

COMMON GOOD CONSTITUTIONALISM AND COMMON GOOD ORIGINALISM: A CONVERGENCE?

JOSH HAMMER*

Three years ago now, Harvard Law School Professor Adrian Vermeule first proposed the jurisprudential framework he called “common good constitutionalism.”¹ He has since elaborated on that initial proposal at great length, including his widely discussed eponymous book on the subject, published last year.²

After Vermeule’s opening salvo, I initially responded in a similarly short essay, proposing my own jurisprudential framework, which I called “common good originalism.”³ I too have since elaborated on that initial proposal at length,⁴ most prominently including

* Newsweek senior editor-at-large, host of “The Josh Hammer Show,” syndicated columnist, and research fellow with the Edmund Burke Foundation. He previously worked at Kirkland & Ellis LLP, clerked for Judge James C. Ho of the U.S. Court of Appeals for the Fifth Circuit, and served as a John Marshall Fellow with the Claremont Institute and a Fellow with the James Wilson Institute. He holds a B.S. from Duke University and a J.D. from the University of Chicago Law School.

1. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (March 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/?utm_source=copy-link&utm_medium=social&utm_campaign=share].

2. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

3. Josh Hammer, *Common Good Originalism*, THE AMERICAN MIND (May 6, 2020), <https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/> [https://perma.cc/QK9Q-5NSH].

4. See, e.g., Josh Hammer, *In Defense of Common Good Originalism*, Public Discourse (July 26, 2021), <https://www.thepublicdiscourse.com/2021/07/76917/> [https://perma.cc/3KQ5-A63D]; see also Josh Hammer, *Contra Historicist Originalism*, ANCHORING TRUTHS, <https://www.anchoringtruths.org/contra-historicist-originalism/>

an eponymous essay on the subject for this very journal, published two years ago.⁵

I initially conceived of common good originalism as a direct response to common good constitutionalism, and it remained that way until I began to further develop it as a viable and independent framework for constitutional interpretation. Vermeule responded to that initial 2020 essay of mine, praising it at the time as “a laudable development, a movement half-way to the right approach.”⁶ Over three years later, I still do not object to the characterization of common good originalism as a “half-way” measure of sorts between the long-regnant originalism status quo, the avowedly positivist originalism of the late Justice Antonin Scalia and the late Judge Robert Bork, and common good constitutionalism.

In short, common good originalism as I have conceived and theorized it is *originalist* insofar as historical legitimacy defines the “construction zone” endpoints of a word or clause’s range of plausible interpretations. But it counsels epistemological humility in interpretation insofar as it recognizes the reality of more genuinely ambiguous constitutional provisions than most positivist/historicist-inclined originalists might be comfortable conceding. And as an interpretive lodestar, it thus counsels recourse to constructing ambiguous words or clauses through the analytical prism of the *telos*—or what Sir William Blackstone referred to as the *ratio legis*, or “reason of the law”—of the American constitutional order, which is most explicitly found in the normative ends of governance enumerated in the Preamble to the Constitution.⁷

[<https://perma.cc/8G7A-XZMD>] (last visited April 10, 2023); Josh Hammer, *Common Good Originalism After Dobbs*, THE AMERICAN MIND, (September 21, 2022), <https://americanmind.org/features/florida-versus-davos/common-good-originalism-after-dobbs/> [<https://perma.cc/73DP-HT6D>].

5. Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL’Y 917 (2021).

6. Adrian Vermeule, *On “Common-Good Originalism”*, MIRROR OF JUSTICE (May 9, 2020), <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html> [<https://perma.cc/EB5A-BPY6>].

7. Hammer, *In Defense of Common Good Originalism*, *Public Discourse*, *supra* note 4.

When Vermeule and I first entered this extended multiparty colloquy over the future of right-of-center American jurisprudence, there was not-insubstantial daylight between our respective positions. True, common good originalism even in its first instantiation was considerably closer to common good constitutionalism in its first instantiation than was the originalism status quo, but there were still notable theoretical differences between the two.

Some sizable differences between common good constitutionalism and common good originalism certainly remain, to be sure. But three years later, those differences have diminished.⁸ From a *legal theory* perspective, if not necessarily always an outcome- or subject matter-specific perspective, there is now definitively more that unites common good constitutionalism and common good originalism than there is that divides them. I believe that the simplest and most straightforward explanation is that, even if unwittingly, my position has somewhat gravitated toward Vermeule's position just as Vermeule's position has somewhat gravitated toward mine.

