

**“INDISPENSABLY OBLIGATORY”:
NATURAL LAW AND THE AMERICAN LEGAL
TRADITION**

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Good and wise men, in all ages, have . . . supposed, that the Deity, from the relations we stand in to Himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever.¹

INTRODUCTION

It is popular to affirm that legal analysis begins, always, with the text. Grounding law in the words written, not the intentions thought, is believed to restrain power, divide government, and ensure liberty. But a persistent problem prevents easy application of that prescription: who decides? Not in the structural sense of which actor or what branch, but the more personal challenge of competence. We cannot best determine who decides without acknowledging that not all deciders are equal. Admitting that in the wrong hands, even the right rule can be mangled into something monstrous.

Today, many hands make much mischief misapplying rules. Judges, scholars, advocates, students, commentators (both serious

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1. Alexander Hamilton, *The Farmer Refuted*, in *THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON* 52 (Richard B. Vernier ed., 2008).

and attention-starved), all urging rules for their own work and for the work of everyone else. That should give us pause. Tempting as it is to believe that work is fungible, that familiarity with one idea is enough for anyone to piece together new answers, we would do better each to find our own work.² Not the work that appeals to us, not the work we would like, but the work we are called to do. We should attack, collectively, the two characteristics of our current legal culture that get in the way. One conflates roles; the other conflates rules and theories to create a dogmatism that distracts from our work once properly identified. Both characteristics produce outcomes that fight the natural purpose of the law and sever it from traditional moral reasoning, sweeping aside the law's grounding the "whole teleological conception of the aims of government"³ — always thought essential. Law, of course, did not spring into existence with the advent of written rules, and it cannot depend on amateur dogmatists for its authority.

I. AMATEURISM

Start with the obvious: judges and scholars wear different robes, and a commission does not make a man of letters. The accessibility of the judiciary, particularly in conservative legal circles, is a

2. Every person "should do the work for which he is fitted by nature. . . . [Yet, o]nly feebly, inadequately, and spasmodically do we ever attempt to . . . inquire: What type of worker is suited to this type of work?" DOROTHY SAYERS, *Why Work*, in LETTERS TO THE DIMINISHED CHURCH 125, 136 (2004); cf. ROBERT BOLT, A MAN FOR ALL SEASONS 73 (1962) ("God made the angels to show him splendor—as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind!").

3. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 62 (2022); see also ARISTOTLE, NICOMACHEAN ETHICS bk. X, ch. 7, 1177a11–1177b26 (c. 340 B.C.) (W.D. Ross trans., 1908) (expounding happiness (*eudaimonia*) as the highest end (*telos*)); Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 957 (2021) ("Ideally, judges might attempt to reconcile the *ratio legis* of a transient legislative act with the *telos* of the American political order and its Constitution—the 'supreme Law of the Land'—and thus read the statute's text through that harmonized prism.").

remarkable and wonderful tradition. As a student, I was thrilled to stand in the same room as Antonin Scalia and Robert Bork, listening to men of extraordinary learning. Dreaming, perhaps, that I might dare to aspire to follow their example. Today, I am honored to share one of their accomplishments as a member of the federal bench. But I am neither of those men. And as bright as many federal judges are, most are not, either. Justice Scalia and Judge Bork were, for much of their lives, scholars. Their only job, their comfortable center, was the future of ideas. Most members of the bench are simply lawyers who, through a combination of timing and connections, wound up serving as judges.⁴ Be careful how you view us, mindful of what you ask the generalist judge to do.⁵

Of course, the rush to specialization and expertise can be dangerous. Wendell Berry cautioned against it decades ago,⁶ echoing the sentiments of influential thinkers reaching back millennia.⁷ But let us be honest: we do not live in a Republic still suited for farmer-philosophers, statesmen who timed their service to coincide with the harvest, or judges who rode the circuit in search of fertile ground for crops and clients. The crisis of abandoning general interests and general ability to an ever-increasing legion of certified experts is not solved by allowing everyone a seat at the table, no

4. ANTONIN SCALIA, *The Vocation of a Judge*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED, 169–70 (Christopher J. Scalia & Edward Whelan eds., 2017) (“There is no Judge School from which one must earn a certificate of authenticity. . . . Instead, as the old saying goes, a judge is a lawyer who knows the governor.”).

