MAKING JUDGES MORAL: ORIGINALISM AND THE PRACTICE OF COMMON GOOD CONSTITUTIONALISM

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INTRODUCTION

Common good constitutionalism and its relation to originalism have been widely discussed in scholarly literature and public discourse of late. I contend that common good constitutionalism is neither a dangerously novel theory, as some originalist scholars and judges have contended, nor does it require neglecting contemporary jurisprudence in the process of resurrecting older legal traditions. Common good constitutionalism rightly understood is a species of originalism because the original public meaning of constitutional texts depends upon and requires judges to consult the moral principles that grounded the text when it was ratified. Some originalists claim that judges who engage in any moral reasoning whatsoever in their legal analysis violate their oath of office. I contend that the real problem is that judges sometimes engage in flawed moral reasoning. Moral reasoning is an inevitable aspect of judicial decision-making in certain areas of law such as the freedom of speech. Originalist judges and justices not only should but also in many cases have referred to common good principles of morality to ground their decisions in the original public meaning of the Constitution.

I will begin this Note by mediating between scholarly theories of originalism and propose a way forward to reconcile originalism with common good constitutionalism in theory. Still, my primary purpose in this Note is more practical. I will argue that common good constitutionalism, understood as the application of moral reasoning about the common good to judicial decision-making, has in several instances appeared in contemporary opinions authored by originalist-minded Supreme Court justices.

In Part I, I will analyze scholarly developments within both originalism and common good constitutionalism. I object to the unimaginative yet all too common framing of these two theories as irreconcilable. Advocates of both originalism and common good constitutionalism tend to misunderstand each other's arguments and infer cleavages which do not in fact exist. I will also argue that scholars heretofore have largely failed to recognize examples of common good constitutionalism in contemporary judicial practice.

In Part II, I will turn to my primary argument about judicial practice. It is an inevitable fact that judges in our constitutional system must refer to moral principles to decide cases in order to adjudicate right from wrong. Originalist judges and justices in particular often engage in a line of moral reasoning characteristic of common good constitutionalism by referring to common good principles against morally libertarian claims of right. To develop this point, I will study dissenting opinions in four cases, all of which pertain to the freedom

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of speech: *Texas v. Johnson* (1989), *United States v. Stevens* (2010), *Snyder v. Phelps* (2011), and *United States v. Alvarez* (2012). First Amendment free speech cases are uniquely conducive to encouraging arguments about the common good because these cases tend to pose thorny questions of public significance which demand a heavy dose of moral reasoning about the values underlying our constitutional order. Each dissenting opinion pushes back against a majority's morally libertarian reading of the First Amendment and in doing so advances robust common good arguments for government regulations of speech when the object of such regulations is in fact evil. Even though the justices who authored or signed onto these opinions may not explicitly adhere to a common good constitutionalist vision of the Constitution, their use of moral reasoning about the common good reveals the inevitable fact that morality must inform constitutional interpretation and demonstrates why the original public meaning of constitutional texts must be consistent with common good considerations. In other words, there are two levels to my primary argument. First, originalism is an inherently moral jurisprudence in that is relies upon and demands reference to the moral principles underlying constitutional texts. Second, originalism's internal morality requires prioritizing common good considerations as opposed to a morally libertarian reading of the Constitution.

PART I: THEORIES OF ORIGINALISM AND COMMON GOOD CONSTITUTIONALISM

A. What is Originalism?

During the late 20th century, great legal minds such as Justice Antonin Scalia, Ed Meese, and Robert Bork began to publicly champion originalism, a theory of constitutional interpretation which held that judges must interpret the Constitution according to its original public meaning rather than as the living document that the Warren Court perceived it to be. In recent times, originalism has gained widespread acceptance as an essential interpretive lens for adjudicating constitutional questions, as even progressive legal minds such as Justice Elena Kagan[1] and Jack Balkin[2] have maintained. Lawrence Solum summarizes originalism as encompassing two fundamental beliefs about constitutional texts: fixity (that the Constitution's meaning was fixed at the time of its enactment) and constraint (that judges and other legal actors are constrained by this fixed meaning in arguing and adjudicating constitutional questions).[3] In other words, originalism requires judges to critically analyze constitutional text, history, and tradition to determine original public meaning. It is not a perfect theory, but it is an intellectually demanding method of

1. *See 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. 62 (2010) (statement of Elena Kagan) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

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

3. *See* Lawrence Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 3, 2019) (on file with SSRN).

interpreting constitutional texts according to the principles of the Founding generation and English common law, the lesser of two evils compared to living constitutionalism.[4]

In recent times, several scholars have argued at length in favor of originalism's consistency with constitutional practice. William Baude employs a positivist approach (what he calls a "positive turn") to argue that Supreme Court jurisprudence and American constitutional practice more generally are consistent with and are in fact structured upon originalist criteria; in short, positive law requires our judges and legal actors to be originalists.[5] Similarly, Stephen Sachs contends that originalism is the positive law of the Constitution, insofar as originalism is a rule of legal change with a genealogy extending back to the American Founding.[6] Building upon these positivist approaches, Jeffrey Pojanowski and Kevin Walsh have attempted to justify originalism on normative grounds, claiming that originalism's enduring character lies in its ability to meet our nation's moral need for a positive law of the Constitution.[7] Pojanowski and Walsh distinguish carefully between the non-exhaustive original law of the Constitution and "other constitutional law." The latter body of law includes authorized developments upon that original law as well as unauthorized developments and unauthorized departures which, respectively, either get the law wrong or seek to overturn originalism as the law of the Constitution.[8]

B. What is Common Good Constitutionalism?

The common good constitutionalist challenge to originalism has been waged most famously by Harvard Law School's Adrian Vermeule, a public law scholar and recent convert to the Roman Catholic Church. In various writings, including his *Atlantic* article *Beyond Originalism*, and a new book entitled *Common Good Constitutionalism*,[9] Vermeule attacks contemporary originalism for its inconsistency with "a robust, substantively conservative approach to constitutional law and interpretation."[10] While Vermeule's critics have accused him of embracing a conservative form of what is essentially living constitutionalism or Dworkinian moralizing, Vermeule's challenge is in many ways a modest and historically grounded approach to constitutional interpretation.

In *Beyond Originalism*, Vermeule notes that allegiance to originalism has not only "become all but mandatory for American legal conservatives," but has

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4. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 849 (1989).

5. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015).

6. *See* Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 817 (2015).

7. Jeffrey Pojanowski & Kevin Walsh, *Enduring Originalism*, 105 GEO. L. J. 97, 97 (2016).

8. *Id.* at 145.

9. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

10. Adrian Vermeule, *Beyond Originalism*, THE ATL. (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

also begun to characterize the "left-liberal legal academy," as Justice Kagan's famous quip that "we are all originalists now" demonstrates. However, Vermeule contends that originalism has "outlived its utility" for legal conservatives and now serves as an obstacle that impedes a "substantively conservative approach to constitutional law and interpretation," an approach that he terms "common good constitutionalism." In Vermeule's understanding, common good constitutionalism is rooted in the principle that "government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate."[11]

Perhaps anticipating objections that his favorable diagnosis of "strong rule" reeks of authoritarianism, Vermeule contends that common good constitutionalism in in fact grounded in "constitutional text and in conventional legal sources," especially within "the sweeping generalities and famous ambiguities of our Constitution, an old and in places obscure document" which from Vermeule's perspective can and should be given "substantive moral readings." For example, Vermeule cites the Constitution's General Welfare Clause as a starting point to relate common good constitutionalism to the Constitution's actual text, against the "cramped reading" of this clause typically assumed within the liberal tradition. Vermeule admits that his constitutional argument is grounded in a fundamentally different conception of "the general structure of the constitutional order" and "the nature and purposes of government" from contemporary originalist beliefs, a conception which emphasizes the state's "police power … to protect health, safety, order, and public morality" and permits courts, legislatures, executives, and administrative bodies to act in pursuit of the common good.[12]

C. Critics and Proponents of Common Good Constitutionalism

Of course, objections to Vermeule's article did arrive, most immediately and notably from libertarian-leaning originalist scholar Randy Barnett in *The Atlantic*. Barnett contends that Vermeule's common good constitutionalist perspective is "nothing but conservative living constitutionalism."[13] That is, Vermeule unapologetically attempts to employ the methodology of scholars such as left-leaning Ronald Dworkin who read the Constitution in a moral sense, though common good constitutionalists seek different substantive ends from Dworkin.

Similarly, Judge William Pryor of the U.S. Court of Appeals for the Eleventh Circuit has argued in a speech to the Heritage Foundation that common good constitutionalism is more accurately described as "living common good-

11. *Id.*

12. *Id.*

13. Randy Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATL. (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/.

ism."[14] Writing against Vermeule and natural law scholars such as Hadley Arkes of Amherst College,[15] Pryor contends that common good constitutionalism's effort to achieve substantive outcomes threatens the rule of law because it fails to provide a procedurally impartial framework for adjudicating constitutional disputes. Acknowledging the influence of Ed Meese upon his own legal thought, Pryor argues that originalism demands moral respect because it is rooted in the Founders' "belief in natural law and natural rights,"[16] a belief articulated most finely in the Declaration of Independence "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights." Pryor further maintains that judges who interpret constitutional texts take an oath to apply the meaning of the Constitution rather than the natural law, and that "there is no necessary connection between the meaning of a legal text and the natural law or the common good." Rather, when confronted with a conflict between the meaning of the text and the common good, judges must defer to textual meaning "even if doing so, in their view, works against the common good."[17]

Although well-articulated, Barnett's and Pryor's critiques are in large part mere reassertions of their own originalist premises and misidentifications of their opponents' viewpoints. They seem to imply that originalism and common good constitutionalism are two fundamentally different theories rather than fruits of the same tree of morally infused jurisprudence. As Arkes points out in response to Pryor's criticisms, Arkes's flavor of common good constitutionalism would not overthrow originalism as the dominant interpretive philosophy among right-leaning jurists but would improve upon it by "recover[ing] the way in which that first generation of jurists showed the knack of tracing back to those anchoring truths that underlay any of their judgments."[18]

On the other hand, Vermeule's brand of anti-originalist common good constitutionalism, doubtlessly wedded to his integralist political philosophy, is more ambitious than Arkes's and is thus more vulnerable to the critique that common good constitutionalism is an immodestly open-ended, results-oriented, and ahistorical enterprise compared to originalism as understood by the likes of Scalia, Meese, and Bork. However, in his article *Common-Good Constitutionalism: A Model Opinion,* Vermeule combats the suggestion that common good constitutionalism is "an alien interruption into our law" by

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14. William Pryor, *Politics and the Rule of Law*, THE HERITAGE FOUND. (OCT. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law.

15. *See* Hadley Arkes, *Judge Pryor's Friendly Fire*, L. & LIBERTY (OCT. 26, 2021), https://lawliberty.org/judge-pryors-friendly-fire/ (Arkes wrote in response, however, that Pryor mischaracterized Arkess' views and that there was much greater agreement between Judge Pryor's views and natural law scholars like Arkes than Pryor himself acknowledged).

16. Pryor, *supra* note 14 (citing Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2282 (2001)).

17. Pryor, *supra* note 14.

18. Arkes, *supra* note 15. *See also* Arkes et al., *A Better Originalism*, THE AM. MIND (MAR. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/.

referring to several Supreme Court cases from the late 19th century and early 20th centuries in which the Court advanced "the concept of the common good to define the 'police powers' of government … to promote the 'health, safety, and morals' of the people."[19] Vermeule discusses decisions "upholding maximum rates for grain warehouses and elevators,"[20] upholding "state regulation of the manufacture and sale of intoxicating liquors,"[21] "upholding an eight-hour maximum day for workers,"[22] and upholding "a scheme of mandatory vaccination."[23] All of these decisions were grounded in common good principles against a personal or contractual liberty interest. In the "model opinion" of *Mugler v. Kansas*, Justice John Marshall Harlan upheld Kansas's law prohibiting "the manufacture and sale of intoxicating drinks" because such drinks "are, or may become, hurtful to society," adding that individuals may not violate what "the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare."[24]

In short, against critics such as Barnett and Pryor, Vermeule's common good constitutionalism is historically grounded. Vermeule identifies a moment and body of reasoning in American jurisprudential history which unabashedly sought to advance common good principles through the exercise of judicial deference, giving legislatures wide latitude to make "reasonable determinations" of policy principles in pursuit of the "general welfare" of their people.[25] Hence, even a judge who might personally disagree with a conception of the common good being pursued by the state through legislation would still be required to uphold such legislation as long as it is reasonable. In other words, it seems as though Vermeule is arguing for more widespread use of rational basis review, according to which legislative and executive powers which may act within a zone of reasonableness to advance common good principles without being restrained by activist courts under the compelling interest test characteristic of strict scrutiny. When in doubt, judges should defer to these other branches of government.

