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The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context

Joel B. Moore

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> Our Business is, to declare, how, chiefly for the Direction of the *Will*, a certain Kind of Attributes have been impos'd on Things, and their natural Motions; whence there springs up a peculiar Agreement and Conveniency in the Actions of Mankind, a grateful Order and Comeliness for the Ornament of human Life.[1]

ABSTRACT

The Organization of the Petroleum Exporting Countries (OPEC) stabilizes petroleum prices to promote the economic prosperity of its member nations for which oil is a substantial export. Price stabilization influences the price of petroleum around the world, impacting the economies of developed and developing countries. Under U.S. antitrust jurisprudence, the OPEC quota agreements that stabilize prices would likely be declared illegal, and other countries might also declare price fixing to be illegal under their respective competition laws.

Several U.S. Senators have recently proposed that price fixing should be illegal under international law as well. This Note avoids a superficial analysis of the status of international antitrust law by exploring the ultimate basis of legal obligation and situating antitrust in the context of natural law. This Note's conclusion that OPEC should not be sued before the

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1. SAMUEL VON PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO [OF THE LAW OF NATURE AND NATIONS IN EIGHT BOOKS] bk. I, ch. I, § II, at 2 (Basil Kennett, D.D. trans., London 1729) (1672) (quotations from *De Jure Naturae et Gentium* alter the letter "f" from the original source to the letter "s," and citations indicate the appropriate book, chapter and section of *De Jure Naturae et Gentium*, along with the page number corresponding to this particular translation). The title page refers to Samuel von Pufendorf (1632-1694) as "Counsellor of State to his late Swedish Majesty, and to the late King of Prussia" (Frederick III). *Id.*; PUFENDORF, *infra* note 259, at xiii. Before his work for the Kings, King Charles XI of Sweden appointed Pufendorf to a full professorship of natural and international law with the Faculty of Law at the University of Lund. *Id.* at xii. Pufendorf later dedicated *De Jure Naturae et Gentium*, his major work, to Charles XI who gave Pufendorf a barony in 1694. *Id.* at xii, xiii. *De Jure Naturae et Gentium* was "translated into every major European language, reprinted innumerable times, and used as textbooks in dozens of universities on the continent and in Scotland and the American colonies." J.B. Schneewind, *Pufendorf's Place in the History of Ethics*, *in* GROTIUS, PUFENDORF AND MODERN NATURAL LAW 199 (Knud Haakonssen ed., 1999). Other works by Pufendorf are cited in this Note. *See infra* notes 226, 259.

International Court of Justice is based upon implications of the characteristics of the relationship between natural law and human law, the footing of the world community on antitrust matters, and the requirements for implementing fair and consistent antitrust enforcement.

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I. INTRODUCTION

United States Senator Arlen Specter made a floor statement on July 19, 2001 about the possibility of legal action against the Organization of the Petroleum Exporting Countries (OPEC) to decrease the price of petroleum.[2] Senator Specter was concerned with OPEC's practice of entering into agreements to restrict oil production, affecting the world market for oil by driving up its price.[3] Senator Specter and four other U.S. Senators together suggested two possible lawsuits against OPEC and other conspiring nations, including a suit in federal district court under U.S. antitrust law,[4] and a suit in the

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2. 147 Cong. Rec. S7942-01 (daily ed. July 19, 2001) (statement of Sen. Specter), *reprinted in* 27(7) INT'L L. & TRADE PERSP. 2 (July 2001) [hereinafter *OPEC and Antitrust Law*].

3. *See id.*

4. Discussion of a lawsuit in U.S. district court is beyond the scope of this Note, but the Senators opined that a revisiting of *International Association of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553, 565-69 (C.D. Cal. 1979) is in order because OPEC action should more properly be characterized as

International Court of Justice (ICJ) based on "the general principles of law recognized by civilized nations."[5]

To determine the responsibility of OPEC nations to other sovereigns on principles of antitrust law, the basis of legal obligation should be explored. Natural law explains the origin, nature, and limits of obligation in a historically comprehensive and practical way, and enables cogent analysis of the international law question presented. International antitrust enforcement has elicited heightened concern in an increasingly connected world community where business concerns more frequently involve legal questions that transcend national borders, in which antitrust authorities "communicate, co-operate, and co-ordinate their efforts to achieve compatible enforcement results" in increasing measure.[6] The international legal question posed by OPEC's practice of price fixing is set forth in this Note, including discussion of U.S. antitrust law and the recognition of competition principles around the world, followed by a discussion of the natural law framework for legal obligation that enables a conclusion.

"commercial" rather than "governmental" activity, which would remove OPEC's protective shield under the Foreign Sovereign Immunities Act (FSIA). *OPEC and Antitrust Law*, *supra* note 2; *see also* 28 U.S.C. § 1602 (1994). The Senators' proposal is in line with the intent of the United Nations Conference on Trade and Development (UNCTAD) *Model Law on Competition*, *infra* note 142, at 3, which defines "enterprise" to include government-operated entities. *Infra* note 155; *see also* U.N. TDBOR, 6th Sess., Agenda Item 6, *Report of the Expert Meeting on Consumer Interests, Competitiveness, Competition and Development* (held Oct. 17-19, 2001) at 3, U.N. Docs. TD/B/COM.1/43 & TD/B/COM.1/EM.17/4, *available at* http://www.unctad.org/en/docs/c1em17d4.en.pdf (recommending that enterprises "obey relevant laws and regulations of the countries in which they do business") [hereinafter *Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board)]; *The Set of Multilaterally Agreed Equitable Principles*, *infra* note 160, pt. IV § D, para. 1 ("Enterprises . . . should be subject to the competence of the courts and relevant administrative bodies [of the countries in which they operate].").

5. *OPEC and Antitrust Law*, *supra* note 2. The Senators also suggested obtaining an advisory opinion from the International Court of Justice (ICJ) through the U.N. Security Council. *Id.*

6. John J. Parisi, Enforcement Co-operation Among Antitrust Authorities, Speech Before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law in London, England (May 19, 1999) (Updated October 2000), § I, *at* http://www.ftc.gov/speeches/other/ibc99059911update.htm. Parisi serves as Counsel for European Union Affairs in the International Antitrust Division of the U.S. Federal Trade Commission. *Id.* at n.1.

II. THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES

Currently, the Organization of Petroleum Exporting Countries (OPEC) is composed of 11 countries[7] that together produce approximately 40 percent of the world's oil and hold more than 77 percent of the world's proven oil reserves.[8] The first agreement between OPEC nations reportedly took place in 1949 when Venezuela, Iran, Iraq, Kuwait, and Saudi Arabia met to "exchange views" and to "explore avenues for regular and closer communications between them."[9] In response to the unilateral reduction in price of Venezuelan crude oil in 1959, the First Arab Petroleum Congress was convened in Cairo to establish an "Oil Consultation Commission."[10] OPEC was officially formed in 1960 in Baghdad, Iraq.[11] Today, "The Conference," composed of delegations headed by "Their Excellencies the Ministers of Oil, Mines and Energy" of member countries, is the "supreme authority of the Organization" that determines OPEC policy and makes decisions regarding applications for membership.[12] Membership is open to nations with a "substantial net export" of crude petroleum and nations with "fundamentally similar interests" who "share the ideals" of member countries.[13]

OPEC's "principle aims" include the "co-ordination and unification of petroleum policies" of member countries and the "determination of the best means for safeguarding their interests, individually and collectively."[14] To safeguard their interests, OPEC admits to actively seeking ways of "ensuring the stabilization of

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7. The founder members of OPEC include Iraq, Iran (accession in 1960), Kuwait, Saudi Arabia, and Venezuela, and the other full member countries of OPEC include, with year of accession noted in parenthesis, Algeria (1969), Indonesia (1962), Libya (1962), Nigeria (1971), Qatar (1961), and United Arab Emirates (1967). Organization of Pertroleum Exporting Countries (OPEC), *Member Countries*, *at* http://www.opec.org; OPEC GENERAL INFORMATION, *infra* note 9, at 5, 12. Ecuador and Gabon withdrew their OPEC memberships in 1992 and 1995 (respectively). *EIA OPEC Facts*, *infra* note 8. Gabon's withdrawal in 1995 came after it adopted competition legislation in 1989. *See* UNCTAD *Model Law on Competition*, *infra* note 142, at 9.

8. Energy Information Administration, *Country Analysis Briefs: OPEC*, *at* http://www.eia.doe.gov/cabs/opec.html (last updated Dec. 9, 2002) [hereinafter *EIA OPEC Facts*]. *See also* Organization of the Petroleum Exporting Countries, *About OPEC*, *at* http://www.opec.org [hereinafter *About OPEC*].

9. OPEC, GENERAL INFORMATION 5, *available at* http://www.opec.org/Publications/GI/GenInfo.pdf [hereinafter OPEC GENERAL INFORMATION].

10. *Id.*

11. *Id.*

12. *Id.* at 6.

13. *Id.* at 11; *About OPEC*, *supra* note 8.

14. OPEC GENERAL INFORMATION, *supra* note 9, at 10, *quoted in* Int'l Ass'n. of Machinists and Aerospace Workers v. OPEC, 477 F. Supp. 553, 558 (C.D. Cal. 1979). The quotation cited is part of a Resolution of the First Conference. *Id.*

prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations."[15] OPEC maintains a specialized division named the "Economic Commission" to "assist[] the Organization in promoting stability in international oil prices at equitable levels."[16] OPEC describes itself as composed of nations "heavily reliant" on oil revenues as their main source of income,[17] and consequently attempts to secure "a steady income" for member nations.[18]

To achieve price stabilization in the oil market, OPEC nations form agreements similar to the one reached in July 2001 that involved reducing production by one million barrels per day, effective September 1, 2001.[19] In an OPEC meeting on September 27, 2001, Dr. Chakib Khelil, President of The OPEC Conference and Algerian Minister of Energy and Mines, said:

> You will recall that, when price stability was threatened in July, we took the decision to remove one million b/d from the market, with effect from 1 September. This sent a positive signal to the market about the seriousness of OPEC's intentions and met with immediate success, because we put our credibility on the line. But our credibility is only as good as the continuation of the effort among our Member Countries to maintain cohesion, solidarity and cooperation, as happened in July. We are prepared to act again, as and when necessary, in the interests of market price stability, either as a full Conference or through informal contacts among our Ministers. . . . We shall reach a decision that ensures adequate supplies at the $25/b market price, to the full satisfaction of producers and consumers alike.[20]

In the year 2001, OPEC agreed to reduce oil production four times to increase prices.[21] Some sources have reported that OPEC has fixed the actual prices for exports due to problems stemming from "quota

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15. OPEC GENERAL INFORMATION, *supra* note 9, at 10-11.

16. *Id.* at 10.

17. *About OPEC*, *supra* note 8.

18. OPEC GENERAL INFORMATION, *supra* note 9, at 11, *quoted in Int'l Ass'n. of Machinists*, 477 F. Supp. at 558. The goal of securing a steady income is stated as a Resolution of the First Conference. *Id.*

19. Press Release, OPEC, Agreement of the OPEC Conference (July 25, 2001), *at* http://www.opec.org/ (News & Info, Press Release 17/2001).

20. Press Release, OPEC, Opening Address to the 117th Meeting of the OPEC Conference by His Excellency Dr. Chakib Khelil, President of the Conference and Minister of Energy and Mines, Algeria (Sept. 27, 2001), *at* http://www.opec.org (News & Info, Press Release 19/2001).

21. Energy Information Administration, *World Oil Market and Oil Price Chronologies: 1970 – 2001*, *at* http://www.eia.doe.gov/emeu/cabs/chron.html#a2001 (last updated Jan. 2002) (compiling a world oil market and oil price chronology). OPEC agreed to cut production on January 17, March 17, July 25, and December 28 in the year 2001 for a total agreed production cut of five million barrels per day for the year. *Id.*

cheating."[22] OPEC established a "price band mechanism" at its March 2000 meeting that aims to stabilize the price per barrel between $22 and $28.[23] Any fluctuation outside of this six-dollar range will prompt another quota agreement.[24]

Venezuela Oil Minister Alvaro Silva said, "Nobody [among oil producers] wants a price war."[25] Price wars drive down the cost of oil to consumers, which is what happened in the global economic downturn of 1998 when "internal bickering over production quotas flooded the world with oil, sending prices crashing to $10 a barrel."[26] OPEC Secretary-General Ali Rodriguez commented, "If we compete in times of difficulty, we will all lose something."[27] Since non-member nations such as Russia, the world's second-largest oil producer following OPEC member Saudi Arabia, can also influence the market, OPEC tries to include other countries in agreements to cut production levels.[28] In December 2001, OPEC reached a production cut agreement for which it persuaded Russia, Norway, Mexico, Oman, and Angola to reduce their production as well, effective January 1, 2002.[29] Without such agreements, non-member nations such as Russia can increase their market share when OPEC decides to cut back production.[30] Even when OPEC loses market share from cutbacks due to non-member nation production, OPEC officials believe the alternative is worse; Kuwait's Oil Minister Mr. al-Sabeeh stated, "Long term, we are net gainers out of this."[31] Although OPEC member nations profit from agreements that stabilize petroleum

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22. John W. Schoen, *OPEC is in the Driver's Seat, for Now, but Cartel's Record of Controlling Prices is Mixed*, MSNBC NEWS, July 25, 2001, *at* http://www.msnbc.com/news/605024.asp?cp1=1. The precarious nature of negotiating pledges for oil production is evident from the effects of OPEC internal dissention in 1998, *infra* text accompanying note 26. Because nobody really knows how much oil exists, the most reliable data being a "rough estimate" at best, even OPEC nations that have agreed to reduce production have an incentive to slip extra barrels into their export inventories. *See* Schoen, *supra*.

23. *EIA OPEC Facts*, *supra* note 8.

24. *Id.*

25. Alexei Barrionuevo, *OPEC Cutback May Help Prices, Erode its Clout*, WALL ST. J., Dec. 31, 2001, at A3. On price wars, consider ROSS, *infra* note 43, at 117 ("By 'cheating' on an agreed upon price, firms may end up in a price war as vigorous as any that would occur without a cartel.").

26. Schoen, *supra* note 22.

27. Barrionuevo, *supra* note 25.

28. *Id.*

29. *EIA OPEC Facts*, *supra* note 8.

30. *See* Barrionuevo, *supra* note 25. In 2001, OPEC reduced production 20% from year 2000 levels, while Russia boosted production by 500,000 more barrels per day in 2001. Barrionuevo, *supra* note 25. The U.S. Energy Information Administration predicts rising production levels for oil-producing countries that are not OPEC member nations or parties to OPEC production restraint agreements. *EIA OPEC Facts*, *supra* note 8.

31. Barrionuevo, *supra* note 25.

prices, such agreements are probably illegal in countries such as the United States.

III. ANTITRUST LAW IN THE UNITED STATES

In addition to his floor statement about legal action against OPEC, Senator Specter wrote a letter with the support of Senators Charles Schumer, Herb Kohl, Strom Thurmond, and Mike DeWine addressed to the attention of President George W. Bush.[32] In that letter, the Senators expressed particular concern for the agreements entered into by OPEC and other oil-producing states to restrict production in light of the energy crisis and high prices of OPEC oil.[33] The Senators referred to the agreements as "nothing more than an old-fashioned conspiracy in restraint of trade which has long been condemned under U.S. law."[34]

In the United States, antitrust law[35] is the body of law "designed to protect trade . . . from restraints, monopolies, [and] price-fixing."[36] The Sherman Act[37] declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," and imposes strong punishments on offenders.[38] The Clayton Act also provides a damages remedy for injuries arising from antitrust violations, and also permits injunctive relief.[39]

As the U.S. Supreme Court noted in *Chicago Board of Trade v. United States*, every agreement or regulation concerning trade restrains trade by its very nature.[40] Therefore, as Justice Brandeis

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32. *OPEC and Antitrust Law*, *supra* note 2.

33. *Id.*

34. *Id.*

35. For the purposes of this Note, "antitrust law" will be a term generally interchangeable with "competition law," despite the possibility of non-antitrust issues that might "conceivably be included under the rubric of 'competition policy.'" James, OECD Global Forum on Competition Address, *infra* note 95, at 6.

36. BLACK'S LAW DICTIONARY 92 (7th ed. 1999).

37. 15 U.S.C. §§ 1-7 (1994).

38. 15 U.S.C. § 1. An illegal restraint of trade under the Sherman Act is considered a felony in the United States, and is punishable by "fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." *Id.*

39. 15 U.S.C. §§ 12-27. The Clayton Act provides for threefold recovery of damages sustained as a result of injury from violation of antitrust laws (§ 15), and for injunctive relief "against threatened loss or damage by a violation of the antitrust laws" (§ 26).

40. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). *See also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44 (1982) (explaining that "Congress could not have intended a literal interpretation of the word 'every' [in the

wrote, such a simple test as whether the agreement at issue restrains trade cannot alone constitute the basis for determining the legality of the contract.[41] The Court determined that the true test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[42]

As the *Chicago Board of Trade* Court elucidated, an agreement in restraint of trade is illegal if it restrains trade "unreasonably."[43] In 1906, the Chicago Board of Trade adopted a "call rule," whereby members including brokers, merchants, dealers, millers, maltsters, and manufacturers of corn products were prohibited from making negotiations to purchase or arrive at a price for purchase of any wheat, corn, oats, or rye after the closing of the call session until the opening of the next day's call session.[44] The agreement was that any grain purchased after the call session and before the next one could only be sold at the closing price.[45] The Court held that the Chicago Board of Trade's call rule did not constitute an illegal restraint of trade under the Sherman Act.[46]

To arrive at its conclusion, the Court considered the particular facts of the business restrained, the condition of that business before and after the imposition of the restraint, and the actual and probable nature and effect of the restraint.[47] The Court held that the actual effect of the restraint was to stimulate—rather than suffocate—the market.[48] By looking at the impact on competition and the industry in such a way, the method of antitrust analysis referred to as the "rule of reason" developed.[49]

The rule of reason analysis used by courts since *Chicago Board of Trade* can prove to be burdensome, because inquiring into the

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Sherman Act]," which would prohibit every contract in restraint of trade), *discussed in* ROSS, *infra* note 43, at 138-39.

41. *Chicago Bd. of Trade*, 246 U.S. at 238.

42. *Id.* at 238. This statement by Justice Brandeis is considered part of the "classic statement of the rule of reason." *Maricopa County Med. Soc'y*, 457 U.S. at 343 n.13 (1982). The remainder of Justice Brandeis' synopsis of the rule of reason is reflected in the text accompanying note 47.

43. STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 123 (1993) (summarizing *Chicago Bd. of Trade*, 246 U.S. at 238).

44. *Chicago Bd. of Trade*, 246 U.S. at 235-37.

45. *Id.* at 237.

46. *Id.* at 241.

47. *Id.* at 238.

48. *Id.* The Court noted, *inter alia*, that the call rule benefited the market by bringing buyers and sellers into more direct relations, distributing the business in grain among a larger number of merchants, eliminating the risks of a private market, making the Chicago market more attractive to more people, and facilitating trading by enabling merchants to more easily fulfill contracts. *Id.*

49. Also playing a substantial role in the development of the rule of reason analysis were *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). *See generally* ROSS, *supra* note 43, at 125.

many impacts of a challenged restraint can involve a high cost to plaintiffs and the government.[50] The burden caused by the rule of reason analysis prompted the development of a per se rule.[51] Under the per se rule, a category of restraints may be deemed so anti-competitive in nature that it can be presumed illegal without an elaborate analysis of the history, purpose, and effect of the restraint.[52] The per se rule is applied in a case where the court, by experience, can "predict with confidence that the rule of reason will condemn [the restraint]."[53]

The per se rule developed in the context of a price fixing[54] arrangement in *United States v. Trenton Potteries Co.*[55] The defendants, 20 individuals and 20 corporations, occupied a substantial percentage of the market for the manufacture and distribution of "sanitary pottery" for use in "bathrooms and lavatories."[56] The defendants combined and agreed to fix prices at a designated level and sell the pottery only to "jobbers."[57]

Despite the rule of reason analysis established by *Chicago Board of Trade*, the trial court in *Trenton Potteries* submitted the case to the jury upon the instruction that if it found the agreements at issue to have occurred, it should return a guilty verdict.[58] The trial court instructed: "The law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce."[59] In affirming the defendants' convictions under the Sherman Act, the U.S. Supreme Court held that the reasonableness

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50. ROSS, *supra* note 43, at 127.

51. *Id.* at 127-28.

52. *Id.*

53. *Maricopa County Med. Soc'y*, 457 U.S. at 344. Price fixing, as discussed below, division of markets, group boycotts, and tying arrangements are practices courts have deemed illegal "in and of themselves." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), *quoted in Maricopa County Med. Soc'y*, 457 U.S. at 344 n.15.

54. For the purposes of this Note, price fixing is discussed in the context of "horizontal" agreements rather than "vertical" agreements. Both lawyers and economists refer to agreements among competitors at the same stage of production as horizontal agreements, whereas vertical agreements involve firms at different levels of production such as an agreement between a manufacturer and a retailer to control resale price. ROSS, *supra* note 43, at 117 n.1; BLACK'S LAW DICTIONARY 1208 (7th ed. 1999). The proliferation of horizontal agreements monopolizing the market prompted the enactment of the Sherman Act. ROSS, *supra* note 43, at 117 (citing the original Sherman Act).

55. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

56. *Id.* at 393-94.

57. *Id.* at 394.

58. *Id.* at 395.

59. *Id.* at 396.

or unreasonableness of the price fixing arrangement in *Trenton Potteries* was immaterial,[60] explaining:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.[61]

Thus, although the instructions given to the jury circumvented the rule of reason analysis of *Chicago Board of Trade*, the Court held that such a detailed industry analysis was gratuitous in the context of the price-fixing agreement because of the difficulty in monitoring price reasonableness and the power exerted over the market with the attendant potential for harm.[62]

Then, in *United States v. Socony-Vacuum Oil Co.*, the Court held price fixing as a category to be per se illegal under the Sherman Act.[63] The indictment charged major oil companies operating in the Mid-Western area of the United States as having "combined and conspired together for the purpose of artificially raising and fixing . . . prices of gasoline . . . at artificially high and non-competitive levels, and at levels agreed upon among them and have thereby intentionally increased and fixed . . . prices."[64] When small independent refiners discovered a surplus of gasoline and had to sell the excess at a distress sale price,[65] prices for all refiners were driven

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60. *Id.* at 401.

61. *Id.* at 397-98, *quoted in* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-14 (1940).

62. *See Trenton Potteries Co.*, 273 U.S. at 402.

63. *See Socony-Vacuum Oil Co.*, 310 U.S. 150. *See generally* ROSS, *supra* note 43, at 129-30.

64. *Id.* at 166.

65. Distress sale prices resulted from the following factors: (1) the disproportionately large supply of gasoline relative to a smaller capacity to consume (demand), due in large part to the discovery of the largest oil field in history in East Texas in 1930, (2) the fact that, despite unprofitability, the small refiners could not shut down because they could not afford to, because abandoned wells are exceedingly

down—sometimes below the cost of production—which negatively impacted the business of all competing refiners.[66] Congress and the President attempted to remedy the situation to no avail.[67] Price wars ensued, entailing "cutthroat and self-defeating" competition,[68] and, although some progress was made in attempting to stabilize the volatile situation, no significant progress was made before the illegal combination.[69] The defendants entered into a "gentleman's agreement" in which the larger refiners would purchase the excess supply from smaller refiners to prevent distress sales and stabilize prices.[70]

The Court held that any such combination "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[71] According to the Court, a violation of the Sherman Act did not require fixing prices in a "uniform and inflexible" way.[72] The Court explained:

> An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. . . . Hence prices are fixed within the meaning of the Trenton Potteries case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.[73]

Reasoning that the Sherman Act would eventually be emasculated should the Court accept "competitive evils" as a legal justification for price-fixing, the Court identified protestations of "[r]uinous competition, financial disaster, evils of price cutting," and good intentions as typical excuses for price-fixing that cannot be appraised without undermining the entire purpose of the Sherman Act.[74] The

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difficult to bring back into operation and because of the probability of losing regular customers, and (3) the fact that the small refiners did not have the storage capacity to hold the surplus. *See id.* at 170-71. The result was "distress gasoline," which involved selling "as fast as they made it" for whatever price obtainable. *Id.* Predictably, prices dropped dramatically. *See id.*

66. *See id.*

67. *See id.* at 171-75.

68. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 346 (1982).

69. *See Socony-Vacuum Oil Co.*, 310 U.S. at 175-77.

70. *See id.* at 177-81.

71. *Id.* at 223.

72. *Id.* at 222.

73. *Id.*

74. *Id.* at 220-21, 222. The Court acknowledged that fixed prices would not be subject to "continuous administrative supervision and readjustment in light of changed conditions." *Id.* at 221. Consider also the Court's reasoning in *Trenton Potteries*, *supra* text accompanying note 61, where it noted the infeasibility of monitoring prices for

prohibition on price fixing is strong enough to withstand even the defense that the conspirators did not have the ability to control the market, because by raising, lowering, or stabilizing prices the conspirators interfere with the "free play of market forces," and such agreements have been placed "beyond the pale" by Congress in an attempt to "protect[ ] that vital part of our economy."[75]

The Court later summarized per se antitrust violations as "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[76] The benefits of a per se category as noted by the Court include increased certainty of the law and avoidance of complicated and prolonged, and often unproductive, economic investigations into the industry at issue.[77]

In *Broadcast Music, Inc. v. Columbia Broadcasting System*, the Court was cautious about applying a per se analysis where the restraint promoted a lawful purpose and thus contained some "redeeming virtue."[78] The agreement approved by the Court involved the issuance by American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) of blanket licenses to Columbia Broadcasting System, Inc. (CBS), giving CBS the right to perform the compositions as often as it liked for a specified term, for negotiated fees.[79] The Court excepted to the litigation arising from "efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act . . . and to make possible and to facilitate dealings between copyright owners and those who desire to use their music."[80] Under *Arizona v. Maricopa County Medical Society*, the Court might still deem a price-fixing agreement per se illegal despite the existence of a lawful purpose if

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reasonableness day to day, along with changing economic circumstances. Those fixing prices would be in a strategic position to dominate the market and "destroy or drastically impair" the competitive system. *Socony-Vacuum Oil*, 310 U.S. at 221. Therefore, the Court has been unsympathetic to the interposition of defenses of the competitive evils discussed. *Id.* at 218, *quoted in* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 345 (1982).

75. *Socony-Vacuum Oil*, 310 U.S. at 221.

76. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), *quoted in* Int'l Ass'n. of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 559 n.3 (C.D. Cal. 1979).

77. *Northern Pac. Ry. Co.*, 356 U.S. at 5.

78. ROSS, *supra* note 43, at 134 (construing Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9 (1979)). *See also* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (reiterating the "redeeming virtue" position).

79. *Broad. Music*, 441 U.S. at 1.

80. *Id.* at 10.

less restrictive means exist to achieve the lawful purpose.[81] Pursuant to *Catalano, Inc. v. Target Sales, Inc.*, if an agreement does not further a lawful purpose, the court should end the inquiry and deem the price-fixing arrangement per se illegal.[82]

Under this existing U.S. antitrust jurisprudence, OPEC would not be able to allege a lawful purpose because the very reason for OPEC's existence is to stabilize international oil prices, with an open goal of coordination and unification of petroleum policies.[83] In a U.N. Trade and Development Board meeting, a group of experts made a thinly-veiled reference to OPEC as an "excuse for fixing prices."[84] The "harmful and unnecessary fluctuations"[85] in the market OPEC seeks to curtail, and the price wars OPEC seeks to avoid,[86] are the market forces that U.S. antitrust law protects. Whether OPEC establishes a production quota for its members or actually sets a price for petroleum sales,[87] all such activity is considered "price-fixing" under U.S. jurisprudence.[88] OPEC's only defense for its price-fixing activity is to "safeguard their interests, individually and collectively," which include securing a "steady income."[89] Such defenses are akin to the "ruinous competition" or "financial disaster" explanations denounced by the U.S. Supreme Court as typical excuses for price fixing arrangements.[90] Therefore, OPEC agreements would probably receive per se condemnation in a U.S. court. However, a similar condemnation by the International Court of Justice (ICJ) would present greater complexities than in a U.S. domestic context.

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81. ROSS, *supra* note 43, at 142 (construing Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982)).

82. *Id.* (construing *Catalano*, 446 U.S. at 646).

83. *See supra* notes 14-24 and accompanying text. OPEC would also be unable to claim "conscious parallelism" under U.S. antitrust law, where independent decisions to raise prices are not condemned under the Sherman Act. *See* ROSS, *supra* note 43, at 158-59. Conscious parallelism occurs when a competitor has knowledge of another competitor's decision to increase prices and independently decides to do the same. BLACK'S LAW DICTIONARY 299 (7th ed. 1999). In a perfectly competitive market, Ross observed, all firms end up selling at the same price, and therefore parallel conduct is consistent with both cartel behavior and competition. ROSS, *supra* note 43, at 161. The critical difference between conscious parallelism and healthy competition is the agreement between horizontal competitors to act together. The UNCTAD *Model Law on Competition*, *infra* note 142, at 15 ¶ 26 also permits parallel behavior if the conduct "would be in [the firm's] own interest in the absence of an assurance that its competitors would act similarly." *But see infra* note 120.

84. *See Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 6.

85. *Supra* text accompanying note 15.

86. *E.g., supra* note 25.

87. *E.g., supra* text accompanying notes 19-24.

88. *See, e.g., supra* notes 71-75 and accompanying text.

89. *Supra* text accompanying notes 14, 18.

90. *Supra* text accompanying notes 74-75.

IV. POLITICAL DISAGREEMENTS OVER ANTITRUST ENFORCEMENT POLICY

Enforcement of U.S. antitrust principles on an international scale would present difficulties because of the various decisions that can be made regarding antitrust enforcement based upon different political goals or philosophical perspectives. The Senators recognized that an action against OPEC before the ICJ would constitute a "cutting-edge lawsuit, making new law at the international level."[91] Any new international law would have to account for what the U.S. Supreme Court has acknowledged as "rival philosophies" behind U.S. antitrust law,[92] and philosophies are likely to be even more varied between nations. One author explained that

> As legislative history and case law both disclose, the general objective of the antitrust laws is the maintenance of competition. Competition per se thus becomes a goal of the legal order. Yet, competition is not a concept which defines itself; notions about the desirability of competition may shape judgments about how the law should apply, at least at its indistinct edges.[93]

European Commission Commissioner Mario Monti noted well the "variety of forms and expressions" that antitrust enforcement can take.[94] U.S. Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice Charles James commented on the "range and complexity of international antitrust issues."[95] James recognized that "some of the procedural and substantive differences among us do matter, to us as agencies, to the businesses whose conduct we review, and to the consumers we serve."[96] He concluded that such differences "cannot reasonably be expected to disappear solely through strong enforcement cooperation."[97]

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91. *OPEC and Antitrust Law, supra* note 2.

92. *Supra* text accompanying note 61 (quoting United States v. Trenton Potteries Co., 273 U.S. 392 (1927)).

93. LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 5, at 20 (1977).

94. European Comm'n Comm'r Mario Monti, Opening Speech at the Organisation for Economic Co-operation and Development (OECD) Global Forum on Competition (Oct. 17, 2001), at 2, *at* http://www.oecd.org/pdf/M00019000/M00019632.pdf [hereinafter Monti, Speech at the Global Forum on Competition].

95. Assistant U.S. Attorney General Charles A. James, Address before the OECD Global Forum on Competition (Oct. 17, 2001), at 3, http://www.oecd.org/pdf/M00019000/M00019731.pdf [hereinafter James, OECD Global Forum on Competition Address].

96. *Id.* at 7. Some procedural differences between sovereigns include differences of timing of premerger notifications, statutory timetables for decisions and limits on the sharing of information. Starek, Remarks at International Antitrust Conference, *infra* note 135, § II.

97. James, OECD Global Forum on Competition Address, *supra* note 95, at 7.

At the outset, antitrust scholars disagree on whether courts should hear antitrust cases at all. "Chicago school" advocates favor antitrust enforcement solely to achieve economic efficiency.[98] According to the Chicago school, if a court compared other multifarious and competing goals in a type of balancing test under an antitrust analysis, the process would grind against the proper role of the non-elected judiciary in a democratic system, which may be unsuited to "evolving major social policy."[99] The opposing, more traditional camp of antitrust thinkers note that courts routinely balance competing interests, and properly do so in antitrust cases as well, and opine that Congress can always correct imbalances when required.[100] In the OPEC controversy, the debated issue would be the competency of the ICJ to hear an international antitrust case that, because of its global reach, would necessarily encompass political and social implications and undertones having dramatic impact on the world community, requiring a balancing test of a dimension heretofore unrealized.

If the ICJ should hear antitrust cases, reasonable minds could also disagree on whether a particular antitrust case should be heard, based on the amount of faith placed in the market. The Chicago school believes the market can correct itself to a large extent, and therefore favors a limited role for antitrust law.[101] Antitrust traditionalists, however, prefer to prevent private parties from restraining the market as much as possible to enhance the marketplace.[102] In the case of OPEC, adherence to quotas equates to increased market share for non-OPEC nations that are not co-conspirators in OPEC deals, and quota cheating can disrupt OPEC from the inside.[103] The prospect of the market solving the OPEC problem on its own might discourage Chicago school thinkers from bringing suit in the case of OPEC, but not so for traditionalists.

If the ICJ actually heard an antitrust case, assuming that the ICJ should evolve major social policy and that natural market processes would not provide a remedy, it would be confronted with the complicated task of assessing the market effects of a particular restraint. The most qualified experts are only able to suggest tendencies, not probabilities, for the effect of a certain practice upon the market.[104] As Professor Ross observed, the "true economic effect

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98. ROSS, *supra* note 43, at 2.
99. *Id.* (quoting Judge Robert Bork).
100. *Id.*
101. *Id.* at 1, 3.
102. *Id.* at 1.
103. *See supra* notes 22, 26, 30, and accompanying text.
104. ROSS, *supra* note 43, at 2.

of many business practices is impossible to determine."[105] Even for the price-fixing by OPEC, it is impossible to determine how much oil has actually been held back,[106] much less what effect that oil would have had upon the market price for oil if it had been released according to the dictates of the market.

The recently-proposed merger between General Electric (GE) and Honeywell illustrates the potential intractability of assessing the market. The proposed merger would have resulted in the ability for the merged firm to offer higher quality products at reduced prices, as compared with each firm operating on its own.[107] The U.S. Department of Justice (DOJ) approved the merger, but the European Commission lead by Commissioner Monti blocked the transaction despite having access to the same facts as the DOJ and despite extensive coordination between the agencies.[108] U.S. Assistant Attorney General James reflected, "I do not think we could have worked together more closely," but the agencies nevertheless arrived at "glaringly inconsistent decisions."[109] As James observed, the European Commission blocked the merger because it believed competitors would be adversely affected by the higher quality and reduced prices resulting from the merged company, which, in turn, would drive some competitors from the market because of their inability to compete.[110] However, James noted, antitrust law protects competition and consumers rather than competitors,[111] and antitrust law exists "not to protect business from the working of the market; it is to protect the public from failure of the market."[112] Analyst Michael Regan commented, "The European Union seems to be focusing more on the concerns of competitors."[113]

However, the European Commission was probably looking out for consumers as much as the DOJ, on the basis of oligopoly theory.[114]

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105. *Id.*

106. *See, e.g., supra* note 22 (noting that the most reliable data of oil production is a "rough estimate" at best).

107. James, OECD Global Forum on Competition Address, *supra* note 95, at 4.

108. *Id.*

109. *Id. See also EU Kills GE-Honeywell, infra* note 113 (quoting Michael Regan, Credit Suisse First Boston analyst, who commented, "It's a fundamental difference"). *But see also* Starek, Remarks at International Antitrust Conference, *infra* note 135, § II (listing several successful instances of U.S.-E.C. cooperation).

110. James, OECD Global Forum on Competition Address, *supra* note 95, at 4.

111. *Id.* (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

112. James, OECD Global Forum on Competition Address, *supra* note 95, at 4 (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)). *See also Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 9 (pointing out that competition law and policy is intended to protect competition rather than competitors).

113. *EU Kills GE-Honeywell,* CNN MONEY, July 3, 2001, *at* http://money.cnn.com/2001/07/03/europe/ge_eu/index.htm.

114. Oligopoly is defined as "[c]ontrol or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly."

Oligopoly theory posits that markets composed of few sellers are insufficiently competitive to force prices down to a competitive level,[115] meaning that firms can maintain prices above competitive levels without an agreement to fix prices.[116] In an oligopoly, new firms pose a minimal threat of entering into the market, which translates into a disincentive for firms to cut prices to attract more business.[117] Market share remains nearly the same whether a firm increases or decreases its prices, despite brief fluctuation, because its competitors can always imitate the move.[118] Decreasing prices would equal less revenue with a nearly identical market share, but when a "price leader" raises its prices, its competitors can either do the same to increase their own revenue or wait for the price leader to bring its price back down.[119] The competitors know that they can maintain a higher-than-competitive pricing level without losing market share because their market hegemony eliminates worries of new firms entering the market to offer competitive pricing, acquiring market share, and driving competitor prices back down.[120] Consumers are exploited because of the excessive market power and price discretion in the hands of oligopolists, and an oligopoly might operate much like a price-fixing cartel.[121]

The apprehension of the European Commission over the GE-Honeywell merger appears to have stemmed from oligopoly principles, but U.S. actors were not so worried. Although all schools of antitrust thought would disapprove of a merger that resulted in an oligopolistic market structure,[122] the disagreement probably took root in whether an oligopoly scenario would in fact result from the

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BLACK'S LAW DICTIONARY 1115 (7th ed. 1999). A monopoly is characterized by "[c]ontrol or advantage obtained by one supplier or producer over the commercial market within a given region." *Id.* at 1023. Judge Learned Hand added that "[ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent is enough; and certainly thirty-three per cent is not." *Id.* (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)).

115. ROSS, *supra* note 43, at 318.

116. *Id.* at 159.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.* Competitors in an oligopolistic market structure, as long as they make no agreement to raise prices, are not precluded from selling at higher than competitive price levels, which can be squared with conscious parallelism discussed in note 83. *See also* ROSS, *supra* note 43, at 159 ("[W]ithout proof of an agreement . . . this type of oligopolistic behavior may not fall within the language of § 1 [of the Sherman Act]."). *But see* BLACK'S LAW DICTIONARY 299 (7th ed. 1999) (noting that consciously parallel activity might be viewed as evidence of an underlying conspiracy).

121. ROSS, *supra* note 43, at 159, 318. As a result, some commentators have suggested that action must be taken against oligopolistic market structures. *Id.* at 159 (referencing Donald Turner).

122. *Id.* at 318.

proposed merger. In other words, the DOJ and the European Commission might have differed on how many firms the market needed in order to maintain competitiveness.[123] GE and Honeywell formally terminated the merger deal on October 2, 2001 after word from the European Commission that the merger would create a company with too much market power.[124] European Commision Commissioner Monti said in a statement, "The merger between GE and Honeywell . . . would have severely reduced competition in the aerospace industry and [would have] resulted ultimately in higher prices for customers, particularly airlines."[125] The DOJ, based on its experience, doubted that assertion.[126] GE issued a statement explaining, "We strongly disagree with the commission's conclusions about the competitive effects of GE's acquisition of Honeywell . . . [w]e believe this acquisition would have clearly benefited consumers in terms of quality, service and prices."[127] At bottom, the European Commission and the DOJ did not disagree on *whether* consumers ought to be protected, but on *how* best to protect them. Multiple answers might exist, particularly given the imprecision of assessing market effects, and the increased difficulty of analyzing and assessing larger economic systems. The ICJ would be required to select a single answer that would apply to all interested sovereigns.

After a court attempts to assess the market effects of a particular restraint, a court must assign a point at which it can justifiably circumscribe private interests.[128] Upon a continuum of harm, the judge must decide the point at which the restraint's destruction to the market is great enough to justify a declaration of illegality. Such a judgment call entails another judgment call about the proper level of

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123. Professor Ross advanced two competing theories for determining the point at which a market transitions from a competitive market to an oligopoly: the "age" theory and the "virginity" theory. *Id.* at 319. Similar to growing older, under the age theory a market becomes progressively less competitive as the number of firms decreases. *Id.* Under the virginity theory, the market either has enough firms to be competitive or it does not. *Id.* Most economists apparently adhere to the latter theory because if the number of firms becomes too small, firms can collude easier and more secretively and smaller numbers of firms permit a more accurate prediction of what the market will do, bringing it closer to an oligopolistic arrangement. *Id.* But even when one theory is selected, wide disagreement exists as to what number of firms is required to avoid the problems attendant to an oligopolistic market. *Id.*

124. *GE/Honeywell Declared Dead*, CNN MONEY, Oct. 2, 2001, *at* http://money.cnn.com/2001/10/02/deals/ge_honeywell.

125. *EU Kills GE-Honeywell*, *supra* note 113.

126. *E.g.*, James, OECD Global Forum on Competition Address, *supra* note 95, at 5 (responding to the proposition that inefficient rivals might be driven from the market: "Our experience, however, is that business rivals rarely go quietly into the night. Instead, they typically respond by lowering their own costs and prices, competing harder to survive.").

127. *EU Kills GE-Honeywell*, *supra* note 113.

128. ROSS, *supra* note 43, at 2.

protection to extend economic rights.[129] Conventional wisdom holds that "the right to maximize profits does not deserve the kind of judicial protection reserved for those rights expressed or implied in the Bill of Rights," and most people believe government should be able to more-rigorously regulate business affairs.[130] While it is clear that economic freedoms should receive less protection than humanitarian freedoms, the actual amount of protection that economic rights deserve is often unclear.[131] Policy-based judgment calls such as these might vary across different countries, and even across different courts.

The potential points of disagreement discussed above "reflect conflicting ideologies, opposed visions of human nature, market relationships, and the proper role of the state,"[132] creating factions in antitrust thinking. Lord Wilberforce remarked, "It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."[133] John J. Parisi, Counsel for European Union Affairs in the International Antitrust Division of the Federal Trade Commission, highlighted the way in which antitrust laws differ from jurisdiction to jurisdiction, making an analogy to tax, employment, and environmental law variances where a violation in one jurisdiction may not be a violation in another jurisdiction.[134] FTC Commissioner Starek commented that even if two nations share common goals of maximizing consumer welfare and allocative efficiency, "politics and national policy objectives may dictate marked differences between the enforcement priorities of the two countries' antitrust systems."[135] For over five decades, proposals have been made to develop an antitrust code with uniform global application that would be enforceable by the WTO, but such proposals have not come to fruition.[136] U.S. policymakers are skeptical about implementing a uniform international antitrust code because they question "whether agreement can be reached on a sufficiently stringent set of antitrust policies."[137] Untethering antitrust from the

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129. *See generally id.*

130. *Id.*

131. *See id.*

132. William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 2-3 (1991).

133. Parisi, *supra* note 6, at 142 n.1 (citing Lord Wilberforce).

134. *Id.* at 133.

135. Roscoe B. Starek, III, International Cooperation in Antitrust Enforcement and Other International Antitrust Developments, Remarks at the Business Development Associates, Inc. Antitrust 1997 Conference, § III (Oct. 21, 1996), *at* http://www.ftc.gov/speeches/starek/bdaspc96.htm [hereinafter Starek, Remarks at International Antitrust Conference]. At the time of the address, Starek was serving as Commissioner of the Federal Trade Commission. *Id.*

136. *Id.*

137. *Id.*

designated approaches of individual sovereigns would require consensus on policy matters that appear to be hopelessly variable.

Still, the dramatic increase in transnational activity in recent years signals the importance of international cooperation,[138] and the DOJ and the FTC communicate with foreign antitrust authorities almost daily.[139] Despite political and ideological differences, Parisi optimistically suggested that similarities between competition laws are actually greater than differences,[140] and the rapid advance of competition policy around the world seems to support his claim.

V. THE RAPID ADVANCE OF COMPETITION POLICY WORLDWIDE

Despite the various difficulties that can stymie international antitrust cooperation, globalization has exerted enormous pressure to come together on antitrust issues in recent years. The Senators opine that the stage is set for development of new international law,[141] but the Senators are not the only proponents of competition policy. Today, competition legislation has been adopted in at least 67 countries and is pending in at least 19 other countries, and 10 other countries have established antimonopoly committees.[142] Therefore,

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138. Parisi, *supra* note 6, at 133.

139. *Id.* Bilateral antitrust cooperation agreements and mutual legal assistance treaties are examples of the types of contacts between U.S. agencies and foreign agencies. *See infra* note 213 ¶ 1.

140. Parisi, *supra* note 6, at 133. *See, e.g., infra* note 430 (discussing Venezuela's competition laws, which resemble U.S. laws in their aims).

141. *OPEC and Antitrust Law*, *supra* note 2.

142. The statistics are derived from a list of countries, set out below, that have competition legislation, pending competition legislation, or antimonopoly committees. U.N. Conference on Trade and Development (UNCTAD), *Model Law on Competition: Draft Commentaries to Possible Elements for Articles of a Model Law or Laws*, at 9-10, U.N. Doc. TD/RBP/CONF.5/7 (2000) (Series on Issues in Competition Law and Policy), *available at* http://www.unctad.org/en/docs//tdrbpconf5d7.en.pdf [hereinafter UNCTAD *Model Law on Competition*].

OECD countries adopting competition legislation include (with year of initial adoption indicated parenthetically): Australia (1974), Austria (1988), Belgium (1991), Canada (1889), Czech Republic (1991), Denmark (1997), European Union (1957), Finland (1992), France (1977), Germany (1957), Greece (1977), Hungary (1996), Ireland (1991), Italy (1990), Japan (1947), Luxembourg (1970), Mexico (1992), Netherlands (1997), New Zealand (1986), Norway (1993), Poland (1990), Portugal (1993), Republic of Korea (1980), Spain (1989), Sweden (1993), Switzerland (1985), Turkey (1994), United Kingdom (1890), and the United States (1890). Non-OECD countries with competition legislation include the African nations of Algeria (1995), Côte d'Ivoire (1978), Gabon (1989), Kenya (1988), Malawi (1998), Mali (1998), Morocco (1999), Senegal (1994), South Africa (1955), Tunisia (1991), United Republic of Tanzania (1994), Zambia (1994), and Zimbabwe (1997); Asian and Pacific nations of China (1993), Fiji (1993), India (1969), Indonesia (1999), Pakistan (1970), Sri Lanka (1987), Taiwan (1992), and Thailand (1979); transitional nations of Bulgaria (1991), Croatia (1995), Lithuania (1992), Mongolia (1993), Romania (1996), Russian Federation (1991), Slovakia (1994), and Slovenia (1991); and Latin American and

approximately 96 sovereigns intend to implement competition principles in their respective countries.[143] These 96 sovereigns are located all over the world in Africa, Asia and the Pacific, North America, Central America and the Caribbean, South America, Europe, and Australia.[144] Still, the development is very recent, because over half of the countries with competition legislation adopted the legislation in the 1990s.[145] The fact that only 15 sovereigns had competition legislation before 1980 indicates an explosion of competition law in recent decades.[146]

Part of this explosion might be influenced by the efforts of the U.N. Conference on Trade and Development (UNCTAD) in generating awareness among developing countries of the adverse effects of restrictive business practices upon their economies and working with them to implement competition laws.[147] The United Nations formed

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Caribbean nations of Argentina (1980), Brazil (revised 1994), Chile (1973), Colombia (1992), Costa Rica (1992), Jamaica (1993), Panama (1996), Peru (1990), and Venezuela (1991). *Id.*

The following nations have pending legislation or antimonopoly committees: African nations of Benin, Burkina Faso, Cameroon, Egypt, Ghana, Mauritius, and Togo; Asian and Pacific nations of Jordan, Malaysia, Philippines, and Viet Nam; transitional nations of Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Republic of Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan; and Latin American and Caribbean nations of Bolivia, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, and Trinidad and Tobago. *Id.*

143. *See id.* The statistics relied upon are from 2000, and at least 13 to 23 more nations may have since enacted legislation or taken other action. *See, e.g.*, Kondo, Remarks at the Global Forum on Competition, *infra* note 176, para. 10 (mentioning that as of 2001, more than 80 countries had competition laws in force); James, OECD Global Forum on Competition Address, *supra* note 95, at 2 (mentioning that as of 2001, over 90 countries had some type of antitrust law, and 20 more countries were drafting antitrust laws).

