
NOTES

JUSTICE BREYER: THE COURT'S LAST NATURAL LAWYER?

Natural law “still spooks many constitutional lawyers.”¹ Justice Scalia, for example, was once asked: “Does natural law have a place in interpreting the Constitution?”² He perfunctorily responded: “No.”³ Justice Thomas has similarly explained that, while natural law served as a “background in our Declaration” and helped “form[] our Constitution,” it does not have “an appropriate role directly in constitutional adjudication.”⁴ And recent confirmation hearings have abounded with pledges never to impose “personal convictions” upon the law,⁵ lest the judicial hopeful be maligned for her brazen willingness to exercise moral judgment. Yet this rejection of natural law is a fairly modern development. Throughout American history, lawyers and judges operated within the classical legal tradition, routinely relying on natural law until it began to fall out of fashion in the late nineteenth and early twentieth centuries.⁶ Since then, coinciding with the entrenchment of originalism, a commitment to positivism and its legal ontology that “[o]nly the written word is the law”⁷ has characterized jurisprudential theories and pervaded judicial decisionmaking.⁸ Notwithstanding this background, for twenty-eight years, as if through some mysterious crack, the smoke of the natural law entered the U.S. Supreme Court via an unlikely champion: Justice Breyer.

Justice Breyer’s retirement thus represented a loss for the natural law tradition. For many, though, the claim that Justice Breyer was a natural lawyer may seem counterintuitive. He was regarded, after all, as the quintessential “pragmatic liberal,” often supporting outcomes favored by the political left on fiercely contested issues like abortion,

¹ Gerard V. Bradley, *The Constitution’s “Value Judgments,”* LAW & LIBERTY (Mar. 1, 2021), <https://lawliberty.org/natural-law-and-the-constitutions-value-judgments> [https://perma.cc/UP2N-39WH].

² Hoover Institute, *Uncommon Knowledge with Justice Antonin Scalia*, YOUTUBE, at 41:30 (Oct. 30, 2012), <https://youtu.be/DaoLMW5AF4Y> [https://perma.cc/WSE3-DFEW].

³ *Id.* Justice Scalia elaborated, saying: “I apply United States law. I don’t apply natural law. God applies natural law.” *Id.* at 41:40.

⁴ *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 147 (1993) (statement of then-Judge Clarence Thomas).

⁵ *Nominations*, SEN. COMM. ON THE JUDICIARY, at 1:13:12 (Sept. 6, 2017, 10:00 AM), <https://www.judiciary.senate.gov/meetings/08/08/2017/nominations> [https://perma.cc/N5XG-XBJX].

⁶ STUART BANNER, *THE DECLINE OF NATURAL LAW 1–2* (2021).

⁷ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

⁸ See generally Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321 (2021) (discussing originalism’s positivist, yet anachronistic, foundations).

capital punishment, and race relations.⁹ The term “natural law,” by contrast, almost immediately evokes political conservatism, with many people today “think[ing] of natural law as a set of Christian doctrines” that “tends to yield conservative outcomes.”¹⁰ This view, however, is simply a misconception.¹¹ Under a more accurate understanding of natural law and the classical legal tradition, several features of Justice Breyer’s jurisprudence render him a natural lawyer. For example, his “active liberty” approach to judicial review, which emphasized the Constitution’s role in generating a robust exercise of self-governance, accords with the classical legal tradition’s recognition of the government’s broad authority to act for the common good. As an adherent of the Legal Process school, Justice Breyer also interpreted positive law as a natural lawyer would — that is, purposively and teleologically given the understanding that all positive law rests on and is subject to a body of unwritten background principles. Justice Breyer can thus rightly be understood as contributing to our law more than just his signature “downright silly” hypotheticals¹² — sidesplittingly hilarious as they may be¹³ — but also a deeper sense of how value judgments should suffuse judging at the interpretive level.

This unique contribution should not be overshadowed by the politically contentious context that characterized the timing of Justice Breyer’s retirement. Fortunately, efforts to pay tribute to and reflect on his legacy have long been underway — many in the pages of this august *Law Review*.¹⁴ This Note seeks to join these efforts by analyzing Justice Breyer’s jurisprudence through the lens of the classical legal tradition. Specifically, this Note argues that Justice Breyer can profitably be understood as a natural lawyer. Part I provides an overview of natural law, explaining what it is and how it has been used historically, while also dispelling a few common misconceptions. Part II explores Justice Breyer’s jurisprudence, connecting themes that emerge from his writings and opinions to the classical legal tradition. And Part III situates Justice Breyer’s jurisprudence in the context of an era dominated by professed commitments to positivism. In a world where “we are all

⁹ Amy Howe, *Stephen Breyer, Pragmatic Liberal, Will Retire at End of Term*, SCOTUSBLOG (Jan. 26, 2022, 12:46 PM), <https://www.scotusblog.com/2022/01/stephen-breyer-pragmatic-liberal-will-retire-at-end-of-term> [https://perma.cc/Y2TE-M23Z].

¹⁰ BANNER, *supra* note 6, at 3.

¹¹ *See id.*

¹² C-SPAN, *Chief Justice Roberts Tribute to Retiring Justice Breyer*, YOUTUBE, at 00:20 (Apr. 27, 2022), https://youtu.be/S-a3vB71O_s [https://perma.cc/QLQ3-PRAF].

¹³ *See, e.g.*, Transcript of Oral Argument at 42, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (No. 09-60), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/09-60.pdf [https://perma.cc/468E-49VR] (describing an ice-cream-distributing, soft-pillow-carrying, pop-gun-stealing gentleman known as the “pussycat burglar”).

¹⁴ *See In Tribute: Justice Stephen G. Breyer*, 136 HARV. L. REV. 1 (2022); *Essays in Honor of Justice Stephen G. Breyer*, 128 HARV. L. REV. 416 (2014).

originalists”¹⁵ and “textualists now,”¹⁶ Justice Breyer set himself apart with his contrarian willingness to engage forthrightly in the purposive legal reasoning characteristic of natural lawyering. And, although it is possible that a natural lawyer remains on the Court or that one will soon emerge, the current reign of positivist rhetoric is enough to at least raise the question: Was Justice Breyer the Court’s last natural lawyer? Whatever that answer may be, one thing remains clear: although many regard the label “natural lawyer” as “particularly dreaded,”¹⁷ Justice Breyer, for nearly three decades on the Supreme Court, was guilty of natural law. The law is better for it.

I. WHAT IS NATURAL LAW?

It is a bracingly simple idea. As Professor Ronald Dworkin “crude[ly]” describes it, natural law “insists that what the law is depends in some way on what the law should be.”¹⁸ In other words, a natural law theory¹⁹ is one that “makes the content of law sometimes depend on the correct answer to some moral question.”²⁰ This can be contrasted with positivist theories, which equate law with the will of the sovereign and hence sharply distinguish “between the law *that is* and the law *that ought to be*.”²¹ Natural lawyers thus have a broader conception than positivists of what counts as law — one ultimately rooted in a sense of moral realism. Indeed, natural lawyers acknowledge that universal and unchanging moral truths exist, are accessible to human reason, are binding of their own force, and provide a standard against which positive law can be evaluated.²² While natural lawyers debate the precise source of those truths,²³ the basic concept remains the same. As Hamilton put

¹⁵ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

¹⁶ Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), <https://youtu.be/dpEtszFTg> [<https://perma.cc/GGP3-8D7D>].

¹⁷ Ronald A. Dworkin, “Natural” Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982).

¹⁸ *Id.*

¹⁹ For some, even describing natural law as a “theory” is misguided. See, e.g., Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J.L. & PUB. POL’Y 961, 962 (2013). Whereas “theories” are embraced or rejected by reference to their plausibility or implausibility, the ground upon which such a judgment itself is made relies, necessarily, on “the laws or canons of reason” — on natural law. *Id.*

²⁰ Dworkin, *supra* note 17, at 165.

²¹ LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 5 (1940).

²² See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *41 (“This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.”).

