

SEEKING THE MORAL GROUND OF ORIGINALISM: FOLLOWING THE PATH AND REVELATIONS OF PROFESSOR ALICEA

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INTRODUCTION

Aristotle alerted us to the path of hope, while conveying some sobering and surprising news: that political science may deliver us, and especially young people, from living a life marked by “a succession of unrelated emotional experiences.”¹ “To one who is like that, knowledge [of the principles of politics] is as unprofitable as it is to the morally unstable. On the other hand, for those whose desires and actions have a rational basis, a knowledge of these principles of morals must be of great advantage.”²

Political science, at its best, was the science of reflecting on the principles of justice, the nature of the just political order, and the things that may be rightly imposed on people with the force of law. And so the life of politics and law persistently raises the question of whether there is some principled ground that connects the judgments we make this week with the judgments we made last week—or in the weeks and years to come. It puts the question of whether we have a principled ground for our motivations and for the decisions we make in the laws—or in our personal lives. It puts the question then of the moral justification for the Constitution and laws we put in place.

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1 HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE*, at v (1986) (translating ARISTOTLE, *NICOMACHEAN ETHICS* 1095a).

2 *Id.*

I. PROFESSOR ALICEA BREAKS THE NEWS, AND TAKES UP THE CASE

With his major article on *The Moral Authority of Original Meaning*,³ Professor J. Joel Alicea has sought to provide a high public service by seeking to establish the moral ground of Originalism, the ground of its rightness and justification.⁴ But at the same time he backed into an innocent revelation: for he has spoken the news, unsettling in some quarters, that Originalism has never really had one.⁵ That is all the more remarkable, for in the vast history of political philosophy, from Plato and Aristotle down through John Locke, Jean-Jacques Rousseau, Thomas Hobbes, Karl Marx, and, yes, John Rawls, all had to deal with this question: How can it be that any man, or set of men, claimed the authority to have their edicts treated as binding law on everyone who comes within their territory? What can explain and justify such a state of affairs? Surely that was the dramatic question and challenge posed in the Declaration of Independence: to insist that the mere success of a king or parliament in gaining control over other human beings cannot itself provide the justification for that rule.⁶ Thomas Jefferson and his colleagues drafted one of the most memorable briefs to make the case for the rights that flowed to all human beings by nature: that the only legitimate governments over human beings “deriv[ed] their just powers from the consent of the governed.”⁷ To make that case anew became the task of the Framers of the Constitution, and there is surely no more compelling account of the seriousness and elegance they brought to the task than James Madison’s notes on the Constitutional Convention.⁸

And so why should it not have occurred to the writers and judges who have brought us Originalism that there was such a need to explain the moral justification for the system of governance they were putting before us with the highest claim to our respect? Joel Alicea has been innocently candid, as I say, in recognizing that this cardinal account has been wanting. That will come as interesting news in some quarters, but it will spur some irritation in other quarters, especially among people who have somehow never noticed that the moral justification for this jurisprudence was missing—or that it was even needed.

3 J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

4 *See id.* at 5–6.

5 *See id.* at 4.

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

7 *Id.*

8 James Madison, Journal of the Constitutional Convention of 1787, in 3 THE WRITINGS OF JAMES MADISON 1 (Gaillard Hunt ed., 1902); James Madison, Journal of the Constitutional Convention of 1787—*Continued*, in 4 THE WRITINGS OF JAMES MADISON 1 (Gaillard Hunt ed., 1903).

That absence is one that has counted for Professor Alicea, for he has been schooled by professors who have taken seriously the natural law, the law that underlies and justifies the positive law.⁹ But the problem for Professor Alicea is that it is exceedingly hard, to say the least, to offer a moral defense of Originalism, when the most celebrated figures in the cause of Originalism took the matter of moral truth as unknowable, and in fact, not strictly needed for this business called “law.” They also happened to be two beloved friends of mine, who brought wit, warmth, and wisdom to their judgments: the late Judge Robert Bork and Justice Antonin Scalia. Judge Bork once asked with amusement why he had trouble convincing his wife that he was not a moral relativist.¹⁰ To which this friend replied, in an exchange in the journal *First Things*, that she probably read lines such as this from him: “‘Truth,’ he once said, ‘is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly.’”¹¹

Indeed, in his own, most recent piece, Alicea was unsparing as he traced Judge Bork’s judgments here to the root. Judge Bork took the telling side of arguing for “moral neutrality in constitutional adjudication.”¹² As Alicea observed, “[Judge Bork] refused to provide a worked-out moral argument for originalism, arguing instead that originalism was the methodology required by our constitutional history and traditions. Why we should be bound by our history and traditions was never really explained.”¹³

To put it another way, what supplied the ground for the moral judgment that Originalism was indeed the preeminently rightful method of determining the constitutional grounds on which we are governed? But of course Judge Bork readily claimed to *believe* there were moral truths, just as Justice Scalia affirmed his belief in moral truths.¹⁴ But these convictions, assigned to the domain merely of “beliefs,” carried no claim to truth for those who didn’t share those beliefs.

9 See, for example, ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY*, at vii (1993); JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 290 (2d ed. 2011); and, yes, I suppose, ARKES, *supra* note 1, at 4–5.

10 See Robert H. Bork, *Natural Law and the Constitution*, *FIRST THINGS* (Mar. 1, 1992), <https://firstthings.com/natural-law-and-the-constitution/> [https://perma.cc/7G7X-VQ57].

11 Hadley Arkes, Russell Hittinger, William Bentley Ball & Robert H. Bork, *Natural Law and the Law: An Exchange*, *FIRST THINGS* (May 1, 1992), <https://firstthings.com/natural-law-and-the-law-an-exchange/> [https://perma.cc/P7E4-3GEA].

12 J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 *HARV. J.L. & PUB. POL’Y* 307, 317 (2025).

13 *Id.* at 317–18 (footnote omitted).

14 See Bork, *supra* note 10; ANTONIN SCALIA, *SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED* 262 (Christopher J. Scalia & Edward Whelan eds., 2017).

As Alicea recognizes, these men “were wary of making moral truth claims in constitutional theory”—they would credit no truth claims that a judge could rightly recognize on the strength of reason alone if they were not contained in the text of the Constitution.¹⁵

As Joel Alicea looked back at Judge Bork, the emptiness of the matter struck more forcefully. This notion of moral neutrality in the Constitution, said Alicea, “could not endure.”¹⁶ And as he sought to take the matter to the root, he found himself bringing Originalists back to the inescapable properties of a *moral judgment*:

Justifying a constitutional methodology requires arguing that judges ought to employ that methodology, which requires making a moral argument that the methodology is better than its competitors. And we can only know the comparative moral soundness of competing methodologies by reference to some standard of moral evaluation. And for a theorist to assert that there is a standard of moral evaluation that other people ought to accept is to assert that the moral standard applies to them as much as it applies to the theorist; this ultimately means—though some further argumentation would be required to show this—that the theorist is asserting that the moral standard is true.¹⁷

Alicea could hardly have done more, in tutoring Originalists young and old, on the unavoidable logic of moral judgment. And with that sense of the matter it should have become ever clearer why Justice Scalia could not help falling into the same fallacies as he sought to put claims to moral truths outside the field of an Originalist jurisprudence. One of the most bittersweet and penetrating analyses of Justice Scalia on this matter was offered by his closest boyhood friend, Fr. Robert Connor. Robert Connor and Antonin Scalia were teenage friends at the private Catholic high school in Manhattan, the Xavier Academy.¹⁸ Their friendship would last a lifetime, and I would meet Fr. Connor at various gatherings of the Scalia family. But it was the natural law that drove a wedge between these two, the closest of friends.¹⁹ Justice Scalia was held back by tradition and reverence from rejecting natural law, but he admitted that he could never get his mind around it.²⁰ Fr. Connor could never let him back away so easily, for the natural law—with its insistent claims of reason—touched the ground of truth that had

15 Alicea, *supra* note 12, at 318.

16 *Id.*

17 *Id.* at 318–19 (footnotes omitted).

18 See, e.g., Robert A. Connor, *Justice Scalia and Yogi Berra: A Matter of Interpretation*, 41 AM. J. JURIS. 165, 188 (1996).

19 See *id.* at 167–71.

20 See *id.* at 168–69; see also SCALIA, *supra* note 14, at 243–249.

become as sacred for the Catholic faith as the dogmas of the Church.²¹ And when it came to abortion and other grave moral matters, the Church would *not* appeal to faith or belief; it would appeal rather to the weave of principled moral reasoning that marked the natural law.²²

The argument over natural law would not let up, for Fr. Connor would just never let go of it, and he was sparked to write as Justice Scalia put his most radical point up front: There was no moral ground for “minority rights” or any other moral ground of rights if it was not contained in the text of the Constitution.²³ As Justice Scalia had it, “The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights.”²⁴ This was indeed radical positivism—a Constitution thoroughly detached from any moral ground, especially the moral ground that establishes the rightful authority of the majority to rule. Justice Scalia followed here the muscular positivism of Justice Holmes: that the majority claimed its right to rule the brute fact that it had the strength or the power to overbear the minority.²⁵

It was a claim, in another day, that would have shocked respectable people, for it was simply a prettified version of what Rousseau labeled so clearly as “*Might makes Right*.”²⁶ No one has put the matter as sharply or clearly as Rousseau in *The Social Contract*, when he began with what should have been the most unexceptional axiom: that the mere success of some people in seizing and holding power could not possibly supply the ground for the rightness or justification of their rule²⁷:

Strength is a physical attribute, and I fail to see how any moral sanction can attach to its effects. To yield to the strong is an act of necessity, not of will. At most it is the result of a dictate of prudence. How, then, can it become a duty?

... [T]o admit that *Might makes Right* is to reverse the process of effect and cause. The mighty man who defeats his rival becomes heir to his Right. So soon as we can disobey with impunity, disobedience becomes legitimate. And, since the Mightiest is always right, it merely remains for us to become possessed of *Might*. But

21 See Connor, *supra* note 18.

22 See *id.*; HADLEY ARKES, *MERE NATURAL LAW* 177–79 (2023).

23 Connor, *supra* note 18, at 167; see *id.* at 166–67.

24 *Id.* at 167 (quoting Antonin Scalia, Remarks at Gregorian University (June 13, 1996), <http://www.catholicnews.com/data/stories/cns/960613.htm> [<https://perma.cc/7T5D-C6EZ>]).

25 See *id.* at 165. On Justice Holmes, see ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 58–63 (2000).

26 Jean-Jacques Rousseau, *The Social Contract*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 167, 173 (Oxford Univ. Press 1962) (1762).

