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The Role of the Common Good in
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ARTICLE

THE ROLE OF THE COMMON GOOD IN
LEGAL AND CONSTITUTIONAL
INTERPRETATION*

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I. INTRODUCTION

I am going to argue that the concept of the common good—a concept of which the modern secular legal academy has lost sight—plays an essential role in an adequate theory of legal and, more specifically, constitutional interpretation. The concept of the common good fills a gap in the current understanding of legal and constitutional interpretation.

First, I will discuss the legal academy's understanding of the determinacy¹ of legal materials. I will show how outcomes in legal cases² are occasionally underdetermined, that is, the legal materials governing a case leave the judge with some discretion. I will describe two analytically distinct causes of this underdeterminacy. The first is the universal nature of legal texts as applied to concrete, contingent circumstances. The second, broader

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This article is my first attempt to elaborate an originalist theory of the process of legal and constitutional interpretation. I recognize that many ideas and arguments need further clarification, explanation and thought, which I intend to do in future writings.

1. I will define determinacy shortly.

2. I want to concentrate on legal cases, that is, where a lawsuit has been filed, instead of the broader category of nonlegal cases which involve those instances of conduct that do not result in a lawsuit and where a person's actions were determinately legal or illegal under the law. For example, in writing the first paragraph of this article, I did not slander Gore Vidal. This is an instance where my actions were determinately legal. This example is used and explained in Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 471 (1987).

cause is the underdetermined nature of and relationship between legal materials—statutes, cases, legal rules and principles—more generally.

Second, I will provide a rough overview of the nature of law as described by the Catholic intellectual tradition. This overview will discuss the characteristics of law, the nature of the legislative process, and the role of the judge. Central to this understanding is the common good.

Lastly, I will apply this understanding to statutory and constitutional interpretation and show how in each instance the common good must play a role because of the underdetermined nature of legal adjudication. In doing so, I will show how the Catholic intellectual tradition provides rich conceptual resources upon which to draw.

The Catholic intellectual tradition, as I use the phrase, refers to the intellectual tradition that has its foundation in Aristotle,³ was largely synthesized with Christian thought by St. Thomas,⁴ and which has continued with recent proponents including Alasdair MacIntyre,⁵ John Finnis,⁶ Robert P. George,⁷ and Russell Hittinger,⁸ among many others.

II. CURRENT UNDERSTANDING OF LEGAL DETERMINACY

A. Introduction

In this Part I will discuss two causes of underdeterminacy in legal cases. Secular scholars have identified situations of legal underdeterminacy, but they have generally failed to provide a reason for how

3. See Aristotle, *Metaphysics: Books X–XIV* (Hugh Tredennick trans., Harv. U. Press 1982); Aristotle, *Metaphysics: Books I–IX* (Hugh Tredennick trans., Harv. U. Press 1979); Aristotle, *The Nicomachean Ethics of Aristotle* (D. P. Chase trans., J. M. Dent & Sons 1915) [hereinafter *Nicomachean Ethics*]; Aristotle, *Aristotle's Politics* (Benjamin Jowett trans., The Modern Lib. 1943). See also Richard Kraut, *Aristotle: Political Philosophy* (Oxford U. Press 2002).

4. See St. Thomas Aquinas, *Summa Contra Gentiles* (U. of Notre Dame Press 1975); St. Thomas Aquinas, *Summa Theologica* I-II, qq. 90-97 (Benzinger Bros. 1947) [hereinafter *Summa Theologica*]. See also John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford U. Press 1998); Ralph McInerney, *St. Thomas Aquinas* (U. of Notre Dame Press 1982); Josef Pieper, *Guide to Thomas Aquinas* (Ignatius Press 1991).

5. See Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court Publ. Co. 1999); Alasdair MacIntyre, *A Short History of Ethics: A History of Moral Philosophy from the Homeric Age to the Twentieth Century* (2d ed., U. of Notre Dame Press 1998); Alasdair MacIntyre, *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (U. of Notre Dame Press 1990); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (U. of Notre Dame Press 1988); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (2d ed., U. of Notre Dame Press 1984). See also *Alasdair MacIntyre* (Mark C. Murphy ed., Cambridge U. Press 2003).

6. See John Finnis, *Natural Law and Natural Rights* (Oxford U. Press 1980).

7. See Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Intercollegiate Stud. Inst. 2001); Robert P. George, *In Defense of Natural Law* (Oxford U. Press 1999); Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford U. Press 1993).

8. See Russell Hittinger, *The First Grace: Rediscovering the Natural Law in the Post-Christian World* (ISI Books 2003); Russell Hittinger, *A Critique of the New Natural Law Theory* (U. of Notre Dame Press 1987).

our society—and judges in particular—should respond to that underdeterminacy. And those who have provided such reasons have failed to arrive at a consensus. The concept of the common good provides a missing element.

The issue of the determinacy or indeterminacy of legal texts and materials⁹—such as statutes, case law, legal principles and rules, and the theoretical justification for an area of the law—remains one of the most contentious issues in jurisprudence. Before proceeding, I will provide definitions of key terms used throughout this Article. Legal materials are *indeterminate* when the legal materials “[do] not place any limit on the possible results” in a case.¹⁰ This means that a judge presiding over a case could reach any result because the law does not constrain the judge’s judgment. Legal materials are *underdeterminate*, by contrast, when “the outcome [of a legal case] must be chosen on grounds other than the law itself . . . from a range of possible results that are consistent with and *limited* by the law.”¹¹ In practice this means that the outcomes of a case—and the judge’s discretion—are limited by the law. Lastly, the law is *determinate* when the judge has no discretion and the result in a case is limited to one outcome by the law.

Scholars are divided over the existence and extent of indeterminacy in legal materials. Some, such as Ronald Dworkin, strive to show that, when properly understood, the law in a mature legal system such as our own provides “right answers” even in the hardest case, and therefore there is no indeterminacy or underdeterminacy.¹² Others, particularly critical legal scholars, argue that, because the law is riddled with indeterminacy, judges have unlimited discretion, and that the “legal system [simply] reinforces relations of social and economic domination while retaining the appearance of neutrality and autonomy.”¹³ For critical legal scholars, the “law is radically indeterminate, incoherent, and contradictory.”¹⁴

Most legal scholars acknowledge that legal materials are underdetermined.¹⁵ Professor Ken Kress has expressed this consensus: “[T]he

9. In this article I will use the terms *law* and *legal materials* synonymously unless the context indicates a different meaning.

10. Solum, *supra* n. 2, at 473.

11. *Id.* (emphasis added). See also Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 283 (1989) (“[L]egal questions lack single right answers.”).

12. See e.g. Ronald Dworkin, *Taking Rights Seriously* 286 (Harv. U. Press 1977).

13. Solum, *supra* n. 2, at 470.

14. Kress, *supra* n. 11, at 283.

15. See e.g. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 118 (Princeton U. Press 2004) (noting that legal text, like all language, has limits); Kress, *supra* n. 11, at 283 (“[T]he indeterminacy of the law is no more than moderate.”); Solum, *supra* n. 2, at 503 (“[S]cholars . . . are right to identify significant zones of underdetermination and contingency in legal doctrine.”); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 5–14 (U. Press of Kan. 1999) (arguing that constitutional text has limited meaning and that, at the point that meaning ends, constitutional construction must occur).

indeterminacy of the law is no more than moderate and [I] reject critical legal scholars' arguments for radical indeterminacy."¹⁶

B. Underdeterminacy Caused by the Universal Nature of Legal Texts

In this subsection I will discuss how underdeterminacy may arise when general legal terms and rules, such as those found in statutes, are applied to concrete circumstances. This particular *indeterminacy of application*, though analytically distinct from underdeterminacy caused by the underdetermined nature of legal materials more generally (which is discussed in the next subsection), will in practice often be related.

