

Originalism and Conservatism: An American Story

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Originalism and American conservatism have worked well together for the past 50 years. Their collaboration has restored some degree of faithfulness to our Constitution in our legal system and legal culture. It also has provided conservatism with a politically and sociologically attractive approach to constitutional interpretation that is fully compatible with the rule of law. While it may not be true in all times and places, in the United States, because of its distinct circumstances, originalism is a good match for conservatism.

For the first time in nearly 40 years, it is a widely debated question within American conservatism whether originalism is the way Americans should interpret their Constitution.¹ Ever since Robert H. Bork and Raoul Berger articulated a jurisprudence of “original intent” in the 1970s and Edwin Meese made originalism the policy of the Reagan Administration in the 1980s,² originalism has been one of the most important consensus points within the American conservative movement.

And it has been a winning combination. Politically, from Richard Nixon’s promise to appoint “strict constructionists”³ to Donald Trump’s promise to nominate Supreme Court justices from a published list of likely nominees,⁴ originalism has been politically potent. Jurisprudentially, originalism has grown exponentially in sophistication and influence from a couple of leading if isolated scholars⁵ to today’s large number of scholars at leading institutions who elaborate originalism and debate its merits with each other and with other scholars.⁶

Originalism seemed to right-of-center Americans to fit conservatism. It seemed to be how law was supposed to work because it identified the law as fixed at ratification and declared that legal officials, especially judges, should follow (and not alter) this fixed law. It seemed humble about the power, intellect, and integrity of judicial officers: They are not, as Ronald Dworkin persuaded a generation of liberal legal scholars, Hercules.⁷ Originalism reserved most lawmaking for the more representative parts of the constitutional system where the virtue of political wisdom lay. It seemed to provide conservative interpretive outcomes or at least to avoid the more radical outcomes like *Wickard v. Filburn*,⁸ *Miranda v. Arizona*,⁹ and *Roe v. Wade*.¹⁰ It also seemed to provide results that all components of the conservative movement could embrace, including a more libertarian, limited federal government faction along with social conservatives who were concerned about the protection of American religious practices, to give just two examples.¹¹

This successful conservative consensus came under strain in the run-up to the 2016 election when it appeared that Donald Trump might not win the election and his promises to appoint originalist judges therefore would not bear fruit. The Supreme Court's 2019 *Bostock v. Clayton County* decision,¹² authored by one of President Trump's two originalist nominees, Justice Neil Gorsuch, further bent the consensus through its use of a textualist rationale to interpret the 1964 Civil Rights Act's "sex" to cover both sexual orientation and transgender status. The consensus nearly cracked under the pressure caused by the debate swirling around the Supreme Court while *Dobbs v. Jackson Women's Health Organization* was pending,¹³ and some suggested that the Supreme Court might not overrule *Roe v. Wade* and that this would show that originalism's promise was hollow.¹⁴

For these and other reasons, some conservatives have been attracted to common good constitutionalism, which explicitly and enthusiastically employs substantive—often conservative—norms in constitutional interpretation and at the same time criticizes originalism's purportedly positivist ethical neutrality.¹⁵

In this essay, I argue that American conservatism needs originalism because originalism is the most viable approach to constitutional interpretation that may fairly be characterized as "conservative." My argument has four parts.

- I stipulate an ecumenical definition of American conservatism;
- I provide a brief description of originalism;

- I argue that originalism fits well with and supports conservatism, at least better than current alternatives do; and
- I explain that conservatism also needs originalism in order to be a viable movement in the United States.

I do not argue that originalism is simply conservatism in the constitutional interpretation sphere. Instead, this essay is an intervention into the current debate within American conservatism, and I contribute to that debate by identifying the reasons right-of-center Americans should continue to embrace originalism. These reasons are many and powerful, but they are not without caveat.

One last note before proceeding: This essay presents reasons for conservative and libertarian Americans to utilize originalism. It does not follow—and I do not argue—that Americans of other stripes do not also have sound reasons to follow the Constitution’s original meaning. In particular, my own view is that the strongest argument for originalism is its capacity to secure the common good of our pluralistic political community,¹⁶ and *this* is a reason that all Americans of good faith can and should embrace.

An American Conservatism

The label “conservative” has had many connotations depending on time and place. Edmund Burke is often identified as the founder of modern conservatism. Burke was a leading Whig member of Parliament late in the 18th century. His ideas influenced Americans from the beginning of the United States, but especially after their recovery and popularization in the United States by Russell Kirk in his seminal book *The Conservative Mind*, published in 1953.

There are many (and contested) aspects of Burke’s thought, but most scholars agree that Burkeanism included pride of place for tradition, including traditional communities, and a corresponding commitment to slow, incremental change. Burke argued that individual and abstract human reason was relatively less reliable than the propositions of tradition, tried and tested through experience. A related component of Burkeanism is appreciation of the valuable role and place of religion and religious institutions, especially the Church, in the life of political communities. A third aspect of Burkeanism was preservation of private property, both because it provided for independence and freedom of property owners from government control and because it was an established aspect of the political community.¹⁷

Modern American conservatism arose in the 1950s in response to a number of phenomena including Communism abroad and socialism at home. Key articulators included Richard Weaver, Russell Kirk, and William F. Buckley Jr. American conservatism soon made explicit other commitments, including traditional mores and ways of life, especially as the cultural challenges of the 1960s became manifest. Most recently, with the decline of international Communism, the fusionism that held the movement together has come under stress.

As defined by *American Conservatism: An Encyclopedia*:

Conservatism is a philosophy that seeks to maintain and enrich societies characterized by respect for inherited institutions, beliefs and practices, in which individuals develop good character by cooperating with one another in primary, local associations such as families, churches and social groups aimed at furthering the common good in a manner pleasing to God.¹⁸

Consistent with this definition, this essay stipulates the following conception of American conservatism (which I intend to be ecumenical): Conservatism in the United States is a political, intellectual, and cultural movement that has both substantive and procedural commitments. Substantively, it seeks to protect and enhance community (especially the family and local communities, but also states and the United States); religion (in private *and* public life); individual flourishing as a member of a community; private property and the free market; and the importance and fundamental soundness of the American Founding, including the Constitution's commitment to ordered liberty originating from Western Civilization.¹⁹ Procedurally, it values tradition, slow incremental change, and local and private decision-making. It is opposed to one-size-fits-all, top-down, and dramatic change. It is humble about human capacities to identify and follow the truth.

In the United States, unlike Europe, conservatism is not tied to monarchy or an established church or an aristocratic culture. Instead, it is tied to key ideas, institutions, and practices in existence at the time of the Founding and at later historically important points, such as the Civil War and Reconstruction.

There is debate within conservatism over the ideas that defined America. The Declaration of Independence is widely regarded as identifying a number of core propositions of the American political creed: Humans are created by God, have natural rights, and are of equal moral worth, and human government is legitimate when it protects those rights through consensual means.

Belief in natural law and natural rights was fundamental and widespread at the Founding.²⁰ The common law—both its decentralized approach to law and lawmaking, and its substance—was similarly fundamental.²¹

Originalism’s Faithfulness to Fixed Constitutional Meaning

Originalism in its modern scholarly form first arose in the early 1970s,²² though there were predecessors, such as the Legal Process School, that continued to influence its development.²³ Originalist scholars have also shown that what today would be called an originalist approach to legal interpretation was widespread at the time of the framing and ratification of the Constitution and up to the New Deal.²⁴ To take just one of the numerous pieces of evidence, Sir William Blackstone’s influential *Commentaries on the Laws of England* explicitly identified rules of interpretation to determine the meaning of parliamentary statutes, and these rules sought this meaning through “signs the most natural and probable” including the conventional meaning of words, legal context, and other tools that today are employed by originalists.²⁵

This 1970s originalist scholarship was self-consciously responding to the interpretive excesses that took place at the Supreme Court during the tenures of Chief Justices Earl Warren and Warren Burger. For example, then-Professor Robert Bork argued that the Supreme Court should “stick close to the text and the history, and their fair implications.”²⁶ Such a Court “need make no fundamental value choices,” unlike the Warren and Burger Courts. Raoul Berger similarly argued in 1977 that “[t]he Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them, ‘not [to] construct new rights’”²⁷ as was done by the Warren and Burger Courts.

This early version of originalism had three primary commitments. It focused on the Constitution’s originally intended meaning; it cabined judicial discretion by tying judges to the Constitution’s originally intended meaning; and this curbed judges’ ability to invalidate the laws adopted by democratic institutions, such as state legislatures, and thereby respected democracy.

As originalism entered the intellectual fray, it was subject to withering criticism by legal scholars and judges, and hence began its decades-long process of intellectual evolution. This story is too long and complex for an essay. Suffice it to say that today, originalism has three key commitments.²⁸

- The Constitution’s meaning was fixed at the time the text was ratified. There continue to be good-faith debates over the form that meaning

takes, and the major current options are original intent,²⁹ original meaning,³⁰ original methods,³¹ and original-law originalism.³²

- This fixed constitutional meaning contributes to constitutional doctrine. There is a range of theoretically possible options, but most originalists argue that officers must follow the Constitution's original meaning. What this means practically is that legal officials must follow the original meaning in their official capacities, such as when crafting legislation or deciding a case. Most originalist scholars also identify some limited situations in which officers may be legally allowed or required to follow some other meaning, the most important such situations being nonoriginalist precedent and when the Constitution's original meaning does not provide a determinate legal answer (known as constitutional construction).
- The Constitution's original meaning can be underdeterminate; that is, it does not provide determinate answers to all legal questions. There are several causes of this underdeterminacy, but the most important implication is that originalism needs subsidiary mechanisms to guide officers in what is called the "construction zone," and originalists have provided different suggestions including, for example, deference to other branch constructions.

