

## TOWARD A LIBERAL COMMON GOOD CONSTITUTIONALISM FOR POLARIZED TIMES

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Adrian Vermeule urges his fellow conservatives to change the way they think about the American Constitution. Instead of maintaining a constitutionalism that emphasizes aggregating popular preferences, limiting government, and securing individual rights, he promotes a constitutionalism that emphasizes the common good and cultivates the attitudes and competences requisite to its pursuit. Vermeule calls his constitutionalism a “common good constitutionalism.”<sup>1</sup> For the common good

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\* Robert Kent Professor of Law, Boston University School of Law. Professor McClain was uncertain initially whether to accept the invitation to contribute to this symposium after, to put it diplomatically, Professor Vermeule’s dismissive treatment of her feminist commentary on his book, *Common Good Constitutionalism*, in the *Balkinization* symposium on the book. However, after consulting with her colleague Gary Lawson, a prominent conservative legal scholar, who assured her that this journal has a broad readership, she agreed. The old hymn she used to sing as a child at Redeemer Lutheran Church in Toledo, Ohio came to mind: “Untold millions are still untold, untold millions are outside the fold.”

\*\* The Honorable Paul J. Liacos Professor of Law, Boston University School of Law. In this article, we have drawn from, while reworking, two blog posts we previously published. We are grateful to Jack Balkin and to Sotirios A. Barber and Stephen Macedo for permission to do so. Linda C. McClain, *Reasons to Doubt Whether “the Best Way Forward Is To Look Backward”*: Commentary on Adrian Vermeule, *Common Good Constitutionalism*, *BALKINIZATION* (July 12, 2022), <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [https://perma.cc/T7HW-MLGB]; Sotirios A. Barber, Stephen Macedo & James Fleming, *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, *THE CONSTITUTIONALIST* (Jan. 26, 2021), <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [https://perma.cc/9M5R-DKMA].

1. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION* (2022).

constitutionalist, a government is established primarily to do good things for people. Pursuing what it sees as real goods, not just apparent goods, Vermeule's constitutionalism assumes objective standards of political morality. It envisions an active government, including a strong president, a strong administrative state, and judges exercising reasoned judgment about which results would contribute to the general welfare, correctly understood, not necessarily as understood by the American founders. Above all, Vermeule's constitutionalism would raise Americans above their unreflective preferences and self-indulgent inclinations.<sup>2</sup>

Thus, Vermeule's version of common good constitutionalism is a species of positive constitutionalism, and these two types of constitutionalism are neither new nor inconsistent with American traditions. Both the Declaration of Independence and the Constitution's preamble assume a government dedicated chiefly to public purposes.<sup>3</sup> A pro-government ends-orientation pervades the *Federalist Papers*.<sup>4</sup> Representatives of a common good constitutionalism include Alexander Hamilton, John Marshall, Abraham Lincoln, and Franklin Roosevelt.<sup>5</sup> Liberals in the positive tradition include Cass Sunstein and Stephen Holmes, Joseph Fishkin and William Forbath, Frank Michelman, Walter Murphy, Lawrence Sager, Sotirios Barber, and Stephen Macedo.<sup>6</sup> We put

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2. *Id.* at 7–9, 42–43.

3. For example, the preamble proclaims public purposes for which the Constitution and government are established: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." It hardly states, as negative constitutionalists seem to presuppose, that We the People established government primarily to limit government.

4. See SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 35–55 (2007).

5. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 150 (2003).

6. See STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (2000); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY

ourselves in this group as well.<sup>7</sup> Label it a common good constitutionalism, a positive constitutionalism, or an ends-oriented constitutionalism: This is the only constitutionalism that can make sense of the American Founding as a rational act, for no rational agent would establish a government *de novo* for the chief purpose of restraining its operations. As Barber, Macedo, and one of us (Fleming) have argued, when the American story is told, power wielded for the common good, and therewith a common good constitutionalism, will be the only constitutionalism that has a chance against challenges like climate change, rolling pandemics, economic injustice, racial and gender injustice, uncontrolled technological change, advancing oligarchy, and recrudescing white Christian nationalism in the United States.<sup>8</sup>

The version of antiliberal common good constitutionalism offered by Vermeule, however, is not appropriate to our circumstances of moral pluralism, and would not be acceptable to our morally and politically diverse and divided people. We need instead a forward-looking liberal common good constitutionalism for our polarized times. In *Common Good Constitutionalism*, Vermeule asserts that breaking with the last few generations of constitutional interpretation by looking “backward for inspiration” to “classical law” is the “best way forward” to “restore the integrity

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CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (1979); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY* (2007); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2006), BARBER, *supra* note 5; STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990).

7. See JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 9–10 (2013).

8. Sotirios A. Barber et al., *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, *THE CONSTITUTIONALIST* (Jan. 26, 2021), <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [https://perma.cc/9M5R-DKMA].

of our law and of our legal traditions.”<sup>9</sup> Vermeule bluntly contends that “our public law” oscillates fruitlessly between two interpretive “camps,” originalism and progressivism. He would replace this “exhausted opposition” with a third approach, “common good constitutionalism.”<sup>10</sup> This approach would recover and adapt “the classical tradition” as “the matrix within which American judges read our Constitution, our statutes, and our administrative law.”<sup>11</sup> This classical legal tradition, Vermeule contends, predated “the founding era” and remained “central” to the American legal world until the mid-twentieth century.<sup>12</sup> Vermeule describes this tradition variously, for example: (1) the “*ius commune*”—“the classical European synthesis of Roman law, canon law, and local civil law;” (2) the “ordinary cosmology” of “divine law, natural law, and civil or ‘municipal’ law;” (3) a blend of natural law and natural rights; and (4) a mix of civil law, natural law, and the law of nations.<sup>13</sup> But whatever the description of the classical tradition to which Vermeule would look backward, there are good reasons to resist this disruptive move.