Let me begin with a hypothetical similar to that utilized by legal philosophers in the discussion of legal indeterminacy.¹⁷ Suppose that the city council of a small city in Iowa with few ordinances on the books, and none dealing with the subject matter of parks, passes an ordinance which states: "No vehicles in the park." The council was reacting to complaints by park patrons that teenagers were periodically driving four-wheelers through the park, terrorizing the patrons. Next, imagine that the following day a park patron, while playing tennis on the court in the middle of the park, suffers a heart attack. Others call 911 and the ambulance rushes to aid the stricken patron. The ambulance driver drives to the middle of the park, collects the patron, and rushes back to the hospital just in time to save the patron's life.

Lastly, assume that the local prosecutor—being a firm believer in the rule of law¹⁸—initiates a prosecution of the ambulance driver for violating the city ordinance. The judge in the case is faced with a difficult question: does the ordinance's proscription of "[n]o vehicles in the park" apply to the ambulance driver who entered the park to aid a stricken park patron?

This hypothetical shows the existence of different levels of determinacy regarding the application of legal texts to concrete circumstances. For legal texts there is a core of determinacy, surrounded by a penumbra of underdeterminacy, and both are encompassed by a sea of indeterminacy. First, there are countless determinate applications of the ordinance. For example, if I drive my Ford Escort to the tennis court in the middle of the park simply because I am too lazy to park in the parking lot and walk to the tennis court, most would agree that the ordinance would determinately apply to my actions.

16. Kress, *supra* n. 11, at 283.

17. See e.g. H. L. A. Hart, *The Concept of Law* 126 (2d ed., Oxford U. Press 1994).

18. For a discussion of the value of rules of law rather than standards or principles see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 39–46 (1997); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176–82 (1989); see also Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 Penn. St. L. Rev. 573, 605–08 (2003) (discussing Scalia's view on rules of law).

Second, there is a penumbral area of underdeterminacy. Two sources of underdeterminacy become apparent through application. The first is the imprecise extent of written terms: the ill-defined extent of the category of social reality to which the terms refer.¹⁹ Is a go-cart included? A horse-and-buggy? These and other marginal objects that may or may not be within the socially constructed meaning of the term "vehicle" cause underdeterminacy.

The second source of underdeterminacy is where the context is such that application of the term or rule produces results clearly contrary to the intended scope of the term or rule. For instance, most would agree that the conventional meaning of the ordinance's term "vehicle" includes ambulances, especially in light of the council's use of "vehicle" in response to four-wheelers, which lie on the outer edge of conventional use of the term "vehicle." Most would also, however, have great unease at application of the ordinance to the life-saving ambulance driver.

There are innumerable instances where seemingly clear rules, such as the city's ordinance, may become indeterminate in application. What is the result in our hypothetical if a prosecution is brought against a child riding his bicycle through the park? Or against a teenager who uses his four-wheeler to rescue a park patron? Or against an ambulance driver who drives an ambulance through the park to test the ambulance's four-wheel drive capabilities? One can readily see how a seemingly clear and determinate rule may be indeterminate in application.

The indeterminacy in application of legal rules is caused by the universality of legal terms. The city council in our hypothetical created a legal rule that forbids *all* vehicles at *all* times for *any* reason in the park. This prohibition on vehicles in the park was the council's response to the particular problem of teenagers on four-wheelers, but the ordinance swept much more broadly. The ordinance did not take into account circumstances that, had the council thought of them, would have caused the council to alter the ordinance's broadness and/or create exceptions to the ordinance; for example, for emergency vehicles performing emergency services.

However, one must not hastily conclude that, even in this penumbral area, the lack of determinacy is radical. A judge in the park-ordinance hypothetical faced with the prosecution of the life-saving ambulance driver cannot rule for Mickey Mouse, and is therefore constrained. Or the judge cannot flip a coin to determine the outcome of the case. The judge's discretion, though real, remains limited to arguments that are plausible within our legal practice.

Third, beyond core determinate applications of the ordinance, and the underdeterminate penumbral area caused by indeterminacy of application, there is a broad sea of determinacy. These are situations where it is clear

19. For a discussion of terminological categories and their relationship to socially constructed categories see Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 577-88 (1987).

that the ordinance is inapplicable. In writing this article, for example, I did not violate the hypothetical ordinance.

What the example of the city's "[n]o vehicles in the park" ordinance shows is that legal texts, although they may at first appear to be determinate, may be indeterminate in their application to concrete circumstances. The example also demonstrates that the indeterminacy is not pervasive and is instead a limited underdeterminacy.

C. *Limited Legal Indeterminacy Caused by the Undetermined Nature of Legal Materials*

In this subsection I will broaden my focus from legal texts to the broader universe of legal materials. This universe includes legal rules and principles, statutes and case law, and the theoretical justifications/explanations for particular areas of the law.²⁰ Most scholars conclude that the outcomes in some cases are underdetermined by the legal materials and that judges have limited discretion in such instances.²¹

There are a number of causes of underdeterminacy related to legal materials. These include: (1) the choice in determining which of the universe of legal materials is pertinent to a particular case; (2) the choice in determining how the pertinent legal materials relate to each other; (3) relatedly, the choice in determining the relative authority of the pertinent legal materials; and (4) the choice in determining which theoretical structure of the law is best.

Let me start with another famous case used by legal philosophers to explain the nature of, and interplay between, legal materials.²² The case is *Riggs v. Palmer* and the facts are fairly straightforward.²³ *Riggs* involved a will made by Palmer in which Palmer gave the bulk of his estate to his grandson, Elmer Palmer.²⁴ Fearing that Palmer might change his will and cut Elmer out of it, Elmer murdered Palmer.²⁵ Under the conventional meaning of New York's Statute of Wills, standing alone, the will was valid and Elmer was entitled to inherit Palmer's estate under it; the statute said nothing regarding the murder of a testator by the main beneficiary of a will.²⁶

20. By "theoretical justifications/explanations for particular areas of the law" I am referring to Dworkinian structures of the law. See e.g. Dworkin, *supra* n. 12, at 116–17 ("[The judge] must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.").

21. See *supra* n. 15 and accompanying text (discussing the scholarly consensus that legal materials are underdetermined).

22. See e.g. Ronald Dworkin, *Law's Empire* 15–20 (Harv. U. Press 1986).

23. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

24. *Id.*

25. *Id.* at 189.

26. *Id.*

Despite the clear, unrestricted language of the statute, the court ruled that Elmer would not inherit under the will.²⁷ The majority reached that result by relying on the “fundamental maxim[]” that “[n]o one shall be permitted to profit by his own . . . wrong.”²⁸ When understood in light of this principle, the legal rules of the statute did not compel the conclusion that Elmer take under the will and instead led to the result—directly contrary to the conventional meaning of the text of the statute—that Elmer was legally prohibited from taking under the will.²⁹

We can see in the *Riggs* case the operation of legal rules—rules regarding the creation and enforcement of wills—and the legal principle—that no man shall profit by his own wrong. We can also see that these rules and principles come from statute and case law. Lastly, we can see that the judges in *Riggs* construed New York’s will statute against a background of legal materials, and that the judges believed their job was to construe the will statute so as to be consistent with the legal background, including its legal principles. In doing so, the judges provided a justificatory structure for the area of law.

For the majority, the principle that ordered the subsidiary legal materials to create a justificatory legal structure was: no man shall profit by his own wrong. The dissenters in *Riggs* concluded that the legal principle relied upon by the majority did not govern in the *Riggs* case because of the principle of separation of powers, and therefore the conventional meaning of the text of the will statute controlled to permit Elmer to take under the will.³⁰

The *Riggs* case presents a discrete example of our complex legal system: its different components and the interaction of those components. But one can see from this example that cases present judges with numerous instances where the judges must exercise judgment regarding which legal materials to bring to bear on the case and how those materials relate to each other. In *Riggs*, for instance, the judges had to determine which legal rules and principles governed the case and how those legal materials related to each other: did the principles constrain the rules (or vice-versa), and if so, in what manner?

More broadly, in our legal system, which is thick with legal materials bearing on nearly every legal case or issue, judges will have to exercise judgment because there is no mechanical means by which a judge can conclude which legal materials bear on a particular legal issue or case and how those materials relate to each other. The legal materials will therefore often underdetermine the outcome of (at least hard) cases.