27 See *id.* at 172–73.

what validity can there be in a Right which ceases to exist when Might changes hands? . . .

. . . It must, then, be admitted that Might does not create Right, and that no man is under an obligation to obey any but the legitimate powers of the State.²⁸

Justice Scalia could not supply the moral ground that justifies, and makes morally necessary, a government by the “consent of the governed.”²⁹ To recall that understanding is simply to recall the argument in the Declaration of Independence.³⁰ Justice Scalia turned decisively away from that argument, or any moral ground, for what President Abraham Lincoln called the right of a people to govern itself;³¹ and so the “rule of the [people]” stood for Justice Scalia as the anchoring axiom of a democratic regime.³² Justice Scalia’s complaint was that those first principles, proclaimed in the Declaration of Independence, were never part of our law, because they were never *enacted*.³³ But what he did not grasp was President Lincoln’s point: that this first principle came first and established just who had the authority to enact that positive law in the first place. Justice Scalia missed the logic that had been unfolded by John Locke. As Locke held, “The legislative power is that which has a right to direct how the force of the commonwealth shall be employed”³⁴ And yet what was the source of the legislative power? Answer: the “supreme act of the society,” in constituting the rightful organs and powers of the government,³⁵ or as we would have it, the Constitution, telling us whether we have a legislature, with how many chambers and what kinds of power. But then what is the source of this *constituting* power? It must be, said Locke, a source “antecedent

28 *Id.*

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

30 *See id.*

31 See Abraham Lincoln, Speech at Peoria, Illinois (October 16, 1854), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 247, 265–66 (Roy P. Blaser ed., 1953):

The doctrine of self government is right—absolutely and eternally right—but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is not or is a man. If he is not a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro is a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern himself?

32 Connor, *supra* note 18, at 166.

33 *See* Scalia, *supra* note 24.

34 John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU, *supra* note 26, at 1, § 143, at 85.

35 *Id.* § 157, at 93.

to all positive laws in it, and depending wholly on the people,” in their rightful authority to establish the terms of their own governance.³⁶

In his *First Inaugural Address*, President Lincoln managed to show that the rule of the majority, under moral and constitutional restraints, was the only operational form of government with the “consent of the governed.”³⁷ But that government with the “consent of the governed” was truly a first principle that had to be grasped on its own terms before we had a Constitution and a positive law. It ran back to the primary understanding that no man was by nature the ruler of other men in the way that God was by nature the ruler of men, and men were by nature the rulers of horses and dogs. And anyone who denied that, as Jefferson said, had to assume that “the mass of mankind” were “born . . . with saddles on their backs,” while a privileged few were born, “booted and spurred, ready to ride them legitimately.”³⁸

Justice Scalia turned away from that first principle, antecedent to the positive law. His dear friend Fr. Connor sought to remind him of the deep lacuna in his argument:

[T]he will of the people cannot be the grounding absolute of authority since freedom always raises the question of truth, and the human will is not its own truth To abandon the search for truth as the authority for freedom’s use is to abandon the human person ultimately to being used by forces more powerful than himself.³⁹

But to press in this way for the moral ground that precedes the positive law is to make one’s way back, of course, to the natural law.

Fr. Connor knew that his boyhood friend professed to “love[] natural law,”⁴⁰ but as he recognized, “[Justice Scalia] reserves moral values to the sphere of *private* conscience. There can be no access to those values except by way of *private* persuasion”⁴¹ As a Catholic, Justice Scalia believed in moral truths and a natural law, but he regarded those mainly as his own *private beliefs*, which could not be rightly imposed on others with the force of law.⁴² Justice Scalia chided those who challenged this view: “To say, ‘Ah, but it is contrary to the natural law’ is

36 *Id.*

37 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 262, 267–68.

38 Letter from Thomas Jefferson to Roger Chew Weightman (June 24, 1826), *reprinted* by NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archive.gov/documents/Jefferson/98-01-02-6179> [<https://perma.cc/LV7H-NHFS>].

39 Connor, *supra* note 18, at 170 (footnote omitted).

40 *Id.* at 168 (internal quotation marks omitted).

41 *Id.* (footnote omitted).

42 See *id.* at 168–69; Scalia, *supra* note 24.

simply to say that you set yourself above the democratic state and presume to decide what is good and bad in place of the majority of the people.”⁴³ For Justice Scalia, as for Judge Bork, the appeal to moral truths was an appeal simply to one’s *private and merely personal beliefs*. As Judge Bork famously said, when a judge moves beyond the text of the Constitution, he is simply looking into himself, into his personal likes and legal agenda.⁴⁴ What Judge Bork and Justice Scalia were reluctant to recognize were any moral truths that were accessible to reason alone, and as with any of the laws of reason, like the “law of contradiction,” a judge would be obliged to respect them simply because they commanded the respect of our reason.⁴⁵ To take these two judges literally, they could not recognize even that first principle of all moral and legal judgment, recognized by Thomas Reid and Kant, and expressed by Reid in this way: “[T]o call a person to account, to approve or disapprove of his conduct, who had no power to do good or ill, is absurd. No axiom of Euclid appears more evident than this.”⁴⁶ This was one of those “primary truths or first principles,” as Alexander Hamilton put it, “upon which all subsequent reasonings must depend.”⁴⁷ They had to be grasped *per se nota*, as true in themselves. They revealed, as Hamilton said, “an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.”⁴⁸ It was a truth accessible to ordinary people even without advanced degrees. Judge Bork and Justice Scalia did not seem to grasp the depth of what they were saying when they were willing to insist—contra Hamilton,⁴⁹ Chief Justice Marshall,⁵⁰ and James Wilson⁵¹—that there were no such necessary, axiomatic truths that judges were allowed to recognize.

Scalia’s derision of natural law came back persistently to his insistence that we cannot get a “consensus” on those moral truths of the

43 Connor, *supra* note 18, at 169.

44 See Robert Bork, *The Struggle Over the Role of the Court*, NAT’L REV., Sep. 17, 1982, at 1137.

45 See Aristotle on Non-Contradiction, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/aristotle-noncontradiction/> [<https://perma.cc/5TMW-2XVF>].

46 THOMAS REID, *Of Active Power in General*, in ESSAYS ON THE ACTIVE POWERS OF MAN 7, 39 (Knud Haakonssen & James A. Harris eds., Edinburgh Univ. Press 2010); see also IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 2–3 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997).

47 THE FEDERALIST NO. 31, at 186 (Alexander Hamilton) (Robert Scigliano ed., 2000).

48 *Id.*

49 See *supra* notes 47–48 and accompanying text.

50 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, at 222, 278 (1824); see also EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 123 (1919).

51 See James Wilson, Lectures on Law, in 1 COLLECTED WORKS OF JAMES WILSON 427, 512–515 (Kermit L. Hall & Mark David Hall eds., 2007).

natural law.⁵² As Fr. Connor reminds us, that key proposition came in critically in defense of Scalia's notable speech and essay on *Originalism, The Lesser Evil*.⁵³ But to that curious claim, some of his friends would ask in turn: "Did you get a 'consensus' on *that* proposition—that the only claims to moral truth that are valid are the ones that command a 'consensus'?"⁵⁴ For if he had taken a survey to find out, we would have had to report that we had never received our ballots.⁵⁵ And if we had, he never would have found a "consensus" for the rule he was tendering.⁵⁶ He had simply fallen back into what the philosophers call a "self-refuting proposition": in this case, that the presence of disagreement marks the absence of truth.⁵⁷ It would merely fall to me then to record my opposition to that proposition, and that would be enough to confirm its falsity.⁵⁸

We find disagreement even among mathematicians, and those disagreements are never taken to mean that mathematics has no truth to uncover. And more recently Justice Gorsuch has grandly conceded that Originalists and textualists may find themselves in disagreement; yet he did not fly to the conclusion that Originalism and Textualism have no truths to discern.⁵⁹ The fact that moral argument has been an enduring part of human life can no more yield the insight that moral reasoning has no moral truths to discern.

II. THE PATH AWAY FROM JUDGE BORK AND JUSTICE SCALIA

The path from Judge Bork and Justice Scalia may be marked, for Alicea, by that estimable jurist Chief Judge Pryor of the U.S. Court of Appeals for the Eleventh Circuit. In a notable lecture, Chief Judge Pryor offered a critical view of Professor Adrian Vermeule on the constitutionalism of "the Common Good," and the willingness to have judges appeal at times to the natural law that underlay the Constitution.⁶⁰ Chief Judge Pryor was willing to concede that the Founders drew

52 Connor, *supra* note 18, at 168.

53 See *id.* at 169; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–63 (1989).

54 Connor, *supra* note 18, at 168; see ARKES, *supra* note 22, at 13.

55 See ARKES, *supra* note 22, at 13.

56 *Id.* (internal quotation marks omitted).

57 *Id.*

58 See *id.*

59 See NEIL M. GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 112 (2019).

60 William H. Pryor Jr., Chief Judge, U.S. Ct. of Appeals for the Eleventh Cir., The Joseph Story Distinguished Lecture at the Heritage Foundation (Oct. 8, 2021), <https://www.youtube.com/watch?v=eXIMc9BuYLk> [<https://perma.cc/X3JA-H576>]. Chief Judge Pryor offered a critique of Common Good Constitutionalism, see *id.*, a critique that might have moved a trifle too far in the treatment of the writers he was faulting. One writer posted

on those long-established principles of law when they framed the Constitution.⁶¹ But the judges would have to be confined in their reasoning to the perimeter of that text the Framers gave us, along with the amendments that came later.⁶² Chief Judge Pryor drew then on the observation-*cum*-warning of Justice Iredell in *Calder v. Bull*, that the problem of natural law, or natural justice, is that it had “no fixed standard” as a reliable ground of judgment.⁶³ Chief Judge Pryor offered the high recognition that the natural law underlies the Constitution—but then he diminished that insight with the conviction registered by Justice Iredell that this natural law, underlying the Constitution, *contains no ground of truth*.⁶⁴ No truth, then, to guide the practical judgments of lawyers and judges, and no truth to certify the meaning of natural law.

