

# FLOURISHING, VIRTUE, AND COMMON GOOD CONSTITUTIONALISM\*

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## INTRODUCTION

In *Common Good Constitutionalism*, Professor Adrian Vermeule articulates a conception of the common good.<sup>1</sup> Vermeule has much to say about the common good, but very little to say about the substantive component of his conception, which he describes as “happiness or flourishing.”<sup>2</sup> This Article articulates a conception of the common good that is grounded in a virtue-centered conception of human flourishing. Humans are rational and social creatures, and therefore, flourishing for humans consists in rational and social activities that express the human excellence or virtues. The common good requires communities that facilitate human flourishing in three ways: (1) by creating the preconditions for human flourishing, including peace, health, and prosperity, (2) by fostering the development of the human virtues through sustaining nurturing families and virtue-centered systems of education, and (3) by providing opportunities for rational and social activities in the form of meaningful work and recreation. This virtue-centered conception of the common good has important implications for both legislation and constitutionalism. Constitutions should be designed to encourage

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\*\* William L. Matheson and Robert M. Morgenthau Distinguished Professor of Law and Douglas D. Drysdale Research Professor of Law. This article is dedicated to Rosalind Hursthouse, whose work has shaped my understanding of virtue.

1. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 58–59 (2022).

2. *Id.*

legislation for the common good and the selection of virtuous officials, including judges.

The turn to virtue in this Article is part of a larger project, the articulation of a “Virtue Jurisprudence” that draws on the insights of virtue ethics and virtue epistemology to articulate a virtue-centered theory of law.<sup>3</sup> One element of this approach to law is a virtue-centered theory of judging;<sup>4</sup> another is an account of virtue as the end of law.<sup>5</sup> This Article articulates a conception of the common good within the framework of virtue jurisprudence.

Here is the roadmap. Part I distinguishes between thin and thick conceptions of the common good. Part II articulates a thick conception of the common good as the promotion of human flourishing. Part III lays out an account of the common good as the end of law. Part IV articulates a virtue-centered version of common good constitutionalism and is followed by a brief conclusion.

#### I. THICK AND THIN CONCEPTIONS OF THE COMMON GOOD

The phrase “common good” is used to represent a very general concept in political and moral philosophy.<sup>6</sup> That concept includes a contrast between what we can call “individual goods” that attach to particular persons and what are called “common goods” because they are the goods of some community. To elucidate this concept,

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3. See, e.g., Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHIL. 178–213 (2003); LAW, VIRTUE AND JUSTICE (Amalia Amaya and Ho Hock Lai, eds., 2013); Chapin Cimino, *Virtue Jurisprudence*, in THE OXFORD HANDBOOK OF VIRTUE (Nancy E. Snow ed., 2018); R.A. Duff, *The Limits of Virtue Jurisprudence*, 34 METAPHIL. 214 (2003); Lawrence Solum, *Natural Justice*, 51 AM. J. JURISPRUDENCE 65–105 (2006); VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008).

4. Solum, *Virtue Jurisprudence*, *supra* note 3, at 76.

5. See, e.g., Lawrence B. Solum, *Virtue as the End of Law: An Aretaic Theory of Legislation*, 9 JURIS. 6–18 (2018).

6. See Waheed Hussain, *The Common Good*, STAN. ENCYC. PHILOSOPHY (Edward N. Zalta ed., Spring 2018), <https://plato.stanford.edu/archives/spr2018/entries/common-good/> [<https://perma.cc/D77E-U85G>]; Thomas W. Smith, *Aristotle on the Conditions for and the Limits of the Common Good*, 93 AME. POL. SCI. REV. 625, 625 (1999); Lisa Sowle Cahill, *The Catholic Tradition: Religion, Morality, and the Common Good*, 5 J. L. & RELIGION 75, 75 (1987).

we can borrow the concept-conception distinction from the philosopher John Rawls.<sup>7</sup> The phrase “common good” represents a general concept, some kind of good that is in some sense common. We can distinguish between different conceptions or specifications of this general idea. Because the common good plays a role in a variety of philosophical and theological views about the nature of the good for communities, there are many such conceptions. A utilitarian conception of the common good might specify that the common good is the sum of the individual utilities of the members of the community, but other conceptions are very different; for example, religious concepts of the common good may emphasize communal religious observance such as prayer.

There are many disagreements about the nature of the common good, with varying views about what counts as a “common good.” Some accounts of the common good stipulate that common goods are nonaggregative.<sup>8</sup> This criterion would rule out a utilitarian understanding of the common good but would allow a religious conception that is community centered.

One important way in which conceptions of the common good differ can be described using the words “thick” and “thin.”<sup>9</sup> A thin conception of the common good describes a set of formal criteria that must be satisfied for a theory to count as a conception of the common good; by contrast, thick conceptions provide an account of the substance of the good. For example, a thick conception of the common good might specify that the common good consists in a form of communal life in which the members of the community frequently engage in pleasurable activities such as the consumption of alcohol and dancing energetically to popular music; call this the “Party-On Conception of the Common Good.” This example may

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7. See JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971). Rawls popularized an idea that originates in W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167 (1956).