For disruption is, indeed, what Vermeule seeks. Using Ronald Dworkin’s famous image of legal interpretation as writing a long “chain novel,” Vermeule calls for “rip[ping] up . . . the last few chapters of” or “substantial segments” of that novel—sometimes reinterpreting certain “chapters” in “drastic terms.”<sup>14</sup> Vermeule does not spell out the full scope of the disruption, but the examples that he does give concerning constitutional liberty and equality are deeply troubling, as is his fiery rhetoric. For example, he would have some of the Court’s prior articulations of the scope of personal autonomy protected by Due Process liberty “stamped as abominable,

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9. See VERMEULE, *supra* note 1, at 183.

10. *Id.* at 1.

11. *Id.*

12. *Id.* at 2.

13. *Id.* at 54–56.

14. *Id.* at 181.

beyond the realm of the acceptable forever.”<sup>15</sup> He characterizes the Court’s landmark decision, *Obergefell v. Hodges*, which held that same-sex couples have the fundamental right to marry, as “an attempt to break a traditional and natural legal institution [marriage] by sheer force of will in the service of a liberationist agenda.”<sup>16</sup> Furthermore, Vermeule says little about how a revived and adapted classical tradition would address problems of gender and racial inequality recognized by current Supreme Court jurisprudence as incompatible with the Fourteenth Amendment.

Again, what he does say is troubling. One of the few times he discusses racial and gender inequality is in a mocking account of the “liturgy” of “progressive constitutionalism,” in which he contends, “Whatever the question, whether race relations, women’s rights, gender identity, or what have you, the *bien-pensant* judge should always be able to say, ‘We have made progress, but there is still much to do.’”<sup>17</sup>

In this article, we will begin with two points on which we agree with Vermeule: the necessity for (1) a “moral reading” of the U.S. Constitution rather than an originalist reading and (2) a positive constitutionalism instead of a view of the Constitution as simply a charter of negative liberties. We will then raise several concerns about Vermeule’s disruptive project: (1) the historical role of appeals to natural law and divine law in justifying sex and race inequality, including in family law, marriage, and civil society; (2) Vermeule’s caricatured depiction of what he calls “progressive constitutionalism”<sup>18</sup> and his emphatic rejection of autonomy as a basis for Due Process liberty; and (3) the seeming absence of the role of deliberation by the people about the common good and of

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15. *Id.* at 42 (criticizing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added). See *infra* text accompanying notes 108–111 for further discussion.

16. *Id.* at 133.

17. *Id.* at 119. For more on his caricatured depiction of “progressive constitutionalism,” see *infra* text accompanying notes 52–54.

18. See *id.* at 117–20 (describing “progressive constitutionalism” as the “main competitor” to originalism).

appreciation of reasonable moral pluralism in his conception of common good constitutionalism. We close by sketching an alternative liberal common good constitutionalism for our morally pluralistic and politically polarized people.

I. TWO POINTS OF AGREEMENT:  
MORAL READING OF THE CONSTITUTION AND POSITIVE  
CONSTITUTIONALISM

First, we agree with Vermeule that originalism is an “illusion” because it fails to recognize that constitutional interpretation requires judgments about the best understanding of principles of political morality.<sup>19</sup> Here, Vermeule credits Dworkin’s call for “moral readings of the Constitution” — though he “emphatically” rejects Dworkin’s liberal moral commitments and liberal account of rights.<sup>20</sup> Vermeule is right to characterize “living originalists” as moral readers.<sup>21</sup> Here he echoes<sup>22</sup> the earlier argument of one of us (Fleming), in *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*, that once originalists—including proponents of “living originalism” such as Jack Balkin—recognize that the Constitution includes broad and abstract moral terms (such as “liberty” and “equality”) whose meaning embodies broad, abstract principles of political morality, and not just relatively specific original meanings or a deposit of concrete historical

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19. *Id.* at 91–92.

20. *Id.* at 5–6. The term “moral reading of the Constitution” is from RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

21. VERMEULE, *supra* note 1, at 97–99.

22. Randy E. Barnett, *Enter Conservative Living Constitutionalism*, REASON (Apr. 3, 2020, 8:21 AM) <https://reason.com/volokh/2020/04/03/enter-conservative-living-constitutionalism/> [https://perma.cc/73WJ-5SUA] (“Sound familiar? Jim Fleming call your office. You have a new convert, though he’s not exactly what you hoped for (and he doesn’t cite you). He’s just across the river, so you guys should get together and hash this out over lunch.”).

practices as of 1791 or 1868, they have left originalism behind.<sup>23</sup>

We also agree with Vermeule's project of common good constitutionalism to the extent that it recognizes the need for a *positive constitutionalism* and appeals to the positive aims for establishing a government set out in the preamble. Again, as Barber, Macedo, and Fleming argue, "positive constitutionalism is neither new nor inconsistent with American traditions" and properly moves from protecting "negative liberties" against government to pursuing positive ends through government.<sup>24</sup> It views government as dedicated chiefly to public purposes. In *Ordered Liberty*, we embraced this view, arguing that the Constitution is "a charter of *positive benefits*: an instrument for pursuing good things like the ends proclaimed in the Preamble, for which We the People ordained and established the Constitution."<sup>25</sup>

Of course, there is no single account of how to interpret those ends or "the common good"—here, Vermeule and we part company. We have argued for a constitutional liberalism that includes, among other things, a "formative project" of cultivating civic virtues and capacities necessary to secure ordered liberty.<sup>26</sup> Both in *Common Good Constitutionalism* and in other writings, Vermeule is a sharp critic of liberalism and would likely characterize our approach as a species of problematic "progressive constitutionalism" (more on that below). Vermeule instead offers a "moral reading" that looks to the classical tradition to flesh out the common good. We now turn to why this is a disruptive, even subversive project.<sup>27</sup> Below, we sketch our own long-term project of developing a common good liberalism for polarized times.