Professor Alicea ventures a move in improvement. He wishes to take seriously that there is a natural law, with a body of moral truths.⁶⁵ But he wishes to argue that the original understanding of the Constitution establishes the preeminence of the original text and—in the next move—that it bars judges from appealing even to those foundational principles of natural law if they were not set down in the text.⁶⁶ The judges who respect the ground of the Founding in natural law would understand themselves, then, to be confined in their reasoning to the four corners of the text and the understandings that came originally to envelop them. Just as the natural law establishes the ground for the positive law, Alicea finds the natural law to offer a stern instruction to federal judges: to wit, to follow the discipline of finding their principal guide in the positive law of the Constitution.⁶⁷

What is especially important for Professor Alicea in his version of Originalism is that the natural law gives the framework a moral imprimatur, and it works by taking as the moral anchor in the system the

a caution: See Hadley Arkes, *Judge Pryor's Friendly Fire*, LAW & LIBERTY (Oct. 26, 2021), <https://lawliberty.org/judge-pryors-friendly-fire/> [https://perma.cc/7KCP-T4WC].

61 See Pryor, *supra* note 60, at 24:56–26:20.

62 See *id.*

63 *Id.* at 27:11–28:25; *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798). To recall Justice Iredell's fuller line, he wrote:

The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Calder, 3 U.S. (3 Dall.) at 399.

64 See Pryor, *supra* note 60, at 44:29–44:58 (noting “there is no necessary connection between an enacted text and the common good or natural law”).

65 See Alicea, *supra* note 12, at 308–09.

66 See Alicea, *supra* note 3, at 59.

67 See *id.*

case for popular sovereignty.⁶⁸ With government “of the people, by the people, for the people,”⁶⁹ there is a renewed conviction of the classic doctrine, coming from Aristotle and Plato, that the law will be directed to the good of the whole, to the common good, rather than serving mainly the private interests of those who rule.⁷⁰

But as Alicea moves more deeply into his exposition, he finds himself straining to sort out the moral planes in his analysis. What is the ordering among “popular sovereignty,” the “common good,” Originalism, and natural law? “Political authority,” writes Alicea, “only exists to serve the common good, so political authority exercised contrary to the common good cannot bind in conscience. A positive law that violates the natural law is, obviously, contrary to the common good and, therefore, does not bind in conscience.”⁷¹

But this is a line that has come to haunt Alicea, for it was cited against him in a recent critique in the *Ius & Iustitium* blog (now part of *The New Digest*) by a writer identified only as Anonymous Legal Clerk (ALC).⁷² The writer cited a string of powerful lines coming not only from Thomas Aquinas but also from Popes Leo XIII and Pius X to make the simple but resonating point, as Pope Leo XIII put it, that “the eternal law of God is the sole standard and rule of human liberty, not only in each individual man, but also in the community and civil society which men constitute when united.”⁷³ In this understanding, as ALC wrote, “natural law, the order of right reason, is the standard by which law is interpreted and judged, [so] a law ‘out of conformity with the principles of right reason, and consequently hurtful to the commonwealth . . . can have no binding force of law.’”⁷⁴ For this reason, as ALC summed it up, “[Pope] Leo XIII and Pope St. Pius X also condemned popular sovereignty precisely because it anchors political authority in the will of the people, instead of God.”⁷⁵ The point is that if we understand the deep principles of natural law, the principles that underlie the positive law of the Constitution, there can be no tenable ground for saying that the positive law enacted by the representatives of the sovereign people can ever claim to sweep past the moral

68 See *id.* at 31–32.

69 See Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 22–23.

70 See, e.g., Alicea, *supra* note 3, at 20–21; see ARISTOTLE, POLITICS 1279a26–31, at 204–07 (H. Rackham trans., Harvard Univ. Press 1959) (c. 350 B.C.E.); PLATO, THE REPUBLIC 434c–d, at 372–73 (Paul Shorey trans., Harvard Univ. Press 1937) (c. 380 B.C.E.).

71 Alicea, *supra* note 3, at 53–54 (footnotes omitted).

72 Alicea’s *Noble Lie*, IUS & IUSTITIUM (Aug. 21, 2023) (on file with Notre Dame L. Rev.).

73 *Id.* (internal quotation marks omitted).

74 *Id.* (alteration in original).

75 *Id.*

principles of the natural law. Or that, in reviewing acts of legislation, a court must be barred from appealing to those deeper principles of natural law that underlie the Constitution.

A. *Popular Sovereignty—in a Moral Framework*

Anonymous Law Clerk sought to strike more deeply at Alicea's argument by raising the question of whether it was really an act of will, on the part of the sovereign people, that put in place this political regime and the Constitution.⁷⁶ But there, I think, a stronger word may be said on behalf of Alicea. And there is no better word here than that of Justice Wilson, in that early decision of the Supreme Court, *Chisholm v. Georgia*,⁷⁷ well preceding *Marbury v. Madison*.⁷⁸ Justice Wilson noted that the law in America will begin from a different ground from that of law in England.⁷⁹ The law in England would proceed, in good positivist fashion, from the "principle . . . that all human law must be prescribed by a superior."⁸⁰ That "superior" could not be challenged in court, for he was the source of all law.⁸¹ But in America, wrote Justice Wilson,

[A]nother principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man.⁸²

He would be found, that is, in the natural man, the human person, tendering his consent to the terms on which he is governed.

When seen through that lens, there is a dramatic difference in the understanding of "that terrain or political order, that is ruled."⁸³ It is not the possession of the sovereign or king.⁸⁴ What we mean by a "state" or polity now is "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own,

⁷⁶ See *id.*

⁷⁷ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

⁷⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷⁹ See *Chisholm*, 2 U.S. (2 Dall.) at 457–58 (opinion of Wilson, J.).

⁸⁰ *Id.* at 458 (emphasis removed).

⁸¹ *Id.* (emphasis removed); see *id.*

⁸² *Id.* (emphases removed).

⁸³ Hadley Arkes, *James Wilson: Sentinel of Nature's Anchoring Truths*, HERITAGE FOUND. (internal quotation marks omitted), https://www.heritage.org/american-founders/leading-founders/james-wilson-sentinel-natures-anchoring-truths#Wilson_edn30 [https://perma.cc/6FTC-Q4ML] (last visited Nov. 5, 2025).

⁸⁴ *Id.*

and to do justice to others.”⁸⁵ “It is a collective of natural persons and yet in its ‘body politic’ is also ‘an artificial person.’”⁸⁶ In that artificial personhood it has many critical attributes. For one thing, it has endurance; it remains the same even as many of the persons who composed it have died or been replaced.⁸⁷ But it has, then, its own distinct interests and more:

It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men.⁸⁸

And because they are men, they may be responsible, in their associational form, with the same responsibilities that arise for other men.⁸⁹ “The only reason,” said Justice Wilson,

[W]hy a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise?⁹⁰

No one of the Founders could have been as thorough as Justice Wilson in affirming Alicea’s argument about the anchoring principle of the regime in the right of a people to be governed by their own consent. Justice Wilson thought that the election of the President should be a popular election, and he argued that the proportional representation of the people should be the principle that worked to constitute the Senate as well as the House.⁹¹ He was virtually alone on these points.⁹² His colleagues settled in with the notion of the Constitution bringing a “mixed” regime, with several counters to the prospects of everything ruled by the vote of a majority.⁹³ And yet, it was widely

85 *Id.* (quoting *Chisholm*, 2 U.S. (2 Dall.) at 455 (opinion of Wilson, J.)).

86 *Id.*

87 *See id.*

88 *Chisholm*, 2 U.S. (2 Dall.) at 455–56 (opinion of Wilson, J.) (emphasis removed).

89 Arkes, *supra* note 83.

90 *Chisholm*, 2 U.S. (2 Dall.) at 456 (opinion of Wilson, J.) (emphasis removed).

91 *See* James Madison, Journal of the Constitutional Convention of 1787, in 3 THE WRITINGS OF JAMES MADISON, *supra* note 8, at 1, 56–65.

92 *See id.*

93 THE FEDERALIST NO. 40, *supra* note 47, at 246 (James Madison); *see supra* notes 91–92 and accompanying text.

recognized that the Constitution would not be authoritatively installed without the affirmation of the people in conventions calling for the ratification of the Constitution recommended by the Constitutional Convention. And indeed, the intensity of the arguments in the conventions in Pennsylvania and New York remind us that this was a curiously close-run thing.⁹⁴ Madison caught the hard sense of the matter: The powers of the Constitutional Convention, he wrote, “were merely advisory and recommendatory,” and the Convention “proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed.”⁹⁵ Yes, the people at large were being led and advised by the uncommon talents collected in the Convention in Philadelphia, but “[t]he prudent inquiry,” said Madison, “ought surely to be, not so much from whom the advice comes, as whether the advice be good.”⁹⁶

But what was also clear—deeply clear—was that the sovereignty of the people under this Constitution was a popular rule *within a framework of moral and legal restraint*. As I have already pointed out, drawing on Locke, the natural law would give us the principles that establish just who has the rightful authority to make the positive law in the first place. And President Lincoln, in his *First Inaugural Address*, showed that the rule of the majority under moral and constitutional restraints was the only *operational form* of government by “the consent of the governed”—and the “only true sovereign of a free people.”⁹⁷ But it was a majority exercising its rule under moral and legal constraints: “A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism.”⁹⁸

It is a majority that understands in the first place that it is not free to legislate just anything that commands the favor of a majority. As Jefferson famously said, there is nothing above the majority—except the moral law.⁹⁹ Just as no individual could coherently claim, as President

94 See *generally* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot ed., n.p., 2d ed. 1836).

95 THE FEDERALIST NO. 40, *supra* note 47, at 252 (James Madison).

96 *Id.* at 255 (emphases removed).

97 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 249, 256–57.

98 Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 262, 268 (footnote omitted).

99 “[I]ndependance [sic] can be trusted nowhere but with the people in mass. [T]hey are inherently independant [sic] of all but moral law.” Letter from Thomas Jefferson to

Lincoln said, the “right to do wrong,”¹⁰⁰ the persons forming a majority needed to understand the things they have no right to will even in their standing as a ruling majority. To respect the moral limits of that authority is what separates a sovereign, ruling people from a criminal band.