²³ See Russell Kirk, *The Case for and Against Natural Law* (July 15, 1993), in HERITAGE FOUND., *HERITAGE LECTURE NO. 469*, at 1 (1993).

it, “there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.”²⁴ These first principles “contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.”²⁵ “[T]hat we do not hold people blameworthy or responsible for acts they were powerless to affect” is one example.²⁶ Although people may disagree as to how that principle cashes out — whether, for example, someone truly was powerless under this or that set of facts — such disagreement does not undermine the truth of the axiom itself.²⁷ Understood in this light, natural law can be regarded as “simply ‘the doctrine of intrinsic reasonableness.’”²⁸

Notwithstanding (or perhaps because of) this initially apparent simplicity, the natural law tradition is much richer and more nuanced than its “bumper sticker” versions.²⁹ In fact, “the label ‘natural law’ can confound as much as it clarifies.”³⁰ To avoid any confusion, a few misconceptions about natural law should first be dispelled. One misconception is the almost instantaneous association of the term “natural law” with political conservatism. While conservatives frequently invoke natural law in contemporary debates over issues like abortion and same-sex marriage, at least historically, natural law “had no political valence one way or the other.”³¹ “To employ natural law did not brand a lawyer as conservative; it merely branded him as a lawyer.”³² In the historical debate over capital punishment, for example, supporters of the death penalty pointed to the inherent justice in reciprocally punishing death with death.³³ Opponents parried by observing that the natural right to life cannot be violated except in self-defense, which is vitiated upon imprisonment when the criminal is no longer an immediate threat to society.³⁴ And natural law was similarly invoked on both sides of many other issues, including property rights,³⁵ the role of women,³⁶ and even slavery.³⁷ Thus, far from yielding outcomes consistent with only one side of an issue, the natural law tradition sometimes exhibits a certain

²⁴ THE FEDERALIST NO. 31, at 189 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁵ *Id.*

²⁶ Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245, 1252 (2012). Another, perhaps more famous, example of such a “self-evident” truth is “that all men are created equal.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁷ Arkes, *supra* note 26, at 1253.

²⁸ BANNER, *supra* note 6, at 16 (quoting LE BARON BRADFORD COLT, ADDRESSES 103 (1906)).

²⁹ Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 118 (2016).

³⁰ *Id.* at 117.

³¹ BANNER, *supra* note 6, at 3.

³² *Id.*

³³ *See id.* at 139.

³⁴ *See id.* at 138–39.

³⁵ *See id.* at 142–45.

³⁶ *See id.* at 145–49.

³⁷ *See id.* at 149–60.

“[t]wo-[s]idedness.”³⁸ But, not unlike originalists and textualists who retain a broader commitment to their method even while disagreeing over its applications,³⁹ natural lawyers maintain their sense of moral realism even while understanding that disagreements are inevitable.

Another common misconception about the classical legal tradition is that it is chiefly concerned with conflicts between the natural law and the positive law. This misunderstanding arises from an excessive fixation on the famous maxim that “an unjust law is no law at all.”⁴⁰ Of course, natural lawyers do subscribe to a form of this proposition.⁴¹ Where some posited enactment plainly conflicts with background principles of natural law, the natural law should prevail.⁴² And historically, natural law was, on rare occasion, employed in this sense. Justice Chase, for example, in the “perennial law school chestnut”⁴³ *Calder v. Bull*,⁴⁴ adopted this view, declaring that an enactment “contrary to the great first principles of the social compact” is merely an “act of the Legislature,” for he “cannot call it a law.”⁴⁵ And yet, as important as it is, this feature of natural law is but “a sideshow.”⁴⁶ In fact, the classical legal tradition accords great respect to positive law, given positive law’s important role in concretizing the broad, underdetermined postulates of the natural law.⁴⁷ To preserve this respect, the classical legal tradition also focuses more on using natural law to *interpret* the positive law than to strike it down.⁴⁸ So, while the maxim “an unjust law is no law at all” plays a role at a high level of theoretical justification, the natural law tradition is much more nuanced than the idea that one’s view of the natural law should always override the positive law.

With these misconceptions addressed, consider now the affirmative case of what the classical legal tradition stands for. Two organizing themes can help with this analysis. The first is the classical legal tradition’s

³⁸ *Id.* at 137. In fact, it was precisely this frequent inability to yield consensus on a given issue that contributed to natural law’s eventual decline. *See id.* at 161–63.

³⁹ *See* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RESV. L. REV. 855, 859–60 (2020) (“Justices Scalia and Thomas are both known as originalists, yet they didn’t agree in every case.”).

⁴⁰ The bow-tied Latin fanboys might prefer the locution “*lex iniusta non est lex.*”

⁴¹ *See* 2 THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 92, art. 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1265–1274) (“A tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law.”).

⁴² The relationship between natural law and positive law can therefore be analogized to the relationship between constitutions and statutes, “in that statutes are deemed void if they are contrary to constitutional provisions.” BANNER, *supra* note 6, at 19.

⁴³ Bradley, *supra* note 1.

⁴⁴ 3 U.S. (3 Dall.) 386 (1798).

⁴⁵ *Id.* at 388.

⁴⁶ Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIAM (Mar. 22, 2022), <https://iustitium.com/pickwickian-originalism> [<https://perma.cc/E7CV-GPE6>].

⁴⁷ Pojanowski & Walsh, *supra* note 29, at 122.

⁴⁸ BANNER, *supra* note 6, at 19.

moral justification for political authority and its concomitant respect for positive law. The second pertains to the methodological implications for judicial decisionmaking that arise from adherence to this tradition.

Begin with the importance of authority and positivity. The classical legal tradition defines law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”⁴⁹ It recognizes that securing a community’s political common good requires stability, coordination, and cooperation.⁵⁰ These goods, in turn, can be fully realized only through authoritative legal institutions, meaning that “there is a moral need for positive law.”⁵¹ Specifically, because natural law “underdetermines questions about a legal order in general and many particular questions to which law must speak,”⁵² there exists a need for what Saint Thomas Aquinas termed *determinatio*, or determination, which is “when the civil authority makes concrete the general principles of natural law.”⁵³ For example, while the natural law principle that certain acts must be punished might be readily discernable, the question of the precise punishment — “should the sentence be set at seven days, or eight days, or perhaps two weeks, or even a month?” — presents a “wide and important area, where law cannot be discovered, but must be made.”⁵⁴ Positively promulgating legal norms of this sort is necessary because “[i]f citizens and officials cannot identify the authority’s determinations, those choices will be inert and fail to serve their purpose.”⁵⁵ So, because adhering to the identifiable positive law helps law achieve its moral task — itself a requirement of natural law⁵⁶ — judges sympathetic to the classical legal tradition should presumptively defer to the public authority’s reasonable determinations about how to promote the common good.⁵⁷

This still leaves open the important question of who is vested with the political authority to positively promulgate these determinations of

⁴⁹ 2 AQUINAS, *supra* note 41, at pt. I-II, q. 90, art. 4; *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403, 416–48 (2022) (book review) (identifying and elaborating on the four elements of Aquinas’s definition).

⁵⁰ *See* Pojanowski & Walsh, *supra* note 29, at 121 (“To flourish, persons and communities need to be able to protect the peace, coordinate their activities, and cooperate on shared projects to promote the common good.”).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Masurius Sabinus, *The Tapestry of Common Good Constitutionalism*, IUS & IUSTITIUM (Aug. 4, 2022), <https://iustitium.com/the-tapestry-of-common-good-constitutionalism> [<https://perma.cc/WPK5-3MEZ>].

⁵⁴ Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 378 (1946).

⁵⁵ Pojanowski & Walsh, *supra* note 49, at 439.

⁵⁶ *See* Jeffrey A. Pojanowski, *Why Should Anyone Be an Originalist?*, 2017 DPCE ONLINE 583, 585–86.

