

Politics and the Rule of Law

The Honorable William H. Pryor Jr.

KEY TAKEAWAYS

Originalism demands respect for the moral perspective of the Founding generation that ratified our Constitution and the succeeding generations that amended it.

Proposals like court-packing and living common goodism, based on the notion that judicial decisions should be driven by substantive outcomes, undermine rule of law.

Our country needs to be weaned from judicial supremacy and to return the judiciary to the modest role that our Founders envisioned for it.

Thank you for inviting me to deliver the Joseph Story Lecture. Delivering this lecture represents a singular honor for many reasons: It is named after Story, one of our greatest justices and constitutional scholars; the late Judge Robert Bork delivered the inaugural lecture; and my Circuit Justice and friend, Clarence Thomas, delivered the lecture five years ago. Above all, the honor comes with its association with last year's lecturer, Ed Meese, for whom the Center that sponsors this lecture is named.

I doubt I would be here tonight or would have ever been appointed a federal judge or a state attorney general were it not for Ed Meese. We first met 35 years ago when I was a law student at Tulane University where then-Attorney General Meese delivered an address entitled *The Law of the Constitution*.¹ Our student chapter of the Federalist Society hosted a reception

This paper, in its entirety, can be found at <http://report.heritage.org/hl1325>

The Heritage Foundation | 214 Massachusetts Avenue, NE | Washington, DC 20002 | (202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

in his honor that evening. And he later permitted me, as editor in chief, to publish his address in the *Tulane Law Review*.

Both before and after that formative experience, Ed Meese influenced my career in countless ways. When he launched “the Great Debate” about interpreting our Constitution in a speech to the American Bar Association in 1985, Ed Meese turned the attention of all judges, lawyers, scholars, and students to the case for originalism.² He persuaded me and others that judges—indeed, all branches of government, both federal and state—are bound by the original meaning of the Supreme Law of the Land. He nurtured the Federalist Society and inspired me to help found lawyers’ chapters throughout the Deep South and to become active in its practice groups.

He also inspired me to pursue a career of public service. When Jeff Sessions was elected Attorney General of Alabama, he appointed me to serve as a deputy attorney general. Ed Meese served as a role model for both of us and as a bond between us. Sessions had served as a United States Attorney while Meese led the Department of Justice. Sessions knew about the Tulane speech and my role in publishing it, and he knew about my association with the Federalist Society. That knowledge led him to pluck me from a private law firm, practicing commercial litigation in Birmingham, and to make me his chief constitutional lawyer. When the voters later elected him to the Senate, Sessions persuaded the governor to appoint me, despite my youth, to finish his term as state attorney general. And that opportunity led me to renew my friendship and collaboration with Ed Meese.

Five years ago, Heritage invited me here to tell a backstory about the Tulane speech,³ but tonight I want to tell another story about Ed Meese. It involves my former career in politics and offers a nice segue for my topic this evening.

After the governor appointed me to serve as state attorney general, the voters elected me to that office. Ed Meese and Bill Barr served as hosts for a fundraiser for my first campaign. And no Republican contested my nomination. But the governor who appointed me lost his reelection bid, which made for a tough general election for me against a Democratic opponent who endorsed me four years later in my reelection. In that reelection campaign, a district attorney threatened to run against me in the Republican primary. He told the press that I had not been a partisan attorney general, as if that charge was somehow disqualifying.

Despite my alleged failures as a partisan, my campaign was able to enlist support from prominent leaders of the Grand Old Party following my service as President George W. Bush’s state campaign chairman. Both Senator Sessions and Senator Richard Shelby endorsed me. But my campaign

wanted something even more valuable for sending my potential opponent a message: an endorsement from President Ronald Reagan’s friend and Attorney General, Ed Meese.

So I called Meese’s office and told his assistant that my campaign was mailing a brochure to 40,000 Republican households and wanted to include a cover letter of endorsement and fundraising appeal from Mr. Meese. She scoffed, telling me he was unlikely to provide such a letter, but she promised to ask him. Then she called back astonished. She said that he always declined these kinds of requests but that he immediately agreed to do it for me. Soon after that endorsement, the district attorney decided to run for Congress instead. And the letter’s request for donations more than paid for the mailing.