To put it more directly, then—and more sharply—Wilson and the Founding generation understood that there was an anchoring moral ground for government by “the consent of the governed,” while the leading figures of Originalism did not see or admit such a ground. Which is why Professor Alicea was moved to the keyboard, to supply what was missing. But when these anchoring points are in place, how could Alicea tenably regard it as inadmissible for the executive and judiciary, in checking the legislature, to invoke those deeper principles of natural law that underlie and constrain the rule of the sovereign majority? The very *telos* of the government, and all parts of the government, was to secure those natural rights that formed the purpose and justification for this government under the Constitution. Indeed, it became the habit of our best judges from the very beginning under the Constitution to appeal to those deep axioms of natural law when it was quite critical in explaining the coherence of their judgments.¹⁰¹

That practice seemed to be taken as part of their teaching, their taking up of the office of “republican schoolmasters” under this new Constitution.¹⁰² As a kind of throwaway line at the end of his opinion in the classic case of *Gibbons v. Ogden*, on the Commerce Clause, Chief Justice Marshall apologized to his readers for spending so much time “demonstrat[ing]” what should be in the position of an “axiom[.]”¹⁰³ He assumed that all of his literate readers knew, as Hamilton said in *Federalist No. 31*, that “[i]n disquisitions of every

Spencer Roane (Sep. 6, 1826), *reprinted by NAT’L ARCHIVES: FOUNDERS ONLINE*, <https://founders.archives.gov/documents/Jefferson/03-15-02-0014> [https://perma.cc/5MHC-WML6]; *see also* HARRY V. JAFFA WITH BRUCE LEDEWITZ, ROBERT L. STONE & GEORGE ANASTAPLO, “Who Killed Cock Robin?: A Retrospective on the Bork Nomination and A Reply to ‘Jaffa Dives the House,’” in *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* 269, 287 (1994).

100 Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 31, at 245, 257.

101 *See, e.g.*, R.H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401 (2007).

102 *See* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127.

103 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 221 (1824); U.S. CONST. art. I, § 8, cl. 3; *see Gibbons*, 22 U.S. (9 Wheat.) at 221–22.

kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.”¹⁰⁴ They must be grasped *per se nota*, as true in themselves.¹⁰⁵ That two contradictory propositions both cannot be true was indeed one of those truths that had to be grasped on its own terms; and if one did not grasp it, it could not be explained to him in the course of the demonstration. It was one of those things one had to grasp before one entered into a demonstration. It may strike us as odd now for Chief Justice Marshall to take such time, in the course of a major opinion, to explain to his readers what he was doing. And yet he thought it was vitally important that readers understood the anchoring ground of his argument, on what made it compellingly true:

It is felt that the tediousness inseparable from the endeavour to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.¹⁰⁶

Not only, that is, did Chief Justice Marshall follow a path of tracing his judgments back to their foundational reasoning; he went out of his way to explain and justify what he was doing as he offered a lesson on how judges go about their work of teaching in a republic. And if they were willing to be so above board in appealing back to the anchoring truths underlying their judgments, why should we be surprised that they showed no reluctance in making that same appeal when the task fell to them to overturn, or set aside, a legislative act that ran counter to the Constitution?

In Alicea’s judgment, “to set aside the original meaning of the Constitution *is* to set aside the Constitution as positive law.”¹⁰⁷ For Alicea the respect of the Constitution was bound up with the reverence for original meaning, and he suspects that Vermeule would be audacious enough to think that the natural law even “requires that judges be able to depart from the original meaning and construe the positive

104 THE FEDERALIST NO. 31, *supra* note 47, at 186 (Alexander Hamilton); *cf. Gibbons*, 22 U.S. (9 Wheat.) at 221–22.

105 See THE FEDERALIST NO. 31, *supra* note 47, at 186 (Alexander Hamilton).

106 *Gibbons*, 22 U.S. (9 Wheat.) at 221–22.

107 Alicea, *supra* note 3, at 57.

law to be consistent with the natural law.”¹⁰⁸ But in sharp contention, Alicea holds that it is nothing less than the natural law that “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.”¹⁰⁹ *But in rising to that grand point, he appeals neither to the natural law nor to the text of the Constitution.* He appeals rather to “legal historians,” who have shown, he claims, that “the original meaning of the Constitution did *not* give judges the authority to invalidate positive law in light of the natural law.”¹¹⁰ But surely that would have come as news to Justice Wilson and Chief Justice Marshall, who quite notably moved beyond the text of the Constitution in reaching their judgments.

1. John Marshall Appealing to the Deep Natural Law

There could have been no more dramatic example under this head than that opinion of Chief Justice Marshall in that classic case of *Fletcher v. Peck*.¹¹¹

There was a rescission by the legislature of Georgia of a grant in land, tainted by scandal.¹¹² But the rescission affected innocent buyers of the land, and so when the case came to the Supreme Court, it seemed to be plainly a law “impairing the [o]bligation” of a contract, coming under Article I, Section 10 (the Contracts Clause).¹¹³ But instead of deciding the case in that way, Chief Justice Marshall did something far more elegant: He showed that the Contracts Clause could be drawn deductively, through a syllogism, from that deeper principle on ex post facto laws, laws that made something punishable retroactively even before it had been forbidden in the law.¹¹⁴ And with that ground Chief Justice Marshall was able to offer an argument quite striking: Georgia, he said, was a great state, part of the American union.¹¹⁵ But even if Georgia were a separate sovereign state, he said, outside the union, outside the Constitution, and outside Article I, Section 10, that

108 *Id.* (citing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSIC LEGAL TRADITION 72–77 (2022)); *but see* VERMEULE, *supra*, at 19, 44, 57.

109 Alicea, *supra* note 3, at 57.

110 *Id.*

111 *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

112 *See* Jane Elsmere, *The Notorious Yazoo Land Fraud Case*, 51 GA. HIST. Q. 425, 426–29 (1967).

113 U.S. CONST. art. I, § 10, cl. 1; *see Fletcher*, 10 U.S. (6 Cranch) at 132, 136.

114 *See Fletcher*, 10 U.S. (6 Cranch) at 138–39.

115 *See id.* at 136.

law would still be wrong.¹¹⁶ For its wrongness was rooted in a principle that did not depend at all for its validity on being mentioned anywhere in the text of the Constitution. Which is to say, the natural law.

The Anonymous Law Clerk, in his critique of Alicea, took the argument to this very ground. “As Aquinas teaches,” he wrote, “when ‘a thing is, of itself, contrary to natural right, *the human will* cannot make it just.’”¹¹⁷ Alicea would invoke an Originalist understanding that enshrines the rule of the majority in positive law;¹¹⁸ still, that “cannot make a law valid that is inconsistent with the natural law. To hold otherwise is to hold the error of positivism which reduces law to mere fact.”¹¹⁹ Alicea, he charges, “has committed this error.”¹²⁰ In the summary view, then, of ALC, “[i]f particular historical understandings of the Constitution conflict with the natural law or the common good [then] the natural law controls.”¹²¹ Alicea, he says, “rejects this position while attempting to claim the mantle of natural law for crass positivism.”¹²²

And yet—and to his deep credit—Alicea finds himself drawing on those deeper principles of natural law as he seeks to counter a kind of stylish positivism offered by Professors Jack Balkin and Bruce Ackerman in the name of “living constitutionalis[m].”¹²³ With Alicea, they would understand the sovereignty of the people as the defining character of the American republic.¹²⁴ But unlike Alicea they would hold that during some key moments or crises in our political regime the people may vote for an administration or a Congress enacting changes so far-reaching that they may alter the constitutional structure.¹²⁵ Balkin and Ackerman may argue, as Alicea recounts it, 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.”¹²⁶ For Balkin, the Constitution, as a “living” document, holds its

116 See *id.* at 135–136. As Chief Justice Marshall put it, the rescinding act passed by the legislature of Georgia “might well be doubted, were Georgia a single sovereign power.” *Id.* at 136.

117 Joel Alicea’s *Failed Counter-Offensive: Further Notes on Political Authority and Natural Law*, IUS & IUSTITIUM (Sep. 14, 2023) (on file with Notre Dame L. Rev.).

118 See Alicea, *supra* note 3, at 44–45.

119 Joel Alicea’s *Failed Counter-Offensive*, *supra* note 117.

120 *Id.*

121 *Id.*

122 *Id.*

123 Alicea, *supra* note 3, at 45.

124 See *id.*

125 See *id.* at 45–46.

126 *Id.* at 45.

legitimate standing more securely as it reflects the views that the people hold *today*.¹²⁷ But as Alicea sees it, the telling mistake, if not the vice, in Balkin's scheme is that it makes no distinction between the way that sovereign people convey their judgment in *ordinary* politics and *constitutional* politics: There is no sense of the need to seek an extraordinary majority before the people would alter the text of the Constitution.¹²⁸ As Balkin puts it, in his most beguiling way, "The 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."¹²⁹

But as Alicea argues, that approach offers no principled ground on which to say that "politics must obey the limits imposed by the Constitution. 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."¹³⁰ Alicea offers here a ringing echo of Chief Justice Marshall in *Marbury v. Madison*¹³¹: When the Constitution comes into conflict with an ordinary statute, the Constitution must be given primacy, or else the Constitution is reduced to the standing of an ordinary statute superseded by what comes later.¹³² Alicea does not muffle his moral language here: To take this course of Balkin's is nothing less than to "stake out a middle ground between originalism and the subversion of the Constitution."¹³³ Alicea rightly recalls, then, Chief Justice Marshall in *Marbury* to argue that "there is no middle ground"¹³⁴: "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."¹³⁵

In all of this, I cannot see how Alicea can be anything other than magnificently—and inescapably—right.¹³⁶ But it is worth getting clear that the compelling force of the argument *is not to be found in the positive*

127 *Id.*

128 *See id.* at 46–48.

129 JACK M. BALKIN, *LIVING ORIGINALISM* 113 (2011); *see also* Alicea, *supra* note 3, at 47.

130 Alicea, *supra* note 3, at 47–48 (footnote omitted).

131 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

132 *See* Alicea, *supra* note 3, at 47–48; *Marbury*, 5 U.S. (1 Cranch) at 176–77.

133 Alicea, *supra* note 3, at 49.

134 *Id.* (internal quotation marks omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

135 *Marbury*, 5 U.S. (1 Cranch) at 177.

