

COMMON GOOD ORIGINALISM: OUR TRADITION AND OUR PATH FORWARD

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Herewith, a paradox. On the one hand, legal conservatism, originalism, and textualism have never been more ascendant and better-positioned within the legal academy and mainstream political discourse. But on the other hand, the state of conservative jurisprudence in America has reached a crisis point.¹

The crisis point did not arrive overnight. The modern Republican Party's judicial nominations apparatus has often failed conservatives and constitutionalists, dating all the way back to President Dwight D. Eisenhower's fateful twin Supreme Court nominations of Justice William Brennan and Chief Justice Earl Warren. "I made two mistakes, and both of them are sitting on the Supreme Court," President Eisenhower famously said.² Justice Harry Blackmun, author of *Roe v. Wade*,³

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1. See, e.g., Josh Hammer, *The Crisis of the Conservative Legal Movement*, AM. GREATNESS (July 30, 2020), <https://amgreatness.com/2020/07/30/the-crisis-of-the-conservative-legal-movement/> [<https://perma.cc/J9H8-UKJZ>]; see also Josh Hammer, *Undoing the Court's Supreme Transgression*, AM. MIND (June 19, 2020), <https://americanmind.org/memo/undoing-the-courts-supreme-transgression/> [<https://perma.cc/2ULQ-WM4A>].

2. Raymond J. de Souza, *Supremacy of the Court*, FIRST THINGS (Dec. 4, 2020), <https://www.firstthings.com/web-exclusives/2020/12/supremacy-of-the-court> [<https://perma.cc/65E6-PCXM>].

3. 410 U.S. 113 (1973).

the twentieth century's moral and jurisprudential successor⁴ to the *Dred Scott*⁵ case, was a President Richard Nixon nominee. Justice John Paul Stevens, liberal lion of the Court for three and a half decades, was nominated by President Gerald Ford. President Ronald Reagan nominated the moderate Justice Sandra Day O'Connor and the idiosyncratic Justice Anthony Kennedy, the latter of whom would encapsulate both a gnostic relativism in metaphysics⁶ and a jurisprudential commitment to individual autonomy maximalism⁷ over the course of his Court tenure. President George H.W. Bush greatly erred in nominating Justice David Souter—he of the eponymous “No more Souters” fame—to the Supreme Court in lieu of the stalwart Edith H. Jones. President George W. Bush was similarly mistaken in selecting John G. Roberts over J. Michael Luttig for the position of Chief Justice of the Supreme Court. Suffice it to say that this is hardly a track record of sustained excellence.

According to prevailing mythology, everything changed when Donald Trump became President. At long last, conservatives and constitutionalists had a White House that was unambiguously, passionately committed to stacking the federal judiciary with principled originalists and textualists. This purported well-oiled machine, aided by outside actors with putative expertise in separating the would-be Souters from the true believers, was finally to deliver conservatives to the judicial promised land.

4. See, e.g., Robert P. George, *A Republic . . . if You Can Keep It*, FIRST THINGS (Jan. 22, 2016), <https://www.firstthings.com/blogs/firstthoughts/2016/01/a-republic-if-you-can-keep-it> [https://perma.cc/9ST2-DHQR]; Josh Hammer, *Abortion Is a Grave Injustice. We Must Treat Roe Just Like Dred Scott.*, DAILY WIRE (Jan. 25, 2020), <https://www.dailymire.com/news/hammer-abortion-is-a-grave-injustice-we-must-treat-roe-just-like-dred-scott> [https://perma.cc/929T-3NAY]. See generally JUSTIN DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING (2013).

5. 60 U.S. (19 How.) 393 (1857).

6. See, e.g., William Haun, *The “Mystery of Life” Makes Law a Mystery*, PUB. DISCOURSE (July 26, 2013), <https://www.thepublicdiscourse.com/2013/07/10091/> [https://perma.cc/N6C7-GZHF].

7. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Windsor v. United States*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

Then came *Bostock v. Clayton County*,⁸ last summer's bitter disappointment in which the Court implausibly⁹ wove both sexual orientation and transgenderism into a key plank of the nation's civil rights statutory edifice. The opinion, of course, was written by none other than President Trump's first nominee to the Court and the man who replaced Justice Antonin Scalia himself, Justice Neil M. Gorsuch. With one stroke of a pen, the Justice Gorsuch-led Court majority misconstrued the proscription of private employment discrimination on the basis of "sex" in Title VII of the 1964 Civil Rights Act as encompassing not merely "sex," but also "sexual orientation" and "gender identity."¹⁰ In so doing, this highly touted product of the conservative legal movement evinced and highlighted for all the shortcomings of a literalist, acontextual, overtly positivist jurisprudence.¹¹

That a man like Justice Gorsuch—closely vetted, with sterling academic credentials, formal natural law training, and top-flight social conservative support at the time of his nomination¹²—could

8. 140 S. Ct. 1731 (2020).

9. See, e.g., Ryan T. Anderson, *The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination*, SCOTUSBLOG (June 16, 2020), <https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination/> [https://perma.cc/3J44-YXQ2]; Josh Hammer, *Neil Gorsuch Slapped Conservatives by Creating New Gay Rights*, N.Y. POST (June 15, 2020, 8:28 PM), <https://nypost.com/2020/06/15/neil-gorsuch-slapped-conservatives-by-creating-new-gay-rights/> [https://perma.cc/4RBZ-RSF8].

10. See *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.").

11. See, e.g., Hadley Arkes, Josh Hammer, Matt Peterson, & Garrett Snedeker, *A Better Originalism*, AM. MIND (Mar. 18, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/> [https://perma.cc/XY3U-7T8W]; Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), <https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence> [https://perma.cc/U4HM-BLA5]; Hadley Arkes, *Conservative Jurisprudence Without Truth*, FIRST THINGS (July 20, 2020), <https://www.firstthings.com/web-exclusives/2020/07/conservative-jurisprudence-without-truth> [https://perma.cc/UPE9-JJGM]; Hadley Arkes, *What Hath Gorsuch Wrought?*, FIRST THINGS (Oct. 13, 2020), <https://www.firstthings.com/web-exclusives/2020/10/what-hath-gorsuch-wrought> [https://perma.cc/H5P3-3DST].

12. See, e.g., Robert P. George, *Ignore the Attacks on Neil Gorsuch. He's an Intellectual*

write an opinion like *Bostock* ought to serve as a wake-up call not only for those who prize the necessity of interpreting legal texts according to those texts' original public meaning, but also for all conservatives who prioritize above all the pursuit of the classical substantive goals of *politics qua politics*: justice, human flourishing, and the common good.¹³ The time has indeed come for those in America's modern legal conservative movement to engage in sober, contemplative self-reflection—to reassess our first principles, retire our outmoded bromides, and rebalance prudence and dogma¹⁴ anew to reach a jurisprudence that actually serves our substantive goals.¹⁵

Too often, contemporary “legal conservatism”—as a *methodology*, not necessarily a specific judicial result—redounds against the interests of substantive conservatism itself. Legal conservatives too often pat themselves on the back for seizing a purported moral high ground of positivist neutrality,¹⁶ content to brush aside every high-profile defection as an unfortunate but inevitable byproduct of our sacrosanct neutrality principle. By contrast, legal progressives, marching in lockstep to the inherently outcome-oriented methodology of Dworkinian living constitutionalism, never make such a first-order confusion of substance and “neutrality.” Perhaps those

Giant—and a Good Man., WASH. POST (Feb. 1, 2017, 7:50 AM), <https://www.washingtonpost.com/posteverything/wp/2017/02/01/ignore-the-attacks-on-neil-gorsuch-hes-an-intellectual-giant-and-a-good-man/> [https://perma.cc/2CHU-K8DR].

13. See, e.g., Josh Hammer, *Who's Afraid of the Common Good?*, AM. MIND (Nov. 23, 2020), <https://americanmind.org/salvo/whos-afraid-of-the-common-good/> [https://perma.cc/J4JK-8SB8].

14. See, e.g., Josh Hammer, *Conservatism Must Be Chastened by Humility*, AM. COMPASS (Oct. 14, 2020), <https://americancompass.org/the-commons/conservatism-must-be-chastened-by-humility/> [https://perma.cc/6E5J-RKFE].

15. See, e.g., Josh Hammer, *Judicial Carnage*, AM. MIND (Oct. 30, 2020), <https://americanmind.org/features/what-comes-next/judicial-carnage/> [https://perma.cc/4TN4-D2TT].

16. See, e.g., Ed Whelan, *The Unsoundness and Imprudence of “Common-Good Originalism”*, PUB. DISCOURSE (Mar. 1, 2021), <https://www.thepublicdiscourse.com/2021/03/74424/> [https://perma.cc/FF7F-E5EK]; Ilya Shapiro, *After Bostock, We're All Textualists Now*, NAT'L REV. (June 15, 2020), <https://www.nationalreview.com/2020/06/supreme-court-decision-bostock-v-clayton-county-we-are-all-textualists-now/> [https://perma.cc/7WCU-4L8B].

perpetually pollyannaish legal conservatives would do well to consider why exactly it is that the legal Left has never had its “*Bostock* moment.”

Fortunately, despite the precarity of our situation, our path forward is reasonably clear. That path forward is not a break with our tradition; rather, it is a rediscovery and implementation of our tradition and our true Anglo-American constitutional inheritance, properly understood and as previously intuited and promulgated by many of the greatest statesmen in American history. I call it “common good originalism.”¹⁷

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The post-1982 era¹⁸ of the modern legal conservative movement has seen the doctrinal advancement of at least three distinct forms of originalism: progressive, libertarian, and conservative.¹⁹ Progressive originalism’s champions, namely Professor Jack Balkin, essentially argue that the Constitution’s original public meaning paradoxically *requires* an interpretive methodology of Dworkinian living constitutionalism.²⁰ Progressive originalism is thus substan-

17. See Josh Hammer, *Common Good Originalism*, AM. MIND (May 6, 2020), <https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/> [<https://perma.cc/3YJ6-FXP3>]; Josh Hammer, *A Conservative Jurisprudence Worthy of a Conservative Economics*, AM. COMPASS (Sept. 21, 2020), <https://americancompass.org/the-commons/a-conservative-jurisprudence-worthy-of-a-conservative-economics/> [<https://perma.cc/28HT-A5SU>]; Josh Hammer, *Toward a New Jurisprudential Consensus: Common Good Originalism*, PUB. DISCOURSE (Feb. 18, 2021), <https://www.thepublicdiscourse.com/2021/02/74146/> [<https://perma.cc/S59P-2Z57>].