144. *See supra* note 142. The only continent not represented as having competition legislation is Antarctica, where such legislation does not currently appear to be necessary.

145. The dates each country enacted competition legislation are listed in note 142, from which these statistics are deduced. At least 38 countries out of the 67 with competition legislation have enacted the legislation since 1990. *See supra* note 142. Ten countries with competition laws at least revised their policies in the 1990s. *See supra* note 142. Thus, 48 of the 67 countries (72%) with competition laws established or modified such laws in the 1990s. *See supra* note 142. If the antimonopoly committees were all established in the 1990s, then 78 of the 96 countries (81%) observing some sort of antitrust policy in 2000 had established or modified their policy in the 1990s. *See supra* note 142. As mentioned in note 143, between 13 and 23 more countries might have established competition policy or taken further steps on it since the statistics cited were released in 2000, which would further increase the percentage of activity occurring since 1990.

146. *See supra* notes 142, 145. *See also* James, OECD Global Forum on Competition Address, *supra* note 95, at 2 (explaining that there has been "explosive growth in the number of countries with antitrust laws and agencies").

147 Rubens Ricupero, Statement to the OECD Global Forum on Competition, para. 9 (Oct. 17, 2001), *available at* http://webnet1.oecd.org/pdf/M00019000/M00019635.pdf

UNCTAD in 1964 as a specialized intergovernmental body of the U.N. General Assembly to deal with trade, investment, and development issues.[148] The UNCTAD mission is to maximize trade and development opportunities for developing countries to help them integrate into the world community and to confront challenges related to globalization.[149] UNCTAD provides technical assistance and advisory and training programs for developing countries and countries in transition with experts from the Organisation for Economic Co-operation and Development, the World Bank, and the WTO.[150] For consultation matters, UNCTAD also organizes annual meetings of an Intergovernmental Group of Experts on Competition Law and Policy.[151] And finally, UNCTAD continues to publish a "Model Law on Competition," discussed below, with commentary on approaches followed by various competition laws.[152]

The Antitrust Division of the U.S. Department of Justice and the FTC have also contributed to the explosion of global awareness of antitrust issues.[153] The DOJ Antitrust Division and the FTC have sent representatives to advise countries on six continents for a total of almost 250 missions in the last decade, and have hosted foreign antitrust officials to explain U.S. policy.[154]

UNCTAD's Model Law on Competition seeks "to control or eliminate restrictive agreements, or arrangements among enterprises . . . or abuse of dominant positions of market power, which . . . unduly restrain competition, adversely affecting domestic or international trade or economic development."[155] In particular, the Model Law prohibits agreements between "rival or potentially rival firms, regardless of whether such agreements are written or oral, formal or informal" that "fix[ ] prices or other terms of sale, including in international trade."[156] According to the Model Law commentary, price fixing is a common form of restrictive business practice and one

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[hereinafter Ricupero, Statement to the Global Forum on Competition]. Ricupero is the Secretary-General of the U.N. Conference on Trade and Development. *Id.*

148. U.N. Conference on Trade and Development (UNCTAD), *About UNCTAD*, http://www.unctad.org/en/aboutorg/aboutorg.htm.

149. United Nations, *United Nations Conference on Trade and Development*, http://www.un.org/partners/civil_society/m-trade.htm (listing the UNCTAD mandate).

150. Ricupero, Statement to the Global Forum on Competition, *supra* note 147, para. 10.

151. *Id.* para. 12.

152. UNCTAD *Model Law on Competition*, *supra* note 142; Ricupero, Statement to the Global Forum on Competition, *supra* note 147, para. 11.

153. James, OECD Global Forum on Competition Address, *supra* note 95, at 3.

154. *Id.* at 3.

155. UNCTAD *Model Law on Competition*, *supra* note 142, at 3. The Model Law defines "enterprises" broadly to include virtually any entity "controlled by private persons or by the State," and defines a dominant position of market power as a position to control the relevant market for a good or service. *Id.*

156. *Id.*

of the anti-competitive practices most likely to lead to an investigation.[157] The commentary points out that some countries that have recently amended their competition laws have denoted price fixing as a per se violation, as it is in the United States.[158] Like U.S. law, the Model Law also includes production quotas in the category of price fixing, subject to per se analysis.[159]

The Model Law is based in large part upon "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (Set of Multilaterally Agreed Equitable Principles).[160] The U.N. General Assembly convened the U.N. Conference on Restrictive Business Practices under the auspices of UNCTAD in 1978.[161] The Conference on Restrictive Business Practices completed and approved the Set of Multilaterally Agreed Equitable Principles in 1980, and the U.N. General Assembly adopted them the same year.[162] Four U.N. Conferences to Review All Aspects of the Set have taken place in 1985, 1990, 1995, and 2000.[163] The Fourth Review Conference again reaffirmed the validity of The Set of Multilaterally Agreed Equitable Principles and called upon all U.N. Member Nations to "implement the provisions of the Set,"[164] although it is not legally binding.[165] Considered the "sole multilateral

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157. *Id.* at 16, para. 34. *See also id.* at 15.

158. *Id.* at 41 n.63.

159. *Id.* at 16, para. 35.

160. *See id.* at 11, 12, 14, 16, 20, 33. The provision at issue in this Note, quoted in the text accompanying note 156, derives from *The Set of Multilaterally Agreed Equitable Principles. Id.* at 14.

> Enterprises, except when . . . they are under common control . . . or otherwise not able to act independently of each other . . . should refrain from practices such as the following when, through formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries.

U.N. Conference on Trade and Development, *United Nations Set of Principles and Rules on Competition,* pt. IV, § D, para. 3, U.N. Doc TD/RBP/CONF/10/Rev.2 (2000), *at* http://www.consumer.org.hk/20020416/unctad/webpage/backdoc/set_pri.pdf [hereinafter *Set of Multilaterally Agreed Equitable Principles*]. The provision lists "[a]greements fixing prices, including as to exports and imports" as disapproved practices. *Id.*

161. *Id.* pt. I, para. 1.

162. *Id.* (citing a U.N. resolution).

163. *Id.*

164. U.N. Conference on Trade and Development, *Conference to Review of All Aspects of The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,* U.N. TDBOR, Agenda Item 1, U.N. Doc. TD/RBP/CONF.5/15 (Oct. 4, 2000), *available at* http://www.unctad.org/en/docs/tdrbpconf5d15.en.pdf.

165. Ricupero, Statement to the Global Forum on Competition, *supra* note 147, para. 7.

instrument of a universal character dealing with this area,"[166] The Set's provisions apply to transnational enterprises operating in more than one country that adversely affect international trade, particularly that of developing countries.[167]

The existence and involvement of the Organisation for Economic Co-operation and Development (OECD) also demonstrates the reach of competition policy worldwide. The OECD currently has 30 member nations.[168] Since the early 1980s, the OECD has featured a Competition Law and Policy Committee (CLP Committee) that is "the world's premier source of policy analysis and advice to governments on how best to harness market forces in the interests of greater global economic efficiency and prosperity."[169] The CLP Committee encourages decisionmakers to take action against anti-competitive practices and regulations.[170] In addition, the OECD's Competition Division provides analytical papers, sector studies, and policy recommendations to the CLP Committee.[171] The OECD attempts to affect "efficient, competition-friendly economic regulation," and recently has focused upon "tougher enforcement against cartels."[172] The OECD objective in focusing on "unnecessary" restraints of competition is "to make market principles the cornerstone of government policy."[173]

The OECD held the first Global Forum on Competition in Paris on October 17-18, 2001, emphasizing the importance of a competitive international market.[174] The Forum was designed to help governments develop frameworks for encouraging efficient competition while deterring abuses.[175] Present at the Forum were

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166. *Id.*

167. *Set of Multilaterally Agreed Equitable Principles*, *supra* note 160, pt. IV, § B(ii), para. 1.

168. OECD nations include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Organisation for Economic Co-operation and Development (OECD), *Member Countries*, *at* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-countrylist-0-nodirectorate-no-no-159-0,FF.html.

169. OECD, *About Competition Law and Policy*, *at* http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-about-71-3-no-no-no-71,FF.html.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. OECD, *Global Forum on Competition - 17-18 October 2001: Keynotes*, *at* http://webnet1.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-71-3-no-21-7537-71,FF.html (providing transcripts of the keynotes) [hereinafter OECD Global Forum on Competition keynotes].

175. Press Release, OECD, OECD Organizes First Global Forum on Competition (Sept. 10, 2001), *at* http://webnet1.oecd.org/oecd/pages/document/displaywithoutnav/0,3376,EN-document-notheme-1-no-no-18881-0,00.html. In addition to the 30 member

representatives from the World Bank, the WTO, and the International Bar Association, among others.[176] The Forum represented a cooperative effort between UNCTAD and the OECD,[177] and 55 countries from every part of the world were represented.[178] On February 14-15, 2002, the OECD held the second Global Forum on Competition in Paris, where experts and officials from more than 60 countries discussed what "action is needed for developing economies to implement effective competition laws and how to promote international co-operation in anti-trust investigations."[179]

On April 27, 1988, the OECD issued a Recommendation suggesting that its member nations "ensure that their competition laws effectively halt and deter hard core cartels."[180] A decade later in 1998, the OECD Council adopted another Recommendation (1998 Recommendation) proposing effective measures to take against hard core cartels.[181] "Hard core cartel" was defined as any anticompetitive agreement to fix prices or establish output restrictions or quotas.[182] The 1998 Recommendation referred to hard core cartels as the "most egregious" violations of competition law, and disapproved of raising prices and restricting supply, "making goods and services completely

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nations and the "observers" to the OECD Competition Law and Policy Committee (including Argentina, Brazil, Israel, Lithuania, and Russia), the OECD also invited Bulgaria, Chile, China, Egypt, Estonia, India, Indonesia, Kenya, Latvia, Malaysia, Morocco, Peru, Romania, Singapore, Slovenia, South Africa, Chinese Taipei, Thailand, Ukraine, Venezuela, and Zambia. *Id.*

176. OECD Deputy Sec'y Gen. Seiichi Kondo, Opening Remarks at the Global Forum on Competition, para. 1 (Oct. 17, 2001), *at* http://www.oecd.org/pdf/M00019000/M00019624.pdf [hereinafter Kondo, Remarks at the Global Forum on Competition]. Other groups present at the forum included the Business and Industry Advisory Committee, Consumers International, several regional organizations, about 20 invited economies (listed in note 175), five observer nations to the OECD CLP Committee (also listed in note 175), and the 30 OECD member nations (listed in note 168). Kondo, Remarks at the Global Forum on Competition, *supra*, para. 1.

177. Ricupero, Statement to the Global Forum on Competition, *supra* note 147, para. 2.

178. James, OECD Global Forum on Competition Address, *supra* note 95, at 2.

179. Press Release, OECD, OECD Global Forum on Competition to Focus on Developing Country Needs, Paris, 14-15 February 2002 (July 2, 2002), *at* http://webnet1.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-71-nodirectorate-no-12-25813-2,FF.html. The second Global Forum on Competition invited the following nations that did not attend the first Forum: Algeria, Cameroon, Gabon, Hong Kong China, Ivory Coast, Senegal, Tunisia, and Vietnam. *Id.*; *see also supra* note 175. Algeria is a member of OPEC, and Gabon withdrew its membership from OPEC in 1995. *Supra* note 7.

180. *OPEC and Antitrust Law*, *supra* note 2.

181. *See generally* OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, 921st Sess., OECD Doc. C(98)35/FINAL (1998), *available at* http://www.oecd.org/pdf/M00018000/M00018135.pdf [hereinafter OECD 1998 Recommendation].

182. *Id.* at 3.

unavailable to some purchasers and unnecessarily expensive for others."[183]

OPEC nations are probably guilty of the "most egregious" violations of competition law according to the OECD. Because OPEC nations supply at least one-third of the 77 million barrels per day of oil consumed by the world market and restrict the supply of that vital natural resource to raise petroleum prices, OPEC probably falls into the OECD "hard core cartel" category.[184] But the OECD Recommendation, by its own terms, applies only to membernations and merely "invites" non-member countries to "associate themselves with this Recommendation and to implement it."[185] No OPEC nation is an OECD membernation,[186] so the OECD Recommendation does not bind OPEC nations. Nevertheless, the world has moved toward recognizing competition policy on a large scale, and the Senators claimed international consensus on the illegitimacy of price fixing based on "respect for and adherence to fundamental international principles and norms."[187]

VI. PRINCIPLES BEHIND COMPETITION LAW

One of the fundamental principles recognized internationally is the apprehension over excessive power, and the concomitant esteeming of fairness, liberty, equality, and justice. The U.S. Supreme Court's uneasiness over excessive power can be gleaned from reading landmark antitrust opinions such as *United States v. Trenton Potteries Co.*, where the Court characterized the price fixing agreement as per se unreasonable and unlawful.[188] Stephen Ross summarized antitrust law as "not about economics, but about power."[189]

The concern over excessive power is not confined to the economy, but accounts for one of the most fundamental principles in the U.S. Constitution.[190] In *The Federalist* papers, James Madison stressed the need for a government structure that separates powers. Tyranny,

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183. *Id.* at 2.

184. *See* Barrionuevo, *supra* note 25; *see also supra* notes 19-28 and accompanying text.

185. OECD 1998 Recommendation, *supra* note 181, at 4.

186. *See supra* notes 7, 168. The OECD did, however, extend invitations to OPEC member nations Venezuela and Indonesia for the first OECD Global Forum on Competition held October 17-18, 2001, probably because both countries have enacted competition legislation. *See supra* notes 142, 175.

187. *OPEC and Antitrust Law*, *supra* note 2.

188. *See supra* text accompanying note 61 (quoting United States v. Trenton Potteries Co., 273 U.S. 392 (1927)).

189. ROSS, *supra* note 43, at 1 (emphasis modified).

190. *See* U.S. CONST. arts. I-III.

as Montesquieu also explained, is the result of the accumulation of legislative, executive, and judicial power in the hands of a single entity, whether composed of one person or many, and whether elected or appointed.[191] According to Madison, the preservation of liberty requires the separation of the three main classes of government power, without which there arises a "universal reprobation of the system."[192]

Preserving liberty by checking excessive power protects equal opportunity and fairness, and therefore justice as well. Even the most powerful parties are benefitted by having concern for weaker parties, as Madison explained:

> In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.[193]

A society seeking liberty and justice also seeks protection of weaker factions from the will of stronger factions.[194] Devices to resist the encroachment by one branch of the government upon another branch are necessary because men are not angels, and angels do not govern men, or such controls would be unnecessary.[195] Madison wrote that justice is the end of government and the end of civil society, and it "ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[196]

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191. THE FEDERALIST NO. 47 (James Madison). *See also* THE FEDERALIST NO. 48 (James Madison) ("In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire."). The United States features the following balance of power between state and federal governments and their coordinate branches:

> [T]he power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 51 (James Madison).

192. THE FEDERALIST NOS. 47, 48, 51 (James Madison).

193. THE FEDERALIST NO. 51 (James Madison).

194. *See generally* THE FEDERALIST NOS. 47, 48, 51 (James Madison).

195. THE FEDERALIST NO. 51 (James Madison).

196. *Id.*

Creating opposite and rival interests as a check on excessive power are "inventions of prudence" for the distribution of governmental power, but might also be "traced through the whole system of human affairs, private as well as public."[197] Apprehensions over excessive power also arise in economic matters, and antitrust law operates as an opposite and rival check on excessive power by one particular economic entity, securing equal opportunity for citizens who cannot secure it themselves. OPEC member nation Venezuela began a "free competition regime" in 1992 that attempts to minimize abuses of dominant market positions.[198] The U.S. Supreme Court in *United States v. Socony-Vacuum Oil Co.* observed that the framers of the Sherman Act intended to embody a "charter of freedom" with antitrust laws.[199]

As can be demonstrated by the Indonesian experience, the same "universal reprobation of the system" that would result from a tyrannical government also results where an economy is controlled only by the most powerful—where equal opportunity and fairness cannot not be attained. Dr. Didik Rachbini, Commissioner for the Indonesian Commission for Business Competition, shared Indonesia's experience with economic change at the second OECD Global Forum on Competition.[200] The "New Order regime" in Indonesia, since 1965, has been characterized by the main goal of economic development.[201]

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197. *Id.*

198 OECD Global Forum on Competition, *Venezuela's Free Competition System*, at 2, OECD Doc. CCNM/GF/COMP/WD(2002)37 (Mar. 14, 2002), *at* http://www.oecd.org/pdf/M00028000/M00028255.pdf [hereinafter *Venezuela's Free Competition System*]. Venezuela submitted this paper as a contribution to the first OECD Global Forum on Competition, held October 17-18, 2001. *Id. See also supra* note 142 (listing Venezuela as having enacted competition legislation in 1991).

199. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940). The Court also noted in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) that

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Id.

200. Dr. Didik J. Rachbini, Political Economy of Business and Competition Issues in Indonesia, Presentation Before the OECD Global Forum on Competition, at 2, OECD Doc. CCNM/GF/COMP/WD(2002)28 (Feb. 11, 2002), *available at* http://www.oecd.org/pdf/M00026000/M00026177.pdf [hereinafter *Contribution from Indonesia at the Second OECD Global Forum on Competition*]. Dr. Rachbini is a professor and Vice Rector at Universitas Mercu Buana in Jakarta, and serves as Comissioner of the KPPU (Commission for Business Competition) in Indonesia. *Id.* at 3.

201. *Id.* at 4-5.

However, the goals of the New Order were substantially hindered by the lack of "economic equity."[202] At his address to the Forum, Rachbini repeatedly highlighted the lack of equity and justice in the economy, referring to unfair monopoly practices, mixing of private and public domains, highly leveraged firms, and the effects of collusion, corruption, and wastefulness in the economy.[203] Approximately 15 years ago, Indonesia began to discuss the importance of fair business competition because unfair business practices stifled their economic goals.[204] However, government actors in power prevented development of competition policy, having personal interests in the mixing of government and business roles.[205] The power structure preventing the development of anti-monopoly and competition law collapsed in 1998, allowing the new government led by President Habibie to reform the economic system.[206] In 1999, Indonesia enacted competition legislation to promote "more fairness in business competition."[207]

As OPEC member nation Indonesia has experienced, checking excessive power benefits everyone because sustainable economic development ultimately depends upon fair business practices, even on the international level.[208] The Set of Multilaterally Agreed Equitable Principles explains that anti-competitive practices are "likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries."[209] The objectives of the Set of Multilaterally Agreed Equitable Principles include, *inter alia*, (1) attaining greater efficiency in

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202. *Id.* at 5.
203. *Id.* at 5-8.
204. *Id.* at 7-8.
205. *Id.*
206. *Id.* at 8.
207. *Id.* *See also supra* note 142 (listing Indonesia as having enacted competition legislation in 1999).
208. *See Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 3 (commenting that properly implemented competition policy can make a key contribution to sustainable development); Kondo, Remarks at the Global Forum on Competition, *supra* note 176, para. 3 (noting that a competitive market is "now widely recognised as the only viable means to create sustainable economic efficiency and growth").
209. *Set of Multilaterally Agreed Equitable Principles*, *supra* note 160, pt. IV § D, para. 3. The distinguished keynote speakers at the first OECD Global Forum on Competition emphasized the importance of competition policy in providing equal opportunity for all nations to achieve economic prosperity, and highlighted the "creation of dominant positions, cartels and abuses of market power" as the problem with which competition policy is concerned. Monti, Speech at the Global Forum on Competition, *supra* note 94, at 1, 2, 4; OECD Global Forum on Competition keynotes, *supra* note 174. *See also* OECD 1998 Recommendation, *supra* note 181, at 2 (decrying the "distortion" of world trade by hard core cartels, creating "market power, waste, and inefficiency in countries whose markets would otherwise be competitive").

international trade and development, particularly in developing countries, (2) protecting and promoting social welfare and the interests of consumers in all countries, (3) eliminating disadvantages to trade and development resulting from restrictive business practices, and (4) maximizing benefits of international trade for developing countries.[210] By checking excessive power and ensuring fairness and equal opportunity, the competition laws of various individual sovereigns have facilitated economic liberty and yielded positive economic results,[211] and the question remains whether enforcement is appropriate on an international scale.

VII. THE NATURAL LAW BASIS OF LEGAL OBLIGATION

With concern for the power wielded by OPEC and the resultant increase in oil prices, the Senators recommended a groundbreaking action against OPEC before the ICJ.[212] In their letter to President Bush, the Senators suggested that OPEC is obligated to other countries not to fix oil prices based on the "general principles of law recognized by civilized nations," specifically delineated in Article 38 of the Statute of the International Court of Justice as a permissible basis for decision.[213] Whether OPEC nations are responsible to other

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210. *Set of Multilaterally Agreed Equitable Principles*, *supra* note 160, pt. IV § A(2)-(4).

211. *See* OECD Global Forum on Competition keynotes, *supra* note 174.

212. *See OPEC and Antitrust Law*, *supra* note 2.

213. *Id.*; BASIC DOCUMENTS IN INTERNATIONAL LAW 319 (Ian Brownlie ed., 2002). Some writers have disagreed over whether the general principles are precepts of positive law or precepts of natural law. *See, e.g.*, DEGAN, *infra* note 250, at 14-15. Regardless of technicalities, the general principles tend to point to natural law. The ability of diverse societies to conclude similarly on a matter indicates, as a matter of common sense, that there must be a larger blueprint for human interaction responsible for the similarity. Although universal approval does not necessarily point to natural law, discussed in note 349 of this Note, Grotius observed that natural law might be proved *a posteriori* when all, or at least the more civilized nations, recognize the point: "For a universal effect requires a universal cause: now such a universal belief can hardly have any cause except the common sense of mankind." GROTIUS, *infra* note 233, bk. I, ch. I, § XII, ¶ 1, at 5. *See also infra* note 265 (regarding the common sense of natural law); Heaven v. Pender, 11 Q.B.D. 503 (Eng. C.A. 1883) ("The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major propositions."). The existence of even one general principle tends to point to natural law as the common motivation for wide recognition.

