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## The Moral Authority of Original Meaning

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## ARTICLES

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# THE MORAL AUTHORITY OF ORIGINAL MEANING

*J. Joel Alicea\**

*One of the most enduring criticisms of originalism is that it lacks a sufficiently compelling moral justification. Scholars operating within the natural law tradition have been among the foremost critics of originalism's morality, yet originalists have yet to offer a sufficient defense of originalism from within the natural law tradition that demonstrates that these critics are mistaken. That task has become more urgent in recent years due to Adrian Vermeule's critique of originalism from within the natural law tradition, which has received greater attention than previous critiques. This Article is the first full-length response to the natural law critique of originalism as represented by Vermeule, presenting an affirmative argument for originalism from within the natural law tradition. Although other theorists have offered natural law justifications for originalism, they have not yet developed a theory of legitimate authority, which is essential both to the natural law tradition and to originalism. This Article fills that gap by grounding originalism in the legitimate authority of the people-as-sovereign.*

*In doing so, it draws upon and adapts centuries-old natural law arguments in favor of popular sovereignty that have rarely been mentioned in American law reviews and have never been presented as the basis for originalism. By creating a novel synthesis between this natural law theory of popular sovereignty and originalism, the*

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*Article offers new responses to longstanding objections to popular-sovereignty-based originalist theories, such as the exclusion of women and enslaved Black people from the ratification process.*

*Finally, having answered those criticisms, the Article shows that obeying the original meaning of the Constitution is necessary to preserve the legitimate authority of the people, which is essential to achieving the common good. This allows the Article to confront the core of the natural law critique: that originalism is incompatible with the natural law because it privileges the original meaning above the natural law when they are in conflict. The Article demonstrates that this critique overlooks the natural law limits on judicial authority that undergird the common good. By grounding originalism in a moral argument drawn from the natural law, this Article shows that, far from being a morally empty jurisprudence, originalism is justified by the moral authority of original meaning.*

INTRODUCTION.....	2
I. MORAL FRAMEWORKS IN CONSTITUTIONAL THEORY.....	10
A. <i>Moral Arguments in Constitutional Theory</i> .....	10
B. <i>Selecting a Moral Framework</i> .....	13
II. THE MORAL BASIS FOR POLITICAL AUTHORITY AND POPULAR SOVEREIGNTY.....	16
A. <i>The Argument for Political Authority</i> .....	16
B. <i>The Argument for Popular Sovereignty</i> .....	24
C. <i>Responding to Common Objections to Popular Sovereignty</i> .....	33
1. Unanimous Consent and the Original Exclusions .....	33
2. The Dead Hand of the Past.....	41
III. THE MORAL AUTHORITY OF ORIGINAL MEANING.....	43
A. <i>The Obligation to Obey the Original Meaning of the Constitution</i> .....	44
B. <i>Conflicts Between Original Meaning and Natural Law</i> .....	52
CONCLUSION.....	60

## INTRODUCTION

One of the most enduring criticisms of originalism since its modern emergence in the 1970s is that it lacks a sufficiently compelling moral justification. This criticism often takes the form of questions like why should we follow the original meaning of the Constitution if it sometimes leads to unjust outcomes?<sup>1</sup> Why should we follow the original meaning of the Constitution if it binds those of us living today

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1 See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 12–18 (2010); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 601 (1999); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1254–58 (1987).

to the views of those long-since dead?<sup>2</sup> These are deep challenges to originalism's moral foundations, and they have come from scholars representing various philosophical traditions.

Prominent among these moral critics of originalism are scholars of the natural law tradition.<sup>3</sup> Indeed, of the moral critiques of originalism, the natural law critique has received far more attention in recent years due to the work of Adrian Vermeule. Although Vermeule's views are complex, the core of his critique is that, because originalism fails to "guarantee[]" that "the original understanding will necessarily or even predictably track the common good"—as the term "common good" is understood in the natural law tradition—originalism is morally bankrupt.<sup>4</sup> Vermeule is thus focused, among other things,<sup>5</sup> on the "resulting outputs" of an originalist methodology, and because those outputs are constrained by historical inquiry and might not align with the natural law, originalism is—in his view—incompatible with the natural law tradition.<sup>6</sup> Or, to put the point as Hadley Arkes did in levelling his own version of a natural law critique, originalism "is a morally empty jurisprudence."<sup>7</sup>

Vermeule's critique has received greater attention than previous natural law critiques of originalism because it has arrived at a time of intellectual tumult among political and legal conservatives, when there is a greater openness to rejecting ideas that have been standard features of American conservatism for decades.<sup>8</sup> Because originalism is

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2 See, e.g., David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1721–31 (2003); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980).

3 See, e.g., ROBERT H. BORK, A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 303, 305–48 (2008) (collecting essays by Robert Bork, Hadley Arkes, Russell Hittinger, William Bentley Ball, and Harry Jaffa debating, in various forms, the relationship between originalism and natural law).

4 See Adrian Vermeule, *On "Common-Good Originalism,"* MIRROR OF JUST. (May 9, 2020) [hereinafter Vermeule, *Common-Good Originalism*], <https://perma.cc/9XLA-WB5F>; Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020) [hereinafter Vermeule, *Beyond Originalism*], <https://perma.cc/7MRU-ANQW>. In his book, Vermeule reaffirms the arguments in his blogpost on "Common-Good Originalism." ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 214 n.290 (2022).

5 See VERMEULE, *supra* note 4, at 91–116.

6 See *id.* at 114–15; Vermeule, *Common-Good Originalism*, *supra* note 4.

7 Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), <https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence> [<https://perma.cc/9EGW-X5H7>].

8 See Conor Casey, "*Common-Good Constitutionalism*" and the New Battle over Constitutional Interpretation in the United States, 2021 PUB. L. 765, 768–73; Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1053–56 (2019).

predominantly embraced by conservatives,<sup>9</sup> and because Vermeule's alternative theory promises to reach many results that are appealing to many conservatives,<sup>10</sup> Vermeule's critique has found a greater audience than have previous natural law criticisms of originalism that were made during less volatile moments on the right.<sup>11</sup>

That volatility is due, in part, to the fact that originalists have not yet developed a persuasive response to natural law critiques of originalism, which has left originalism vulnerable to arguments like Vermeule's. Most originalists have never been particularly comfortable making moral arguments.<sup>12</sup> Modern originalism began as a reaction against the Warren and Burger Courts,<sup>13</sup> which originalists criticized for having made decisions based on "fundamental value choices" rather than "neutral principles."<sup>14</sup> Thus, while Judge Robert Bork defended originalism against an earlier wave of natural law criticisms in the 1990s,<sup>15</sup> he never developed a moral foundation for originalism based on the natural law tradition. The same was true of Justice Antonin Scalia, who endorsed the natural law tradition<sup>16</sup> but was so concerned about abuses of judicial power that he was wary of appeals to natural law in constitutional theory.<sup>17</sup>

The most robust efforts at defending originalism from a natural law perspective have come from Jeffrey Pojanowski and Kevin Walsh on the one hand<sup>18</sup> and Lee Strang on the other.<sup>19</sup> Both contributions are of great importance, but they are less focused on trying to show

9 Keith E. Whittington, Essay, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 29 (2011).

10 See, e.g., Vermeule, *Beyond Originalism*, *supra* note 4.

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

12 See, e.g., Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1418–25 (2021).

13 JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 94–110 (2005); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–603 (2004).

14 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 5–7 (1971).

15 See BORK, *supra* note 3, at 305–14, 328–32.

16 ANTONIN SCALIA, *Judges as Mullahs*, in *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 260, 262 (Christopher J. Scalia & Edward Whelan eds., 2017) [hereinafter *SCALIA SPEAKS*].

17 See ANTONIN SCALIA, *Natural Law*, in *SCALIA SPEAKS*, *supra* note 16, at 243, 243–48; see also Bradley, *supra* note 12, at 1418–25.

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

19 See generally LEE J. STRANG, *ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (2019). For other major contributions that do not attempt to put forward full justifications for originalism, see generally Bradley, *supra* note 12; RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 102–12 (1999).

why the natural law criticisms of originalism are mistaken. Moreover, they do not develop theories of legitimate authority, which (as I will show) are essential to justifying originalism from within the natural law tradition. Pojanowski and Walsh, for example, ground their originalism in the Constitution as a form of stipulated positive law that has been promulgated by “the people as the constituent authority” to definitively resolve social coordination problems,<sup>20</sup> but at least thus far, they have neither offered an account of why the people *are* the constituent authority nor addressed common objections to popular sovereignty. Strang offers a brief argument (very similar to the one offered by John Finnis) about how to identify who exercises legitimate authority,<sup>21</sup> but it is not his focus.

But the natural law critics of originalism *are* mistaken, at least insofar as they (like Vermeule) posit an incompatibility between originalism and the natural law tradition. Taking Vermeule as representative of the natural law critique of originalism,<sup>22</sup> this Article presents the first full-length response to Vermeule by offering a natural law justification for originalism grounded in the legitimate authority of the people-as-sovereign, authority that is necessary for achieving the common good. In doing so, it draws upon arguments in favor of popular sovereignty developed by medieval<sup>23</sup> and Renaissance<sup>24</sup> natural law theorists that were later refined by their twentieth-century<sup>25</sup> successors. Surprisingly,

20 See Pojanowski & Walsh, *supra* note 18, at 124, 127–28.

21 Compare STRANG, *supra* note 19, at 249–52, 280–82, with JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 245–52 (2d ed. 2011).

22 This is not to say that Vermeule’s argument is the best version of the natural law critique, only that it is the most popular and, therefore, the one most in need of rebutting at this moment. If my argument is correct, however, it should rebut *any* natural law based critique, since my argument will show—based on widely held premises drawn from within the natural law tradition—that the natural law *requires* originalism in the American context.

23 See 2 THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 90 art. 3 (Fathers of the Eng. Dominican Province trans., Christian Classics Complete Eng. ed. 1981) (c. 1270).

24 See Thomas Cajetan, *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, 232 (J.H. Burns & Thomas M. Izbicki eds., 1997); ROBERT BELLARMINE, DE LAICIS OR THE TREATISE ON CIVIL GOVERNMENT 24–30 (Kathleen E. Murphy trans., 1928); FRANCISCO SUÁREZ, *De Legibus, ac Deo Legislatore*, in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 362–91 (James Brown Scott ed., Gwladys L. Williams, Ammi Brown, John Waldron & Henry Davis trans., 1944) (1612). It should be noted that, although the theorists on whom I rely are Catholic, similar ideas can be found in works by non-Catholic theorists writing around the same time. See, e.g., JOHANNES ALTHUSIUS, POLITICA 70–71 (Frederick S. Carney ed. & trans., Liberty Fund, Inc., 1995) (1603). I thank Sam Bray for bringing Althusius to my attention.

25 See YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 144–94 (1951); HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY 390–413 (Cluny Media 2016) (1945).

these arguments—though commonly debated in political philosophy during the twentieth century<sup>26</sup>—have rarely been cited in American law reviews,<sup>27</sup> and they have never been presented as the basis for originalism. American constitutional theorists tend to equate the concept of popular sovereignty with Enlightenment-era social contract theories, all of which have been subjected to devastating criticism.<sup>28</sup> Yet, there is an older, sounder philosophical tradition of popular sovereignty based on the natural law, which differs significantly from the way we often think about popular sovereignty.<sup>29</sup> This Article breaks new ground in presenting and adapting the natural law conception of popular sovereignty as the justification for originalism.

That is the core of my argument, but I begin in Section I.A by explaining briefly why constitutional theories—including originalism—*need* to make moral arguments. Constitutional theorists believe that jurists and other actors in our system *ought* to follow their prescribed methodologies (such as originalism) for adjudicating constitutional disputes, and that “ought” must ultimately rest on a normative foundation.<sup>30</sup> Specifically, it must rest on an argument in favor of the moral legitimacy of the Constitution—the Constitution’s ability to bind us in conscience—because *why* the Constitution is morally legitimate influences *how* to adjudicate disputes under it.<sup>31</sup>

Once we acknowledge that a moral argument in favor of the Constitution’s legitimacy is necessary to support a constitutional methodology like originalism, we must then decide which moral framework to use in making that argument. As I will explain in Section I.B, I will offer arguments from within the natural law tradition. The foremost representative of that tradition is, of course, Thomas Aquinas, and my analysis will use his criteria for assessing whether a law is morally

26 See Russell Hittinger, *Introduction to Modern Catholicism*, in *THE TEACHINGS OF MODERN ROMAN CATHOLICISM: ON LAW, POLITICS, AND HUMAN NATURE* 1, 1–33 (John Witte Jr. & Frank S. Alexander eds., 2007); Moorhouse F.X. Millar, *The History and Development of the Democratic Theory of Government in Christian Tradition*, in *THE STATE AND THE CHURCH* 99, 99–144 (John A. Ryan & Moorhouse F.X. Millar eds., 1922). See generally Paul E. Sigmund, *The Catholic Tradition and Modern Democracy*, 49 *REV. POL.* 530 (1987).

27 See Edward Rubin, *Judicial Review and the Right to Resist*, 97 *GEO. L.J.* 61, 72–81 (2008); Brian Tierney, *Historical Roots of Modern Rights: Before Locke and After*, 3 *AVE MARIA L. REV.* 23, 31 (2005); Robert John Araujo, *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 *AVE MARIA L. REV.* 159, 172–73 (2003); see also *infra* note 230.

28 See, e.g., STEVEN D. SMITH, *FICCTIONS, LIES, AND THE AUTHORITY OF LAW* 1–12 (2021); BRIAN M. MCCALL, *THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION* 271–76 (2018); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 14–25 (2004).

29 See *infra* Sections II.B–C.

30 See *infra* Section I.A.

31 *Id.*

binding. There are two criteria: a law is morally binding only insofar as it is both (1) substantively consistent with the natural law *and* (2) promulgated by a legitimate authority.<sup>32</sup>

My focus in this Article will be on the latter requirement: legitimate authority. I will bracket whether the Constitution is, as a general matter, sufficiently just to be morally binding and assume that it is for purposes of my analysis.<sup>33</sup> That is not to assume that *all* aspects of the Constitution are just; I will address *unjust* applications of the Constitution (as originally understood) in Section III.B. But how to address individual, unjust applications of a generally just constitution is a different question from how to address a fundamentally unjust constitution, which should be rejected in its entirety.

My point, rather, is to focus on the implications of Aquinas's criterion of legitimate authority for constitutional adjudication. Non-originalist natural law theorists have tended to underappreciate those implications and the significance of the concept of authority in the natural law tradition. Vermeule, for instance, acknowledges the importance of legitimate authority,<sup>34</sup> but he provides no account of *who* the legitimate authority that promulgated the Constitution was or what implications that has for constitutional adjudication.<sup>35</sup> Focusing on authority will set up the argument at the end of the Article for why, even when the natural law and the original meaning of the Constitution conflict, judges cannot set aside the original meaning.<sup>36</sup> As will become clear in Section III.B, my argument will not be that judges must participate in the enforcement of unjust laws; it will be that they cannot *displace* unjust laws with the natural law without doing grave harm to the common good.

Part II presents my argument for the moral legitimacy of political authority in general and of the Constitution in particular. Section II.A provides a traditional natural law argument for political authority as the logical entailment of human beings living in society.<sup>37</sup> Human beings are social animals; they can only flourish in society.<sup>38</sup> But society cannot flourish without authority, a necessary condition for the achievement of the common good.<sup>39</sup> The phrase “the common good”—like the concept of “the natural law”—is very much contested,

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32 See 2 AQUINAS, *supra* note 23, at I-II Q. 96 art. 4. Vermeule assumes the same Thomistic understanding of law. See VERMEULE, *supra* note 4, at 3.

33 See *infra* Section I.B.

34 See VERMEULE, *supra* note 4, at 37, 43–47.

35 Vermeule gestures toward this question without addressing it. See *id.* at 88–89.

36 See *infra* Section III.B.

37 See *infra* Section II.A.

38 See *id.*

39 See *id.*



but political authority is necessary even under the most modest conception of the common good.<sup>40</sup> Political authority, then, is the logical implication of, and is justified by, the moral imperative to seek the common good.<sup>41</sup>

But in whom is political authority vested? That is the subject of Section II.B, where I present a Thomistic argument for popular sovereignty. Because political authority is necessary to achieve the common good, it is vested in whoever has responsibility to achieve the common good, and as Aquinas points out, *everyone* in a society has a responsibility to achieve the common good.<sup>42</sup> Thus, *everyone* in a society is vested with political authority as an original matter, but because the common good will rarely be achievable by direct democracy, the people have a moral duty to transmit a portion of their political authority (excepting the power to abolish or amend their constitution) to distinct governing personnel.<sup>43</sup> This is the process of constituting a government, and the natural law tradition does not require any particular form of government or allocation of authority among constitutional actors.<sup>44</sup>

Once we understand the moral basis for popular sovereignty, we will be in a position to address the two most common moral objections to popular-sovereignty-based originalist theories: the exclusion of groups (such as women and enslaved Black people) from voting on the Constitution (the “unanimity” or “original exclusions” objection)<sup>45</sup> and the alleged problem of allowing those long-since dead to govern those living today (the so-called “dead hand” objection).<sup>46</sup> Here, I adapt the popular-sovereignty argument of the natural law tradition to meet these objections, developing novel responses to both that will be of interest to constitutional theorists of all stripes. The mistake popular-sovereignty theorists have made is in relying on individualistic, social-contract versions of popular sovereignty, which are indeed flawed.<sup>47</sup> While both objections are difficult to address if popular

40 See *id.*

41 See *id.*

42 2 AQUINAS, *supra* note 23, at I-II Q. 90 art. 3; see also J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S *TREATISE ON LAW* 44 (2014).

