ARGUMENT BY SLOGAN

CONOR CASEY AND ADRIAN VERMEULE

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Conor Casey and Adrian Vermeule[1]

When law professors try to write judicial opinions, even as a pedagogical exercise, the results are decidedly mixed, especially when the effort is derivative of a great original.[2] When sitting judges try to write legal theory, the same is true. The occupational hazards for the judge-turned-occasional-theorist are that the necessary concepts and background knowledge, mapped out by intellectual pioneers, are half-remembered and hazily defined; that the judge unwittingly assumes by force of habit that the task is to arbitrate a dispute rather than to lay out a cogent train of thought; and that, consequently, the judge believes the right approach is to say no more than necessary to rule against a losing party, rather than to capture an enduring positive idea. Some, like Justice Scalia, have been able to make theoretical contributions while in office, elaborating their positions with clarity of mind (although Scalia was a scholar before he was a judge). Others are less successful.

Which brings us to Chief Judge William Pryor of the 11th Circuit. Judge Pryor has ventured a response to common good constitutionalism, which, in an effort to imitate Scalia's wit, he calls "living common-goodism."[3] Here the risks of part-time theorizing have all materialized, and in their most grievous forms. Judge Pryor knows that he is against "living constitutionalism," because

[1] Assistant Professor, University of Liverpool School of Law & Social Justice; Ralph S. Tyler Jr. Professor of Constitutional Law, Harvard Law School. We would like to thank Michael Foran and Cass Sunstein for helpful comments, and the editors of the journal for excellent work editing the piece.

[2] Compare Lon Fuller's brilliant *The Case of the Speluncean Explorers* 62 HARV. L REV. 616 (1949) with Naomi R. Cahn, John O. Calmore, Mary I. Coombs, Dwight L. Greene, Geoffrey C. Miller, Jeremy Paul & Laura W. Stein, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754 (1993).

[3] William Pryor, *Against Living Common-Goodism*, 23 FED. SOC. REV. 25 (2022).

living constitutionalism is bad, but he has no very clear idea why he is against it or what exactly it means. Nor does he have any very distinct idea what he is for, except that he is for "originalism," because originalism is good. But friend-enemy categories, argument conducted by means of the slogans of sociological affiliation, do not make for conceptual precision and do not add up to a theory.

In this short essay we make two main points.[4] The first is that while Judge Pryor offers unobjectionable arguments, entirely consistent with the classical tradition, for respecting the fixity of posited law promulgated by legitimate political authority, he has not established how and why these arguments compel him, or ought to compel anyone else, to be an originalist in any substantive sense, still less any specific flavor of originalism from the many on offer. In particular, the bare commitment to the fixity of meaning — the only commitment that Judge Pryor's arguments entitle him to hold — cannot by itself exclude interpretation that, while taking meaning as fixed, reads that meaning at a high level of abstraction to embody general constitutional principles, and then allows the application of those principles to evolve over time as circumstances change, and as judged by the interpreter. If this is what Judge Pryor means by "living constitutionalism," his argument is entirely consistent with allowing it. If this is Brennanism, Judge Pryor has inadvertently licensed Brennanism.

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[4] We lack the space here to take up the separate issue of Judge Pryor's effort at legal history. Despite his putative methodological commitments, Judge Pryor neither discusses nor even cites a single one of the eminent legal historians who have recently detailed, as a group, the pervasive role of nonpositivist and nonoriginalist conceptions of law in American courts throughout the founding era and the 19th century. *See, e.g.*, Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW AND HISTORY REVIEW 321, 324 (2021); STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246 (2017); RICHARD HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE (2015). (All of these sources were cited and discussed in our works to which Judge Pryor responds). Judge Pryor's reading of a select handful of cases and commentaries thus seems unlikely to disturb the reigning view that originalism, in any self-consciously methodological sense, is a creation of the post-World War II era. *See* Calvin Terbeek, *"Clocks Must Always Be Turned Back": Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AMERICAN POLITICAL SCIENCE REVIEW 821 (2021).

