ORIGINALIST CHERRY-PICKING

TIMON CLINE

Originalist Cherry-Picking

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For a legal theory self-professedly predicated on history and historical meaning, originalism is consistently bad at history. Originalists excel, however, at cherry-picking the record—ironic for a political strategy hatched to combat the Warren-era's so-called judicial activism. Justice John Paul Stevens aptly and memorably identified this conspicuous selectivity of the originalist majority in his *Van Orden v. Perry* dissent.[2]

In his assault on "living common goodism," as he pejoratively refers to the classical legal tradition lately recovered by Adrian Vermeule and Conor Casey, Circuit Judge William Pryor is nothing if not a faithful practitioner of originalist historiography.[3] His recent Federalist Society speech, subsequently published in the *Federalist Society Review*, is a representative instantiation of this impulse. *Reason* and *National Review* were predictably ecstatic,[4] as they were about his Heritage Foundation lectures last fall.[5]

In their response to Pryor, Vermeule and Casey intentionally sidestep some of the historical questions raised by Pryor.[6] Indeed, Vermeule (rightly) makes clear in his book that while the American founders should be generally conceived as classical lawyers, his project is not predicated on any kind of filial piety as such.[7] As Vermeule well knows, this is a low hanging, irresistible fruit for originalists.

After critiquing Vermeule for his appeal to cases *too* recent, Pryor references a grand total of two decisions extant from the early republic or antebellum period. He opts to dedicate more time to haggling over an article by Jefferson Powell and relies on Powell's sources to stand

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[1] Deputy Attorney General, Office of the New Jersey Attorney General, Division of Law; Research Fellow, Craig Center, Westminster Theological Seminary.

[2] 545 U.S. 677 (2005) (Stevens, J., dissenting).

[3] William Pryor, *Against Living Common-Goodism*, 23 FED. SOC. REV. 25 (2022). All of this, of course, stems from Professor Vermeule's 2020 piece, Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/?msclkid=d622c4ecd0c511eca661e1b81d7df4c6. For the best summary of what followed, *see* Conor Casey, *'Common-Good Constitutionalism' and the new Battle over Constitutional Interpretation in the United States*, 4 PUBLIC LAW 765–787 (2021).

[4] Ed Whelan, *Judge William Pryor's 'Against Living Common Goodism'*, NATIONAL REV. (Apr. 6, 2022), https://www.nationalreview.com/bench-memos/judge-william-pryors-against-living-common-goodism/; Jonathan H. Adler, *Judge Bill Pryor Challenges Common-Good Constitutionalism*, REASON (Apr. 5, 2022), https://reason.com/volokh/2022/04/05/judge-bill-pryor-challenges-common-good-constitutionalism/.

[5] Ed Whelan, *Judge William Pryor against 'Living Common Goodism'*, NATIONAL REV. (Oct. 20, 2021), https://www.nationalreview.com/bench-memos/judge-william-pryor-against-living-common-goodism/.

[6] Conor Casey & Adrian Vermeule, *Argument By Slogan*, 10 HARV. J. L. & PUB. POLICY: PER CURIAM (Spring 2022) (see esp. note 4). *See also* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POLICY 103 (2022).

[7] This claim makes immediate, intuitive sense to those familiar with the colonial background which conditioned the constitutional milieu of the late eighteenth century. *See e.g.*, RICHARD M. GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION (1963).

in for his own.[8] A curious strategy.[9] A more worthy endeavor might have been to consider Harry Jaffa's work on the question.[10] And stranger still, Pryor claims that Powell's work evidences "the practice of originalism at the Founding era,"[11] but Powell himself concludes that the relationship between what he calls "modern intentionalism" and "early interpretive theory is purely rhetorical."[12] It is "historically mistaken" to think that the "interpretive intention" of the framers was "that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions."[13] (Whether Powell is right or wrong is, ultimately, neither here nor there.) Pryor's anachronistic conviction, following from *his* reading of Powell, is that "Early Justices too practiced originalism."[14]

Here, we will briefly take aim at Pryor's sweeping claim that judges in the early republic "practiced originalism."[15] For this proposition, Pryor chiefly relies on *Calder v. Bull*,[16] or rather, on James Iredell's opinion in *Calder*. Accordingly, *Calder* will be our primary expositional focus.