43 See *infra* Section II.B.

44 *Id.*

45 See RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 24–35, 83–85 (2018); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 16–17 (2012); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 406–20, 448–52 (2009–2010); BARNETT, *supra* note 28, at 11; RONALD DWORIN, LAW’S EMPIRE 192–93 (1986); see also Thurgood Marshall, Essay, *The Constitution’s Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

46 JACK M. BALKIN, LIVING ORIGINALISM 56–57, 63–64, 281–82 (2011); BARNETT, *supra* note 28, at 19–22; Strauss, *supra* note 2, at 1718–24.

47 See *infra* subsection II.C.1.

sovereignty is premised on something like Lockean social-contract theory, they have much less force—indeed, they fail—when applied to a natural law–based understanding of popular sovereignty.<sup>48</sup>

Finally, I turn in Part III to the argument for originalism. Section III.A shows why originalism in some form is entailed by popular sovereignty. Here, my basic argument is similar to Keith Whittington’s: originalism is necessary to preserve the people’s legitimate authority within the context of the American constitutional system,<sup>49</sup> and that authority is essential to achieving the common good. But as my emphasis on the common good suggests, because my argument rests on a natural law foundation, it creates a new synthesis between Whittington’s theory (which is generally acknowledged to be the most sophisticated defense of popular-sovereignty-based originalism)<sup>50</sup> and a politico-theoretical framework much older and sounder than the social-contract framework he employs.<sup>51</sup>

After seeing that originalism is essential to the common good in the American context, we finally will be able to address the argument made by Vermeule and others that originalism is incompatible with the natural law because the original meaning may sometimes conflict with the natural law.<sup>52</sup> By emphasizing that the outcomes in constitutional disputes must accord with the natural law, these critics have underappreciated the equally important imperative to respect the limits of legitimate authority,<sup>53</sup> which the rest of the Article will have shown entails obeying the original meaning of the Constitution. That does not mean that we have no remedy in the case of a conflict between the original meaning and the natural law; our system provides many ways to resolve those conflicts through the political process. But it *does* mean that judges cannot displace the original meaning with the natural law.<sup>54</sup>

This is not sufficient, of course, to *comprehensively* respond to the moral challenge posed to originalism by natural law scholars. In the case of Vermeule, for instance, that would require a separate article critiquing his new book.<sup>55</sup> Rather, my focus here is on making an

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48 See *id.*

49 See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 135–59 (1999).

50 See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 72 (2009).

51 See *infra* Section III.A; WHITTINGTON, *supra* note 49, at 113–27.

52 See Vermeule, *Common-Good Originalism*, *supra* note 4.

53 See *infra* Section III.B.

54 See *id.*

55 VERMEULE, *supra* note 4. Such a review by Jeffrey Pojanowski and Kevin Walsh from within the natural law tradition is published in this same Issue. See Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403 (2022) (reviewing VERMEULE, *supra* note 4). For a

affirmative argument for originalism based on the natural law tradition and using it to show why the natural law critique of originalism is wrong. The Article thus takes Vermeule’s critique—the most popular natural law critique of originalism—as its jumping-off point, but a complete response to Vermeule’s arguments—including addressing other Vermeulean critiques of originalism that I do not mention here<sup>56</sup>—would require more than what I can do in this Article.<sup>57</sup> My aim, instead, is to demonstrate that, far from being a “morally empty jurisprudence,”<sup>58</sup> originalism rests on a robust moral argument drawn from the natural law.

## I. MORAL FRAMEWORKS IN CONSTITUTIONAL THEORY

Bork and Scalia were not alone among originalists in their reluctance to make moral arguments. Indeed, many theorists have argued that it would be better to forgo (or at least downplay) controversial moral arguments as part of the justification for originalism.<sup>59</sup> Although this desire to broaden originalism’s appeal as much as possible is understandable, constitutional theories ultimately rest on moral arguments, and once that point is established, it follows that we need a general moral framework within which we can make moral arguments.

### A. *Moral Arguments in Constitutional Theory*

There are two reasons why moral arguments are necessary to support constitutional theories. The first is that, without such arguments, constitutional theories would not serve their purpose. The primary purpose of a constitutional theory is to explain and justify a particular constitutional methodology, a decision procedure for adjudicating constitutional disputes.<sup>60</sup> Constitutional theorists seek to demonstrate that their methodologies *ought* to be used by judges, practitioners, and

thorough critique from outside the natural law tradition, see William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. (forthcoming 2023) (reviewing VERMEULE, *supra* note 4).

56 See VERMEULE, *supra* note 4, at 91–116.

57 Indeed, I agree with some of Vermeule’s criticisms of modern originalist theory. See, e.g., *id.* at 72–73 (criticizing a positivist version of originalism).

58 Arkes, *supra* note 7.

59 See, e.g., Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 825–27 (2015); Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL’Y 485, 490–91 (2008).

60 J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1719–21 (2021). *But see* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022) (arguing that originalism should not be understood as a decision procedure).

other theorists in resolving constitutional disputes,<sup>61</sup> and that means that they must provide a normative argument in favor of their methodologies.<sup>62</sup> True, many constitutional theories rely heavily on descriptive accounts of American constitutional practices,<sup>63</sup> but whether a particular methodology best explains our current constitutional practices says nothing, by itself, about whether or why we should care about that fact when deciding constitutional disputes.<sup>64</sup> Showing that we should care about a methodology's ability to explain our constitutional practices requires demonstrating that a particular *descriptive* account has *normative* implications.<sup>65</sup> That is why theorists who place great weight on descriptive accounts nonetheless acknowledge that they must provide a moral argument to show why their preferred methodology *should* be adopted.<sup>66</sup>

It is not enough, however, to insert *just any type* of normative premise into the argument; the normative premise must justify presumptive obedience to the U.S. Constitution. That is to say, it must explain why the Constitution is presumptively *morally legitimate*<sup>67</sup>—binding in conscience.<sup>68</sup> Constitutional methodologies prescribe *how* we should adjudicate disputes concerning the application of the Constitution,<sup>69</sup> but if we have no moral obligation to obey the Constitution (even if that obligation is a weak or rebuttable one), such a methodology would be pointless from the perspective of constitutional adjudication.<sup>70</sup> In other words, for purposes of constitutional adjudication, we must first establish *why* we should obey the Constitution if the question of *how* we

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61 See FALLON, *supra* note 45, at 125–26; David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 586–88 (1999).

62 Alicea, *supra* note 60, at 1773–75; Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 545–49 (1999).

63 See, e.g., William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2363–85 (2015); Sachs, *supra* note 59, at 838–74; Prakash, *supra* note 59, at 486–89; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825–33 (1997); Fallon, *supra* note 1, at 1209–23, 1252–68.

64 See Alicea, *supra* note 60, at 1774–75; Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1314–15 (2013); Fallon, *supra* note 62, at 545.

65 See Pojanowski & Walsh, *supra* note 18, at 108–16.

66 See Sachs, *supra* note 59, at 841–42; Baude, *supra* note 63, at 2395; Prakash, *supra* note 59, at 489–91; Fallon, *supra* note 62, at 545–49; Lawson, *supra* note 63, at 1823–25, 1835–36.

67 See FALLON, *supra* note 45, at 22–23.

68 See *id.* at 23; BARNETT, *supra* note 28, at 12.

69 Alicea, *supra* note 60, at 1719–21; FALLON, *supra* note 45, at 132–33; Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 836.

70 See Christopher J. Peters, *What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism*, 2013 BYU L. REV. 1251, 1275–76; Lawson, *supra* note 64, at 1311–12.

should interpret it is to affect our resolution of constitutional disputes.<sup>71</sup>

Some theorists have attempted to bridge this gap without providing a theory of constitutional legitimacy, arguing instead that the oath of office morally binds federal judges to obey the Constitution, regardless of whether the Constitution is morally binding in some more general sense.<sup>72</sup> But if taking an oath to support the Constitution imposes a moral obligation on the oath-taker, there would also seem to be a moral obligation to take and obey that oath only if the Constitution were morally sound.<sup>73</sup> If I took an oath to support and obey a hypothetical constitution that, in express terms, mandated genocide and required that I, as a government official, participate in it, I would be committing an immoral act just by taking the oath,<sup>74</sup> and I would have a moral obligation to *disobey* the oath.<sup>75</sup> So taking and obeying the oath presupposes some prior moral evaluation of the object of one's oath, which means we cannot escape moral evaluation of the Constitution by appealing to the oath imposed by the Constitution.

The second reason why an argument in favor of constitutional legitimacy is required is that it has implications for one's constitutional methodology.<sup>76</sup> For example, Jack Balkin argues that the legitimacy of the Constitution depends on its ability to reflect the views of each generation through constitutional construction,<sup>77</sup> and he correctly concludes that, given his theory of legitimacy, his methodology must allow for a very significant amount of construction limited by only a thin conception of interpretation.<sup>78</sup> Balkin's theory of legitimacy thus requires a particular methodology,<sup>79</sup> and other theories will require different methodologies.<sup>80</sup> In assessing the relationship between *why* we should obey the Constitution and *how* we should adjudicate disputes under it,

71 See Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 5 (2017); FINNIS, *supra* note 21, at 275–76.

72 See, e.g., Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 306–20 (2016); see also Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1643–48 (2009); Baude, *supra* note 63, at 2394 (appearing to adopt Re's oath theory).

73 See 3 AQUINAS, *supra* note 23, at II-II Q. 89 art. 3.

74 See *id.* at art. 7.

75 See *id.*; see also Evan D. Bernick & Christopher R. Green, *What Is the Object of the Constitutional Oath?* 30–36 (Aug. 9, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234) (noting that there may be circumstances when violating an oath would be permissible); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1801 (2005) (same).

76 See Alicea, *supra* note 60, at 1732–34.

77 See BALKIN, *supra* note 46, at 29–34, 41, 59–64, 282.

78 See *id.* at 59–73.

79 Alicea, *supra* note 60, at 1732–34.

80 See generally FALLON, *supra* note 45.

“it turns out that our answer to the ‘why’ question has implications for the ‘how’ question.”<sup>81</sup>

None of this is to say that constitutional methodologies *themselves* necessarily require resort to moral evaluation in deciding cases (indeed, I reject methodologies, like Ronald Dworkin’s,<sup>82</sup> that *always* require resort to moral reasoning in deciding cases), but it is to say that the choice *of* a constitutional methodology necessarily requires resort to moral evaluation.<sup>83</sup> The theoretical foundation of originalism—of any constitutional methodology—requires a moral argument in favor of obedience to the Constitution.<sup>84</sup>

### B. *Selecting a Moral Framework*

But what criteria should we use to evaluate the moral legitimacy of the Constitution? Under what conditions would it be correct to say that the Constitution, at least presumptively, is binding in conscience?

These questions cannot be answered outside of a larger moral framework,<sup>85</sup> which will necessarily extend beyond the narrow questions at hand. They implicate the nature of law,<sup>86</sup> authority,<sup>87</sup> and justice,<sup>88</sup> all of which presuppose some antecedent understanding of the human person.<sup>89</sup>

81 Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998); see also SMITH, *supra* note 28, at 53–73; Peters, *supra* note 70, at 1276–78; WHITTINGTON, *supra* note 49, at 111. One can acknowledge this while still insisting—as Ekins does—that to “interpret,” properly speaking, is to read a document according to its original understanding. See Ekins, *supra* note 71.

82 See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2* (1996).

83 See Alicea, *supra* note 60, at 1771.

84 See *id.*

85 See Lawson, *supra* note 64, at 1309–12.

86 See, e.g., 2 AQUINAS, *supra* note 23, at I-II Q. 90 art. 4, Q. 96 art. 4.

87 See, e.g., DWORKIN, *supra* note 45, at 190–95.

88 See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE 3–6* (rev. ed. 1999).

89 See Alicea, *supra* note 60, at 1750–67. By “antecedent,” I do not mean to suggest that normative answers can be directly derived from theoretical knowledge of human nature without reference to primary practical principles. Different natural law traditions have different answers to that question. Compare FINNIS, *supra* note 21, at 33–36 (rejecting the idea that normative answers can be directly derived from theoretical knowledge of human nature without reference to primary practical principles), and GEORGE, *supra* note 19, at 83–87 (same), with Steven A. Long, *Fundamental Errors of the New Natural Law Theory*, 13 NAT’L CATH. BIOETHICS Q. 105, 107–11 (2013) (adopting the opposite view), and RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY 192* (1987) (same). But even those who argue that moral norms and other basic practical principles neither need, nor can, be derived from methodologically antecedent theoretical knowledge of human nature nonetheless acknowledge that we must know enough facts about the things that are the *subjects* of that evaluation. See GEORGE, *supra* note 19, at 85. I will attempt to frame my arguments in a way that would be acceptable to both sides of this divide.

A consequentialist,<sup>90</sup> a natural rights theorist,<sup>91</sup> and a natural law theorist<sup>92</sup> would answer each of these questions—and the ultimate question of how to assess the moral legitimacy of the Constitution—in different ways, with potentially different implications for constitutional methodology.

One could, following John Rawls, attempt to avoid selecting a comprehensive moral framework altogether, instead appealing to some common principles that all reasonable people could accept and hope to achieve agreement on the moral criteria for legal obligation through an overlapping consensus among otherwise divergent views.<sup>93</sup> That is, essentially, the approach taken by David Strauss in his justification for his common-law constitutionalism.<sup>94</sup> It would require too much of a diversion here to explain the problems with Rawls's approach, but for reasons that Rawls's critics have laid out elsewhere, Rawls's public reason and overlapping consensus approach does not succeed in general<sup>95</sup> and has particular problems in the context of constitutional theory.<sup>96</sup> Thus, while it is possible in some contexts to make arguments acceptable to different camps within the *same* tradition of moral reasoning, as I will attempt to do in this Article,<sup>97</sup> there is no getting around the fact that, in evaluating the moral legitimacy of the Constitution, we must rely on antecedent moral frameworks with which others may reasonably disagree.<sup>98</sup>

My analysis assumes a framework for moral evaluation drawn from the natural law tradition, both because it is the framework that I believe is correct and because—as stated above—I believe it is necessary to respond to the natural law critics of originalism on their own terms (again, taking Vermeule as representative of that critique). Most of what I say in Section II.A about the justification for authority is well accepted across the various schools of the natural law tradition, so my primary task in that subsection will be exposition. Sections II.B and II.C, by contrast, require more original argument on my part.

The natural law tradition has a deep well of philosophical reflection on the criteria for assessing whether laws are binding in conscience.<sup>99</sup> As described by Aquinas, the justness of a law—and,

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90 See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33–99 (2013).

91 See BARNETT, *supra* note 28, at 1–52.

92 Pojanowski & Walsh, *supra* note 18, at 117–24.

93 See JOHN RAWLS, POLITICAL LIBERALISM 133–72 (expanded ed. 2005).

94 See Strauss, *supra* note 2, at 1738–39.

95 See, e.g., GEORGE, *supra* note 19, at 196–221.

96 Alicea, *supra* note 60, at 1731–34.

97 See *supra* note 89 and accompanying text.

98 Alicea, *supra* note 60, at 1729–34.

99 For an overview, see BUDZISZEWSKI, *supra* note 42, at 379–93.

therefore, whether it is binding in conscience—depends on criteria that relate both to its substance and its author. Substantively, laws are just if they are ordered to the common good and impose proportional burdens on the citizenry.<sup>100</sup> But even if those substantive criteria are met, Aquinas contends that a law must also have the right *author*, and it follows that a law is unjust “when a man makes a law that goes beyond the power committed to him.”<sup>101</sup>

A complete moral justification of the Constitution would require showing that the Constitution meets both of these criteria.<sup>102</sup> That is too much to try to do in one paper, so I will assume for the sake of this Article that the Constitution generally satisfies the criterion of substantive justice (though I will address situations in which a particular provision or application of the Constitution is unjust in Section III.B) and focus on the question of authority,<sup>103</sup> which is the more significant point of contestation among scholars about the moral legitimacy of the Constitution.<sup>104</sup> As I will show later,<sup>105</sup> understanding the moral basis for the exercise of authority under the American Constitution facilitates my ultimate aim of identifying the correct constitutional theory, since it rules out theories that would have some actor *transgress* limitations on authority.<sup>106</sup> If a law promulgated by one who does *not* have the authority to do so is not binding in conscience—as the natural law tradition holds—then we need to know *who* has the authority to promulgate law in a regime. Once we do, we can assess whether particular constitutional theories—like Vermeule’s—that seek to achieve *substantively* just outcomes are nonetheless inadmissible because they violate justice in a *different* way—“as when a man makes a law that goes beyond the power committed to him.”<sup>107</sup> That is not to say that judges should enforce laws that contravene the natural law; it is only to say that, when confronted with an unjust law, they cannot act in a way that goes beyond their legitimate authority.<sup>108</sup> Natural law justifications for originalism have paid insufficient attention to the importance of

100 2 AQUINAS, *supra* note 23, at I-II Q. 96 art. 4.

101 *Id.*

102 BUDZISZEWSKI, *supra* note 42, at 384.

103 Other scholars often make the same assumption or treat the issue very briefly. *See, e.g.,* FALLON, *supra* note 45, at 29; STRANG, *supra* note 19, at 308; Pojanowski & Walsh, *supra* note 18, at 124.

104 *See* Alicea, *supra* note 60, at 1750–58; *see also* Peters, *supra* note 70, at 1276–78; McConnell, *supra* note 81, at 1128.

105 *See infra* Section III.B.

106 As noted below, my focus will be on federal judges, in particular. *See infra* Section III.B.

107 2 AQUINAS, *supra* note 23, at I-II Q. 96 art. 4.