136 The main offset here would come from Jonathan Gienapp: that decisions on constitutionality in the Founding were not made so much by judges, but by elected representatives as they made over time the decisions that would "liquidate" the meaning of the Constitution, as in persuading President Madison by 1816 that it must indeed be "constitutional" to establish a National Bank. JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 149 (2024); *see id.* at 148–49.

law of the Constitution. The truer echo here comes from Alexander Hamilton making the same point in *Federalist No. 78*. Hamilton pointed out that we work under this rule of construction: that a later statute supersedes an earlier one.¹³⁷ But that cannot be the rule of construction we use when a statute comes in conflict with the Constitution.¹³⁸ For the Constitution, coming earlier, has to override the statute coming later, or else *it loses its function as a control on the legislative power.*¹³⁹ “But how do we know this?” Hamilton might ask, for this understanding is *not contained in the positive law of the Constitution.* As Hamilton wrote, this was:

[A] mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law.¹⁴⁰

Alicea’s argument depends, then, *not on the standing of the Constitution as positive law, but on the underlying axioms of moral reasoning or natural law that enjoined us in the first place to have government by the “consent of the governed”*¹⁴¹ *anchored in the underlying logic of a constitutional order.* But once one is clear on that point, it offers a deepening corrective to one key argument of Alicea’s that could possibly sustain his position even in the face of the critique I have unfolded in these pages. The task he set for himself was to show how an Originalism grounded in natural law would nevertheless cast up serious restraints on judges when they sought to move beyond the text of the Constitution in appealing to those same grounding principles of the natural law.¹⁴² One of Alicea’s most fetching arguments here draws upon Professor Russell Hittinger’s close reading of Aquinas. It is possible to insist that the positive law must have some kind of consistency with the natural law in order to claim the true standing of “law,” and yet the question may still arise for Alicea as to “whether judges in the American system have the legitimate authority to disregard the original meaning when it conflicts with the natural law.”¹⁴³ On that point Russell Hittinger weighs in, drawing on Aquinas: “[T]he substantive moral properties of a legal

137 See THE FEDERALIST NO. 78, *supra* note 47, at 499 (Alexander Hamilton).

138 See *id.* at 499–500.

139 See *id.*

140 *Id.* at 499 (emphasis added).

141 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

142 See Alicea, *supra* note 3, at 55–57.

143 *Id.* at 55.

enactment is a different issue than the morality of jurisdictional authority.”¹⁴⁴ Alicea fills out the explanation:

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, 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.¹⁴⁵

Here too I find Alicea quite right—but on terms that *undo the prescription he would place on judges*: to bar them from appealing beyond the original understanding of the Constitution to the principles of natural law that underlie the Constitution. The deeper truth of the matter would be revealed in two cases that would surely offer the most dramatic confirmation of his point on the *jurisdictional* limits to the reach of the judges. One case would involve Justice Sutherland at that critical moment of the Roosevelt administration in recognizing the Soviet Union, in *United States v. Belmont*.¹⁴⁶ The other would involve Justice Story, at war with his earlier self, as he sustained the Fugitive Slave Clause of the Constitution in *Prigg v. Pennsylvania*.¹⁴⁷

2. Justice Sutherland and the Court in Foreign Affairs

In the first year of the New Deal, in November 1933, the Roosevelt administration recognized the Soviet Union.¹⁴⁸ The agreement of recognition contained the need to settle debt and recover property.¹⁴⁹ The Petrograd Metal Works was liquidated by the decrees of the Bolshevik government in 1918, with the property nationalized.¹⁵⁰ But a bank in New York City still held funds deposited by the corporation, and so part of the settlement involved a move to confiscate those assets held by a private corporation and transfer them to Joseph Stalin’s government.¹⁵¹ For Justice Sutherland the issue involved the clearest assault on property privately owned and held, and if this involved any government in the United States, federal or local, seeking to seize private property, this would have been the easiest of calls.¹⁵² But the act to claim or reclaim the property arose out of the recognition of a foreign government, and that moved the case onto an entirely different plane

144 *Id.* (quoting RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD* 69 (2003)).

145 *Id.* (footnotes omitted).

146 *United States v. Belmont*, 301 U.S. 324 (1937).

147 U.S. CONST. art. IV, § 2, cl. 3; *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

148 *See Belmont*, 301 U.S. at 326, 330.

149 *See id.*

150 *See id.* at 325–26.

151 *See id.* at 325–27.

152 *See id.* at 332.

in our law.¹⁵³ Justice Sutherland hardly needed reminding by his colleague, Justice Stone, writing in concurrence, that the State of New York had the most profound aversion to the confiscation of private assets.¹⁵⁴ But Justice Sutherland was moved to respond that, when it came to foreign affairs, there was no New York: "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."¹⁵⁵

For the deeper problem here is that the recognition of foreign governments goes hand in hand with military strategy. That connection was seen clearly during the Second World War when the United States recognized an anti-Semitic regime in North Africa headed by Admiral Jean Louis Xavier François Darlan.¹⁵⁶ General Dwight D. Eisenhower did not think he had enough troops to occupy Morocco and Algeria, and so he made an accommodation with Darlan, for that regime, attached to the Vichy government in France, would interpose no objection to the landing of American forces in North Africa.¹⁵⁷ The recognition of a foreign government carried heavy stakes and responsibilities: If New York blocked the recognition of the Soviet Union, no one in New York could be held politically responsible for the disaster sustained by the country as a whole. There was another axiom of moral reasoning at work here, the one set down by Alexander Hamilton in *Federalist No. 80*: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART."¹⁵⁸ It could not fall to the judiciaries in the separate states to deal with controversies arising over treaties or the recovery of property on the part of foreigners, for these were the kinds of disputes that could strain relations with other countries.¹⁵⁹ And with the same understanding, it could not fall to aggressive settlers on the frontiers to initiate attacks on American Indians that would draw the whole country into war.

But what could be said here about people in official authority in New York applied with even more force to federal judges, who were not elected, for they were not politically responsible to anyone. There was surely no principle running more deeply in America, from the revolution onward: that the safety of the American people could not be placed in the hands of officers, whether in Westminster, or in

153 *See id.*

154 *See id.* at 333–35 (Stone, J., concurring).

155 *Id.* at 331 (majority opinion).

156 *See* HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 211–12 (1994).

157 *See id.*

158 *THE FEDERALIST NO. 80*, *supra* note 47, at 508–09 (Alexander Hamilton).

159 *See id.*

chambers with unelected judges, who bore no direct responsibility to the people whose lives were at stake. Justice Sutherland was acutely aware of that cardinal point. The power over foreign affairs was rightly concentrated in the national government, and “in respect of what was done here, the Executive had authority to speak as the sole organ of that government.”¹⁶⁰ “Within the field of its powers,” said Justice Sutherland,

[W]hatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.¹⁶¹

Justice Sutherland suffered no doubt: There was a powerful moral/constitutional constraint on the power of the judges in this case to vindicate the principles of natural right on the taking of private property; *but that limitation did not arise from anything in the text of Constitution*. It was entailed by those principles of natural law that brought forth an elected government responsible to the people for whom it ruled.

3. On Justice Story Eating His Words

Justice Story, much earlier, faced another deep principle constraining his reach in vindicating the principles of natural justice. He suffered never a trace of doubt—as virtually no other jurist of his period suffered a doubt—that the enslavement of human beings, putting them on the same plane as animals, was a blatant offense to natural justice.¹⁶² In the famous case on the slave ship *La Jeune Eugenie*, Justice Story offered the sharpest conclusion that could ever be rendered on this subject—that something so contrary to the deepest principles of law could not be reconciled with any coherent system of law:

[The trade in slaves] is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, *it is impossible, that it can be consistent with any system of law, that purports to rest on the authority of*

160 *Belmont*, 301 U.S. at 330.

161 *Id.* at 331–32.

162 *See, e.g.,* *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846–47 (C.C.D. Mass. 1822) (No. 15,551).

reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.¹⁶³

But twenty years later he had to eat his words or muffle their swallowing, for he now encountered the laws of Pennsylvania, casting up procedural barriers to the enforcement of the Fugitive Slave Clause of the Constitution.¹⁶⁴ That Clause marked the telling sign of the prudential compromise or accommodation of the American Founding. As Lincoln would later say, he had no passion to chase and track down runaway black slaves; but that Clause, with its undeniable message, was “nominated in the bond”: It was the price that had to be paid, the accommodation that had to be made, in bringing slave states into a common union with other states that were coming to reject slavery in point of principle.¹⁶⁵ And yet even more than that, bringing slave states into a union whose constituting principles stamped slavery as the deepest wrong. Who could have expressed the point better than those slave owners meeting at Darien, in southern Georgia, in 1775, now willing to give up their slaves precisely because slavery was at odds with the governing principle on which they claimed their own right to rule themselves:

[W]e hereby declare our disapprobation and abhorrence of the unnatural practice of Slavery in America . . . [as] a practice founded in injustice and cruelty, and highly dangerous to our liberties, . . . debasing part of our fellow-creatures below men, and corrupting the virtue and morals of the rest; and is laying the basis of that liberty we contend for . . . upon a very wrong foundation. We therefore resolve, at all times to use our utmost endeavours for the

163 *Id.* at 846 (emphasis added).

164 U.S. CONST. art. IV, § 2, cl. 3; *see Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 570 (1842).

165 Abraham Lincoln, Speech at the Republican State Convention of Illinois (May 29, 1856), in ABRAHAM LINCOLN’S LOST SPEECH 9 (New York, The De Vinne Press 1896):

We grant a fugitive slave law because it is so “nominated in the bond”; because our fathers so stipulated—had to—and we are bound to carry out this agreement. But they did not agree to introduce slavery in regions where it did not previously exist. On the contrary, they said by their example and teachings that they did not deem it expedient—did not consider it right—to do so; and it is wise and right to do just as they did about it [Voices: “Good!”], and that is what we propose—not to interfere with slavery where it exists (we have never tried to do it), and to give them a reasonable and efficient fugitive slave law. [A voice: “No!”] I say YES! [Applause.] It was part of the bargain, and I’m for living up to it; but I go no further; I’m not bound to do more, and I won’t agree any further. [Great applause.]

Id. at 32–33.

manumission of our Slaves in this Colony, upon the most safe and equitable footing for the masters and themselves.¹⁶⁶

What we encounter here is a problem, and an understanding, that runs as deep as anything in the annals of statecraft: that there are times even when the most decent society must make an accommodation with some intractable evils for the sake of compressing them. And it may be hoped: setting the ground for a policy that would later, as Lincoln famously said, put those evils “in the course of ultimate extinction.”¹⁶⁷ Slavery was one of the oldest and most entrenched institutions in the world. Some of the first Americans planted slavery in the new land, and as ever the case when lives become dependent on such a thing, the institution became hard to resist. Still, the Founders did resist it, and they gave us a record on how they sought to make a prudential compromise with slavery *without eroding the principles that barred slavery at the root*. First, there would be no endorsement of slavery in the text of the Constitution, and that was no inadvertence. Oliver Ellsworth thought there should be no lingering recognition of that hateful institution when, in time, it would pass from the scene, unmarked and unmourned.¹⁶⁸ But beyond that, the telling moves were made to bar, in the Constitution, the import of slaves from abroad, beginning in 1809.¹⁶⁹ And then, by an Act of Congress, to bar the planting of slavery in the new territories in the West.¹⁷⁰ As Lincoln would later say, anyone looking at this scheme would notice at once that all of the features marked a policy meant to discourage and contain, not to praise and promote.¹⁷¹

166 Darien (Georgia) Resolutions (Jan. 12, 1775), in 1 AMERICAN ARCHIVES: FOURTH SERIES, CONTAINING A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA, FROM THE KING’S MESSAGE TO PARLIAMENT, OF MARCH 7, 1774, TO THE DECLARATION OF INDEPENDENCE BY THE UNITED STATES 1135, 1136 (Washington, D.C., M. St. Claire Clarke & Peter Force, 1837) (emphasis removed).

