

ORIGINALISM, COMMON GOOD CONSTITUTIONALISM, AND TRANSPARENCY

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ABSTRACT

A theory of interpretation that is more transparent tends to be preferable to less transparent alternatives. Increased transparency tends to promote the values of constraint, democratic legitimacy, and an understanding of what the law is. Under a transparency rubric, originalism, as a standard of interpretation, performs better than common good constitutionalism. Originalism provides a better defined (though still imperfect) basis for determining the correctness of claims about what the Constitution means. Common good constitutionalism's reliance on morally and politically loaded terminology makes it elusive as a standard of interpretation which tends to match the desires of the interpreter. At the implementation stage, however, those who implement common good constitutionalism do so in a transparent manner—reading the Constitution in line with their readily expressed moral and political inclinations. Originalism, on the other hand, is vulnerable to disingenuous interpreters who use originalism as a smokescreen to achieve political ends in the guise of neutrality. This casts doubts on originalist attempts to use common good constitutionalism as an opportunity to sell their theory to nonoriginalists.

INTRODUCTION

Since Professor Adrian Vermeule's early 2020 article on common good constitutionalism, originalists and common good

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constitutionalists have been at war. Vermeule doesn't hold back in attacking originalism, and originalists aren't shy about responding.² One might be tempted to claim that "Adrian Vermeule's legal theories illuminate a growing rift among US conservatives."³

As a critic of originalism, I'm inclined to sit back and let these folks duke it out. After all, I don't care for common good constitutionalism either. From how it has been presented, defended, and interpreted so far, common good constitutionalism uses malleable terms like "common good" and "flourishing," coupled with the most open-ended provisions of the Constitution, to launder political preferences through a theory purporting to be an interpretive process.⁴ The result is claimed constitutional interpretations that align with the preferences of the interpreter.

Common good constitutionalists present their theory as a movement—hoping that their theory will "make[] the very same kind of inroads that originalism made" on its way to its ascendant status.⁵ This requires "a multi-front engagement aimed at informing

2. See, e.g., ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 91-116 (2022) (critiquing originalism); William H. Pryor, Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24 (2022) (critiquing common good constitutionalism and arguing in favor of originalism); William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861 (2023) (critiquing common good constitutionalism from an originalist perspective); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 1 (2022) (responding to critiques of common good constitutionalism).

3. Brooke Masters, *Adrian Vermeule's Legal Theories Illuminate a Growing Rift Among US Conservatives*, FINANCIAL TIMES (Oct. 14, 2022) <https://www.ft.com/content/5c615d7d-3b1a-47a2-86ab-34c7db363fe4> [<https://perma.cc/N55N-CZLT>].

4. See Brian Leiter, *Politics By Any Other Means: The Jurisprudence of "Common Good Constitutionalism"*, 90 U. CHI. L. REV. 1685, 1689 (2023) (describing common good constitutionalism as "a kind of crude, results-oriented legal realism"). While common good constitutionalism's focus on open-ended text in favor of preferred political results suggests it is not so much an interpretive theory as political tactic, this paper will treat common good constitutionalism as an interpretive theory for the purpose of aiding comparisons to originalism.

5. See Conor Casey, *"Common-Good Constitutionalism" and the New Battle Over Constitutional Interpretation in the United States*, 4 PUB. L. 1, 27 (2021) (available at <https://liverpository.liverpool.ac.uk/3125430/1/Casey%20Final%20Revised%20Final%20.pdf> [<https://perma.cc/77AG-4LP8>]).

judicial ideology and the background socio-political order which influences the assumptions, beliefs, and values of officials about the purpose of a constitution and constitutional law” — a strategy that will “help take ‘off-the-wall’” constitutional arguments “and make them plausible, or even convert them into a new orthodoxy.”⁶ A symposium devoted to the theory at Harvard Law School fits nicely into this strategy.

And despite my skepticism of common good constitutionalism, here I am, attending that symposium, surrounded by prestigious scholars and judges, all of whom act like common good constitutionalism warrants such a display.⁷ Given my prior criticism of originalism, I might be tempted to cheer on common good constitutionalists’ work against the theory.⁸ But these critiques aren’t anything new, as Vermeule acknowledges,⁹ so there’s no need to lend any credibility to common good constitutionalism because its adherents recycle these arguments.

