

ST. THOMAS CONFOUNDS VERMEULE:  
A THOMISTIC CRITIQUE OF PROFESSOR  
VERMEULE’S CONSERVATIVE ANTI-ORIGINALISM

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INTRODUCTION

In recent American jurisprudence, “originalism” has been the province of political conservatives.<sup>1</sup> Increasingly, however, beginning largely during the Trump Administration, some conservatives have begun to question whether originalism is worth their continued allegiance.<sup>2</sup> Most prominently, the Harvard public law scholar Professor Adrian Vermeule sent shockwaves throughout the conservative legal community with the publication of his 2020 essay, *Beyond Originalism* in the *Atlantic*.<sup>3</sup> These currents, apexed by Vermeule’s essay, have led to an explosion of literature on what Vermeule termed “common-good constitutionalism” and, more broadly, conservative critiques of originalism.<sup>4</sup>

One aspect of Vermeule’s theory that has been largely neglected by the follow-up literature is his express “Dworkinianism,” the philosophical underpinning of “living constitutionalism.”<sup>5</sup> While I am sympathetic to Vermeule’s desire for a morally thicker jurisprudence, his Dworkinianism renders him totally untethered to any thoroughgoing conservatism. In its stead, I defend a recent construal of originalism—one anchored in the common good—as a worthier iteration of the Thomistic classical legal tradition.

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1. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMANS 263, 311–14 (1991).

2. See, e.g., Joel Alicea, *Originalism and the Rule of the Dead*, NAT’L AFFS., Spring 2015, at 149; Hadley Arkes et al., *A Better Originalism*, AM. MIND (Mar. 18, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/>.

3. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

4. See, e.g., Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL’Y 917, 921 (2021); Conor Casey, ‘Common Good Constitutionalism’ and the New Debate over Constitutional Interpretation in the United States, 4 PUB. L. 765 (2021).

5. One notable exception is Professor Randy Barnett. See Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/>.

## I. ORIGINALISM

Among the many varieties of originalism,<sup>6</sup> here I care to defend only one: the common good originalism articulated most recently by Josh Hammer.<sup>7</sup> Hammer develops common good originalism in opposition to the substantively empty, procedurally focused originalism associated with the late Justice Antonin Scalia, as well as against the “libertarian” and “progressive” versions of originalism, both of which read substantive commitments into originalism by maintaining that the Founders themselves originally understood the Constitution either to be interpreted as an evolving document (so-called living originalism) or to be construed in accordance with Lockean classical liberal principles.<sup>8</sup> Fundamentally, “conservative” originalism’s most profound error is its turning of the “rule of law” into an end in itself, contrary to most all traditional understandings of the *end* of law, the state, viz. the common good: peace, justice, safety, abundance, etc.<sup>9</sup> Indeed, in this respect, “progressive” and “libertarian” originalism are both premised on a truer conception of human nature, one that recognizes a higher end than legalism itself: respectively, evermore liberation from traditional strictures or the furtherance of maximum individual autonomy. Common good originalism accepts this need to ground a conception of the law in an understanding of human nature and the proper end of the state while rejecting as ultimate those ends of the progressive or libertarian, instead arguing that the “common good” is the end of the state and so the end of law itself.<sup>10</sup>

Ultimately, however, any originalist case must rest upon a construal of what the Founders understood the Constitution to mean, to require. That this substantively conservative conception of the state and law is called for by originalism is illustrated most obviously in *The Federalist No. 57*, written—surprisingly enough—by Madison: “The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to

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6. Among them are original-law originalism (closest to common good originalism), see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 99 (2016); living originalism, see JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011); an originalism that focuses on the original *intent*, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 363–72 (1977); and an originalism that focuses on the “original public meaning,” see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (rev. ed. 2018). Most recently, Professor Stephen E. Sachs has put forward a defense of originalism as a standard against which to determine correct answers rather than as a procedure for attaining to them. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778–79 (2022).

7. See Hammer, *supra* note 4.

8. See *id.* at 921–24.

9. See *id.* at 923–24. An excellent discussion of the “common good”—including why it is not authoritarian—is provided by Vermeule in his recently released book *Common Good Constitutionalism*. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 26–51 (2022). While a proper understanding of the “common good” is necessary for this Note, an extended discussion of it is outside its scope.