Second, we suggest that Judge Pryor's advocacy of public meaning originalism is infected by a horror of judgment — a deep-seated fear that absent originalism, constitutional interpretation will collapse into a moral free-for-all where judges arbitrarily inject personal preferences into law. But this is a false binary. It is an impoverished and tendentious legal ontology, argument by slogan, to assume that there are only rules defined by original meaning, on the one hand, and ungrounded arbitrary "preferences" on the other. Rather the law also contains enduring commitments and background principles of political morality, which judges rightly and inevitably draw upon whenever positive texts are general, vague, ambiguous, or conflicting — which is to say, in many or most of the hard cases that reach appellate courts.

It is also question-begging, argument by slogan, to assume that common good constitutionalism seeks to amend, change or displace posited law. Rather, common good constitutionalism is the classical approach to interpreting posited law, not an argument for displacing it. In the end, Judge Pryor's core commitment is no more than animus against Justice Brennan, which does not by itself yield anything close to a coherent view. Enmity is not a theory.

I. Thin and Thick Originalism

By "thin" originalism, which we have also called "Pickwickian originalism,"[5] we will mean the bare commitment to the claim that the meaning of a fixed text remains constant over time. This is particularly clear in the case of semantic meaning.[6] If, to use one of Ronald Dworkin's favorite examples, Hamlet uses the word "hawk" in juxtaposition to the word "handsaw," then "hawk"

[5] Conor Casey & Adrian Vermeule, *Pickwickian Originalism,* IUS ET IUSTITIUM (March 22, 2022), https://iusetiustitium.com/pickwickian-originalism/ [https://perma.cc/P3MJ-S562].

[6] In this section, we put aside hard cases in which, due to the intrinsic or extrinsic ambiguity of semantic meaning, the semantic meaning and the legal meaning come apart. (In the typical formulation of classical lawyers, these are cases in which "the letter of the statute" and "the statute [itself]" are not coterminous). In such cases, interpreters at the point of application may have to recur to general background principles of political morality, themselves part of the law, to resolve the ambiguity and thereby determine legal meaning. We take up those cases in Section II.

does not refer to a bird of prey, but a renaissance-era tool.[7] Crucially, thin originalism allows that the meaning of a constitutional text may just be an abstract principle, such as "liberty," which is then cashed out over time by means of evolving application as circumstances change, and as the interpreter judges those circumstances. As we will see, thin originalism therefore cannot exclude a mode of interpretation that is equivalent to or indistinguishable from Brennanism – the very thing Judge Pryor must exclude if his effort is to succeed.

By "thick" originalism, on the other hand, or "originalism in a substantive sense," we mean originalism in any sense sufficiently robust to exclude this sort of evolving interpretation over time. An example is so-called expected-applications originalism, which ties meaning to the particular applications that the framers of a posited constitutional text expected their words would pick out. What Judge Pryor needs is an argument that entails thick originalism, but no such argument is anywhere to be found. And as discussed below, any such argument would have to have a normative character; it cannot simply be read off the surface of the concept of interpretation, or assumed to be inherent in the taking of a constitutional oath.

To understand Judge Pryor's commitments, one must begin with the animus that galvanizes his argument. His enemy is Justice William Brennan, taken as a paradigm of the lawless judge. For Pryor, Brennan exemplifies "results-oriented jurisprudence"[8] that swaps legislative authority, even popular sovereignty, for rule by the whim of whatever personal judicial morality happens to predominate at the time.[9]

The consequence of this core enmity is simple: Judge Pryor's argument fails if, and to the extent that, it fails to advance a methodological argument that would exclude constitutional

[7] RONALD DWORKIN, JUSTICE IN ROBES 120 (2006).
[8] Pryor *supra* note 3, at 26.
[9] *Id.* at 27.

interpretation of which Brennan could heartily approve. If Pryor has failed even to exclude Brennanism, he has achieved nothing. And as we will see, his argument in fact does nothing at all to exclude Brennanism, and necessarily lacks the theoretical resources to do so. This is because Pryor's arguments suffice only to establish thin originalism, not thick originalism; and thin originalism is entirely compatible with Brennanism.