Instead, I use common good constitutionalism as a foil for originalism and analyze whether, and to what degree, each theory accomplishes the normative goal of transparency. Part II distinguishes between interpretive standards and procedures and argues that considering theories as both standards and procedures is necessary for a meaningful discussion. Part III briefly addresses the normative consideration of transparency and why theories of interpretation that are more transparent are preferable. Parts IV and V evaluate how transparent originalism and common good

6. *Id.*

7. Cf. DJR Memes, *Hey Look at Us (Paul Rudd) – Original*, YOUTUBE (Nov. 4, 2019) https://www.youtube.com/watch?v=3Yd3lQVbkYc&ab_channel=DJRMemes [<https://perma.cc/C4T9-ZYJW>].

8. See Eric Segall, *Ten Observations About Adrian Vermeule’s Book “Common Good Constitutionalism,”* DORF ON LAW (March 2, 2022, 7:59 a.m.) <http://www.dorfonlaw.org/2022/03/ten-observations-about-adrian-vermeules.html> [<https://perma.cc/FLM6-RNTD>] (applauding Vermeule’s critiques of originalism and urging that “[w]e must stop dismissing people because we disagree with some of their ideas”).

9. VERMEULE, *supra* note 1, at 92.

constitutionalism are. I conclude that originalism is more transparent as a standard of interpretation than common good constitutionalism, but that common good constitutionalism is far more transparent in its implementation. This complicates originalist attempts to use common good constitutionalism as an example to warn progressives of the dangers of living constitutionalism. The substantive results under originalism and common good constitutionalism are likely to be the same, but common good constitutionalism is just more honest about what's going on.

I. THEORIES OF INTERPRETATION: STANDARDS AND PROCEDURES

Professor Stephen Sachs's recent work emphasizes the distinction between theories of interpretation as *standards* for determining whether a claim about what the Constitution says is correct, and *procedures*, or guides for how those interpreting the Constitution are to arrive at conclusions about what the Constitution means.¹⁰ Professor Christopher Green makes a similar distinction between ontological questions about the Constitution's nature (what the Constitution actually means) and epistemological questions (how to determine what the Constitution means)—generally preferring a focus on ontology to epistemology.¹¹ And even more ink has been spilled on distinguishing between theories of law and adjudication and theories of “the ultimate criteria of legal validity, or of the ultimate determinants of legal content” and “theories of what judges should do in the course of resolving disputes.”¹²

Those who highlight the distinction between interpretive standards and questions of implementing those standards tend to

10. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 787 (2022).

11. Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 497, 509–11 (2018).

12. See Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 HARV. L. REV. FORUM 133, 137–38 (quoting Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 552 (2013)).

minimize the implementation part of the interpretive process.¹³ Green, for example, argues that abandoning a standard because it lacks a decision procedure is akin to a drunk “looking for his keys under the lamppost, rather than the place he dropped his keys, because the light is better under the lamppost.”¹⁴ The key, in this metaphor, is the correct meaning of the Constitution.

Space constraints prevent a detailed response. But, in brief, an overt or exclusive focus on standards and constitutional ontology is mistaken because such an approach is of limited value to judges, attorneys, and the public. Failing to account for how standards of interpretation require or necessitate certain procedural steps is poor guidance for these interpreters and is all but useless if one hopes to predict or explain how constitutional interpreters have acted or will act.¹⁵ This, however, doesn't seem consistent with how academic originalists act outside the pages of law reviews, where they frequently opine on how originalist justices can or ought to act.¹⁶

13. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 789 (2022); Mitchell N. Berman & Keven Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1739–40 (2013) (“A view about what the law is or what it consists of does not by itself entail or presuppose any position about how judges are supposed to adjudicate constitutional disputes”).

14. Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 497, 509 (2018).

15. For a more extensive treatment of this argument, see Michael L. Smith, *Originalism and the Inseparability of Decision Procedures from Interpretive Standards*, 58 CAL. WEST. L. REV. 101 (2022).

16. See e.g., Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, THE ATLANTIC (April 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> [https://perma.cc/3G4K-XBUC]; William Baude, *Of Course the Supreme Court Needs to Use History. The Question is How*, WASH. POST (Aug. 8, 2022, 9:27 a.m.), https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/?utm_medium=social&utm_campaign=wp_opinions&utm_source=twitter [https://perma.cc/LAU8-39DL]; Lawrence B. Solum, *Judge Barrett is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020, 1:31 p.m.), <https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative> [https://perma.cc/V9VB-BQTS].