18. The Federalist Society was founded in 1982 by students at Yale Law School, Harvard Law School, and the University of Chicago Law School. See David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> [<https://perma.cc/P2RQ-LFML>].

19. See Ilan Wurman, *The Founders’ Originalism*, NAT’L AFFS. (Spring 2014), <https://www.nationalaffairs.com/publications/detail/the-founders-originalism> [<https://perma.cc/CN6N-FGME>] (“In contemporary legal thinking, there have been broadly speaking three schools of originalism—libertarian, progressive, and conservative.”).

20. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

tively, and not merely procedurally, progressive insofar as the interpretive precepts of Dworkinian living constitutionalism necessarily redound to substantive progressive priorities such as privacy, individual autonomy, and sexual liberation. Libertarian originalism's champions, namely Professors Randy Barnett and Richard Epstein, argue that the Constitution must be interpreted in light of an underlying presumption of liberty or an underlying normative framework of Lockean classical liberalism.²¹ Libertarian originalism, much like progressive originalism, is thus substantive, and not merely procedural, to the extent that the concomitant interpretive precepts of individual liberty and government minimization are at the core of substantive libertarianism (or what most political theorists would call classical liberalism). By contrast, "conservative" originalism, frequently associated with the late Judge Robert Bork and the late Justice Scalia, has historically been understood as a popular sovereignty-based positivist approach that often entails some conception of judicial modesty or judicial restraint.²² Perhaps above all else, "conservative" originalism has historically prioritized the notion that there is only one "true" and historically honest answer to most questions of constitutional interpretation.²³ "Conservative" originalism, defined as such, thus fails to confront the obvious question of whether human beings are generally even capable of engaging in such stolid, substantively detached interpretations.

The careful reader should notice something curious. "Progressive" originalism has its idiosyncratic conception of morality built into its framework; such is the inherent nature of the claim that the original public meaning of sweeping constitutional clauses actually requires interpreters to judicially impose "evolving" notions of mo-

21. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003); RICHARD EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

22. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

23. See *id.* at 17.

rality from the bench. Similarly, “libertarian” originalism is expressly rooted in the claim that normative ideals of individual liberty and Lockean liberalism serve as the background conceptual framework needed to reach the Constitution’s legitimate original public meaning. But conservative originalists are left with nothing more than the thinnest gruel of rote proceduralist positivism. With only small and occasional exceptions, such as Justice Thomas’s belief, *contra* that of Justice Scalia, in the nature of the Declaration of Independence and its natural law theoretical undergird as an “authoritative guide for judges,”²⁴ conservative originalism, as it has been conceived and taught, has abandoned the realm of more avowedly moralistic exegeses. Progressive originalism and libertarian originalism—not to mention non-originalist methodologies, such as unabashed progressive Dworkinian “living constitutionalism”—have filled the void. Self-described *conservative* originalists have thus been left without resort to any *normative* argumentation in constitutional interpretation. We have wholly denuded ourselves of conservative *substance*.

This is wrong. As a consequentialist matter, it undermines conservatives’ interests to synonymize their preferred approach with the bland dictates of positivism; human beings, as Aristotle discussed at length so long ago, are at their core moral creatures, and preemptively foreclosing legal actors the ability to make overtly moralistic argumentation is “an attempt to deprive us of the very faculties that make us human in the first instance.”²⁵ Moreover, the conflation of *any* purportedly legitimate jurisprudence with the barest form of positivism—illustrated by Justice Scalia’s decades-long vehement arguments against any role for the Declaration in constitutional interpretation—is a higher-order philosophical mistake of first principle. The rule of law, like any other societal institution—such as the market—is best conceptualized not as an end

24. Steven F. Hayward, *Two Kinds of Originalism*, NAT’L AFFS. (Winter 2017), <https://www.nationalaffairs.com/publications/detail/two-kinds-of-originalism> [https://perma.cc/YG68-2MYS].

25. Hammer, *Common Good Originalism*, *supra* note 17.

unto itself, but rather as an instrumental means to achieve the historically understood substantive goals of any worthy politics: justice, human flourishing, and the common good. Much as the free market must be regulated when it is not sufficiently serving these ends—antitrust law, for example—so too must the bare-bones positive law be modified or exegetically re-imbued with substantive vigor when it is not sufficiently serving these timeless ends. The American rule of law and our American constitutional order must conform with the teleology of mankind—not the other way around.

A more descriptively apt and genealogically fitting “conservative” originalism, which ought to be branded as “common good originalism,” would thus operate differently than would any of the three extant general categories of originalist jurisprudence. Just as progressive originalism invokes substantive progressivism and libertarian originalism invokes substantive libertarianism, so too must conservative legal theorists first understand what substantive “conservatism,” rightly understood, even is.²⁶ Second, we must understand the historical extent to which background substantive norms of conservatism, rightly understood, are, or should be, ingrained in the extant U.S. constitutional order.

A comprehensive explication of conservatism, rightly understood, is beyond the scope of this Essay. For present purposes, let us stipulate that “conservatism,” as opposed to classical liberalism

26. See, e.g., Ofir Haivry & Yoram Hazony, *What Is Conservatism?*, AM. AFFS. (Summer 2017), <https://americanaffairsjournal.org/2017/05/what-is-conservatism/> [<https://perma.cc/2ZK8-VTP8>] (defining the centuries-long Anglo-American conservative tradition as principally concerned with historical empiricism, nationalism, religion, limited executive power, and individual freedoms); see also Chris Buskirk, *Conservatism Defends the Natural Order*, AM. CONSERVATIVE (July 9, 2020, 2:46 PM), <https://www.theamericanconservative.com/articles/conservatism-defends-the-natural-order/> [<https://perma.cc/XTE9-X4TX>] (“[W]hat is American conservatism? It is simply this: the belief that human nature is immutable, is knowable in its most important distinctiveness, that legitimate government exists to secure the life and property of its citizens, to protect the family, the church, and to enable them to exercise authority within their rightful domains. It requires a recognition of the independence but also interdependence of the three main institutions—government, family, church—that are together the pillars of civilization.”).

or libertarianism, is wary of “reason”-based claims of rationalist abstraction and is more empirically rooted in the historical customs, norms, and traditions of distinct communities, tribes, and nations. While certainly valuing individual liberty (above all, religious liberty), conservatism strictly distinguishes liberty from libertinism and conceives of most forms of individual liberty (including economic liberty) more as instrumentalities than as intrinsic ends to be pursued unto themselves. Rather, conservatism in the Anglo-American tradition is preeminently concerned with the societal health and intergenerational cohesion of the nation-state,²⁷ with the structural integrity and formative capability to inculcate sound republican habits of mind in the intermediary communitarian institutions that exist between citizen and state,²⁸ and with the flourishing of individual citizens in a way that serves God and nation and comports with the great Western religions’ conceptions of the teleological ends of man. Conservatism is thus more open to wielding state power, when need be, to “enforce our order,”²⁹ or even to “reward friends and punish enemies (within the confines of the rule of law).”³⁰ Classical liberalism and libertarianism, by contrast, are almost singularly defined by the view that a robust conception of individual liberty and the concomitant pursuits of limited government and globalized markets necessarily define the very ends that a just and proper government ought to pursue.³¹

27. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 29 (Frank M. Turner ed., Yale Univ. Press 2003) (1790) (“People will not look forward to posterity, who never look backward to their ancestors.”).

28. See, e.g., *id.* at 40 (“To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.”).

29. Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism> [<https://perma.cc/HV9X-9R4H>].

30. David Azerrad, *American Conservatism Is Fiddling While Rome Burns*, AM. CONSERVATIVE (July 30, 2020, 1:36 PM), <https://www.theamericanconservative.com/articles/american-conservatism-is-fiddling-while-rome-burns/> [<https://perma.cc/QT7E-9MPB>].

31. See *id.*

The Lockean natural rights language of the Declaration, famously penned by Thomas Jefferson, provides the strongest Founding-era evidence to buttress libertarian originalists' central claims. The Declaration is undoubtedly important, and it is impossible to understand both the Constitution and the American republic at-large without understanding the Declaration. For President Abraham Lincoln, our greatest statesman, the Declaration was the "apple of gold" around which the Constitution was but a surrounding frame of silver.³² The Declaration is obviously an invaluable asset in understanding the American way of life, the American regime, and the American constitutional order.

At the same time, "one cannot escape the rudimentary fact that the Constitution of 1787 was written under circumstances tangibly different than those surrounding the drafting of the Declaration in 1776."³³ Not only had the early republic already experienced the ratification and subsequent failure of the Articles of Confederation, but Jefferson himself was also not even present at the 1787 Constitutional Convention in Philadelphia—he was gallivanting overseas in pre-revolutionary France.³⁴ James Madison, generally lionized as the preeminent father of the Constitution and "Jefferson's once and future protégé," thus "fell under the interstitial influence of the men who came to be the Federalist Party, led by Anglophilic, common good-oriented statesmen such as Alexander Hamilton."³⁵ One can see this lasting influence upon Madison by Hamilton in the *Federalist Papers*, as well, as Madison opined in *The Federalist No. 57* that "[t]he aim of every political constitution is, or ought to be, first to

32. See, e.g., Tony Williams, *An Apple of Gold in a Picture of Silver*, LAW & LIBERTY (Aug. 7, 2020), <https://lawliberty.org/book-review/an-apple-of-gold-in-a-picture-of-silver/> [<https://perma.cc/G4AS-JCUX>].

33. Hammer, *supra* note 13.

34. See Haivry & Hazony, *supra* note 26 (While "the Articles of Confederation . . . embod[ied] a radical break with the traditional English constitution," they also "came close to destroying the United States.").