Pursuant to the Statute of the ICJ, the Court may decide a case before it on four other grounds, detailed below. Each ground for decision is an investigative tool for determining natural law (as discussed in note 349), the ultimate source of legal obligation:

(1) "[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting States." BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra*, at 319. The United States has entered into "bilateral antitrust cooperation

agreements" with Australia, Brazil, Canada, the European Commission, Germany, Israel, Japan, and Mexico, and the language of such agreements approximates a 1967 OECD Recommendation, modified most recently in 1995, encouraging countries to cooperate in enforcement of antitrust laws under the principles of sovereignty and comity. Parisi, *supra* note 6, at 134; Starek, Remarks at International Antitrust Conference, *supra* note 135, § II; James, OECD Global Forum on Competition Address, *supra* note 95, at 3. *See also* SPENCER WEBER WALLER & JEFFREY L. KESSLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 12.07, at 12-30 to 12-30.1 (1992) (detailing the U.S. agreement with Japan as an example of the typical terms). The United States has also entered into "mutual legal assistance treaties" (MLATs) with at least 40 other countries. James, OECD Global Forum on Competition Address, *supra* note 95, at 3. The International Antitrust Enforcement Assistance Act (IAEAA), Pub. L. No. 103-438, 108 Stat. 4597 (1994), authorizes the FTC and the DOJ to negotiate bilateral agreements with other countries that permit each country to obtain confidential information to enhance the efficacy of investigations. Starek, Remarks at International Antitrust Conference, *supra* note 135, § II; *see also* Parisi, *supra* note 6, at 135.

Pacta sunt servanda, the duty to observe agreements and stipulations contained in treaties, derives from natural law. BLACK'S LAW DICTIONARY 1133 (7th ed. 1999) (translating *pacta sunt servanda* literally as "agreements must be kept"). Locke considered the duty as one of the two factors upon which human society in its entirety rests, but "it is not to be expected that a man would abide by a compact because he has promised it, when better terms are offered elsewhere." LOCKE, *infra* note 231, ch. I, at 119 (citing Pufendorf). *See also* PUFENDORF, *supra* note 1, bk. II, ch. III, § XX, at 143.

> For altho' the Usefulness and Expediency of [compacts] be clearly apparent, yet this bare Consideration could never bring so strong a Tie on Mens Minds, but that they would recede from these Rules, whenever a Man was pleas'd either to neglect his own Advantage, or to pursue it by some different Means, which he judg'd more proper, and more likely to succeed . . . . [T]he meer Force of human Command seems insufficient to invest these Dictates with the Power of Obligation. For since no such Command could take Place otherwise than by the Intervention of Covenants, and since Covenants owe all their Strength to some Law, it doth not appear how there could arise any human Sovereignty capable of Obligations, unless the Dictates of Reason were before-hand receiv'd for Laws.

Id. Grotius observed that it is "conformable to Natural Law to observe compacts," because "some mode of obliging themselves was necessary among men, and no other natural mode could be imagined." GROTIUS, *infra* note 233, ¶ 15, at xxvii. *See also* PUFENDORF, *infra* note 226, § 2, at 148:

> For even if some multitude not bound to one another by supreme command should entirely agree with one another upon certain formulae for living together, still this would be in vain, if a supreme command had not yet been set up, through whose force the disobedient could be restrained by punishments. For this agreement would have no other force than that which, on the basis of the law of nature, inheres in pacts.

Id.

(2) "[I]nternational custom, as evidence of a general practice accepted as law." BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra*, at 319. International custom is the "main process in which rules of general international law arise, modify and terminate." DEGAN, *infra* note 250, at 179. Several issues arise in recognizing custom as law, including (1) the extent of "general practice" necessary to bind all actors, (2) whether silence should be construed as acquiescence to the customary rule (most scholars

countries for upholding principles of antitrust law, as the Senators charge, ultimately depends upon the nature of obligation in the international system. As will be explained, natural law is the root of all legal obligation, including obligation in the international system, and a thorough examination of the epistemology of natural law reveals important considerations regarding international enforcement of antitrust principles.

A. *The Natural Law Framework*

The big picture is important to conceptualizing the natural law framework of legal obligation. St. Thomas Aquinas construed natural law in the context of four distinguishable categories of law, including

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answer in the affirmative), (3) whether a "persistent objector" to the custom could be immune from it, and (4) whether the practices have been established around the world for sufficient time to constitute a customary rule. *Id.* at 182, 185; *see also supra* notes 142, 168, 175, 179 (indicating the extent of "general practice" of antitrust policies); *supra* notes 142-46 (giving statistics that reveal the recency of recognition of antitrust policy around the world); *infra* note 426 (noting that antitrust law is still a "new thing" for Indonesia, as it is for other sovereigns). Recognizing customary practices as settled legal rules has been described as a "slow, continuous and progressive," and often mysterious (Sir Humphrey Waldock) process. DEGAN, *infra* note 250, at 185.

The utilization of natural law is evident in forming a customary rule. When a particular entity makes a decision on a matter—among the many decisions required to form a customary rule—that entity makes the decision based on many smaller decisions of fairness. In the aggregate, the customary rule eventually formed is the result of a large group of such decisions over a long period of time by many different entities who all scrutinize the facts and issues to arrive at what they believe to be the best solution. Through trial and error, the customary rule is often the most sensible, rational and fair method of handling similar situations, and natural law is utilized throughout the process. *See also* GROTIUS, *infra* note 233, ¶ 27, at xxx ("[N]o one readily joins himself to those whom he believes to think lightly of right laws and good faith."). *But see infra* note 349 (noting that consent does not create natural law).

(3) "[J]udicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra*, at 319. Grotius wrote that *Jus Gentium*, the Law of Nations, "is proved in the same manner as the unwritten Civil Law, by constant usage, and the testimony of those who have made it their study. It is, as Dilo Chrysostom says, the invention of life and of time. And here the best historians are a great help to us." GROTIUS, *infra* note 233, bk. I, ch. I, § XIV, ¶ 2, at 6. Highly qualified representatives from the U.N., WTO, OECD, DOJ, FTC, and the various other competition authorities and antitrust agencies throughout the world could perhaps qualify as a "subsidiary means for the determination of rules of law." *See* BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra*, at 319. Under the natural law framework, this basis for decision can be considered a method for incorporating right reason into the ICJ's analysis. *See infra* discussion accompanying notes 337-52.

(4) Upon consent of the parties, the Court may also decide a case *ex aequo et bono*, which means, "according to what is equitable and good," and a judge given the power to decide *ex aequo et bono* may rely entirely on equitable principles rather than legal rules. BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra*, at 319; BLACK'S LAW DICTIONARY 581 (7th ed. 1999). *See also infra* note 294 (discussing equity and its close realtionship to natural law).

(1) eternal law, (2) divine law, (3) natural law, and (4) human positive law.[214] William Blackstone, Hugo Grotius, Baron Samuel von Pufendorf, John Locke, and Thomas Hobbes all acknowledged similar categories of law,[215] and Jerome Frank wrote, "I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."[216]

The first type of law, eternal law, equates to divine wisdom.[217] Aquinas wrote that because God created the whole world, the whole community is governed by divine reason,[218] and the divine intellect is "the measure of things: since each thing has so far truth in it, as it represents the Divine intellect . . . [which] is true in itself; and its type is truth itself."[219] He further noted, "the very Idea of the government of things in God the Ruler of the universe, has the nature of a law."[220] Moreover, that law "which is the Supreme Reason cannot be understood to be otherwise than unchangeable and eternal;"[221] and thus the title of eternal law.

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214. ST. THOMAS AQUINAS, SUMMA THEOLOGICA Q. 91 arts. 1-5, at 996-1000 (Fathers of the English Dominican Province trans., 1948); *id.* QQ. 93-95, at 1003-17. Aquinas wrote *Summa Theologica* between 1224 and 1274 A.D. All material cited to Aquinas is from volume one, in the first part of the second part (Part I-II) of *Summa Theologica*, and may be found in THE TREATISE ON LAW: SUMMA THEOLOGICA, QUESTIONS 90-97 (1996).

215. Aquinas wrote centuries before all of these authors, but all provided valuable discussions on natural law. *E.g.* 1 WILLIAM BLACKSTONE, COMMENTARIES *42 (distinguishing natural law, the law of revelation and human law); *id.* at *38-40 (discussing divine wisdom and the independent actions of the Creator); *id.* at *40 (describing eternal law and natural law); GROTIUS, *infra* note 233, ¶ 48, at xxxvi, ¶ 37, at xxxiii, & bk. I, ch. I, § XIII, at 6 (distinguishing natural law, human law and positive divine law); *id.* ¶¶ 11-12, at xxvi (ascribing natural law to God, and paralleling the concept of eternal law); PUFENDORF, *supra* note 1, bk. I, ch. VI, § XVIII, at 76 (discussing divine law, human law and natural law, and acknowledging the existence of God); LOCKE, *infra* note 231, ch. I, at 109 (describing the influence of God and natural law); *id.* at 119 (explaining positive civil laws); *id.* ch. II, at 123 (mentioning divine revelation); HOBBES, *infra* note 242, at 189 (discussing divine positive law, and human positive law); *id.* at 149 (describing natural law and the separate existence of God).

216. JEROME FRANK, *Preface to Sixth Printing of* LAW AND THE MODERN MIND, at xx (1963). *See also* M.B. Crowe, *The "Impious Hypothesis": A Paradox in Hugo Grotius?*, *in* GROTIUS, PUFENDORF AND MODERN NATURAL LAW 3 (Knud Haakonssen ed., 1999) ("[C]ontemporary approaches to the natural law are conditioned by and understood in the light of the history of the idea.").

217. AQUINAS, *supra* note 214, Q. 93 art. 1, at 1003.

218. *Id.* Q. 91 art. 1, at 996; *id.* Q. 93 art. 1, at 1003.

219. *Id.* Q. 93 art. 1, at 1004.

220. *Id.* Q. 91 art. 1, at 996. *See also infra* note 258 (citing Blackstone, Pufendorf, Locke, and Austin, who explained that a law always implies a superior lawgiver).

221. AQUINAS, *supra* note 214, Q. 91 art. 1, at 996 (quoting Augustine) (italics omitted).

Divine law, Aquinas explained, is part of eternal law as revealed to men in the Scriptures, and includes the Old Law and the New Law.[222] Blackstone cited the "benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, has been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation," which "doctrines thus delivered" Blackstone called the revealed or divine law of the scriptures.[223]

Natural law, Aquinas' third type of law, also "partake[s] somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends."[224] The relationship between the Creator and a created human being is characterized by the obligation of the inferior being "to take the will of him, on whom he depends, as the rule of his conduct."[225] The Creator's will for a created thing is expressed in

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222. *Id.* Q. 91 art. 5, at 999. *See also* GROTIUS, *infra* note 233, ¶ 48, at xxxvi ("The books written by men inspired by God, or approved by them, I often use as authority, with a distinction between the Old and the New Law."); HOBBES, *infra* note 242, at 189 (describing divine positive law, commandments of God given by those "whom God has authorized to declare them," as one category of positive law). The Ten Commandments as revealed to Moses on Mount Sinai, which is part of the Old Testament in *Exodus* 19-20, have multiple identities. PUFENDORF, *infra* note 226, § 8, at 153:

> This much, indeed, is certain: in so far as they are viewed as laws promulgated by God through the instrumentality of Moses for the Jews, they are in fact civil; because God himself in that commonwealth performed also the function of a civil legislator, and those precepts had there in every way the force of civil laws, punishment, which it was in the hands of the magistracy to exact, being provided against transgressors. But when those laws are considered with reference to their substance, as they necessarily harmonize with the condition of human society, and so obligate all men, even apart from their promulgation by Moses, they are in fact laws of nature.

Id.

223. 1 BLACKSTONE, *supra* note 215, at *41-42.

224. AQUINAS, *supra* note 214, Q. 91 art. 2, at 997. The apostle Paul was perhaps the first to articulate the imprint of divine law on creation, writing in A.D. 57. "[W]hat may be known about God is plain to them, because God has made it plain to them." *Romans* 1:19. Paul further explained. "For since the creation of the world God's invisible qualities—his eternal power and divine nature—have been clearly seen, being understood from what has been made, so that men are without excuse." *Romans* 1:20.

225. 1 BLACKSTONE, *supra* note 215, at *39. Similarly, Locke discussed the "right which the Creator has over His creation," noting that all obligation leads back to God to whom "we are bound to show ourselves obedient to the authority of His will." LOCKE, *infra* note 231, ch. VI, at 183. *See also* PUFENDORF, *supra* note 1, bk. I, ch. I, § III, at 3-4 ("[The Almighty God], by his Right of Creation, hath the Power of circumscribing, within proper Limits, that Liberty of Will with which he indulg'd Mankind, and when it grows refractory, of turning it which way soever he pleaseth, by the Force of some threatned Evil."). We are so bound "because both our being and our work depend on His will, since we have received these from Him, and so we are bound to observe the limits He prescribes; moreover, it is reasonable that we should do what

certain laws of nature. As Pufendorf wrote, "He who is the author of the whole of nature, is the author of nature's laws."[226] Blackstone

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shall please Him who is omniscient and most wise." LOCKE, *infra* note 231, ch. VI, at 183. Locke further noted the power of God and human dependence where "God has created us out of nothing and, if He pleases, will reduce us again to nothing: we are, therefore, subject to Him in perfect justice and by utmost necessity." *Id.* at 187. *See also Isaiah* 64:8 ("We are the clay, you are the potter; we are all the work of your hand."); *Jeremiah* 18:6 ("'O house of Israel, can I not do with you as this potter does?' declares the LORD."); *Isaiah* 45:9 ("Woe to him who quarrels with his Maker, to him who is but a potsherd among the potsherds on the ground. Does the clay say to the potter, 'What are you making?'"); *Romans* 9:20-21 ("Does not the potter have the right to make out of the same lump of clay some pottery for noble purposes and some for common use?").

226. 2 SAMUEL VON PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO [ELEMENTS OF UNIVERSAL JURISPRUDENCE IN TWO BOOKS] § 10, at 154 (James Brown Scott ed., William Abbott Oldfather trans., Oxford 1931) (1660) (all citations to *Elementorum Jurisprudentiae Universalis* are from the indicated section of the "Definition XIII" (definition of a law) chapter of book I, unless otherwise indicated, and page numbers correspond to this particular English translation). *See also* HOBBES, *infra* note 242, at 190 (noting that natural law is "undoubtedly God's law"); 1 BLACKSTONE, *supra* note 215, at *41 (mentioning that the law of nature is dictated by God himself). Pufendorf considered the existence of God to be a critical factor in the validity of natural law (which is described in the text accompanying notes 259-60), and explained:

> Of all the notions which everyone must hold about God, the first is a settled conviction that God exists . . . on whom this universe depends. This has been most plainly demonstrated by philosophers . . . [and claiming] not to understand these arguments is no excuse for atheism. For since this conviction has been a constant possession of the whole human race, anyone who wished to overthrow it would not only have to produce a solid refutation of all the arguments which prove God's existence, but also come forward with more convincing reasons for his own position.

PUFENDORF, *infra* note 259, bk. I, ch. IV, § 2, at 39-40. Grotius stated that natural law principles are valid whether or not they originated with God or nature, but strongly affirmed that God is the author:

> And what we have said would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs. But inasmuch as we are assured of the contrary of this, partly by reason, partly by constant tradition, confirmed by many arguments and by miracles attested by all ages, it follows that God, as the author of our being, to whom we owe ourselves and all that we have, is to be obeyed by us without exception, especially since he has, in many ways, shewn himself both supremely good and supremely powerful.

GROTIUS, *infra* note 233, ¶ 11, at xxvi. Consider also LOCKE, *infra* note 231, ch. I, at 109:

> Since God shows Himself to us as present everywhere and, as it were, forces Himself upon the eyes of men as much in the fixed course of nature now as by the frequent evidence of miracles in time past, I assume there will be no one to deny the existence of God, provided he recognizes either the necessity for some rational account of our life, or that there is a thing that deserves to be called virtue or vice.

aptly described nature's laws, beginning with the inception of the universe. Laws, he explained, signify rules of action, whether they be laws of motion, laws of gravitation, laws of optics, laws of mechanics, laws of nature, or laws of nations.[227] When the Supreme Being formed the universe, he "impressed certain arbitrary laws for its direction" upon matter, from which the subjects can never depart.[228] Blackstone continued:

> The whole progress of plants, from the seed to the root, and from thence to the seed again; - the method of animal nutrition, digestion, secretion, and all other branches of vital economy; - are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.[229]

Pufendorf conceived of the status of man similarly:

> All the Beings which compose this Universe, as they consist of such Principles as were by the most wise Creator temper'd and fitted for the producing of each particular Essence; so they have every one of them their particular *Properties*, arising from the Disposition and Aptitude of their Substance, and exerting themselves in agreeable Actions, according to that Portion of Strength which their Divine Author and Founder hath imprinted on them. These *Properties* we now usually call *natural*, since the Term *Nature* hath been extended so far, as to denote not only the general Mass of Things, but also the Modes and Acts flowing from the internal Force of their Constitution, by which is produc'd that infinite Variety of Motions which turns and manages all the Business of our World. Those Things which exercise their Operations, either without any Sense at all, or with pure down-right Sense, or with such as is assisted by very imperfect Reflection, are guided by the sole Instinct of Nature, and are unable to govern their Actions by any Rules or Modes of their own Invention.[230]

Locke paralleled Blackstone and Pufendorf, noting the senselessness of conceiving of man as without a plan to his existence,

> for it is by His order that the heaven revolves in unbroken rotation, the earth stands fast and the stars shine, and it is He who has set bounds even to the wild sea and prescribed to every kind of plants the manner and periods of germination and growth; it is in obedience to His will

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Id.

227. 1 BLACKSTONE, *supra* note 215, at *38.

228. *Id.* Blackstone noted that, although the rules set by the Creator are said to be arbitrary, which is a necessary ability due to the Creator's nature as "a being of infinite *power*" with the ability to prescribe "whatever laws he pleased to his creature," the Creator is also "a being of infinite *wisdom*," such that he has "laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept." *Id.* at *40. These "things antecedent," Blackstone explained, are "the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions." *Id.*

229. *Id.* at *38-39.

230. PUFENDORF, *supra* note 1, bk. I, ch. I, § II, at 2.

> that all living beings have their own laws of birth and life; and there is nothing so unstable, so uncertain in this whole constitution of things as not to admit of valid and fixed laws of operation appropriate to its nature—it seems just therefore to inquire whether man alone has come into the world altogether exempt from any law applicable to himself, without a plan, rule, or any pattern of his life.[231]

Later Locke answered his own question, writing "it does not seem that man alone is independent of laws while everything else is bound."[232] In fact, Grotius described the truth of the things that belong to natural law as readily apparent, and

> notions, so certain, that no one can deny them, without doing violence to his own nature. For the principles of such Natural Law, if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses; which do not deceive us, if the organs are rightly disposed, and if other things necessary are not wanting.[233]

Natural law constitutes the blueprint for the existence and purpose of, and interaction between, humans.

Obligation springs from natural law because of the free will of mankind. Pufendorf defined obligation as "an operative moral quality by which some one is bound to furnish, allow, or endure something."[234] Locke defined obligation similarly as "the bond of law whereby one is bound to render what is due," further defining the "bond of law" as "the bond of natural law whereby one is bound to discharge a natural obligation, that is, to fulfil the duty which it lies

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231. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE ch. I, at 109 (W. von Leyden ed., Oxford 1954) (1664). Locke originally wrote *Essays on the Law of Nature* in Latin, shortly after 1660, but never published the essays. *Id.* at v.

232. LOCKE, *supra* note 231, ch. I, at 117. Locke wrote:

> [A] manner of acting is prescribed to him that is suitable to his nature; for it does not seem to fit in with the wisdom of the Creator to form an animal that is most perfect and ever active, and to endow it abundantly above all others with mind, intellect, reason, and all the requisites for working, and yet not assign to it any work, or again to make man alone susceptible of law precisely in order that he may submit to none.

Id.

233. HUGO GROTIUS, DE JURE BELLI ET PACIS [ON THE RIGHTS OF WAR AND PEACE] ¶ 39, at xxxiii-xxxiv (William Whewell trans., Cambridge 1853) (1625) (page numbers from *De Jure Belli et Pacis* cited with roman numerals indicate material from the *Prolegomena*). *De Jure Belli et Pacis* is considered "one of the most influential books in the history of the natural law." M.B. Crowe, *The "Impious Hypothesis": A Paradox in Hugo Grotius?*, *in* GROTIUS, PUFENDORF AND MODERN NATURAL LAW 4 (Knud Haakonssen ed., 1999). Moreover, most scholars trace the beginning of thought on international law to this work by Grotius. *See, e.g.*, CHRISTOPHER R. ROSSI, JAMES BROWN SCOTT AND THE ORIGINS OF MODERN INTERNATIONAL LAW, at vii (1998).

234. PUFENDORF, *supra* note 226, bk. I, def. XII, at 71. *See also* PUFENDORF, *supra* note 1, bk. I, ch. VI, § V, at 60.

upon one to perform by reason of one's nature."[235] The obligation to render what is due can only exist if the subject might not render what is due. Humans, as opposed to plants and animals, have such a choice. Marcus Tullius Cicero observed that mankind "was endowed by the supreme god with a grand status at the time of its creation."[236] "[O]f all types and varieties of animate creatures," Cicero noted, man alone "has a share in reason and thought, which all the others lack."[237] The ability to reason extends a certain liberty to humans, as Pufendorf explained:

> But Man, who besides his excellent Form and most accurate Contexture of Body, fitting him for the noblest and the quickest Offices of Life and Motion, is endu'd with a singular Light of Understanding, by the Help of which he is able most exactly to comprehend and to compare Things, to gather the Knowledge of Obscurities from Points already settled, and to judge of the Agreement which Matters bear to each other; and hath also the Liberty of exerting, suspending, or moderating his Actions, without being confin'd to any necessary Course and Method.[238]

Blackstone also described man as "the noblest of all sublunary beings, a creature endowed with both reason and freewill."[239] The liberty to exert, suspend, or moderate action creates moral obligation to act pursuant to the proper acts and ends designated by nature, for man

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235. LOCKE, *supra* note 231, ch. VI, at 181.

236. 1 MARCUS TULLIUS CICERO, ON THE COMMONWEALTH AND ON THE LAWS 113 (James E.G. Zetzel ed., Cambridge 1999) (54-51 B.C.). Regarding mankind's distinguished status, see *Genesis* 1:26-30, which recounts the creation of man in God's own image, God giving him the power to rule over the fish of the sea, the birds of the air, the livestock over all the earth and all the creatures that move along the ground, and further giving man every seed-bearing plant on the face of the earth for food.

237. 1 CICERO, *supra* note 236, at 113 (observing also that man is "provident, perceptive, versatile, sharp, capable of memory, and filled with reason and judgment"). *See also* GROTIUS, *supra* note 233, ¶ 6, at xxiv (describing man as an "animal of an excellent kind," differing from other animals by a desire for society and a life spent tranquilly); *id.* ¶ 9, at xxv (describing man as superior to other animals in social impulses, judgment and power of estimating advantages and disadvantages, which leads to the ability to understand future good and ill and what is congruous to human nature to follow); LOCKE, *supra* note 231, ch. I, at 117 (reflecting on the work of the Creator, endowing man "abundantly above all others with mind, intellect, reason, and all the requisites for working").

238. PUFENDORF, *supra* note 1, bk. I, ch. I, § II, at 2. *See also id.* bk. I, ch. VI, § VI, at 61.

> As to Man's being capable of receiving *Obligation*, one Reason how he comes to be so is, because he is endu'd with Will, which can turn to either Side, and so guide itself by a moral Rule; unlike those other Beings which by some intrinsical Constraint are determin'd to one and the same Way of acting.

