

ORIGINALISM, COMMON GOOD
CONSTITUTIONALISM,
AND OUR COMMON ADVERSARY:
FAIR-WEATHER ORIGINALISM

HON. JAMES C. HO*

I'm honored to be here. But to be honest, I'm also a bit disoriented to be here. Professor Vermeule was my legislation professor in law school. So *he* graded *my* papers. And now, I'm being asked to grade *his* papers? It feels totally backwards. But I'm honored to do it.

My message today in sum is this: I'm an originalist. And I'll spend a few words explaining what that means. One thing it means is that I'm not an advocate of common good constitutionalism. But I'm not an opponent, either.

To the contrary, I appreciate and respect Professor Vermeule's criticisms of originalism. In fact, I've voiced similar criticisms myself—including the last time I spoke at Harvard Law School, earlier this year.¹ I see quite a bit of overlap in our respective views. In particular, I would say that we share a common adversary—what I have called “fair-weather originalism.”²

In an opinion I wrote a few years ago, I explored the work of various scholars who uncovered a rather troubling insight: many

* Circuit Judge, United States Court of Appeals for the Fifth Circuit.

1. See James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335 (2022).

2. *Id.* at 349 (“[I]f you’re an originalist only when elites won’t be upset with you—if you’re an originalist only when it’s easy—that’s not principled judging. That’s fair-weather originalism.”).

scientists aren't very good at science.³ Unfortunately, it turns out that the same thing could be said about originalism: many originalists aren't very good at originalism.

I.

This past year was the 40th anniversary of my becoming an American citizen, and the 25th anniversary of my joining the Federalist Society. I've been a profoundly grateful American—and an originalist—for longer than I've been a lawyer. And just as I don't think of myself as a hyphenated American,⁴ I don't think of myself as a hyphenated originalist.

I'm an unhyphenated originalist for one simple reason: when judges decide cases, we don't just resolve disputes as an intellectual or academic exercise. We exercise the formidable coercive power of the government, and we deploy that power in favor of one party in a dispute against another. So in every case, I ask myself: where do I get the authority to act? Answering that question with anything other than legal text (or at least binding precedent) would make me very nervous.⁵ I would worry about any suggestion that anyone on

3. See *Whole Woman's Health v. Paxton*, 10 F.4th 430, 465 (5th Cir. 2021) (en banc) (Ho, J., concurring) ("scientists don't always follow the science themselves"); *id.* at 468 ("The bottom line is this: Of course we should 'follow the science.' But that doesn't mean we should always blindly follow the scientists. Because, like the rest of us, scientists are, first and foremost, human beings. They're susceptible to peer pressure, careerism, ambition, and fear of cancel culture, just like the rest of us.").

4. See, e.g., *Roosevelt Bars the Hyphenated*, N.Y. TIMES, Oct. 13, 1915, at 1 ("There is no room in this country for hyphenated Americans.").

5. See Ho, *supra* note 1, at 338 ("[B]eing an originalist just means being faithful to whatever text you're interpreting. . . . Whether we're talking about a contract or a constitution, our needs are the same. We need to be able to negotiate with one another—compromise—and hopefully, eventually, reach an agreement. But we can't do that—indeed, we *shouldn't* do that—unless we have confidence that our agreement will be interpreted faithfully, not randomly, and certainly not partially. After all, who in their right mind would enter into an agreement, if you know that the agreement is just going to be distorted to favor the other side?").

the bench would subvert legal text in favor of the judge's personal view of the common good.⁶

Originalism must be principled, not partisan. And principled originalism is neither liberal nor conservative. A principled originalist applies the same faithful approach to the text—no matter whose ox is gored. You apply the same substantive rules and the same jurisdictional doctrines—no matter whose interest is served. Some of my biggest fights on my court have been with colleagues who were appointed by a President of the same party—including even colleagues who claim the originalist mantle for themselves.⁷ And that's okay.

In fact, I would hope that it reinforces what originalism is, and what it isn't. It isn't the exclusive province of plaintiffs or defendants, government or citizen, management or labor. Fidelity to text doesn't mean you favor folks on the left or the right.