Again, some important distinctions remain.

The remainder of this essay will be dedicated to reviewing the key facets of both common good constitutionalism and common good originalism, explaining this two-pronged theoretical convergence, and exploring what that convergence might entail for the vibrant, ongoing debates over the future of right-of-center American jurisprudence—while still bearing in mind the theoretical distinctions that are perhaps ineluctable.

* * * * *

The crux of common good constitutionalism in its initial form is an appeal to a jurisprudence that “should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to,

8. Ian Ward, *Critics Call It Theocratic and Authoritarian. Young Conservatives Call It an Exciting New Legal Theory.*, POLITICO (December 12, 2022), <https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201> [https://perma.cc/A34Z-Y9FU].

judges) should read into the majestic generalities and ambiguities of the written Constitution.”⁹ In a follow-up essay, Vermeule anchored common good constitutionalism in “the common-good framework” of Justice John Marshall Harlan’s majority opinion in *Mugler v. Kansas*,¹⁰ which he summarized as: “(1) the public authority may act for the common good; (2) by making reasonable determinations about the means to promote its stated public purposes; and (3) when it does, judges must defer.”¹¹

In subsequent writings, including his 2022 book, Vermeule made explicit the extent to which common good constitutionalism emerges out of the Roman law inheritance and what Vermeule calls the “classical legal tradition,” which is itself Roman law- and natural law-based.¹² As a review essay stated: “The book astutely emphasizes the distinction between *ius* (law as a general field) and *lex* (law in the sense of a specific enactment).”¹³ Under this framework, *ius* is roughly synonymous with the universalist natural law tradition, while *lex* is roughly synonymous with step (2) of the aforementioned “common-good framework” from *Mugler*: “the civil authority makes concrete the general principles of natural law,”¹⁴ via a process known as *determinatio*.¹⁵

In practice, common good constitutionalism often cashes out in favor of jurisprudential and case-specific outcomes that strongly favor a particular, viz., Thomist, conception of the common good over various claims of individual autonomy. Some of these

9. Vermeule, *supra* note 1.

10. 123 U.S. 623 (1887).

11. Adrian Vermeule, *Common-Good Constitutionalism: Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/> [<https://perma.cc/J7U4-MGQY>].

12. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

13. *The Tapestry of Common Good Constitutionalism*, IUS & IUSTITIUM (August 4, 2022), <https://iusetiustitium.com/the-tapestry-of-common-good-constitutionalism/> [<https://perma.cc/QD2J-6WYY>].

14. *Id.*

15. See Adrian Vermeule, *Deference and Determination*, IUS & IUSTITIUM (December 2, 2020), <https://iusetiustitium.com/deference-and-determination/> [<https://perma.cc/HT2G-Q9JW>].

outcomes, such as common good constitutionalism's support for the Commerce Clause-emboldening majority opinion in *Gonzales v. Raich*,¹⁶ its support for the dissenters in the epochal Second Amendment case of *District of Columbia v. Heller*,¹⁷ and its support for sweeping "Green New Deal"-style environmental regulation, are at odds with the conservative legal movement consensus. In other instances, such as common good constitutionalism's support for Justice Samuel Alito's First Amendment jurisprudence¹⁸ and its support for fetal personhood under the 14th Amendment, the theory is not at loggerheads with the conservative legal consensus so much as it is representative of a minority faction of that consensus.¹⁹

The upshot is that common good constitutionalism's conception of *ius* and *lex* consistently cashes out in favor of a certain conception of the common good, wherein the *telos* of the American constitutional order is to enable strong rulers—oftentimes situated within the administrative state—with “both the authority and the duty to rule well.”²⁰ The notion of “fixation thesis”—the central tenet of originalist orthodoxy, whereby the words in a legal text mean what they mean at the time of enactment, and that meaning binds future interpreters—plays, or at least for a while seemed to play, a fairly little role in the exegetical framework. More on that shortly.

The essence of common good originalism as already mentioned, by contrast, is a hearty assent to common good constitutionalism's emphasis on the American constitutional order as revolving around substantive justice and the common good over

16. 545 U.S. 1 (2005).

17. 554 U.S. 570 (2008).

18. See, e.g., *U.S. v. Stevens*, 559 U.S. 460 (2010); see also *Snyder v. Phelps*, 562 U.S. 443 (2011).

19. As I will soon detail, it is this latter bucket of cases and jurisprudential areas where common good constitutionalism and common good originalism have the clearest overlap.