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23. JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 125–41 (2015) (analyzing JACK M. BALKIN, LIVING ORIGINALISM (2011)).

24. Barber et al., *supra* note 8.

25. FLEMING & MCCLAIN, *supra* note 7, at 114. See also *id.* at 277 n.25 (criticizing, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

26. *Id.* at 9–10, 112–45.

27. Barber et al., *supra* note 8.

## II. APPEALS TO NATURAL LAW AND DIVINE LAW IN JUSTIFYING SEX AND RACE INEQUALITY

Consider again what's in the "stew"<sup>28</sup> of the classical legal tradition that Vermeule would revive and adapt. For example, Vermeule explains that Blackstone's *Commentaries*, "the main legal resource for many of the Constitution's framers and ratifiers," were structured "around divine law, natural law, and civil or 'municipal' law—the ordinary cosmology of the classical law."<sup>29</sup> Divine law, natural law, and civil law have all starred in justifying status hierarchy in marriage as well as the exclusion of women—married or unmarried—from full participation in civic, political, and economic life.

Blackstone's account (in the *Commentaries*) of the disabilities to which wives were subject under the common law model of "coverture" marriage—during which "the very being or legal existence of the woman' was suspended 'during the marriage or . . . incorporated and consolidated into that of the husband'"—traveled to the colonies.<sup>30</sup> It became "the common currency of legal and political descriptions of marriage," shaping the law of domestic relations in the states.<sup>31</sup> Coverture's marital unity meant that the husband became the "one *full* citizen in the household," the political and legal representative of his wife, with his "authority over and responsibility for" her and his other "dependents" enhancing his

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28. VERMEULE, *supra* note 1, at 21 (referring to the *ius commune* as "the rich stew of Roman law, canon law, and other legal sources that formed the matrix within which European legal systems developed" and that shaped "Anglo-American law"). *See also id.* at 54–56 (giving other formulations of what is included in the classical legal tradition).

29. *Id.* at 53–54.

30. *See* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 115–16 (2000) (observing that Blackstone's description of coverture was "relied on by voices on all sides of the political spectrum" in eighteenth and nineteenth century America).

31. *Id.*



“citizenship capacity.”<sup>32</sup> Further, as Nancy Cott explains, the founders assumed that Christian monogamous marriage would “underpin” the “new nation.”<sup>33</sup> Christian doctrine of spousal unity (“one flesh”) found in the Bible support for husbandly governance (headship) and wifely obedience.<sup>34</sup> In 1873, in *Bradwell v. Illinois*, concurring Justice Bradley famously appealed to “the constitution of the family organization, which is founded in the divine ordinance” as well as to “the nature of things” to rationalize the “domestic sphere” as that “which properly belongs to the domain and functions of womanhood” and “unfits” women for “many of the occupations of civil life” including, in that case, the practice of law.<sup>35</sup>

The gender revolution in the Supreme Court’s interpretation of the Equal Protection Clause in the 1970s and 1980s contributed to the dismantling of coverture marriage, a process that began through feminist advocacy and state law reform even in the nineteenth century.<sup>36</sup> In cases such as *Planned Parenthood v. Casey*,<sup>37</sup> the Court has looked back to Justice Bradley’s concurrence (joined by two other justices, reaffirming the “common-law principle” of a woman having no legal existence separate from her husband) to chart the gulf between those earlier conceptions of the family, marriage, women’s role, and the Constitution itself and present-day understandings.

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32. NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11–12 (2000); see also LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 56–60 (2006) (discussing role of marriage as model for self-government).

33. COTT, *supra* note 32, at 10.

34. *Id.* at 10–13.

35. 83 U.S. 130, 141 (1872).

36. For informative overviews, see generally LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011).

37. 505 U.S. 833, 896–97 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2248 (2022).

Similarly, in *Obergefell v. Hodges*, the Court observed that the “centuries-old doctrine of coverture” articulated by Blackstone was abandoned as society “began to understand that women have their own equal dignity,” and as women gained “legal, political, and property rights . . . .”<sup>38</sup> When Vermeule, alluding to Dworkin, speaks of ripping up recent chapters in the chain novel<sup>39</sup>—chapters that are “impossible to square” with the principles of classical law that offer the “best overall interpretation overall [sic] of our public law”<sup>40</sup>—he does not tell us of the fate of the transformation of family law and the law of marriage away from status hierarchy. Are these, under his distinctions, genuine developments, or are they “corrupt” and false ones?<sup>41</sup> By what criteria will revivers of the classical tradition separate what they carry forward from what they leave behind? Presumably, Vermeule does not seek to revive coverture marriage, with a wife’s suspension of identity, loss of property rights, duty to obey and serve her husband, or the husband’s right to physically “chastise” his wife and his immunity from the law of rape. But how will common good constitutionalists following Vermeule’s invitation decide how to adapt the classical tradition with respect to marriage and family?

In raising these questions, we want to disclaim a common tactic in our current circumstances of political and intellectual polarization: engaging in guilt-by-association attacks. For example, do you defend *Roe v. Wade*’s protection of a right to decide whether to terminate a pregnancy? So (allegedly) did the early twentieth century birth control movement. And since Margaret Sanger, a founder of Planned Parenthood, made racist remarks about population control and (allegedly) was a eugenicist, therefore, you and *Roe* support racial genocide and eugenics. We see suggestions

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38. 576 U.S. 644, 659–60 (2015).

39. VERMEULE, *supra* note 1, at 181.

40. *Id.* at 5.