10. See Hammer, *supra* note 4, at 923–24.

discern, and most virtue to pursue, *the common good* of the society.”<sup>11</sup> The Preamble to the Constitution provides the most fleshed-out gloss on what the Framers took to be the proper ends of government, and thus of law: “[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . .”<sup>12</sup> Common good originalists take these enumerated ends seriously, finding in them a lens through which the rest of the Constitution must be read and a check on statutes that contravene them. Most notably, and contrary to the libertarian and proceduralist originalists, there is “nothing in the Preamble that reduces to the protection and promotion of individual rights. Nor is there anything in the Preamble . . . supporting the positivist claim that values-neutral liberal proceduralism . . . is an end . . . of our [government].”<sup>13</sup>

## II. THE CRITIQUE OF ORIGINALISM

Among the many critiques of originalism, some of the most surprising are those by conservatives.<sup>14</sup> Vermeule’s critique has sparked both positive engagement<sup>15</sup> and an outcry.<sup>16</sup> Vermeule’s primary argument against originalism concerns its overweening focus on proceduralism and its moral neutrality even as it undermines substantive conservative priorities.<sup>17</sup> Vermeule’s article predates the *Bostock v. Clayton County* decision,<sup>18</sup> but one can imagine that case as the perfect encapsulation of Vermeule’s critique of originalism—or, in that case, textualism—run amok. Following liberal “living constitution” thinkers who eschew inquiries into “original meaning” and focus instead on construing the Constitution to realize their substantive policy goals, Vermeule calls on conservatives to do the same.<sup>19</sup> One way of conceptualizing Vermeule’s critique is to think of him as making a “natural law” argument; this especially comes out

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11. *Id.* at 926–27 (emphasis added) (quoting THE FEDERALIST NO. 57, at 348 (James Madison) (Clinton Rossiter ed., 2003)).

12. U.S. CONST. pmbl.; see Hammer, *supra* note 4, at 928.

13. Hammer, *supra* note 4, at 929.

14. See, e.g., Vermeule, *supra* note 3; David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 969 (2008).

15. See, e.g., Hammer, *supra* note 4; Casey, *supra* note 4; John O. McGinnis, *Adrian Vermeule: Unwitting New Originalist*, LAW & LIBERTY (Apr. 9, 2020), <https://lawliberty.org/adrian-vermeule-unwitting-new-originalist/>.

16. See, e.g., James W. Ceaser, *Adrian Vermeule's Sixteenth-Century Constitutionalism*, HERITAGE FOUND.: THE CONST. (Apr. 17, 2020), <https://www.heritage.org/the-constitution/commentary/adrian-vermeules-sixteenth-century-constitutionalism>; David B. Rivkin Jr. & Andrew M. Grossman, *The Temptation of Judging for 'Common Good'*, WALL ST. J. (July 23, 2021, 1:58 PM), <https://www.wsj.com/articles/supreme-court-conservative-liberal-originalist-vermeule-11627046671>; John Grove, *The Bad History of Common Good Originalism*, PUB. DISCOURSE (July 25, 2021), <https://www.thepublicdiscourse.com/2021/07/76750/>.

17. See Vermeule, *supra* note 3.

18. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

19. See *id.*

when he calls on lawmakers to “legislate morality.”<sup>20</sup> The “natural law” foundation of Vermeule’s critique is primarily Dworkinian, which to some degree determines his departure from originalism. Replacing this Dworkinian foundation, however, with a Thomistic one retains the moral thickness of Vermeule’s ideal without throwing originalism to the curb.

But indeed, part of what makes originalism untenable to Vermeule is that his aim is focused squarely on the proceduralist “conservative” originalism that is nowhere defended here. Vermeule does address Hammer’s common-good constitutionalism, finding it to be an “unstable” “half-way position[].”<sup>21</sup> At this point, the crux of Vermeule’s argument redirects slightly, focusing his attack on the alleged positivism lurking behind all forms of originalism.<sup>22</sup> Vermeule’s worry becomes that “nothing at all guarantees that the original understanding will necessarily or even predictably track the common good.”<sup>23</sup> As will be articulated below, this line of argument betrays Vermeule’s too-broad notion of legal positivism. Accordingly, this misfire of his undermines his argument against common good originalism as an alternative to his own non-originalist interpretative method.