108 *See infra* Section III.B.



developing the argument for *who* has the lawmaking authority within a regime, a deficiency this Article hopes to remedy.<sup>109</sup>

One final point bears emphasis. My argument below is that we have a moral obligation to obey the Constitution according to its original meaning. As G.E.M. Anscombe famously argued, the concept of obligation is controversial in modern moral philosophy,<sup>110</sup> a controversy that extends into the natural law tradition.<sup>111</sup> I will attempt, perhaps not always successfully, to avoid taking sides in these intramural debates in presenting my arguments below. For example, despite their differences about the nature of obligation,<sup>112</sup> natural law theorists like Francisco Suárez and John Finnis offer fairly similar justifications for political authority. Thus, I am confident that, even where my argument might implicate foundational disagreements among natural law theorists, the basic contours of my argument would remain the same regardless of which side of those disputes one were to adopt.

## II. THE MORAL BASIS FOR POLITICAL AUTHORITY AND POPULAR SOVEREIGNTY

My task in this Part is to provide a moral justification for political authority and popular sovereignty. Political authority and popular sovereignty are related but distinct ideas. Sovereignty, though a contested concept,<sup>113</sup> is commonly understood as “a power against which there is no appeal and which is therefore supreme” within the civil realm.<sup>114</sup> Popular sovereignty, in turn, is a theory about *who* possesses this ultimate political authority: namely, the people of a particular society. As I will argue, popular sovereignty is the logical implication of a sound theory of political authority.

### A. *The Argument for Political Authority*

The concept of authority—its definition, implications, and moral justification—has been the subject of intense interest in modern

109 As noted in the Introduction, Pojanowski, Walsh, and Strang have not yet focused on this question.

110 G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 5–9 (1958).

111 See Terence H. Irwin, *Obligation, Rightness, and Natural Law: Suárez and Some Critics*, in INTERPRETING SUÁREZ: CRITICAL ESSAYS 142, 142–62 (Daniel Schwartz ed., 2012); Matthew Bennett O’Brien, *Practical Necessity: A Study in Ethics, Law, and Human Action* 91–132 (May 2011) (Ph.D. dissertation, University of Texas at Austin), <https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2011-05-3257/O%27BRIEN-DISSER-TATION.pdf> [<https://perma.cc/Y2TF-95GK>].

112 See *supra* note 111 and accompanying text.

113 JACQUES MARITAIN, *MAN AND THE STATE* 28–30, 49 (Cath. Univ. of Am. Press 1998) (1951).

114 ROMMEN, *supra* note 25, at 358; see also SUÁREZ, *supra* note 24, at 367.

political philosophy.<sup>115</sup> That the debates over authority are so voluminous makes it even more important to identify a moral framework within which to examine authority, since any attempt to construct a theory of authority from the ground up would be a Herculean task. My earlier stipulation that I will be using a moral framework drawn from the natural law tradition is, therefore, crucial to my analysis. No philosophical tradition as deep and aged as the natural law tradition will speak with one voice on such complex questions as those posed by the concept of authority,<sup>116</sup> but it at least provides us with certain bedrock assumptions and a rich body of sources with which we can sketch a moral justification for authority and, in turn, for popular sovereignty.<sup>117</sup>

I want to stress that this is just that—a sketch. A complete theory of authority and popular sovereignty would require answering numerous questions that I must leave largely unaddressed here, such as whether my conception of popular sovereignty is compatible with the way popular sovereignty is conceived in American constitutional culture,<sup>118</sup> under what conditions it justifies revolution,<sup>119</sup> what limits it entails for political authority (a question closely bound up with how one conceives of the common good),<sup>120</sup> and how it responds to the reality that regimes have often been imposed by force rather than anything recognizable as popular consent.<sup>121</sup> In what follows, I make arguments that begin to answer those questions, but my limited aim is to show that there is a compelling *prima facie* natural law justification for political authority and popular sovereignty.

115 See MCCALL, *supra* note 28, at 265–87; see, e.g., FINNIS, *supra* note 21, at 231–59; JOSEPH RAZ, *Legitimate Authority*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 3, 3–27 (2d ed. 2009); JOHN LOCKE, *The Second Treatise of Government*, in *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 1, 35–57 (Tom Crawford ed., Dover Publ'ns 2002) (1690); THOMAS HOBBS, *LEVIATHAN* 117–29 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) (1651); EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 84–85 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

116 See, e.g., MCCALL, *supra* note 28, at 278–80 (criticizing Finnis's account of authority from within the natural law tradition).

117 For historical overviews of this tradition in relation to political authority, see *supra* note 26 and accompanying text.

118 See J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 *NOTRE DAME L. REV.* 1145, 1182–91 (2022).

119 See SIMON, *supra* note 25, at 179–80; SUÁREZ, *supra* note 24, at 370, 385, 387; THOMAS AQUINAS, *DE REGNO* 36–44 (Gerald B. Phelan & I. Th. Eschmann trans., Divine Providence Press 2014) (c. 1267).

120 See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 70–76 (John J. Fitzgerald trans., Univ. of Notre Dame Press 1966) (1946); ROMMEN, *supra* note 25, at 293–94, 359–65.

121 See ROMMEN, *supra* note 25, at 391–92; SUÁREZ, *supra* note 24, at 370, 385; JOHN LAURES, *THE POLITICAL ECONOMY OF JUAN DE MARIANA* 34 (1928).

Before turning to that argument, I should say what I mean by “authority,” a term I have been using without definition but that remains an elusive concept in modern philosophy. I will stipulate that an entity has “authority” when it can provide—in Raz’s famous phrase—an “exclusionary reason” for doing or not doing something.<sup>122</sup> To place Finnis’s gloss on the idea of an “exclusionary reason”: it is “a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would[,] in the absence of the exclusionary reason[,] have sufficed to justify proceeding in some other way.”<sup>123</sup> For example, if a mother orders her ten-year-old son to wear a particular jacket (that the son regards as ugly) to a social outing, the mother’s instruction is an exclusionary reason: it is a reason for acting irrespective of at least some reasons (like the ugliness of the jacket) that, in the absence of her instruction, would have been reasons for not acting.<sup>124</sup> The mother, therefore, has authority. Some natural law theorists would argue for what they see as a more robust conception of authority,<sup>125</sup> and Raz’s definition of authority (as further interpreted by Finnis) remains controversial.<sup>126</sup> Nonetheless, I think it captures what we usually mean when we say someone has “authority.”

Yet, we need to qualify the definition further, since, under this definition, there would be no difference between an elected lawmaker demanding that a citizen pay taxes and a gunman demanding that a pedestrian hand over his wallet.<sup>127</sup> And there *is* a difference between those two scenarios.<sup>128</sup> What we are interested in, then, is *legitimate* authority: authority that is justified.<sup>129</sup> And, to avoid confusion, the “authority” with which we will be concerned is legitimate *political* authority—that is, authority to resolve legal disputes and make and enforce laws that (if the criterion of substantive justice is satisfied) are

122 RAZ, *supra* note 115, at 17. I am deviating from Raz’s definition in a couple of ways. First, Raz only uses “exclusionary reasons” to refer to second-order reasons *not* to do something, whereas I (like Finnis) have extended it here to include reasons *to* do something. Second, Raz qualifies his definition in numerous ways that I (again, largely following Finnis) have omitted. For a discussion of why the use of Raz’s definition of authority is fully consistent with a natural law account of justified authority like the one I give below, see FINNIS, *supra* note 21, at 233–37.

123 FINNIS, *supra* note 21, at 234; *see also* MCCALL, *supra* note 28, at 267.

124 *See* RAZ, *supra* note 115, at 17–18.

125 MCCALL, *supra* note 28, at 268–69 (rejecting the Razian definition of authority as “minimalist”).

126 *See id.*; N.P. Adams, *In Defense of Exclusionary Reasons*, 178 PHIL. STUD. 235, 236 (2020) (collecting criticisms of the concept of “exclusionary reasons”).

127 *See* H.L.A. HART, *THE CONCEPT OF LAW* 6–7 (2d ed. 1994).

128 *See* Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFFS. 3, 5 (1985); SIMON, *supra* note 25, at 7.

129 *See* Raz, *supra* note 128, at 5; MCCALL, *supra* note 28, at 266.

presumptively binding in conscience. Nonetheless, I will often simply speak of “authority” without the additional descriptors “legitimate” or “political.”

With these clarifications in mind, we can proceed to examine the moral basis for authority, which I will construct using arguments drawn from the natural law tradition. The moral basis for authority begins by establishing the proposition that human beings are social animals—that is, it is in their nature as rational beings to exist in society.<sup>130</sup>

There are many arguments for this claim,<sup>131</sup> but the most important argument for why human beings are social animals is that living in society is inseparable from our pursuit of the good. There are multiple versions of this argument in the natural law tradition. One could say that the attainment of virtue is necessary for our flourishing, and because certain virtues, like the virtue of justice, can only exist in society,<sup>132</sup> society is necessary for our flourishing.<sup>133</sup> Another way would be to say that there are certain ends that are self-evidently worth pursuing for their own sake—such as the good of friendship—that are only possible in society.<sup>134</sup> This is not to suggest an instrumental view of society. True friendship, for example, perfects *both* participants in the relationship and is worthwhile for its own sake, not as a means to each friend’s separate good.<sup>135</sup> In any event, regardless of how the argument is framed, the essential point is that the formation of society is not “the necessity of a blind ‘must,’ but the moral necessity of a rational ‘ought.’”<sup>136</sup> This is what it means to say that we are social *by nature*.

Once this proposition is established, the need for authority follows, though it requires a couple of more steps in the argument. If the moral imperative to be in society is entailed by our nature as social animals dependent on one another for the realization of certain goods (both material and nonmaterial), then the *purpose* of society is, at the very least, the creation of conditions that will allow each of us to attain those goods.<sup>137</sup> If society did not create those conditions, we would

130 ARISTOTLE, *The Politics*, in ARISTOTLE: THE POLITICS AND THE CONSTITUTION OF ATHENS 11, 13 (Stephen Everson ed., B. Jowett trans., Cambridge Univ. Press rev. 2d ed. 1996) (c. 350 B.C.E.); AQUINAS, *supra* note 119, at 7; 1 AQUINAS, *supra* note 23, at I Q. 96 art. 4; SUÁREZ, *supra* note 24, at 364; BELLARMINE, *supra* note 24, at 20.

131 See, e.g., ARISTOTLE, *supra* note 130, at 13; AQUINAS, *supra* note 119, at 7.

132 BELLARMINE, *supra* note 24, at 21; see also 3 AQUINAS, *supra* note 23, at II-II Q. 58 art. 1.

133 See JACQUES MARITAIN, SCHOLASTICISM AND POLITICS 68 (Mortimer J. Adler ed. & trans., Liberty Fund 2011) (1940); MARITAIN, *supra* note 120, at 47–49; AQUINAS, *supra* note 119, at 8–9; 1 AQUINAS, *supra* note 23, at I Q. 96 art. 4; BELLARMINE, *supra* note 24, at 21.

134 See FINNIS, *supra* note 21, at 141–44.

135 See *id.*

136 ROMMEN, *supra* note 25, at 192.

137 See FINNIS, *supra* note 21, at 154–56; ROMMEN, *supra* note 25, at 213–14, 218, 235.

have no reason to be in community with others; society would be an irrational phenomenon. The conditions under which we may achieve the goods found in society might be called the *common good* of society.<sup>138</sup> That is to say, our common good as members of society secures each of us the conditions necessary to achieve our own good.

Three immediate clarifications are essential here. First, I am primarily concerned here with the common good of a political community, what we might call the political common good.<sup>139</sup> There are other communities, such as the family, that have their own common good, but unless I indicate otherwise, I am discussing the political common good when I use the unadorned phrase “common good.”

Second, the proper understanding of the “common good” is a fraught issue in the natural law tradition, since it is a concept that “remains slippery even in the best of philosophical hands.”<sup>140</sup> Mark C. Murphy has observed that there are three conceptions of the common good in the tradition: instrumental, aggregative, and distinctive.<sup>141</sup> The understanding of the common good that I described in the paragraph before last is instrumental: the common good is seen as a means to each of us achieving our individual good.<sup>142</sup> This is the view associated most closely with the school of twentieth-century natural law scholars known as personalists,<sup>143</sup> as well as with Finnis.<sup>144</sup> The aggregative conception sees the common good as realized when each member of a society *is* achieving their own good, a view associated with Murphy himself.<sup>145</sup> Finally, the distinctive common good is the view that the common good is the good of the community considered as a whole, a good that is not reducible to the achievement of our individual goods.<sup>146</sup> This last position—which is arguably the more traditional Thomistic position<sup>147</sup>—is associated with Charles De Koninck, who

138 See FINNIS, *supra* note 21, at 154–56; ROMMEN, *supra* note 25, at 235, 274.

139 See FINNIS, *supra* note 21, at 154–56.

140 Aquinas Guilbeau, Charles De Koninck’s Defense of the Primacy of the Common Good 4 (May 27, 2016) (Ph.D. dissertation, University of Fribourg) (on file with author).

141 Mark C. Murphy, *The Common Good*, 59 REV. METAPHYSICS 133, 136 (2005).

142 See *id.*

143 See Guilbeau, *supra* note 140, at 52, 89.

144 See FINNIS, *supra* note 21, at 154–56. The fact that the instrumental view of the common good focuses on the conditions necessary to secure the good of each individual does *not* mean that it is only concerned with *individual goods* (i.e., goods that are reducible to the good of individuals). For example, the common good should favor the good of friendship, which has its own common good that is not reducible to the good of each participant in the friendship. See *id.* 141–44, 155.

145 See Murphy, *supra* note 141, at 137–38.

146 *Id.* at 136.

147 See generally Guilbeau, *supra* note 140, at 111–84; see also Yves R. Simon, *On the Common Good*, 6 REV. POL. 530, 530–31 (1944) (book review).

famously attacked the personalist school,<sup>148</sup> and it has likewise been championed by Ralph McInerny<sup>149</sup> and Louis Dupré.<sup>150</sup>

This is an important disagreement,<sup>151</sup> if for no other reason than how one defines and conceptualizes the common good potentially affects the aims and limits of political authority.<sup>152</sup> One of the recurring and essential issues in defining “the common good” is avoiding the danger that it will lead to totalitarianism, which was a major feature of the debate between the personalists and De Koninck.<sup>153</sup> So there is much that needs to be said about this debate in articulating a complete common-good theory of politics.

I do not, however, believe that it is necessary for me to pick sides in this debate to make my argument justifying political authority *in principle*. Under any of the foregoing conceptions of the common good, there must be conditions in place that *permit* and (ideally) *facilitate* the good if the good is to be achieved. Instrumentalist scholars say that these conditions simply *are* the common good, while those who oppose them would argue that these conditions, while necessary *for* the common good, do not *exhaust* the common good.<sup>154</sup> But because (as we will see) the need for these conditions suffices to justify political authority,<sup>155</sup> I can and will assume the instrumental conception of the common good *solely* for purposes of my argument in this Article, leaving for another day whether a more robust conception of the common good is correct.<sup>156</sup>

148 See 2 CHARLES DE KONINCK, *The Primacy of the Common Good Against the Personalists*, in THE WRITINGS OF CHARLES DE KONINCK 74, 74–88 (Ralph McInerny ed. & trans., 2009); see also Mary Martha Keys, *The Problem of the Common Good and the Contemporary Relevance of Thomas Aquinas* 39–68 (1998) (Ph.D. thesis, University of Toronto), <https://tspace.library.utoronto.ca/bitstream/1807/12073/1/NQ35203.pdf> [<https://perma.cc/8SDC-RJL8>].

149 See RALPH MCINERNY, *ART AND PRUDENCE: STUDIES IN THE THOUGHT OF JACQUES MARITAIN* 77–91 (1988).

150 See Louis Dupré, *The Common Good and the Open Society*, 55 REV. POL. 687 (1993).

151 But see Joseph E. Capizzi & V. Bradley Lewis, *Bullish on the Common Good?*, PUB. DISCOURSE (May 11, 2020), <https://www.thepublicdiscourse.com/2020/05/63220/> [<https://perma.cc/4WTG-NZS7>] (arguing that the importance of this dispute is overstated in recent discourse).

152 See MARY M. KEYS, *AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD* 10–14 (2006).

153 See Guilbeau, *supra* note 140, at 96–104; 2 DE KONINCK, *supra* note 148, at 105–08.

154 See Murphy, *supra* note 141, at 147.

155 Nor would a more robust understanding of the common good affect my arguments below about who possess legitimate authority (the people) and what is necessary to preserve that authority (originalism). See discussion *infra* Section II.B; Part III. A more robust conception of the common good would only potentially change the *extent* of legitimate authority that the people possess.

156 Vermeule appears to adopt De Koninck’s conception of the common good, but nothing in the architecture of his theory seems to depend on this. See VERMEULE, *supra*

Third, when I speak of the conditions for us to achieve “our own good,” I do not mean an idiosyncratic or subjective understanding of the good. In the natural law tradition, what is “good” for human beings is an objective reality capable of being understood through reason.<sup>157</sup> At the same time, individuals will pursue the objective good in different ways, depending on circumstances.<sup>158</sup> For example, it is good for me to have friends,<sup>159</sup> but since friendship is, in part, “based on some similarity” between friends,<sup>160</sup> I will form friendships with individuals with whom others might not.<sup>161</sup> In this sense, each of us has our own good that we pursue, even though “the good” is an objective concept.<sup>162</sup>

But what *are* the conditions for the attainment of the good, and what are the means of creating those conditions? Some of these conditions and the means of creating them are directly deducible from the natural law and should be the same across all societies.<sup>163</sup> For instance, the good of life can only be preserved under the condition that those in society refrain from engaging in murder, and it follows (in an imperfect world) that there must be laws prohibiting murder as a means of achieving that essential condition.<sup>164</sup>

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 many of the *means* of achieving desirable conditions.<sup>165</sup> Deciding what these latter conditions are and the means to achieve them is a process called *determinatio*, but I will avoid the Latin and instead employ “determination.”<sup>166</sup> To take a commonly used example, reason does not dictate the side of the road on which we should drive to avoid crashing into one another, but because avoiding crashing into one another is a condition for preserving the goods of life and health, one condition for the attainment of the good is that a society decide on which side of the road people will drive, regardless of what

note 4, at 28–29; *see also* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 111–13 (2022).

