WHAT ORIGINALISM MUST TAKE FROM THE COMMON GOOD

JAMESON M. PAYNE*

I. INTRODUCTION

On May 29th, 1919, British researchers operating out of Principe and Sobral, Brazil, tested a simple proposition: whether, during that day's total eclipse, the light of stars proximate to the sun would be deflected, thus distorting their observed position in the night sky. The proposition was proven correct, and, in November of 1919, the results were reported in global news. The British researchers were Sir Arthur Eddington and Sir Frank Watson Dyson,[1] and their experiment was designed to prove the validity of Einstein's theory of general relativity. Proven it was, humanity's previous "Newtonian Ideal" was overthrown. The world was never the same again.

Like physics in the 20th century, so too comes the conservative constitutional conversation to a crucible. In wake of the Supreme Court's ruling in *Bostock v. Clayton County*[2]—a vast expansion of Title VII justified as an exercise in textualism—many prominent conservative thinkers have taken to assailing the legitimacy of originalism as a means of upholding our rule of law (or, alternatively, as a means of guaranteeing conservative prerogatives).[3] The nigh-unanimous laudation of originalism that has been enjoyed in conservative legal circles for the past three decades has experienced an unprecedented level of disruption and cynicism. The question that now rears its head is such: will the "Originalist Ideal" too be overthrown?

No matter the answer, originalism must spar with its formidable right-wing challenges. In this spirit of discourse over obstinacy, conservative channels like the *Harvard Journal of Law & Public Policy* have circulated such essays as "Common Good Originalism: Our Tradition and Our Path Forward" by Josh Hammer[4] and "Myths of Common Good Constitutionalism" by Conor

* Bachelor's of Physics and Political Science, Kent State University (2022). My immense gratitude is extended to the *Harvard Journal of Law & Public Policy: Per Curiam* editors for their thoughtful comments and revisions throughout the draft process. I also owe a great deal to my mentor, John González Cohen, who has been formative in my views on law and political morality. A protean in talents—civil rights attorney for the Department of Education, national chess master, and friend—John's example and sage advice serves as a reminder to be gracious, sensible, and intellectually honest.

[1] DAVID H. LEVY, DAVID LEVY'S GUIDE TO ECLIPSES, TRANSITS, AND OCCULTATIONS 17–24 (2010).

[2] 140 S. Ct. 1731. In this piece, *Bostock* will be interchangeably referred to as "originalist" or "textualist." These two terms have been treated as analytically distinct by some commentators, but this distinction might be unhelpful for various reasons. *See infra* note 14.

[3] *See, e.g.*, Josh Blackman, *Senator Hawley: Bostock "represents the end of the conservative legal movement,"* REASON (June 16, 2020),
https://reason.com/volokh/2020/06/16/senator-hawley-bostock-represents-the-end-of-the-conservative-legal-movement/ [https://perma.cc/Z2DT-HVQY].

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

Casey and Adrian Vermeule.[5] These, however, fail to compare to the true *chef d'oeuvre* of anti-originalism: *Common Good Constitutionalism*, a systematic, anti-originalist account of jurisprudence by Adrian Vermeule.[6]

Vermeule took originalism to task even before *Bostock* exacerbated these fault lines. Months before the decision was released, his piece in *The Atlantic*[7] called for the abandonment of originalism—a philosophy he deemed as having "outlived its utility"—and for it to be replaced by what he calls "common-good constitutionalism." This philosophy is cabined in the notion that "government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate."[8]

In *Common Good Constitutionalism*, Vermeule lays an analytic and normative defense for a theory that he argues is premised in the ancient notion of *ius*—a body of law, albeit containing *lex* (written law)—that encapsulates the principles of natural justice and thus orients society towards the vector of "common good." He heavily contrasts this to both originalism and living constitutionalism: the former he asserts is analytically deficient and fails to account for the various Dworkinian problems of "abstraction" that plague positivism; the latter he asserts as being an engine towards a "mythology of endless human liberation."[9]

Many pages could be spent criticizing this book in detail; indeed, some are already doing just that.[10] I think, however, that what the book gets *correct* is of vastly greater utility to originalists, such as myself. Originalists cannot and should not delve into line-by-line philippic to evade the many important—and, yes, valid—criticisms that Vermeule offers against originalism.

