Thought*, 30 REV. OF METAPHYSICS 686, 686 (1997).

61. *See id.*

62. *See* Robert S. Barker, *Natural Law and the United States Constitution*, 66 REV. OF METAPHYSICS 105, 107 (2012); Reck, *supra* note 60.

63. MCDONALD, *supra* note 59.

64. "Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all radii were not equal." BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans.) (1949).

65. *See* Barker, *supra* note 62, at 114–15 ("although Locke did not explicitly define natural law, he deferred to Richard Hooker, . . . whose work, Of the Laws of Ecclesiastical Polity (1594–97), explicitly draws from and restates Thomas Aquinas's conceptions.").

66. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed.) (1960).

with a degree of force and conviction almost equally irresistible.[67]

James Madison, "The Father of the Constitution," similarly espoused natural law understandings of human nature and government in Federalist Paper 10's defense of the Constitution's republican government.[68] Humans, he argues, are neither inherently virtuous nor depraved but fall prey to social acrimony. And "[t]he regulation of these various interests forms the principal task of modern legislation."[69] The state and government are innate institutions, rather than artificial inventions, meant to pursue the common good where desultory human nature falls short.[70] One can also see Madison's scholastic epistemology in his defense of the infamous three-fifths rule. Madison contended that "the rule is understood to refer to the personal rights of the people, with a natural and universal connection."[71] The Founders' philosophical underpinnings are thus likely woven into the Constitution's structure.

The Framers also established several immutable safeguards in the Constitutional structure: foremost among them is the doctrine of the separation of powers. The division of power in government between the legislature, executive, and judiciary functions as a mechanism to stabilize society, safeguard individual rights, and advance the common good.[72] These ends are arguably an inheritance of classical republicanism within natural law.[73]

3. The Preamble & Finnis

Natural law tenets are present most explicitly in the Declaration of Independence and the Preamble to the United States Constitution. When the United States of America declared its independence in 1776, it proclaimed that men were "endowed by their Creator" with unalienable rights, relying

67. THE FEDERALIST NO. 31, 193 (Alexander Hamilton).

68. *See* Barker, *supra* note 62, at 128 ("But anyone who doubts the overwhelming influence of the Natural Law should read the best known of the Federalist Papers No. 10, written in 1787 by James Madison.").

69. THE FEDERALIST NO. 31 (Alexander Hamilton) ("So strong is [the] propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.").

70. *See* Barker, *supra* note 62. Madison stated, "It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole." THE FEDERALIST NO. 10. (James Madison).

71. THE FEDERALIST NO. 31, 252–53 (Alexander Hamilton).

72. Reck, *supra* note 60.

73. *See also id.*

on "the protection of divine Providence." Whereas the Declaration is perhaps appropriate for grandiose exhortations, the Constitution is a legally binding document for sovereign states. Paul Weiss thereby observes that the Preamble operates as a list of reasons why the People ordained the Constitution, including "a more perfect union," "justice," "domestic tranquility," "the common good," "the general welfare," and "the blessings of liberty."[74] These magnanimous objectives eerily mirror Finnis's "basic values of life." Finnis describes the "responsibility" to abide by measures sufficient for domestic tranquility and the common good:

> Does not one's own sense of 'responsibility,' in choosing what one is to be and do, amount to a concern that is not reducible to the concern to live, play, procreate, relate to others, and be intelligent? . . . [A]nd all this, prior to any choice of his, 'man' is and is-to-be free[.][75]

The Constitution can be understood as a dual-focused document: the determination of the popular will and the veneration of the higher law, which clarifies and informs such will.[76]

4. The Bill of Rights

The Preamble and general structure of the Constitution establish underlying objectives, but the Bill of Rights presents natural law in action in the Constitution. Scholars have long acknowledged the jurisprudential relevance of natural law for the guarantees in the Bill of Rights.[77] One

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74. PAUL WEISS, TOWARD A PERFECTED STATE 279 (1986).

75. FINNIS, *supra* note 11, at 90.

76. *See generally* EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 152 (1928) (arguing the connection between the "higher law" and the Constitution).

> There are . . . certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.

Id. Corwin further argues that judicial review has effectuated the conception of natural law as a recourse for individuals. *Id.* at 89.