41. *See id.* at 122 (enlisting Newman’s “notes” of “false or corrupt development” to assess *Obergefell*).

of guilt-by-association along these lines in Justice Thomas's statements in *Box v. Planned Parenthood of Ind. and Ky.*, where he traces the "foundations" of legalizing abortion to the early twentieth century birth control movement, observes that the American eugenics movement also developed at this time, and then falsely claims that "[m]any eugenicists therefore supported legalizing abortion . . ."<sup>42</sup> In *Dobbs*, discussing the supposed "motives of proponents of liberal access to abortion[,]" Justice Alito cites both to Thomas's *Box* concurrence and to a section of an amicus brief titled "The Eugenics Era Lives on through the Abortion Movement."<sup>43</sup>

We do not mean to make similar moves in the criticisms we make of Vermeule or the questions we pose about how he will adapt the classical tradition to contemporary constitutional controversies. For example, we do not mean to suggest: Vermeule favorably cites to sixth century Byzantine emperor Justinian's account of marriage in criticizing *Obergefell's* extension of the right to marry to same-sex couples;<sup>44</sup> Justinian believed (based on the Biblical story of Sodom's destruction) that same-sex sexual conduct caused natural disasters like earthquakes and he castrated persons found guilty of homosexuality;<sup>45</sup> and, therefore, Vermeule is consorting with

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42. 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). For a rebuttal of this false claim, see Paul A. Lombardo, "A Vigorous Campaign against Abortion": Views of American Eugenic Leaders v. Supreme Court Distortions, 51 J. L. Med. & Ethics 473 (2023); see also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

43. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2256 n.41 (2022) (citing Brief for African-American Organization et al. as Amici Curiae 14–21, and *Box*, 139 S. Ct. at 1782–84 (Thomas, J., concurring)). See also Lombardo, *supra* note 42.

44. VERMEULE, *supra* note 1, at 218–19 n.344 & n.346.

45. See John Corvino, *Homosexuality and Morality, Part 3: The Harm Arguments*, <https://johncorvino.com/2002/12/homosexuality-and-morality-part-3-the-harm-arguments/> [<https://perma.cc/8FJK-JRMW>] (earthquakes); VERN BULLOUGH, *HOMOSEXUALITY: A HISTORY* 33 (1979) (cited in Gayle Zive, *A Brief History of Western Homosexuality*), <https://www.csustan.edu/sites/default/files/honors/documents/journals/sexinstone/Ziv>

irrational retrograde ideas that may lead to appallingly reactionary conclusions today. Instead, we mean to suggest that when Vermeule claims to apply the classical tradition as a “method” or “framework” to contemporary controversies—but rejects the conclusions his preeminent forebears in that tradition reached—we need to know what is truly doing the work here, the classical “method” or a modern conservative sense of what positions are mandatory “fixed points”?

If we are to look to principles of Roman law, for example, presumably we reject practices such as Roman society’s status hierarchy of free citizens versus slaves, or its practice of “concubinage.”<sup>46</sup> Family law and religion scholar John Witte, Jr. has detailed the “creative convergence” or synthesis of, on the one hand, classical and early Christian ideas and traditions about marriage and family with, on the other hand, “modern liberties” concerning sex, marriage, and family life.<sup>47</sup> It took Enlightenment thinkers such as Mary Wollstonecraft and Frances Hutcheson, Witte concludes, to help push the Western legal tradition to “remove the many layers of patriarchy and coverture” and, eventually, to more fully realize in law itself ideals of sex equality in marriage and in the broader society.<sup>48</sup>

We would argue, as even some conservative critics of *Common Good Constitutionalism* such as James Stoner have done, that Vermeule doesn’t acknowledge the necessary role of liberalism in challenging unjust status hierarchies, including the status of women, and fostering the capacity for personal and deliberative

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e.pdf [<https://perma.cc/KK5N-CDRA>] (mentioning castration, although penalty was death).

46. JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 17–30 (2d ed. 2012) (detailing that, “[m]uch to the dismay of the early Church Fathers, Roman law recognized the institution of concubinage”).

47. JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES* 521–22 (2019).

48. *Id.*

self-government.<sup>49</sup> Vermeule does not tell us a similar tale of shedding status hierarchies, although he tells readers that constitutional law should elaborate “subsidiary principles” that include respect for “the hierarchies needed for society to function.”<sup>50</sup> He elaborates: “common good constitutionalism does not suffer from a horror of legitimate hierarchy, because it sees that law can encourage those subject to the law to form desires, habits, and beliefs that better track and promote communal well-being.”<sup>51</sup> Of course, we need to know: what is “legitimate” hierarchy and by what criteria do we make judgments about which forms of hierarchy to preserve or reject?

Vermeule mentions status hierarchies when he criticizes—or caricatures—progressive constitutionalism. He claims that progressive constitutionalism, with its “saint” of Justice Ruth Bader Ginsburg, has an “overarching sacramental narrative” of “the relentless expansion of individualistic autonomy.”<sup>52</sup> He characterizes it as driven by a “mythology of endless liberation through the continual overcoming of the reactionary past,” always seeking to produce rather than to fend off change.<sup>53</sup> As noted earlier, race relations, women’s rights, and gender identity are areas in which, on his account, a judge is expected as a progressive constitutionalist to say, “We have made progress, but there is still much to do.”<sup>54</sup> These mocking formulations prompt us to ask: were none of the race and gender hierarchies involved in prior Supreme Court cases properly challenged as unduly limiting human freedom and failing to realize equality? For example, Vermeule suggests that progressives seek liberation from family, but how

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49. James Stoner, *Wanted: A Constitutional Ethos*, LAW & LIBERTY (Aug. 31, 2022), <https://lawliberty.org/forum/wanted-a-constitutional-ethos/> [https://perma.cc/S5S8-K3MG].

50. VERMEULE, *supra* note 1, at 37.

51. *Id.* at 38.

