AGAINST LIVING COMMON GOODISM[*]

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Today I want to discuss a new version of an old debate. In 1985, then-Attorney General Ed Meese delivered a famous address to the American Bar Association in which he advocated "a jurisprudence of original intention."[1] Meese argued that, in contrast with many modern decisions by the Supreme Court, the Founders expected that "[t]he text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution."[2] He explained that judges should not "depart[] from the literal import of the words"[3] in the Constitution and argued, as Justice Story had two centuries earlier, that "[w]here the words admit of two senses, . . . that sense is to be adopted, which . . . best harmonizes with the nature and objects, the scope and design of the instrument."[4]

The backlash against Meese's speech was swift and fierce. At a law school symposium a few months later, Justice William Brennan lambasted originalism as "little more than arrogance cloaked as humility."[5] Justice Brennan instead promoted an approach whose results aligned with his personal moral vision. He argued that what mattered was what "the words of the text mean *in our time*."[6] And he maintained that the Constitution required judges to

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[*] Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org. This article is adapted from a speech Judge Pryor delivered at the Federalist Society's 2022 Ohio Chapters Conference.

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[1] Edwin Meese III, *Speech Before the American Bar Association*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 52 (Steven G. Calabresi ed., 2007).

[2] *Id.* at 48.

[3] *Id.* at 53.

[4] *Id.* at 53–54.

[5] William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 58 (Steven G. Calabresi ed., 2007).

[6] *Id.* at 61 (emphasis added).

"striv[e] toward th[e] goal" of "human dignity."[7] Of course, it was not the *Founders'* conception of human dignity that Justice Brennan sought to advance. Justice Brennan made clear that it was a *particular* vision of human dignity that the Constitution should guarantee. For example, he argued that capital punishment was a violation of human dignity—and so unconstitutional—even though he acknowledged that most of his colleagues and most Americans disagreed.[8] I will let you decide, as between Justice Brennan's methodology and the methodology he condemned, which of the two is better described as "arrogance cloaked as humility."[9]

After the debate between Attorney General Meese and Justice Brennan, the proponents of originalism multiplied in politics, the bar, the academy, and the bench, thanks in no small part to the Federalist Society. Justice Antonin Scalia became the leading evangelist for originalism, and Justice Clarence Thomas became its leading practitioner. Four decades later, originalism has been restored as the primary interpretive philosophy of the judiciary. Today, most of the Justices of the Supreme Court are originalists—they maintain that the text of the Constitution has a fixed meaning, that the Constitution means now what it originally meant, and that the original meaning is binding on them as judges. And as the Justices have become less inclined toward living constitutionalism, so too has the Court's jurisprudence.

Consider the recent decision in *Bucklew v. Precythe*,[10] in which the Court stated that the Constitution "allows capital punishment" because of its original meaning.[11] As the Court explained, that fact "mean[s] that the judiciary bears no license to end a debate reserved for the people and their representatives."[12] And contrary to Justice Brennan's view, this Court acknowledges that a judge is powerless under our Constitution to abolish capital punishment even if he or she sincerely believes that capital punishment is against human dignity, the natural law, or the common good. Tellingly, the *Bucklew* Court ignored the formulation of the Warren Court that the Eighth

[7] *Id.* at 67.
[8] *Id.* at 68–69.
[9] *Id.* at 58.
[10] 139 S. Ct. 1112 (2019).
[11] *See id.* at 1122–23.
[12] *Id.* at 1123.

Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[13]

Despite that achievement, a few individuals on the right side of the political spectrum have recently condemned the current practice of originalism.[14] Some advocate for a new kind of originalism—so-called "common-good originalism"—that they say is "rooted in the teleology and *ratio legis* of" the Constitution[15] and that would allegedly secure conservative ends. Last year, in the Joseph Story Lecture at the Heritage Foundation, I explained the problems with this view,[16] and I will not rehearse them again here.

