

“FIXING” THE CLASSICAL LEGAL TRADITION

JAMIE G. MCWILLIAM*

ABSTRACT

A “moral turn” in jurisprudence—in which scholars and judges are making overt appeals to the classical legal tradition and its natural law principles—has been gaining steam. Originalism, with its focus on positive law, is increasingly viewed as a morally empty jurisprudence. But positive law is a necessary, though not sufficient, component of the classical tradition, providing the means for a society to advance the common good. With that in mind, this Article explains how certain core originalist theses provide a deeper understanding of the mechanics of how positive law fulfills its moral role. It, therefore, argues that these concepts should be accepted by classical legalists. Importantly, this does not mean that the natural law requires interpreters to be “originalist.” Rather, they should view discrete originalist theses as part of a larger jurisprudential whole that incorporates the background moral justifications for law.

This Article begins by showing how the classical tradition, which grounds law in reason and the common good, provides a richer jurisprudential framework than the morally neutral approach characteristic of positivist originalism. It then examines how three key originalist commitments—the theory of legal change, the fixation thesis, and the constraint principle—align with and enhance the classical tradition’s understanding of positive law. The theory of legal change preserves lawmakers’ determinations until lawfully changed or displaced by a new determination. The fixation thesis keeps interpreters honest about what lawmakers sought to convey through their promulgated instrument. And the constraint principle guides judges from the legal text’s original meaning to the determination embodied therein. These principles operate together to provide the settlement and stability necessary for the community to flourish.

By situating these three theses within the broader tradition, this Article develops a practical framework for interpretation that is honest to both the lawmakers’ prior determinations and the law’s background prin-

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principles. The interpreter begins with an historical understanding of the legal text. In most cases, that decides the issue. But sometimes the text is underdetermined, providing a range of historically plausible interpretations. Then the interpreter must appeal to the principles determined through the law in order to decide on the proper interpretation. Drawing on illustrative case studies, including blasphemy laws under the First Amendment and the disarmament of felons under the Second Amendment, this Article reveals how incorporating these originalist theses into classical legalism offers principled guidance, preserving the stability of textual meaning while advancing the moral purposes of law. This incorporation provides a morally grounded, historically informed, and practically robust framework for contemporary legal interpretation.

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INTRODUCTION

Originalism has been characterized by its opponents as everything from “bullshit”¹ to a “banalit[y].”² In particular, natural law criticisms of originalism have gained steam in recent years—those that view a strictly

1. See generally Michael L. Smith, *Is Originalism Bullshit*, 28 LEWIS & CLARK L. REV. 779 (2025).

2. Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), <https://iustitium.com/pickwickian-originalism>.

positivist conception of originalism as “morally empty.”³ These critiques carry weight, and more and more scholars have attempted to provide classical moral justifications for their jurisprudence. But even among these scholars, there is something many find inescapable about originalism’s core theses. This Article aims to examine those theses that transcend originalism as a judicial philosophy and show how they operate within the classical legal tradition.

A philosophical split has been growing on the legal right between those committed to a positivist conception of law⁴ and those who desire a return to our country’s classical, natural law origins.⁵ And originalism, once the touchstone of legal conservatism in the United States, is not immune from this divide. Originalism has always had its discontents on both sides of the aisle, represented on the legal right by those who sought a philosophy more in tune with our country’s natural law roots.⁶ During the rise of originalism in the latter half of the twentieth century, the likes of Hadley Arkes⁷ and Harry Jaffa⁸ stood as torch bearers of that tradition. They worked tirelessly to rebut⁹ the positivist philosophies of Antonin Scalia¹⁰ and Robert Bork.¹¹ Nonetheless, positivist originalism has been the dominant conservative judicial philosophy for several decades.¹²

3. Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), <https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence>.

4. See, e.g., Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 819–20 (2015); William Baude, *Is Originalism our Law?*, 115 COLUM. L. REV. 2349, 2351–52 (2015) (describing the “positive turn”).

5. See Chester James Antieau, *Natural Rights and the Founding Fathers—The Virginians*, 17 WASH. & LEE L. REV. 43, 51 (1960) (describing how many of the Founders “had been well nurtured in the jurisprudence of [classical natural law thinkers like] Hooker, Bellarmine, Grotius, Thomas Aquinas, and Vattel”); ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 53 (2022) (advocating a return to the classical legal tradition that “structured and suffused our law” from this nation’s birth).

6. Compare Arkes, *supra* note 3 (describing originalism as “a morally empty jurisprudence”), with Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1502 (2012) (“[W]hen reasonable people disagree over the fundamental original meaning of text based on identical historical source materials, the value of originalism as a means of authoritatively determining constitutional meaning becomes highly questionable.”).

7. See, e.g., HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990).

8. See, e.g., HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* (2000).

9. See Hadley Arkes, Russell Hittinger, William Bentley Ball, & Robert H. Bork, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1, 1992), <https://firstthings.com/natural-law-and-the-law-an-exchange> (Arkes responding to Bork’s criticisms); Glenn Ellmers, *Why Harry V. Jaffa Matters*, CLAREMONT REV. BOOKS, <https://claremontreviewofbooks.com/why-harry-v-jaffa-matters/> (last visited Nov. 8, 2025) (describing how Jaffa argued against the “amoral proceduralism of conservatism’s leading judicial thinkers, including Robert Bork, William Rehnquist, and Antonin Scalia, who repudiated any judicial notice of moral principles outside the bare text of the Constitution”).

10. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

11. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

12. See Jonathan Gienapp, *Why is the Supreme Court Obsessed with Originalism?*, YALE UNIV. PRESS (Oct. 21, 2024), <https://yalebooks.yale.edu/2024/10/21/why-is-the-supreme-court->

Though not new, the arguments attacking originalism from a natural law perspective have taken on new life in recent years. This largely began when Adrian Vermeule published his essay *Beyond Originalism* in the *Atlantic* in 2020.¹³ At a broad level, Vermeule and similar scholars advocate for a return to the tradition that has its roots in Aristotle, Augustine, and Aquinas,¹⁴ and that was brought into the American legal regime by the Founders.¹⁵ This tradition is rich and varied but generally accepts Aquinas's definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."¹⁶ In other words, there is more to a law in the classical conception than its positive enactment or social acceptance.¹⁷ Behind every law binding in conscience is a principle of reason.¹⁸ And the posited law must be "ordained to the common good."¹⁹ In addition to these substantive features of law is the positivist ideal of law as a promulgated command of the sovereign.²⁰ So the classical lawyer views law in light of the broader moral principles that are concretely applied through the posited law.

obsessed-with-originalism ("For several decades, originalism has been the rallying cry of the conservative legal movement . . .").

13. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

14. Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 408 (2006) (citing "Aristotle, Augustine, and Aquinas" as early advocates of the natural law).

15. See Robert S. Barker, *Natural Law and the United States Constitution*, 66 REV. METAPHYSICS 105, 106 (2012) ("[T]he Natural Law as understood by the Founding Fathers of the Constitution was the Natural Law that for two millennia had been a traditional and essential element of Western Civilization; that is, Natural law as understood and explained by, for example, Sophocles, Aristotle, Cicero, St. Thomas Aquinas, and Francisco de Vitoria."); Antieau, *supra* note 5, at 78 (describing Aquinas's influence on Madison and the broad reach of similar thinkers in the colonies); KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING 4 (2022) (showing how "the background assumptions of American public life during the American founding were derived from and compatible with the Christian natural-law tradition that developed from the long engagement of Christianity with classical political philosophy, hitting its highwater mark in medieval scholasticism and retaining its influence through the dominant theological traditions in the North American colonies").

16. Thomas Aquinas, *Summa Theologica*, NEW ADVENT, question 90, art. 4, <https://www.newadvent.org/summa/2090.htm> (last visited Nov. 8, 2025); see, e.g., VERMEULE, *supra* note 5, at 3; Jamie G. McWilliam, *A Classical Legal Interpretation of the Second Amendment*, 28 TEX. REV. L. & POL. 125, 130 (2023); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 7 (2022); Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 416 (2022).

17. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 108 (2022) ("Law in this tradition . . . is not the product of the arbitrary will of a ruler, nor is it simply whatever is identified by social convention as law."). *Contra* Sachs, *supra* note 4, at 825 (describing the positivist position that "what counts as law in any society is fundamentally a matter of social fact").

18. McWilliam, *supra* note 16, at 131 ("The *ius naturale* provides general principles of law discernable by the reason of all people."); Alicea, *supra* note 16, at 7 (describing "substantive[] consisten[cy] with the natural law" as a criteria for law to be morally binding).

19. Aquinas, *supra* note 16, at question 90, art. 2.

20. See, e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 120–21 (1861) ("Laws properly so called are a species of *commands*. But, being a *command*, every law properly so

Originalism, in its most widely accepted forms, renounces the use of reasoning that does not ultimately depend on historical fact of some type.²¹ By relying purely on demonstrations of social fact, it claims moral neutrality.²² But classical scholars have critiqued this claim as a fool’s errand.²³ Since the justification for both law itself and the content of the law is a moral one, facially ignoring law’s underlying morality at best presents an incomplete picture of law and the process of interpretation,²⁴ and at worst perverts the law by allowing its application to drift from its moral reason.²⁵ And as Hadley Arkes and others have pointed out, this move away from law’s first principles is itself ahistorical, as the Founders regularly employed such moral reasoning in their arguments and decisions.²⁶

But even for many who accept the classical tradition, there is something appealing about originalism—something that rings true. For this reason, some have sought to bridge the gap between originalism and the classical tradition. Arguing from within the classical tradition, Jeffrey Pojanowski and Kevin Walsh have sought to justify a form of original-law originalism (originally posited by Stephen Sachs).²⁷ Beginning with the classical notion that positive law exists to authoritatively resolve underdetermined natural law principles in a way that advances the common good,²⁸ they persuasively argue that the original legal decision made by the Founders must be fixed until lawfully changed in order for those decisions to actually have that resolving effect.²⁹ Joel Alicea has similarly defended originalism by arguing from popular sovereignty and the peo-

called flows from a *determinate* source, or emanates from a *determinate* author Positive laws, or laws strictly so called, are established directly or immediately by [among others:] monarchs, or sovereign bodies, as supreme political superiors”).

21. See, e.g., Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778 (2022) (“Originalists say our law depends on facts about the past.”); BORK, *supra* note 11, at 66 (arguing that judges should not appeal to moral justifications).

22. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 5–6 (1971) (arguing that “the Court need make no fundamental value choices” because neutral principles can be derived from the “rights and liberties specified by the Constitution”); Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1325 (2021) (describing the originalist movement as “allerg[ic] to critical moral reasoning”).

23. Casey & Vermeule, *supra* note 17, at 127 (“To the extent it tries to exclude consideration of principles of law’s morality, originalism tries to banish what cannot be banished.”).

24. Arkes, *supra* note 3 (“That Originalism indeed has nothing to say on matters of real consequence. It is a morally empty jurisprudence.”).

25. McWilliam, *supra* note 16, at 144–45.

26. Hadley Arkes, *Natural Law and Originalism*, LAW & LIBERTY (June 27, 2023), <https://lawliberty.org/natural-law-and-originalism-what-is-the-argument-really-about> (rejecting “a truncated Originalism, which detaches the Constitution from the moral ground of the Constitution, as the leading Founders understood it. John Marshall, James Wilson, and Alexander Hamilton had a remarkable knack of tracing their judgments back to those axioms or anchoring truths that the framers had drawn upon in shaping the Constitution”); STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 1–2 (2021) (describing the move in American jurisprudence away from natural law reasoning).

27. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 101 (2016).

28. *Id.* at 99.

29. *Id.* at 100.

ple's responsibility to achieve the common good³⁰ that, in the American system, the Constitution's commands must be construed as they were understood by the people at the time it was drafted.³¹ Josh Hammer has taken a slightly different approach by working within mainstream originalism's interpretation–construction framework to advocate for a form of originalism that accepts considerations of the common good and natural principles at the construction phase.³²

This Article accepts much that has been said by these and other authors. But it engages in a slightly different endeavor. The point of this Article is not to attempt to justify originalism as a jurisprudential theory with natural law arguments. Nor is it to craft a form of originalism that incorporates natural law principles or conceptions of the common good. It is also not intended to argue for any particular modern conception of the classical tradition—such as Vermeule's common good constitutionalism.

Instead, this Article inhabits the classical tradition broadly understood. And operating within that tradition, its aim is twofold. First, it is to explain why certain originalist theses—rather than any particular form of originalism—are true and necessary for proper legal interpretation even under the classical tradition. Importantly, this is not to say that “originalism” as theory of jurisprudence is required by the classical tradition. Rather, certain *theses* recognized by originalists must be true, and are therefore necessary to the classical tradition—or any jurisprudential theory claiming a fulsome understanding of law—as well. The second purpose is to describe a practical framework for interpretation that utilizes these theses within the broader natural law tradition. Ultimately, this Article concludes that originalism (meaning the collection of theses accepted herein) is simply the deference that we owe to the prior determinations made by the Founders in drafting the Constitution. And it shows how to apply that deference in real-world scenarios while also taking full account of the law's natural law foundations.³³

30. Alicea, *supra* note 16, at 25 (“Who is responsible for achieving the common good? *All members of a society*, since the common good is necessary to the realization of *their own* good.”).

31. *Id.* at 44–45.

32. See Josh Hammer, *Common Good Constitutionalism and Common Good Originalism: A Convergence?*, 46 HARV. J.L. & PUB. POL'Y 1197, 1210–11 (2023) (contrasting common good originalism with common good constitutionalism by noting that the former “formulates itself within the more originalist-familiar nomenclature of ‘construction zones’”).

33. One important note: While this Article presents these theses as necessary to classical legal interpretation at a high level, the specific ways they are applied in a given legal system depend on certain assumptions imbedded in that system. For example, in the United States, the written nature of the Constitution affects how we approach ascertaining the determinations embodied therein. But other countries have different methods of structuring their posited legal system, and there, the text might not matter as much—the originalist theses focused on the text itself, therefore, would have less influence. See generally Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 168 (2017) (arguing that “you can have a bona fide originalism in a society that uses no written instruments at all”).

Part I of this Article explores the classical legal tradition and the role of positive law within it. The classical tradition begins with general principles of reason that are morally binding in their own right. But these principles are often too broad to apply to concrete situations with any consistency, causing disorder and other harms to the common good. Those charged with lawmaking authority must determine these principles in ways that are sensitive to the needs and goods of the specific polity. This process culminates in the promulgation of posited law—rules that implement general principles of reason in a specific manner.

Against the backdrop of this tradition, Part II turns to a number of originalist theses that have had particular hold over originalist scholars. Specifically, this Article examines the theory of legal change, the fixation thesis, and the constraint principle. The new kid on the block is Stephen Sachs’s thesis that “[o]ur law is still the Founders’ law, as it’s been lawfully changed.”³⁴ The classical legal tradition operates against the backdrop of objective, unchanging principles. Those principles are concretized through the decision-making of lawmakers. That decision had a specific legal content. If the law’s foundational principle is unchanging and the decision implementing it had a particular content, then the legal content of the determination is, in the first instance, fixed. By analogy, if the foundation of a house cannot move, and the framing built upon that foundation cannot move, then the house itself is fixed in place.

The law’s legal content changes only when a new determination is made that supplants the prior one. In a legal system in which determinations are embodied in text, the communicative content of that text is *also* fixed.³⁵ Linguistic drift occurs, but that does not change the meaning of the text. For example, in the 1930s, “dinner” often referred to the meal taken in the middle of the day, but now it is typically applied to the evening meal.³⁶ It would be ridiculous to suggest that a text—legal or otherwise—written in the 1930s that referred to “dinner” necessarily meant the evening meal. And ultimately, the preceding theses must constrain legal interpreters. The words used to convey the lawmakers’ determination meant something. To assert differently is to lie either about the communicative content of the text or the determination itself.³⁷

Taking these theses for what they are—and nothing more—Part III lays out a framework for interpretation that is faithful to the classical tradition while incorporating the aspects of these theses that must be true. In the general case, a legal interpreter’s job is to ascertain and apply the

34. Sachs, *supra* note 4, at 838.

35. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 15 (2015).

36. See *infra* note 212.

37. See Jamie G. McWilliam, *Negative Originalism*, 76 RUTGERS U. L. REV. COMMENTS. 1, 2–3 (2023) (describing originalism as “a theory of not lying” or “a theory requiring judges to be honest about the linguistic meaning of a text and to be faithful to that meaning”).

determination made by lawmakers. Where this determination is embodied in a legal text, the first place to look for the content of the determination is in the communicative content of the text itself.³⁸ This requires an examination of what the words of the text meant at the time it was written, which usually decides the issue. Once the determination is ascertained, it is simply applied. But other times, even once the lawmakers' decision is established, it is still underdetermined as applied to the facts of the case.³⁹ In those instances, the interpreter should look to the background principles implemented *through* the determination and apply the law in a manner that best fulfills those principles. This is not being unfaithful to either the communicative content of the legal text or the determination embodied therein for two reasons: (1) this step is only taken when the foregoing are underdetermined in a given case (so the text could not have uncontroversially decided the issue anyway); and (2) the principle of reason is already contained within the determination made by lawmakers, so consideration of the principle is really fidelity to the determination applying it. Finally, Part III applies this interpretive framework to First and Second Amendment examples.