20. VERMEULE, *supra* note 3.

idiosyncratic notions of individual autonomy maximalism,²¹ while emphasizing that “originalism” is a broad enough categorical descriptor to comfortably permit a common good/*telos*-oriented interpretive subgenre. Common good originalism is also more explicitly rooted than common good constitutionalism in America’s English common law inheritance “and the [English] common law tradition’s sundry underlying precepts, such as the Roman law [and] the Bible itself (even more so than the Roman law).”²² I summarized the basic common good originalism analytical framework in a speech last year at the September 2022 National Conservatism Conference:

Common good originalism is originalist insofar as the original meaning of a legal provision controls, but it is also morally “thick”: It counsels interpreters to cabin the permissible range of possible constructions to, and ultimately choose the best construction from, those which ultimately best further the *telos*—the overarching substantive orientation—of the American regime. The *telos* of the U.S. constitutional order is naturally and most explicitly captured by the very Preamble of the Constitution. The Preamble speaks of nationalist, solidaristic societal aims such as “a more perfect Union,” “the common defense,” and “the general Welfare,” as well as a concept of “justice” that can only be understood, much like the English common law itself, as downstream of the natural law tradition and, perhaps above all, the Bible and Scripture. Common good originalism is thus a substantively conservative . . . approach to originalism.²³

21. See, e.g., Josh Hammer, *Our Constitutional Order Prioritizes Justice, Not Procedure*, THE AMERICAN MIND (September 17, 2019), <https://americanmind.org/salvo/our-constitutional-order-prioritizes-justice-not-procedure/> [<https://perma.cc/69DB-E59U>]; see also *Who’s Afraid of the Common Good?*, THE AMERICAN MIND (November 23, 2020), <https://americanmind.org/salvo/whos-afraid-of-the-common-good/> [<https://perma.cc/X34F-CYXY>].

22. Josh Hammer, *A Common Law Restoration Serves the Common Good*, LAW & LIBERTY (October 7, 2021), <https://lawliberty.org/a-common-law-restoration-serves-the-common-good/> [<https://perma.cc/H97S-4YXP>].

23. Hammer, *Common Good Originalism After Dobbs*, *supra* note 4.

A corpus of words calling itself “law,” in order to be respected as *law qua law* and not mere words scribbled on a piece of paper, must have a legitimate and substantively just *telos*.

As the world was vividly reminded at Nuremberg last century, it is insufficient for political and legal actors to deem words worthy of respect simply because they are promulgated as purported “law”; this is, of course, the error of legal positivism, at least when taken to its logical conclusion. It is imperative to first ask teleological questions about the substantive orientation of a legal or political order. It is indispensable to have a viable substantive case for any proposed interpretive theory, and teleological legitimacy is the most straightforward way to ground an interpretive theory and thereby make that substantive case.

Fortunately, the American constitutional order has an explicit *telos*,²⁴ found in the common good-oriented and common law-rooted Preamble to the U.S. Constitution.²⁵ The central command of common good originalism is thus to interpret a constitutional (or statutory) provision in the manner that most naturally conduces to the constitutional order’s *telos*—the substantive ends enumerated in the Preamble—since the substantive legitimacy of that *telos* is what makes the entire edifice worth respecting by political and legal actors as *law qua law*.²⁶ Crucially, however, this interpretive exercise

24. Josh Hammer, *The Telos of the American Regime*, THE AMERICAN MIND (April 7, 2021), <https://americanmind.org/features/a-new-conservatism-must-emerge/the-telos-of-the-american-regime/> [<https://perma.cc/SE9J-Q3VG>].

25. U.S. CONST. pmb.

26. See, e.g., ARISTOTLE, NICOMACHEAN ETHICS 1103a30: “Lawgivers make the citizens good by inculcating [good] habits in them, and this is the aim of every lawgiver; if he does not succeed in doing that, his legislation is a failure. It is in this that a good constitution differs from a bad one.” (accessed at: <https://iep.utm.edu/aristotle-politics/#H5>); accord Joseph Wood, *Greek to Me*, THE AMERICAN INTEREST (August 22, 2021), <https://www.the-american-interest.com/2014/08/22/greek-to-me-2/> [<https://perma.cc/SAT3-WK4Q>] (“[T]he common good represents the practical aim of good governance in accord with the end of man’s happiness. Politics is either the pursuit of that aim—the common good—for that *telos*, or it is wrong (though real cities, Aristotle knows, will in practice be less than perfect in their politics). Political rule is thus about choosing the means to reach the common good.”)

must transpire within the confines of a permissible range of constructions that is cabined by fixation thesis. These claims are, in essence, two sides of the same coin: Because the Constitution is a *good* and *just* document, its meaning (at *some* level of abstraction) must be “fixed”; similarly, because it is a *good* and *just* document, its *telos* should be respected and advanced in legitimately close cases.