### III. PRIMER ON NATURAL LAW

Classical Natural Law Theory owes debts to Aristotle and Cicero, among other great classical and medieval thinkers, but none so great as that to the *Doctor Angelicus*, St. Thomas Aquinas.<sup>24</sup> Due to the metaphysical richness of St. Thomas’s work, his *Treatise on Law*, housed within the second part of his *Summa Theologiae*, “cannot be fully understood apart from his metaphysics.”<sup>25</sup>

In Question 90 of the *Summa*, St. Thomas works toward a definition of law, finally settling on “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”<sup>26</sup> In Question 91, he presents his famous three-tiered metaphysics of law. First, there is the eternal law, which is the “very Idea of the government of things in God.”<sup>27</sup> St. Thomas grounds the eternal law, and law itself, in the mind of God as the ultimate

20. *See id.*

21. Adrian Vermeule, *On “Common-Good Originalism,”* MIRROR OF JUST. (May 9, 2020), <https://mirrorofjustice.blogspot.com/2020/05/common-good-originalism.html>.

22. *See id.*

23. *Id.*

24. *See* Christopher Wolfe, *Thomistic Natural Law and the American Natural Law Tradition*, in ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION 197, 199 (John Goyette et al. eds., 2004).

25. William S. Brewbaker III, *Thomas Aquinas and the Metaphysics of Law*, 58 ALA. L. REV. 575, 575 (2007).

26. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-I, q. 90, art. 4, at 995 (Fathers of the English Dominican Province trans., Christian Classics 1981). Unless otherwise noted, translations of the *Summa Theologiae* are taken from THOMAS AQUINAS, *SUMMA THEOLOGICA* (Fathers of the English Dominican Province trans., Christian Classics 1981).

27. *Id.* pt. II-I, q. 91, art. 1, at 996.

lawgiver, as he who “governs . . . the whole community of the universe,”<sup>28</sup> a proposition earlier defended in the *Summa*.<sup>29</sup> The Natural Law, which gets the most attention both from St. Thomas and posterity, “is nothing else than the rational creature’s participation of the eternal law.”<sup>30</sup> The natural law is not “something different from the eternal law” but refers instead to that share of the eternal law that is “imprint[ed]” upon and ascertainable by humans.<sup>31</sup> Finally, human law refers to those positive laws—e.g., the U.S. Code or Justinian’s Institutes—that both are derived “from the precepts of the natural law” and satisfy “the other essential conditions of law,” i.e., those outlined in St. Thomas’s definition of law.<sup>32</sup>

Human law—or, hereafter, positive law—is derived from the natural law in two ways: “as a conclusion from premises” or “by way of determination of certain generalities.”<sup>33</sup> The former refers to positive laws like those prohibiting murder and manslaughter, which clearly and logically follow from natural law precepts such as “thou shalt not kill.”<sup>34</sup> The second type is a bit less straightforward but much more common, for many laws—e.g., those governing the construction of a will or setting the speed limit—do not clearly follow from the natural law. With these laws, the natural law does not dictate the content of the positive law; rather, the positive laws make manifest, or concretize, certain natural law precepts. For example, the natural law requires that the “evil-doer should be punished,” but it does not specify the means of punishment; a positive law establishing the forms of punishment would, then, be a determination of a natural law principle.<sup>35</sup>

Two final points about St. Thomas’s Natural Law Theory deserve explication. First, St. Thomas holds that the purpose of law is to “make men good.”<sup>36</sup> This follows from St. Thomas’s earlier argument that all law is properly directed to the “common benefit of the citizens,” i.e., the common good.<sup>37</sup> Law, existing within the domain of “practical reason,” i.e., of reason directed to proper action rather than knowledge as such, is, like all activities governed by practical reason, directed to the end of human flourishing.<sup>38</sup> And, following Aristotle, because the polity is the “perfect community,” i.e., the whole in which

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28. *Id.*

29. *Id.* pt. I, q. 22, art. 1–2, at 121–23.

30. *Id.* pt. II-I, q. 91, art. 2, at 997.

31. *Id.*

32. *Id.* pt. II-I, q. 91, art. 3, at 997.

33. *Id.* pt. II-I, q. 95, art. 2, at 1014.

34. *Id.* pt. II-I, q. 95, art. 2, at 1015 (emphasis omitted); see Daniel A. Degnan, *Two Models of Positive Law in Aquinas: A Study of the Relationship of Positive Law and Natural Law*, 46 THOMIST: SPECULATIVE Q. REV. 1, 2 (1982).

35. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 2, at 1015.

36. *Id.* pt. II-I, q. 92, art. 1, at 1001.

37. *Id.* pt. II-I, q. 90, art. 2, at 994 (emphasis omitted).