Originalism: “The Sense of the Terms, and the Intention of the Parties”

Ed Meese supported my political campaign because he knew that we shared a belief that the Constitution—indeed, the rule of law—transcends politics and that originalism secures our constitutional tradition of the rule of law. In his 1985 speech to the Federalist Society, he quoted the justice for whom this lecture is named, Joseph Story: “The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.”⁴ He quoted James Madison, who argued that if “the sense in which the Constitution was accepted and ratified by the nation...be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers.”⁵ And Thomas Jefferson: “Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.”⁶

Meese explained that originalism was “[a] jurisprudence that seeks fidelity to the Constitution...not a jurisprudence of political results.”⁷ He maintained, “It is very much concerned with process, and it is a jurisprudence that in our day seeks to de-politicize the law.”⁸

Fortunately, Ed Meese succeeded in persuading countless Americans, including judges, scholars, and lawyers, about the rightness of originalism, but our constitutional order faces renewed threats today—both from the left and from the right. Advocates on both ends of the political spectrum now champion previously discredited ideas for politicizing the law.

- On the left, some threaten court-packing to secure a jurisprudence of liberal political results.

- On the right, some call for a jurisprudence of conservative political results— so-called common-good constitutionalism,⁹ common good originalism,¹⁰ or what I call living common goodism.¹¹

These proposals threaten the rule of law—the linchpin of constitutionalism and the common good.

The rule of law serves as a bulwark against the arbitrary abuse of power. It demands equality before the law so that no person or official is above the law. Judicial decisions rendered impartially, doing equal right to the poor and to the rich, secure the rule of law. And proposals like court-packing and living common goodism, premised on the notion that judicial decisions should be driven by substantive outcomes, undermine the rule of law.

Threat from the Left: The Perils of Court-Packing

Consider first the perils of court-packing, where American history teaches valuable lessons. The earliest lesson came in the aftermath of the election of 1800. After President Jefferson and his supporters won control of the executive branch and Congress, the Federalists, in a lame-duck session, enacted a judiciary act that created new judgeships and ended circuit-riding for Supreme Court justices.¹² But the Jeffersonians repealed that law after taking office because they understandably perceived that the Federalists had packed the judiciary with their political supporters—the so-called midnight judges.¹³ Congress also cancelled the next terms of the Supreme Court.¹⁴ And Jefferson refused to deliver several judicial officers' commissions,¹⁵ which led to the landmark decision in *Marbury v. Madison*,¹⁶ Chief Justice John Marshall's unanimous opinion that dismissed the case for lack of jurisdiction and avoided embroiling the Court in a political conflict.

The lesson from the Jeffersonian era is that court-packing may last only so long as its supporters win elections. And the inevitable political battle to either undo or preserve it will roil the nation afterward, disrupt judicial administration, and threaten public confidence in the judiciary.

When President Franklin Roosevelt a century later resurrected the idea of court-packing, he failed spectacularly. On the pretense of assisting an aging Court with a growing backlog, he proposed adding a justice to the Court for every member over 70 years old, an idea Justice James McReynolds ironically had suggested decades earlier when he served as Attorney General.¹⁷ As Chief Justice Rehnquist later described it, "The proposal astounded the Democratic leadership in Congress and the nation as a whole."¹⁸ And it has been a discredited idea ever since then, at least until as of late.

Four years ago, I publicly opposed a similar proposal from the right. In the first year of the Trump Administration, a prominent originalist law professor published a proposal to create hundreds of new federal judgeships as a way of “undoing” President Barack Obama’s judicial legacy.¹⁹ I published an op-ed in *The New York Times* opposing it.²⁰ My op-ed explained, “The judicial conference regularly monitors caseloads and surveys courts about needs for new judgeships,”²¹ and the professor’s argument that the federal courts were overwhelmed by heavy caseloads was false. Since then, Ron Cass has published an excellent review of the relevant data and urged “caution in adding judgeships to the federal courts,” even to the modest extent recommended by the judicial conference.²²

My op-ed argued that it “makes no sense to expand...federal courts to serve a political agenda.”²³ The op-ed explained, “Although presidents of different parties have appointed federal judges, circuit courts regularly decide appeals unanimously in more than 95 percent of cases and affirm a vast majority of district-court rulings.”²⁴ And it argued, “One of the hallmarks of the federal judiciary is that it proves its devotion to the rule of law by resolving most of its cases without any political disagreement.”²⁵

Fortunately, that court-packing proposal went nowhere. Other originalist law professors opposed it. Neither the President nor any Member of Congress supported it. And the professor who published it, to his credit, soon afterward removed it from the Social Science Research Network.

