

NOTE

Our Natural Law Moment(s)

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ABSTRACT

To both its sharpest critics and strongest proponents, natural law increasingly appears to be enjoying a “moment” in American legal discourse. The 2024 Herbert W. Vaughan Lecture at Harvard Law School, in fact, took as its subject “The Natural Law Moment in Constitutional Theory.” Following the publication of Adrian Vermeule’s Common Good Constitutionalism, among other works on natural law in the last half-decade, the 2024 Vaughan Lecture raises two important questions for those interested in the United States’ contemporary jurisprudential debates: is there something unique about today’s natural law moment, and, if so, what might understanding previous natural law moment(s) portend for contemporary debates about natural law?

In light of the 2024 Vaughan Lecture, this Article historicizes the United States’ latest natural law moment. First, this Article demonstrates that there were at least two natural law moments in twentieth-century American legal history which emerged in response to then-novel developments in the legal academy—namely, the advent of legal realism and, decades later, originalism. Then, this Article reveals that today’s natural law moment shares important (dis)continuities with its predecessors. For example, leaders of the United States’ second natural law moment—like those writing during the first moment, but unlike many today—privileged outcome determinacy over methodological purity. If an interpretive method produced outcomes irreconcilable with the natural law tradition, they argued, that method was itself illegitimate. As this Article reveals, this conviction not only shaped much twentieth-century legal scholarship, but it also informed how natural lawyers engaged with political movements and approached nominations to the U.S. Supreme Court.

In concluding, this Article makes a predictive judgment that today’s natural law moment may be one of reconciliation between natural lawyers on the relative margin of American legal discourse and (positivist) originalists squarely within the judicial and scholarly mainstream. Indeed, as new historical scholarship on the eighteenth- and early nineteenth-century United States continues to uncover natural law’s importance to the intellectual environment in which the U.S. Constitution’s drafters were situated, future originalists may be led to conclude with increasing frequency that, as a matter of “original meaning,” “original intent,” or “original

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law,” judges must take seriously the natural law thinking of past generations. Should this prediction prove prescient in time, contemporary originalists will have refashioned a method of constitutional interpretation that was first articulated—albeit in less theoretically nuanced forms—during the United States’ last two natural law moments.

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I. INTRODUCTION: NATURAL LAW AND CONSTITUTIONAL MEMORY

There are few attributes more common to members of the American legal profession than the ability to remember and forget. In adjudicating disputes, judges “tell stories about the nation’s past experience to clarify the meaning of the nation’s commitments, to guide practical reason, and to help express the nation’s identity and values.”¹ In both the text of judicial decisions and the omissions therefrom, judges thereby reveal their capacities to remember and forget aspects of American legal history. Likewise, legal advocates “push the normative views they would like to prevail” by “read[ing] history selectively—and even occasionally tendentiously.”² As one scholar has recently observed, this process of remembering and forgetting “helps constitute [a] group’s identity and structures its values and its commitments.”³

Despite the pervasive disagreements that exist within the legal profession about American legal history and the proper uses thereof, there is at least one sense in which the profession has near-uniformly forgotten an aspect of the nation’s past.⁴ Indeed, one of the unifying characteristics of the profession’s contemporary constitutional memory is that natural law—once an indispensable

1. Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL’Y 19, 21 (2022).
2. Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 339 (2022).
3. *Id.* at 307.
4. Compare, e.g., JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024), with Stephen E. Sachs, *In Praise of Ignoring Facts*, 33 WM. & MARY B. RTS. J. 411 (2024), and Mark L. Movsesian, *Traditionalizing Everything*, L. & LIB. (May 6, 2024), <https://lawliberty.org/book-review/traditionalizing-everything> [<https://perma.cc/94LU-H958>]; see also, e.g., Andrew Koppelman, *What’s Left of Originalism? On Jack M. Balkin’s “Memory and Authority”*,

feature of American legal culture—was permanently displaced by positivism in the early twentieth century.⁵ On this account, by the time that the Supreme Court decided *Erie Railroad Co. v. Tompkins*⁶ in 1938, the positivist philosophical attitude that gave rise to legal realism seems to have “virtually dictated” the overruling of even uncontested natural law precedents, thus reflecting Americans’ new vision of judges as “lawmakers in a relativistic legal world,” rather than as finders of law amidst the “brooding omnipresence in the sky.”⁸ Such an understanding would also lead one to expect that lawyers quickly abandoned natural law arguments in courtrooms and that institutions of legal education equally quickly omitted references to natural law in their classrooms.⁹

The few scholars who have rejected this “dominant narrative” of positivism’s triumph and natural law’s concomitant decline have offered various explanations for why natural law has been almost entirely purged from contemporary constitutional memory.¹⁰ Notwithstanding the descriptive accuracy of these theories, some proponents of natural law jurisprudence today have impliedly accepted the narrative that positivism’s triumph rendered natural law obsolete for most of the twentieth century. At Harvard Law School’s 2024 Herbert W. Vaughan Lecture,

L.A. REV. BOOKS (Jun. 28, 2024) (book review), <https://lareviewofbooks.org/article/whats-left-of-originalism-on-jack-m-balkins-memory-and-authority> [<https://perma.cc/QK5G-VK7P>].

5. On natural law in the eighteenth- and nineteenth-century United States, see, e.g., STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 1–70 (2021); R. H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 142–73 (2015); ANDREW FORSYTH, *COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS* 24–105 (2019); JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 79–124 (2024).

6. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

7. William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 *TUL. L. REV.* 907, 907–8 (1988). But see Jack L. Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 *VA. L. REV.* 673 (1998) (offering a contrasting interpretation of *Erie*); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000) (same).

8. William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 *SUFFOLK U. L. REV.* 771, 774 (1986).

9. The positivist developments in elite legal education that followed Christopher Columbus Langdell’s deanship at Harvard Law School have seemed to confirm this narrative. See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 51–64 (1983); BRUCE A. KIMBALL & DANIEL R. COQUILLETTE, *THE INTELLECTUAL SWORD: HARVARD LAW SCHOOL, THE SECOND CENTURY* 226–52 (2020).

10. See, e.g., John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Catholic Legal Thought’s Response to Legal Realism*, 98 *MARQ. U. L. REV.* 1203, 1209–10, 1257–1309 (2015) (offering explanations). Neil Duxbury has conceded that, “in truth, natural law in the United States has never entirely waned,” but he nevertheless has dismissed twentieth-century natural lawyers’ efforts as “little more than crude attempts at proselytisation.” Thus, even those invocations of natural law that Duxbury acknowledges appear to have had little, if any, cognizable influence on American jurisprudence. See Neil Duxbury, *The Reinvention of American Legal Realism*, 12 *LEGAL STUD.* 137, 166, 170 (1992). Stuart Banner has articulated an intermediate position that purports to take seriously “echoes” of natural law that appeared in the mid-to-late-twentieth century. Nevertheless, his recent book on “the decline of natural law” devotes rather little attention to these “echoes.” See Dennis J. Wieboldt III, *Review of The Decline of Natural Law: American Lawyers Once Used Natural Law and Why They Stopped*, by Stuart Banner, 56 *ESSAYS IN HIST.* 1 (2023).

for instance, J. Joel Alicea began by observing that “something *new* is happening in American constitutional theory [today].”¹¹ “Never before,” Alicea continued, “have so many legal scholars sought to ground constitutional theory in the natural law tradition.”¹² The premise of Alicea’s Vaughan Lecture was, therefore, that the legal profession is experiencing a “natural law moment in constitutional theory.”¹³

By (perhaps inadvertently) channeling a central feature of the legal profession’s constitutional memory—again, that natural law was displaced from the United States during much of the twentieth century—Alicea’s Vaughan Lecture would seem to suggest that today’s “natural law moment” is “new.” But such a conclusion about the novelty of natural law’s prominence in American legal discourse is at odds with the historical record. Indeed, contrary to the dominant view of twentieth-century American legal history that frames natural law as a mere eighteenth- and nineteenth-century curiosity, recent debates about natural law are “iterations, with variation, of discussions that happened in and during the last major revival of classical legal theory in the [United States] and Europe [during the twentieth century] when legal positivism for a time seemed patently inadequate.”¹⁴ Consequently, while Alicea would certainly be right to reject the pejorative claim that natural law is “dead, never to rise again from the ashes,”¹⁵ he would be wrong to assume that today’s natural law moment is particularly new.

In light of the 2024 Vaughan Lecture, this Article historicizes the United States’ latest natural law moment. First, this Article demonstrates that there were at least two natural law moments in twentieth-century American legal history which emerged in response to then-novel developments in the legal academy—namely, the advent of legal realism and, decades later, originalism. Then, this Article reveals that today’s natural law moment shares important (dis)continuities with its predecessors. For example, leaders of the United States’ second natural law moment—like those writing during the first moment, but unlike many today—privileged outcome determinacy over methodological purity. If an interpretive method produced outcomes irreconcilable with the natural law tradition, they argued, that method was itself illegitimate. As this Article reveals, this conviction not only shaped much twentieth-century legal scholarship, but it also informed how natural lawyers engaged with political movements and approached nominations to the U.S. Supreme Court.

In concluding, this Article makes a predictive judgment that today’s natural law moment may be one of reconciliation between natural lawyers on the relative margin of American legal discourse and (positivist) originalists squarely within the judicial and scholarly mainstream. Indeed, as new historical scholarship on the eighteenth- and early nineteenth-century United States continues to uncover natural

11. J. Joel Alicea, *The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL’Y 307, 308 (2024) (emphasis added).

12. *Id.*

13. *See generally id.*

14. Adrian Vermeule, *Enriching Legal Theory*, 46 HARV. J.L. & PUB. POL’Y 1299, 1299 (2023).

15. Quoted in Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEO. L.J. 111, 130–31 (2023).

law's importance to the intellectual environment in which the U.S. Constitution's drafters were situated, future originalists may be led to conclude with increasing frequency that, as a matter of "original meaning," "original intent," or "original law," judges must take seriously the natural law thinking of past generations. Should this prediction prove prescient in time, contemporary originalists will have refashioned a method of constitutional interpretation that was first articulated—albeit in less theoretically nuanced forms—during the United States' last two natural law moments.

II. MOMENT ONE: LEGAL REALISM AND GLOBAL MORAL RELATIVISM

The first organized movement to revive natural law jurisprudence in the United States emerged as legal realism rose to prominence at elite American law schools in the 1920s and 1930s.¹⁶ From the vantage point of early twentieth-century natural lawyers situated outside of those elite institutions, realists appeared to support a novel conception of legal reasoning in which the only test of rightness or wrongness was what a particular individual's standard of morality concluded was the most "just" outcome. In Neil Duxbury's perceptive formulation, "[f]or the realist, according to the popular burlesque, the law is simply what legal officials—usually judges—do when settling disputes; and what judges do, being human, is settle disputes on the basis of their intuitions as to what is right or wrong, just or unjust."¹⁷ Also described as "positivists,"¹⁸ "pragmatists,"¹⁹ and "atheist[s],"²⁰ realists came under intense scrutiny during and after the Second World War because the stakes of morally foundationless legal theory were increasingly evident in the most abominable aspects of the war. Crucially, however, this wartime and postwar criticism of realism refashioned aspects of interwar engagement with realism. As such, the United States' first natural law moment can be said to have begun in the 1920s and extended through the postwar period, taking as its principal concerns first realism's apparent domestic popularity and then the global threat of moral relativism seemingly enabled by positivist philosophical presuppositions.

For both its evangelists and opponents, the precise term "realism" encompassed a variety of related jurisprudential approaches. As John Henry Schlegel once famously quipped, "Realism is just a name. Like 'chicken soup,' it means

16. On realism and its rise to prominence, see, e.g., Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74–94 (1973); STEVENS, *supra* note 9, at 131–72; LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986); MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 9–32, 109–44, 169–268 (1982); STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 83–136 (2000).

17. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 67 (2009).

