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A Further Comment on Robert P. George's "Natural Law"

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COLLOQUIUM

A FURTHER COMMENT ON ROBERT P. GEORGE'S "NATURAL LAW"

*James E. Fleming**

In this further comment, I shall not undertake a rebuttal of Professor George's many misinterpretations of my positions. For example, George interprets me as suggesting that *Roberts* adopts the first draft of Douglas's opinion in *Griswold*.¹ But I did not claim that Douglas's first draft itself was a full justification for the right recognized in *Griswold* or that the Supreme Court subsequently adopted the precise argument of that draft. Rather, my claim was that the personal liberty protected in *Griswold* can be justified on the basis of freedom of intimate association and that the Court in *Roberts* characterized it in those terms.²

A more pressing matter is not my positions, but George's, and a problem that arises from his evident yet unacknowledged attempt to wed natural law with Borkian legal positivism. I cannot see the sense in which George's is a "natural law" reading of *the Constitution*. George avoids claiming that the Constitution embodies simple or natural justice or a just reading of due process, equal protection, and other normative ideas. He says, in the fashion of a Borkian originalist, that the Constitution embodies, and that judges and legislatures therefore ought to apply, the framers' and ratifiers' views of justice, due process, equal protection, and other constitutional ideas. Since he cannot deny that the framers' views of these things can be morally wrong, he is therefore saying that the Constitution embodies these views even if they are morally wrong—that the meaning of the Constitution does not turn on what is morally right or wrong. Now, George may want to claim (I cannot be sure) that morality requires that judges try to ignore moral questions when interpreting the

* This Colloquium began in a previous volume of *Fordham Law Review*. See *Natural Law Colloquium*, 69 *Fordham Law Review* 2269-2312 (2001). This article is Professor Fleming's Response to Professor Robert P. George's rebuttal in that volume.

1. Robert P. George, *The Natural Law Due Process Philosophy*, 69 *Fordham L. Rev.* 2301, 2310 (2001).

2. See James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 *Fordham L. Rev.* 2285, 2289-90 (2001).

Constitution and follow original understanding, as discovered essentially by historical (not moral) inquiry. If so, he is making what could loosely be called a “natural law” argument for a form of legal positivism. In neither case is he defending a natural law theory *of the Constitution*.