In practice, common good originalism cashes out in favor of jurisprudential and case-specific outcomes that advance a more consolidationist,²⁷ communitarian, common good-oriented vision over libertine or idiosyncratic “liberty”-based alternatives within the confines of historical “fixation” at a *reasonable* level of abstraction. In some instances, such as *Raich* and *Heller*, common good originalism’s respect for a *reasonable* level of interpretive abstraction and its more express tethering to America’s English common law inheritance cashes out in a way more consonant with the conservative legal movement status quo ante. In other instances, such as questions pertaining to free speech and fetal personhood,²⁸ common good originalism is in lockstep with common good constitutionalism. One might well argue that this account of common good originalism is not merely *prescriptive*, but also *descriptive* of how many (though of course not all) originalist-sympathetic judges actually *do* interpret the Constitution.

In other instances still, such as so-called “incorporation” of the Bill of Rights (even under the Privileges or Immunities Clause, as is proffered by much of the originalist firmament) and birthright citizenship for the children of illegal aliens, good-faith common good originalist arguments can be advanced in multiple directions. This is true for the very simple reason that common good originalism, like any method of constitutional interpretation, is merely a

27. Josh Hammer, *A Consolidationist Agenda for the Right*, AMERICAN COMPASS (March 10, 2021), <https://americancompass.org/a-consolidationist-agenda-for-the-right/> [https://perma.cc/KMZ5-5ZAC].

28. Josh Hammer & Josh Craddock, *The Next Pro-Life Goal Is Constitutional Personhood*, NEWSWEEK (July 19, 2022), <https://www.newsweek.com/next-pro-life-goal-constitutional-personhood-opinion-1725698> [https://perma.cc/2HBZ-X8P4].

framework for constructing genuinely ambiguous words or clauses and adjudicating specific “cases” and “controversies” as they arise in a judicial tribunal; common good originalism is not, just as any method of constitutional interpretation cannot be, a tidy bullet-point list of preordained outcomes.

Let us now consider the ways that common good constitutionalism and common good originalism—or at minimum, Vermeule’s position and my own position—seem to have converged since the onset of these debates three years ago.

* * * * *

There is at least one key way that I have moved slightly closer to Vermeule’s position.

In my initial short essay on common good originalism,²⁹ I appealed to the Article VI constitutional oath of office³⁰—that all political and judicial officers of the United States “shall be bound by oath or affirmation, to support this Constitution”—as a reason for rejecting common good constitutionalism in its strongest form. I did so by appeal to fixation thesis, which I believed in then just as firmly as I believe in it now: “If words maintain fixed meanings over time, then to ‘support’ a text necessarily entails an inquiry into what words meant at the time they were enacted into law.”³¹ As Ole Miss Law professor Christopher Green argued around the same time: “The oath . . . was written to have real bite in how officeholders go about their business: to tie them down to a particular Constitution—‘this’ one.”³² The basic argument is that the Article VI oath of office, via its appeal to “*this* Constitution,” affirmatively mandates that interpreters utilize some strand of originalism.

A political constitution that is *good* and *just* and is embodied within a legal order with a *telos* oriented to substantively *good* and

29. Hammer, *supra* note 3.

30. U.S. CONST. art. VI.

31. Hammer, *supra* note 3.

32. Christopher R. Green, *Does the Oath of Office Bind Constitutional Interpretation?*, NEWSWEEK (May 21, 2020), <https://www.newsweek.com/does-oath-office-bind-constitutional-interpretation-opinion-1505760> [<https://perma.cc/VXF7-JZ8Q>].

just ends must be bound by fixation thesis operating at *some* level of abstraction. But there are three important caveats.

First, there is nothing especially compelling about the Article VI invocation of “this Constitution”; the word “this” should not be over-analyzed to mean more than it plainly does, and it candidly does not mean very much other than specifying that it is the U.S. Constitution, and not any other legal document, for which Article VI requires a solemn oath. Second and related, there is an entirely legitimate debate about the precise *level* of abstraction that is appropriate and proper, both for interpreting “this [U.S.] Constitution” or for interpreting any other constitution. Third, and also related, the “oath debate” becomes mostly just a semantic dispute over whether any specific interpretive methodology, so long as it fixes its meaning at *some* level of abstraction, is so far outside fixation to denude it of theoretical legitimacy—even if that methodology explicitly rejects the label “originalism,” as common good constitutionalism does.