77. *See, e.g.*, Andre Leduc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, 42 OHIO N. U. L. REV. 613 (2016); Peter Brandon Bayer, *Deontological Originalism: Moral Truth, Liberty, And Constitutional "Due Process" Part II – Deontological Constitutionalism And the Ascendency of Kantian Due Process*, 43 T. MARSHALL L. REV. 165 (2019); Steven G. Calabresi et al., *State Bills of Rights In 1787 And 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1544 (2012) ("What our findings suggest is

interpretation presupposes the Framers constructed these Amendments to guarantee individual natural rights against the government. Natural rights are not equivalent to natural law, but they are correlative. Neither can exist without the other.[78] To borrow Finnis's terminology, a requirement of practical reasonableness, or rule derived therefrom, creates a duty, and for every duty exists a corresponding right. Rights correlative to these natural law duties are natural rights.

The Second Amendment is the subject of internecine debates in contemporary political, social, and judicial conflicts. But rarely does the emphasis rest on the Amendment as a natural right. One recent Supreme Court case examined the Amendment from this perspective. In *District of Columbia v. Heller*,[79] the Court held that a state law prohibiting the possession of usable handguns in the home violates the Second Amendment's right to bear arms. In writing for the 5-4 majority, Justice Scalia utilized a historical natural rights analysis. "The very text of the Second Amendment implicitly recognizes the preexistence of the right," the Court instructed.[80] It further implied that others of the first ten Amendments were formal codifications of a "*pre-existing*" right.[81] This approach to the Bill of Rights finds support in many of the Founders' writings.[82]

The Constitution operates as a tool of limited governance. Similarly, natural law has always applied *only* to those rights that are indelible to all humans. Aquinas wrote, "The [human] law should not try to prescribe every virtue and forbid every vice."[83] The Constitution stands as the preeminent illustration of natural law's influence on American law and history—if not in express purpose, then in practical application.

Thus far, this Note has assumed two premises. Part I contends that modern natural law theories popularized by John Finnis and others share religious purposes and practical effects with Thomistic, theological natural law. Finnis-Calvin natural law does not adjudge laws as valid or invalid

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that while [Professor] Amar is correct about the communitarian reading the Framers gave the Federal Bill of Rights in 1791, it must also be acknowledged that the Federal Bill of Rights was passed in a climate in which eight states out of fourteen had state bills of rights that were quite libertarian, individualistic, and invoking of natural law.").

78. Howard P. Kainz, *Natural Law and Natural Rights*, *in* PHILOSOPHICAL THEORY AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 20 (William Sweet, ed.) (2003).

79. 554 U.S. 570 (2008).

80. *Id.* at 592.

81. *Id.*

82. *See* THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM 545 (Julian P. Boyd, ed., Princeton Univ. Press 1950) (1779) ("the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privilege and advantages to which, in common with his fellow citizens, *he has a natural right*[.]") (emphasis added).

83. *See* ST. THOMAS AQUINAS, TREATISE ON LAW (SUMMA THEOLOGICA, QUESTIONS 90-97) 70–71.

according to their adherence to the natural law, but they are presumptively disfavored if they counteract religious principles of Truth. Part II asserts that natural law is inextricably linked to the history of the Constitution. Those quasi-religious sentiments permeate the Bill of Rights, making American law susceptible to Finnis-Calvin influence.

These two premises, if accepted, necessarily raise the issue of religion's scope in American law and what it ought to be. The remaining discussion attempts to address these questions. Since the law widely utilizes empirical studies, one intriguing avenue of study focuses on the interaction between religion and science.

III. (RELIGIOUS) NATURAL LAW AND SCIENCE

A. How the Law Employs Science

American case law regularly utilizes scientific theories and developments to inform legal rules. Justice Henry Brown observed during the Reconstruction era when discussing the development of Fourteenth Amendment jurisprudence, "[T]his court has not failed to recognize the fact that the law is, to a certain extent, a progressive science."[84] Justice Brown attributed to scientific developments a series of legal reforms—including decreased capital crimes, antiquated real estate transferal requirements, and equality of property ownership in marriage.[85] Former Supreme Court justice Benjamin Cardozo qualified the activity of a judge as "free scientific research" (*libre recherche scientifique*): "free, since it is here removed from the action of positive authority; scientific, … because it can find its solid foundations only in the objective elements which science alone is able to reveal to it."[86]

Since Justice Brown's opinion in 1898, the Court has exemplified Cardozo's description, particularly for contested social issues. But often, it overlooks the scientific nature of their inquiries. For instance, in *Witherspoon v. Illinois*, the Court held that courts may not exclude jurors solely because of conscientious objections to the death penalty since the Sixth Amendment protects the right to trial by impartial, or in this case, representative, jury. And "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot

84. Holden v. Hardy, 169 U.S. 366, 385 (1898).

85. *Id.* at 386. He also listed a series of reforms to criminal substance and procedure: the abolition of imprisonment for debt, additional exemptions from execution, and the simplification of indictments.