27. *Id.* at 191.

28. *Id.* at 190.

29. *Id.* at 190–91.

30. *Id.* at 191–93 (Gray, J., dissenting).

III. THE NATURE OF THE LEGAL PROCESS IN THE CATHOLIC INTELLECTUAL TRADITION

A. *Law Is a Purposive Instrument to Pursue the Common Good*

As understood by the Catholic intellectual tradition, law has four characteristics: law is “[1] an ordinance of reason [2] for the common good, [3] made by him who has care of the community, and [4] promulgated.”³¹ The common good is central to the nature of law. The legislator determines what the common good of society requires and molds legislation to enable society to effectively pursue that good.

The common good is a difficult concept to grasp in individualist America because its focus is the community. Further, the concept of the common good is premised on an understanding of the nature of man that is foreign to many, one that is teleological. In the Catholic intellectual tradition, man’s end is happiness in this world and Beatitude in the next.³² Happiness in this world consists of becoming fully human: fulfilling one’s telos.³³ More particularly, human happiness is acting rationally excellently, that is, with virtue.³⁴ However, doing so requires goods which the individual cannot procure *qua* individual: virtue and the material necessities to enable one to act virtuously.³⁵

The common good provides the ordered community that is necessary for individuals to achieve happiness (which they cannot procure for themselves). The common good consists of, among other things, justice, law, friendship,³⁶ the dignity of man, and fraternal love;³⁷ goods which all members of society—in an ordered manner—together pursue.³⁸ As Professor V. Bradley Lewis summarizes: “The common good of any community, then, is an order of parts that explains and enables their coherence and activity without damaging their own internal integrity.”³⁹

The legislator,⁴⁰ prior to legislating, has in his mind “the type of the order of those things that are to be done by those who are subject to his

31. *Summa Theologica*, *supra* n. 4, at 1-2, q. 90, a. 4.

32. *Id.* at 1-2, q. 5, a. 3.

33. *Nicomachean Ethics*, *supra* n. 3, at 1097b–1098a.

34. *Summa Theologica*, *supra* n. 4, at 1-2, q. 3, a. 5.

35. *Id.* at 1-2 q. 4, aa. 6–8; *id.* at 1-2, q. 57 a. 5.

36. In the Aristotelian political sense of the word.

37. Jacques Maritain, *Man and the State* 59 (U. of Chi. Press 1951); *see also* Jacques Maritain, *The Person and the Common Good* 29 (John J. Fitzgerald trans., U. of Notre Dame Press 1966) (“Because the common good is the *human* common good, it includes . . . the service of the human person.”).

38. *See* V. Bradley Lewis, *The Common Good in Classical Political Philosophy* 5 (Forthcoming in *Current Issues in Catholic Higher Education*); *see also id.* at 8 (“[T]he common good [is] constituted by [a] set of conditions supportive of and/or constitutive of genuine human flourishing.”).

39. *Id.* at 5.

40. Although there is an extensive debate surrounding the topic, *see e.g.* Dworkin, *supra* n. 12, at 314–37 (arguing that there is no collective intent of a body such as Congress), for purposes

government.”⁴¹ In other words, the legislator sees a problem in society and conceives of an alternative social ordering to eliminate the problem and ensure a more effective pursuit of the common good. The source of positive law is the legislator’s intellect, his reason participating in the eternal law.⁴² Then, through legislation, the legislator recreates that order in the members and institutions of society.⁴³

The craft analogy is apt.⁴⁴ Like a sculptor who has in his mind prior to carving an image of the thing to be carved out of the stone, the legislator has in his mind prior to legislating a picture of what he wants to occur in society as a result of his legislation. The legislator understands what the common good of the society requires and molds legislation to enable soci-

of this article, I avoid delving into the question of intent of corporate bodies such as Congress. Let me note that it is not clear that my arguments require the attribution of a state of mind to collective entities such as Congress. As explained in the text regarding interpretation of the Constitution, the immediate object of interpretation is not the state of mind of the legislator. Rather, the object is the publicly-accessible meaning of the text. In other words, although the legislator’s “intent” is the authoritative law, our ability to know that “intent” is limited. What we have more ready access to is the artifact of the legislator’s intent—the legal text—and the text’s context which, depending on the circumstances, will more or less approximate the legislator’s intent. *See* Whittington, *supra* n. 15, at 165–66, 191–94 (arguing that one can access the “intent” of legislators by looking to the written terms used and the context in which they were used).

41. *Summa Theologica*, *supra* n. 4, at 1-2, q. 93 a. 1.

42. *Id.* at 1-2, q. 93 a. 1.

43. The human legislator makes the natural law effective and moves society toward the common good through two separate means: deduction and *determinatio*. Through the processes of how positive law makes natural law effective, one can see that the authority or source of positive law is the legislator’s intellect—his reason participating in the eternal law. Law, in all its forms (eternal, divine, natural, and positive), is a reflection of (a part of) reality, of being, and—because its ultimate origination is God—the fullness of being. Man is like God in his ability to reason and through his reason participates in God’s reason which is His regulation of Himself and creation. As Aquinas stated, human law is “derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities.” *Id.* at 1-2, q. 95 a. 2. Through these two processes, human law “is a dictate of the practical reason.” *Id.* at 1-2, q. 91 a. 3. For instance, the law that one must not commit murder is derived from the principle that one shall do no harm to any man.

Determinatio is complex and is meant to describe a situation where a legislator attempts to make the natural law effective in the myriad contingent circumstances facing his society. The result of *determinatio* will not be complete certainty because the matters for determination are contingent matters which do not allow for such exactness. As St. Thomas states, “Nor is it necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus.” *Id.* at 1-2, q. 91 a. 3. Here, the practical wisdom of the legislator is called to action to, within the broad bounds laid out in the natural law and deductions therefrom, order his society for the common good. Different laws will be directed to those different roles occupied by citizens (e.g., soldiers, governors, priests, farmers), the form of government of the society, and different human activities (commerce, family relations, property relations, etc.). *Id.* at 1-2, q. 95 a. 4.

A good example of *determinatio* is highway regulation. There are broad bounds within which a legislator must work: safety, efficiency, environmental protection, etc. Within these bounds the legislator must judge which of the countless combinations of traffic regulations would most advance the common good given the circumstances of the society.

44. For a discussion of the role of the craft analogy in the Catholic intellectual tradition see MacIntyre, *Three Rival Versions*, *supra* n. 5, at 127, 130–31.

ety to effectively pursue that good. Law, to be law, must contribute to the common good of society.⁴⁵ It must direct the members of society to act cooperatively in their different capacities.⁴⁶

In this way, law is a *purposive instrument*. Law's overarching purpose is to better secure the common good, while its specific purpose will vary depending on the particular goal the legislator has in mind for a particular statute. Law is an instrument or tool of the legislator to effect a change in society to better order society toward the common good.

Societies, to enable their effective pursuit of the common good, must entrust the common good of the society to particular offices.⁴⁷ The norms of the Catholic intellectual tradition do not require any particular set of offices with any particular set of powers. Our society has a specific social ordering, much of it embodied in the Constitution. One of our society's principle offices is that of legislator: the members of Congress. These office holders have the primary responsibility in our governmental structure, given by Article I, to create laws to order society to the pursuit of the common good. Other offices, the executive and judiciary, are entrusted with particular aspects of our society's pursuit of the common good.⁴⁸ For example, the judiciary is primarily entrusted with the adjudication of concrete disputes under the Constitution and laws created by Congress.⁴⁹

While the full meaning of a legal text is found in the legislator's conceived-of alternative social ordering, judges applying a legal text do not have direct access to this and must instead use other means to determine the meaning of a legal text.⁵⁰ In our society, the written text of a law is an

45. *Summa Theologica*, *supra* n. 4, at 1-2, q. 90 a. 3.

"Law" that does not contribute to the common good, but instead to the good of one or a group of individuals, contravenes the nature of society—the purpose of which is to help perfect its members. For instance, if a purported law only enriches one individual, (the tyrant for example), it does not serve the common good but one individual's "good." (Although the individual in fact also harms himself by enriching himself at the expense of others and thereby violating distributive justice.)