Id. Although man is not confined to any necessary course or method, "Almighty GOD . . . would not that Men should pass their Life like Beasts, without Culture and without Rule; but that they and their Actions should be moderated by settled Maxims and Principles." *Id.* bk. I, ch. I , § III, at 3.

239. 1 BLACKSTONE, *supra* note 215, at *39.

cannot rightly do otherwise,[240] as Aquinas observed quoting a verse from *Romans*:

> Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.[241]

Thus, Hobbes wrote that natural laws "have been laws from all eternity, and are called not only *natural*, but also *moral* laws."[242] The attributes of natural law are moral because "the *Manners* and the *Actions* of Men are judg'd and temper'd with relation to them; and do hence assume a Face and Habit different from the horrid Stupidity of the dumb Creation."[243] Moral fundamentals are often referred to under a natural law framework as "principles," which are the "fundamental laws of nature."[244] Natural law requirements perpetually obligate humans "in the sense that there neither is, nor can be, a time when the law of nature orders men, or any man, to do something and he is not obliged to show himself obedient."[245] In summary, according to Grotius, natural law is the "Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational and social nature of man has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature."[246]

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240. PUFENDORF, *supra* note 1, bk. I, ch. VI, § V, at 60.

241. *Romans* 2:14-15, *quoted in* AQUINAS, *supra* note 214, Q. 91 art. 2, at 996-97. *See also* LOCKE, *supra* note 231, ch. I, at 117 ("'[N]o one who commits a wicked action is acquitted in his own judgement' [and thus] the sentence which everyone passes on himself testifies that there is a law of nature.").

242. THOMAS HOBBES, LEVIATHAN 189 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651).

243. PUFENDORF, *supra* note 1, bk. I, ch. I, § II, at 2.

244. PUFENDORF, *supra* note 226, § 16, at 159. Ronald Dworkin defined a principle as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." DWORKIN, *infra* note 380, at 22. However, observing natural law is required for a just and peaceful society, which ultimately does produce economic, political, and social situations that are desireable and in accord with the human purpose, even if one must forego immediate gratification. *See* discussion accompanying notes 317-27. Yet, Dworkin correctly pointed out that the rationale for observing natural law is for natural law's sake itself; the benefits follow.

245. LOCKE, *supra* note 231, ch. VII, at 193. *See also supra* note 224 (quoting the apostle Paul).

246. GROTIUS, *supra* note 233, bk. I, ch. I, § X, ¶ 1, at 4, (notations by the translator omitted). Grotius related that "he has prohibited the perverse aberrations of our affections which draw us this way and that, contrary to our own interest and the good of others; putting a bridle upon our more vehement passions, controlling and restraining them within due limits." *Id.* ¶ 13, at xxvi. Consider also C.S. Lewis:

Human positive law accounts for Aquinas' fourth type of law, "afterwards added at the Pleasure of Men, as they found it expedient to bring them in, for the polishing and the methodizing of common Life."[247] Hobbes explained positive laws as "those which have not been from eternity; but have been made laws by the will of those that have had the sovereign power over others; and are either written, or made known to men, by some other argument of the will of their legislator."[248] Humans are naturally social and political beings that live in community, and human law "should be framed, not for any private benefit, but for the common good of all the citizens,"[249] said Aquinas, such that they can exist in a common social life together.[250] As Blackstone explained, if man lived unconnected to other individuals, human law would be unnecessary.[251] The dictates of natural law could be enough to hold society together if everybody followed them by the strength of their character, but nobody has reason to imagine that "a bare Reverence of the Law of Nature . . . could ever have been able to secure the whole Body of Mankind."[252] The end of civil laws, Pufendorf explained, "is to have men held to the performance of something by a tighter bond than natural obligation, to wit, by the addition of a penalty to be inflicted upon us in a human court of law by men having, as it were, authority over us," which authority has the power to "reduce [the recalcitrant] to order."[253] As Aquinas mentioned, man has a "natural aptitude for virtue; but the

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> These, then, are the two points I wanted to make. First, that human beings, all over the earth, have this curious idea that they ought to behave in a certain way, and cannot really get rid of it. Secondly, that they do not in fact behave in that way. They know the Law of Nature; they break it. These two facts are the foundation of all clear thinking about ourselves and the universe we live in.

C.S. LEWIS, MERE CHRISTIANITY 21 (Simon & Schuster 1996) (1943). *See also infra* note 271 (discussing the effects of the fall of man).

247. PUFENDORF, *supra* note 1, bk. I, ch. I, § III, at 3.

248. HOBBES, *supra* note 242, at 189.

249. AQUINAS, *supra* note 214, Q. 96 art. 1, at 1017 (quoting Isidore).

250. *See* V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 23 (1997) (discussing Aquinas).

251. 1 BLACKSTONE, *supra* note 215, at *43.

252. PUFENDORF, *supra* note 1, bk. VII, ch. I, § VIII, at 632. *See also* AQUINAS, *supra* note 214, Q. 95 art. 1, at 1013.

> And as to those young people who are inclined to acts of virtue, by their good natural disposition, or by custom, or rather by the gift of God, paternal training suffices, which is by admonitions. But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous.

Id.

253. PUFENDORF, *supra* note 226, § 2, at 148.

perfection of virtue must be aquired by man by means of some kind of training."[254] Human law also attempts to delineate proper responses to specific situations that natural law would require, as Aquinas concluded, "it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters."[255] These particular determinations, he continued, are called human laws.[256] The foregoing four categories of law provide the necessary framework for conceptualizing the existence, characteristics, and operation of natural law, and for analyzing the domain in which legal obligation operates.

B. *Characteristics of the Natural Law Framework*

The importance of accurately assessing the attributes of natural law cannot be underestimated, and an error in theory leads to imprecise analysis. The characteristics of natural law will be discussed, including the classification of natural law as law, the principles that natural law prescribes, the uniformity of natural law over time compared with the variability of human law, the applicability of natural law to all humans, the critical relationship between natural law and human law for the promotion of human happiness, and the process of determining natural law by right reason.

Natural law may properly be considered law.[257] Blackstone, Pufendorf, Locke, and Austin explored the elements of a "law," which

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254. AQUINAS, *supra* note 214, Q. 95 art. 1, at 1013.

255. *Id.* Q. 91 art. 3, at 997.

256. *Id.*

257. Ultimately, natural law provides instructions that can be considered a moral standard of right and wrong, a law, a right, and an obligation, because all are derived from the same standard blueprint for humans. Natural law sometimes dictates what may be done, sometimes what should be done, sometimes what must be done, and sometimes what must not be done. *E.g.*, PUFENDORF, *supra* note 1, bk. III, ch. V, § I, at 259.

> It now follows in course, that we enquire how such *Obligations* as are not *born* with Men, should by virtue of some Act of theirs be laid upon them, by which means there arises, at the same time, in other Persons a *Right* which before they wanted. For these two moral Qualities have such a mutual Relation and Dependence, that whenever there is produced an *Obligation* in one Man, there immediately springs up a correspondent *Right* in another; for 'tis impossible to apprehend that I am *bound* to any Performance, unless there be some Person in the World, who can either fairly require it, or at least fairly receive it of me. Tho' the Remark will not hold *vice versa*, that where-ever there is a *Right* in one, there must presently be an *Obligation* in another.

Id. Extended discussions of the fine distinctions between rights and laws, and between positive duties and negative prohibitions, are beyond the scope of this Note.

requires a superior lawgiver and enforcement.[258] According to Pufendorf, natural law receives its force from "presuppositions that God exists and rules all things by His providence, and that He has enjoined the human race to observe as laws those dictates of reason which He has Himself promulgated."[259] Otherwise, he continued, "though they might be observed for their utility, like the prescriptions doctors give to regulate health, they would not be laws."[260] Locke noted that "all the requisites of a law are found in natural law," including the decree of a superior will, the laying down of what is and what is not to be done, and the binding of men, containing "in itself all that is requisite to create an obligation."[261] The enforcement of natural law occurs in at least three ways, all of which negatively reinforce any divergence from natural law: (1) defiance of the human blueprint frustrates the human purpose and causes certain evils in itself,[262] (2) the conscience burdens divergences,[263] and (3) the divine judgment seat provides ultimate enforcement.[264] Although natural law is not always promulgated by written word or decree like human law, the knowledge of it runs even deeper,[265] and Pufendorf

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258. *E.g.*, 1 BLACKSTONE, *supra* note 215, at *43 ("[A] law always supposes some superior who is to make it."); PUFENDORF, *infra* note 259, § 10, at 36 ("Laws necessarily imply a superior, and such a superior as actually has governance of another."); PUFENDORF, *supra* note 1, bk. I, ch. VI, § IX, at 63 ("*Obligations* are laid on human Minds properly by a *Superior*, that is, by such an One as not only hath sufficient Strength to denounce some Evil against us upon Non-compliance, but hath likewise just Reason to require the retrenching of our Free-wills by his own Pleasure."); LOCKE, *supra* note 231, ch. V, at 173 ("[T]here is no law without a law-maker, and law is to no purpose without punishment."); AUSTIN, *infra* note 296, at 10, 29-30 (stating that commands, which are laws "properly so called," proceed from superiors to oblige inferiors).

259. SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO [ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW IN TWO BOOKS] § 10, at 36 (James Tully ed., Michael Silverthorne trans., Cambridge 1991) (1673) (all citations to *De Officio Hominis et Civis Juxta Legem Naturalem* are from the indicated section of chapter III ("On Natural Law") in book I, unless otherwise indicated, and page numbers correspond to this particular translation). *See also supra* notes 225, 226 (discussing God).

260. PUFENDORF, *supra* note 259, § 10, at 36.

261. LOCKE, *supra* note 231, ch. I, at 111, 113. *See also infra* text accompanying note 315 (quoting Hobbes).

262. *E.g.*, *infra* text accompanying notes 286-87 (quoting Blackstone); *infra* text accompanying notes 317-21.

263. *Supra* note 241 and accompanying text.

264. *Infra* notes 358-60 and accompanying text.

265. People have an innate sense of right and wrong, and can sense when natural law is or is not followed. C.S. Lewis wrote that when two people quarrel, they say things like, "How'd you like it if anyone did the same to you?", or "Come on, you promised." LEWIS, *supra* note 243, at 17. The speaker is appealing to "some kind of standard of behaviour which he expects the other man to know about." *Id.* The other person does not say "[t]o hell with your standard," but instead "tries to make out that what he has been doing does not really go against the standard, or that if it does there is some special excuse." *Id.* Quarrelling, Lewis concluded, is trying to show that the

commented, "it is sufficient that the Will of the Legislator be any way made known to the Subject, tho' it should only be by the internal Suggestion of Natural Light."[266]

Natural law has been around since creation and can be charted through history. In the first century A.D., when asked by a Pharisee what constitutes the greatest commandment of the Mosaic law, Jesus replied, "'Love the Lord your God with all your heart and with all your soul and with all your mind.' This is the first and greatest commandment. And the second is like it: 'Love your neighbor as

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other man is in the wrong, and "there would be no sense in trying to do that unless you and he had some sort of agreement as to what Right and Wrong are." *Id.* at 18 ("[T]here would be no sense in saying that a footballer had committed a foul unless there was some agreement about the rules of football."). *See also* LOCKE, *supra* note 231, ch. I, at 115.

> [A]lthough even the more rational of men do not absolutely agree among themselves as to what the law of nature is and what its true and known precepts are, it does not follow from this that there is no law of nature at all; on the contrary it follows rather that there *is* such a law, when people contend about it so fiercely. For just as in a commonwealth it is wrong to conclude that there are no laws because various interpretations of laws are to be met with among jurisprudents, so likewise in morality it is improperly inferred that there is no law of nature, because in one place it is pronounced to be this, in another something different. This fact rather establishes the existence of the law more firmly, seeing that all the disputants maintain the same idea about the law itself (for they all know that there is something evil and something good by nature), and they differ only in their interpretations of it.

Id. Grotius and Euripides observed that nearly everybody has the sense of right and wrong:

> I speak not things hard to be understood,
> But such as, founded on the rules of good
> And just, are known alike to learn'd and rude.

GROTIUS, *supra* note 233, ¶ 39, at xxxiv (quoting Euripides). Locke observed that all men acknowledge some principle of good and evil "since there is no nation so savage and so far removed from any humane feelings that it does not have some notion of virtue and vice, some consciousness of praise and blame." LOCKE, *supra* note 231, ch. II, at 123. "Even those among mortals who are corrupted by vice recognize it and while shunning it approve it." *Id.* ch. I, at 109. Seneca reflected:

> Ask a common Rogue . . . whether he had not rather obtain by honest Means, what he now gets by Theft and Villany? He who makes it his Gain to assault and pillage all he meets, would be more willing to find the Money by Chance, than to take it by Violence. There is no one who would not be better pleas'd to enjoy the Fruits of his Wickedness without the Practice of it.

PUFENDORF, *supra* note 1, bk. III, ch. I, § I, at 214 (quoting Seneca) (italics omitted). Therefore, "anyone can understand [the law of nature] who is willing to apply diligent study and to direct his mind to the knowledge of it." LOCKE, *supra* note 231, ch. VI, at 187. Equity would be useless as a judicial tool if right and wrong could not be determined in specific situations, but that is not the case. *See infra* note 294 (discussing the use of equity).

266. PUFENDORF, *supra* note 1, bk. I, ch. VI, § IV, at 60.

yourself.' All the Law and the Prophets hang on these two commandments."[267] According to Thomas Aquinas, writing in the 13th century A.D., the first and most important command of natural law is that "good is to be done and pursued, and evil is to be avoided," upon which all other commands of natural law are based.[268] Thomas Hobbes, in the 17th century A.D., delineated three laws of nature: (1) to seek peace and to follow it (and if peace cannot be obtained to use the advantages of war),[269] (2) "to lay down [the initial] right to all things; and be contented with so much liberty against other men, as he would allow other men against himself," which derives directly from the Biblical requirement to "[d]o to others as you would have them do to you,"[270] and (3) "that men perform their covenants made: without which, covenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war."[271] Elsewhere, Hobbes referred to moral laws, synonymous with

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267. *Matthew* 22:37-40. *See also Mark* 12:28-34.

268. AQUINAS, *supra* note 214, Q. 94 art. 2, at 1009.

269. HOBBES, *supra* note 242, at 87.

270. *Id.*; *see also Luke* 6:31. As Hobbes pointed out, the concept originated in the words of Jesus. HOBBES, *supra* note 242, at 87; *see also Matthew* 7:12 ("So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets."). By the initial "right to all things," Hobbes was referring to what he termed the "right of nature," which is the liberty "each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto." HOBBES, *supra* note 242, at 86. This description appears to be similar to the interest of "self-preservation" discussed by Locke. Self-preservation, Locke explained, is *not* the fundamental law of nature:

> For if the source and origin of all this law is the care and preservation of oneself, virtue would seem to be not so much man's duty as his convenience, nor will anything be good except what is useful to him; and the observance of this law would be not so much our duty and obligation, to which we are bound by nature, as a privilege and an advantage, to which we are led by expediency.

LOCKE, *supra* note 231, ch. VI, at 181. *See also* PUFENDORF, *supra* note 1, bk. III, ch. V, § III (commenting on the proper understanding of the right to all things); *id.* bk. II, ch. II, § III (refining Hobbes' position). In the text above, Hobbes was cognizant of problems that would arise if the initial right of nature were a fundamental law of nature, because he required that right to be laid down as part of his second law requiring the doing to others of what you would have them do to you. *See also infra* text accompanying note 321 (stating the rationale of doing to others as you would have them do to you).

271. HOBBES, *supra* note 242, at 95. As reflected in the quotation above, Hobbes envisioned the state of nature to be a state of war, which assessment is limited in value because it fails to take account of the fall of man. Hobbes described the state of war as a known disposition that every man is inclined to battle with, invade and destroy one another, and a state characterized by a perpetual fear and danger of violent death. *Id.* at 84. Yet such dispositions, and even death itself, were not known to man before his fall. Aquinas described the inception of a "law of sin" beginning with Adam and Eve in the Garden of Eden, characterized by man turning his back on God and deviating from the path of reason. *See* AQUINAS, *supra* note 214, Q. 91 art. 6, at 1000. *See also infra* note 345 (quoting from Blackstone's discussion of the fall of man in *Genesis*); *Genesis* 3

natural laws, as "consisting in the moral virtues as justice, equity, and all habits of the mind that conduce to peace, and charity."[272] Locke wrote in the 17th century that when one's "own Preservation comes not in competition," he ought, "as much as he can, *to preserve the rest of Mankind*, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another."[273] Pufendorf, also in the 17th century, named the fundamental natural law as, "every man ought to do as much as he can to cultivate and preserve sociality,"[274] noting elsewhere that "men have been made by nature to cultivate social relations with one another, and that no one at all ought to bring upon a second person that which can furnish a cause for discord and war,"[275] and:

> It is but a poor thing not to have hurt another, or not to have robb'd him of his just Esteem: This negative Kindness to a Man will barely

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(recounting how Adam and Eve disobeyed God by eating from the tree in the middle of the Garden of Eden); *Genesis* 3:22 (explaining the moment at which God made death a part of the human condition along with the other curses imposed; without the fall of man Adam and Eve would have lived forever); *Genesis* 4:1-12 (telling of the first murder after the fall of man). Sin can be defined as that which contradicts God or his purposes for creation, which directly relates to the discussion of natural law and the springing up of obligation. *See supra* notes 224-46 and accompanying text. Subsequent to the fall, the apostle Paul observed "another law at work in the members of my body, waging war against the law of my mind and making me a prisoner of the law of sin at work within my members." *Romans* 7:23, *quoted in* AQUINAS, *supra* note 214, Q. 91 art. 6, at 1000. The law of sin that wages war against the law of God and right reason creates the appearance of war that Hobbes observed (as did the apostle Paul, Aquinas, and others). *See also infra* notes 341-45 and accompanying text (listing some common indications of such a war). However, the critical point for assessing the natural state of man should not be subsequent to creation as when the law of sin arose, but rather at the time of creation. At the time of creation, God fashioned man in his own image, and "saw all that he had made, and it was very good." *Genesis* 1:26-27; *Genesis* 1:31. Thus, by the definition of sin, man lacked sin at the time of his creation, and the indications of a state of war could not have existed before the fall. *See, e.g.*, PUFENDORF, *supra* note 1, bk. II, ch. II, §§ VII-VIII (criticizing Hobbes, noting that the first men lived in a state of pure friendship rather than hostility). At bottom, it would be senseless to try to comply with a standard of peace if peace would defy the purpose for which man was created, and it would not be good or profitable for man to conform to purposes not his own. Hobbes correctly observed a state of war, but inaccurately described it as the natural state of man.

272. HOBBES, *supra* note 242, at 189.

273. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 311 (Peter Laslett ed., Cambridge 1960) (1690).

274. PUFENDORF, *supra* note 259, § 9, at 35.

275. PUFENDORF, *supra* note 226, bk. I, def. XII, § 15, at 86. Pufendorf also wrote that "the intent and purpose of the law of nature shall not come to naught, and this intent and purpose is that an upright and peaceful society be preserved among men." *Id.* bk. I, def. XIII, § 6, at 151. Elsewhere, Pufendorf isolated the absolute duty antecedent to human institutions, "[T]hat no Man hurt another; and that in case of any hurt or damage done by him, he fail not to make Reparation." PUFENDORF, *supra* note 1, bk. III, ch. I, § I, at 213.

> hinder him from having any fair Reason to hate, but can give him little Encouragement to love us. To knit Mens Minds more strongly together, it is necessary to add to this Forbearance of mutual Evil, the real Practice of mutual Good. The Debt which I owe upon account of my being a sociable Creature I have not yet discharg'd, whilst I have not estrang'd a Man's Affection from me by any mischievous or distastful Deed; but I ought farther to promote his actual Profit and Benefit, that I may shew it is a Pleasure to me to see others Partners of my Nature, and Sharers with me in the Goods which we possess. The near Relation which Men naturally bear to one another, is lost, unless it be cherish'd and kept up by a constant Commerce of kind Offices betwixt them.[276]

Grotius also wrote in the 17th century and summarized natural law as including the "rule of abstaining from that which belongs to other persons" and "the fulfilling of promises."[277] Grotius encapsulated natural law as the "Mother of Right."[278] In the 18th century, William Blackstone emphasized the principles "that we should live honestly, should hurt nobody, and should render to every one his due," to which three principles Justinian "has reduced the whole doctrine of law."[279] Blackstone described the general principle propelling the law of nations, "that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests."[280] Three concepts of natural law are explicit within the Preamble to the U.S. Constitution, written in the 18th century by the Founding Fathers of the United States, including justice, peace, and liberty.[281] Justice and peace are similar to the primary natural law principles of seeking the common good, avoiding harm to others, and rendering to each his own, as Jerome Frank highlighted in the 20th century.[282] The foregoing principles of natural law are indisputably broad in nature, but they have been the pillars of law throughout time up until the present day.

Principles of natural law remain consistent over time, and the natural law that applied to sovereigns years ago still applies in today's international legal order. Eternal law, divine law, and natural law do not contradict and are very much in line with each

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276. PUFENDORF, *supra* note 1, bk. III, ch. III, § I, at 233.
277. GROTIUS, *supra* note 233, ¶ 8, at xxv.
278. *Id.* ¶ 16, at xxvii.
279. 1 BLACKSTONE, *supra* note 215, at *40.
280. 4 BLACKSTONE, *supra* note 215, at *66.
281. U.S. CONST. pmbl.

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Id.

282. FRANK, *supra* note 216, at xx (referring to Aquinas).

other by necessity. Pufendorf explained: "[S]ince God is quite as much the author of natural laws as of his own positive laws, and it were impious to think that he ordains things contradictory to one another, it is assuredly apparent that the divine positive laws cannot at all be opposed to natural laws."[283] Moreover, Grotius explained that the "will of God . . . is never at variance with the true Law of Nature."[284] Not only are eternal law, divine law, and natural law internally consistent, but they are consistent over time as well. The fact that nature's Creator does not change lends support to the notion that he does not need to alter the laws of nature to maintain consistency.[285] Furthermore, according to Blackstone, the rules of action imposed by the Creator at the beginning of time upon motion, gravitation, optics, mechanics, nature, and nations can never be departed from or that matter would cease to be as created.[286] He explained that

> When a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.[287]

Thus, as Blackstone observed, a thing must continue to follow the laws of its creation, and the world was only created once.

It is the broad character of natural law principles that enables natural law to be perpetually binding yet never changing, and the concept becomes more lucid when making an analogy to the U.S. Constitution. There exists a continuing "interpretive mission"[288] in trying to ascertain the proper application of the Constitution to the facts of particular situations, which prompted Justice Stevens of the Supreme Court to comment that "[t]he Constitution of the United States is a mysterious document."[289] The Fourteenth Amendment, for example, prohibits states from infringing on the privileges or immunities of citizens, "but contains no catalogue of privileges or

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283. PUFENDORF, *supra* note 226, § 6, at 150.

284. GROTIUS, *supra* note 233, ¶ 48, at xxxvi.

285. *See, e.g., Psalm* 100:5 ("For the Lord is good and his love endures forever; his faithfulness continues through all generations."); *Psalm* 102:25-27 ("In the beginning you laid the foundations of the earth, and the heavens are the work of your hands. They will perish, but you remain . . . you remain the same, and your years will never end."), *quoted in Hebrews* 1:11-12; *Mark* 13:31 ("'Heaven and earth will pass away,' said Jesus, 'but my words will never pass away.'"); *Hebrews* 13:8 (characterizing God as the same "yesterday and today and forever"). *See also supra* text accompanying note 221 (citing Aquinas and Augustine on the unchangeable nature of God).