Common good originalism, for example, would argue that the level of interpretive abstraction that is most historically authentic, exegetically legitimate, and most consonant with the *telos* of the American constitutional order is a *reasonable* level of abstraction. That *reasonable* level of abstraction is clearly supported by a Burkean conception of epistemological humility, and it rejects the extremes of both the overly low abstraction of the positivist/historicist originalists and the overly high abstraction of common good constitutionalism. This is also consonant with respect for the norm of prudence, which Aristotle regarded as “the comprehensive moral virtue.”³³

In sum, as Jordan L. Perkins concluded a blog post on the subject three years ago: “[T]he mere existence of the oath cannot fix the interpretive methodology for ascertaining to what the oath refers. It might, more practically than logically, rule out some candidates, but the argument obtains the leverage originalists need *only* if it leaves

33. Glenn Elmers, *Conservatism Is No Longer Enough*, AM. MIND (Mar. 24, 2021), <https://americanmind.org/salvo/why-the-claremont-institute-is-not-conservative-and-you-shouldnt-be-either/> [<https://perma.cc/DXG4-DT76>].

exactly one candidate standing.”³⁴ The upshot is that while some methods of constitutional interpretation may well be “rule[d] out,” numerous contenders are still “standing.” The “oath debate” about the meaning of “this Constitution” in Article VI therefore does not get us particularly far. To the extent my initial essay on common good originalism implied otherwise—and more specifically, implied that the words “this Constitution” somehow prove the theoretical illegitimacy of common good constitutionalism—I regret the analytical error and formally renounce any such implication.

Very much related, there is at least one key way that Vermeule has moved slightly closer to my own position.

In an essay for this journal published last year,³⁵ in response to an essay from U.S. Court of Appeals for the Eleventh Circuit Chief Judge William H. Pryor that was critical of common good constitutionalism,³⁶ Vermeule and coauthor Conor Casey seem to have slightly changed their tune—or, at minimum, their rhetorical or argumentative emphasis—when it comes to fixation. In responding to Pryor, Vermeule and Casey argue that “equating respect for the fixity of posited law with originalism in anything but a thin sense is an unjustified parochialism,” where “thin originalism” refers to the “bare commitment to the claim that the meaning of a fixed text remains constant over time.”³⁷ They add: “[T]hin originalism allows that the meaning of a constitutional text may just be an abstract principle, such as ‘liberty,’ which is then cashed out over time by means of evolving application as circumstances change.”³⁸

34. Jordan Perkins, *On the Article VI Oath*, JORDAN L. PERKINS (May 12, 2020), <https://www.jordanlperkins.com/post/on-the-article-vi-oath> [<https://perma.cc/A9BW-S3W8>].

35. Conor Casey & Adrian Vermeule, *Argument by Slogan*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1 (2022).

36. William H. Pryor, *Against Living Common Goodism*, THE FEDERALIST SOCIETY (April 5, 2022), <https://fedsoc.org/commentary/publications/against-living-common-goodism> [<https://perma.cc/3478-K3JL>].

37. Casey & Vermeule, *supra* note 35, at 3.

38. *Id.* at 4.

The upshot is that common good constitutionalism now takes “fixation thesis” as a given, with the only relevant debate being the particular *level* of abstraction at which a constitutional provision’s meaning is fixed. A member of the decades-long originalist firmament besotted with “methodological tribalism” might quibble that this concession itself *renders* common good constitutionalism a strand of originalism, but that is a mere semantic dispute and intellectually unedifying in the extreme.³⁹ It is far better, instead, to acknowledge the axiomatic legitimacy over debates pertaining to the precisely correct level of abstraction for the fixed-meaning interpretation of a constitution. I made a similar argument in my 2021 *Harvard Journal of Law & Public Policy* essay on common good originalism:

The first core tenet of common good originalism is to channel rudimentary Burkean conceptions of epistemological humility and forthrightly concede that the original public meaning of many other clauses in our majestic national charter is more susceptible to competing interpretations that are well within the range of historical plausibility. . . . Originalists should become more comfortable with this reality; in fact, a proper conception of epistemological humility likely makes inconsistency on such things as the level of abstraction a feature, not a bug, of *any* constitutional interpretive methodology.⁴⁰

Thus, when it comes to the intersection of the “oath” debate and fixation thesis, Vermeule and I have moved closer to one another’s positions—and common good constitutionalism and common good originalism have partially converged, as a result. Key differences of course still remain, and the remainder of this essay will focus on analyzing those remaining differences and exploring possible avenues forward, as debates over the future of right-of-center American jurisprudence continue.