Most originalists accept a role for *stare decisis*,³³ though there remains significant debate over the extent to which nonoriginalist precedents—that is, cases where a court has misinterpreted the Constitution—should be followed or overruled. My own view is that the Constitution itself requires that federal judges give significant respect to constitutional precedent, including nonoriginalist precedent.³⁴ This means that the Supreme Court will follow some nonoriginalist precedents, especially those that are deeply entrenched and widely respected.

Originalism is best seen as having a three-step approach to nonoriginalist precedent.³⁵ In stage one, nonoriginalist precedent dominates a body of law, and originalist arguments are rare. Originalism has limited force. Few bodies of American constitutional law today are in this stage. The second stage is an eclectic body of constitutional law that is an incoherent mix of both originalist and nonoriginalist precedent. In this stage, judges should typically not extend nonoriginalist precedents and should generally extend originalist precedents. Much of our current constitutional law is at this stage of legal eclecticism. Stage three is a coherent originalist practice by

which all or nearly all of the precedent is originalist, and judges work with those precedents, applying existing doctrine to new situations. Some areas of American law—for example, the emerging Second Amendment jurisprudence—fit this stage.

As we will see, originalists' normative justifications for originalism have grown in number and sophistication since Bork's first foray 50 years ago.

Three Axes of Evaluation

One could evaluate whether an approach to constitutional interpretation is conservative in several ways.³⁶ One axis of evaluation is whether an approach to constitutional interpretation is itself—in its process—conservative. I will argue that the manner in which originalism interprets the Constitution is conservative in ways that living constitutionalism is not.

A second axis of evaluation is whether an approach leads to substantive legal propositions that are consistent with American conservatism. I will explain, with some caveats, that this is the case with originalism.

A third axis of evaluation for conservative Americans is whether a theory of constitutional interpretation supports conservatism sociologically. By this I mean, does originalism, compared to living constitutionalism, support and advance conservatism as a movement within American society? The answer, I will show, is yes.

My approach to the debate within conservatism on the proper method of constitutional interpretation is systematic and thorough and provides new reasons to those in the debate, but it also cautions against overidentification of originalism with conservatism. I do not argue that originalism entirely aligns with conservatism. Nor do I argue that left-of-center Americans lack reasons to follow originalism; on the contrary, many of the reasons I give here and elsewhere³⁷ should be embraced by all Americans.

Before getting to my positive arguments for why conservatism needs originalism, however, let me identify and then put to one side a set of related implausible arguments. One might think that the reason originalism is conservative is that it preserves the Constitution's meaning by identifying and following the fixed original meaning *simpliciter*. Yet, both in law and in other contexts of interpretation, there is debate over what following a text's meaning is. It might be the case that preserving and following the Constitution's meaning requires new interpretations of that meaning precisely in order to conserve the Constitution. In *Kyllo v. United States*, for example, the Supreme Court debated whether government use of thermal imaging devices to ascertain information about the inside of a home was a

“search” within the meaning of the Fourth Amendment.³⁸ Justice Antonin Scalia authored an opinion that was explicitly trying to preserve the Fourth Amendment’s protections in the face of new and unforeseen technological advances.³⁹ The Court ruled that faithfulness to the Fourth Amendment required holding that the police activity was a “search” because it “assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”⁴⁰

This debate also occurs in a variety of related contexts. In the context of Biblical interpretation, there is a debate among Christian churches and communities over whether and in what way(s) doctrinal development is faithful to the Bible. The Catholic Church’s position, as articulated by John Henry Newman, is that the process of doctrinal development is necessary if we are to remain faithful to Scripture as Scripture’s manifold implications are revealed through time.⁴¹ Other ecclesial communities have argued that faithfulness to the Bible precludes such doctrinal development: indeed, that development is itself evidence of unfaithfulness.⁴² Therefore, the fact that it preserves the Constitution’s original meaning is not by itself sufficient to make originalism conservative.

Another superficial way to evaluate whether originalism is conservative is to imagine an alternative theory by which the relevant interpreters “interpret” the Constitution always to reach a conservative result (which, as I explain below, is not what originalism will do). According to this approach, the Constitution effectively means what Russell Kirk believed was the ideal public policy for our political community. A related superficial (though slightly more plausible) comparison is to imagine an approach that more frequently produces conservative results than originalism does. Can Congress use its Commerce Clause power to regulate intrastate possession and use of “hard” drugs? Yes. Can Utah establish the Mormon Church? Yes. Can local governments regulate property owners in ways that substantially reduce the property’s value? No. Think of this alternative to originalism as “conservative judicial activism” by which judges depart from established law, be it precedent or original meaning, to reach substantively conservative results.⁴³

You should also think of these two related alternatives as fundamentally unconservative, and for a number of reasons. Such approaches to constitutional interpretation are lawless both in a conventional sense and theoretically. Conventionally, interpreters in the American legal system do not possess the discretion or authority to justify an interpretation of the law simply because it suits their political and policy preferences. Most scholars acknowledge that the law is underdeterminate,⁴⁴ but few claim that interpreters are (almost) always able to reach the “right answer.”

Jurisprudentially in the Western legal tradition, human law is an artifact, a human creation, with its own substance and integrity and therefore of limited—and often very limited—malleability. Though there is debate within the tradition on the extent, most agree that propositions of law are and should be changed relatively rarely through the process of legal interpretation. Instead and characteristically, interpreters are authorized to interpret the law—that is, identify it, expound it, articulate it—and not create new legal propositions.⁴⁵ Legislatures create new legal propositions that judges then interpret.

Originalism’s Conserving Power: Positive Arguments

American conservatism needs originalism because originalism is conservative in how it interprets the Constitution, because it generally leads to relatively conservative legal propositions, and because it gives conservatism an essential component of a successful movement. These are powerful reasons for conservatism to continue its alliance with originalism, but the most powerful reason—and likely the most obvious—is that originalism is the correct way to interpret our Constitution. If originalism is supported by sound reasons, conservatives should continue to embrace it; otherwise, they should not do so.

Originalist scholars have covered the figurative waterfront of normative justifications for originalism over the past 25 years. One of the first sophisticated justifications for originalism was offered by Keith Whittington, who argued that originalism best protects and incentivizes democratic self-government by the American people.⁴⁶ More recently, Professor Joel Alicea has tied this popular sovereignty justification to the natural law tradition.⁴⁷ Professor Randy Barnett has argued that originalism best secures the individual natural rights of Americans.⁴⁸ Professors John McGinnis and Michael Rappaport have argued that originalism secures the good consequences of the Constitution’s original meaning.⁴⁹

Another line of justification pursued primarily by Professors Stephen Sachs and William Baude goes by the label original-law originalism. As its label suggests, Baude and Sachs argue that the Constitution’s original meaning and its implementing doctrines *are* America’s *current* constitutional law, so the reasons that nearly all Americans have to follow the law apply with full force to following the Constitution’s original meaning.⁵⁰ This justification does not directly appeal to normative considerations and hence is often referred to (sometimes pejoratively) as a legal positivist justification for originalism.

Professor Christopher Green has articulated a compatibilist oath theory for originalism pursuant to which officers who swear to “support and defend the Constitution” have, because of their oath, reason to follow the Constitution’s original meaning.⁵¹ Professor Green’s argument is “thicker” than the Baude and Sachs position but also “thinner” than the other normative justifications. It relies on the virtue of honesty: The oath-taker is committing to telling the truth about the Constitution, and that truth is the Constitution’s original meaning.

Most and possibly all of these justifications (with some nuance⁵²) are compatible with conservatism. For example, popular sovereignty has been an aspect of the United States at least since the Declaration of Independence and is therefore an aspect of conservatism.⁵³ Natural rights, likewise, is an aspect of American conservatism. While it is likely that a deep commitment to utilitarianism is inconsistent with American conservatism, McGinnis and Rappaport’s consequentialist arguments are compatible with conservatism because conservatism cares about consequences. Stated differently, because originalists have provided normative justifications for originalism from all of the major ethical perspectives—deontological, consequentialist, and natural law—then, regardless of one’s own ethical perspective, there is a normative justification that should be congenial to conservatives.

My own view is that Americans have sound reasons to follow the Constitution’s original meaning because of its capacity to overcome coordination problems, secure the United States’ common good, and provide the conditions within which Americans can flourish.⁵⁴ This natural law justification for originalism complements similar justifications by other scholars, including Professors Pojanowski and Walsh.⁵⁵

Argument 1: Originalism’s process of interpretation is conservative. Process is distinct from substance. This distinction is a staple of the legal system, and different processes of interpretation can be more or less conservative.

One of conservatism’s defining characteristics is a belief in the need to preserve and follow traditional modes of life. This includes family structures, religious participation, and civic engagement, and it also includes legal practice. Originalists have shown that American constitutional practice at the time of the framing and ratification and up until the New Deal was originalist.⁵⁶ Originalism is the American political community’s traditional way of interpreting its Constitution.

This contrasts with the reasons given by the Supreme Court and scholars during and after the New Deal, which prototypically included claims about changed circumstances necessitating changes in constitutional

meaning. Whatever the power of these reasons, their product is *not* to utilize originalism.

Originalism's commitment to *stare decisis* as part of how it identifies and implements the Constitution's meaning is a powerful example of its adherents' respect for tradition. For many (and likely most) originalists, *stare decisis* and related ideas are a component of the theory. This commitment includes both the standard judicial respect for precedent, based on such considerations as legal stability and reliance interests, and the associated concepts of tradition⁵⁷ and liquidation.⁵⁸ All of these mechanisms have the common feature of following a pre-existing meaning, typically one of long-standing pedigree and identified either in a judicial precedent or in a long-standing interpretation outside the judiciary.

The process of originalism is also conservative because it identifies the Constitution's original meaning as its authoritative meaning, which is the product of an authentic political community. The Constitution's original meaning is the product of the Framers' drafting in the Philadelphia Convention and the ratifiers' authorization in the state ratification conventions. The Constitution's meaning reflected the United States' experiences. For instance, a major precipitating impetus for the Constitutional Convention was the trade fights breaking out between states, and the Constitution's primary solution was the Interstate Commerce Clause. The Constitution's meaning was, moreover, the product of numerous members of both the national United States political community and the 13 state political communities. The Contracts Clause, for instance, arose out of the widespread problem created by the newly independent states' passage of legislation that undermined settled contractual expectations.