18. Thomas F. Broden, *The Straw Man of Legal Positivism*, 34 NOTRE DAME LAW. 530, 530 (1959).

19. Ben W. Palmer, *The Natural Law and Pragmatism*, 2 CATH. LAW. 150, 160 (1956).

20. Robert I. Gannon, SJ, *What Are We Really Fighting?*, 11 FORDHAM L. REV. 249, 251–53 (1942).

what we choose to call it.”²¹ Even scholars commenting on realism in the 1960s noted that “[t]here is no infallible method to determine who is a legal realist.”²² One important feature of realist theories, however, was the nature of their own inception: a response to “prevailing understandings about the nature of law and the process of legal reasoning.”²³ At the time, these “prevailing understandings” were connected to the classical notion that “deductive logic and analogic reasoning” can achieve a precise set of legal rules.²⁴ Because, realists asserted, the law is often indeterminate, lawyers must abandon the formalism of Langdellian “legal science” and that of its natural law precursors and instead focus on the practical dimensions of legal controversies.²⁵ By accounting for the ways in which legal rules impact day-to-day realities, realists believed that American jurisprudence could better promote a just society.

Oliver Wendell Holmes, Jr. was the most common subject of natural lawyers’ rebuke, but other positivists perceived to be associated with realism included Roscoe Pound and Karl Llewellyn.²⁶ In a 1941 address, in fact, the Jesuit legal scholar John C. Ford snidely included Pound in a list of fourteen “thinkers in modern law” who led a “great chorus of adulation” for Holmes.²⁷ A professor at, and later dean of, Harvard Law School, Pound was a widely read theorist who published a three-part series of articles in the *Harvard Law Review* (*HLR*) that articulated his understanding of the need for a “sociological jurisprudence.”²⁸ In the first article of this series, Pound observed that natural law jurisprudence seeks “an absolute, ideal law,” as opposed to what the “modern philosophy” of law desires: “to deduce and fix the element of the just in and out of the positive law.”²⁹ An advocate of this “modern philosophy,” Pound’s early *HLR* articles attempted to supplant classical legal reasoning with a jurisprudence that regarded

21. John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 464 (1989).

22. Wilfrid E. Rumble, Jr., *Legal Realism, Sociological Jurisprudence, and Mr. Justice Holmes*, 26 J. HIST. IDEAS 547, 547 (1965).

23. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 474 (1990).

24. *Id.*

25. See Dennis J. Wieboldt III, *The “Crusading Fanatics” of American Law: American Jesuits and the Origins of the Neo-Scholastic Legal Revival, 1870–1960*, 40 J.L. & REL. 81, 82–3 (2025).

26. Indeed, *The New Catholic Encyclopedia*’s 1967 entry on “Jurisprudence” asserted that Holmes was one of the leading figures in a “turn of the century” “positivistic collegium” motivated by a conviction that legal reasoning must be limited to the consideration of only that which can be found within the “‘four corners’ of a written document.” Miriam Theresa Rooney, *Jurisprudence*, in THE NEW CATHOLIC ENCYCLOPEDIA (1967), in CDRD-9-07, John F. Dearden Papers, Univ. of Notre Dame Archives (hereafter UNDA).

27. John C. Ford, SJ, *The Fundamental of Holmes’ Juristic Philosophy* (published and bound typescript, d. Sept. 1941), in box 10, folder 26, Francis B. Biddle Papers, Booth Fam. Ctr. for Special Collections, Geo. Univ. Libr.

28. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence: I. Schools of Jurists and Methods of Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence: II. The Social Utilitarians*, 25 HARV. L. REV. 140 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence: III. Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

29. Pound, *I. Schools of Jurists*, *supra* note 28, at 607.

the law as a “social institution.”³⁰ In socially contextualizing the law, Pound hoped that judges would emphasize the “working of the law,” not the law’s “abstract content.”³¹ Therefore, Pound’s theory promised to replace the natural lawyer’s “inflexible molds” with the modern lawyer’s “guides” for serving the law’s “social purposes.”³²

A law professor at Columbia University and the University of Chicago, Karl Llewellyn sought to use early twentieth-century social science to remake American legal theory. More attracted to empiricism than Pound, Llewellyn made his first major contribution to realism by publishing an article in *The American Economic Review* in 1925.³³ In the first paragraph of this article, Llewellyn asserted that lawyers “need to” turn to social science “for light on the nature and function of law.”³⁴ Unsurprisingly, Llewellyn then framed a sharp dichotomy between the natural lawyer’s deductive metaphysical method and the social scientist’s inductive, quasi-scientific rationality.³⁵ Instead of using philosophy to articulate purportedly natural principles from which specific rules can be deduced, Llewellyn asserted that the dynamics of economic life studied by social scientists ought to inform the “general character of legal rules and institutions.”³⁶

Despite the fact that Pound and Llewellyn became engaged in wide-ranging (and arguably “confrontational”)³⁷ debates about the normative stakes of their respective jurisprudential methods in the 1930s, both were viewed as prominent expositors of a positivist and methodologically inductive legal theory opposed to natural law. For example, the Jesuit legal scholar Francis E. Lucey described Llewellyn in a series of mid-twentieth-century personal notes as believing that “[l]aw is what officials do about disputes,” just as “[r]ealists” believed that “[l]aw is what the courts will do in fact.”³⁸ These understandings of the nature of law were contrasted with the “Natural Law” philosophy of “St. Thomas [Aquinas] and [Francisco] Suarez,” who “define[d] laws as rules of action mandatory in form established and promulgated by competent authority for the common good.”³⁹ In the 1930s, Lucey’s law students at Georgetown University placed Pound and Llewellyn alongside “[Jerome] Frank . . . and men of similar mind” in

30. Pound, *III. Sociological Jurisprudence*, *supra* note 28, at 516.

31. *Id.*

32. *Id.*

33. See Karl N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925). This empiricism made Llewellyn a particularly influential realist because the two other primary academic centers of realist scholarship—Yale Law School and John’s Hopkins University—were also home to empirically minded legal scholars. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 115–210 (1995); KALMAN, *supra* note 16; PURCELL, *supra* note 16, at 80–81.

34. *Id.* at 665.

35. See *id.*

36. *Id.*

37. JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 176–80 (1990).

38. Francis E. Lucey, SJ, *What is Law?* (unpublished typescript, n.d.), box 3, folder 93, Francis Edmund Lucey, SJ, Papers, Booth Fam. Ctr. for Special Collections, Geo. Univ. Libr. (hereafter FELP).

39. *Id.*

course assignments seeking to critique positivist methods of legal reasoning from natural law perspectives.⁴⁰

Roughly a decade after Pound's *HLR* series was published, natural lawyers began to respond to their realist contemporaries. This initial critique of realism questioned how a purely positivist approach to legal reasoning could properly restrain human behavior, and asked whether realism offered an affirmative guide for judicial decision-making, or if it merely empowered judges to use their own standards of social utility to render judicial decisions.⁴¹ Taken together, these interwar forms of engagement with realism provided a foundation for later emphasis on how the wartime and postwar threats of morally foundationless governance (seemingly evident in totalitarianism and communism) should prompt American lawyers to reject positivism and return to natural law.

In 1924, Joseph C. Sampson published one of the earliest natural law critiques of realism.⁴² Sampson argued in the *American Bar Association Journal* that "Legal Fundamentalists" were being opposed by "Legal Modernists."⁴³ While the former group "still looks to the fundamental law for fundamental conceptions of our republican form of government," the latter, he claimed, "expects the constitution to conform itself to every popular whim of reform, which at the moment represents the apparent opinion of the majority."⁴⁴ Acknowledging that "Modernists" had spurred a "complete change in [the] American polity," Sampson proposed that the true authority of law was being subjected to "wide-spread disrespect."⁴⁵ In response to these faults, Sampson asserted that "the source of all law is the Law of Nature, which controls us in spite of ourselves."⁴⁶

Sampson was unique among the critics of realism who participated in this first natural law moment in the sense that he did not write from a self-consciously Catholic (and, more particularly, Thomistic) perspective. Indeed, early and mid-twentieth-century Catholic legal scholars "constituted the single largest body of criticism" directed at realism, and the most influential Catholic critiques of realism were written from distinctly Thomistic perspectives.⁴⁷ In 1925, what would become a decades-long period of debate between Catholic natural lawyers and (largely non-Catholic) positivists about the place of natural law in the American

40. Robert T. Murphy, *A Criticism of the Sociological School of Jurisprudence* (unpublished typescript, n.d.), box 8, folder 283, FELP. Murphy was involved in the planning of a testimonial dinner for Lucey in 1938, so it is almost certain that he was a student at Georgetown in the 1930s. See *Testimonial Dinner to Francis E. Lucey, SJ, Regent of the Georgetown University Law Center* (unpublished typescript, d. Feb. 3, 1938), box 7, folder 268, FELP.

41. These critiques of positivist legal theory remained standard bearing even a half-century later. See, e.g., Stephen Wexler, *The Moral Confusions in Positivism, Utilitarianism, and Liberalism*, 30 AM. J. JURIS. 121 (1985).

42. See Joseph C. Sampson, *The Criminal Law and the Ten Commandments*, 10 A.B.A. J. 520 (1924).

43. *Id.* at 521.

44. *Id.*

45. *Id.*

46. *Id.* at 522.

47. Breen & Strang, *supra* note 10, at 1207; see also Wieboldt, *supra* note 25.

legal tradition began with the publication of Fordham University law professor Walter B. Kennedy's "Pragmatism as a Philosophy of Law."⁴⁸ In this article, Kennedy lamented the failure of Pound and his contemporaries to appreciate that "permanent constitutional principles and natural rights" are the only sure "protection against the hurricane of social wants and demands."⁴⁹ In 1937, Kennedy advanced this critique further in an address before the American Catholic Philosophical Association by arguing that "Scholastic [i.e., Thomistic] Jurisprudence" was under "attack[]" by "Realist Jurisprudence," the latter of which was marked by an "inductive method and . . . functional approach" that rendered it "essentially authoritarian and dogmatic."⁵⁰

The natural law critique of realism—or, more particularly, realism's positivist philosophical orientation—typified in the interwar period by Kennedy's writings was initially premised upon the theoretical conviction that moral relativism would endanger fundamental rights in the natural law's absence. This critique entered into mainstream legal discourse⁵¹ and assumed a global character⁵² during the wartime and postwar periods because of Catholic intellectuals' appealing to everyday Americans concerned about totalitarianism and communism,⁵³ Catholic universities' establishment of natural law journals and academic institutes,⁵⁴ Catholic lawyers' production of voluminous scholarship on natural law,⁵⁵

48. See Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 64 (1925).

49. *Id.* at 77 (emphasis added).

50. *Summary of Address to be Delivered by Walter B. Kennedy at the American Catholic Philosophical Association Section on Jurisprudence* (unpublished typescript, d. Dec. 6, 1937), box 8, folder 293, FELP.

51. Perhaps the best evidence that this critique entered mainstream legal discourse is Jerome Frank's "near-180 degree turn toward natural law" in the 1940s, and former U.S. Attorney General Francis Biddle's 1960 Oliver Wendell Holmes Devise Lectures, which took as their principal subject three Jesuit priests known for their criticisms of realism. See Breen & Strang, *supra* note 10, at 1205–07; Wieboldt, *supra* note 25.

52. See Dennis J. Wieboldt III, *Making Natural Law "Useful in the Solution of Practical Problems": Global Catholicism and Human Rights in The Catholic Lawyer, 1955–1964*, 111 CATH. HIST. REV. 334 (2025) (describing the global orientation of mid-century natural law discourse in the United States).

53. See, e.g., Dennis J. Wieboldt III, *Natural Law for the Laity: A Case Study in Catholic Education on the Airwaves*, in THEOLOGY AND MEDIA(TION): RENDERING THE ABSENT PRESENT 196–209 (Stephen Okey & Katherine Schmidt eds., 2024) (arguing that mid-century Catholic intellectuals effectively used new media technologies to present arguments about natural law to everyday Americans); Dennis J. Wieboldt III, *Natural Law Appeals as Method of American-Catholic Reconciliation: Catholic Legal Thought and the Red Mass in Boston, 1941–1944*, 41 U.S. CATH. HIST. 27 (2023) (describing the connection between fears of totalitarianism and wartime appeals to natural law).