Common Good Constitutionalism offers a strong injunction: "The truly principled originalist would immolate his own method and transform himself into a classical lawyer, in an act of intellectual self-abnegation and self-overcoming."[11] I believe that this unalloyed command for common good constitutionalism cannot be sustained. Rather, I will be arguing that a reconciliation of these two philosophies is not only highly desirable but in fact necessary. Despite Professor Vermeule's reproach of such "hybrid theories," the normative posture of common good constitutionalism offers a vital strength to buttress originalism, a strength that has been lost upon some (but certainly not all) aspects of the discourse within originalist spheres.

My essay is organized as follows. First, I endeavor to offer a brief sketch of common good constitutionalism's high points, along with the balance that originalism brings to the table. The rest of the essay will be dedicated to a tripartite conclusion: 1) The need for a moral-political

---

[5] Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. PUB. POL'Y 103 (2022).

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

[7] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (March 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/4Q5G-R65R].

[8] *Id*.

[9] Vermeule, *supra* note 6, at 117.

[10] *See, e.g.*, Christopher R. Green, *Problems with Vermeule, Common Good Constitutionalism*. THE ORIGINALISM BLOG (March 22, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/03/problems-with-vermeule-part-1-introduction.html [https://perma.cc/JWB6-L8E8]. *See also* Smith, *infra* note 13.

[11] Vermeule, *supra* note 6, at 2.

justification of originalism; 2) The need for originalists to abjure "living originalism" where it is found and to critique it on normative grounds; and 3) The integration of originalism into the higher-level theory of morality upon which it resides.

II. WHAT'S GOOD ABOUT COMMON GOOD?

The common good's strength is in its admission of moral and political normativity. Contained in inconspicuous endnote thirty-four of the book, Vermeule notes that "the leading theoretical defenses of originalism are explicitly positivist."[12] Key to his criticism of modern originalism is the notion that positivism fails to sustain an internal logic of decision-making and can lead to such jarring consequences as *Bostock*. I agree with this assessment but will attempt to demonstrate that originalism can be revived under a fully moral framework.

Chapter 3, "Originalism as Illusion," explains the downfall that positivism spells for originalism. The posture he takes in this analysis is explicitly Dworkinian in flavor. As he notes,

> Dworkin observed that originalism is committed to "public meaning," but that "public meaning" is itself ambiguous, and that originalist judges and other interpreters constantly toss uneasily between the two accounts of meaning; the choice between them can only be made, explicitly or implicitly, on the basis of normative principles of political morality.[13]

I will not try to reconstruct in excruciating detail the minutiae of the argument; it suffices to demonstrate the point through illustration. To this end, Vermeule segues to *Bostock*, where he counterposes the so-called "expected applications" originalism that undergirds the logic of Justice Kavanaugh's dissenting opinion in contrast to Justice Gorsuch's "semantic originalist"[14] approach. Here, Justice Gorsuch essentially takes the text of Title VII, providing against discrimination "because of . . . sex,"[15] to a higher level of abstraction than the immediate original application might provide for. Arguing a kind of but-for analysis akin to the "process of logical entailment . . . used by analytical philosophers" rather than the textual comprehension of a layperson, what is *meant* is truly, in a Dworkinian sense, not obvious—or, rather, not defensible within the purview of original public meaning itself.[16] As Jack Balkin put it, the choice between such various options "cannot be settled by the meaning of 'meaning.'"[17]

To be sure, some scholars of jurisprudence would contend that what a text *means* and how the text was *applied* in its original context are categorically distinct.[18] I think that this view is correct;

---

[12] *Id.* at 192, n. 34.

[13] *Id.* at 95. *See also* Peter J. Smith, *Originalism and Level of Generality*, 51 GEO. L. REV. 485 (2017).