Since then, another election has changed the political landscape, and some activists on the left now want to pack the Supreme Court and perhaps other federal courts. And some members of Congress agree.

But Justice Stephen Breyer recently made a strong case against court-packing in his Scalia Lecture at Harvard Law School.²⁶ Justice Breyer argued that judges are not “junior varsity politicians”²⁷ and that “jurisprudential differences, not political ones, account for most, perhaps almost all, of judicial disagreements.”²⁸ As he explained, “[S]ome judges emphasize text and history; some emphasize purposes and consequences.”²⁹ He predicted, “[I]f the public comes to see judges as merely ‘politicians in robes,’ its confidence in the courts, and in the rule of law itself, can only decline.”³⁰ And he warned that “the Court’s authority can only decline, too, including its hard-won power to act as a constitutional check on the other branches.”³¹

Justice Breyer is right. Americans should heed his words. And we can help him promote the rule of law by resisting, with equal fervor, an attack on sound constitutional interpretation from the political right.

Threat from the Right: Living Common Goodism

Recently, some academics and commentators have called for what they describe as “[a] truly conservative jurisprudence”³² to replace originalism. They contend that originalism entails a “hollow positivism” and produces “a denuded jurisprudence that solely relies on proceduralist bromides.”³³ They propose that the “substantive ends” of a “naturally ordered[] common good...ought to imbue constitutional interpretation.”³⁴ And they defend their position with “whataboutism” by saying that “the Left” has “ha[d] no problem in defining law in terms of moral purpose and the common good *as they are pleased to define it.*”³⁵

The proponents of living common goodism are wrong. Originalism is not a morally empty jurisprudence. And the Constitution gives federal judges no authority to fashion a jurisprudence of living common goodism to achieve conservative political results; indeed, fashioning that sort of jurisprudence would be lawless and contrary to natural law.

Originalism demands respect for the moral perspective of the Founding generation that ratified our Constitution and for the succeeding generations that amended it. As Robert George has observed, “the fabric and theory of our Constitution embodies our founders’ belief in natural law and natural rights.”³⁶ That perspective was reflected first in the Declaration of Independence when they asserted their right to self-government—the right of “one People...to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them”³⁷—and their understanding “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”³⁸ It was reflected in the preamble to the Constitution where “We the People” sought to “establish Justice” and to “secure the Blessings of Liberty.”³⁹ But respecting that moral perspective does not mean federal judges have general authority to use natural law to achieve conservative ends or to enforce natural rights unmentioned in the Constitution.

The Founders’ moral perspective about the nature of man and of government matters to an originalist when interpreting the natural rights expressly protected by the Bill of Rights. The Founding generation understood those constitutional rights—for example, the free exercise of religion, the freedom of speech and of the press, the right to assemble, and the right to keep and bear arms for self-defense—to be what Patrick Henry called “the rights of human nature.”⁴⁰ And they understood that an individual could not exercise a natural right in a way that would violate another’s natural rights.

So, as Philip Hamburger has explained, the Founding generation understood that an individual enjoyed no right to “exercise his natural right of free speech in a way that injured another individual in his natural right to his reputation.”⁴¹ The Founding generation understood that obscene, fraudulent, or defamatory speech lacked constitutional protection.⁴² They distinguished liberty from license, understanding liberty to be the freedom to do what is morally right.⁴³ They were not libertarians. An originalist would seek to understand this historical perspective in discerning the original meaning of the Bill of Rights.