⁵⁷ *See* Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iustitium.com/common-good-constitutionalism-a-model-opinion> [<https://perma.cc/2XNH-D2C2>].

broader natural law principles.⁵⁸ Some scholars of the classical legal tradition answer this by arguing that the “whole body politic is vested with political authority,” at least as an original matter.⁵⁹ This insight might arise from the natural, fundamental equality of all human beings⁶⁰ or from the fact that the common good is necessary to the realization of each person’s *own* good.⁶¹ Either way, “[n]atural law gives political power to the community,” thereby embracing an account of authority rooted in popular sovereignty.⁶² Crucially, this account of popular sovereignty does not necessitate a democratic form of government; a polity is free to determine that some other regime type best conduces to its common good and hence transfer its authority to, say, a monarch.⁶³ But this understanding of popular sovereignty nevertheless acknowledges that democracy serves as a sort of natural baseline, a departure from which requires some positive act.⁶⁴ When the people do, in fact, choose to transmit their authority to distinct governing personnel through democratic forms, they thus preserve for themselves a power “likened to that of the regular owner over his regularly possessed goods.”⁶⁵ This is of particular significance in the United States, where the formal, written Constitution itself actually incorporates popular sovereignty as its animating principle and establishes a republican government in which the people govern through elections.⁶⁶

Turn now to the interpretive and methodological implications of natural law theory. Professor John Finnis — “the most prominent living natural lawyer”⁶⁷ — has observed that the theory is “approximated to by Ronald Dworkin’s account of law and adjudication.”⁶⁸ Under this approach, law comprises “social-fact sources (statutes, precedents, practice, etc.)” on one dimension and “moral standards . . . that the judge

⁵⁸ See J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 24 (2022).

⁵⁹ *Id.* at 26.

⁶⁰ *Id.* at 25 n.190 (citing FRANCISCO SUÁREZ, *De legibus, ac Deo legislatore*, in 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 372–74 (James Brown Scott ed., Gwladys L. Williams et al. trans., Clarendon Press 1944) (1612); ROBERT BELLARMINE, *DE LAICIS OR THE TREATISE ON CIVIL GOVERNMENT* 25 (Kathleen E. Murphy trans., Fordham Univ. Press 1928)).

⁶¹ *Id.* at 25. The common good is, in fact, each individual’s highest good. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 28–29 (2022).

⁶² YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 173 (Univ. of Notre Dame Press 1993) (1951).

⁶³ Alicea, *supra* note 58, at 29; see also VERMEULE, *supra* note 61, at 10.

⁶⁴ SIMON, *supra* note 62, at 172–73 (noting that democracy exists, unlike monarchy and aristocracy, as “a natural institution,” *id.* at 172, that is established “without any positive disposition,” *id.* at 173, by the people).

⁶⁵ *Id.* at 180.

⁶⁶ See U.S. CONST. pmb. (“We the People of the United States . . .”); *id.* art. IV, § 4 (guaranteeing a republican form of government).

⁶⁷ Pojanowski & Walsh, *supra* note 29, at 118 n.118.

⁶⁸ John Finnis, *Natural Law Theories*, STAN. ENCYCLOPEDIA OF PHIL. (June 3, 2020), <https://plato.stanford.edu/entries/natural-law-theories> [<https://perma.cc/D2UT-gE8K>].

can accept as in truth morally sound” on the other.⁶⁹ Considering the foregoing account of the importance of authority and positivity, “[i]n easy cases, where all relevant legal sources point in the same direction and the law’s commands neatly track the common good,” a natural lawyer can simply adhere to any version of positivist interpretation.⁷⁰ But the classical legal tradition is, of course, also concerned with “what to do when the positive law is not self-interpreting.”⁷¹ Due to the limits of the lawmaker’s foresight, hard cases inevitably arise where “positive texts are general, vague, ambiguous, or conflicting.”⁷² In such cases, the natural lawyer’s reliance on a form of Dworkinian fit and justification⁷³ becomes clearer. The judicial task here entails a sort of interpretive harmonization, wherein the judge considers the law’s social-fact sources, identifies the relevant background principles, and settles on a reflective equilibrium between the two justified by the judge’s best account of the requirements of political morality.⁷⁴

This kind of fit and justification is, in fact, how natural law had long been used. To illustrate this point, Dworkin famously relies on *Riggs v. Palmer*,⁷⁵ which involved the question whether a murdering heir could inherit from his victim, his grandfather.⁷⁶ The applicable statutory provision, “if literally construed,” would have allowed the murderer to inherit.⁷⁷ But, invoking the unwritten, “fundamental maxim[]” that “[n]o one shall be permitted to profit by his own fraud,” the court declined to read the statute as extending to the murderer’s situation.⁷⁸ Significantly, as Dworkin observes, *Riggs* “was not about whether judges should follow the law or adjust it in the interests of justice.”⁷⁹ It was about what the positive law itself actually meant, “about what the real statute the legislators enacted really said.”⁸⁰ And *Riggs* is by no means the only example of natural law’s rich historical pedigree; early American case law is replete with a frank reliance on broader natural law principles to determine the meaning of positive law.⁸¹

⁶⁹ *Id.*; see also VERMEULE, *supra* note 61, at 3–4 (distinguishing *lex* and *ius*).

⁷⁰ Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 125–26 (2022).

⁷¹ Casey & Vermeule, *supra* note 46.

⁷² Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL’Y PER CURIAM, Spring 2022, at 4; see also 2 AQUINAS, *supra* note 41, at pt. I-II, q. 96, art. 6.

⁷³ For a more extensive overview of this method, see Dworkin, *supra* note 17, at 169–73.

⁷⁴ See Adrian Vermeule, *Enriching Legal Theory*, IUS & IUSTITIUM (Nov. 4, 2022), <https://iustitium.com/enriching-legal-theory> [https://perma.cc/DF3J-KTNY].

⁷⁵ 22 N.E. 188 (N.Y. 1889).

⁷⁶ *Id.* at 189.

⁷⁷ *Id.*

⁷⁸ *Id.* at 190.

⁷⁹ RONALD DWORKIN, *LAW’S EMPIRE* 20 (1986).

⁸⁰ *Id.*

⁸¹ See BANNER, *supra* note 6, at 18–31; R.H. HELMHOLZ, *NATURAL LAW IN COURT* 142–72

II. JUSTICE BREYER'S NATURAL LAW JURISPRUDENCE

Under this view of the classical legal tradition — where natural law infuses a judge's methodology at the interpretive level — Justice Breyer's guilt as a natural lawyer starts to come into focus. Yet understanding a judge's jurisprudence as a coherent whole can prove a formidable task.⁸² This Part thus embarks on that challenge by first providing some high-level background on Justice Breyer's jurisprudential commitments, next considering Justice Breyer's approach to the administrative state, and finally examining Justice Breyer's moral reasoning in the context of particular cases.

A. *Principles of Justice Breyer's Judicial Philosophy . . .*

Because “expansive essays on legal principles” are often lacking, one usually “has to glimpse [a] Justice's enduring commitments through a cloud of concrete facts and issues.”⁸³ With Justice Breyer, however, in addition to his significant body of judicial opinions, the American public benefits from a richer corpus on which to draw when considering his jurisprudential commitments.⁸⁴ Two salient features emerge from these writings that merit consideration given their parallels to the classical legal tradition. First is the principle of “active liberty” as the animating lodestar for legal interpretation. Second is the influence of Professors Henry Hart and Albert Sacks's Legal Process materials.

Active liberty “refers to a sharing of a nation's sovereign authority among its people.”⁸⁵ To explain this concept, Justice Breyer distinguishes between the liberty of the ancients and the liberty of the moderns.⁸⁶ Whereas the liberty of the moderns is a freedom from the majority, a “freedom to pursue [one's] own interests and desires free of improper government interference,”⁸⁷ the liberty of the ancients is an active one that entails the people's “active and constant participation in collective power.”⁸⁸ Justice Breyer has observed that this understanding

(2015). Examples include *State v. Reilly*, 4 Mo. App. 392, 397 (1877), which applied “[t]he universality of the natural law which deems no one to merit punishment unless he intended evil,” and *Barkley v. State*, 12 S.W. 495, 496 (Tex. Ct. App. 1889), which infused a Texas statute that prohibited pistols near polling places on Election Day with a natural law self-defense principle. The list goes on. See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890); *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

⁸² See Adrian Vermeule, *Reason and Fiat in the Jurisprudence of Justice Alito* 1 (Harvard Pub. L. Working Paper, Paper No. 22-05, 2022), <https://ssrn.com/abstract=4060925> [<https://perma.cc/T762-693D>].