8. See Hussain, *supra* note 6, at 17.

9. See Pekka Väyrynen, *Thick Ethical Concepts*, *STANF. ENCYC. PHILOSOPHY* (Edward N. Zalta ed., Spring 2021), <https://plato.stanford.edu/archives/spr2021/entries/thick-ethical-concepts/> [<https://perma.cc/26UW-AWX2>].

seem frivolous, but this frivolity enables us to see what is required for a conception of the common good to be both (1) normatively attractive and (2) sufficiently thick to act as a guide for individuals, their communities, and a legal system. The Party-On Conception is thick but may not be normatively attractive.

A. *Thin Conceptions of the Common Good*

Thin conceptions of the common good specify formal criteria for what counts as a common good. One such thin conception is found in Adrian Vermeule's monograph, *Common Good Constitutionalism*:

In the classical account, a genuinely *common* good is a good that is unitary ("one in number") and capable of being shared without being diminished. Thus, it is inherently non-aggregative; it is not the summation of a number of private goods, no matter how great that number or how intense the preference for those goods may be. . . .

In the classical theory, the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the polis. It is not that "private" happiness, or even the happiness of family life, is the real aim and the public realm is merely what supplies the lawful peace, justice, and stability needed to guarantee that private happiness. Rather the highest felicity in the temporal sphere is itself the common life of the well-ordered community, which includes those other foundational goods but transcends them as well.<sup>10</sup>

Vermeule's formulation includes formal criteria: the common good is (a) unitary, (b) nonaggregative, and (c) constitutes the common life of the well-ordered community.<sup>11</sup> Formal criteria for what counts as the common good can rule out some conceptions; for example, the utilitarian conception because is aggregative and says nothing about the common life of the community. But formal criteria do not provide a thick conception of the common good. For example, Vermeule's formal criteria are compatible with the Party-On

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10. VERMEULE, *supra* note 1, at 28.

11. *Id.*

Conception, which posits a unitary good (partying), that is nonaggregative, and constitutive of communal life.

Vermeule's formulation includes the idea of "happiness or flourishing" of the community.<sup>12</sup> By specifying "happiness or flourishing," Vermeule gestures towards a thick conception, but by itself the invocation of "happiness or flourishing" is thin. Happiness and flourishing are concepts of which there can be many conceptions. What is happiness? What constitutes a flourishing community? The answers to these questions can be found by turning from thin to thick conceptions of the common good.

#### *B. Thick Conceptions of the Common Good*

A thick conception of the common good provides a concrete and substantive account of the forms of life that constitute the good life for a community. Vermeule identifies happiness or flourishing as the key substantive element of a conception of the common good. This formulation is neutral as between subjective and objective understandings of the best human life. Consider subjective understandings first.

The word "happiness" is ambiguous, but its ordinary meaning suggests a psychological state. Consider these definitions: "1 a: a state of well-being and contentment: JOY, b: a pleasurable or satisfying experience."<sup>13</sup> "Contentment," "joy," "pleasure," and "satisfaction" are all mental states and hence subjective. One can imagine a thick conception of the common good that is focused on the subjective well-being of the community. In order to satisfy Vermeule's formal criteria, the subjective state of happiness would have to be communal or shared and not the sum of individual psychological states.<sup>14</sup>

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12. *Id.*

13. *Happiness*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/happiness> (last visited Dec. 23, 2022) [<https://perma.cc/XTA8-RPWB>].

14. Whether this is possible raises a philosophical question about collective psychological states that is beyond the scope of this article.

The word “flourishing” points us in the direction of an objective conception. There are many possible objective conceptions. The Party-On Conception, introduced above, is an objective conception because it specifies a form of life for a community. Likewise, we can imagine an objective conception of the common good in which the good life of a community consists in group activities of communal prayer and contemplation.

Formal criteria for the common good do not, by themselves, give us an answer to some of the most important and difficult questions. Is the good subjective or objective? What form of life constitutes the good for human individuals and their communities? What end or ends are most choiceworthy? The next Part of this Article sketches an answer to those questions by articulating a thick and objective conception of the common good as human flourishing.

## II. HUMAN FLOURISHING: A VIRTUE CENTERED ACCOUNT OF THE COMMON GOOD

In this Part, I will offer an account of the common good as human flourishing. That account begins with human nature: humans are rational and social creatures. A flourishing human community is one where members of the community engage in social and rational activities that express the human excellence or virtues. This view draws on Neo-Aristotelian ideas about human nature, human flourishing, and the human excellences or virtues; the account offered here relies heavily on the work of Rosalind Hursthouse<sup>15</sup> and Gavin Lawrence.<sup>16</sup>

### A. *Human Nature: Rational and Social Creatures*

We can begin with human nature and the plausible assumption that humans are social and rational creatures. The assumption that humans are naturally social creatures is plausible because humans

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15. ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

16. Gavin Lawrence, *Human Excellence in Character and Intellect*, in A COMPANION TO ARISTOTLE 419–70 (Georgios Anagnostopoulos ed.) (2013).

live in social groups, interact with each other, and form communities. The assumption that humans are naturally rational is plausible because humans regularly engage in reason-involving activities. Human occupations typically involve reasoning and problem solving of various kinds and different levels of complexity. Lawyers, judges, plumbers, weavers, investment bankers, construction workers, caregivers, and parents—all of these occupations involve reasoning. Reason-involving activity characterizes a wide variety of social and economic conditions, ranging from hunter-gatherer societies to farming communities and industrial megacities.