Additionally, whether a theory is easier or harder to implement, or more prone to abuse, is a relevant consideration when deciding what interpretive theory to accept. Returning to Green's analogy of the drunk searching for keys, a better analogy for debates over what theory to use is a drunk confronted with a range of city streets with varying degrees of lighting, each of which contains a copy of the desired key. It makes sense to choose the street that is better lit because finding the key will be easier—that is, a theory that is easier to implement is, all else being equal, more desirable than a theory that is difficult or impossible to implement.

To address a potential objection: originalists may claim that a standard of interpretation has nothing to say about procedures to be followed by those making determinations of meaning, so this argument bypasses the position they defend. But this doesn't seem correct. A theory that deems the original public meaning of the Constitution to be the standard for what the Constitution means requires a determination of original public meaning. In cases where the meaning is not immediately apparent,¹⁷ this will require investigation of historical evidence of writings, statements, and laws. The original public meaning standard also excludes certain procedures: one would not expect the interpreter to poll the modern voting public on their preferred reading.¹⁸

II. TRANSPARENCY'S NORMATIVE FORCE

Debates over constitutional theories often fail to clarify the normative criteria used to select one theory over another, or focus on particular normative considerations without contemplating others. For example, modern originalists argue that originalism's failure to

17. That is, the cases that draw the most debate and attention.

18. See, e.g., Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1655–67 (2018) (describing a “triangulation” method employing various methodologies and categories of evidence, such as records of ratification debates and broader surveys of founding-era documents that may be used to identify overlapping conclusions regarding the Constitution's original meaning).

constrain judicial actors is not a problem with the theory—citing other normative considerations like democracy, predictability, and democratic legitimacy.¹⁹ But shifting the focus doesn't make the value of constraint go away—a theory that is more constraining may be preferable to originalism, at least by that metric. Debates over interpretive theories should specify which normative considerations are in play, and which—if any—are being set aside. This Essay focuses primarily on the normative consideration of transparency—the notion that a theory of interpretation is more desirable, all things considered, if it is easier to follow and verify by actors other than the decider.²⁰ This formulation of transparency is meant to address both complex methods employed in good faith and those same methods employed in pretextual manner. Those acting in good faith may make mistakes, and the more transparent their method is, the easier it will be for third parties to identify these errors. Those acting in bad faith—purporting to employ a method while seeking to accomplish their own, unrelated ends—may be easier to spot if their method is more transparent.

Focusing on transparency does not entirely neglect other normative considerations. A more transparent theory may better achieve democratic legitimacy interests to the extent that the public is able to understand and verify how the Constitution is interpreted and to respond through political means, such as amending the Constitution. At the same time, a pure focus on transparency does not guarantee other normative values. For example, an approach that requires judges to decide in favor of the petitioner in every case is a transparent rule that constrains judges, but does not accomplish democratic legitimacy or stability.

19. See Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (describing a shift from “Old Originalism” which promised judicial constraint to “New Originalism,” which lacks any “pretense of a power to constrain judges to a meaningful degree”).

20. See Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J. L. & PUB. POL'Y 287, 334 (2020) (describing the “central idea” of transparency as “constitutional decisions are rendered more legitimate to the extent that the motives and reasons for the decisions are made public and offered in good faith”).

Originalism, as a standard, is fairly transparent—although some concerns exist. As a procedure, it fares less well. Common good constitutionalism, on the other hand, promises a far more transparent procedure for decisions—urging judges to articulate how their rulings are meant to achieve ends consistent with the common good rather than conceal this reasoning behind a veil of historical citations. But common good constitutionalism, as a standard, lacks transparency because the notion of the “common good” eludes definition. This risks the theory becoming a rubber stamp permitting any desired outcome—a phenomenon that’s already begun.²¹

III. ORIGINALISM AND TRANSPARENCY

A. *Originalism as a Standard*

Academic theories of originalism initially appear transparent as standards for determining whether statements about the Constitution’s meaning are correct. While there may be a debate over what type of originalist theory ought to be employed, each of these theories provide formulations of original meaning that at least take efforts to refer to some external phenomenon as a basis for definitions. Original public meaning originalism, for example, holds that the meaning of the Constitution, as understood by a reasonable reader at the time of the Constitution’s ratification, is the standard for determining meaning.