35. Hammer, *supra* note 13; see also Carson Holloway & Bradford P. Wilson, *Hamiltonian Nationalism: A Response to Samuel Gregg*, PUB. DISCOURSE (July 15, 2020), <https://www.thepublicdiscourse.com/2020/07/65565/> [<https://perma.cc/8ATB-BRR9>] (arguing that Hamilton is best understood as a leading nationalist, common good-oriented statesman).

obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."³⁶ And that is to say nothing of the ubiquity with which appeals to the "public good" abound in Madison's *magnum opus* written contribution to the post-convention effort to ratify the Constitution: *The Federalist No. 10*.³⁷

Although the First Party System that quickly emerged after ratification of the Constitution and Jefferson's return stateside from France, pitting the Federalists against the Democratic-Republicans, was sharply divided along ideological (and geographic) lines, the men who met in Philadelphia during that sweltering 1787 summer were relatively unified. Consider, for instance, that the five members of the Convention's Committee on Style were Gouverneur Morris (who chaired it), Hamilton, Rufus King, Madison, and William Samuel Johnson: four nationalist, common good-oriented, Anglo-inspired conservatives and one moderate (Madison).³⁸ The Committee on Style was responsible for drafting the Constitution's Preamble, which is "the closest we might come to an express enunciation of the charter's intent and purpose":³⁹

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁴⁰

The reader will note that at no time in the Preamble is individual

36. THE FEDERALIST No. 57 (James Madison) (Clinton Rossiter ed., 2003).

37. See THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 2003). The phrase "public good" appears six times in the essay, and the phrase "common good" also appears once. See *id.*

38. William Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2021). During the Convention, Madison was pulled toward Hamilton's camp due to the absence of his sometime mentor Jefferson. See Lee Wilkins, *Madison and Jefferson: The Makings of a Friendship*, 12 POL. PSYCH. 593, 601–05 (1991).

39. Hammer, *supra* note 13.

40. U.S. CONST. pmb1.

liberty put forth as an intrinsic substantive end of the U.S. constitutional order. The end of “secur[ing] the Blessings of Liberty to ourselves and our Posterity” is the closest, but even here “Liberty” is an instrumental means through which to attain the sole true substantive goal, the appurtenant “Blessings” thereof.⁴¹ It seems, rather, that the Founders who drafted the Constitution viewed the protection of natural rights and the expansion of individual liberty less as intrinsic *ends*, and more as a “*means* by which citizens could pursue a common good.”⁴² And the citizenry’s common good is necessarily oriented toward, among ends, the overt nationalism of the Preamble’s very first purposive enumeration: “to form a more perfect Union.”⁴³ This was drafted, after all, by men all too familiar with the infamous shortcomings of the antecedent Articles of Confederation, including its enfeebled national government. These were men concerned with augmenting and fortifying the common good, by which they meant the health of the “commonwealth”—a term roughly synonymous with and barely linguistically distinguishable from the “common good.”⁴⁴ In the Preamble, the “common good” and the “commonwealth” are merged into the first enumerated end of governance: the attainment of a “more perfect Union” itself.

In total, there are seven enumerated ends of government in the Preamble: a more perfect Union, establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, securing the blessings of liberty for us, and securing the blessings of liberty for our posterity. Each and every one

41. The deliberate inclusion of “and our Posterity” is also profoundly Burkean. *See, e.g.,* Burke, *supra* note 27.

42. Tony Woodlief, *Against the Libertarian-Pajama-Boy Consensus*, AM. MINDSET (Nov. 17, 2020), <https://americanmind.substack.com/p/against-the-libertarian-pajama-boy> [<https://perma.cc/G2JX-UEZG>].

43. U.S. CONST. pmb1.

44. The linguistic link between the commonwealth and the common good has continued into modern American English. *See* *Commonwealth*, Merriam Webster Online Dictionary (2021), <https://www.merriam-webster.com/dictionary/commonwealth> [<https://perma.cc/WWW5-9EYA>] (defining commonwealth as a “nation, state, or other political unit: such as one founded on law and united by compact or tacit agreement of the people for the common good”).

of these seven pronounced aims represents the statesman's view and description of the common good of the nation as a whole. There is, quite simply, nothing in the Preamble that reduces to the protection and promotion of individual rights. Nor is there anything in the Preamble—or the Declaration, of course—supporting the positivist claim that values-neutral liberal proceduralism, redolent of John Stuart Mill's famous "harm principle," is an end, let alone *the* end, of our constitutional order. Rather, the Preamble affirmed for its contemporaries and progeny alike the well-understood, historical notion that the collective substantive ends of governance amount to the defining trait of any legitimate political order—and that these substantive ends prioritize the true flourishing of the communitarian whole over the temporal satisfaction of the individualist self.

To drive home the point of how profoundly and earnestly conservative the U.S. Constitution's Preamble is, consider the uncanny similarities between it and the functional equivalent that the corporeal embodiment of Anglo-American conservatism, Edmund Burke, wrote just a few years later in 1791:

But none, except those who are profoundly studied, can comprehend the elaborate contrivance of a fabric fitted to unite [i-ii] private and public liberty with [iii] public force, [iv] with order, [v] with peace, [vi] with justice, and above all, [vii] with the institutions formed for bestowing permanence and stability through the ages, upon this invaluable whole.⁴⁵

The similarities in the substantive ends of self-governance—what Burke calls here the society's "fabric"—are simply remarkable. What the Preamble refers to as the "general Welfare," for example, Burke calls "this invaluable whole"; both are unmistakable directives for the statesman—and the judge—to look to the overall health of the whole body politic and the whole nation-state, even when contemplating the good of specific individuals. And of

45. EDMUND BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS, *in* 4 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 61, 211 (Little, Brown & Co. 1866) (1791).

course, the Preamble's reference to "our Posterity" evokes a distinctly Burkean conception of "the nature of a people as a partnership of generations dead, living, and yet unborn."⁴⁶

The Preamble is infrequently invoked in legal argumentation, and rarely appears in judicial opinions. Large swaths of the legal academy—and the legal profession, more broadly—are content to act as if it simply does not exist.⁴⁷ This is wrong. Much intellectual groundwork has been laid over the decades in arguing for the legal relevance and moral significance of the Declaration—what President Lincoln famously called the "electric cord" that "links the hearts of patriotic and liberty-loving men together . . . as long as the love of freedom exists in the minds of men throughout the world"⁴⁸—in constitutional interpretation.⁴⁹ This is, of course, salutary; even the most dogmatic of positivists ought to take solace in the fact that the Declaration has long been defined by the U.S. Code as an "Organic Law[] of the United States of America."⁵⁰ But it would be very peculiar to act as if the Declaration commands deep and meaningful significance in constitutional interpretation, while the Preamble—which quite literally *commences* the Constitution—accords no such status. Consider, for instance, how Justice Joseph Story, in his renowned *Commentaries on the Constitution*, describes the craft of construing statutory preambles:

The importance of examining the preamble, for the purpose of expounding the language of a statute, has

46. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1735 (1994).

47. For a notable exception, see John W. Welch & James Heilpern, *Recovering Our Forgotten Preamble*, 91 CAL. L. REV. 1021 (2020).

48. *Lincoln on the Independence Generation: 'They Were Iron Men'*, AM. GREATNESS (July 3, 2019), <https://amgreatness.com/2019/07/03/lincoln-americas-founders-iron-men-2/> [<https://perma.cc/Y7W3-YRVS>].

49. See, e.g., John C. Eastman, *The Declaration of Independence as Viewed from the States*, in THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 96 (2002). See generally THE REDISCOVERY OF AMERICA: ESSAYS BY HARRY V. JAFFA ON THE NEW BIRTH OF POLITICS (Edward J. Erler & Ken Masugi eds., 2019).

50. UNITED STATES CODE: THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA (1952), <https://www.loc.gov/item/uscode1952-001000003/> [<https://perma.cc/E262-6QS7>].

been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers."⁵¹

Similarly, Story described the Constitution's Preamble as "not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government."⁵²

It is worth further emphasizing the peculiar nature of the legal academy and extant constitutional scholarship, in this respect. In the eyes of many, the Declaration has (not necessarily incorrectly) come to take on a mythical status not only as a political and historical document but also as an indispensable tool of constitutional interpretation itself. Many leading natural lawyers and natural law scholars, echoing President Lincoln, appeal to its immortal language in arguing that the Constitution can only be properly understood through the interpretive prism of natural law, abstract natural rights, and the concomitant governmental pursuit of securing negative liberty.⁵³ American civic life has long cherished the Declaration, and it is hardly an accident that its 1776 drafting still marks our annual Independence Day celebration. But as a pure matter of constitutional interpretation, it is frankly bizarre that so much intellectual capital has been deployed by lawyers and historians who argue on behalf of the Declaration's interpretive salience, whereas comparatively little effort has been made to argue on behalf of the Preamble's substantive heft. Not only were the five members of the Constitutional Convention's Committee on Style dramatically more important in helping to shape the original understanding of the Constitution than was Jefferson (who, it is again worth emphasizing, was not even in the country during the Convention), but the

51. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 459 (Boston, Hilliard, Gray, & Co. 1833).

52. *Id.* § 463.

53. See, e.g., Eastman, *supra* note 49, at 96; THE REDISCOVERY OF AMERICA, *supra* note 49.

Preamble is of course *part* of the Constitution itself. To put into writing this exceedingly simple point is only to accentuate the bizarreness of how seldom the point is made. The Declaration is a document of soaring political rhetoric to which many of America's greatest leaders have looked, at times of great national strife or fissure, for inspirational succor and perspicacity; but if it is substantively important as a legal tool of constitutional interpretation, then how curious would it be to pretend that the Preamble does not attain similar, or quite likely *greater*, interpretive significance.

The Preamble is but one example, albeit a striking one, evincing the intellectual dominance in the nascent American republic of Hamilton—the “original originalist”⁵⁴—and what emerged as his Anglophilic, prudential, nationalist, common good-oriented Federalist Party.⁵⁵ This is crucial, because Hamilton “did more than any other American to plant [Edmund] Burke’s ideas firmly in American soil,” and “shared a worldview so similar [to Burke’s] that it’s often difficult to distinguish between their thoughts and statements.”⁵⁶ Specifically, “Hamilton, like Burke, was suspicious of abstract theories and preferred practical systems tested by history,” and also “like Burke, was [above all] a nationalist.”⁵⁷ Just as Burke’s iconic *Reflections on the Revolution in France* was, in part, a rebuttal to the contemporary universalist and rationalist claims of men such

54. Robert E. Wright, *Who Is the Real Alexander Hamilton?*, AM. INST. FOR ECON. RES. (Jan. 12, 2012), <https://www.aier.org/article/who-is-the-real-alexander-hamilton/> [<https://perma.cc/HD4N-BW2W>]; accord Alexander Hamilton, *Hamilton’s Opinion as to the Constitutionality of the Bank of the United States*, in THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES BY ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY 655, 664 (Paul Leicester Ford ed., Henry Holt & Co. 1898) (1791) (“[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended.”).