5. Cf. James V. Schall, SJ, *A Happening That Really Took Place*, in THE NATURE OF POLITICAL PHILOSOPHY 90 (William McCormick, SJ, ed., 2022) (“Not everyone needs to be, can be, or even wants to be a philosopher,” a pursuit that demands isolation from distractions and duties. “The Church’s monastic tradition in part attested to this realization, as did the academic tradition in the ancient city.”).

6. See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 152 (1977) (“The stock in trade of the ‘man of learning’ comes to be ignorance.”).

7. See generally Daniel Silvermintz, *Plato’s Supposed Defense of the Division of Labor: A Reexamination of the Role of Job Specialization in the Republic*, 42 HIST. POL. ECON. 747 (2010) (arguing that Plato’s Republic “offers a radical critique . . . of job specialization and its accompanying psychological orientation toward acquisitiveness”).

matter how unqualified or inexperienced. We can avoid a judiciary of expert scholars without embracing a bench of frustrated amateur professors living out their tenure-track fantasies.

Each, rather, according to his own work, whether poet, farmer, politician, judge, or scholar. Yet always with a healthy interest in the work of others, always ready to learn. There is little point to judges developing principles of law, let alone legal philosophy, outside of their work on cases and controversies. And there is danger when they try. As Professors Vermeule and Casey write, “the occupational hazards for the judge-turned-occasional-theorist are that the necessary concepts and background knowledge, mapped out by intellectual pioneers, are half-remembered and hazily defined.”⁸ This too-generous portrait captures the careless amateurism that causes judges to veer from the path of the law the Framers envisioned when they built our Republic. A path the Framers did not invent, but took from thinkers still central to the American legal tradition.

II. UNDERSTANDING LAW

Many legal opinions give testament to the notion that judges ought to stay in their lane: we are not trained linguists,⁹ engineers,¹⁰

8. Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL’Y: PER CURIAM (Apr. 23, 2022), <https://www.harvard-jlpp.com/argument-by-slogan-conor-casey-and-adrian-vermeule/> [<https://perma.cc/25FU-WJWA>].

9. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 865–66 (2018) (“Judges and lawyers are not linguists. Most all of us, at least, are not professionally trained ones. . . . [T]he judicial analysis of ordinary meaning will be improved in cases in which the parties or their experts proffer corpus analysis that can be tested by the adversary system.”).

10. See, e.g., Thomas W. Hazlett, *Physical Scarcity, Rent Seeking and the First Amendment*, 97 COLUM. L. REV. 905, 926–31 (1997) (explaining that the alternatives to the electromagnetic spectrum that existed during the early 20th century undermined the Supreme Court’s early decisions justifying governmental control of broadcasting).

classicists,¹¹ or statisticians.¹² So we should be conservative, careful when we use the tools of other arts and sciences. Because when judges shed the role of humble carpenter in favor of toolmaker, real risk accrues. It is the work of the scholar, not the judge, to theorize, analyze trends, elevate concepts. Judges are merely *judges*, with a single charge: to faithfully interpret the law. What does faithful interpretation look like? And what must it consider?

Start with what does not matter: argument, as Vermeule and Casey call it, by slogan.¹³ A declaration of fidelity to some isolated methodology, a law review article, or clever turn of phrase. Of course, theories can be helpful, offering useful ways to advance second order goods like predictability, fairness, institutional integrity, and morally grounded judgments. But the contemporary trend of announcing adherence to a legal theory mistakes the accidental for the essential.

Theory must always be in service of the law, meaning that we sometimes need to depart from the former when it offends the latter—that is, when theory fails to protect “the voluntary compact” that constitutes “the origin of all civil government” and alone can establish the limitations “necessary for the security of the *absolute rights*” of the people.¹⁴ And, equally as dangerous, by purporting to place theories first, judges run the risk of transforming methodology into a sort of secular dogma, skipping the thing that transforms teachings into tenets: the source of the authority.