157 3 AQUINAS, *supra* note 23, at II-II Q. 47 art. 15.

158 *See id.*

159 *See* ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, at 141 (1155a3–12) (Roger Crisp ed. & trans., Cambridge Univ. Press rev. ed. 2014) (c. 384 B.C.E.).

160 *Id.* at 144 (1156b21).

161 *See* C.S. LEWIS, THE FOUR LOVES 83 (HarperCollins 2017) (1960).

162 Mary Keys has suggested that Maritain and De Koninck’s different understandings of the common good might be reconcilable by distinguishing between objective ends and subjective means. *See* Keys, *supra* note 148, at 57–59.

163 *See* 2 AQUINAS, *supra* note 23, at I-II Q. 95 art. 2.

164 *See* GEORGE, *supra* note 19, at 108.

165 *Id.*; 2 AQUINAS, *supra* note 23, at I-II Q. 95 art. 2.

166 *See* GEORGE, *supra* note 19, at 108.

that side is.<sup>167</sup> Thus, as Yves Simon argued, even in a society of perfectly rational and virtuous beings, there would still be a need to make society-wide decisions about the means of achieving the common good, and because some of those decisions would not be dictated by reason, there would inevitably be disagreement about them.<sup>168</sup> It is (at least) because of this inevitable disagreement about the means of achieving the common good in underdetermined situations that we need authority.<sup>169</sup> That is why Madison was wrong when he said that “[i]f men were angels, no government would be necessary.”<sup>170</sup>

I say that authority is needed “at least” in situations of underdeterminacy because, of course, human beings are *not* angels, and even when the conditions for the attainment of a good are inexorably dictated by reason, many will fail to grasp or to abide by those conditions. In those circumstances, there is a need to substitute for reason the threat of force, with the goal of ensuring compliance with the conditions of human flourishing.<sup>171</sup> And, further, Simon makes a compelling argument that—even in a society of perfectly rational and virtuous beings—there would still be disagreement about what the common good *is* in many situations,<sup>172</sup> though accepting that point is not necessary for my argument. The upshot is that authority is both *necessary in principle* (because it cannot be dispensed with even in a perfectly rational and virtuous society) and *necessary contingently* (because of the imperfection of human nature).<sup>173</sup>

An important implication of this justification for authority is that there are significant limits on the extent of legitimate authority. Because the common good is what justifies authority, legitimate authority cannot go further than what is necessary to achieve the common good, and it certainly cannot act in *contravention* of the common good.<sup>174</sup> And because the common good is an objective reality, there are

167 See FINNIS, *supra* note 21, at 285; GEORGE, *supra* note 19, at 108; SIMON, *supra* note 25, at 30. Pojanowski and Walsh offer a similar argument to Finnis about the need for authority, see Pojanowski & Walsh, *supra* note 18, at 121–22, as does Strang, in greater detail, see STRANG, *supra* note 19, at 230–78.

168 See YVES R. SIMON, A GENERAL THEORY OF AUTHORITY 31–50 (1962); MCCALL, *supra* note 28, at 294; SUÁREZ, *supra* note 24, at 365–66; I AQUINAS, *supra* note 23, at I Q. 96 art. 4.

169 See SIMON, *supra* note 168, at 31–50.

170 THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

171 See SIMON, *supra* note 25, at 37.

172 See SIMON, *supra* note 168, at 50–72.

173 See SIMON, *supra* note 25, at 154. *But see* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 3–19 (Univ. of Cal. Press 1998) (1970).

174 See ROMMEN, *supra* note 25, at 293–97; MARITAIN, *supra* note 120, at 50–51, 64–65; *infra* Section III.B (offering further discussion).



objective limits on legitimate authority,<sup>175</sup> which is why many in the natural law tradition have supported the notion that the people may justly depose a ruler who becomes a tyrant and acts contrary to the common good.<sup>176</sup>

To say that human beings are social animals, then, is to say that society is good for them, and to say that society is good for them is to say that authority is good for them. Authority is the logical implication of our social nature.<sup>177</sup> It would be irrational for a person to simultaneously be part of a society and object to being subject to political authority—the latter is entailed by the former.<sup>178</sup> By the same token, political authority would not exist outside of society, since there would be no need for it.<sup>179</sup> This means that political authority (which, again, I am defining as the power to resolve legal disputes and make and enforce laws presumptively binding in conscience) comes into existence at the same moment that a society comes into existence.<sup>180</sup> It is not something that individuals possess outside of society; it is something with which they are vested once *in* society.<sup>181</sup> And because society is our natural condition, so is living under political authority.<sup>182</sup> That is why Aquinas describes human beings as *both* social *and* political animals.<sup>183</sup> In sum: we *ought* to obey legitimate authority because it is necessary for securing the conditions under which we can achieve those goods we *ought* to pursue by virtue of the kind of beings that we are.<sup>184</sup>

### B. *The Argument for Popular Sovereignty*

But this raises the question: *who* is vested with political authority once it comes into existence, at least as an original matter?<sup>185</sup> Aquinas

175 See Gerard V. Bradley, *Natural Law Theory and Constitutionalism*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 397, 398–400 (George Duke & Robert P. George eds., 2017); ROMMEN, *supra* note 25, at 293–97, 363; MARITAIN, *supra* note 113, at 12–19, 23–24; MARITAIN, *supra* note 120, at 50–51, 64–65, 71–72.

176 See, e.g., SUÁREZ, *supra* note 24, at 387; SIMON, *supra* note 25, at 179–80.

177 See ROMMEN, *supra* note 25, at 203; SIMON, *supra* note 25, at 62–63; AQUINAS, *supra* note 119, at 10–11; SUÁREZ, *supra* note 24, at 365–66, 377; BELLARMINE, *supra* note 24, at 22.

178 SUÁREZ, *supra* note 24, at 375.

179 *Id.* at 379–80.

180 See Charles B. Macksey, *Sovereignty and Consent*, in THE STATE AND THE CHURCH, *supra* note 26, at 68, 93–94.

181 See SUÁREZ, *supra* note 24, at 380.

182 See MARITAIN, *supra* note 133, at 103; ROMMEN, *supra* note 25, at 186–89.

183 See AQUINAS, *supra* note 119, at 7.

184 See John A. Ryan, *The End of the State*, in THE STATE AND THE CHURCH, *supra* note 26, at 195, 195.

185 I use the term “vested” to emphasize that political authority is not something we inherently possess; it is something that we only gain once the need for it arises. As noted

provided the answer in Question 90, Article 3 of the *Prima Secundae Partis* of the *Summa*,<sup>186</sup> and it follows from the logic of the account of political authority given above. Political authority is a means to an end—namely, the achievement of the common good.<sup>187</sup> It comes into existence to make the common good possible, and it does not exist except to achieve that end. Accordingly, it must be vested, ultimately, in whoever is responsible for achieving the common good. 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 (or, under some conceptions of the common good, the common good is, or is part of, *their* good).<sup>188</sup> Thus, Aquinas concludes that “the making of a law belongs either to the whole people or to a public personage who has care of the whole people: since in all other matters *the directing of anything to the end concerns him to whom the end belongs.*”<sup>189</sup> J. Budziszewski has helpfully laid out the argument of Question 90, Article 3 in step-by-step form:

- (1) What is the first and principal concern of law? Directing things toward their purpose, the common good.
- (2) Who is responsible for directing things toward a purpose? The one to whom the purpose belongs.
- (3) To whom does the purpose of the common good belong? To the whole people.
- (4) Therefore, the people themselves, or someone acting in its place and on their behalf, is responsible for directing things toward the common good.
- (5) From this it further follows that the people themselves, or someone acting in its place and on their behalf, is responsible for making law.<sup>190</sup>

That is, “[t]he exigency for civil sovereignty does not naturally arise in any man, or any individual group of men, but only in a body politic; for it is a naturally necessary means only to an end proper only

below, theists in the natural law tradition would say God is the one who vests the people with this authority. See *infra* note 267.

186 2 AQUINAS, *supra* note 23, at I-II Q. 90 art. 3.

187 See *supra* Section II.A.

188 *Id.*

189 2 AQUINAS, *supra* note 23, at I-II Q. 90 art. 3 (emphasis added). Aquinas makes clear that, even when lawmaking power is in the hands of one who has “care of the whole people,” that person exercises *the people’s* authority as their “viceregent.” *Id.*

190 BUDZISZEWSKI, *supra* note 42, at 44; see also SIMON, *supra* note 25, at 158. Suárez and Bellarmine provide a different argument for popular sovereignty based on the fundamental equality of all human beings. See SUÁREZ, *supra* note 24, at 372–74; BELLARMINE, *supra* note 24, at 25.

to a body politic.”<sup>191</sup> The whole body politic is vested with political authority as an original matter because the whole body politic has the responsibility to achieve the common good, and political authority is simply the means to that end.<sup>192</sup>

This is no more than a specification of the general principle that the natural law does not impose an obligation without providing the means of fulfilling that obligation.<sup>193</sup> It cannot simultaneously be the case that the people have a duty to achieve the common good but lack the essential tool for fulfilling that duty: ultimate political authority in a society. Nor would it solve the problem to say that, while the people as a whole lack political authority, one or a group of them (or some outsider conquering them) can supply the authority the people need to carry out their responsibility, since it will inevitably be the case that the people’s assessment of what the common good requires differs from what some individual or group claiming political authority proposes to do. If the people lacked political authority, they would have no way of remedying this discrepancy between their responsibility to achieve the common good and the course of action pursued by their would-be rulers. Of course, as noted above, the people *themselves* will disagree about the common good, and that poses problems both for direct democracy and the ability of the people to act unanimously. I will address those problems shortly, but my point here is that, if the people are responsible for the common good, then they must possess the ultimate power to ensure that the common good is secured.

One might wonder: why would the natural law vest political authority in the people as a whole rather than in whatever members of the society have, like everyone else, a responsibility to pursue the common good but who *also* have, *unlike* everyone else, the skill, community-wide respect, or other features necessary to wield that authority effectively? If political authority is justified by the need to achieve the common good, then should not those most capable or effective, as a practical matter, of achieving the common good possess political authority?<sup>194</sup>

I will provide a fuller response to this type of argument below when discussing Finnis’s view of authority, but for now, I would point out that this argument confuses *responsibility* with *relative ability*. Authority is a means to an end, so it is given to those who are responsible for achieving the end in question. That does not mean that those who

191 Macksey, *supra* note 180, at 87.

192 My account of popular sovereignty assumes that the people are seen as a single body, a hotly contested question at the Founding. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402–05 (1819); see also SMITH, *supra* note 28, at 45–53.

193 See Macksey, *supra* note 180, at 86; 2 AQUINAS, *supra* note 23, at I-II Q. 5 art. 5.

194 See ROMMEN, *supra* note 25, at 393 (describing this argument).

have the responsibility to achieve the end are *best suited* to doing so; there might very well be others who are *better suited*. But that does not change the fact that the authority originally belonged to those with responsibility for the end.

By way of a loose analogy, consider the authority of parents over their children. That authority would exist even in the absence of positive law because it is the necessary means to achieving the common good of the family,<sup>195</sup> and it is vested in both parents because both have responsibility for the common good of the family. But suppose that the wife is far wiser and more virtuous than her husband and, thus, a clearly better parent. That does not mean that the husband is never vested with parental authority; it just means that he would do well to defer to his wife's better judgment on parental matters most of the time. The analogy is imperfect, but it highlights the key point: we would not suppose that the mere fact that one parent is better able to wield parental authority means that the other parent has *no* parental authority. Rather, we would say that both parents have parental authority because both parents are responsible for the common good of the family, to which the authority is a necessary means. In a similar way, the people have responsibility for the common good, so they are vested with political authority, even if it would be unwise for them to exercise political authority directly.

This gets us to the issue of the transmission of authority. Political authority consists of various powers. “[T]he first powers that [society] needs” are “the power[s] to organize itself under a definite form of government of its choice.”<sup>196</sup> This is the power of constituting the government, of deciding its form and allocating the powers it will wield. Because political authority is vested in the people as an original matter, the original form of government is a direct democracy,<sup>197</sup> but as Suárez argued, “natural law does not require either that the power should be exercised directly by the agency of the whole community, or that it should always continue to reside therein.”<sup>198</sup> Direct democracy is not compelled by the need for political authority or by the vesting of that authority in the people. “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; and therefore, men straightaway determine the said power by vesting it in one of the [principal] forms of government.”<sup>199</sup> Simon rightly observes that, precisely due to the practical difficulties

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195 See SUÁREZ, *supra* note 24, at 366.

196 Macksey, *supra* note 180, at 85; see also ROMMEN, *supra* note 25, at 373.

197 ROMMEN, *supra* note 25, at 405.

198 SUÁREZ, *supra* note 24, at 383; see also SIMON, *supra* note 25, at 173.

199 SUÁREZ, *supra* note 24, at 383; see also BELLARMINE, *supra* note 24, at 26–27.

of direct democracy in a society of any significant size (not to mention other problems with direct democracy), in the vast majority of cases “the common good demands that power be placed in a few hands.”<sup>200</sup> That is, the justification for political authority—achieving the common good—would be defeated if it could not be effectively exercised. 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.”<sup>201</sup>

This is the process of constituting a government, which, in the United States, the people did through a written constitution.<sup>202</sup> In constituting a government, the people transmit a portion of the political authority originally vested in themselves.<sup>203</sup> I say “a portion of the political authority” because they cannot and do not transmit *all* political authority. “[O]riginal sovereignty as in the people includes the governing powers as well as the powers of organization,” but “[o]utside of an absolute democracy the people entrust the governing powers to the rulers, retaining the organizing powers for the emergency of necessary reorganization.”<sup>204</sup> 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.<sup>205</sup> But the great powers of governance—the executive, legislative, and judicial powers—can be and are transmitted to distinct governing personnel who exercise those powers on behalf of the people, regardless of whether the regime is representative in form.<sup>206</sup> Because the people retain the ultimate responsibility for the common good and the constitution-making portion of political authority, the people have “the power to depose the prince, that is, the king, if he rules tyrannically,” which is to say that the people may alter or abolish the government they have constituted if the common good demands it.<sup>207</sup> But because revolutions are often harmful to the common

200 SIMON, *supra* note 25, at 168.

201 *Id.* But see *id.* at 175–76 (observing differences among natural law theorists about this conclusion).

202 I focus here on the transmission of authority accomplished through the Constitution, leaving aside the transmissions that occurred under the Articles of Confederation and at the state and local levels.

203 See SUÁREZ, *supra* note 24, at 383–84; see also MARITAIN, *supra* note 133, at 106.

204 Macksey, *supra* note 180, at 86.

205 See WHITTINGTON, *supra* note 49, at 135.

206 See 2 AQUINAS, *supra* note 23, at I-II Q. 90 art. 3; see also Cajetan, *supra* note 24, at 232.

207 Cajetan *supra* note 24, at 280; see also SIMON, *supra* note 25, at 179.

good,<sup>208</sup> the abolition and reconstituting of the government “cannot be lawfully exercised except in extreme cases.”<sup>209</sup>

In transmitting a portion of their authority, the people are required to organize the government in such a way that it can effectively exercise political power (since constituting an ineffective government would be contrary to the common good),<sup>210</sup> and they are also required to organize the government in such a way as to prevent the abuse of that power (which would likewise be contrary to the common good).<sup>211</sup> This is the delicate balance to which Madison alluded in *Federalist No. 51*: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>212</sup> But within those boundaries, nothing about the common good logically entails a specific plan of government, and the people are free to choose whatever form of government best suits their society, with its distinctive history and culture.<sup>213</sup> Thus, the form of government and the allocation of powers within it are largely matters of determination. In Burke’s words, “as to the share of power, authority, and direction which each individual ought to have in the management of the state, . . . [i]t is a thing to be settled by convention.”<sup>214</sup>

This may strike many readers as a strange understanding of the term “popular sovereignty.” In 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.<sup>215</sup> Here, by contrast, I am using the term “popular sovereignty” to mean, simply, that ultimate civil authority resides in the people, but nothing about *that* proposition requires any particular form of government.<sup>216</sup> 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. This more modest understanding of popular sovereignty is the one embraced by the natural law tradition.

208 See SIMON, *supra* note 25, at 180.

209 *Id.* at 179.

210 See *id.* at 185–86.

211 See AQUINAS, *supra* note 119, at 36–37.

212 THE FEDERALIST NO. 51, *supra* note 170, at 269.

213 See Pojanowski & Walsh, *supra* note 18, at 121–22; Bradley, *supra* note 175, at 401; SUÁREZ, *supra* note 24, at 382–83; BELLARMINE, *supra* note 24, at 27.

214 BURKE, *supra* note 115, at 52.

215 See, e.g., YUVAL LEVIN, THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT 92–97 (2014); Yves R. Simon, *The Doctrinal Issue Between the Church and Democracy*, 14 LOGOS: J. CATH. THOUGHT & CULTURE 132, 135–45 (2011).

216 See SIMON, *supra* note 25, at 176–79 (distinguishing between these two conceptions of “popular sovereignty”); Macksey, *supra* note 180, at 84–86.

Although the foregoing argument for popular sovereignty is well-grounded in that tradition, it could be attacked from two different perspectives: what we might call the “thin” and “thick” theories of political authority. By “thin” theories I mean those that “do[] not require one to accept more controversial claims about human nature and metaphysical propositions,”<sup>217</sup> and by “thick” theories I mean those that do require acceptance of such controversial claims, such as the claim that political authority can only be justified by theism.<sup>218</sup> Both would likely offer different versions of the same criticism: that popular sovereignty is unnecessary to a natural law theory of political authority, though the thin theory would see it as adding unnecessary thickness, while the thick theory would see it as mere proceduralism. Because the thin theory of authority has developed this critique more robustly,<sup>219</sup> my focus will be on the thin account, and addressing it will show why popular sovereignty is necessary to the common good regardless of whether one has a thick or thin theory of authority.