Many experts in natural law argue persuasively that it supports originalism. Jeff Pojanowski and Kevin Walsh put it this way: “[T]he classical natural law tradition of legal thought...supplies a solid jurisprudential foundation for constitutional originalism in our law today.”⁴⁴ They explain that “constitutional law ought to be applied in an originalist way as long as the framers’ constitution remains accepted by us as the kind of written positive law the framing generations authoritatively made in order to secure for our society the human goods that they sought to secure for theirs.”⁴⁵

That conclusion should not be surprising because, as Robert George has explained, “the American founders were firm believers in natural law and sought to craft a constitution that would conform to its requirements, as they understood them, and embody its basic principles for the design of a just political order.”⁴⁶ Lee Strang makes the even bolder argument that “the Aristotelian philosophical tradition’s account of our Constitution *requires* federal judges to utilize originalism.”⁴⁷

A “Double Security” for “the Rights of the People”

The proponents of living common goodism charge that originalism’s “fixation on procedure ignores the fact that the whole project of the American Founding was directed to substantive ends.”⁴⁸ They contend that originalism “is at loggerheads with the underlying principles and the moral ends that marked the jurisprudence of the founders.”⁴⁹ Nonsense!

Originalism respects the structure or procedure of the Constitution because it too reflects the Founders’ moral perspective. In his brilliant defense of the structural Constitution, *Federalist 51*, Madison explained, “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”⁵⁰ He then described the challenge of constitutionalism: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control

the governed; and in the next place oblige it to control itself.”⁵¹ Madison made the case for what he called “a double security” for “the rights of the people”—with the horizontal structure of separated powers and the vertical structure of federalism, “[t]he different governments will control each other; at the same time that each will be controlled by itself.”⁵²

When they created a “compound republic,”⁵³ the Founders built on a long tradition of moral philosophy about the design of good government. Aristotle described one who governs for the common good, “[k]ingship”; when a few do so, “[a]ristocracy”; and when many do so, “[c]onstitutional [g]overnment” or “polity.”⁵⁴ He described the corrupted form of kingship as “[t]yranny,” of aristocracy as “[o]ligarchy,” and of polity as “[d]emocracy.”⁵⁵ In the *Summa*, St. Thomas Aquinas, using Aristotle’s classifications, concluded that because the corrupted form of kingship was the worst constitution, the best form was a mix of kingdom, aristocracy, and polity.⁵⁶

Like the ancient moral philosophers, the Founders understood that power corrupts. So they gave the judiciary and other branches limited powers within separate domains for protecting the common good. They recognized, as Robert George has explained, that “natural law itself does not settle the question...whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that the positive law conforms to natural law and respects natural rights.”⁵⁷

The problem with the idea that the Founders expected judges to fashion a jurisprudence of living common goodism is that most of the Founding generation believed that, all men being equal, they were equally qualified to understand the laws of nature.⁵⁸ From their moral perspective, the Founders would not have understood judges, trained in the positive law, to have better insight into natural law or superior qualifications to enforce natural rights.⁵⁹ As Walter Berns once explained, “In [the Founders’] world where all opinions of justice and injustice are understood to be merely private opinions, no man can rationally agree to an arrangement where another man is authorized to convert his opinion into fundamental law.”⁶⁰

This moral perspective explains why one of my favorite Founders, Justice James Iredell, wrote in *Calder v. Bull*⁶¹ in 1798 that if Congress or any state legislature “shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”⁶² As he explained, “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject.”⁶³ He concluded, “[A]ll that the Court could properly say, in such an event, would be, that the Legislature[,] [] possessed of an equal right of opinion[,] had

passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.”⁶⁴

Securing Natural Rights

Justice Iredell’s opinion remains persuasive in the light of the progressive opinions of our contemporary legal elite or what Walter Berns once called “the Court’s most attentive public—in our day, the legal profession and especially the professors of law.”⁶⁵ In 1984, when then-Judge Scalia debated Richard Epstein about whether federal judges could be expected to enforce economic liberties as a form of so-called substantive due process, Scalia said that with “the development of lawyers (and hence of judges) through a system of generally available university education which, in this country, more often nurtures collectivist rather than capitalist philosophy, one would be foolish to look for Daddy Warbucks on the bench.”⁶⁶ And today I would say that with universities nurturing critical theories of race and gender, one would be foolish to look for St. Thomas Aquinas on the bench.

Consider, for example, the testimony of a Supreme Court justice. At Justice Elena Kagan’s confirmation hearing, Senator Tom Coburn asked her whether she considered the right to bear arms for self-defense to be a “natural right.”⁶⁷ And Kagan, former dean of the Harvard Law School, replied, “[T]o be honest with you, I don’t have a view of what are natural rights, independent of the Constitution.”⁶⁸ Her answer suggests that, but for the text of the Constitution, Justice Kagan would be unsure whether *any* right is a natural right.