11. See, e.g., Grzegorz Blicharz, *Why Justice Blackmun's Appeal to Roman Law to Justify Roe v. Wade is Wrong*, 2021 HARV. J.L. & PUB. POL'Y: PER CURIAM 16, *1 (Nov. 22, 2021), <https://www.harvard-jlpp.com/why-justice-blackmuns-appeal-to-roman-law-to-justify-roe-v-wade-is-wrong-grzegorz-blicharz/> [https://perma.cc/BFU8-QA6S] (“*Roe*'s unsophisticated grasp of ‘ancient [Roman] attitudes’ toward the unborn generally and abortion specifically ignores both the effect of Christianity on the Roman Empire and the ways in which even the pre-Christian Roman Empire and Roman Republic protected the unborn. A proper historical analysis would account for both, and produces the opposite conclusion than the breezy one reached after two sentences in *Roe*.”).

12. See generally Ryan D. Enos et al., *The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts*, 14 J. EMPIRICAL LEGAL STUD. 618 (2017).

13. See Casey & Vermeule, *supra* note 8.

14. Hamilton, *supra* note 1, at 53.

This new dogma lurks in the background while we weave new “doctrines” into the law. Take the suddenly everywhere discussion about the “major questions doctrine” that spilled from the casebooks into the courtroom.¹⁵ The name is misleading. What we are really doing is treating a scheme devised to explain a given phenomenon—say, when Congress can assign some work to the Executive—as a revealed, incontrovertible truth.¹⁶ That kind of thinking threatens the intellectual curiosity and openness that ought to mark the habits of the judiciary.

It also places an undue emphasis on which philosophy or what theory is best, a focus that threatens to distract judges from the true object of their work—the law itself.¹⁷ Sure, historical criticism helps biblical scholars understand the meaning of scripture, but it does not transform theology into the Word.¹⁸

Nor does legal philosophy create the law that guides the disposition of a given case or controversy.¹⁹ And heaping up new methods risks wasting time trying to wake from history while the time-tested

15. See, e.g., Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/VKD3-4FCT>]; Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

16. Cf. *Matthew* 15:8–9 (lamenting the people’s wont to “teach[]as doctrines human precepts”).

17. Admittedly, law is necessarily cloaked in the “cloudy medium” of language: “Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment.” THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003). But that does not excuse dressing the law in new concealments through whatever -isms rule the day. Instead, acknowledging that the lawmaker’s intent is “rendered dim and doubtful by the cloudy medium through which it is communicated,” *id.*, we should aim for that source using a method that accounts for language’s inaccuracy and imperfections. Thankfully, the Framers identified such a method for us. See *infra* Part III.

18. See Denis M. Farkasfalvy, INSPIRATION AND INTERPRETATION: A THEOLOGICAL INTRODUCTION TO SACRED SCRIPTURE 234–35 n.34 (2010) (“Historical truth is demonstrated in reference to credible witnesses and their testimony, evaluated by the rules of historical criticism. Such instruments are valuable in setting limits of credibility; they do not dictate what may or may not elicit faith in the Incarnation.”).

19. See generally R.R. RENO, THE END OF INTERPRETATION (2022).

tools universally used by the Founding generation²⁰ rust away in the judge's toolbox.²¹

III. RECALLING BLACKSTONE

When a young man interested in becoming a lawyer wrote to Abraham Lincoln asking for "the best mode of obtaining a thorough knowledge of the law," Lincoln told him to start by reading Blackstone's *Commentaries* twice.²² And for good reason: all the formative documents of the Framing Era were drafted by legal

20. See KODY W. COOPER & JUSTIN BUCKLEY DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* 11 (2022) ("The classical natural-law tradition was in the intellectual air that both the future Federalists and the future Republicans breathed."); see also STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 32 (2021); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 195 (1994) ("To the founders, reason and tradition need not be opposed. The two were joined in the classical heritage."); VINCENT PHILLIP MUÑOZ, *RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES* 25 (2022); THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM* 19 (2017).

21. A danger that "not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now." *Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting) ("[T]o blind yourself to history is both prideful and unwise. 'The past is never dead. It's not even past.'") (quoting WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951)).