I want instead to address a kind of results-oriented jurisprudence that is indistinguishable in everything but name from Justice Brennan's living constitutionalism: Harvard Law Professor Adrian Vermeule's so-called common-good constitutionalism—a variant of what I call living common goodism. Vermeule's approach, in his words, "take[s] as its starting point substantive moral principles that conduce to the common good, principles that [judges] . . . should *read into* the majestic generalities and ambiguities of the written Constitution."[17] Replace "common good" with "human dignity" and Vermeule's living common goodism sounds a lot like Brennan's living constitutionalism. Indeed, the difference between Brennan's living constitutionalism and Vermeule's living common goodism consists mainly in their differing substantive moral beliefs; in practice, the methodologies are the same.

Although I disagree with Vermeule's view, it would be a mistake to dismiss it out of hand. To be sure, there is little evidence that many judges or lawyers have been persuaded by Vermeule but his view is being taken seriously by at least some law students. And because the history of the Federalist Society proves that minority views can become prevailing ones, we should take seriously even mistaken views like living common goodism. So I want to explain why Vermeule's view is mistaken.

The Constitution does not give judges the power to "read into" the text of the Constitution "substantive moral principles that conduce to the

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[13] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[14] *E.g.*, Hadley Arkes et al., *A Better Originalism*, THE AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.

[15] Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 942 (2021).

[16] *See* William Pryor Jr., *Politics and the Rule of Law*, Heritage Foundation (Oct. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law.

[17] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (emphasis added).

common good."[18] And fashioning that kind of jurisprudence would conflict with natural law. As Professor Robert George has explained, when courts exceed their jurisdiction and usurp "legislative authority," whether for good or bad causes, "they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government."[19]

Within the bounds of the constraints it imposes, the natural law is neutral about the kind of constitution that a people can establish to promote the common good. Like the ancient moral philosophers, the Founders understood that power corrupts. They gave the judiciary and other branches limited powers within separate domains for protecting the common good. They recognized, as Professor George put it, that "natural law itself does not settle the question . . . whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights."[20] And as Professor Vermeule acknowledges, "the common good does not, by itself, entail any particular scheme of . . . judicial review of constitutional questions, or even any such scheme at all."[21]

The only question for judges is the scope of their power under *our* Constitution. As Professor Joel Alicea recently explained in his excellent article refuting living common goodism, an enacted text is morally binding according to the natural-law tradition "only insofar as it is both . . . substantively consistent with the natural law *and* . . . promulgated by a legitimate authority."[22] Judges committed to that tradition have already determined for themselves that the Constitution accords with natural law and has been promulgated by a legitimate authority, or else they would not have taken an oath to support it.[23] As far as I can tell, Vermeule is not advocating for a revolution of our constitutional order. So we must ask whether our Constitution gives

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[18] *Id.*

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

[20] *Id.* at 2279.

[21] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 10 (2022).

[22] J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 6), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049069&msclkid=356649d7ab8011ec93d2e720134bf1ed.

[23] *See* U.S. CONST. art. VI.

judges the power to "insure that the positive law conforms to the natural law"[24] by departing from original meaning; if it does not, then a judge who purports to exercise that power has transgressed the natural law by going "beyond the power committed to him."[25]

The nature of our written Constitution conflicts with living common goodism because, as Professor Chris Green points out, our Constitution refers to itself as a written text situated at a fixed time in history.[26] Consider just a few examples. The Preamble identifies our Constitution with the text: the People "ordain[ed] and establish[ed] *this* Constitution for the United States of America."[27] Article II declares that "[n]o Person except a natural born Citizen, or a Citizen of the United States, *at the time of the Adoption* of *this* Constitution, shall be eligible to the Office of President."[28] Article III extends the "judicial Power . . . to all Cases, in Law and Equity, arising under *this* Constitution,"[29] as distinguished from those arising under distinct bodies of law—federal statutory law and treaties. Article VI likewise distinguishes "*[t]his* Constitution" from the rest of the law that composes "the supreme Law of the Land."[30] And it requires that "judicial Officers" be "bound by Oath" to "support *this* Constitution."[31] So unlike Britain's unwritten constitution, our Constitution is a written text that expressed its meaning "at the time of [its] Adoption."[32]

Vermeule's failure to appreciate the nature of our Constitution causes him to misunderstand what originalism claims about it. Originalism does not, as Vermeule asserts, "simply equate[] law with positive enacted texts";[33] after all, the Constitution itself refers both to the "Law of Nations"[34] and to the common law.[35] Originalism instead acknowledges that our particular Constitution—novel when it was adopted—*is* the text with which it identifies *itself*.