Mentioned by Pryor also is *Ogden v. Saunders*,[17] but he simply and summarily states that in *Ogden* John Marshall "clearly embraced originalism," without further comment.[18] In short order, the inquiry for Pryor shifts rapidly from proving originalism in the period to refuting "living common goodism." *Ogden* will, therefore, be ignored by us as well.[19] In the end, Pryor

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[8] H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (Mar. 1985).
[9] Pryor says that Vermeule "repeatedly relies" on Powell. Pryor, *supra* note 3, at 36. In fact, Vermeule clearly gives more weight to Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW AND HISTORY REVIEW 321 (2021), which he quotes at length in the same footnote in which Powell is found. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022), 186–187 n 4.
[10] HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (1994). *See also* Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?* 10 UNIV. PUGET SOUND L. REV. 351 (1987). In a qualified sense, what separates Vermeule and Pryor is what separated Jaffa and his interlocutor, Ralph Rossum, which is what separated Justices Iredell and Chase. *See* Harry V. Jaffa, *Original Intent and the American Soul*, 6 CLAREMONT REV. OF BOOKS 1 (Winter 2005/2006).
[11] Pryor, *supra* note 3, at 37.
[12] Powell, *supra* note 8, at 948.
[13] *Id.*
[14] Pryor, *supra* note 3, at 37.
[15] *Id.*
[16] 3 U.S. 386 (1798).
[17] 25 U.S. 213 (1827).
[18] Pryor, *supra* note 3, at 37.
[19] Though it should be noted that Marshall's purportedly originalist opinion primarily considers a case of *allocation*. See below. Note well also that Pryor performs more originalist cherry-picking in shunning the more interesting opinion of Justice Thompson which features numerous references to natural law, natural justice, and natural right. Indeed, at one point he declares a statutory survey unnecessary:

> There can be no natural right growing out of the relation of debtor and creditor that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice, growing out of such relation, that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess, and that the modification and extent of such liability is a subject within the authority of state legislation, seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the states on this subject, but think it may be safely

pins his historical hopes on one justice and one opinion whilst ignoring all counter evidence, even within the same case.

Calder v. Bull

Let's now look to the *Calder* seriatim opinions invoked by Judge Pryor. Recounting the underlying facts of *Calder* is unnecessary for our purpose since Judge Pryor's citation of *Calder* is purely for Iredell's purportedly originalist method. *Calder* is well known to all law students as the *ex post facto* case wherein the court jointly held that the relevant clause of the constitution applied to criminal laws (per Blackstone), that the Supreme Court could not nullify state laws that violated state constitutions—state courts are the "proper tribunals"—and that the specific act in question was valid.[20]

Moving on. Mentioned already is that Pryor selectively invokes *only* Justice Iredell's opinion.[21] There was no dissent in *Calder*. The central holding was unanimous though the reasoning differed between justices, *viz.*, Iredell and Samuel Chase. Noteworthy is that Pryor totally ignores the opinions of Justices Chase, William Cushing, and William Paterson. (Oliver Ellsworth and James Wilson apparently joined Chase.) Cushing was one of the greatest legal minds of the period, though he is underappreciated now, and his comments in *Calder* are humorously terse and disinterested, and so, easily forgotten.[22]

But that the rationale adopted by the functional majority of Chase, Ellsworth, Wilson, and Paterson is missing from Pryor's assessment is problematic. Chase's opinion, in particular, offers a stark contrast to Iredell's and, therefore, a counternarrative to the one Pryor tells. Iredell denied that legislative enactments could be overturned by courts on the basis of "natural justice" because he did not believe that any "fixed standard" governed its apprehension or application.[23] Chase was of the opposite persuasion.[24] The question is, which justice was representative of the bench at the time and, more importantly, American jurisprudence generally?