Finnis is the best representative of the thin account. He argues that “legalistic theories which seek to justify the authority of rulers by reference to the prior authority of some presumably self-authorizing transaction” are superfluous and misguided.<sup>220</sup> In his view, all that is necessary for a person or group to have the presumptive right to exercise authority is “that in the circumstances the say-so of this person or body or configuration of persons probably will be, by and large, complied with and acted upon, to the exclusion of any rival say-so and notwithstanding any differing preferences of individuals about what should be stipulated and done.”<sup>221</sup> In other words, for Finnis, a person presumptively has authority if, by and large, they are *perceived* as having authority (i.e., perceived as being able to give exclusionary reasons),<sup>222</sup> though he acknowledges that the ruler would forfeit the authority by acting contrary to the common good.<sup>223</sup> But, crucially, Finnis does not base authority entirely on this sociological fact. He concedes that:

217 STRANG, *supra* note 19, at 227.

218 See, e.g., MCCALL, *supra* note 28, at 289–90.

219 Additional points relevant to the thick theory can be found in Section II.C below, especially footnote 264. Because, as noted above, Vermeule has not meaningfully addressed how to identify the holder of political authority, it is unclear whether his theory is thick or thin. See *supra* note 35 and accompanying text.

220 FINNIS, *supra* note 21, at 247. It is important to say that Finnis is arguing against a justification for popular sovereignty that I pointed out in footnote 217 above but on which I do not rely. See *id.* at 248. Finnis has not engaged much with Aquinas’s argument for popular sovereignty. See *id.* at 257–58; JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 264–65 (1998).

221 FINNIS, *supra* note 21, at 249.

222 See SMITH, *supra* note 28, at 15.

223 See FINNIS, *supra* note 21, at 247, 249.

[P]ractical reasonableness requires (because of the self-same desirability of authority for the common good) that, faced with a purported ruler's say-so, the members of the community normally should acquiesce *or withhold* their acquiescence, comply or *withhold* their compliance, precisely as the purported ruler is, or is not, designated as the lawful bearer of authority by the constitutional rules authoritative for that time, place, field, and function—if, by virtue of custom or authoritative stipulation, *there are such rules*.<sup>224</sup>

That is, Finnis acknowledges that, even if a would-be ruler is *perceived* as having authority, the people should not obey the would-be ruler if the would-be ruler acquired power in a manner contrary to the laws designating who the rightful ruler is. Finnis's concern here is to uphold the rule of law, which is an essential component of the common good.<sup>225</sup> Since authority is justified by the need to secure the common good, authority cannot be based on something that harms the common good, such as the violation of the rule of law. Strang offers a very similar account of authority.<sup>226</sup>

A key question under Finnis's understanding of authority, then, is how do we determine what laws designate who the rightful ruler is? Here, there are two potential answers. One is to employ something like H.L.A. Hart's rule of recognition and say that the relevant laws are those accepted by the people as the relevant laws.<sup>227</sup> This would define the rule of law in sociological terms. The problem with this answer is that it does not give us any reason to *accept* the rule of recognition.<sup>228</sup> The fact that people *do* accept it says nothing, by itself, about whether it *should* be accepted. One might respond that normative evaluation is irrelevant to the rule of recognition; the whole point of the rule of recognition is that it exists as a sociological reality.<sup>229</sup> But the same could be said for the perception that a would-be ruler has authority, yet Finnis correctly refuses to say that that sociological reality is sufficient to confer authority on the would-be ruler, since that would eviscerate the rule of law. For the sake of the common good, he inserts a *normative* evaluation into his concept of authority: the people *should* or *should not* obey the would-be ruler to the extent the would-be ruler violated the rule of law in acquiring power. In the same way, practical reasonableness requires that we have a *reason* to believe that the rule of recognition is *justified*: that we *should* regard the rule of recognition as binding. If the perception that a would-be ruler has authority is

224 *Id.* at 250.

225 *See id.* at 270–73.

226 *See* STRANG, *supra* note 19, at 249–52, 261–65, 280–82.

227 *See* FALLON, *supra* note 45, at 84–87.

228 *See* MCCALL, *supra* note 28, at 267–68, 280.

229 *See* HART, *supra* note 127, at 107–08.



insufficient to show that their authority is consistent with the common good, then the perception that a rule of recognition is the relevant law designating who has authority is likewise insufficient to show that that law is consistent with the common good.

That leaves us with the second answer: the laws designating who the rightful ruler is are those laws that, in *addition* to purporting to be such laws, *also* meet the Thomistic definition of law, which requires that the laws be promulgated by a legitimate lawmaker. But how do we know whether the lawmaker who promulgated the laws in question was a legitimate lawmaker? We cannot simply point to *other* laws that made them a legitimate lawmaker, since that would raise the question of whether *those laws* were promulgated by a legitimate lawmaker. We will find ourselves in an infinite regress unless there is someone in society in whom authority *necessarily* is vested and who therefore may promulgate the laws by which we determine the legality of *other* claimants to authority: that is, unless there is someone who necessarily has the authority to create a constitution for the society. That someone is the people.

Finnis's thin account of authority, then, is insufficient on its own terms to explain why we should obey a would-be ruler. It lacks the essential ingredient that popular sovereignty supplies: a justification for the laws under which a would-be ruler is selected. That justification, in the final analysis, must be grounded in the authority of the people, who are the only entities who *necessarily* hold authority (by dint of their ultimate responsibility for the common good) and need not point to some prior authorization for their authority. Popular sovereignty, then, is *itself* part of what undergirds the common good: it explains why a particular ruler is entitled to our obedience beyond the brute sociological realities that, by themselves, cannot supply a reason for obedience that is consistent with the common good.

Remarkably, this account of popular sovereignty has been almost completely overlooked by American constitutional theory scholarship,<sup>230</sup> even though it was widely held to be true by medieval and Renaissance natural law scholars.<sup>231</sup> Indeed, except for a few passing mentions,<sup>232</sup> American law reviews are devoid of any discussion of the natural law justification for popular sovereignty. That is unfortunate, because as we will now see, the natural law account of popular sovereignty is better able to respond to common critiques of popular sovereignty

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230 McCall's important contribution comes closest to developing that account, but he does not see popular sovereignty as necessary to the transmission of authority or spell out the account's implications for American constitutionalism. See MCCALL, *supra* note 28, at 305–14.

231 See ROMMEN, *supra* note 25, at 406–07.

232 See, e.g., *supra* note 27 and accompanying text.

and the legitimacy of the American Constitution than its social-contract competitors.

### C. *Responding to Common Objections to Popular Sovereignty*

Popular sovereignty is the theory of constitutional legitimacy that is woven into our constitutional culture.<sup>233</sup> It is the assertion of the Declaration of Independence,<sup>234</sup> the Constitution's Preamble,<sup>235</sup> and innumerable other hallowed texts in our history.<sup>236</sup> Yet, few constitutional theorists today make popular sovereignty the basis of their theories.<sup>237</sup> This strange disconnect between the theories of our scholars and the theory of our culture can be explained, in part, by the powerful objections to conventional, social-contract-based theories of popular sovereignty.<sup>238</sup> The natural law account of popular sovereignty provides us with a firmer foundation for answering these common objections.

#### 1. Unanimous Consent and the Original Exclusions

Social-contract theories of popular sovereignty contend that political authority is justified by the consent of the governed.<sup>239</sup> In their paradigmatic form, these theories begin by imagining human beings existing either outside of society entirely (in the case of Rousseau)<sup>240</sup> or outside of the political authority of others (in the case of Locke).<sup>241</sup> In either case, human beings are considered naturally free of political authority "and remain so, till by their own consents they make themselves members of some politic society."<sup>242</sup>

233 See Alicea, *supra* note 118, at 1189–90.

234 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

235 U.S. CONST. pmb1.

236 See, e.g., Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available at [https://rnc.library.cornell.edu/gettysburg/good\\_cause/transcript.htm](https://rnc.library.cornell.edu/gettysburg/good_cause/transcript.htm) [<https://perma.cc/Q6LP-7N4Z>]).

237 See Alicea, *supra* note 118, at 1191–94.

238 See *id.* at 1192–94.

239 See, e.g., LOCKE, *supra* note 115, at 7; HOBBS, *supra* note 115, at 91–100.

240 See JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 115, 145, 148–49 (Victor Gourevitch ed. & trans., 2d ed. 2019).

241 See LOCKE, *supra* note 115, at 35–38; PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM 44 (Rebecca Balinski trans., Princeton Univ. Press 1995) (1987).

242 LOCKE, *supra* note 115, at 7. I should note that here and throughout this paper I describe Locke and Rousseau's theories as I understand them, but I acknowledge that these interpretations would be disputed by other scholars. See, e.g., NELSON LUND, ROUSSEAU'S REJUVENATION OF POLITICAL PHILOSOPHY: A NEW INTRODUCTION (2016) (disagreeing with some conventional interpretations of Rousseau). Insofar as the reader disagrees with my interpretations of Locke and/or Rousseau, that does not affect the substance of my

Possibly the most common objection to this standard conception of popular sovereignty was well-put by Randy Barnett: “Though ‘the People’ can surely be bound by their consent, this consent must be real, not fictional—unanimous, not majoritarian. Anything less than unanimous consent simply cannot bind nonconsenting persons.”<sup>243</sup> Yet, as Richard Fallon has observed, “[t]he Constitution of the United States never received unanimous consent. At the time of its ratification, many white males opposed it. Women could not vote. Many African Americans were enslaved.”<sup>244</sup>

There are several errors with the social-contract model of popular sovereignty—at least as that model is discussed in American constitutional theory—that, once corrected by the natural law model, show that the unanimity objection is not a problem for the legitimacy of the Constitution. The most basic is the one identified by Simon: “[T]hroughout the history of political literature there is a tendency to identify [that is, conflate,] the two following questions: (a) whether society needs to be governed and (b) whether it needs to be governed by a distinct personnel.”<sup>245</sup> In truth, “the necessity of government is one question and the necessity of a distinct governing personnel[, as opposed to direct democracy,] an entirely different one.”<sup>246</sup> American constitutional theorists very often collapse these two distinct questions, which in the American context would be: (1) is American *political authority* legitimate and (2) is *the Constitution* legitimate?<sup>247</sup> Those are not the same question, though they are related. The former asks whether *someone* in a society may justifiably exercise political authority, while the latter asks whether *a particular person or group of people* in a society may do so.<sup>248</sup> It is essential that we distinguish these two questions, since the form and object of consent relevant to each are distinct. I will first address here the circumstances under which we are bound by the political authority of a *particular society* (i.e., Question (1) above), and I will then address the circumstances under which political authority can be transmitted to a person or group of persons within a society (i.e., Question (2) above).

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argument, since I only use these theorists to draw contrasts with my own view and clarify its contours for the reader.

243 BARNETT, *supra* note 28, at 11; *see also* FALLON, *supra* note 45, at 24–35, 83–85; DWORKIN, *supra* note 45, at 192–93.

244 FALLON, *supra* note 45, at 25; *see also* MCCALL, *supra* note 28, at 272–73; SEIDMAN, *supra* note 45, at 16–17; Stein, *supra* note 45, at 406–20, 448–52; *see also* Marshall, *supra* note 45, at 1338.

245 SIMON, *supra* note 25, at 37–38 (italics omitted).

246 *Id.* at 168; SIMON, *supra* note 168, at 49.

247 *See, e.g.*, FALLON, *supra* note 45, at 25; BARNETT, *supra* note 28, at 11–31.

248 *See* LOCKE, *supra* note 115, at 44–45; *see also* RUTH W. GRANT, JOHN LOCKE’S LIBERALISM 106 (1987).

As I have said, the moral basis for political authority is that human beings cannot flourish without being in community with other human beings,<sup>249</sup> and a society of human beings cannot flourish without political authority.<sup>250</sup> Notice that at no point in this chain of reasoning is it required that the members of a society consent to political authority. Once they are in a society, political authority is entailed.

But to be part of a society is to be part of a web of social relationships, and social relationships among adults—to be genuine—require a form of consent. It would, for example, be antithetical to the nature of friendship for two individuals to be compelled to be friends at the point of a gun. That would be an *ersatz* friendship, a form of playacting rather than the willing of the good of the other that (among other things) characterizes friendship.<sup>251</sup> But, by the same token, no one would assert that the consent necessary for friendship requires voting by secret ballot: “Do you consent to become friends with John? Circle ‘Yes’ or ‘No.’” Rather, we consent to social relationships *through our actions*.<sup>252</sup> If I am to be friends with John, I will *do* things that manifest my consent to that friendship, such as helping John move into his new apartment, counseling him about his frustrations at work, or accompanying him on a leisure activity like a sports game.<sup>253</sup> The consent to our friendship is no less real because it lacks the formality of the voting booth, and that is true of the consent required of almost *any* genuine social relationship, including the consent necessary to belong to a particular society.<sup>254</sup> Our daily actions demonstrate our consent to the social relationships that constitute this particular society; they show our consent to being part *of* this society.

One potential counterexample would be marriage, which usually *does* involve a formal exchange of consent, but the reason why the marital rite traditionally includes this formality is that the consent has historically been considered *irrevocable*.<sup>255</sup> That is not true of the consent necessary for society. Just as two friends do not commit themselves to a permanent relationship (which is one of the features of friendship

249 See *supra* notes 131–38 and accompanying text.

250 See *id.*

251 See FINNIS, *supra* note 21, at 141–44; ARISTOTLE, *supra* note 159, at 144–45 (1156b8–32).

252 See Gregory Froelich, *Friendship and the Common Good*, 12 AQUINAS REV. 37, 41 (2005); 4 AQUINAS, *supra* note 23, at II-II Q. 168 art. 1.

253 See ARISTOTLE, *supra* note 159, at 167, 180 (1166a3–9, 1172a2–8); see also Froelich, *supra* note 252, at 41–42; AUGUSTINE, THE CONFESSIONS bk. IV ch. 8, at 62 (John E. Rotelle ed., Maria Boulding trans., 1997).

254 SIMON, *supra* note 25, at 178–79; ROMMEN, *supra* note 25, at 201.

255 See SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 32–36 (2012).

that has traditionally distinguished it from marriage),<sup>256</sup> there would be nothing contrary to my argument in a person deciding to leave a particular society and emigrate to another, as individuals have a right to do.<sup>257</sup> This explains why a less-formal means of consent is acceptable to both maintaining a friendship and maintaining membership in a particular society.<sup>258</sup>

This informal consent to being in a society requires subjection to the political authority of that society. It would be unreasonable to consent to a social relationship but object to some aspect of the social relationship that is necessarily part of that relationship. For instance, if I were to purport to consent to a friendship with John but reject any obligation to make sacrifices on John's behalf during our friendship, that would be tantamount to rejecting friendship with John, since mutual sacrifice is entailed in the idea of friendship.<sup>259</sup> In the same way, one cannot consent to being part of a society while objecting to the political authority that is necessary for the society to exist.<sup>260</sup> Heinrich Rommen perfectly captured this dynamic when he said that political authority is "the result of the daily renewed free resolution of the citizen to live in the *ordo*, in the working organization for the common good, which has arisen out of the social nature of man as a reasonable being and for the perfection of his nature."<sup>261</sup> That is to say, (1) our daily actions manifest our consent to the social relationships that form our particular society, and (2) once we have consented to be in a particular society, we cannot reasonably reject the political authority of that society (even though we did not consent to that authority) because (as shown in Section II.A) society cannot function without authority.

But because being part of a community is essential to human flourishing, the choice of whether to belong to a society is not unencumbered: the person must agree to be part of *some* society if she is to act rationally (that is, in accordance with the natural law).<sup>262</sup> It follows that a human being cannot rationally choose *not* to be subject to political authority; reason dictates that she be subject to political authority *somewhere* so that she may achieve her own flourishing. The only ways to avoid this conclusion are to (1) deny that human beings are social animals (in that they need society to flourish) or (2) deny that being a social animal necessarily entails being a political animal. Rousseau

256 *See id.*

257 *See* JOHN PAUL II, LABOREM EXERCENS ¶ 23 (1981).

258 For the relationship between friendship and society, see ARISTOTLE, *supra* note 159, at 152 (1159b25–1162a34).

259 *See* FINNIS, *supra* note 21, at 142–43; Froelich, *supra* note 252, at 52–55.

260 SUÁREZ, *supra* note 24, at 375.

261 ROMMEN, *supra* note 25, at 240.

262 *Id.* at 189.

chose the first option,<sup>263</sup> while Locke chose the second.<sup>264</sup> But for the reasons laid out above, neither option is sound.

Some theorists, such as Barnett<sup>265</sup> or Dworkin,<sup>266</sup> would perhaps reject the consent I have described as mere “tacit consent,” not the consent necessary for political authority. But that disparagement of the consent involved only has bite if we assume that the thing to which we have to consent is *political authority itself*, rather than the social relationships to which political authority *necessarily attaches*.<sup>267</sup> Nor is it a counterargument to say that our consent to our current society was not ours to begin with (since we were born into the society or taken there by our parents/guardians) and is bounded by all manner of practical and emotional obstacles to severing those social relationships.<sup>268</sup> The same is true of many social relationships—such as the relationships among adult family members—yet we do not say that those relationships are somehow morally defective or involve no consent.<sup>269</sup> It is true that two adult siblings, for instance, might have practical and emotional obstacles to severing their familial bond, but it is also true that they cannot form a genuine relationship unless they consent to maintain that relationship over time. It would be wrong to say that their consent to that relationship is not real, even if it is bounded in many unchosen ways.