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[24] George, *supra* note 19, at 2279.

[25] Alicea, *supra* note 22, at 14.

[26] Christopher R. Green, *"This Constitution": Constitutional Indexicals As a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009) ("[T]he Constitution presents itself as a historically situated text—that is, a text whose meaning was attached to it at the time of the Founding.").

[27] U.S. CONST. pmbl.

[28] *Id.* art. II, § 1, c.5 (emphasis added).

[29] *Id.* art. III, § 2, cl. 1.

[30] *Id.* art. VI.

[31] *Id.*

[32] *Id.* art. II, § 1, c.5.

[33] VERMEULE, *supra* note 21, at 8.

[34] U.S. CONST. art. I, § 8, cl. 10.

[35] *Id.* amend. VII.

So Vermeule's view that "departing from the text is not the same as departing from the law"[36] may be true of *other* constitutions, but it is untrue of *our* Constitution, from which judges have no legal authority to depart.

The judicial oath obliges judges, as a moral duty, to support the written text that is our Constitution.[37] To be sure, an oath could be immoral. Professor Alicea imagines "a hypothetical constitution that, in express terms, mandated genocide."[38] It would be wrong to support that constitution even if one were—wrongly—to take an oath to support it. But as I have explained, judges have already determined for themselves that our Constitution, as amended, is morally legitimate. If we are right, then our oath morally binds us. The oath bridges the gap between *descriptive* facts about the meaning of the text that is our Constitution and the *normative* fact that judges are obliged to faithfully interpret what the text means.[39] So the oath squarely presents the question whether originalists have the correct account of interpretation; if so, judges are morally bound to original meaning.

On the mistaken living-common-goodist account, legal texts must always be read in the light of the natural law[40]—or, more accurately, what a judge believes is the natural law. That is, judges may "read into" the text the moral principles that, they believe, "conduce to the common good."[41] But the problem with that account is that there is no necessary connection between the meaning of a text and any particular conception of the common good.[42] One must know a text's meaning *before* one can know whether faithful application of its meaning would "conduce to the common good."[43] That fact is why we can know that a legal text serves an immoral end. For example, if we were to discover an ancient Roman edict, we would have to understand what the edict originally meant before we could form a belief about whether enforcing *it*—instead of something distinct to which we have superadded our own moral

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[36] VERMEULE, *supra* note 21, at 75.

[37] *Cf.* Catechism of the Catholic Church ¶ 2150 (1994).

[38] Alicea, *supra* note 22, at 11.

[39] *See* C'zar Bernstein, *Originalism and the "Oath Theory"*, NAT'L REV. ONLINE (May 20, 2020), https://www.nationalreview.com/2020/05/constitution-originalism-what-critics-of-venerable-legal-philosophy-get-wrong/.

[40] *See* VERMEULE, *supra* note 21, at 3.

[41] Vermeule, *supra* note 17.

[42] *See* Bernstein, *supra* note 39.

[43] Vermeule, *supra* note 17.

principles—would have been consistent with the natural law. So whether the text bears a particular meaning is an independent, antecedent question for judges to answer, and going beyond that meaning would be going "beyond the power committed to [them]."[44]

A major theme of Vermeule's recent popular-level[45] polemic defending living common goodism is that it supposedly prevailed at the Founding.[46] He contends that living common goodism "*is* the original understanding" of the Constitution.[47] In his revisionist historical account, "the classical legal tradition structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789."[48] And living common goodism "has since been displaced . . . by originalism,"[49] which he labels as a creature of the late 20th century. Rubbish!

