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RESPONSE TO ROBERT P. GEORGE, NATURAL LAW, THE CONSTITUTION, AND THE THEORY AND PRACTICE OF JUDICIAL REVIEW

*Joseph W. Koterski, S.J.**

Hearty thanks to Professor George for a sophisticated comment on the practice of judicial review in light of natural law ethics.¹ In taking as controversial a case as *Griswold v. Connecticut*,² he rightly reminds those of us who are partisans of natural law theory about its checkered history in much the same way that Yves Simon's *The Tradition of Natural Law* does when recounting the many ways that the ideal of natural law can be used—and sometimes abused—ideologically by the left and by the right in the hopes of giving the appearance of objectivity to what is really only political willfulness.³ Whether the issue is a public matter like slavery,⁴ racism, busing, desegregation or quotas, let alone the claims about marital privacy that came to the fore in *Griswold*, the possibility is enormous for one side or the other to use the rhetoric of “natural right” or “natural law” for something that is really a matter of political will. To put the matter another way, not every argument that claims to be a good natural law argument is really entitled to the natural law banner. The trouble, of course, is: “Who’s to say?” As Stephen Krason, whom Professor George cites, likes to argue, natural law arguments depend on careful reasoning and bringing reasonable people to see the compelling nature of the arguments offered.⁵ Hence there are good natural law arguments and bad natural law arguments, but the fact that there is disagreement should not prevent us from attempting to make such arguments. Rather, it should challenge us to make the best

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1. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *Fordham L. Rev.* 2269 (2001).

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

3. Yves R. Simon, *The Tradition of Natural Law* (1965)

4. I mean here to refer to that pro-slavery position which invoked Aristotle's idea of “natural servitude.”

5. Stephen M. Krason, *Constitutional Interpretation, Unenumerated Rights, and the Natural Law*, 1 *Cath. Soc. Sci. Rev.* 20 (1996).

case we can, mindful of the possible pitfalls.

George's reminder to us that there are competing schools of thought about judicial review is deeply appreciated. He reviews some of the different positions that can be taken about the legitimacy of the practice of judicial review as well as about the proper limits of its scope, once the practice is recognized in principle. I especially appreciated the historical notes about the difference between those legal traditions where judicial review has grown up in common law practice, and those constitutions which expressly provide for a power of judicial review, whether constituted in a limited way for the purpose of reconciling statutory law with constitutional principles or constituted more expansively so that a certain level of the judiciary is invested with the power to overturn legislation that is seen to violate natural law principles. It is my understanding that this is the situation, for instance, in Austria today.

Clearly, Professor George's preference at the level of political philosophy is for restricting considerations about substantive justice to the political arena of legislation and not allowing appeals to the natural law to enter the judicial sphere by way of a natural law jurisprudence of judicial review. He allows for the possibility that a constitution may make explicit provision for a judiciary to overturn legislation on the basis of natural law considerations. His understandably pessimistic evaluation about the likelihood of judges remembering to restrain their desires to put things aright, however, leads him prudentially to prefer that this power not be explicitly assigned to the judiciary. In this paper he claims that natural law ethics itself does not determine where the power should be vested.

In practice, I have absolutely no disagreement with him. But I would beg to differ with him theoretically. Let me put this as a philosophical question about the very nature of authority in general and about civil authority in particular. I grant that natural law allows for quite diverse forms of government and for different ways of vesting the various powers that properly belong to civil authority—including our own practice of the separation of powers into different branches so as to prevent or minimize the abuse of power. If I have understood him correctly, he holds that the natural law does not decide the question of where any power of statutory review should be located. Thus, Professor George contends that we should require an express constitutional provision for the judiciary to use substantive justice known by natural law as the standard for judgment; otherwise, they should limit themselves to questions of procedural fairness.

I find it questionable to hold that there is no natural law warrant for judges especially to employ insights about substantive questions of justice to overturn legislation that violates natural law principles. Authority, it seems to me, in any of its forms, is a matter of witnessing to truths that are earlier, higher, or logically prior to itself, and using

powers responsibly for that purpose. Civil authority will invariably bring itself into contempt by excessively activist judicial legislation, but civil authority can also fail by defect. It can do so, for instance in the scenario of judges who will not assert themselves to halt injustice that gets embodied in legislation, whether by the will of an activist legislature or by a legislature whipped into action by a media-induced frenzy in the populace. Indeed, such a scenario is not hard to imagine in the recent muddle over the Electoral College and could equally be the case, say, with regards to the natural human rights of immigrants in an unexpected economic downturn.

Put another way, I think that we dare not restrict questions of substantive justice known by way of natural law to the realm of politics and legislation—we dare not do so because of what natural law requires. We must rather insist that the natural law requires that all three powers of government (whether these powers are separated as in our system or combined in some other form of government) need to call to mind and to act according to substantive justice and not just procedural fairness. Professor George has argued that there is nothing about the natural law that gives this role to the judicial branch, so long as some branch of government has the role. Yet I do not see that the natural law allows any branch (within a polity whose powers are separated into distinct branches) to be excused from this function.

The old adage that justice needs to be in the heart of the judge applies not just to cases of equity (where a judge must go beyond the letter of the law in order to bring about justice in a situation where there would be some injustice done by strict application of the letter of the law because legislators could not foresee all possible cases and because their necessarily general perspective did not adequately take into account the relevant circumstances), but also to cases where political willfulness has brought to the fore a piece of legislation that clearly and directly violates the principles of natural law.

Now there remains a useful distinction here between, on the one hand, admitting that jurists may use natural law principles to overturn legislation in the course of judicial review, and, on the other hand, attempts at judicial legislation by any activist court. In a system with separation of powers like our own, to refuse to the courts any law-making role at all is one thing, but it is quite another to recognize that this part of the body politic bears a unique and special responsibility for witnessing to the truths about justice and for using the powers within its discretion to overturn legislation that violates justice. Naturally, there will be a need for tremendous prudence and incredible reserve to prevent judges from straying into the judicial activism that has risked contempt, but to say that the rule of law entails that courts have no legitimate authority to witness to truths about substantive questions of justice strikes me as excessive. It is the

moral virtue of restraint that they need, not the removal of responsibility for giving witness to what authorities are supposed to give witness in their maintenance of the common good and the rule of law.