46. Law must therefore prevent individuals from acting against other members of society through, for example, criminal and tort law. These laws help ensure the dignity of each individual and that members of society can go about their business—pursue their ends—without fear of harm. The law should also guide cooperative conduct of individuals into established paths, making social cooperation predictable and efficient, such as is attempted through the application of and adherence to contract and property law.

47. See e.g. Hittinger, *supra* n. 8, at 68–69, 76–77, 93–94 (discussing the creation of offices with the duty and authority to care for the (or a portion of the) common good).

48. *Id.*; see also Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 Harv. J.L. & Pub. Policy 909, 992–97 (2005) (arguing for originalism in part based on the limited authority given to the office of judge by the Constitution).

49. U.S. Const. art. III; *The Federalist* No. 78 (Alexander Hamilton); see also Strang, *supra* n. 48, at 992–97 (discussing the limited scope of authority given judges).

50. The epistemological difficulty of determining the legislator's intended meaning of a legal text occurs in any society, such as ours, which utilizes inanimate justice—we separate the law making from the law applying functions. The difficulty is compounded because our society does

“artifact”; it is the legislator’s attempt to convey to society, in the clearest means possible, the conclusion of his own internal process of practical reasoning regarding the manner in which society must be ordered to effectively pursue the common good. Thus, the text is a strong indicator of the results of the legislator’s practical reasoning, and in the normal course of adjudication regarding that statute, it will suffice to determine the outcome of a case.

Relatedly, the context in which a legislator operated when crafting and adopting a legal text enables a judge to interpret the legal text in a manner that more closely approximates the legislator’s intended ordering. The context will include the broader cultural, religious, economic, and other social circumstances, as well as the more specific historical record: what social problem was the legislator acting upon; what does the legislative record reveal; who were the prominent figures arguing for and against the legal text in question?

However, the text of a law is not and *cannot* be determinative in every case. This is because positive law is framed with the majority of cases in mind.⁵¹ According to Aristotle, “every law is necessarily universal.”⁵² But the subject matter of law is the infinite variety of contingent circumstances of social life which admit of no universal categorization. Therefore, “it is not possible to speak . . . rightly in any universal or general statement” regarding the subject matter of law.⁵³ The inaccurate universality of law is not the fault of a particular law or the fault of the lawmaker, “but is [instead] inherent in the nature of the thing”⁵⁴ because law governs human actions which defy universal rules and calls for the application of practical reason. This is the substance of Aristotle’s concept of equity, discussed more fully below.

B. *Role and Character of the Judge*

Given the necessity of judges sometimes going beyond the conventional meaning of the text of a law, the judge must have a particular type of character. Accordingly, within the Catholic intellectual tradition, the concept of virtue also plays a central role in legal systems. Judges need certain virtues to be excellent judges, and most prominent among these are justice and practical wisdom. The just judge will have respect for and abide by the laws of his society.

not condone the practice of having the legislator(s) testify regarding the intended meaning of a legal text regarding its application in a case. Further problems arise because, as noted *supra* n. 40, legislators in our society are collective entities, the membership of which, in some cases (such as the ratification of our Constitution) is not well-defined.

51. *Summa Theologica*, *supra* n. 4, at 1-2, q. 96 a. 1.

52. *Nicomachean Ethics*, *supra* n. 3, at 1137b.

53. *Id.*

54. *Id.*

What undergirds Aristotle's claim that judges may decline to follow the conventional meaning of a legal text is the concept of justice.⁵⁵ Aristotle defines justice as "act[ing] according to the law"—as the "lawful"—and as the "equal."⁵⁶ For our purposes, we will concentrate on Aristotle's discussion of *justice as lawfulness*, which encompasses both types of justice.⁵⁷ Richard Kraut has explained Aristotle's conception of justice as lawfulness as "the intellectual and emotional skill one needs in order to do one's part in bringing it about that one's community possesses [a] stable system of rules and laws."⁵⁸

Aristotle, in explaining justice as lawfulness and why the just man is obligated by the law, relates the law back to the common good:

[F]urther, it is plain that all Lawful things are in a manner Just, because by Lawful we understand what have been defined by the legislative power and each of these we say is Just. The Laws too give directions on all points, aiming . . . at the common good of all[:]. . . those things that are apt to produce and preserve happiness and its ingredients for the social community.⁵⁹

The law is the primary means by which the society secures the ordering necessary to secure the common good. The just person will therefore bring about and uphold society's laws.

Under the concept of equity, to the extent it is impracticable for legislators to govern all possible situations *a priori* with written laws, it is necessary that judges have discretion, beyond the conventional meaning of the law, to render a judgment in accord with the natural law—in accord with the result of the legislator's practical reasoning on the needs of the common good for the society.⁶⁰ When a judge sits in judgment of a case in which application of the conventional meaning of a law would be inequitable, the judge must "set right the omission [of an exception to the law] by ruling . . . as the lawgiver himself would rule were he there present, and would have provided by law had he foreseen the case would arise."⁶¹ In Aristotle's vision of the law, when application of a law would not accord with the purpose of the law, the judge must attempt to put himself in the role of the

55. For a more in-depth discussion of Aristotle's theory of equity, see Roger A. Shiner, *Aristotle's Theory of Equity*, 27 *Loy. L.A. L. Rev.* 1245 (1994).

56. *Nicomachean Ethics*, *supra* n. 3, at 1129a ("[A]nd so manifestly the Just man will be, the man who acts according to the law, and the equal man.")

57. See Kraut, *supra* n. 3, at 102–03 (Oxford U. Press 2002) (discussing the distinction between the two forms of justice). Kraut explains that justice as lawfulness is the virtue of following the laws of the community, while justice as equality is a more narrow concept of giving each his due. *Id.* at 106–07. For a more complete discussion of judicial virtue see generally Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 *Metaphilosophy* 178 (Jan. 2003) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=369940).

58. Kraut, *supra* n. 3, at 106.

59. *Nicomachean Ethics*, *supra* n. 3, at 1129b.

60. *Summa Theologica*, *supra* n. 4, at 1-2, q. 96 a. 1.

61. *Nicomachean Ethics*, *supra* n. 3, at 1137b.

legislator who enacted the law to order society in a particular manner toward the common good, and determine whether the legislator would have created an exception to the law had this particular case been in his consciousness at the time of enactment.

Further, if there is some error in the legislator's transmission of his intention into written law, the duty of the judge is to seek the legislator's purpose—the legislator's intended means to enable society to effectively pursue the common good—and not follow the conventional meaning of the law. Kraut summarizes the disposition of the judge who respects the laws of his society:

[Justice] does not require but in fact forbids casting a blind eye on the deficiencies of the law and mechanically doing whatever it requires. Justice consists not in obeying each and every law, but in supporting the legal framework as a whole. It is adherence to the law, but not to every particular law, however deficient.⁶²

The equitable judge is not acting in contradiction of the legislator. Instead, he is cooperating with the legislator to bring about the common good.⁶³ The legislator's goal is to, through law, bring about an ordering of society and its members to more effectively pursue the common good. Law is a blunt instrument to do so, and on occasion its application will impede the pursuit of the common good. When this occurs—not necessarily through the fault of the legislator—the judge will act equitably and thereby correct the legislator's means to enable the law to better reach the legislator's goal.⁶⁴ The concept of equity and its relationship to the common good are resources most theories do not offer.

A judge's duty—at least in our society—is not to second-guess the legislative determination of how the natural law should be made effective.⁶⁵

62. Kraut, *supra* n. 3, at 109.

63. *Id.* at 110.

64. *Summa Theologica*, *supra* n. 4, at 1-2, q. 96 a. 6. “[H]uman laws fail in some cases: wherefore it is possible sometimes to act beside the law; namely, in a case where the law fails; yet the act will not be evil.” *Id.* at 1-2, q. 97 a. 3.