Despite these historically grounded aspects of Vermeule's constitutionalism, Vermeule's conceptualization of originalism as a roadblock to common good constitutionalism is itself an intellectual obstacle to the contemporary development of a robust common good framework for interpreting the Constitution. Vermeule is often misunderstood, yet he does maintain several excesses which render his theory of common good

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19. Adrian Vermeule, *Common Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (JUN. 17, 2020), https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/.

20. *See* Munn v. Illinois, 94 U.S. 113 (1877).

21. *See* Mugler v. Kansas, 123 U.S. 623 (1887).

22. *See* Holden v. Hardy, 169 U.S. 366, 380 (1898).

23. *See* Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

24. Vermeule, *supra* note 19 (citing Mugler, *supra* note 21, at 663).

25. Vermeule, *supra* note 19. In the chapter "The Classical Legal Tradition in America" in his new book, Vermeule engages in a lengthier discussion relating this "Dworkinism-plus-deference" approach employed in *Mugler* and other cases to the classical legal tradition's emphasis upon the common good as the end of government. *See* VERMEULE, *supra* note 9, at 52–90.

constitutionalism unworkable in practice against the background of the widely accepted and intellectually rigorous theory of originalism. He believes that originalism is a fundamentally irredeemable project, that it has served its purpose and must be replaced by something wholly new. Vermeule's often Twitter-fueled anti-originalist rhetoric may sound exciting at times, but for the purposes of actual judging it fails to be a trustworthy guide. Furthermore, as I will elaborate in Part II, Vermeule fails to recognize the elements of common good constitutionalist reasoning in contemporary judicial opinions written by originalist-minded judges.[26]

There is another category of common good constitutionalists who are similarly critical of contemporary originalism in practice but who nevertheless maintain that originalism, properly understood, supports a moral or common good constitutionalist reading of the Constitution. Two scholars in particular fit this mold: Gerard Bradley and Josh Hammer.

Bradley has authored a voluminous array of hard-hitting legal scholarship about originalism over the past several decades,[27] and he has most recently written about contemporary originalism's failure to acknowledge moral reasoning as a legitimate form of constitutional interpretation. In his article *Moral Truth and Constitutional Conservatism*, Bradley criticizes the anti-philosophical "predilections" of contemporary originalist or quasi-originalist judges like Justice Scalia[28] and Justice Roberts (with his famed "balls and strikes" jurisprudence)[29] who eschew moral reasoning in their opinions when moral reasoning is precisely what they need in many contexts to understand the original public meaning of constitutional texts. This kind of "philosophical abstinence"[30] was perhaps an effective strategic move in the late 20th century to combat the excesses of erroneous Warren Court moral philosophizing. However, a true originalist judge or justice should not replace bad moral reasoning with no moral reasoning whatsoever but rather with right and just moral reasoning. That is, the original public meaning of constitutional texts itself includes moral concepts, and thus a judge tasked with applying the text to particular cases must consult this meaning (e.g. that marriage is a fundamental moral good rather than a legally-created institution regulated by the state). Bradley elaborates upon this point at great length in his article with reference to

26. I define "contemporary" somewhat arbitrarily to include any period of time since Justice Scalia first appeared on the Court in 1986 (including the 1989 case *Texas v. Johnson*, in which Scalia was in the majority that agreed with Johnson's free speech claim).

27. *See, e.g.,* Gerard Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 245 (1991).

28. Gerard Bradley, *Moral Truth and Constitutional Conservatism*, 81 LA. L. REV. 1317, 1325 n.27 (2021) (citing Scalia, *supra* note 4, at 863) ("Now the main danger in judicial interpretation of the Constitution— or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.").

29. Bradley, *supra* note 28, at 1326 ("This whole development is captured in the image of Supreme Court Justices settling the meaning of the Constitution as if they were umpires calling balls and strikes.").

30. *Id.* at 1325.

several doctrinal areas of law, areas which should (at least in theory) encompass "foundational aspects of our polity": human personhood, marriage and family, public morality, gender identity, and religious liberty issues.[31] Against the thrust of Justice Kennedy's "Mystery Passage" in *Planned Parenthood v. Casey* which defines liberty as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"[32] Bradley contends that liberty properly understood in its original meaning during the American Founding is "nested among abiding societal convictions" and "moral norms which are true for everyone" and which form "anchor points of a genuinely *common good*."[33]

Similarly, Josh Hammer takes a somewhat in-between stance upon originalism and common good constitutionalism in his aptly named essay *Common Good Originalism*.[34] Against the dead consensus of contemporary originalism which has revealed its inconsistency with common good principles in judicial opinions such as Justice Gorsuch's majority opinion in *Bostock v. Clayton County*,[35] Hammer concludes that judges should consult the sweeping generalities of the Constitution's Preamble and the arguments of *The Federalist Papers* to resolve ambiguities in original public meaning in favor of common good principles. In Hammer's view, the Founding tradition is characterized by a strong common good orientation favored by the likes of Alexander Hamilton, John Marshall, and James Wilson, along with their successors in future generations of American political thought and constitutional history such as Abraham Lincoln.[36]

PART II: CONTEMPORARY CASE LAW AND COMMON GOOD CONSTITUTIONALISM

Though cogent, these scholarly accounts of originalism largely fall short in identifying examples from contemporary American case law which point toward a moral reading of the Constitution. In his various essays and his new book, Vermeule does refer to several cases from the late 19th and early 20th centuries which encapsulate a common good framework to constitutional interpretation,[37] but he has yet to account for contemporary examples of case

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31 *Id.* at 1328.

32 505 U.S. 833, 851 (1992).

33. *Id.* at 1321.

34. Josh Hammer, *Common Good Originalism*, 4 HARV. J.L. & PUB. POL'Y 917, 917 (2021).

35. *See* 140 S. Ct. 1731 (2020).

36. Hammer, *supra* note 34 at 939. For an alternative view of the American Founding's liberal and individualist nature, *see* PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018).