38. *Id.* pt. II-I, q. 94, art. 2, at 1009.

families and individuals (the parts) find their true end, the proper end of law is not merely any individual's personal flourishing but "universal [flourishing]."<sup>39</sup>

Accordingly, to achieve such a lofty goal, it follows that the purpose of any given law, and so law writ large, must be "to lead its subjects to their proper virtue" in one of two respects.<sup>40</sup> A law can make man good "either simply or in some particular respect."<sup>41</sup> The former is the case if the law is actually directed to the good, such that obedience by its subjects will bring them along to the good too.<sup>42</sup> A law can make man good "in some particular respect" insofar as it makes him good at the thing which the law commands; for example, if the law, not aiming at the good, prescribes theft, then that particular law is working to make the subject not good simply but good only *qua* thief.<sup>43</sup> Despite this being the foremost aim of law, St. Thomas recognizes that the law cannot and should not command all virtue, for law, to be fully just, "should be possible both according to nature, and according to the customs of the country."<sup>44</sup> First, because the law is oriented toward the *common good*, the law should prescribe only those virtuous actions that are "ordainable to the common good," refraining from legislating about matters of wholly private virtue.<sup>45</sup> Similarly, the law should not proscribe all vicious actions; rather, recognizing the limits of its subjects' abilities, the law should prohibit those "more grievous vices, . . . chiefly those that are to the hurt of others."<sup>46</sup>

St. Thomas's theory of judging also deserves attention. Contrary to other medieval theorists who elevated the acts of judges above written laws, St. Thomas champions "inanimate law."<sup>47</sup> He gives three reasons for preferring written law to the acts of judges: (1) because "it is easier to find" a few "wise" legislators than it is to find many judges; (2) legislators can take their time and consider alternatives, whereas a judge is required to decide comparatively quickly; and (3) legislators are able to think ahead and contemplate the effects of their laws, whereas judges are (supposed to be) constrained to the facts before them.<sup>48</sup> Because proper judging requires the judge to be imbued with "animate justice," i.e. that special ability to weigh the facts before them and decide without prejudice, "it [is] necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of

39. *Id.* pt. II-I, q. 90, art. 2, at 994.

40. *Id.* pt. II-I, q. 92, art. 1, at 1001.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* pt. II-I, q. 96, art. 2, at 1018 (emphasis omitted).

45. *Id.* pt. II-I, q. 96, art. 3, at 1019.

46. *Id.* pt. II-I, q. 96, art. 2, at 1018.

47. Russell Hittinger, *Thomas Aquinas on Natural Law and the Competence to Judge*, in ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION 261, 273–74 (John Goyette et al. eds., 2004).

48. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 1, at 1014.

men.”<sup>49</sup> In keeping with St. Thomas’s emphasis on subordinating judges, he concludes that it is “necessary to judge according to the written law,” though he allows for some notable exceptions in the cases of unjust laws.<sup>50</sup> In two instances, St. Thomas allows for judges to depart from the written positive law. First, if the written law violates the natural law, then the judge should not enforce the written law because in any event, “the written law does not give force to the natural” law, but it is rather through compliance with the natural law that the written positive derives its authority and bindingness.<sup>51</sup> Secondly, a judge should deviate from “the letter of the law,” considering the “equity which the lawgiver has in view,” in cases where, though the written law does not violate the natural law as such, applying it in a given instance would be unjust.<sup>52</sup>

### A. Contemporary “Natural” Law

Standing in contrast to St. Thomas and Classical Natural Law Theory, Ronald Dworkin and Lon Fuller hold out “natural” law theories that stand quite apart both from St. Thomas and his successors and contemporary nonnatural law jurists.

Ronald Dworkin stands out as the foremost philosopher undergirding the “living constitution” movement.<sup>53</sup> According to Dworkin’s “moral reading” of the Constitution, judges interpret, for example, the First Amendment as if “shall make no law abridging ‘the freedom of speech’” stands in for the moral principle “that it is wrong for government to censor or control what individual citizens say or publish.”<sup>54</sup> And it is on the basis of a principle like this, so Dworkin contends, that the courts must decide whether to extend the First Amendment to include, e.g., pornography, campaign contributions, etc.<sup>55</sup> Thus, judicial interpretations of the Constitution are not solely anchored to the “original public meaning” of the text, its history, or the intent of its drafters. Rather, judicial interpretation is principally a matter of the judge identifying the reading of the text that makes the law—that law and the law in general—the best it can be.<sup>56</sup> And at these junctures at which the Constitution imports a moral principle, e.g., equality before the law, the judge’s job is “to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”<sup>57</sup> Ultimately then, in Dworkin’s view, judges

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49. *Id.*

50. *Id.* pt. II-II, q. 60, art. 5, at 1444; *see also* Hittinger, *supra* note 47, at 276–80.