I. POSITIVE LAW AND THE CLASSICAL TRADITION

Classical legalism emphasizes the pre-constitutional principles that form the background of our moral judgment (otherwise known as the natural law).⁴⁰ But the tradition is also about interpreting the *positive* law.⁴¹ At the core of classical legalism is Aquinas's definition of the positive law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."⁴² Some of these features of law relate to its positive nature, such as its promulgation and who enacts it. But the others—that the law be "of reason" and for "the

38. VERMEULE, *supra* note 5, at 74–75 (discussing "presumptive textualism").

39. See, e.g., Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 26 (2018) ("But how are judges to follow their constitutional instructions when the communicative content of the Constitution's text does not yield a single determinate answer, and they must exercise (textually bounded) discretion?").

40. See, e.g., HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 8 (2010) (describing how law is to traced "back to first principles and anchoring truths"); Casey & Vermeule, *supra* note 17, at 114 ("Human flourishing as conceived in the classical tradition is based on the premise there are ends and goods objectively constitutive of human *eudaimonia* or *felicitas*—happiness. These goods and ends are instantiated by acting consistently with the precepts of the *ius naturale* (natural law), whose most basic and self-evident injunction is that good is to be done and evil to be avoided."); McWilliam, *supra* note 16, at 130–31 ("[T]he classical tradition emphasizes the *ius naturale* . . .").

41. See McWilliam, *supra* note 16, at 131–32 (describing the relationship between the natural and positive law in the classical tradition); VERMEULE, *supra* note 5, at 108 ("Recall that the classical approach itself includes positive law, in the form of *lex*, or more broadly the *ius civile* promulgated by particular jurisdictions in order to determine and implement background legal principles.").

42. Aquinas, *supra* note 16, at question 90, art. 4; see also Jerome Hall, *Concerning the Nature of Positive Law*, 58 YALE L.J. 545, 554 (1949) (describing "St. Thomas Aquinas' definition of positive law as . . . the crystallization of a long philosophical tradition"); Pojanowski & Walsh, *supra* note 16, at 416 ("Fidelity to the understanding of law set forth in [Aquinas'] definition is or ought to be common ground for everyone claiming fidelity to the classical natural law tradition.").

common good”—illustrate how the positive law relates to substantive requirements of the natural law.⁴³ In other words, classical legalism views positive law as inherently tied to certain background principles. The classical tradition, therefore, is not about judges *sua sponte* applying their own subjective preferences.⁴⁴ Rather, it concludes that specific background principles are embodied within a posited law and provides a framework for interpreting positive law in light of those principles.⁴⁵

A. “An Ordinance of Reason”

The classical legal tradition accepts that there are certain “first principles” that are ascertainable by human reason.⁴⁶ These principles are typically too generally defined to resolve complex cases directly.⁴⁷ Therefore, in most situations, lawmakers must give specificity to these general principles.⁴⁸ This process has classically been referred to as “determination”—giving further legal content to underdetermined principles.⁴⁹ The result of determination is the enactment of positive law.⁵⁰ In the classical tradition, positive law is a specific enactment within the bounds of rational principles, or an “ordinance of reason.”⁵¹

43. The two substantive and two procedural classical requirements for law have been described as the “*formal cause, final cause, efficient cause, and material cause*” of law. Pojanowski & Walsh, *supra* note 16, at 417 (citing J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S *TREATISE ON LAW* 11 (2014)). The guiding principles of reason are the “formal” cause because they provide a pattern for what positive law should be. *Id.* Providing for the common good is the ultimate purpose of law and so is the “final” cause. *Id.* The “efficient” cause is the way that the law is implemented—through the authority of he who has care of the community. *Id.* And promulgation is how the law is constructed, or its “material” cause. *Id.*

44. See Casey & Vermeule, *supra* note 17, at 109 (“[T]he common good is not simply a blank, or a placeholder for whatever subjective preferences any particular official might desire to impose . . .”).

45. See *id.*

46. Aquinas, *supra* note 16, at question 94, art. 2; McWilliam, *supra* note 16, at 131 (“The *ius naturale* provides general principles of law discernable by the reason of all people.”).

47. See Pojanowski & Walsh, *supra* note 27, at 121 (describing how the natural law “underdetermines” both “questions about a legal order in general and many particular questions to which law must speak”); McWilliam, *supra* note 16, at 131 (describing the vagueness of rational principles); Casey & Vermeule, *supra* note 17, at 120 (discussing situations in which “principles of justice are general and thus do not specifically dictate particular legal rules or when those principles seem to conflict and must be mutually accommodated or balanced”).

48. See Aquinas, *supra* note 16, at question 95, art. 2 (describing how the natural law can be applied in a manner in which “general forms are particularized as to details”); Pojanowski & Walsh, *supra* note 27, at 121 (“Even where the natural law speaks clearly, the positive law must fill in details that are underdetermined by reason.”); McWilliam, *supra* note 16, at 131 (describing how natural principles must often “be given a concrete form by lawmakers to have a practical effect in a community”).

49. See Casey & Vermeule, *supra* note 17, at 120 (describing determination as “the prudential process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to [particular] local circumstances or problems”); Alicea, *supra* note 16, at 22 (characterizing determination as the process of deciding when the means of achieving desirable conditions “are *not* inexorably dictated by reason and will vary according to circumstances” and therefore deciding on the means of achieving them).

50. McWilliam, *supra* note 16, at 131 (“[The] end result [of determination] is the creation of positive law.”).

51. Aquinas described this through the example of punishing crime: “[T]he law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determina-

Of course, whether there are self-evident natural principles⁵² is not self-evident to some, and much debate has occurred over this issue.⁵³ That is a serious philosophical inquiry, and this Article will leave it to the philosophers. Instead, the focus here will be on the *legal* ramifications of these principles in a system that for thousands of years took them for granted.⁵⁴

Recognizing these background moral principles—if only at the level of “do good and avoid evil”⁵⁵—is the threshold of understanding the classical tradition. But the principles themselves are typically too general to properly order society.⁵⁶ The positive law, therefore, is needed to provide specific enactments of these general principles.⁵⁷ One way that the

tion of the law of nature.” Aquinas, *supra* note 16, at question 95, art. 2; *see also* Pojanowski & Walsh, *supra* note 27, at 121 (describing the natural law as “a framework within which people can make reasoned choices”); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 27 (2d ed. 2011) (emphasis added) (noting the classical view that “[t]he legal validity (in the focal, moral sense of ‘legal validity’) of positive law is derived from its *rational* connection with (i.e. *derivation from*) natural law”).

52. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident”); J. BUDZISZEWSKI, *WHAT WE CAN’T NOT KNOW: A GUIDE* 19 (2011) (describing certain moral principles as truths “we can’t not know”).

53. For lawyers, a paradigmatic example can be found in the various opinions in *Lochner v. New York*, 198 U.S. 45 (1905). On the one hand, Justice Peckham, writing for the majority, and Justice Harlan in dissent each seem to take for granted that certain moral principles can be considered in deciding cases. Both considered the individual right to engage in an occupation in a manner he so chooses—his “freedom to contract”—as well as the state’s duty to promote public health and safety. *Id.* at 57, 64–66 (Justice Peckham balancing these two general principles); *id.* at 65–66 (Harlan, J., dissenting) (same). Though the two justices shared this general outlook, they differed on how the two principles weighed against each other. On the other hand, Justice Holmes rejected the ideas that moral truths exist or that they should influence the outcome of cases. *Id.* at 75–76 (Holmes, J., dissenting) (“Some . . . laws embody convictions or prejudices which judges are likely to share. Some may not [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

54. *See* Barker, *supra* note 15, at 106–07, 109–14 (describing how natural law formed an essential part of Western law since Aristotle, tracing that thinking through Aquinas and the Scholastics, and discussing the Founders’ understanding of unchanging and eternal natural principles).

55. Martin Rhonheimer, *Natural Law as a “Work of Reason”*: *Understanding the Metaphysics of Participated Theonomy*, 55 AM. J. JURIS. 41, 54 (2010) (“[T]he call that . . . is found within all cultures: ‘to do good and avoid evil.’”); Germain G. Grisez, *The First Principle of Practical Reason*, in *AQUINAS: A COLLECTION OF CRITICAL ESSAYS* 340, 340 (Anthony Kenny ed., 1969) (“The first principle of practical reason is a command: *Do good and avoid evil.*”); Aquinas, *supra* note 16, at question 94, art. 2 (“Hence this is the first precept of law, that ‘good is to be done and pursued, and evil is to be avoided.’ All other precepts of the natural law are based upon this”).

56. *See* HADLEY ARKES, *MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION* 42 (2023) (“[N]othing in those principles could possibly tell judges the ‘right price’ for a pair of pants, the right number of divisions in breaking up AT&T, or the standards to govern wage-price controls.”); Pojanowski & Walsh, *supra* note 27, at 121 (“The natural law prohibits some legal rules and may require others, but there are many more questions for which the natural law does not dictate precise answers.”).

57. Michael P. Foran & Conor Casey, *Constitutionalism and the Common Good: On the Role of Unwritten Principles*, 110 SUP. CT. L. REV. 169, 176 (2023) (“Adherents to the classical natural law tradition view posited law as a determination made by a political authority which makes more particular and specific the frequently open-ended and under determinate demands of the basic precepts of the natural law.”); McWilliam, *supra* note 16, at 132 (“[P]ositive law exists to enact, in a specific manner, the principles of the *ius naturale.*”).

positive law can be derived is through deduction: “[E].g. that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man.’”⁵⁸ But even if the need to outlaw murder is derivable from natural law principles, the questions of how to differentiate between severity of killings for purposes of punishment, and then how to actually punish the offender, remain open. Those decisions, which implement natural principles in a practical and administrable manner, are left to lawmakers’ reasonable discretion. In other words, even when we accept that objective moral principles form the background of law, lawmakers must make decisions that are not deductively required by those principles, but that are nonetheless consistent with them.⁵⁹

This is the process of determination.⁶⁰ To continue with the murder example, one might deduce that a statute criminalizing murder is necessary.⁶¹ But whether premeditated murder and a heat-of-the-moment killing should be punished the same is something the lawmaker must decide.⁶² And if they are punished differently, what should the punishments be? And just how disparate the treatment? Let us assume that lawmakers decide to punish premeditated murder with life imprisonment, while the killer of passion is eligible for only twenty years in prison. Neither of these incarceration terms are specifically required by the natural law, but each is consistent with the principle that murder is wrong and should be punished.

One might think of natural principles as a soccer goal. So long as the ball (the determination) is within the goal (the principle), it does not matter where it crosses the line. But of course, the goal is a defined area, and a ball that misses will not score. So too with principles of reason: A determination that falls outside the scope of its background principles is

58. Aquinas, *supra* note 16, at question 95, art. 2 (emphasis added); *see also* Foran & Casey, *supra* note 57, at 183 (“For example, the preservation of life is an aspect of human good and principle of the natural law. This yields the conclusive precept against the intentional taking of innocent life that is easily posited through laws prohibiting homicide and providing for self-defence.”).

59. *See* Foran & Casey, *supra* note 57, at 184 (“There has always been recognition in the classical legal tradition that concretization of the principles of natural law . . . is . . . much less simple than [simple deduction], as natural law’s first precepts are open-ended.”); Alicea, *supra* note 16, at 22 (“But it is possible that some conditions are *not* inexorably dictated by reason and will vary according to circumstances, and it is certain that this is true of . . . the *means* of achieving desirable conditions.”).

60. Aquinas, *supra* note 16, at question 95, art. 2 (“[T]he 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.”).

61. *Id.* (emphasis added) (“Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g. that ‘one must not kill’ may be derived as a conclusion from the principle[s] that ‘one should do harm to no man.’”).

62. *See* Pojanowski & Walsh, *supra* note 27, at 122 (“To take a simple example, even if the moral law requires a human law against murder, it does not speak directly or categorically about every element of the crime, degrees of culpability, available excuses and justifications, and particular penalties.”).

not an “ordinance of reason.”⁶³ In the murder example, lawmakers have much discretion in deciding how to punish murder. But a “statute [explicitly] *legalizing* murder, for example, is so far out of the confines of human rationality that it could not possibly be an ordinance of reason.”⁶⁴

So positive law is necessary to provide specific guidance to the community on how its members should order their actions.⁶⁵ But the requirement that an ordinance be “of reason”⁶⁶ acts as a real check on the scope of permissible lawmaking.⁶⁷ Positive law exists to implement broader principles of reason in a practical manner.⁶⁸ But those laws must also be consistent with the background principles they apply.⁶⁹

Just as positive law can add specificity to underdeterminate⁷⁰ natural principles, it can also provide principles within which future determinations must operate.⁷¹ For example, a constitution should determine natural principles, but it probably also specifies its own narrower, but still relatively broad, principles.⁷² Within the bounds of *those* principles, lawmakers enact legislation. And within the scope of legislation, agencies can promulgate regulations.⁷³ At each step of decision-making, the

63. See McWilliam, *supra* note 16, at 133 (“The positive law, then, is a determination for the common good, but the scope of this determination is not unbounded . . . The *ius naturale* thus provides the basic bounds of reason within which such determinations for the common good can be made.”).

64. *Id.* (emphasis added).

65. See Pojanowski & Walsh, *supra* note 27, at 121 (describing this “moral need for positive law”); Casey & Vermeule, *supra* note 17, at 118 (“Posited law is also critical to the common good, as it is needed to give specific content to the law where background principles of the *ius naturale* need specificity . . .”).

66. Aquinas, *supra* note 16, at question 90, art. 4.

67. See Pojanowski & Walsh, *supra* note 27, at 121–22 (“[W]e mean that the natural law provides a framework within which people can make reasoned choices, and bounds beyond which they ought not choose . . .”); Casey & Vermeule, *supra* note 17, at 117–18 (discussing how lawmakers’ “discretionary choice[s]” must be “within [the] reasonable bounds” of the natural law); McWilliam, *supra* note 16, at 133 (“The *ius naturale* thus provides the basic bounds of reason within which such determinations for the common good can be made.”).

68. VERMEULE, *supra* note 5, at 58 (“The natural and positive law . . . work together in a larger framework, in which the positive law specifies and gives concrete form to general principles established by the natural law. The main vision is not one of contradiction, but of harmonious cooperation.”).

69. See Conor Casey, *Constitutional Design and the Point of Constitutional Law*, 67 AM. J. JURIS. 173, 180 (2022) (“Determination of a large-C Constitution and determination *within* the constitutional order both involve an immense degree of creative choice that is cabined, but not dictated by, reason and an orientation to the common good.”).

70. “Underdeterminate” is meant in the sense commonly used by classical legal writers: “the natural law provides a framework within which people can make reasoned choices . . . but no precise algorithm for making such choices.” See Pojanowski & Walsh, *supra* note 27, at 121–22.

71. VERMEULE, *supra* note 5, at 151 (“[Determination] describes not only the relationship between natural law and positive law, but also the relationship between higher and lower levels of positive law . . .”).

72. This discussion uses the American system as an example, but similar tiers of determination can be imagined in any legal system.

73. VERMEULE, *supra* note 5, at 151 (“[A]gency action often determines, gives concrete form to, general principles laid out in statutes or agency legislative rules . . .”).

broader principles become more concrete.⁷⁴ So every level of positive law, from constitutions to granular regulations, traces its content back to first principles of reason. And at each step, it is those principles that constrain and guide lawmaking authority.

B. “The Common Good”

The classical tradition accepts that certain things are inherently “good” for people. At a general level, natural goods are those things that lead to human flourishing and happiness.⁷⁵ Of course, those are broad concepts, and some conceptions⁷⁶ of them might not actually be good. As Lawrence Solum has noted, “The word ‘happiness’ is ambiguous . . . ‘[c]ontentment,’ ‘joy,’ ‘pleasure,’ and ‘satisfaction’ are all mental states and hence subjective.”⁷⁷ What makes one person “happy” might terrify another. A serial killer could gain pleasure by brutalizing a victim, but that does not mean he is flourishing in the classical sense. In a less hyperbolic example, a substance abuser might find relief in methamphetamine, but eventually that use will deteriorate his health and well-being and be destructive of his social happiness.

The good cannot be purely subjective.⁷⁸ Instead, an account of human flourishing should draw on human nature.⁷⁹ We are rational creatures.⁸⁰ And how we ought to live is a question of reason. The answer to that question is one that will be debated until the end of time, but its contours are provided by those first principles described above.⁸¹ These principles are dictated by human nature and are ascertainable by human reason. They account for a just and fulfilling way of living.

As an example of how to derive these substantive principles, consider the classical principle that it is “good” to defend one’s own life. “A man’s strongest inclination is the preservation of his own life.”⁸² This

74. McWilliam, *supra* note 16, at 134–35 (“[E]ach step of determination (constitutional, legislative, regulatory) further narrows the bounds of possible determination at later steps.”).