Judicial confusion about natural law in constitutional interpretation is an old problem. Consider *Griswold v. Connecticut*,⁶⁹ which recognized a constitutional right to privacy based on “penumbras” and “emanations” from the Bill of Rights and granted a married couple a right to artificial contraception.⁷⁰ Justice Hugo Black’s dissent described the ruling as grounded in the “natural law due process philosophy”⁷¹ of *Lochner v. New York*,⁷² where the Court ruled “[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”⁷³ Or consider *Dred Scott v. Sanford*,⁷⁴ where the Court wrongly ruled that a former slave was by nature an “inferior” being who could not be a citizen.⁷⁵

The Founders adopted a written constitution to secure our natural rights, but instead of trusting an elite class of judges to enforce unwritten principles of natural law, they relied on the structural restraints of enumerated and separated powers and federalism and frequent elections as checks

on the abuse of power. To be sure, the Founders expected judges to play a critical role in interpreting the Constitution. Alexander Hamilton wrote in *Federalist 81* “that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution.”⁷⁶ But he insisted that “there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution.”⁷⁷ He expected judges to be what he called in *Federalist 78* “faithful guardians of the Constitution.”⁷⁸ But he also argued in *Federalist 83* that “the judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified.”⁷⁹ He explained, “The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction.”⁸⁰

When courts exceed their jurisdiction and usurp “legislative authority under the guise of protecting individual rights and liberties,” whether for good or bad causes, “they violate the rule of law by seizing power authoritatively allocated by the framers and ratifiers of the Constitution to other branches of government.”⁸¹ “And,” as Robert George has explained, “respect for the rule of law is itself a requirement of natural justice.”⁸² As he put it, “The American founders were not utopian; they knew that the maintenance of constitutional government and the rule of law would limit the power of officials to do good as well as evil.”⁸³ And “to sacrifice constitutional government and compromise the rule of law in the hope of rectifying injustices is to strike a bargain with the devil.”⁸⁴

A Moral Duty with Moral Consequences

Chief Justice Marshall’s defense of judicial review in *Marbury* rightly invoked the oath that judges take to support and defend *this* written Constitution.⁸⁵ That solemn promise, with God as witness, also carries with it a moral duty with moral consequences.⁸⁶ Taking a false oath is a grave offense.⁸⁷

The judicial oath makes clear, contrary to proponents of living common goodism, that originalists who highlight the authority of positive law make an important contribution when they argue that originalism is our law.⁸⁸ Because judges take an oath to support and defend this Constitution, it matters whether originalism is the positive law. If it is, as these originalists contend, then judges owe a moral duty to obey it in fulfilling their oath.⁸⁹ As David Forte recently wrote, “to appreciate positive law is not necessarily to be a positivist.”⁹⁰

Recently, two proponents of living common goodism, Adrian Vermeule and Conor Casey, asserted that the argument for originalism from the oath is “transparently circular.”⁹¹ But it is not. Oaths establish that judges have a moral duty to obey the commands of enacted texts. And one obeys those texts only if one applies their *meanings*; applying what they do not mean would be to fail to obey them. There is no necessary connection between the meaning of a legal text and the natural law or the common good; that is why we can know that an enacted text is bad policy.⁹² So whether the text bears a particular meaning is an independent, antecedent question for interpreters to answer, and the oath requires that judges apply the meaning of enacted texts even if doing so, in their view, works against the common good.

Nor is there anything to Vermeule and Casey’s assertion that “originalism is self-refuting” because allegedly “the Framers themselves were not originalists.”⁹³ That assertion betrays a failure to understand originalism, which does not say that everything individual Framers believed is binding. So even if the premise were true, originalism would emerge unscathed. But the premise is false: The Framers were originalists. In addition to the examples that Ed Meese quoted in his 1985 speech to the Federalist Society, James Madison also wrote that “In the exposition of...Constitutions,... many important errors [would] be produced...if not controulable by a recurrence to the original and authentic meaning attached to” their words and phrases.⁹⁴

So nobody ought to be fooled by the absurd notion that “[o]riginalism is a creation of the post-WWII era.”⁹⁵ After all, as Justice Scalia and Bryan Garner point out in *Reading Law*, “[i]n the English-speaking nations, the earliest statute directed to statutory interpretation,” enacted by the Scottish Parliament in 1427, “made it a punishable offense for counsel to argue anything other than original understanding.”⁹⁶ But I want to be clear: I am not suggesting that we should imprison the proponents of living common goodism for arguing against original understanding.