55. See, e.g., Ofir Haivry & Yoram Hazony, *American Nationalists*, AM. CONSERVATIVE (July 2, 2020, 12:01 AM), <https://www.theamericanconservative.com/articles/american-nationalists/> [<https://perma.cc/Q2AT-NCT8>].

56. David Brog, *Up from Laissez-Faire: Reclaiming Conservative Economics*, 4 AM. AFFS. NO. 4, 63 (Winter 2020).

57. *Id.*; accord Holloway & Wilson, *supra* note 35.

as Thomas Paine,⁵⁸ so too did Hamilton's vehement opposition to Jeffersonian universalism emerge during the contentious early republican fight over the national bank: "[I]n all questions of this nature, the practice of mankind ought to have great weight against the theories of individuals."⁵⁹

Hamilton's general preference for prudence over dogma was not absolute,⁶⁰ but it was nonetheless a hallmark of his worldview and an omnipresent leitmotif throughout his public career. Crucially, for our purposes, this staunch preference for circumstantial prudence over unyielding dogma heavily affected Hamilton's views on constitutional interpretation. Contrasted with the "strict constructionist" approach of Virginian rivals Jefferson and (post-ratification) Madison, Hamilton "constru[ed] the Constitution expansively but respectfully"⁶¹—as something roughly akin to a "comfortable garment that allows [more] flexibility"⁶² for political actors to prudentially pursue, within the realm of interpretive reasonableness, their substantive vision of the good. That circumstantial, as-applied interpretive "flexibility" is dependent upon what is necessary, at a given moment in time, to effectuate and operationalize the classical goals of politics enumerated in the Preamble. As Hamilton said in his *Opinion as to the Constitutionality of the Bank of the United States*:

[A] restrictive interpretation of the word necessary [in the Necessary and Proper Clause of Article I, Section 8, as construed by Jefferson and Madison] is also contrary to

58. See Haivry & Hazony, *supra* note 26.

59. Brog, *supra* note 56 (quoting Hamilton's *Opinion as to the Constitutionality of the Bank of the United States*, *supra* note 54).

60. See, e.g., THE FEDERALIST NO. 31, at 193 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.").

61. George F. Will, *George Will: Texas's Ted Cruz Gives Tea Party a Madisonian Flair*, WASH. POST (Aug. 1, 2012), http://www.washingtonpost.com/opinions/george-will-texas-ted-cruz-gives-tea-party-a-madisonian-flair/2012/08/01/gJQApi-wePX_story.html [https://perma.cc/4RKS-KB8R].

62. Adrian Vermeule, *Publius as an Exportable Good*, NEW RAMBLER (Dec. 3, 2015), <https://newramblerreview.com/component/content/article?id=104:publius-as-an-exportable-good> [https://perma.cc/A72L-SKAP].

this sound maxim of construction, namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., *ought to be construed liberally in advancement of the public good*. . . . The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that *there must of necessity be great latitude of discretion in the selection and application of those means*. Hence, consequently, the necessity and propriety of exercising the authorities [e]ntrusted to a government on principles of liberal construction.⁶³

The dispute over the constitutionality of the First Bank of the United States, centered on rivalrous interpretations of the Necessary and Proper Clause, was one of the most contentious of all during the First Party System. Jefferson, a vociferous opponent of the national bank, posited that the national government “could do nothing which was not either specifically granted as a power or was not *absolutely necessary* to carry out the enumerated powers.”⁶⁴ Hamilton, by contrast and as aforementioned, believed that “in construing a Constitution, it is wise, as far as possible, to pursue a course, which will reconcile essential principles with convenient modifications.”⁶⁵ (It is worth briefly emphasizing the inherent limitation of Hamilton’s formulation: The inclusion of the “as far as possible” qualifier implies interpretive guardrails of intellectual honesty, historical legitimacy, and sheer reasonableness, thus foreclosing much of the Dworkinian living constitutionalism interpretive enterprise.)

63. Hamilton, *supra* note 54 (emphasis added).

64. MORTON J. FRISCH, THE HAMILTON-MADISON-JEFFERSON TRIANGLE: THEIR THREE-CORNERED PERSPECTIVES ON THE CONSTITUTION (2014), <https://ashbrook.org/viewpoint/hamilton-madison-jefferson-triangle/> [<https://perma.cc/8K4V-AEWS>] (emphasis added).

65. Alexander Hamilton, *The Examination, No. XVI*, in 25 THE PAPERS OF ALEXANDER HAMILTON 566 (Harold C. Syrett ed., 1977), <https://founders.archives.gov/documents/Hamilton/01-25-02-0305> [<https://perma.cc/VYY7-EPTP>].

At the same time, this debate was but a microcosm, and intellectually downstream, of a higher-order early American republic debate over the very genealogical nature of the U.S. Constitution's provenance: "Paine and Jefferson asserted that the Constitution resulted from rationalist ideals about 'rights of man,'" while "Burke, with Hamilton and [John] Adams, insisted that the American Constitution was not written on a blank slate," but was deeply inspired by the English constitution and the English Bill of Rights.⁶⁶ Similarly, these men profoundly disagreed on the extent to which the early American republic inherited, at its conception, the English common law—a debate in which the more Anglophilic Federalists were clear victors, as partially evidenced by the fact that American law students, nearly two and a half centuries later, devote large swaths of their first year of study to classic common law subjects such as property, contracts, and torts.

Serendipitously, it was on the very issue of the constitutionality of the national bank that Hamilton's conception of an Anglo-inspired, prudential, non-rationalist, common good-oriented originalist jurisprudence was most clearly vindicated,⁶⁷ in the canonical case of *McCulloch v. Maryland*.⁶⁸ In *McCulloch*, Chief Justice John Marshall, himself a former Federalist Party political leader and a judicial appointee of a leading Federalist, President John Adams, came down decisively on the side of Hamilton: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁶⁹ Chief Justice Marshall even channeled the Preamble's common good-centric ends for self-governance, rhetorically asking earlier in his opinion: "Can we adopt

66. Ofir Haivry, *American Restoration: Edmund Burke and the American Constitution*, AM. AFFS. (Feb. 17, 2020), <https://americanaffairsjournal.org/2020/02/american-restoration-edmund-burke-and-the-american-constitution/> [<https://perma.cc/52Z9-VLK6>].

67. Vindication came posthumously for Hamilton, who was famously killed in an 1804 duel with then-Vice President Aaron Burr.

68. 17 U.S. (4 Wheat.) 316 (1819).

69. *Id.* at 421.

that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when *granting these powers for the public good*, the intention of impeding their exercise by withholding a choice of means?"⁷⁰ Notably, *McCulloch* is not seriously contested today in originalist circles of any variety; even Justice Thomas, for instance, has referred to Marshall's handiwork in *McCulloch* as having "carefully and effectively refuted" the Jeffersonian "absolute necessity" construction.⁷¹

Chief Justice Marshall's prudential, nationalist, common good conservatism was, if anything, surpassed by that of Justice Joseph Story, a "proponent of constitutional nationalism"⁷² and "perhaps the most conservative member of Marshall's bench."⁷³ Justice Story's highly influential *Commentaries on the Constitution* were "overtly conservative in spirit, citing Burke with approval and repeatedly criticizing not only Locke's theories, but Jefferson himself."⁷⁴ Justice Story was a staunch advocate of public morality and public religiosity, and a scathing critic of the ahistorical⁷⁵ Jeffersonian promotion of a constitutional "wall of separation" between church and state.⁷⁶ An Anglophile and dedicated student of the

70. *Id.* at 408 (emphasis added).

71. *Sabri v. United States*, 541 U.S. 600, 611 (2004) (Thomas, J., concurring in the judgment).

72. *The Idea of the Senate: The Senate as a Balance Wheel*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/idea-of-the-senate/1833Story.htm> [<https://perma.cc/A6LT-MFKT>].

73. Sandra F. VanBurkleo, Book Review, 3 CONST. COMMENT. 244, 245 (1986) (reviewing KENT NEWMAYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)).

74. Haivry & Hazon, *supra* note 26; accord William Story (ed.), *Letter written by Justice Joseph Story to Judge Fay, February 15, 1830*, in 2 LIFE AND LETTERS OF JOSEPH STORY 33 (1851) ("Have you seen Mr. Jefferson's Works? If not, sit down at once and read his fourth volume. It is the most precious melange of all sorts of scandals you ever read. It will elevate your opinion of his talents, but lower him in point of principle and morals not a little.").

75. See generally PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

76. See Story, *supra* note 51, § 1875 ("It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape.")

common law tradition, Justice Story also believed that “there has never been a period of history, in which the common law did not recognize Christianity as lying at its foundation.”⁷⁷ Here, Justice Story, much like Chief Justice Marshall before him, was channeling Sir William Blackstone and the other great common lawyers, all of whom understood the obvious truth that the common law was itself directly influenced by biblical morality, biblical justice, and the broader tradition of Judeo-Christian ethical principles.

It would not be a stretch to aver that President Lincoln, the most paradigmatic national conservative in American history and nonpareil practitioner of Scripture-infused public political rhetoric,⁷⁸ was in some ways a political personification of Justice Story’s legal ideals. In his famous 1858 U.S. Senate candidacy debates with Senator Stephen Douglas, President Lincoln repeatedly resorted to substantive, justice-oriented argumentation as a rhetorical cudgel against Senator Douglas’s rote, morally hollow pleas for “popular sovereignty” in the Western territories.⁷⁹ In so doing, President Lincoln appealed to a “kind of constitutional common sense that[,] while respecting the requirements of procedural regularity and formal legality” was important, “preserving the substance of republican liberty” was the preeminent goal of our constitutional order.⁸⁰ Senator Douglas dedicated immense prolixity to the proposition that amoral proceduralist norms of “popular sovereignty” were intrinsic ends to be pursued unto themselves, but as President Lincoln put it in his 1854 Peoria speech:

The doctrine of self-government is right—absolutely and eternally right—but it has no just application, as here

77. HARMON KINGSBURY, *SABBATH: A BRIEF HISTORY OF LAWS, PETITIONS, REMONSTRANCES AND REPORTS, WITH FACTS, AND ARGUMENTS, RELATING TO THE CHRISTIAN SABBATH* 124 (1840).