Judge Pryor marshals several arguments to defend originalism. One is that common good constitutionalism is incompatible with the nature of the US Constitution as a codified document which refers to itself as a written text situated at a fixed time in history.[10] Second, that the oath officials swear upon taking office under the Constitution means they have a moral duty to obey the commands of enacted texts.[11] As Judge Pryor framed it in another recent lecture critical of common good constitutionalism, one "obeys those texts only if one applies their *meanings*; applying what they do not mean would be to fail to obey them."[12] The judicial oath, says Judge Pryor, "obliges judges, as a moral duty, to support the written text that is our Constitution."[13] Third, Judge Pryor[14] makes the argument that the natural law's respect for legitimate authority means that the meaning of posited text must be faithfully adhered to and not displaced by judicial fiat. Judges committed to "that [natural law] tradition," says Pryor, 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"[15] and therefore act unjustly if they displace the law posited by that authority. So, while Judge Pryor is ambiguous on his own approach to "that

[10] *Id*. at 28.
[11] *Id*. at 29.
[12] William Pryor, *Politics and the Rule of Law,* Heritage Foundation 14th Annual Joseph Story Distinguished Lecture (Oct. 20, 2021) (author's emphasis).
[13] Pyror *supra* note 3, at 29.
[14] Drawing upon Joel Alicea, *The Moral Authority of Original Meaning*, NOTRE DAME L. REV. (forthcoming 2022).
[15] Pyror *supra* note 3, at 27.

tradition," he relies heavily on thin arguments for "some form" of originalism, which he takes to support original public meaning.[16] On this view, arguments from the nature of the Constitution as a written text posited at a certain point in time, the importance of the oath, and the legitimacy of political authority, all taken together, support the proposition that where judges "displace" the meaning fixed by posited law, they go beyond the power committed to them and thus act unjustly.

So far as this goes, Judge Pryor's argument is entirely consistent with what he dubs the "so-called classical tradition";[17] that is, the approach to the nature and purpose of law articulated and defended by the likes of Aquinas, Isidore, Suárez, Blackstone and the mainstream of the Western legal tradition for millennia.[18] The classical legal tradition, as we show later, by no means licenses interpreters to "displace," amend or ignore the meaning of posited law. What Judge Pryor fails to do, however, is to justify his crucial next step: showing that these arguments entail originalism in any thicker, substantive sense that would exclude Brennanism.

Put differently, the problem for Judge Pryor is that the "fighting question is…how interpretation should work, given the mandate (which no one sensible denies) to respect the legitimate authority's choice in positing what it did posit."[19] Or, as Dworkin put it in his famous review of Bork's *Tempting of America*, the real debate is "not about whether the Constitution should be obeyed but about the proper way to decide what its various provisions actually require."[20] No amount of oath-taking to "this Constitution" resolves that question, despite circular and rather tortuous arguments to the contrary. The very question at hand is what exactly this

[16] Alicea *supra* note 14, at 42.
[17] Pyror *supra* note 3, at 30.
[18] *See generally* HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY (Russel Hittinger, ed., Liberty Fund ed. 1998).
[19] Casey & Vermeule, *supra* note 5.
[20] Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 659 (1990).

Constitution should be taken to mean and how to go about interpreting it.[21] Thicker choices about method are necessary and must be justified by additional arguments from political morality, as we have argued severally[22] and jointly.[23]

The easiest way to see that Judge Pryor makes an unwarranted leap is to look both abroad and at home. We begin with comparative law. Judge Pryor seems to believe that (1) fixed law, (2) a commitment to judges interpreting rather than amending law, (3) constitutional oaths, and (4) thick originalism all go together as a package deal. But in legal systems around the world, judges subscribe to the first three without subscribing to the last. From India to Ireland, judges respect the fixed enactments of legitimate political authority and the fixed meaning of those enactments, yet without believing that originalism, in the substantive sense that Pryor needs to exclude Brennanism, is entailed by those uncontroversial premises. On Judge Pryor's view, almost every other judge who currently sits around the world is conceptually confused about the implications of their commitments.