To begin with, it is odd that Vermeule places so much emphasis on the alleged historical basis for his view. He emphatically states that he "do[es] not advocate a revival of the classical law *because* it is the original understanding,"[50] but then spends many pages attempting to convince readers of the historical pedigree of his view.[51] Vermeule does not make clear what role, if any, he believes his historical account plays in his overall argument, but surely it must play a key role. In the so-called classical tradition, law is "an ordinance of reason for the common good, promulgated by a [legitimate] public authority."[52] If living common goodism were not the prevailing view of the legitimate "public authority" at the Founding, then it would be implausible to suppose that its "ordinance of reason for the common good"[53]—that is, our Constitution—empowered judges to do what Vermeule would now have them do. So Vermeule's account of the Founding turns out to be critical to his case.

Vermeule's argument for that historical revisionism does not withstand scrutiny. He argues that three opinions—the first Justice Harlan's dissent in

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[44] Alicea, *supra* note 22, at 14.

[45] *See* VERMEULE, *supra* note 21, at 25.

[46] *Id.* at 58 ("The largest and simplest point may also be the most important: the classical view was central to our legal world (not exclusive, but central) during the founding era and through the nineteenth century.").

[47] *Id.* at 2.

[48] *Id.* at 53.

[49] *Id.*

[50] *Id.* at 2.

[51] *See id.* at 52–90.

[52] *Id.* at 3.

[53] *Id.*

Lochner v. New York,[54] the decision of the Supreme Court in *United States v. Curtiss-Wright*,[55] and the decision of a New York court in *Riggs v. Palmer*[56]—"illustrate how deeply the classical legal tradition has *always* infused our law."[57] Setting aside whether these decisions support Vermeule's methodology, it strains credulity to suppose that a dissenting opinion from 1905, a Supreme Court decision from 1936, and a state-court decision from 1889 could establish that living common goodism is deeply rooted in the American tradition: that it "structured and suffused our law" "[r]ight from the beginning, long before the Constitution of 1789 was written."[58] Vermeule's argument is about as persuasive as using *Roe v. Wade*[59] as evidence that living constitutionalism is deeply rooted in our legal tradition.

But even if we ignore the recency of the opinions he chose, Vermeule's argument still fails. Consider first *Riggs v. Palmer*, an 1889 decision of the Court of Appeals of New York. In that case, a grandson murdered his grandfather to inherit under the grandfather's will.[60] The grandson "claim[ed] the property, and the sole question for [the Court's] determination [was whether he] c[ould] . . . have it[.]"[61] The relevant statute stated that "'[n]o will in writing, . . . nor any part thereof, shall be revoked or altered otherwise'" except in circumstances not at issue in *Riggs*.[62] The *Riggs* court read into the governing statute an exception for murderous heirs and held that the grandson could not inherit.[63]

The *Riggs* court started with what Vermeule asserts is "a crucial proposition of"[64] living common goodism: "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the

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[54] 198 U.S. 45 (1905).
[55] 299 U.S. 304 (1936).
[56] 115 N.Y. 506 (1889).
[57] VERMEULE, *supra* note 21, at 53 (emphasis added).
[58] *Id.*
[59] 410 U.S. 113 (1973).
[60] *Riggs*, 115 N.Y. at 508–09.
[61] *Id.* at 509.
[62] *Id.* at 517 (Gray, J., dissenting).
[63] *Id.* at 514–15.
[64] VERMEULE, *supra* note 21, at 80.

statute, unless it be within the intention of the makers."[65] The *Riggs* court appealed to Aristotle's authority to reason that "equitable construction[s]" can "restrain[] the letter of a statute"[66]—you can see why Vermeule likes this decision. And the court determined that it was not "much troubled by the general language contained in the laws" because it was "inconceivable" that the "legislative intention" was to allow the property to pass to the grandson.[67] So I agree that *Riggs* is an example of living common goodism.

The problem for Vermeule's argument is that most American courts of that era rejected *Riggs* in favor of the textualist approach he says was invented after the Second World War.[68] For example, in *Wall v. Pfanschmidt*,[69] the Supreme Court of Illinois in 1914 rejected the living common goodism of *Riggs*. It quoted Chief Justice Marshall's 1820 opinion in *United States v. Wiltberger*: "Where there is no ambiguity in the words [of a statute], there is no room for construction."[70] And it explained that, "[u]nder the rules for the interpretation of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning."[71] In 1892, the Supreme Court of Ohio affirmed a decision that expressly rejected *Riggs*'s approach as "legislation in disguise."[72] In that case, *Deem v. Millikin*, the court endorsed textualism: "when the legislature . . . speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent."[73] And it derided the decision in *Riggs* as "the manifest assertion of a wisdom believed to be superior to that of the legislature upon a question of policy."[74]

The dominant textualist approach that rejected *Riggs* was nothing new. After all, Chief Justice Marshall had in 1819 endorsed a strong textualism with a narrow absurdity canon: "if, in any case, the plain meaning of a provision . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity

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[65] *Riggs*, 115 N.Y. at 509.