78. See, e.g., Rafi Eis, *National Unity and National Perpetuation*, NAT’L AFFS. (Spring 2021), <https://www.nationalaffairs.com/publications/detail/national-unity-and-national-perpetuation> [<https://perma.cc/J2CW-8YYG>].

79. See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* 347 (1959).

80. HERMAN BELZ, *LINCOLN AND THE CONSTITUTION: THE DICTATORSHIP QUESTION RECONSIDERED* 24 (1984).

attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the negro is a *man*, why then my ancient faith teaches me that “all men are created equal;” and that there can be no moral right in connection with one man’s making a slave of another.⁸¹

Economically, President Lincoln’s successful enactment of his political hero Henry Clay’s tripartite “American System” program—a national bank, an internal improvements system, and protective tariffs—was necessarily dependent upon Marshall’s earlier legitimization of Hamiltonian originalism, and its more permissive construction of the Necessary and Proper Clause in particular, in *McCulloch*.⁸² President Lincoln’s common-good, whole-of-the-citizenry oriented statesmanship reached its zenith, of course, in his Civil War leadership to preserve that “more perfect Union” to which the Preamble so expressly refers. But he would never have been able to wage his successful campaign to preserve the Union were it not for his vehement, career-defining opposition to the most morally denuded and trite forms of proceduralism—nor would he have been able to implement his indispensable wartime domestic economic program had he subscribed to the interpretive straitjacket of Jeffersonian “strict constructionism.”

A nationalist, common-good-oriented, whole-of-the-citizenry jurisprudence, with its eye carefully attuned toward justice and hu-

81. JAFFA, *supra* note 79, at 347–48.

82. See Brog, *supra* note 56; Wells King, *Rediscovering a Genuine American System*, AM. COMPASS (May 4, 2020), <https://americancompass.org/essays/rediscovering-a-genuine-american-system/> [<https://perma.cc/N5Q9-4V6H>].

man flourishing, rather than either bland positivism or ever-evolving expansionist conceptions of individual autonomy, is thus our true historical inheritance—and “historical consciousness is a fundamental basis of law.”⁸³ Common good originalism—the interpretation of the Constitution and its subordinate statutes enacted pursuant thereto through the prism of, and in accordance with, the substantive political aims of the American political regime, as enumerated in the Constitution’s common-good-centric Preamble—is the modern-day manifestation of our conservative Anglo-American legal tradition. Common good originalism is, in any meaningful sense of the term, a more authentically “conservative” originalism than the banal strand of positivism, which all too often redounds to the interests of individual autonomy maximalism, that has pervaded originalist discourse for decades—and which would have been anathema to common good conservatives such as Hamilton, Justice James Wilson, Chief Justice Marshall, Justice Story, and President Lincoln, all of whom were well versed in the natural law tradition, the very antithesis of positivism.⁸⁴

Such a desiccated positivism would also have been anathema to the leading English forebears whose views on jurisprudence so pro-

83. Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 23 (2005).

84. President Lincoln’s transcendent belief in the exceptionalism of the natural law undergirded Declaration, already referred to, has been the study of immense modern scholarship, centered around the teachings of Harry Jaffa and the Claremont Institute. See, e.g., Eastman, *supra* note 53; THE REDISCOVERY OF AMERICA, *supra* note 53. Hamilton’s belief in natural law can be seen in THE FEDERALIST NO. 31, *supra* note 60. Chief Justice Marshall’s reliance on a natural law leitmotif in *McCulloch* was noted by no less a positivist than the late Judge Bork: “[A] method of reasoning from the implications of written constitutional principles to subsidiary principles is indispensable and was brilliantly demonstrated by Marshall’s opinion in *McCulloch v. Maryland*.” Robert H. Bork, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1992), <https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange> [<https://perma.cc/5YMW-6NUN>]. And Justice Wilson, one of the more underappreciated American Founders and a man of great wisdom, once said: “Human law must rest its authority, ultimately, upon the authority of that law, which is divine. . . . Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants.” James Wilson, *Of the General Principles of Law and Obligation*, in THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 55, 104–06 (Bird Wilson ed., 1804).

foundly shaped the Founding generation and our own constitutional order. Consider, for instance, how Sir William Blackstone, perhaps the single most influential of all the English common lawyers known to the U.S. Constitution's Framers, begins his famous *Commentaries on the Laws of England* with general accounts of legal corpuses, followed by specific interpretive guidelines. In the context of statutory construction,⁸⁵ Blackstone's view urged jurists to "[f]irst look at the text, then consider the intention of its authors, then weigh a whole list of factors: such are the general canons."⁸⁶ More generally, "in the Anglo-American legal tradition the most important conventions for interpreting legal documents embody various mixtures of text, tradition and logic," which "[a]ll have the sole purpose of directing courts in their search for the legislative will."⁸⁷ Modern adherents of positivist textualism and originalism, by contrast, "absolutize one of the several canons Blackstone and his followers identified," thereby zealously excluding legitimate and complementary tools of construction from the overarching interpretive enterprise *in toto*.⁸⁸ This sort of insipid positivism, which traces its roots to the nineteenth century, exists in an irreconcilable state of tension with the common law tradition, which was predicated on the notion that law was not made, but found.⁸⁹

Far too often, the wholly legitimate legal interpretive guideposts of teleology and purposivism are subsumed into kneejerk positivist

85. England, of course, has no written constitution compiled in one comprehensive document (most of the constitution is indeed written down across several well-known documents).

86. James Stoner, *Why You Can't Understand the Constitution Without the Common Law*, L. & LIBERTY (Dec. 3, 2012), <https://lawliberty.org/forum/why-you-cant-understand-the-constitution-without-the-common-law/> [<https://perma.cc/YCH2-5S6M>].

87. Robert Lowry Clinton, *Textual Literalism and Legal Positivism: On Bostock and the Western Legal Tradition*, PUB. DISCOURSE (July 5, 2020), <https://www.thepublicdiscourse.com/2020/07/66630/> [<https://perma.cc/7TBD-7XTQ>].

88. Stoner, *supra* note 86.

89. See, e.g., Jeremy Rozansky, *Precedent and the Conservative Court*, NAT'L AFFS. (Winter 2021), <https://www.nationalaffairs.com/publications/detail/precedent-and-the-conservative-test> [<https://perma.cc/HDX5-SY2M>].

denunciations of “legislative intent.”⁹⁰ It is true that only the statutory text emerging from the Constitution’s prescribed presentment and enactment process binds the polity as “supreme law of the land,” but it is impossible to properly understand what a specific legal provision *meant*, at a specific point in time, without understanding both the distinct meaning ascribed to the provision by the relevant legislative body (or plebiscite or, perhaps in modern times, administrative agency) and the broader societal role and function for which the law was devised in the first instance. To the extent originalists have failed to incorporate this obvious truism into their theoretical framework, they have gone astray.

As Blackstone put it, a law can only be genuinely understood if the interpreter rejects acontextual literalism and instead considers “the cause which moved the legislator to enact it.”⁹¹ In the context of American constitutional interpretation, this means understanding why the balkanized Articles of Confederation failed; why nationalist, common-good-oriented statesmen accordingly came to dominate the Constitutional Convention of 1787; and why the Preamble of the Constitution—the charter’s “statement to explain ‘whither we are going’”⁹²—reads the way that it does. Only then might we understand the *ratio legis*, or “reason of the law,” which undergirds our entire constitutional edifice—and, by extension, comprehend the “objective truth” of what that legal edifice conveys.⁹³ Anything to the contrary undermines the “primary source of the validity of law” itself, which is “its historical character, its source in the customs and traditions of the community whose law it is.”⁹⁴ Consider, for example, long-running originalist disagreements over the weight afforded to the *Federalist Papers* in the context of constitutional interpretation. Here, an interpreter ascribing substantive heft to the *Federalist Papers* would faithfully channel Blackstonian *ratio legis* and the unique contextual circumstances of the

90. See, e.g., Scalia, *supra* note 22, at 17.

91. Clinton, *supra* note 87 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

92. Woodlief, *supra* note 42.

93. Clinton, *supra* note 87.

94. Berman, *supra* note 46, at 1655.

Founding era, such as the dueling motivations to forestall a reprise of a British-style monarch while also sufficiently empowering the federal government so as to avoid a reprise of the failed Articles of Confederation.⁹⁵ Such an interpreter would better intuit the true original public meaning—one, that is, imbued with the substantive aims and political *telos* that the *Federalist Papers* authors broadly shared, as encapsulated by the Preamble.

These are, broadly speaking, the central tenets of common good originalism as a distinctive methodology of constitutional (and statutory) interpretation: a Preamble-imbued, non-positivist reading of the Constitution—and statutes passed pursuant thereto—that is rooted in the teleology and *ratio legis* of a legal enactment, and which redounds to the common good and national weal of the citizenry when such outcomes are in direct tension with the maximization of individual autonomy. It would now be instructive to expound upon this methodology's underlying interpretive mechanics, as well as the contemporary ramifications of what a praxis of common good originalism might entail—including some specific examples pertaining to highly contentious constitutional provisions.

* * *

In recent decades, the originalist methodological enterprise has oftentimes been theorized and promulgated as the belief that there are unassailable, clear-cut “right” and “wrong” answers to questions of constitutional interpretation, wherein “right” answers are necessarily those to which the clear bulk of the historical evidence points. In other words, post-1982 originalism has taken on a historicist tint and has frequently been conceived as a logical corollary of a hermeneutics of basic textual determinacy.⁹⁶ For instance, Justice

95. See Welch & Heilpern, *supra* note 47.

96. See, e.g., Michael Stokes Paulsen, *Originalism: A Logical Necessity*, NAT'L REV. (Sept. 13, 2018, 11:20 AM), <https://www.nationalreview.com/magazine/2018/10/01/originalism-a-logical-necessity/> [https://perma.cc/3745-NY3C] (opining that originalism is the “only method consistent with the very idea of written constitutionalism”).