54. See Wieboldt, *Making Natural Law "Useful in the Solution of Practical Problems"*, *supra* note 52 (describing the establishment of St. John's University's *The Catholic Lawyer* in 1955); Dennis J. Wieboldt III, *Ideas With(out) Consequences?: The Natural Law Institute and the Making of Conservative Constitutionalism During the Cold War, 1947–1951*, 42 L. & HIST. REV. 1 (2025) (describing the establishment of the University of Notre Dame's Natural Law Institute in 1947).

55. See, e.g., Breen & Strang, *supra* note 10, at 1260 ("[a]lthough less voluminous than the Realists' own scholarly output, the [natural law writings] of Catholic legal scholars remained substantial").

and Catholic law schools' incorporation of natural law into their curricula.⁵⁶ Importantly, these features of the United States' first natural law moment emerged from a set of philosophically Thomistic presuppositions, leading this moment to have been described as the "neoscholastic legal revival."⁵⁷ A particularly textured sense of this first natural law moment's motivating concerns and normative claims can therefore be identified in the distinctive context of early and mid-twentieth-century Catholic legal education.⁵⁸

At a 1948 meeting of the Jesuit Educational Association, the dean of the University of Santa Clara College of Law proposed that there should be "no pragmatism" in a Catholic law school's curriculum, and also that there "should be a working method of integrating the philosophy of the natural law and the body of the [positive] law."⁵⁹ When placed in their appropriate historical context, it is clear that these claims were informed by interwar debates over legal realism, debates that even were invoked in the establishment of new Catholic law schools during the early twentieth century. Indeed, in a 1929 letter to his religious superior in Rome asking for permission to establish the Boston College Law School, Boston College's Jesuit president argued that the first of four reasons for which such permission should be granted was to "provide a remedy against subversive influences prevailing in Law Schools associated with Secular Institutions in Boston . . . [where], e.g., Natural Law is ignored."⁶⁰

There were various features of Catholic legal education during this first natural law moment that would have distinguished a student's experience at a Catholic law school from that of a contemporary at a non-Catholic law school. For one, most students at Catholic law schools of this period were likely Catholic,⁶¹ in part because some leading secular law schools refused for a time to admit graduates

56. See, e.g., Wieboldt, *supra* note 25 (describing the place of natural law in the curricula of two leading Catholic law schools); John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J.L. HIST. 553 (2011) (arguing that, until the mid-1950s, natural law was an important part of Catholic law schools' curricula).

57. See Wieboldt, *supra* note 25.

58. For a more detailed account (to which I am generally sympathetic), see Breen & Strang, *supra* note 56.

59. *1948 Report on the Meeting of the Representatives of Jesuit Law Schools* (unpublished typescript), box 11, folder 28, Jesuit Educational Association Records, John J. Burns Libr., Bos. Coll. (hereafter JEA Records).

60. James H. Dolan, SJ, to James M. Kilroy, SJ, Jan. 26, 1929, 1001-III-2, Provincia Novae Angliae, Archivum Romanum Societatis Iesu, Rome, IT.

61. To be sure, further empirical evidence would be required to comprehensively evaluate the religious composition of student bodies at Catholic law schools during this period, but three consecutive examples from Boston College are instructive: in 1932, the Law School's student body was 86% Catholic; in 1933, the student body was 80% Catholic; in 1934, the student body was 80% Catholic. See *1932-1934 Enrollment Cards*, box 1, folder 10, Louis J. Gallagher, SJ, President's Office Records, John J. Burns Libr., Bos. Coll. In a survey of thirteen Jesuit law schools conducted two decades after these figures were compiled at Boston College, 71% of students enrolled in Jesuit law schools were found to be Catholic. (For context, 65% of all students educated at Catholic law schools at this time were educated at Jesuit law schools in particular.) See David C. Bayne, SJ, *Survey of Jesuit Law Schools: 1950-1951* (unpublished typescript), box 4, folder 21, Joseph R. N. Maxwell, SJ, President's Office Records, John J. Burns Libr., Bos. Coll. (hereafter JRNMPOR).

of Catholic universities⁶² (which were themselves largely composed of Catholic undergraduates). Additionally, many Catholic law schools sponsored non-curricular events—especially the annual Red Mass—that offered unique opportunities for students to integrate their learning of the law with philosophical and theological ideas (including natural law) that were commonplace in the Catholic intellectual tradition.⁶³ Furthermore, Catholic law schools sponsored religious sodalities through which students could be formed in “sound moral principles and habits . . . with particular reference to their future work as members of the bar.”⁶⁴

By infusing graduates of Catholic law schools with “traits of Christian character and moral stamina,” Catholic leaders believed that “the root of nearly all the problems both political and social of our day and generation” could be undone.⁶⁵ Under the leadership of Francis Lucey, for example, nearly 200 law students at Georgetown were expected to attend sodality meetings in 1950 to hear lectures on “American Communism,” “marriage and divorce,” “Freedom of Speech,” “Negligence in Morals,” and “the Limits of Restitution,” among other topics.⁶⁶ In a survey of thirteen Catholic law schools prepared during the 1950-1951 academic year, the survey’s author concluded that “all the schools but one have an annual retreat in some form for the law students[,] seven schools have an annual retreat obligatory on all Catholics, and three have some form of retreat obligatory on all . . . in six out of the thirteen schools . . . there is a Sodality of Our Lady.”⁶⁷ Notably, the report—which particularly focused on Jesuit law schools—further concluded that “one out of every ten law students [in] the United States is Jesuit educated.”⁶⁸

These non-curricular programs aside, the most common way that Catholic law schools attempted to inculcate respect for natural law in their students during this first natural law moment was by requiring them to enroll in a course in jurisprudence. In fact, Catholic law schools that did not offer this jurisprudence course were chastised for abdicating their responsibilities to assist their graduates in effectively “confront[ing] a world which has little or no sense of values and of the eternal verities.”⁶⁹ Typically required during the first year of legal training, the course in jurisprudence offered students concrete exposure to natural law philosophy. At Georgetown, for instance, Lucey sought for his jurisprudence course to

62. See, e.g., KATHLEEN A. MAHONEY, *CATHOLIC HIGHER EDUCATION IN PROTESTANT AMERICA: THE JESUITS AND HARVARD IN THE AGE OF THE UNIVERSITY* (2003) (explaining the history of Harvard Law School’s refusal).

63. On the history of the Red Mass tradition during this first natural law moment, see Wieboldt, *Natural Law Appeals as Method of American-Catholic Reconciliation*, *supra* note 53.

64. Frederick Evan Crane, *Reverend John X. Pyne, SJ*, 6 *FORDHAM L. REV.* 357, 359 (1937).

65. *Id.* at 359.

66. Francis E. Lucey, SJ, to Robert F. Drinan, SJ, Nov. 29, 1950, box 79, folder 3, Robert F. Drinan, SJ, Papers, John J. Burns Libr., Bos. Coll.

67. Bayne, *supra* note 61.

68. *Id.*

69. James Thomas Connor, *Some Catholic Law School Objectives*, 36 *CATH. EDUC. REV.* 161, 165 (1938).

provide students with an understanding of “the true conception of the entire legal order.”⁷⁰ Although Lucey later earned an American law degree, he had only received graduate degrees in philosophy and theology when he began teaching this jurisprudence course in the 1930s.⁷¹ As such, Lucey presented the natural law philosophy that he had learned during his seminary formation alone as the unifying conceptual apparatus for understanding the American legal tradition.⁷²

Like his colleagues at other Catholic law schools, Lucey channeled the central claims of the United States’ first natural law moment into his classroom teaching—namely, that the American legal tradition cannot be understood apart from its foundations in natural law, and that the failure to respect natural law would make the United States vulnerable to moral relativism (and therefore political despotism). During a 1937 meeting of the American Catholic Philosophical Association, Walter Kennedy articulated this first claim especially clearly in asserting that natural law jurisprudence was “embedded in the common law” of the Anglo-American legal tradition.⁷³ In light of “attacks” against this “common law” at the hands of “Realist Jurisprudence,” the association considered how best to empower Catholic law school students to articulate a natural law-oriented understanding of the American legal tradition.⁷⁴ This prompted the association to produce a five-year plan for authoring a new textbook on natural law that would counteract “[t]he dominance in . . . legal education of the sociological and realist schools.”⁷⁵

The principal interwar and postwar teaching text about natural law jurisprudence was the Jesuit legal scholar Francis P. LeBuffe’s *Outlines of Pure Jurisprudence*.⁷⁶ At a 1949 meeting of Catholic law school administrators, in fact, the keynote address on “The Place and Scope of Jurisprudence in the Law School Curriculum” began by adopting a definition of the term “Jurisprudence” articulated by LeBuffe: “‘A study of the origin, nature, and development of the law,’ provided that, origin and nature include proximate as well as ultimate.”⁷⁷ First published in 1924, the *Outlines* was a collection of LeBuffe’s lectures from his time teaching at Fordham University.⁷⁸ The *Outlines* was used by faculty and students at Catholic law

70. 1939–1940 *Georgetown Law Annual Bulletin*, Record Group 02-08-002.03, box 3, folder 10, Law Center Archives, Geo. Univ. (hereafter GULCA).

71. See 1935–1936 *Georgetown Law Annual Bulletin*, Record Group 02-08-002, box 3, folder 8, GULCA.

72. See Wieboldt, *supra* note 25.

73. 1937 *Annual Meeting Program of the American Catholic Philosophical Association Section on Jurisprudence* (bound typescript), box 8, folder 293, FELP.

74. *Id.*

75. *Summary of Franklin F. Russell Address at the 1937 American Catholic Philosophical Association Section on Jurisprudence Annual Meeting* (unpublished typescript), box 8, folder 293, FELP.

76. See FRANCIS P. LEBUFFE, SJ, *OUTLINES OF PURE JURISPRUDENCE* (1924).

77. 1949 *Meeting of the Representatives of Jesuit Law Schools Program*, box 11, folder 28, JEA Records.

78. See ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 144 (2012).

schools⁷⁹ and suggested for use by professors at non-Catholic law schools.⁸⁰ Importantly, this textbook offered both a philosophical examination of natural law jurisprudence and responded to positivists' claims about issues seemingly inherent in the natural law tradition. For instance, LeBuffe argued that the positivist's interest in the real-world effects of legal rules did not require an abandonment of the natural lawyer's philosophical framework. Rather, LeBuffe proposed, natural law jurisprudence "finds place for traditional stable principles and yet gives wide scope for that pragmatic aspect of law about which Dean [Roscoe] Pound and other jurists are thinking so much these days."⁸¹

Characteristically for a participant in this first natural law moment, LeBuffe engaged with positivist legal theory through the lens of restraint on human behavior. For LeBuffe, because the authority from which law proceeds is "the right to issue to others binding, obligatory regulations," one must properly understand how legal rules ought to restrain human behavior.⁸² This inquiry, of course, raised the question of the nature of civil authority. In response, LeBuffe introduced the Hobbesian belief that the "[s]ource of authority is force," or "[m]ight is right."⁸³ To LeBuffe, the Hobbesian view was "subver[sive]" and "destructive" because it neglected to acknowledge that human beings are "rational creature[s] gifted with faculties which *must* be used in accord with God's will."⁸⁴ On this view, those empowered with legal authority have a general responsibility to prohibit individuals from engaging in behavior that violates natural law precepts. And so, contrary to the realist belief that "the possibilities for [human] progress seem[] endless, limited only by human ingenuity," LeBuffe and likeminded natural lawyers concluded that "natural law principles provide[] both a goal and a limit for social and legal progress."⁸⁵

As other proponents of natural law jurisprudence would later argue, only the natural law tradition appeared to properly articulate the contours of individual natural rights, including the necessary "limitations" placed thereupon by political authorities.⁸⁶ In 1957, for example, the Jesuit legal scholar William J. Kenealy remarked that the right to religious worship "may be qualified by reasonable

79. See, e.g., 1935–1936 *Georgetown Law Annual Bulletin*, *supra* note 71; 1951–1952 *Jurisprudence Course Materials*, box 4, folder 139, FELP; Henry W. Sweeney, *A Critical Analysis of Sociological Jurisprudence* (unpublished typescript, n.d.), box 8, folder 284, FELP; Laurence J. Marhoefer, *Religious Neutrality in Education – What and How* (unpublished typescript, d. May 1964), box 8, folder 287, FELP.