[66] *Id.* at 510.

[67] *Id.* at 511.

[68] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 8, at 99–100 & nn.29–31 (2012) (collecting decisions and reporting that "[m]ost cases agreed with the . . . murderer-can-inherit holding, which we believe is textually correct").

[69] 106 N.E. 785 (Ill. 1914).

[70] *Id.* at 788 (quoting United States v. Wiltberger, 18 U.S. 76, 95–96 (1820)).

[71] *Id.* at 789.

[72] Deem v. Milikin, 1892 WL 971, at *2 (Ohio Cir. Ct. May 1, 1892), *aff'd* Deem v. Milliken, 44 N.E. 1134 (Ohio 1895).

[73] *Id.*

[74] *Id.*

and injustice of applying the provision to the case, would be so monstrous, that *all* mankind would, without hesitation, unite in rejecting the application."[75] In *Reading Law*, Justice Scalia and Bryan Garner explain that "all states [now] have statutes that explicitly deal with" the problem of murderous heirs because most American courts rejected *Riggs* and applied even "unwise law[s] as written"[76]—the kind of textualism that prevails today.

Consider next Justice Harlan's dissent in *Lochner*. Although the outlier decision in *Riggs* was consistent with living common goodism, Harlan's dissent in *Lochner* was not. The *Lochner* Court held that a state law prohibiting bakers from "working . . . more than sixty hours in one week" violated the supposed liberty of contract protected by the Fourteenth Amendment.[77] Both the majority and Harlan agreed that the Fourteenth Amendment protects a right of contract "subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society,"[78] but they disagreed about whether the maximum-hours law for bakers was a reasonable exercise of the state's police power.[79] Harlan argued that the state law "cannot

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[75] Sturges v. Crowninshield, 17 U.S. 122, 202-03 (1819) (emphasis added). Vermeule places a lot of emphasis on Justice Scalia's endorsement of the absurdity canon and asserts that *Riggs* faithfully applied it, *see* VERMEULE, *supra* note 21, at 77, but as Chief Justice Marshall's statement of the canon makes clear, it was traditionally far narrower than Vermeule's description of it, *accord* SCALIA & GARNER, *supra* note 68, at § 37, at 237–38; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 315 (Bos., Little, Brown, & Co. 1873) ("But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."). As I have explained, most courts rejected its application in the context of murderous heirs. *See* SCALIA & GARNER, *supra* note 68, at § 8, at 99–100. And the outcome in *Riggs* was not so absurd and unjust "that all mankind would, without hesitation, unite in rejecting the application," *Sturges*, 17 U.S. at 203, because, as the dissent in *Riggs* illustrates, one could rationally suppose that a murderous heir should not suffer the "imposition of an additional punishment or penalty" that was not "provided by law for the punishment of [the] crime" of which he was convicted, *see Riggs*, 115 N.Y. at 519–20 (Gray, J., dissenting) (internal quotation marks omitted). The absurdity canon, properly understood, is part of textualism.

[76] SCALIA & GARNER, *supra* note 68, § 8, at 100.

[77] *Lochner*, 198 U.S. at 52–53.

[78] *Id.* at 68 (Harlan, J., dissenting).