51. AQUINAS, *supra* note 26, pt. II-II, q. 60, art. 5, at 1444.

52. *Id.*

53. *See* Barnett, *supra* note 5.

54. Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. BOOKS, Mar. 21, 1996, <https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/>.

55. *See id.*

56. *See id.*

57. *Id.*



should consider three factors: fit, justification, and integrity. An interpretation “fits” to the extent that it is cohesive with the relevant precedents.<sup>58</sup> An interpretation is “justified” to the extent of its “moral value,” as determined by the judge relying on the legal system’s broader principles.<sup>59</sup> Finally, a judge should interpret the law with “integrity” in mind, i.e., with an explicit desire to make the *corpus juris* cohesive and consistent, “preferring interpretations which make the law more like the product of a single moral vision.”<sup>60</sup>

#### IV. NATURAL LAW AND ORIGINALISM

##### A. Vermeule’s Dworkinianism

Prior to anything particularly Dworkinian—but by no means in conflict with Dworkin<sup>61</sup>—Vermeule stands athwart positivism<sup>62</sup>—which he accuses originalism of succumbing to—by adamantly defending the overlap of law and morality.<sup>63</sup> But Vermeule moves far beyond this shared basis. He explicitly frames his methodology around Dworkin’s “moral readings of the Constitution” while “advocat[ing] a very different set of substantive moral commitments and priorities.”<sup>64</sup> Though Vermeule has not yet discussed his theory in book-length form, this framing strongly suggests an interpretative framework that takes as its starting point Dworkin’s tripartite formula of fit, justification, and integrity.<sup>65</sup>

At least with respect to “fit” and “justification,” as a theory of interpretation generally, Dworkin’s theory is very attractive. Indeed, it seems to fit well with what judges seem to do in their opinions.<sup>66</sup> Most of all, “fit” is a criterion hard to argue with: to the extent that it is synonymous with “consistent with precedent,” it is a hallmark principle of Anglo-American jurisprudence, one neither St. Thomas nor contemporary originalists disapprove.<sup>67</sup> Dworkin’s—and, by extension, Vermeule’s—notation of “justification” is muddier, however. Some commentators equate “justification” with “moral

58. See STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS 238 (2d ed. 2006).

59. See *id.*

60. See *id.* at 240.

61. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 402 (2011).

62. See Vermeule, *supra* note 3.

63. For a description of the “separability thesis,” which argues for the strict separation of law and morals, see H.L.A. HART, THE CONCEPT OF LAW 6–9 (Paul Craig ed., 3d ed. 2012).

64. See Vermeule, *supra* note 3.

65. See VERMEULE, *supra* note 9, at 5–7.

66. This is an intentional aspect of Dworkin’s view, which is very much grounded in a theory of adjudication. For instance, Dworkin begins his magnum opus, *Law’s Empire*, with an extended meditation on judicial disagreements. See RONALD DWORKIN, LAW’S EMPIRE 1–30 (1986).

67. While St. Thomas does not explicitly defend a doctrine similar to stare decisis, such a stance is implicit in his view that laws should not change without good cause. AQUINAS, *supra* note 26, pt. II-I, q. 97, art. 2, at 1023.

value.”<sup>68</sup> Like Dworkin, Vermeule reads stipulated positive law against background principles of “political morality”<sup>69</sup> (in Dworkin’s phrase) or “natural law”<sup>70</sup> (in Vermeule’s). Accordingly, and to preview the analysis below, both would firmly disagree with Justice Neil Gorsuch’s opening salvo in *Bostock* that “[o]nly the written word is the law.”<sup>71</sup> Both of them conceptualize law much more broadly, as encompassing those background principles.

### B. Critique of Vermeule

Ultimately, there at least five serious critiques of Vermeule’s project, two of which are broader critiques also of Dworkin. First, Vermeule’s view is premised on a rejection of an overly positivist originalism. Second, Vermeule fails to sufficiently take account of the call for judicial minimalism, which is found especially in St. Thomas and present-day originalists, by implicitly endorsing a Dworkinian judicial maximalism. Third, Vermeule ignores the “inner morality” of originalism.<sup>72</sup> Fourth, Vermeule, while claiming to follow in the “classical legal tradition” typified by St. Thomas, fails to appreciate the extent to which St. Thomas’s view comports with originalism.<sup>73</sup> Fifth and finally, Vermeule does not take account of one of the most compelling conceptions of originalism: as a *mere* tool of judging.