263 ROUSSEAU, *supra* note 240, at 115, 145, 148–49; *see also* NICHOLAS DENT, ROUSSEAU 61–62 (2005). Rousseau acknowledged that human beings are, in some sense, better off in society at an early stage in social development, *see* ROUSSEAU, *supra* note 240, at 171, but he does not, in my view, argue that society is *necessary* to their flourishing, *see id.* at 141–61.

264 LOCKE, *supra* note 115, at 35–43; *see also* MANENT, *supra* note 241, at 42.

265 *See* BARNETT, *supra* note 28, at 14–19, 22–25.

266 DWORKIN, *supra* note 45, at 192–93.

267 This is an important distinction from the perspective of theorists within the natural law tradition who hold to the Pauline principle that “there is no authority except from God.” *Romans* 13:1. That is, political authority does not originate with human beings; God grants political authority to human beings when they constitute a society, since He supplies the power that the logic of human society demands. SUÁREZ, *supra* note 24, at 378–80; BELLARMINE, *supra* note 24, at 24–25, 27. Some critics of the transmission theory have argued that it is incompatible with condemnations of social-contract theory expressed by Popes Pius X and Leo XIII, but as many scholars have shown, those condemnations were *not* of the transmission theory articulated by Aquinas, Cajetan, Bellarmine, and Suárez. *See* Simon, *supra* note 215, at 156–57, 163 nn.24–25; ROMMEN, *supra* note 25, at 429–31; John A. Ryan, *Comments on the “Christian Constitution of States”*, in *THE STATE AND THE CHURCH*, *supra* note 26, at 26, 26–28, 53–54; Louis Cardinal Billot, *The Moral Origin of Civil Authority*, in *THE STATE AND THE CHURCH*, *supra* note 26, at 62, 62–67; *see also* MCCALL, *supra* note 28, at 305–14; Hittinger, *supra* note 26, at 19.

268 BARNETT, *supra* note 28, at 17–19, 22–24.

269 McConnell, *supra* note 81, at 1134; ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 21–24, 129–31 (St. Augustine’s Press rev. 3d ed. 2002) (1980); BURKE, *supra* note 115, at 27–33.

The intuition among social-contract theorists that consent is necessary for political authority is rooted in the erroneous view that the phrase “social contract” reveals: that subjection to political authority is the result of a bargained-for exchange in which individuals give up some form of political authority they previously had in a state of nature to acquire certain goods.<sup>270</sup> Barnett captures this view with his description of individuals as each being “sovereign,”<sup>271</sup> as if each was possessed of political authority unto themselves. It is the view that Locke expressed when he described the state of nature as being one in which each person has “all the power and jurisdiction” over themselves,<sup>272</sup> including such powers as “the executive power of the law of nature.”<sup>273</sup>

But political authority is not “the sum of the conceded rights of the individuals” in a society.<sup>274</sup> Human beings do not *give up* political authority in exchange for goods that come with society, because they do not *possess* political authority outside the context of a society in which subjection to such authority is necessary.<sup>275</sup> In other words, it is illogical to build an account of political authority on the notion that human beings could exist either: (1) as solitary beings each of whom possesses political authority (since political authority would not exist without society),<sup>276</sup> or (2) as social beings each of whom possesses political authority yet are not subject to the political authority of others (since it is impossible to have society without being subject to the political authority of others).<sup>277</sup> Only if one has this erroneous understanding of political authority does it make sense to demand the consent to political authority known to *contractual* relationships, rather than seeing political authority as a good and logical implication of our ongoing, informal consent to *social* relationships.

Once these mistakes of the social-contract school have been corrected, it becomes clear that political authority in the United States is morally justified, since each of us—by our daily actions of consenting to the social relationships that constitute this society—manifests our consent to being part of this society, which entails living under the political authority of this society. This is not a meaningless consent. For

270 See, e.g., LOCKE, *supra* note 115, at 57; HOBBS, *supra* note 115, at 91–100. This is the kind of voluntarism that I reject. See PATRICK J. DENEEN, WHY LIBERALISM FAILED 31–34 (2018).

271 See RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 69–73 (2016).

272 LOCKE, *supra* note 115, at 2.

273 *Id.* at 6.

274 ROMMEN, *supra* note 25, at 430.

275 See BELLARMINE, *supra* note 24, at 24; see also MCCALL, *supra* note 28, at 275; Macksey, *supra* note 180, at 73–74.

276 See HOBBS, *supra* note 115, at 91–92.

277 See LOCKE, *supra* note 115, at 35–43.

example, with respect to the original exclusions, there is a compelling argument that Black people forcibly brought here as slaves and coerced—with the threat of violence—to remain part of American society had no obligation to obey American political authority during their time in captivity. Slaves would not have been acting contrary to the common good by deliberately disobeying American political authority, since they never consented to be part of American society (and, separately but perhaps more importantly, since the substance of the laws that kept them in slavery is gravely immoral and contrary to the natural law).<sup>278</sup> They were, in my example earlier, in the same position as the person being asked to be “friends” with someone else at the point of a gun. But that does not in any way change the position of descendants of slaves living in the United States today, who *do* manifest their daily consent to the social relationships that entail obedience to the political authority of this society now.

There is, however, still the separate question of whether *the Constitution*—as a transmission of the people’s legitimate authority—required unanimous consent in some direct and formal way, which it obviously lacked. Having kept this question distinct from the question of legitimate political authority, we are now in a position to see why the Constitution is legitimate.

As discussed above, because the people only possess political authority for the sake of the common good, where the common good cannot be achieved through a direct democracy, the people have a duty to transmit a portion of their authority to distinct governing personnel.<sup>279</sup> Given the size and complexity of the United States at the Founding, the common good could not be achieved by the people continuing to exercise their political authority through a direct democracy,<sup>280</sup> so they had a duty to the common good to transmit their authority.

Because the common good required the transmission of the people’s authority, unanimous consent was not necessary to effectuate the transmission. As shown above, the people are subject to political authority regardless of their consent, so the only question here is *who* should wield that authority within the regime. The choice of who wields the authority is a component of the people’s power to constitute their regime, but they can only exercise that authority consistent with the common good. The very circumstances that make the transmission of authority a duty—namely, the size and complexity of a society—

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278 See Joseph E. Capizzi, *The Children of God: Natural Slavery in the Thought of Aquinas and Vitoria*, 63 THEOLOGICAL STUD. 31, 50–51 (2002).

279 See SUÁREZ, *supra* note 24, at 383; BELLARMINE, *supra* note 24, at 26–27.

280 See THE FEDERALIST NO. 10, *supra* note 170, at 45–49 (James Madison); THE FEDERALIST NO. 14, *supra* note 170, at 63–65 (James Madison).



make unanimity impossible, which means a unanimity requirement would be incompatible with the common good because it would make transmission impossible. And if a unanimity requirement is incompatible with the common good, then it is not a feature of the authority vested in the people. As Suárez argued, “if we assume that men have willed to gather together into one political community, it is not in their power to set up obstacles to this jurisdiction.”<sup>281</sup>

To make this clearer, consider *why* theorists often think that unanimous consent is necessary. The most common reason is that, because we are all in some fundamental sense equal, we cannot be compelled to obey another person without our consent.<sup>282</sup> But as I have explained, we are subject to political authority regardless of whether we consent to it,<sup>283</sup> so this autonomy-based rationale cannot support the unanimity requirement. The other reason is that political authority belongs to the people and, therefore, it cannot be taken away from them without their unanimous consent.<sup>284</sup> But as I have shown, the people only possess that authority insofar as it is consistent with the common good, and because the unanimity requirement would defeat the common good by making transmission impossible, the unanimity requirement is not entailed by the authority the people possess. In short, *no principle* is being violated in allowing for the transmission of authority without unanimous consent: there is no need for consent for political authority as such, and the people are deprived of nothing to which they are entitled if transmission takes place without unanimous consent, since they are only entitled to authority that is consistent with the common good.

That does not mean that the people were required to ratify *this* Constitution. If they had been, their consent to the Constitution would have been unnecessary and empty. It only means that they were required to ratify *a* constitution of some sort. Because nothing in the natural law dictated how the transmission would take place and the form of government that would result, their consent was both real and necessary. They could have rejected the Constitution and called a new convention to draw up a new proposed method of transmitting their authority—but they did not.

What form and degree of consent, then, *is* required for a transmission of political authority to be legitimate? The answer follows from what has just been said: whatever form and degree of consent is consistent with the imperative to secure the common good in the

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281 SUÁREZ, *supra* note 24, at 378; see LOCKE, *supra* note 115, at 44–45.

282 LOCKE, *supra* note 115, at 44.

283 EDMUND BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS 122 (London, J. Dodsley 2d ed. 1791).

284 See BARNETT, *supra* note 271, at 69–78.

context of a particular society when the transmission takes place.<sup>285</sup> Voting up or down is the ideal way of manifesting the people's consent, since it is the clearest indication of their consent,<sup>286</sup> but "just as human reason and will, in practical matters, may be made manifest by speech, so may they be made known by deeds."<sup>287</sup> So, in a particular society at a particular time, the transmission of political authority might involve no voting by the members of the society at all, either (or both) because voting would not be practicable or because well-accepted tradition (as a manifestation of the people's consent) holds that it is unnecessary. In this sense, sociological legitimacy is an important indication that transmission has occurred.<sup>288</sup>

In the context of the United States in 1787, the people's ability to consent to ratification through voting was the greatest it had ever been. As Akhil Amar has pointed out: "[T]he ratifying conventions that met between 1787 and 1790 operated under special voting and eligibility rules, allowing a wider swath of Americans to vote and serve" compared with the rules for voting or serving in a state legislature.<sup>289</sup> "What is unique about this act of constitution is thus not the extent of its *exclusion* but the breadth of its *inclusion*."<sup>290</sup> To insist that the Constitution could only be a valid form of transmission if it allowed universal suffrage is to ignore that it had already gone "further than anyone ha[d] ever gone before" in permitting the people to explicitly consent to the transmission of their political authority through voting,<sup>291</sup> and it would be to "set up obstacles" to the common good by demanding what was, lamentably, unimaginable at the time.<sup>292</sup> It would be to insist on a condition for transmission that would defeat the possibility of transmission, and the people have no authority to impose such a condition, since it is hostile to the common good.

## 2. The Dead Hand of the Past

If we were to ask which argument is most commonly raised against popular-sovereignty theories of constitutional legitimacy, it would be a close race between the unanimity objection and the dead-hand

285 See STRANG, *supra* note 19, at 250–51; SIMON, *supra* note 25, at 178–79; ROMMEN, *supra* note 25, at 201.

286 See 2 AQUINAS, *supra* note 23, at I-II Q. 105 art. 1; J. BUDZISZEWSKI, COMPANION TO THE COMMENTARY 102–03 (2014).

287 2 AQUINAS, *supra* note 23, at I-II Q. 97 art. 3.

288 See FALLON, *supra* note 45, at 84–87; FINNIS, *supra* note 21, at 245–52.

289 AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 308 (2005).

290 Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 36 (2000) (emphases added).

291 *Id.*

292 SUÁREZ, *supra* note 24, at 378.

objection. In its simplest form, the dead-hand argument contends that those who are dead have no political authority over those living today, so the dead's consent to the Constitution cannot bind us today.<sup>293</sup> This objection rests on similar errors as the unanimity objection.

We can start with the failure, again, to distinguish between whether American political authority is legitimate and whether the American Constitution is legitimate.<sup>294</sup> As to the former, our ongoing actions to sustain the social relationships constituting this society manifest our consent to being in this society,<sup>295</sup> which entails being subject to American political authority here and now. Only if one thinks that political authority is something we, as individuals, possess in a state of nature and give up in exchange for certain goods (i.e., the social-contractarian model)<sup>296</sup> does it make sense to think that American political authority rests on the formal consent to a social contract in the distant past. Instead, American political authority exists now because American society exists now, and our society exists now because we, the living, continue to consent to the social relationships constituting our society.<sup>297</sup> We are not, therefore, subject to American political authority because of consent given in the past; we are subject to American political authority because of our consent to be part of American society now.<sup>298</sup> The Constitution, as discussed above, is the transmission of a portion of that political authority from the people to distinct governing personnel. The proper way to frame the dead-hand objection, then, is to ask whether the transmission of political authority effected by the Constitution can only be justified if we provide our ongoing consent to the transmission. The answer to that question, as should be clear by now, is no.

As discussed above, political authority is not something we possess unencumbered; it is a power that we possess *solely* to achieve the common good.<sup>299</sup> For that reason, where the common good requires the transmission of that authority to distinct governing personnel, we have a moral obligation to transmit the authority in some form.<sup>300</sup> The dead-hand argument, if accepted, would make the *stable* transmission of political authority impossible, since it would entail an ongoing

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293 BALKIN, *supra* note 46 at 56–57, 64, 281–82; BARNETT, *supra* note 28, at 19–22; Strauss, *supra* note 46, at 1718–24.

294 See SIMON, *supra* note 25, at 37–38; SIMON, *supra* note 168, at 49.

295 See *supra* subsection II.C.1.

296 See *id.*

297 See ROMMEN, *supra* note 25, at 218.

298 To be clear, we would be subject to political authority *somewhere* if we were not subject to American political authority, since the existence of political authority *as such* and our subjection to it does not depend on our consent. See *supra* subsection II.C.1.

299 See *supra* Section II.A.

300 See *supra* Section II.B.

reevaluation of *how* the people should transmit authority, as new members continuously joined the society through birth or immigration.<sup>301</sup> Yet, for the common good to be achieved, the transmission of authority to a government has to be stable.<sup>302</sup> No government could function effectively to secure the common good if each new entrant into the society was presumptively exempt (subject to their consent) from the government's legitimate ability to exercise authority.<sup>303</sup>

If the people have an obligation to transmit their authority for the common good, and if the common good will only be served by a stable transmission of authority, it follows that a condition that would make the stable transmission of their authority impossible cannot be a component of the people's authority. That does not mean that the transmission is irrevocable; the people reserve the authority to decide that the Constitution should be modified or abolished to *better* effectuate the common good (though that calculus would have to consider the potentially destabilizing effects of amending or abolishing the Constitution). But until the people do so, they remain bound to obey the person or persons holding the transmitted authority, which in our case are those elected under the Constitution.

It is important to see that this conclusion does not cheat the people of subsequent generations out of anything to which they were entitled. They were only entitled to the political authority necessary to secure the common good, and since the common good can only be secured by the stable transmission of that authority, they are not entitled to a reversion of the authority to themselves with each new generation.

### III. THE MORAL AUTHORITY OF ORIGINAL MEANING

If what I have said thus far is correct, and if we assume that the Constitution is generally sufficiently just as a substantive matter, then we are presumptively bound in conscience to adhere to the Constitution. Living in society is essential to our good,<sup>304</sup> and so society's purpose is, at a minimum, to create the conditions under which we can achieve our good, conditions we might call the common good.<sup>305</sup> But the common good can only be achieved through political authority, so there is a moral need for authority.<sup>306</sup> That authority is vested in the

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301 See Joel Alica, *Originalism and the Rule of the Dead*, 23 NAT'L AFFS. 149, 151 (2015).

302 See SIMON, *supra* note 25, at 179–80; BURKE, *supra* note 115, at 80–84; SUÁREZ, *supra* note 24, at 387; RAWLS, *supra* note 93, at 140–44.

303 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–76 (1803).

304 See *supra* Section II.A.

305 See *id.*

306 See *id.*

people of the society, who have responsibility for achieving the common good.<sup>307</sup> In the American context, the common good required that the people transmit a portion of their authority to distinct governing personnel, which they did by vesting that portion in the offices created by the Constitution.<sup>308</sup> The Constitution is, therefore, a law promulgated by a legitimate authority that is presumptively binding in conscience.<sup>309</sup>

That still leaves two questions. First, what implications does this account of the Constitution's moral authority have for constitutional methodology? My answer will be that it requires adherence to the original meaning of the Constitution. As noted below, I will take no position on whether original public meaning, original intent, or some other form of originalism is the appropriate methodology (though, importantly, I will rule out some forms of originalism in discussing the relationship between originalism and popular sovereignty). My purpose is merely to show that *some* form of originalism is required. Second, even if the Constitution, as a general matter, is sufficiently just as a substantive matter to make it presumptively morally binding (as I have assumed), what is the appropriate judicial response when a particular application of the original meaning of the Constitution would lead to an outcome that conflicts with the natural law? My answer will be that it would be contrary to the natural law for the judge to modify or disregard the original meaning of the Constitution.

I will begin with the issue of constitutional methodology before moving to consider conflicts between the original meaning of the Constitution and the natural law. Thus, in Section III.A, I am addressing situations in which the original meaning is consistent with the natural law; only in Section III.B do I consider circumstances where it is not.

#### A. *The Obligation to Obey the Original Meaning of the Constitution*

Originalism follows directly from the account of popular sovereignty provided above. The people's authority is necessary to secure the common good,<sup>310</sup> and the Constitution is their transmission of a portion of their authority for that purpose.<sup>311</sup> Because there is a moral obligation to further the common good, there is a concomitant moral obligation to preserve the legitimate authority of the people. In the American context, the only way to preserve the authority of the people is to understand their commands—as embodied in the Constitution—

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307 See *supra* Section II.B.