Originalism: Alive and Well

As constitutionalists, we should reaffirm our commitment to originalism without hyphenated qualifiers. If we will not defend the limited authority of the judiciary, who will? And we should not forget the progress we have made since Attorney General Meese made the case for originalism.

We should be grateful for originalist decisions that respect the Founders’ moral perspective like *Glucksberg*,⁹⁷ where the Court unanimously rejected the argument that the Due Process Clause protects a right to assisted suicide;⁹⁸ *Hosanna-Tabor*,⁹⁹ where the Court unanimously ruled that the First

Amendment safeguards the right of religious institutions to select their own ministers;¹⁰⁰ *Citizens United*,¹⁰¹ where the Court upheld the freedom of speech in elections;¹⁰² *Heller*,¹⁰³ where the Court ruled that the Second Amendment protects an individual right to bear arms;¹⁰⁴ and *Bucklew*,¹⁰⁵ where the Court ruled that the Constitution, like the natural law, permits capital punishment.¹⁰⁶ To be sure, there have been setbacks. But the hopes for correcting demonstrably erroneous precedents remain alive and well, as most justices now describe themselves as originalists.

Even so, we should not be surprised if we sometimes disagree with the opinions of originalist justices. After all, Justices Scalia and Thomas sometimes disagreed about what originalism required in a particular case.¹⁰⁷ Originalism is a method of interpretation, not a mathematical formula. The Founders understood that judges engaged in the same objective enterprise of applying the law will sometimes reasonably disagree about the law. That fact explains why Justice Robert Jackson once quipped, “We are not final because we are infallible, but we are infallible only because we are final.”¹⁰⁸

Discontent among conservatives about originalism reminds me of one of Justice Scalia’s favorite jokes. When two hunters open their tent to discover a grizzly bear, they both start running. And when the slower-running hunter complains to the faster one, “We’ll never outrun this bear,” the faster one responds, “I don’t have to outrun the bear. I just have to outrun you!”¹⁰⁹ Justice Scalia’s rhetorical point was that originalism was better than any alternative theory of interpretation.

In his famous lecture, *Originalism: The Lesser Evil*,¹¹⁰ Justice Scalia admitted that originalism has defects, especially that the historical research necessary to determine the original understanding of the Constitution can sometimes be difficult.¹¹¹ But he argued that “the main danger in judicial interpretation of the Constitution...is that the judges will mistake their own predilections for the law.”¹¹² And the alternatives to originalism “play[] precisely to this weakness.”¹¹³ The same is true with living common goodism—like other variants of living constitutionalism.

The current debate about originalism is not new. In the debate with Richard Epstein, Antonin Scalia described our situation well:

[T]his issue presents the moment of truth for many conservatives who have been criticizing the courts in recent years. They must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less principled grievance that the courts have not been doing what *they* want.¹¹⁴

Scalia's point was that courts should not be expected to adopt a conservative policy agenda.

That observation calls to mind my experience as a state attorney general prosecuting and removing from office then-Chief Justice Roy Moore after he defied a federal injunction.¹¹⁵ Convinced of the rightness of his position, he failed to appreciate that the Supreme Court is what its name in Article III suggests and that he was obliged to respect an injunction that required him to remove a monument of the Ten Commandments he installed in the state courthouse. His misconduct—declaring himself the final judicial authority on the Constitution—threatened to diminish public confidence in the rule of law.

Conclusion

In the end, both the liberals who advocate court-packing and the conservatives who advocate living common goodism have succumbed to the false notion that the nation should depend on the judiciary to resolve our political controversies. They fail to appreciate why the Constitution assigns the judiciary the modest role of resolving cases based only on law. And they fail to appreciate why the Constitution assigns other branches the authority to develop policies that promote the common good. The democratic process is hard work, especially in a constitutional republic with separated powers and dual sovereigns. But the Founders understood that doing the hard work of politics through consensus-building and compromise is the better way to promote the common good.