75. See FINNIS, *supra* note 51, at 23 (discussing those “basic forms of human flourishing [that are] goods to be pursued and realized”); VERMEULE, *supra* note 5, at 28 (describing “the happiness or flourishing of the community” as the “ultimate genuinely common good”); Aquinas, *supra* note 16, at question 90, art. 2 (“[T]he last end of human life is bliss or happiness . . . Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness.”).

76. See Lawrence B. Solum, *Flourishing, Virtue, and Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL’Y 1149, 1150–51, 1153 (2023) (discussing the “concept-conception distinction”).

77. *Id.* at 1153.

78. As previously noted, this Article takes the classical legal tradition’s view on the good as a given and does not attempt to prove this thorny issue or counter all the attendant objections.

79. See, e.g., Solum, *supra* note 76, at 1154 (“That account [of the common good as human flourishing] begins with human nature: humans are rational and social creatures.”).

80. *Id.*

81. See *supra* Section I.A.

82. John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 50 (2010).

drive comes from the “very nature of humanity.”⁸³ One need only consider “the crafty struggle and prayer of someone fallen overboard seeking to stay afloat until the ship turns [a]round”—or even simply one “watching out as one steps off the kerb”—to see that this is true.⁸⁴ And “if one is attacked, [they are] urged by their very nature to attempt to repel their aggressor.”⁸⁵

It is, therefore, in our nature to preserve human life.⁸⁶ From this we receive two correlative principles. First, it is right to preserve our own life. Second, it is wrong to take the life of another. In most day-to-day situations, those two principles guide us toward the general safety of all. But in the case of self-defense, the two come into conflict since preserving one’s own life might cause the aggressor to lose his. Aquinas resolved this conflict through his theory of “double effect.”⁸⁷ As he described it, “[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention.”⁸⁸ Since “moral acts take their species according to what is intended,”⁸⁹ if one acts with solely the intent to preserve their own life, “the ancillary effect of harming another does not render the self-defense unjust.”⁹⁰ Properly executed self-defense preserves innocent life, creating conditions in which we can continue to flourish.

Philosophers operating within the classical tradition have identified general “goods” that are “basic component[s] in our flourishing” and can serve as the starting point for reasoning about more discrete questions.⁹¹ John Finnis famously identified life, knowledge, play, aesthetic experience, friendship, practical reasonableness, religion,⁹² and marriage.⁹³ To

83. Jamie G. McWilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 MINN. L. REV. HEADNOTES 315, 322 (2024).

84. FINNIS, *supra* note 51, at 86.

85. McWilliam, *supra* note 83, at 322.

86. A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 60 (1992) (describing Locke’s view that we have a “[d]ut[y] to preserve others (when this does not conflict with self-preservation)”).

87. David B. Kopel, *The Catholic Second Amendment*, 29 HAMLINE L. REV. 520, 553–54, 562 (2006).

88. Aquinas, *supra* note 16, at question 64, art. 7.

89. *Id.*

90. Jamie G. McWilliam, *Second Amendment Principles*, 33 WM. & MARY BILL RTS. J. 1127, 1134 (2024).

91. FINNIS, *supra* note 51, at 85–87. For present purposes, it is unnecessary to delve into the differences between the “new natural law,” as expounded by the likes of Finnis and Robert George, and the classical natural law of Aquinas. Much ink has been spilled over this distinction. *See, e.g.*, Sean Coyle, *Natural Law Theory, “New” and Old*, 68 AM. J. JURIS. 33, 61–62 (2023). Finnis generally inherits the classical tradition, and where he diverges from those before him, the differences have little impact on the overall point of this Article.

92. FINNIS, *supra* note 51, at 86–90.

93. John Finnis, *Marriage: A Basic and Exigent Good*, 91 THE MONIST 388, 389 (2008) (“Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely, the bringing of that person *into existence* as conceptus, embryo, child, and eventually adult, fully able to participate in human flourishing on his or her own responsibility.”).

this list, others have added family,⁹⁴ work,⁹⁵ integrity,⁹⁶ justice,⁹⁷ and authenticity,⁹⁸ among others. Each of these goods is derived through their role in allowing us to flourish and fulfill our nature most completely.⁹⁹

This is only half of the story, however. Law is classically oriented toward the *common* good—the happiness and flourishing of the community and its members which is “the ultimate genuinely common good of political life.”¹⁰⁰ As the ultimate flourishing of the community, the common good is “capable of being shared [by its members] without being diminished.”¹⁰¹ The “goods” identified by Finnis and other new natural lawyers are central to human flourishing¹⁰² and so are constituent of the broader common good. Friendship is a good that only grows as more people partake in it. The same is true of life, justice, and similar goods. When people experience these goods, they prosper and their community flourishes, leading to the common good of all.¹⁰³ In the classical tradition, securing this common good is the proper end of law.¹⁰⁴

But just because law must classically be oriented toward the common good, does not mean that it subverts individual goods.¹⁰⁵ Law obvi-

94. ALFONSO GÓMEZ-LOBO, MORALITY AND THE HUMAN GOODS: AN INTRODUCTION TO NATURAL LAW ETHICS 13–14 (2002) (“The family is a basic human good.”).

95. *Id.* at 17–18.

96. *Id.* at 23–24.

97. 1 GERMAIN GRISEZ, CHRISTIAN MORAL PRINCIPLES: THE WAY OF THE LORD JESUS (1983), <http://twotlj.org/G-1-5-D.html> (describing the good of justice as an “aspect[] of the interpersonal communion of good persons freely choosing to act in harmony with one another”).

98. *Id.* (“[A]uthenticity . . . is harmony among moral reflection, free choices, and their execution . . .”).

99. See Casey & Vermeule, *supra* note 17, at 114–15 (“Broadly speaking, the goods central to human flourishing . . . include life and component aspects of its fullness: health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity. Our instantiation and participation in these ends and goods constitute the completion or fulfillment of our nature as rational animals.”).

100. *Id.* at 109–11.

101. *Id.* at 108–10 (“In the classical account, a genuinely *common* good is a good that is unitary (‘one in number’) and capable of being shared without being diminished.”); see also FINNIS, *supra* note 51, at 155 (noting that human values such as life, knowledge, friendship, etc., are “‘common good[s]’ inasmuch as [they] can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions”); John Goyette, *On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory*, 13 NAT’L CATH. BIOETHICS Q. 133, 137 (2013) (“When we say that the common good is able to be pursued or enjoyed by many, . . . we mean that the common good as such is not diminished by being shared.”).

102. See, e.g., FINNIS, *supra* note 51, at 155 (“For there is a ‘common good’ for human beings, inasmuch as life, knowledge, play, aesthetic experience, friendship, religion, and freedom in practical reasonableness are good for any and every person. And each of these human values is itself a ‘common good’ inasmuch as it can be participated in by an inexhaustible number of persons in an inexhaustible variety of ways or on an inexhaustible variety of occasions.”).

103. Casey & Vermeule, *supra* note 17, at 115 (“Our instantiation and participation in these ends and goods constitute the completion or fulfillment of our nature as rational animals.”).

104. Aquinas, *supra* note 16, at question 90, art. 3 (“A law, properly speaking, regards first and foremost the order to the common good.”).

105. See Casey & Vermeule, *supra* note 17, at 110 (“[That law is oriented to the common good] is not at all to say, of course, that the individual should be absorbed into the political community or subjected to it.”).

ously should not subject the flourishing of the community to the private benefit of those exercising the power of the sovereign.¹⁰⁶ Nor should it “sacrifice an individual for the sake of an increased benefit to the rest of the community.”¹⁰⁷ This idea—that the common good requirement for law is satisfied just because the law provides some arguable public benefit, and so whatever effect it has on the individual is pardoned—is a fallacy.¹⁰⁸ As Michael Foran has argued, “To diminish the flourishing of others . . . in the name of the common good, is to fundamentally misunderstand what makes the common good common. It also fundamentally misunderstands what it means to pursue a good life, of which membership within a flourishing political community of equals is essential.”¹⁰⁹

Instead, the common good is that which leads to a flourishing community.¹¹⁰ As such, the common good must necessarily harmonize the individual good with the communal good. A community cannot flourish if its members do not. And individuals cannot flourish in an unjust or tyrannical society.¹¹¹ A community oriented to the common good is, therefore, a peaceful and just one in which each citizen is afforded the rights they are due¹¹² and where they “can pursue their own happiness in accordance with law.”¹¹³ As a simplified example of this harmonizing function, consider a baseball team: When a batter hits the ball over the fence, they have achieved an individual good. Yet in doing so, they position the entire team for victory—a communal good. The two are harmonized in a good of the whole that is shared in its entirety by every player on the team.¹¹⁴ The same is true of the common good. It provides the conditions necessary for the flourishing of the individual *and* the flourishing of the community, for the two are inextricably linked.

The end of law is the common good of the polis. This requirement is closely related to the condition that law be an “ordinance of reason.”¹¹⁵ As Foran notes, one can “conceive of the common good and the natural

106. See VERMEULE, *supra* note 5, at 26–27 (“Rule by one, few, or many . . . ordered . . . for private benefit [is] considered tyrannous.”).

107. McWilliam, *supra* note 16, at 137–38.

108. *Id.* at 140–44 (describing “[t]he common good fallacy”).

109. Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MOD. L. REV. 599, 606 (2023).

110. Casey & Vermeule, *supra* note 17, at 110 (“In the classical theory, the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the polis.”).

111. See *id.* (“To put it differently, human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities . . . within which humans are always born, found, and embedded.”).

112. See *id.* at 136–38 (discussing how rights and justice—“affording to each what is due to each”—relate to the common good); Foran, *supra* note 109, at 613 (“To act according to the demands of justice . . . is to render to another what they are due.”).

113. McWilliam, *supra* note 16, at 138.

114. *Id.*

115. Aquinas, *supra* note 16, at question 90, art. 2 (“[S]o nothing stands firm with regard to the practical reason, unless it be directed to the last end which is the common good: and whatever stands to reason in this sense, has the nature of a law.”).

law (including fundamental rights) as co-constitutive; the common good sets boundaries on and helps to define the limits of rights, but the common good is itself defined partly by reference to the natural rights of individual members of a civic community.”¹¹⁶ Put differently, the common good is the goal of law, but that goal is achieved in part through those discrete goods that contribute to human flourishing. And human flourishing is itself defined by those principles of reason that comprise the natural law. Lawmaking must implement those principles in a way that leads to the flourishing of the community and its members in common.

C. “Him Who Has Care of the Community”

The process of determining natural law principles for the common good requires an authority to execute it. This aspect of law should be familiar to the modern reader, as it echoes the positivist notion of law as a command of the sovereign.¹¹⁷ But while the classical tradition includes authority in its conception of law, its view of that authority involves deeper moral claims than the traditional positivist one, intrinsically tied to both ideas about the common good and the principles of reason that guide us.

At a fundamental level, authority itself is necessary to the common good. One purpose of lawmaking is to resolve open questions of societal order—underdetermined by reason—providing the conditions to “[allow] for social coordination, facilitate cooperation, and peacefully and reasonably resolve disputes.”¹¹⁸ But for law to have this effect, it must *authoritatively* resolve those questions.¹¹⁹ Otherwise, resolution would be illusory, and citizens would be free to appeal to opposing authorities.

Alicea provides a persuasive account of the origins and transmission of political authority. As an original matter, he argues, each member of the community has a duty to pursue the common good.¹²⁰ The common good is necessarily linked to the individual good,¹²¹ so individuals share

116. Foran, *supra* note 109, at 609.

117. See, e.g., AUSTIN, *supra* note 20, at 138–39 (“Laws properly so called are a species of *commands*. But, being a *command*, every law properly so called flows from a *determinate* source, or emanates from a *determinate* author Positive laws, or laws strictly so called, are established directly or immediately by [among others:] monarchs, or sovereign bodies, as supreme political superiors . . .”).

118. Pojanowski & Walsh, *supra* note 27, at 100.

119. See *id.* at 99–100 (emphasis added) (“[T]here is a need for *authoritative* resolution to proceed one way or another in bringing about certain human goods in society. Law supplies one such *authoritative* resolution that going forward will settle something that would otherwise have been unsettled.”).

120. Alicea, *supra* note 16, at 25 (“Who is responsible for achieving the common good? *All members of a society* . . .”).

121. *Id.* (“[T]he common good is necessary to the realization of [each individual’s] good (or, under some conceptions of the common good, the common good is, or is part of, *their* good.”); see also Casey & Vermeule, *supra* note 17, at 110 (“To put it differently, human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the

in the responsibility of achieving the common good.¹²² At the same time, “the natural law does not impose an obligation without providing the means of fulfilling that obligation.”¹²³ Since each member of the community has the duty to achieve the common good, “[t]he whole body politic [must be] vested with political authority as an original matter.”¹²⁴ In other words, “‘natural law gives political power to the community,’ thereby embracing an account of authority rooted in popular sovereignty.”¹²⁵

In a community of any considerable size, however, it is not always feasible or efficient for its members to exercise that authority themselves.¹²⁶ In these cases, “the justification for political authority—achieving the common good—would be defeated” by forcing authority to remain in the hands of the community as a whole.¹²⁷ Therefore, “the duty to pursue the common good, which entails the duty to obey political authority, entails also the duty to put it in the hands of a distinct governing personnel, and the people are bound, under the circumstances to transmit power.”¹²⁸ Governments are formed when the people transmit their political authority to a defined subset of individuals who will act as the sovereign in their stead.¹²⁹ In the United States, this happened through the adoption of our written Constitution.¹³⁰

The fact that political authority is transmitted to ensure the common good of the community has important ramifications for how that authority can be exercised. Many forms of government are theoretically able to advance the common good by providing definitive resolution of natural law principles.¹³¹ Monarchies can do so just as direct democracies can—

flourishing of the political communities . . . within which humans are always born, found, and embedded.”).

122. Alicea, *supra* note 16, at 25.

123. *Id.* at 26.

124. *Id.*

125. *Justice Breyer: The Court’s Last Natural Lawyer?*, 136 HARV. L. REV. 1368, 1374 (2023) [hereinafter *Justice Breyer: Natural Lawyer?*] (quoting YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 120 (Univ. of Notre Dame Press 1993) (1951)).

126. See Alicea, *supra* note 16, at 27 (“On the contrary, it would be most difficult, from a practical point of view, to have a direct democracy, for infinite confusion and trouble would result if laws were established by the vote of every person . . .”) (modifications omitted) (quoting FRANCISCO SUÁREZ, *A Treatise on Laws and God the Lawgiver*, in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 195, 383 (James Brown Scott ed., Gwladys L. Williams, Ammi Brown, John Waldron, & Henry Davis trans., 1944) (1612)).

127. Alicea, *supra* note 16, at 28.

128. *Id.*

129. *Id.* (“In constituting a government, the people transmit a portion of the political authority originally vested in themselves.”).

130. *Id.* (“This is the process of constituting a government, which, in the United States, the people did through a written constitution.”).

131. See Casey & Vermeule, *supra* note 17, at 132 (“A range of regime types can be ordered to the common good, or not. If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any particular set of institutional forms . . . [P]arliamentary . . . and presidential systems, [constitutional] monarchies and republics— all these and more can in principle be ordered to the common good.”).

though with obvious tradeoffs between efficiency and accountability.¹³² The people originally vested with political authority therefore have great leeway in deciding how to structure their government.¹³³ So while "[i]n post-Enlightenment political thought, the idea of popular sovereignty is usually equated with the right of the people to choose their own rulers—that is, with a democratic form of government"—the conception of popular sovereignty Alicea advances as "embraced by the natural law tradition" gives the original holders of political authority broad discretion in how to transmit that power.¹³⁴

The second implication of this theory of popular sovereignty is that, even though authority is transmitted to a particular ruling regime, ultimate sovereignty must always remain with the people.¹³⁵ Since the people always bear ultimate responsibility to achieve the common good, they must also always retain the authority to implement the common good.¹³⁶ They must also "retain[] the organizing powers for the emergency of necessary reorganization"¹³⁷ in the event that a regime becomes unjust and subverts the common good. In such a case, "the people may alter or abolish the government they have constituted if the common good demands it."¹³⁸ But while Alicea's account of popular sovereignty retains this power to the people,¹³⁹ it can only be justly exercised where the consequent unrest does not cause more damage to the common good

132. See *id.* at 132; *Justice Breyer: Natural Lawyer?*, *supra* note 125, at 1374 ("[A] polity is free to determine that some other regime best conduces to its common good and hence transfer its authority to, say, a monarch."); Alicea, *supra* note 16, at 28–30 ("The people could, for instance, constitute their government as a monarchy with hereditary succession if they believed that that form of government was most conducive to the common good of their particular society.")

133. See *Justice Breyer: Natural Lawyer?*, *supra* note 125, at 1374 ("Crucially, this account of popular sovereignty does not necessitate a [particular] form of government."); VERMEULE, *supra* note 5, at 10 ("Such matters are left for specification that gives concrete content to the operative, small-c constitution (which is not necessarily the same as the formal written Constitution even in polities that have the latter).")