*B. Metaethics: Natural Goodness*

What is the moral significance of human nature? Again, this is a large topic. My approach is based on what we might call a “naturalist” account of metaethics. That is, I will assume that what is morally good for humans is a function of human nature. This assumption can be clarified by thinking about flourishing in the case of other natural creatures. A flourishing life for an Eagle involves successful flying, hunting, and mating. A flourishing life for a beaver involves the building of dams and lodges, eating various plants, and monogamous family life. Likewise, we can draw conclusions about what constitutes a flourishing human life by observing humans. This account of the good for humans assumes that goodness is a natural property, and hence that moral philosophy is in many ways continuous with the natural sciences. This account of metaethics draws on the ideas of Philippa Foot<sup>17</sup> and Michael Thompson.<sup>18</sup> For the purposes of this Article, naturalist metaethics is simply assumed and not justified.

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17. See PHILIPPA FOOT, *NATURAL GOODNESS* (2003).

18. See MICHAEL THOMPSON, *LIFE AND ACTION: ELEMENTARY STRUCTURES OF PRACTICE AND PRACTICAL THOUGHT* (2012).

C. *Flourishing: Lives of Rational and Social Activity that Express the Human Excellences*

What then is flourishing (or *eudaimonia*) for humans? I will begin with a stipulated definition that expresses an aretaic<sup>19</sup> (virtue centered) conception of flourishing:

The Aretaic Conception of Human Flourishing: Human flourishing consists of whole lives engaged in rational and social activities that express the human excellences.

This Aretaic Conception can be unpacked in five steps. First, flourishing is a characteristic of whole lives and not of individual moments. Second, flourishing is a function of activity. Mental states, such as pleasure or satisfaction are not themselves flourishing; nonetheless flourishing frequently produces such positive mental states. Third, flourishing involves rational activity; humans are creatures that reason and can act on the basis of reason. Fourth, flourishing requires social activity; humans are social creatures who communicate and interact with one another. Fifth and finally, flourishing involves rational and social activities that express the human excellences or virtues. Virtue-expressing rational and social activities are such activities done well. Because the understanding specified by the Aretaic Conception is stipulated for the purposes of this Article, the underlying justifications for each of the steps are not presented here.

D. *Virtue: The Human Excellences*

The Aretaic Conception of the Common Good is virtue centered. A flourishing human life is one that expresses the human excellences or virtues. The virtues are dispositional qualities; to have a virtue is to be disposed to act, feel, or believe in ways that are characteristic of human excellence. Following Aristotle, we can identify moral and intellectual virtues. Although Aristotle classified the

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19. See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, BROOK. L. REV. 475, 476 (2004).



virtue of justice as a moral virtue,<sup>20</sup> I will treat justice as a distinct category.

### 1. The Moral Virtues

The moral virtues are dispositions to the mean with respect to morally neutral emotions. Thus, the virtue of courage is a disposition with respect to the morally neutral emotion of fear. The virtue of good temper is a disposition with respect to the morally neutral emotion of anger. And the virtue of temperance is a disposition with respect to the morally neutral emotion of desire.

The nature of the moral virtues can be illustrated by the virtue of courage. Humans with the virtue of courage are disposed to feel the emotion of fear in a way that is proportionate to the threat or danger that elicits the fear and to respond to the emotion proportionally. The disposition associated with courage is a mean with respect to a vice of excess, cowardice, and a vice of deficiency, rashness. The vice of cowardice involves the disposition to disproportionate or exaggerated fear of danger. The vice of rashness involves a disposition of fear that does not adequately reflect the danger, and hence is associated with inappropriate risk-taking.

A similar pattern exists with respect to the emotion of anger and the associated virtue of good temper, and with the emotion of desire and the associated virtue of temperance. In each case, the virtue is a disposition to the mean with respect to a morally neutral emotion; the virtues are contrasted with vices of excess and deficiency. For example, the vice associated with excessive anger can be expressed as an “anger management problem.” The vice of deficiency would result in a failure to experience anger in response to injustice; contemporary lingo would express the dysfunction associated with this vice as “letting people walk all over you.”

The moral virtues play both an instrumental and a constitutive role in human flourishing. Instrumentally, the moral virtues enable humans to successfully pursue rational and social activities; the

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20. See Charles M. Young, *Justice*, in *A COMPANION TO ARISTOTLE* 457, 457 (Georgios Anagnostopoulos ed., 2009).

moral vices have the opposite effect, undermining both rationality and sociability. The constitutive role of the virtues involves the conceptual link between action in accord with the virtues and morality. Action that would characteristically be performed by a virtuous agent under the circumstances is the standard of right action.

## 2. The Intellectual Virtues

The intellectual virtues are dispositional qualities of mind. Among the intellectual virtues are *sophia* or theoretical wisdom and *phronesis* or practical wisdom. Theoretical wisdom is roughly the ability to think well about complex and abstract matters. Thus, theoretical wisdom facilitates the mastery of mathematics or complex legal doctrines. Practical wisdom can be understood in various ways; here, I adopt the perceptual account offered by Nancy Sherman.<sup>21</sup> Humans with *phronesis* are able to perceive the morally salient aspect of situations that requires humans to make significant choices and to identify workable responses to the problems and challenges humans face.