⁸³ *Id.*

⁸⁴ See, e.g., STEPHEN BREYER, ACTIVE LIBERTY (2005); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK (2010); STEPHEN BREYER, THE COURT AND THE WORLD (2015).

⁸⁵ BREYER, ACTIVE LIBERTY, *supra* note 84, at 15.

⁸⁶ *Id.* at 3–7.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* (quoting BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with that of the Moderns* (1819), in POLITICAL WRITINGS 309, 316 (Biancamaria Fontana ed. & trans., 1988)).

of active liberty “bears some similarities to[] the philosopher Isaiah Berlin’s concept of ‘positive liberty,’”⁸⁹ which refers to a kind of self-mastery, a self-imposition of certain wise restraints to make oneself truly free.⁹⁰ And, while this concept applies to individuals, it applies at the collective, societal level as well. To use one scholar’s gloss on this “positive vision of liberty,” it is “the liberty that aims at cultivating the skills and habits that enable people to live together as citizens of a flourishing community.”⁹¹ For Justice Breyer, all of that is more than just highfalutin political theory. Rather, this understanding of active liberty undergirds the Constitution’s democratic objective, which serves as “a source of judicial authority and an interpretive aid” for the judge.⁹²

Part of the judicial task, therefore, is to hold the liberty of the ancients and the liberty of the moderns in a pragmatic balance. The Constitution itself calls for such an approach, given that it sometimes emphasizes ancient liberty by, for example, requiring democratic elections,⁹³ while simultaneously emphasizing modern liberty by, say, incorporating explicit rights protections.⁹⁴ These values must be carefully calibrated since an overemphasis on either one carries with it certain risks.⁹⁵ Overemphasizing ancient liberty risks flirting with tyranny by “plac[ing] too low a value upon the individual’s right to freedom from the majority.”⁹⁶ But overemphasizing modern liberty “runs the risk that citizens, ‘enjoying their private independence and in the pursuit of their individual interests,’ will ‘too easily renounce their rights to share political power.’”⁹⁷ Akin, therefore, to Aristotle’s conception of virtue as the mean between two extremes, judges “must ‘learn to combine the two together.’”⁹⁸ Justice Breyer sought to do exactly that by bending the stick back from excessively libertarian contemporary attitudes and “call[ing] increased attention to . . . the active liberty of the ancients.”⁹⁹

This sense of active liberty has deep roots in the classical legal tradition.¹⁰⁰ The classical view of law arises, in part, from preliberal anthropological assumptions. Whereas “liberal anthropology assume[s] that ‘natural man’ [is] a cultureless creature, existing in a ‘state of

⁸⁹ *Id.* at 137 n.6 (citing ISAIAH BERLIN, *Two Concepts of Liberty* (1958), reprinted in FOUR ESSAYS ON LIBERTY 118, 118–72 (1969)).

⁹⁰ See BERLIN, *supra* note 89, at 131–32.

⁹¹ George McKenna, *Reclaiming a Positive Vision of Liberty*, FIRST THINGS (Aug. 15, 2022) (citing RYSZARD LEGUTKO, *THE CUNNING OF FREEDOM* (2021)), <https://www.firstthings.com/web-exclusives/2022/08/reclaiming-a-positive-vision-of-liberty> [<https://perma.cc/RB6H-RNXU>].

⁹² BREYER, ACTIVE LIBERTY, *supra* note 84, at 6.

⁹³ See *id.* at 25.

⁹⁴ See *id.* at 31–32.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ *Id.* (quoting CONSTANT, *supra* note 88, at 326).

⁹⁸ *Id.* (quoting CONSTANT, *supra* note 88, at 327).

⁹⁹ *Id.*

¹⁰⁰ As Justice Breyer himself observed, “when the Founders referred to ‘public liberty,’ they were referring to “an idea of freedom as old as antiquity.” *Id.* at 3.

nature' noteworthy for the absence of any artifice created by humans,"¹⁰¹ the classical view recognizes "that man is a social and political animal."¹⁰² It is "an imperative of his nature" that "[m]an, always and everywhere, lives in a society."¹⁰³ Because that society "is impossible without law and government[,] . . . [i]t follows that civil authority is natural to man."¹⁰⁴ In other words, it is simply a principle of natural law, logically flowing from man's nature, that a community must possess the liberty to direct both its ends and the means for those ends. As Cicero explained in his treatise on public offices, "the dereliction of the common good is opposed to nature, for it is unjust."¹⁰⁵ The basic point is that ordering governance, including law, to the common good is just a dictate of the natural law.¹⁰⁶ Active liberty implements that understanding, all while harmonizing with the natural law tradition's account of popular sovereignty.

Justice Breyer was also "the leading proponent of the great Legal Process tradition."¹⁰⁷ In emphasizing "statutory purpose and congressional intent,"¹⁰⁸ he was "evidently influenced" by Hart and Sacks's brilliant Legal Process materials.¹⁰⁹ Hart and Sacks famously insisted that judges should assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."¹¹⁰ Justice Breyer adopted that central heuristic, explaining that judges should ask how the "reasonable member of Congress' . . . *would have wanted* a court to interpret the statute in light of present circumstances in the particular case."¹¹¹ And, as some have observed, the parallels between the Legal Process school and the classical legal tradition run deep.¹¹²

The Legal Process approach begins by emphasizing the importance of "institutional settlement."¹¹³ For the reader who hasn't dusted off her

¹⁰¹ PATRICK J. DENEEN, *WHY LIBERALISM FAILED* 67 (2018).

¹⁰² Thomas J. Brogan, *The Natural Law and the Right to Liberty*, in 4 *NATURAL LAW INSTITUTE PROCEEDINGS* 24, 30 (Edward F. Barrett ed., 1951).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 31.

¹⁰⁵ CICERO, *De Officiis*, in *ETHICAL WRITINGS OF CICERO* 1, 185 (Andrew P. Peabody trans., Boston, Little, Brown & Co. 1887).

¹⁰⁶ See Vermeule, *supra* note 74.

¹⁰⁷ *Pragmatic Justice*, *HARVARD L. TODAY* (Jan. 27, 2022) (quoting Dean John F. Manning), <https://hls.harvard.edu/today/pragmatic-justice> [<https://perma.cc/3XQV-6928>].

¹⁰⁸ BREYER, *ACTIVE LIBERTY*, *supra* note 84, at 85.

¹⁰⁹ Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 *YALE L.J.* 1719, 1726 (2006) (book review).

¹¹⁰ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1415 (1958).

¹¹¹ BREYER, *ACTIVE LIBERTY*, *supra* note 84, at 88. Notably, the "reasonable member of Congress" does not necessarily refer to an empirical claim about legislative desires; it is "a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem." *Id.*

¹¹² VERMEULE, *supra* note 61, at 2 ("The so-called 'Legal Process' school, which emphasized law as a purposive ordering, represented a last iteration of the classical legal tradition but in a thin, impoverished version, bereft of the rich background of tradition and principle worked out over many centuries by the *ius commune*." (footnote omitted)).

¹¹³ HART & SACKS, *supra* note 110, at 1–10.