Consider that codified constitutional texts explicitly referring to themselves as *this* Constitution – as a written text situated at a fixed time – are hardly unique to America, as the most cursory familiarity with other legal systems would have suggested. The preamble of the 1937 Irish Constitution states that the People of Ireland "Do hereby adopt, enact, and give to ourselves *this* Constitution."[24] Article 15.4.1 of the Irish Constitution, which constitutes the Irish Parliament, states that it "shall not enact any law which is in any respect repugnant to *this* Constitution or any provision thereof"[25] while Article 15.4.2 provides that every law enacted "which is in any respect

[21] Cass Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).
[22] Adrian Vermeule, COMMON GOOD CONSTITUTIONALISM 95-108 (2022).
[23] Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL. 103, 125-128 (2022).
[24] BUNREACHT NA HÉIREANN [Constitution of Ireland] 1937, pmbl.
[25] *Id*. at art. 15.4.1.

repugnant to *this* Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."[26] Similarly, the Preamble to the Indian Constitution of 1950 states that the People "Do hereby adopt, enact, and give to ourselves *this* Constitution."[27] The Constitution of India also stipulates that judges must take oaths to

> "Swear in the name of God/Solemnly Affirm that I will bear true faith and allegiance to *the* Constitution of India *as by law established*, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and *that I will uphold the Constitution and the laws*."[28]

The Preamble of the 1949 German Basic Law states that:

> "Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted *this* Basic Law."[29]

Article 146 speaks explicitly to the enduring quality of the fundamental law, providing that: "*This* Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect."[30]

It goes without saying that none of the legal systems we have mentioned employ originalism in any sense Judge Pryor would favor.[31] These and countless other constitutional systems around the world designate "the people" as the highest legitimate political authority; officials and judges

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[26] *Id*. at art. 15.4.2 (emphasis added).
[27] BHĀRATĪYA SAṂVIDHĀNA [Constitution of India] 1950, pmbl (emphasis added)..
[28] *Id*. at, THIRD SCHEDULE: Forms of Oaths or Affirmations (Articles 75(4), 99, 124(6), 148(2), 164(3), 188 and 219), IV. Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India. Emphasis added.
[29] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [German Basic Law] 1949, pmbl.
[30] *Id*. at Art. 146.
[31] *See, e.g*., Conor Casey, *The Supreme Court, the Constitution, and 'Derived Rights': Cause for Concern or Optimism?*, 72 DOCTRINE & LIFE 1, 2-18 (2022); Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837 (1991); Menaka Guruswamy, *Crafting Constitutional Values: An Examination of the Supreme Court of India, in* AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW 215 (Dennis Davis, Alan Richter, Cheryl Saunders eds., 2015).

in these systems approach the binding posited commands of that authority specified in constitutional text with great respect and a desire to faithfully give effect to the meaning of those commands, not to displace them. In many of these systems, officials are sworn to uphold "the" or "this" Constitution. But virtually none have thought to designate their doing so as a species of "originalism" or think that originalism in any substantive sense is logically compelled by their other commitments.[32]

Also consider the work of important supranational Courts like the European Court of Human Rights. This Court operates on the premise that the Treaty constituting it, the European Convention on Human Rights 1950, is law and is subject to amendment only by the terms agreed to by the relevant member state parties. Furthermore, the meaning of this text is fixed; a word whose semantic meaning had changed entirely over time would obviously be read in the sense given at the time the treaty was concluded.[33] However, no one thinks that the fixity of the treaty text or of its meaning entails originalism in any substantive sense. Rather, the Court adopts the view that the abstract principles embedded in the posited text remain fixed but require development and unfolding, clarification and specification, in response to changing circumstances. The Court also gives an extensive "margin of appreciation" or zone of deference for national courts in developing and unfolding the principles fixed in the Convention considering their own national circumstances.[34] Legal actors in this context do not see themselves as amending the treaties or

[32] Casey & Vermeule, *supra* note 5.
[33] Again, we assume here that there are no special circumstances such that semantic meaning and legal meaning diverge — the issue we take up in Section II. For purposes of evaluating Judge Pryor's argument in this Section, we can grant *arguendo* that the two are coterminous; the argument fails on its own terms in any event.
[34] Clare Ryan, *Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNAT'L 467, 482 (2018).

altering the meaning of the principles fixed by the text, but as giving faithful effect to them in light of changing concrete socio-political circumstance.[35] But this is just thin originalism.