167 Abraham Lincoln, Seventh and Last Debate with Stephen A. Douglas at Alton, Illinois (Oct. 15, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 283, 307–08.

168 Lincoln noted, in his debate with Stephen Douglas, that:

[C]overt language was used with a purpose, and that purpose was that in our Constitution, which it was hoped and is still hoped will endure forever—when it should be read by intelligent and patriotic men, after the institution of slavery had passed from among us—there should be nothing on the face of the great charter of liberty suggesting that such a thing as negro slavery had ever existed among us.

Id. at 307. On Ellsworth’s views, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 370–71 (Max Farrand ed., rev. ed. 1966).

169 See U.S. CONST. art. I, § 9, cl. 1.; Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426, 426 (prohibiting the importation of slaves into the United States after January 1, 1808).

170 See Act of Mar. 6, 1820, ch. 22, § 8, 3 Stat. 545, 548.

171 As Lincoln put it in his *Address at Cooper Institute*,

Hovering over the whole scheme was that venerable principle of the common law: that slavery was so repugnant to natural law that it could be sustained only by positive law. It could be sustained, that is, in a prudential compromise designed to contain that evil—precisely the design that emanated from the wit of the American Founders. Indeed, the logic of that accommodation was written plainly in the Clause that was at the focus of *Prigg v. Pennsylvania*.¹⁷² Justice Curtis, in his later dissent in the *Dred Scott* decision, would recall the precise language of the Fugitive Slave Clause¹⁷³: That Clause would not speak of “slaves,” humans marked by their nature for the most abject subservience. It spoke rather of “Person[s] held to Service or Labour in one State, under the Laws thereof, escaping into another.”¹⁷⁴ That is, slavery was sustained only under the positive laws of a state, and as one judge from Kentucky made clear at the time, everyone knew that where the positive law was silent, the natural law came back into place.¹⁷⁵

Justice Story knew, as well any jurist around him, of that prudential accommodation, “nominated in the bond,”¹⁷⁶ and he would make his own effort in *Prigg v. Pennsylvania* to firm up the limits of that accommodation. He would argue for the primacy of the federal government, a government not under the thumb of the slave owners, in enforcing that federal law.¹⁷⁷ What Justice Story had to understand as an obdurate political and legal fact was that, without that Fugitive Slave

[N]either the word “slave” nor “slavery” is to be found in the Constitution, nor the word “property” even, in any connection with language alluding to the things slave, or slavery, and that wherever in that instrument the slave is alluded to, he is called a “person;”—and wherever his master’s legal right in relation to him is alluded to, it is spoken of as “service or labor which may be due,”—as a debt payable in service or labor. Also, it would be open to show, by contemporaneous history, that this mode of alluding to slaves and slavery, instead of speaking of them, was employed on purpose to exclude from the Constitution the idea that there could be property in man.

Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1868), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 31, at 522, 545 (footnote omitted).

172 U.S. CONST. art. IV, § 2, cl. 3; *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

173 See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J., dissenting).

174 U.S. CONST. art. IV, § 2, cl. 3.

175 See *Dred Scott*, 60 U.S. (19 How.) at 624 (Curtis, J., dissenting). Justice Curtis cited there, in this vein, *Rankin v. Lydia* in the Supreme Court of Appeals of Kentucky: “Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 470 (1820)).

176 Abraham Lincoln, Speech at the Republican State Convention of Illinois (May 29, 1856), in ABRAHAM LINCOLN’S LOST SPEECH, *supra* note 165, at 9, 32.

177 See *Prigg*, 41 U.S. (16 Pet.) at 615.

Clause, there would have been no American union, still standing on its Founding principles—and he would have no standing as a jurist figure in that government to pronounce any judgment on slavery.

With Justice Sutherland in the *Belmont* case, and Justice Story in *Prigg v. Pennsylvania*, we have the clearest examples in our history of judges being constrained by the structures and principles of the American Constitution. But the explanation was not to be found in the text of the Constitution. It was to be found rather in those deep principles of natural law that underlay the Constitution—the principles that told us why the safety of the American people could not be put in the hands of officers who bore no direct responsibility to the people whose lives were at stake. And these were the same principles that countered any attempt to *deny the truth of the Founding principles* as statesmen made an earnest effort to limit an evil in the course of making an accommodation with it. But when those principles barring the reach of judges were not engaged, the judges would be as free as any other officers of the government to appeal to those deep principles underlying the Constitution, even when they were not mentioned in the text.

B. On the Judges Rejecting an Original Meaning

It can hardly be stated strongly enough that, for Alicea, a decision of judges to turn away from original meaning is nothing less than a turn away from the Constitution itself.¹⁷⁸ What does one do, then, when we confront a case in which the Supreme Court surely made the most striking break away from original meaning? In the now iconic case of *Loving v. Virginia*,¹⁷⁹ the Court invoked the Equal Protection Clause when it struck down the laws in Virginia (and other states) that barred marriage across racial lines.¹⁸⁰ But that judgment flew in the face of the most sober assurances given by Senator Lyman Trumbull of Illinois, who managed the Fourteenth Amendment in its passage through the Senate. Trumbull was compelled to swear up and down to his colleague that nothing in that Amendment would threaten the laws of Illinois as well as Virginia that forbade interracial marriages.¹⁸¹ And it was

178 See Alicea, *supra* note 3, at 44–52.

179 *Loving v. Virginia*, 388 U.S. 1 (1967).

180 See *id.* at 12; U.S. CONST. art. XIV, § 1.

181 See, e.g., David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 246–47 (2015). See also, in this vein, the exchange among Senators Trumbull, Fessenden, and Johnson, during the debate over the Civil Rights Act of 1866, CONG. GLOBE, 39th Cong., 1st Sess. 505–06 (1866), and the exchange between Senators Trumbull and Davis, *id.* at 600. This understanding was also incorporated in some early cases, testing the laws on miscegenation under the Fourteenth Amendment. See, e.g., *In re Hobbs*, 12 F. Cas. 262 (C.C.N.D. Ga. 1871) (No. 6,550);

understood at that time that, if he couldn't give that assurance, the Fourteenth Amendment would not have had a ghost of a chance in passing.¹⁸² If the original understanding is to be taken from the men who drafted that bill, who explained and defended it to their colleagues, and the senators and congressmen who voted for the bill, it would be hard to find many other decisions of the Supreme Court that moved as emphatically in overturning the original meaning of a constitutional text.

Of course, the original meaning of the Fourteenth Amendment had proved quite a stumbling block for the Court already—most notably in *Brown v. Board of Education* on the racial integration of schools.¹⁸³ After all, the Congress that passed the Fourteenth Amendment had plenary controls over the public schools in the District of Columbia.¹⁸⁴ The Republican leadership in that Congress had never found in that Amendment a principle that commanded the ending of racial segregation in the schools, and so it was hard to see what principle could have enjoined the desegregation of the schools in Topeka, Kansas, or in the other schools collected under *Brown*.¹⁸⁵ The embarrassment for the Supreme Court in *Brown*, as in *Loving*, was that it could find nothing in the text of the Constitution that could support the interpretation of the Constitution in these cases.¹⁸⁶ Nor could it find support in the understanding of the men who drafted and voted for that Amendment.¹⁸⁷ This was surely one of the most openly recognized—and yet grandly disregarded—concerns of the age: that some of the most venerable scholars in the law and civil rights had registered the serious concern that the Court had not succeeded in supplying a principled ground for its judgment.¹⁸⁸

The Court had been insistent that its new reading of the Fourteenth Amendment found its clearest justification in the dealing with education and schools.¹⁸⁹ But scholars such as Herbert Wechsler at Columbia University and Philip Kurland at the University of Chicago asked how that logic of the case carried over to things such as beaches

State v. Gibson, 36 Ind. 389 (1871); State v. Hairston, 63 N.C. 451 (1869); Lonas v. State, 50 Tenn. (3 Heisk.) 287 (1871).

182 See, e.g., Upham, *supra* note 181, at 246–47; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1018 (1995).

183 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

184 See U.S. CONST. art. I, § 8, cl. 17.

185 See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252–53 (1991).

186 See *id.* at 252–53, 256–57.

187 See *id.*

188 See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33–34 (1959).

189 See Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

and swimming pools and tennis courts.¹⁹⁰ Did we need a separate “constitutional right to swim” or to “play tennis”?¹⁹¹ Or was there a principle at work that would cover swimming pools and trains, and restaurants and inns, as simply instances in manifesting the same principle engaged in cases of racial discrimination? Even as late as the *Loving* case, the Court could not quite explain what that principle was. Chief Justice Warren wrote in *Loving* that “[o]ver the years, *this Court has consistently repudiated* ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”¹⁹² Well, not exactly. It wasn’t until the 1930s that the Court started taking a turn away from *Plessy v. Ferguson*¹⁹³ in holding racial segregation wrong in certain public law schools.¹⁹⁴ But that was to say, about twenty-nine judges, at most, had come to see the meaning of the Equal Protection Clause in a different way without quite explaining what that new way was.¹⁹⁵

All of which simply sharpened that question of Originalism: What had the Justices discovered about the meaning of equal protection that had somehow eluded the understanding of those men who framed and

190 See Wechsler, *supra* note 189, at 22; Philip B. Kurland, “Brown v. Board of Education was the Beginning”: *The School Desegregation Cases in the United States Supreme Court: 1954-1979*, 1979 WASH. U. L.Q. 309, 320.

191 Hadley Arkes, *The Argument Renewed: Who’s Afraid of Substantive Due Process?*, 16 GEO. J.L. & PUB. POL’Y 365, 366 (2018) (internal quotation marks omitted); *id.* (internal quotation marks omitted).

192 *Loving v. Virginia*, 388 U.S. 1, 11 (second alteration in original) (emphasis added) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

193 *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

194 See, e.g., *Missouri ex rel. v. Canada*, 305 U.S. 337, 345 (1938); see also *Brown*, 347 U.S. at 491–92 (collecting cases). Of course the Court had taken a decided turn away from *Plessy v. Ferguson* in *Buchanan v. Warley*, 245 U.S. 60 (1917), when the city of Louisville had specified, in the law, “the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively,” *id.* at 70. But things were kicked into a further gear with Justice Holmes, of all people, in *Nixon v. Herndon*, 273 U.S. 536 (1927) when the State of Texas sought to bar black people from voting in political primaries, see *id.* at 539–40. Things would heat up in all dimensions in the 1930’s and 1940’s, as Democratic parties were turned into “private associations” holding votes among their members. Segregated housing would move in a different guise through “restrictive covenants” in private contracts. And the racial litigation would heat up over the trial of the famous “Scottsboro boys,” black young men accused of rape on a freight train, with a trial in a hostile town in Alabama. It took Justice George Sutherland to run to the rescue. See *Powell v. Alabama*, 287 U.S. 45 (1933).