Some issues exist at the standard level. For example, difficulties remain for defining what “original public meaning” means, particularly in cases where different portions of the public took a single provision to mean different things.²² Does originalism run out at this point? Is there a way of selecting between alternatives? Difficulties also arise in defining the reasonable reader of the

21. See, *infra* notes 55–59 and accompanying text.

22. See generally Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021) (discussing the problem of multiple meanings and the challenges these meanings present to “more-than-minimal” claims about original public meaning).

Constitution—including questions of how well educated this person is, whether this person can, in fact, read, and how to account for the views and understandings of women, African Americans, Native Americans, and others whose voices and views were excluded from political discourse.²³ These are serious concerns, although there may be potential responses.²⁴ One may object that this uncertainty renders originalism, as a standard, fatally opaque. There may be merit to this concern—especially to the extent that originalists shrug away historical complexity rather than addressing it.²⁵ Still, as will be addressed later, originalism at least attempts to identify a reference point for claims of constitutional meaning, while common good constitutionalists tend to avoid doing so—especially in the face of concerns over the implications of their theory.²⁶

B. *Originalism as a Procedure*

While modern originalists have put a fair amount of scholarship into defining and parsing out the details of originalism as a standard for interpretation, the steps required to implement that standard are far from transparent. Originalists state that the meaning of

23. See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, Or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584–86 (2011) (“An imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind. How the existence of such a figure can offer a constraint on the excesses of judicial discretion seems equally a fabrication as well. It is, in effect, a legal fiction in a novel sense of the term.”); Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 522 (2011); see also Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018); Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 479–80 (2016).

24. See Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 412–23 (2018) (discussing how originalism may be implemented in a manner that incorporates more diverse perspectives and speakers).

25. See, Solum, *supra* note 18 at 1653–54 (2018) (dismissing work by historians that delves into complex motivations and devotes, in Solum’s estimation, insufficient attention to textual meaning).

26. See Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022, 1:33 P.M.), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/74MQ-ZNS5>].

the Constitution is determined by its original public meaning—so at this point, all that needs to be done is to determine what that original public meaning is. This seems straightforward enough.

But things aren't so simple. Determining the original public meaning of constitutional provisions—particularly those that are imprecise or loaded—may require a fair amount of historical investigation. Advocates arguing for a particular interpretation will likely present a skewed set of historical citations and arguments in support of their preferred meanings. Courts engage in historical analysis based primarily on the submissions of advocates before them.²⁷ Judges and Justices are not experts, and must balance the time needed to conduct historical research with their overall case-load.²⁸ While their opinions on original public meaning may purport to be objective findings, these opinions are likely influenced by the arguments of advocates and by biases that may work their way into the process, whether the judges are aware of these biases or not.²⁹

What's more, historical analysis involves numerous discretionary decisions that are often overlooked or underemphasized by the court.³⁰ While the Supreme Court's opinion in *National Rifle & Pistol Association, Inc. v. Bruen*³¹ is more of a traditionalist opinion than an originalist one, its treatment of historical evidence illustrates these hidden discretionary calls.³² Without setting forth standards for

27. At least, this is how the Supreme Court has said courts can get around any difficulties of historical analysis. See *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 142 S.Ct. 2111 (2022).

28. See Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 *FORDHAM L. REV.* 905, 912–13 (2015).

29. See Rebecca Piller, *History in the Making: Why Courts Are Ill-Equipped to Employ Originalism*, 34 *REV. LITIG.* 187, 197–200 (2015); ERIC J. SEGALL, *ORIGINALISM AS FAITH* 123–24 (2018).

30. See Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 *MINN. L. REV.* 283, 330–33 (2021) (addressing how discretion is inevitable in judicial reasoning).

31. 142 S.Ct. 2111, 2130 n.6 (2022)

32. Where originalism may look to historical practices as evidence of original public meaning, a traditionalist approach tends to equate constitutional meaning with those

how much evidence was sufficient to establish a historical tradition of gun restrictions, or what evidence would be sufficiently analogous to demonstrate a historic restriction, the Court rejected numerous examples of historical restrictions on guns as irrelevant in its quest to overrule New York's century-old permitting scheme.³³ Moreover, while the Court took pains to differentiate the New York licensing scheme it invalidated from most other states' licensing regimes, it remains unclear why any state licensing schemes hold up to historical scrutiny.³⁴

At best, non-expert judges are likely to engage in selective reliance on history and reach conclusions that are motivated, at least in part, by preferred outcomes that are supported by evidence amassed by the advocates before them. At worst, these same judges use the historical analysis of originalism as a smokescreen to disguise goal-oriented results.³⁵ Either way, implementing originalism lacks transparency.