308 See *id.*

309 See 2 AQUINAS, *supra* note 23, at I-II Q. 96 art. 4.

310 See *supra* Section II.A.

311 See *supra* Section II.B.

as the people themselves understood those commands.<sup>312</sup> If the distinct governing personnel could construe the people's commands differently from how the people understood them, the governing personnel could interfere with the means for achieving the common good that the people selected, which would effectively nullify the people's authority.<sup>313</sup> As Whittington has argued, "The ideal of popular sovereignty would be meaningless if others could set the actions of the sovereign aside" by construing the sovereign's commands contrary to their original meaning.<sup>314</sup> This is what Smith has called the "separation error": "[A] mode of interpretation that severs the connection between the text and the legal authority that enacted or promulgated that text will in effect deprive that designated legal authority of actual lawmaking authority."<sup>315</sup>

That argument is simple, but is it *too* simple? Consider two counterarguments that accept the premise that the people are the ultimate lawmaking authority and that we have an obligation to obey their commands—yet prescribe a living constitutionalist approach to adjudication. First, one might argue that true respect for the people's authority requires understanding those commands as the people would understand them *today*, rather than at some point in the distant past.<sup>316</sup> Second, one might argue that, since the people are the ultimate constitution-making authority, they are not bound by Article V's amendment process, and they have effectively amended the Constitution repeatedly outside Article V since 1788, such as by ratifying the great expansion of federal power during the New Deal.<sup>317</sup> Balkin's theory is a good example of the first argument, while Bruce Ackerman's theory is a good example of the second.<sup>318</sup> Both theories have "much in common," as Balkin has said,<sup>319</sup> as they argue in favor of ongoing constitutional change outside the Article V amendment process. In the

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312 Vermeule acknowledges that "if we are trying to understand the commands of the public authority, we will want to pay attention to the words used by that authority, *and the meanings attached to them when produced.*" VERMEULE, *supra* note 4, at 90 (emphasis added). He diverges from originalism because he makes the original meaning just *one* consideration in discerning what the law (inclusive of natural law and positive law) requires. *See id.*

313 *See* RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 95–98 (2003) (making a related argument).

314 WHITTINGTON, *supra* note 49, at 156.

315 SMITH, *supra* note 28, at 34–35.

316 *See* JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 62–65 (2001).

317 *See generally* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3–31 (1998).

318 Akhil Amar has also argued that amendments outside of Article V are possible. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

319 BALKIN, *supra* note 46, at 309.

context of the natural law tradition, they can both appeal to Aquinas's argument that the people can manifest their lawmaking power through custom,<sup>320</sup> which could be interpreted to mean that the people can amend the Constitution through widespread acceptance of constitutional change rather than through formal amendment. Both share the same flaw: they cannot be reconciled with the nature of our constitutional system, which the people have authoritatively determined is in the interest of the common good.

The first point to make is that there is, for purposes of my argument here, little by way of distinction between Balkin and Ackerman's theories (even if there may be important distinctions for other purposes),<sup>321</sup> so both theories (and the counterarguments they represent) can be dealt with together. Both theories effectively argue in favor of constitutional amendments outside of the Article V process. Ackerman does so explicitly,<sup>322</sup> while Balkin does so implicitly. Balkin argues that, while "the initial authority of the text comes from the fact that it was created through successive acts of popular sovereignty,"<sup>323</sup> the people can only truly be sovereign if the Constitution continues to reflect their changing understanding of the Constitution as expressed through the process of ordinary politics.<sup>324</sup> Political and social movements—as manifestations of the views of the people—can use ordinary politics to effect a change in constitutional doctrine in various ways, including through selecting judges who embody the people's current understanding of the Constitution.<sup>325</sup>

Although Balkin's theory claims to be an argument about how the people's *understanding* of the Constitution can change over time, it inevitably slides—as with Ackerman's theory—into an argument in favor of allowing the people to make *amendments* to the Constitution through ordinary politics. Suppose the people ratify the Constitution at Time A through the special procedures of 1787–88 that we can call constitutional politics, and they manifest a different understanding of the Constitution at Time B through ordinary politics. The people's understanding of the Constitution at Time B (through ordinary politics, postratification) can only supersede their understanding at Time A (through constitutional politics at ratification) if they are acting in the same capacity at both moments in time (or in a higher capacity at

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320 2 AQUINAS, *supra* note 23, at I-II Q. 97 art. 3; *see also* FINNIS, *supra* note 21, at 238–45.

321 I have previously suggested that there is no real distinction between Ackerman and Balkin's theories of popular sovereignty. *See* Alicea, *supra* note 118, at 1193.

322 *See* 2 ACKERMAN, *supra* note 317, at 3–31.

323 BALKIN, *supra* note 46, at 55.

324 *See id.* at 55, 59–73.

325 *See id.* at 277–339.

Time B). If, instead, they were acting in some lower capacity at Time B, there would be no basis for superseding their understanding at Time A (cf. a lower federal court's interpretation of a statute cannot supersede the Supreme Court's interpretation of that statute). But once we concede that the people are acting in the same capacity at both moments in time and disregard the distinction between constitutional politics and ordinary politics, it follows that the people should be able to amend the Constitution (not just change their understanding of the Constitution) at Time B through ordinary politics. Their commands have equal authority at both moments in time, so the most recent command can be taken as amending and superseding the previous command,<sup>326</sup> not merely changing how that previous command is understood.<sup>327</sup> Balkin would respond that he does *not* disregard the distinction between constitutional and ordinary politics, since he assigns constitutional politics the role of amending specific constitutional provisions (e.g., the presidential age requirement) and assigns ordinary politics the role of changing how vague or broadly worded provisions are understood.<sup>328</sup> But given Balkin's theory of popular sovereignty, this distinction is arbitrary. If what makes the Constitution legitimate is its ability to reflect the views that the people hold *today*, as Balkin argues, then specific provisions must reflect those views to the same extent as general provisions.<sup>329</sup> Indeed, Balkin at times seems to acknowledge that his theory does not maintain a line between constitutional and ordinary politics, since it presupposes that "[t]he people's constitution-making power never really goes away. It is continually exercised through the processes of constitutional construction and by the same institutions that participate in ordinary politics."<sup>330</sup> Balkin never provides a persuasive explanation for why this ongoing exercise of constitution-making power is limited to changing constitutional constructions (i.e., how broadly worded provisions are understood) and does not extend to changing the text of the Constitution itself (by changing the meaning of provisions like the presidential age requirement).<sup>331</sup> And once the distinction between constitutional and ordinary politics is erased, there remains no principled reason for saying that ordinary

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326 See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

327 See SMITH, *supra* note 28, at 63–66. This is why Mitch Berman is mistaken when he suggests that Whittington “ignores” the “possibility” that the people can act in their sovereign capacity through ordinary politics in interpreting the Constitution yet refrain from engaging in constitutional amendments through ordinary politics. Berman, *supra* note 50, at 73. Such a “possibility” is, in fact, impossible.

328 See BALKIN, *supra* note 46, at 21–34, 282–83.

329 Alicea, *supra* note 301.

330 See BALKIN, *supra* note 46, at 113.

331 Alicea, *supra* note 301; see also Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31, 34 & n.14 (2015).



politics must obey the limits imposed by the Constitution.<sup>332</sup> The Constitution becomes, in effect, no more than a well-respected statute subject to change at every election, rather than the higher positive law by which the legal validity of all other positive laws is judged.<sup>333</sup>

That is also the endpoint of Ackerman's theory when he argues for "constitutional moment[s],"<sup>334</sup> though he attempts to separate constitutional and ordinary politics by only recognizing constitutional moments when they meet certain criteria.<sup>335</sup> That attempt fails, as both originalist and nonoriginalist commentators have argued, both because there is no principled basis for the criteria and because the criteria are vague.<sup>336</sup> The consequence is that Ackerman's theory collapses into precisely the kind of "monist" theory of popular sovereignty he disclaims,<sup>337</sup> under which "[d]emocracy requires the grant of plenary lawmaking authority to the winners of the last general election," unconstrained by the "institutional checks" imposed by the Constitution.<sup>338</sup>

There is nothing intrinsically wrong or illogical with the Ackerman/Balkin understanding of popular sovereignty in the context of other societies. A polity in which the legislature is understood to be the embodiment of the people's political authority, even capable of changing the society's constitution whenever a majority of parliament agrees, is a permissible way for the people to constitute their regime (though some residual constitution-making power must always reside with the people as those ultimately responsible for the common good).<sup>339</sup> But the premise of *our* regime—and the basis for judicial review—is that the Constitution is *not* changeable by ordinary politics because it is supposed to serve as a form of higher positive law to which all other positive laws must conform.<sup>340</sup> As Chief Justice Marshall

332 See SMITH, *supra* note 28, at 63–66; see WHITTINGTON, *supra* note 49, at 131–32. Berman does not respond to this vital point. See Berman, *supra* note 50, at 73–75.

333 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 8 (1991).

334 See 2 ACKERMAN, *supra* note 317, at 410; *id.* at 85–88.

335 See 1 ACKERMAN, *supra* note 333, at 266–69.

336 See, e.g., WHITTINGTON, *supra* note 49, at 241 n.48, 274 nn.92 & 98, 275 n.100; Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 120–22 (1994); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 763–75 (1992) (reviewing 2 ACKERMAN, *supra* note 317); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 928–34 (1992) (reviewing 1 ACKERMAN, *supra* note 333).

337 James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1522–25 (1998) (reviewing 2 ACKERMAN, *supra* note 317); see WHITTINGTON, *supra* note 49, at 241 n.48, 274–75 nn.92, 98 & 100.

338 1 ACKERMAN, *supra* note 333, at 8.

339 See *id.*

340 U.S. CONST. art. V; *id.* art. VI; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

observed in *Marbury v. Madison*: “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”<sup>341</sup> The theory that the Constitution’s meaning may change over time through ordinary politics without compromising the higher-law status of the Constitution is an attempt to stake out a middle ground between originalism and the subversion of the Constitution. But “[b]etween these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.”<sup>342</sup>

This division between higher and ordinary lawmaking is no accidental feature of our system.<sup>343</sup> The separation of constitutional and ordinary lawmaking was intended to further the common good in at least two ways.<sup>344</sup> First, because the procedures for constitutional lawmaking under Article V ensured supermajority support by the people,<sup>345</sup> they prevented sudden, unwise, and impassioned changes in the allocation of constitutional authority that could undermine the common good.<sup>346</sup> Second, it allowed for genuine, enforceable limits on governmental power, since it took out of the hands of the governors the power to grant themselves additional authority or reallocate their authority in ways contrary to the common good.<sup>347</sup> The conscious separation of higher and ordinary lawmaking, therefore, sought to prevent two ever-present dangers in politics: tyranny of the mob from below and tyranny of the rulers from above. Preservation of that separation, then, is necessary to respect the reasonable determination that the American people made to achieve the common good, a determination they were entitled to make as an exercise of their legitimate authority. Thus, although the people retain customary lawmaking authority that could, in principle, be used to alter the Constitution, Article V and the design of our constitutional system represent the people’s determination that they will *not* use their customary lawmaking authority in this manner and will instead adhere to the process described in Article V.

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341 *Marbury*, 5 U.S. at 176.

342 *Id.* at 177.

343 GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 372–83, 600–02 (1998).

344 I thank John Stinneford for his insights on this paragraph.

345 MCGINNIS & RAPPAPORT, *supra* note 90, at 62–64.

346 THE FEDERALIST NO. 43, *supra* note 170, at 228 (James Madison); see also Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 125–26, 172–73 (1996).

347 See AMAR, *supra* note 289, at 291–92; WHITTINGTON, *supra* note 49, at 124–31.

To be clear, while my response to Ackerman and Balkin depends on making a positivist argument that the law in our system distinguishes between higher and ordinary positive law (a point that, as noted above, both Ackerman and Balkin accept), I am *not* arguing that *originalism* is our law.<sup>348</sup> I am arguing that originalism is an implication of our positive law, but that does not necessarily mean that originalism is the positive law. It is possible that originalism is required as a normative matter in our system but that our positive law has often failed to conform to originalism, which would be a reason to reform the positive law.

Thus, while preserving the people's authority may not require originalism across *all* regimes,<sup>349</sup> it *does* require originalism in a regime operating under a constitution (written or unwritten) that is designed to serve as a higher form of positive law than acts of ordinary politics.<sup>350</sup> The Ackerman/Balkin conception of popular sovereignty would deny the people the power to constitute their regime in this manner, which can only be the required result if the natural law forbids the American form of government. We have no reason to think that is true.<sup>351</sup>

The model of popular sovereignty that emerges from these considerations is a dualist model similar to the one described by Whittington:

[T]he people emerge at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent. Between these moments, the only available expression of the sovereign will is the constitutional text, and government agents are bound by the limits of that text.<sup>352</sup>

Although I would not describe the Constitution merely as a matter of "will," Whittington's essential point is correct: the people do not exercise their constitution-making powers through ordinary politics in our system. They only exercise those powers when the common good requires that they do so, and because amending or abolishing the Constitution is a significantly disruptive act that can harm the common good, it will rarely be the case that the common good justifies the exercise of this sovereign power (in the case of abolishing the

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348 See Baude, *supra* note 63, at 2363–85; Sachs, *supra* note 59, at 838–74.

349 I take no position on whether originalism is, in fact, required in some form across all regimes. I am merely distinguishing other regimes from the American Constitution and arguing that, at least with respect to *our* Constitution, originalism is required.

350 See Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 159–62 (2017).

351 See GEORGE, *supra* note 19, at 107–11 (making a similar argument); see also *supra* Section II.B.

352 WHITTINGTON, *supra* note 49, at 135.

Constitution, such an occasion may not—hopefully, will not—ever arise).<sup>353</sup> In Simon’s words, “[T]he superior power of the people should be suspended by the act of transmission and should remain suspended until circumstances of extreme seriousness give back to the people the right to exercise it.”<sup>354</sup>

Thus, in a system (like ours) that distinguishes between higher and ordinary positive law and reserves to the people the authority to make higher positive law, the only way to preserve the legitimate authority of the people is to understand the higher law as the people themselves understood it *originally*. To depart from that is to collapse the distinction between higher and ordinary lawmaking, which deprives the people of their authority to constitute the government in a form that they reasonably believe is conducive to the common good.<sup>355</sup>

Whether the correct way to understand the people’s commands is through the original public meaning of those commands,<sup>356</sup> the people’s original intent,<sup>357</sup> or some other formulation of original meaning<sup>358</sup> is, as Smith has demonstrated, a complex question.<sup>359</sup> I have deliberately used vague formulations—such as the need to “understand” the people’s commands as they would “understand” them—because this is not the place to address that issue. Nor have I addressed the role of *stare decisis*, which could be compatible with preserving the people’s authority if the original meaning of the Constitution incorporated a notion of precedent into “the judicial power.”<sup>360</sup> My limited purpose was to show that a natural law understanding of political authority requires originalism in some form in the context of the American regime.

This moral account of the basis for originalism shows why non-originalist natural lawyers are wrong to charge that originalism “is a morally empty jurisprudence.”<sup>361</sup> In the American context, adherence to the original meaning is required precisely because of its *moral*

353 See SIMON, *supra* note 25, at 180.

354 *Id.* at 182.

355 SMITH, *supra* note 28, at 35; WHITTINGTON, *supra* note 49, at 156.

356 See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1124–48 (2003).

357 See, e.g., Ekins, *supra* note 71, at 2–11; Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 972–82 (2004).

358 See, e.g., DONALD L. DRAKEMAN, *THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS* (2020); STRANG, *supra* note 19, at 44–63.

359 SMITH, *supra* note 28, at 54–63.

360 See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 807–29 (2009).

361 Arkes, *supra* note 7.

*authority*: its role in preserving the people's legitimate political authority that is necessary to achieve the common good.

### B. *Conflicts Between Original Meaning and Natural Law*

But what if the original meaning of the Constitution is *contrary* to the common good when applied in a particular case? As Vermeule has pointed out, nothing guarantees that the original meaning will accord with the natural law in all instances.<sup>362</sup> Assuming, therefore, that there are going to be instances in which application of the original meaning of the Constitution leads to results at odds with the natural law (because the original meaning either requires or permits an unjust result), what is the proper response of the judge in our system?<sup>363</sup>

I focus on the role of the judge because, throughout its history, originalism has been seen primarily as a guide to judicial decisionmaking.<sup>364</sup> Moreover, where there is a conflict between the natural law and a particular application of the Constitution, our system permits the political branches much more creativity and freedom in responding to the problem. The situations of the judge and the legislator in responding to conflicts between the original meaning and the natural law are, therefore, meaningfully different in the American system and should be considered separately.

It is also important to note that conflicts between the original meaning and the natural law could come in many different forms.<sup>365</sup> Those different forms might inflict varying degrees of harm on the common good, and a judge's personal culpability for the resulting harm might also vary.<sup>366</sup> For example, a judge who applies a *just* law in a way that leads to an *unjust* result is in quite a different posture than a judge who applies an *unjust law* to reach an *unjust* result,<sup>367</sup> and these differences might matter for the recusal question I will discuss briefly at the end of this Section. Nonetheless, I will largely abstract away from these important distinctions to facilitate a clearer presentation of what I regard as the key conceptual issues below.

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362 Vermeule, *Common-Good Originalism*, *supra* note 4.

363 There may be an argument that focusing on conflicts between the original meaning and the natural law is too narrow a lens, *see* VERMEULE, *supra* note 4, at 44, but as Vermeule observes, it is precisely where there is such a conflict that the differences between his theory and originalism are most visible, *see id.* at 112; Vermeule, *Common-Good Originalism*, *supra* note 4.

364 *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 5–9 (2016).

365 *See* HITTINGER, *supra* note 313, at 93–112.

366 *See id.*

367 *See id.*

Although the question of how a judge responds to a conflict between the original meaning and the natural law has been a significant debate in American constitutional theory for decades,<sup>368</sup> it is a debate that has often been confused and superficial, with only a few contributions to that debate providing genuine insight.<sup>369</sup> On one side, there is a tendency to argue that the natural law requires rejecting originalism merely because the natural law must prevail over positive law when they are in conflict.<sup>370</sup> On the other side, there is a tendency to argue that the potential for judges to abuse their power means that natural law has essentially no relationship to constitutional methodologies.<sup>371</sup> While both views have justifiable concerns (the unwitting embrace of positivism and moral relativism on one side, the illegitimate exercise of judicial power on the other), neither accurately understands the proper judicial response to a conflict between the natural law and the positive law because both underappreciate the relationship between the common good and the limits on judicial authority.

