The Case for Normative Originalism
A Conversation with Jameson Payne
Interview Conducted and Transcribed by Maclain Conlin
(All errors are my own.)

Maclain Conlin: Good afternoon, and welcome to Originalist Angles. My name is Maclain Conlin. Today, we are joined by a very special guest, Mr. Jameson Payne. Jameson earned a Bachelor's degree in physics and political science from Kent State University. During his last semester of studies at Kent, he wrote what would later be his first published law review article, *What Originalism Must Take from the Common Good*. He has since worked at the New Civil Liberties Alliance, and at the Heritage Foundation's Meese Center for Legal and Judicial Studies as a research associate. His research interests include early constitutional history, the 14th amendment, administrative law, and legal philosophy. Today, he joins us to discuss a new legal theory called common-good constitutionalism, and what it means for originalism. Mr. Payne, thank you for joining us.

Jameson Payne: It's a pleasure to be here.

MC: I'd like to start off by reading aloud a quote from your article that I just mentioned on originalism, which was published in the Harvard Journal of Law and Public Policy last year. In the second paragraph, you wrote the following: "Like physics in the twentieth century, so too comes the conservative constitutional conversation to a crucible. In wake of the Supreme Court's ruling in *Bostock v. Clayton County*,...many prominent conservative thinkers have taken to assailing the legitimacy of originalism as a means of upholding our rule of law. The nigh-unanimous laudation of originalism that has been enjoyed in conservative legal circles for the past three decades has experienced an unprecedented level of disruption and cynicism. The question that now rears its head is such: Will the 'Originalist Ideal' too be overthrown?" There's a lot to cover here, but I would like to begin by asking two questions: (1) How would you define originalism? And (2) why are many conservative legal thinkers now starting to question it? What happened in the last three years?

JP: Absolutely. It's not just that they're questioning how we should be doing originalism-they are also asking, more fundamentally, what *is* originalism? This is something that, although it's been exacerbated in recent times, has always been floating around in academic and political circles. What is originalism? You can't really speak of originalism as a sort of monolithic ideal, but at its most general level, originalism is the idea that when we are judging what a law is and what it does, we should give attention to the original meaning of the law. How would someone at the time of the law's enactment interpret that law? For the Constitution, that of course means the 1790s for the main body of the Constitution, the nineteenth century for the Reconstruction Amendments, and so on. But there's a lot to unpack there, because one of the key questions is what does "original meaning" actually mean? There are different approaches to this. Some people say that it should be a well-educated person from the time of enactment. That would be the "original public meaning." Some people say it should be the "original intent"-what did the drafters think about this law? What did they understand themselves to be doing? Another way is "original legal meaning"-how would a lawyer interpret that provision at the time? There's a lot of ambiguity as to what originalism is, but that's a high-level overview of it.

MC: Thank you for that. As I mentioned before, you also discussed the case of *Bostock v. Clayton County* in your piece. I know we can't go into all the intricacies of that case, but what surprised so many conservative legal scholars about *Bostock*? What is the "*Bostock* moment"?

JP: What surprised most people about *Bostock* is of course the outcome. One of the things that you need to understand-and Adrian Vermeule makes this point in his book *Common Good Constitutionalism,* and I think this point is correct-is that originalism cannot just be understood as an intellectual idea that came from nowhere and rooted itself in the legal world. It was, fundamentally, a political movement. It was a reaction against what was perceived as the exuberance of the Warren Court and the belief that the judiciary was going too far in its task of interpreting the law, and starting to bring in too many political considerations. Originalism was an attempt to rein in the perceived overbearings of the Court. That's how it originated.

Originalism wasn't really an outcome-independent movement. The thought was that originalism was meant to bring back an ideal of how law should be interpreted and fits into our larger political movement. That's what makes *Bostock* such an interesting ruling. Both of the main opinions in that case-the majority opinion by Justice Gorsuch and the dissent by Justice Kavanaugh-are both originalist. They both say that they're originalist. It's not true that Gorsuch says he is a textualist. He writes that the law is to be interpreted by the original understanding of the text. He is working from an originalist framework when he does this. But he came to a conclusion that very few people saw coming. The question was what discrimination "on the basis of sex" means, and he said that discrimination "on the basis of sexual orientation" constitutes discrimination "on the basis of sex." He said that this was completely justified by the original meaning of the law. Not many self-identified originalists were happy about that.