22. Abraham Lincoln, *Letter to John M. Brockman* (Sept. 25, 1860), <https://www.abrahamlincolnonline.org/lincoln/speeches/law.htm> (last accessed Nov. 29, 2022) [<https://perma.cc/P2D5-WS7W>]. Unsurprising advice, as shown by the book's proliferation: "[B]efore the Revolution, nearly 2500 copies had been sold on this side of the Atlantic." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 405 (1929). "In all, 16 of the subscribers became signatories of the Declaration of Independence, six were delegated to the 1787 Constitutional Convention, one was elected President of the United States and another became Chief Justice of the Supreme Court." Dennis Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743-44 (1976). As a result, the *Commentaries* were "read by virtually every student of the law." R.H. HELMHOLZ, *NATURAL LAW IN COURT* 133 (2015).

thinkers steeped in Blackstone's theories.²³ Indeed, at the Virginia convention, Madison directed his colleagues' attention to "a book which is in every man's hand—Blackstone's Commentaries."²⁴

Blackstone opens his commentaries with a discussion on the nature of laws in general. There, he defines the municipal, or civil, law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."²⁵ And it is the *will* of this supreme power—whether vested in an individual or an institution—that a legal interpreter has as her object.²⁶ Blackstone contends that "[t]he fairest and most rational method to interpret" this will is by exploring the lawmaker's "intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."²⁷

As to the first sign, Blackstone wrote that "[w]ords are generally to be understood in their usual and most known signification,"²⁸ a point widely accepted among judges.²⁹ The last sign has caused much consternation: anathema in positivist circles and seminars, invoked as a wraith wriggling free from the "scientific apprehension of the relations of law to society" achieved through a

23. See, e.g., R. A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L.REV. 731, 731 (1976); see generally Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); BLACKSTONE AND HIS CRITICS (Anthony Page & Wilfrid Prest eds., 2018).

24. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (1876). Hamilton also relied on Blackstone, specifically his explication of the natural law, in his rebuttal to those who argued that the Continental Congress should be condemned. See, e.g., Hamilton, *supra* note 1, at 52.

25. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

26. See *id.* at *52.

27. *Id.* at *59.

28. *Id.*

29. See, e.g., *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017) (a unanimous court "begin[ning], as [it] must, with a careful examination of the statutory text").

"sociological jurisprudence" that shunned "Blackstone's wisdom."³⁰ If the "spirit of the law" really were standardless and indeterminate, then fears over judges thieving the vested functions of the coordinate branches and veering into unaccountable policy-making would be well-founded.

But those fears fall when Blackstone is read in full. His definition and methods, which informed the Framers,³¹ begin from the proposition that human law serves the natural law and seeks the common good. The natural law, for Blackstone, signifies those "certain immutable laws of human nature" laid down by the Creator to regulate and restrain free will.³² Natural law brings with it "the faculty of reason to discover the purport of those laws."³³ An understanding of this natural law is essential,³⁴ Blackstone writes, because "no human laws are of any validity, if contrary to [it]; and such of them as are valid derive all their force, and all their authority, mediately

30. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 30 ANN. REP. A.B.A. 911, 918 (1907), quoted in BANNER, *supra* note 20, at 221.

31. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3(1941) ("In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 39 (1991) ("It would be hard to exaggerate the degree of esteem in which . . . the Commentaries were held [at the Framing].").

32. BLACKSTONE, *supra* note 25, at *40. As R.H. Helmholz catalogues, Blackstone was not the first or only English lawyer to connect the common and natural law. R.H. Helmholz, *Natural Law and Human Rights in English Law*, 3 AVE MARIA L. REV. 1, 5–12 (2005).

33. BLACKSTONE, *supra* note 25, at *40.

34. Although some scholars claim the natural law was mere window dressing for Blackstone, see, e.g., H.L.A. Hart, *Blackstone's Use of the Law of Nature*, BUTTERWORTHS S. AFR. L. REV. 169, 170 (1956), the notion that the natural law was a "rule of human action prescribed by the Creator and discoverable by reason . . . [was] no more peripheral to Blackstone than a chapel was peripheral to the foundation of an English university college at any time between the thirteenth and nineteenth centuries." John M. Finnis, Note, *Blackstone's Theoretical Intentions*, 12 NAT. L. F. 163, 175 (1967). In Blackstone's day, as Finnis notes, "God's will for man was a subject of interest and concern, and the divine order of creation was reasonably seen as a pattern and precondition for man's ordering of his soul and thus of his society." *Id.*

or immediately, from this original.”³⁵ And if a person lived “unconnected with other individuals, there would be no [need] for any other laws, than the law of nature.”³⁶ But since all persons living in society are necessarily “connected with other individuals,” something in addition to the natural law is required.