The key to understanding that relationship is to distinguish the different positions of an ordinary citizen and an American federal judge in relation to an unjust law.<sup>372</sup> Aquinas expressly draws this distinction when considering a conflict between the natural law and the outcome of a judicial controversy: namely, whether a judge may “pronounce judgment against the truth that he knows, on account of evidence to the contrary.”<sup>373</sup> Aquinas unambiguously states that the judge must enter judgment according to the evidence rather than according to the judge’s own knowledge of the accused’s innocence.<sup>374</sup> This shows that Aquinas regarded the different capacities in which we act as potentially outcome-determinative in thinking about such conflicts.

With regard to an individual citizen acting in her private capacity, the analysis of what to do about an unjust law is comparatively simple. Political authority only exists to serve the common good,<sup>375</sup> so political authority exercised contrary to the common good cannot bind in conscience.<sup>376</sup> A positive law that violates the natural law is, obviously, contrary to the common good and, therefore, does not bind in

368 See, e.g., BORK, *supra* note 3, at 305–32 (collecting essays by various scholars debating the relationship between originalism and natural law).

369 See, e.g., GEORGE, *supra* note 19, at 102–12; HITTINGER, *supra* note 313, at 93–112.

370 See, e.g., VERMEULE, *supra* note 4, at 114–15; Vermeule, *Common-Good Originalism*, *supra* note 4.

371 See, e.g., SCALIA, *supra* note 17, at 243–48.

372 See FINNIS, *supra* note 21, at 352–53.

373 3 AQUINAS, *supra* note 23, at II-II Q. 67 art. 2.

374 *Id.*

375 See *supra* Section II.A.

376 2 AQUINAS, *supra* note 23, at I-II Q. 96 art. 4.

conscience.<sup>377</sup> In a real sense, it is as if no authority were being exercised at all.<sup>378</sup> Thus, all else being equal, the ordinary citizen does not in any way subvert the people's *legitimate* authority by refusing to obey an *illegitimate* law: the people had no authority to make that law in the first place. Of course, "all else being equal" is doing a lot of work here, since the natural law tradition makes clear that there are situations in which defying an unjust law does *more* harm to the common good than obeying it.<sup>379</sup>

But the situation is quite different for a judge. A judge is not acting as an ordinary citizen; she is acting in an official capacity.<sup>380</sup> To the extent she renders judgment in defiance of the unjust positive law, she is not simply refusing to obey a positive law; she is *exercising judicial powers* whose extent is dictated not by the natural law but by the people. Aquinas observes that the "power [the judge] exercises" belongs to "the commonwealth" because the judge is acting "not as a private individual but as a public person."<sup>381</sup> If the people have not transmitted to her the authority to set aside a positive law that violates the natural law (a point to which I will return shortly), then to pretend to exercise that authority is to engage in "judgment *by usurpation*,"<sup>382</sup> which (unlike the situation of the disobedient ordinary citizen) *does* undermine the authority of the people-as-sovereign.<sup>383</sup> Unlike the ordinary citizen, whose defiance of an unjust law *might* (but does not necessarily) harm the common good, a judge who usurps power *necessarily* harms the common good.<sup>384</sup> Therefore, the logic of the judge who commits such an action must ultimately be that the ends justify the means, precisely the kind of consequentialism to which the natural law stands opposed.<sup>385</sup> That is, "[b]ecause usurpation is an offense against the common good, it will *never do* to cite the common good as the reason for usurping the authority."<sup>386</sup> "For judges to arrogate such power to

377 *Id.*

378 FINNIS, *supra* note 21, at 359–60.

379 *Id.* at 361–62; 2 AQUINAS, *supra* note 23, at I-II Q. 96 art.4.

380 HITTINGER, *supra* note 313, at 109.

381 3 AQUINAS, *supra* note 23, at II-II Q. 67 art. 4.

382 3 AQUINAS, *supra* note 23, at II-II Q. 60 art. 2.

383 *See supra* Section III.A.

384 HITTINGER, *supra* note 313, at 103.

385 *See* 2 AQUINAS, *supra* note 23, at I-II Q. 88 art.6.

386 HITTINGER, *supra* note 313, at 103 (emphasis added). Thus, Vermeule's assertion that achieving "first-order" goods (i.e., achieving substantively just outcomes) takes priority over achieving "second-order" goods (i.e., the stability of the legal system and society) has no application to my argument. *See* VERMEULE, *supra* note 4, at 114–15. Departure from the original meaning would not involve a decision to prioritize one set of goods over another; it would involve doing *affirmative harm* by undermining the legitimate authority essential to the achievement of the common good.

themselves in defiance of the Constitution is not merely for them to exceed their authority under the positive law; it is to violate the very natural law in whose name they purport to act.”<sup>387</sup>

The failure to appreciate the importance of the distinction between the citizen and the judge in relation to the common good explains why it is mistaken to say that “originalism is a positivist enterprise” merely because it does not “guarantee[.]” that “the original understanding will necessarily or even predictably track the common good.”<sup>388</sup> To make this assertion is to confuse two quite different issues: (1) whether the positive law must be consistent with the natural law if it is to be properly considered “law,” and (2) whether judges in the American system have the legitimate authority to disregard the original meaning when it conflicts with the natural law. One can answer “yes” to the first question and “no” to the second without contradiction because, as Russell Hittinger points out, “the substantive moral properties of a legal enactment is a different issue than the morality of jurisdictional authority.”<sup>389</sup> Just as it is possible to simultaneously believe that a statute is unconstitutional but that a court lacks jurisdiction to hear a case challenging the statute,<sup>390</sup> it is possible to simultaneously believe that the original meaning is not binding in conscience because it conflicts with the natural law but that a court lacks the authority to declare it so. Collapsing these distinct issues leads to “debilitating confusion.”<sup>391</sup>

Where the original meaning permits or mandates outcomes at odds with the natural law, the Constitution supplies the paths to correcting the errors: executive action, ordinary legislative action, or constitutional amendment, depending on the type of error involved.<sup>392</sup> If that were not true—that is, if the Constitution provided *no realistic recourse* for correcting conflicts between the natural law and the original meaning—that would indeed be contrary to the natural law, and the entire constitutional system would have to be rejected. But that is not our situation. Rather, our Constitution provides multiple avenues to resolve conflicts between positive and natural law. For example, if the conflict in question involves a federal statute or regulation, those avenues include: the administrative repeal or amendment of the

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387 GEORGE, *supra* note 19, at 111.

388 Vermeule, *Common-Good Originalism*, *supra* note 4.

389 HITTINGER, *supra* note 313, at 69.

390 *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2120–23 (2021) (Thomas, J., concurring).

391 HITTINGER, *supra* note 313, at 69. Vermeule acknowledges something akin to this distinction. *See* VERMEULE, *supra* note 4, at 43.

392 Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2282 (2001).



regulation in question;<sup>393</sup> the exercise of executive discretion not to enforce a law when a particular application would be unjust;<sup>394</sup> the pardon power;<sup>395</sup> the invocation of extraordinary powers;<sup>396</sup> legislative action that authorizes judges to set aside federal statutes;<sup>397</sup> and, if necessary, a constitutional amendment.<sup>398</sup> The natural law does not require that there be a guarantee that one of these methods will succeed; it could not require such a guarantee given that any constitutional system is run by imperfect beings. All that is required is that the regime provide realistic avenues for resolving the conflict in favor of the natural law. Indeed, the division of authority within the American system—in which resolution of such conflicts is primarily entrusted to the political branches—is in line with Aquinas’s argument that, while a “lower” judge “has no power to exempt a guilty man from punishment against the laws imposed on him by his superior,” “the sovereign, to whom the entire public authority is entrusted” may remit the punishment.<sup>399</sup>

It follows that to insist that the judges *must* have authority to remedy a conflict between the natural law and the positive law is to insist that the natural law *forbids* constitutions that limit judicial power and instead provide *other ways* (i.e., political action) of remedying defects in the positive law, which is another way of saying that the natural law *forbids* the American Constitution. Yet “[n]atural law theory treats the role of the judge as itself fundamentally a matter for *determinatio*, not for direct translation from the natural law.”<sup>400</sup> Indeed, as Hittinger has observed, there is “no evidence in [Aquinas’s] writings of a principle or practice on which judges can invalidate unjust positive law for no other reason than the natural law.”<sup>401</sup>

Here, there is common ground: Vermeule repeatedly acknowledges that “[t]he precise allocation of law-interpreting power between courts and other public bodies is itself a question for determination at

393 See, e.g., *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379–86 (2020).

394 See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688–716 (2014).

395 U.S. CONST. art. II, § 2; see, e.g., MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, *THE CONSTITUTION OF THE UNITED STATES* 862–63 (4th ed. 2021) (describing Thomas Jefferson’s pardoning of those convicted under the Sedition Act).

396 See, e.g., PAULSEN ET AL., *supra* note 395, at 326–28 (describing the Emancipation Proclamation).

397 See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–36 (2014).

398 See, e.g., U.S. CONST. amend. XIII.

399 3 AQUINAS, *supra* note 23, at II-II Q. 67 art.4.

400 GEORGE, *supra* note 19, at 110.

401 HITTINGER, *supra* note 313, at 110.

the constitutional level.”<sup>402</sup> Nonetheless, he would likely argue that I have conflated the power to set aside *the positive law* with the power to set aside *the original meaning*, and while he agrees that the judicial power to set aside the positive law is a matter of determination, the natural law requires that judges be able to depart from the original meaning and construe the positive law to be consistent with the natural law.<sup>403</sup> But as I argued in Section III.A, in the American context, the natural law requires that we understand the Constitution—as positive law—according to its original meaning. Thus, to set aside the original meaning of the Constitution *is* to set aside the Constitution as positive law. And as legal historians have shown, the original meaning of the Constitution did *not* give judges the authority to invalidate positive law in light of the natural law,<sup>404</sup> a point even Vermeule comes close to conceding.<sup>405</sup>

Vermeule might respond by asserting that the natural law requires that whichever institution in a government has primary responsibility for interpreting the law *must* have the power to depart from the original meaning and harmonize the positive law with the natural law (i.e., that the power to depart from the original meaning is *not* a matter of determination). But he offers no argument in favor of such an assertion, and I see no reason why the assertion must be true. Indeed, my primary argument in this Article has been that, in the context of the determinations made in the American constitutional system, the natural law *forbids* federal judges from departing from the original meaning. All that is necessary, as I have argued, is that there be a realistic recourse for correcting conflicts between the natural law and the original meaning; that recourse need not be the institution with primary law-interpretation responsibility.

One might try to defend Vermeule’s position by arguing that the original meaning of the Constitution *incorporates* background principles of the natural law,<sup>406</sup> such that it is legitimate to interpret the Constitution (especially where it is indeterminate) in light of natural law

402 VERMEULE, *supra* note 4, at 12; *see also id.* at 10, 43–47, 75; Casey & Vermeule, *supra* note 156, at 124 n.67.

403 *See* VERMEULE, *supra* note 4, at 72–77.

404 *See* STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 71–92 (2021); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907, 937–44 (1993); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of “Unwritten” Individual Rights?*, 69 *N.C. L. REV.* 421, 457–90 (1991).

405 *See* VERMEULE, *supra* note 4, at 19, 44, 57.

406 *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 *L. & HIST. REV.* 321, 336–45 (2021); BANNER, *supra* note 404, at 18–31; R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 165–68 (2015).

principles. That argument is compatible with many originalist theories<sup>407</sup> if the historical evidence shows that the Constitution was indeed understood to incorporate natural law principles,<sup>408</sup> but Vermeule emphatically disclaims such an argument: “I certainly do not advocate a revival of the classical law *because* it is the original understanding.”<sup>409</sup> And that is no surprise: the incorporation argument would concede the *principle* of originalism within the American context,<sup>410</sup> shifting the dispute to *what the original meaning says* about the scope of the judicial power under Article III.<sup>411</sup> Vermeule wants to make a more ambitious argument: that “it is intrinsic to the natural law that it should be followed for its *own* binding force” in resolving constitutional disputes, not “only insofar as it happens to be picked up by an originalist command.”<sup>412</sup> But that more ambitious argument is incompatible with Vermeule’s concession that the scope of judicial power is a matter of determination. It would convert what Vermeule describes as a “strong[] presum[ption]” that “civil lawmakers” do not “violate background principles of [the natural law]” into an irrebuttable rule.<sup>413</sup>

My argument does not mean, however, that a contradiction between original meaning and natural law is irrelevant to a judge. As Justice Scalia once hypothesized, “a judge in Nazi Germany, charged [by positive law] with sending Jews and Poles to their death,” would have an obligation to refuse to issue an order or enter judgment according to that gravely unjust positive law.<sup>414</sup> “[S]uch documents are to be called, not laws, but rather corruptions of law . . .[,] and

407 See STRANG, *supra* note 19, at 48–63. See generally Sachs, *supra* note 350; 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 (2009). Gienapp acknowledges this. See Gienapp, *supra* note 406, at 330 n.31.

408 See HELMHOLZ, *supra* note 406, at 165–68. If such interpretive principles were incorporated into the original meaning, that could be a basis for the kind of “equitable” role that Aquinas envisioned for judges to avoid unjust applications of the positive law. 3 AQUINAS, *supra* note 23, at II-II Q. 60 art. 5; see also VERMEULE, *supra* note 4, at 77–80. But as Hittinger shows, in Aquinas’s view, any such appeal to equity would not authorize *overruling* or *setting aside* the positive law. HITTINGER, *supra* note 313, at 106–08.

409 VERMEULE, *supra* note 4, at 2.

410 See Ekins, *supra* note 71, at 13.

411 See SMITH, *supra* note 28, at 68–71; DRAKEMAN, *supra* note 358, at 75–76. See generally John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737.

412 VERMEULE, *supra* note 4, at 214 n.290; see also *id.* at 41.

413 Casey & Vermeule, *supra* note 156, at 125. One interesting feature of Vermeule’s theory is that it simultaneously asks judges to usurp authority by disregarding the original meaning of the Constitution *and* asks them to relinquish authority by broadly deferring to the actions of the political branches. VERMEULE, *supra* note 4, at 151–54. This combination of judicial maximalism and judicial deference appears to be unique to Vermeule.

414 SCALIA, *supra* note 17, at 248–49.

consequently judgment should not be delivered according to them.”<sup>415</sup> But, critically, this does *not* mean that the judge may render judgment *in defiance* of the unjust law or purport to *invalidate* that law. “Thomas says that no judgment should be rendered according to the flawed measure; he does not say that one is entitled to make a new rule and measure, for that would imply legislative authority.”<sup>416</sup> Rather, the judge’s obligation in that situation is, as Aquinas says, simply to refrain from rendering judgment according to the corrupt law. The judge could accomplish this by recusing herself from the case or, in extreme situations (such as where the corpus of positive law is fundamentally corrupted, as in Nazi Germany), by resigning from office. These were precisely the options that Justice Scalia proposed when addressing the question in the final public lecture he delivered before his death,<sup>417</sup> and Justice Amy Coney Barrett (along with her coauthor, John Garvey) has explored the recusal question in greater detail.<sup>418</sup> But “refus[ing] to render judgment on no other ground than natural law” is “a different issue than acts that officially invalidate a law or that make a new one.”<sup>419</sup> As shown above, the latter are incompatible with the people’s legitimate authority that is essential to the common good.

Much more could be said about how judges should respond to conflicts between the positive law and the natural law, but the key point is that the natural law both demands that positive law conform to the natural law *and* that judges respect the limits of their authority. And under the American system, this requires judges to adhere to the original meaning of the Constitution for the sake of the common good.<sup>420</sup>

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415 3 AQUINAS, *supra* note 23, at II-II Q. 60 art. 5.

416 HITTINGER, *supra* note 313, at 107.

417 SCALIA, *supra* note 17, at 248–49.

418 See generally John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

419 HITTINGER, *supra* note 313, at 110.

420 Before this Article was published in its final form, I posted an earlier draft online through the Social Science Research Network. Vermeule and his supporters responded to the draft, and I replied to their criticisms, elaborating on some points made in this Article in greater detail. See J. Joel Alicea, *Why Originalism Is Consistent with Natural Law: A Reply to Critics*, NAT’L REV. (May 3, 2022, 6:30 AM), <https://www.nationalreview.com/2022/05/why-originalism-is-consistent-with-natural-law-a-reply-to-critics/> [<https://perma.cc/CU4T-9CUQ>]. For example, my reply provides additional analysis about how originalists should handle the problem of the underdeterminacy of original meaning (a point Vermeule emphasizes in his response to the draft), and it restates my argument about customary lawmaking and its relationship to originalism. I have chosen to retain the substance of this Article in largely the same form that it appeared before my exchange with Vermeule and his supporters, with a few minor modifications that attempt to clarify points that either my critics or other commentators have noted could use clarification. For example, although I believe (as stated in my reply) that it was clear in the initial draft that Section III.A is designed to address Aquinas’s customary lawmaking argument, I have made that purpose more explicit

## CONCLUSION

Originalists have often been uncomfortable making moral arguments, but the natural law critique of originalism's moral foundations has forced the issue. Those foundations, properly understood, are found in the very natural law tradition that originalism's critics (including Vermeule) embrace. It is the original meaning that preserves the people's legitimate political authority, and it is their legitimate political authority that secures the common good. The moral authority of original meaning is the justification for originalism.

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in this draft than in the previous one, since there appeared to be some confusion among commentators about it. I would direct the reader to my reply (and to the responses of Vermeule and others to which I link in my reply) for further exploration of the issues raised in this Article.