[14] Some have characterized Gorsuch's majority as "textualist" rather than "originalist." *See, e.g.* Austin Piatt, *A Matter of (Statutory) Interpretation: Bostock and the Differences Between Originalism and Textualism*, NW. U. L. REV. OF NOTE (March 29, 2021), https://blog.northwesternlaw.review/?p=2465 [https://perma.cc/5D4F-XQRL]. However, this view seems to contradict the standard which Gorsuch himself applies. His opinion states that "This Court normally interprets a statute in accord with the ordinary public meaning of its terms *at the time of its enactment*." *Bostock*, 140 S. Ct. at 1738 (emphasis added). A better account of the difference between Gorsuch's and Kavanaugh's approach is how they define "original meaning."

[15] 42 U.S.C. § 2000e-2(a)(2).

[16] Vermeule, *supra* note 6, at 85.

[17] Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 828 (2012).

[18] *See, e.g.*, Chris Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS UNIV. L.J. 555; Lawrence B. Solum, *Semantic Originalism*, (Ill. Pub. L. & Legal Theory Res. Papers Series No. 07-24, Nov. 22, 2008), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

however, it is beside the point. Even within the distinct category of "original meaning," there are as many definitions of "meaning" as there are individuals writing on the topic: some would take it as abstract concepts into which we infuse and construct new applications based on updated historical and moral understanding; some would define it as the original text interpreted through methods known to lawyers at the time; some would take these same original methods but circumscribe them to the particular understanding that contemporary lawyers would have reached with these methods. The different variances of "meaning" are legion.[19] Furthermore, those who have a shared understanding of the proper object of interpretation might nonetheless dispute how to give *effect* to such a legal object—Lawrence Solum's fantastic work on construction surveys the numerous competing originalist views on this matter.[20]

Within this universe of meaning, *Bostock* is no outlier. The extremities of higher-order originalism are prevalent in such works as Balkin's *Living Originalism*,[21] where the linguistic content of the Constitution is taken as sweeping, conceptual prerogatives upon which our legal order must constantly evolve and develop. In a very real and concerning sense, this is exactly what is meant by the issue of "convergence;" the lack of self-evident scope in originalism-*qua*-originalism begets an unrestrained theory—a freewheeling theory that can lead to almost anything under the sun.

If words are the skin of living ideas, then what is the body? Do we pierce only the thinnest layer, or reach down and touch the linguistic heart of the matter? Such is the fundamental contention that Vermeule takes to a positivist approach, bereft of internal justification; a point that he correctly raises. Although there is much to be said about venerable, descriptive accounts of originalism (Will Baude's account being one of the transformative pieces in my journey to originalism[22]), it is necessary for us to delve into a *moral-political* edifice upon which originalism can safely roost.

III. THE STICKING POINT OF ORIGINALISM

For all the fanfare I have thus far given to common good constitutionalism, it is not without its flaws.

Although *Common Good Constitutionalism* focuses primarily on the failures of positivist originalism to fully encapsulate the substance of law, it fails to respond to the various arguments that justify originalism on explicitly naturalist and normative grounds. In fact, Vermeule and Casey seem to believe that originalism is definitionally severed from morality; in their own words, "To the extent it tries to exclude consideration of principles of law's morality, originalism

[19] Balkin, *supra* note 17, at 822–28. *See also* Lawrence B. Solum, "Legal Theory Lexicon: The New Originalism," LEGAL THEORY BLOG (June 5, 2022), https://lsolum.typepad.com/legaltheory/2018/10/legal-theory-lexicon-the-new-originalism.html [https://perma.cc/D3D7-26D6]; John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 (2012).

[20] Lawrence B. Solum, *Originalism and Constitutional Construction.* 82 FORDHAM L. REV. 453, 534–36. Solum himself notes that construction is a normative endeavor. *Id.* at 472–74.

[21] JACK M. BALKIN, LIVING ORIGINALISM (2014).