Hart and Sacks in a while, that principle counsels deference to “decisions which are the duly arrived at result of duly established procedures . . . unless and until they are duly changed.”¹¹⁴ By adopting this positivist-sounding principle,¹¹⁵ Hart and Sacks embraced the natural lawyer’s account of authority and positivity, in that both proceed under the theory that the community benefits from having the law settled. Justice Breyer agreed with this; his broader resort to purpose and intent was confined to “difficult cases of interpretation in which language is not clear.”¹¹⁶ In cases “[w]hen the words fit with all the relevant elements of their context to convey a single meaning, as applied to the matter in hand” — ones in which, in a certain sense, “the need for interpretation does not arise”¹¹⁷ — Justice Breyer readily relied on a traditional, text-based toolkit.¹¹⁸ Like the natural lawyer, therefore, Justice Breyer understood that in a certain category of cases, interpretation is “simply historical.”¹¹⁹

But, in hard cases, Justice Breyer, like the natural lawyer, adopted Hart and Sacks’s process of “reasoned elaboration.”¹²⁰ That process begins with the conventional inquiry into language, structure, and history,¹²¹ in an effort to determine the positive law’s “permitted range of choice” for deciding what purpose to attribute to it.¹²² Within that range, like the natural lawyer’s Dworkinian fit and justification, Hart and Sacks urged “a double test,” wherein judges “elaborate” on the legal directive in a way that fits “other established applications of it” and “which best serves the principles and policies it expresses.”¹²³ In eschewing a “literal text-based approach” and instead emphasizing “statutory purpose and congressional intent,”¹²⁴ Justice Breyer registered his agreement with this idea and with the broader reality that “the law rests upon a body of hard-won and deeply embedded principles and policies.”¹²⁵ He understood, moreover, that the positive law “can only be interpreted in accordance with those principles.”¹²⁶ Above all, Justice Breyer’s Legal Process approach, by appreciating the fact that “[l]aw is

¹¹⁴ *Id.* at 4.

¹¹⁵ See Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 29–32 (2013).

¹¹⁶ BREYER, ACTIVE LIBERTY, *supra* note 84, at 85.

¹¹⁷ HART & SACKS, *supra* note 110, at 1411.

¹¹⁸ See BREYER, ACTIVE LIBERTY, *supra* note 84, at 86, 99.

¹¹⁹ 4 JOHN FINNIS, *A Grand Tour of Legal Theory*, in PHILOSOPHY OF LAW: COLLECTED ESSAYS 91, 152 (2011).

¹²⁰ HART & SACKS, *supra* note 110, at 165.

¹²¹ See BREYER, ACTIVE LIBERTY, *supra* note 84, at 86.

¹²² HART & SACKS, *supra* note 110, at 165; see also *id.* at 1413–17.

¹²³ *Id.* at 165.

¹²⁴ BREYER, ACTIVE LIBERTY, *supra* note 84, at 85.

¹²⁵ HART & SACKS, *supra* note 110, at 101.

¹²⁶ VERMEULE, *supra* note 61, at 2; accord BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 84, at 84.

tied to life,”¹²⁷ cohered with the natural law’s command that law be ordered to the common good.

B. . . . As Applied to the Administrative State . . .

Justice Breyer’s approach to administrative law is among the most notable of ways in which his jurisprudence reflects these ideas and accords with the classical legal tradition. Consistent with his love of pragmatically balancing competing values, at the heart of Justice Breyer’s approach to the administrative state was a fascinating tension. On the one hand, Justice Breyer had long been much more skeptical than his colleagues of giving *Chevron*¹²⁸ deference to administrative agencies.¹²⁹ On the other hand, he was “the most deferential justice in practice.”¹³⁰ But this paradox, when understood in light of the classical legal tradition, makes good sense.

Justice Breyer rooted his *Chevron* skepticism in the twin themes of active liberty and Legal Process. From a democratic perspective, active liberty “suggests that *Chevron*’s rule is not absolute but simply a rule of thumb.”¹³¹ This is because it should always be possible “to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves”¹³² — a sentiment that echoes the natural lawyer’s account of political authority’s vesting in the whole body politic. When insulated technocrats purport to exercise that authority, tracing that line to the people becomes more difficult, and the specter of democratic unaccountability looms.¹³³ Justice Breyer channeled these concerns as a Legal Process judge would: by considering the “reasonable member of Congress,” who in some instances might prefer courts not to defer.¹³⁴ This insight even led Justice Breyer to embrace what sounds like a major questions doctrine: “Would our hypothetical reasonable member of Congress have wanted a regulatory agency to decide such questions of major importance?”¹³⁵ In this way, by retaining the ultimate moral justification for political authority — popular

¹²⁷ BREYER, ACTIVE LIBERTY, *supra* note 84, at 100; *see also* HART & SACKS, *supra* note 110, at 113 (describing the law’s purposes of promoting the “benefits of group living[,] . . . maximiz[ing] the total satisfactions of valid human wants,” and “fair[ly] divi[ding]” “the good things of life”).

¹²⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹²⁹ *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) (calling Justice Breyer “the Court’s most vocal critic of a strong reading of *Chevron*”).

¹³⁰ *Id.*

¹³¹ BREYER, ACTIVE LIBERTY, *supra* note 84, at 106.

¹³² *Id.* at 15.

¹³³ *See* Cass R. Sunstein, *From Technocrat to Democrat*, 128 HARV. L. REV. 488, 489 (2014) (discussing the tension between technocracy and democracy).

¹³⁴ BREYER, ACTIVE LIBERTY, *supra* note 84, at 107 (eschewing deference when “Congress is likely to have wanted to decide [the matter] for itself”).

¹³⁵ *Id.*; *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

sovereignty — as a legitimizing outer frame for judicial review of agency action, Justice Breyer reconciled administration with democracy in the way a natural lawyer would.

However, instead of distorting that insight to advance the de-regulatory agenda of the Cato Institute and the New Civil Liberties Alliance, Justice Breyer was, as an empirical matter, among the most deferential of Justices.¹³⁶ In case after case, policing only for minimal rationality and nonarbitrariness, Justice Breyer was animated by the Constitution’s creation of “a *workable* democracy — a democratic process capable of acting for the public good.”¹³⁷ Consistent with Aquinas’s insight about the limits of the lawmaker’s foresight,¹³⁸ Justice Breyer recognized that “[n]o one can foresee all possible applications of a statute” and that, therefore, “[l]egislation inevitably contains ambiguities and gaps.”¹³⁹ The classical legal tradition addresses this inevitability by “look[ing] to the virtue of *epikeia* or ‘the equity of the statute,’” which refers to the case-specific adjustments necessary for harmonizing the literal words of a statute with their broader import, with the statute’s purposes.¹⁴⁰ Because the agency authorized to administer a statute “will likely better understand the practical implications of competing alternative interpretations,” Justice Breyer found that deference was most often appropriate.¹⁴¹ And, in deferring, Justice Breyer effectively treated agencies as the legitimate dispensers of *epikeia*, permitting them to serve as the “living voice of our law.”¹⁴² Giving this kind of respect to reasonable agency determinations of how to “carry[] natural-law obligations into execution”¹⁴³ allowed Justice Breyer to secure the “[l]aw’s authoritative settlement function,” thereby promoting “the second-order moral benefits” of social coordination and cooperation.¹⁴⁴

Overall, Justice Breyer’s role morality led him to conclude that the sort of morally infused, reasoned elaboration called for by the Legal Process school was best left to an institutionally competent authority — in many cases, an administrative agency accountable to the President and thus to the people. By deferring to that authority’s reasonable determinations and choosing not to override them absent patent unreasonableness, Justice Breyer protected the people’s ability to “complet[e] and

¹³⁶ Miles & Sunstein, *supra* note 129, at 826.

¹³⁷ BREYER, ACTIVE LIBERTY, *supra* note 84, at 103 (emphasis added).

¹³⁸ See 2 AQUINAS, *supra* note 41, at pt. I-II, q. 96, art. 6.

¹³⁹ BREYER, ACTIVE LIBERTY, *supra* note 84, at 105.

¹⁴⁰ VERMEULE, *supra* note 61, at 77–78.

¹⁴¹ BREYER, ACTIVE LIBERTY, *supra* note 84, at 105.