Saint Thomas gives a telling example of when observance of a positive law should not occur: if a city has a law requiring the gates to be closed when besieged, the law should not be followed if there are defenders of the city outside the gates being pursued by the besiegers. *Id.* at 1-2, q. 96 a. 6. The common good requires that the defenders be allowed into the city. He then provides a strong qualifier: only those with the authority to dispense with obedience to the law may determine when not to observe it. *Id.* “For if it be a matter of doubt, he must either act according to the letter of the law, or consult those in power.” *Id.*

65. The question of the role of judges in making the natural law effective is one for each society to make; it is a positive and not natural law decision. In fact, St. Thomas argues that it is better for judges to act in a secondary law-making role for a number of prudential reasons. *Id.* at 1-2, q. 95 a. 1; *see also* George, *In Defense of Natural Law*, *supra* n. 7, at 110 (“While the role of the judge as law-creator reasonably varies from jurisdiction to jurisdiction according to each jurisdiction's own authoritative *determinationes*—that is to say, each jurisdiction's positive law—Judge Bork's idea of a body of law that is properly and fully (or almost fully) analyzable in technical terms is fully compatible with classical understandings of natural law.”) (footnote omitted).

This obedience to the law is the essence of justice as lawfulness. However, if there is some error in the legislator's transmission through the writing of his intention into law—of how the natural law is to be made effective and further the common good—the duty of the judge is to seek the legislator's purpose—the legislator's intended means to enable society to effectively pursue the common good—and not follow the conventional meaning of the law. Stated differently, if the positive law, for some reason or another, does not do what the legislator clearly intended it to do—the law does not appropriately order society to achieve the common good—then the judge must act in accord with the legislator's purpose.

A judge acts unjustly when he refuses to enforce a law simply because the judge believes the law to be unjust or imprudent. In doing so, the judge “sets himself up as a rival to the body that has the authority to make the laws.”⁶⁶ As discussed above, presuming the particular society created the office of the legislator whose duty it is to care for the common good of the society, the legislator's determinations for the society on that score are binding. A judge's disagreement with the legislator's determinations is generally not sufficient to authorize the judge to refuse application of a law.

The excellent judge will determine cases, if possible, on the basis of the conventional meaning of the laws of his society.⁶⁷ The judge must possess the virtue of justice as lawfulness to give the statutory text its due regard. Judges must also possess and use their practical wisdom when, as discussed above, application of the law would produce a result contrary to the purpose of the law. Practical wisdom is the virtue of being able to correctly discern, in the contingent circumstances in which one finds oneself, what course of action is correct.⁶⁸ Contingent matters are the everyday circumstances of our individual and social lives “where there is no definite rule” of action.⁶⁹ It is in these “thick” or highly contextualized situations that one has need of practical wisdom, gained by experience⁷⁰ or grace,⁷¹ to discern the correct course of conduct.

66. Kraut, *supra* n. 3, at 110.

67. The judge has the duty to enforce the natural law *as made effective in the society through the positive law*. St. Thomas writes that

Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived. . . . Now laws are said to be just, both from the end, when, to wit, they are ordained to the common good,—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver,—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good.

Summa Theologica, *supra* n. 4, at 1-2, q. 96 a. 4.

68. *See id.* at 2-2, q. 47 a. 1 (“Prudence is the knowledge of what to seek and what to avoid.”); *see also id.* (“A prudent man is one who sees as it were from afar, for his sight is keen, and he foresees the event of uncertainties.”).

69. *Nicomachean Ethics*, *supra* n. 3, at 1140b.

70. *Id.* at 1142a.

71. *Summa Theologica*, *supra* n. 4, 2-2, q. 47 a. 14.

Judges will utilize their practical wisdom when faced with legal underdeterminacy. The judge will have to weigh various values and the issues facing the judge will arise in (sometimes highly) contextualized cases. In these situations, the judge must determine whether the law is determinate, and if not, what the legislator would have intended in the case.

IV. APPLICATION TO STATUTORY AND CONSTITUTIONAL TEXTS

A. *Introduction*

In this last portion of the article I will apply to statutory and constitutional texts the understanding of the nature of law taken from the Catholic intellectual tradition, a central component of which is the common good. I do so because of the importance of statutory and particularly constitutional texts to our society. The Catholic intellectual tradition and its concept of the common good provide a missing ingredient to explain the role of the judge in underdetermined cases.

The perhaps surprising conclusion at which I arrive is that while judges have equitable authority in the statutory context, and may thereby mold the general terms of a law in light of its purpose, I also conclude that in the constitutional context, judges may not exercise similar equitable discretion. They must instead defer to the *constructions* of the constitutional text when the original meaning of the text of the Constitution does not determine the outcome of a particular case. However, in both contexts, when there exists underdeterminacy caused by the underdetermined nature of the pertinent legal materials, judges must exercise choice and determine the law in the manner most conducive to the common good.

B. *Statutory Texts*

In this subsection I will discuss how the Catholic intellectual tradition has the conceptual resources to explain how and why legal underdeterminacy arises in situations involving statutory texts, and offers direction for how a judge should act in such situations.

The understanding of legal texts taken from the Catholic intellectual tradition is that indeterminacy will arise in the application of statutory texts to concrete circumstances. This conclusion follows from the nature of legal texts: they are universal categorizations of social life, which is not susceptible to categorization because of its contingent nature.

In our society, statutes are the primary means by which a legislator moves society to the common good. The legislator may see a problem in society that is impeding pursuit of the common good and create a law to eliminate the problem. For instance, at the end of the nineteenth century, many Americans believed that large trusts were harming the economic and

social well-being of the country⁷² and so, to remedy the problem, Congress enacted the Sherman Antitrust Act.⁷³ Or relatedly, the legislator may see that a different social ordering will make members of the society more effective in their pursuit of the common good. One example is the Northwest Ordinance, which was enacted to organize some of the vast western territories of the United States and provided for a minimal government, defense, and property regulation.⁷⁴

With each statute, like all statutes, the legislator (in the first example, the U.S. Congress, in the second, the Continental and later the U.S. Congresses) enacted a law to move society to an end. There was a particular goal in the mind of the legislator and the legislator communicated to society through the statute the authoritative means he prescribed for achieving that goal. The legislator used the language of the statute to communicate the means but, for a number of reasons, the language of the statute did not perfectly fit the goal in the legislator's mind. This leads to underdeterminacy, and the judge in a case involving a statute where such underdeterminacy arises must make a choice.

The Catholic intellectual tradition argues that the judge should choose to construe the statute to achieve the legislator's purpose for which he enacted the statute. Law is a purposive tool, and a statute enacted by a legislator has the purpose of ordering members and institutions in society in a manner conducive to the effective pursuit of the common good. Because laws are framed universally, there will arise instances where application of the conventional meaning of the statutory text will lead to results contrary to either the particular goal of the legislator, or to the broader common good, the legislator's pursuit of which is presupposed by the nature of law (law is "for the common good, made by him who has care of the community"). In the context of statutes passed by Congress, the judicial interpretation of the statute in light of Congress' purpose is consistent with the constitutional roles of Congress and the judiciary.⁷⁵

In the literature discussing statutory interpretation, *Church of the Holy Trinity v. United States*⁷⁶ looms large and offers a vehicle to show how the Catholic intellectual tradition can provide direction and reasons for how and why a judge should interpret statutes. On one end of the spectrum are "textualists" such as Justice Scalia who, in *A Matter of Interpretation*, called *Holy Trinity* the "prototypical case involving the triumph of supposed 'leg-

72. See Herbert Hovenkamp, *Enterprise and American Law 1836–1937*, 246–49 (Harvard U. Press 1991) (discussing the motivation(s) behind the Sherman Antitrust Act).

73. *Sherman Antitrust Act*, 15 U.S.C. § 1 (2000).

74. See 1 Stat. 50, 50–52 (1789) (re-enacting the Northwest Ordinance under the newly ratified Constitution).

75. See *infra* n. 85 and accompanying text (giving reasons why, in our society, judicial exercise of equity is consistent with the constitutional roles of the federal branches).