Perhaps virtually all these systems misunderstand that the only interpretive methodology capable of respecting official oaths and the reasoned determinations of legitimate political authority is originalism in the thick sense. A more plausible conclusion, however, is that equating respect for the fixity of posited law with originalism in anything but a thin sense is an unjustified parochialism, one that is fatal for Judge Pryor's argument. What Judge Pryor would need, and conspicuously lacks, is any argument for a thicker originalism that would exclude the sort of evolutive jurisprudence that is common in other Western legal systems.

The same point holds on the home front, where it has become vividly clear that thin originalism is compatible with forms of Brennanism that would doubtless appall Judge Pryor. Among American scholars who are self-described originalists, the most-cited is Professor Jack Balkin, and one of the most cited is Professor Steven Calabresi,[36] a founder of the Federalist Society itself. Both subscribe to thin originalism; both hold that the meaning of constitutional texts is fixed at the time of enactment. And both go on to cash out this thin commitment in evolutive ways that are either equivalent to Brennanism, or effectively indistinguishable from Brennanism. Both argue, for example, that the equal protection clause embodies an exceedingly abstract anti-subordination or an anti-caste principle, which they take, in light of contemporary circumstances, to protect rights of abortion[37] and same-sex marriage, respectively.[38] Balkin calls this "living

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[35] Whether the Strasbourg Court has been consistently faithful in developing these principles, as opposed to functionally amending or displacing them, is another question on which reasonable minds will differ.
[36] Michael Ramsay, *Top 20 [sic] Most-Cited Originalism Scholars, 2016-2020 [Corrected]*, THE ORIGINALISM BLOG (Sept. 22, 2021), https://originalismblog.typepad.com/the-originalism-blog/2021/09/top-15-most-cited-originalism-scholarsmichael-ramsey.html [https://perma.cc/HWZ4-DYFP]
[37] *See* Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).
[38] Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648 (2016).

originalism" and it is a form of interpretation that Brennan could sincerely applaud.[39] Unfortunately, this version is also the only form of originalism that Judge Pryor's argument suffices to establish. So too, one strongly suspects that Justice Ketanji Brown Jackson — who professed commitment to originalism at her confirmation hearings — will go on to explain that originalism is consistent with judgments about the changing application of constitutional principles of which Brennan could only dream.[40]

If Balkin, Calabresi, Justices Jackson and Kagan, and the European Court of Human Rights are all employing a jurisprudence that is entirely compatible with Judge Pryor's premises, then so was Justice Brennan. Something has gone badly wrong with Judge Pryor's argument. The essential problem is that the argument has fallen into an equivocation. It hovers between originalism in the thin contentless sense that cuts very little methodological ice — Pickwickian originalism — and a further, ungrounded and unjustified commitment to a substantive originalism that would exclude judicial application of abstract principles, over time, to embrace the very moral novelties that Judge Pryor abhors. Interpreters from other legal systems, and on the home front, do not claim that words may simply change their semantic meanings over time; no one thinks that Hamlet's "hawk" refers to a bird. But what this leaves open is entirely consistent with the further position that the posited meaning that judges are bound to respect is the fixation of abstract principles whose application changes over time to incorporate, say, the "evolving standards of decency that mark the progress of a maturing society."[41]

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[39] Indeed, in the very same speech of Justice Brennan's that Judge Pryor lambasts, Brennan did not at any point argue for displacing the meaning of the principles fixed by the Constitution's text, but argued that the "genius" of the document lay in the "adaptability of its great principles to cope with current problems and current needs." William J. Brennan Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

[40] Conor Casey & Adrian Vermeule, *If Every Judge is an Originalist, Originalism is Meaningless,* WASH. POST, March 25, 2022.