Living constitutional meaning is different from the meaning that originated from the flesh-and-blood American Constitution makers at different points in our history. A living constitutionalist might claim that new constitutional meaning was itself a product of the United States community when the new meaning was created. One might, for example, point to the United States political community in 1966 and claim that the *Miranda* warnings are a product of that community. This is most plausible (though still not persuasive) with regard to the national political community, but it is implausible with regard to the majority of state and local communities that did not follow *Miranda*-like warnings prior to the Supreme Court's nonoriginalist decision. Yet it is also implausible with regard to the United States' national community because many nonoriginalist decisions, including *Miranda*, have self-consciously ruled against the political community's existing norms and have been immediately contested and frequently

narrowed (and sometimes overruled) by the national political community over time, as was *Miranda* itself.⁵⁹

Living constitutionalism also represents a rejection of the traditional American approach to constitutional interpretation. Living constitutionalism does typically employ *stare decisis* and related concepts; however, they are employed in the service of constitutional meanings that are characteristically of recent vintage and therefore do not reflect long-standing tradition as does originalist precedent.⁶⁰ Moreover, living constitutionalism in principle is committed to continually updating current precedential meaning through new precedent, while the end state of originalism is a fully originalist body of precedent that is applied to new circumstances but otherwise maintains its character. Living constitutionalism is a rejection of the Constitution's original meaning and to that degree is a rejection of the real communities whose meaning is reflected in it.

Originalism's process of constitutional interpretation is also conservative because the meaning it identifies is not *characteristically* abstract; instead, it is a typically concrete meaning derived from and tied to the authentic American community from which it originated and whose members it is coordinating. To be clear: My claim is not that originalism provides a low percentage of concrete constitutional meanings in absolute terms, though I think that is true; my argument is that originalism does not *systematically* identify abstract meaning. Originalism obviously does produce some abstract constitutional meaning. The original meaning of the Cruel and Unusual Punishment Clause is one such instance: It means "unjustly harsh,"⁶¹ which is a relatively abstract principle. What I mean is that originalism as a method of constitutional interpretation is not *characterized* by abstract constitutional meaning. The level of abstraction of the Constitution's original meaning, as Keith Whittington explained back in 2004, is determined by the original meaning itself, not by an a priori commitment to abstract meaning. "[O]riginalism...insist[s] that those are interpretive questions to be discovered through historical investigations. An abstract text may be subject to judicial manipulation, but its meaning is historically determined."⁶²

Thus, many provisions characterized by living constitutionalists as broad and abstract are, upon investigation, neither broad nor abstract. The Equal Protection Clause was famously pronounced by Ronald Dworkin to be "a very general principle,"⁶³ and this abstract interpretation was characteristic of Dworkin's theory of interpretation.⁶⁴ By contrast, the clause's original meaning—which is the product of the actual circumstances faced by the Reconstruction Republicans leading the American community—was a

more concrete rule. As described by Professor Christopher Green, the clause “imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system.”⁶⁵

This is in contrast to living constitutionalism, which in its various forms characteristically gravitates toward abstract constitutional meaning. I have noted Ronald Dworkin, but similar living constitutionalist claims are ubiquitous. Scholars⁶⁶ and justices⁶⁷ have made similar claims. Even hybrid theories, like Professor Jack Balkin’s *Living Originalism*,⁶⁸ embrace what Professors McGinnis and Rappaport have called the “abstract meaning fallacy.”⁶⁹

Originalism’s penchant for the non-abstract is conservative because conservatism is averse to theoretical abstraction. Conservatism shies away from abstract political and ethical principles in favor of traditions and norms originating from and reflective of the human communities’ practices from which they arose. As described by Professor Jesse Merriam, conservatism “is more communally oriented, historically rooted, and empirically grounded,” and the Constitution’s original meaning reflects that.⁷⁰

Originalism is also “historically rooted[] and empirically grounded” because the Constitution’s original meaning both has the purpose and is the means to coordinate Americans toward the common good. The Constitution’s purpose is to coordinate the political community toward the common good.⁷¹ A few aspects of that coordination may be abstract, as noted earlier, but most will be concrete because law-based coordination requires that law’s subjects are capable of understanding and following the law’s reasons in their practical deliberations and to act accordingly.⁷² Law’s subjects will have a more difficult time following abstract legal propositions in a systematically coordinated manner than they will following concrete legal propositions.

It is not surprising, therefore, that the Constitution’s legal propositions are typically “historically rooted[] and empirically grounded.” A perusal through Article I, Section 8, for example, shows a litany of concrete common terms and legal terms of art:⁷³ “lay and collect taxes,” “borrow Money,” “the Indian Tribes,” “Bankruptcies,” “coin Money,” “Punishment,” and “Post Offices.” These terms are readily understood by Americans because they are drawn from and are meant to coordinate existing concrete American life. The terms’ concreteness allows officers and Americans to coordinate their actions. Stated differently, it is easier for Americans to understand and follow the original meaning of the Equal Protection Clause than it is for them to follow Ronald Dworkin’s abstract moral principle of equal concern and respect.

There is another, related manner in which originalism as a process of interpretation is conservative: It conserves whatever the public meaning of the Constitution was when it was ratified. This rationale is not focused on the substance of the original meaning; it is agnostic about the substance. Instead, it focuses on the process of interpretation through which originalism conserves the original fixed meaning. For instance, Professor Ilan Wurman has argued that originalism preserves the “balance among the principles of our Founding,” whatever that balance was.⁷⁴

There is a jurisprudentially deep way in which originalism’s process fits and supports conservatism. Conservatism recognizes both human reason and human will, and both are essential components of humans individually and communally. What constituted the United Kingdom for Burke was the *reasoned* choices of Englishmen along with, simply, their *choices* of how to live.

Likewise, originalism treats the Constitution as the product of both reason and will. The Constitution was authorized by the ratifiers who chose to ratify it. The Constitution was also the product of reason by the Framers who crafted its provisions and of the ratifiers who debated whether to adopt it. Originalism’s capacity to treat the Constitution as an integrated product of reason and will is the consequence of its treatment of the Constitution as having fixed constitutional meaning whose provenance was the framing (reason) and ratification (will and reason).

Compare that to living constitutionalism. Living constitutionalists are sociologically “stuck” with the Constitution’s text, which is a product of the framing and ratification, yet they change that text’s operative meaning to something other than the public meaning from the time of the framing and ratification. In practice, this typically occurs in Supreme Court cases in which the justices announce newly changed meaning. The justices in such cases view the original public meaning as inadequate (by hypothesis, otherwise why change it?), but they must make a plausible argument that the newly changed meaning is actually an interpretation of the Constitution’s text. This places the newly changed meaning in possible tension with the sociologically fixed text, so the justices must choose a newly changed meaning that is *both* superior to the original meaning (normatively) *and* plausibly consistent with the Constitution’s text (as a sociological matter).

The process of living constitutionalism therefore has *two* chronological points of will and *two* points of reason. The first point of will is the choice to adopt the Constitution’s text and original meaning; the second is when the justices choose newly changed meaning. The first point of reason is when the Framers and ratifiers crafted and adopted the Constitution’s text with its public

meaning; the second is when the justices (A) determine what they believe to be the superior, newly changed meaning and (B) determine that the newly changed meaning is sufficiently consistent with the Constitution's text to survive sociological scrutiny. Point (B) is created by living constitutionalism's process of interpretation and shows that the rationality of living constitutionalism's process is undermined by the tension between the newly changed meaning and the Constitution's text. Because of (B), the newly changed meaning is partially an accident caused by the artifact of the Constitution's text.⁷⁵

Relatedly, originalism's process treats the Constitution seriously as law to be followed, while living constitutionalism is less serious about the conventional sources of constitutional meaning. Turning to the granular to exemplify the different manners of performing constitutional interpretation, one can compare how the Supreme Court justices acted and reasoned in *Roe v. Wade* and *Dobbs v. Jackson Women's Health Organization*. In its opinion, the *Roe* Court treated the Constitution's text as an afterthought. By contrast, the *Dobbs* Court gave pride of place to the question by treating it as the first issue. This same pattern of focusing on text, structure, history, and tradition was in evidence in *Dobbs*'s oral argument⁷⁶ and virtually absent in *Roe*'s. The *Roe* Court's casual attitude toward text, structure, and history was the product of its living constitutionalist approach in which the real work of lawmaking being done was not in 1868; instead, it was in the justices' own reasoning as to what legal propositions are sound.

Originalism's process is also conservative because it is compatible with the rule of law. The rule of law is a deep commitment of Western Civilization and of the United States. The rule of law is a tremendous good, especially in a large, diverse republic such as ours. The rule of law is largely about process. As summarized by John Finnis, the rule of law has eight characteristics that are process-oriented, such as prospectivity and promulgation.⁷⁷ Originalism's process comports with the rule of law better than living constitutionalism does.

Originalism's two core commitments—the fixation thesis and constraint principle—tie it to pre-existing constitutional meaning that officers then apply. This comports with the rule of law. By contrast, living constitutionalism is *characterized* by the rejection of one or both of these commitments,⁷⁸ which requires officers who follow living constitutionalism to create new constitutional meaning and/or not follow existing constitutional meaning. This is not consistent with the rule of law.