Our country needs to be weaned from judicial supremacy. We need to return the judiciary to the modest role that our Founders envisioned for it. And we need judges who do more than pay lip service to judicial modesty to promote public confidence in the judiciary; we need judges who faithfully perform the modest duty of respecting the Constitution and allowing the American people and the states to govern themselves.

The Honorable William H. Pryor Jr. is Chief Judge of the United States Court of Appeals for the Eleventh Circuit. Chief Judge Pryor is grateful to his law clerks, Will Courtney and C'zar Bernstein, for their helpful suggestions and citation and research assistance.

Endnotes

1. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).
2. Edwin Meese III, *Speech Before the American Bar Association*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, 47 (Steven G. Calabresi ed., 2007).
3. William H. Pryor Jr., *Remembering Edwin Meese's Tulane Speech*, in THE ORIGINALISM REVOLUTION TURNS 30: EVALUATING ITS IMPACT AND FUTURE INFLUENCE ON THE LAW, at 3–4 (Heritage Found., Special Rep. No. 191, 2017).
4. Edwin Meese III, *Speech Before the D.C. Chapter of the Federalist Society*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, 71, 75 (Steven Calabresi ed., 2007) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 400, at 295 (4th ed. 1873)).
5. *Id.* at 76 (quoting Letter from James Madison to Henry Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 442 (J.B. Lippincott 1865)).
6. *Id.* (quoting Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), in 4 WRITINGS OF THOMAS JEFFERSON 506 (Derby & Jackson 1859)).
7. *Id.* at 79.
8. *Id.*
9. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.
10. Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 921 (2021); Hadley Arkes et al., *A Better Originalism*, THE AMERICAN MIND (Mar. 18, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/>. For an earlier version of this kind of misguided theory, see HARRY V. JAFFA, STORM OVER THE CONSTITUTION (1999).
11. *But cf.* JACK M. BALKIN, LIVING ORIGINALISM (2014).
12. Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 582–83 (2004).
13. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 68 (7th ed. 2015).
14. *Id.*
15. *Id.*
16. 5 U.S. (1 Cranch) 137 (1803).
17. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 79 (2006).
18. Rehnquist, *supra* note 12, at 593.
19. Steven G. Calabresi & Shams Hirji, *Proposed Judgeship Bill 1* (Nw. Univ. Pritzker Sch. of L., Working Paper No. 17-24, 2017).
20. William H. Pryor Jr., *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html>.
21. *Id.*
22. Ronald A. Cass, *Adding Judges: Issues in Federal Courts' Governance* 29 (Ctr. for the Study of the Admin. State Working Paper No. 21-25, 2021).
23. Pryor, *supra* note 20.
24. *Id.*
25. *Id.*
26. STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERILS OF POLITICS (2021).
27. *Id.* at 62.
28. *Id.* at 51.
29. *Id.* at 55.
30. *Id.* at 63.
31. *Id.*
32. Arkes et al., *supra* note 10.
33. *Id.*
34. *Id.*
35. *Id.* (emphasis in original).
36. Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001).
37. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
38. *Id.* at para. 2.

39. U.S. CONST. preamble.
40. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993) (quoting 3 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (Jonathan Elliot ed., 1836)).
41. *Id.* at 928.
42. *Id.* at 935.
43. *Id.* at 929.
44. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 99 (2016).
45. *Id.* at 101.
46. George, *supra* note 36, at 2269.
47. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 5 (2019) (emphasis in original).
48. Arkes et al., *supra* note 10.
49. *Id.*
50. THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).
51. *Id.*
52. *Id.*
53. *Id.*
54. ARISTOTLE, POLITICS bk. III, ch. 7, 1279a, at 100 (R.F. Stalley trans., Oxford Univ. Press 1995).
55. *Id.*
56. See ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 105, art. 1.
57. George, *supra* note 36, at 2279.
58. Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 442-444 (1990).
59. *Id.*
60. Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 SUP. CT. REV. 49, 74 (1982).
61. 3 U.S. (3 Dallas) 386 (1798).
62. *Id.* at 399.
63. *Id.*
64. *Id.*
65. Berns, *supra* note 60, at 82.
66. Antonin Scalia, *Economic Affairs as Human Affairs*, in SCALIA V. EPSTEIN: TWO VIEWS ON JUDICIAL ACTIVISM 1, 6 (1985).
67. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 284 (2010).
68. *Id.* Justice Kagan went on to say, "I'm not saying I do not believe that there are rights preexisting the Constitution and the laws, but my job as a justice is to enforce the Constitution and the laws." *Id.*
69. 381 U.S. 479 (1965).
70. *Id.* at 484.
71. *Id.* at 524 (Black, J., dissenting).
72. 198 U.S. 45 (1905).
73. *Id.* at 57.
74. 60 U.S. 393 (1857).
75. *Id.* at 405.
76. THE FEDERALIST No. 81, *supra* note 50, at 481 (Alexander Hamilton).
77. *Id.* (emphasis in original).
78. THE FEDERALIST No. 78, *supra* note 50, at 469 (Alexander Hamilton).
79. THE FEDERALIST No. 83, *supra* note 50, at 496-97 (Alexander Hamilton).