76. 143 U.S. 457 (1892).

islative intent' (a handy cover for judicial intent) over the text of the law."⁷⁷ On the other end are scholars such as William Eskridge who argue that statutes should be interpreted in light of the context of their enactment and in light of the present context.⁷⁸ *Holy Trinity* is therefore an interesting case because it provides an example of the application of a statute to concrete circumstances that would thwart the likely end of Congress, but which application is arguably required by the conventional meaning of the statute's text.

In *Holy Trinity* the conventional meaning of the statute, entitled "An Act to prohibit the importation and migration of foreigners and aliens under contract . . . to perform labor in the United States,"⁷⁹ arguably prohibited the defendant Episcopal parish from contracting with an English pastor to reside in the United States and be the parish's rector.⁸⁰ However, the Supreme Court—admitting that what it called the "letter" of the law applied to the church⁸¹—ruled that Congress would never have intended such a result and held for the church.⁸² The Court looked to: (1) the particular context in which the statute was enacted and the evil Congress sought to remedy—Congress was concerned with the massive waves of poor immigrants being brought to the United States for their cheap unskilled labor; (2) the legislative history of the statute—committee reports showing that Congress wanted to prohibit only the practice of contracting for manual laborers and not professionals; and (3) the general background of our nation regarding Christian ministers—one could not impute to the legislature of a Christian nation the desire to prohibit the importation of Christian ministers.⁸³ The Court then concluded that Congress did not intend to prohibit churches from contracting for the services of foreign ministers.⁸⁴

The understanding of the nature of law found in the Catholic intellectual tradition provides a route for judges to take when faced with *Holy Trinity*-type cases and provides reasons and guidance for the route. When, during application of a statute, it becomes clear that application would thwart the end or goal the legislator had in mind when he enacted the statute—because the language of the statute is over- or under-inclusive—the judge should read the statute in light of the statutory end. The overarching purpose of the statute was to promote the common good, and the statute should therefore be read in light of that overarching purpose along with the particular goal of the statute.

77. Scalia, *supra* n. 18, at 18.

78. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

79. 143 U.S. at 463.

80. *Id.* at 458.

81. *Id.*

82. *Id.* at 472.

83. *Id.* at 463–72.

84. *Id.* at 472.

In doing so, the judge is not usurping the legislator's democratic prerogative for at least three reasons.⁸⁵ First, by effectuating the legislator's goal the judge is participating in and aiding the legislator's goal. The judge who cooperates with the legislator to advance his end follows the law—the social ordering conceived of in the legislator's mind—and not the artifact of the statutory text which approximates the law in the legislator's mind.⁸⁶ Second, as was the case in *Holy Trinity*, the absurd result that would arise from application of the conventional meaning of a statute often provides the motivation for courts to look beyond the conventional meaning. Avoiding an absurd result through equitable interpretation, when licit, promotes the common good, and therefore should occur in such situations. Third, if the legislator later determines that the judge hindered the statute's attainment of its ordained end, the legislator may amend the statute to rectify the situation.⁸⁷

In a *Holy Trinity*-type case, the judge, to *effectively* judge whether a particular statute is over- or under-inclusive, must possess the virtue of justice as lawfulness. The judge must have the appropriate character to abide by the law and not lightly disregard it. In addition, once the judge has determined that the law has “run out,” so to speak, he must also possess the virtue of practical wisdom in order to *correctly* determine what the legislator's purpose behind the statute requires the judge to do in light of the inapplicability of the statute's conventional meaning.

Returning to the hypothetical city ordinance prohibiting vehicles in the park: The city council enacted the ordinance to enable members of the community to more effectively use the park for leisure and other purposes. No rational council, seeking to procure the common good through legislation, would intend the proscription to apply to an ambulance driver who drove the ambulance into the park to save a stricken patron. The judge in the case brought by the hypothetical prosecutor would be justified (required?) in giving a narrow reading to the ordinance and ruling that it was not applica-

85. Although I have not sufficiently researched the issue, my initial impression is that a further very powerful reason why the judiciary may exercise equity regarding congressional statutes is that, as originally understood, “judicial power” in Article III included such authority. See e.g. *The Federalist No. 78* (Alexander Hamilton) (“[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.”).

86. The distinction between the textual artifact of the law here and the true law (the legislator's conception of a social ordering) may require a distinction between what I tentatively label the contextualized meaning of a law (the conventional and/or original meaning of a law) and the particularized meaning of a law (the meaning of the law as applied to a concrete case through adjudication). Both the contextualized meaning and the particularized meaning of a law are specifications of meaning that more closely approximate the true law as conceived of by the legislator. I do not address these issues in this article.

87. Depending on the particular statute in question and the statutory context, this last reason may not carry much weight because of the super-majority hurdles (bicameralism, presentment, overcoming factions), institutional constraints such as the amount of time to devote to legislative subjects, and inertia that must be overcome to pass legislation. As a result, although there is a democratic check on judicial application of a statute, the check is generally not rigorous.

ble to the ambulance driver. The judge would thereby cooperate with the council in enabling the city to pursue the common good and the particular good of effective use of the parks for leisure purposes.

In sum, the interpretation of statutes must be in light of the good the legislator intended to effect through the enactment. As discussed above, the judge in a case involving a statute may have discretion when the statute is applied to particular circumstances; if so, the judge must then exercise that discretion in cooperation with the legislator's goal or end (as evidenced in the statute) and within the legislator's broader pursuit of the common good.

In the statutory context there is a second manner in which a judge will have discretion, but his discretion will not be (as?) circumscribed by the legislator's prior goal or end. A judge will have discretion in cases when he must determine what are the applicable legal materials, the relative authority of the pertinent legal materials, the relationship of the pertinent legal materials, and how those factors play out in a given case: in essence, the judge must determine what the law is. In these situations, the statute at issue will be one of the pertinent legal materials (perhaps the most important), and in dealing with the meaning of the statute the judge's discretion will be circumscribed by the legislator's goal; but there will remain other non-circumscribed pertinent legal materials, and the judge will have to determine their relationship to the statute.

Riggs v. Palmer provides an example of this second form of discretion. The state's statute governing wills was clearly relevant, but the New York Court of Appeals still had to determine how that statute interacted with the other pertinent legal materials and apply the result of this determination to the case. That discretion required the judges to exercise their judgment to answer the question: what is the law governing the case?

Unlike where a judge is attempting to discern the meaning of a statute and the judge is a partner in the legislator's ordering of society toward the common good and his discretion is accordingly circumscribed by the legislator's goal in enacting the statute, when a judge is performing the broader judicial task of synthesizing an area of law his discretion—his judgment—in doing so is much less circumscribed. Instead, the legal materials may be underdetermined, and so the judge will have the opportunity *to choose* different syntheses of the legal materials. The judge is choosing "what the law is" that governs the case. The particular area of the law the judge is dealing with may offer some guidance as to the end(s) of that area of law⁸⁸ which the judge would accordingly take into account; but that will not always be the case, and in any event, the judge must exercise judgment to discern the end(s) of the area of law, and the end(s) of an area of law will only provide

88. For example, one of the ends of real property law is security of title and stability because of the great value placed on real property (family homes for example) by owners and our society.

guidance to the judge and will not determine the correct ordering of the legal materials.

Consequently, judges in many cases involving statutes will be left with ineliminable discretion. As noted earlier, some scholars will either attempt to argue that judges in fact have no discretion or that their discretion is so pervasive as to destroy the rule of law. The position that I believe is offered by the Catholic intellectual tradition is that judges have some discretion because of the underdetermined nature of the legal materials governing cases. The Catholic intellectual tradition also affirms, however, that judges, as officials within the official apparatus of society charged with the care of the common good—the state—must utilize their discretion to further the common good and the end(s) of the particular area of law in question. Stated differently, judges must choose that synthesis of the legal materials that would make the social pursuit of the common good most effective. And to do so, judges must possess virtue, especially justice as lawfulness and practical wisdom.