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I would remind the reader also, before we proceed, that Connecticut's "constitution" at the time was none other than its common law practice coupled with a meager statutory landscape

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> affirmed that in most if not all the states some limitation of the right of the creditor over the property of the debtor has been established.

Ogden v. Saunders, 25 U.S. 213, 309 (1827) (Thompson, J., dissenting). Similarly, Justice Trimble, who considers aspects of "natural obligation," and "universal law" at length, and points out that, in this instance, municipal law had not fully codified all aspects of the same. Id. at 318–19 (Trimble, J., dissenting).

[20] *Calder*, 3 U.S. at 392–95.

[21] Pryor, *supra* note 3, at 37-38.

[22] *See generally* HENRY FLANDERS, THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE UNITED STATES 11–54 (1859).

[23] *Calder*, 3 U.S. at 399.

[24] Pryor says that Vermeule "asserts that this interpretation of Iredell's opinion is a 'wild overreading.'" Pryor, *supra* note 3, at 38 (citing VERMEULE, *supra* note 9, at 59). In fact, Vermeule simply says the suggestion of John Hart Ely that "the Constitution itself abandoned" the natural law tradition is a "wild overreading" of *Calder* "as a rejection of natural law." VERMEULE, *supra* note 9, at 59. In other words, Vermeule is confronting the one-dimensional, single opinion, reading of *Calder* offered by Pryor. He does not fixate on, or mention, Iredell's opinion at all.

and its 1662 charter; not until 1818 was it replaced by something originalists would be comfortable *interpreting*.

Hence, Justice Paterson says that the state's constitution was "made up of usages"[25] which, for more than a hundred years by then were not to be "contrary to the Lawes and Stuatutes of this our Realme of England."[26] A more thoroughly common law jurisdiction none could find in 1798. And Patterson is explicit: usage and constitution were "synonymous terms" in Connecticut, and the General Court performed both judicial and legislative functions, as all colonial New England governments had, such that Paterson stipulates at the outset that he will artificially distinguish between the two functions as if two different bodies performed them.[27] (Already we find ourselves adrift, further from the shore than originalists would like.)

Though Patterson provides necessary historic background, his opinion is characteristically underwhelming. He notes that in the common law, per Blackstone, prohibition on *ex post facto* laws only refers to criminal statutes, and that myriad state constitutions agreed with that distinction.[28] (Chase also provides a terse state survey.[29]) End of opinion. Why Patterson wrote separately at all is unclear, and he says nothing directly pertinent to the debate Chase and Iredell are having.

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More to the point, maybe Iredell does represent a case of epistemological skepticism and moral relativism insofar as judges can apply it to challenge legislative enactments. But the question is whether Iredell mirrored his compatriots in so doing—stipulating *arguendo* that he did, in fact, do so himself—or, alternatively, whether he was an outlier amongst the same cohort. It is entirely likely that Iredell was just as described. Yet, the milieu of his period was one in which the stream of moral and legal thought remained basically classical and, therefore, drinkable. Albeit the dam restraining enlightenment epistemologies had broken by that point and foul waters had already begun to contaminate the intellectual streams. What dripped from Justice Chase's pen, however, appears to conflict with Pryor's one-dimensional reading of *Calder* (i.e., Iredell *as* the court).

We enter early at the point when Chase declines to "subscribe to the omnipotence of a State Legislature, or that it is absolute and without control[.]"[30] The next clause reads "although its authority should not be expressly restrained by the constitution or fundamental law of the State."[31] Do not misunderstand Chase: the comment "although its authority should not be expressly restrained" is not proscriptive but descriptive, or rather, means that "*even where*, or *in the event that*, its authority is not expressly restrained," etc. etc.