¹⁴² VERMEULE, *supra* note 61, at 138.

¹⁴³ Adrian Vermeule, *Natural Law, Welfare Economics, and Administrative Law: Comments on Helmholtz*, MIRROR OF JUST. (May 22, 2017), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2017/05/natural-law-welfare-economics-and-administrative-law-comments-on-helmholtz.html> [https://perma.cc/YDB6-DWW4].

¹⁴⁴ Pojanowski & Walsh, *supra* note 29, at 100, 139.

fulfill[] the natural law project,”¹⁴⁵ all the while remaining mindful that it is *the people’s* authority being wielded.¹⁴⁶

C. . . . And in the Context of Particular Cases.

Of course, times arise when a court, and not an agency, is the appropriate legal actor for engaging in reasoned elaboration, for more thoroughly determining the meaning of positive law at the point of application. Justice Breyer’s candid willingness to rely, in such cases, on moral judgments and on broader background principles is reflected in countless of his nearly half-century’s worth¹⁴⁷ of judicial opinions. Consider three of them.

In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹⁴⁸ the Supreme Court determined that a double layer of for-cause removal protection for inferior officers violated the Constitution’s separation of powers.¹⁴⁹ Specifically, because the power to “appoint[], oversee[], and control[] those who execute the laws” logically flows from the Vesting and Take Care Clauses,¹⁵⁰ the Court found that such a double layer of protection “subverts the President’s ability to ensure that the laws are faithfully executed — as well as the public’s ability to pass judgment on his efforts” — and was, therefore, unconstitutional.¹⁵¹ Justice Breyer’s powerful dissent likewise began with the text of the constitutional provisions at issue.¹⁵² However, Justice Breyer noted, nothing in the literal words said anything about the scope of the President’s removal power; the text alone was “completely ‘silent with respect to the power of removal from office.’”¹⁵³ The contested history similarly failed to “offer significant help,”¹⁵⁴ and the conflicting and off-point precedent failed to “fully answer the question presented.”¹⁵⁵ With the law’s social-fact sources exhausted, the continued existence of indeterminacy required, for Justice Breyer, a resort to another dimension of law, namely, the

¹⁴⁵ Vermeule, *supra* note 143.

¹⁴⁶ For an argument that the classical legal tradition recognizes an energetic administrative state as a protector and enforcer of popular sovereignty, see Adrian Vermeule, *The Many and the Few: On the American Lex Regia*, REVUE INTERNATIONALE DES DROITS DE L’ANTIQUITÉ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4321671 [<https://perma.cc/W8XS-43GV>].

¹⁴⁷ See Press Release, U.S. Sup. Ct., Statements from the Supreme Court Regarding Justice Stephen G. Breyer’s Retirement (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-27-22b [<https://perma.cc/7EP5-3G4W>] (statement of Chief Justice John G. Roberts, Jr.) (honoring Justice Breyer’s “42 years as a federal judge — 27 as a Member of this Court”).

¹⁴⁸ 561 U.S. 477 (2010).

¹⁴⁹ See *id.* at 483–84.

¹⁵⁰ *Id.* at 492 (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834)).

¹⁵¹ *Id.* at 498.

¹⁵² See *id.* at 515–16 (Breyer, J., dissenting) (quoting U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. II, § 3; *id.* art. III, § 1).

¹⁵³ *Id.* at 516 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839)).

¹⁵⁴ *Id.* at 517.

¹⁵⁵ *Id.* at 518.

moral principles that guide the attribution of meaning to an underdetermined text.¹⁵⁶ Justice Breyer therefore engaged in a functional analysis, weighing the tension between the President's ability to efficiently exercise the executive power with a polity's liberty to structure that power's administration.¹⁵⁷ Consistent with his active liberty approach to judicial review, Justice Breyer ultimately determined that undermining the removal protections would "create an obstacle, indeed pose a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create."¹⁵⁸ Overall, though he may have described this analysis as "nontextual,"¹⁵⁹ Justice Breyer was all along reasoning in the way a natural lawyer would precisely to determine the meaning of underdetermined texts.

Consider a similarly general, vague, and opaque text: "Congress shall make no law . . . abridging the freedom of speech."¹⁶⁰ What does that text mean for the people's ability to prohibit the sale of violent video games to children? In assessing one such prohibition in *Brown v. Entertainment Merchants Ass'n*,¹⁶¹ the Court held that depictions of violence did not fall into one of the traditional categories exempted from First Amendment protection.¹⁶² Justice Breyer, dissenting, would have found the statute constitutional, given that the relevant "category" for him was not "depictions of violence," but rather the "protection of children."¹⁶³ By framing the scope of the free speech right by reference to the law's broader purposes in this way, Justice Breyer implicitly adopted a classical conception of rights.¹⁶⁴ Whereas rights, today, are often regarded as individually held "trumps" against government action,¹⁶⁵ the classical view understands rights as corollaries of justice, themselves shaped and molded by the law's purposes, by principles of natural law.¹⁶⁶ Rights, understood in this sense, are subject to "internal specification and determination," which gives content to their "proper boundaries or limits."¹⁶⁷ When California sought to protect children from "gruesomely violent video game[s]," therefore, Justice Breyer recognized that the implicated free speech right must be evaluated in light of the

¹⁵⁶ See *id.* at 518–19 (considering "how a particular provision, taken in context, is likely to function," *id.* at 519).

¹⁵⁷ See *id.* at 523–24.

¹⁵⁸ *Id.* at 549.

¹⁵⁹ *Id.* at 519.

¹⁶⁰ U.S. CONST. amend. I.

¹⁶¹ 564 U.S. 786 (2011).

¹⁶² *Id.* at 792–93, 795–96.

¹⁶³ *Id.* at 841 (Breyer, J., dissenting).

¹⁶⁴ See VERMEULE, *supra* note 61, at 165–69.

¹⁶⁵ See Jamal Greene, *The Supreme Court, 2017 Term — Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30, 32 (2018).

¹⁶⁶ See VERMEULE, *supra* note 61, at 166.

¹⁶⁷ *Id.* at 167.

law's purpose.¹⁶⁸ Given the social-scientific evidence about the negative effects of exposure to such graphic violence, coupled with the low value of the depictions at issue, Justice Breyer found the statute straightforwardly reasonable.¹⁶⁹ Like a natural lawyer, therefore, Justice Breyer advanced an understanding of free speech informed by background principles of justice and the people's ability to place those limits on themselves that make them truly free.

Finally, Justice Breyer's dissent in *Printz v. United States*¹⁷⁰ is emblematic of his willingness to engage with foreign law, the law of nations, as a source for determining legal meaning.¹⁷¹ In *Printz*, the majority relied on principles of federalism and dual sovereignty to hold unconstitutional a federal requirement that state officials enforce a national background-check system for handgun distribution.¹⁷² Justice Breyer, however, in "reconcil[ing] the practical need for a central authority with the democratic virtues of more local control," would have found it helpful to consider the practices of "[a]t least some other countries, facing the same basic problem."¹⁷³ Though mindful of the "relevant political and structural differences between their systems and our own," such "comparative experience" would have led Justice Breyer to read the Constitution differently.¹⁷⁴ And, while such reliance on foreign law has been sharply derided in recent years,¹⁷⁵ the law of nations has a more robust pedigree in the classical legal tradition.¹⁷⁶ Aquinas saw the law of nations as a sort of "secondary" form of natural law, in that it vacillates "somewhere between the natural law and the human (positive) law."¹⁷⁷ Indeed, the law of nations possesses an element of positivity, in that it is grounded in "historically existing conditions, in the mutual agreement among men, in human consent, or in a common determination caused by a certain necessity or by the utility or idea of the common

¹⁶⁸ *Ent. Merchs. Ass'n*, 564 U.S. at 848, 850 (Breyer, J., dissenting); see also Martha Minow, *The Big Picture: Justice Breyer's Dissent in Brown v. Entertainment Merchants Association*, 128 HARV. L. REV. 469, 476 (2014).