80. See, e.g., Francis E. Lucey to Charles W. Webster [University of Buffalo], Aug. 8, 1951, box 6, folder 232, FELP; Francis E. Lucey to Robert W. Foster [University of Louisville], Mar. 20, 1952, box 6, folder 232, FELP.

81. LeBuffe, *supra* note 76, at 9.

82. *Id.* at 17.

83. *Id.* at 18–19.

84. *Id.* (emphasis added).

85. Feldman, *supra* note 16, at 10.

86. William J. Kenealy, *Scholastic Natural Law - Professor Goble's Dilemma*, 17 CATH. LAW. 300, 306 (1971); see also *infra* note 88 and accompanying text (highlighting the consistency with which scholars have argued that "natural rights" have natural limits).

restrictions as to time, place and circumstance.”⁸⁷ The fact of these limits being “built-in” to a natural lawyer’s conception of “natural rights,” Kenealy argued, did not amount to “linguistic gymnastics,” as positivists had claimed.⁸⁸ Rather, Kenealy proposed that a constitutional democracy’s understanding of natural rights must be circumscribed by natural law precepts. And, importantly, these natural law precepts were to be informed by the writings of “classist[s],” chief among whom was Thomas Aquinas and his (neo-)scholastic intellectual disciples.⁸⁹ In his 1929 letter seeking permission to establish the Boston College Law School, in fact, the president of Boston College specifically identified the writings of “Aquinas” and other scholastics—“[Robert] Bellarmine,” “[Francisco] Suarez,” and “[Francisco] Divittoria”—as the solutions to positivism.⁹⁰

Upon its first publication in 1924, the *Outlines* acknowledged that respect for natural law was necessary to “combat . . . disruptive tendencies and to substantiate our fundamental rights as men and as Americans.”⁹¹ As reflected in the second edition of LeBuffe’s textbook (published in 1938), positivists’ theoretical disrespect for legal authority appeared to portend concrete abuses of political power.⁹² This threat later seemed to be prophetically realized in the Second World War.

Published with co-author James V. Hayes, *Jurisprudence*, as LeBuffe’s textbook was now titled, offered students a revised resource on natural law in light of recent developments. In fact, *Jurisprudence*’s new preface emphasized the worsening condition of legal philosophy: “Man as man, with God-given, natural, pre-State rights is, we are told, an exploded myth. The wreckage from the explosion is in full evidence—and worse seems to await us or at least the remnant of us.”⁹³ This was undoubtedly a reference to the fog of a second global war descending upon the international community, one seemingly predicated on the positivist philosophical presuppositions about which American Catholics had been warning the legal profession since the 1920s. Against the backdrop of the “thunders and

87. Kenealy, *supra* note 86 at 306.

88. *Id.* at 305–07. Notably, some contemporary legal scholars likewise argue that the founding generation understood natural rights (such as the “natural right of religious liberty”) to have “natural limits” at “the points where legitimate state jurisdiction begins, i.e., protecting public peace and the rights of others.” Vincent Philip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POLI. SCI. REV. 369, 374 (2016). See also STEVEN D. SMITH, THE GODLESS CONSTITUTION AND THE PROVIDENTIAL Republic 165–66 (2025) (“[I]f rights are thought to be based on some foundation (such as the natural law or the providential plan), that foundation may help both to ground or support rights and also . . . to limit them . . . [B]oth the supportive and the limiting functions [of rights] are necessary to give rights meaning—to explain what it means and why it matters that something is said to be a ‘right.’”).

89. Kenealy, *supra* note 86, at 301; see also William J. Kenealy, *Whose Natural Law?*, 1 CATH. LAW. 259, 259 (1955).

90. Dolan to Kilroy, *supra* note 60.

91. LeBuffe, *supra* note 76, at 1.

92. See FRANCIS P. LeBuffe & JAMES V. HAYES, JURISPRUDENCE: WITH CASES TO ILLUSTRATE PRINCIPLES (1938).

93. *Id.* at v.

lightnings of the totalitarian States in Europe,” *Jurisprudence* purported to offer a new path forward by reviving an old tradition.⁹⁴

Like the 1924 *Outlines* and other texts that critiqued realism during this first natural law moment, *Jurisprudence* engaged with the positivist philosophical attitude motivating realism through the lens of restraint on human behavior. In a section exploring the “Consequences of the Denial of Natural Law,” for instance, LeBuffe and Hayes remarked that there “can be no inalienable right[s]” apart from natural law.⁹⁵ This was a result of the fact that “the majority is bound to respect” no one but itself in the natural law’s absence.⁹⁶ Later in the same section, LeBuffe and Hayes similarly asserted that “the power of the sovereign is strictly unlimited” within positivist frameworks.⁹⁷ As such, positivism engendered fears of “destroy[ing] every liberty, and giv[ing] up the whole world to absolute despotism.”⁹⁸

LeBuffe and Hayes were not alone in leveraging appeals to political despotism to respond to realism’s positivist philosophical orientation. In 1943, for example, Brendan F. Brown—a Catholic legal scholar who would later serve as dean of The Catholic University of America Columbus School of Law—published an article about how the “sheer force” of militaries must be “restricted in both theory and practice [by] the ethics of the natural law.”⁹⁹ Consequently, Brown concluded his article by arguing that “the whole body of positive law itself, in the national and international domains [must be tested] by the extent of conformity with [the] natural law.”¹⁰⁰ Unsurprisingly, this was an intellectual project set over and against the “challenge to [natural law] jurisprudence by realism in the class-room of the American law school.”¹⁰¹ For Brown, as his contemporaries, the apparent abandonment of natural law in wartime Europe was illustrative of the fact that positivism enabled moral relativism and therefore political despotism because there are no “stable principles” (in the words of the *Outlines*) from which to critique the decisions of political authorities.

Throughout this first natural law moment, natural lawyers increasingly connected theoretical fears of realist jurisprudence to the concrete threats to individual rights posed by devolution into political despotism.¹⁰² Participants in this first natural law moment therefore continued in the postwar period to frame natural law jurisprudence as the only sure way to secure the American legal tradition’s

94. *Id.* at v-vi.

95. *Id.* at 58.

96. *Id.*

97. *Id.*

98. *Id.* at 59.

99. Brendan F. Brown, *Legal Aspects of Truth in a World at War*, 18 NOTRE DAME L. REV. 303, 308 (1943). The following year, John Ford similarly turned to natural law to articulate his understanding of how the United States could fight a “just war.” See John C. Ford, *The Morality of Obliteration Bombing*, 5 THEOLOGICAL STUD. 261 (1944).

100. Brown, *supra* note 99, at 316.

101. *Id.* at 315.

102. See, e.g., Ignatius M. Wilkinson, *The Lawyer and the Defense of Constitutional Democracy in America*, 7 FORDHAM L. REV. 301 (1938).

promise of ordered liberty, often contrasting it with morally boundless majoritarianism. At Loyola University of New Orleans, for example, students enrolled in a legal philosophy course in 1960 would have been asked whether they could defend the proposition that “the test of a morally acceptable legal system is its capacity to satisfy the needs and desires of the [political] majority.”¹⁰³ And, notably, even those outside the Catholic networks constitutive of this first natural law moment seem to have been persuaded that the horrors of the Second World War were illustrative of the dangers associated with eschewing natural law. In a 1957 survey, “Natural Law for Today’s Lawyer,” in fact, one writer in the *Stanford Law Review* decried the “glorification of war and violence” involved in Nazi Germany’s “systematic attempt to exterminate the Jewish people.”¹⁰⁴ For this author, as his Catholic contemporaries, natural law seemed uniquely able to secure immutable individual rights against the countervailing pressures of despotic political majorities.

III. MOMENT TWO: ORIGINALISM AND DOMESTIC MORAL CRISIS

The first organized movement to revive natural law jurisprudence in the United States emerged as legal realism rose to prominence at elite American law schools during the early twentieth century. The domestic and largely theoretical features of this moment’s early years, however, became global and increasingly concrete during the Second World War and in the decade-or-so following. This internal development notwithstanding, Catholic law schools, lawyers, and legal scholars drawing on Thomistic intellectual resources were the most prominent and influential exponents of natural law jurisprudence throughout this first moment. In the 1950s, in fact, Catholic Thomists in the United States continued to advance the normative claims of this first natural law moment as they established academic institutes and journals devoted to natural law scholarship, many of which frequently took as their principal concern the cause of global human rights.¹⁰⁵ In 1949, for example, the University of Notre Dame’s Natural Law Institute featured an address by Carlos Romulo, the president of the United Nations, on the means by which lawyers should counteract overbearing forms of postwar political governance across the world.¹⁰⁶

By the 1960s, the first natural law moment—preoccupied initially with domestic legal realism, and later with global moral relativism—gave way to a second

103. *Loyola University School of Law Philosophy of Law Exam* (unpublished typescript, d. 1960), box 53, folder 9, Louis J. Twomey, SJ, Papers, Special Collections & Archives, J. Edgar & Louise S. Monroe Libr., Loy. Univ. New Orleans.

104. Note, *Natural Law for Today’s Lawyer*, 9 STAN. L. REV. 455, 462 (1957).

105. See *supra* notes 52–57 and accompanying text.

106. See *Press Release 49–192*, Nov. 11, 1949, UDIS 020/04, UDNA. For further discussion of the Natural Law Institute’s mid-century history, see, generally, Wieboldt, *Ideas With(out) Consequences?*, *supra* note 54. On Catholic natural law philosophy and mid-century human rights discourse, see, briefly, Sarah Shortall & Daniel Steinmetz-Jenkins, *Introduction*, in *CHRISTIANITY AND HUMAN RIGHTS RECONSIDERED* 1, 6–7 (Sarah Shortall & Daniel Steinmetz-Jenkins eds., 2020).

natural law moment. The causes of this first natural law moment's ultimate failure to capture the legal academy, bench, or bar (as, contrastingly, positivism did), is a story to which many more pages could be devoted. Nevertheless, it suffices at this juncture to observe that the second natural law moment in twentieth-century American legal history shared some continuities with its predecessor, but also diverged from it in important ways.

Both the first and second natural law moments were led by Catholic lawyers and legal scholars concerned about methodological developments in American jurisprudence. During the first moment, this concern was connected to legal realism, and during the second, it was informed by the emergence of originalism as a response to the perceived excesses of the Warren Court.¹⁰⁷ Moreover, the most influential writings published during the first and second natural law moments were not generally concerned with the technicalities of jurisprudential method, but were rather focused on desired adjudicatory outcomes. Furthermore, the leaders of both the first and second natural law moments sought to win adherents in the academy, bench, and bar, but ultimately failed to effectively penetrate any corner of the legal profession to the extent that had been hoped. Rather, the first and second natural law moments appear to have exerted influence on mainstream academic legal discourse by making natural law scholarship available to a handful of scholars in the elite legal academy whose own work—while often omitting direct references to Catholic legal scholarship—nevertheless grappled with the critiques lodged against positivism in general and realism in particular by Catholic Thomists.¹⁰⁸ Likewise, influential jurists—including the Chief Judge of the U.S. Court of Appeals for the Fifth Circuit and the Chief Justice of the New Jersey Supreme Court—were known to be active participants in academic initiatives at Catholic universities focused on natural law.¹⁰⁹ This is not also to mention the fact that proponents of positivism outside of the legal academy dedicated significant resources to undermining both natural law moments' scholarly leaders. In 1960, for example, former U.S. Attorney General Francis Biddle devoted one-third of his inaugural Oliver Wendell Holmes Devise lectures to criticizing three Jesuit priests who were on the leading edge of the first natural law moment.¹¹⁰

107. The scholarship on the Warren Court is vast, but helpful historical treatments thereof be found in MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1999) and LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

108. Aside from Jerome Frank, perhaps the best example of an elite legal scholar who allied himself publicly with the first natural law moment was Wilbur G. Katz, the dean of the University of Chicago Law School. See, e.g., Wilbur G. Katz, *Natural Law and Human Nature*, 1 CATH. LAW. 70 (1955). Among other prominent legal scholars, Katz and Lon L. Fuller were selected by the University of Notre Dame to serve on the editorial board of its natural law journal in 1955. See Joseph O'Meara to Lon L. Fuller, Oct. 4, 1955, box 5, folder 15, Lon L. Fuller Papers, Hist. & Special Collections Libr., Harv. L. Sch.