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[25] *Calder*, 3 U.S. at 395 (Paterson, J., concurring).
[26] CHARTER OF CONNECTICUT (1662), https://avalon.law.yale.edu/17th_century/ct03.asp.
[27] *Calder*, 3 U.S. at 395–96 (Paterson, J., concurring).
[28] *Id.* at 396–97.
[29] *Id.* at 389.
[30] *Id.* at 387–88.
[31] *Id.* at 388.

Even in this case, Chase is saying, the "purposes for which men enter into society will determine the nature and terms of the social compact[]" and thereby direct and limit the organs of power within the constitutional order.[32] The "nature, and ends of legislative power [itself] will limit the exercise of it."[33] As it happens, the "people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty[,] and to protect their persons and property from violence."[34]

Note the mention of constitutions and forms of government in the plural: a reference to the several states though Chase invokes the language of the federal preamble—also of note is the subtle reference by Chase to the fact of historic contingency as to the form and style governments take.

Chase argues that because of the nature of a republican government, and legislatures therein, and given their precipitating circumstances, there quite simply are "acts which the Federal or State Legislature cannot do, without exceeding their authority,"[35] that is, implicit authority according to the nature of the thing—a metaphysical argument of sorts. Stated more clearly:

> An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.[36]

Chase further explains:

> A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words for an act, which, when done was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause, or a law that takes property from A. and gives it to B: It is against all reason and justice for a people to entrust a Legislature with such powers, and, therefore it cannot be presumed that it has done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; It may declare new crimes and establish rules of conduct for all its citizens in future cases; it may command what is right and prohibit what is wrong, but it cannot change innocence into guilt or punish innocence as a crime or violate the right of an antecedent lawful private contract or the right of private property. To maintain that our Federal or State legislature possesses such powers if

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

> it had not been expressly restrained would, in my opinion, be a political heresy altogether inadmissible in our free republican governments.[37]

Hadley Arkes—one of the "better originalists"[38]—recognized in *Beyond the Constitution* what Chase (as well as most of his cohort on the bench and his contemporaries off it) was doing.[39] Inherent in the form and mode of government are imbedded (or implied) fundamental, necessary preconditions for its existence. Put more simply, principles of justice lie behind and before any regime by which said regime can be judged good or bad. And these principles of natural justice (i.e., natural law) precede all formation of any government. John Marshall, to whom Pryor also appeals, believed that the judgments of the court should be drawn from the "general principles of our political institutions," not merely the "words of the Constitution," as he wrote in *Fletcher v. Peck*.[40] The "reasoning spirit of the Constitution," not just the "words or letter," was a sound guide for the court.

Vermeule highlights this type of reasoning—sitting squarely within the classical tradition—in *Common Good Constitutionalism*.[41] Since the general principles of the constitution "will inevitably be saturated with principles of political morality," it is a mistake to assume that said principles, such as the common good, must spring from specific texts.[42] Rather, "they can be grounded in the general structure of the constitutional order and in the nature and purposes of government." These "determine the just authority of the state."[43] On this Vermeule cites *United States v. Curtiss-Wright Export Corp.*:

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[44]

He just as easily could have cited Chase's *Calder* opinion. The reasoning is the same; a testament to the endurance of the classical tradition in America even as it was embattled by nascent realist-positivist movements by the time of *Curtiss-Wright*.

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[37] *Id.*
[38] Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AMER. MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.
[39] HADLEY ARKES, BEYOND THE CONSTITUTION 10, 21-39 (1990). It should be remembered that intra-originalist debates are not new. It is not at all clear that participants like Jaffa properly belonged therein. Steven F. Hayward, *Two Kinds of Originalism*, 51 NAT'L AFFS. (Spring 2022).
[40] Fletcher v. Peck, 6 Cranch 87, 140 (1810). In the same case, Justice Johnson wanted it to be "distinctly understood" that his opinion was "not founded on the provision in the constitution … relative to laws impairing the obligations of contracts." Rather, it was predicated on "a general principle, on the reason and nature of things." *Id.* at 143–44.
[41] VERMEULE, *supra* note 9, at 41.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 87 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