This brings us to the main thrust of my article, which is that you can't talk about originalism outside of its moral and political metasystem. You have to ask yourself what the ideal political setup is. You have to ask what our constitutional structure is and where the judiciary falls into that. It's not just a question of doing originalism. It's doing originalism while being conscious of our role in a larger moral structure. The fact that you could have two originalists on the Court come to completely different conclusions shows that originalism, by itself, is an art, not a science, and that it has both a moral and political touch to it.

MC: Would you consider yourself, to use Josh Hammer's phrase, a "common good originalist"? How would you define your legal philosophy?

JP: I don't use that term myself usually because I think the term "common good" carries some valence to it. Obviously, when you hear the words "common good," you're thinking of people like Josh Hammer and Adrian Vermeule. Josh Hammer's work is great, but I don't call myself that. I would call myself a "normative originalist." I'm an originalist, and I think we should do originalism, but I also want to ask *why* we do originalism. What's the point of doing so? It's not like math, where 2+2=4 and if you get the wrong answer it's because you did the calculation wrong. It's a political art. You have to be conscious of the normative-and that's a philosophical way of saying "ethical"-foundations behind what you're doing.

MC: You mentioned the work of Professor Adrian Vermeule. Many scholars, including Vermeule, have developed an alternative to originalism called common-good constitutionalism. Would you mind offering a summary of that theory for our readers?

JP: Vermeule's work is more of a theory of government. His theory is that the point of government, and this is a quote, is to, "help[ ] direct persons, associations, and society generally towards the common good, and that strong rule in the interest of attaining the common good is entirely legitimate." He then explicates in his book *Common-Good Constitutionalism* what he thinks the common good is, although obviously many people will have their own ideas about what the common good is. His main theory is that there are two types of law. First and foremost, there is *ius,* what we might in the American tradition refer to as the common law (although he's not necessarily working from a common law structure). He argues that there are unwritten legal principles that are in the background of every legal decision that we make. We can't necessarily articulate all of them, but we can articulate some of them, and we do that through written law. He calls that *lex.* Basically, he's rejecting a system called positivism, which holds that judging is more like a science. It asserts that judging is more like a calculative task, where there is always a right answer which can be predetermined by what you put into it. You put in the law, and you have this machine that gives you a right answer based on the factual circumstances. He's saying that that isn't always how this works. He's saying that there are background moral principles that we have not enumerated which nevertheless determine how the law is structured.

The issue he takes with originalism is that he perceives it as being positivist, and therefore not considering the full scope of moral principles that one ought to when they're serving in the role of a judge. That's a very broad overview. It's similar to the wider natural-law theory in general, which holds that legal questions are inherently ethical and normative.

MC: It's hard to put a theory like this into a small box, but is it almost like an avoidance canon? Does it basically say that if there's a plausible way to interpret a written law that would not cause it to conflict with the natural law, a judge should interpret it that way? I'm just trying to clarify your view of how Professor Vermeule's approach would be different from originalism in practice.

JP: That's one of the things that I really take issue with in his reading. To his credit, he does give some examples of what he thinks common-good constitutionalism would look like in practice. He says what he thinks the implications are for executive power, free speech, and so on. He does give some examples near the end of his book. But the idea of "common good" is a really amorphous concept, and he admits in his book that it is subject to reasonable disagreement. Different classical lawyers will ultimately have different understandings of what the common good is.

I wouldn't phrase it exactly as an avoidance canon. He would put the natural law prior to everything else. It's not like you're reading the law and then the common good comes in. I think he would say that the natural law takes root in every single step. It's just a background that you're always conscious of when you're judging, although he does bring up examples where the text of the law is unequivocally against the natural law. He brings up the famous case of the person who killed their grandfather to inherit their estate. Can you inherit an estate that you killed for, even if the text of the estate law says that you can? That's an

example of where maybe you could view it as an avoidance canon. But like you said, it is hard to put it in a small box because of how amorphous it is.

MC: You mentioned that you would consider yourself a normative originalist. Are there any cases where you think originalists should be open to bringing in principles that are not found in the text? How would you balance that?