134. Alicea, *supra* note 16, at 29.

135. See *id.* at 28 ("The power to constitute the government must remain in the people as a whole for the same reason it was originally vested in them: because they have ultimate responsibility for the common good."); *Justice Breyer: Natural Lawyer?*, *supra* note 125, at 1374 ("When the people do, in fact, choose to transmit their authority to distinct governing personnel through democratic forms, they thus preserve for themselves a power 'likened to that of the regular owner over his regularly possessed goods.'" (quoting YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 125 (Univ. of Notre Dame Press 1993) (1951))).

136. Alicea, *supra* note 16, at 28.

137. Charles B. Macksey, *Sovereignty and Consent*, in *THE STATE AND THE CHURCH* 68, 86 (The MacMillan Co. 1922).

138. Alicea, *supra* note 16, at 28; see also Tommaso de Vio Of Gaeta, *The Apology of Brother Tommaso de Vio of Gaeta, Master General of the Order of Preachers, Concerning the Authority of the Pope Compared with That of the Council, to the Most Reverend Niccolò Fieschi, Well-Deserving Cardinal of the Holy Roman Church*, in *CONCILIARISM AND PAPALISM* 201, 280 (J.H. Burns & Thomas M. Izbicki eds., 1997) (arguing that "a free community" maintains "the power to depose the prince, that is, the king, if he rules tyrannically"); 5 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 208 ("Wherefore, if the king shall . . . cruelly tyrannise over the whole . . . the people have a right to resist and defend themselves from injury . . .").

139. Alicea, *supra* note 16, at 28–29.

than the regime being deposed.¹⁴⁰ Put another way, authority would be meaningless if governments were toppled at the drop of a hat, rendering open questions of social order practically unresolved.

The natural law gives to the community at large the authority to fulfill their duty of achieving the common good. But when a smaller group is able to govern more effectively, that duty implies a further duty to transmit their authority to that group. Who the group is, what powers they hold, and how they should exercise those powers are all questions that the community establishing the government is free to decide. And when that group no longer rules in the common good, the community is free to establish a new government. But for a determination of natural law principles to practically resolve open questions of social order—for it to be *law*—it must come from an established authority. The authority behind the determination provides the stability necessary for the community and its members to flourish.

D. “Promulgated”

Much like authority, the promulgation of a law is necessary for it to have a settling effect.¹⁴¹ For law to advance the common good, it must at a minimum settle open questions of social order. To paraphrase the old adage, is a law really a law if no one knows, or could know, about it? A law’s effect comes, in part, from the internal acceptance of the community.¹⁴² If the community not only fails to accept it but also has no idea

140. See *id.* (“[B]ecause revolutions are often harmful to the common good, the abolition and reconstituting of the government ‘cannot be lawfully exercised except in extreme cases.’”); Kopel, *supra* note 87, at 557 (“Consequently there is no sedition in disturbing [an unjust government], unless indeed the tyrant’s rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant’s government.”); McWilliam, *supra* note 16, at 154–55 (“[T]he *ius naturale* places on the ruler’s subjects a duty to resist [a tyrant] This duty is only abrogated where resistance would itself harm the common good.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments long established should not be changed for light and transient causes But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government”); Jamie G. McWilliam, *Second Amendment Principles*, 33 WM. & MARY BILL RTS. J. 1127, 1142 (2025) (“[R]esistance must be performed with minimally necessary force, so that the community does not ‘suffer greater harm from the consequent disturbance than from the tyrant’s government.’”); LOCKE, *supra* note 138, at 208 (“[In revolution,] [t]hey may repair the damages received, but must not, for any provocation, exceed the bounds of due reverence and respect. They may repulse the present attempt, but must not revenge past violences.”).

141. See Pojanowski & Walsh, *supra* note 16, at 439 (“Promulgation—the act that announces a legal norm in a particular form—is critical for law’s task.”).

142. See Aquinas, *supra* note 16, at question 90, art. 4 (“Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it.”); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1159–63 (2006) (discussing H.L.A. Hart’s views on the acceptance of law as one method of imposing legal obligation). Lon Fuller has pointed out that communal acceptance of rules helps to solve the problem of knowledge gaps among citizens: “[I]n many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many.” LON L. FULLER, *THE MORALITY OF LAW* 51 (Yale Univ. Press, rev. ed. 1969) (1964).

what the law is, then they will have no opportunity to follow it. As Pojanowski & Walsh put it, “If citizens and officials cannot identify the authority’s determinations, those choices will be inert and fail to serve their purpose.”¹⁴³ A law unknown to its subjects will not provide the determination necessary to guide coordinate action and create the circumstances in which members of the community can flourish.¹⁴⁴ The common good would therefore be intrinsically harmed absent the promulgation of the lawmakers’ determinations.¹⁴⁵

Promulgation also acts as a means for the sovereign people to place a check on the government they establish. As Lon Fuller has argued, promulgation allows laws to “be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them.”¹⁴⁶ Promulgation therefore adds to the representative nature of government by providing the sovereign people with notice of state actions.¹⁴⁷ Similarly, promulgation provides a means for knowing if authorities are abusing or disregarding the application or enforcement of laws intended for general effect.¹⁴⁸ If laws are secret, one cannot know if the law applied to them matches the law applied in prior or future cases. The integrity of state officials in those instances is unverifiable.

The promulgation of law therefore promotes the common good in a number of ways. It inherently supports the common good by providing identifiable and authoritative determinations of natural law principles. This allows citizens to coordinate their activities safe with the knowledge of how others and the government will respond. Promulgation also serves to notify the people of how their government is acting, building trust with the community and allowing the sovereign people to take action to change government if necessary.

E. The Classical Legal Tradition: A Moral (Re)Turn in Jurisprudence

Renewed interest in the classical legal tradition could be characterized as a “moral turn” in jurisprudence.¹⁴⁹ But since the tradition served

143. Pojanowski & Walsh, *supra* note 16, at 439.

144. See *Justice Breyer: Natural Lawyer?*, *supra* note 125, at 1373 (“[A]dhering to the identifiable positive law helps law achieve its moral task—itsself a requirement of natural law . . .”).

145. See *id.* (“[The classical legal tradition] recognizes that securing a community’s political common good requires stability, coordination, and cooperation.”); Pojanowski & Walsh, *supra* note 27, at 100 (describing part of “law’s contribution to the common good and human flourishing” as its “authoritative settlement function [that] can provide for social coordination, facilitate cooperation, and peacefully and reasonably resolve disputes”); Casey, *supra* note 69, at 177 (“Posited law promulgated by political authority with capacity to ensure co-ordination is effective and prudently done, is critical for our communal good.”).

146. FULLER, *supra* note 142, at 51.

147. See *id.*

148. See *id.*

149. See, e.g., Hadley Arkes, *The Moral Turn*, FIRST THINGS (May 1, 2017), <https://www.firstthings.com/article/2017/05/the-moral-turn>; see Chad Squitieri, *Administrative*

as the standard model for thousands of years,¹⁵⁰ forgotten largely only since the vogue of realism and positivism in the nineteenth and twentieth centuries,¹⁵¹ it is better thought of as a return to what was once conventional wisdom. The tradition has its roots in the philosophy of Aristotle.¹⁵² It was expanded upon by the likes of Cicero, Augustine, and Aquinas.¹⁵³ Thinkers like Suárez, Grotius, and Locke carried the tradition into the modern period.¹⁵⁴ And learning from them, the Founders carried the tradition across the Atlantic to the New World.¹⁵⁵ Appeals to the natural law persisted during the first two centuries of American law.¹⁵⁶

Like those writing in the “positive turn,”¹⁵⁷ the classical legal tradition accepts social practice and posited sources as aspects of law’s nature. As already discussed, the classical tradition strongly values promulgated law and accepts political authority as key to lawmaking. But where the positive turn values these because they are a part of social practice,¹⁵⁸ the classical tradition digs deeper, into the moral contributions of those

Virtues, 76 ADMIN. L. REV. 599, 630 (2024) (describing the “moral turn” in administrative law scholarship in which writers consider “administrative law’s internal ‘morality’”).

150. See Barker, *supra* note 15, at 106 (emphasis added) (“[T]he Natural Law as understood by the Founding Fathers of the Constitution was the Natural Law that for *two millennia* had been a traditional and essential element of Western Civilization”); Pojanowski & Walsh, *supra* note 27, at 117 (“[T]he classical natural law approach . . . predominated from the time of the Romans to the late nineteenth century”).

151. See BANNER, *supra* note 26, at 167, 187 (describing the fundamental change in American legal thought that took place in the later 19th and early 20th centuries as lawyers and judges moved away from natural law arguments); VERMEULE, *supra* note 5, at n.132 (discussing “the positivist revolution [in the United States] led by Justice Holmes around World War I”).

152. See Barker, *supra* note 15, at 106 (describing the Founder’s Natural Law as grounded in the thinking of Aristotle); Pojanowski & Walsh, *supra* note 27, at 120–21 (discussing historical figures who embraced the classical tradition, including Aristotle).

153. Pojanowski & Walsh, *supra* note 27, at 120.

154. See *id.*

155. See COOPER & DYER, *supra* note 15, at 11 (“The classical natural-law tradition was in the intellectual air that both the future Federalists and the future Republicans breathed.”); Barker, *supra* note 15, at 106 (arguing that the Founder’s inherited that “Natural law [tradition] as understood and explained by, for example, Sophocles, Aristotle, Cicero, St. Thomas Aquinas, and Francisco de Vitoria”); Antieau, *supra* note 5, at 51 (“[The Virginian Founders] had been well nurtured in the jurisprudence of Hooker, Bellarmine, Grotius, Thomas Aquinas, and Vattel, and the influence is omnipresent.”); VERMEULE, *supra* note 5, at 89 (describing “the rich legal world of the classical tradition that the founders originally inhabited”); Jack Ferguson, *The Ciceronian Origins of American Law and Constitutionalism*, 48 HARV. J.L. & PUB. POL’Y 181, 182–84 (2025) (describing Cicero’s influence on the Founders).

156. See William Harren, *The Canon of Natural Law Avoidance*, 56 ARIZ. ST. L.J. 505, 507–09 (2024) (describing the natural law’s influence on the Founding and early American common law).

157. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1455 (2019) (describing “[t]he ‘positive turn’ in legal scholarship”); Pojanowski & Walsh, *supra* note 27, at 103 (same).

158. Even if soft positivists won’t go so far as to say social practice is all law is, see, e.g., Baude & Sachs, *supra* note 157, at 1464 (“Positivism might ground law on social practice, but it doesn’t *reduce* law to social practice.”), they are comfortable ultimately grounding claims on social practice. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (arguing that constitutional theories should be assessed “by looking to our positive law, embodied in our legal practice”; in other words, “We ought to ask: Is originalism our law?”); Sachs, *supra* note 4, at 825 (describing the positivist position that “what counts as law in any society is fundamentally a matter of social fact”).

aspects of law.¹⁵⁹ And the classical tradition goes deeper still, to the substantive moral principles underlying every act of lawmaking in order to determine the meaning of that act.¹⁶⁰ Both the very existence of, and the content of, the positive law are therefore taken as moral issues in the classical tradition.¹⁶¹ Posited law provides authoritative determinations of natural law principles in furtherance of the common good, and the law's meaning cannot be divorced from the principle it implements.¹⁶² In interpreting positive law, the classical lawyer looks to the underlying principle to understand the legal effect of the law. This return in jurisprudence is, therefore, a decidedly *moral* one.

That is not to say that the natural law displaces or trumps the positive law. Critics argue that the classical tradition authorizes judges to apply their own moral reasoning in lieu of the lawmakers' determinations.¹⁶³ This relies on the mistaken premise that "the natural law is some entity entirely distinct from the positive law, and that in considering the natural law at all, the judge must be engaged in a type of choice of law analysis."¹⁶⁴ One Note in the *Harvard Law Review* chalks this misunderstanding up to "an excessive fixation on the famous maxim that 'an unjust law is no law at all.'"¹⁶⁵ While the natural law does provide the bounds of reasonable lawmaking, the classical judge is not a bloodhound sniffing out immoral laws.¹⁶⁶ Instead, there is a strong moral presumption that laws are valid determinations of natural law principles.¹⁶⁷ Disrupting

159. Pojanowski & Walsh, *supra* note 27, at 119 (emphasis added) ("The tradition's appreciation of the moral value of positive law brings together empirical, normative, and conceptual considerations . . ."); FULLER, *supra* note 142, at 33–94 (discussing the inner morality of positive law).

160. Hon. Paul B. Matey, "Indispensably Obligatory": *Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967, 976–77 (2023) (describing how the classical tradition "consult[s] . . . each law's foundations in the natural law and the role that law serves in advancing human flourishing").

161. *See id.* at 980.

162. *See* Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL'Y (Apr. 23, 2022), <https://www.harvard-jlpp.com/argument-by-slogan-conor-casey-and-adrian-vermeule/> ("Long before the emergence of jurisprudential positivism, the classical tradition has always shown immense respect for posited law, which in typical cases promotes the common good by providing co-ordination and authoritative direction for persons and by making more concrete the open-ended and vague requirements of background principles of natural law.")

163. *See, e.g.*, Hon. Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1522 (2011) (arguing that judges do not have the "freestanding authority to enforce the natural law"); BORK, *supra* note 11, at 66 (suggesting that it is inappropriate for lawyers and judges to appeal to the natural law because they are "apt to confuse their strongly held beliefs with the order of nature").

164. McWilliam, *supra* note 16, at 136.

165. *Justice Breyer: Natural Lawyer?*, *supra* note 125, at 1372.

166. *See* Casey & Vermeule, *supra* note 17, at 125 ("[T]he classical approach itself recognizes that interpreters of law typically should not venture an all-things-considered assessment of political morality from first principles.")

167. *See* Pojanowski & Walsh, *supra* note 27, at 100 (emphasis added) ("Because of law's contribution to the common good and human flourishing, practically reasonable citizens and officials should . . . adopt a strong, presumptive moral obligation to respect the authority of positive law in a reasonably just legal system."); *id.* at 124 (noting that, while "some legal choices can be beyond the pale," "given the wide range of reasonable disagreement on many questions and the moral benefits

those determinations would undermine positive law's authoritative resolution of underdetermined legal questions and therefore subvert its moral purpose.¹⁶⁸ So while a law's background principles can inform its meaning, the moral function of posited law limits the extent to which judges should undertake first order analyses of a law's moral validity in most cases,¹⁶⁹ and generally constrains them to interpreting law in light of its background natural law principles.¹⁷⁰

Instead of two distinct sources of law, positive and natural law work in harmony. The natural law provides broad principles of reason that guide communities toward their common good. The positive law acts to determine those general moral principles in ways that are sensitive to local conditions and that can effectively coordinate social activities.¹⁷¹ The classical legalist recognizes the moral principles at the heart of posited laws and aims to interpret those laws against the backdrop of those principles. Since the positive law is intrinsically tied to the first principles of moral reasoning it determines, interpreting it necessarily involves interpreting the natural law at a general level.¹⁷² This recognition of the inherent morality of law—*that* is the moral turn in jurisprudence.

Since law includes both promulgated determinations and the broader principles underlying them, classical legal interpretation must take both into account. The first step is to ascertain what determination the lawmakers made in enacting the law.¹⁷³ This naturally means reading the instrument promulgated by those lawmakers to implement their determination.¹⁷⁴ In most cases, where the law plainly and naturally covers the

of authority, . . . the presumptive moral obligation would often have to be a strong one"); VERMEULE, *supra* note 5, at 46 (discussing "the rebuttable presumption of authority" that "can be overcome, of course, when the public authority acts in such a way as to forfeit its claim to be implementing law at all, either because (1) a particular body acts outside its sphere of legal competence, or (2) it pursues aims that have no imaginable public purpose, or (3) it acts in an unreasoned manner"); Justice Breyer: *Natural Lawyer?*, *supra* note 125, at 1372 ("[T]he classical legal tradition accords great respect to positive law, given positive law's important role in concretizing the broad, underdetermined postulates of the natural law.").

168. Pojanowski & Walsh, *supra* note 27, at 100.

169. Casey & Vermeule, *supra* note 17, at 125.

170. Justice Breyer: *Natural Lawyer?*, *supra* note 125, at 1372 ("[T]he classical legal tradition also focuses more on using natural law to interpret the positive law than to strike it down."); Casey & Vermeule, *supra* note 17, at 124 ("[T]he classical tradition, in appropriate cases, looks to general principles of law and the *ius naturale* precisely in order to understand the meaning of [positive law] . . .").

171. See McWilliam, *supra* note 16, at 136–37 ("To the classical legalist, the positive law embodies the *ius naturale* as applied to specific times and circumstances.").

172. *Id.* at 137 ("Interpreting positive law, then, necessarily involves interpreting some level of the *ius naturale*."); see also Casey & Vermeule, *supra* note 17, at 124 ("The background principles of *ius* themselves enter into and help to determine the meaning to be attributed to *lex*.").

173. McWilliam, *supra* note 16, at 143 (describing the first step of classical legal interpretation as "ascertaining what the decision [of the authority] is").