The same reasoning also crops up in early American legal commentaries like Zephaniah Swift's *System of Laws of the State of Connecticut*. Explaining the logic of the common law vis-à-vis precedent, Swift instructs that courts are not

> absolutely bound by the authority of precedents. If a determination has been founded upon mistaken principles, or the rule adopted by it be inconvenient, or repugnant to the general tenor of the law, a subsequent court assumes the power to vary from or contradict it. In such cases they do not determine the prior decisions to be bad law; but that they are not law. Thus in the very nature of the institution, is a principle established which corrects all errors and rectifies all mistakes.[45]

Swift then briefly characterizes the common law of England as "a highly improved system of reason, founded on the nature and fitness of things [which] furnishes the best standard of civil conduct."[46] English common law was embraced and adopted by American courts "so far as it was consistent with the difference of situation," such that American common law became essentially English.[47] Swift notes, in turn, that English law itself owes much to the Roman law and that, indeed, the notion of precedent as binding and analogically applicable to sufficiently similar cases was a principle "common to all nations," not just England.[48] Precedent, therefore, comprises the "greatest part" of the common law, and these are to be studied primarily for the sake of acquaintance with the internal reason and movement of the common law, not for rote memorization and wooden application as such.[49] Courts must generally adhere to precedent in like cases except when "repugnant to reason," as noted already.[50]

Accordingly, Swift insists that "our courts exercised the same discretionary power and jurisdiction, as have been exercised by all the English judges, from the earliest periods of their government, to the present time," such that "There are a vast many improvements which were introduced by the courts without any legislative act."[51] And again, "Our courts have always acted upon the same general principles, as the British courts."[52] He goes on to explain that the common law must fill in statutory gaps and errors and further adopted prudently to local circumstances.[53]

It is only natural, then, that Swift expects judges to not mindlessly give force to statutes, but to insure not only their equitable and reasonable application but their coherence within the preexistent common law system. Courts, as guardians of the common law, maintained (like the

[45] ZEPHANIAH SWIFT, 1 A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 41 (1795).
[46] *Id.*
[47] *Id.*, at 40. *See also Id.*, at 20 ("They were naturally led to copy as nearly as difference of situation and manners would admit, the institutions of the country from whence they originated.").
[48] *Id.*, at 40. *See generally*, Gerald J. McGinley, *Roman Law and Its Influence in America*, 3 NOTRE DAME L. REV. 70 (1927); Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447 (1961).
[49] *Id.*, at 42.
[50] *Id.*, at 45.
[51] *Id.* at 44.
[52] *Id.*
[53] *Id.*

English courts) the right to alter or even abolish unjust and noxious laws, whether found in precedent or statute, according to the "general principles of reason, and law."[54]

> Our courts still possess, and exercise the same privilege, and whenever they find the common law unreasonable, impolitic, or unjust, or repugnant to the general tenor of our jurisprudence, they have rejected it, and adopted, such rules in their decisions, as they conceived to be right, and consonant to the general principles of our law.[55]

"[I]n all cases of a defect of common law, not supplied by statute, the courts must supply it by an adjudication, grounded upon the basis of all laws, reason and justice."[56]

Lest Swift be cast as an outlier—and we have already supplied more historical analysis than Pryor—we can (briefly) invoke also Chancellor Kent's *Commentaries on American Law*.[57] Kent recounts:

> In 1792, the Supreme Court of South Carolina, in the case of *Bowman v. Middleton* [1 Bay, 252 (S.C. Com. Pl. Gen. Sess. 1792)], went further, and set aside an act of the colony legislature, as being against *common right and the principles* of Magna Carta, for it took away the freehold of one man and vested it in another, without any compensation, or any previous attempt to determine the right. They declared the act to be *ipso facto* void, and that no length of time could give it validity. *This was not strictly a question arising upon any special provision of the state constitution, but the court proceeded upon those great fundamental principles which support all government and property, and which have been supposed by many judges in England to be sufficient to check and control the regulations of an act of parliament.*[58]