For these reasons, I disagree with Professor Merriam's assessment that the legal conservative movement diverged from the broader conservative movement because of its focus on process and not the substance of constitutional interpretation.⁷⁹ Merriam contrasts the responses to *Brown v.*

*Board of Education*⁸⁰ by legal scholars such as Herbert Wechsler with those of movement conservatives to exemplify the distinction between process and substance. Similarly, Merriam critiques Robert Bork's 1971 and Berger's 1977 interventions because they focused on the Warren Court's incorrect process of constitutional interpretation but left behind the earlier conservative substantive criticisms.⁸¹

Merriam is right that originalism focuses on the correct process for interpreting our Constitution. Its two core commitments are process oriented. The fixation thesis tells us when and how constitutional meaning is set, and the constraint principle instructs officers to follow that fixed constitutional meaning. Application of these commitments does not depend on the substance of the Constitution's meaning. It is surely unexceptionable, then, for lawyers who have expertise in law to critique deviations from the original meaning precisely as failed process.

Originalism's focus on process does not imply that substantive critiques of living constitutionalism are illegitimate or that originalists do not make them; many certainly do.⁸² It is only that originalism's focus is more narrow and tied to what originalism is trying to do: describe how to be faithful to the Constitution *as a theory of constitutional interpretation*. Originalism is not materially about the substance of the Constitution.⁸³

Argument 2: Conservatism needs originalism because originalism articulates relatively more conservative legal propositions than living constitutionalism articulates. The concept of the "substance" of constitutional interpretation is relatively easy to understand. This substance is the body of legal propositions articulated as the product of interpretation of the Constitution's original meaning. For example, one legal proposition recently identified by the Supreme Court is that the Commerce Clause does not authorize Congress to regulate non-market inactivity and does not require Americans to purchase government-approved health insurance.⁸⁴

It is not possible in the span of this short essay to show definitively that the propositions articulated through interpretation of the Constitution's original meaning are overall and on balance relatively conservative, so I will try to support my claim indirectly. When people think of originalism as being conservative, this substantive perspective is most often what they have in mind. There are several reasons that, for the most part, support this conclusion.

First, one might think that the Constitution's original meaning is more conservative than living constitutional meaning if the relevant creators of meaning were more conservative than the alternatives. This conclusion, in my view, would be the product of three likely premises.

The first premise is that the political community that created the key parts of the Constitution during the Founding, Reconstruction, and the Progressive Era was relatively more conservative than today's United States. Using today's contested political-legal issues as test cases, it seems likely that the United States was more conservative than it is today on most major constitutional issues including the size and powers of the federal government, religion in public life, individual gun rights, marriage, and government takings of property, among many others.⁸⁵

The second premise is that political communities tend to create laws that reflect their general outlook. This tends to be case both theoretically and sociologically. From the perspective of the natural law tradition, law's purpose is to coordinate law's subjects so they can secure the common good and their individual goods. Both law's purposes and its coordinations are the product of the political community. Sociologically, human lawmakers in all sorts of political systems typically share the outlooks of their political communities, and the citizens in those political communities expect and are more likely to follow laws that comport with that outlook.

The third premise is that the Constitution's original meaning is more conservative than contemporary living constitutionalist interpreters' policy preferences (or the preferences they perceive in popular social movements or wherever they derive their updating information). The contrast between the interpretations of living constitutionalist justices since the rise of living constitutionalism in the early 20th century—those that have been adopted by the Supreme Court and those that have not—and the original meaning shows that originalism is typically more conservative. The close collaboration of living constitutionalism and liberal-progressive politics during the 20th century suggests that living constitutionalism was employed precisely to achieve *non-conservative* results.

A second way to see that originalism will produce more conservative legal propositions than living constitutionalism is to compare it with the Supreme Court's practice during the New Deal, Warren, and Burger Court eras. The Court's practice during this period is widely (and in my view correctly) seen as nonoriginalist. This can be seen from the near-total absence of originalist arguments in the Court's opinions during this period. For example, in place of the text, structure, and history of the Fifth Amendment's privilege against self-incrimination, the Supreme Court talked about psychological coercion, contemporary police manuals, and adequate psychological safeguards in *Miranda v. Arizona*. It employed the same kind of nonoriginalist analysis in other cases as well.⁸⁶

In addition to and following from the absence of originalist analysis, there was a dearth of originalist holdings during this era: that is, holdings that are consistent with the Constitution's original meaning.⁸⁷ The New Deal Supreme Court's Commerce Clause decisions were fundamental to and characteristic of the period's constitutional revolution, and their holdings were progressively more extravagant, culminating in *Wickard v. Filburn*, which removed constitutional limits on Congress's commerce power and thus fatally undermined the principle of limited and enumerated powers.⁸⁸

A third way to get at this is to look at the legal propositions living constitutionalism has tried to implement. In subject after subject, when the New Deal and later progressive Courts employed living constitutionalism, it was to move toward a meaning that fit the ideological viewpoint of the justices, which in turn fit the dominant liberalism in the early to mid-20th century United States. It is hard for many of us today to recall the absolute zaniness of many of the Supreme Court's purported constitutional interpretations during this time. One of the most exotic was the Court's movement toward ruling that there is a constitutional right to government benefits.⁸⁹ Another was the Court's living constitutionalist interpretation of the Interstate Commerce Clause that expanded it to the point where it nearly—but not quite—gave Congress a police power.

Fourth, one of American conservatism's core commitments is community, and originalism is relatively protective of the various forms of community in the United States. The United States has four fundamental levels of community: the national community, state communities, local communities, and civic communities. Many conservatives think it is implausible to describe the United States as a community,⁹⁰ but most think that states and their subsidiary communities count as genuine communities. Originalism protects these communities because the Constitution's original meaning identifies and protects them through many mechanisms, both directly and indirectly.

The United States is, in my view, a genuine if relatively thin political community. Different groups of humans may have different characteristics and yet all be communities, though of different sorts. The United States is a genuine community in many ways. One powerful piece of evidence is that American citizens share with one another civic friendship. That is, we generally and genuinely will the good of our fellow citizens as civic friends⁹¹ in a way that most of us do not for non-Americans.⁹²

Originalism preserves and enhances the national American community by its focus on the framing and ratification of the Constitution and subsequent amendments. America lacks a common ethnicity or religion, includes many immigrants with ties to ancestral countries, and features a relatively thin national

culture with a profusion of sub-national cultures. In these circumstances, the Constitution has come to play a central role in American self-identity, but this identity is not tied to the mere notion of the Constitution. Instead, it is the actual written Constitution, currently in the National Archives and which was the product of the unique framing and ratification process, that can and does play that role. Our actual Constitution was part of that foundational process and is recognized by Americans today as our Constitution solely because of its unique provenance. Americans of all stripes are able to—and in fact do—find common ground in the Constitution, and originalism facilitates that process.⁹³

Most importantly for states, the Constitution’s original meaning protects the states as distinct political sub-communities. The structural principle of federalism holds that ours is a federal republic and that the Constitution should be interpreted to identify and preserve both the federal and state governments. For instance, the Supreme Court in *United States v. Lopez* crafted a new sub-doctrine to limit the scope of the nonoriginalist substantial effects test created during the New Deal.⁹⁴ The *Lopez* Court ruled that the Commerce Clause allowed Congress to regulate only economic activities. This new doctrinal limit was a product of the federalism structural principle instructing the Court to identify a way to protect the role and power of states over crime and education (and other areas traditionally governed by states) that was threatened by the nonoriginalist substantial effects test.

Similarly, the structural principle of limited and enumerated powers limits the federal government’s powers and in doing so preserves state use of non-enumerated powers. Think of all the important subjects in human communities in need of legal coordination that Congress is not authorized to regulate: education, property, marriage, torts, community morality, contracts, and farming among many others. This principle persuaded the Supreme Court in *NFIB v. Sebelius* to reject Congress’s claimed power to regulate the status (or inactivity) of being uninsured.

Local communities are indirectly supported by originalism. Some—probably most—states will distribute some of their retained authority to local communities. Whether and to what extent this will occur depends on a variety of circumstances, though the fact that many states already provide for significant “intrastate federalism”⁹⁵ suggests that local community authority will be preserved and enlarged by originalism.

By contrast, living constitutionalism undermines all of these communities and in multiple ways.

First, living constitutionalism is committed to these structural principles only so long as and to the extent that today’s interpreter believes is warranted. This permits diminution of constitutional protection for states.

Second, living constitutionalists have drastically narrowed these structural principles. To summarize a large subject, living constitutionalist decisions have authorized nearly unlimited congressional power, significant executive power, and federal judicial supremacy over most of state life.

Third, and fundamentally, living constitutionalists change the Constitution's structural commitment to state flourishing and replace it with an analysis that evaluates whether, *in each particular case*, preserving state autonomy is valuable. This living constitutionalist analysis systematically leads to diminution of federalism because the value of federalism is itself systemic, and that system's value is not fully captured in a particular case.⁹⁶

Another key conservative commitment is to religion and its importance to a flourishing political community. Religious liberty is key to protecting religion's positive role in our political community, and it appears that the consensus originalist position would support that.

First, on the free exercise side of the ledger, this majority interpretation of the Free Exercise Clause authorizes judicial exemptions from laws that incidentally burden religious exercise.⁹⁷ This provides relatively more robust protections for religious liberty than do most current living constitutionalist views.

Second, though there continues to be reasonable debate about the Establishment Clause's original meaning,⁹⁸ there is a consensus that the Eversonian wall of strict separation⁹⁹ is wrong.¹⁰⁰ This means that the federal and state governments may enter into relationships with religious institutions and individual believers so long as those relationships do not establish a religion. This for the most part fits the conservative perspective on the value of religion in public life by allowing significant religion–government interaction that, among other things, maintains a robust role for religion in the public square that includes, for instance, support for religious institutions.

Promoting and protecting the free market has been a mainstay of the conservative movement since the 1950s,¹⁰¹ and originalism is supportive of the free market in many ways. First, the Constitution's original meaning provides a number of protections for private ordering, including the Contracts Clause and the Takings Clause. More importantly, though indirectly, the Constitution leaves to the states and their common law most regulation of private ordering through contract and property law, and this common law is characterized by a preference for private ordering. Despite 20th century doctrinal innovations in some areas of the common law, its center of gravity and characteristic is to provide avenues for private economic ordering.