52. *Id.* at 119.

53. *Id.* at 117–19.

54. *Id.* at 119.

would he evaluate the role of constitutional law—invoking evolving understanding of the status of women under the Constitution and in society—in dismantling the gender-based status hierarchy embedded within the classical law’s model of marriage discussed above? We heard more in a single panel at the conference about sexism and racism being affronts to human dignity than we can find in Vermeule’s entire book.<sup>55</sup>

Vermeule clearly believes that one legitimate family hierarchy would limit the definition of marriage to one man and one woman. Enlisting natural law and the writings of Justinian,<sup>56</sup> he criticizes *Obergefell*’s extension of the fundamental right to marry to same-sex couples. Vermeule argues that common good constitutionalism would recognize that marriage is “a natural and moral and legal reality simultaneously.”<sup>57</sup> Marriage is “a form . . . constituted by the natural law in general terms as the permanent union of man and woman under the general *telos* or indwelling aims of unity and procreation (whether or not the particular couple is contingently capable of procreating).”<sup>58</sup> On that view, “for the civil authority to specify in law that marriage can only be the union of a man and a woman fits the *telos* of the institution and thus determines through the civil law what the natural law prescribes in any event.”<sup>59</sup> *Obergefell*, thus, “warped the core nature” of marriage by “forcibly removing one of its built-in structural features,” namely, reproduction.<sup>60</sup> Instead, Vermeule praises Justice Alito’s dissent for observing that, “for millennia, marriage was inextricably linked to

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55. Emphasizing “equal dignity,” panelist Professor Michael Foran stated that racism and sexism were inconsistent with a natural law approach. See Michael Foran, *Equal Dignity and the Common Good*, 46 HARV. J. L. & PUB. POL’Y 1009 (2023).

56. VERMEULE, *supra* note 1, at 218 n.344.

57. *Id.* at 131.

58. *Id.* at 131–32.

59. *Id.* at 132.

60. *Id.*

the one thing that only an opposite-sex couple can do: procreate.”<sup>61</sup> Vermeule also embraces the *Obergefell* dissenters’ unjustified charges that Justice Kennedy’s majority opinion tarred traditional religious believers with the brush of “bigotry.”<sup>62</sup>

While Vermeule invokes Justinian, this teleological argument closely parallels familiar contemporary arguments about marriage asserted (unsuccessfully) in constitutional litigation by conservative political theorist Robert George and coauthors Sherif Girgis and Ryan Anderson.<sup>63</sup> Elsewhere we have challenged that argument against civil marriage equality as inconsistent with contemporary family law and constitutional law,<sup>64</sup> and will not repeat those arguments here. Our concern here is what present-day interpreters of the U.S. Constitution take on board when they look to the classical tradition for guidance about constitutional rights, including the right to marry. In the United States, well into the twentieth century, defenses of racial segregation, including restrictions on interracial marriage, frequently appealed to divine law and natural law, along with unchanging moral principles on which the U.S. was established.<sup>65</sup> Further, as one of us (McClain)

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61. *Id.* at 133 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 738 (2015) (Alito, J., dissenting)).

62. *Id.* at 131. For an argument that Justice Alito’s charge is unjustified, see LINDA C. MCCLAIN, WHO’S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 154–57, 178–79 (2020).

63. *United States v. Windsor*, 570 U.S. 744, 814–16 (2013) (Alito, J., dissenting) (citing SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23–28 (2021), as offering a “philosophical” account of the “conjugal” view of marriage).

64. FLEMING & MCCLAIN, *supra* note 7, at 170–76 (criticizing Manhattan Declaration drafted by Robert George, Timothy George, and Chuck Colson); Linda C. McClain, *Civil Marriage for Same-sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 87, 92–94, 108–115 (Timothy Samuel Shah et al. eds., 2016).

65. A familiar text is the lower court opinion in *Loving v. Virginia*, 388 U.S. 1, 3 (1967). See generally FAY BOTHAM, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW (2009). For examples of appeals to divine and natural law offered in defense of racial segregation and in criticism of *Brown v. Board*

elaborated in *Who's the Bigot?*, the “theology of segregation” and the “theology of integration” offered starkly contrasting appeals to divine law as well as to how “founding” principles should shape constitutional interpretation and civil rights laws.<sup>66</sup> Vermeule’s book is notably silent about problems like religiously-inspired racism and white supremacy.

One of us (McClain) made these criticisms and posed these questions in a symposium on Vermeule’s book on the legal blog, *Balkinization*.<sup>67</sup> In his dismissive reply, Vermeule stated that he had nothing to say about these criticisms and questions because McClain had failed to understand that *Common Good Constitutionalism* proposes a “methodological framework for approaching questions of constitutional lawmaking and interpretation” rather than taking on “particular laws and customs from a point in time and apply[ing] them uncritically today.”<sup>68</sup> He added, “Some historically existing rules and customs were

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*of Education*, 347 U.S. 483 (1954), see MCCLAIN, WHO’S THE BIGOT?, *supra* note 62, at 76–102. Preventing interracial marriage (or racial “amalgamation” contrary to divine law) was a key argument offered against desegregation in education. *Id.* at 81–86.

66. MCCLAIN, WHO’S THE BIGOT?, *supra* note 62, at 76–102. In using the term, “theology of segregation,” WHO’S THE BIGOT? refers to several “characteristic features” in sermons, speeches, and other texts from the 1950s responding to *Brown*, among them: (1) “the appeal to the Bible to identify God as the author of racial differences, as segregating the races, and as prohibiting intermarriage and amalgamation;” (2) “the positing of a God-given natural instinct in human beings to preserve racial purity;” and (3) the premise that “segregation is in keeping with American history, traditions, and constitutional principles.” *Id.* at 83. The “theology of integration” of the same era—reflected in denominational statements as well as sermons and speeches—includes such premises as: (1) “the practice of racial segregation is a blight on the Christian conscience;” (2) neither the Bible nor science supports racial segregation; and (3) *Brown* is in harmony with scriptural and constitutional principles. *Id.* at 86–91.