As with the moral virtues, the intellectual virtues play both an instrumental and constitutive role in human flourishing. Instrumentally, theoretical and practical wisdom enable humans to succeed when they engage in rational and social activities. Complex reasoning is enabled by theoretical wisdom and such reasoning is frequently required to accomplish complex tasks. The virtue of practical wisdom enables humans to see the morally salient implications of their actions and to make sensible choices in response to moral challenges. The constitutive role of the intellectual virtues is the same as for the moral virtues. The standard of right action is the fully virtuous agent, with all of the moral and intellectual virtues.

## 3. The Virtue of Justice as Lawfulness

The virtue of justice is especially important to an account of the common good. There are many different ideas about the nature of justice as a virtue. For the purpose of this discussion, I will lay out

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21. See NANCY SHERMAN, *THE FABRIC OF CHARACTER* (1st ed.1989).

a particular conception of the virtue of justice, which we can call “Justice as Lawfulness.”<sup>22</sup>

The key idea of Justice as Lawfulness is that justice is a disposition to internalize widely shared and deeply held social norms (or *nomoi*) that govern human interaction and enable human flourishing. Lawfulness is understood in a wide sense that includes the disposition to internalize social norms and positive enactments—to the extent that such enactments are recognized as authoritative by the relevant social norms. Humans who lack this virtue can be called “outlaws,” their attitude towards the *nomoi* is that of the Holmesian “bad man.”<sup>23</sup> Outlaws may obey the law, but they do so for instrumental reasons.<sup>24</sup>

Understanding the virtue of Justice as Lawfulness requires an appreciation of its relationship to human flourishing and the other virtues. Not every custom, social norm, or enactment is a true *nomos*.<sup>25</sup> Some social norms may be dysfunctional, undermining rather than facilitating human flourishing. The virtue of justice as lawfulness is the disposition to internalize the customs, social norms, and enactments that are consistent with human flourishing.<sup>26</sup>

Not every human will be able to recognize the defectiveness of customs and social norms that are contrary to human flourishing.

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22. See, e.g., Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 678–84 (2005); Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 516 (2005). See also RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 105–06 (1st ed. 2002).

23. Oliver Wendell Holmes, Jr., *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997).

24. On the bad man, see *id.*

25. The phrase “true *nomos*” is used to represent the idea that some social norms may resemble the *nomoi* but be defective because they are not consistent with human flourishing.

26. The *nomoi* may include customs or social norms that are consistent with human flourishing but do not, by themselves, contribute to such flourishing directly. For example, norms that govern etiquette might indirectly contribute to flourishing by reinforcing communal solidarity but make no direct contribution such flourishing. On the account offered here, such norms are true *nomoi* so long as they do not undermine human flourishing.

For example, in a slave owning society, many slaveowners may come to believe that slavery contributes to the flourishing of slaves and the society in which they live. These beliefs seem obviously false to us, but a combination of misinformation, social sanctions, and motivated reasoning may lead those who benefit from slavery to embrace such false and pernicious beliefs. In these circumstances, it may require extraordinary virtue (and especially theoretical and practical wisdom) to fully appreciate the systematic ways that slavery undermines the flourishing of all the members of a slave owning society. A fully virtuous human would understand that customs, social norms, and enactments that support the institution of slavery are inconsistent with human flourishing and hence are not true *nomoi*. For this reason, the virtue of lawfulness would not dispose a fully virtuous human to internalize social norms that embrace slavery or to obey enactments that support the institution of slavery.

As with the other virtues, justice as lawfulness serves both an instrumental and constitutive role. Instrumentally, the virtue of justice as lawfulness enables humans to live together in communities. Successful human interactions require cooperation and coordination. Lawfulness disposes humans to comply with customs, social norms, and enactments that facilitate coordinated and cooperative behavior. Not all humans are virtuous. Outlaws may engage in violence, theft, fraud, and a variety of other behaviors that undermine human flourishing. The virtue of justice as lawfulness helps to maintain social norms that discourage criminal behavior and to enlist the cooperation of virtuous citizens in the enforcement of the criminal law. In addition, justice as lawfulness is constitutive of flourishing human lives; having the virtue of justice is an essential element in a flourishing human life. Because a flourishing human life involves activities that express the virtues, the virtue of justice is a constitutive element of such a life.

### E. *Solidarity as Civic Friendship*

Virtuous humans care about each other and about their communities. They view their communities as involving more than a set of agreements for mutual self-interest. Rather, individuals with the human excellences see their relationship with fellow community members as what we might call “civic friendship,” a relationship of mutual concern that resembles the kinds of caring for one another that characterize personal friendships or the affection of family members for each other. And such caring is not limited to a desire for the material well-being or preference satisfaction of fellow community members. Virtuous humans want their fellows to flourish, that is, to have lives of rational and social activities that express the human excellences.<sup>27</sup>

This relationship of civic friendship is a form of solidarity—a kind of social glue that makes the objective good of each member of a community into the subjective and objective good of all members and hence the good of the community itself. Fully virtuous members of a community, therefore, include the common good as a central element in their own life plans.