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Returning to *Calder*, what background principles and purposes might Chase have had in mind? Mentioned already is that Connecticut had no written constitution in 1798. (Rhode Island also initially retained its royal charter.[59]) For a historically proximate textual referent to satisfy our textualist brethren—and determine the original public meaning, *of course*—we might look to the only other state more thoroughly conditioned by Puritanism than Connecticut, *viz.*, Massachusetts.[60] The constitution of 1780 declares that its government is "instituted for the

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[54] *Id.* at 47.
[55] *Id.* at 46–47.
[56] *Id.*
[57] Adopted from his lectures at Columbia in 1794. *See generally* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993) (situating Kent's *Commentaries* within the "institutionalist" tradition of systemization stretching back through Blackstone to Justinian).
[58] JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 423 (1826) (emphasis added).
[59] Rhode Island Royal Charter (1663), https://avalon.law.yale.edu/17th_century/ri04.asp.
[60] *See generally* JOHN EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH CENTURY ENGLAND (1958), 126-141; Ralph Clover, *The Rule of Law in Colonial Massachusetts*, 108 U. PENN. L. REV. 1001 (1960); GEORGE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN (1960), 43–65; 113–162.

common good; for the protection, safety, prosperity and happiness of the people." The constitution of 1776 in Chase's home state of Maryland, government is said to be "instituted solely for the good of the whole."[61] Those who exercise executive and legislative power are "trustees of the public."[62]

Indeed, in *Jacobson v. Massachusetts*,[63] the first Justice Harlan, citing *Commonwealth v. Alger*,[64] rooted the internal (or state) police power in the overarching principles of governance featured in the Massachusetts constitution. There was no strict, textual basis for it, though a prior text had cited it—a common mistake of the originalist historiographer is to miss this distinction:

> In the constitution of Massachusetts adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of anyone man, family or class of men." The good and welfare of the Commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts.[65]

In route to formulating proto-rational basis review, Harlan later cites himself in *Mugler v. Kansas* for the conclusion that,

> [I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[66]

What is the "fundamental law" anyway? It is surely not merely the text of the Constitution, though it may attest to it. For by adhering to the fundamental law over and against statutes to the contrary, Harlan says that judges "give effect" to the Constitution itself, implying that something sits behind both texts—a decidedly non-positivist assertion. Rather, Harlan's standard of review looks beyond chapter and verse and into the underlying (and overarching) rationale of the structure of the republic itself in conjunction with the customary "usage" within the common law to which Paterson attested.

As John Eusden has shown, nailing down what "fundamental law" meant within the common law tradition, even by the seventeenth century, is not easy.[67] Some combination of

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[61] MARYLAND CONST. OF 1776, Dec. of Rights, art. I.
[62] *Id.*, art. IV.
[63] 197 U.S. 11 (1905). *See generally* Timon Cline, *Common Good Constitutionalism and Vaccine Mandates: A Review of* Jacobson v. Massachusetts *in Light of COVID-19*, 21 APPALACHIAN JOURNAL OF LAW 1 (2022).
[64] 61 Mass. 53 (1851).
[65] *Jacobson*, 197 U.S. at 27.
[66] 123 U.S. 623, 661 (1887).
[67] EUSDEN, *supra* note 60, at 44–49.

natural law, custom, and tried and true statute comprised its multi-dimensional, interactive core—that is, *ius*, *lex*, and *iustitia*.

Sounding much like Kent, William Drayton, in the *American Claim of Rights* (1774), followed Blackstone in describing "fundamental law" as more or less historic, common law rights of Englishmen.[68] It is key to notice that Drayton refers to several texts, *viz.*, Magna Carta, the Petition of Right (1628), the Bill of Rights (1689), etc., but says that these documents only "specified" the fundamental laws of England and rights of Englishmen which were formed by their "common ancestors." In other words, the texts themselves were nowise the origin of the law and rights referenced nor a necessary referent for the rights in view to be ascertained. Bushrod Washington's circuit court opinion, *Corfield v. Coryell*, went to greater lengths to catalog these "fundamental principles" albeit under "general heads," and calling the exercise "tedious."[69] To him, they comprised the privileges and immunities of all republican citizens *qua* republican citizens.