86. Cardozo, *supra* note 4, at 121.

speak for the community."[87] The Court based its holding in part on tentative empirical evidence. The abortion cases *Roe v. Wade* and *Planned Parenthood v. Casey* represent another famous, albeit recently outdated, example of the Court employing empirical evidence to craft legal principles.[88] Numerous other examples exist from the Supreme Court's opinions.

B. How Religion Relates to and Informs Science

Having briefly observed the critical role that empirical data and scientific processes play in the law, this Note turns now to religion's influence on science. Modern science, bent on observable and replicable information gathering, has occupied reason's role in contemporary rhetoric. But science shares more in common with religion and, correspondingly, with natural law than fervent naturalists would credit.[89] Professor Robert McCauley discusses religion's glaring reliance on "intentional agents" in reality.[90] These agents—invisible and supposedly unobservable—can be described in a multitude of ways, from the Holy Spirit to cosmic energy, and might reasonably be compared to the axioms or fundamental assumptions of other systems of reasoning. These assumptions, or "inferences, that prevail in popular religion are no more a 'little or lesser' version of systemic theological reasoning than are the intuitive shortcuts of our commonsense explanations a 'little or lesser' form of scientific reasoning."[91] Scientific observation relies on ineffable assumptions. Theories of these "intentional agents" play an essential role in many fields of social sciences: such as psychology, microeconomics, cultural anthropology, and more.[92] Therefore, as a broad category of observation, science is bound to some

87. Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

88. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (overruled by Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (exemplifying that the present Court's willingness to, among other things, supplant precedent to return to what it considered reasonable).

89. *See* PHILIP CLAYTON, RELIGION AND SCIENCE 1 (2011) (showing that the warfare method of religion and science often relies on similarly contrived definitions of the two). According to Clayton, the spectrum of demarcation sees "Separationists" at the polar ends and "Integrationists" in the middle. *Id.* at 183. The far-left end of the spectrum classifies strict naturalists who leave no room for religious appreciation in scientific disciplines. The far right includes religious fundamentalists who view science as a direct threat to their faith. Approaching the middle from each side will be the theistic evolutionists and those who see the laws of physics as a representation of God. Expanding the options past a simple dichotomy of science or religion allows more room for a nuanced appreciation of both subjects. "Theists can now be Darwinians," says Clayton, "and naturalists can find room for awe, wonder, reverence, and ecstatic mystical experiences." *Id.* at 31.

90. ROBERT MCCAULEY, WHY RELIGION IS NATURAL AND SCIENCE IS NOT (2011).

91. *Id.* at 133.

92. *Id.*

confines that only religion may breach. This relationship fosters tenuous interdisciplinary reliance.

One can observe interdisciplinary reliance with the esoteric field of quantum physics. The issue of photons and electrons—where they originate and how they are observed—has existed ever since Isaac Newton published his *Principia Mathematica*. Subsequent dissemination and debate led to the Heisenberg Uncertainty Principle, which asserts that an electron cannot be observed for both its position and momentum; they are either observed independently or as superimposed.[93] Light was observed to possess a "wave-particle duality" involving two distinct paradigms simultaneously. Light cannot be both a wave and a particle, but it can be a superimposed version of both.[94] Neils Bohr and Werner Heisenberg devised The Copenhagen Interpretation from 1925-1927 to explain this confounding phenomenon; quantum particles do not exist in one particular state but in all of their possible states simultaneously.[95]

The double-slit experiment demonstrates that hypothesis. In this experiment, an electron beam gun fires singular electrons through a partition with two slits. The electrons then arrive as light on the screen behind the partition. When fired individually, these electrons form a pattern on the screen. There is no way to predict exactly where one individual electron will land. But a series of electrons always form the same pattern.[96] Yet, there is no widely accepted answer to account for the electrons' seemingly random but ultimately predestined location after it exits the slit. Particle predestination gives plausible credence to the presence of a deterministic deity.[97] French physicist and philosopher of science Bernard d'Espagnat coined the term "veiled reality" to describe this gap in human comprehension through observation.[98] Whether scientific or theological, the

93. *Id.* at 135.