## III. THE COMMON GOOD AS THE END OF LAW

Vermeule frames Common Good Constitutionalism as a constitutional theory, but the implications of the common good for law are not limited to questions of constitutional design or constitutional interpretation and construction. Constitutions are important, but the promotion of human flourishing is primarily the job of legislation. We will return to the constitutional implications below,<sup>28</sup>

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27. This account is heavily influenced by Aristotle. See ARISTOTLE, *POLITICS* 1280b29–1281a3, 1280b29–33 (Carnes Lord trans., U. Chi. Press 1st ed. 1985); ARISTOTLE, *NICOMACHEAN ETHICS* 129 (Terence Irwin trans., Hackett 2d. ed. 1999). See also Iris van Domselaar, *A Neo-Aristotelian Notion of Reciprocity: About Civic Friendship and (the Troublesome Character of) Right Judicial Decisions*, 23 *IUS GENTIUM* 223, 240 (2013).

28. See *infra* Part IV.

but for now, we will consider the common good as the end of law via exploration of a virtue-centered theory of legislation.

In this Part, I lay out what we can call the “Aretaic Theory of Legislation.” Let us stipulate the following definition:

Aretaic Theory of Legislation: The aim of legislation should be the promotion of human flourishing, including: (1) the promotion of peace, health, and prosperity as the preconditions of flourishing, (2) the promotion of the acquisition of the virtues, and (3) the creation of opportunities for meaningful work and recreation that express the virtues.

The Aretaic Theory of Legislation aims to capture implications of the Aretaic Conception of Human Flourishing for the ends of law. For the system of legislation to promote human flourishing, it must accomplish three tasks. First, human flourishing requires peace, health, and prosperity, so legislation should aim at the elimination of violence, sickness, and poverty. Second, human flourishing requires the virtues, so legislation should aim at creating the conditions for healthy emotional and intellectual development. Third, human flourishing requires lives of rational and social activity, so legislation should aim at creating vibrant communities with opportunities for meaningful work and play that engage our rational and social capacities.

How can legislation accomplish these goals? Begin with peace, health, and prosperity.

A. *Peace, Health, and Prosperity*

Flourishing consists in “living well and doing well,” as Aristotle is sometimes translated.<sup>29</sup> Peace, health, and prosperity are (usually and in some sense, almost always) preconditions for lives lived well. It seems uncontroversial that peace, health, and prosperity are

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29. For the Greek, see ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 10–11 (H. Rackham trans., Loeb Classical Library, Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.). Irwin as well as Broadie and Rowe use “living well and doing well.” See ARISTOTLE, NICOMACHEAN ETHICS 97 (Sarah Broadie & Christopher Rowe trans., Oxford Univ. Press 2002); ARISTOTLE, NICOMACHEAN ETHICS 3 (Terence Irwin trans., Hackett 2d. ed. 1985).

conducive to a flourishing life. Violence, illness, and poverty limit human possibilities in significant ways. Pervasive violence will result in significant pain and suffering, disabling injuries, and death. Illness and disease can destroy the capacity to live a flourishingly and end life itself. Severe poverty can result in malnutrition, starvation, and many other afflictions. Even if peace, health, and prosperity were not preconditions for the development of the human excellences, legislation would still properly aim at the creation and maintenance of these conditions as constituent elements of flourishing human lives.

But peace, health and prosperity also create the conditions necessary for the development of human capacities. Violence, illness, and poverty can stunt emotional and intellectual growth. For example, children who grow up in chaotic and violent conditions are likely to suffer from emotional problems that make the acquisition of courage, good temper, and temperance less likely. Similarly, illness and disease are obstacles to the acquisition of the moral and intellectual virtues. And it seems likely that poverty will have similar effects. Extreme deprivation during childhood and adolescence is not conducive to healthy emotional or intellectual development.<sup>30</sup>

Finally, peace, health, and prosperity are preconditions for rational and social activities that express the human excellences. Such activities can take many forms. Thus, many different occupations can provide opportunities for social and rational activities. Crafts-person, parent, merchant, engineer, computer programmer, scholar, or public servant—each and all of these occupations can provide opportunities for reasoning and social interaction. Likewise, a variety of avocational or recreation activities can form part of a flourishing human life. Examples abound: playing a musical instrument, painting, photography, sport, knitting, sewing, and

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30. It is nonetheless true that overcoming obstacles provides opportunities for the exercise of the virtues. Thus, war can provide opportunities for courageous action, and illness can provide the opportunity to exercise theoretical wisdom. Those facts are consistent with the role of peace and health in creating the preconditions for the development of the virtues.

perhaps even participation in a fantasy baseball league. Peace, health, and prosperity facilitate these activities by creating opportunities for meaningful employment and by creating the time and resources that enable meaningful avocational pursuits.

How can legislation promote peace, health, and prosperity? Some answers to this question are obvious. The criminal law can forbid and punish violence. The law of nations can forbid aggressive wars. Air and water pollution can be regulated. Public health laws can prevent the spread of communicable diseases. Legal frameworks for the ownership of property and contractual relationships can facilitate the production of goods and services.

But there will also be disagreements about the means for achieving peace, health, and prosperity. For example, some believe that prosperity is best facilitated by a minimalist state that creates the conditions for *laissez-faire* markets, private ownership of the means of production, and free choice by consumers and workers. Others believe that market capitalism results in harsh conditions for workers and the promotion of mindless consumption that is inconsistent with human flourishing. There are many other possibilities for organization of the economy; making the best choice between the feasible alternatives depends on the answers to complex empirical questions that are far outside the scope of this essay.