[22] William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

tries to banish what cannot be banished."[23] They are certainly right about morality being unassailable, but their characterization of originalism is plainly inaccurate. Whereas they attempt to disarm originalism by jailing it in the "narrow cage of a particularly rigid positivism," such a constraint is entirely illusory.[24]

While the previously mentioned endnote thirty-four concedes that "there have always also been normative, non-positivist justifications for originalism,"[25] it completely fails to respond to such defenses. This is unfortunate given such defenses are, in fact, the most persuasive methods of justifying originalism. The works of great scholars like John O. McGinnis,[26] Michael Rappaport,[27] Randy Barnett,[28] Lee J. Strang,[29] and most recently Joel Alicea,[30] have gone into extensive exposition on why propositions of moral and political weight translate naturally into an originalist reading of the Constitution. Many of these works echo the early admonition of Justice Scalia in *Originalism: The Lesser Evil*,[31] where normative assessments of democratic legitimacy and judicial objectivity underwrite the rhetorical fabric of the discussion.

Indeed, it is rather odd to not engage with moralistic theories of originalism when in fact originalism is often justified or clarified in explicitly pragmatic, policy-driven, or moral language. For example, many of Justice Scalia's criticisms of using original *intent* over original *meaning* were rooted in explicitly practical issues.[32] Likewise, the 1985 speech of Attorney General Edwin Meese[33]—arguably one of the foundational pieces in originalism's genesis—explicitly notes that "[b]y fulfilling its proper function, the Supreme Court contributes both to institutional checks and balances and to the *moral undergirding* of the entire constitutional edifice." Recent speeches from the judiciary, such as Judge Neomi Rao's speech for the Sumner Canary Memorial Lecture, rely on explicitly normative premises to defend originalism.[34] To leap over discussing originalism in thick, moral terms is to ignore one of the most common rhetorical modes by which it is justified.

Alas, this entire body of work is summarily dismissed in *Common Good Constitutionalism* under the section entitled "Hybrid Theories." There, Vermeule states that:

---

[23] Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 127 (2022).

[24] Steven D. Smith, *The Constitution, the Leviathan, and the Common Good* (San Diego Legal Studies Res. Paper No. 22-005, May 2, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098880.

[25] VERMEULE, *supra* note 6, at 192, n. 34.

[26] JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013). *See also* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 110 NW. U. L. REV. 383 (2007).

[27] *Id.*

[28] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2017).

[29] Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909 (2005).

[30] J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (forthcoming 2022). *But see* Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (March 22, 2022), https://iusetiustitium.com/pickwickian-originalism/ [https://perma.cc/B5PW-9AEN].

[31] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

[32] Elizabeth A. Liess, Comment, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 571 (1993).

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

[34] Judge Neomi Rao, Sumner Canary Lecture at the Case Western Reserve University School of Law (Mar. 3, 2022).

> [Normative originalism] is non-positivist at the level of justificatory method, even if it tries to preserve a kind of positivist originalism at the operative level. But then it is at best unclear what in this scheme is distinctively originalist, for the classical law already has this two-level structure.[35]

This brisk rebuff of a large body of originalist thinking fails in multiple ways, not least of which is the fact that it proves far too much. Vermeule accuses originalism of lacking substantive content when framed as existing outside the confines of morality and political organization. This is not only true but plainly evident—it would be silly to assume that originalism simply "is," and that there is no external reason to subscribe to its tenets. But when originalism becomes properly situated in its normative context, Vermeule swats it away as indistinguishable from classical law.

If this is the case, then common good constitutionalism is no better than positivist originalism. If originalism is a species classical law merely by virtue of being normative and having a weak operative overlap, then it is not clear why *anything*, including progressive constitutionalism's "mythology of endless liberation,"[36] would not be welcome under the tent. Even Justice Sotomayor professes a presumptive adherence to the positive law and a "two-level structure."[37] If common good constitutionalism is everything, then it is patently nothing at all.

This accusation of normative originalism being a simulacrum of classical law is more incoherent when one considers the specific applications that Vermeule himself puts forward. In the penultimate chapter of his book, he lists some examples that typify a common-good juridical program: justification and support for the regulatory state, the collapse of "pre-commitment sovereignty," and a less expansive view of free-speech rights.[38] Clearly, these are substantive outcomes that most originalists do not reach.[39] In fact, a good number of these examples are used as a vehicle to expressly draw distinctions between the polity as might arise under common good constitutionalism as opposed to originalism. If such radical differences of opinion can come out of what is nominally the same ideology, then the problems raised in "Originalism as Illusion" are a snake that eats its own tail.[40]

To inject the language of Professors Vermeule and Casey into the discussion for a moment, this should be clarified: what I am discussing here is an explicitly "thick" form of originalism. Although it seems that thick originalism's existence has been acknowledged to some degree,[41] I

---

[35] Vermeule, *supra* note 6, at 109.