109. See *Panel at N.D. Natural Law Institute*, SOUTH BEND TRIBUNE (Dec. 14, 1952), in UDIS 020/06, UNDA; *Notre Dame Welcomes Institute Speakers*, SOUTH BEND TRIBUNE (Dec. 9, 1950), in UDIS 020/05, UNDA.

110. See FRANCIS BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* (1961). For further discussion of the 1960 Holmes Devise Lectures, see, generally, Wieboldt, *supra* note 25. Albeit

Inasmuch as there were similarities between the first and second natural law moments, so too were there important differences. First, the second moment, though generally led by Catholic lawyers and legal scholars, had far less explicit institutional support from the network of Catholic law schools that had grown contemporaneously with the first natural law moment in the United States. As two keen observers of the history of Catholic legal education have persuasively argued, many of the distinguishing (natural law-related) features of Catholic law schools, including the required course in jurisprudence, “began to crack in the mid-to-late 1950s.”¹¹¹ And, as many Catholic universities appeared to drift away from their theological and philosophical foundations during the last few decades of the twentieth century, prominent natural lawyers trained during the first natural law moment often became alienated from the institutions in which they had once studied.¹¹² Moreover, unlike the first natural law moment—which was initially pre-occupied with domestic legal developments, and later increasingly turned its attention to global issues—the second natural law moment remained keenly focused on domestic jurisprudential questions, including and especially abortion.¹¹³

William Bentley Ball was among the most important leaders of the United States’ second natural law moment. A “prominent Roman Catholic layman”¹¹⁴ and 1948 graduate of the University of Notre Dame College of Law, Ball’s legal training was completed under the tutelage of the first natural law moment’s leading apologists, including Clarence E. Manion, the College of Law’s dean from 1941 to 1952.¹¹⁵ Although Ball is known among contemporary historians and legal scholars for his advocacy in *Wisconsin v. Yoder*¹¹⁶ and several other First Amendment cases before the U.S. Supreme Court—in which he served as counsel of record for the religious claimants—Ball was also engaged in consequential

just one example, Biddle’s inaugural Holmes Devise lectures challenge John Henry Schlegel’s claim that critics of realism writing during the first natural law moment were “awful” and often “not so serious” (or even “really frivolous”). If Schlegel’s characterization of realism’s Catholic critics was descriptively accurate, there is little doubt that Biddle would have devoted these high-profile lectures to subjects of greater importance. See SCHLEGEL, *supra* note 33, at 3.

111. Breen & Strang, *supra* note 10, at 1256.

112. For example, one leader of the second natural law moment was rumored not to have received an honorary degree from the University of Notre Dame because his “devotion” to Notre Dame’s “authentic character” was unappealing to “leaders” at the institution “[with] other priorities.” Charles E. Rice, *Remarks in Honor of William Bentley Ball’s Receipt of the 2006 Fidelis Award* (unpublished typescript, d. Jun. 19, 2006), doc. no. 27, William Bentley Ball Subject File, Charles E. Rice Priv. Fam. Collection, South Bend, IN (hereafter CERPFC).

113. See *infra* Section I.

114. Wolfgang Saxon, *William Bentley Ball is Dead at 82; Defended Religious Rights*, N.Y. TIMES, Jan. 18, 1999.

115. See Wieboldt, *Ideas With(out) Consequences?*, *supra* note 54 (describing Ball’s experience at Notre Dame). Manion’s leadership of the first natural law moment was typified by his authorship of a 1949 article on natural law and the founding of the United States. See Clarence Manion, *The Founding Fathers and the Natural Law: A Study in the Source of Our Legal Institutions*, 35 A.B.A. J. 461 (1949). Manion’s article was later reprinted as a small pamphlet by a Notre Dame-affiliated publisher and distributed around the country. See CLARENCE E. MANION, *THE FOUNDING FATHERS AND THE NATURAL LAW* (1950), in PGEN 98/4096, UNDA.

116. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

debates about the conservative legal movement's originalist response to the Warren Court during the last few decades of the twentieth century.¹¹⁷ As such, an understanding of the second natural law moment's distinguishing features can be discerned from an analysis of Ball's writings on originalism after the sunset of the first natural law moment at the beginning of the 1960s. Such an inquiry into Ball's engagement in later-twentieth-century debates about natural law's relationship to the American legal tradition, in fact, reveals that the second natural law moment emerged in response to originalism's growing foothold in the legal profession, was not generally concerned with the technicalities of jurisprudential method, and principally concerned itself with domestic jurisprudential questions.

As Johnathan O'Neill,¹¹⁸ Amanda Hollis-Brusky,¹¹⁹ and other scholars of twentieth-century American constitutional history have detailed at length, originalism is typically understood to have emerged in the 1970s to counteract what William H. Rehnquist once termed "the notion of a living Constitution."¹²⁰ Perhaps the defining moment in the history of originalism, however, occurred in 1985 when U.S. Attorney General Edwin Meese delivered an address before the American Bar Association in which he argued that "a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government."¹²¹ To prevent judges from employing visions of a "living constitution" to expand the scope of unenumerated rights (as members of the Warren Court seemingly had), early originalists and their chief institutional sponsor—the Federalist Society for

117. In addition to *Yoder*, Ball argued *Lemon v. Kurtzman I*, 403 U.S. 602 (1971); *Lemon v. Kurtzman II*, 411 U.S. 192 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Ohio C.R. Comm'n v. Dayton Christian Schs.*, 477 U.S. 619 (1986); and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). During the course of his career, Ball also served as chief counsel in constitutional litigation before at least twelve state supreme courts and eleven lower federal courts. See William Bentley Ball Curriculum Vitae (unpublished typescript, n.d.), doc. no. 403, William Bentley Ball Priv. Fam. Collection, Mechanicsburg, PA. On Ball's legacy as a prominent First Amendment attorney, see, e.g., BRUCE J. DIERENFIELD & DAVID A. GERBER, *DISABILITY RIGHTS AND RELIGIOUS LIBERTY IN EDUCATION: THE STORY BEHIND ZOBREST V. CATALINA FOOTHILLS SCHOOL DISTRICT* (2020); SHAWN FRANCIS PETERS, *THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS* (2003); see also Dennis J. Wieboldt III, "Shall We Settle for Anything Less Than Complete Equality?": *Catholic Power and the First National Fight for Parental Rights in Education, 1947–1962*, 34 REL. & AM. CUL. — (2026), available at: [<https://dx.doi.org/10.2139/ssrn.6064411>] (highlighting the long-term significance of Ball's legal advocacy in *Yoder*).

118. JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005).

119. AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (rev. ed. 2019).

120. William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401 (2006).

121. Lawrence B. Solum, *What is Originalism?: The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 6* (Grant Huscroft & Bradley W. Miller eds., 2011). For the full text of Meese's speech, see Edwin Meese, III, *Speech Before the American Bar Association*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE 23–25* (Steven G. Calabresi ed., 2007).

Law and Public Policy Studies—developed a method of constitutional interpretation founded upon the conviction that “the separation of powers is the best and perhaps only condition under which . . . limited government and individual freedom can be properly realized.”¹²²

To be sure, originalism has routinely come under scrutiny from various normative perspectives, but the practice of originalism—which requires, in one popular formulation, an inquiry into the public meaning of a legal text at the time of its enactment—has, from a descriptive point of view, always been methodologically positivist.¹²³ For originalists then (and mostly now), there is no deductive reasoning from unchanging metaphysical principles required to interpret constitutional text (or, for that matter, any legal text).¹²⁴ And despite the fact that originalists today may acknowledge that “those who wrote and ratified the U.S. Constitution were believers in natural law,”¹²⁵ William Bentley Ball’s first-generation originalist contemporaries in the conservative legal movement do not seem to have entertained the possibility that any natural law inquiry would be required to ascertain the original meaning of a legal text, even if the authors of that text were themselves steeped in the natural law tradition.¹²⁶

Considering that the form of originalism articulated in the 1970s and 1980s was methodologically positivist, Ball and other like-minded natural lawyers trained during the United States’ first natural law moment became deeply skeptical of originalism’s ability to produce outcomes that could be reconciled with natural law principles. As Ball once rhetorically quipped, “[w]hat’s a [c]onstitution [w]ithout [n]atural [l]aw?”¹²⁷ Following their first-generation teachers, natural lawyers writing during the second natural law moment were thus consequentialists of a certain type, frequently arguing, as prominent eighteenth-century lawyers and judges did, that certain interpretations of the law “must be mistaken because of [their] adverse consequences.”¹²⁸ Like the leaders of the United States’ first natural law moment, those most responsible for advancing the second natural law moment’s normative claims therefore too developed a natural law critique of an emerging jurisprudential method—just, in this second case, originalism, not realism.

122. HOLLIS-BRUSKY, *supra* note 119, at 17.

123. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2017); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. UNIV. L. REV. 1455 (2019).

124. Tellingly, in one influential article on the “evolution of contemporary originalist theory,” the term “natural law” never appears. See Solum, *supra* note 121.

125. Brian T. Fitzpatrick, *Originalism and Natural Law*, 79 FORDHAM L. REV. 1541 (2011).

126. John Mikhail has (rightly, in my view) described these dynamics as originalism’s “natural law problem.” See John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 L. & HIST. REV. 361 (2021).

127. William Bentley Ball, *The Tempting of Robert Bork: What’s a Constitution Without Natural Law*, CRISIS (Jun. 1990), in box 8, folder 27, William Bentley Ball Papers, Special Collections of the Univ. Librs., Cath. Univ. of A. (hereafter WBBP).

128. Saikrishna Prakash, *The Inconvenience Doctrine*, 78 STAN. L. REV. 1, 1 (2026).

In the 1980s, Ball castigated the originalist movement in American constitutional theory that emphasized the need for structural and textual restraints on the post-Warren Court judiciary. On the occasion of Sandra Day O'Connor's nomination to the Supreme Court in 1982, in fact, Ball remarked that "Philosophy is everything in dealing with the spacious provisions of the First Amendment, the Due Process Clauses, equal protection and much else in the Constitution."¹²⁹ "It is perfect nonsense to praise a candidate as a 'strict constructionist,'" Ball continued, "when, in . . . vital areas of the Constitution, there is really very little language to 'strictly' construe."¹³⁰ To Ball, meaningfully evaluating a nominee for the Court did not necessarily require an analysis of whether he or she would utilize a particular interpretive method to vindicate the Constitution's "original meaning." Rather, in Ball's view, a nominee was qualified for membership on the Court if he or she possessed a prior philosophical attitude that would enable the nominee to render decisions compatible with natural law precepts.¹³¹ From Ball's perspective, this was especially important in light of the Constitution's significant textual ambiguities—or, what Jud Campbell has recently described as the Constitution's "undertermina[cy]" (especially in the Bill of Rights).¹³² As even contemporary originalists concede, such ambiguities often require interpreters to engage in "constitutional construction."¹³³ In the language of more recent constitutional theorists, therefore, Ball appears to have believed that an interpreter's construction of an ambiguous constitutional provision—such as the Religion Clauses of the First Amendment, in which Ball had a particularly acute interest—must proceed from the presupposition that a construction that violates natural law precepts is invalid.¹³⁴

As a prominent religious liberty litigator, many of Ball's criticisms of originalism were framed within the context of the First Amendment. During a 1987 address, for example, Ball explained how the Supreme Court's 1925 decision in *Pierce v. Society of Sisters*—upholding the right of Catholic parents to send their

129. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE ON THE NOMINATION OF JUDGE SANDRA DAY O'CONNOR OF ARIZONA TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 30 (1982).