94. *Id.*

95. Josh Clark, *How Quantum Suicide Works*, HOW STUFF WORKS, https://perma.cc/Q956-TFLY (last visited April 8, 2024).

96. This phenomenon has perturbed the scientific world, instigating a series of quantum theories, such as the "Many-Worlds" theory that suggests every possible destination for the electron exists simultaneously before it passes through the double-slit, and our observations after it passes effectively choose one of the many possibilities. *See, e.g.*, HUGH EVERETT ET. AL, THE MANY-WORLDS INTERPRETATION OF QUANTUM MECHANICS 6-10 (Bryce S. DeWitt & Neil Graham ed.) (1973). The repercussions of this theory provoke imagination of an alternate timeline or universe for every possible outcome and decision in reality.

97. Determinism is the theory that all actions are predestined. Carl Hoefer, *Causal Determinism*, STAN. ENCYCLOPEDIA OF PHIL., January 23, 2003, https://perma.cc/MR74-EUZK. Conceptualizing a deity as deterministic is to describe it as omnipotent, transcending time and space—much how monotheistic religions view their Creator. Particle predestination can therefore be viewed as empirical evidence of "God's plan," in colloquial terms—or merely of nature's mechanical arrangement.

98. ERNEST L. SIMMONS, THE ENTANGLED TRINITY: QUANTUM PHYSICS AND THEOLOGY 140 (2014).

attempt to fill this gap is where religion and science can intersect. While esoteric, the wave-particle duality of light example presents an endemic legal problem in the abstract; scientific questions persist with no determinative answers, just as many questions remain unanswered in the law. Religion often augments science by presenting alternative hypotheses to otherwise incomprehensible empirical data, such as the particle predestination dilemma. Religion may play a similar role in the law through natural law, as Finnis and Calvin demonstrate, particularly through the law's use of science.

IV. HOW NATURAL LAW'S QUALIFIED PRESCRIPTION OF POSITIVE LAW SUPPLEMENTS THE LAW'S USE OF SCIENCE

A. The Equal Protection Clause

One significant area of the law impacted by religious natural law theories is equal protection jurisprudence under the Fifth and Fourteenth Amendments. The Equal Protection Clause of the Fourteenth Amendment expressly forbids states from denying persons within their jurisdiction equal protection of the laws.[99] The clause safeguards equality of rights against arbitrary discrimination[100] and measures the validity of state-law classifications.[101] The law has developed to allow some state-law discrimination if legitimate state interests justify it, so the analysis tends to center on the reasonableness of state laws.[102] Finnis's value of "practical reasonableness" requires foremost that "the basic goods be not turned against."[103] The analysis of state laws for arbitrary discrimination thus overlaps with Finnis's analysis of practical reasonableness: maximizing the net good consequences when balancing state and private citizens' interests.[104]

One notorious and repeatedly contested issue in equal protection claims is state laws' interaction with sexual orientation. Both Finnis and George used their natural law theories to further normative advocacy for state regulation of homosexuality. It seems that analyzing state statutes for sufficient rationality implicates the Finnis-Calvin approach more pointedly when the subject matter involves what the Court deems a "fundamental right." For instance, the Court in *Obergefell v. Hodges* held that there is no

99. U.S. CONST. amend. XIV; 16B C.J.S. Constitutional Law § 1256.
100. Beauharnais v. People of State of Ill., 343 U.S. 250 (1952).
101. Parham v. Hughes, 441 U.S. 347 (1979).
102. 16B C.J.S. § 1256, *supra* note 99.
103. JOHN FINNIS, RELIGION AND PUBLIC REASONS: COLLECTED ESSAYS VOLUME V 256 (2011).
104. *Id.* at 257.

lawful basis for a state to refuse to recognize same-sex marriages because marriage is a "fundamental right."[105] Historically, common law deemed marriage sacred for its importance to society, not just to the individual.[106] Therefore, the Finnis-Calvin approach subtly comments on the validity of a statute that purports to uphold individual rights at the expense of a particular class.