* * * * *

39. *See id.* at 12.

40. Hammer, *supra* note 5, at 943–44.

Given the confluence of common good constitutionalism and common good originalism on the binding nature of fixation, any alleged “difference in kind” between the two interpretive methodologies, along the lines of what I thought at the time of my initial May 2020 common good originalism essay at the Claremont Institute’s *American Mind* journal and perhaps even as late as my 2021 *Harvard Journal of Law & Public Policy* essay on the subject, largely collapses. What we are now left with, three years after common good constitutionalism and common good originalism first entered the jurisprudential lexicon, is not so much a “difference in kind” but a “difference in degree” over the proper level of abstraction.

The key recognition is that all relevant “right-of-center” (broadly defined) interpretive methodologies, from Professor Vermeule’s common good constitutionalism on the one extreme to the positivist originalism of Justice Scalia and Judge Bork (or, more contemporarily, Professors Will Baude and Stephen Sachs⁴¹) on the other extreme, endorse the notion that the meaning of a provision is *fixed* at the time the provision is enacted by a legitimate governing authority into a corpus of positive law. The most relevant distinction among these competing interpretive methodologies thus becomes, to no small extent, a somewhat arcane one over what the most appropriate level of abstraction is when an interpreter is asked to discern the meaning of a legal provision.

Imagine a continuum, from positivist originalism on one extreme to common good originalism toward the middle to common good constitutionalism on the other extreme. The *Raich* case, previously discussed, is again instructive. Positivist originalism, taking a very strong view of the intensity of fixation of the original meaning of the Commerce Clause and Necessary and Proper Clause, would reject the Court’s result in *Raich*. Common good constitutionalism, taking a very weak view of the intensity of fixation and instead ceding much in the way of *determination* to a legitimate governing

41. See generally William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

authority engaged in the act of prudentially applying *ius*, would support the Court's result in *Raich*.

Common good originalism, which takes a *reasonable* but not overly rigid view of fixation, could plausibly support both outcomes but would more likely cash out in favor of the *Raich* dissenters for the simple reason that the *Raich* majority's construction of the Commerce Clause and the Necessary and Proper Clause are so expansive as to support a *de facto* federal police power and thereby violate one of the most rudimentary foundations of American constitutional structure, which Madison aptly summarized in *The Federalist* No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."⁴² Where the historical implications are this cut-and-dry, in other words, epistemological humility and openness to a broader "construction zone" of historically viable interpretive plausibilities can only go so far.

We can see a similar dynamic in debates about the *Heller* case and the proper interpretation of the Second Amendment, as well as any number of other contested questions of constitutional interpretation. The point is that the competing interpretive methodologies exist on something of a continuum that is predicated upon "differences in degree" (when it comes to level of abstraction), not "differences in kind." For those interested in a *modus vivendi* between common good constitutionalism and common good originalism as they endeavor to challenge a common foe, regnant positivist originalism, this ought to be very encouraging.

In contrast to the seeming merger of common good constitutionalism and common good originalism on the question of fixation, one of the biggest remaining differences between common good constitutionalism and common good originalism is that of intellectual genealogy. Common good constitutionalism, which again is essentially an attempt to revive what Vermeule calls the "classical legal

42. THE FEDERALIST NO. 45, at 99 (James Madison) (Michael A. Genovese ed., 2009).

tradition,” is a direct modern byproduct of the venerable Roman and natural law traditions.

While it is by no means a strictly provincial form of legal interpretation, its strong emphasis on the natural law and its Thomas Aquinas-inspired conception of what law *is*—an ordinance of reason oriented to the common good⁴³—most naturally lends itself to Catholic theorists and practitioners.

Common good originalism, by contrast, sees itself as more ecumenical and as most emphatically being downstream of the English common law tradition, which itself was arguably even more heavily rooted in the Bible and Scripture than it was in the Roman law.⁴⁴ For some prominent English common lawyers, such as John Selden, that included reverence for political Hebraism and even the Mosaic Law⁴⁵; for Justice Joseph Story, writing centuries later, it was axiomatic that “there has never been a period of history in which the common law did not recognize Christianity as lying at its foundation.”⁴⁶ Common good originalism thus has substantial overlap with more explicit natural law-based jurisprudences, but it is more expressly rooted in the Bible and Scripture.