"Fundamental law" did not refer to text *simpliciter* and necessarily avoided exact codification. Otherwise, it could never function as a failsafe, so to speak. What can be said more easily is that Anglo-American classical lawyers, from Edward Coke to Matthew Hale[70] to William Blackstone to John Marshall Harlan, did not conceive of themselves as glorified parsers of texts. Originalists they were not. They were by and large classical jurists. And, to return to our earlier emphasis, the fundamental law was intertwined with accompanying or reflective institutional logic. To cite Blackstone once more and come full circle:

> The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government … and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.[71]

The codification is not the basis. These codifications corrected unjust codifications and did so by appealing to, and instantiating, the natural law. They are only textually asserted when threatened but no classical lawyer like Blackstone thought for a moment that such textual record was either definitive or authoritative in itself. And though, admittedly, Iredell could not conceive of a way around bad legislation in terms of institutional allocation, it is not at all obvious that on this front Iredell disagreed with Blackstone.[72]

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[68] R.W. GIBBES, 1 DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION, 1764-1776, 15-39 (1855).
[69] 6 F. Cas. 546, 551 (No. 3230) (CCED Pa. 1825).
[70] *See generally* MATTHEW HALE: ON THE LAW OF NATURE, REASON, AND COMMON LAW (ed. Gerald J. Postema 2018).
[71] 1 WILLIAM BLACKSTONE, COMMENTARIES *120, *127.
[72] Iredell may also be both under and over-reading Blackstone when he cited him for his central contention against Chase. In the pericope referenced by Iredell, Blackstone simply says that, within the English system, if parliament promulgates an unreasonable law, he knows not what power "in the *ordinary forms* of the constitution" could control it. On the other hand, where "some [unreasonable] collateral arises" from the legislation, "judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to

Conclusion

Iredell is admittedly a tough case. His epistemological doubt—a virtue of that age of reason— (and unwillingness to rule)[73] caused him to drift from classical assumptions, though not wholesale.[74] But Pryor, without revealing his criteria of selection, positions Iredell as a definitive rebuttal to Vermeule's allegedly lackluster historical survey is the real source of contention. Within *Calder* itself Iredell is refuted, as already shown. And most jurists and caselaw outside of *Calder* contradicts Iredell. Wilson,[75] Nathaniel Chipman,[76] and Joseph Story,[77] in addition to those jurists already mentioned, all carried the torch for the natural law tradition and classical metaphysics as the basis for all law.

True enough, Chase is largely an exponent of the classical tradition in *Calder* and Iredell is not. How does one choose which justice should be afforded more weight? Pryor's selection is arbitrary and self-serving, perpetuating both untrustworthy originalist historiography and the "unhappy side effect" of *Calder*, as Richard Helmholz calls it[78]—i.e., introducing an unnatural tension between positive law and natural law within American jurisprudence.[79] More substantively, critics have thus far refused to recognize the relative indifference of the classic theory to the structure of a polity, within limits, and, by extension, the distribution of labor and power therein. The issues are, perhaps, related but properly separate.

Vermeule himself has, citing Harlan, written in favor of a kind of legislative deference (and textualism[80]) as an instantiation of the classical principle of *determinatio*.[81] Critics who

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expound the statute by equity, and only *quoad hoc* disregard it." BLACKSTONE, *supra* note 71, at *91 (emphasis added).

[73] Ricardo Calleja, *Imperare aude! Dare to command! (Part I)*, IUS & IUSTITIUM (Oct. 20, 2020), https://iusetiustitium.com/imperare-aude-dare-to-command/.