37. In the "The Classical Legal Tradition in America," Vermeule discusses at length Justice Harlan's dissent in *Lochner* and his majority opinion in *Mugler* along with the cases *Riggs v. Palmer* (1889) and *United States v. Curtiss-Wright* (1936) as model examples of common good constitutionalism. *See* VERMEULE, *supra* note 9, at 52–90. Later in the book, Vermeule analyzes *Village of Euclid v. Ambler Realty Co.* (1926) to shed light upon the principle of "developing constitutionalism" according to common good principles as opposed to a morally libertarian understanding of property rights. *Id.* at 124–28. Although Vermeule is critical in his book of

law (either majority opinions or dissents) which employ a similar framework.[38] Furthermore, though Bradley cites a large volume of case law which tends to reveal contemporary originalism's failure to promote a moral or common good framework in American jurisprudence, he does not examine instances in which originalist judges and justices *have* reasoned in this manner. Hammer perhaps comes closest to identifying a common good jurisprudential vision in contemporary case law by referencing Chief Justice Rehnquist's dissent in *Texas v. Johnson* and Justice Samuel Alito's solo dissents in *US v. Stevens* and *Snyder v. Phelps*,[39] but he fails to follow up upon these references with a rigorous scholarly analysis and is content to fall back upon the ambiguities of the Constitution's Preamble as the launching point for his project of common good originalism.

My goal in this section is to analyze the elements of moral reasoning about the common good in four dissenting Supreme Court opinions pertaining to the freedom of speech and demonstrate that these opinions embody what common good constitutionalists are searching for in theory but often fail to identify and expound in practice.

A. Texas v. Johnson (1989)

In *Johnson*, the Court in Justice William Brennan's majority opinion held that Gregory Lee Johnson's conviction for burning an American flag at a political protest in Dallas, Texas, violated the First Amendment's guarantee of the freedom of speech. Under Tex. Penal Code Ann. § 42.09 (1989), the state of Texas outlawed the "[d]esecration of [a v]enerated [o]bject" and more explicitly included "a state or national flag" among the objects whose desecration was prohibited.[40] The Court held that this statute was not a content-neutral restriction and thus must be subjected to "the most exacting scrutiny."[41]

According to Brennan, Texas's production of *Johnson* under this statute was unconstitutional on an as-applied basis, as Johnson's conduct did not incite

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Pojanowski and Walsh's concept of "enduring originalism," Vermeule's theory of developing constitutionalism seems quite similar to Pojanowski and Walsh's category of "authorized developments" upon the law of the Constitution; that is, developments "that are consistent with the fixed Law of the Constitution, even though they are not required by or derived directly from its legal content." Pojanowski & Walsh, *supra* note 7, at 145.

38. For example, in his new book Vermeule considers only the majority opinion in the "stolen valor" case of *United States v. Alvarez*, a case which he criticizes for framing the question at hand in relation to whether government may regulate social harm rather than more narrowly considering whether government may protect from destruction "a public and common good, the military honors system." VERMEULE, *supra* note 9, at 169. I largely agree with Vermeule's criticism of the *Alvarez* majority. However, in his negative treatment of *Alvarez*, Vermeule entirely passes over Justice Alito's dissent which, as I will contend in Part II of this note, embodies precisely the kind of common good constitutionalist kind of reasoning which Vermeule desires to play a larger role in American jurisprudence.

39. Hammer, *supra* note 34, at 946.

40. Texas v. Johnson, 491 U.S. 397, 400, n.1 (1989).

41. *Id.* at 412.

"imminent lawless action" or constitute "fighting words" that threaten public order.[42] Furthermore, although Brennan acknowledges the state's "interest in preserving the flag as a symbol of nationhood and national unity,"[43] he also notably asserts a "bedrock" First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[44] Texas's statute may have been well-intentioned in the end that it sought, preserving national unity, yet its means of getting there, a criminal prohibition upon Johnson's expressive conduct, was constitutionally objectionable: "To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest."[45]

It is important to highlight the fact that Justice Brennan's majority opinion in *Johnson* acknowledges the government's legitimate interest in preserving the flag as a symbol of American unity. At the very least, the Court recognizes the theoretical importance of how the Texas statute and Johnson's conviction implicate common good principles. However, Brennan's opinion ultimately takes a morally libertarian approach to free speech jurisprudence and does not appeal to *common* beliefs about the meaning of the flag in relation to national unity. The flag in the Court's view reflects "the principles of freedom and inclusiveness" which permits *individuals* like Johnson to engage in what many would consider distasteful or even anti-American behavior such as flag burning.[46]

On one hand, the Court is asserting a libertarian moral argument here: an individual endowed with dignity and free will is expressing his unfavorable beliefs about the United States and its president, Ronald Reagan, and the proper response of those who support the flag's symbolic value should not be to punish them but to use their own capacity for argumentation "to persuade them that they are wrong."[47] On the other hand, this argument largely ignores common good considerations because the substance of Johnson's speech is contrary to commonly-shared moral norms about respect for national symbols. For example, Johnson's conduct is not analogous to the conduct at issue in *West Virginia State Board of Education v. Barnette*,[48] a case which the Court cites on multiple occasions in its opinion to justify its permissive interpretation of the First Amendment's free speech clause. Johnson's flag burning was an active assault against the flag and, by extension, America's national traditions, an assault which the government could properly regard as "evil."[49] It was not merely a passive refusal according to sincerely held religious beliefs like Barnette's refusal to salute the American flag at school. From a common good

42. *Id.* at 409.
43. *Id.* at 410.
44. *Id.* at 414.
45. *Id.* at 418.
46. *Id.* at 419.
47. *Id.*
48. W. Va State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
49. *Johnson*, 491 U.S. at 435 (Rehnquist, C.J., dissenting).

constitutionalist perspective, evil acts such as flag burning can and should be regulated.

In his dissent, Chief Justice William Rehnquist articulates a different understanding of how "evil" can and should be regulated by the government, an understanding that aligns closely with the principles of common good constitutionalism. Rehnquist contends that the freedom of speech is properly limited by the compelling interest of preserving America's national traditions. Rehnquist notes that the American flag's symbolic significance has been "for more than 200 years" a "uniqueness" which cannot be papered over with libertarian moral arguments but in fact "justifies a governmental prohibition against flag burning in the way respondent Johnson did here."[50] In other words, the internal morality of the American constitutional regime values our nation's traditions in a manner that must affect the Court's interpretation of the First Amendment's text. Rehnquist thus leans heavily upon the perhaps equally bedrock constitutional principle that the freedom of speech is not an absolute right when it conflicts with the Constitution's internal morality, and he applies this principle to conclude that Johnson's speech is not constitutionally protected.