#### 1. Positivism and Originalism

Undoubtedly, originalism can be quite positivist. Positivism, construed broadly and somewhat crudely, holds that the law is *merely* a matter of sociohistorical facts; thus, there is no “unwritten law,” and the justice or injustice of a law has no bearing on its legality.<sup>74</sup> Indeed, Justice Gorsuch’s refrain in *Bostock* is that “[o]nly the written word is the law.”<sup>75</sup> If this is originalism, then it deserves to be tossed in the bin for standing athwart the dictates of the natural law, attempting to usurp the subordinate place of the positive law as it does. However, originalists need not accept such positivism.

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68. See GOTTLIEB ET AL., *supra* note 58, at 240.

69. See Dworkin, *supra* note 54.

70. Adrian Vermeule, *Two Versions of Textualism*, IUS & IUSTITUM (Aug. 3, 2020), <https://iusetiustitium.com/two-versions-of-textualism/>.

71. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

72. This notion of the “inner morality” of law harkens to the theory of the “inner morality of law” of Professor Lon Fuller. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 650 (1957).

73. See Vermeule, *supra* note 70.

74. See, e.g., Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYC. PHIL. (Dec. 17, 2019), <https://plato.stanford.edu/entries/legal-positivism/>.

75. *Bostock*, 140 S. Ct. at 1737.

In fact, a consistent originalist would likely *have* to reject any such positivism not only on theoretical grounds but also as standing athwart the Ninth Amendment,<sup>76</sup> which makes clear that the Constitution protects some unwritten<sup>77</sup> legal rights. Common good originalism, grounded as it is in the Preamble, does, of course, care a great deal about the written positive law. However, as that very written law makes clear, it is inexhaustive and incorporates by reference a conception of the common good that must not be ignored. This is far from positivism. Indeed, it is the approach taken by St. Thomas, as illustrated above. It maintains the crucial place of positive law in the constitutional paradigm but sees that positive law either as determinations or conclusions from the natural law.<sup>78</sup> The Preamble reads as a recognition of this fact: that what follows, the Constitution itself and all the law promulgated as a result of it, should be construed as a manifestation of that guiding conception of the common good. Deviances therefrom are violations of the Constitution *in addition to* being violations of the natural law.

## 2. *Judicial Minimalism*

Vermeule’s call to scrap originalism is in part premised on his failing to grasp one of the central appeals of originalism—the judicial restraint it often calls for.<sup>79</sup> This judicial restraint—openly rejected by the likes of Dworkin, who calls for judges to openly “make fresh moral judgments” when deciding cases<sup>80</sup>—is nonetheless trumpeted by St. Thomas Aquinas. St. Thomas writes that “it is better that all things be regulated by law, than left to be decided by judges,”<sup>81</sup> clearly indicating quite a strong review of judicial restraint.<sup>82</sup> Rather than judges issuing “fresh moral judgments,”<sup>83</sup> St. Thomas envisages legislators imbuing the law with its moral weightiness with judges left merely to adjudicate, departing from the written text only upon extenuating circumstances.<sup>84</sup>

To be fair, Vermeule does pay lip service to the subordinated role of the judiciary in our constitutional scheme.<sup>85</sup> He calls for a deferential, “presumptive

76. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

77. Or, at least, the Ninth Amendment protects some legal rights that go unwritten *in the Constitution*.

78. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 2, at 1014–15.

79. See Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1617 (2012); see also THE FEDERALIST NO. 78, at 504 (Alexander Hamilton) (Robert B. Luce, Inc., Bicentennial ed. 1976) (“[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment . . .”).

80. RONALD DWORKIN, JUSTICE IN ROBES 132 (paperback ed. 2008).

81. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 1, at 1014 (emphasis omitted).

82. For further discussion of St. Thomas’s reasoning, see AQUINAS, *supra* note 48 and accompanying text.

83. DWORKIN, *supra* note 80, at 132.

84. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 1, at 1014.