67. Linda C. McClain, *Reasons to Doubt Whether “the Best Way Forward Is To Look Backward”*: Commentary on Adrian Vermeule, *Common Good Constitutionalism*, BALKINIZATION (July 12, 2022) <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [<https://perma.cc/XY69-QYEX>].

68. Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (Jul. 27, 2022), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/D23G-PP8N>].



justifiable and others were unjust, according to the criteria of the classical approach itself,"<sup>69</sup> and further, "the methodological project is to translate and adapt the principles of the classical legal ontology into our world and to elicit the justificatory structure they imply."<sup>70</sup> But McClain's post on *Balkinization* acknowledged this distinction:<sup>71</sup> the point was to press Vermeule to articulate more fully what the criteria of the classical approach were and to spell out more fully how he would apply them to modern problems. The post asked him to illuminate how his common good constitutionalism would translate and adapt the classical tradition.

In other words, Vermeule objected that McClain did not understand that his project is to develop the classical tradition as a "method" or "framework"<sup>72</sup> for judgment, not as applications of that method. But his own arguments elide that distinction. For example, Vermeule refuses or declines to address questions of gender equality on the ground that he is developing a method or framework, but still confidently proclaims that the federal government must ban abortion<sup>73</sup> and that no state may choose even "to allow same-sex civil marriage."<sup>74</sup> Plus, to repeat the question which Vermeule has not adequately answered: if he wishes to detach the classical tradition, as a method, from its historical manifestations in racism and sexism, what are the criteria he will use in deciding when to criticize, and seek to eradicate, those historical manifestations and when to uphold them as "legitimate hierarchy" that accords with the telos of an institution?

In response to McClain's post on *Balkinization*, Julia Mahoney posted "A Common Good Constitutionalist Feminism?"<sup>75</sup> She

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69. *Id.*

70. *Id.*

71. McClain, *supra* note 67.

72. VERMEULE, *supra* note 1, at 71, 72.

73. *Id.* at 199 n.103.

74. *Id.* at 219 n.346.

75. Julia D. Mahoney, *A Common Good Constitutionalist Feminism?*, LAW & LIBERTY

repeated Vermeule's distinction between method and specific practices, and added: common good constitutionalism "should not necessitate the reinstatement of practices that contravene modern values[,]" which she finds reassuring. But then she adds: "the fact that common good constitutionalism can be so readily adjusted to changed circumstances compounds the mystery of whether it has much in the way of actual content."<sup>76</sup>

We agree that there is some "mystery" as to the actual content of Vermeule's common good constitutionalism. What we do know is hardly reassuring. Vermeule sketches an approach (adapted from St. John Henry Newman) for distinguishing between "legitimate and corrupt development"—or "genuine" and "corrupt" development—in constitutionalism to contrast the "developing constitutionalism" that he favors with the "progressive constitutionalism" that he rejects.<sup>77</sup> Vermeule explicates that Newman "articulated seven 'notes' of genuine development, as opposed to corruption;" "armed" with these, he labels *Obergefell* a "false or corrupt development"—an "anti-model" rather than a "model opinion."<sup>78</sup> He explains that the "essential aim" of Newman's theory of legitimate development is "profoundly conservative."<sup>79</sup> Using a tree analogy, he contrasts an acorn developing eventually into an oak (change that is consistent with growth) from an acorn mutating into a walnut.<sup>80</sup> Vermeule then contends that, although progressives claim the metaphor of the "living tree" for themselves, they actually seek not the "full growth" of principles and "faithful application of them," but, as "exemplified by *Obergefell*" and akin to "modernism in theology,"

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(August 24, 2022), <https://lawliberty.org/forum/a-common-good-constitutionalist-feminism/> [<https://perma.cc/54CS-8V23>].

76. *Id.*

77. VERMEULE, *supra* note 1, at 122–23.

78. *Id.* at 122–23, 131–33.

79. *Id.* at 123.

80. *Id.*

the “evolution of principles.”<sup>81</sup> Progressives, he argues, view the fundamental constitutional principles of the past as “benighted” and something to be “overcome.”<sup>82</sup>

What, exactly, is the difference between the “full growth” and “development” of constitutional principles like “liberty” and “equality” and their “evolution”? As one of us (Fleming) has argued elsewhere, the best interpretation of the broad clauses of the Constitution is as “aspirational principles,” not historical practices.<sup>83</sup> Further, sometimes the best interpretation requires breaking from traditions (understood as historical practices) (as Justice Harlan famously observed in his influential dissent in *Poe v. Ullman*<sup>84</sup>). *Obergefell* is in that vein. Observing that “the nature of injustice is such that we may not always see it in our times,” the Court noted that “new insights” about the meaning of the Constitution’s “central protections” (e.g., liberty and equality) led to striking down coverture laws (and other marriage laws upholding the husband/wife hierarchy), antimiscegenation laws, sodomy laws, and the marriage laws before the Court.<sup>85</sup> Vermeule scathingly criticizes progressive constitutionalism’s emphasis on evolution and new insights. At the same time, he insists that his project embraces recovering, adapting, and translating “into our world”<sup>86</sup> the classical tradition’s “principles” without taking on board and applying uncritically “the particular laws and customs from a point in time.”<sup>87</sup> In response to McClain’s earlier critique, Vermeule states that some of those historical practices were “justifiable” and “others were unjust according to the criteria of the classical tradition itself;” however, he declines to explain whether

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81. *Id.* at 124.

82. *Id.* as 123.

83. JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 28–30 (2022).

84. 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

85. *Obergefell*, 576 U.S. at 663–75.

86. VERMEULE, *supra* note 1, at 3.

87. Vermeule, *The Common Good as a Universal Framework*, *supra* note 68.

and how these internal criteria would apply to the classical tradition about marriage and gender hierarchy.<sup>88</sup>

Justice Ginsburg observed, in the VMI case, “[a] prime part of the history of our constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>89</sup> In this sense, the story of We the People has expanded. And so, we put the question as directly as we can to Vermeule: Agree or disagree? Has this been a proper extension within a common good constitutionalism? In the colloquy at the conference on his book, Vermeule avoided this question, protesting that it was not fair to expect him to have the expertise to answer every question that a disagreeing theory would pose.<sup>90</sup> Yet a commitment to gender equality is, as Cass Sunstein put it in his remarks at the conference, a “fixed point” in our constitutional practice that every theory, to be acceptable, must be able to fit and justify.<sup>91</sup> It is hardly an arcane, peculiar matter on which Vermeule should not be expected to have a view!

### III. DELIBERATION BY THE PEOPLE AND APPRECIATION OF REASONABLE MORAL PLURALISM

Remarkably, given his claim to be developing a common good constitutionalism, Vermeule gives no indication that he understands that the common good is a generic concept that is common to many political and constitutional theories, not a

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88. *Id.*

89. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

90. By way of answer, Professor Vermeule also referred to the work of symposium moderator ERIKA BACHIOCHI, *THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION* (2021). We do not attempt to evaluate Bachiochi’s theory of feminism in this essay, but notably, her book (published before *Dobbs*) criticizes abortion rights as a “putative right in search of constitutional justification” in *Roe* and *Casey* and also rejects Justice Ginsburg’s justification of abortion (in her dissent in *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007)) in terms of women’s autonomy and equal citizenship. *Id.* at 219–37.

91. Cass R. Sunstein, *Experiments of Living Constitutionalism*, 46 HARV. J. L. & PUB. POL’Y 1177 (2023).

concept that is peculiar to what he calls the classical tradition. For example, conceptions of civic republicanism like Michael Sandel's, conceptions of civic liberalism like William Galston's, Stephen Macedo's, or our own,<sup>92</sup> and conceptions of deliberative democracy like Cass Sunstein's are all theories of common good constitutionalism.<sup>93</sup> Sotirios Barber has given the literature's most thorough argument for such a theory.<sup>94</sup> Vermeule does not engage with any of these prominent and influential varieties of common good constitutionalism. Furthermore, unlike these theories of common good constitutionalism, Vermeule does not seem to contemplate deliberation by the people as public-spirited citizens concerning what constitutes the common good. Instead, he seems to contemplate that rulers will reason in the manner of the classical tradition and ascertain what is good for the people in common. Put another way, his common good constitutionalism does not appear to be government of the people, by the people, and for the people. It seems to be only one out of three: government for the people.

Let us imagine what would happen if proponents of a liberal variety of common good constitutionalism—for example, a civic liberal political theorist like Stephen Macedo—were to write extensively on the virtues of a comprehensive liberal perfectionism like that of John Stuart Mill,<sup>95</sup> and then were to write a book on common good constitutionalism. Let us suppose further that Macedo were to contend that his common good liberalism was a freestanding view that was ecumenical among competing comprehensive conceptions of the good life, that is, that it did not rest upon or presuppose any particular comprehensive liberal view

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92. See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); FLEMING & MCCLAIN, *supra* note 7, at 3, 183.

93. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

94. BARBER, *supra* note 5.

95. See JOHN STUART MILL, *ON LIBERTY* (1859).

like Mill's. We can be certain that many critics, especially conservatives who reject Mill, would be dubious and would argue that Macedo's common good liberalism not only would presuppose, but indeed would impose, a comprehensive liberal conception of the good life upon the polity.

Therefore, we want to make the corresponding point concerning Vermeule's common good constitutionalism. In other writings, he embraces a "Catholic integralism," which is a deep perfectionism concerned not merely with developing people's civic character but also with making them moral and saving their souls.<sup>96</sup> In his criticism of Patrick Deneen's *Why Liberalism Failed*, Vermeule advocates "bring[ing] about the birth of an entirely new regime, from within the old" by having true-believing antiliberals occupy its courts and bureaucracies and "nudge" the country in the right direction.<sup>97</sup> This paternalistic nudging would continue until liberalism "'is rooted out to the last fiber, the place where it grew being seared as with a hot iron.'"<sup>98</sup>

To be sure, in *Common Good Constitutionalism*, Vermeule indicates that he seeks to put aside or bracket deeper comprehensive religious views (like "Catholic integralism") from his common good constitutionalism,<sup>99</sup> which implies that he would maintain that the latter does not stem from the former. But liberals and non-perfectionist conservatives understandably will be uneasy and dubious concerning whether Vermeule can detach his common good constitutionalism from his comprehensive religious view, or whether he even wants to detach them.

In any case, Vermeule has complicated the task of positive

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96. See Micah Schwartzman & Richard Schragger, *What Common Good?*, THE AMERICAN PROSPECT (Apr. 7, 2022).

97. Adrian Vermeule, *Integration from Within*, 2 AM. AFF. 202 (2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> [<https://perma.cc/RW46-F9YF>].

98. *Id.* (quoting JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (Stuart D. Warner ed., Liberty Fund 1993) (1873), an emphatic rejection of Mill's *On Liberty*).

99. VERMEULE, *supra* note 1, at 29.

constitutionalists. Before he appeared, they could have argued that the negative constitutionalism of William Rehnquist<sup>100</sup> and John Roberts<sup>101</sup> had hobbled the national government's ability to serve the common good and that the nation should return to the positive constitutionalism of Alexander Hamilton and the New Deal. More is needed now, however, because of Vermeule. Before positive constitutionalists can make their affirmative case now, they must show that they create no more opening to rule by Catholic orthodoxy or a counter-reformation than to any other revolution.