¹⁶⁹ *Ent. Merchs. Ass'n*, 564 U.S. at 851–55, 857 ("[W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her?" *Id.* at 857.).

¹⁷⁰ 521 U.S. 898 (1997).

¹⁷¹ See generally BREYER, *THE COURT AND THE WORLD*, *supra* note 84.

¹⁷² See *Printz*, 521 U.S. at 902, 935.

¹⁷³ *Id.* at 976 (Breyer, J., dissenting).

¹⁷⁴ *Id.* at 977.

¹⁷⁵ See, e.g., Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004) (finding "modern foreign legal materials" to be "hardly ever" "relevant to constitutional adjudication" (emphases omitted)), in 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004).

¹⁷⁶ VERMEULE, *supra* note 61, at 3 (describing "the *ius gentium* (the law of nations or peoples)" as a relevant legal source within the classical tradition).

¹⁷⁷ See Anton-Hermann Chroust, *The "Ius Gentium" in the Philosophy of Law of St. Thomas Aquinas*, 17 NOTRE DAME LAW. 22, 26 (1941).

good to be fostered thereby.”¹⁷⁸ But, because those positivist considerations can reflect broader consistencies across communities, they serve as useful evidence of how a community can structure its partaking in the moral absoluteness of natural law.¹⁷⁹ Justice Breyer’s insistence that courts should not “ignore the world,”¹⁸⁰ therefore, corresponds with the natural lawyer’s reliance on a wider variety of legal categories over a single-minded, wooden consideration of positive text alone.

III. WITHIN A POSITIVIST ERA

We are all positivists now. Recognizing the commitments to positivism, to literal text alone, that pervade contemporary jurisprudence allows the distinctiveness of Justice Breyer’s natural lawyering to be better appreciated. Today’s regnant positivism began in earnest with the American legal culture’s rejection of natural law in the late nineteenth and early twentieth centuries.¹⁸¹ At that time, Justice Oliver Wendell Holmes routinely heaped derision upon natural law,¹⁸² dismissing the idea of a “brooding omnipresence in the sky.”¹⁸³ Ordinary lawyers, too, scoffed at what they saw as the classical legal tradition’s faulty logic “[t]hat there prevailed in Babylon [t]he law of motor cars.”¹⁸⁴ And *Erie Railroad Co. v. Tompkins*¹⁸⁵ hammered a nail in natural law’s coffin when it “overruled [that] particular way of looking at law.”¹⁸⁶

More recently, the rise of constitutional conservatism has culminated in a convergence on methodological moral reticence.¹⁸⁷ In an effort “to oppose constitutional innovations by the Warren and Burger Courts,” the conservative legal movement embraced originalism to “appeal[] over the heads of the justices to the putative true meaning of the Constitution itself.”¹⁸⁸ But this theory was quickly eclipsed by an “overriding *desideratum*” of “strict moral-philosophical abstinence.”¹⁸⁹ The conservative legal movement’s remedy to what it saw as incorrect judicial philosophizing was, in other words, simply to retreat from judicial

¹⁷⁸ *Id.* at 27.

¹⁷⁹ *See id.*

¹⁸⁰ Stephen Breyer, *America’s Courts Can’t Ignore the World*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360> [<https://perma.cc/QD47-6HEE>].

¹⁸¹ *See* BANNER, *supra* note 6, at 1.

¹⁸² Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (asserting that natural lawyers suffer from a “naïve state of mind”).

¹⁸³ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹⁸⁴ Harry R. Blythe, *A Theory*, 22 GREEN BAG 193, 193 (1910).

¹⁸⁵ 304 U.S. 64 (1938).

¹⁸⁶ *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

¹⁸⁷ *See* Gerard V. Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1325–26 (2021).

¹⁸⁸ Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [<https://perma.cc/HTQ8-KKRX>].

¹⁸⁹ Bradley, *supra* note 187, at 1325–26.

philosophizing altogether.¹⁹⁰ Eventually, constitutional conservatives won the rhetorical battle, resulting in an environment in which judges of all stripes shudder at the thought of personal-preference imposition¹⁹¹ and embrace the supposed neutrality of originalism and textualism instead.¹⁹²

These commitments to methodological moral abstinence have appeared in numerous Supreme Court opinions.¹⁹³ For concreteness, consider *Van Buren v. United States*¹⁹⁴ as just one example of the pervasive judicial devotion to positive law alone. This statutory interpretation case involved a police sergeant who was charged with a felony for using his patrol-car computer to run an unauthorized license-plate search.¹⁹⁵ The relevant statute imposes stiff criminal penalties on anyone who intentionally “exceeds authorized access” to a computer and thereby obtains certain information.¹⁹⁶ And an individual “exceeds authorized access” when he obtains information in the computer that he “is not entitled so to obtain.”¹⁹⁷ The basic issue before the Court was choosing between one of two proposed interpretations: The criminal defendant, naturally, urged a narrower reading that would essentially extend liability only to computer hackers.¹⁹⁸ The government, by contrast, urged a broader reading that would cover all those who “have improper motives for obtaining information that is otherwise” already available to them.¹⁹⁹ The latter interpretation, significantly, would have criminalized “a breathtaking amount of commonplace computer activity,” such as sending personal emails or reading the news on a work computer.²⁰⁰

In deciding this issue, a natural lawyer might have followed the approach Justice Breyer laid out in his *Badgerow v. Walters*²⁰¹ dissent, which served as a sort of valedictory to the Legal Process school. There, Justice Breyer advised that “it is often helpful to consider not simply the

¹⁹⁰ *Id.* at 1326.

¹⁹¹ See, e.g., Lincoln Caplan, *Justice Elena Kagan, In Dissent*, HARV. MAG., Nov.–Dec. 2022, at 28, 34 (“Judges create legitimacy problems for themselves . . . when they’re imposing their own personal preferences.” (quoting Justice Kagan)).

¹⁹² See, e.g., Conor Casey & Adrian Vermeule, *If Every Judge Is an Originalist, Originalism Is Meaningless*, WASH. POST (Mar. 25, 2022, 10:54 AM), <https://www.washingtonpost.com/outlook/2022/03/25/if-every-judge-is-an-originalist-originalism-is-meaningless> [<https://perma.cc/58T9-MRFS>] (describing Justice Jackson’s commitment to original public meaning).

¹⁹³ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (“Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral.”); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (rejecting a “raw consequentialist calculation” in favor of a grammar lesson about the indefinite article “a”).

¹⁹⁴ 141 S. Ct. 1648 (2021).

¹⁹⁵ *Id.* at 1653.

¹⁹⁶ 18 U.S.C. § 1030(a)(2), (c).

¹⁹⁷ *Id.* § 1030(e)(6).

¹⁹⁸ See *Van Buren*, 141 S. Ct. at 1654.

¹⁹⁹ See *id.* at 1652, 1654–55.

²⁰⁰ *Id.* at 1661.

²⁰¹ 142 S. Ct. 1310 (2022).

statute's literal words, but also the statute's purposes and the likely consequences of our interpretation."²⁰² "[O]f course," Justice Breyer acknowledged, the interpretation of a statute must "be *consistent* with its text."²⁰³ But what that text itself actually means is determined not by construing the "words 'in a vacuum'" but by considering "context, structure, history, purpose, and common sense."²⁰⁴ Applied to *Van Buren*, one might reasonably conclude that both proposed interpretations fit with the literal text — that is, nothing about the bare words "exceeds authorized access" and "entitled so to obtain" renders either interpretation offensive to the English language.²⁰⁵ For a judge confronted with this stalemate, a frank consideration of practical consequences would prove illuminating: one interpretation converts anyone who has ever played solitaire at work into a criminal; the other criminalizes computer hacking. Coupling this observation with the background principle of lenity — the expectation "that words which mark the boundary between criminal and non-criminal conduct should speak with more than ordinary clearness"²⁰⁶ — a natural lawyer might decide that it would be unreasonable for Congress to attach severe criminal penalties to such innocuous conduct and that, hence, only the narrower reading of the statute ought to be enforced.