Peter Cicchino compiled a list of the eight most common rationales states used to justify discrimination on the basis of sexual orientation during the twentieth century. Those rationales were procreation, national security, disease, child safety, protecting marriage and the nuclear family, preserving public order, conserving public resources (in the case of states prohibiting statutes that ban discrimination), and protecting privacy (of those who object to same-sex relations).[107] These rationales appeal to what Justice Souter termed "secondary effects."[108] Secondary effects focus not on society's moral consensus; they utilize empirical data to demonstrate a public interest in regulation. Because the Equal Protection Clause (as many other rights guarantees in the Constitution) aims to protect minority classes, legislative or judicial assertions of *public* morality seem counterintuitive. Cicchino characterizes legal assertions of public morality as "identical to that of sectarian or theological assertions," and he includes Finnis's natural law in this category.[109] But Finnis emphasized basic goods, such as the good of "human-life-in-its-transmission," i.e., procreation.[110] The Finnis-Calvin approach would seek not to invalidate but to analyze and supplement laws contrary to this good. This assessment would be a factual inquiry to discern the course of action most beneficial to the common good—and, by implication, most analogous to the natural law. On this understanding, equal protection jurisprudence necessitates scientific methods to discern the appropriate means for achieving the "common good" and, in doing so, produces ends that parallel those of religion. Public opinion and science regarding homosexuality eventually progressed, discrediting many state rationales for regulating it. Nevertheless, this case study demonstrates the

105. 576 U.S. 644 (2015).

106. *See* Davis v. Beason, 133 U.S. 333, 341 (1890) ("few crimes are more pernicious to the best interest of society, and receive more general or more deserved punishment [than those which tend to] . . . destroy the purity of the marriage relation.").

107. Cicchino, *supra* note 25, at 146–49.

108. Barnes v. Glen Theatre, 501 U.S. 560, 2468–69 (1991) (J. Souter, concurring) ("I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.").

109. Cicchino, *supra* note 25, at 149.

110. Finnis, *supra* note 11.

law's susceptibility to Finnis-Calvin influence when it relies heavily on empirical data and touches on precepts important to religious doctrine.

B. Environmental Law

Finnis-Calvin natural law also plays a substantial role in environmental law. Modern environmental law traces its roots to the environmental movements of the 1960s and the confluence of two distinct interests in the environment: conservationist concern for the protection of nature and the concern for human quality of life.[111] The basis for protection against environmental harm, such as pollution, was statutory.[112] Litigation subsequently shaped the contours of these regulatory areas, and the field grew immensely soon after.

However, these issues were not functioning on an entirely clean slate; for example, the public trust doctrine was engrained in common law. The doctrine essentially recognizes that the sovereign, or state, owns the navigable waterways and soil within its jurisdiction as a trustee of the public interest.[113] Michael C. Blumm argues that the doctrine operates with exclusive ownership and public easement functions, and the "public easement aspect ... means that the [doctrine] is not so much a threat to private property as a means of curtailing private rights that damage public uses."[114] This public use rationale mirrors the "common good" rationales under scrutiny in Equal Protection cases. The doctrine provides a specific example of a broader theme portrayed in environmental law—namely, positive law aimed at restricting individual rights for the public good. It thereby shares qualities with the Finnis-Calvin approach.

Environmental law is unique, however, in the indivisibility of those two concerns. The law intends to protect nature, so is nature included in the "common good?" The law in this area encourages a new realm of rational justifications. It prompts the creation of intelligible legal rules under the impetus of a profoundly religious perspective.

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111. 16B C.J.S. § 1256, *supra* note 99.

112. 1965 saw the first federal solid waste law; 1970, the Federal Water Pollution Control Act Amendments and the Noise Control Act; 1976, the Toxic Substance Control Act (TOSCA) and the Resource Conservation and Recovery Act, and 1977, substantial revision of both the Clean Air Act and the Clean Water Act. In the meantime, on the other side of environmental concerns, the National Environmental Policy Act (NEPA), which was passed in 1969, would assure the consideration of environmental values before the federal government could proceed with any project with significant impact on the human environment.

113. *See* State Water Resources Control Board Cases, 136 Cal. App. 4th 674 (2006); Bauman v. Woodlake Partners, LLC, 199 N.C. App. 441 (2009).

114. Michael C. Blumm, *Two Wrongs? Correcting Professor Lazarus's Misunderstanding of the Public Trust Doctrine*, 46 J. ENV'T L. 481, 483 (2016).