286. *Supra* notes 227-29 and accompanying text.

287. 1 BLACKSTONE, *supra* note 215, at *38.

288. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 64 (1991).

289. *Id.* at 1 (quoting John Paul Stevens).

immunities."[290] Many of the Framers of the Constitution "supposed that the meaning, at least of the more general terms being deployed, was inherently variable . . . [and] that the examples likely to occur to them at the time of the creation would not be forever fixed into the meaning of the text itself."[291] The Framers did not intend to fashion a temporary document for their own time, but rather to create a document that could apply to posterity,[292] and the document contains "very little in the way of specific political solutions."[293] Instead, one author observed that the Constitution is an expression of certain general principles that reflect "the deepest purpose of the Constitution."[294] Thus, except for such things as specifically

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290. *Id.* at 6-7. *See also* U.S. CONST. amend. XIV.

291. TRIBE & DORF, *supra* note 288, at 9-10.

292. Edwin Meese, III, *Interpreting the Constitution, in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 14 (Jack N. Rakove ed., 1990).

293. *Id.* at 16. *See also* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (noting that the "Constitution is not intended to embody a particular economic theory").

294. Meese, *supra* note 292, at 16. Perhaps the deepest purpose of antitrust law can partially explain a criticism by one author of the handling of antitrust cases by the U.S. Supreme Court. Presumably, since the United States was the first country along with the United Kingdom to enact antitrust legislation in 1890, it should have the most practice if it were going to establish rigid rules. *See supra* note 142. However, Professor Ross commented, "In cases involving horizontal restraints, the Court frequently makes contradictory statements, overrules precedent without acknowledging that it is doing so, and describes its mode of analysis in a way that appears to be at variance with what it is really doing." ROSS, *supra* note 43, at 118. Perhaps the U.S. Supreme Court was attempting to follow the general principles behind antitrust and apply the statute fairly to the facts at hand. Equity, not defined restrictively, is indivisible from the process of making law or deciding cases.

Judge Posner characterized the discussion thus implicated in *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990), where he contrasted the "severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures," with the natural lawyer's view that "the practice of interpretation and the general terms of the Constitution (such as 'equal protection of the laws') authorize judges to enrich positive law with the moral values and practical concerns of civilized society." Posner noted the drawback of the positivist slant, which "buys political neutrality and a type of objectivity at the price of substantive injustice," and the drawback of the natural law slant, which "buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness." *Id.* Posner commented: "It is no wonder that our legal system oscillates between the approaches." *Id.*

Equity is defined as "fairness; impartiality; evenhanded dealing," or alternatively "[t]he body of principles constituting what is fair and right; natural law." BLACK'S LAW DICTIONARY 560 (7th ed. 1999) (noting the influence of natural law, or equity, on the Declaration of Independence); *see also* notes 327, 281 and accompanying text (regarding the birth of the United States from natural law principles). Grotius provided another definition of equity as "the correction of that, wherein the law (by reason of its universality) is deficient." 1 BLACKSTONE, *supra* note 215, at *61 (quoting Grotius). *See also id.* at *62 ("[T]here can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law."). Pufendorf explained a typical situation calling for application of equity,

enumerated eligibility requirements for the president, for example, the Constitution is characterized by a high level of abstraction, and it avoids rigidly defined rules. Consequently, the government has been able to sustain its influence as a valid and respected institution for over 200 years, despite monumental changes associated with industrialization, globalization, the economy, technology, and even a civil war—without having to reinvent the Constitution at every turn. By necessity, then, a body of law applicable to the entire human race for all time, that must account for countless fact scenarios, cultures, and the customs of every nation, must operate at a high level of

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> For it happens frequently that an absurdity follows from applying to special cases the letter of the law, because the legislators have not been able to see and make exception for these special cases, owing to the variety and number of them. But, since no one is presumed to have established absurdities by a law, it is thoroughly understood that the legislator had not intended to include such cases, and so, the judge who restricts through equity the universality of the letter, is not setting himself in opposition to the legislator, but rather is prudently gathering his intent by inference from the analogy and sense of other laws.

PUFENDORF, *supra* note 226, § 22, at 164.

A balanced natural law approach is more fitting than a positivistic approach when human law cannot be specifically defined to fit every situation *ex ante*, which is always, and uncertainty can be diminished at least as far as the facts known before trial permit. Unlike human law, natural law is designed to fit every situation before it happens, so it is always useful to a court. Because the judge applying equity gathers the intent of the legislature (unless the legislature has contradicted natural law), uncertainty could be diminished or eliminated by researching the intent of the legislature if a statute is at issue. If a statute is not at issue, Blackstone's scheme of applying equity entails following precedent first, and only applying equity when it conflicts with right reason and natural law, which maintains immediate certainty of outcome in most cases. *Infra* text accompanying note 300. In the cases requiring equity (e.g., Judge Cardozo's opinion in *Graf v. Hope Building Corp.*, 171 N.E. 884, 888 (N.Y. 1930): "Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path."), one might still predict an outcome with some degree of certainty by analyzing the equities, which requires a refined sense of morality rather than only an aptitude for synthesizing precedents, and an objective perspective rather than the mental positioning that results from being a hired advocate for a particular client. *E.g., infra* note 342 (quoting *Hebrews* 5:14). Such certainty could be had even if equity were used more frequently than Blackstone suggested. However, the problem with too much equity is that a judge becomes too much like a legislator, which in turn begins to offend the purposes of separation of powers. *See infra* note 351 and accompanying text; *see also* 1 BLACKSTONE, *supra* note 215, at *62 ("And law, without equity, tho' hard and disagreeable, is much more desirable for the common good, than equity without law: which would make every judge a legislator."). The ultimate purpose of separating powers is to ensure equity at the systemic level by limiting power imbalances that ultimately compromise fairness. In view of the big picture, limited judicial use of equity actually permits the greatest distribution of equity. Thus, Blackstone's view of the role of equity not only promotes the most equitable system of government and substantive justice in each case, but uncertainty need not be greater than the facts require. *E.g., infra* note 310 (citing Frank regarding the potential for factual error).

abstraction *a fortiori*. Natural law principles describe the "deepest purposes" of human beings according to the human blueprint, just as the Constitution describes the "deepest purposes" of our government. General principles employed to determine right and wrong are not impaired by changing fact scenarios, cultural variances, or technological innovations because all human activity can be encompassed within the ambit of natural law.

Although natural law does not change, human law changes according to the needs of society in two ways. Aquinas delineated two just causes for change in human law, where the law may change (1) due to a change "on the part of reason," or (2) contemporaneous with a change "on the part of man whose acts are regulated by law."[295] First, a change on the part of reason may be necessary because, although a conflict between eternal law, divine law, and natural law is impossible, a conflict between human law and natural law is a more apparent danger. As Austin noted, human law is the creature of imperfect human sovereigns, and not of the Divine monarch.[296] As a result, Aquinas related that

> it seems natural to human reason to advance gradually from the imperfect to the perfect. . . . [F]or those who first endeavored to discover something useful for the human community, not being able by themselves to take everything into consideration, set up certain institutions which were deficient in many ways; and these were changed by subsequent lawgivers who made institutions that might prove less frequently deficient in respect of the common weal.[297]

Progressing from the imperfect to the perfect might involve rectifying old mistakes, because a human law that "deflects from the law of nature" is a "perversion of law"[298] and is considered unjust to the degree it contradicts natural law.[299] Blackstone explained that common law judges are bound by precedent, having a sworn duty not to pronounce new law unless a former decision is "most evidently contrary to reason; much more if it be clearly contrary to the divine law."[300] Anything that is not reason is not law, he continued, and a "manifestly absurd or unjust" decision is not considered "*bad law*," but "*not law*"—that is, "that it is not the established custom of the

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295. AQUINAS, *supra* note 214, Q. 97 art. 1, at 1022.

296. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 10-11, 141, 142 (Wilfrid E. Rumble, ed., 1995).

297. AQUINAS, *supra* note 214, Q. 97 art. 1, at 1022.

298. *Id.* Q. 95 art. 2, at 1014.

299. *See id.* Q. 96 art. 4, at 1019-20 (explaining that "laws may be unjust through being opposed to the divine good"); *see also id.* Q. 95 art. 2, at 1014 (mentioning that "the force of a law depends on the extent of its justice"); DEGAN, *supra* note 250, at 24 (discussing the same concept by quoting Aquinas).

300. 1 BLACKSTONE, *supra* note 215, at *69.

realm, as has been erroneously determined."[301] Thus, a judge might diverge from precedent to rectify the law, where he does not "pretend to make a new law, but to vindicate the old one from misrepresentation."[302] In fact, Blackstone explained, law is the "perfection of reason, that it always intends to conform thereto,"[303] which implies a continuing process of checking positive law against natural law, the larger standard to which human law should conform in all cases.

The second way human law changes is "on account of the changed condition of man, to whom different things are expedient according to the difference of his condition."[304] Natural law, Grotius wrote, "deals not only with things made by nature herself, but with things produced by the act of man."[305] For example, "property, as it now exists, is the result of human will: but being once introduced, Natural Law itself shews that it is unlawful for me to take what is yours against your will."[306] Thus, as Grotius astutely observed, there is a "seeming of change" in acts directed by natural law, but "in fact it is not Natural Law which is changed, but the thing about which that Law is concerned."[307] The application of natural law in the form of new human laws enacted for evolving circumstances should not be

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301. *Id.* at *70, *71. *See also* AQUINAS, *supra* note 214, Q. 96 art. 4, at 1020 (quoting Augustine, "a law that is not just, seems to be no law at all" (italics omitted)). Austin criticized Blackstone's position, stating that "to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense." AUSTIN, *supra* note 296, at 157-58. Blackstone would not have denied that some hypothetical unjust human law could result in an unjust temporal outcome for a particular citizen, because he realized that vindicating misrepresentations in the law might mean that cases prior to such vindication had been adjudged according to the error of law. *See infra* text accompanying note 302; *see also* GROTIUS, *supra* note 233, ¶ 27, at xxx ("Nor ought any persons to be moved by the occasional success of unjust designs."); FRANK, *infra* note 310. Blackstone certainly meant that unjust human laws were not binding, but he did not mean that they could not result in undue punishment. *See also infra* notes 322-24 and accompanying text. In one sense, human law is typically promulgated by superiors to oblige inferiors according to the definition of "law," but a superior forfeits his authority by promulgating an unjust human law. *See supra* note 258; *see also infra* notes 322, 378. In another sense, human law is only a particular contextual application of natural law, meaning that human law is not really law when it conflicts with divine law or natural law even though it can cause damage to particular citizens. *See supra* text accompanying notes 253, 255-56. Dworkin encapsulated Austin's criticism by noting that "all specimens captured—even Blackstone and Joseph Beale—have had to be released after careful reading of their texts." DWORKIN, *infra* note 380, at 16. An extended discussion of semantic detail is beyond the scope of this Note.

302. 1 BLACKSTONE, *supra* note 215, at *70.

303. *Id.*

304. *Id.*

305. GROTIUS, *supra* note 233, bk. I, ch. I, § X, ¶ 4, at 4.

306. *Id.*

307. *Id.* bk. I, ch. I, § X, ¶ 6, at 5. *See also id.* ¶ 30, at xxxi (explaining natural law as "being always the same").

confused as natural law itself, although natural law still guides conduct under new situations.[308]

Some writers have not separated natural law from human law explicitly enough, creating a confused picture of natural law as changing over time. Vitoria, or James Brown Scott in his analysis of Vitoria, misapprehended natural law as having a "changing and variable content, which may be said to be artificial, in that it takes note of man's civilization,"[309] confusing the variation of civil laws with the invariable natural law principles behind them. Jerome Frank made the distinction between natural law and positive law, but perhaps not explicitly enough, writing that the Thomists "freely acknowledge that the applications of those highly general principles—applications which necessarily take the form of man-made rules—must vary with time, place, and circumstance."[310] Frank's statement appears to conflate natural law and positive law. Only when natural law (highly general principles) is applied in the form of particular human law (man-made rules) does it vary with time, place, and circumstance.

Not only does natural law remain constant over time in contradistinction to human law, but it is applicable to all human beings that have the same human blueprint from creation. According to Grotius, Aquinas, and Isidore, natural law is common to all nations,[311] and Blackstone wrote that natural law is "binding over all the globe, in all countries, and at all times."[312] Natural law's universal applicability to humans implies its relevance to human establishments as well. Natural law pronounces certain rights and duties inherent in humanity, which are prescribed for nations in the

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308. *See also infra* note 349 (discussing the error of conceiving of natural law as an application or investigation of natural law).

309. JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS 165 (1934).

310. FRANK, *supra* note 216, at xx. Frank referred to himself as a "fact skeptic," noting that judicial decision turns on a "multitude of elusive factors," including the "humanly fallible" process of discerning whether witnesses are telling the truth and unconscious prejudices of judges and juries who are "also human." *Id.* at xii. As a result, Frank mentioned that natural law "furnishes no helpful standard for evaluating the fact-determinations of trial courts in most lawsuits, and no assistance in ensuring uniformity, certainty, or predictability in such determinations." *Id.* at xx. Indeed, natural law is not the same as reason or discernment, which are tools used by humans to reach a conclusion consistent with natural law, subject to human imperfections. *E.g., infra* note 349; *infra* text accompanying notes 341-45. As Frank noted, if a court were to decide that a particular man Wilcox has broken a contract, but he has not, that decision "is surely unjust if in truth he did not so act." FRANK, *supra* note 216, at xx. The frequency of judicial error in determining the best result according to natural law is beyond the scope of this Note.

311. GROTIUS, *supra* note 233, bk. I, ch. I, § XIV, ¶ 1, at 6; AQUINAS, *supra* note 214, Q. 94 art. 4, at 1011 (quoting Isidore).

312. 1 BLACKSTONE, *supra* note 215, at *41.

same manner as they are prescribed for individuals, according to Pufendorf.[313] Hobbes reflected:

> Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *law of nations*, I need not say any thing in this place; because the law of nations, and the law of nature, is the same thing.[314] And every sovereign hath the same right, in procuring the safety of his people, that any particular man can have, in procuring his own safety. And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard of one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes and sovereign assemblies; there being no court of natural justice, but in the conscience only; where not man, but God reigneth; whose laws, (such of them as oblige all mankind,) in respect of God, as he is the author of nature, are *natural*; and in respect of the same God, as he is King of kings, are *laws*.[315]

Similarly, Pufendorf found "no reason for our conducting any special discussion [on the Law of Nations] here, since what we recount on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person."[316] Natural law is applicable to and binding over all humans and all countries.

Natural law's intrinsic presence in humans translates into the import of obeying it, and human conformity with natural law translates into human happiness. Pufendorf commented that "[to] observe Nature's Laws is good and profitable to Mankind,"[317] and that "by a natural Consequence our Happiness flows from such

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313. *See* PUFENDORF, *supra* note 226, § 24, at 165.

314. *But see* GROTIUS, *supra* note 233, ¶ 40, at xxxiv (noting that "writers everywhere confound the Law of Nature and the Law of Nations"). Grotius correctly distinguished the law of nations from the law of nature just as he distinguished civil law from the law of nature, where both the law of nations and civil law are contextual applications of natural law by humans, subject to the same potential defects and limitations as is discussed below. *See, e.g., id.* ¶ 38, at xxxiii. *See also* AQUINAS, *supra* note 214, Q. 95 art. 4, at 1016 (dividing positive law into the law of nations and civil law). A fair reading of the entire quotation above evinces that Hobbes would agree with the more accurate statement of Pufendorf. *See infra* text accompanying note 316. His point was that natural law applies and obliges both domestically and internationally.

315. HOBBES, *supra* note 242, at 235.

316. PUFENDORF, *supra* note 226, § 24, at 165. *See also* VERZIJL, *infra* note 340, at 3.

> [T]here is no denying that international law has always been historically intertwined with the concept of a natural law; that, in fact, the former has been treated by many authors as a simple deduction from, or application of, the law of nature; and that only a very few writers totally reject the central idea itself which underlies it.

Id.

317. PUFENDORF, *supra* note 1, bk. I, ch. VI, § IV, at 60.

Actions as are agreeable to the Law of Nature, and our Misery from such as are repugnant to it."[318] Conversely, as Pufendorf explained elsewhere, "by breaking the Law of Nature they exceedingly obstruct their own Happiness (the Promotion of which depends on the Assistance of others) and bring many grievous Evils and Dangers on themselves."[319] Grotius keenly observed:

> For as a citizen who violates the Civil Law for the sake of present utility, destroys that institution in which the perpetual utility of himself and his posterity is bound up; so too a people which violates the Laws of Nature and Nations, beats down the bulwark of its own tranquillity for future time. And even if no utility were to arise from the observation of Law, it would be a point, not of folly, but of wisdom, to which we feel ourselves drawn by nature.[320]

Pufendorf echoed Grotius' rationale for following the dictates of natural law, because

> even if, perchance, sometimes they inconvenience some one person, on another occasion again they may help him; and that the equality of right which laws of that kind set up among citizens removes the cause of complaints. For there are some things which, although, perchance, we might be eager to be permitted to do ourselves, nevertheless, if others also were going to be permitted to do them to us, we should not desire to be permitted to do ourselves; and if such things be established by civil laws, it is impossible that peace and the proper order intended by nature be not disturbed.[321]

The diligence of humans in regarding the precepts of natural law directly effects their happiness and the success of their communities.

The beneficial harmony between human efforts and natural law should also be sought in the context of creating human law, to promote the efficacy of human law. If human law does not conform to natural law, the lawgiver has exceeded his authority according to Aquinas.[322] Where a state compels citizens either to do something forbidden by natural law or to give up doing something natural law orders, Pufendorf explained, "we emphatically deny that obedience is

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318. *Id.* bk. II, ch. III, § XX, at 144.

319. *Id.* bk. VII, ch. I, § XI, at 633.

320. GROTIUS, *supra* note 233, ¶ 18, at xxviii ("For since, by his own confession, that Citizen is not foolish who in a Civil Community obeys the Civil Law, although, in consequence of such respect for the Law he may lose something which is useful to himself."). *See also id.* ¶ 22, at xxix ("[T]here is no State so strong that it may not, at some time, need the aid of others external to itself.").

321. PUFENDORF, *supra* note 226, § 6, at 151.

322. AQUINAS, *supra* note 214, Q. 96 art. 4, at 1019-20 (noting that laws are just "when the law that is made does not exceed the power of the lawgiver," which occurs when a law is "contrary to the commandments of God" or when a law "inflicts unjust hurt on its subjects"). The authority of a lawgiver is a delegation of authority from God, as Locke pointed out in *Essays On the Laws of Nature*, which means that an action contrary to God's law is an abuse of that authority. *See infra* note 378.

due the state."[323] Such disobedience is justified because "the [social] pact, whereby a man obligates himself to obey the supreme command, is not so absolute but it involves at least the limitation, 'as far as what is ordered be not opposed to the laws of God and nature.'"[324] Citizens become aware of discrepancies between their government's actions and natural law. Justice, or "the observance of Rights" as Grotius defined it, "brings security to the conscience; while injustice inflicts on it tortures and wounds."[325] And "[t]he conscience of honest men approves justice, condemns injustice."[326] Citizens continually make critical determinations of whether the government comports with or offends their deep sense of what is right and fair, natural law being the standard against which the government is judged. Accordingly, the Declaration of Independence stated that governments "derive[ ] their just powers from the consent of the governed," and a "history of repeated injuries and usurpations" by the King of Great Britain prompted the 13 colonies to declare their independence.[327] As citizens tolerate only limited divergence from natural law, a government that promulgates laws conflicting with natural law is likely to fail in the long run, or at least whenever it can no longer use coercive force, depending on the gravity and frequency of the contradictions. Good governance requires that lawmakers honor natural law principles.

The efforts of some people to separate the moral precepts of natural law from human law is not only patently unwise, but it is virtually inconceivable how that might be done. At an address in 1897, Oliver Wendall Holmes commented, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[328]

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323. PUFENDORF, *supra* note 226, § 7, at 153.

324. *Id. See also* 1 BLACKSTONE, *supra* note 215, at *42-43 (explaining that if a human law "should allow or injoin us to commit [murder] . . . we are bound to transgress that human law, or else we must offend both the natural and the divine").

325. GROTIUS, *supra* note 233, ¶ 20, at xxviii.

326. *Id. See also id.* ¶ 27, at xxx ("How great the power of the conscience of justice is, the writers of histories everywhere shew, often ascribing victory to this cause mainly."); *supra* note 241 and accompanying text (discussing the conscience).

327. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration of Independence discussed the role of government to secure the unalienable rights of life, liberty and the pursuit of happiness endowed by the Creator. *Id.* The rights cited are natural rights, not rights conferred by a government. When government "becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government." *Id. See also infra* note 349 para. 2 (noting that consent does not actually create natural law but might point to it; and that the non-consent of the governed does not automatically imply injustice or that the government is offending natural law).

328. Oliver W. Holmes, Jr., *The Path of the Law*, *in* PHILOSOPHY OF LAW 45, 50 (Conrad Johnson ed., 1993).

But while attempting to "dispel a confusion between morality and law" and asking his audience to "imagine yourselves indifferent to other and greater things," Holmes admitted that "law, if not a part of morality, is limited by it," that law "is the witness and external deposit of our moral life," and that the history of law is the history of moral development.[329] So while Holmes promoted mastering law's "specific marks,"[330] he advised his audience not to study that which defines law and gives it boundaries.[331] Moreover, John Austin attempted to separate human law from the law that "ought" to be.[332] According to the introduction to Austin's work, if the distinction between what law is and what law ought to be "has a core meaning, it is a denial of any *necessary* connection between the law that is and the law that ought to be."[333] Yet while denying a necessary connection between human law and morality, Austin conceded to the "frequent coincidence" of law and morality, referred to instances where "positive law has been fashioned on positive morality, or where positive law has been fashioned on the law of God," and where a portion of positive law "is parcel of the *law of nature*."[334] Austin observed that positive laws are closely analogous and related to laws of God and positive morality, "[i]n the way of resemblance," and even admitted "without hesitation" that "all human laws ought to conform to the Divine laws," and that "human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because if they do not, God will punish them."[335] The question lingers whether positive laws that bear close resemblance to the laws of God and positive moral rules, and that ought to conform to them, can actually be distinguished from them in the "no necessary connection" sense that Austin seemed to advance.[336] Even discussions of the possibility of divorcing human law from natural law and moral principles cannot maintain consistency.

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329. *Id.* at 46-47.

330. *Id.* at 47.

331. Not only did Holmes fail to provide a convincing reason to ignore morality in the study of law, but he also failed to separate natural law from his own opinions. Justice Souter pinpointed Holmes as having written the opinion that came closer to natural law on the matter of sovereign immunity than any other Supreme Court opinion in *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). Alden v. Maine, 527 U.S. 706, 795 (1999).

332. AUSTIN, *supra* note 296, at 157-58.

333. Wilfrid E. Rumble, *Introduction to* AUSTIN, *supra* note 296, at xviii.

334. AUSTIN, *supra* note 296, at 141, 142.

335. *Id.* at 11, 157-58.

336. If Austin meant only that human law can act autonomously from natural law and has the *ability* to do something different than what natural law prescribes, such a thesis could have been explored without the semantic cartwheels by reading Blackstone, Grotius, Pufendorf, Aquinas, and Locke. *See, e.g., supra* note 301; *see also supra* paragraph accompanying notes 234-46 (discussing the free will of humans).