An aretaic theory of legislation can and should address questions about the kind of peace, health, and prosperity that is conducive to human flourishing. Legislation should aim at the right kinds of peace, health, and prosperity. It might be the case that violence would be minimized by an authoritarian social order that would undermine flourishing in other ways. For example, a police state might control violence through fear and intimidation created by a system of secret police, informants, and mass surveillance, but such a state would likely undermine healthy social relationships and might impair the ability of children to develop emotionally and intellectually. Likewise, the kind of prosperity that enables human flourishing might differ from simple maximization of gross



domestic product and focus instead on the enrichment of human lives by meaningful work and recreation.

*B. Facilitating Acquisition of the Virtues*

Legislation should facilitate the development and acquisition of the virtues. How can this be accomplished? Again, this is a complex empirical question, and we may not know enough about the cognitive, social, and developmental psychology of the virtues to be certain about the answer. Despite this uncertainty, we may be able to make some plausible but tentative assumptions. It seems likely that nurturing family environments facilitate healthy emotional development by children. Therefore, legislation should aim at conditions in which children are attached to stable, loving family environments. Similarly, the law should aim to prevent domestic violence and child abuse. Moreover, nurturing families may be fostered by generous family leave policies and undermined by working conditions that do not permit parents (and other caretakers) to spend time with children.

It also seems likely that the educational system can facilitate the development of the virtues in various ways. The process of learning is one way to foster the intellectual virtue of theoretical wisdom. Classrooms and common areas in schools and colleges provide opportunities for activities that facilitate social interaction, including sports, games, plays, music, and public speaking. A virtue-focused approach to education would evaluate and modify the curriculum, teaching methods, and extra-curricular activities in ways that would foster the acquisition of the virtues by children and young adults. Legislation can support the educational system by creating state schools and by subsidizing private schools. Educational standards can be crafted with the aim of ensuring that both public and private education create conditions that support the development of the virtues.

*C. Meaningful Work and Recreation*

Peace, health, and prosperity provide the preconditions for the acquisition of the virtues, and their development requires nurturing families and opportunities for education. But human flourishing requires more. Flourishing consists in rational and social activities that express the human excellences. Thus, an aretaic theory of legislation counsels lawmakers to create opportunities for work and recreation that facilitate expression of the human excellences.

From an aretaic perspective, meaningful work involves rational and social activities that engage the virtues. Let us call this sort of work, "good work." For work to be good, it must involve more than mere drudgery. Good work involves opportunities for social interaction, and such interaction allows for the expression of the moral virtues, because of the close relationship between cooperative human endeavors and the emotions. Good work involves opportunities for the engagement of human intellectual capacities, including theoretical and practical reason. Thus, good work should involve problem solving that engages both abstract thinking and practical judgment.

The concrete implementation of this aspect of an aretaic theory of legislation involves many complex problems and depends on many factors. Opportunities for good work depend, at least in part, on the state of technological development. Mechanization and the development of artificial intelligence may allow for automation of routine tasks that do not involve problem solving or social interaction.

Likewise, the availability of good work may depend on the form of economic organization. For example, different forms of capitalism and socialism may produce different kinds of work. The Aretaic Theory of Legislation suggests that legislative choices about the investments in technology and the form of economic organization should consider their impact on the availability of good work. Creating the preconditions for human flourishing is crucial, but the maximization of wealth and income may be inconsistent with the maximization of human flourishing. Lives focused on mindless consumption of material objects that are preferred because they

signal wealth or success would not be flourishing lives, and these forms of consumption may undermine civic friendship and the solidarity of the community.

The word “recreation” is used in the context of this article in a special and stipulated sense. Let us stipulate that “recreation” includes the whole gamut of rational and social activities outside the realm of work and employment. In this stipulated sense, sports, hiking, games, music, reading, gardening, social clubs, and religion are all forms of recreation. Legislation should aim to facilitate those forms of recreation that involve social and rational activities that involve the human excellences or virtues. Let us call such forms of recreation “good recreation.”

Again, there are complex questions about how legislation can promote good recreation. There are many possible alternatives. Government might subsidize good recreation directly. Illustrative possibilities include: (1) a system of public parks and recreation centers; (2) the inclusion of recreational activities within the system of public education, including sports, music, and clubs for intellectually challenging games, such as chess, go, Katan, and video games; and (3) reliance on the markets to produce opportunities for good recreation. Recreation policy should be oriented towards the promotion of social and rational recreational activities that express the human virtues.

One more thing: family life involves both work and recreation. Households produce a variety of goods and services, including meals, caretaking, cleaning, and maintenance. Legislation might encourage forms of family organization that emphasize good work. But family life can also be the locus of recreational activities. Again, legislation could encourage good recreation. This role for legislation need not be direct and intrusive. It seems likely that the best family life policies will encourage substantial autonomy for decisionmaking within families and will avoid attempts to mandate particular activities, no matter how virtuous those activities might be. The design of legislation that aims to strengthen and enrich

family life depends on a variety of empirical questions, but the ultimate goal of such legislation is human flourishing.

*D. Thickness and Diversity in the Aretaic Conception of the Common Good*

The Aretaic Conception of the Common Good is thick. It goes beyond formal criteria and articulates the common good as a way of life for humans. The life of a community ordered by this conception of the common good would revolve around rational and social activities that involve the human excellences. But a thick conception of the common good is fully consistent with a diversity of life plans. Good work and good recreation come in many different forms. A society ordered by the common good can and should allow its members to make their own decisions about the life that is good for them.