[74] For instance, Iredell quotes Blackstone at length in *Chisholm v. Georgia*, 2 U.S. 419 (1793), and signals no distaste for the references to "natural law" and "natural equity" imbedded therein. As Iredell obviously knew, Blackstone's position included that, "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." BLACKSTONE, *supra* note 71, at *42. Also in the same section Blackstone affirms that statutes should be "construed" by judges to not "extend to" absurd or "unreasonable" results—not merely practically but morally or what Arkes calls "underlying canons of jural reasoning." Arkes, *supra* note 39, at 23. *See also* BLACKSTONE, supra note 71, at *41 (citing the "three general precepts" of Justinian: "to live honestly, to injure no one, and to give every man his due." *Institutes*, 1.1.3). On the structure of Blackstone's *Commentaries* conforming to classical categories, *see* VERMEULE, *supra* note 9, at 55.

[75] *See generally* Justin Buckley Dryer, *The Christian Natural Law Tradition and James Wilson's* Lectures on Law, Berkely Natural Law Workshop (2019), https://www.law.berkeley.edu/wp-content/uploads/2019/10/Dyer-Berkeley-paper.pdf.

[76] *See generally* CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS, INCLUDING THE CONSTITUTION OF THE UNITED STATES (1833).

[77] *See generally* Gerald T. Dunne, *American Blackstone*, 1963 WASH. U. L. Q. 321 (1963).

[78] RICHARD HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 176 (2015).

[79] VERMEULE, *supra* note 9, at 58–60.

[80] Adrian Vermeule, *Two Versions of Textualism*, IUS & IUSTITIUM (Aug. 3, 2020), https://iusetiustitium.com/two-versions-of-textualism/.

[81] Adrian Vermeule, *Who Decides?*, POSTLIBERAL ORDER (Jan. 11, 2022), https://postliberalorder.substack.com/p/who-decides?s=r; Adrian Vermeule, *Deference and Determination*, IUS & IUSTITIUM (Dec. 2, 2020), https://iusetiustitium.com/deference-and-determination/.

assume an exaggerated judicial supremacy in classical law as delivered and explicated by Vermeule are simply not paying attention.

As Vermeule has insisted more than once against this persistent, presumptuous jab, interpretive method and institutional allocation are distinct inquiries. Pryor, like most originalists, melds them into one. But what common good constitutionalist are arguing is that as a heuristic, a governing political rationality and justification of authority, the common good should influence *all* law making, whether legislative or judicial.[82] In fact, following Harlan (and Aquinas), Vermeule believes that "judges do and should broadly defer to political authorities, within reasonable boundaries."[83]

The rub, however, is when it comes to tough cases. At that point, the originalist dutifully refers to the textual restraints imposed upon him—*ius* is subjected to *lex*, to the detriment of *iustitia*—whereas the classical lawyer recognizes the priority of the higher law whether *manifested* in statute, constitution, custom, or principles of natural justice preserved in the *synderesis* of all reasonable creatures.[84]

Even if Pryor may claim Iredell for his camp, Vermeule may easily claim Chase and many others beside. If Judge Pryor really wants to put "living common-goodism" down, he will have to extend beyond the tired originalist cherry-picking historiography that requires little more of its proponents than citation of a "favorite founder."[85]

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[82] VERMEULE, *supra* note 9, at 43.

[83] *Id.*; *See also Id.*, at 48.

> [T]he classical tradition identifies good reasons to respect, within a broad range of determination, the law produced by legislatures, because that law takes into account a broader range of central cases, resting on a broader base of information and a more impartial basis, than does the judgment of any fallible individual in particular cases. For similar reasons, the common good will often require that judges defer to the reasonable public-oriented judgments of legislatures, within their constitutional competence.

[84] *See generally* BRIAN MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 86–101 (2018).

[85] William Pryor, *Politics and the Rule of Law*, Heritage Foundation Lecture No. 1325, at 8 (Oct. 20, 2021), https://www.heritage.org/sites/default/files/2021-10/HL1325.pdf.