[36] *Id.* at 117.

[37] *Garland v. Gonzales*, 142 S. Ct. 919 (2022) (Sotomayor, J., dissenting) ("The essence of statutory interpretation is to review the plain meaning of a provision in its context.").

[38] Vermeule, *supra* note 6, at 134–78.

[39] It can be fairly argued that the positions espoused by Vermeule are closer to the actual original public meaning of the constitution than those held by self-professed originalists; but this is beside the point. Originalism, properly understood, is a standard of adjudication—not a social identifier—and thus this goes more to the consistency of individual practitioners, not the intrinsic propriety of originalism.

[40] In all fairness, Vermeule hedges his bet by pointing out that his theory does not commit a classical lawyer to any particular outcome; there is leg room for difference of opinion within his theory. This could mean that the positions advocated by Vermeule are merely precatory and that classical lawyers might disagree. But if that is the case, then it just deepens the confusion as to why originalism could not then fall within the ambit of valid natural law—if his entire dispute is with *self-justifying* originalism, then he is thrashing a strawman.

[41] *See* Adrian Vermeule & Conor Casey, *Argument by Slogan*, HARV. J.L. & PUB. POL'Y PER CURIAM 10 (Apr. 23, 2022), https://www.harvard-jlpp.com/argument-by-slogan-conor-casey-and-adrian-vermeule/ [https://perma.cc/ANN6-W6AU].

am not aware of any serious attempts by Vermeule or Casey, jointly or severally, to engage originalism in thick moral terms, aside from the rather brief demurrer that I have already mentioned. This framing—a serious engagement of originalism on its moral terms—seems like the most plausible way to engage with originalism; alas, it has not been done.

The key takeaway to derive from *Common Good Constitutionalism* is not that originalism is broken. Hardly so. Rather, modern originalism must be imbued with the energy of political and moral underpinning—it is a normative system that necessitates a normative skeleton. It is a creature that derives from the same origin as its common-good cousin; but, as has been demonstrated, it is distinct and substantively unique. This theory of originalism—one that lives within a structure of morals and politics—is the object of the remainder of this essay.

IV. THE NEED FOR NORMATIVE ORIGINALISM

Where does this dialectic leave us? Conventional wisdom would suggest that we are left with oil and water—two apparently irreconcilable ideologies that must necessarily be synthesized to approach a working body of law. This is a difficult undertaking which, as Scalia said, "done perfectly [] might well take thirty years and 7,000 pages."[42] I cannot hope to mark the precise contours of how a normative originalism will operate in practice. But I shall nonetheless attempt a rough outline.

A. Defining Originalism's Moral Landscape

The necessary starting place for this far-reaching endeavor is to command the exact prescriptive boundaries of originalist justification. In my view, the act of "doing originalism" is necessarily a synthesis between descriptive elements of Constitutional meaning (i.e., "What *is* the relevant history?") with prescriptive elements of discretion and judgment (i.e., "At what scope of generality *ought* we read the text?"). Jurists and scholars have toiled hard at knowing the dynamics of early American constitutional history down to an exact science; nonetheless, this work must find itself integrated into a schema of larger political mores.

What has been said here probably sounds obscurantist and necessarily unhelpful. To give content to exactly what I mean, allow me to use an example where originalists often squabble: cruel and unusual punishment.[43] One well-behaved property of the Eighth Amendment is that the history is relatively undisputed: a litany of punishments—harsh by modern standards—were prescribed at the time of ratification. The resolution of this question to a normative originalist, then, relies entirely on prescription.

The determination of this question lies entirely outside the scope of "meaning." The relevant threshold question—before we even attempt to imbue an open-textured provision, like the Eighth Amendment, with meaning—is to ask what the dictates of the court's institutional morality require it to do when it gives effect to legal meaning. Take two contrasting views: if you believe that the court best effectuates the demands of its role in a republican democracy when it defers

[42] Scalia, *supra* note 31, at 852.