Some citizens may choose to invest their energies and talents in good recreational activities and avoid jobs that involve long hours. Others may choose good work that is intense and involving, spending more of their time on work that is rewarding and less on recreation. Some individuals might choose to pursue art, music, or dance, while others focus on family life and community service. And some citizens might choose to make religion the primary focus of their rational and social activities. The Aretaic Conception of the Common Good is thick but it allows and facilitates diversity. The promotion of human flourishing is fully consistent with freedom of choice with respect to life plans.

#### IV. THE CONSTITUTION OF VIRTUE

What are the implications of the Aretaic Conception of the Common Good for constitutionalism? A full answer to that question is beyond the scope of this article, but two ideas are especially important. First, a virtue-centered approach to constitutionalism should emphasize the role of constitutional design in electing and selecting virtuous officials and judges. Second, a virtue-centered

approach to constitutional practice should recognize the centrality of the virtue of justice as lawfulness to a good constitutional order.

A. *Constitutional Design and Virtuous Officials*

Full realization of the common good requires that official action be oriented toward human flourishing, understood as rational and social activities that express the human excellences. And this in turn requires officials who reliably aim at the common good and have the intellectual and emotional equipment that enables them to achieve it. Officials need the intellectual virtues. Theoretical wisdom is required for officials to appreciate the complex problems that face legislatures and executive departments. Practical wisdom (moral vision) is required for them to appreciate the morally salient features of the choices they face and to devise workable statutes, regulations, policies, and plans. The moral virtues are required to keep their aim true. Fear, anger, and appetite can lead officials without the virtues astray; courage, good temper, and temperance can keep them on course.

For these reasons, the Aretaic Conception of the Common Good has dual implications for constitutional design. First, constitutions should be designed in order to ensure the selection of virtuous officials and judges. Second, constitutions ought to provide guardrails against the ascension to high office of vicious humans. James Madison expressed this idea in *Federalist 57*:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.<sup>31</sup>

Madison's formulation of the idea echoes a classic formulation found in Aquinas in the *Summa Theologica*:

Hence the best ordering of government in any city or kingdom is achieved when one man is chosen to preside over all according to

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31. THE FEDERALIST NO. 57, at 348 (James Madison) (Clinton Rossiter ed., 2003).

virtue; when he has under him others who govern according to virtue; and when such government nonetheless belongs to all, both because all are eligible for election to it and because it is elected by all.<sup>32</sup>

Both Madison and Aquinas articulate a fundamental goal of constitutional design; from an aretaic perspective, the constitution should structure the election and appointment of public officials to maximize virtue and minimize vice.

How to accomplish this goal involves complex and difficult questions of institutional design, involving multiple relationships between the constitutional structure of elected officers, the party system, and election regulation. There are no guarantees that democratic elections will produce virtuous legislators and executives. History suggests that demagogues and villains can and do win electoral victories. There is even a danger that an outlaw will achieve high office. But the Aretaic Conception of the Common Good cannot be realized in practice without virtuous officials and judges. Constitutional design can help to maximize the likelihood that officials will be virtuous, but it offers no guarantees. For this reason, a virtuous citizenry is required for the election of virtuous officials in a republic with democratic elections.

Because there is a real danger that public officials will lack the virtues and actively seek to undermine the common good, constitutional design has a second task, protection of the common good from power wielded by the vicious. One diagnosis of this danger is the classic discussion of the dangers of faction by Madison in *Federalist 10*:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a

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32. THOMAS AQUINAS, *SUMMA THEOLOGICA IaIIae 105:1 Concerning the reason for the judicial precepts (of the Old Testament)* (R.W. Dyson trans., 2002), in *AQUINAS: POLITICAL WRITINGS* 54 (R.W. Dyson, ed., 2002).

majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.<sup>33</sup>

Madison discusses several strategies for countering the tendency of faction to undermine the common good, including a republican form of government, federalism, the separation of powers, and a large republic.<sup>34</sup> Similarly, judges should be selected for judicial virtue and knowledge of the law, and not on the basis of their ideology.<sup>35</sup>

#### *B. Justice as Lawfulness and Constitutional Practice*

The Aretaic Conception of the Common Good has a second implication for constitutionalism. The virtue of justice as lawfulness has important implications for constitutional interpretation and construction. Recall that the virtue of justice as lawfulness is the disposition to internalize the *nomoi*—widely shared and deeply held social norms that are consistent with human flourishing. The *nomoi* include norms that recognize the authority of institutions and enactments, including constitutions. A virtuous judge or official will be disposed to internalize the *nomoi* and hence to embrace an obligation to comply with the provisions of constitutions that are recognized by deeply held and widely shared social norms as authoritative.

In other words, constitutional interpretation and construction ought to express the virtue of justice as lawfulness. A virtuous judge, who has internalized the *nomoi*, will want to follow the law

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33. THE FEDERALIST NO. 10, at 75 (James Madison) (Clinton Rossiter ed. 2003).

34. *Id. passim*.