[79] *See* Adair v. United States, 208 U.S. 161, 174 (1908) ("Although there was a difference of opinion in that case among the members of the court as to certain propositions, there was no

be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its *original* purpose."[80] And other famous Harlan dissents confirm that he was an originalist. In the *Civil Rights Cases*, he explained that courts must follow "the familiar rule *requiring*, in the interpretation of constitutional provisions, that full effect be given to the intent with which they were adopted."[81] In *Hurtado v. California*, Harlan argued that the meaning of the words "due process of law" in the Fifth and Fourteenth Amendments "*must* receive the same interpretation they had at the common law from which they were derived."[82] And in *Plessy v. Ferguson*, he argued that the Thirteenth and Fourteenth Amendments should be "enforced according to their true intent and meaning."[83]

Finally, consider *Curtiss-Wright*. Contrary to Vermeule's account, *Curtiss-Wright* does not "illustrate how deeply the classical legal tradition has *always* infused our law."[84] In that decision, the Supreme Court held that a joint resolution of Congress permitting the President to prohibit the sale of arms in a foreign conflict was not an unconstitutional "delegation of the lawmaking power."[85] The Court reasoned that "[t]he Union existed before the Constitution," which, according to the constitutional text itself, was "ordained and established . . . to form 'a *more* perfect Union.'"[86] The Court explained that because sovereignty "immediately passed to the Union" from Britain,[87] the federal government possessed "powers of external sovereignty"—such as the power to declare war, to conclude peace, and to make treaties—that "did not depend upon the affirmative grants of the Constitution."[88] And the Court acknowledged that those powers "remained [in the Union] without change save in so far as the Constitution in express terms qualified [their] exercise."[89]

Vermeule asserts that *Curtiss-Wright* "stands as a direct and . . . flagrant affront to originalism, and to the positivism of which the currently reigning version of originalism is a species" because it endorsed "[t]he shockingly anti-

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disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation.").

[80] *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting).

[81] Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (emphasis added).

[82] Hurtado v. California, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) (emphasis added).

[83] 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

[84] VERMEULE, *supra* note 21, at 53 (emphasis added).

[85] *Curtiss-Wright*, 299 U.S. at 315–317.

[86] *Id.* at 317 (emphasis added).

[87] *Id.*

[88] *Id.* at 318.

[89] *Id.* at 317.

originalist idea that '[t]he Union existed before the Constitution.'"[90] But Vermeule again attacks a straw man. Originalism does not assert that the Constitution created the Union or that there is no law outside the written text. Originalism asserts that our Constitution is a written text that was adopted as the supreme law[91] at a fixed point in time. And the Court in *Curtiss-Wright* agreed. The Court described the "establish[ment]" of the written Constitution by the Union as an "event" in time,[92] and it declared that the federal government retained the powers of sovereignty that pre-existed that event only "in so far as the Constitution in express terms [did not] qualif[y] [their] exercise."[93] The Court explained that presidential power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[94] Because the Constitution is supreme, the Court considered whether the resolution was consistent with the Constitution. It based its ruling on "the unbroken legislative practice which has prevailed almost from the inception of the national government" by examining Acts of Congress from as early as 1794.[95] And it engaged in originalist reasoning by giving "unusual weight" to the "impressive array of legislation . . . enacted by nearly every Congress from the beginning of our national existence."[96] *Curtiss-Wright* is not an example of living common goodism.

A major theme of Vermeule's revisionism is that originalism was "initially developed in the 1970s and '80s,"[97] but that canard flouts a mountain of historical evidence. For example, James Madison could not have been clearer: "In the exposition of . . . Constitutions, . . . many important errors [would] be produced . . . if not controulable by a recurrence to the original and authentic meaning attached to" their words and phrases.[98] Scalia and Garner explain in *Reading Law* that, "[i]n the English-speaking nations, the earliest statute directed to statutory interpretation," enacted by the Scottish

[90] VERMEULE, *supra* note 21, at 85–86, 87 (quoting *Curtiss-Wright*, 299 U.S. at 317).
[91] *See* U.S. CONST. art. VI.
[92] *Curtiss-Wright*, 299 U.S. at 317.
[93] *Id.*
[94] *Id.* at 320.
[95] *Id.* at 322–28.
[96] *Id.* at 327.
[97] Vermeule, *supra* note 17.
[98] Letter from James Madison to Converse Sherman (Mar. 10, 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 519 (J.B. Lippincott 1865).