195 And even in the most recent critical cases, the cases striking down “racial preferences” in schools receiving federal aid, the Justices added nothing new to the explanation. They held rather that a more demanding understanding of the Equal Protection Clause would now compel the Court to overturn the scheme of racial preferences that the Court had been quite willing to sustain since *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as an arrangement quite in harmony with the Equal Protection Clause. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

voted for the Fourteenth Amendment? For those men, the Amendment had not entailed a mandate for racial integration in schools, even though there were Republicans like Senator Charles Sumner who thought it did bear on the management of public schools.¹⁹⁶ But the one thing that was unarguable on either political side at the time was that the Amendment could never challenge one of the deepest prejudices, so vibrant at the time, which made interracial marriage unthinkable in the law.¹⁹⁷ To reach that judgment now required an appeal to a deeper moral argument that ran beyond the understanding that had broken in yet on the political men who had framed and passed the Fourteenth Amendment.

I made my own effort, in the *Supreme Court Review*, many years ago, to offer an account of what that principle might be,¹⁹⁸ and I sharpened that account in two subsequent books, *The Philosopher in the City* and *First Things*.¹⁹⁹ And the answer to the problem came, I thought, in one of the rare mistakes made by that most urbane of judges, Justice Robert Jackson.²⁰⁰ It came in 1952 in the *Beauharnais* case, when the Court sustained a statute in Illinois dealing with the defamation of racial groups.²⁰¹ Joseph Beauharnais sought to inflame opposition to black people seeking to buy homes in neighborhoods that were identifiably “white.”²⁰² Justice Jackson dissented in the case, because he thought that Beauharnais, in a case of libel, should be allowed the defense of establishing what he had argued about black people.²⁰³ And yet at the same time, Justice Jackson didn’t think that Beauharnais had “even a remote chance of justifying what impresses me, as it did the trial court, as reckless and vicious libel”²⁰⁴: that black people were simply driven as a race, as Beauharnais said, to “aggressions . . . rapes, robberies, knives, guns and marijuana.”²⁰⁵ What seemed to be breaking on Justice Jackson was the recognition of why it was deeply implausible to impute guilt to individual persons based on what was known in the aggregate of that racial or ethnic group of which they happened to be members. To back into that assumption was to back decisively into the notion that race exerted a kind of “deterministic” force in shaping and controlling the

196 See McConnell, *supra* note 182, at 964; see also Klarman, *supra* note 185, at 252–53.

197 See, e.g., McConnell, *supra* note 182, at 1018.

198 Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281.

199 HADLEY ARKES, *THE PHILOSOPHER IN THE CITY: THE MORAL DIMENSIONS OF URBAN POLITICS* (1981) at 46–49; ARKES, *supra* note 1, at 96–97.

200 See Arkes, *supra* note 198, at 297–305.

201 *Beauharnais v. Illinois*, 343 U.S. 250 (1952); see *id.* at 266–67.

202 *Id.* at 252.

203 See *id.* at 300–01 (Jackson, J., dissenting).

204 *Id.* at 300.

205 *Id.* at 252 (majority opinion) (alteration in original).

moral conduct of its members.²⁰⁶ But any one of us could be seen as a member of one race or another, and if every one of us was “determined” most critically in our moral reflexes by our race, then no one of us was strictly in control of his own acts.²⁰⁷ The whole language of moral judgment, of praise or blame, would be rendered meaningless, for each one of us would be judged as blameworthy or responsible for things we were powerless to do.²⁰⁸

To understand the principle in that way is to grasp a point that will never be contingent on harms or slights that may be suffered by people in schools or swimming pools or factories. To grasp that point is to grasp a categorical wrong that will not be altered in its wrongness under any conditions. To turn away from a potential partner in marriage on the basis of race would again draw moral inferences about a person on the basis of an attribute that could not in itself “determine” anything in the character and fitness of the person.²⁰⁹ Trumbull just had not seen at the time the reach of the principle that was at work. And yet there was nothing damning here, for the life of moral experience is a life of discovering implications of our own principles that had heretofore gone unnoticed. We could be grateful for what Trumbull and his colleagues accomplished in the Fourteenth Amendment, even though they did not see through the conventions of the time that the deep principle in their work would indeed bear on the matter of marriage.

I had the occasion years ago to recall Trumbull to my good friend Justice Scalia, to remind him that Trumbull had to reject emphatically the notion that the Fourteenth Amendment could ever challenge those laws that barred marriage across racial lines in Illinois as well as Virginia. I posed the question to him as to whether the Court might have been improvident then in taking up *Loving v. Virginia*. He was as candid as ever and acknowledged that as a serious question. He said he would have to think about it. But of course it was quite unimaginable that any conservative Justice in our own time would have the temerity of asking the Court to revisit *Loving v. Virginia* and call that judgment into question. The matter has to stand then as one of the most telling cases of the Court detaching itself from one of the clearest meanings that ever formed part of the original understanding of any clause of the Constitution. And the only ground on which to sustain that judgment is one that would correct and complete the understanding of its Framers by supplying the most defensible and morally

206 ARKES, *supra* note 1, at 96 (emphasis removed).

207 *Id.* at 97 (internal quotation marks omitted).

208 For the fuller argument here, see *id.* at 96–99 and ARKES, *supra* note 22, at 100–103.

209 ARKES, *supra* note 1, at 96–97 (internal quotation marks omitted).

coherent meaning to the Equal Protection Clause. Which is to say, the meaning to which we would be led by the natural law.

III. AS THE MORAL GROUND BECOMES CLEARER, DOES ORIGINALISM RECEDE AND FADE?

At every turn, Professor Alicea's path does take us to the moral ground of Originalism and the law, but every path takes us, in its decisive end point, to the natural law, not Originalism, as the anchoring moral ground of this constitutional order. It is the natural law that makes the case for "popular sovereignty," or government by "the consent of the governed,"²¹⁰ the right of a people to govern itself, but under moral and legal constraints. Past all the lights and shadows, it is not clear why Originalism would offer a better defense of popular sovereignty than the moral axioms of the natural law on the right of a people to govern itself. With every step in the analysis, Originalism seems to slip further away, rather like Lewis Carroll's Cheshire Cat, smiling on as it fades and disappears.²¹¹ At every turn Originalism depends on a ground in natural law that the votaries of Originalism continue to treat as a venerable ornament, with a patina of something ancient and high, but offering no truths to which the judges may ever appeal in forming the grounds of their practical judgments under the Constitution.

In the most curious way, Alicea may find that he has backed himself into Justice Scalia's old argument in *Originalism, the Lesser Evil*.²¹² And yet he would find there now not only a lower claim for Originalism, but a confession that makes a nullity of it. For Justice Scalia, Originalism could have the standing of an "evil[]," even lesser, because it still involved unelected judges offering interpretations of the Constitution that will affect profoundly the way millions of Americans would live.²¹³ The danger in any judicial interpretation of the Constitution "is that the judges will mistake their own predilections for the law. . . . It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are 'fundamental to our society.'"²¹⁴ An appeal to a fixed, original meaning of the Constitution was the only safety against that danger; but as Justice Scalia took pains to explain, Originalism, in that commanding sense, was not so much evil as

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

211 Cf. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 87 (Dodd, Mead & Co., Inc. 1922) (1865).

212 Scalia, *supra* note 53.

213 *Id.* at 862; *see id.* at 862–63.

214 *Id.* at 863.

implausible.²¹⁵ We must ever presume that words have meaning, but can we reliably capture the way they were used at the end of the eighteenth century? It was in fact, as Justice Scalia said, “exceedingly difficult to plumb the original understanding of an ancient text”²¹⁶:

Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.²¹⁷

In the same vein, Justice Scalia recognizes the tricks of mind that will invariably come into play. In the classic case *Myers v. United States*, on the removal powers of the President,²¹⁸ Chief Justice Taft drew upon the experience of the British monarch in exercising the executive powers.²¹⁹ That regal model did serve as a useful guide in part, but Justice Reynolds, in dissent, could cite a line of commentaries from distinguished sources insisting that the British monarch could not set the proper standard for an executive in a republic.²²⁰ And the late, beloved Eugene Rostow, the Sterling Professor at Yale Law School, used to offer a soft caution to the Originalists when he recalled Madison and Hamilton arguing tenaciously, in the *Helvidius* and the *Pacificus* papers, over the powers of the executive and legislature in foreign affairs.²²¹ It would be hard to find two men more prominently “present at the Creation” of the Constitution than these two.²²² And if these two men were unsettled on the original meaning on this cardinal issue, it did not take much imagination to grasp that so much of original meaning may be comparably unsettled or unknowable.

The historian Jonathan Gienapp brings the problem yet to another level as he seeks to show that the Founding generation did not

215 See *id.* at 856–61.

216 *Id.* at 856.

217 *Id.* at 856–57.

218 *Myers v. United States*, 272 U.S. 52 (1926).

219 See *id.* at 118.

220 See *id.* at 233–34 (McReynolds, J., dissenting).

221 Conversation over the dinner table. But see Hadley Arkes, *Originalism Is Not Enough*, 22 CLAREMONT REV. BOOKS 78, 78 (2022) (reviewing DONALD L. DRAKEMAN, *THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS* (2021)).