Returning to the *Riggs* case, The judges in *Riggs* were faced with legal materials including, among other things: the New York Statute of Wills; precedent from New York and other jurisdictions on the interpretation of will statutes; precedent utilizing the general common law principle that no man shall profit by his own wrong; the inequity of allowing Elmer to profit from murder; and the background constitutional principle of separation of powers between the legislature (which made the will statute) and the judiciary. The judges had to synthesize these legal materials, and in doing so they exercised discretion. The majority could have concluded, as did the dissent, that the principle of separation of powers was the ordering principle for the area of law and which required the court to read the will statute literally (and for Elmer's benefit). Instead, the majority ordered the pertinent legal materials differently. In doing so, the majority concluded that justice and equity and the common good were better served under its ordering—its synthesis—of the legal materials. The majority and dissent answered the question—what is the law—differently by choosing different theoretical structures for the area of law.

C. *Constitutional Texts*

In this subsection I will discuss how the Catholic intellectual tradition has the conceptual resources to understand how and why legal underdeterminacy arises in situations involving constitutional texts, and offers reasons for how a judge should act in such situations.

1. *Nature of the Constitution*

The text of the Constitution is a legal text that, on the understanding of the Catholic intellectual tradition, is a purposive instrument the nature of

which is to order society to an effective pursuit of the common good.⁸⁹ The “legislator” of the Constitution is the People of our society who, in 1787-1789, ratified the Constitution, giving it binding, authoritative, legal status. The People meant to accomplish the broad goal of securing the common good for our society and a number of subsidiary goals.

The Preamble to the Constitution identifies that a more effective pursuit of the common good was the overarching goal of the People. The People recognized that the union under the Articles of Confederation was incomplete and sought to make it “more perfect.”⁹⁰ The People sought to re-order society to achieve justice, domestic peace, external defense, and the general welfare of the members of our society.⁹¹ This is the essence of the common good. The People recognized that the common good, and thus the individual goods of the members of the society, were not being achieved under the Articles of Confederation and sought to use the Constitution to re-order society to achieve those ends.

The specific clauses and the structure of the Constitution, read in light of its original meaning, identify the means by which the People sought to secure the common good. The People authorized the federal government to utilize a number of means to pursue the common good, but wisely did so in a limited fashion through the enumeration of powers and with explicit textual limits such as those in the Bill of Rights.

In sum, like statutory text, the Constitution is law subject to analysis within the Catholic intellectual tradition.

2. *Role of the Judge in Constitutional Judicial Review*

The role of the judge in the constitutional context is different from his role in the statutory context. The Constitution, in our legal system, is the trump card. If a litigant has the Constitution on his side, he wins. The Constitution is the primary authorization and limitation on all government action—including judicial action—given by our society to the state.

Constitutional judicial review is the process by which federal judges declare acts of the Congress (or President)⁹² constitutional or unconstitutional. The exercise of this power by federal judges has been and will continue to be a contentious topic. The reason for this unease with constitutional judicial review was aptly summarized by Ronald Dworkin: “It seems grotesquely to constrict the moral sovereignty of the people them-

89. For a discussion of the purposive nature of the Constitution, that is, the Constitution as the means through which our society ordered itself to the effective pursuit of the common good, see Strang, *supra* n. 48, at 909.

90. U.S. Const. preamble.

91. *Id.*

92. I will concentrate on Congress.

selves.”⁹³ In other words, what warrant do unelected judges have to thwart the will of the People’s democratically elected representatives?

The traditional justification for the exercise of constitutional judicial review is found in *Federalist 78*.⁹⁴ There, Alexander Hamilton argued that constitutional judicial review was not undemocratic because the courts, in exercising that authority, acted as the agent of the People, enforcing the People’s previously enunciated constitutional limitations on the legislature.⁹⁵ Constitutional judicial review, on this reading, was *democracy-enhancing*: it enabled the People to order its social life and constrain its government agents into the future.⁹⁶ As Hamilton stated, “[T]he courts were designed to be an intermediate body between the people and the legislature in order . . . to keep the latter within the limits assigned to their authority.”⁹⁷

This justification was utilized by Chief Justice Marshall in *Marbury v. Madison* to establish the propriety of constitutional judicial review.⁹⁸ Marshall echoed Hamilton stating: “that the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”⁹⁹

3. *Courts Must Follow the Text and Original Meaning of the Constitution*

As with statutory cases, judges in constitutional cases must, if possible, follow the text of the Constitution. I have argued elsewhere that, consonant with the *Federalist 78* justification for judicial review, in cases where the courts exercise judicial review, judges must follow the original meaning of the constitutional text.¹⁰⁰ Therefore, courts act legitimately in striking down acts of Congress that contravene the original meaning of the Constitution.

93. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 4 (Harv. U. Press 1996).

94. *The Federalist No. 78* (Alexander Hamilton). I discuss the implications of Hamilton’s defense and the modern rejection of the defense beginning with Alexander Bickel in Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions within Constitutional Interpretation: Originalism and the Aristotelian Tradition*, 2 *Geo. J.L. & Pub. Policy* 523, 523–24, 574–98 (2004).

95. *The Federalist No. 78* (Alexander Hamilton).

96. See Strang, *supra* n. 94, at 562–98 (discussing the role “democracy” has played in arguments over constitutional judicial review).

97. *The Federalist No. 78* (Alexander Hamilton).

98. *Marbury v. Madison*, 5 U.S. 137 (1803).

99. *Id.* at 176.

100. See Strang, *supra* n. 48, at 982–1001 (providing three arguments why the original meaning of the Constitution is the binding, authoritative meaning which warrants federal judges exercising constitutional judicial review).

The original meaning of the text provides context to the Constitution’s text. It fills out the words on the parchment preventing a detached and a-temporal meaning. The original meaning provides a fuller and deeper meaning that courts may draw upon in deciding constitutional cases.

4. *Courts Must Defer to Legislative Determinations When the Constitution's Text and Original Meaning Do Not Determine the Outcome of a Case*

However, like all language and like statutory texts, the original meaning of the Constitution has limits. When, as often occurs in constitutional cases, the Constitution's text and original meaning do not provide sufficient guidance, that is, when a case is underdetermined by the original meaning, the court's warrant to strike down acts of the elected branches has reached its limit.

Unlike in the statutory context, where in cooperation with the legislature, the court may broaden or constrain the conventional meaning of the language of a statute to fulfill the legislature's purpose, in the constitutional context, the court must defer to the legislature's determination—or what, following other scholars, I shall call a constitutional *construction*¹⁰¹—when the original meaning of the text of the Constitution is underdetermined. Here is why: when the text of the Constitution and its original meaning do not provide a determinate answer to a question—when there are two or more answers *consistent* with the original meaning—the *Federalist 78* justification for constitutional judicial review is inapplicable and our constitutional social ordering, through Article I, gives to Congress the authority to determine how best to order our society towards the common good.

This argument draws on the distinction between constitutional interpretation and constitutional construction.¹⁰² In constitutional interpretation the interpreter is drawing forth the meaning of the Constitution. To discern the Constitution's meaning, the interpreter will look to the text, the structure of the Constitution, and the original meaning of the text. Judges and lawyers are especially adept at interpretation, having learned the tools of the craft during law school and in practice. And judges have been authorized by our society to authoritatively *interpret* the Constitution during constitutional judicial review.¹⁰³

Constitutional construction, by contrast, goes beyond the meaning of the Constitution. Constitutional construction takes up where interpretation has left off. Because of the limited nature of language, the Constitution's original meaning will at some point become underdetermined. This occurs when there are two or more possible answers consistent with the original

101. See e.g. Barnett, *supra* n. 15, at ch. 5; Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* ch. 1 (Harv. U. Press 1999); Whittington, *supra* n. 15, at ch. 5-6.

102. Here, I follow the lead of Professors Whittington and Barnett and their thoughtful discussions.

103. See Strang, *supra* n. 48, at 989 (“Part of that decision [our society's ‘prudential, social ordering decision’] was the determination that the judiciary was bound by the original meaning of the Constitution.”).

meaning of the Constitution, even after all the tools of interpretation have been utilized.¹⁰⁴

As explained above, the only warrant possessed by the judiciary to overrule Congress is the Constitution itself, but if the original meaning of the Constitution has been exhausted, and there is no determinate answer to a question, then Congress' determination of what the common good requires—its construction—should prevail over a contrary judgment by the judiciary.