Furthermore, Rehnquist emphasizes that the moral content of Johnson's speech is relevant to its protected or unprotected status under the First Amendment. Johnson's conduct was not only deeply inflammatory but was also a morally detestable act according to prevailing American beliefs, as Johnson degraded the flag's symbolic meaning which is deeply rooted in both American history and contemporary American life. Unlike Brennan's majority opinion which merely acknowledges the fact of the American flag as a symbol of national unity, Rehnquist asserts that the government's effort to defend this symbolism is an intrinsically moral effort that can overcome the free speech interest at stake. Rather than limiting governmental power to the ambiguous power to "persuade [others] that they are wrong" as the Court would have it, Rehnquist contends that "one of the high purposes of a democratic society is to legislate against conduct that is regarded as *evil* and profoundly offensive to the majority of people . . . ."[51] (emphasis added). In short, democratic government exists not only to protect rights but also to restrict evils including but not limited to flag burning which offend common moral norms and attack commonly-held American traditions. Even when such restriction of evil might offend a morally libertarian interpretation of the First Amendment's free speech clause, the Court cannot ignore the content of the evil at hand.

Second, Rehnquist downplays the suggestion offered by the majority that, like the speech in *Barnette* and other analogous cases, Johnson's speech truly constitutes "expressive conduct." Rather, the act of flag burning has little to no intrinsic value as speech, as it is more analogous to an "inarticulate grunt or roar"[52] than an expression of a coherent idea. Grunting and roaring, especially

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50. *Id.* at 422.
51. *Id.* at 435.
52. *Id.* at 432.

if done in a manner that is deeply offensive to core American traditions, simply is not protected by the Constitution in the same manner as articulate speech. Hence, Rehnquist seems to identify a kind of scale by which the moral weight of speech or expressive conduct is determined not only by the content of the communication but also by the speaker's means of communication. This use of a means-ends distinction brings to mind the means-ends distinction that the majority applies to Texas's prohibition of Johnson's conduct. However, whereas the majority claims that the state of Texas used unconstitutional means to stifle Johnson's speech, Rehnquist's dissent emphasizes that Johnson's inarticulate, inflammatory means of communication is morally inferior to articulate speech and therefore is less deserving of constitutional protection. On the other hand, the more coherent one's speech-act is, the more likely it is that the speech-act possesses moral worth and constitutional protection as expressive conduct.

B. United States v. Stevens (2010)

Moving into the 21st century, I want to focus on a trio of dissents authored by Justice Samuel Alito in free speech cases, dissents which are characterized by a heavy dose of practical moral reasoning analogous to common good constitutionalism.

In *Stevens*, Chief Justice Roberts wrote the 8-1 majority opinion for the Court that invalidated on First Amendment free speech grounds Congress's statutory ban on the "depiction of 'animal cruelty,'" a ban which was intended to target "crush videos" featuring "the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters."[53] The statute nonetheless included an exception for depictions that offered "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[54]

Essential to Roberts's opinion is his distinction between animal cruelty or "animal fighting," which is illegal in all 50 states and the District of Columbia, and the *depiction* of such cruelty which may be constitutionally protected under the First Amendment's free speech clause. Whereas the government in *Stevens* contended that Congress is free to balance the freedom of speech against the "societal costs" of permitting crush videos in the public domain, Roberts claims that such a legislative effort to promote the common good over a morally libertarian understanding of free speech rights is "startling and dangerous" because the First Amendment was itself a value judgment by the American people centuries ago in favor of free speech rights over legislative balancing tests on free speech questions.[55] Roberts admits that some categories of speech such as child pornography, the regulation of which was deemed constitutionally permissible in *New York v. Ferber*,[56] fall "outside the protection of the First Amendment."[57] However, *Ferber* was a "special case" rather than a

53. United States v. Stevens, 559 U.S. 460, 465 (2010) (quoting 18 U.S.C. § 48(b)).

54. *Id.*

55. *Id.* at 470.

56. 458 U.S. 747 (1982).

57. *Stevens*, 559 U.S. at 471.

"freewheeling authority" to restrict free speech because in *Ferber* "the market for child pornography was 'intrinsically related' to the underlying abuse."[58] Here, however, the Court found no evidence that "depictions of animal cruelty" are historically unprotected forms of speech, and that the statute created "a criminal prohibition of alarming breadth" against this constitutional backdrop.[59]

We could grant Chief Justice Roberts's claim that there is no evidence that depictions of animal cruelty constitute unprotected speech. Even so, it remains an open question why the Court cannot apply moral reasoning to determine that Congress may regulate such speech because it is "evil," as Rehnquist contends in his *Johnson* dissent with reference to flag burning, and that the First Amendment does not extend so far as to protect evil depictions as well as evil acts. According to the Rehnquist position, democratic government is not bound to an allegedly sacred but ambiguous and unusually libertarian judgment by the American people when the First Amendment was ratified, but is in fact rooted in "the idea that those who submitted to government"—that is, all those of *succeeding* generations as well as those of the American Founding— "should have some say as to what kind of laws would be passed."[60] Originalism, in other words, might demand an appeal to moral reasoning about the substance or content of the law, not just the historical record.

Justice Alito dissented in *Stevens* in an opinion that was joined by no other justices but which contains several elements of common good reasoning. I identify two particular focal points of Alito's common good constitutionalism in *Stevens*. First, Alito argues that the Court should have deferred to Congress's judgment that regulating the content of crush videos is a moral necessity because of these videos' intrinsic relation to the underlying illegal conduct. In other words, the majority's essential distinction between depictions and acts or underlying conduct fails. Second, Alito contends that the Court must take more seriously than it does these videos' lack of serious social value, a fact which should weigh in favor of the government's argument. Serious social value is not a precondition for First Amendment protection, but it is an important factor.

First, Alito focuses on the intrinsic relation between the statute banning "depictions" of animal cruelty and the prevention of animal cruelty itself, cruelty which neither side disputes is illegal. The regulation of crush videos is necessary to advance the government's compelling interest in preventing "horrific acts of animal cruelty,"[61] and this moral necessity weighs heavily in favor of the government's defense. Alito's reasoning here is better equipped than the majority to discern what is *really* going on in the production of crush videos; that is, the only reason why such videos are produced in the first place is to sell for profit videos that satiate an esoteric fetish for viewing acts of animal cruelty.

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58. *Id.* at 471–72 (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

59. *Id.* at 474.

60. *Johnson*, 491 U.S. at 435 (Rehnquist, C.J., dissenting).

61. *Stevens*, 559 U.S. at 482 (Alito, J., dissenting).