JP: My view is that it's impossible to do judging without bringing in external moral considerations. My view is that originalism isn't done for no reason. It's done for political reasons, and if you look at the so-called founding fathers of the originalist movement, all of them would agree with me. Justice Scalia, for example, wrote a very famous law review article called *Originalism: The Lesser of Two Evils.* He didn't title it, *Originalism: This Is Just How We Do The Law*; he said the lesser of two *evils*. He's making a moral and political appeal. If you look at Edwin Meese, who gave a very famous series of speeches in the 1980s defending originalism, he makes appeals to notions of the separation of powers. I believe he even states that he is dependent on the moral structure of our system. Even old-school originalists say that we're doing originalism because it's politically desirable. This is what is good for the health of our system, structurally speaking.

This is where Vermeule starts to go wrong. He believes that it's impossible to start from moral premises and end up with originalism. He calls it a "hybrid theory of law." But the reason we're constraining the discretion of judges is for moral reasons. I would say that it's impossible to do judging without considering moral goods.

MC: How would you respond to those who argue that *Bostock* proved that originalism leads to problematic results?

JP: I have two points there. The first thing I would ask is, "Which originalism?" People say that *Bostock* can be justified under originalism, but which one? If no one thought that this is how the law would be interpreted for fifty years, many originalists would say that it's not an originalist outcome. If you use what may be called "semantic originalism," where you're not concerned with the original applications, but just the original semantic reading of the text, even if the framers of the law did not anticipate those outcomes, that is a type of originalism, which might be what some critics are getting at. But this leads us to the key question: How do you distinguish the two? How do you choose which system you want to use? It's not like a law of physics, where you have to use semantic originalism over original applications originalism. The thing that distinguishes them is which one is politically more desirable. To that, I would say that if you're getting seemingly crazy, unexpected results, then that's a political consideration against using that kind of originalism.

I will also say that an undesirable outcome in a particular case does not necessarily render your theory of law illegitimate. The whole point of law is that you're biting the bullet and allowing less desirable outcomes for a higher-order good, or a lesser evil, which is less discretion in the judiciary. I think that one of the reasons why originalism is desirable is because the judiciary is the least-suited branch to political discretion. It's designed to be insulated from popular accountability. That's why having a very precise,

rules-based form of originalism is good, because even if you get some bad results, you're still getting a lesser evil at the end. Those would be my two responses.

MC: Stepping away from originalism and the judiciary for a moment, what do you think about Professor Vermeule's broader views about how government should be structured? He seems very opposed to libertarianism, for example.

JP: Since reading his book, I haven't followed too closely all the statements he's made about what he believes the common good is. But I will say, as Justice Holmes wrote, "Even a dog knows the difference between being tripped over and being kicked." People know that when you're talking about either common-good constitutionalism or originalism, you're not talking only about this abstract theory of law. You're talking about something that holds political baggage. When you're talking about common-good constitutionalism, you're talking about something that holds political connotations. This is one of the reasons that I think Vermeule's theory in particular is not very appealing. The political connotations of his theory have a view of administrative law and politics in general that I don't think is very conducive to the American ethos. I think originalism, in grounding its moral appeals in what makes American political culture distinct and focusing on the understanding of the framers, makes its political connotations a little more appealing. Of course, the personal views of the person who came up with a theory are not determinative in whether that system should be used. I showed that you can use common-good principles to get to originalism. I think Vermeule's principles will have a hard time gaining traction, especially when they're contending with originalism. We'll see, I suppose.

MC: That's true. I wonder what the conservative legal movement will look like in twenty years. Also, while our readers can certainly take a look at your article on this topic and the work that you mentioned by Justice Scalia, are there any other normative defenses of originalism that you would recommend they start reading if they want to learn more about this topic?

JP: Yes, definitely. I cite several of them in my paper. I don't know some of the titles off the top of my head, but John McGinnis, Michael Rappaport, and Joel Alicea have all written excellent work on this topic. I'm sure that I am leaving others out. Lee Strang has written a book talking about the reconciliation of natural law with originalism. That is certainly worth reading.

Judge Neomi Rao gave a speech called the Sumner Canary Memorial Lecture. It's up on Youtube, and it's very good. The speech references a lot of the points that I have brought up today, and emphasizes that there are plenty of legitimate political reasons to be an originalist.

Definitely check the footnotes of my article, because I cite many of these works.

MC: Thank you for that. I have found our discussion to be fascinating, and I hope that our readers will as well!

JP: Thank you for having me!