130. *Id.*

131. See, e.g., William Bentley Ball, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1, 1992) ("[Robert] Bork says that Professor [Hadley] Arkes and I want the Supreme Court (and presumably all benches) to be filled with judges who share our moral views. Speaking for myself, he is exactly right.").

132. Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 922, 922 (2025).

133. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); see also Stephanie Hall Barclay, *Constructing Constitutional Rights*, 138 HARV. L. REV. F. 140 (2025).

134. The Religion Clauses—which are merely sixteen words in length—are famously illustrative of the Constitution's textual ambiguity. Consequently, the fact that Ball's area of professional expertise was in religious liberty litigation perhaps disposed him particularly well to identifying the challenges that inhere when one attempts to interpret textually ambiguous constitutional provisions. For an example of constitutional construction in the context of the Religion Clauses, see Vincent Philip Muñoz & Kate Hardiman Rhodes, *Constructing the Establishment Clause*, 54 LOY. UNIV. CHI. L. J. 387 (2022).

children to parochial schools—would have been decided differently if the Court had adopted the central jurisprudential tenets of the conservative legal movement.¹³⁵ In this address, Ball first defined a “judicial conservative” as an originalist: “He defines the original intent of the Framers of the Constitution and does not attempt to dream up constitutional provisions which can’t be discovered in the black print of the document—which is another way of saying that he is not a ‘judicial activist.’”¹³⁶ “[T]he ‘judicially conservative’ judge,” Ball continued, “scrupulously avoids any invocation of ‘natural law,’ or some ‘higher law,’ as a source of rights.”¹³⁷

After defining judicial conservatism, Ball asserted that, in the *Pierce* litigation, judicial conservatives would have permitted Oregon to require Catholic children to attend public schools because originalists defer to legislatures absent express constitutional direction otherwise. Indeed, Ball observed, “if you wet the tip of your forefinger and run it down through the text of the Constitution, you will find no provision which says[,] ‘The state shall not monopolize education,’ or ‘nor shall any parent be required to enroll his children in public schools only.’”¹³⁸ In Ball’s view, the Court’s admirable decision in *Pierce* was not originalist because it merely relied “on four words in the Constitution: ‘due process of law.’”¹³⁹ “Here . . . was a ‘liberty’ of which the parents and the schools could not be deprived without due process of law,” he continued.¹⁴⁰ “The Court, in other words, relied upon a **higher law** which it read into the phrase ‘due process of law.’”¹⁴¹

From Ball’s perspective, the Supreme Court’s decision in *Pierce* was a “radical step” (in an admirable way) because it “[got] going to the root of things,” not because it was “innovative,” as he thought originalists would have contrastingly claimed.¹⁴² Like his predecessors in the first natural law moment, Ball believed that the Court’s attentiveness to the foundation of constitutional rights in *Pierce* appropriately vindicated the American legal tradition’s core conviction that the existence of individual rights ought not to be “determined by majority rule.”¹⁴³ “Legislatures accomplish great good in our society,” Ball warned, “but [they] are also capable of great evil.”¹⁴⁴ Only by articulating the scope of constitutional

135. See *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925).

136. William Bentley Ball, *Address at the Twentieth Annual Red Mass, St. Vincent Archabbey, Latrobe, PA* (published typescript, d. 1987), box 8, folder 1, WBBP.

137. *Id.* In another formulation, Ball defined “judicial conservatism” according to “Attorney General Meese[’s]” apparent view that “judges adhere to the original intent of the Founding Fathers and stop trying to legislate.” *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (emphasis original).

142. *Id.*

143. *Id.*

144. *Id.*

rights on the basis of natural law precepts, Ball thought, could American courts truly be faithful to the vision of the “Founding Fathers.”¹⁴⁵

In a 1987 article, Ball continued to criticize the form of originalism then-popular in the conservative legal movement by observing that lawyers and scholars “defending the popular positions of Mr. Meese . . . tend to leave unnoticed the two most basic constitutional issues of all: What is the source of our constitutional rights? and What does the answer to that question imply?”¹⁴⁶ Again, to Ball, the issue inherent in originalist legal theory (and judicial conservatism more broadly) was its obscuring of the fact that natural law is the “source of our constitutional rights.”¹⁴⁷ Of course, Ball believed that this obscuring of the “source of our constitutional rights”¹⁴⁸ portended concrete abuses of the Constitution in American courtrooms.¹⁴⁹ So too, however, was Ball of the view that originalist approaches to the Constitution impoverished the United States’ “constitutional conversation”¹⁵⁰ on account of their positivist presuppositions. Thus, after the Supreme Court constitutionalized a national right to abortion in *Roe v. Wade*,¹⁵¹ Ball and likeminded natural lawyers argued that a constitutional convention should be held to “induc[e] Congress to propose a human life amendment,” even if “Congress steadfastly refused to vote out a proper amendment,” because it was preferable to “have a convention than tolerate the continued constitutional legitimacy of abortion.”¹⁵²

Knowing that the product of any such convention, “[t]o be effective . . . would have to be ratified by 38 states,” Ball and his allied contemporaries were hopeful that inducing a national conversation about the nature of human life would reverse the damage that originalism and other positivist legal theories had wrought on the nation’s understanding of individual rights, as typified in *Roe*.¹⁵³ In so believing, natural lawyers writing during the United States’ second natural law moment found themselves within a long tradition of Catholic intellectuals convicted by a belief that the United States would only survive as a civilization if Americans remained, as the Jesuit political philosopher John Courtney Murray once famously argued, “locked together in argument” about the “American Proposition.”¹⁵⁴ As one perceptive

145. *Id.* This view is reminiscent of that of Ball’s former teacher, Clarence Manion, and some of Ball’s contemporaries, including Hadley Arkes. See MANION, *supra* note 115; HADLEY ARKES, *MERE NATURAL LAW: ORIGINALISM AND THE ANCHORING TRUTHS OF THE CONSTITUTION* 17 (2023) (describing himself as an “original originalist” who taught, “[f]or many years,” on the “American Founding”).

146. William Bentley Ball, *The 200th Anniversary: A Missing Dimension*, CHRIST. LEG. SOC. Q. (1987), in box 6, folder 1, WBBP (emphases omitted).

147. *Id.*

148. *Id.*

149. See, e.g., Ball, *supra* note 131 (arguing that seven “legal positivist[]” Justices on the U.S. Supreme Court erroneously constitutionalized a right to abortion by “resort[ing] to what one can properly call Lower Law or Unnatural Law”).

150. Of course, I borrow here from AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840* (2021).

151. 410 U.S. 113 (1973), *modified*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

152. Charles E. Rice to William Bentley Ball, Dec. 21, 1976, doc. no. 114, CERPFC.

153. *Id.*

154. JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 6 (1960). For further discussion of Murray’s legal thought, see Dennis

commentator has observed, such an argument must ultimately be aimed at the nation's coming to a fuller understanding of natural law:

[A]n important objective of the exchanges conducive to the American experiment and its republican democracy is the making of norms—that is, laws by which the society and its members promote harmonious public life in which policy decisions are made in a just and equitable fashion. Now, it would be relevant here to ask the question: is there some way of thinking about law and the juridical nature of society that would also be a companion of [this] model of public engagement. . .? If we turn once again to [John Courtney] Murray, we find an answer: the natural law.¹⁵⁵

After Robert Bork's failed nomination to the U.S. Supreme Court in 1989, Ball took to the pages of the Catholic magazine *Crisis* to continue condemning originalists for their abandonment of natural law.¹⁵⁶ In this 1990 *Crisis* article, Ball acknowledged first that, to many, the "attractiveness" of originalism was its alleged ability to restrain advocates of "the 'living Constitution'" from expanding and restricting the scope of unenumerated constitutional rights at the behest of temporary social whims.¹⁵⁷ And, second, Ball noted that proponents of originalism advanced "two main [positive] affirmations": "'original understanding'" and "'separation of powers.'"¹⁵⁸ Having articulated these contours of originalist jurisprudence, Ball was able to frame originalism as a failed project that claimed to be "conservative" but actually abandoned the foundation of conservatism itself: natural law.¹⁵⁹ Following the Catholic political theorist Russell Kirk, Ball proposed that the "first canon" of conservative thought is a "belief in a transcendent order, or body of natural law, which rules society as well as conscience."¹⁶⁰ This idea of a "'higher law,'" Ball added, "is profoundly embedded in American constitutional law."¹⁶¹

Like his predecessors who led the United States' first natural law moment, Ball was not generally concerned with the technicalities of jurisprudential method. While reflecting on Bork's failed nomination, for example, Ball looked skeptically upon the claim that an originalist's approach to understanding the Fourteenth Amendment's Due Process Clause could have effectively prevented *Roe*'s "home-made doctrine of

J. Wieboldt III, *Christian History Meets Constitutional History: John Courtney Murray's Augustinian Political Theology of the American Founding*, 51 HORIZONS 134 (2024).

155. Robert John Araujo, *John Courtney Murray, S.J.: A Model of Engagement*, 43 LOY. U. CHI. L. J. i, xi (2011); see also SMITH, *supra* note 88, at 149–50 (describing the importance, to Murray, of the United States' remaining "grounded in a 'public consensus' based on the 'self-evident' truths set forth in the Declaration of Independence").

156. In 1992, Bork acknowledged that Ball's *CRISIS* article, *supra* note 127, took him "to task for excluding natural law as a source of new principles in constitutional adjudication." Robert H. Bork, *Natural Law and the Constitution*, FIRST THINGS (Mar. 1, 1992).

157. Ball, *supra* note 127.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

‘privacy’” from prevailing at One First Street.¹⁶² To Ball, therefore, originalism was indefensible as an interpretive method because it produced *outcomes* that violated natural law precepts. “If a statute is enacted requiring an abortion for any pregnant woman who already has two children,” Ball remarked in his *Crisis* article, “not a syllable in the present Constitution bars enforcement of that law.”¹⁶³ “[I]n the view of [Robert] Bork, and his like-minded supporters,” he added, “if the woman was accorded fair procedures (being served the right papers, given proper service of process, notice, and an adequate hearing) enforcement should proceed.”¹⁶⁴ Years later, in an article for the *Catholic Social Science Review*, Ball expounded further upon how an abandonment of natural law by American lawyers and judges would render the Constitution unable to produce appropriate “*results*.”¹⁶⁵ According to Ball, members of the legal profession are not only “justified in ignoring the positive law in favor of direct appeals to natural law,” but also, “ethically [they] must.”¹⁶⁶

As the influential originalist Randy Barnett observed in 1996, there was a “natural law revival” in the 1990s as a result of Bork’s failed nomination to the Court and now-Justice Clarence Thomas’s later nomination in 1991.¹⁶⁷ In the words of then-Senate Judiciary Committee Chairman Joseph R. Biden, “Clarence Thomas’s nomination to the Supreme Court has generated controversy in part because he endorses a natural law philosophy . . . [though this debate about the proper role of natural law thinking in the interpretation of our Constitution] dates back to the Framers, it is as current as the controversy over Robert Bork’s failed nomination.”¹⁶⁸ Natural law’s political influence on the nominations of Bork and Thomas remains subject to potential historical dispute, but even this cursory review of Ball’s engagement in late-twentieth-century debates about the necessity of natural law for American constitutionalism nevertheless illustrates the distinctive features of the United States’ second natural law moment: that it emerged in response to originalism’s growing foothold in the legal profession, was not generally concerned with the technicalities of jurisprudential method, and remained keenly focused on domestic jurisprudential questions.

Ball is certainly not the only example that could be offered to evidence these features of the United States’ second natural law moment. Indeed, the (then-non-Catholic) legal philosopher Hadley Arkes—whose writings on abortion and other life issues could often be found alongside Ball’s “Constitution Watch” column in the

162. *Id.*

163. *Id.*

164. *Id.* (emphasis omitted).