6. I note that Professor Vermeule does not favor subverting legal text in favor of a judge's personal views. Rather, he aims to use natural law principles to inform one's reading of texts—principles that are objective and knowable through reason, not derived from one's subjective personal views. See, e.g., ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 8 (2022) ("Common good constitutionalism draws upon an immemorial tradition that includes, in addition to positive law . . . principles of objective natural morality (*ius naturale*) . . ."; *id.* at 19 ("[T]he classical tradition does not substitute 'preferences' for law; it claims there are objective principles of legal justice accessible to reason, that it is entirely possible to 'find' rather than 'make' law.")).

7. See, e.g., *Hewitt v. Helix Energy Solutions Group*, 15 F.4th 289 (5th Cir. 2021) (en banc), *aff'd*, 598 U.S. 39 (2023); *Oliver v. Arnold*, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in denial of rehearing en banc); *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022), *vacated on reh'g en banc*, 52 F.4th 265 (5th Cir. 2022); *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc); *Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc); *Hamilton v. Dallas County*, 79 F.4th 494, 506–12 (5th Cir. 2023) (en banc) (Ho, J., concurring); *Mayfield v. Butler Snow*, 78 F.4th 796, 797 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

II.

But all that being said, judges are, first and foremost, imperfect human beings. In my experience, there are a number of reasons why avowed originalists sometimes err. I'll focus on two.

First, originalism may in certain cases inevitably lead to results that cultural elites despise.⁸ And when it does, the elites typically don't keep quiet about it.⁹ And for good reason: their attacks are, all too often, all too effective. Psychologists teach us that succumbing to peer pressure, avoiding public opprobrium, falling prey to conformity—all of these are common elements of human personality and experience.¹⁰ But they're absolutely fatal to principled originalism.¹¹

Second, originalism will inevitably lead to results that judges themselves dislike. Justice Scalia often said that a “judge who always likes the results he reaches is a bad judge.”¹² But as imperfect humans, judges may be tempted to stray, and to strain, to engineer a result we personally prefer.

So I understand and agree when Professor Vermeule sharply criticizes originalism on these grounds. I'll take each one in turn.

A.

On the first point, Professor Vermeule says that too many originalists “allow principles to be read at dizzyingly high levels of generality,” “in ways that are pragmatically indistinguishable from

8. See Ho, *supra* note 1, at 341.

9. See *id.* at 345–46 (collecting examples).

10. See *id.* at 341–42.

11. See *id.* at 349 (“We’re not binding ourselves to the text if we only follow it when people like the result. Originalism is either a matter of principle or a talking point. Fair-weather originalism isn’t originalism. If you’re not an originalist in every case, then you’re not really an originalist at all.”).

12. Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1601 (2017) (quoting Antonin Scalia).

the [*very*] *progressive constitutionalism* that originalism was created and designed to *oppose*.”¹³ In other words, originalists too often morph originalism into its very opposite—“like the convergence of a predator and its prey”—a colorful, if depressing, metaphor.¹⁴ “[O]riginalist judges have written expressly originalist opinions . . . reaching results that almost no one alive at the time of the law’s enactment would conceivably have thought desirable or even defensible. It is a strange originalism indeed that would be unanimously voted down by the enacting generation.”¹⁵ It “leaves it unclear what originalism stands for and what it excludes.”¹⁶

In sum, Professor Vermeule says that originalism is “an illusion”—it “does not actually exist.”¹⁷

These are sharp criticisms of originalism. But I get them. I’ve made similar comments myself.¹⁸ So I get why Professor Vermeule sees common good constitutionalism as an important “competitor” to originalism.¹⁹

But if we are indeed “competitors,” I would urge that it be a friendly competition. Good faith originalists and common good constitutionalists should be allies, not enemies. Because originalists and common good constitutionalists face a common adversary.

The last time I spoke at Harvard Law School, I warned about the perils of what I call “fair-weather originalism.” My basic premise is that originalism often devolves into fair-weather originalism for one simple reason: judges are human. We’re susceptible to the

13. VERMEULE, *supra* note 6, at 98–99 (emphasis added).

14. *Id.* at 98.