[41] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Here a debater's trick becomes possible.[42] We have said that the bare commitment to the fixity of meaning is common ground in almost all legal systems. For "originalists" who are sociologically committed to the victory of their label, it then becomes possible to claim that in this sense everyone is an originalist, that as Justice Kagan once put it: "we are all originalists" now.[43] But in this sense, and by the same token, almost everyone everywhere has been an originalist all along. Alternatively and equivalently, no one is an originalist, for the term gives no specific differentiation. If originalism means everything, it means nothing.

The debater's trick here is of course a kind of pun. It rests on the same equivocation that Judge Pryor has stumbled into, between the thin and thick senses of originalism, between Pickwickian originalism and originalism in a substantive sense. Given that thin originalism cannot exclude originalists in good standing like Balkin, Calabresi and Justices Jackson and Kagan, it is entirely mysterious what substantive point is being served — other than methodological tribalism — by insisting on a label whose content is compatible with everything that Judge Pryor so vehemently despises. If the tribalism of labels is all that remains of originalism, then the game is up.

II. A False Binary

A few final words are necessary about what positive view common good constitutionalism takes of these issues — about what we are for, as opposed to what Judge Pryor is against. Judge Pryor argues that common good constitutionalism is a "results-oriented jurisprudence that is

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[42] *See, e.g.*, Kevin Walsh, *Agreement on the moral authority of original meaning,* MIRROR OF JUSTICE (March 25, 2022), https://mirrorofjustice.blogs.com/mirrorofjustice/2022/03/agreement-on-the-moral-authority-of-original-meaning.html [https://perma.cc/L5BZ-JUJE]

[43] The context to Justice Kagan's now famous quip, during her confirmation hearing, actually illustrates allegiance to a distinctly thin originalism, amounting to precious little of methodological substance. What Justice Kagan said was that, in approaching constitutional interpretation, judges should appreciate that "sometimes they [the Founders] laid down very specific rules. *Sometimes they laid down broad principles*" and that either way "we apply what they say, what they meant to do. So in that sense, we are all originalists." *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) (Emphasis added) https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf. This is of course very far from endorsement of a substantive public meaning form of originalism.

indistinguishable in everything but name from Justice Brennan's living constitutionalism."[44] Yet we have seen that Judge Pryor's originalism is entirely compatible with Brennanism. By contrast, common good constitutionalism actually *does* differ from Brennanism. We are faced, in other words, with a memorable case of projection.

Because Judge Pryor is strikingly unfamiliar with the existence of the classical legal tradition, he believes that common good constitutionalism disrespects legitimate political authority and proper institutional role morality – both important aspects of the common good - by allowing judges to set aside the meaning of posited law fixed at a historical point in time in favour of their personal morality.[45] Judge Pryor thus seems to think that the only real choice is between, on the one hand, the objectivity, stability, and predictability of originalism, which reduces interpretation to the detached discernment of socio-historical facts, and on the other hand an anarchic living constitutionalism where meaning previously fixed by a legitimate authority can be swapped for the interpreter's arbitrary personal preferences. And Judge Pryor seems to put into the category of arbitrary preference not only Justice Brennan's social liberalism, but also the classical lawyer's commitment to the natural law, as one type of law. Because common good constitutionalism is not a form of originalism it is therefore, Judge Pryor asserts, no different from the unstructured living constitutionalism of Justice Brennan, save with a different moral content.[46]

This is an entirely false binary.[47] For a start, originalism simply does not yield any such stability of meaning. Where specified determinations in the form of posited constitutional text are vague, general or intrinsically ambiguous, or in which the core cases they are intended to address