A closely related and even more obvious difference between common good constitutionalism and common good originalism is the phraseologies and hermeneutical paradigms associated with each interpretive methodology. Common good constitutionalism formulates itself in terms of *ius* and *lex*, whereas common good originalism formulates itself within the more originalist-familiar nomenclature of “construction zones”—with the interpreter deliberately putting a thumb on the scale in favor of the Preamble-centric

43. See, e.g., Adrian Vermeule, *Liberalism and the Rule of Law*, POSTLIBERAL ORDER (December 8, 2022), <https://postliberalorder.substack.com/p/liberalism-and-the-rule-of-law> [<https://perma.cc/2K6T-7DU4>].

44. See *id.* at 21.

45. See generally Issac Herzog, *John Selden and Jewish Law*, 13 J. COMP. LEGIS. & INT’L LAW 246 (1931).

46. HARMON KINGSBURY, *THE SABBATH: A BRIEF HISTORY OF LAWS, PETITIONS, REMONSTRANCES AND REPORTS, WITH FACTS AND ARGUMENTS, RELATING TO THE CHRISTIAN SABBATH* 124 (1840).

telos of the constitutional order when, operating at a *reasonable* level of interpretive abstraction, the original fixed meaning of a term is genuinely ambiguous. For common good originalism, it is the substantive legitimacy of that *telos* that makes it appropriate for the interpreter's deliberate thumb on the scale, when faced with a contestable legal question. Because that substantive legitimacy is necessarily constitutional order- and nation-specific, common good originalism is inherently less universalist and more nationalist than common good constitutionalism.

The extent to which these differences between common good constitutionalism and common good originalism are of existential importance, let alone should prevent a *modus vivendi* between the two camps, is debatable. Certainly, these differences cannot be ignored—perhaps especially not the differences in genealogy and pedigree, which have profound implications for the underlying sources and extrinsic prooftexts an interpreter should consult when constructing a legal text that is genuinely ambiguous when defined at some reasonable level of abstraction. On the other hand, the now-crystalline overlap between common good constitutionalism and common good originalism on the overall concept of fixation is a very big deal, bringing the two methodologies considerably closer together than they were when these debates were first aired three years ago.

* * * * *

One potentially nettlesome roadblock obstructing a grand common good constitutionalism/common good originalism *modus vivendi* is the particular issue of administrative law, the foremost area of Vermeule's scholarship and expertise. Vermeule is passionate about the corpus of administrative law, including its inner morality.⁴⁷ Unsurprisingly, administrative law also plays a large role in

47. See generally Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018); see also ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016).

Vermeule and Casey's formulation, in recent years, of common good constitutionalism.⁴⁸ Indeed, it is difficult to envision an interpretive theory of common good constitutionalism without a concomitant emphasis on the legitimacy of, and the need for, a strong administrative state comfortably ensconced in the executive branch. So, the relevant question is whether this particular view of the administrative state is *intrinsic* to the methodology of common good constitutionalism, or whether it is *extrinsic* to it.⁴⁹

If a favorable disposition toward the contemporary administrative state is intrinsic to the methodology, it would be so because common good constitutionalism's structural view of the interaction of *ius*, *lex*, and *determination* necessarily entails a strong executive bureaucracy freed from direct political accountability. If, by contrast, a favorable disposition toward the contemporary administrative state is extrinsic to the methodology, it would be so because common good constitutionalism's view of the proper level of abstraction in interpretive questions could plausibly cash out in different ways when it comes to the legitimacy of the administrative state. For example, it could be the case that the Vesting Clause of Article I, which is what is usually cited by "nondelegation doctrine" proponents to decry the legitimacy of the administrative state, could be susceptible to multiple plausible interpretations even under common good constitutionalism, based on both the level of textual abstraction and competing moral claims about the specific

48. Aaron Bondar, *The Living Voice of the Law: Debates over Common Good Constitutionalism*, AMERICAN AFFAIRS (Spring 2023) (accessed at: <https://americanaffairsjournal.org/2023/02/the-living-voice-of-the-law-debates-over-common-good-constitutionalism> [<https://perma.cc/CK7T-EUMY>]) ("[Vermeule's] recent book, *Common Good Constitutionalism*, lays out an admiring vision of the administrative state—or, at least, its potential—a vision of jurisprudence which is more pragmatic than philosophical."