[43] *See, e.g.*, Merin Cherian, Note, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 AM. CRIM. L. REV. 1759 (2019).

generously to other political institutions, you might then deny any construction that is not unambiguously within the scope of original meaning.[44] To the contrary, if you take the view that the court *must* introduce modern cultural and factual understandings, then you might sympathize with living originalism.

These are questions that originalists must take seriously. It is impossible to have a jurisprudence that is analytically complete without deliberating on these matters. Thankfully, we do not need to blindly jump into the hodgepodge: work has already been done defending the normative content of original meaning.[45] The question for us to resolve is taking those normative judgments and asking how they fit with other principles of judgment. Do the norms of democracy, stability, and rule of law comport with stare decisis? What about the level of generality? These are hard questions, but they are far less insurmountable if they receive the normative attention which they deserve instead of mere academic theorizing.

B. Against "Living Originalism"

By my previous description of two widely differing perspectives on Eighth Amendment originalism, one might conclude that a shift in frame merely kicks the problem of convergence back another rung. If someone dresses up their theory of originalism with some pragmatic appeals, it's a done deal?

Not so. To borrow an old joke from Justice Scalia, normative originalism doesn't have to outrun any bears—it just has to run faster than everyone else.[46] Divergence of view is intrinsic in *any* theory of law, and there is no reason to think that academics and judges would act much different if they were truly hell-bent on guaranteeing particular outcomes to the neglect of institutional stability.

Rather, the benefit of this view is that it brings the discussion back to what is actually relevant and provides less rhetorical confusion into which crafty arguments can be slipped. The posture of originalism as a disinterested, objective theory of law has provided critics like Vermeule ample opportunity to criticize "originalism" without responding to it in a substantive way.

Another added benefit of clarifying the moral landscape in which we operate is that it gives closure to the problem of "living originalism." Though living originalism is "impishly subversive,"[47] it is not unassailable.

Take for instance the case of Jack Balkin's flavor of living originalism. Though a thin, positivist structure of originalism may be insufficient to disentangle living originalism from alternative accounts of originalism, more pragmatic arguments for originalism might do the job. This is exactly the argument forwarded by McGinnis and Rappaport's response to *Living Originalism*,[48] where they grapple with abstract-meaning theories of originalism and oppose them for being at

[44] *But see* Steven Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419 (2019).

[45] *See supra* notes 24, 26–32.

[46] Dahlia Lithwick, *The Steve and Nino Show*, SLATE (Oct. 6, 2011), https://slate.com/news-and-politics/2011/10/breyer-and-scalia-unintentionally-make-the-case-for-cameras-in-the-courtroom.html [https://perma.cc/4N4W-A5QV].

[47] Vermeule, *supra* note 6, at 98.

[48] McGinnis & Rappaport, *supra* note 19, at 775–81.

tension with the values of deliberative democracy. This type of argument cuts through the circular, pointless bickering about which idiosyncratic variety of "meaning" is valid. Instead, it gives closure to the question of "What is Originalism?" based on the theory's compatibility with our shared political values. Normative originalists should use this type of reasoning as a model by which to ascertain how to apply original meaning and how to refute contrary positions.

This also brings us back to the issue of *Bostock*. Thinking through the actual ramifications, it should be apparent that responding to the outrage in its wake is far more adequately handled by a thick originalism than a thin one; the debate over what Title VII "means" will inevitably beat around the bush if not contextualized properly.

Therefore, those who think *Bostock* was right as an originalist matter should emphasize the overarching benefits of consistently applying a text's broad meaning even when it might be surprising to its original intended audience. Those who oppose it should emphasize that further abstraction away from expected application might denigrate the superintending value of judicial restraint.[49] Of course, these arguments might fail—people disagree on the optimal political structure. Some might find the outcome of *Bostock* so problematic as to be a definitive indictment of originalism (or, more specifically, the versions of originalism that give rise to the majority in *Bostock*). But if that is true then they must affirmatively defend their stance and show that their grievance is morally sufficient to justify some alternative theory of interpretation. They can no longer point at originalism-as-a-monolith when the court hands down a disfavored decision and call it a day.