A prudent lawmaker will attempt to ensure harmony between human law and natural law by the use of reason. The U.S. Supreme Court recently referred to natural law as "a universally applicable proposition discoverable by reason."[337] Rational creatures, wrote Aquinas, are subject to divine providence in a more "excellent way" than animals or plants, and have a "share of the Eternal Reason, whereby [they have] a natural inclination to [their] proper act[s] and end[s]: and this participation of the eternal law in [] rational creature[s] is called the natural law."[338] Blackstone explained that God "laid down certain immutable laws of human nature . . . and gave him also the faculty of reason to discover the purport of those laws," and to "make use of those faculties in the general regulation of his behaviour."[339] Natural law, according to Emeritus Professor of International Law at Utrecht University, Dr. J.H.W. Verzijl, is "of such a nature that [it] can be conceived, and should in virtue of [its] intrinsic cogency be adopted, as enforceable commands."[340]

Still, not everybody demonstrates understanding of the direction natural law prescribes at all times, although all humans have the ability to use reason. Locke explained that some people "make no use of the light of reason but prefer darkness and would not wish to show themselves to themselves," and others are "brought up in vice, who scarcely distinguish between good and evil."[341] Locke recommended consulting those "who are more rational and perceptive than the rest"[342] for discerning the laws of nature, but even the virtuous few may be "led astray by the violence of passions or being indifferent

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337. Alden v. Maine, 527 U.S. 706, 763 (1999).

338. AQUINAS, *supra* note 214, Q. 91 art. 2, at 997. *See also supra* notes 236-39 and accompanying discussions (noting the superiority of mankind to other beings, endowed with reason and free will and therefore obligation).

339. 1 BLACKSTONE, *supra* note 215, at *39-40.

340. 1 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 3 (1968) (summarizing Langemeijer's analysis of natural law in the Royal Netherlands Academy of Sciences). *See also supra* note 265 (discussing the conceivability of natural law).

341. LOCKE, *supra* note 231, ch. I, at 115. To this Locke added:

> [I]t does not follow that a law does not exist or is not published, because it is impossible for a blind man, and difficult for one who sees badly, to read a legal notice displayed in a public place, so, in other circumstances, a man who is occupied is not free, nor an idle or bad man disposed, to lift his eyes to the notice board and learn from it the nature of his duty.

Id. at 113, 115. Locke also wrote that the knowledge of natural law "can be concealed from no one unless he loves blindness and darkness and casts off nature in order that he may avoid his duty." *Id.* ch. VI, at 189.

342. *Id.* ch. I, at 115. *See also Hebrews* 5:14 ("But solid food is for the mature, who by constant use have trained themselves to distinguish good from evil.").

through carelessness or degenerate through habit."[343] Pufendorf reflected, "Those Motions of the Mind which they call Passions or Affections, chiefly excited by the Appearances of Good and Evil, have likewise a great Force in driving the Will violently to some certain Actions, besides their ill Influence on the Judgment, which they frequently cloud and obscure."[344] Blackstone wrote that the discovery of universal propositions would be easy if reason were "clear and perfect, unruffled by passions, unclouded by prejudice, [and] unimpaired by disease or intemperance," but human experience "now finds the contrary."[345]

Due to the various human proclivities that tend to lead reason astray, not just any reasoning will suffice, but *right reason* is law, as Cicero wrote.[346] Cicero explained that the type of reason that man and God have in common is "the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite," and that type of right reason is, in turn, law.[347] Locke defined reason, not as "that faculty of the understanding which forms trains of thought and deduces proofs," but as "certain definite principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals."[348] Only that which is "correctly derived from these principles is justly said to be in accordance with right reason."[349] A judgment "rightly framed" is

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343. LOCKE, *supra* note 231, ch. I, at 115. Following the "inducements of pleasure or the urges of their base instincts rather than the dictates of reason" may also lead to errant conclusions. *Id.* *See also supra* text accompanying note 195 (discussing James Madison's description of men as non-angels).

344. PUFENDORF, *supra* note 1, bk. I, ch. IV, § VII, at 39.

345. 1 BLACKSTONE, *supra* note 215, at *41. Blackstone wrote that human experience *now* finds the contrary in an allusion to Adam in *Genesis*, "our first ancestor before his transgression," but "every man now finds . . . that his reason is corrupt, and his understanding full of ignorance and error." *Id.*; *Genesis* 1:26-3:24 (accounting for the creation of man through the fall of man).

346. 1 CICERO, *supra* note 236, at 113. *See also* GROTIUS, *supra* note 233, bk. I, ch. I, § X, ¶ 1, at 4 (explaining that natural law is the dictate of right reason).

347. 1 CICERO, *supra* note 236, at 111.

348. LOCKE, *supra* note 231, ch. I, at 111.

349. *Id.* Implied in Locke's statement is that reason is not the maker of natural law, "unless, violating the dignity of the supreme legislator, we wish to make reason responsible for that received law which it merely investigates." *Id.* Reason does not establish natural law, but searches for it and discovers it. *Id.* Aquinas suggested two ways to derive enforceable commands from natural law, "first, as a conclusion from premises, secondly, by way of determination of certain generalities." AQUINAS, *supra* note 214, Q. 95 art. 2, at 1014. He further explained that the first way is like "to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape." *Id.* For an example of the first way, "that *one must not kill* may be derived as a conclusion from the principle that *one should do harm to no man*." *Id.* at 1015. Grotius suggested methods of determining natural law *a priori* and *a posteriori*, "the former the more subtle, the latter, the more popular proof."

required, as Grotius explained, which is "not to be misled by fear or by the temptation of present pleasure, nor to be carried away by blind and thoughtless impulse."[350] To enable judgments rightly framed, the Founding Fathers separated legislative, executive, and judicial powers in the U.S. Constitution to minimize the impact of the human

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GROTIUS, *supra* note 233, bk. I, ch. I, § XII, ¶ 1, at 5. An *a priori* proof demonstrates natural law by "shewing the agreement or disagreement of anything with the rational and social nature of man," while an *a posteriori* proof considers such things as acceptance by civilized nations. *Id.*

But acceptance by civilized nations, or consent generally, does not create natural law, either. *E.g.*, PUFENDORF, *supra* note 226, § 2, at 147-48.

> Nor, in truth, are those sufficiently accurate who speak of laws as certain common agreements . . . since thereby they confuse a law with a pact. For assuredly, neither the positive divine laws nor the laws of nature can be said to have arisen from the agreement or consent of men.

Id. Even "if there existed among men a unanimous and universal consent concerning some opinion, that consent would not prove this opinion to be a natural law." LOCKE, *supra* note 231, ch. V, at 177. As Locke cautioned, "if what is rightful and lawful were to be determined by men's way of living, moral rectitude and integrity would be done for. What immorality would not be allowable and even be inevitable, if the example of the majority gave us the law?" *Id.* at 165. As Pufendorf observed, the consent of all nations cannot be conclusory because

> the Number of Fools far exceeds that of wise Men; and [ ] few Persons have form'd their Opinions upon a full Search into the Foundations of Things; but most Men follow on in the Track of others, and yield an implicit Assent to their Notions, without applying their own Thoughts or Judgments to the Points in Debate.

PUFENDORF, *supra* note 1, bk. II, ch. III, § VII, at 125. As a result, Locke imagined that unanimous consent "might point to natural law," or "might make me believe more ardently . . . that this opinion is a law of nature," but it could not prove it. LOCKE, *supra* note 231, ch. V, at 177. Consent operates similarly to reason, which investigates the content of natural law, but like reason, it might conclude erroneously as to the direction dictated by natural law, and it does not necessarily follow from consent that the matter is consistent with natural law. *See supra* notes 341-45 and accompanying text. Grotius reviewed that Hesiod, Heraclitus, Aristotle, Cicero, Seneca, and Quintilian agreed that "the consent of all nations is *evidence* of the truth." GROTIUS, *supra* note 233, bk. I, ch. I, § XII, ¶ 1, at 5 (emphasis added). *See also id.* ¶ 40, at xxxiv ("I have made use of the testimonies of philosophers, historians, poets, and finally orators . . . as witnesses whose conspiring testimony, proceeding from innumerable different times and places, must be referred to some universal cause."). But widespread consent should still not be taken as automatic proof of natural law, and the same precautions should be taken with any contextual observation of the utilization of natural law, including the use of equity in courts (*supra* notes 294, 310), the promulgation of human law modeled after but not always equivalent to natural law (*supra* discussion accompanying notes 295-310), the giving of consent (including consent to the dictates of government, *supra* note 327), and the formation of pacts (*supra* note 213 ¶ 1). The general idea is that natural law principles are constantly being employed, but accuracy of application by humans is not guaranteed and the product is not necessarily equivalent to natural law. *See, e.g.*, *supra* note 265.

350. GROTIUS, *supra* note 233, ¶ 9, at xxv.

propensity to succumb to improper influences upon right reason.[351] Where human laws are just, products of right reason, and consistent with natural law, they have "the power of binding in conscience, from the eternal law whence they are derived."[352] Upon the premise of an accurate description of the attributes of natural law, an analysis of a specific legal question demands criteria for determining when to enforce natural law.

C. *Policy of Natural Law Enforcement*

Feasibility concerns limit the ability of human law to enforce natural law. Seneca wrote, "How slight a thing it is to be a good man according to the law! How much more broadly does the rule of duties extend than the rule of law! How many things do piety, humanity, justice, fidelity demand! And yet they are all outside public records."[353] Because of the more extensive list of duties under natural law, Pufendorf did "not dare to affirm" that a civil magistracy is "bound to punish all wrongs whatsoever that have been committed against the law of nature."[354] All evil deeds, wrote Aquinas, cannot be punished or forbidden by human law, because, "while aiming at doing away with all evils, it would do away with many good things, and would hinder the advance of the common good, which is necessary for human intercourse."[355] Additionally, complications arise where natural law violations involve "[i]nner acts of the mind," and Pufendorf pointed out the administrative infeasibility of such enforcement because, "forsooth, it is beyond the power of other men to know whether obedience has been rendered the laws or not, so long as external acts do not reveal it."[356] Pufendorf imagined the administrative infeasibility of a "boundless harvest of suits before tribunals" if all natural law were enforced civilly.[357] Therefore, human law might effectively give permission to do something that natural law prohibits.

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351. *See* U.S. CONST. arts. I-III; *see also supra* notes 191, 192 and accompanying text.

352. AQUINAS, *supra* note 214, Q. 96 art. 4, at 1019.

353. PUFENDORF, *supra* note 226, § 18, at 161 (quoting Seneca).

354. *Id.* § 7, at 152.

355. AQUINAS, *supra* note 214, Q. 91 art. 4, at 998. For example, dishonesty in contracting is prohibited only for a material misrepresentation, and the law declines to recind contracts for every instance of less than admirable behavior which would result in nullifying many contracts, the performance of which would benefit society.

356. PUFENDORF, *supra* note 226, § 19, at 162. However, Pufendorf continued, "when they have broken out into external actions, the internal action of the mind is most carefully regarded in aggravating or mitigating the crime." *Id. See also* AQUINAS, *supra* note 214, Q. 91 art. 4, at 998 ("[M]an is not competent to judge of interior movements, that are hidden, but only of exterior acts which appear.").

357. PUFENDORF, *supra* note 226, § 18, at 161.

Where human law does not enforce natural law, obligation to natural law persists even though its disregard is not attended by a civil penalty. Pufendorf explained:

> For these two conditions are not mutually at variance, namely, that a thing is forbidden by the law of nature, and permitted by civil laws. For the permission of the civil law does not prevent a certain act from being contrary to the law of nature, or allow one to commit it without sinning against God; but it merely declares that, by civil authority, the one who desires to commit the act is neither prevented from doing so, nor punished, and that in a human court of law those acts are granted the effects which otherwise attend also upon acts that are licit and legitimate on the basis of the law of nature.[358]

Aquinas wrote, "In order, therefore, that no evil might remain unforbidden and unpunished, it was necessary for the Divine law to supervene, whereby all sins are forbidden."[359] A prohibition by divine law or natural law not enforced civilly still "obligates men, indeed . . . but the prosecution is left solely to the divine judgement-seat and to one's own consciousness of having violated that law."[360] Provisionally, ethics and integrity are of particular consequence at the margins where civil law cannot enforce natural law consistently, and beyond those margins where civil law is powerless to enforce natural law.[361]

As civil law cannot enforce all natural law, a selection must be made between natural law obligations competing for human enforcement resources, and two criteria for making such a determination are (1) proximity of the proposed obligation to natural law, or relative importance of the obligation, and (2) whether a decent society and peace can be maintained without civil enforcement. First, Pufendorf noted that conclusions "can be deduced from the principles sometimes more clearly, sometimes less so; some also are closer to the

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358. *Id.* § 7, at 152.

359. AQUINAS, *supra* note 214, Q. 91 art. 4, at 998.

360. PUFENDORF, *supra* note 226, § 18, at 160. *See also supra* note 241 and accompanying text (discussing the role of the conscience). Pufendorf explained:

> Now, just as the law of nature has the efficacy of an obligation from the most exalted lawgiver, God, in such wise that he who has violated it should be thought to have contravened God's own will, so there is no doubt but it rests with Him to punish the violation of the law of nature as such.

PUFENDORF, *supra* note 226, § 17, at 160. *See also Matthew* 12:36 ("'But I tell you,' said Jesus, 'that men will have to give account on the day of judgment for every careless word they have spoken.'"); *2 Corinthians* 5:10 ("'For we must all appear before the judgment seat of Christ,' the apostle Paul wrote, 'that each one may receive what is due him for the things done while in the body, whether good or bad.'").

361. *See, e.g.*, PUFENDORF, *supra* note 1, bk. I, ch. VI, § XV, at 74 ("Regard is likewise always to be had to natural Law, or to common Honesty, which is the perpetual Supplement of civil Decrees.").

same, others more remote."[362] The proximity of a certain civil obligation to natural law determines the relative importance of enforcement of that obligation, because some obligations are direct requirements of natural law while others are more remotely derived from natural law principles.

Blackstone's distinction between an act *mala in se*[363] and an act *mala prohibita*[364] provides the two extremes for a continuum-like array of obligation based upon strength of relationship to natural law. Acts *mala in se* are "public mischief or private injury" offenses that bind the conscience because of superior laws, or natural law, existing even before human laws.[365] Pufendorf discussed certain absolute precepts of the law of nature that "obligate all men whatsoever in any state whatsoever."[366] For example, the nearly unanimously accepted doctrine of *jus cogens* (peremptory norms) derives from the *communis opinio juris* (generally accepted belief about a point of law).[367] States are obligated to these "mandatory norm[s] of general international law from which no two or more nations may exempt themselves or release one another,"[368] and peremptory norms override all treaties or customary rules that conflict with them pursuant to Article 53 of the 1969 Vienna Convention.[369] These beliefs have been described as "deeply-held and widely shared conviction[s] about the unacceptability of the [proscribed] conduct," aspects of social reality "that cannot be ignored," and "elementary considerations of humanity and fundamental general principles of humanitarian law."[370] A violation of *jus cogens* easily constitutes an act *mala in se* within Blackstone's definition. Also fitting easily within the *mala in se* category are things "so bad that they are not to be done even for the sake of saving our country."[371] However, acts *mala in se* are not limited to such alarming and large-scale acts, and include such things

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362. PUFENDORF, *supra* note 226, § 16, at 159.

363. *Malum in se* is latin for "evil in itself," and is defined as a "crime or an act that is inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY 971 (7th ed. 1999).

364. *Malum prohibitum* is latin for "prohibited evil," and is defined as an "act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral," such as jaywalking. *Id.*

365. 1 BLACKSTONE, *supra* note 215, at *57.

366. PUFENDORF, *supra* note 226, § 16, at 159.

367. DEGAN, *supra* note 250, at 217, 219; BLACK'S LAW DICTIONARY 273 (7th ed. 1999).

368. BLACK'S LAW DICTIONARY 864 (7th ed. 1999). *Jus cogens* means "compelling law" in English. *Id.*

369. DEGAN, *supra* note 250, at 217-18, 226 (quoting Article 53 of the 1969 Vienna Convention on the Law of Treaties). *Jus cogens* obligations are not vitiated by their non-observance. *Id.* at 221 (quoting Oscar Schachter).

370. *Id.* at 217 (quoting Oscar Schachter); *see also id.* at 222 n.77. Violations of *jus cogens* are international crimes such as slavery, racial discrimination and genocide. *Id.* at 221 (quoting an ICJ opinion).

371. GROTIUS, *supra* note 233, ¶ 23, at xxix (quoting Cicero).

as murder, theft, and any other act that is directly binding upon the conscience because of natural law or divine law.

Blackstone distinguished acts *mala in se* from acts *mala prohibita*. The occasion of civil laws, Grotius wrote, is to "regard the Utility of that Community," and those who prescribe laws for others "aim, or ought to aim, at some Utility, to be produced to them for whom they legislate."[372] *Mala prohibita* offenses seek the utility of the community and are "purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offense."[373] Citizens are directed either to "abstain from this, or submit to such a penalty."[374] Less moral guilt results from violating a law of the *mala prohibita* type than from violating a law of the *mala in se* type.[375] *Mala in se* offenses are wrong because of their intrinsic characteristics and bear a closer relationship to the natural law that prohibits them; *mala prohibita* offenses that are only binding upon the conscience because of the social pact and duty to obey authority.[376]

In the same way as acts *mala prohibita*, other particulars of human law rank low on the continuum of relative importance. Natural law does not specify every detail required for the administration of a civil society, nor does it expressly determine "just which one is to rule the other, or which ought to obey, and also does not mark the extent to which punishment is to be inflicted among men."[377] Aquinas also noted that "the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature . . . [which has] no other force than that of human law."[378] Civil laws must specify such particulars:

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372. *Id.* ¶¶ 16-17, at xxvii.

373. 1 BLACKSTONE, *supra* note 215, at *58 (providing the examples of "killing a hare," "possessing a Partridge in August," or "innumerable other positive misdemeanors").

374. *Id.* Blackstone explained that "prohibitory laws" do not create a sin out of a violation, and "the only obligation in conscience is to submit to the penalty, if levied." *Id*; *see also infra* note 378 (discussing in detail the obligation in conscience to just government).

375. *See, e.g.*, 1 BLACKSTONE, *supra* note 215, at *58; *see also infra* note 378.

376. *See infra* note 378.

377. PUFENDORF, *supra* note 226, § 17, at 160.

378. AQUINAS, *supra* note 214, Q. 95 art. 2, at 1015. Pufendorf also discussed certain things that derive their force only "from the will of those who establish them." PUFENDORF, *supra* note 226, § 15, at 158. Still, natural law does lend force to human laws even if they are not natural laws per se, and the force behind obedience to government does not rest solely in the ability of government to enforce penalties.

> For those who had joined any community, or put themselves in subjection to any man or men, those either expressly promised, or from the nature of the

> [A]lthough by a law of nature, as it were, theft, homicide, adultery, &c., are forbidden, nevertheless, it is in the province of civil laws to define what is another's, what is one's own, what force it may be permissible to employ against a man, and just what kind of sexual connexion constitutes adultery.[379]

Some human law specifies how a civil system will operationalize natural law, and such specific details cannot usually muster enough importance to justify their uniformity across the world.

The relative importance of a natural law obligation might also be influenced by other principles implicated in particular facts. An obligation might be concerned with several principles simultaneously,

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> case must have been understood to promise tacitly, that they would conform to that which either the majority of the community, or those to whom the power was assigned, should determine.

GROTIUS, *supra* note 233, ¶ 15, at xxvii. Pufendorf also wrote about the "social pact," whereby men obligate themselves to obey the "supreme command" of the state, which is a moral precept. *See supra* text accompanying note 324. Locke explained that without the binding force of natural law, no human positive law could be binding because such laws "derive their whole force from the constraining power of natural law, certainly so far as the majority of men is concerned." LOCKE, *supra* note 231, ch. VI, at 189.

> [I]f you abolish the law of nature among them, you banish from among mankind at the same time the whole body politic, all authority, order, and fellowship among them. For we should not obey a king just out of fear, because, being more powerful, he can constrain . . . , but for conscience' sake, because a king has command over us by right.

Id. The right of the king to command derives from his superior societal position, conferred by a delegation of authority from God, which obligates the king's subjects to the king "by the will of God." *Id.* at 187. The principle is also reflected in divine law, as is demonstrated in *Matthew* 22:21 (where Jesus directed the Pharisees to "Give to Caesar what is Caesar's, and to God what is God's.") and in *Romans* 13:6 (where Paul explained, "This is why you pay taxes, for the authorities are God's servants, who give their full time to governing."). It is for these reasons that the "ethical writers," as Blackstone pointed out, observed that human laws are still "binding upon men's consciences" even where the laws do not directly mirror natural law. 1 BLACKSTONE, *supra* note 215, at *57. *See also id.* at *41 ("[N]o human laws are of any validity, if contrary to this [law of nature]; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."). If the will of the government were the only source of obligation to a particular civil law, it would mean that the conscience could not be bound to the law because the government was either attempting to compel citizens to do something forbidden by natural law or to give up doing something natural law orders. If that be the case, obedience would not be morally due the state, and the government might not be able to sustain its influence for long. *See supra* discussion accompanying notes 322-27. More precisely stated, therefore, certain human laws only become binding because of the will of a human legislature, but once promulgated, they receive the binding force of natural law as long as they are just. *See supra* text accompanying note 352; *supra* text accompanying notes 325-26; supra note 327 and accompanying text. Therefore, the legislative goal is to "link[ ] Force in the same yoke with Law." GROTIUS, *supra* note 233, ¶ 19, at xxvii (quoting Solon).

379. PUFENDORF, *supra* note 226, § 6, at 150.

all of which might bear different relationships to natural law in the sense that each principle is more or less strongly implicated in the particular context. The several principles implicated might each tend toward different outcomes. To illustrate this effect, Dworkin discussed the logical distinction between principles and rules which "differ in the character of the direction they give."[380] Rules operate on an "all-or-nothing" basis, because they are either valid and operative on given sets of facts or they are not.[381] Principles, on the other hand, "seem very different" from rules, because legal consequences do not automatically follow from them.[382] Unlike rules, principles do not set out preconditions that compel their application, but rather state reasons that argue in one direction without requiring a particular decision.[383] Principles have a dimension of "weight or importance" that rules do not, because principles may "intersect" without invalidating each other.[384] Thus, one principle implicated in a particular scenario might add or subtract weight from another principle, which affects the relative importance of the latter principle and also the decision whether to enforce the obligation.[385]

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380. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

381. *Id.* at 24-25 (providing examples of speed limits or the requirement of three witnesses in signing a will, which are attended automatically with legal consequences). Although exceptions may exist to rules, such as when the baseball catcher drops the third strike (such that the batter is not out), the exceptions are incorporated into the character of the rule and can be listed in an accurate and complete statement of the rule. *Id.*

382. *Id.* (illustrating with the principle that "no man may profit from his own wrong," which does not mean "the law never permits a man to profit from wrongs he commits," as in the case of adverse possession where an initial wrong of trespass ripens into a legally recognized right over time, or where breaking an employment contract for a higher paying job will not require the employee to forego his new salary).

383. *Id.* at 26 (noting that principles are things that the law will "take into account").

384. *Id.* at 26-27. To illustrate how principles intersect without invalidating each other, consider *Kansas v. Colorado*, where the U.S. Supreme Court stated:

> [W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

206 U.S. 46, 97-98 (1907), *quoted in* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1024 n.8 (1983).

385. For example, a court will extend comity to the judicial acts of another nation where "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated," and as long as "fundamental standards of procedural fairness" have been followed by the foreign court. Cunard S.S. Co. v. Salen Reefer Servs. A.B., 773 F.2d 452, 457 (2d Cir. 1985), *quoted in* Int'l Nutrition Co. v. Horphag Research Ltd., 257 F.3d 1324, 1329 (Fed. Cir. 2001). Supreme Court Justice Gray described

The second critical factor in determining whether to enforce an obligation of natural law is whether a decent society and peace can be maintained without enforcement. Too much civil permission might disrupt what would be a peaceful and decent society. An overly-narrow definition of theft, for example, might diverge too far from dictates of natural law.