165. William Bentley Ball, *Natural Law, the Power of Courts, and the Strange Case of Annie Stumpf*, 1 CATH. SOC. SCIENCE REV. (1996), in box 7, folder 21, WBBP (emphasis original).

166. *Id.* But see Ball, *supra* note 131 (arguing that judges must “embrace the saving concept of a transcendent order” while remaining “respectful of the legislative will”).

167. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CON. COMM. 93, 93 (1995).

168. Joseph R. Biden, Jr., *Law and Natural Law: Questions for Judge Thomas*, WASH. POST (Sept. 7, 1991). For further discussion of natural law and Justice Thomas’s nomination, see, e.g., John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471 (1999–2000); see also Jeremy Christiansen, “Give Me That Old-Time Judge Thomas,” THE NEW DIGEST (Jul. 1, 2025) (arguing that Justice Thomas’s “re-embrace [of] the natural law” would provide a “coherent thread” to “connect[] some of his most important views”).

conservative magazine *First Things*—is similarly demonstrative of many of the second natural law moment’s defining features.¹⁶⁹ Ball’s intellectual formation during the heyday of the first natural law moment and most prominent writings on natural law, however, are characteristic of a broader (and somewhat more religiously ecumenical) movement that arose contemporaneously with originalism to critique jurisprudential methods that, unlike natural law, appeared to “provide[] no inherent limits on the power of the state and no basis for determining what is just.”¹⁷⁰ As Ball’s remarks on abortion suggest, methods of legal reasoning that eschewed natural law were credited with creating domestic moral crises, including and especially abortion.¹⁷¹

IV. A “MOMENT” OF RECONCILIATION?

In 2020, *The Atlantic* published an article by Harvard Law School professor Adrian Vermeule entitled “Beyond Originalism.”¹⁷² Not unlike Ball, Vermeule advocated in this oft-cited article for an approach to constitutional reasoning that abandons “original meaning” (or “original intent”) and instead returns to the precepts of the natural law tradition.¹⁷³ If the substantial attention that scholars of originalism have paid to Vermeule’s monograph-length reflections on this subject, *Common Good Constitutionalism*, is any indication, the natural law critique of originalism first articulated during the United States’ second natural law moment appears poised to again challenge the dominant foothold of positivist jurisprudential methods in the American legal profession.¹⁷⁴

169. *But see* Alicea, *supra* note 11, at 312–13 (rightly noting that Arkes is not a Thomist).

170. Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989).

171. *See generally id.*

172. *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020).

173. For popular engagement with Vermeule, see, e.g., Samantha Perri, *The Corporate Origins of Common Good Constitutionalism*, THE FLAW (Jan. 25, 2023); Dan McLaughlin, *Adrian Vermeule’s ‘Common-Good Constitutionalism’: No Alternative to Originalism*, NAT’L REV. (Apr. 2, 2020); Paul Seaton, *Classical Historicism?*, L. & LIB. (Apr. 28, 2022); James R. Rogers, *Policing Common Good Constitutionalism*, L. & LIB. (Apr. 28, 2022); James M. Patterson, *Uncommonly Bad Constitutionalism*, L. & LIB. (Apr. 28, 2022); John O. McGinnis, *Originalism for the Common Good*, L. & LIB. (Apr. 28, 2022); Jesse Marriam, *A Common Good Requires a Common People*, L. & LIB. (Apr. 28, 2022); Michael Smith, *Common Good Constitutionalism Could Influence Judicial Practice*, U.S. L. WEEK (Dec. 7, 2022); Peter Hammond Schwartz, *Originalism is Dead. Long Live Catholic Natural Law*, THE NEW REPUBLIC (Feb. 3, 2021); Richard A. Epstein, *The Problem With ‘Common Good Constitutionalism’*, DEFINING IDEAS (Apr. 6, 2020); Brooke Masters, *Adrian Vermeule’s Legal Theories Illuminate a Growing Rift Among U.S. Conservatives*, FIN. TIMES (Oct. 14, 2022).

174. *See* ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION* (2022). For originalists’ engagement with Vermeule, see, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403 (2022); William H. Pryor, Jr., *Against Living Common Goodism*, 23 FED. SOC. REV. 23 (2022); William Baude & Stephen E. Sachs, *The ‘Common-Good’ Manifesto*, 136 HARV. L. REV. 861 (2023); James C. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary: Fair-Weather Originalism*, 46 HARV. J.L. & PUB. POL’Y 957 (2023); Lawrence B. Solum, *Flourishing, Virtue, and Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL’Y 1149 (2023); Lee J. Strang, *The Common Good as a Reason to Follow the Original Meaning of the United States Constitution*, 46 HARV. J.L. & PUB. POL’Y 1243 (2023); Stephen E. Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL’Y 1271 (2023). For a non-originalist critique of Vermeule, see, e.g., Brian Leiter, *Politics by Other Means: The Jurisprudence of ‘Common Good Constitutionalism’*, 90 U. CHI. L. REV. 1685 (2023).

As with Hadley Arkes's recently published *Mere Natural Law*,¹⁷⁵ Vermeule's *Common Good Constitutionalism* is characteristic of one facet of today's natural law moment—namely, the desire to abandon positivist jurisprudential methods (especially originalism) and return to forms of legal reasoning predicated upon natural law. The approaches taken by Vermeule and Arkes, while resembling that of Ball in many ways, however, only represent one dimension of what Joel Alicea described in his 2024 Vaughan Lecture as our new “natural law moment.” Indeed, of greater interest to Alicea was not this project of *abandonment*, but rather of *reconciliation*.

As best reflected in Alicea's work¹⁷⁶ and that of Jeffrey Pojanowski,¹⁷⁷ Kevin Walsh,¹⁷⁸ and Lee Strang,¹⁷⁹ today's natural law moment is as much indebted to the work of Vermeule and Arkes as it is to those who seek not to abandon originalism in favor of natural law, but rather to justify originalism on the terrain set by Thomas Aquinas and other leading exponents of the natural law tradition. Unlike previous natural law moments, today's “natural law moment” can therefore be understood as proceeding along two parallel paths, both of which claim natural law as a normative authority but reach markedly different conclusions on a variety of jurisprudential questions. As Jonathan Gienapp has argued, in fact, reconciliationists (whom he terms “natural law originalists”) seek to “marry” natural law and originalism “by grounding an originalist interpretation of the Constitution on a natural law account of human flourishing.”¹⁸⁰ According to Gienapp, “natural law critics of originalism” in the mold of Arkes and Vermeule therefore evince a “different conception of the Constitution” than “natural law originalists” in the mold of Alicea, Pojanowski, Walsh, and Strang.¹⁸¹

In Alicea's formulation, today's natural law moment may be “new” in the sense that those engaged in the project of reconciliation seek to employ the natural law tradition in ways that leaders of the United States' two previous natural law moments did not. This notwithstanding, there are other important aspects of today's natural law moment that bear particular resemblances to, and discontinuities with, the United States' first two natural law moments that challenge the “received wisdom”¹⁸² that natural law was displaced so early in the twentieth century that any contemporary interest in natural law renders today's “natural law moment” especially “new.”

175. ARKES, *supra* note 145.

176. See, e.g., J. Joel Alicea, *Constitutional Theory and the Problem of Disagreement*, 173 U. PA. L. REV. 321 (2025); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022); J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145 (2022).

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

178. See, e.g., *id.*

179. See, e.g., LEE J. STRANG, *ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (2019).

180. GIENAPP, *supra* note 5, at 24, 270 n.36.

181. *Id.* at 24, 270 n.37.

182. See Breen & Strang, *supra* note 10, at 1209–10.

Unlike the leaders of the first and second natural law moments, today's reconciliationists do not eschew the technicalities of jurisprudential method in favor of near-exclusive attention to desired adjudicatory outcomes. This is not to say that all participants in the first and second natural law moments were completely oblivious to the technical means by which natural law could be employed in judicial decision-making,¹⁸³ nor that all reconciliationists are oblivious to the outcomes that their methods produce, but rather that today's natural law moment—in its reconciliationist form—is characterized by much greater attention to jurisprudential method than its predecessor moments. In this sense, today's reconciliationists seem likely to follow originalists more broadly who pride themselves on the fact that their chosen *method* of legal reasoning may produce *outcomes* that they personally find objectionable.¹⁸⁴ To natural lawyers of previous generations, however, such lack of concern with the outcomes produced by one's chosen method of legal reasoning was deeply objectionable. As William Bentley Ball once argued,

Some zealous supporters of [Sandra Day] O'Connor[s] nomination . . . [say] that it should be of no significance that a candidate would have an actual and prove[n] record of having voted or acted on behalf of racism or anti-Semitism or any other philosophical point of view . . . These concerns are not dispelled by a recital that the candidate is “personally” opposed to such a point of view. Why the qualifying adverb? Does that not imply that, while the candidate may harbor private disgust over certain practices, he or she does not intend to harbor support of those practices [in his or her judicial decisions]?¹⁸⁵

In the words of one contemporary constitutional theorist, twentieth-century natural lawyers were principally concerned with “what kind of constitutional order [a method of interpretation] would likely bring about or produce.”¹⁸⁶ For today's reconciliationists and (positivist) originalists, by contrast, “arriv[ing] at the final choice of an interpretive theory” should *not* “begin by assessing the consequences” of a decision.¹⁸⁷

183. In a 1938 article, for example, one natural law scholar articulated how, in three different practical circumstances, American judges could invoke natural law. See William P. Sternberg, *Natural Law in American Jurisprudence*, 13 NOTRE DAME L. REV. 89 (1938).

184. Compare, e.g., *Texas v. Johnson* 491 U.S. 397 (1989), with Scott Bomboy, *Justice Antonin Scalia Rails Again About Flag-Burning “Weirdoes”*, NAT. CONST. CTR. (Nov. 12, 2015) (quoting then-Justice Antonin Scalia's quip at a public event that, “If it were up to me, I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag,” and noting that Scalia nevertheless joined the majority opinion in *Johnson* (which defended the constitutionality of flag burning)).

185. HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE, *supra* note 129, at 30.

186. Cass R. Sunstein, *Experiments of Living Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 1177, 1177 (2023); see also CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* (2023).

187. John O. McGinnis, *Unmooring the Constitution*, L. & LIB. (Oct. 26, 2023). Reconciliationists have defended their anti-consequentialism by arguing, among other things, that an eschewal of the Constitution's original meaning would create “coordination problems.” See, e.g., Strang, *supra* note 174, at 1263–64.

Because reconciliationists employ the natural law tradition to justify originalism, today's natural law moment also breaks with its predecessor moments whose leaders instead evaluated the merits of discrete legal questions by engaging in natural law reasoning. For instance, Lee Strang's recent monograph, *Originalism's Promise*, invokes natural law to justify originalism so that originalism can then itself be employed to resolve live legal disputes.¹⁸⁸ For Strang and other reconciliationists, the natural law inquiry thus ends where the actual legal dispute begins.¹⁸⁹ A second implication of this feature of today's natural law moment is that those writing from a reconciliationist posture are able to sidestep many of the moral questions about which leaders of the first two natural law moments were so deeply concerned. Consider, for example, questions about the lawfulness of artificial contraception and abortion. To leaders in the first and second natural law moments, neither artificial contraception nor abortion could be legalized in the United States (by a court or legislature) because both practices contravene natural law precepts. As William Kenealy argued characteristically in a 1948 address, "I urge all not to permit the majesty of our civil law to sanction a perversion of God's natural law [by legalizing artificial contraception]."¹⁹⁰ Reconciliationists, however, seem methodologically poised not to evaluate the lawfulness of contraception, abortion, or any other contested practice through the lens of natural law, but rather as originalists do: by determining whether a right to contraception or abortion would have been understood in the late-nineteenth century to be protected under the Fourteenth Amendment's Due Process Clause (or another constitutional provision).¹⁹¹

Although these differences between today's natural law moment and those of the twentieth century are noteworthy, they do not suggest that our contemporary natural law moment is entirely novel. For example, all three natural law moments have been led (even if to somewhat varying degrees) by Catholic lawyers explicitly drawing on resources within the Catholic intellectual tradition, especially

188. See STRANG, *supra* note 179.

189. But see Jeffrey A. Pojanowski, *Why Should Anyone Be an Originalist?*, 31 DIRITTO PUBBLICO COMPARATO ED EUROPEO O. 583, 585–87 (2017) (suggesting that, "[b]ecause human law exists to serve moral purposes," there may be circumstances in which an official has a moral obligation not to enforce a positive legal norm because it would "sufficiently undermine[] the common good and human rights").