80. *Id.* at 497.
81. George, *supra* note 36, at 2282.
82. *Id.*
83. *Id.* at 2283.
84. *Id.*
85. *Marbury*, 5 U.S. (1 Cranch) at 180.
86. CATECHISM OF THE CATHOLIC CHURCH ¶ 2150 (1994).
87. *Id.*
88. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 Nw. L. REV. 1455 (2019).
89. C'zar Bernstein, *Originalism and the "Oath Theory"*, NAT'L REV. ONLINE (May 20, 2020) ("Judges are bound by the oath to support and faithfully interpret a written instrument that may or may not conform with the moral law or any particular conception of the 'common good.'").
90. David F. Forte, *Originalism and Its Discontents*, LAW & LIBERTY (May 6, 2021), <https://lawliberty.org/originalism-and-its-discontents/>.
91. Conor Casey & Adrian Vermeule, *Myths of Common-Good Constitutionalism*, IUS & IUSTITIUM (Sept. 9, 2021), <https://iusetiustitium.com/myths-of-common-good-constitutionalism/>.
92. *Cf. id.* ("[T]he limits of legislative foresight ensure that enacted texts will always contain crucial gaps and ambiguities, or that the provision the lawmaker laid down for standard cases will diverge from the common good in unusual cases.").
93. *Id.*
94. Letter from James Madison to Converse Sherman (Mar. 10, 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 5, at 519.
95. Casey & Vermeule, *supra* note 91.
96. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, § 7, at 79 (2012) ("Enacted by the Scottish Parliament in 1427, the act... read: 'Item, The King of deliverance of council, the manner of statute forbiddis, that na man interpret his statutes urtherwaies, then the statute beares, and to the intent and effect, that they were maid for, and as the maker of them understoode: and quha sa dois the contrarie, shall be punished at the Kingis will.'") (quoting James I, 7th Parl., cap. 107 (1427) (Glendook ed.) (repealed by the Statute Law Revision (Scotland) Act of 1906, § 1 & schedule)).
97. *Washington v. Glucksberg*, 521 U.S. 702 (1997).
98. *Id.* at 728 ("[O]ur decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").
99. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).
100. *Id.* at 188 ("We agree that there is such a ministerial exception.").
101. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).
102. *Id.* at 353 ("There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.").
103. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
104. *Id.* at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").
105. *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).
106. *Id.* at 1122 ("The Constitution allows capital punishment.").
107. See William H. Pryor Jr., *Justice Thomas, Criminal Justice, and Originalism's Legitimacy*, 127 YALE L. J. F. 173, 175–81 (2017) (reviewing several cases where Justices Scalia and Thomas disagreed on originalist grounds).
108. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).
109. Jerry de Jaeger, *Justice Scalia Comes Home to the Law School*, U. CHI. L. SCH. (May 22, 2012), <https://www.law.uchicago.edu/news/justice-scalia-comes-home-law-school>.
110. Antonin Scalia, *Originalism: The Lesser Evil*, 57 CINN. L. REV. 849 (1989).
111. *Id.* at 856–60.
112. *Id.* at 863.
113. *Id.*
114. Scalia, *supra* note 66, at 5.
115. William H. Pryor Jr., *Moral Duty and the Rule of Law*, 31 HARV. J. L. & PUB. POL'Y 153, 161–70 (2008).