85. VERMEULE, *supra* note 9, at 12–13.

textualism” on the part of the judiciary.<sup>86</sup> As he rightly notes, this is “Aquinas’[s] approach.”<sup>87</sup> Common good originalism similarly calls for a “presumptive originalism”—but “presumptive” in a slightly different sense. Here, the presumption is in favor of “ordinary public meaning” originalism, just like St. Thomas’s presumptive textualism is presumption in favor of “ordinary meaning of the text” textualism. However, that *form* of originalism is defeated when the original public meaning—or when the statute or constitutional provision itself—violates the core constitutional commitments to the common good. But (and this is where Professor Vermeule misses the mark), this defeasibility is itself justified by originalism—by common good originalism’s look to the Preamble. Just like the Angelic Doctor<sup>88</sup> would have a judge deviate from the text when it is clear that a literal application would undermine the manifest purpose of the written law, so too common good originalism would instruct the judge to deviate from a particular statute or constitutional provision when such law undermines the “common good” principles articulated in the Preamble.

### 3. *Inner Morality of Originalism*

Vermeule is also clearly influenced by Professor Fuller,<sup>89</sup> who is famous for his “procedural natural law” theory that focused on the so-called inner morality of law, i.e., the idea that law, of itself, necessarily involves order and consistency, brought with it its own inherent morality, with recourse to any “higher” morality being unnecessary.<sup>90</sup> To the extent that there is an “inner morality” to the law, such morality is also clearly found in the originalist enterprise. Among the foremost commitments of originalism is that of fidelity to the original law, i.e., the law as it was enacted.<sup>91</sup> So, too, contrary to purely procedural forms of originalism, more substantive iterations—like the original-law originalism discussed above in Part II—incorporate (at least the framework of) the original moral judgments of the Framers, particularly those found in the Declaration of Independence and the Constitution’s Preamble.<sup>92</sup> An originalist has recourse to these Founding Era moral judgments insofar as they are referenced by and incorporated into the text of the Constitution. *This* inner morality of originalism is, however, wholly contingent. Nonetheless, the originalist methodology is

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86. *Id.* at 75 (“Aquinas’[s] approach is an example of what we might call presumptive textualism—textualism that is defeasible when an unusual circumstance falls outside the core central case that was within the rational ordination of the law.” (footnote omitted)).

87. *Id.*

88. A traditional honorific for St. Thomas Aquinas.

89. See Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1927 (2018).

90. STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS 198–200 (3d. ed. 2015).

91. See Pojanowski & Walsh, *supra* note 6, at 142–44.

92. See *id.* at 127–28.

perhaps the most effective safeguard for Fuller’s seventh and eighth requirements of the “inner morality” of law, viz. that laws should be “relatively constant through time”<sup>93</sup> and that “there should be a congruence between the laws as announced and as applied.”<sup>94</sup>

#### 4. St. Thomas and Originalism

Like the type of originalism defended here, St. Thomas’s theory recognizes the judiciary power as a fundamentally delegated power.<sup>95</sup> Moreover, the power to promulgate new law is not seated in the judiciary but in “him who has care of the community,”<sup>96</sup> whoever that may be.<sup>97</sup> In some ways one can see a foreshadowing of Alexander Hamilton’s line in *The Federalist No. 78*, in which he writes that “[the judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment.”<sup>98</sup> Under our Constitution, it is principally Congress and the state legislatures that have “care of the community.”<sup>99</sup> This is made apparent by the fact that Congress is in charge of establishing all “such inferior Courts”<sup>100</sup> and promulgating the “Laws . . . and Treaties”<sup>101</sup> over which the judicial power extends. An originalist (not uniquely, of course) will interpret the above line from the Constitution considering *The Federalist No. 78*, seeing in Article III an implicit subordination of the judiciary to the legislative power.<sup>102</sup>

Contrary to Vermeule’s invocation of the Angelic Doctor, St. Thomas’s discussion of legal interpretation favors a kind of originalism. Granted, St. Thomas does not discuss “original public meaning” but rather speaks in terms of the interpreter following the intent of the legislator<sup>103</sup>—an approach which seems contrary to originalism. Specifically, it discusses what a judge should do when a just law fails in application, where applying the law as written would be to do injustice; in such a case, St. Thomas instructs the judge to judge “not according to the letter of the law, but according to equity which the lawgiver has in view.”<sup>104</sup> First, it is clear that the departure from the written law—which

93. GOTTLEB ET AL., *supra* note 90, at 199 (citing LON L. FULLER, *THE MORALITY OF LAW* 33–91 (rev. ed. 1969)).

94. *Id.*

95. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 1, at 1014 (“[T]herefore it was necessary . . . for the law to *determine* how to judge . . .” (emphasis added)).

96. *Id.* pt. II-I, q. 90, art. 4, at 995.

97. St. Thomas contemplates this power either vesting in the “whole people, or [in] someone who is the viceregent of the whole people.” *Id.* pt. II-I, q. 90, art. 3, at 995.