15. *Id.* at 16.

16. *Id.* at 105.

17. *Id.* at 22.

18. See, e.g., Ho, *supra* note 1, at 349.

19. VERMEULE, *supra* note 6, at 22.

same peer pressure, fear of criticism, desire for approval, and tendency to conform that everyone else is.²⁰

If anything, I fear that federal judges are even more susceptible to such weaknesses. When you look at the typical résumé of a federal judge, you often see a bunch of fancy credentials—fancy law schools, fancy clerkships, fancy law firms and government jobs. And folks like that—people who are typically used to collecting gold stars—tend to be motivated by one overarching objective: collecting even more gold stars. I call this “gold star” syndrome.²¹

But if you plan to be faithful to the Constitution in every case, no matter how unpopular that may be, gold stars are not in the cards. Principled originalists aren’t exactly showered with praise from the media, awards from bar associations, recognitions and honors from distinguished institutions.²²

In sum, “gold star” syndrome means there’s a strong temptation to stray. And that’s what I see in Professor Vermeule’s deep frustration with originalism.

But what I see in his work is not just a *complaint* about originalism—it may also be part of the *cure*.

Originalists should be fearless. They should refuse to bend the knee to anyone. We know that we live in a fallen world—a world infected by “gold star” syndrome. That doesn’t mean we can’t practice principled originalism. But it does mean that we have to account for the fact that originalism will sometimes lead to results condemned by cultural elites. It means we must be ready to counter and combat those dynamics when it does.

One promising antidote for social pressure and “gold star” syndrome is to make sure you hear from *all* sides. Judges need to hear

20. See Ho, *supra* note 1, at 341–42.

21. See *id.* at 343–45.

22. See *id.* at 345–46 (collecting examples).

legal arguments from *every* corner of America—not just the 1%. And the arguments need to be forceful, vigorous, and unapologetic.

Take the Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization*.²³ Historically, the debate over abortion has focused on two positions: Is the right to abortion constitutionally required? Or is the Constitution neutral on abortion?²⁴ To that debate, Professor Vermeule added a third option: Is abortion constitutionally forbidden?²⁵

No matter what you may personally think about the competing arguments, we should all agree that every argument should be presented and available to the Supreme Court.²⁶

Common good constitutionalism can help ensure that originalists practice fearless, principled originalism—and resist the competing forces of expediency and elite acceptance. If we can put systems and structures in place that will bolster and strengthen originalists and help them to become full-time rather than fair-weather originalists, we should embrace it.

23. 142 S. Ct. 2228 (2022).

24. Compare *Roe v. Wade*, 410 U.S. 113 (1973), with *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”).

25. See VERMEULE, *supra* note 6, at 199 n.103 (“I believe there is a straightforward argument . . . that due process, equal protection, and other constitutional provisions should be best read in conjunction to grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law. This view is not a mere rejection of *Roe v. Wade*, but the affirmation of the opposite right, and would be binding throughout the nation.”).

26. Compare, e.g., Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, in *Dobbs v. Jackson Women’s Health Org.*, 2021 WL 3374325 (“The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court’s recent landmark originalist rulings. . . . [T]he unborn are ‘person[s]’ guaranteed equal protection and due process by the Fourteenth Amendment.”), with *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (“On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral.”).

B.

I'll turn briefly to the second criticism of originalism. Professor Vermeule criticizes originalists for catering not only to cultural elites, but also to corporate executives. Here, his concern is not so much bending to peer pressure, but to personal preference. As he puts it, originalist judges "angrily condemn departures from the putative original understanding, *except* in areas" that benefit "corporations . . . in which the law propounded by conservative judges is either expressly or arguably non-originalist."²⁷

Again, I'm sympathetic—indeed, I've voiced such criticisms myself.²⁸ As Justice Scalia once wrote, "such questions as 'Who wins?' 'Will this decision . . . help future defendants?' 'Is this decision . . . good for business?' . . . Questions like these are appropriately asked by those who write the laws, but not by those who apply them."²⁹

I totally agree. Originalists must be principled in *every* case—even when originalists risk being disdained by others, and even when originalism leads to outcomes that originalists themselves disdain. As we like to say in my chambers: Text, not tribe.