Of course, Roberts seems to imply that (unlike *Ferber*) the content at issue here is not "intrinsically related" to illegal animal cruelty. In reality, however, this case closely mirrors *Ferber* and its "intrinsically related" rule comparing the depicted conduct to the underlying illegal conduct, the only major distinction being that the depicted conduct in *Ferber* was of children rather than animals. Illegal animal cruelty (the conduct) itself is the linchpin of this case that the Court cannot ignore in its free speech analysis of "depictions" in crush videos. Alito emphasizes that prior to the statute's enactment, "the underlying conduct . . . was nearly impossible to prosecute."[62] As it had previously done with respect to child pornography, the issue in *Ferber*, Congress acted here to prevent the underlying illegal and immoral conduct of animal cruelty by banning its depiction outright. After all, "the videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos,"[63] just as in *Ferber* where the Court concluded that the market for the content at issue was "intrinsically related" to the underlying abuse.

In reality, allowing the videos to be created (in secret, of course, or perhaps in other countries where the underlying conduct is not illegal) and leaving their sellers unprosecuted would guarantee that the underlying immoral conduct, quite literally crushing helpless animals, would continue as long as selling crush videos remained a profitable activity. According to a moral reading of the Constitution in line with common good principles, the First Amendment does not require "Congress to step aside and allow the underlying crimes to continue."[64] Congress was faced with a choice: "Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market."[65]

Second, Alito contends that these crush videos lack any serious social value sufficient to outweigh the "harm caused by the underlying crimes" depicted in them.[66] In doing so, Alito acknowledges an exception to the statute which permits depictions of animal cruelty which have "serious religious, political, scientific, educational, journalistic, historical, or artistic value,"[67] though Alito seems to implicitly emphasize Congress's common good purpose by using the phrase "*social* value" (emphasis added) to describe this exception rather than just "value" or "serious value" as the majority uses.[68]

This exception seems to be Congress's way of morally distinguishing other legitimate free speech activities from the crush videos they targeted. The animal cruelty depicted in crush videos lacks serious social value and thus may be prohibited by Congress: "The animals used in crush videos are living

62. *Id.* at 491.

63. *Id.* at 493.

64. *Id.*

65. *Id.* at 495.

66. *Id.*

67. *Id.* (citing 18 U.S.C. § 2252, § 48(b)).

68 *Id.* at 482, 498.

creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country."[69] Alito likens crush videos to videos of dogfighting which, in addition to depicting actual crimes and being legally regulated by Congress because of the intrinsic relation between the videos and the illegal underground market for dogfighting, "have by definition no appreciable social value" and cause harms like "physical torture and emotional manipulation" which "greatly outweighs" any purported redeeming value.[70]

Hence, the moral problem that is the pain, suffering, and death which animals experience is itself an important factor in the free speech analysis, even independently, it seems, of the fact that the underlying conduct is illegal. Against the majority's claim that it is a "startling and dangerous" proposition to consider the freedom of speech less as an absolute liberty and more in the context of "social costs and benefits,"[71] Alito's jurisprudence could not be clearer: The Court *must* consider how that these depictions lack serious social value in its First Amendment analysis.

C. Snyder v. Phelps (2011)

Another notable dissent in which Alito employed a heavy dose of moral reasoning about the common good came in the 2011 case *Snyder v. Phelps*. At issue in *Snyder* was the picketing of a military funeral in Westminster, Maryland, by the infamous Westboro Baptist Church, headquartered in far-away Topeka, Kansas, to communicate the church's belief that God hates the United States for tolerating homosexuality in the military.[72] The Court overturned on First Amendment freedom of speech grounds a multimillion-dollar civil jury judgment originally awarded to the Snyder family against the church for the church's "intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims . . . ."[73] As in *Stevens*, Alito again wrote a lone dissent against the Court's morally libertarian opinion and for a common good constitutionalist approach to free speech jurisprudence.

In its statement of facts, the Court in a majority opinion authored by Chief Justice Roberts acknowledges the highly adversarial and revolting nature of the Westboro Baptist Church's demonstration outside of deceased Marine Lance Corporal Matthew Snyder's funeral in Westminster, Maryland, the Snyder's hometown. The seven picketers, which included Westboro Baptist parishioner Fred Phelps and six family members, traveled from Kansas to Maryland to line the streets of Annapolis and Westminster and carry signs that stated, "God Hates the USA/Thank God for 9/11," "America Is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Fag Troops," "Maryland Taliban," "Fags Doom Nations," "Not Blessed Just Cursed," "Thank God for Dead Soldiers," "Pope in

69. *Id.* at 496.
70. *Id.* at 497–98.
71. *Id.* at 470 (majority opinion).
72. Snyder v. Phelps, 562 U.S. 443, 448 (2011).
73. *Id.* at 450.

Hell," "Priests Rape Boys," "You're Going to Hell," and "God Hates You."[74] Although Roberts is quick to qualify that the church complied with all police instructions during the demonstration and neither entered church property nor engaged in acts of violence,[75] the overtly hostile content of the signs and the fact that Snyder later became aware of and emotionally distressed from that content were not in dispute.

Despite acknowledging these gruesome signs and Snyder's knowledge of and subsequent distress stemming from Westboro Baptist's emotionally hostile yet nonviolent demonstration, Roberts concludes that the First Amendment's free speech clause shielded the church from any liability to Snyder, as the church's picketing was legally protected expression or speech on a matter of public concern.[76] Whereas speech relating to matters of public concern receives broad constitutional protections, speech which concerns merely private interests does not receive similar protections, regardless of the moral outrageousness of that speech. Here, Roberts concludes that the content of the church's signs "plainly" constitutes a matter of public concern rather than "purely private concern,"[77] and since the church "conducted its picketing peacefully"[78] and did not interfere with the funeral itself, their speech was "entitled to 'special protection' under the First Amendment" and was thus immunized from civil liability.[79]

Justice Alito dissented, acknowledging that while the church's commentary "on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not."[80] Alito's common good constitutionalism is evident in his emphasis that the majority opinion has produced an absurd result: the Court bars any recovery to Snyder, the suffering father of a soldier killed in the line of duty and later attacked by Westboro's extreme emotional abuse, for emotional injuries he endured due to no fault of his own.

Alito contends that First Amendment free speech considerations do not and should not act as a complete bar to Snyder's recovery, noting as his "most important" point that "[t]he First Amendment allows recovery for defamatory statements *that are interspersed with nondefamatory statements on matters of public concern* . . . ."[81] (emphasis added). Even though the church's speech touched on military and religious matters of great public concern, the majority fails to recognize that the church may have followed all the police rules

74. *Id.* at 448, 454.

75. *Id.* at 449.

76. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983); and San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (cited in *id.* at 453), which respectively define speech dealing with matters of a public concern as "fairly considered as relating to any matter of political, social, or other concern to the community" or as "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.[…]"

77. *Snyder*, 562 U.S. at 454.