98. *THE FEDERALIST NO. 78*, *supra* note 79.

99. AQUINAS, *supra* note 26, pt. II-I, q. 90, art. 4, at 995.

100. U.S. CONST. art III, § 1.

101. U.S. CONST. art. III, § 2, cl. 1.

102. See LON L. FULLER, *THE MORALITY OF LAW* 101–02 (1964).

103. AQUINAS, *supra* note 26, pt. II-II, q. 60, art. 5, at 1443–44.

104. *Id.* pt. II-II, q. 60, art. 5, at 1444.

is absolutely the default in *St. Thomas*<sup>105</sup>—is an exception, not the rule. Second, the judge is not—contra Dworkin—to judge according to the equity *he* has in view but rather keeping in mind what the legislator had in view, i.e., the evil that the law was seeking to remedy. This kind of circumscribed purposivism is not entirely alien to the kind of originalism defended here, a normatively thick originalism that is itself grounded in the moral purposes of law.<sup>106</sup> It is certainly at odds, however, with the Dworkinian approach proffered by Vermeule, which would empower judges to interpret based on their own conceptions of the common good or political morality and only secondarily consider the views of the original lawmakers.

Though he has done so nowhere explicitly, Vermeule, to prove the subordination of the written law and the original legislator’s intent to the “common good,” would likely turn to *St. Thomas*’s discussion of the duty of a judge not to enforce a patently unjust law. As stated above in Part IV, *St. Thomas* understands the positive law to be grounded in the natural law in one of two ways—either as a logical conclusion, in which case the relevant positive law is dictated by the natural law, or as a determination, in which case the relevant positive law is just one way in which the given natural law could be manifested.<sup>107</sup> Accordingly, the positive law does not have any force over and against the natural law.<sup>108</sup> As such, “if the [positive] law contains anything contrary to the natural [law], it is unjust and *has no binding force*.”<sup>109</sup> For example, Nazi laws that allowed or commanded the extermination of Jews would *have no binding force* as against the natural law prohibition on the killing of innocents. A judge in the Third Reich, then, when asked to enforce such a law, would be under no legal or moral obligation to comply with it (and probably even under a moral obligation to disobey it). In this *very limited* sense, then, a judge might be asked to depart from the written law on effectively moral grounds, but this is not to concede anything substantial to the Dworkin–Vermeule position. Indeed, an originalist could easily look to the Founders’ understanding that natural law was the backbone of the constitutional order and that it was never their understanding that “[o]nly the written word is the law,”<sup>110</sup> especially in cases where the law is confronted with injustice.<sup>111</sup>

Finally, perhaps the most persuasive argument for originalism is a prudential one, and most all of *St. Thomas*’s arguments about the role of the judiciary are prudential. Methodologically, this puts Vermeule, whose view is much less prudential and much more idealistic (even moralistic), further at odds

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105. See, e.g., *id.* (“Hence it is necessary to judge according to the written law . . .”).

106. See *supra* Subpart II; see also Pojanowski & Walsh, *supra* note 6, at 110.

107. AQUINAS, *supra* note 26, pt. II-I, q. 95, art. 2, at 1014–15.

108. *Id.* pt. II-II, q. 60, art. 5, at 1443–44.

109. *Id.* pt. II-II, q. 60, art. 5, at 1444 (emphasis added).

110. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

111. See Pojanowski & Walsh, *supra* note 6, at 126–30.

with the classical natural law tradition. Originalism is best conceived as a “*standard, not a decision procedure.*”<sup>112</sup>

#### CONCLUSION

Professor Vermeule’s conservative critique of originalism is a serious one. Vermeule is no doubt correct that conservatives have too long preoccupied themselves with a merely procedural methodology and have ignored the classical legal tradition. However, he errs when he forfeits procedural conservatism more or less entirely. The answer, so I have argued here, is not the wholesale abandonment of originalism but the reprisal of a thicker, morally rich originalism—one that also happens to be consistent with the original public understanding *and* be of a piece with the classical legal tradition, especially the work of St. Thomas. Thomistic common good originalism must be conservatives’ future.

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112. Sachs, *supra* note 6, at 778 (emphasis added) (“[Originalism] offers an account of what makes right constitutional answers right. What it doesn’t offer, and shouldn’t be blamed for failing to offer, is a step-by-step procedure for finding them.”).

\* Dedicated to the Blessed Virgin, Mary Immaculate, Seat of Wisdom.