Finally, Vermeule does not offer a persuasive reason why personal autonomy in making significant decisions is not a more persuasive reading of the "liberty" protected under the Due Process Clause than his antiliberal classical conception. On his conception, "rights, properly understood, are always ordered to the common good and that common good is itself the highest individual interest."<sup>102</sup> But there is no unitary understanding of the common good. It is not clear that Vermeule's trio of "peace, justice, and abundance"<sup>103</sup> maps well onto the practice of modern constitutional law, or, in any case, exhausts the common good.

Despite Vermeule's agreement with Dworkin's arguments for a moral reading of the Constitution over and against originalism, his own substantive moral reading fares poorly on Dworkin's two criteria of interpretation, fit with and justification of the extant constitutional practice.<sup>104</sup>

Vermeule promises that common good constitutionalism will render vulnerable the Court's jurisprudence on "abortion, sexual liberties, and related matters."<sup>105</sup> Vermeule wrote these words before Justice Alito's majority opinion in *Dobbs* overruled *Roe* and

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100. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

101. *Obergefell*, 576 U.S. at 701–02 (Roberts, C.J., dissenting).

102. VERMEULE, *supra* note 1, at 167.

103. *Id.* at 15, 35–40.

104. *Id.* at 6, 69.

105. *Id.* at 142.

*Casey*,<sup>106</sup> using the narrow approach to liberty taken in *Washington v. Glucksberg* and putting in question the entire “fabric” of constitutional liberty.<sup>107</sup> *Dobbs* itself portends disruption of constitutional practice, or tearing up chapters of the chain novel. Vermeule presumably supports the ruling in *Dobbs*, given his rejection of *Roe* and his characterization of the *Casey* joint opinion as “notorious.”<sup>108</sup> In dramatic rhetoric, he argues that *Casey*’s language about the right to “define one’s own concept of existence, of meaning, of the universe and of the mystery of human life”<sup>109</sup> should be “not only rejected but *stamped as abominable*, beyond the realm of the acceptable forever after.”<sup>110</sup> Vermeule’s non-recognition and non-response to the well-developed arguments justifying *Casey* and other substantive due process cases<sup>111</sup> is emblematic of his abandonment of public reason, reasoned judgment in constitutional interpretation, and pluralism. In a footnote, Vermeule shares his view that the best reading of due process, equal protection, along with “other constitutional provisions” would “grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law.”<sup>112</sup>

#### IV. CONCLUSION: TOWARD A LIBERAL COMMON GOOD CONSTITUTIONALISM FOR POLARIZED TIMES

Vermeule’s common good constitutionalism is the ultimate

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106. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

107. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); James E. Fleming, *How Justice Alito’s Hidebound Conservatism in Dobbs Shreds the Fabric of Ordered Liberty*, FORUM (Fall 2022).

108. VERMEULE, *supra* note 1, at 41, 199 n.103.

109. 505 U.S. at 851.

110. VERMEULE, *supra* note 1, at 42 (emphasis added).

111. *See, e.g.*, the arguments developed between *Casey* (1992) and the publication of Vermeule’s book (2022) to justify *Casey*’s framework for substantive due process. For vigorous formulations of such arguments, see FLEMING, *supra* note 83.

112. VERMEULE, *supra* note 1, at 199 n.103.



conservative reaction against liberal “orthodoxy.” Over the next few years, building upon our prior work as well as Barber’s, we plan to develop a liberal common good constitutionalism in contradistinction from Vermeule’s view. Like Vermeule, we reject “originalism” and argue for what Dworkin called a “moral reading” of the Constitution: that it is a basic charter of normative principles, not a code of historical rules. But he proposes an unsustainable moral reading—rooted in Catholic integralism—one to which a morally pluralistic people would not submit. Like Vermeule, we conceive the Constitution as a charter of not merely negative liberties—protecting people from government—but also positive benefits—obligating government to promote the positive ends proclaimed in the preamble. Contrary to Vermeule, the benefits government should promote do not stem from a unitary, comprehensive conception of the good life for all—but are ecumenical, all-purpose goods enabling persons to pursue a plurality of conceptions of the good life.<sup>113</sup> Like Vermeule’s theory, ours will be oriented toward the common good. Whereas his theory seemingly conceives the common good as what our rulers, reasoning from the classical tradition, conclude is good for all people in common, our theory will contemplate civic-minded deliberation about the common good by a people engaged in constitutional self-government. In its commitment to equality and affirmative governmental obligation to support social reproduction, our common good liberalism will have affinities with forms of feminist common good constitutionalism.<sup>114</sup>

Hence, Vermeule’s supposedly common good constitutionalism does not respect but indeed denies and evidently would expunge moral pluralism. That is why he wrongly “stamp[s] as abominable” any right of autonomy to enable people to make certain decisions

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113. FLEMING & MCCLAIN, *supra* note 7, at 190.

114. *See, e.g.* JULIE C. SUK, HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 180–209 (2023) (looking to examples of constitutional reform in Ireland and elsewhere to argue for a “constitutionalism of care” that embraces gender equality).

fundamentally affecting their identity, destiny, or way of life. Vermeule's theory amounts to a conservative counter-reformation. The common good liberalism we will develop is the antithesis of Vermeule's putative common good constitutionalism and is more suitable to morally pluralistic constitutional democracy.

We close by expressing our profound doubt that a free people such as the American people—characterized by reasonable moral pluralism and the capacities to reason about justice and their own conception of the good life—would (or even could) submit to rule by Vermeule's authoritarian common good constitutionalism.<sup>115</sup>

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115. See Barber et al., *supra* note 8.