Scalia once opined that “the original public meaning of a constitutional provision is ‘usually . . . easy to discern and simple to apply.’”⁹⁷ Similarly, Justice Thomas has stated that his “vision of . . . judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.”⁹⁸

In many circumstances, this is undoubtedly true. There are any number of constitutional provisions where one need not have much more than an elementary school education to ascertain the sole possible construction. For example, Article II, Section 1 unambiguously sets the minimum age for presidential eligibility at thirty-five years old, the Seventh Amendment unambiguously sets the minimum amount in controversy for a civil suit jury trial at twenty dollars, and the Fifteenth Amendment unambiguously forbids any state from denying or in any way abridging the right to vote on the basis of “race, color, or previous condition of servitude.”⁹⁹ There is very little room for interpretive ambiguity in any of these provisions. Even many interpretive quandaries that may superficially appear thorny, such as the question whether the Second Amendment’s so-called “prefatory clause” limits the individual right expressly enumerated in its so-called “operative clause,” are not actually all that thorny when one engages in a sober analysis of the historical meaning of the relevant language at issue.¹⁰⁰

Enter common good originalism. The first core tenet of common good originalism is to channel rudimentary Burkean conceptions of epistemological humility and forthrightly concede that the original

97. Josh Hammer, *Overrule Stare Decisis*, NAT’L AFFS. (Fall 2020), <https://www.nationalaffairs.com/publications/detail/overrule-stare-decisis> [https://perma.cc/U59W-9J3D] (quoting Scalia, *supra* note 22, at 45).

98. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996).

99. U.S. CONST. art. II, § 1; U.S. CONST. amend. VII; U.S. CONST. amend. XV.

100. See *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008); TED CRUZ, *ONE VOTE AWAY: HOW A SINGLE SUPREME COURT SEAT CAN CHANGE HISTORY* 44–48 (2020) (demonstrating, based on historical logic and widely accepted canons of construction, that the Second Amendment’s prefatory clause does not in any way undermine the force of the Amendment’s clearly written operative clause); see also 10 U.S.C. § 246 (2018) (refuting the dissenting opinions in *Heller* of Justices Stevens and Breyer in its very existence as the extant version of the First Militia Act of 1792).

public meaning of many other clauses in our majestic national charter is more susceptible to competing interpretations that are well within the range of historical plausibility. This is because, quite simply, not every constitutional provision is written in an expressly rule-like fashion—sometimes “the original meaning is rather abstract, or at a higher level of generality.”¹⁰¹ Indeed, originalism’s at-times inconsistent approach to the proper level of interpretive abstraction is a frequent point made by some of its leading contemporary conservative critics, such as Harvard Law School Professor Adrian Vermeule. Originalists should become more comfortable with this reality; in fact, a proper conception of epistemological humility likely makes inconsistency on such things as the level of abstraction a feature, not a bug, of *any* constitutional interpretive methodology.

The first common good originalist move is thus to accept epistemological humility and admit that many leading originalists have likely overstated the extent to which the originalist methodology will always arrive at the one, true, historically “right” legal answer. It is in these situations, in trying to delineate the endpoints and all intervening possible interpretations within the breadth of exegetical possibilities that some originalist scholars refer to as the “construction zone,”¹⁰² that “constitutional constructions or doctrines” can help ascertain the soundest, most teleologically appropriate, most purposively suitable “original meaning of the text.”¹⁰³ The act of interpreting non-explicit, more abstruse constitutional provisions through the Preamble-inspired prism of the common good, and with a more Blackstonian conception of the validity and moral relevance of *ratio legis*, can often help to narrow down a provision’s interpretive endpoint possibilities from a broader starting point of

101. Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005).

102. See, e.g., Mike Rappaport, *Original Methods Originalism Part III: The Minimization of the Construction Zone Thesis*, L. & LIBERTY (June 2, 2017), <https://lawliberty.org/original-methods-originalism-part-iii-the-minimization-of-the-construction-zone-thesis/> [<https://perma.cc/3JLL-SVTK>].

103. Barnett, *supra* note 101, at 264.

openly confessed epistemological humility. From within that narrowed down starting point, furthermore, political and judicial actors utilizing common good originalism can then attempt to construct the soundest distillation of a genuinely common good-oriented jurisprudence, including the possible deployment therein of substantive moralistic argumentation. In other words, common good originalism counsels express and unapologetic use of the “very faculties that make us human in the first instance” in furtherance of authentic constitutional (and statutory) interpretation consonant with the *telos* of the American regime and constitutional order.¹⁰⁴ Some concrete examples will hopefully help demystify and explicate.

The First Amendment is a natural place to begin.¹⁰⁵ In the modern era, left-leaning liberals and right-leaning liberals alike have oftentimes coalesced around an ahistorical re-envisioning of the American Founding as some sort of libertarian paradise, wherein private citizens’ free speech is maximally secured, no matter the objective value or worth of the underlying speech (or as the case may be, “speech”). This oftentimes assumes either a banal form of morally neutered positivism—“it is . . . often true that one man’s vulgarity is another’s lyric”¹⁰⁶—or an emotive appeal to Voltaire-esque Enlightenment norms—“it is our law and our tradition that more speech, not less, is the governing rule.”¹⁰⁷ But this is simply not our tradition: at the time of its ratification, “the First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote

104. Hammer, *Common Good Originalism*, *supra* note 17; see also Josh Hammer, *The Telos of the American Regime*, AM. MIND (Apr. 7, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/the-telos-of-the-american-regime/> [<https://perma.cc/6HRJ-F9DT>].

105. U.S. CONST. amend. I.

106. *Cohen*, 403 U.S. at 25.

107. *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

the public good.”¹⁰⁸ A natural corollary is that natural law-undergirded substantive argumentation about the moral worth of any particular flavor of speech is wholly appropriate. And if that is true, then it is highly dubious, at best, whether most non-vocal human actions, such as flag burning, ought to be construed as “speech” at all. Justice Samuel Alito’s solo dissents in the “crush video” case of *United States v. Stevens*¹⁰⁹ and the Westboro Baptist Church case of *Snyder v. Phelps*¹¹⁰ are archetypes for common good originalism operationalized at the highest level. Hyper-literalist free speech absolutism must be rejected, and substantive argumentation about the low public value of certain forms of speech ought to be encouraged. As Justice Alito argued in *Snyder*, for example, “[o]ur profound national commitment to free and open debate is not a license for . . . vicious verbal assault[s]” such as those “that occurred in [that] case.”¹¹¹ Nor, *a fortiori*, is “[o]ur profound national commitment to free and open debate” a constitutional “license” for nonvocalized, “speech”-resemblant human action that debases public morals, harms the national interest, or undermines the common good—such as flag burning.¹¹²

Similarly, common good originalism supports revisiting modern conceptions of the substantive protections afforded by the Free Press Clause. At the time of the Founding, the “freedom to express thoughts [in writing] . . . was limited to *honest* statements—not efforts to deceive others.”¹¹³ This had strong implications for the Sedition Act, another legal and political debate that characterized the First Party System, because, in the eyes of leading Federalists like John Allen and then-President John Adams, “[s]edition laws were . . . facially consistent with the freedom of opinion when confined to false and malicious speech.”¹¹⁴ Common good originalism

108. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 257 (2017).

109. 559 U.S. 460, 482–99 (2010) (Alito, J., dissenting).

110. 562 U.S. 443, 463–75 (2011) (Alito, J., dissenting).

111. *Id.* at 463.

112. See *Texas v. Johnson*, 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting).

113. Campbell, *supra* note 108, at 282.

114. *Id.* at 283.

also supports revisiting modern defamation law doctrine, following the lead of Justice Thomas's 2019 concurrence in the denial of a writ of certiorari in *McKee v. Cosby*,¹¹⁵ wherein he persuasively relied on Founding-era authority to inveigh against the doctrinal legitimacy of the "actual malice" defamation standard for public figures fabricated by the Warren Court in *New York Times Co. v. Sullivan*.¹¹⁶ In general, then, the early republic by and large took a view of reconciling natural rights and the common good that would make today's right and left leaning civil libertarians alike positively blench: "[W]hen expressive conduct caused harm and governmental power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct."¹¹⁷ That view—"that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual"¹¹⁸—ought to be revitalized today in the name of promoting the common good of the polity. The Founding generation, whether in the context of freedom of speech or freedom of the press, was thus far more fastidious than today's right- and left-leaning civil libertarians about reasonably construing and delimiting natural and positive rights, as well as harmonizing both with the common good.

Consider also the Fourth Amendment, with its enshrined protection against "unreasonable searches and seizures."¹¹⁹ As has been noted at length in other legal scholarship, the paramount colonial-era malady that the Fourth Amendment sought to remedy—in other words, its *ratio legis*—was the noxious practice of the "general warrant," wherein a government agent was afforded wide latitude to search or seize unspecified places or persons.¹²⁰ But modern-day

115. 139 S. Ct. 675, 675–82 (2019) (Thomas, J., concurring in the denial of certiorari).

116. 376 U.S. 254 (1964).

117. Campbell, *supra* note 108, at 287.

118. *Id.* at 289 (quoting Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of James Wilson), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 455 (Merrill Jensen, ed. 1976)).

119. U.S. CONST. amend. IV.

120. See, e.g., Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 1, 79

analogues of the “general warrant” are exceedingly rare; indeed, as a prophylactic tool, the Fourth Amendment has been remarkably successful. Perhaps it is due to the resoundingly successful abolition of “general warrants” that much in the realm of Fourth Amendment litigation today, including but hardly limited to Section 1983¹²¹ qualified immunity litigation pertaining to underlying alleged Fourth Amendment violations, deals with government conduct that is plainly permissible. Much of the underlying police conduct at issue in these cases is not necessarily *correct* as a black-letter matter, let alone consequentially or morally *ideal*, but it is usually at least “reasonable” under any recognizable conception of the balancing test explicitly required by the Amendment’s text.¹²² Consider, for instance, how the common law “allowed the use of whatever force was necessary to effect the arrest of a fleeing felon.”¹²³ The Founders would have positively guffawed at large swaths of contemporary Fourth Amendment and Section 1983 litigation; *ratio legis* can be immensely helpful here.

In the realm of Fourth Amendment jurisprudence, then, judges implementing an approach of common good originalism should be highly deferential to the good-faith, “reasonable,” split-second, on-the-spot decisions of law enforcement officers.¹²⁴ Officers’ robust presence on the street and performance of their jobs without great fear of recriminatory civil action or punitive prosecution secure law and order, with the attendant substantive goods of a law-abiding

(Spring 1999) (“[The Fourth A]mendment repudiates general warrants.”); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 214 (1993) (“The framers undoubtedly feared general warrants.”).

121. 42 U.S.C. § 1983 (2018).

122. See, e.g., *Cole v. Carson*, 957 F.3d 484, 485 (5th Cir. 2020) (Ho, J., dissenting) (“We should have granted qualified immunity to the police officers in this case—not because there is no ‘clearly established’ violation, . . . but because there was no Fourth Amendment violation at all.”).

123. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

124. Cf. Adrian Vermeule, *Deference and the Common Good*, MIRROR OF JUSTICE (May 8, 2020), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/05/a-confusion-about-deference.html> [<https://perma.cc/7QY4-62BT>] (“[T]he common good may itself suggest that judges should defer to other actors under various circumstances, as when those other actors are engaged in reasonable specifications of legal principles . . .”).

and well-secured societal order—a civic ethos of communitarianism, culture of solidarity, family, and religious piety—inherently redounding to the “establish[ment of] Justice”¹²⁵ and the common good of the society.¹²⁶ The very term “reasonable” helps operationalize this, as some degree of mandated deference toward the governmental actors tasked with “search[ing]” or “seiz[ing]” offending citizens is seemingly implicit in the very word itself. Common good originalism thus rejects the privacy-maximizing civil libertarianism of legal groups like the left-liberal American Civil Liberties Union and the right-liberal Institute for Justice alike, opting to substantively prioritize societal order and follow the sagacity of those who exalt the moral imperative of the rule of law, such as President Calvin Coolidge: “[O]ur success in establishing self-government . . . [is] predicated upon [our being] a law-abiding people.”¹²⁷

Next consider the Eighth Amendment’s ban on the government infliction of “cruel and unusual punishments.”¹²⁸ Here, the two interpretive endpoints of the “construction zone,” which are for all intents and purposes the only two plausible originalist interpretations, are the traditional conservative positivist viewpoint, in which effectively any form of punishment that was permissible at the time of the Founding is thus necessarily permissible today, and the progressive originalist viewpoint, in which the original public meaning of the provision *was* to establish an “evolving standards of decency”¹²⁹ judicial test. Much like common good originalism is generally comfortable deferring to the good-faith decisions of govern-

125. U.S. CONST. pmbl.

126. See, e.g., Charles Fain Lehman, *Beat Cops Cut Crime*, CITY J. (Nov. 30, 2020), <https://www.city-journal.org/how-police-presence-maintains-public-order> [<https://perma.cc/C7YK-GWZ3>] (“[W]hen it comes to how cops control crime, simply walking the beat is one of the most powerful tools available.”). See generally HEATHER MAC DONALD, *THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE* (2016).

127. Calvin Coolidge, *Address at Gettysburg Battlefield*, CALVIN COOLIDGE FND. (May 30, 1928), <https://coolidgefoundation.org/resources/address-at-gettysburg-battlefield> [<https://perma.cc/GFK7-U5FD>].

128. U.S. CONST. amend. VIII.

129. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

mental actors in the context of the Fourth Amendment's "reasonable[ness]" requirement for searches and seizures,¹³⁰ so too is common good originalism generally comfortable deferring to the good-faith republican or plebiscitary decisions of those tasked with deciding the propriety and probity of the death penalty, as well as the specific methods employed therein when the practice is bestowed legitimacy in the first instance. There will of course be reasonable—and justiciable—dispensations to this baseline rule of deference; judges deploying common good originalism will be called upon, at least in extreme cases, to provide an objective definition of "cruel" and adjudicate a specific case or controversy accordingly.

But here, the common good is generally best served—and we best "establish Justice" and "insure domestic Tranquility"¹³¹—when conscientious citizens and legislators decide what the most proper punitive measures are for their own distinctive communities, bearing in mind the various penological goals of retribution, deterrence, incapacitation, and rehabilitation. How to balance these interests as a matter of principle, and how to implement that balancing effort as a matter of praxis, is inherently a prudential judgment generally best left to be determined, within reason, by majorities acting within their legitimate spheres of influence as agents of a sovereign people. Where the Founding-era history with respect to a provision's original public meaning does not overwhelmingly support an "evolving" clausal construction, as is quite clearly the case in the Eighth Amendment context, that is precisely what ought to happen. The *ratio legis* of the Eighth Amendment is also best realized through such a deferential approach, as the historical impetus for the proscription of "cruel and unusual punishments" was quite plainly the perpetual abolition of the horrid forms of torture that had too often tarnished the bloody landscape of medieval Europe. Much like the abolition of the "general warrant" in the Fourth Amendment context, this laudable goal has been realized. We thus

130. See, e.g., Vermeule, *supra* note 124.

131. U.S. CONST. pmbl.

see that the common good is oftentimes, though of course not always, best served when judges defer to the “reasonable” good-faith decisions of public actors attempting to effectuate ancient or biblical principles of natural justice,¹³² whether in the Fourth Amendment context or outside of the Fourth Amendment context.

It is worth emphasizing that common good originalism is of course not synonymous, or even broadly coextensive, with a strong form of Thayerian judicial deference. Consider the example of abortion, the affirmative taking of an innocent human life and an action thus manifestly contrary to both natural justice and the substantive precepts of the Declaration and Preamble alike. Here, common good originalism would likely support “The Lincoln Proposal,” according to which state-sanctioned abortion is itself unconstitutional, regardless of what plebiscitary majorities purport to decide.¹³³ Consider as another example Professor John Eastman’s long-standing constitutional argument against Fourteenth Amendment-mandated birthright citizenship for illegal aliens.¹³⁴ Here too, common good originalism would more readily support Professor Eastman’s argument due to the reasonable “construction zone” interpretive ambiguity and the profound substantive harms that a mandated birthright citizenship interpretation would wreak upon cherished common good concepts such as national sovereignty and the sanctity of national citizenship, notwithstanding the alternative

132. See, e.g., Leviticus 24:19-21 (King James) (“And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again. And he that killeth a beast, he shall restore it: and he that killeth a man, he shall be put to death.”).

133. See Catherine Glenn Foster, Chad Pecknold, & Josh Craddock, *The Lincoln Proposal: Pro-Life Presidents Must Take Ambitious and Bold Action to Protect the Constitutional Rights of Preborn Children*, PUB. DISCOURSE (Nov. 8, 2020), <https://www.thepublicdiscourse.com/2020/11/72631/> [<https://perma.cc/E6NF-B6DT>]; see also John Finnis, *Abortion is Unconstitutional*, FIRST THINGS (Apr. 2021), <https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional> [<https://perma.cc/4V7C-TW63>].

134. See, e.g., John Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUNDATION (Mar. 30, 2006), <https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship> [<https://perma.cc/JAD6-FR6G>].

argument that Congress perhaps adopted the birthright citizenship presumption when it borrowed the near-verbatim contested language of the Fourteenth Amendment's Citizenship Clause in Section 301 of the Immigration and Nationality Act of 1952.¹³⁵

For one final constitutional example, consider also the crux of the Fourteenth Amendment, whose sweeping and majestic clauses—the Due Process Clause and the Equal Protection Clause, in particular—and the subsequent judicial misinterpretations thereof have cumulatively amounted to the greatest shift in constitutional structure since New Hampshire became the ninth of the original thirteen states to ratify the Constitution as the law of the land. Common good originalism of course rejects the most risible of the Fourteenth Amendment claims that have been advanced over the decades, from the ludicrous “penumbras” and “emanations” of *Griswold v. Connecticut*¹³⁶ to *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s¹³⁷ farcical casuistry that “[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹³⁸ On the contrary, common good originalism seeks true human flourishing in a well-ordered society and solidaristic polity, even when those goals are contrary to the prioritization or maximization of individual autonomy expansionism. Common good originalism is thus deeply hostile to natural-law-subversive, individual-autonomy-centralizing cases that structurally undermine the family—the very wellspring of any legitimate societal conception of the common good—such as *United States v. Windsor* and *Obergefell v. Hodges*.¹³⁹ While common good originalism is distinct from Professor Vermeule's own “common good constitutionalism” theory of interpretation, it nonetheless shares Professor Vermeule's belief that solipsistic citizens' “own

135. U.S. CONST. amend. XIV; 8 U.S.C. § 1401 (2018).

136. 381 U.S. 479, 484 (1965).

137. 505 U.S. 833 (1992).

138. *Id.* at 851.

139. See *supra* note 7. *Windsor* is of course a Fifth Amendment—not Fourteenth Amendment—case, but the same principles apply with respect to a cabined Due Process Clause interpretation that redounds to the interests of establishing justice and promoting the common good, not maximizing individual autonomy.

perceptions of what is best for them” are, for all intents and purposes, constitutionally irrelevant.¹⁴⁰ The Fourteenth Amendment, whose *ratio legis* was not to transmogrify Hamilton’s “least dangerous”¹⁴¹ branch into an all-powerful super-legislature, but rather to achieve the much less ambitious goal of merely legitimating the Civil Rights Act of 1866, is perfectly compatible with the notion that “all legislation is necessarily founded on some substantive conception of morality, and . . . the promotion of morality is a core and legitimate function of authority.”¹⁴² Common good originalism, which generally supports a more robust constitutional ambit for the actions of the federal government than other originalist interpretive methodologies,¹⁴³ thus also takes a strong view of state police powers over regulatory matters of health, safety, and morals, similar to James Madison in *The Federalist No. 45*.¹⁴⁴ Indeed, common good originalism is, if anything, skeptical of the so-called “incorporation” doctrine of the Bill of Rights in the first instance.¹⁴⁵

Crucially, and perhaps counterintuitively, the common good originalism framework can (and should) also apply to *statutory* interpretation. Common good originalism takes its cue from Senator

140. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [https://perma.cc/F48A-6PCG].

141. THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

142. Vermeule, *supra* note 140.

143. For example, consider the triumph of a Hamiltonian interpretation of the Necessary and Proper Clause, best encapsulated by THE FEDERALIST NO. 33, in *McCulloch v. Maryland*: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.” 17 U.S. (4 Wheat.) 316, 421 (1819).

144. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 2003) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”); cf. Keith E. Whittington, *Can the Government Just Close My Favorite Bar?*, REASON (Mar. 16, 2020, 2:03 PM), <https://reason.com/volokh/2020/03/16/can-the-government-just-close-my-favorite-bar/> [https://perma.cc/2AEZ-5Z4S].