IV. COMMON GOOD CONSTITUTIONALISM AND TRANSPARENCY

A. *Common Good Constitutionalism as a Standard*

To serve as a standard for constitutional interpretation, common good constitutionalism must help interpreters distinguish between correct and incorrect statements about what the Constitution means.³⁶ For this process to be transparent, the standard must be defined in an understandable manner that ensures consistent

traditions. *See generally*, Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43 (2023).

33. *Id.* at 2133, 2143–46, 2152–53. For more detail, see Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOKLYN L. REV. 797 (2023).

34. Adam M. Samaha, *Is Bruen Constitutional? On the Methodology that Saved Most Gun Licensing*, 98 N.Y.U. L. REV. (forthcoming) (manuscript at 5–6) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4241007 [<https://perma.cc/MVY5-MLX6>].

35. For arguments that this is the case, *see* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 569–70 (2006).

36. *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 789–90 (2022).

application—it must reference some verifiable fact, facts, or set of requirements that must be met. Otherwise, common good remains undefined and opaque—an external observer would be unable to reach an independent conclusion about what common good constitutionalism demands.

Common good constitutionalism calls for the Constitution to be interpreted in a manner that “aims to put our constitutional order . . . in its best possible light,” a process that Vermeule argues involves “reviv[ing] the principles of the classical law, looking backward so that we may go forward.”³⁷ The classical legal tradition Vermeule seeks to revive is defined with the loaded phrase, “an ordinance of reason for the common good.”³⁸ As for the “common good,” it is defined with a further series of loaded terms and phrases. These include “the happiness or flourishing of the community, the well-ordered life in the polis,” not to be confused with “‘private’ happiness, or even the happiness of family life” which is what the common good is meant to guarantee.³⁹ The common good also includes the achievement of “a famous trinity, peace, justice, and abundance,” which Vermeule “extrapolate[s] to modern conditions to include various forms of health, safety, and economic security” as well as “solidarity and subsidiarity.”⁴⁰ Those seeking additional politically and morally charged terminology to serve the role of definitions need not fear, as Vermeule argues that Constitutional law should “elaborate subsidiary principles,” including:

Respect for legitimate authority; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and workers’ unions, trade associations and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to “legislate

37. VERMEULE, *supra* note 1 at 5.

38. *Id.* at 3.

39. *Id.* at 28. Vermeule argues that the happiness of the community, properly accomplished, includes the happiness of private individuals and families. *Id.*

40. *Id.* at 7.

morality” — indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.⁴¹

Elsewhere, Vermeule and Conor Casey emphasize the goal of “human flourishing,” defining it as involving “life and component aspects of its fullness: health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity.”⁴² More detail? Well, there is “an extremely rich and extensive philosophical debate in the natural law tradition over this question that we cannot do justice to here,” other than to say that it involves “fundamentally different assumptions than those underpinning some contemporary liberal and progressive jurisprudence.”⁴³ What these assumptions are and how to determine whether they are correct or incorrect remains unclear.

Referencing historical practices to define the common good seems out of the question. For example, Linda McClain criticizes common good constitutionalism as a backward-looking theory that will import gendered hierarchies to the severe detriment of women.⁴⁴ Vermeule dismisses this concern with barely a shrug, asserting that common good constitutionalism does not look “uncritically” to history but seeks to “translate and adapt” classical legal principles to the modern world.⁴⁵ Vermeule does identify several

41. *Id.* at 37.

42. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 1, 12–13 (2022).

43. *Id.* at 12.

44. Linda C. McClain, *Reasons to Doubt Whether “the Best Way Forward Is To Look Backward”*: Commentary on Adrian Vermeule, *Common Good Constitutionalism*, BALKINIZATION (July 12, 2022) <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [<https://perma.cc/JHG2-PZA3>].

45. Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022) <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/4V86-6P5R>].

examples of laws or doctrine that would fail under his formulation of the common good, but the derivation of these results tends to boil down to little more than citations to the wide-ranging and malleable principles identified above.⁴⁶

I'm not the first to raise this concern.⁴⁷ But Vermeule's responses to these critiques perpetuate the indeterminacy of common good as a standard for determining what the Constitution means. Responding to a desire that common good constitutionalism place general maxims of Roman law "alongside more specific cases," Vermeule argues that the "basic function of the praetorian law itself" of "provid[ing] a mechanism by which magistrates nominally lacking the full power of legislation might exercise remedial and interpretive flexibility in the specification, adjustment and enforcement of general rules of law in political cases" is what ought to be extracted from historical laws and practices.⁴⁸ It seems that indeterminacy is part of common good constitutionalism's appeal.⁴⁹

But not always. "Straight replication" of Roman or medieval law is "often . . . a conceptual error," *except*—however—for "cases where the Roman or medieval law tracked inherent precepts of the natural law, such as the nature and ends of marriage."⁵⁰ For elaboration, Vermeule directs us back to his book's criticism of the

46. See Steven D. Smith, *The Constitution, the Leviathan, and the Common Good*, CONST. COMMENT. (forthcoming 2022) (manuscript at 9) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098880 [<https://perma.cc/5Z6E-XXJ3>] (describing Vermeule's analysis as "platitudinous invocations of the common goods of health, safety, and such coupled with conclusory denunciations of this legal doctrine or that legal decision as contrary to the common good," and critiquing Vermeule as doing "little to illuminate any genuine controversies of our time").

47. See, e.g., *id.*; William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC'Y REV. 24, 38–39 (2022).

48. Adrian Vermeule, *The Theory and Practice of Common Good Constitutionalism*, IUS & IUSTITIUM (Aug. 8, 2022) <https://iustitium.com/the-theory-and-practice-of-common-good-constitutionalism/> [<https://perma.cc/3QBD-RQGE>].

49. Casey and Vermeule also argue that originalist critics of common good constitutionalism face similar problems of indeterminacy with their own theories. Conor Casey & Adrian Vermeule, *Argument By Slogan*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 13–14 (2022). Fine by me.

50. *Id.*

Supreme Court's decision in *Obergefell v. Hodges*.⁵¹ Vermeule highlights the majority's "acknowledge[ment]" that "marriage has for millennia been defined as the union of male and female for the purpose of procreation" as "powerful evidence of the *ius gentium* and *ius naturale*."⁵² Marriage, Vermeule contends, is "not (merely) a civil convention" or "corporate form" created to allocate benefits, but a "form itself constituted by the natural law in general terms as the permanent union of man and woman under the general telos or indwelling aims of unity and procreation (whether or not the particular couple is contingently capable of procreating)."⁵³

This, it appears, is a point so firm and obvious as a matter of natural law that straight replication of the Old Ways is warranted. Never mind that squaring the parenthetical qualification about capability of procreation contradicts the argument in which it appears. Never mind that antiquated notions of marriage that obsess over procreation may not be worthy of reverence and are instead something to move beyond. And never mind that, in the spirit of Vermeule's affinity for loaded terminology and principles, one may respond in kind by arguing that concepts like "love," "companionship," and "mutual support toward the goals of achieving a couple's personal, professional, and spiritual ends" are all goals and ideals of a marriage beyond procreation. No. All of this is wrong. The Romans got it right.

Also illuminating is Vermeule's reaction to the expected critique that common good constitutionalism seems indistinguishable from the "moral readings" approach to constitutional law, most prominently advocated by Ronald Dworkin.⁵⁴ Under the moral readings approach, judges should interpret the Constitution with an eye to "aspirational principles embodied in the constitution" and

51. 576 U.S. 644 (2015).

52. VERMEULE, *supra* note 1 at 131 (2022).

53. *Id.* at 131–32.

54. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2–3 (1996); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1978); see also JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 73 (2015)

“affirmatively . . . pursue good things like the ends proclaimed in the Preamble.”⁵⁵

Vermeule doesn’t attempt to distance himself from the framework of the moral readings approach. Indeed, he approves of it.⁵⁶ Instead, Vermeule argues that common good constitutionalism “advocates a different set of substantive moral commitments and priorities . . . from Dworkin’s, which were all of a conventionally left-liberal and individualist bent.”⁵⁷ While Vermeule makes sure to distinguish his moral commitments from Dworkin’s, reasons why Vermeule’s commitments ought to be adopted *rather than* Dworkin’s appear to be little more than a manner of choice. Vermeule asserts that common good constitutionalism holds the common good as the “highest principle,” but this isn’t an argument for why it should be preferred over alternate commitments.⁵⁸ Vermeule briefly references how “classical lawyers in America” “frequently cited” the common good “as a fundamental constitutional principle.”⁵⁹ This may be the beginning of an argument that the common good has a stronger historical pedigree and is therefore preferable to Dworkin’s moral commitments. But that argument remains unstated and appears to clash with Vermeule’s disapproval of defining the common good through historic practices.⁶⁰

A final note: I expect that common good constitutionalists will critique this characterization, likely arguing that I lack sufficient expertise about the common good and natural law. Casey and Vermeule, for example, accuse sitting judges of lacking sufficient recollection of the “necessary concepts and background knowledge” to write legal theory.⁶¹ In response to Judge William Pryor’s criticism of common good constitutionalism, they accuse him of being

55. James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 517 (2014).

56. VERMEULE, *supra* note 1 at 69.

57. *Id.* at 6.