> The question of how we ought to interact with our natural environment has proved to be as unavoidable as any other. Once we begin to reflect on the issue, the option of merely acting the way we do act ceases to exist, and the need arises to find *reasons* to relate to our environment in one way rather than another.[115]

"Ought" claims, such as those requested here, are the subject of traditional natural law. Aquinas evinced a duty to craft laws to effectuate discoverable universal truths. Modern natural law, in contrast, seeks to determine human goods through practical reasoning. Some scholars advocate for a renewed emphasis on traditional natural law in the context of environmental law to incorporate nature into the "common good."[116] They contend that the natural law pioneered by Finnis and George reinforces anthropocentric, as opposed to eco-centric, actions in environmental law.[117] Anthropocentric actions benefit human beings; eco-centric actions benefit the environment. "It is axiomatic that anthropocentrism is the dominant ethic in current environmental law and policy."[118] But, again, traditional and modern natural law share religious aims and practical effects regardless of epistemological differences. These religious purposes impose considerable influence on environmental policy and law.

C. Religion and Science in the Employ of Environmental Law

Around the same time that Congress began instituting measures to combat widespread environmental degradation, Lynn White published his article "The Historical Roots of Our Ecological Crisis."[119] White postulated that Western influence in science and religion is the guiding force that condones and perpetuates environmental degradation. "We continue today to live, as we have lived for about 1700 years, very largely in a context of Christian axioms."[120] The widely applied perspective of the Judeo-Christian creation story holds that God created man 'in His image'—not a part of nature despite being made from nature—to dominate the animals that he named. Before this Christian thought, humans had largely animist and pagan beliefs. Natural objects had spirits.

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115. Bebhinn Donnelly & Patrick Bishop, *Natural Law and Ecocentrism*, 19 J. ENV'T L. 89, 89 (2007).

116. *Id.* at 100–01.

117. *Id.* at 91–92.

118. *Id.* at 90.

119. Lynn White, Jr., *The Historical Roots of Our Ecological Crisis*, 155 SCIENCE 1203, 1203 (1967) ("Today, less than a century after [the first English usage of 'ecology'], the impact of our race upon the environment has so increased in force that it has changed in essence.").

120. *Id.* at 1205.

The introduction of Christianity brought the shift from animism to dominance over nature.[121] This ideology is reflected in traditional natural law's spiritual elevation of humans as the sole creatures capable of discerning universal truths and constructing laws to match. It manifests in modern natural law through the pursuit of intelligible legal principles calculated to produce utilitarian *human* goods. But modern natural law equally shares the monotheistic traditions' anthropocentric mentality. George acknowledges this implication through a sequence of suppositions about the human nature of all laws. First, intelligible rules are those that instantiate an intrinsic human good. Second, people always have reasons "to do whatever provides an intelligible benefit for themselves or others."[122] It follows that the concept of *reason* in the law flows from benefits to humans. George's approach excludes the first core concern of environmental laws: the protection of the environment, both for nature's sake and for future generations. Through monotheistic influence, the Finnis-Calvin approach is predisposed to disfavor all environmental laws targeting prospective, rather than concrete, harm to humans.

Environmental law is also steeped in empirical data. From a legislative perspective, congressional statutes regulating pollution, emissions, waste disposal, or other supranational concerns rely crucially on empirical judgments balanced against individual rights (often of corporations or other entities). On an administrative level, through their rulemaking and adjudicating capacities, agencies promulgate numerous regulations to motivate behavioral changes in the market that are more conducive to legislative intent. One example in the ocean of examples is the Environmental Protection Agency's use of extensive studies on sulfur dioxide emissions that lead to acid rain and the efficacy of cap and trading programs to effectuate the Clean Air Act's purposes.[123] These agencies remedy concerns ranging from local impacts of fossil-fuel-burning factories to global issues surrounding fossil-fuel use in the United States.[124]

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121. *Id.* White also makes it clear to point out the difference between Greek and Latin Christianity in this process. While they both maintained the same view toward nature, they differed in their respective actions. Greek theology believed sin was "intellectual blindness." Latins believed it was "moral evil" manifested through actions. Therefore, the Latins were more culpable for the denigration of nature in action.

122. Donnelly & Bishop, *supra* note 115 (analyzing Robert P. George's modern natural law conclusions about anthropocentrism).