According to Blackstone, “it is the *sense* of their weakness and imperfection that *keeps* [humanity] together; that demonstrates the necessity of th[eir] union; and that therefore is the solid and natural foundation . . . of civil society.”³⁷ From this collective acknowledgment flows the agreement that “the whole should protect all its parts, and that every part should pay obedience to the will of the whole.”³⁸ This agreement ultimately leads to the creation of a state, “a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together . . . by one uniform will.”³⁹

That is why human laws must have their root in the natural law and have as their end the common good. We are not wandering through a dark forest when interpretation requires us to turn to the “reason and spirit” of our law. Because as Blackstone makes clear, and the Framers agreed,⁴⁰ the “reason and spirit” — manifesting the lawmaker’s intentions through language—*are* the law. We have been given a map and key, and what we ought to consult is each

35. BLACKSTONE, *supra* note 25, at *41. For a defense of originalism rooted in this principle, see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

36. BLACKSTONE, *supra* note 25, at *43.

37. *Id.* at *47. Cf. *Xavier Le Pichon: The Fragility at the Heart of Humanity*, ON BEING (July 21, 2016) (“[H]uman life is really so fragile that it needs to create a whole new way of culture, of dealing with . . . others. Th[is] fragility is the essence of men and women, and it is at the heart of humanity.”).

38. BLACKSTONE, *supra* note 25, at *48.

39. *Id.* at *52.

40. Hamilton, *supra* note 1, at 53 (“Upon this law depend the natural rights of mankind: the Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest.”).

law's foundations in the natural law⁴¹ and the role that law serves in advancing human flourishing.⁴²

IV. RECLAIMING THE COMMON GOOD

The current debate roiling the conservative legal world over what originalism is and ought to be, and where common good constitutionalism fits in,⁴³ misses two points. First, once more, that debate ought to consume scholars and advocates, not judges. The former work out the details and the contours, see what methods help advance difficult legal arguments, and the latter will do the best they can with what they are given to resolve cases and controversies. Second, that battle seems a bit like the one fought in New Orleans two centuries ago: the war has already been decided, and yet the combatants fight on.⁴⁴ Blackstone's discussion of interpretive method was not only normative, but descriptive. He ably synthesized the methods of interpretation that jurists like Pufendorf and Grotius, and statesmen like Cicero and Justinian, used with a reasonable degree of success throughout the development of Western

41. See, e.g., *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33–34 (1812) (“[U]pon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government, belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.”) (emphasis added).

42. Indeed, the promotion of human flourishing, or what could be styled the pursuit of happiness, was the motivating principle of Blackstone's project to create a “simpler science of jurisprudence.” CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS IN THE FOUNDING ERA: AN INTELLECTUAL HISTORY* 24 (2019).

43. See, e.g., Conor Casey, “Common-Good Constitutionalism” and the New Battle over Constitutional Interpretation in the United States, 4 *PUB. L.* 765, 768–73 (2021).

44. See JON MEACHAM, *AMERICAN LION* 32 (2008) (“[T]he battle came after the war had ended—news of the treaty signed in Ghent on Christmas Eve would not reach New Orleans for several weeks.”).

civilization.⁴⁵ And that was the method the Framers⁴⁶ and jurists of the early Republic embraced.⁴⁷

45. Works by all these thinkers appear on the list of books James Madison hoped would “constitute the intellectual nucleus for a library for the Congress.” *List of Books Prepared by James Madison in 1783 to Constitute the Intellectual Nucleus for a Library for the Congress* (photograph), LIBRARY OF CONGRESS (1783), <https://www.loc.gov/item/2002707211/> (last visited Nov. 30, 2022) [<https://perma.cc/X3C4-R4B8>]; *Report on Books for Congress, [23 January] 1783*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-06-02-0031> (last visited Nov. 30, 2022) [<https://perma.cc/UUT5-CN2R>].

46. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 910 (1993) (“[I]n the late eighteenth century . . . natural law was assumed to have a role in constitutional analysis.”); GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 10 (1969) (“The general principles of politics that the colonists sought to discover and apply were not merely abstractions that had to be created anew out of nature and reason. They were in fact already embodied in the historic English constitution—a constitution which was esteemed by the enlightened of the world precisely because of its ‘agreeableness to the laws of nature.’”); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967) (“It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts and fought for the legal recognition of natural rights The ideas and writings of the leading secular thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu—were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and government contract, Montesquieu and later Delolme on the character of British liberty and the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”); THE FEDERALIST NO. 2 (John Jay) (“Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.”); John Adams, “VI. A Dissertation on the Canon and the Feudal Law, No. 4,” 21 October 1765, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-01-02-0052-0007> [<https://perma.cc/SNG2-D6ZN>] (“Let us study the law of nature; search into the spirit of the British constitution; read the histories of ancient ages; contemplate the great examples of Greece and Rome; set before us, the conduct of our own British ancestors, who have defended for us, the inherent rights of mankind, against foreign and domestic tyrants and usurpers, against arbitrary kings and cruel priests, in short against the gates of earth and hell.”).

Near the advent of the twentieth century, courts started skipping the text, all the text sometimes, and emphasizing social purpose fixed on modern needs.⁴⁸ As the century closed, the judiciary began overcorrecting and ignoring everything but the text, sometimes supplementing it with a dose of statutory structure or broader context.⁴⁹ Now here we are trying to devise something new that accounts for both: posited law and purpose. We need not look far, because, as Professor Vermeule establishes, "[t]he principles of the classical legal tradition are our own principles, written into our own traditions."⁵⁰ And those principles and traditions reveal a tool, available all along, that accounts for text and purpose: the classical method of legal interpretation that uses the law's text, context, subject matter, consequence, reason, and spirit to search out meaning. A method that took for granted the law's roots in the natural law and its orientation towards the common good. One not contrived by today's judges and scholars to further second-order goals, but one given to us by the thinkers who framed our form of

47. See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 397–456 (1833); *Vowels v. Craig*, 12 U.S. (8 Cranch) 371, 375 (1814) (citing "writers on natural law," including Pufendorf's *Law of Nature and Nations*); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 222 n.p (1827) ("Natural law is the cause, mediately at least, of all obligations, for if contracts, torts, and quasi torts, produce obligations, it is because the natural law ordains that every one should perform his promises, and repair the wrongs he has committed.") (quoting Pothier and citing Grotius, Burlamaqui, and Vattel); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 625–26 (1834) (referencing "[t]he notions of personal property of the common law, which is founded on natural law" but acknowledging the need for "positive enactments" where desired rights "[are] not to be found in natural law or common law") (citing Lord Coke, Lord Mansfield, and Vattel).

48. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892).

49. Cf. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated.").

50. VERMEULE, *supra* note 3, at 53.

government and tasked the judiciary with safeguarding it. Their method is how we can best help the People keep their Republic.⁵¹

CONCLUSION

Once, our law followed Blackstone's declaration that positive law could restrain liberty as much "as is necessary and expedient for the general advantage of the public,"⁵² because legitimate positive law, whether legislative or judicial, is always "bound by the laws of nature."⁵³ Judges must follow the path of the law that begins with text, as ordinarily understood by the People when adopted, a people who reached for their common good by relying on the natural law. But judges cannot honestly inquire into legal history without engaging the natural law foundations against which, as Blackstone argued, "depend all human laws; that is to say, no human laws should be suffered to contradict."⁵⁴ If judges are to carry on their work faithfully, they must embrace the "canons of moral reasoning that guided the Founders themselves when they had set about to frame a new government,"⁵⁵ ones that for thousands of years have helped build governments with the best chance at safeguarding natural rights.⁵⁶

51. To see what this method looks like in practice, see *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 165–66, 169–70 (3d Cir. 2023) (using history and tradition to discover the legislature's intent in enacting the FSIA) and *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, 80 F.4th 223, 229–32 (3d Cir. 2023) (interpreting Federal Rule of Civil Procedure 19 by "consulting history, context, and the reason behind the Rule").

52. BLACKSTONE, *supra* note 25, at *125.

53. HELMHOLZ, *supra* note 22, at 120.

54. BLACKSTONE, *supra* note 25, at *42.

55. HADLEY ARKES, *BEYOND THE CONSTITUTION* 23 (1990).

56. See Adams, *supra* note 46 (acknowledging that the governments of Greece, Rome, and Britain, despite the failings of each, provided a model for defending the "inherent rights of mankind"); cf. 1 *Corinthians* 2:6 ("We speak a wisdom to those who are mature, not a wisdom of this age, nor of the rulers of this age who are passing away.").