There are reasons to be cautious about the assessment in this subsection. The most important is that there remains underdeterminacy on what the Constitution's original meaning is for some of its provisions, including some of its important ones. There is some excellent work on the Necessary and Proper Clause,¹⁰² but the total quantity of work is still thin enough to reduce confidence in the current consensus.¹⁰³ Surprisingly, there has been relatively limited research into the original meaning of the Free Speech Clause. There continues to be stubborn disagreement on the original meaning of the Establishment Clause and the Privileges or Immunities Clause.¹⁰⁴ In these areas of continuing underdeterminacy, it is not possible to say definitively that the original meaning is substantively conservative.

Additionally, there continues to be debate over the nature of originalism, and it is possible that these theoretical disagreements may lead to practical differences of original meaning. This possibility is best seen by comparing Professor Jack Balkin's *Living Originalism*¹⁰⁵ to conventional versions of originalism. One distinguishing characteristic of Professor Balkin's originalism is its thinness: The original meaning is solely the Constitution's semantic meaning,¹⁰⁶ which Professor Balkin often characterizes as an abstract principle. By contrast, conventional types of originalism draw on more resources to create a thicker original meaning that is (and is typically) not an abstract principle.

The upshot is that these different versions of originalism may lead to different legal propositions. For instance, Professor Balkin has argued that the Commerce Clause authorizes Congress to regulate social intercourse,¹⁰⁷ while Professor Randy Barnett, employing standard original meaning analysis, has concluded that Congress may regulate interstate commercial transactions.¹⁰⁸ I do not want to overstate the uncertainty these differences among originalism may cause. For the vast majority of the Constitution's text, it appears that conventional versions of originalism typically lead to the same legal propositions.

As noted earlier, many and perhaps most originalists embrace stare decisis to varying degrees. This complicates my analysis in two ways. The most obvious is that different conceptions of stare decisis will lead to more or less following the original meaning depending on the strength of the conception. In practice, however, it appears that most originalists see stare decisis as running in a relatively narrow range from being a tie-breaker among different interpretations to a modest level of respect for nonoriginalist precedent.

The second complication is that stare decisis makes it less likely that a court will follow the Constitution's original meaning because the court will sometimes follow an inconsistent nonoriginalist precedent. This means

that, even if the Constitution's original meaning is typically conservative, it may be displaced by a nonoriginalist precedent's different meaning (at least until that precedent is overruled by the Supreme Court). To make matters worse, it is very difficult to say *a priori* whether and to what extent a nonoriginalist precedent should be followed or overruled, so the existence of stare decisis creates uncertainty. That being said, even the originalists with the most robust conception of stare decisis would not preserve most nonoriginalist decisions over the long term.¹⁰⁹

Professor Merriam has raised what, in effect, is a counterargument to this section: He has argued that the conservative movement initially advocated for a narrow interpretation of the Fourteenth Amendment partly to prevent the federal judiciary from taking from states governance of large swaths of their traditional police powers.¹¹⁰ It is true that the consensus today is that the Fourteenth Amendment at least incorporates the Bill of Rights against the states,¹¹¹ and this does have the effect of giving federal courts (and Congress) power over some areas of traditional state governance, such as religious liberty. For Professor Merriam, this result is not conservative because it deprives local communities of their capacity to govern themselves.

I agree that this is a loss.¹¹² However, that loss is justified if the reason for it was poor state self-governance, which was in fact the reason for the loss. States mistreated many of their citizens, sometimes grievously so, and application of the Bill of Rights remedied some of those abuses. This was true prior to 1868, of course, when Southern states prohibited abolitionist literature, and it remains true today when states like New York abuse their citizens' capacity to defend themselves with firearms.

There is also something decidedly unconservative about criticism of incorporation of the Bill of Rights, drafted by James Madison and adopted during the Founding period. These commitments are for the most part¹¹³ sound legal commitments of the early American Republic and should for both reasons be supported by conservatives.

The real culprit in the narrative of judicial supplanting of state governance is not incorporation of the original meaning of the Bill of Rights; instead, it is the living constitutionalist misinterpretations of the Bill of Rights and in particular the doctrine of substantive due process. The Warren and Burger Courts' misinterpretations are legion: Cases like *Cohen v. California*,¹¹⁴ *Craig v. Boren*,¹¹⁵ *Reynolds v. Sims*,¹¹⁶ *Katz v. United States*,¹¹⁷ *Miranda v. Arizona*,¹¹⁸ *Massiah v. United States*,¹¹⁹ *Goldberg v. Kelly*,¹²⁰ *Griswold v. Connecticut*,¹²¹ and of course *Roe v. Wade*¹²² were not originalist and so cannot be laid at originalism's feet.

Argument 3: Originalism is theoretically and practically more conserving than common good constitutionalism. One way to compare whether and to what extent originalism is conservative, and therefore whether conservatism needs originalism, is by comparing it to another theory of constitutional interpretation that expressly criticizes originalism and promises to deliver substantively better—and typically more conservative¹²³—results. This recent rival to originalism in right-of-center circles is common good constitutionalism (CGC).

First articulated by Professor Adrian Vermeule in a March 2020 essay, CGC began its life in a critical stance against originalism, as its title—*Beyond Originalism*—suggests.¹²⁴ Since then, common good constitutionalism has grown. Professor Vermeule published his eponymous book in 2022,¹²⁵ and he has been joined by a small cadre of other scholars contributing both to traditional scholarship¹²⁶ and to an online presence.¹²⁷ As it has grown, CGC has continued its robust criticism of originalism¹²⁸ and has also articulated its own positive case.

One obvious way to evaluate whether CGC is conservative is to evaluate the concrete legal propositions to which its proponents say CGC would lead. If successful, it appears that CGC would lead to the following interpretations of the U.S. Constitution: a federal police power with jurisdiction over the health, safety, and morals of all Americans;¹²⁹ a robust administrative state;¹³⁰ an innervated federalism;¹³¹ narrow protections for private property rights;¹³² and likely thin protection for individual gun rights.¹³³

It is difficult to know, at this point in its development, many of the propositions to which CGC would lead, but one may infer that, given its commitment to federal and state police power along with its relatively narrow conception of constitutional rights, CGC would frequently lead to a robust regulatory role for government and limited constitutional rights protections. Perhaps another way to get at CGC's substantive interpretations is that it appears to embrace all of the federal and state government empowerment of the 20th century with small carve-outs for some social conservative issues like abortion and natural marriage.

Common good constitutionalism's two related and key criticisms of originalism are that it is positivist and that it misunderstands how interpretation operates. The first, if true, would be a strike against originalism as conservative because most conservatives embrace some aspect of the natural law tradition. The latter criticism, however, does not appear relevant to whether originalism is conservative.

First, common good constitutionalists argue that originalism is positivist.¹³⁴ This positivism makes originalism impermeable to first-order,

substantive normative propositions including many ethical propositions that are true. Stated differently, originalism stops the officers charged with interpreting and following the Constitution from using natural law to interpret it. Officers following the Constitution's original meaning will neglect this *ius naturale* that, according to Vermeule, includes "the general principles of jurisprudence and legal justice"¹³⁵ that are "part of the law and internal to it."¹³⁶ Interpreters must "look to...the *ius naturale* precisely in order to understand the meaning of the text."¹³⁷

From CGC's perspective, therefore, originalism's blindness to natural law leads it to absurd and unjust interpretations of the law, such as *Bostock v. Clayton County*.¹³⁸ There, Justice Gorsuch said he interpreted "sex" in Title VII according to its "ordinary public meaning" to include homosexuality and transgender status.¹³⁹ Originalists like Justice Gorsuch are pulled down to progressive living constitutionalism as a result of originalism's failure to acknowledge natural law. As summarized by Vermeule, "[i]t is a strange originalism indeed that would be unanimously voted down by the enacting generation"¹⁴⁰

A second, related way in which originalism is purportedly positivist is its adherents' insistence that interpreters should follow only the Constitution's original meaning. That is not possible, according to CGC, because interpretation is inherently normative. "Positive law based on the will of the civil lawmaker," according to Professor Vermeule, "while worthy of great respect in its sphere, is contained within a larger objective order of legal principles and *can only be interpreted in accordance with those principles*."¹⁴¹ In other words, the phenomenon of legal interpretation itself *always* requires interpreters to use the natural law to interpret the positive law.

These criticisms are inaccurate for at least two reasons: (1) because many scholars have shown that originalism is not only consistent with the natural law tradition, but also the correct application of that tradition in the United States,¹⁴² and (2) because originalism's use of positive law is the sound—and limited—use of positive law as a tool to secure the common good. Originalism claims that the positive law of our mature legal system—that is, the Constitution's original meaning and originalist precedent—has the capacity to answer most constitutional questions without resort to natural law. Originalism does not make the additional claim that the positive law always has the resources to provide legal answers to questions, nor does it make the claim that natural law is irrelevant to the Constitution's positive law. Instead, originalists have identified *determinatios* of our legal system where originalism mandates or permits use of natural law in specific contexts.¹⁴³

One can also turn around CGC's criticism of originalism and ask: What role does our actual, written, positive law Constitution play in CGC? The

answer is very little.¹⁴⁴ Claims about the Constitution’s meaning are severely undersupported. One of the most prominent such instances is Professor Vermeule’s claim that the phrase “general Welfare of the United States”¹⁴⁵ in the Taxing and Spending Clause “is an obvious place to ground principles of common good constitutionalism” because of the clause’s “obvious semantic ambiguity.”¹⁴⁶ A theory of interpretation of the United States Constitution in which the Constitution itself plays only a modest role is not one that fits well with American conservatism.

Finally, there is a deep practical reason why originalism is more likely to conserve what is good in the United States than CGC is: Originalism is more attractive to Americans of a wide variety of perspectives. The United States is a large, pluralistic political community. Americans have a wide variety of religious, philosophical, political, and other viewpoints. This presents a challenge to any non-liberal theory, such as conservatism, because it is necessarily making claims with which (at least at this point) many Americans will not agree. To take just one example, conservatism wishes to follow tradition, and traditions of all sorts are rejected and viewed with suspicion—simply because they are traditions—by many Americans. Originalism has been one of the conservative movement’s most successful and attractive components precisely because originalists have intentionally appealed to a wide variety of Americans.