174. *Id.* at 144 ("So a classical legal analysis always begins with the text of the positive law. Since the positive law is a determination of *ius naturale* principles, the best place to see how to apply the principle is the way anticipated by the public authority enacting the law."); see also VERMEULE, *supra* note 5, at 74 ("[T]he common good . . . might itself best be served if judges were generally to stick to the ordinary meaning of texts of civil law enacted by public authorities who,

conduct at issue, this textual inquiry decides the case.¹⁷⁵ But in the rare case "[w]here the text is indeterminate with respect to the facts of a case or where the application of strict textualism would circumvent the very legal principles that the text seeks to put into effect, then the text should be read in light of those principles."¹⁷⁶ Putting this method of interpretation into practice will be discussed more in Part III.

II. THE ROLE OF ORIGINALIST THESES IN THE CLASSICAL TRADITION

As just discussed, the fundamental inquiry in classical interpretation is to ascertain the determination made by lawmakers. And since lawmakers generally memorialize their determination through a legal text, this is largely a textual inquiry. As Pojanowski and Walsh have observed, there is value in considering the nature of these legal texts as posited law.¹⁷⁷ After all, posited laws play a crucial role in determining principles of reason and securing the conditions for the community to flourish.¹⁷⁸ Understanding the mechanics through which they do so helps us to better understand not only the meaning of those texts but also the role they play in the broader legal universe.¹⁷⁹

It is here that originalism might have much to offer even the classical legalist. Not the positivism-infused judicial philosophy of "originalism" writ large, but certain specific theses that originalists have postulated: the theory of legal change, the fixation thesis, and the constraint principle. These originalist observations about the nature of law—the fixation of legal and semantic meaning and the necessary constraint provided by those meanings—are mechanisms through which the positive law determines natural law principles and secures the common good. By separating these theses from originalism's positivist priors, classical legalism can develop a more robust understanding of how authoritative prom-

having been charged with stewardship of the community, were to enact those texts as rational ordinances intended to serve the common good.").

175. See Casey & Vermeule, *supra* note 17, at 125–26 ("[I]n the great bulk of ordinary cases, [classical interpreters] proceed on the basis of a respect for text, albeit justified on different grounds than modern positivism. In easy cases, then, there is no difference between originalist and classical interpretation from the standpoint of considerations of legal predictability, settlement, durability and stability."); VERMEULE, *supra* note 5, at 74–75 (discussing "presumptive textualism"); Justice Breyer: *Natural Lawyer?*, *supra* note 125, at 1375 (noting how, in most cases, "a natural lawyer can simply adhere to any version of positivist interpretation").

176. McWilliam, *supra* note 16, at 144–45; see also Justice Breyer: *Natural Lawyer?*, *supra* note 125, at 1375 ("The judicial task [in hard cases] entails a sort of interpretive harmonization, wherein the judge considers the law's social-fact sources, identifies the relevant background principles, and settles on a reflective equilibrium between the two . . .").

177. Pojanowski & Walsh, *supra* note 27, at 103 ("The [positive] turn's emphasis on the Constitution as positive law, its focus on the arguments and internal commitments of those participating in that system, and its jurisprudential clarity are all virtues.").

178. Casey, *supra* note 69, at 177.

179. See Pojanowski & Walsh, *supra* note 27, at 118 ("Human law, while a distinct and important object of study and theorizing, is a practice and institution best understood and shaped in light of those higher purposes that justify its existence in the first place.").

ulgations, central to originalist interpretation, similarly determine natural law principles and achieve the common good.

A. Authoritative Determination and Legal Change

First consider the originalist claim that the law's content is fixed until lawfully changed. This idea—the theory of legal change—recognizes that lawmaking involves discrete legal decisions that have particular content. In classical thought, that is the lawmakers' determination. For the content to change, a new legal decision must actively change it. Through this mechanism of fixture and revision, positive law fulfills the role assigned to it by the classical tradition by authoritatively determining natural principles in order to secure the common good. The theory of legal change therefore helps explain the moral function of positive law within the classical legal tradition.

In Sachs's formulation of this thesis, “[o]ur law is still the Founders’ law, as it’s been lawfully changed.”¹⁸⁰ As Sachs describes, “Originalism starts by assigning the legal system an *origin*, namely the Founding.”¹⁸¹ The law as it existed at the Founding formed the baseline for the construction of our legal system over time. That construction occurred through changes implemented through internally accepted rules of change.¹⁸² The result is the original law plus lawful changes made over time, like a house with additions built around it.¹⁸³ In other words, “this account[] treats the framers’ law—the law that the Constitution established—together with lawful changes that have occurred since the Founding, as our constitutional law.”¹⁸⁴

As a member of the “positive turn,” Sachs supports his theory with an examination of social practice,¹⁸⁵ but a version of it can also be derived from the classical requirements for law. Lawmakers’ determinations of natural principles have a discrete legal effect. Consider speed limits. One might reasonably determine, from the principle that “people should refrain from acting in a way that endangers innocent lives,”¹⁸⁶ that

180. Sachs, *supra* note 4, at 838.

181. *Id.* at 845.

182. *See id.* (“But from the Founding on, it requires that changes be lawful—that is, that they be made under rules of change that were already law at the time . . .”).

183. *See id.* (“So another way of describing the text is to define it recursively, as whatever was in the original Constitution plus whatever’s been added through an amendment procedure that was already in place at the time.”).

184. Pojanowski & Walsh, *supra* note 27, at 104.

185. *See* Sachs, *supra* note 4, at 822 (“American law might be originalist in nature, but then again it might not. Which view is right depends on facts about society today, not two hundred years ago. This Article merely argues that, if it is true, the claim that we adhere to the Founders’ law is the best reason to be an originalist—and, if it’s false, the best reason not to.”); Pojanowski & Walsh, *supra* note 27, at 104 (“[Sachs] hitches originalism to the wagon of Hart’s legal positivism, which claims that identifying ‘the law’ is a matter of identifying social facts, not moral evaluation.”).

186. McWilliam, *supra* note 16, at 132; *see also* Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1248 (2012) (noting that the natural law principle behind speed limits is to protect “innocent life”).

the speed limit on a certain road should be 65 miles per hour. That speed limit has the legal effect of punishing those who drive above 65 miles per hour. Its legal effect is objective—its legal content has only one accurate meaning. In other words, the law is triggered above 65 miles per hour, not 60 or 55 miles per hour. Other laws might be less clear, and require more interpretive work, but the determination is always in a sense objective and unchanging.¹⁸⁷ Because the natural law principle is unchanging,¹⁸⁸ and so is the law determining it, the law must be fixed until a new determination is made.

Fixation is also integral to the nature of law as an authoritative promulgation. Determinations, once made, are promulgated by a recognized authority in a way around which the community can confidently coordinate its activities and so advance the common good.¹⁸⁹ As discussed in more detail in the previous Part, law must authoritatively decide questions left open by principles of reason.¹⁹⁰ Otherwise, the common good cannot be advanced through law’s settling effect.¹⁹¹

That settling effect is illusory if it does not last into the future. In order for law to provide the conditions for cooperation and the flourishing of the community, it must settle open issues not just today, but tomorrow and the day after that as well.¹⁹² People would rationally refuse to purchase property without the assumption that the legal regime protecting their quiet enjoyment of that land would last at least until they sold the property. What allows people to live rich social lives, to build a home for their family, to establish a career, and to contribute to the economy, is the confidence of knowing how one’s neighbors and government will respond to their actions. Put simply, for social order to contribute to the common good, people have to know the rules of the game they are playing. If the rules are apt to change without notice on a given day, peo-

187. One might argue that underdeterminate laws do not have an objective legal effect. After all, judges might disagree as to the law’s meaning. But the fact that law fails to fully determine a legal question does not mean that the determination has no objective legal effect. If the law truly does not determine the issue, then that just means that further determination is necessary, not that the first determination lacks meaning. And if judges disagree, the possibility remains that some are simply *wrong*.

188. VERMEULE, *supra* note 5, at 121 (discussing how natural law principles, “incorporated (by determination) into the positive law, remain constant over time”).

189. See Pojanowski & Walsh, *supra* note 27, at 122 (arguing that without authority, “cooperation and social coordination will be impossible, and the vulnerable and the law-abiding will be subject to the stronger who reject the system”); *id.* at 139 (“Promulgation—the human act that chooses and announces a norm in particular form—is critical for law to effectuate reasoned choices in furtherance of the common good.”).

190. See *supra* Sections I.C, D.

191. See Alicea, *supra* note 16, at 43 (arguing that, at the fundamental stage of transmitting political authority, “for the common good to be achieved, the transmission of authority to a government has to be stable”).

192. See Pojanowski & Walsh, *supra* note 27, at 100 (emphasis added) (“Law supplies [an] authoritative resolution that *going forward* will settle something that would otherwise have been unsettled.”).

ple will not be able to plan their actions accordingly. For law to serve its moral function, it must in a sense be *fixed* going forward.

That is not to say that law cannot be changed. But the rules for that change must also be baked into the community's legal system and fixed.¹⁹³ Otherwise, law's settling effect would be defeated for the same reason as if the law's substance were variable without rhyme or reason. Imagine Adam owns Blackacre. His legal status as owner of the property is changeable, typically through sale, gift, or bequest. Adam can plan for those types of changes. But now imagine there were no rules governing the transfer of property, and Ben arrives and asserts that, by doing a cartwheel on each of the four corners of the property, he obtains title to the land. Without accepted rules for change, Adam cannot be prepared for when and how changes will occur. The same is true for law generally. Both substantive rules and rules of change must be fixed until lawfully changed or they will not have their settling effect.¹⁹⁴

Indeed, fixation is fundamental to the nature of positive law. To quote Finnis, the idea that a legal rule remains valid until modified or repealed "is a working postulate of legal thought []so fundamental that it is scarcely ever identified and discussed."¹⁹⁵ One might even call this fixation a "banalit[y], truism[], universally understood and accepted by all remotely sensible legal systems."¹⁹⁶ They would be right. As described above, law only serves its purpose if it provides a settled set of rules. But that does not refute the need to accept the thesis of legal change. Certainly, the basic, fundamental nature of the thesis might suggest that it does not tell the entire story of legal interpretation, but it also highlights the thesis's necessary role in understanding how law operates.

A lawmaker's determination is fixed until lawfully changed, i.e., until a new determination supersedes it. Through this fixation, the determination provides the necessary resolution to general principles of reason such that community members are able to coordinate their activities and work together to advance the common good.¹⁹⁷ The fixation of a determination's legal content is, therefore, a fundamental part of how promulgated law serves the common good and fulfills the classical tradi-

193. Sachs, *supra* note 4, at 841.

194. *Id.* (explaining: "[I]n any legal system worthy of the name, the rules of change have to have a certain amount of exclusivity or closure. They can't be generally agnostic as to other methods of changing the law, at least not without casting everything else in the system into doubt. (Did that gentle breeze or passing cloud just repeal the tax code? How would you know, absent a rule one way or the other?)").

195. FINNIS, *supra* note 51, at 268.

196. Casey & Vermeule, *supra* note 2.

197. See Casey, *supra* note 69, at 191 (describing Finnis' view that "respect for legitimate authority, and its critical role in securing the common good, ensures all officials have a (defeasible) obligation to faithfully adhere to and interpret the meaning of X, Y or Z constitutional provisions posited and fixed by a legitimate political authority at a given historical point in time[—]whether 1789, 1868, or 1992[—]unless and until those provisions are lawfully repealed or replaced").

tion’s substantive requirements for law.¹⁹⁸ In this way, the legal change thesis is not only compatible with, but also arguably *required* by, the classical view of law.

B. Fixed Semantic Meaning of Legal Texts

A correlative thesis from the theory of legal change is the fixation thesis—the idea that the meaning of the law’s text is similarly fixed. Since posited law is a reasoned decision by lawmakers, classical legal interpretation involves ascertaining what that decision was. The theory of legal change describes how that decision remains fixed over time. The fixation thesis explains how the linguistic meaning of the instrument of promulgation is also fixed, thereby allowing interpreters to understand that decision as the lawmakers chose to describe it. This thesis is grounded in basic principles of communication and, like the previous one, is fully compatible with the classical legal tradition. If law is a reasoned act of will, then understanding the law requires understanding what the lawmakers said, when they said it.

The first step in classical interpretation is to ascertain what determination the lawmakers made in passing a law.¹⁹⁹ The most natural starting place for this inquiry is the instrument through which the law was promulgated. After all, that is how the lawmakers intended to convey the meaning of their determination to the people governed by it.²⁰⁰ In the case of a written constitution, statute, or regulation, the instrument is a text. So, the words chosen by the lawmakers to embody their determination should be the starting point in understanding the reasoned decision they made.²⁰¹

While the previous thesis focuses on “preserving the content of the Founders’ law,”²⁰² doing so at least partly requires understanding what the words used to promulgate the law meant at the time it was enacted.²⁰³ This should not be too controversial of a claim, as understanding what a communicator means to convey is largely dependent on the words he

198. *Id.*

199. McWilliam, *supra* note 16, at 144 (“Step one involves . . . [an] analysis to ascertain the content of the lawmaker’s determination.”).

200. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 610 (2004) (“The text is the medium by which we convey intended meaning to an audience.”).

201. See McWilliam, *supra* note 16, at 148 (“A classical legal interpretation of [a law] must by necessity begin with its text. The text is the final determination made by the lawmakers and so is the proper place to begin in ascertaining how to apply the law.”).

202. Sachs, *supra* note 4, at 819.

203. *Id.* (describing “[p]reserving the meaning of the Founders’ words” as “important” as a means to the end of preserving legal content); Adrian Vermeule, *Democracy, Disagreement, and Authority: A Response to the Symposium on Common Good Constitutionalism*, AM. J. JURIS. 241, 243 (2025) (arguing that even in legal systems that reject “originalism,” one must understand the original semantic meaning because it is “partly constitutive of the force and legal meaning of the law”). I say “partly” because even under Sachs’s conception of originalism, background interpretive rules come into play in addition to semantic meaning. See Sachs, *supra* note 4, at 876.

chooses to convey it.²⁰⁴ This purely semantic point has led to what originalists typically refer to as the “fixation thesis.”²⁰⁵

The fixation thesis can be stated as the idea that “the communicative content of [a legal] text was fixed at the time each provision was framed and ratified.”²⁰⁶ While this formulation focuses on legal texts, it is fundamentally derived from the nature of linguistics. To see why this is the case, consider a non-legal example. Amy keeps a diligent journal. In 1994, she writes an entry that reads: “Picked up my car from the mechanic today.” What does this entry convey?

The fixation thesis is solely about the “communicative content” of a text.²⁰⁷ Basically, what the writer was conveying with the chosen words.²⁰⁸ Amy’s journal entry refers not to cars generally, but the specific car that she owned. The communicative content of a text becomes fixed at a point in time.²⁰⁹ Amy referred to “my car.” But she has had numerous cars over the years—in fact, she buys a new one every five years. To interpret the journal entry, the reader must pick which car she refers to.

Fixation occurs when the text was written.²¹⁰ Hypothetically, fixation in meaning could occur at any time. A reader could interpret the journal to mean that the author picked up the car that she owned at the time the reader read the entry. But the nature of a journal renders this reading implausible. Journals are meant to chronicle the thoughts and events that occur in real life—the events are empirically verifiable. The reader could tell themselves that Amy was referring to the 2023 Porsche Cayman that she owned in 2025. But they would be lying to themselves. The date of the journal entry in 1994 suggests that Amy was referring to the car she owned *in 1994*—a 1990 Honda Civic. Further, one could look back at Amy’s receipts to see that work was, in fact, performed on that

204. Even those who reject originalism can usually agree on this weak statement. *See, e.g.,* Vermeule, *supra* note 203, at 243 (“[I]f we want to understand what Shakespeare hoped to achieve by referring to a ‘hawk,’ or (another common example) what framers and ratifiers of the American (written) Constitution hoped to achieve by guaranteeing a ‘republican form of government,’ then we had better understand those words in their original sense.”).

205. *See, e.g.,* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) (“The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*.”).

206. *Id.* at 7; *see also* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) (describing as a “crucial component[] of originalism” that “constitutional meaning was fixed at the time of the textual adoption.”); Barnett & Bernick, *supra* note 39, at 3 (“Originalists hold that . . . the meaning of a provision of the Constitution was *fixed* at the time it was enacted.”).

207. Solum, *supra* note 205, at 15 (“The Fixation Thesis is a claim about the communicative content of the authoritative version of the constitutional text.”).

208. *See id.* (“The phrase ‘communicative content’ is used to provide a more precise formulation than ‘meaning’ or ‘linguistic meaning.’”).

209. *Id.*

210. *Id.* at 16; *see also* McWilliam, *supra* note 37, at 3 (“[The fixation thesis] claims that when interpreting a text, its communicative content was fixed when it was drafted.”).

Civic. In other words, understanding the communicative content of the journal’s text is to some extent a historical exercise.