Finally, a natural corollary of this principle is that originalism cannot be treated as a monolith because there are numerous types of originalism with different normative premises. Professor Vermeule has been quick to dismiss any attempts to apply this basis against decisions like *Bostock*, claiming it a boldfaced "No True Scotsman."[50] But just as the Pope speaking *ex cathedra* is not infallible against the Scripture, so too are even the best originalists not infallible against measured analysis of norm-laced original meaning.

Professor Vermuele says that originalism is broken. To that I respond: which originalism?

C. Integrating Originalism into a Meta-Theory

In some sense, the fundamental thesis of *Common Good Constitutionalism* rings true: there is indeed an *ius*—one that occupies a space encompassing and expanding beyond the text of law. As originalists, this simply exists as the "moral landscape" we have previously mentioned. But what does that mean in terms of jurisprudence?

Though normative originalism *is* originalist—it heavily circumscribes the application of non-textual and ahistorical evidence to legal determinations—it also considers how these principles harmonizes with the superintending values that justify originalism.

[49] Smith, *supra* note 13.

[50] Adrian Vermeule, *Gnostic Constitutional Theory*, IUS & IUSTITIUM (2021), https://iusetiustitium.com/gnostic-constitutional-theory/ [https://perma.cc/9DD7-Y5YA].

For instance, stare decisis must be given a long and hard look. In this meta-theoretical look, stare decisis is not a "pragmatic exception"[51] to any fundamental rule of originalism. Rather, it is a tool that flows from the conditions that necessitate originalism to begin with. To what extent it is applied is an entirely prescriptive question; but it at least is one that has the benefit of no longer colliding with originalism in an awkward fashion. In an ironic way, it is quite like Vermeule's discussion of rights under the common-good: they are not entitlements carved out from the scope of our moral structure, but rather a part of a coherent whole that flows naturally in operation.[52] So too are doctrines like stare decisis, constitutional avoidance, or judicial restraint not *exceptions* to originalism. They are all logical consequents that operate by nature of their normative progenitors.

For this reason, I propose an example of what a "hard" case might look like under this brand of normative originalism: *District of Columbia v. Heller*.[53] Even stipulating that the originalist logic behind the majority in *Heller* is correct, a judge employing a naturalist brand of originalism must still contend with the disturbance of long-standing, democratically enacted law—features that seem to cut against a strict application of originalism, if we are to view it as a mere substructure in a larger political-moral edifice. Indeed, there may be many such examples of cases where the application of pure originalism might frustrate the higher-order values of our system; no theory of law can ever remove hard cases. However, it should also be expressed that this view on originalism is not necessarily the "correct" one—it may be the case that, as a matter of judicial morality, judges should *never* appeal to considerations that fall clearly outside the scope of original meaning. The answers to these questions are not fully apparent *ab initio*; the issue is left on the table for jurists to decide what type of originalism best coheres with the dictates of political morality.

To not belabor the point any further than necessary, I leave to the imagination of you, the reader, further speculation as to how this "integration" might look in practice. Would anything in the moral superstructure that holds originalism necessitate any other reassessments of our fundamental judicial norms?

V. Conclusion

At the onset of this essay, I described the baptism by fire that originalism is currently undergoing. If it survives this ordeal, it is not evident that it will look the same as when it entered. The originalism of Scalia, of Bork, and even of contemporary academics may come out with a decidedly moralistic bent to it. If anything that I have said up to this point is convincing, then we should rejoice rather than fear these developments. We should take them for their worth and use them to strengthen the vitality of originalism as a method of good law-making; but to do so requires good-faith engagement with its counterparts. From this strife, it is hoped that we gain something rather than lose.

[51] Antonin Scalia, A Matter Of Interpretation: Federal Courts And The Law 140 (1998).
[52] Vermeule, *supra* note 6, at 4.
[53] 554 U.S. 570 (2008).

When the world changed in 1919, it did not weep over the loss of Newtonianism. It rejoiced for the progress of mankind and the discovery of an exciting new frontier. That is what I think common good constitutionalism offers to us: the dominant theory of conservative justice will be different, but its difference will be in its newfound strength and robustness. That is what we must take from the common good.