This is true for a number of reasons. First, our society established the Constitution to enable us to effectively pursue the common good. The three branches of the federal government were each given a particular role that was both authorized and limited by the Constitution. The federal legislature was entrusted, through Article I, with the primary care of the common good of the national society. The federal judiciary, through Article III, was entrusted with adjudicating disputes under the Constitution. In sum, under our Constitution's social ordering, Congress' judgments on what the common good requires are binding, and the federal courts cannot thwart those decisions absent a mandate in the source of our social ordering: the Constitution.

Second is the argument from democracy. Congress is elected by the People unlike the federal judiciary, which consists of appointed, life-tenured judges. In our society, absent a compelling reason, judgments of the democratically elected legislature are entitled to greater authority than judgments by unelected entities.¹⁰⁵ This primacy of the legislature has repeatedly been recognized by the Supreme Court itself: the legislature is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."¹⁰⁶

Third, as a practical matter, Congress has a greater ability to understand the problems of society—what is impeding the effective pursuit of the common good—and of formulating effective measures to better order society for effective pursuit of the common good. Congress has constant contact with its constituents while the courts are isolated. Congress has the resources to study problems while the courts are dependent on the efforts of the parties before it. The courts are "institutionally unsuited to gather the facts upon which economic predictions can be made."¹⁰⁷ Congress can proactively address issues while the courts must wait for a party to initiate

104. However, this does not mean that constitutional constructions are completely indeterminate. On the contrary, the constructor is constrained by the meaning of the Constitution uncovered through interpretation, underdetermined though it is.

105. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 5 (Harv. U. Press 1980) ("We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government.").

106. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

107. *General Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997).

litigation. Lastly, Congress has the ability to make compromises that balance competing goods and move society forward while the courts are restrained by precedent and legal principles. For these and other reasons, Congress is a more effective body to entrust with the guidance of society toward the common good.

When facing application of statutory text, a court is authorized to both interpret and construct the text. The situation is different regarding application of constitutional text because our society has limited the scope of judicial power in this context. Judges have the authority from Article III to interpret the Constitution: they must apply the original meaning of the Constitution, trumping congressional statutes if need be. However, the office of federal judge does not have the authority to trump congressional statutes beyond the requirements of the original meaning. In other words, once the original meaning runs out, so to speak, the authority of the federal judiciary has also reached its limit (at least vis-a-vis a congressional statute). It is this absence of authorization to act in the face of congressional action when the meaning of the Constitution's text is underdetermined that distinguishes the role of the courts in this context from the statutory context. There, when statutes are underdetermined, judges act in cooperation with Congress to effectuate Congress' pursuit of the common good, and for good reason.

In sum, when the original meaning of the Constitution is determinate, the courts are warranted in overriding the determinations of the elected branches. However, when the meaning of the Constitution is underdeterminate and the situation is one of constitutional construction, the courts must defer to the constructions of the other branches.

5. *Courts Must Exercise Justice and Practical Wisdom When Confronted with Underdeterminacy of Legal Materials*

There are further reasons for legal underdeterminacy in the constitutional context: the underdeterminacy caused by identification of pertinent legal materials; the relationship between the pertinent legal materials; the relative authoritative force of the legal materials; and the choice of justificatory legal framework for the materials.

Ours is a mature legal system; therefore, in most constitutional cases, as with statutory cases, there will be more pertinent legal materials than simply the positive legal text in any given case. For example, in a case involving Congress' Commerce Clause authority, the pertinent legal materials will include: the text of the Clause; the structure of the Constitution; the original meaning of the Clause (including its level of generality, and whether it is a rule, standard, or principle); precedent involving the Commerce Clause (applications of the Clause to other contexts); other constitutional limitations on Congress' Commerce Clause authority (such as the

Eleventh Amendment) including text, original meaning, and precedent; and past congressional and executive practice under the Commerce Clause.

When faced with legal underdeterminacy caused by the underdetermined nature of legal materials, the courts cannot defer to the legislature because the question at issue is, what is the law?¹⁰⁸ The question, what is the law, can only be answered by the person asking it. Only the court deciding a case can answer the question, what is the law, because the process of determining what the law is involves the exercise of judgment in which different people, with different levels of respect for the law and practical wisdom—different portions of judicial virtue—will arrive at different conclusions. Judges cannot defer to, for example, Congress' understanding of what the law is in a particular case because Congress has not been asked the question. And more fundamentally, our Constitution has lodged with the federal courts the "judicial power"—the authority to decide cases—which encompasses the authority to determine what the law is, and Congress has only a limited constitutional role in deciding cases or determining the governing law in a case.

Hence, the courts must themselves operate within this area of underdeterminacy. The Catholic intellectual tradition's concept of the common good offers guidance to courts when they are faced with underdeterminacy of the legal materials. When legal materials are underdetermined, they can be organized and brought to bear in different ways in a case such that two or more outcomes are possible. The court faced with legal underdeterminacy—with the question, what is the law—must exercise its discretion in a manner that best enables society to effectively pursue the common good. The court must choose that legal justificatory framework for the legal materials that would make the area of law best able to order society toward the common good.¹⁰⁹

As in the statutory context, judges determining what the law is must exercise the virtues of justice as lawfulness and practical wisdom (among

108. The law is composed of legal rules and principles, positive law and case law, and the justificatory structure of the law, so to answer the question of what is the law one must identify the pertinent legal materials, determine how they relate to each other, and determine their authoritative force.

109. The text of this article is substantially the same as that given at the conference. In response to one question by a conference participant, and upon further reflection, I believe that this subsection needs revision to better accommodate what in my view is the primary focus of constitutional interpretation: the original meaning. The conference participant asked: if, as I argued, the original meaning is the binding meaning of the Constitution, then is not the original meaning the sole legal material that federal judges are authorized to use? In other words, given my commitment to the original meaning, judges who use legal materials other than the original meaning to rule in a manner not in accord with the original meaning would violate their oath of office. I partially address this in my forthcoming article, *An Originalist Theory of Precedent*, 36 N.M. L. Rev. ____ (forthcoming 2006), where I address the question of what a judge should do when faced with mistaken nonoriginalist precedent. In a future article I hope to explain the relationship between the original meaning and other legal materials, in the constitutional context, more fully.

many others). The virtue of justice will enable the judge to respectfully determine whether the judge has discretion regarding the legal materials, and practical wisdom will enable the judge to choose the justificatory legal framework that best advances the common good.

D. Summary

Part IV discussed how the understanding of law offered by the Catholic intellectual tradition has the conceptual resources to explain why legal underdeterminacy arises and to give reasons as to how judges should respond. The context in which legal underdeterminacy arises matters. In the statutory context, when judges are faced with underdeterminacy caused by the universal nature of legal texts, they must cooperate with the legislator to advance the legislator's end; but in the constitutional context, when the original meaning of the Constitution is underdetermined, courts must defer to legislative constructions. However, when judges confront underdeterminacy of legal materials more generally, in both contexts they must exercise their discretion in such a manner as to enable society to more effectively pursue the common good.

V. CONCLUSION

I argued in this article that the concept of the common good—a concept of which the modern secular legal academy has lost sight—plays an essential role in an adequate theory of legal and, more specifically, constitutional interpretation. I discussed the secular academy's understanding of the determinacy of legal materials and showed that, occasionally, outcomes in legal cases are underdetermined. I then described two analytically distinct causes of this underdeterminacy: the universal nature of legal texts as applied to concrete, contingent circumstances, and the underdetermined nature of and relationship between legal materials more generally.

Second, I provided a rough overview of the nature of law provided by the Catholic intellectual tradition and the centrality to this understanding of the common good.

Lastly, I applied this understanding to statutory and constitutional interpretation and showed how in each instance the common good must play a role because of the underdetermined nature of legal adjudication.