35. See, e.g., Solum, *The Aretaic Turn in Constitutional Theory*, supra note 22; Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

and will not be tempted to impose their own will in the guise of faithful interpretation and construction of the constitutional text. This understanding of justice has important implications for constitutional theory. One way to get at those differences is via a comparison of originalism and living constitutionalism, the two great families of constitutional theory in the United States.<sup>36</sup>

The predominant form of originalism is Public Meaning Originalism, the view that constitutional actors should be bound by the original public meaning of the constitutional text.<sup>37</sup> Public meaning originalism can be expressed as the conjunction of three ideas:

- (1) The Fixation Thesis: the meaning of the constitutional text is fixed at the time each provision is framed and ratified;<sup>38</sup>
- (2) The Constraint Principle: constitutional doctrines ought to be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text;<sup>39</sup> and
- (3) The Public Meaning Thesis: the best understanding of the meaning (communicative content) of the constitutional text is the original public meaning.<sup>40</sup>

Judges who comply with the Constraint Principle are acting consistently with the virtue of justice as lawfulness so long as two conditions are met: (1) the Constitution is recognized as authoritative by widely shared and deeply held social norms; (2) the substantive content of legal norms that comply with the Constraint Principle is consistent with human flourishing. The question of whether these conditions are actually met by the United States Constitution is a large question that is outside the scope of this Article.

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36. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

37. See *id.* at 1251.

38. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

39. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 3 (Apr. 3, 2019) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215)) [<https://perma.cc/5DCH-VSVG>].

40. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1953 (2021).



What about living constitutionalism? There are many different forms of living constitutionalism; it is a large and diverse family.<sup>41</sup> It might be argued that all or almost all members are, at bottom, versions of the superlegislature theory: the view that the Supreme Court does, can, and should act as a superlegislature with authority to make constitutional law.<sup>42</sup> Whatever the merits of this critique, many forms of living constitutionalism permit judges to act as constitutional lawmakers, taking their own moral views into account when they decide constitutional cases. This is particularly clear in the case of Professor Ronald Dworkin's theory, *Law as Integrity*, which requires judges to decide constitutional cases in accord with the moral theory that best fits and justifies the law as a whole.<sup>43</sup> Dworkin's theory requires judges to rely on their own moral beliefs when they engage in constitutional interpretation and construction: there is no mechanism by which moral truths can decide cases without going through the moral beliefs of judges.<sup>44</sup>

If judges adopt the view that they have the power to make constitutional law on the basis of their own moral beliefs or preferences, their decisions will be inconsistent with Justice as Lawfulness and hence with the Aretaic Conception of the Common Good.<sup>45</sup> The extreme version of this form of judicial lawlessness is juristocracy or rule by judges. Because judicial decisions are made on a case by cases basis, juristocracy is a form of *tyranny* (rule by decree) in the Aristotelian sense.<sup>46</sup> Just as lawfulness is both

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41. See Solum, *supra* note 36.

42. For the claim that the current United States Supreme Court is best understood as a superlegislature, see Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601 (2015).

43. For Dworkin's statement of his view, see RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2–3 (1996). Dworkin's views are now associated with James Fleming's Dworkinian theory of constitutional interpretation and construction. See James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 515 (2014).

44. See Fleming, *supra* note 43, at 516–18.

45. The full argument for this conclusion is beyond the scope of this Article. See Solum, *supra* note 39.

46. See KRAUT, *supra* note 22, at 105–06.

instrumental to and constitutive of human flourishing, tyranny both undermines the preconditions of flourishing and is inherently inconsistent with lives of rational and social activities that express the human excellences.

#### CONCLUSION

In *Common Good Constitutionalism*, Professor Adrian Vermeule has articulated formal criteria for the common good and identified happiness or flourishing as its substantive content. But when it comes to the forms of life that constitute flourishing, Vermeule's monograph has very little to say. In this article, I have sketched the Aretaic Conception of the Common Good. That conception is based on an account of human nature. Humans are rational and social beings. So, human flourishing involves lives of rational and social activities that express the human excellences or virtues. The moral virtues, including courage, good temper, and temperance, are dispositions to the mean with respect to morally neutral emotions, including fear, anger, and desire. The intellectual virtues include both theoretical and practical wisdom, the latter of which is best understood as a sort of moral vision that enables virtuous agents to see the morally salient features of choice situations and identify workable solutions to moral problems. The virtue of justice is particularly important. The best understanding of that virtue is provided by justice as lawfulness; virtuous humans will internalize the *nomoi*, the widely shared and deeply held social norms that regulate human interaction and that are consistent with human flourishing.

The Aretaic Conception of the Common Good has implications for the ends of law. The Aretaic Theory of Legislation posits human flourishing as the proper purpose of lawmaking. Legislation should aim (1) to create and maintain the preconditions for human flourishing, including peace, health, and prosperity, (2) to facilitate the acquisition and maintenance of the virtues by supporting nurturing families and educational systems that support development of the moral and intellectual virtues, and (3) to create opportunities for

good work and good recreation, which involve rational and social activities that express the human excellences.

An aretaic understanding of the common good, flourishing, and legislation has further implications for constitutionalism. Constitutional design should aim for the selection of virtuous public officials. Constitutional interpretation and construction should be guided by the virtue of justice as lawfulness, which requires that judges be constrained by law and abjure the power of ad hoc constitutional lawmaking; exercise of that power is rule by decree and leads to tyranny. In sum, a constitution for the common good must be a constitution of virtue.