78. *Id.* at 456.

79. *Id.* at 458.

80. *Id.* at 470 (Alito, J., dissenting).

81. *Id.* at 471.

surrounding picketing in public and yet also have committed an actionable tort against Snyder for infringing upon his private person. Westboro's display was not only a protest against the American military but was also an assault against Snyder, not subjectively "outrageous"[82] as the majority portrays the jury's reasoning for its verdict but objectively emotionally injurious.[83] As Alito notes earlier in his dissent, the First Amendment protects individuals who "picket peacefully in countless locations," yet it does not shield them from liability for "intentionally inflict[ing] severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."[84] In other words, from Alito's perspective the majority opinion has produced an absurd result: an injured person is unable to receive any compensation for the injury inflicted upon him by an at-fault party.

Alito's discussion of *Snyder*'s absurd results mirrors Vermeule's discussion in his new book of *Riggs v. Palmer*,[85] a late-19th century case arising out of New York State. Vermeule's discussion here is in a certain sense originalist in that it is rooted in Justice Scalia's doctrine of "absurd results," according to which judges should reason to "avoid egregious outcomes that no reasonable legislator could be thought to have intended, in light of fundamental general background principles of the legal system."[86] In *Riggs*, the absurd result would have been that a grandson who had deliberately poisoned his grandfather in order to receive his inheritance was statutorily entitled to that inheritance based upon his grandfather's will, despite the undisputed fact that the grandson had murdered his grandfather.[87] That is, the statute did not explicitly contemplate a scenario like this to prevent rewarding an individual from profiting from his parricidal crime. However, the majority of the New York Court of Appeals held that the statute should be read in accordance with "general, fundamental maxims of the common law" such as the generally-accepted principle that "[n]o one should be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[88] Hence, the court enjoined the grandson from benefitting from his grandfather's inheritance.

In *Snyder*, of course, no murder accusations are involved. I reference this analogy simply to illustrate "the majority's appeal to fundamental public policies," or what one might otherwise call an appeal to the common good as

82. *Id.* at 458 (majority opinion).

83. The majority even acknowledges Snyder's testimony about the "severity of his emotional injuries," as he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing" and would regularly become "tearful, angry, and physically ill when he [thought] about it." *Id.* at 450.

84. *Id.* at 464 (Alito, J., dissenting).

85. 22 N.E. 188 (1889).

86. VERMEULE, *supra* note 9, at 77 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 234–39 (2012)).

87. VERMEULE, *supra* note 9, at 80.

88. *Id.* at 81 (citing *Riggs*, 22 N.E. at 190).

the statute's moral backdrop, rather than a strict reading of the statutory text.[89] Common good constitutionalism as embodied within Justice Alito's dissenting opinion in *Snyder* does not seek to ignore the text of the First Amendment or overturn the Court's free speech jurisprudence as it has developed over time (for example, the distinction between public and private concern), but it does require judges to consider the "background principles" of the law in accordance with that jurisprudence.[90] Hence, Alito acknowledges in his dissent that Westboro's speech related to a matter of public concern, yet it also infringed upon Snyder's private person and caused an emotional injury that the law would be wrong to not correct through just compensation in a tort suit. In sum, Alito's dissent in *Snyder* demonstrates that judges should avoid applying the law in a way that produces absurd results such as denying an aggrieved plaintiff compensation for an emotional injury he sustained due to no fault of his own.

D. United States v. Alvarez (2012)

Finally, *Alvarez* presents another free speech case in which the Court's majority took a permissive approach to the First Amendment's freedom of speech clause, and Justice Alito authored a dissent that employed moral reasoning characteristic of common good constitutionalism. However, unlike Alito's solo dissents in *Johnson* and *Stevens*, in *Alvarez* Alito's dissent was joined by two other justices, Justice Scalia and Justice Thomas.

At issue in *Alvarez* was an as-applied constitutional challenge to defendant Xavier Alvarez's conviction under the Stolen Valor Act of 2005, which criminalized making a false or fraudulent declaration that one had been awarded a military honor such as the Congressional Medal of Honor. Alvarez was convicted after lying at a water district board meeting in Claremont, California, about having been awarded the Congressional Medal of Honor in 1987.[91] Alvarez pled guilty to a federal criminal charge under the Act for his lie, but he also appealed his conviction to the United States Court of Appeals for the Ninth Circuit on First Amendment free speech grounds. The appellate court found for Alvarez and reversed his conviction.[92]

The Court affirmed the appellate court's judgment, declaring in a majority opinion by Justice Anthony Kennedy that the "sometimes inconvenient principles of the First Amendment" prohibited Alvarez's conviction under the Act.[93] Citing Justice Roberts's opinion in *Stevens* that a First Amendment analysis which takes into consideration "social costs and benefits" is "startling and dangerous,"[94] Kennedy confines permissible content-based restrictions to a few "historic and traditional categories" of permissible regulation and asserts

89. *Id.* at 82.

90. *Id.* at 83.

91. United States v. Alvarez, 567 U.S. 709, 713–14 (2012).

92. *Id.* at 714.

93. *Id.* at 716.

94. *Id.* at 717 (citing United States v. Stevens, 559 U.S. 460, 470 (2010)).

that "falsity alone" is not enough to bring a statement outside constitutional protection under the First Amendment's free speech clause.[95]

Still, Kennedy does not conclude his opinion with a bare listing of permissible categories of speech regulation, as gives additional reasons why such a rule categorizing false speech as unprotected speech would have deleterious policy implications. Kennedy judges that the statute is overbroad, as it could be applied to criminalize "personal, whispered conversations within a home" in addition to public statements like Alvarez's at the water district board meeting.[96] Furthermore, the "list of subjects" which the government could conceivably prosecute under the statute is "endless," thereby giving the government "a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."[97] While acknowledging the uniqueness of the Congressional Medal of Honor and the importance of the government interest in protecting its integrity, Kennedy writes that these asserted interests do not overcome the government's "heavy burden when it seeks to regulate protected speech."[98] Instead, Kennedy proposes that "counterspeech" may well suffice to "overcome the lie."[99] For example, the government could create a database listing Congressional Medal of Honor winners, which would make it "easy to verify and expose false claims."[100]

Kennedy's understanding of the First Amendment as applied in *Alvarez* comes across in these lines as highly libertarian. There is not much in Kennedy's opinion in *Alvarez* to suggest that he is concerned about the common good implications of evacuating the Stolen Valor Act of its effectiveness. Rightly understood, the common good not only includes the promotion of truth but also the punishment of certain lies which violate public confidence in institutions such as the military awards system. Kennedy's suggestion of alternative means such as creating a database of medal winners through which the government can achieve its interest of upholding the Congressional Medal of Honor's integrity is not a serious effort to remedy a pervasive public problem, as Congress sought to remedy through the Stolen Valor Act. Mere "counterspeech" cannot *regulate* the conduct of others who seek to profit from achievements that are not theirs; that is, it may promote truth, but it cannot punish lies. Under Kennedy's proposed framework, liars would perhaps face a greater risk of being discovered, but they still would not be held accountable for it by the federal government. A more restrictive means than counterspeech or a database is necessary to achieve the government's compelling interest here.