145. See generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989).

Josh Hawley of Missouri, who lamented the day after the *Bostock* ruling that “if textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism and all of those phrases don’t mean much at all.”¹⁴⁶ Indeed, it is now past time to retire the outmoded taxonomical dichotomy of “textualism” as a mere method of statutory interpretation, and “originalism” as a mere method of constitutional interpretation. Instead, it would be better to conceive of “textualism” as an acontextual, amoral, ahistorical, non-purposive, non-*ratio legis*-undergirded reading of a legal provision—whether in a statute or in the Constitution. Similarly, it would be better to conceive of “originalism”—with common good originalism being the truest form, both our inheritance and our future—as a more properly contextualized, historical, purposive, *ratio legis*-undergirded, moralistic reading of a legal provision—whether in a statute or in the Constitution. For example, Justice Gorsuch’s majority opinion in *Bostock* ought to be thought of as “textualist,” and Justice Alito’s lead dissent in *Bostock* ought to be thought of as (common good) “originalist.” In our constitutional order, statutes are necessarily subordinate to the Constitution itself—the very crux of Chief Justice Marshall’s correct, if frequently misunderstood,¹⁴⁷ ruling in *Marbury v. Madison*¹⁴⁸—and they thus ought to be construed through the prism of the Constitution’s *ratio legis* and substantive aims, as expressed in the Preamble. In this sense, the substantive

146. Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/> [<https://perma.cc/U242-GY3D>].

147. See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

148. 5. U.S. (1 Cranch) 137 (1803); see Hammer, *Overrule Stare Decisis*, *supra* note 97 (“The proper interpretation of *Marbury* . . . amounts to a conflict-of-laws analysis by which Marshall was forced to choose between competing sources of law that are each enumerated in the Supremacy Clause of Article VI of the Constitution. In choosing the Constitution as superior to federal statute, Marshall properly discharged his conflict-of-laws analytical duty.”).

goals of the nation's enduring intergenerational compact may rightfully imbue with meaning the statutes, rules, and regulations enacted by the people's more transient political agents, who adopt more prudential policies at a given moment in time, in response to an idiosyncratic and ever-evolving set of specific circumstances.

Indeed, the dueling opinions in *Bostock* of Justices Gorsuch and Alito provide something of an archetype for a prospective distinction between a revised conception of "textualism," that is acontextual literalism, and a revised conception of "originalism," that is common good originalism. Justice Gorsuch's majority opinion is profoundly un-conservative—it pays no heed to the historical context of the 1964 Civil Rights Act, is woefully indifferent to the legislation's overarching telos, discards any consideration whatsoever of pertinent enactment-era social norms and customs about homosexuality and gender dysphoria, ignores the plain fact that Congress repeatedly declined to legislate what plaintiffs expressly argued was intrinsic and needed no further legislative modification, eschews the most rudimentary conceptions of Burkean epistemological humility, and deploys hyper-literalism and sophistic logical "reasoning" to reach a manifestly absurd result. Justice Alito's leading dissent, by contrast, is profoundly conservative—it is tethered in the specific historical context, social norms, societal customs, and *telos* of the congressional enactment of the 1964 Civil Rights Act; it is attuned to the fact that Congress repeatedly declined to amend Title VII to add sexual orientation and "gender identity" as additional protected classes; and it reaches a result that defers to political actors attuned to the common good, longstanding canons of interpretation, and broader notions of prioritizing the national weal over idiosyncratic, fashionable conceptions of personal identity. Justice Alito's dissent is directly in line with both the substantive ends of politics articulated in the Constitution's Preamble and the *ratio legis* of the 1964 Civil Rights Act; Justice Gorsuch's majority opinion, by contrast, fails mightily at both. Justice Alito's dissent rightfully (if only implicitly) recognizes the transcendental axioms lying just beneath the text—namely, who is a "man" and who is a

“woman” — while Justice Gorsuch’s majority opinion is at best indifferent, and at worst hostile, to them.¹⁴⁹ Justice Alito’s path in *Bostock*, much like his path in *Snyder*, illustrates common good originalism’s path forward. Indeed, to the extent traditional “conservative” originalism had Justice Scalia as its greatest champion from the bench, one could envision Justice Alito as a modern champion of something roughly approximating common good originalism.¹⁵⁰

To be sure, utilizing the Constitution’s Preamble as a tool of *statutory* construction can only go so far. Statutes themselves generally have their own preambles, and the same aforementioned exegetical framework of interpreting a legal provision’s words through the substantive prism of a statutory preamble ought to similarly apply. For example, as part of the ongoing political debate over the legal immunity afforded by Section 230 of the Communications Decency Act of 1996,¹⁵¹ many commentators and scholars alike who argue in favor of substantial reform or outright repeal have often referenced the fact that Congress noted in Section 230’s preambulatory “Findings” — in other words, the *ratio legis* or stated purpose for why this extralegal immunity was deemed valuable — that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁵² This

149. See *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) (“The Court’s opinion is like a pirate ship” that “sails under a textualist flag.”).

150. See generally Adam J. White, *The Burkean Justice*, WKLY. STANDARD (July 18, 2011), <https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice> [<https://perma.cc/KZ74-XJU7>].

151. 47 U.S.C. § 230 (2018).

152. *Id.* § 230(a)(3); see also Rachel Bovard, *Section 230 Protects Big Tech From Lawsuits. But It Was Never Supposed To Be Bulletproof.*, USA TODAY (Dec. 13, 2020), <https://www.usatoday.com/story/opinion/2020/12/13/section-230-big-tech-free-speech-donald-trump-column/3883191001/> [<https://perma.cc/ZS38-CSCL>] (“[Section 230] was enacted nearly 25 years ago as something akin to an exchange: Internet platforms would receive a liability shield so they could voluntarily screen out harmful content accessible to children, and in return they would provide a forum for ‘true diversity of political discourse’ and ‘myriad avenues for intellectual activity.’”); see also *Stifling*

is an example of a proper invocation of a statutory structure's articulated goals to help imbue the statutory text itself with meaning and, as is the case with present Section 230 discourse, to make public policy arguments accordingly.¹⁵³ This model ought to be followed in statutory construction; ideally, in attempting to decipher the truest original public meaning and the truest expression of the legislative will of a particular piece of legislation, interpreters would consult *both* the relevant statute's preamble provisions and the Constitution's Preamble. Future scholarship in this area might explore further the interpretive intersection of statutory preamble provisions, the Constitution's Preamble, and, of course, the statutory text itself. Ideally, judges might attempt to reconcile the *ratio legis* of a transient legislative act with the telos of the American political order and its Constitution—the “supreme Law of the Land”¹⁵⁴—and thus read the statute's text through that harmonized prism. This is a more complex and nuanced exercise than the ambit of constitutional construction, but the basic interpretive frameworks are highly analogous, if not identical.

A fuller explication is perhaps impossible absent the inevitable trial and error that attends to the practical judicial and political implementation of this theory of law. But I hope that this Part has at least helped illuminate *some* tangible aspects of what a constitutional and statutory interpretive methodology of common good originalism would look like in practice. It is a methodological ap-

Free Speech: Technological Censorship and the Public Discourse: Hearing Before the Subcomm. on the Const. of the S. Judiciary Comm., 116th Cong. 3 (2019) (statement of Eugene Kontorovich, Professor of Law, George Mason University Antonin Scalia School of Law). (“Section 230's blanket presumption is not mandatory, and certainly open to revision in a different environment more than two decades after its passage. In enacting the immunity provisions, Congress assumed that protected internet services provide ‘a forum for a true diversity of political discourse.’ To the extent that assumption is weakened by online companies filtering out viewpoints that they deem ideologically impermissible, the assumptions behind Section 230 may need to be revisited.”).

153. For a recent attempt at judicial construction of Section 230, see *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting the denial of certiorari).

154. U.S. CONST. art. VI.

proach with great promise for the flourishing of the American citizenry and the common weal of the American republic—greater promise, that is, than any of the three extant forms (progressive, libertarian/classical liberal, and conservative/positivist) of originalism on display today.

* * *

President Trump's successful 2020 confirmation of Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg was the single most profound ideological shift in a Supreme Court seat since Justice Thomas replaced Justice Thurgood Marshall in 1991, if not earlier. Indeed, social and religious conservatives are already seeing the results.¹⁵⁵

But let us not lose the forest for the trees. The judicial deck is systematically stacked against conservatives for a myriad of reasons. As Senator Ted Cruz, a former Supreme Court clerk and highly accomplished appellate litigator, has put it, speaking of judicial nominations: "To borrow from baseball, Republicans at best bat .500. . . . Democrats, on the other hand, bat nearly 1.000."¹⁵⁶ For those conservatives who prioritize the goals of *substantive conservatism* above any specific conception of liberal proceduralism, it is long past time to reassess first principles and attempt to calibrate a forward-looking strategy that stands a chance of success of protecting and effectuating conservative principles over the long term. We must leave no stone unturned, including curricular reform of America's sclerotic legal education status quo, reform of the specific criteria conservatives consider before settling on Supreme Court nominees, and ending once and for all the anti-constitutional but nonetheless widely held post-*Cooper v. Aaron*¹⁵⁷ belief in judicial

155. See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (enjoining Governor Andrew Cuomo's enforcement of ten and twenty-five person occupancy limits for religious services during the COVID-19 pandemic).

156. Cruz, *supra* note 100, at 199.

157. 358 U.S. 1 (1958).

supremacy.¹⁵⁸ Crucially, reform of the tenets and underlying precepts of originalist jurisprudence must itself also be on the table. None of the three general forms of originalism on the menu today—progressive, libertarian, or positivist conservative—has been anywhere near successful at retaining and promoting the substantive ends of conservatism. None of these forms of originalism has been particularly successful in staving off cunning legal assaults—from both avowed legal progressives and purported legal “conservatives”—against the common good and human flourishing of the American citizenry.

One is forced to recall, in anguish, the (perhaps apocryphal) Albert Einstein aphorism about the definition of insanity as trying the same thing over and over again and expecting different results. Justice Barrett’s propitious confirmation success notwithstanding, the legal conservative movement today remains beset by twin crises of intellectual cogency and political legitimacy. Unfortunately for conservative legal types, there are no panaceas to be found amidst the rubble. But common good originalism presents our best chance yet for a truly, substantively conservative jurisprudence that is faithful to our traditions, cognizant of where we have gone astray, and clear-eyed about our future. Let’s get to work.

158. See Hammer, *Undoing the Court’s Supreme Transgression*, *supra* note 1; see also Josh Hammer, *Standing Athwart History: Anti-Obergefell Popular Constitutionalism and Judicial Supremacy’s Long-Term Triumph*, 16 U. ST. THOMAS L.J. 178 (2020).