> Thus some author or other reports of the Tartars that it was a custom among them for one who had taken something away from a second person, merely to give as an excuse to the judge that he needed it, and the judge would render this decision: "Because you had need, keep it; and so you of the other party, if you shall likewise need anything, you will be allowed to take it from another person in the same way." Therefore, by Tartar definition, it will be theft when something is taken from its owner, against his will, which was not needed by the one who took it. Yet one can scarcely doubt that the narrowness of this definition all but utterly overturns that law of nature about theft.[386]

Such a narrow definition of theft extending too much civil permission to violate natural law would eventually frustrate the goals of a civil society,

> And surely no one, in my judgement, would wish for such a law, since it might very frequently happen that he himself would be robbed of that which was the last thing in the world that he would be willing to part with, and whose like he could not find in the possession of another, or else, because its owner watched over it, would be prevented from carrying off.[387]

As another example from U.S. history, no amount of objection prevented slave owners from treating slaves unjustly, and citizens were free to disregard the dictates of natural law with impunity—at least without penalty administered by the government. As Pufendorf discussed, "that every Man should esteem and treat another as one who is naturally his Equal, or who is a Man as well as he" is a command of natural law.[388] Eventually, a decent society and peace

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comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895), *quoted in Horphag*, 257 F.3d at 1328 (citing *In re* Maxwell Communication Corp., 93 F.3d 1036, 1046 (2d Cir. 1996)). Thus, the principle of fairness might subtract from the force of obligation attributed to the principle of comity, and thereby decreases the relative importance of extending comity.

386. PUFENDORF, *supra* note 226, § 6, at 151. *See also id.* at 150 (giving an example of Lacedemonian boys who "secretly stole the property of other persons, nevertheless they did not commit theft, because the civil law had defined that a thing taken in that fashion was not another's," and was a "legitimate mode of acquisition").

387. *Id.* at 151.

388. PUFENDORF, *supra* note 1, bk. III, ch. II, § I, at 224 (italics omitted). The principles listed in notes 267-82 also militate against holding slaves against their consent. Some people discounted the humanity of slaves, even for representation purposes, which can be seen as a way of trying to avert natural law obligation because natural law requires different things for the treatment of humans and animals. *See, e.g., supra* note 236.

could not be maintained without enforcing natural law in the area of slavery. Even regarding more borderline activities,[389] whether a magistracy may "rightly permit" something prohibited by natural law depends upon whether, "without punishment of this kind, a decent society and peace cannot be maintained among men."[390]

If a decent society and peace can be maintained without enforcement, a magistracy cannot be blamed for failing "to ratify by a civil penalty some precept of the law of nature, because it foresaw that a greater inconvenience would result from so doing than if every one whatsoever be left to his own conscience in that matter."[391] Aquinas explained that "many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man."[392] However, human law must be framed to apply to both the virtuous and those not perfect in virtue, which is most of society.

> Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.[393]

Rather than trying to prohibit all vices from which the virtuous abstain, the magistracy might sometimes be required to attend only

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389. An example of a "borderline activity" is civil permission for the impregnation of a man's wife with his consent. First, the prohibition against adultery is simultaneously part of the natural law and divine law. *See Exodus* 20:14 ("You shall not commit adultery."). Some societies have prohibited it strictly, others more loosely. One society discussed by Pufendorf permitted an "impotent old man to substitute some vigorous young man in order to get his wife with child," and in that society, such activity was not considered adultery because "the civil laws did not include under the head of adultery such sexual connexion with another man's wife at the instigation of the husband himself." PUFENDORF, *supra* note 226, § 6, at 150. Here, civil law did not punish the activity, assuming an agreement were demonstrable, and viewed children produced from such activity as legitimate. *Id.* at 152.

390. PUFENDORF, *supra* note 226, § 7, at 152. *See also supra* note 275 (quoting Pufendorf).

391. *Id.* at 162. *See also* PUFENDORF, *supra* note 226, § 18, at 162; *id.* § 7, at 152 (explaining that civil authority is not bound to exact such punishment); AQUINAS, *supra* note 214, Q. 96 art. 2, at 1018 (quoting Augustine, who wrote, "The law which is framed for the government of states, allows and leaves unpunished many things that are punished by Divine providence. Nor, if this law does not attempt to do everything, is this a reason why it should be blamed for what it does." (italics omitted)).

392. AQUINAS, *supra* note 214, Q. 96 art. 2, at 1018 ("[M]any things are permitted to children, which in an adult are punished by law or at any rate are open to blame.").

393. *Id.* Along these lines, Pufendorf noted the benefit of leaving some matters of natural law unenforced civilly in order to "leave good men a large share of their praise, as it were, unimpaired, the praise, namely, for having done right solely out of reverence for the Deity." PUFENDORF, *supra* note 226, § 18, at 161. Pufendorf continued, "And this praise disappears where it is impossible to discern whether one has done right out of fear of punishment, or solely from love of right." *Id.*

to matters posing a threat to public tranquility, such as where, without enforcement, "the internal tranquillity of the commonwealth could not exist at all."[394] Such a determination might rely on the "peculiar disposition of the citizens."[395] In summary, a determination of whether to enforce a natural law obligation civilly can be made based on the relative importance of the obligation and whether a decent society and peace can be maintained without civil enforcement.

VIII. ANALYSIS

In their letter to President Bush, U.S. Senators Arlen Specter, Charles Schumer, Herb Kohl, Strom Thurmond, and Mike DeWine suggested that the Bush Administration might sue OPEC before the ICJ at the Hague.[396] OPEC should not be sued in the ICJ at the current time for the following reasons.

In the context of the natural law framework elucidated above, antitrust is a form of law promulgated and enforced by human sovereigns that seeks to reinforce dictates of natural law. Antitrust enforcement is one method among many of attempting to buttress the natural law principles of doing that which one would want done to himself; preserving and cultivating social relations among one another; promoting peace and seeking the common good; practicing equity; and, with regard to international relationships, doing the most possible good to other nations in times of peace.[397] In the particular application of economic policy, antitrust law promotes fair dealing and justice by preventing behavior that tends to lead to unfair results for consumers and minimizing power discrepancies to protect a competitive market, economic freedom, and economic prosperity for all nations.[398] Antitrust law indirectly preserves harmony and peace among citizens, facilitating the smooth functioning of society and encouraging good will.[399] All countries are bound to observe the foregoing principles regardless of human enforcement,[400] and such principles link force in the same yoke with

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394. PUFENDORF, *supra* note 226, §§ 18-19, at 161-62 (explaining that civil authority should not be disturbed "on account of things from which . . . there is no danger to the public tranquillity").

395. *Id.* § 7, at 152.

396. *OPEC and Antitrust Law*, *supra* note 2.

397. *See supra* notes 267-82 and accompanying text (discussing concepts of natural law).

398. *See, e.g.*, *supra* Part VI; *supra* note 199.

399. *See, e.g.*, *supra* note 192 (discussing universal reprobation of the system in the face of power imbalances).

400. *See, e.g.*, *supra* notes 262-64 and accompanying text (presenting the methods in which natural law binds).

antitrust law.[401] Antitrust law is a contextual application of natural law in the form of human law, also subject to the potential deficiencies of natural law application.[402]

Whether to reinforce natural law with human law punishments depends on the policy factors for enforcing natural law: relative importance of the obligation and whether a decent society and peace can be maintained without enforcement.[403] On the continuum of relative importance of natural law obligation, antitrust law does not rise to a direct prescription from natural law because violations are not as intuitively binding upon the conscience[404] as other, more direct violations such as murder, theft, or genocide that do not require variable policy input.[405] On the other hand, antitrust is not merely *mala prohibita* because of the fundamental natural law principles propelling competition policy; natural law binds the conscience on more grounds than the social pact and duty to obey government,[406] and sovereigns are, or should be, aware of their duties to other sovereigns. Initially, antitrust law appears to occupy a middle position on the continuum of relative importance.

Antitrust's middle position on the continuum is altered by the distinction between humanitarian concerns and economic concerns. Economic rights do not receive the same level of civil protection as human and political rights, such as free speech,[407] and antitrust policy primarily concerns economic freedom rather than humanitarian freedom. Domestically, the less critical nature of economic rights would equate to fewer concerns over regulation.[408] But internationally, co-equal sovereigns have the right to self-preservation and survival, the right to independence, and the right to be respected.[409] Currently, OPEC nations are attempting to preserve their own economic prosperity by agreeing to increase market prices for an economically critical export, and requiring OPEC nations to discontinue price fixing would involve a change of behavior to which OPEC nations might not consent. The relative importance of enforcing international antitrust policy is decreased because the weaker concern over economic freedom also weakens the relative

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401. *See supra* note 378 (discussing the force behind human law).

402. *See supra* note 349 (describing contextual applications of natural law); *supra* text accompanying notes 341-45 (listing potential obstacles to correct application of natural law).

403. *See supra* Part VII.C.

404. *See supra* notes 241, 378 (discussing the binding of the conscience).

405. *See, e.g., supra* Part IV (highlighting several variations on antitrust policy).

406. *See supra* note 378.

407. *See supra* text accompanying notes 128-31 (citing Ross).

408. *See supra* text accompanying note 130.

409. DEGAN, *supra* note 250, at 84 (synthesizing and enumerating the fundamental rights of states).

importance of compelling OPEC nations to refrain from price fixing.[410] The position of the obligation on the continuum is thus shifted toward *mala prohibita* violations, making the obligation less useful for international enforcement because of its more specific applications.

Since antitrust law is human law and its enforcement contains details relevant to particular communities,[411] the international system needs reviewing authority to implement antitrust on a global scale. The happiness and success of the international community are "bound up" with maintaining consistency with natural law, and not maintaining such consistency "beats down the bulwark of its own tranquillity for future time."[412] A U.S. court might not deem a restraint of trade appearing illegal on its face as unreasonable where it does not result in the evils that the Sherman Act was intended to prevent, and the restraint would thus be permitted.[413] The Supreme Court has reviewed restraints by considering all relevant facts and principles and has treated parties fairly while upholding the essential purpose of the Sherman Act—even when precedent has seemed to compel a contrary result.[414] The very nature of observing principles, such as those behind antitrust law, requires a balanced approach and right reason.[415] Presumably, the ICJ or other specially-established tribunal could provide reviewing authority in some instances.

However, in the case of antitrust, intervention authority would also be needed. Although OPEC-styled price fixing is arguably the simplest aspect of antitrust law that is most amenable to consensus, even a rigid rule against price fixing would not work on an international scale without an international authority akin to the U.S. Congress.[416] Congress has recognized that competition should not be protected to the point of destroying the industry concerned, which would not benefit consumers, and has ensured fairness by intervening where industries could not legally relieve themselves from a volatile market situation.[417] In *Block v. Community Nutrition Institute*, the U.S. Supreme Court considered a case regarding the

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410. Antitrust does not fall within the ambit of *jus cogens*, either. *See supra* notes 367-70 and accompanying text.

411. *See, e.g., supra* Part IV (suggesting some of the details of antitrust that may vary by community).

412. *Supra* notes 317-20 and accompanying text (quoting Grotius and Pufendorf).

413. *See, e.g., supra* text accompanying notes 78-80.

414. *See supra* note 294 (discussing the need for equity and the court's role in applying it).

415. *Supra* notes 382-85 and accompanying text.

416. Even if workable, picking and choosing portions of antitrust law to enforce internationally, such as price-fixing, would leave a confusing patchwork pattern of protection for consumers.

417. *See, e.g., supra* notes 65-67 and accompanying text (discussing the market problem in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)).

Agricultural Marketing Agreement Act of 1937.[418] As the Court explained, dairy farmers in the early 1900s "engaged in intense competition in the production of fluid milk products," which precipitated the need to "bring this destabilizing competition under control."[419] The 1937 Act authorized the Secretary of Agriculture to set the minimum prices that milk handlers were required to pay to milk producers for their milk products.[420] By setting a minimum price for milk, Congress relieved milk producers from the harsh effects of fluctuating milk prices that jeopardized the production of a household staple. Oil exporting nations experienced similar destabilizing competition in 1998 when the price per barrel of oil crashed to ten dollars per barrel, and such a predicament could seriously hinder the export of one of the world's most critical natural resources long term.[421] Without OPEC agreements, an international body might eventually need to implement a prodedure to establish a minimum price to protect petroleum exporting countries just as the United States has protected dairy farmers. The need for such monitoring and intervention would require a new quasi-legislative body that could issue binding policies,[422] and such a body is not currently in place.[423] Thus, a successful suit before the ICJ enjoining OPEC from price fixing would be premature at best and might even detract from the international public good in the long run. Generally, sufficient structures must be in place to implement antitrust law such that it does not become oppressive, contrary to the public interest, or inconsistent with natural law, but a governmental structure like that of the United States is much more difficult on an international level when dealing with equal sovereigns.[424]

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418. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 340 (1984) (discussing the Agricultural Marketing Agreement Act, 7 U.S.C. §§ 601-08 (1937)).

419. *Block*, 467 U.S. at 341.

420. *Id.* at 341-42 (citing 7 U.S.C. § 608c). The Act established several checks and balances to ensure the set price was fairly determined, considering the interests of all parties. *See id.*

421. *See supra* text accompanying note 26.

422. *E.g.*, Monti, Speech at the Global Forum on Competition, *supra* note 94, at 2 (calling for international governance of markets in the form of an independent agency that enforces antitrust policies under the supervision of the judiciary).

423. U.S. Assistant Attorney General Charles James, U.S. Federal Trade Commission Chairman Tim Muris, European Commission Commissioner Mario Monti, and Director of Investigation and Research for the Canadian Competition Bureau Konrad von Finckenstein were hoping to launch a "Global Competition Network" (GCN) as early as Spring 2002, but the GCN's guidelines would be non-binding "best practices" recommendations. James, OECD Global Forum on Competition Address, *supra* note 95, at 6.

424. *E.g.*, INTERNATIONAL LAW IN A CHANGING WORLD: CASES, DOCUMENTS, AND READINGS 3 (Edward Collins, Jr. ed., 1970) (discussing the lack of an international police force, an international court with compulsory jurisdiction, or a world legislature that may promulgate civil laws binding the world community).

Even if an international structure with power to set minimum prices for the international community could be implemented (such as by having adequate representation from each sovereign), the effort might be unjustifiable because a decent society and peace can probably be maintained. Whether a decent society and peace can be maintained is a function of the tendencies of the world community. Besides the rapid advances of antitrust legislation world-wide, the number of international conferences for exploring and perfecting antitrust policy has increased exponentially in the last few years.[425] The augmenting international pressure against anti-competitive practices due to the recent explosion in antitrust activity might eventually provide sufficient protection against unduly powerful organizations and countries not subject to antitrust law or antitrust conventions.[426] According to one author, the possibility of incurring sanctions, economic pressures, blockades, and even war could be compelling motivations for sovereigns to observe principles supported by the majority of the international community.[427] International enforcement of antitrust in such a context might be unjustifiably onerous, and the international community could not be blamed for declining to engage international resources in such a way.

International trends have also begun to take their toll on OPEC itself, whose power might be vulnerable to defection. Venezuela and Indonesia might follow the lead of Gabon, which withdrew its membership in 1995 after having enacted antitrust legislation in 1989.[428] Venezuela and Indonesia enacted antitrust legislation in 1999 and 1991, but have not yet withdrawn from OPEC practices.[429] The Venezuelan government has also released information about

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425. *See supra* Part V.

426. *See supra* note 213 ¶ 1 (discussing antitrust agreements). Each sovereign needs time to work out the details associated with implementing antitrust legislation, because a major percentage of the world community has relatively little experience. *See supra* notes 142-46 and accompanying text. Indonesia reported that "competition practice is a new thing in Indonesia," and highlighted the importance of learning by doing. *Contribution from Indonesia at the Second OECD Global Forum on Competition*, *supra* note 200, at 8. *See also Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 12 ("[D]ifferent countries [are] at different stages of implementation of consumer policy."). *See also* James, OECD Global Forum on Competition Address, *supra* note 95, at 2; Ricupero, Statement to the Global Forum on Competition, *supra* note 147, para. 6 (describing James' and Ricupero's discussion of the continuing struggle with practical dilemmas of implementing and enforcing anti-cartel policy and competition legislation).

427. INTERNATIONAL LAW IN A CHANGING WORLD, *supra* note 424, at 37.

428. *See supra* note 7.

429. *See supra* notes 7, 142. Venezuela prohibits "all the conducts, practices, agreements, etc. that impede, restrict, falsify or limit the free competition." *Venezuela's Free Competition System*, *supra* note 198, at 2. *See also supra* text accompanying notes 200-07 (discussing the history of Indonesia's economy and its need for competition legislation).

illegal price-fixing to the general public via the Internet.[430] Algeria demonstrated interest in competition policy by attending the second OECD Global Forum on Competition in 2002, along with Venezuela and Indonesia who also attended and contributed papers to the first OECD Global Forum on Competition.[431] All OPEC nations, including Venezuela and Indonesia, are members of both UNCTAD and the U.N. Trade and Development Board and might be increasingly influenced by UNCTAD's Model Law on Competition that condemns OPEC practices.[432] The OPEC Conference pointed to a 1975 "Solemn Declaration," expressing interest in establishing "a new international economic order based on justice, mutual understanding and a genuine concern for the well-being of all peoples," as evidence that OPEC has promoted the "ideals" of the U.N. "throughout [OPEC's] existence."[433] OPEC members Nigeria, Saudi Arabia, Venezuela, and Indonesia attended and participated in a U.N. Trade and Development Board expert meeting on consumer interests, competitiveness, competition, and development—demonstrating that the trend of recognizing the importance of competition policy is not restricted to non-OPEC nations.[434] Along with augmenting international influence, the steps

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430. The Venezuelan government, in Spanish, has posted a question and answer bulletin on horizontal price fixing agreements on their website. Pro Competencia, *Ley para Promover y Proteger el Ejercicio de la Libre Competencia*, *at* http://www.procompetencia.gov.ve/ley.html#6quesonah. As translated by the author, the website explains horizontal agreements as agreements made "between competitors that debilitate or restrict free competition between enterprises in the same market." *See id.* Horizontal agreements, the website explains, manifest themselves in the fixing of prices, restriction of production, division of the market, and price predation. *See id.* Price fixing is described as "economic agents fixing their prices by common agreement instead of establishing prices in an independent and competitive way." *See id.*

431. *See supra* notes 7, 175, 179; *see also supra* text accompanying notes 198, 200-07.

432. *See* United Nations Conference on Trade and Development (UNCTAD), *UNCTAD's Membership*, *at* http://www.unctad.org/Templates/Page.asp?intItemID=1929&lang=1; *supra* note 7 (listing OPEC nations); *supra* text accompanying notes 152, 155-59 (discussing the Model Law); *Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 4 (recommending that enterprises conform to the U.N. Set of Multilaterally Agreed Equitable Principles, particularly § D from which the Model Law derives, as explained in note 160 and accompanying text, and congratulating UNCTAD for its important and useful work in the field of competition policy and consumer protection).

433. OPEC GENERAL INFORMATION, *supra* note 9, at 11. *See also id.* at 14 (expressing interest in promoting "international co-operation in achieving higher standards of living for all nations, full employment, and economic and social progress and development").

434. *See Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 16-17; *see also supra* note 7. Even if OPEC loses no members, all economies might be able to accommodate any harm by OPEC in the long-run if OPEC cannot maintain its price targets during economic booms or increases in oil consumption that force oil-exporting nations to produce to their capacity, or if non-OPEC nations increasingly elect not to participate in OPEC price agreements,

Venezuela and Indonesia have already taken create a reasonable likelihood that they might eventually withdraw from OPEC like Gabon did, which might have a dramatic effect on OPEC because Venezuela is a founding member,[435] and other OPEC nations have demonstrated interest in competition policy as well. A decent society and peace can probably be maintained.

IX. CONCLUSION

In conclusion, the Bush Administration should not bring an action against OPEC before the ICJ, nor should the ICJ accept an invitation to select and enforce specific antitrust policies.[436] Agreed matters of antitrust law will always be the broader natural law justifications for such policy, and a large portion of the international community now desires enforcement of those principles in the context of economic policy. However, strained international harmonization of the more specific antitrust policy matters would create overly specific guidelines for an overly large community, which would defeat the purpose of human law to regard the utility of particular communities and frustrate the goals of antitrust law.[437] Consequently, the need for cooperation on antitrust matters should not be misconstrued as the need for consensus, and any energy expended for antitrust consensus would be unjustifiable due to the rapid advance of

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increasing their own market shares. *See* Barrionuevo, *supra* note 26; *see also supra* note 30 and accompanying text.

435. *See supra* note 7. If both countries withdraw from OPEC, the market share of OPEC will also decrease.

436. Forcing uniform antitrust policy upon the world community might instigate concerns noted by Grotius:

> But this attempt to drive things too far, is often so far from succeeding, that it does harm; because the excess which it involves is easily detected; and then, detracts from the authority of what is said, even within the limits of truth. We are to provide a remedy for both disorders; both for thinking that nothing is allowable, and that everything is.

GROTIUS, *supra* note 233, ¶ 29, at xxxi.

437. Aquinas wrote, "The general principles of the natural law cannot be applied to all men in the same way on account of the great variety of human affairs: and hence arises the diversity of positive laws among various people." AQUINAS, *supra* note 214, Q. 95 art. 2, at 1015. *See also id.* Q. 97 art. 1, at 1023 ("[T]he natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies."); *supra* text accompanying note 372 (quoting Grotius on the purpose of human law); *Report of the Expert Meeting on Competitiveness* (U.N. Trade and Development Board), *supra* note 4, at 12 ("[C]onsumer protection policies differ[ ] among countries and this fact [has] to be reflected in consumer protection laws."); *supra* Part IV (discussing different preferences for antitrust enforcement).

competition policy worldwide.[438] Currently, the international community would be better served by attending to more direct natural law requirements without the enforcement of which world tranquility cannot be maintained at all,[439] to wit, international terrorism, which has been of particular importance in the exhaustion of international resources in recent months and the stated goal of the Bush Administration. International actors can pursue the goal of making antitrust law more effective internationally by increasing the number and efficacy of international conventions and working together to protect each others' citizens from anticompetitive harms.[440]

Joel Brandon Moore[†]

438. *See supra* Part V.

439. *See, e.g., supra* note 394 (quoting Pufendorf); *supra* text accompanying note 393 (quoting Aquinas).

440. *See, e.g.*, Monti, Speech at the Global Forum on Competition, *supra* note 94, at 3-4 (expressing concern for the inability of nations to protect their citizens from anticompetitive behavior due to jurisdictional barriers); *supra* note 179 (discussing the second OECD Global Forum on Competition, which explored avenues for cooperation in antitrust investigations); *supra* note 213 ¶ 1 (listing ways in which sovereigns are currently working together on antitrust matters).

† J.D. Candidate, 2003, Vanderbilt University Law School; M.A. (2000), B.A. (1999), Michigan State University. I dedicate this Note to the memory of Dr. Rev. Frederick C. Moore (1948-1996), my father. His wise guidance is an invaluable asset in my life, and his example continues to inspire and motivate me. I would like to thank my mother Lois for her love and support, and my brothers Brent and Eric. I am perpetually indebted to God for all of these blessings.

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