Once again in *Alvarez*, Justice Alito authors a dissenting opinion in a free speech case in which he reasons morally about the law and the common good implications of speech restrictions. I identify three ways in which Alito's

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95. *Id.* at 717, 719.
96. *Id.* at 722.
97. *Id.* at 723.
98. *Id.* at 726.
99. *Id.* at 726–27.
100. *Id.* at 729.

dissent in *Alvarez* properly falls under the heading of common good constitutionalism. First, Alito defers to the legislative judgment of Congress that only by criminalizing "stolen valor" can the government protect the integrity of the military honors system, as false claims of individuals asserting to have won the Congressional Medal Honor have proliferated into a serious public problem that counterspeech alone cannot resolve. Second, Alito contends that the First Amendment is not a libertarian free-for-all that protects speech even when such protection comes at the expense of that integrity; in short, the First Amendment values different things from what the majority claims it does. Third, and relatedly, Alito emphasizes that, like the crush videos in *Stevens*, the speech at issue here has little to no value. False statements are unworthy of First Amendment Protection in their own right.

First, Alito acknowledges that stolen valor has become a serious problem of public significance; that is, it threatens the common good (though Alito does not explicitly use this phrase). Perhaps one or two individuals lying about their award status might not be a serious social problem to be resolved by congressional legislation. However, the Stolen Valor Act was passed "in response to a proliferation of false claims concerning the receipt of military awards. For example, in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of Honor…. When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award," among several other examples of false claims.[101] Unlike the majority which seems to treat Alvarez as a uniquely pathological liar,[102] Alito recognizes that stolen valor threatens the common good by encouraging fraudsters to make false claims that cause substantial harm to society in two ways. On one hand, false claimants often receive "financial or other material rewards, such as lucrative contracts and government benefits."[103] Furthermore, Alito identifies a "less tangible harm" in stolen valor in that it "tend[s] to debase the distinctive honor of military awards" and serves as a metaphorical "slap in the face" to veterans who have actually won the Medal of Honor and their families.[104] Congress concluded that only the criminalization of such behavior would be sufficient to end this public problem, and the Court should defer to this judgment absent a truly compelling free speech concern. Counterspeech, including the majority's suggestion to create a database of "actual medal recipients," simply "will not work" to remedy this widespread and complex issue in practice, not in the least because the Department of Defense admitted its inability to create such a database.[105]

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101. *Id.* at 741–42 (Alito, J., dissenting).

102. In the opening paragraph of Kennedy's majority opinion, for example, Kennedy begins by detailing a list of other somewhat lunatic lies that Alvarez had previously made: "Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico." *Id.* at 713.

103. *Id.* at 743 (Alito, J., dissenting).

104. *Id.*

105. *Id.* at 744.

Second, Alito's overall understanding of the purposes of the freedom of speech and the First Amendment is distinctively common good constitutionalist. Although the large scale of and damaged caused by stolen valor does not invalidate the requirement that the Court engage in a First Amendment free speech analysis to examine whether such speech is protected, Alito maintains that the seriousness and public significance of this problem weighs heavily in favor of the argument that Alvarez's speech is unprotected. Alito argues that the purpose of First Amendment's freedom of speech clause is not really in tension with other values such as the integrity of the military honors system when one reads the First Amendment in light of important public symbols and institutions. Alito inserts an analogy into his dissent that captures this different understanding succinctly: It would be ridiculous to argue that the First Amendment protects "a dollar given to a homeless man falsely claiming to be a decorated veteran" as "more important in the eyes of the First Amendment" than "damage caused to the very integrity of the military awards system" by this action.[106] In other words, the law of the First Amendment does not go so far as to protect stolen valor because the purposes of the First Amendment necessarily entail considering the implications of speech upon the common good.

Third, and relatedly, Alito's application of this understanding of the First Amendment to this case suggests that common good considerations must come into play when the Court is weighing the value of speech and the relevance of that value to the protected or unprotected status of that speech. As part of his First Amendment argument before the Court, Alvarez claimed that his lie was "nothing out of the ordinary" because "[e]veryone lies …. We lie all the time."[107] Alito judges this kindergarten-level morality (that doing something is permissible simply because other people are doing it too) as "radical" because such a principle would cover speech which would have "no intrinsic value" in society.[108] And like in *Stevens*, Alito writes that the speech at issue here has no intrinsic value and is thus unprotected by the First Amendment. Again, Alito points to a moral quality in the content of speech in making this argument. Some speech is more valuable than other speech, and the Stolen Valor Act prohibits only that speech which is "veritably false and entirely lacking in intrinsic value," which damages the integrity of the military awards system, and which does not risk infringing upon other matters of speech which may be valuable.[109]

Simply put, Alvarez's speech is so overtly false and so lacking in value to the common good (in fact, it gravely harms that good) that it is unworthy of protection under the noble and morally praiseworthy document that is the Constitution of the United States.

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106. *Id.* at 745.
107. *Id.* at 750.
108. *Id.*
109. *Id.* at 752.

CONCLUSION

Common good constitutionalism is neither a radical theory of constitutional interpretation nor does it require ignoring several decades of contemporary jurisprudence and returning to a bygone era. Rather, common good constitutionalism has been practiced in several contemporary cases, most notably in the area of the Supreme Court's free speech jurisprudence. Furthermore, this sense of common good constitutionalism is quite consistent with the more prominent interpretive philosophy of originalism. However, as more and more scholars and influential public figures have been discussing at length over the past few years, originalism's more positivist strains have tended to predominate among judges and legal scholars. Going forward, scholars and judges must read contemporary cases, both majority opinions and dissents, to recognize the elements of the Constitution's internal morality of the common good that are contained within them. This recognition can propel a new originalism of the common good into the common legal parlance and constitutional legal practice, even among those thinkers and actors who do not explicitly acknowledge their allegiance to common good constitutionalism.