Fixation at the time of writing is important to understand because facts underlying the text can change, as in the journal example, or because the meaning of the words themselves change.²¹¹ For example, in the 1930s, the word “dinner” was often used to refer to the midday meal, while “supper” described the evening meal.²¹² But in modern America, “dinner” refers to the evening meal, and “lunch” is used for the midday one.²¹³ It would be anachronistic and factually wrong to assume a writer in the 1930s is referring to the evening meal when using the word “dinner.” Subsequent linguistic drift can cause confusion about the semantic meaning, but it does not change it.²¹⁴ “The meaning of language changes over time, and as a consequence, the meaning of a communication depends in part on the way language is used at the time the communication occurs.”²¹⁵

This is true of texts generally, as well as the subset of texts that convey legal content. Consider a law from 1935 that prohibited the serving of alcohol “at the dinner meal.” With the knowledge that dinner usually meant the midday meal, one could infer that the law was intended to decrease the prevalence of drinking during the day. Without knowing that, one would think that alcohol could not be served with an evening meal—perhaps based on the idea that alcohol should not be imbibed with food at all. Without knowing the meaning of the words used, understanding the point of the law and its legal content becomes impossible.²¹⁶

This form of the fixation thesis is therefore not only compatible with, but also necessary to, the classical legal tradition. Classical interpretation requires one to ask what determination the lawmakers made through their act of lawmaking. The best way to find the answer is to look at what the lawmakers *told* us through the promulgated instrument.²¹⁷ And doing so entails understanding the meaning of the words the lawmakers used at the time they were used. As Vermeule puts it:

211. See Whittington, *supra* note 206, at 378 (“The semantic content of a word or phrase may drift over time, but the fixation thesis contends that the proper meaning of a word within a particular document is the one that was meant at the time of the document’s creation, rather than alternative meanings that might have emerged later or been in use earlier.”).

212. See *Has ‘Supper’ Always Meant ‘Dinner?’*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/wordplay/dinner-vs-supper-difference-history-meaning> (last visited Nov. 12, 2025) (“But the use of *dinner* to refer to the main meal of the day, eaten as the last meal of the day, is a relatively recent phenomenon. For a long time, that main meal was held during the middle part of the day, around or slightly after the time we would nowadays allot for lunch. What was then called *supper* was a lighter meal taken toward the end of the day.”).

213. *Id.*

214. Solum, *supra* note 205, at 24.

215. *Id.* at 25.

216. See Vermeule, *supra* note 203, at 243.

217. See Barnett & Bernick, *supra* note 39, at 25 (explaining how the first task in any interpretation should be “to ascertain the fixed communicative content of the . . . text”).

[T]here is and always has been a chastened sense of “originalism” that . . . is indeed a centerpiece of classical legal interpretation. This chastened sense holds that the aims of and background understandings held by the lawmaker, and embodied in positive texts for given ends, are partly constitutive of the force and legal meaning of the law . . . [I]f we want to understand . . . what framers and ratifie[r]s of the American (written) Constitution hoped to achieve by guaranteeing a “republican form of government,” then we had better understand those words in their original sense.²¹⁸

In other words, to fully understand the mechanics of promulgated law within the broader classical legal framework, one must include a conception of the fixation thesis.

C. Constraint

The fixation thesis explains how to understand the words of a legal text. But it says little about how those words should affect legal practice. A judge might acknowledge that the words of a law meant something originally, and even that the original meaning is an important factor in interpretation, but they could nonetheless choose to disregard that meaning in favor of other considerations.²¹⁹ The originalist answer to this jurisprudential gap is the constraint principle: “[T]hat the communicative content of [a law] should constrain . . . practice, including decisions by courts and the actions of officials such as the president and institutions such as Congress.”²²⁰

The constraint principle explains the connection between the prior two theses. The legal change thesis states that the legal content of a law remains fixed until changed.²²¹ For the legal content to be fixed, two things must be true. First, the communicative content of the law’s text must be fixed. The legal content of a written law is in part determined by its text—by the communicative content therein.²²² If the meaning of the text were not in some sense fixed, then the law’s legal content would

218. Vermeule, *supra* note 203, at 243.

219. See Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice 4* (Apr. 3, 2019) (unpublished manuscript) (“Another position, held by many living constitutionalists is that original meaning plays an important role in constitutional practice, but that role is not constraining: [that] position is exemplified by pluralist approaches to constitutional theory that conceive of constitutional law as a complex argumentative practice constituted by plural forms of justification.”); Solum, *supra* note 205, at 8 (noting one view that “the role of original meaning is . . . simply that of one factor among many”); *id.* at 2 (“Perhaps living constitutionalists actually accept that the linguistic meaning (or more precisely *communicative content*) of the constitutional text is fixed, but argue that it is the legal meaning (or more precisely *legal content*) of the Constitution that changes over time.”); Whittington, *supra* note 206, at 407 (“Critics of originalism have suggested a range of considerations that might trump original meaning if the two were to come into conflict.”).

220. Solum, *supra* note 205, at 8; see also Whittington, *supra* note 206, at 378 (describing how the idea “that the historical meaning [of a legal text] constrains legal meaning [is] at the heart of originalist theory”).

221. Sachs, *supra* note 4, at 838.

222. Vermeule, *supra* note 203, at 243.

drift with its linguistic meaning. Second, the fixed semantic meaning must in some way constrain interpreters in interpreting the legal text. In other words, it must guide them in ascertaining what determination is embodied therein. Otherwise, the legal content of the law becomes disconnected from its text to some degree.

Returning to an earlier example, lawmakers in 1935 determine that decreasing day drinking is an effective way to preserve innocent life from fatal drunk driving accidents. They pass a law that prohibits the serving of alcohol with “dinner.” We have already established how the original communicative content of this hypothetical law meant to stop people from drinking during their midday meal in public. The original legal content of the law, therefore, prohibited doing so. That legal content is supposed to be fixed until changed by lawmakers making a new determination. But without some version of the constraint principle, a judge today could recognize the text’s original communicative content and decide the legal content is nonetheless different today. This would contravene the legal change thesis and inhibit law from providing the stability necessary for the community to flourish.

Thinking of originalism this way, it can be conceived of as “a theory of honesty—or at least of not lying.”²²³ The lawmakers made a determination with a discrete legal content. In order to establish that determination, they promulgated a legal text describing it.²²⁴ If the original communicative content of that text is not constraining at all, then an interpreter can shift that meaning through their interpretive process. This would let an interpreter find whatever determination they want within a legal text, regardless of whether that was the determination the lawmakers actually made. “In other words, the interpreter would be lying about the [determination] as it stood before their ‘interpretation.’”²²⁵ The constraint principle seeks to keep interpreters honest to the fixed communicative content of a legal text and the determination embodied therein.

That is not to say that the original communicative content provides *all* the legal content of a law. Determinations are made by lawmakers within a broader universe of general moral principles. Those principles provide the justification for and purpose of promulgated law and can inform the meaning of law in underdetermined cases. But the fixed communicative content must constrain interpretation to the full extent that the determination it describes does. Otherwise, interpreters are free to depart from the determination lawmakers made. The classical legal tradition requires deference to lawmakers’ prior determinations,²²⁶ and in

223. McWilliam, *supra* note 37, at 4.

224. VERMEULE, *supra* note 5, at 9.

225. McWilliam, *supra* note 37, at 5.

226. VERMEULE, *supra* note 5, at 15 (describing how “courts should defer to public determination[s] . . . so long as the public authority acts rationally and with a view to legitimate public purposes”).

the usual case, ascertaining that determination is all interpretation entails. That deference only occurs when interpreters are constrained by the communicative content that described the lawmakers' determination.

D. Theses About Positive Law, Not Positivist Theses

The preceding ideas—the legal change thesis, fixation thesis, and constraint principle—all help describe the function and nature of promulgated law. In other words, they are theses about positive law. But they need not be *positivist* theses. Positivism does not have a monopoly on the study of authoritatively promulgated law. As should be clear from Part I, the classical tradition also places a special emphasis on posited law.²²⁷ But it does so *because* of the moral role that posited law plays in the broader legal scheme.²²⁸ Similarly, the originalist theses discussed herein are consistent with the classical tradition because they provide an account, in part, of how the positive law fulfills its moral role.

The classical tradition operates against certain background principles.²²⁹ Since these principles are too general to resolve every question of social action, specificity must be given to them by a legitimate authority.²³⁰ This determination of natural law principles is then promulgated to those subject to it.²³¹ The instrument chosen for promulgation provides the positive law. For a determination to have the settling effect required to promote the flourishing of the community, it must be fixed until a new determination modifies or displaces it. The law that we follow today, therefore, should be traceable to those first determinations made by the Founders. Our law is their law, as lawfully changed.²³²

Lawmakers' determinations are generally promulgated through some sort of legal text, such as a constitution, statute, or regulation. Those lawmakers use those instruments to express the content of their

227. See *supra* Part I.

228. See Pojanowski & Walsh, *supra* note 16, at 439 (citing Vermeule for the proposition that “courts generally should defer to promulgated, specifying decisions by legislatures and executive actors, [*because*] this is a function of ‘the political morality of the common good’”).

229. ARKES, *supra* note 40, at 8 (showing how law is traced “back to first principles and anchoring truths”).

230. See Casey & Vermeule, *supra* note 17, at 118 (“Posited law is also critical to the common good, as it is needed to give specific content to the law where background principles of the *ius naturale* need specificity or leave relevant issues to discretionary choice within reasonable bounds.”); VERMEULE, *supra* note 5, at 9–10 (discussing situations in which “principles of justice are general and thus do not specifically dictate particular legal rules, or when those principles seem to conflict and must be mutually accommodated or balanced”); Pojanowski & Walsh, *supra* note 27, at 121 (describing how the natural law underdetermines both “questions about a legal order in general and many particular questions to which law must speak”).

231. See Aquinas, *supra* note 16, at question 90, art. 4 (describing promulgation as a requirement for law); Pojanowski & Walsh, *supra* note 16, at 439 (“Promulgation—the act that announces a legal norm in a particular form—is critical for law’s task.”).

232. Sachs, *supra* note 4, at 838.

determination.²³³ They choose specific words to do so. Because the facts underlying certain words or phrases can change over time,²³⁴ as well as the meaning of the words themselves,²³⁵ understanding the determination conveyed through a text requires understanding the original meaning of the words chosen to communicate it.²³⁶ To assess the text without regard to history risks missing what the lawmakers chose to convey and potentially *changing* the determination the text embodies. The communicative content of the legal text must therefore be fixed at the time it is adopted.

For the lawmakers’ determination to remain in force, interpreters must adhere to the original meaning of the words they chose to promulgate it. They must also actually use that meaning to reach the determination embodied therein. Otherwise, interpreters would be free to disregard the determination itself even if they were to acknowledge the original meaning of the text.²³⁷ That would be the ultimate failure of formalism, as the legal text exists only to communicate the determination.²³⁸ This is not to say that communicative content is the *only* consideration in ascertaining the lawmakers’ determination. Text can itself be indeterminate and fail to resolve a case, and the classical tradition provides other solutions in those instances. But even then, the text typically creates a window of possible interpretation and removes from consideration those interpretations that fall outside of it.²³⁹ So the text, even when underdetermined, works to constrain the classical interpreter.

As is hopefully clear, these theses are inherent to the nature of positive law—a nature that the classical legal tradition fully accepts and incorporates. They describe how the instrument of promulgation should be used to ascertain the lawmakers’ determination. And they explain how those determinations should be treated going into the future. But none of

233. See McWilliam, *supra* note 16, at 144 (describing how the positive law conveys the application of natural law principles in “the way anticipated by the public authority enacting the law”).

234. See Solum, *supra* note 205, at 2 (“[T]he meaning of the thirteenth-century letter is likely to be a function of the context in which it was written, but that context is also time-bound.”).

235. *Id.* at 1 (“Some words may be archaic—no longer used in contemporary English. Other words may have changed their meaning over time—and you would want to know what their meaning was in the thirteenth century.”).

236. See Vermeule, *supra* note 203, at 243 (“[I]f we want to understand what Shakespeare hoped to achieve by referring to a ‘hawk,’ or (another common example) what framers and ratifie[r]s of the American (written) Constitution hoped to achieve by guaranteeing a ‘republican form of government,’ then we had better understand those words in their original sense.”).

237. See Solum, *supra* note 205, at 2 (“Perhaps living constitutionalists actually accept that the linguistic meaning (or more precisely *communicative content*) of the constitutional text is fixed, but argue that it is the legal meaning (or more precisely *legal content*) of the Constitution that changes over time.”).

238. See Vermeule, *supra* note 203, at 243 (arguing that text should be considered “to reconstruct the rational *point* of the lawmaker’s action”).

239. McWilliam, *supra* note 37, at 8 (arguing that originalist methodologies “can tell us which possible interpretations plausibly fit a given text” even if a single interpretation is impossible to ascertain from history; “[m]ore importantly, it can tell us that *all the other* interpretations do not”); Hammer, *supra* note 32, at 1198 ([H]istorical legitimacy defines the ‘construction zone’ endpoints of a word or clause’s range of plausible interpretations.”).

them require a positivist philosophy. They speak to the nature of positive law, but—at least as characterized herein—they say nothing about the law *beyond* the positive law. The classical legalist, therefore, can and should accept these theses as descriptions of positive law and use them in evaluating legal instruments. But they would view them as simply parts of a much greater whole that includes law's background moral principles.

III. CLASSICAL LEGAL INTERPRETATION

The classical tradition recognizes that law originates from objective background principles.²⁴⁰ Those principles are too general to guide everyday behavior, so positive law is required to provide specificity to the principles.²⁴¹ The originalist theses described in Part II deliver a deeper understanding of how positive law fulfills its moral role, and how interpreters should treat positive legal instruments. The aim of this Part is to put it all together. It will show how those originalist theses fit within the classical tradition to provide a comprehensive interpretive framework.

A. A Practical Interpretive Framework

There has thus far been much discussion of theory—of natural law principles and semantic fixation and other abstract notions. Luckily, the theory translates relatively easily into practice. At a high level, the classical legal tradition is about two things: promulgated determinations and their background principles of reason.²⁴² Classical legal interpretation, therefore, can be taken to have two steps. First, the interpreter analyzes the promulgated legal instrument to ascertain the determination that lawmakers made in adopting it.²⁴³ In easy cases, the text of the law might fully resolve the case. In other instances, the text might be underdetermined to the facts of the case. Then it is up to the interpreter to consider the law in light of the background principles it sought to implement.²⁴⁴

The first step acts as a form of “presumptive textualism.”²⁴⁵ This version of textualism—in which judges should refrain from going beyond the text when the text resolves the issue—helps to secure the com-

240. ARKES, *supra* note 40, at 8 (showing how law is traced “back to first principles and anchoring truths”).

241. Casey & Vermeule, *supra* note 17, at 118 (“Posited law is also critical to the common good, as it is needed to give specific content to the law where background principles of the *ius naturale* need specificity or leave relevant issues to discretionary choice within reasonable bounds.”).

242. See McWilliam, *supra* note 16, at 143–44.

243. *Id.* at 144 (“Step one involves a presumptively textualist analysis to ascertain the content of the lawmaker’s determination.”).

244. *Id.* at 144–45 (“Where the text is indeterminate with respect to the facts of a case or where the application of strict textualism would circumvent the very legal principles that the text seeks to put into effect, then the text should be read in light of those principles.”); see also VERMEULE, *supra* note 5, at 20 (“[P]ositive enacted texts are always read against the backdrop of, and if at all possible in accord with, the broader legal background of natural law, general and traditional legal principles, and the law of nations.”).

245. VERMEULE, *supra* note 5, at 74–75.

mon good.²⁴⁶ After all, "institutional settlement and stability" are forms of the common good.²⁴⁷ And stability would be impossible if judges were to depart from the legal text without rhyme or reason. To borrow from Aquinas:

"[I]t is better that all things be regulated by law, than left to be decided by judges": and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case. Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact. Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.²⁴⁸

In most cases, when the text is sufficient to resolve the issue, the common good is therefore served by close adherence to the promulgated text.

This step requires more than just a blind reading of the text, divorced from context and history. As discussed in Part II, the law has a settling effect only if the lawmakers' determination remains in force until displaced through new legal action. Where facts change or linguistic drift occurs, it is possible for an isolated reading of a text to no longer deliver the legal content its drafters sought to express. In those instances, pure textualism would fail to deliver the common goods described above. More evidence than just the bare words is needed.

That evidence is history. The communicative content of a text arises when it is written, not when it is read.²⁴⁹ An interpreter reading a legal text must therefore look to what the words meant at the time it was promulgated in order to understand the meaning conveyed therein.²⁵⁰ The interpreter must then use that original meaning to discern the determination the lawmakers sought to implement through that law.²⁵¹ Put differently, the classical interpreter should inquire as to the original meaning of the text and then apply that meaning if it fully determines the outcome of the case. If this sounds familiar, it is because this is the historical analysis commonplace to originalist opinions today. Step one of classical

246. See McWilliam, *supra* note 16, at 144 ("Beyond the simple practical and linguistic reasons for this, there are important ways that textualism adds to the common good.").

247. Casey & Vermeule, *supra* note 17, at 126.

248. Aquinas, *supra* note 16, at question 95, art. 1.

249. See Solum, *supra* note 205, at 7 ("[The] ('communicative content') of [a legal] text is fixed at the time each provision is framed and ratified.").