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[44] Pryor, *supra* note 3, at 26.
[45] *Id.* at 27.
[46] *Id*. One might justly assert that the difference in substantive moral content is the whole point, but that is a separate line of argument from the one we will pursue.
[47] Vermeule, *supra* note 22, at 118-119.

encounter an exceptional situation or unforeseen circumstances (an extrinsic ambiguity or "absurd result"), the semantic meaning and the legal meaning may diverge. There is then no escape from normative argument, internal to law, to determine what the law provides. In these hard cases, an originalist must decide on answers to a range of unavoidable questions. Should the interpreter opt for specific expected applications, or instead respect abstract principles? If the latter, at what level of generality should those principles be read? How do the answers to these questions interact with contrary precedent?

In order to reach a decision in hard cases the relevant determinations must be interpreted—and in our traditions,[48] historically speaking, have in fact been interpreted—in light of background principles of political morality. Those principles are themselves part of the law and legal practice; when deployed in hard cases, they show that semantic meaning does not exhaust or fully conclude legal meaning. The current Supreme Court bench, for instance, draws on considerations of political morality all the time to aid interpretation of under-determinate text. The conservative faction, which is dominated by originalists, regularly draws on distinctly modernist libertarian concerns when trying to faithfully interpret the meaning of posited law concerning the separation of powers and scope of federal authority.[49] Similarly, when the liberal faction was more dominant, it drew on ostensible moral commitments stemming from an autonomy-centered understanding of individual liberty and dignity to undergird its interpretation of open-ended constitutional text in cases like *Casey* and *Obergefell.*[50] Originalism cannot escape these questions and, as such, cannot claim any kind of unique status as a stability-generating interpretive method.[51]

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[48] That is, in both Irish and United States legal practice.

[49] See Cass R. Sunstein and Adrian Vermeule, *The Unitary Executive: Past, Present and Future*, 83 SUP. CT. REV. (2021); Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary,* 24 CHAP. L. REV. 707, 773-774 (2021).

[50] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Laurence H. Tribe, *Equal Dignity: Speaking Its Name,* 129 Harv. L. Rev. 16, 22, 26 (2015).

[51] For elaboration of this and other problems with stability justifications for originalism, see Vermeule, *supra* note 22, at 181.

Moreover, it is question-begging, argument by slogan, to assume that common good constitutionalism seeks to amend, change or displace posited law. Rather, common good constitutionalism is an approach to interpreting posited law, one that draws upon the classical approach that the framers themselves assumed. Long before the emergence of jurisprudential positivism, the classical tradition has always shown immense respect for posited law, which in typical cases promotes the common good by providing co-ordination and authoritative direction for persons and by making more concrete the open-ended and vague requirements of background principles of natural law.[52]

While emphatically recognizing the existence and value of positive law, the classical tradition rejects any analytic stipulation that the entirety of our law can ultimately be captured by that which is posited. General principles of political morality are also part and parcel of our law, and are binding in their own right, quite apart from their embodiment in positive law. But these principles are by no means used to set aside or displace posited law; instead, classical lawyers look to such principles in hard cases precisely in order to understand the full legal meaning of posited laws, as an ordinance of reason embodying choices of the legitimate authority that promulgated them.

Instead of approaching legal interpretation by stipulating circular definitions of law that confine it to posited text alone, classical lawyers point out that we must *justify* the rules, standards, presumptions, and interpretive canons that cabin and guide the work of judges and officials before the bar of the common good.[53] While classical lawyers understand that the great run of ordinary cases can be decided without *direct* recourse to law's morality, they also emphatically accept that these principles can never be *entirely* excluded from interpretation of legal materials by recourse to technical lawyerly tools. In hard cases — which are particularly rife in constitutional law, and

[52] *See* IV JOHN FINNIS, *Legal Philosophy: Roots and Recent Times*, *in* COLLECTED ESSAYS: PHILOSOPHY OF LAW 155-157 (2011).
[53] Vermeule, *supra* note 22, at 72-77.