A principle isn't a principle until it costs you. You're not an originalist unless you're an originalist "even when it hurts."³⁰

27. VERMEULE, *supra* note 6, at 16 (emphasis added).

28. See, e.g., *Hewitt v. Helix Energy Sols. Group, Inc.*, 983 F.3d 789, 802 (5th Cir. 2020) (Ho, J., concurring), *vacated on reh'g en banc*, 989 F.3d 418 (5th Cir. 2021) ("Those of us who were born, bred, and educated in textualism are unfamiliar with the 'bad for business' theory of statutory interpretation offered by the dissent under the purported flag of textualism."); *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 882 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc) ("[W]hen corporations violate the law, courts should hold them accountable, no less and no more than individuals.").

29. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 352–53 (2012).

30. *Lefebure v. D'Aquila*, 15 F.4th 650, 663 (5th Cir. 2021) (quoting Psalm 15:4).

III.

Even beyond facing a common adversary, there's additional common ground that originalists and common good constitutionalists share.

Professor Vermeule argues that natural law can and should be used “to interpret texts [properly], reading them . . . to square with traditional background principles.”³¹ He explains that, “at the time of the adoption of the Constitution, and for many years afterward, it was sometimes said that the constitutional provisions were ‘declarative of natural law’ . . . and gave more definite shape to certain natural law principles.”³²

I certainly agree with getting the meaning of words right by considering historical context and tradition. We can always debate, to be sure, the extent to which natural law will be relevant or irrelevant in a particular situation or context.³³ But we can all agree that originalists should hear and consider all evidence that helps us

31. VERMEULE, *supra* note 6, at 59.

32. *Id.* at 60. *See also id.* at 2 (“If anything has a claim to capturing the ‘original understanding’ of the Constitution, this does. The classical law is the original understanding. The classical law was deeply inscribed in our legal tradition well before the founding era, and was explicit in legal practice through the nineteenth and into the twentieth century.”).

33. *See, e.g.*, Will Baude, *Beyond Textualism?*, 46 HARV. J.L. & PUB. POL’Y 1331, 1346–47 (2023) (urging his audience to “consider natural law” and suggesting that natural-law principles could “provide a clear statement rule, if you will, for interpreting constitutional text.”); Conor Casey & Adrian Vermeule, *The Owl of Minerva and “Our Law”*, IUS & IUSTITIUM (Mar. 16, 2023), <https://iustitium.com/the-owl-of-minerva-and-our-law/> [<https://perma.cc/LXM2-2RX2>] (“Understanding the importance of unwritten principles to legal practice . . . might even require consideration of—in Baude’s own words—‘natural law,’ whose proper role in the adjudication and interpretation of posited legal texts is one of the oldest legal debates in the American republic.”).

reach an accurate understanding of the original meaning.³⁴ Common good constitutionalism can aid originalism by making sure that judges construe legal terms accurately by considering their proper context.

* * *

President Reagan used to say: “The person who agrees with you 80 percent of the time is your friend and ally—not some 20 percent enemy.”³⁵ Originalists should heed President Reagan’s advice and regard common good constitutionalists as friends and allies. We can do a lot of good together.

Common good constitutionalism can do a lot to push back against fair-weather originalism. In fact, I think it already has. Thank you.

34. See R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 170 (2015) (discussing “[t]he presence of so many arguments and decisions invoking the law of nature in the American reports” of the eighteenth and nineteenth centuries).

35. See Thomas B. Esdall, *Republicans Offer Mixed Forecast for 1994*, WASH. POST (Dec. 26, 1993), <https://www.washingtonpost.com/archive/politics/1993/12/26/republicans-offer-mixed-forecast-for-1994/eb844f18-e678-4182-bc53-c4f45e239a09/> [https://perma.cc/QSY2-3AL3] (quoting former aide to President Reagan).