49. See, e.g., John Ehrett, *Are We All Common Good Constitutionalists Now?*, Anchoring Truths (May 16, 2022), <https://www.anchoringtruths.org/common-good-constitutionalism-a-symposium/are-we-all-common-good-constitutionalists-now/> [<https://perma.cc/Q9Z5-JEWD>] ("[O]ne might make a colorable argument that the design of the administrative state, as currently constituted, is inconsistent with the principles of the common good[.] Vermeule would almost certainly disagree, but the argument does not seem obviously incoherent.").

relationship between the common good and the freewheeling nature of a politically unaccountable administrative state.

The practical importance of this question is that many political conservatives, including those who are vociferous foes of legal positivism, are generally quite skeptical of an engorged administrative state and the power that the modern administrative state—including the much-dreaded “Deep State”—wields. Consider as but one example 2022’s “National Conservatism: A Statement of Principles,” which I signed. That statement read, in relevant part: “We recommend a drastic reduction in the scope of the administrative state and the policy-making judiciary that displace legislatures representing the full range of a nation’s interests and values.”⁵⁰

As a simple matter of coalition-building, it would behoove common good constitutionalism if it could broaden its appeal to those who do not necessarily share its leading theorists’ particular views on the efficacy and morality of the administrative state. To the extent Vermeule’s strongly favorable view of the administrative state is *intrinsic* to the common good constitutionalism project, that will have the natural effect of limiting its appeal to prospective converts—and necessarily cabin the extent to which a *modus vivendi* is possible between common good constitutionalism and common good originalism. To an extent, it seems that common good constitutionalism’s devil-may-care boldness in challenging the regnant status quo and fondness for excoriating originalist shibboleths may militate in favor of a theoretically intrinsic fondness for the administrative state. But that is a mere educated guess on my part.

I am a common good originalist and not a common good constitutionalist, so I cannot definitively answer the question of whether any particular view of the legitimacy or morality of the administrative state is methodologically intrinsic or extrinsic to the common good constitutionalism project. But the question needs to be answered.

50. *National Conservatism: A Statement of Principles*, NATIONAL CONSERVATISM, <https://nationalconservatism.org/national-conservatism-a-statement-of-principles> [https://perma.cc/62UH-TTSM] (last visited April 10, 2023).

* * * * *

In the final assessment, the numerous ways that common good constitutionalism and common good originalism have converged, and perhaps even moved toward a symbiosis, are more important than, and drastically outweigh, the ways in which they are still meaningfully distinct. Common good constitutionalism's clarification, over the past year and a half or so, that it recognizes and abides by fixation thesis, is nothing less than a monumental development in this roiling debate. As a purely methodological matter, the practice effect of this concession is that what differences remain between common good constitutionalism and common good originalism pertain mostly to an incremental disagreement over the appropriate level of abstraction in constitutional interpretation.

Above all, it is important for common good constitutionalists and common good originalists not to miss the forest for the trees. The cause of the explosion of these jurisprudential debates three years ago was deep frustration with the regnant positivist originalism status quo; three years later and *Dobbs v. Jackson Women's Health Organization*⁵¹ notwithstanding, those deep frustrations remain. As I said in the 2022 National Conservatism Conference speech: "That a moral and constitutional monstrosity such as *Roe [v. Wade]* was finally overturned, 49 years after it was decided and 40 years after the formation of The Federalist Society, says very little about the supposed triumph of any particular interpretive methodology, and very much about the success of the political machinations of Donald Trump and Mitch McConnell."⁵²

My former boss, Judge James C. Ho of the U.S. Court of Appeals for the Fifth Circuit, writes in this very symposium that common good constitutionalism and originalism have a "common adversary": "fair-weather originalism," Judge Ho calls it. From a common good originalist perspective, I would phrase it somewhat similarly, but nonetheless differently. Common good constitutionalism

51. 142 S. Ct. 2228 (2022).

52. Hammer, *Common Good Originalism After Dobbs*, *supra* note 4.

and common good originalism also share a common adversary: avowed legal positivism. As the Right's anti-positivist—or at minimum and perhaps more accurately, positivist-skeptical—march through the institutions hopefully accelerates, I am optimistic that common good constitutionalism and common good originalism can coexist as very strong allies against this mutually shared sclerotic foe.