which, due to the limits of lawmaker's foresight and the inevitable ambiguities and open texture of language, can never be entirely excluded — the classical lawyer acknowledges that legal materials must, inescapably, be interpreted in light of background principles of political morality, and rejects the illusion that this is avoidable.[54]

Therefore — and this point is entirely invisible to Judge Pryor — the classical tradition directs us toward a *constrained* form of developing constitutionalism, differing from both originalism and Brennanism. Both halves, the constraint and the development, are essential, and both stem from the master commitment of classical law to the common good. The constraint arises because common good constitutionalism recognizes that role morality and the allocation of authority across institutions like legislatures and courts themselves conduce to the common good. To that end, it recognizes a variety of presumptions, principles of deference, and jurisdictional limits that we have detailed elsewhere and at length.

By the same token, common good constitutionalism is developing constitutionalism in that it aims to preserve, tend and unfold the intrinsic integrity of constitutional principles over time. This is a legal analogue to John Henry Newman's "development of doctrine,"[55] which posits "notes" or signs that distinguish genuine developments from corruptions that distort and twist the nature of enduring constitutional principles.[56] Common good constitutionalism thus recognizes change in the application of constitutional principles where, but only where, "necessary in order for those principles to unfold in accordance with their true natures and to retain those natures in new environments."[57]

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[54] *Id.* at 95-108.
[55] JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 40 (14th ed. 1909).
[56] For extended discussion of these notes of genuine development, with illustrative applications, see Vermeule, *supra* note 22, at 201.
[57] *Id*. at 118, 123-124.

Common good constitutionalism does not alter the semantic meaning of concepts and principles (the "hawk" does not become a bird), nor does it take the semantic meaning to be entirely open to any and all changing applications and moral novelties that current generations may dream up (as does the sort of Brennanism that Judge Pryor is unable to exclude). Rather, it ensures that fixed principles remain recognizable over a community's lifetime as reasoned legal ordinances contributing to the common good, and that they do not misfire or devolve into caricatures of law that fail to serve its purpose in promoting human flourishing. On the classical view, it is defined into the nature of law that law is neither merely whatever ordinance the incumbent authority happens to create (positivism), nor unstructured moral reasoning by interpreters (Judge Pryor's caricature), but is rather an ordinance of reason, promulgated by legitimate authority to promote the common good. And it is defined into the nature of the posited law of a particular community that it derives from higher law that it determines and specifies and which also, in certain circumstances, informs its application. This is why common good constitutionalism presumes that posited law can and will be harmonized with background general principles of political morality where at all possible.[58] It is constitutional law's capacity to orient and guide public power toward the common good and human flourishing that provides it with any claim to guide and settle our present deliberations.[59]

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[58] That this may not be possible on some occasions was entirely clear to the classical jurists, who understood that posited law could misfire and be deployed for evil ends. This possibility is what explains the famous dictum that "an unjust law is not a law" attributed to the natural law tradition. More precisely, Aquinas in his *Treatise on Laws* said that a "tyrannical law, through not being in accordance of reason, is not a law absolutely speaking, but rather a perversion of law." THOMAS AQUINAS, SUMMA Theologica, pt. I-ii, q. 92 Art. 1. What this statement means is that an ordinance (say one promoting a moral evil condemned by the natural law, like slavery) may clearly and utterly clash with background principles, be enforced by judges and officials, and be referred to as law by those officials, but this will nonetheless be a diluted and caricatured version of law which misfires in its *telos* of ordering a community to the common good.; *see* Casey & Vermeule *supra* note 23 at 123.

[59] Casey & Vermeule *supra* note 23 at 123.

Conclusion

In the end, Judge Pryor's core commitment is no more than an ill-defined animus against a specific style of jurisprudence, Justice Brennan's style. But brooding animus does not make for clarity of thought. Indeed, as often happens, the passion overwhelms the argument and turns it into the very thing it aims to destroy. Hence Judge Pryor not only misconceives the commitments of common good constitutionalism and overlooks the constraints built into the classical law, but advances a hopelessly thin originalist view that licenses the very Brennanism he despises. Enmity is not a theory. Slogans are not arguments.