58. *Id.* at 6, 190 n.17.

59. *Id.*

60. *See* Vermeule, *supra* note 45.

61. *See* Casey & Vermeule, *supra* note 42, at 1.

“strikingly unfamiliar with the existence of the classical legal tradition,” having “no very clear idea” of what living constitutionalism is, and failing to cite sufficient historical sources.⁶² What remains unaddressed, though, is that judges like Pryor will be the ones implementing the theory. If they’re butchering it in the theoretical discussions, imagine what common good constitutionalism will look like on the ground.

Perhaps modern philosophizing and moral theorizing will further define the contours of what the “common good” entails. Vermeule acknowledges that his work is “a broad sketch” and suggests that his theory will be “introduce[d] by degrees.”⁶³ Maybe he will tell us more someday. For now, common good constitutionalism as a standard of interpretation remains, at best, opaque and, at worst, infinitely malleable.

B. *Common Good Constitutionalism as a Procedure*

Where those implementing originalism face accusations of using originalist methodology to conceal political preferences, the common good constitutionalist makes no secret that he or she is employing the theory in pursuit of political and moral goals. Common good constitutionalism therefore functions far more transparently as an interpretation procedure.⁶⁴ If the standard of interpretation is little more than political and moral goals, then there’s no need for

62. *Id.* at 1–2 & n.4, 13.

63. VERMEULE, *supra* note 1 at 25.

64. Here, I refer to instances where the interpreter admits to employing a common good constitutionalist method. A scenario may arise where a judge purports to reach a decision through alternate means, such as originalism, but in actuality is using a different method like common good constitutionalism. While this sort of scenario goes beyond the relatively contained discussion of this article, the possibility of such an outcome seems related to originalism’s lack of transparency in implementation. Were its implementation more transparent, it would be harder to smuggle in a common good constitutionalist method. As for the reverse, it may be possible for originalists to sneak in history to a purported common good constitutionalist analysis, but why they would do so seems less clear. Doing so out of moral and political preferences is unnecessary, as the methodology of common good constitutionalism is an easier means of importing these preferences to the interpretive process.

an interpreter to obscure the pursuit of these goals with faux historical analysis.

From this perspective, originalist warnings about the dangers of common good constitutionalism lose their force. Randy Barnett refers to common good constitutionalism as “conservative living constitutionalism,” and warns that those who critique originalism run the risk of judges adopting a transparently conservative approach to constitutional interpretation.⁶⁵ Setting aside Barnett’s failure to recognize that nonoriginalists argue for a number of alternative interpretive approaches that are a far cry from common good constitutionalism,⁶⁶ Barnett’s warning rings hollow because he doesn’t pretend to claim that adopting originalism will stop conservative judges from using the theory as cover. Indeed, he states that “originalism, like any other method or theory, is not self-enforcing.”⁶⁷ Accordingly, for progressives who are concerned that conservative judges strive to reach conservative outcomes—with good reason—originalism seems to add nothing more than a way for those judges to obscure their partisan inclinations.⁶⁸

V. IMPLEMENTING COMMON GOOD CONSTITUTIONALISM

Examples of common good constitutionalism being implemented by judges and scholars illustrate the process’s transparency, and how this theory helps reveal the beliefs of its adherents. Some judicial references to the theory consist of little more than illustrations

65. Barnett, *supra* note 16.

66. For a taxonomy of these alternatives, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

67. Barnett, *supra* note 16.

68. SEGALL, *supra* note 29, at 156–70 (2018); FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 173–89 (2013).

of a general point of law or principle.⁶⁹ Others cite it for tangential purposes, such as critiquing originalism.⁷⁰