Parliament in 1427, "made it a punishable offense for counsel to argue anything other than original understanding."[99]

Instead of interacting directly with the many historical examples that contradict his conspiracy theory that originalism was invented by the conservative legal movement in the "1970s and '80s,"[100] Vermeule broadly dismisses them. "*Of course*," he concedes, "it is true that more than zero instances of originalist-like utterances can be detected across the vast landscape of our legal history."[101] And he asserts that these examples "tend to speak of the framers' intentions rather than the original meaning as understood by the ratifiers," "embody[ing] a version of originalism that few currently defend."[102] But, strangely, Vermeule repeatedly relies on Professor Jeff Powell's 1985 article[103] refuting an original-intentions methodology for the proposition that originalism is "counter-originalist"[104]—apparently unaware that Powell's article established that the Founders were originalists in the modern sense.

Powell's article refutes Vermeule's invented history. Although Founding-era Americans *did* use the term "intent" in the context of constitutional interpretation, that usage, as Powell explained, tracked a long tradition of discerning intent "solely on the basis of the words of the law, and not by investigating any other source of information about the lawgiver's purposes."[105] "At common law," Powell explained, "the 'intent' of the maker of a legal document and the 'intent' of the document itself were one and the same; 'intent' did not depend upon the subjective purposes of the author."[106] And consistent with that tradition, Powell explained that the "Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language."[107]

Powell drew on a host of primary sources, but his discussion of the early debate about the "passage by the first Congress of a bill to establish a national

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[99] SCALIA & GARNER, *supra* note 68, § 7, at 79.

[100] Vermeule, *supra* note 17.

[101] VERMEULE, *supra* note 21, at 210-11 n.241 (emphasis added).

[102] *Id.* at 211 n.241.

[103] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[104] *See* VERMEULE, *supra* note 21, at 2, 186 n.4; Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103, 130 n.83 (2022).

[105] Powell, *supra* note 103, at 895.

[106] *Id.* at 895.

[107] *Id.* at 903.

bank"[108] well illustrates the practice of originalism at the Founding. That bill "provoked an elaborate debate over constitutional interpretation within the executive branch" about the scope of Congress's power in which both sides relied on originalist interpretive methods.[109] Taking the expansive view, Hamilton argued that, "whatever may have been the intention of the framers of the constitution, or of a law, that intention is to be sought for in the instrument itself."[110] Hamilton "derived his knowledge of 'the intent of the convention' from the 'obvious [and] popular sense' of the constitutional expression under consideration."[111] Far from establishing, as Vermeule asserts, that the founders were not originalists, their debate about the national bank proves that they "did not in any way . . . reject[] the traditional common law understanding of 'intent' as the apparent 'meaning of the text.'"[112]

Early Justices too practiced originalism. Chief Justice Marshall clearly embraced originalism in *Ogden v. Saunders*.[113] There, Marshall identified the "principles of construction which ought to be applied to the constitution of the United States."[114] First, "that the intention of the instrument must prevail"; second, "that this intention *must* be collected from its words"; third, "that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended"; and finally, "that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers."[115] Vermeule cannot seriously dismiss Marshall's opinion as an "originalist-like utterance[]."[116]

We can go earlier still for rejections of living common goodism. Justice James Iredell wrote in *Calder v. Bull*[117] in 1798 that if Congress or any state legislature "shall pass a law, within the general scope of their constitutional

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[108] *Id.* at 914.

[109] *Id.* ("Both Hamilton and Jefferson purported to rely on 'the usual & established rules of construction.'").

[110] *Id.* at 915 & n.153.

[111] *Id.* at 915.

[112] *Id.*

[113] 25 U.S. 213 (1827).

[114] *Id.* at 332.

[115] *Id.* (emphasis added).

[116] VERMEULE, *supra* note 21, at 210-11 n.241.

[117] 3 U.S. 386 (1798).

power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[118] As he explained, "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject."[119] And he concluded that, "[A]ll that the Court could properly say, in such an event, would be, that the Legislature[,] []possessed of an equal right of opinion[,] had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."[120] Vermeule asserts that this interpretation of Iredell's opinion is a "wild overreading";[121] I leave it to the literate reader of English to determine whether Justice Iredell's opinion fits more comfortably with living common goodism than with originalism.