190. William J. Kenealy, *The Birth Control Issue in Massachusetts, Address to the Joint Committee on Public Health of the Massachusetts General Court* (d. Apr. 8, 1948), in PCF 1901, file no. 795, Special Collections of the Univ. Librs., Cath. Univ. of Am.

191. See *Dobbs*, 597 U.S. at 231 (defending the conclusion that there is no constitutional right to abortion because, "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law," and observing that "when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy"); see also Stephen E. Sachs, *Dobbs and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539 (2024) (arguing that *Dobbs* is either an "originalist opinion" or at least "originalism-compliant"). Although reconciliations have not written extensively on abortion and contraception in scholarly forums, some reconciliationists have argued that *Dobbs* was a laudable "victory" for originalism. See, e.g., J. Joel Alicea, *An Originalist Victory*, CTY J. (Jun. 24, 2022).

Thomistic natural law philosophy.¹⁹² As Alicea remarked in his 2024 Vaughan Lecture, “Catholic intellectual thought . . . [has] play[ed] a direct role in the revival of natural law theory within the [legal] academy.”¹⁹³ Additionally, all three natural law moments have in some way been connected to Catholic institutions of legal education in the United States: during the first moment, the natural law critique of realism emerged, in part, from the teaching of natural law at Catholic law schools; during the second moment, William Bentley Ball and many of his contemporaries were intellectually formed during the heyday of natural law in American Catholic legal education; and, during the third moment, the most influential reconciliationist scholarship has been published by Catholic scholars teaching at Catholic law schools. Moreover, like first- and second-generation natural lawyers, reconciliationists today do not only seek to shape academic debates about American legal theory, but also frequently involve themselves in active litigation and public-facing debates about the law. Lee Strang, for example, has been one of the most vocal opponents of state-level efforts to legalize abortion after *Dobbs v. Jackson Women’s Health Organization*.¹⁹⁴ Finally, perhaps the chief continuity between all three natural law moments is that the impetus for their emergence has been then-novel developments in the American legal academy—first in the form of legal realism, and then (twice) in the form of originalism.

V. CONCLUSION

In concluding this study, it bears considering what understanding the United States’ previous natural law moments might portend for contemporary debates about natural law. For one, given that the United States’ first two natural law moments rose to prominence, in part, because of their ability to speak simply and with clarity about pressing moral questions, one wonders whether the reconciliationist approach—which is often quite technical and leaves to originalism the actual evaluation of contested moral questions—will be able to garner popularity in the same way as the approaches of twentieth-century natural lawyers who contrastingly leveraged the specter of domestic and global moral crises to advance their jurisprudential aims inside and outside of the courtroom (and legal classroom).¹⁹⁵ Indeed, many of the first two natural law moments’ contributions to American legal history cannot necessarily be identified in the text of prominent scholarly articles or judicial decisions. Rather, many of these contributions can be discerned from the fact that everyday lawyers and laypeople leveraged the

192. Cf. Alicea, *supra* note 11, at 311 (arguing that a “distinctive feature” of today’s natural law moment is that its theorists “are self-consciously Thomistic in their approach to natural law”).

193. HARV. L. SCH., 2024 Vaughan Lecture: Joel Alicea, “The Natural Law Moment in Constitutional Theory”, at 4:20, (YouTube, Apr. 15, 2024), https://www.youtube.com/watch?v=Mfs18Fm_yGk [<https://perma.cc/433H-JT3K>].

194. See, e.g., Nick Evans & Megan Henry, *One Toledo Law Professor is Helping Drive Two of this Year’s Most Controversial Proposals in Ohio*, OHIO CAP. J. (Jun. 14, 2023) (discussing Strang’s advocacy).

195. See, e.g., Wieboldt, *Ideas With(out) Consequences?*, *supra* note 54.

natural law theories articulated by Clarence Manion and likeminded figures to grasp (what they took to be) the fundamental features of the American constitutional order *contra* totalitarianism and communism, for instance. In Ken Kersch's formulation, this can be understood as one important influence of natural lawyers on the "imagin[ing] of constitutional restoration" during the "heyday of American liberalism"¹⁹⁶ (or, in Aziz Rana's more recent formulation, during the formation of mid-century "creedal constitutionalism").¹⁹⁷

In a similar vein, one may reasonably wonder whether future reconciliationists will conclude more frequently than originalists who eschew natural law that ascertaining the original meaning of a legal text requires an inquiry into how the drafters of that text might have themselves proceeded from natural law priors in their drafting. As Joel Alicea noted during his Vaughan Lecture, "Once you justify originalism, [natural law] does not necessarily require case-by-case moral evaluation, and if it does, the warrant for it would be the original meaning itself, picking up moral standards that have to be applied as a matter of original meaning."¹⁹⁸

Critics of originalism writing from non-natural law perspectives have asserted that originalists err in claiming that "original meaning is wholly separable from Founding-era views on the nature of law."¹⁹⁹ As Jonathan Gienapp has persuasively argued, in fact, originalists are "mistaken" in believing that "[w]hatever eighteenth-century constitutionalists happened to think about natural law, common law, the law of nations, or the relationship between non-positive and positive law, it's separable from the search for original constitutional meaning."²⁰⁰ To the extent that originalists in general and/or reconciliationists in particular will respond to this critique by taking seriously the type of legal reasoning pervasive in the late-eighteenth century, it remains possible that explicit appeals to natural law in the evaluation of discrete legal questions may become increasingly frequent. And this may be especially likely in the context of disputes arising under textually ambiguous constitutional provisions, such as the Religion Clauses, where the "zone" of "constitutional construction" is particularly wide.²⁰¹ In the process of

196. See KEN I. KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM* 297–360 (2019).

197. Though Rana does not discuss natural lawyers in his recently published *The Constitutional Bind*, his definition of "creedal constitutionalism"—which emphasizes a vision of the Constitution as "tangibly distinguishing American political identity from the collectivizing extremes associated with totalitarian states like nazi Germany and the Society Union"—certainly encompasses the specific form of constitutional thought articulated by natural lawyers during the first and second natural law moments. See AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* 12 (2024).

198. "2024 Vaughan Lecture," *supra* note 193, at 44:08.

199. Gienapp, *supra* note 5, at 209.

200. *Id.* But see William Baude & Stephen E. Sachs, *Yes, The Founders Were Originalists*, 36 *YALE J. L. & HUM.* 346, 347 (2026) (arguing that the "original law" of the Constitution should guide constitutional interpretation and explaining that "[o]ur original law included much that can't be found in that text . . . [that] were in no sense in competition with the law the Constitution made, but rather an essential part of the same *corpus juris*").

201. See Muñoz, *supra* note 134 and accompanying text.

constructing such ambiguous provisions, in other words, future lawyers, scholars, and judges may turn with increased frequency to natural law—not unlike William Bentley Ball and other first- and second-generation natural lawyers.²⁰² In some federal courts, such turning to the natural law principles pervasive in the late-eighteenth century has already begun to inform the resolution of discrete legal controversies involving ambiguous constitutional provisions, including the Second Amendment.²⁰³

Notably, contemporary proponents of natural law writing from non-originalist perspectives frequently emphasize the prevalence of natural law reasoning before and during the ratification of the Constitution. Kody Cooper and Justin Dyer, for example, have argued recently that “each tenant [of the Christian natural law tradition] was included among the framing assumptions of American public philosophy in the colonies in the eighteenth century. They were taught as part of the moral philosophy curriculum in the colonial colleges, affirmed by each of the dominant theological traditions in the colonies, and appealed to in public life during the revolutionary and constitutional eras.”²⁰⁴ Likewise, Adrian Vermeule begins *Common Good Constitutionalism* with the historical claim that “American public law suffers from a terrible amnesia” in its forgetting of “its own origins and formative influences in the classical legal tradition.”²⁰⁵ “The consequence of this amnesia,” Vermeule continues, “is that our public law now oscillates restlessly and unhappily between two dominant approaches, progressivism and originalism, both of which distort the true nature of law and *betray our own legal traditions*.”²⁰⁶ Such an emphasis on the prevalence of natural law reasoning during the founding of the United States has also marked the recent scholarship of, among others, Jud Campbell,²⁰⁷ continuing a trend that began in the early and mid-twentieth century of emphasizing the relationship between “The Founding Fathers and the Natural Law,”²⁰⁸ albeit with greater historical sensitivity and analytical rigor.

Ultimately, a more capacious understanding of twentieth-century American legal history that takes seriously our often-forgotten natural law moments raises a prior question: How can today’s most recent iteration of natural law debate exert influence on mainstream legal discourse? During the United States’ first two

202. See *id.*; Kenealy, *supra* notes 86–89.

203. See, e.g., *Range v. Att’y Gen. United States*, 124 F.4th 218 (3d Cir. 2024) (Matey, J., concurring).

204. KODY W. COOPER & JUSTIN BUCKLEY DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* (2022).

205. VERMEULE, *supra* note 174, at 1.

206. *Id.* (emphasis added).

207. See, e.g., Campbell, *supra* note 132; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246 (2017). See also, e.g., SMITH, *supra* note 88, at 154–55 (discussing Thomas Jefferson and the signers of the Declaration of Independence); *id.* at 155 n.11 (citing additional scholarship on “how many of the founders processed natural law through social contract thinking”); *id.* at 159 n.15–17 (similar).

208. See Manion, *supra* note 115 and accompanying text; see also Wieboldt, *supra* note 25.

natural law moments, the normative claims advanced by natural lawyers failed to capture the bench, bar, or academy, making their broader influence perhaps more implicit than explicit in forcing proponents of alternative methods to respond to the critiques offered from natural law perspectives. These first two natural law moments certainly effectuated the intellectual conversions of some who were not previously natural lawyers, but it was this critique from the jurisprudential margin—rather than uptake by a majority of the U.S. Supreme Court or most members of the bar and academy—that enabled the first two natural law moments to exert cognizable influence on the historical development of American jurisprudence. As Ken Kersch has observed with respect to the history of twentieth-century conservative constitutional thought, the leaders of the United States’ first two natural law moments were, in many ways, “voices from the political wilderness” who nevertheless advanced “arguments, frames, and rhetoric [that were] a major force” in the United States.²⁰⁹

Today, the likelihood that appeals to natural law will find their way into the federal reports²¹⁰ or will find fertile soil in most corners of the legal academy is less than it may have been during the first two natural law moments.²¹¹ However, it remains true that a theory of legal reasoning need not be adopted by a majority of anyone to be of historical importance or, for that matter, correct. Perhaps that is the greatest lesson of our natural law moment(s), and one that ought not to be erased from our constitutional memory.

209. KERSCH, *supra* note 196, at vii, xii. *See also* Conor Casey, *Reflections on The Natural Law Moment in Constitutional Theory*, 48 HARV. J.L. & PUB. POL’Y 329, 343 (2025) (acknowledging that previous natural law moments, like today’s, “may pass without influencing the ways in which most lawyers or judges think about constitutional law,” but nevertheless affirming the significance of these natural law moments).

210. *But see* FTC v. Zaappaaz, No. 24-20234, 2025 WL 1682296, at *683 & n.1 (5th Cir. Jun. 16, 2025) (Engelhardt, J., dissenting) (citing Aristotle and Thomas Aquinas for “the rule of non-contradiction,” which is frequently understood as natural law principle); Range, 124 F.4th at 232 (explaining how certain natural law principles “inform ‘our regulatory tradition’” and should shape Second Amendment jurisprudence after *United States v. Rahimi*, 602 U.S. 680 (2024)).

211. *See* Martínez & Tobia, *supra* note 15 (empirically analyzing “what law professors believe about the law” and noting that 73.8% of surveyed American law professors are positivists).