222 *Id.* (internal quotation marks omitted).

fully regard “writtenness” as the defining mark of the Constitution.²²³ The Framers had drawn on deep principles of law that were there before the Constitution, and they did not think it necessary for them to place in the text every principle of law they knew.²²⁴ As Gienapp shows, the experience of applying and “liquidat[ing]” the provisions of the Constitution, extended over many years, found the political class drawing on those understandings of law not contained in the text of the Constitution.²²⁵ And that included the moral reasoning that took matters to the root. How else to explain Hamilton’s elegant memorandum to President George Washington making the case for the constitutionality of a national bank?²²⁶ Here was revealed a mind in an entirely different register, so that Hamilton could remark on his adversary on this issue, Jefferson, that the Secretary of State had fallen into a “*radical* source of error in the reasoning” and offered “an idea which alone refutes the construction.”²²⁷ Jefferson’s ally, Madison confirmed the force of Hamilton’s argument eventually, as he felt compelled to change his own position on the national bank as President, in 1816.²²⁸ What that move also showed, as Gienapp observed, was that the business of “liquidation,” settling the meaning of the Constitution, would be *the work mainly of elected representatives, not judges*.²²⁹ “Members of the Founding generation,” he said, took hold of “liquidation” because “few believed that Supreme Court justices would settle major constitutional controversies.”²³⁰

Justice Scalia was quite right, then, as he set forth the problem with his characteristic candor: that the beauty of the concept, honoring the original meaning of the Constitution, was a project fraught with pervasive uncertainty.²³¹ To use an old phrase, it had to be undertaken with common sense, with the precepts of natural law lingering in the common law and with a willingness persistently “to recur to first principles.”²³² And so what, then, was the source of its appeal, even as a “lesser evil”? Justice Scalia was utterly clear on the point that finally

223 GIENAPP, *supra* note 136, at 12.

224 *See id.* at 140–41.

225 *Id.* at 151; *see id.* at 151–52.

226 Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 16, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

227 *Id.* at 102.

228 *See supra* note 136.

229 *See* GIENAPP, *supra* note 136, at 149.

230 *Id.* at 152.

231 *Id.*

232 *See* Scalia, *supra* note 53, at 856–57; *see, e.g.*, VA. DECLARATION OF RIGHTS of 1776, § 15 (“That no free government . . . can be preserved . . . [but] by recurrence to fundamental principles.”).

proved decisive: “[T]he central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.”²³³ That is to say, any movement beyond the text of the Constitution would have to engage moral reasoning and appeal to truths not set down in the text; and that appeal to moral truths would have to be rejected, as he famously said again, because those appeals could summon no “consensus” for the truths they would offer.²³⁴ In sum, the case for Originalism depended on the surety that there were indeed no moral truths outside the text that judges, or ordinary persons, could be obliged to recognize and respect. The case depended then on that self-refuting proposition that he had been willing to take for years, a self-sufficient denial of moral truths—that in the absence of consensus, there were no moral truths.

CONCLUSION

And so where would all of this leave Professor Alicea? Alicea owned that he was not “arguing that *originalism* is our law,” but that it was “an implication of our positive law.”²³⁵ But of course it was the natural law that had to provide the moral ground for any positive law and the authority of those officials who would enact that law. Just in the same way, it is the natural law that would have to provide the ground of Originalism *if Originalism could claim any ground at all of moral justification*. All of which makes it quite baffling, to put it mildly, to grasp what Professor Alicea could possibly mean when he wrote recently (in response to the Anonymous Law Clerk), that “Harvard law professor Adrian Vermeule and emeritus Amherst professor Hadley Arkes have argued that originalism is incompatible with the natural-law tradition.”²³⁶ Based on the books and articles I have written over the past fifty years, I would have thought that he would have been clear that the truth of the matter was quite the inverse of what he had put down. My argument has ever been that the natural law provides the anchoring ground of the Constitution, and that judges have persistently shown over the years the need to appeal to those deeper principles, beyond the text of the Constitution, in explaining the grounds of their judgments. I have joined with other writers in standing for a “Better

233 *Id.* at 862–63.

234 *Id.*

235 Alicea, *supra* note 3, at 50.

236 J. Joel Alicea, *Natural Law and Popular Sovereignty: A Response to My Anonymous Critic*, NAT'L REV. (Aug. 30, 2023, at 06:30), <https://www.nationalreview.com/2023/08/natural-law-and-popular-sovereignty-a-response-to-my-anonymous-critic/> [https://perma.cc/3HKF-CFBV].

Originalism,” an Originalism that does not detach itself from the understanding of the leading Founders on the moral ground of the Constitution they were putting into place.²³⁷

That call for “A Better Originalism” has been sounded against a conservative jurisprudence that has taken it as a kind of operating code to steer around the questions of moral substance that has been at the heart of the gravest issues in our recent law.²³⁸ In this way, a conservative majority in the notable case of *Dobbs v. Jackson Women’s Health Organization* could overturn *Roe v. Wade* without pronouncing any recognition of the human standing of the offspring in the womb.²³⁹ The dissenters in *Dobbs* caught this point sharply: “[T]he majority takes pride,” they said, “in not expressing a view ‘about the status of the fetus’”—“the state interest in protecting fetal life plays no part in the majority’s analysis.”²⁴⁰ The center of the problem for the conservative Justices was a *theory* about the rightful and wrongful reach of the judges quite apart from the moral substance of the case.²⁴¹ My judgment has been that a jural perspective of this kind, cultivated over forty years, has given us by now “a morally empty jurisprudence.”²⁴² In his notable essay in the *Notre Dame Law Review*, Professor Alicea quoted that line no less than three times.²⁴³ It was usually produced as a line taken to reveal perhaps its own vacuity, or a line thought to confirm the very weakness of the argument that Professor Alicea was assailing. And it was all done without ever once recalling the substantive argument that led to that quotable line as its culminating line. Alicea neglected to recall that argument for his readers, just as he neglected to show how he would tenably counter or refute that line.

I had begun, in that argument, with Justice Gorsuch’s opinion in the famous *Bostock v. Clayton County* case on transgenderism²⁴⁴—and the searing commentary by David Crawford and his colleagues at the Pontifical John Paul II Institute for Studies on Marriage and Family at

237 Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, THE AM. MIND (Mar. 18, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/> [<https://perma.cc/TG8X-AV9S>]; Hadley Arkes, *In Defense of “A Better Originalism,”* LAW & LIBERTY (May 10, 2021), <https://lawliberty.org/in-defense-of-a-better-originalism/> [<https://perma.cc/9AZ8-HUD5>].

238 Arkes et al., *supra* note 237.

239 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

240 *Dobbs*, 142 S. Ct. at 2331 (Breyer, Sotomayor & Kagan, JJ., dissenting).

241 *See id.* at 2265 (majority opinion).

242 *See* Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), <https://firstthings.com/a-morally-empty-jurisprudence/> [<https://perma.cc/QNT6-4AUA>].

243 *See* Alicea, *supra* note 3, at 3, 10, 51.

244 *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

the Catholic University of America: that the decision in that case had brought forth nothing less than a new metaphysic on how indeed we are constituted as human beings.²⁴⁵ Mr. Andrew Stephens, in *Bostock's* companion case on funeral homes, was not merely claiming the right to present himself in dress as a woman.²⁴⁶ The claim rather was that when Stephens regarded himself as a woman, the employer and workers around him were required to respect the truth of that claim or put themselves in legal jeopardy for violating the laws on civil rights and sustaining a “hostile work environment.”²⁴⁷ Justice Gorsuch is a confirmed textualist;²⁴⁸ he felt compelled to find in favor of Stephens by his reading of the text of the Civil Rights Act of 1964,²⁴⁹ even though it was hard to believe that the people voting for that statute had meant to cover a discrimination based on gender identity instead of sex as it was so evidently and objectively known: namely, biological sex.²⁵⁰ As Justice Alito remarked in dissent, the Congress had been offered the chance later to construe the meaning of sex in that statute as the feeling of “gender identity.”²⁵¹ But the Congress refused to accept that amendment in place of the meaning of sex imprinted on our bodies in the mint of nature, the meaning that the members had taken for granted when they had enacted the statute.²⁵² And yet, regardless of whether the legislators had understood their work in that way—and regardless of what the dictionaries said in 1964—the meaning of “sex” is simply confirmed on the objective truths that bear on how we are constituted as males and females. Still, Justice Gorsuch was highly vetted as an Originalist and a textualist;²⁵³ he felt constrained then from appealing beyond the text of the statute and the Constitution to that decisive point: the inescapable and objective truth that marks the real meaning and *telos* of “sex,” or why it is necessary that we come into this world as male or female. But then, as we began to sum up the wreckage,

[W]e discover that we have now Originalists who defend the rights to abortion, same-sex marriage, and transgenderism, while others have long resisted these moral novelties. But if

245 See Arkes, *supra* note 242.

246 See *id.*

247 *Id.*

248 See, e.g., GORSUCH ET AL., *supra* note 59, at 10.

249 See *Bostock*, 140 S. Ct. at 1754.

250 See *id.* at 1772–73 (Alito, J., dissenting).

251 *Id.* at 1755 (internal quotation marks omitted).

252 See *id.* at 1776.

253 See, e.g., President Donald J. Trump Nominates Judge Neil Gorsuch to the United States Supreme Court, NAT'L ARCHIVES (Jan. 31, 2017), <https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-nominates-judge-neil-gorsuch-united-states-supreme-court/> [<https://perma.cc/T8ZT-ZXDL>] (“Judge Gorsuch has . . . a commitment to interpreting the Constitution according to its text.”).

Originalism is divided on questions of this kind, is it indecorous to pronounce the plain truth?: That Originalism indeed has nothing to say on matters of real consequence. It is a morally empty jurisprudence.²⁵⁴

I have known Professor Alicea for years as an acute reader and writer, and yet as far as I know, he has still not said anything to show what was wrong, or inapt, in that argument I was making on the way to that culminating line, so irresistible, as he found it, to quote.

Professor Alicea confessed that his “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.”²⁵⁵ But that is to say no more than that Originalism must involve a “higher law,” or Constitution, that tells us how laws are made and who has the rightful authority to make them.²⁵⁶ At the same time Alicea fully recognizes that the sovereign people *may change that Constitution at any time*.²⁵⁷ And he has also noted that the natural law does not entail any particular form of a constitution based on “the consent of the governed.”²⁵⁸ Why, then, should we suppose that it would entail a truncated, positivist form of Originalism, with its immanent aversion to recognizing any principles of right and wrong outside the text? What it all may come down to in the end is simply that telling line in the Declaration of Independence on “the Right of the People to alter or to abolish . . . and to institute new Government,” on grounds that “seem most likely to effect their Safety and Happiness.”²⁵⁹ But the one thing, of course, that is *never open to change* here is that Right of the People to determine the terms of their own governance.²⁶⁰ There, in its stripped-down simplicity, is the irreducible font of our constitutional order. And it is that primary political truth *arising from the natural law*. Nothing in it entails, or makes necessary, what we’ve come to know as Originalism; and nothing in Originalism takes the place, then, of natural law in conveying the fullness, the moral depth of its rightness.

254 Arkes, *supra* note 243.

255 Alicea, *supra* note 3, at 51 (emphasis added).

256 *See id.*

257 *See id.* at 55–56.

258 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see* Alicea, *supra* note 3, at 33–41.

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

260 *See id.*