250. Vermeule, *supra* note 203, at 243.

251. *Id.* ("[T]he chastened sense of 'originalism' tries to reconstruct the rational *point* of the lawmaker's action.").

legal interpretation might therefore be better thought of as “presumptive originalism” than simply textualism.²⁵²

As already noted, in many cases, this analysis is enough to decide a case. A good example is perhaps the Seventh Amendment “right of trial by jury.”²⁵³ To understand what the text of the Seventh Amendment means, the courts look to history, and what right the Founders sought to preserve when they adopted the amendment in 1791.²⁵⁴ In *Dimick v. Schiedt*,²⁵⁵ for example, the Supreme Court considered whether the right to a trial by jury was damaged by a federal judge increasing a jury award rather than granting the plaintiff’s request for a new trial.²⁵⁶ The Court looked to the appropriate common law rules in 1791 and concluded that while English common law at the time allowed judges to decrease damage awards, they could not *increase* them.²⁵⁷ The Court therefore concluded that the judge violated the Seventh Amendment right.²⁵⁸ In other words, the text of the Seventh Amendment, when viewed through an historical lens, was sufficient to resolve the case.

Other times, the question is not so simple. The text, even when viewed in light of historical understandings, can be underdetermined.²⁵⁹ Consider the Direct Tax Clause in the Constitution. It reads: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”²⁶⁰ The application of the proportionality requirement depends on whether a given tax is a “direct tax.” But courts have struggled with what that means.²⁶¹ Some cases are easy to resolve textually. “[T]he language of the Clause, combined with evidence from the ratification debates, show that capitation taxes are clearly direct taxes.”²⁶² On the other hand, there is clear historical evidence that taxes on “exports & imports [or] on consumption” are *not*

252. See Casey, *supra* note 69, at 192 (describing Finnis’ endorsement of legal fixation as “a form of presumptive originalism”).

253. U.S. CONST. amend. VII.

254. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (“In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”); see also Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 876 (2013) (describing the English common law right as it existed at the Founding “as the Seventh Amendment’s touchstone”).

255. 293 U.S. 474 (1935).

256. *Id.* at 476.

257. *Id.* at 482.

258. *Id.* at 488.

259. See Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL’Y 917, 943–44 (2021) (“[T]he original public meaning of many . . . clauses in our majestic national charter is . . . susceptible to competing interpretations that are well within the range of historical plausibility.”).

260. U.S. CONST. art. I, § 9, cl. 4.

261. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).

262. McWilliam, *supra* note 37, at 6.

direct taxes.²⁶³ But between these clear cases, even Founders disagreed on what constituted a direct tax.²⁶⁴ Madison viewed carriage taxes, for example, as direct taxes.²⁶⁵ Hamilton, meanwhile, thought there was no “settled legal meaning” at all to the Direct Tax Clause.²⁶⁶

So the Clause is underdetermined as to a number of cases. That does not render historical analysis pointless, however. The Clause’s fixed historical meaning resolves some cases, and in others, it narrows the bounds of possible interpretation. And further historical research might narrow that window even further.²⁶⁷ This function might be referred to as “negative originalism”—using history as a tool to determine what falls *outside* the bounds of possible interpretation.²⁶⁸ In this way history constrains interpretation even if it does not resolve it, providing a limited set of plausible interpretations.²⁶⁹

To recap, the first step in classical interpretation is to ascertain the lawmakers’ determination. This is done in part through an historical analysis of the legal text to establish its original communicative content. In easy cases, that inquiry delivers a rule that fully resolves the issue. In hard cases, it provides a discrete range of possible interpretations.

When the text proves underdetermined in a given case, the classical tradition provides a solution. Once an array of historically plausible interpretations is reached, the next step is to consider those options in light

263. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 591–92 (Max Farrand ed., rev. ed. 1966); see also THE FEDERALIST NO. 36, at 174 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (“[A]s to [indirect taxes], by which must be understood duties and excises on articles of consumption . . .”).

264. John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of “Direct Taxes,”* in *Hylton v. United States*, 45 HARV. J.L. & PUB. POL’Y 523, 556 (2022); McWilliam, *supra* note 37, at 6.

265. *Carriage Act of 1794*, STATUTES & STORIES: COLLECTIONS & REFLECTIONS ON AM. LEGAL HIST. (Aug. 5, 2018), https://www.statutesandstories.com/blog_html/carriage-act-of-1794/.

266. Brief for the United States, *Hylton v. United States*, 3 U.S. 171 (1796), *reprinted in* 8 THE WORKS OF ALEXANDER HAMILTON 378–79 (Henry Cabot Lodge ed., Fed. ed. 1904). His claim is ironic, since he advocated for the inclusion of the Clause prior to ratification. See, e.g., THE FEDERALIST NO. 21, at 99–101 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); THE FEDERALIST NO. 36, at 172–73 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

267. For example, one article used corpus linguistics methodology to discern the original meaning of the Clause. See generally Bush & Jeffries, *supra* note 264. It concluded that it could not “provide a concrete, usable definition or test for what the constitutional phrase ‘direct tax’ means.” *Id.* at 550. But at the same time, it ascertained that wealth taxes “lay at the heart of direct taxation” while “imposts, duties, and excises” are indirect taxes. *Id.* at 550–51. This historical analysis provided further determination to the underdetermined text.

268. McWilliam, *supra* note 37, at 8 (“This negative quality of the originalist method—of showing not only what is included in the original meaning but also what is excluded—is the true strength of originalism. It is a tool to carve away anachronistic interpretations, and in so doing, it keeps us honest to the true communicative content of a legal text.”); see also Hammer, *supra* note 32, at 1198 (arguing for a form of originalism in which “historical legitimacy defines the ‘construction zone’ endpoints of a word or clause’s range of plausible interpretations”).

269. See Hammer, *supra* note 32, at 1203–04 (noting that the rest of the classical legal “interpretive exercise must transpire within the confines of a permissible range of constructions that is cabined by fixation thesis”).

of the law's background natural law principles.²⁷⁰ To reiterate, that is not to say that judges have “freestanding authority to enforce the natural law” in lieu of a lawmakers’ reasoned determination.²⁷¹ Instead, the first principles of law are baked into every act of positive lawmaking since every reasoned promulgated law is a determination of one or more general moral principles.²⁷² So interpretation of any legal text necessarily includes, if indirectly, a consideration of the principles embodied therein.²⁷³ Put differently, “the ‘reason and spirit’—manifesting the lawmaker’s intentions through language—are the law.”²⁷⁴ When the text is clear in its application to a case, it can simply be applied, for the principle within it is already being implemented as the lawmakers chose. When the text is underdetermined, the interpreter can look beneath it, to its “foundations in the natural law and the role that [it] serves in advancing human flourishing.”²⁷⁵ The law can then be applied in a way that best implements the principle lawmakers sought to determine therein.

To briefly show how this works, consider again the Direct Tax Clause. An historical analysis cabins the options for what is or is not a direct tax. But suppose Congress seeks to enact a tax that is not one of the clear cases, e.g., not a capitation, wealth, duty, excise, or consumption tax. Without clear historical evidence to guide the interpreter, they should appeal to the moral principles underlying the Clause.²⁷⁶ One could infer from history that the Clause was intended to implement a version of one of law’s most fundamental requirements: that it be for the common good. Alexander Hamilton argued that indirect taxes based on consumption “prescribe their own limit” and therefore “form[] a complete barrier against any material oppression of the citizens by the taxes of this class.”²⁷⁷ Since no “limits to the discretion of the government are to be

270. McWilliam, *supra* note 16, at 144–45 (“Where the text is indeterminate with respect to the facts of a case . . . then the text should be read in light of [background] principles.”); VERMEULE, *supra* note 5, at 20 (“[P]ositive enacted texts are always read against the backdrop of, and if at all possible in accord with, the broader legal background of natural law . . .”).

271. O’Scannlain, *supra* note 163, at 1522.

272. McWilliam, *supra* note 16, at 136–37 (“To the classical legalist, the positive law embodies the *ius naturale* as applied to specific times and circumstances.”); *see also* Arkes, *supra* note 186, at 1248 (arguing that the positive law gives content to the natural law in a manner “sensitive . . . to conditions distinctly local”); VERMEULE, *supra* note 5, at 21 (“[Positive law] giv[es] content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.”).

273. McWilliam, *supra* note 16, at 136–37 (“Interpreting positive law, then, necessarily involves interpreting some level of the *ius naturale*.”).

274. Matey, *supra* note 160, at 976.

275. *Id.* at 976–77.

276. *See id.* (“We have been given a map and key, and what we ought to consult is each law’s foundations in the natural law and the role that law serves in advancing human flourishing.”); *id.* at 980 (“If judges are to carry on their work faithfully, they must embrace the ‘canons of moral reasoning that guided the Founders themselves when they had set about to frame a new government,’ ones that for thousands of years have helped build governments with the best chance at safeguarding natural rights.”).

277. THE FEDERALIST NO. 21, at 106 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

found in the nature of [direct taxes],” the apportionment rule provided a means of ensuring a fair and limited distribution of taxes²⁷⁸—in other words, a means of direct taxing that advanced the common good. Reading the Clause in light of this principle might suggest a presumption that a new tax that lacks an internal limiting mechanism is a direct one, and therefore subject to the apportionment rule.

This type of reasoning is neither infidelity to the text nor an overreach of judicial power. Alicea argues that judges lack “the authority to set aside a positive law that violates the natural law.”²⁷⁹ He is correct that in a “reasonably just legal system”—including the American one²⁸⁰—legal interpreters have a “presumptive moral duty to treat [the positive law] as authoritative and enduring.”²⁸¹ But as should be clear, the classical tradition does not “set aside the original meaning [of the Constitution]”²⁸² in favor of the natural law.²⁸³ The original meaning of the Constitution—or any law—is central to classical reasoning because that is how one understands the lawmakers’ determination of natural law principles.²⁸⁴ But even many originalists acknowledge that, sometimes, the text “runs out.”²⁸⁵ Historical evidence may not settle either the textual meaning of a law or how the law should be applied in all cases.²⁸⁶ At that point, judges have to do *something*.²⁸⁷ Originalists have put forward different answers.²⁸⁸ In a sense, the classical tradition simply offers its own solution to that problem.²⁸⁹

And as already discussed, the principles that the classical legal tradition considers are not random or irrelevant to the law being interpreted. They are the very natural law principles determined through that law.²⁹⁰

278. *Id.*

279. Alicea, *supra* note 16, at 54.

280. Pojanowski & Walsh, *supra* note 27, at 100 (“[T]he positive content of our Constitution is sufficiently just to merit our moral obligation to its authority.”).

281. *Id.* at 139.

282. Alicea, *supra* note 16, at 7.

283. Casey, *supra* note 69, at 193–94.

284. See Vermeule, *supra* note 203 at 243 (“[I]f we want to understand . . . what framers and ratifies [sic] of the American (written) Constitution hoped to achieve by guaranteeing a ‘republican form of government,’ then we had better understand those words in their original sense.”).

285. See, e.g., Barnett & Bernick, *supra* note 39, at 54.

286. *Id.* at 26.

287. *Id.* at 32 (“Lacking certainty about how to resolve a given case on the basis of the Constitution’s linguistic meaning alone, judges must make a decision on the basis of *some* reason.”).

288. See, e.g., *id.* at 32 (arguing for recourse to the “spirit” or “function” of a constitutional provision); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 754 (2009) (arguing that original methods should be used to interpret a legal text).

289. See Hammer, *supra* note 32, at 1211–12 (arguing for considerations of the Constitution’s common good-oriented *telos* in the construction zone); Casey, *supra* note 69, at 194 (“[Natural law principles] are looked to in hard cases as relevant to how one should conclude the ruler exercised his or her authority.”).

290. Arkes, *supra* note 186, at 1248 (explaining the implementation of natural law principles through positive law); Foran & Casey, *supra* note 57, at 176 (“Adherents to the classical natural law tradition view posited law as a determination made by a political authority which makes more par-

For generations, the legal tradition that we inherited at the Founding appealed to the reason *within* a law when the text ran out.²⁹¹ As Judge Mathey has explained, such appeals were not viewed by the Founders as disregarding the positive law.²⁹² Instead, “the ‘reason and spirit’—manifesting the lawmaker’s intentions through language—are the law.”²⁹³ Positive law is the practical fulfillment of natural law principles, and so the scope of the law is naturally informed by those principles.²⁹⁴ In other words, an appeal to the natural law principles determined by a law can help us understand the meaning of the positive law.

Nonetheless, Alicea argues that within the governmental structure set forth in the Constitution, judges in particular lack the authority to consider the natural law.²⁹⁵ His argument essentially comes down to the different roles of the three branches of American government. When the people transmitted their authority to secure the common good, he argues that they did not transmit that authority to the judicial branch.²⁹⁶ “[E]xecutive action, ordinary legislative action, or constitutional amendment” are fitting avenues for incorporating natural law reasoning;²⁹⁷ judicial decisions are not.

The transmission of political authority from the people to the established government included a concomitant duty for that government to exercise its power to secure the common good.²⁹⁸ The branches were each assigned unique aspects of that authority,²⁹⁹ but each is still bound by the underlying duty.³⁰⁰ Judges obviously cannot perform first order determinations of natural law principles and promulgate them to the people—that power belongs to the legislative branch.³⁰¹ But the judicial

ticular and specific the frequently open-ended and under determinate demands of the basic precepts of the natural law.”).

291. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 61 (1765) (“[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it.”).

292. See Mathey, *supra* note 160, at 976.

293. *Id.*

294. ARKES, *supra* note 40, at 12 (showing how legal interpretation is aided by appeals to “first principles of . . . moral judgment”).

295. Alicea, *supra* note 16, at 54.

296. See *id.*

297. *Id.* at 55.

298. See *id.* at 42 (“[P]olitical authority is . . . a power that we possess *solely* to achieve the common good.”).

299. *Id.* at 28.

300. See Hadley Arkes, *The Argument Arrives: Prof. Arkes Responds to Prof. Alicea on Mere Natural Law*, JAMES WILSON INST. (Oct. 3, 2024), <https://www.anchoringtruths.org/the-argument-arrives-prof-arkes-responds-to-prof-alicea-on-mere-natural-law/> (“As the Declaration of Independence made clear, the defense of ‘natural rights’ formed the purpose or *telos* of the whole government, of the executive and legislative no less than the judicial.”); Casey, *supra* note 69, at 178 (“In exercising [its] authority, government is always and everywhere limited by the directive force of the basic norms of the natural law and by the need to act consistently with the ultimate purpose of legitimate political authority: upholding the common good.”).

301. See VERMEULE, *supra* note 5, at 9–11 (describing determination as performed by “legislatures”); Casey, *supra* note 69, at 191 (discussing Finnis’ view that interpretive jurisprudence that

power includes the authority to “say what the law is” while deciding a case or controversy.³⁰² As the classical tradition views the reason within the positive law as part of that law,³⁰³ construing the positive law in light of its background principles of reason is nothing more than an exercise of that authority pursuant to its underlying duty to achieve the common good.

Classical interpretation—taking full account of positive law’s moral role—therefore involves a two-step framework. First, perform an historical analysis of the legal text to ascertain its original communicative content, and thereby the determination that lawmakers sought to convey through the text. Second, if the text, as originally understood, proves underdetermined, “consult [the] law’s foundations in the natural law and the role that law serves in advancing human flourishing”³⁰⁴ in order to reach the best interpretation.³⁰⁵

B. Examples

Now that the framework for classical interpretation has been explained, it might be helpful to consider some more rigorous examples of how to apply it. First, this section will consider the First Amendment as it applies to blasphemy laws, showing how those laws are consistent with a classical understanding of the Amendment. Second, it will analyze the Second Amendment rights of felons, drawing a line for when felons may or may not be disarmed. In both, the originalist theses accepted herein help to explain the function of the positive law at issue but operate within the larger classical framework.

1. The First Amendment and Blasphemy Laws

Today, “scholars often assume that anti-blasphemy laws are unconstitutional” under the First Amendment, but that is a fairly recent innovation.³⁰⁶ For the first hundred years of American history, blasphemy was

“effectively displace[s] the choices made by the authority positing the text” is “a judicial ‘grasping’ and ‘usurpation’ of the legislative power to construct new law”).

302. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

303. Matey, *supra* note 160, at 976.

304. *Id.* at 976–77.

305. The framework derived herein is quite similar in practice to Hammer’s Common Good Originalism. The main distinction between this Article and his is a philosophical one: while Hammer operates within the interpretation-construction framework common in mainstream originalism, viewing the common good as something to be appealed to outside the usual case, this Article attempts to capture the classical tradition as a whole, and find the role of specific originalist ideas within that. Compare Jamie G. McWilliam, “Fixing” the Classical Legal Tradition, 103 DENV. L. REV. (forthcoming 2026), with Hammer, *supra* note 32 at 1211–12 (“[C]ommon good originalism formulates itself within the more originalist-familiar nomenclature of ‘construction zones’—with the interpreter deliberately putting a thumb on the scale in favor of the Preamble-centric *telos* of the constitutional order when, operating at a reasonable level of interpretive abstraction, the original fixed meaning of a term is genuinely ambiguous.”).