But, alas, such "results-oriented jurisprudence" provokes at least some finger wagging at Federalist Society events.²⁰⁷ Justice Barrett, writing for the Court, declined to go down that route. Though she reached that same outcome — and thus earned Justice Breyer's vote — the methodological distinction is revealing. Specifically, Justice Barrett undertook a lengthy exegesis of the two-letter word "so," embracing a highly formalistic version of textualism that was careful to eschew any consideration of broader background principles.²⁰⁸ Citing a full

²⁰² *Id.* at 1322 (Breyer, J., dissenting).

²⁰³ *Id.* at 1329 (emphasis added).

²⁰⁴ *Id.* (quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014)).

²⁰⁵ Perhaps the simple fact that the Court split as to the statute's "ordinary" or "plain" meaning is evidence that the text's meaning is not so "ordinary" or "plain" after all. Compare *Van Buren*, 141 S. Ct. at 1655 (the text's "ordinary usage" supports *Van Buren*), with *id.* at 1664 (Thomas, J., dissenting) (the text's "plain meaning" supports the government).

²⁰⁶ HART & SACKS, *supra* note 110, at 1413.

²⁰⁷ See William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 26 (2022).

²⁰⁸ See *Van Buren*, No. 19-783, slip op. at 5–10 (discussing "so" across six pages). Of course, some have defended this sort of judicial consideration of only semantic context as itself animated by moral reasons. See, e.g., Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 296–307 (2020) (arguing that formalistic textualism serves Article III–based values). On such accounts, although moral judgments play a role at a high level of justification, they require judges to "abide[] by the positive law" without referring "to natural law principles that lie at the base of law's function, and, in many cases, of law's substance." David F. Forte, *May It Please the Court*, CLAREMONT REV. BOOKS, Fall 2011, at 50, 52. But this Note adopts the (admittedly contested) view of natural law wherein judges need not soar to Olympian heights of abstraction before making value judgments.

arrangement of dictionaries,²⁰⁹ she concluded that because “so” “refers to a stated, identifiable proposition from the ‘preceding’ text[,] . . . [t]he phrase ‘is not entitled so to obtain’ is best read to refer to information that a person is not entitled to obtain by using a computer that he is authorized to access.”²¹⁰ Following this and a structural analysis, Justice Barrett remarked on the “far-reaching consequences” of the government’s interpretation.²¹¹ Far from “triggering the rule of lenity or constitutional avoidance,” though, these practical implications served as mere afterthoughts; their inclusion was but “extra icing on a cake already frosted.”²¹² This is not reflective of the methodology associated with natural law.²¹³ As discussed, purposes, consequences, and common sense should serve as more than merely extra icing; they are the ingredients in the frosting itself.²¹⁴

And yet, even in an archpositivist era, natural law might be inescapable.²¹⁵ At the very least, resort to broader principles of political morality is required at the level of justifying any interpretive strategy.²¹⁶ Even if a judge chooses to rely strictly on semantic context, that choice cannot be justified by appeals to what interpretation “just is”²¹⁷ or to circular arguments about the constitutional oath.²¹⁸ Further normative argument is required. But, even when committed positivists make this choice, seeking to shirk any resort to critical moral reasoning, they often fail anyway. For example, when the Court in *Seila Law LLC v. CFPB*²¹⁹ invalidated a for-cause-removal-protection provision by relying on Article II’s vesting the “executive Power” in the President alone,²²⁰ some

²⁰⁹ See *Van Buren*, 141 S. Ct. at 1654–55. For an argument rejecting the idea that “[a] dictionary is a textualist’s most important tool” and urging textualists not to “construe language in a wooden, literalistic way,” see Barrett, *supra* note 39, at 856–59.

²¹⁰ *Van Buren*, 141 S. Ct. at 1655.

²¹¹ *Id.* at 1661.

²¹² *Id.* (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).

²¹³ But see David F. Forte, *Natural Law and the Limits to Judicial Review*, 1 CATH. SOC. SCI. REV. 42 (1996).

²¹⁴ Some might be surprised by Justice Barrett’s apparent rejection of a natural law–infused methodology. Justice Barrett, after all, was a longtime professor at her alma mater, Notre Dame Law School, which is one of the few institutions that kept the study of natural law alive when it fell out of vogue in the early twentieth century. BANNER, *supra* note 6, at 223, 227–28. Even today, some professors intentionally structure their courses to nudge students toward the natural law. See, e.g., Jeffrey A. Pojanowski, *Teaching Jurisprudence in a Catholic Law School*, 58 J. CATH. LEGAL STUD. 75, 80 (2019). Justice Barrett’s evident aversion to value judgments, therefore, could be seen as inconsistent with this background. (Of course, perhaps it is simply this Note’s author, lacking the Notre Dame legal education Justice Barrett received, who misunderstands natural law’s methodological implications.)

²¹⁵ See Stephen Macedo, *The Inescapability of Natural Law*, 5 BENCHMARK 117, 117 (1993).

²¹⁶ *Id.*

²¹⁷ See Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015).

²¹⁸ See Cass R. Sunstein, “*This*” (Harvard Pub. L. Working Paper, Paper No. 22-08, 2022), <https://ssrn.com/abstract=4093192> [<https://perma.cc/MC5G-KUWC>].

²¹⁹ 140 S. Ct. 2183 (2020).

²²⁰ *Id.* at 2191–92 (quoting U.S. CONST. art. II, § 1, cl. 1).

regarded this as “an originalist triumph,” as “an enthusiastic embrace of originalism as the proper method of constitutional interpretation.”²²¹ But the Court’s opinion was nevertheless fundamentally Dworkinian, “appeal[ing] throughout to high-level principles, such as ‘liberty’ and ‘accountability.’”²²² Likewise, the dueling opinions in *Bostock v. Clayton County*²²³ all pledged allegiance to the text’s ordinary public meaning.²²⁴ Yet the dispute was, ultimately, over whether Title VII’s ordinary public meaning should be read at a higher semantic level of generality or at a lower level of expected applications — a choice that itself must be guided by normative principles of political morality.²²⁵ Taken together, this inescapability of moral reasoning reflects a certain sense in which, notwithstanding positivism’s ubiquity, we are all natural lawyers now.

CONCLUSION

If, indeed, we are all natural lawyers, then this Note’s establishing Justice Breyer as one amounts to a banality, a truism, universally understood and accepted by all. But if, in fact, this account of natural law’s inescapability is true, then the fighting issue becomes not *whether* judges will make recourse to moral principles but whether they will do so forthrightly and whether their accounts of morality are sound. Though the soundness of Justice Breyer’s animating moral principles is a consideration best left for another day, the fact remains that, at least methodologically, he approached the judicial task as a natural lawyer would. And, while Justice Breyer may have frequently stood alone in his forthright quest to make the law “work better and more simply for those whom it is meant to serve,”²²⁶ he was hardly the first to approach the law in this classical sense. He won’t be the last.²²⁷

²²¹ Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 86 (2021).

²²² *Id.*

²²³ 140 S. Ct. 1731 (2020).

²²⁴ Compare *id.* at 1738 (seeking “the ordinary public meaning”), with *id.* at 1767 (Alito, J., dissenting) (seeking, this time in italics, the “ordinary meaning”), and *id.* at 1825 (Kavanaugh, J., dissenting) (seeking “the ordinary public meaning”).

²²⁵ See VERMEULE, *supra* note 61, at 105–08.

²²⁶ *Badgerow v. Walters*, 142 S. Ct. 1310, 1329 (2022) (Breyer, J., dissenting).

²²⁷ See HEINRICH A. ROMMEN, *THE NATURAL LAW* 237 n.2 (Thomas R. Hanley trans., Liberty Fund 1998) (1936) (“You may drive out nature with a pitchfork, yet it will always return!” (quoting HORACE, *EPISTLES*, bk. I, epistle X, l. 24)).