As described above, the variety of attractive normative justifications that originalists have put forward to support originalism include popular sovereignty, natural rights, good consequences, natural law, truthfulness and promise-keeping, and law-following. These rationales include all of the currently viable normative justifications that Americans of various stripes, given their various normative beliefs, could find convincing.¹⁴⁷ Moreover, many of the goods advanced by these justifications are themselves widely accepted by Americans. For instance, most Americans believe that truthfulness and promise-keeping are good.

My own natural law justification for originalism exemplifies originalism’s ecumenical approach to our fellow citizens. Though one might initially think that a natural law justification for originalism would be off-putting, my law-as-coordination account is intentionally structured to appeal to goods that most Americans recognize as good, thereby providing those Americans with reasons to follow originalism. One key aspect of this was my use of an instrumentalist conception of the common good that is relatively more attractive to more Americans. The instrumentalist conception of the common good has three components: justice, the rule of law, and superintending offices. Each of these components is embraced by the vast

majority of Americans. These common goods are individually valuable and collectively very valuable because Americans of all stripes—including those who are not conservative—see their value.

Compare that to CGC. At least as currently articulated, CGC has adopted a distinctive conception of the common good.¹⁴⁸ Whatever the distinctive conception of the common good is, we know that it is thicker than the instrumental conception, and though I personally believe that this fuller conception is attractive, I know that many and perhaps most of my fellow citizens will not be attracted to it, and many will find aspects of it to be positively wicked. Therefore, CGC's distinctive conception of the common good is sociologically less likely to provide reasons to Americans to follow the Constitution.

Is a Successful American Conservatism Possible Without Originalism?

Could conservatism survive and thrive in the United States without originalism? There are strong reasons to doubt that it could, and these reasons suggest that American conservatives must make a theory of constitutional interpretation a part of conservatism in order for it to be plausible to Americans generally.

In the United States, many if not most important issues of policy, ethics, and even metaphysics are, or become, or are significantly impacted by the Constitution and consequently by constitutional interpretation. For example:

- How should Americans receive health care insurance?¹⁴⁹
- What is marriage?¹⁵⁰
- When does human personhood begin?¹⁵¹
- What is religion?¹⁵²
- To what extent may Americans in their local communities, like schools, pray together?¹⁵³
- To what extent can the President enter into war with another country?¹⁵⁴

For these and countless other vital issues, the Constitution has something to say, and often something determinative to say.

This is the product of many reasons. Perhaps the most significant is that the United States does not possess some of the mechanisms to resolve such issues that other nations have (or to the same degree), past and present, such as an established church,¹⁵⁵ a common cultural heritage, or a widely accepted system of ethics.¹⁵⁶ Protestant Christianity played some of this role until the early to mid-20th century, but it no longer holds sufficient influence to do so. The United States began as and has increasingly become a pluralistic country, so Americans have fewer things in common, and one of those is the Constitution.

A second, related reason is the Constitution's sociological status in the United States. The Constitution is the undisputed supreme law within our legal system, and it is viewed by Americans as such. More importantly, however, Americans look to the Constitution as an important source of national identity and meaning about what America means and what being an American means.

Whatever the causes, a key consequence of the Constitution's centrality within American life is that the conservative movement must offer a plausible theory of constitutional interpretation in order to be viable theoretically, politically, and sociologically. If conservatism cannot explain what the Constitution says about the size of government, the nature of marriage and human life, the place of religion in American life, and who shall conduct foreign policy, for instance, then it fails both absolutely and relative to its rivals.

The progressive movement has answers to these constitutional questions, and living constitutionalism is the theory that provides them. There are many variations on the theory, but all of them say that the Constitution's meaning changes and that interpreters—including and typically judges—should follow this changed constitutional meaning instead of the original meaning. For example, even though abortion had been regulated and largely prohibited since the beginning of the Republic, by 1973, the Constitution had changed to protect abortion¹⁵⁷ because of the now-explicit and less-than-a-decade-old implicit right of constitutional privacy.¹⁵⁸ Similarly, the Constitution changed over the course of the 20th century to authorize Congress to regulate intrastate non-commercial non-activity.¹⁵⁹

Originalism has provided conservatism with a legally, politically, and sociologically attractive approach to constitutional interpretation for nearly 50 years. It has been very successful in causing the legal system to reject the latitudinarian approach to the Constitution that characterized the New Deal, Warren, and Burger Courts and replacing it with a legal culture that gives pride of place to the Constitution's text, structure, history,

and tradition. Originalism's influence is so pervasive that even progressive nominees feel compelled to articulate their commitment to the law in terms of originalism. As nominee Ketanji Brown Jackson stated during her confirmation hearings, "I am focusing on original public meaning because I'm constrained to interpret the text."¹⁶⁰ Indeed, one of the reasons conservatism lost so many battles on the Supreme Court during the Warren and Burger Court eras was that it lacked a theoretically powerful critique of it.¹⁶¹

Originalism has been an important component of conservative political success since 1968. Perhaps the most effective use of originalism was candidate Donald Trump's promise to appoint originalist Supreme Court justices, which polling showed was a key reason why many otherwise unsupportive Americans voted for him.

Conservatism has also benefitted from originalism sociologically because it is a "big tent" approach to the Constitution that goes beyond social conservatives who are insufficient in number to be electorally successful on their own. Originalism adds small-government libertarians to the movement. Abortion is an example of this synergy. Though libertarians and conservatives may disagree about what justice requires of governments regarding abortion, they have been able to agree that the Supreme Court is not the appropriate government regulator.¹⁶²

This leads me to a related point. Professor Merriam has claimed that the transformation of originalism in the 1980s–1990s caused it and, as a consequence, the broader conservative movement to put aside social conservative positions and issues and highlight more libertarian ones.¹⁶³ I think that is likely true to some degree. However, that is analogous to the fusionism of 1950s conservatism. Like the original fusionist coalition, "little held the coalition together," and in place of "free markets and the Founding,"¹⁶⁴ the coalition is held together today partly by originalism. Now as then, neither libertarians nor conservatives are sufficiently powerful politically to win elections, especially national ones, on their own, but together, they have had significant electoral success. If the price for this coalition is prioritizing common issues, it appears to be a bargain conservatives are willing to make.

Part of the reason originalism is so important to American conservatism is that there is no viable alternative theory of interpretation for conservatism in place of originalism. This follows if you agree with my claims that originalism has helped to make the conservative movement successful, that nonoriginalist constitutional interpretation is less conservative, and that CGC would set our Constitution in strong opposition to many long-established, widely prevailing ideas and practices—conservative as well as liberal—in American law, politics, and culture.

Conclusion

Originalism and American conservatism have worked well together for the past 50 years. Their collaboration has restored some degree of faithfulness to our Constitution in our legal system and legal culture and has provided conservatism with a politically and sociologically attractive approach to constitutional interpretation. While it may not be true in all times and places, in the United States, because of its unique circumstances, originalism is a good match for conservatism.

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Endnotes

1. Richard M. Reinsch II, *Did the Conservative Legal Movement Err by Supporting Originalism?*, THE DAILY SIGNAL (May 16, 2022), available at <https://www.dailysignal.com/2022/05/16/did-the-conservative-legal-movement-err-by-supporting-originalism/>.
2. See, e.g., Edwin Meese III, *Speech to the American Bar Association House of Delegates* (July 9, 1985), available at <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> (“The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.”).
3. See Ronald Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REVIEW (May 4, 1972), available at <https://www.nybooks.com/articles/1972/05/04/a-special-supplement-the-jurisprudence-of-richard/> (“When Richard Nixon was running for President he promised that he would appoint to the Supreme Court men who represented his own legal philosophy, that is, who were what he called ‘strict constructionists’.”).
4. See Tessa Berenson, *Hoping to Bring Out Conservative Voters, Donald Trump Releases New Supreme Court Shortlist*, TIME (Sept. 9, 2020), available at <https://time.com/5886873/donald-trump-supreme-court-list-update/> (describing candidate Trump’s strategy).
5. In particular, Robert Bork and Raoul Berger.
6. Perhaps the best example of this is the annual Originalism Works in Progress Conference sponsored by the Center for the Study of Constitutional Originalism at the University of San Diego. The Georgetown Center for the Constitution hosts a variety of lectures, colloquia, seminars, and fellows. Today, there are numerous outlets for originalist scholarship including journals that take special care to publish originalist scholarship such as the *Harvard Journal of Law & Public Policy*.
7. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) (imagining a fictional judge, Hercules, who has the capacity to implement Dworkin’s legal theory).
8. Eliminating the principle of limited and enumerated powers from Commerce Clause jurisprudence.
9. Creating a definitive presumption of psychological coercion, if custodial police interrogation was conducted without the prescribed warnings, that purportedly violated the Fifth Amendment.
10. Fashioning a constitutional right to abortion from the Fourteenth Amendment’s Due Process Clause.
11. There were and remain points of disagreement between these wings of the conservative movement that play out in the field of constitutional interpretation. For instance, libertarians have argued for broad protections from government regulation of sexually explicit communicative activity, while social conservatives had traditionally argued that such activity was not communicative, or that it was not part of “the freedom of speech,” or that the government had sufficient reason to regulate the activity.
12. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
13. J. Joel Alicea, *Dobbs and the Fate of the Conservative Legal Movement*, CITY JOURNAL (Winter 2022), available at <https://www.city-journal.org/article/dobbs-and-the-fate-of-the-conservative-legal-movement>.
14. Adrian Vermeule, *A Crucial Experiment*, IUS & JUSTITIAM (Mar. 29, 2021), available at <https://iustitium.com/a-crucial-experiment/>. Professor Vermeule went further and argued that even if the Supreme Court overruled *Roe* and *Casey*, that would merely show originalism’s relative normative emptiness compared to common good constitutionalism. “It is an anxiety that if they do not, they will cease to matter and will be replaced by a newer (yet older) jurisprudence.” Adrian Vermeule, *The End of Originalism*, IUS & JUSTITIAM (Dec. 21, 2021), available at <https://iustitium.com/the-end-of-originalism/>.
15. See, e.g., ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).
16. See LEE J. STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* 104–25 (2019) (articulating this position).
17. Compare Paul J. Larkin, Jr., *The Original Understanding of “Property” in the Constitution*, 100 MARQ. L. REV. 1 (2016) (describing the meaning of property at the time of the Founding along with its purpose).
18. Bruce Frohnen, *Conservatism*, in *AMERICAN CONSERVATISM: AN ENCYCLOPEDIA* (Frohnen, Beer & Jeffrey eds., 2014).
19. *Id.*; compare Jesse Merriam, *A Sheep in Wolf’s Clothing: The Story of Why Conservatives Began to Look Beyond Originalism*, 11 FAULKNER L. REV. 63, 81 (2019) (describing free markets and the Founding as important to the 1950s conservative movement).
20. KODY W. COOPER & JUSTIN BUCKLEY DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* (2022).
21. FORREST MACDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985).
22. For thoughtful histories of originalism that describe originalism’s beginning in the early Republic, see JONATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW & POLITICS: A CONSTITUTIONAL HISTORY* (2005); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (rev. ed. 1994); see also Merriam, *A Sheep in Wolf’s Clothing*, *supra* note 19, at 90–128.
23. See, e.g., NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 204–99 (2001) (providing a detailed account of the Legal Process School). The seminal work exemplifying the School’s characteristics was *The Legal Process*, eventually published as Henry M. Hart, Jr., & Albert M. Sacks, *The Legal Process* (William Eskridge, Jr., ed. 1994).

24. DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2021); O'NEILL, ORIGINALISM IN AMERICAN THOUGHT AND POLITICS, *supra* note 22; WOLFE, THE RISE OF MODERN JUDICIAL REVIEW, *supra* note 22.
25. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *59 (1769).
26. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).
27. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 314 (2d ed. 1997).
28. These elements are distilled from Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U.L. Rev. 1243, 1249–50 (2019).
29. See, e.g., DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY, *supra* note 24.
30. See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. 1953 (2021).
31. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).
32. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. U.L. Rev. 1455 (2019).
33. Stare decisis is the long-established and universally accepted practice of the American legal system that judges should follow prior analogous cases when deciding current cases.
34. See STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 104–25 (articulating this position).
35. Lee J. Strang, *A Three-Step Program for Originalism*, PUBLIC DISCOURSE (June 12, 2022), available at <https://www.thepublicdiscourse.com/2022/06/82703/>.
36. Compare Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4340257 (visited Mar. 3, 2023) (arguing that constitutional theory should also be evaluated on process criteria).
37. See STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 237–309 (explaining the law-as-coordination account of originalism, which in principle is open to Americans of all viewpoints).
38. *Kyllo v. United States*, 533 U.S. 27 (2001).
39. See *id.* at 34 (internal citation omitted) (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example, as the cases discussed above make clear, the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”).
40. *Id.* at 35.
41. JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1878) (Notre Dame Univ. Press 1994).
42. See, e.g., Norman L. Geisler, *An Evaluation of John Henry Newman's Essay on the Development of Christian Doctrine*, available at <http://normangeisler.com/evaluation-jhnewman-dev-christian-doctrine/>.
43. Compare Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. Rev. 486, 497 (“[L]ike the liberal Justices of the Warren Court, [conservative justices] employ a form of selective judicial activism.”).
44. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. Rev. 462 (1987) (explaining and defending the consensus).
45. See John Finnis, *Judicial Power: Past, Present and Future*, available at <https://policyexchange.org.uk/blogs/john-finnis-judicial-power-past-present-and-future/> (visited Mar. 14, 2023) (“Making law is taking responsibility for the future, a responsibility of persons answerable for the new laws to their subjects. For discharging this responsibility, the institutional design of serious legislatures is broadly superior to the institutional design and procedures of even sophisticated appellate courts.”).
46. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).
47. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. Rev. 1 (2022).
48. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).
49. MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, *supra* note 31.
50. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. Rev. 1079 (2017).
51. Christopher R. Green, *“This Constitution”*: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. Rev. 1607 (2009).
52. For instance, Professor Barnett’s natural rights justification, grounded in his libertarian conception of liberty, RANDY E. BARNETT, THE STRUCTURE OF LIBERTY (2014), may need limitations on the libertarian justification and incorporation of his conception of natural rights within an overall conservative framework. This may or may not be possible.
53. See also Alicea, *The Moral Authority of Original Meaning*, *supra* note 47, at 1 (presenting a natural law popular sovereignty argument for originalism).
54. STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 237–309.

55. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *Geo. L.J.* 97 (2016); see also Alicea, *The Moral Authority of Original Meaning*, *supra* note 47.
56. O'NEILL, ORIGINALISM IN AMERICAN THOUGHT AND POLITICS, *supra* note 22; WOLFE, THE RISE OF MODERN JUDICIAL REVIEW, *supra* note 22.
57. Compare Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 *NOTRE DAME L. REV.* 1123 (2020) (describing tradition as a separate theory of interpretation).
58. William Baude, *Constitutional Liquidation*, 71 *STAN. L. REV.* 1 (2019).
59. This rebuttal does not have universal application because some nonoriginalist precedents, such as those supporting the National Labor Relations Act, have remained relatively intact.
60. That is, precedent that correctly articulates and applies the Constitution's original meaning.
61. John Stinneford, *The Original Meaning of "Cruel,"* 105 *Geo. L.J.* 441 (2017).
62. Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol'y* 599, 611 (2004).
63. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 9 (1996).
64. Compare VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15, at 5–6, 69 (adopting the same claim).
65. Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 *GEORGE MASON U. CIV. RTS. L.J.* 1, 3 (2008).
66. See, e.g., JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: MORAL READINGS AND AGAINST ORIGINALISMS (2015).
67. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 600 (2012) (Ginsburg, J., concurring in part) ("The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation 'in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.'").
68. JACK M. BALKIN, LIVING ORIGINALISM (2011).
69. John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 *U. ILL. L. REV.* 737.
70. Jesse Merriam, *Much to Spew About Nothing*, *LAW & LIBERTY* (Sept. 5, 2022), available at <https://lawliberty.org/much-to-spew-about-nothing/>.
71. U.S. CONST., preamble.
72. See STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 252–61 (describing law's operation in the practical deliberations of its subjects).
73. See John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of Law*, 59 *WILLIAM & MARY L. REV.* 1321 (2018).
74. Ilan Wurman, *What Originalism Conserves*, *LAW AND LIBERTY* (July 27, 2020), available at <https://lawliberty.org/what-originalism-conserves/>; see also ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017).
75. This argument is reflective of Steven D. Smith, *Law Without Mind*, 88 *MICH. L. REV.* 1 (1989).
76. See, e.g., Scott G. Stewart, Oral Argument, at 14:03, *Dobbs v. Jackson Women's Health Org.*, (Dec. 1, 2021), available at <https://www.oyez.org/cases/2021/19-1392> ("I think the concern about appearing political makes it absolutely imperative that the Court reach a decision well-grounded in the Constitution, in text, structure, history, and tradition, and that carefully goes through the stare decisis factors that we've laid out.").
77. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–71 (1980). This is Finnis's summary: "A legal system exemplifies the Rule of Law to the extent that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor." *Id.*
78. Lawrence B. Solum, *Originalism Versus Living Constitutionalism*, *supra* note 28, at 1249–50.
79. Merriam, *A Sheep in Wolf's Clothing*, *supra* note 19, at 93–104.
80. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).
81. *Id.* at 96–104.
82. For instance, I have substantively criticized *Roe* and *Casey*, both products of living constitutionalism. See, e.g., STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 138–40.
83. In the Aristotelian sense of the term.
84. *NFIB v. Sebelius (The Healthcare Cases)*, 567 U.S. 519 (2012).
85. There are some issues for which this analysis is unclear because the conservative movement has adopted positions different from those at the Founding, including some aspects of free speech and a more expansive view of criminal defendant rights (for example, criminal defendant protections beyond those identified in the Bill of Rights).

86. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (employing no textual, historical, or structural analyses to hold that the Commerce Clause authorized Congress to regulate intrastate activity); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”); *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (employing no textual, historical, or structural analyses to hold that the Due Process Clause did not prohibit a state economic regulation); *Massiah v. United States*, 377 U.S. 201 (1964) (employing no textual, historical, or structural analyses to hold that the Sixth Amendment barred introduction of incriminating statements deliberately elicited after the defendant was indicted without the presence of counsel); *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring) (concluding after no textual, historical, or structural analyses that “search” meant reasonable expectation of privacy); *Goldberg v. Kelly*, 397 U.S. 254, 261–62 nn. 7 & 8 (1970) (employing no textual, historical, or structural analyses to suggest strongly that government benefits are constitutionally protected property); *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (employing no textual, historical, or structural analyses to hold that the Equal Protection Clause required heightened judicial scrutiny for sex classifications).
87. See STRANG, ORIGINALISM’S PROMISE, *supra* note 16, at 92–97 (describing as one aspect of an originalist precedent that the precedent must be a good-faith application of the Constitution’s original meaning).
88. *Wickard*, 317 U.S. at 111.
89. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).
90. See, e.g., Merriam, *Much to Spew About Nothing*, *supra* note 70. I don’t share this view, as I describe shortly.
91. See PAUL W. LUDWIG, REDISCOVERING POLITICAL FRIENDSHIP: ARISTOTLE’S THEORY AND MODERN IDENTITY, COMMUNITY, AND EQUALITY (2020) (describing Aristotle’s theory of political friendship).
92. I agree with Professor Jesse Merriam’s argument, Merriam, *Much to Spew About Nothing*, *supra* note 70, that the American people today are different from the American people in 1789 and that the common things that join Americans today are fewer and thinner. It does not follow, however, that we lack a genuine political community even though that community is thinner than it once was.
93. This is not to say that an important law or set of laws cannot play a constitutive role in a political community’s life without originalism. The continuing role of the Twelve Tables of Rome long after legal practice had diverged from their original meaning is an example.
94. *United States v. Lopez*, 514 U.S. 549 (1995).
95. See, e.g., OHIO CONST. art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws.”).
96. *Compare Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (“The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case.”). This is also a key problem with Professor Vermeule’s recharacterization of federalism as America’s version of the political principle of subsidiarity. Though subsidiarity is a true principle of political philosophy, it is different from our structural principle of federalism because it “makes all of our political conflicts potential federal questions, depending on how capably or wisely a state regulates the matter,” as Dr. Jesse Merriam has argued. Merriam, *Much to Spew About Nothing*, *supra* note 70.
97. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); see also Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions and the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) (arguing that the Fourteenth Amendment required religious exemptions).
98. See DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2009) (describing the different positions).
99. The Supreme Court in the first modern Establishment Clause case misinterpreted the clause to “erect ‘a wall of separation between Church and State.’” *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).
100. See Kurt Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (showing that the Fourteenth Amendment prohibited states from supporting or restricting religion).
101. Recently, some leading conservatives have advocated for less emphasis on this tenet and more restraints on the market to preserve and secure other more fundamental goods like community. See, e.g., R.R. Reno, *Church, State, and the Common Good*, FIRST THINGS (Dec. 2022), available at <https://www.firstthings.com/article/2022/12/church-state-and-the-common-good> (visited Mar. 16, 2023). These conservatives do not appear to discard the free market as a principle of American conservatism.
102. See, e.g., GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010).
103. To be clear, there *is* a consensus; my point is simply that one’s level of confidence that the consensus is fully correct is lower than it would be if there were more robust scholarship.
104. The disagreement in these areas does not obviate the deep consensus in both areas. For instance, there is a narrow range within which the consensus falls, and the consensus shows importantly that in the Establishment Clause context, the Eversonian strict-separation claim is wrong.
105. BALKIN, LIVING ORIGINALISM, *supra* note 68.

106. That is, the text's conventional meaning as modified by grammar and syntax.
107. Jack Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).
108. Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623.
109. See STRANG, ORIGINALISM'S PROMISE, *supra* note 16, at 199 (describing a "three-step program" for originalism to address nonoriginalist precedent).
110. Merriam, *A Sheep in Wolf's Clothing*, *supra* note 19, at 82–90.
111. Many originalists argue that additional rights protected by the original Constitution are also applied to the states, and some originalists argue that the amendment also protects unenumerated constitutional rights.
112. However, that loss was more than compensated for by the gains from a federal floor protecting essential aspects of human flourishing. See Lee J. Strang, *Incorporation Doctrine's Federalism Costs: A Cautionary Note for the European Union*, 20 EUR. J. L. REF. 129 (2018) (describing the costs and some of the benefits of incorporation).
113. Applying the original meaning of the original Establishment Clause may be an exception unless the meaning as incorporated was modified by 1868, as Kurt Lash has argued. Lash, *The Second Adoption of the Establishment Clause*, *supra* note 100.
114. See *Cohen v. California*, 403 U.S. 15 (1971) (holding that profanity is generally protected speech).
115. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding that the Equal Protection Clause requires that sex classifications receive intermediate scrutiny).
116. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause requires "substantially equal state legislative representation for all citizens").
117. See *Katz v. United States*, 389 U.S. 347, 361–62 (1967) (Harlan, J., concurring) (holding that "search[]" protects reasonable expectations of privacy).
118. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that introduction in trial of statements by defendants in custodial interrogation violates the Fifth Amendment privilege against self-incrimination).
119. See *Massiah v. United States*, 377 U.S. 201 (1964) (holding that the Sixth Amendment barred introduction of incriminating statements deliberately elicited after the defendant was indicted without presence of counsel).
120. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (ruling that "property" in the Fourteenth Amendment includes government benefits).
121. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (creating a constitutional right to privacy protected by the Fourteenth Amendment).
122. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the Fourteenth Amendment's right to privacy includes a right to abortion).
123. To be clear, advocates of CGC have provided a handful of concrete examples of interpretations to which CGC would lead, and many are conservative, some are liberal, and some are unclear under current conventions.
124. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), available at <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.
125. VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15.
126. The *Harvard Journal of Law & Public Policy* held the first international conference on common good constitutionalism in 2022, and the participating scholars who advocated for common good constitutionalism included Conor Casey, Michael Foran, and Michael Smith in addition to Adrian Vermeule.
127. The most prominent website dedicated to common good constitutionalism is *Ius & Iustitium*, available at <https://iustitium.com/>. Recently, *The New Digest* has also been an outlet for such claims. *The New Digest*, available at <https://thenewdigest.substack.com>.
128. See, e.g., VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15, at 2–3 (stating that a "truly principled originalist would immolate his own method and transform himself into a classical lawyer, in an act of intellectual self-abnegation and self-overcoming").
129. *Id.* at 33, 34.
130. *Id.* at 136–54.
131. *Id.* at 154–62.
132. *Id.* at 124–28, 173–78.
133. Vermeule, *Beyond Originalism*, *supra* note 124.
134. VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15, at 108–09.
135. *Id.* at 4.
136. *Id.* 19.
137. *Id.* at 18.
138. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
139. *Id.* at 1741.

140. VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15, at 16.
141. *Id.* at 2 (emphasis added); *id.* at 38 (stating that it is “impossible to do so without considering principles of political morality”); “Originalism has never been able to free itself from—or even acknowledge—the implicit normative assumptions and judgments needed to attribute rationality to legal texts, to determine the level of generality...and otherwise make sense of their terms.... [I]t proves impossible to avoid interpretation that rests on controversial normative judgments at the point of application, especially in hard cases.” *Id.* at 16 (emphases added).
142. See, e.g., STRANG, ORIGINALISM’S PROMISE, *supra* note 16; Alicea, *The Moral Authority of Original Meaning*, *supra* note 47; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 55.
143. My own view is that this occurs primarily in three situations: when the original meaning itself incorporates natural law, when the original meaning is underdetermined and the interpreter has to construct constitutional meaning, and when a judge evaluates nonoriginalist precedent.
144. See William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861, 868–69 (2023) (stating that common good constitutionalism “refus[es] to commit to any coherent account of American positive law, originalist or not”).
145. See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).
146. VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 15, at 39.
147. Some theoretically possible justifications for originalism are not currently viable. For example, a divine-order justification for originalism could argue that God had ordained the United States Constitution and that to follow the Constitution faithfully, one must utilize originalism. This normative justification is not plausible in the current United States because the vast majority of Americans do not agree with its premises.
148. See George Duke, *The Common Good*, in NATURAL LAW JURISPRUDENCE 376 (George Duke & Robert P. George eds., 2017) (describing the three main conceptions of the common good).
149. See *NFIB v. Sebelius*, 567 U.S. 519 (2012) (holding that the taxing power authorized Congress to pass the Affordable Care Act).
150. See *Obergefell v. Hodges*, 567 U.S. 644 (2015) (holding that the Fourteenth Amendment required states to recognize same-sex marriage).
151. See *Roe v. Wade*, 410 U.S. 113 (1973) (ruling that unborn humans are not protected by the Constitution).
152. See *United States v. Ballard*, 322 U.S. 78 (1944) (ruling that federal courts were constitutionally prohibited from evaluating purported religious beliefs).
153. See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (ruling that the Free Exercise Clause authorized a public school employee to pray when not on official business).
154. See *Massachusetts v. Laird*, 400 U.S. 886 (1970) (ruling that federal courts did not have the power to hear a case challenging the legality of the Vietnam conflict).
155. See, e.g., The Church of England, available at <https://www.churchofengland.org/>.
156. See, e.g., David Wong, *Chinese Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2023) (describing the “tradition of Chinese ethical thought”), available at <https://plato.stanford.edu/entries/ethics-chinese/>.
157. *Roe*, 410 U.S. at 113.
158. *Griswold*, 381 U.S. at 479.
159. *NFIB*, 567 U.S. at 419.
160. Mark Joseph Stern, *Ketanji Brown Jackson’s Shrewd Tactic to Win Conservative Praise*, SLATE (Mar. 22, 2022). She elaborated: “I do not believe that there is a living Constitution...in the sense that it’s changing and it’s infused with my own policy perspective or the policy perspective of the day. Instead, the Supreme Court has made clear that when you’re interpreting the Constitution you’re looking at the text at the time of the founding.” *Id.* Some dispute whether statements by nominees like Brown Jackson and Kagan were the product of a principled embrace of originalism or political pressure. Either way, originalism has influenced American legal culture to such an extent that all nominees pay it homage.
161. Merriam, *A Sheep in Wolf’s Clothing*, *supra* note 19, at 84. The first modern theoretical justification of originalism was Robert Bork’s 1971 article. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).
162. Many conservatives and libertarians have also been able to agree that the states should be the primary regulators of abortion. *But see* Rachel Roubein, *There’s Hardly GOP Consensus Around a 15-Week National Abortion Ban*, WASH. POST (Sept. 14, 2022) (describing the various positions of pro-life conservatives), available at <https://www.washingtonpost.com/politics/2022/09/14/there-hardly-gop-consensus-around-15-week-national-abortion-ban/>.
163. Merriam, *A Sheep in Wolf’s Clothing*, *supra* note 19, at 90–128. As I said, while I think there is some truth to this claim, I think the story is much more complicated by many factors including, for instance, historical research showing that the Fourteenth Amendment did incorporate the Bill of Rights against the states, contrary to earlier arguments.
164. *Id.* at 81.