306. *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689, 689–90 (2021) [hereinafter *Blasphemy and Original Meaning*].

proscribable speech.³⁰⁷ Blasphemy—typically characterized as “maliciously reviling God”—was a crime at English common law.³⁰⁸ States inherited this legal tradition, and throughout the nineteenth century fully accepted the legitimacy of proscribing blasphemy.³⁰⁹ It was not until after World War II that judges began to question this conventional wisdom.³¹⁰ During the twentieth century, courts started to invalidate state blasphemy laws, some under the Free Speech Clause of the First Amendment, others the Religion Clauses, and still others through a combination thereof.³¹¹

To resolve whether blasphemy laws are truly unconstitutional, consider the First Amendment through a classical lens. Classical interpretation begins with the text, which reads in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”³¹² On a plain read, the text seems clear: Any law respecting an establishment of religion, or infringing a person’s free exercise of religion or free speech, is unconstitutional. Problem solved. Blasphemy laws are out because they impose certain views about religion that restrict religious expression.

But even a seemingly clear text can be rendered underdetermined when viewed historically. The very people who adopted the First Amendment passed blasphemy laws within their states alongside state First Amendment analogues.³¹³ By the start of the nineteenth century, at least Massachusetts,³¹⁴ New Hampshire,³¹⁵ New Jersey,³¹⁶ Vermont,³¹⁷ and Pennsylvania³¹⁸ had blasphemy laws in spite of constitutional protections for speech and religion. To the Founders, therefore, blasphemy laws could not have constituted an abridgment of the freedom of speech or a violation of religious rights.

The historical evidence is pretty clear that blasphemy laws were viewed as consistent with First Amendment protections,³¹⁹ so the originalist might be tempted to leave the question there. But to understand the true contours between blasphemy and free speech or religious

307. *Id.* at 689.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 689–90.

312. U.S. CONST. amend. I.

313. *Blasphemy and Original Meaning*, *supra* note 306, at 691–93, 698–700, 705.

314. Act of July 3, 1782, ch. 8, 1782 Mass. Acts 27, 27–28.

315. Act of Feb. 16, 1791, ch. 87, 1791 N.H. Acts 232, *reprinted in* 5 LAWS OF NEW HAMPSHIRE 718, 721–22 (Rumford Press 1916).

316. Act of Mar. 18, 1796, § 20, 1796 N.J. Laws 208, *reprinted in* LAWS OF THE STATE OF NEW-JERSEY 244, 248 (1821).

317. Act of Mar. 9, 1797, ch. XXXII, § 20, 1797 Vt. Acts & Resolves, *reprinted in* 1 THE LAWS OF THE STATE OF VERMONT 332, 339 (Sereno Wright 1808).

318. *Blasphemy and Original Meaning*, *supra* note 306, at 692 (discussing the conviction of a blasphemer in Pennsylvania in 1799).

319. *See generally id.*

exercise, to know *why* the two are consistent, it is helpful to consider the First Amendment’s “foundations in the natural law and the role [it] serves in advancing human flourishing.”³²⁰ Since blasphemy straddles the line of speech and religion, consider principles regarding both.

The natural law has always shown strong support for the seeking of God.³²¹ Religious liberty, as the Founders understood it, was based on providing citizens the means to engage in that endeavor.³²² Blasphemy laws, which prohibited only the malicious reviling of God, did not hinder people from pursuing knowledge of their Creator. Nor did they force them to accept a god they did not believe in. Instead, the laws fostered respect for God generally, creating an environment in which citizens would seek to examine religious questions and thereby grow closer to God. Importantly, blasphemy laws typically “exclude[ed] ‘disputes between learned men upon particular controverted points,’”³²³ thereby engendering debate and advancing the community toward truth.

On the speech side, the common good is secured by a properly functioning political process.³²⁴ And “in a democratic republic such as the United States, the political process may be aided by the freedom of speech.”³²⁵ But not all speech carries the same value in advancing a democratic political process—things like “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . are of . . . slight social value as a step to truth.”³²⁶ And since the Founding,

320. Matey, *supra* note 160, at 977.

321. See, e.g., Aquinas, *supra* note 16, at question 81, art. 1 (quoting Augustine for the proposition that “we ought to seek God again, whom we had lost by our neglect”); Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 MARQ. L. REV. 705, 754 (2018) (“Locke argues that [people] must be free to use their own minds to seek the truth that leads to salvation . . .”); FINNIS, *supra* note 51, at 89–90 (citing religion as a basic human good to be pursued); Francisco Suárez, *A Work on the Three Theological Virtues: Faith, Hope, and Charity*, in SELECTIONS FROM THREE WORKS 829, 878 (Thomas Pink ed. 2015) (“[I]t is the duty of a civil state, by virtue of reason and the natural law, to provide for the true worship of God within its borders . . .”); James Madison, *Memorial and Remonstrance against Religious Assessments*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> (“It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”) (last visited Nov. 15, 2025).

322. See Andy G. Olree, *A Madisonian Vision of Religious Liberty*, 7 FAULKNER L. REV. 19, 24 (2015) (describing Madison’s view “that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence”); Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1759, 1761, (showing how “[r]eligious-moral justifications for religious liberty” such as Locke’s view that religious toleration allowed citizens to choose to honor God “dominated in the founding period”); Heyman, *supra* note 321, at 754 (“[T]he Lockean defense of religious toleration is rooted in the idea that human beings are rational creatures. Locke argues that they must be free to use their own minds to seek the truth that leads to salvation . . .”).

323. *Blasphemy and Original Meaning*, *supra* note 306, at 689.

324. McWilliam, *supra* note 16, at 134 (“The *ius naturale* may provide a principle that a community’s properly functioning political process can contribute to its flourishing.”).

325. *Id.*

326. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

“the prevention and punishment of [these types of speech] have never been thought to raise any Constitutional problem.”³²⁷ Blasphemy is similar in character to these other categories of proscribable speech. It does not advance the community toward religious truth. It simply degrades and insults both God and those seeking to know their Creator. On the other hand, valuable religious debate, even if aggressive, was protected by the blasphemy laws the Founders inherited, since it did promote the seeking of religious knowledge.³²⁸

When blasphemy laws are placed in light of these broader principles, it becomes clear how they can be compatible with the original meaning of the First Amendment. They neither forced religious conversion nor stopped citizens in engaging in the pursuit of God. They did not hinder engagement in productive political or religious speech that could offer “social value as a step to truth.”³²⁹ In sum, blasphemy does not foster any human good and “is clearly outweighed by the social interest in order and morality.”³³⁰ The First Amendment was a determination of these principles, and its contours are defined by them. Blasphemy is therefore fully within the legislature’s power to regulate for the common good.

2. Felons and the Second Amendment

One of the most pressing Second Amendment questions facing courts today is the constitutionality of class disarmament.³³¹ Federal law permanently disarms a number of groups, including those “who ha[ve] been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year”³³²—in common parlance, felons.³³³ In assessing the constitutionality of this provision, a classical analysis can help explain when felons can, and cannot, be disarmed consistent with the Second Amendment.

The Second Amendment states that “the right of the people to keep and bear Arms, shall not be infringed.”³³⁴ Yet at the Founding, that right was denied to a number of groups. As described elsewhere:

Disarming classes of people is not a new concept in American history. During the seventeenth and early eighteenth centuries, the coloni-

327. *Id.* at 571–72.

328. *See Blasphemy and Original Meaning, supra* note 306, at 689 (“The English common law had punished blasphemy as a crime, while excluding ‘disputes between learned men upon particular controverted points’ from the scope of criminal blasphemy.”).

329. *Chaplinsky*, 315 U.S. at 572.

330. *Id.*

331. *See, e.g., Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025).

332. 18 U.S.C. § 922(g)(1).

333. Section 922(g)(1) is often referred to as a felon-in-possession law, even though some state crimes that trigger it are actually classified as misdemeanors. *See, e.g., Range v. Att’y Gen.*, 69 F.4th 96, 100 (3d Cir. 2023) (en banc).

334. U.S. CONST. amend. II.

al governments denied arms-related rights to Black individuals, Catholics, and Native Americans. During the Revolutionary War, the colonies disarmed Loyalists. After the Founding, the young United States continued to deny Second Amendment rights to Black individuals, slaves, and Native Americans.³³⁵

Individuals could also be disarmed based on their conduct.³³⁶ The text of the Second Amendment, when viewed in light of history, therefore, allowed for certain people to be disarmed.

An appeal to the Amendment’s background principles can help to provide the contours of permissible disarmament. The natural law has always recognized a right of personal self-defense.³³⁷ Cicero explained that “‘the meaning . . . of our swords’ is a law ‘imbibed from nature herself’ that ‘if our life be in danger from . . . open violence . . . every means of securing our safety is honorable.’”³³⁸ Aquinas similarly thought self-defense was “not unlawful, seeing that it is natural to everything to keep itself in ‘being,’ as far as possible.”³³⁹ This strain of thinking was built upon by Grotius³⁴⁰ and the scholastics.³⁴¹ Eventually, Locke picked it up, writing that “by the fundamental law of Nature . . . one may destroy a man who makes war upon him.”³⁴² From there, the natural right to self-defense was carried into the burgeoning United States by the Founders.³⁴³

This principle of self-defense—along with its applications at the communal level³⁴⁴—was determined by the Founders through the adop-

335. McWilliam, *supra* note 83, at 318–19.

336. See Jamie G. McWilliam, *Second Amendment Principles*, 33 WM. & MARY BILL RTS. J. 1127, 1161 (2025) (“Unlike the tradition of disarming whole groups, however, [individual disarmament laws] did not take aim at ‘persons expected to take up arms against the government,’ but at ‘persons guilty of committing violent crimes’ or ‘persons with violent tendencies.’”).

337. See Merriam, *supra* note 82, at 46 (describing “[t]he right of self-defense [as] as old as history”).

338. McWilliam, *supra* note 336, at 1133 (quoting Marcus Tullius Cicero, Speech in Defence of Titus Annius Milo, in 3 ORATIONS OF MARCUS TULLIUS CICERO 259, 261 (C.D. Yonge trans., 1913)).

339. Aquinas, *supra* note 16, at question 64, art. 7.

340. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 76 (A.C. Campbell ed. & trans., 1901) (1625).

341. Kopel, *supra* note 87, at 561–63 (describing the views of later scholastics such as Mariana, de Vitoria, and Suárez).

342. LOCKE, *supra* note 138, at 112.

343. See, e.g., James Wilson, *Of the Natural Rights of Individuals*, in 2 COLLECTED WORKS OF JAMES WILSON 215, 235 (Liberty Fund ed. 2007) (arguing that “[t]he defence of one’s self, justly called the primary law of nature, is not, nor can it be abrogated by any regulation of municipal law”); 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, app. 300 (1803) (characterizing “[t]he right of self defence [as] the first law of nature”).

344. See McWilliam, *supra* note 83, at 321–22 (“A key principle behind the Second Amendment is that of defense against *danger*. Generally, this danger takes three forms. First are threats of immediate personal violence, such as murder, battery, or rape. Second is the danger posed by foreign actors committing acts of war. Third and finally is the danger posed to the community by a tyrannical or unjust ruler.”).

tion of the Second Amendment.³⁴⁵ That Amendment secured each citizen's ability to "carry weapons of a type sufficient to resist a spontaneous attack."³⁴⁶ So the Second Amendment obviously protects carrying arms to defend against threats of immediate personal violence. But "a corollary could be that the Second Amendment does not protect such a right for those who have *actually* committed the types of crimes that necessitate violent self-defense in the first place."³⁴⁷

Indeed, every time a group or individual was disarmed at the Founding, there was a threat of violence involved.³⁴⁸ As to the group disarmament laws:

Catholics might have raised arms alongside the French against Protestant England [during the French and Indian War]. The Loyalists may have attacked their fellow colonists during the Revolutionary War. Slaves and Indians may have inflicted violence on the white settlers as revenge for their enslavement or for occupying their land. In each historical scenario, danger meant one thing: a violent attack.³⁴⁹

The same was true of the mechanisms for disarming individuals. Going armed laws punished those who went armed "to the Terror of the People."³⁵⁰ In each case, those disarmed posed a threat of violence.

It is worth noting that the religious or racial basis for disarmament used at the Founding would not stand up to constitutional scrutiny today—nor should it. But the principle underneath—of securing the people from violent threats³⁵¹—remains good. And the Second Amendment could fulfill that principle by simultaneously "arming those in need of protection while allowing for the disarmament of proven aggressors."³⁵² A classical interpretation of the Second Amendment, reading the historically understood text in light of its background natural law principles, therefore suggests "that those who commit . . . violence can, consistent

345. See *id.* at 323 ("The Second Amendment was a determination by the Founders that the best way to fulfill this principle of self-defense was for citizens to keep and bear arms."); McWilliam, *supra* note 16, at 148 (describing "the *ius naturale* principles determined by the text [of the Second Amendment]: a tripartite principle of self-defense that includes the defense of self against immediate personal harm, the defense of the community against foreign aggressors, and the defense of the community against an unjust ruler").

346. McWilliam, *supra* note 83, at 323; see also *New York State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1, 32 (2022) (highlighting that no one disputed the handguns at issue were "weapons 'in common use' today for self-defense"); *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) ("[A]s we have explained, . . . the sorts of weapons protected [by the Second Amendment] were those 'in common use at the time.'").

347. McWilliam, *supra* note 83, at 323.

348. *Id.* at 324 ("[T]he danger feared by those drafting the historical disarmament laws was always physical violence.").

349. *Id.* at 324–25.

350. *United States v. Rahimi*, 602 U.S. 680, 697 (2024).

351. See Darrell A.H. Miller, *Common Good Gun Rights*, 46 HARV. J.L. & PUB. POL'Y 1029, 1046–47 (2023) ("[The Second Amendment] must be about providing *safety*.").

352. McWilliam, *supra* note 83, at 323–24.

with the Amendment, be disarmed.”³⁵³ And this constrained interpretation—“limiting disarmament to those who have actually committed violence[] and only that violence against which a citizen could lawfully self-defend”—secures against the discriminatory disarmament prevalent at the Founding.³⁵⁴

* * *

As should be evident from these examples, original meaning has a role to play in classical legal interpretation. It guides an understanding of a legal text. And where the text, historically understood, is underdetermined, the classical interpreter does not simply throw out the text in favor of first order moral reasoning. Instead, background principles provide a roadmap for choosing between plausible historical interpretations. The best interpretation among an array of possible ones is that which best implements the principle lawmakers sought to determine through their act of positive lawmaking. To reiterate: Classical interpretation always begins with an analysis of the legal text to ascertain what determination the lawmakers made in promulgating it. That analysis requires an historical understanding of the communicative content of the text, and the interpreter cannot go beyond the bounds history allows. This permits the lawmaker’s determination to remain as fixed as is reasonably possible in a system of fallible human actors, thereby providing a stable system in which the common good can flourish. But where the text is underdetermined, the interpreter can look to the principle embodied *within* the promulgated law to decide how to apply it in edge cases.

CONCLUSION

The classical legal tradition provides a more morally grounded account of law than the positivist account widely accepted today among originalists. Yet even for those who find the classical account compelling, there is something about originalism that is convincing to many. If this Article has done its job, then it should be clear that originalist theory offers something valuable to classical lawyers. But that does not mean that originalism should be wholesale adopted by those who operate within the classical framework. Rather, we should acknowledge how certain originalist theses help to fulfill the role of positive law within the larger legal structure that includes substantive background principles.

The classical tradition provides an account of positive law grounded in morality. The requirements of authority and promulgation ensure the settlement and stability necessary for the community to flourish. That law be for the common good orients law towards its proper end of justice for all. And the tradition explains how the substance of law is connected

353. *Id.* at 326.

354. *Id.*

to broader moral principles accessible to human reason. The former requirements are what make positive law, positive law. But the latter ones tell us *why* we have positive law at all and what things are appropriate for positive lawmaking. The classical tradition understands both the *what* and the *why* of law, with both providing the complete account of what law is.

But positive law *is* a necessary part of law, for it provides necessary substance to the natural law's general principles. And it is here that originalism—or at least several of its theses—has something to offer even the classical legalist. The legal change thesis describes how a lawmaker's determination must remain in place until lawfully changed or displaced by a new determination. This stability ensures that law has the settling effect necessary to secure the flourishing of the community. The text is the best place to turn for an understanding of what determination the lawmakers made, since the text is how they conveyed that determination to us. Because of evolving facts and linguistic drift, the text has to be understood historically. And that historical understanding has to be constraining on interpreters. Without either the history or constraint, the determination could change along with linguistic drift or simply be ignored by interpreters. In other words, these originalist ideas provide an account of the mechanisms through which positive law actually determines natural law principles and advances the common good.

Since positive law is a key component of the classical tradition, attention should be paid to the insights offered by these originalist theses. Interpretation should always begin by using these ideas to aid in ascertaining what determination lawmakers made. But these theses should be considered as parts of a larger whole that also acknowledges the principles that provide reason and purpose to the positive law. So when the original communicative content of a legal text fails to fully resolve a case, interpreters should look to those fundamental principles that stand behind every act of reasoned lawmaking.