Justice Iredell's observation that "the ablest and the purest men have differed upon" "principles of natural justice"[122] is why living common goodism in practice would be indistinguishable from living constitutionalism. Throughout Vermeule's work, the phrase "common good" evades concrete application except where the outcomes happen to align with his own worldview. Compare Vermeule's view of the Second Amendment with the view taken by Josh Hammer, who touts common-good originalism.[123] Vermeule complains that *District of Columbia v. Heller*[124] was "revolutionary" and "a startling break with the Court's long-standing precedents,"[125] but Hammer rightly praises it as "a sober analysis of the historical meaning of the" Second Amendment.[126] A Justice Vermeule—who says the common good requires reviewing for arbitrariness burdens on rights secured by the Bill of Rights[127]—would have evidently dissented in *Heller*. And if one were to put living common goodism in the mind of a Justice who disagrees with Vermeule about whether same-sex marriage is required by the common good, one would still get *Obergefell v. Hodges*.[128]

Vermeule asserts that "[i]t is irrelevant that there was, is[,] and will be disagreement between classical lawyers over the content of the common

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[118] *Id.* at 399 (opinion of Iredell, J.).
[119] *Id.*
[120] *Id.*
[121] VERMEULE, *supra* note 21, at 59.
[122] *Calder*, 3 U.S. at 399 (opinion of Iredell, J.).
[123] *See* Hammer, *supra* note 15, at 921.
[124] 554 U.S. 570 (2008).
[125] VERMEULE, *supra* note 21, at 93.
[126] Hammer, *supra* note 15, at 943 & n.100.
[127] *See* VERMEULE, *supra* note 21, at 126-28, 168.
[128] 576 U.S. 644 (2015).

good,"[129] but he conveniently applies a different standard to disagreements between originalists. When responding to Justice Brett Kavanaugh's point in dissent that the majority in *Bostock v. Clayton County*[130] misapplied originalism, Vermeule insists that "[i]f originalism is so difficult that one of its leading champions cannot apply it correctly, one might conclude instead that originalism is simply a dangerously unreliable technology, one that induces fatal rates of human error."[131] But Vermeule cannot have it both ways: he cannot forgive disagreement about the common good among classical lawyers while condemning originalism based on disagreements among its proponents.

I will close by quoting from Justice Benjamin Curtis's dissent in *Dred Scott v. Sandford*.[132] I do so because Vermeule repeatedly invokes the living-constitutionalist myth that *Dred Scott* is "the most clearly proto-originalist decision."[133] Justice Curtis, like the courts that later rejected *Riggs*, repudiated the approach that would allow judges to read unmentioned exceptions into unambiguous texts. When addressing whether the Supreme Court had the authority "to insert into . . . the Constitution an exception of the exclusion or allowance of slavery" to Congress's express "power to make *all* needful rules and regulations respecting" territories,[134] Curtis rejected Chief Justice Taney's majority opinion as anti-textualist:

> To engraft on [the Constitution] a substantive exception not found in it, . . . upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of judicial interpretation. They are different in different men. They are different in the same

[129] Casey & Vermeule, *supra* note 104, at 143.

[130] 140 S. Ct. 1731 (2020).

[131] VERMEULE, *supra* note 21, at 106.

[132] 60 U.S. (19 How.) 393 (1857).

[133] VERMEULE, *supra* note 21, at 210-11 n.241; *see also* Casey & Vermeule, *supra* note 104, at 131.

[134] *See Scott*, 60 U.S. at 620–21 (Curtis, J., dissenting); *see also* U.S. CONST. art. IV, § 3, cl.2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

> men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[135]

Justice Curtis's textualist dissent in *Dred Scott* rejected living common goodism. So should you!

Other Views:

- Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
- Hadley Arkes et al., *A Better Originalism*, THE AMERICAN MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.
- Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 942 (2021), *available at* https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2021/06/Hammer-Common-Good-Originalism.pdf.
- ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022), *available at* https://www.politybooks.com/bookdetail?book_slug=common-good-constitutionalism--9781509548866.

[135] *Scott*, 60 U.S. at 620-21 (Curtis, J., dissenting).