123. *See generally*, Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 799 (2008). The authors' main thesis is that "technology-based regulation, with minimum standards set at the federal level with one or more states allowed to impose more stringent standards, can better drive innovation" in climate change reform.

124. David Faigman, *Where Law and Science (and Religion) Meet*, 93 TEX. L. REV. 1659, 1664 (2015).

Therefore, it presents another case study for Finnis-Calvin natural law since it may function as a tool monotheism uses to satisfy its anthropocentric ends.

V. CONCLUSION

Modern natural law stays afloat in the intellectual world largely due to adherents to the Finnis-George model of modern natural law, many of whom likely find in those scholars' writings a reflection of their religious beliefs. However, the number of adherents is not dispositive to the effect that religious natural law has on the legal system. Religious natural law is a silent but immovable force. It takes shape through subconscious attributions of objectivity from authoritative figures (often judges and policymakers) bolstered by a system historically associated with the natural law. It is agreeable with Calvinist insight and continues to supplement and critique positive law.

This confluence of intellectual and spiritual fields may not necessarily prescribe judicial reform to align with practical reasonableness more closely. The extreme implication of such unification is that judges ought to uphold natural law through their jurisprudence. Russell Hittinger crafts an anticipatory rebuttal to that assertion. He notes that "once the natural law is made effective in the form of positive laws (ordinarily written), the judge, having no natural law jurisdiction, must judge according to the dictates of whoever has authority to make law."[125] More than any other type of judge, a natural law judge would thereby uphold positive law with vigor—since natural law depends on positive law to realize its intended effect. Certainly, the average judge does not credit natural law, formally or informally, as this Note has described it. Yet, as equal protection jurisprudence and environmental law demonstrate, authoritarian legal figures are often unaware of the religious influences shaping their reliance on empirical data.

Crafting intelligible legal principles from empirical data remains a monumental task. One of the most lauded triumphs of the Supreme Court was also one of its most controversial to its contemporaries: the *Brown v. Board of Education* decision. The Court relied in that case on psychological studies showing that black children were stigmatized by segregation.[126] We reflect on this reliance without concern because the result lacks plausible opposition. But we need not strain ourselves to imagine a different scenario; reproductive rights laws have fluctuated despite initial scientific support.

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125. Hittinger, *supra* note 44, at 75–76.

126. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

Instances such as in *Casey*, where the Court declared that individuals have natural immunity from positive laws of abortion, are not moral arguments; rather, the question turns upon judgments of anthropology and theology. And it is here that religious rationales may so easily be conflated with Finnis's 'practical reasonableness' to craft legal principles.

Putting this all together, it seems pressing to summarize the qualities that make legal areas most susceptible to Finnis-Calvin natural law. These qualities are (a) whether it is an issue of first impression, (b) whether it is heavily reliant on empirical data, and (c) whether it touches on precepts corollary to religious tenants. Issues of first impression allow for greater flexibility and judicial discretion. Moreover, the ever-changing substance of empirical data makes many previous decisions ripe for critical review. Issues such as obscenity, discrimination, religion, abortion, physician-assisted suicide, violence against women, and homosexuality have come up recently in the natural law context.[127] These issues are a sampling of those that implicate religious rationales. Animal rights also satisfy these criteria. If the law may ever evaluate whether animals might possess Article III standing, Finnis-Calvin natural law would offer a presumption in the negative. It would so do through widespread appeals to "practical reasonableness," a uniquely human quality. This abstract example demonstrates the importance of identifying the philosophical precepts in judicial, administrative, and legislative pursuits—precepts cloaked in secular language that effectively appeal to *universal*, *objective*, *divinely ordained* moral norms. In his article on modern natural law, Vincent Lloyd advocates for a natural law that would seek out and challenge these hidden norms in positive law.[128] Areas of particular susceptibility, such as those described above, offer a pressing place to look.

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127. JAMES B. STAAB, THE POLITICAL THOUGHT OF ANTONIN SCALIA (2006) (observes that "[p]olitical scientist Harry Jaffa and Justice Thomas have used natural law arguments to call for the overturning of affirmative action programs. For Jaffa and Thomas, affirmative action violates the moral dignity of individuals as promised by the Declaration of Independence. Similarly, Ninth Circuit Court of Appeals judge John T. Noonan Jr. and philosophy and religion professor Russell Hittinger have defended a natural law reading of the Free Exercise Clause of the Constitution").

128. Lloyd, *supra* note 47.