Judge John Stephens's concurring opinion in *United States v. Tabor*⁷¹ is, to date, the most thorough judicial treatment of common good constitutionalism.⁷² In *Tabor*, the U.S. Navy-Marine Corps Court of Criminal Appeals addressed whether a servicemember violated Article 120b(c) of the Uniform Code of Military Justice when he had phone sex with a woman and encouraged her to undress and masturbate while the woman's daughter was sleeping in the woman's bed.⁷³ After a lengthy textual analysis, the majority concluded that the child's awareness was not required to prove a violation of Article 120b(c) of the Uniform Code of Military Justice, which prohibited the commission of "a lewd act upon a child."⁷⁴ But Stephens went beyond the majority's textual analysis and argued for employing a common good approach to interpreting the statute.⁷⁵

Stephens begins by criticizing textualism, arguing that textualist judges still must "make a judgment about the overall meaning of the statute" and that this may give rise to "judicial legislating."⁷⁶ In response to this prospect, Stephens states that a judge taking a

69. See *Lopez v. Att'y Gen.*, 49 F.4th 231, 234 n.4 (3d Cir. Sept. 9, 2022) (citing Vermeule and Casey's article, *Myths of Common Good Constitutionalism*, in support of the principle that interpreting statutes based on their ordinary meaning serves the purpose of notifying the public of the law and coordinating them toward the public good); *Doe v. Beaumont Indep. Sch. Dist.*, 615 F. Supp. 3d 471, 495 (E.D. Tex. July 14, 2022) (citing Vermeule's book, *COMMON GOOD CONSTITUTIONALISM*, for the proposition that child abuse harms the social fabric to bolster the larger conclusion that two children's lawsuit alleging violations of their equal protection rights as a result of sexual abuse should not be dismissed).

70. See *United States v. Rife*, 33 F.4th 838, 859 n.5 (6th Cir. 2022).

71. 82 M.J. 637 (2022).

72. See Pat Smith, *A Notable New Opinion From the Heart of the Classical Tradition*, IUS & IUSTITIUM (May 28, 2022), <https://iustitium.com/a-notable-new-opinion-from-the-heart-of-the-classical-tradition/> [<https://perma.cc/W7X2-GQCW>].

73. *United States v. Tabor*, 82 M.J. 637, 642–43 (2022).

74. *Id.* at 654–55; 10 U.S.C. § 920b. Art. 120b(c), (h).

75. *Id.* at 666–67 (Stephens, J., concurring).

76. *Id.* at 665 (Stephens, J., concurring).

common good approach “would attempt to discern what common good is desired by the statute and recognize that a statute can have a purpose toward the good of the individual, a purpose toward the good of the community, and an additional good in harmonizing the interests between the two.”⁷⁷ To many, the common good approach may seem far more like “judicial legislating” than “mak[ing] a judgment about the overall meaning of a statute,” but not for Stephens.

Stephens claims that “sexual conduct has permeated our society in nearly every possible way” and that “almost every type of sexual activity . . . is shielded as a fundamental constitutional right.”⁷⁸ Stephens then remarks:

Though Western law universally proscribes sexual contact with children, it is difficult for the legal progressive (or even some of the originalists) to say *why* that is, other than the children being democratically determined to be too young to consent.⁷⁹

Stephens then asserts that consent “transform[s] nearly every type of private sexual activity into a licit act.”⁸⁰ Stephens recognizes that a child “cannot give consent because he is, again, as a *matter of law*, too young to do so, and *the law* considers this harmful to the child.”⁸¹ But if “consent is taken off the table,” Stephens suggest that this conduct resembles protected liberty interests—alluding to *Lawrence v. Texas*,⁸² which struck down a state sodomy ban.⁸³ Stephens then claims that, without awareness of the sexual conduct, there is “no failure of consent.”⁸⁴ He then hypothesizes that without any issue of consent, and in instances where children are assumed not to be harmed by lewd conduct, it would be “tempting” to question why the behavior should be criminalized at all.⁸⁵

77. *Id.* at 668 (Stephens, J., concurring).

78. *Id.*

79. *Id.*

80. *Id.* at 673 (Stephens, J., concurring).

81. *Id.* (emphasis added).

82. *Id.*; 539 U.S. 558 (2003).

83. *Tabor*, 82 M.J. at 673 (Stephens, J., concurring).

84. *Id.*

85. *Id.*

The solution? The basis for criminalizing lewd conduct is not a lack of consent, not harm, but instead the pursuit of “the objective common good of punishing those who sexualize children.”⁸⁶ “Even if the child is never ‘harmed’ by such conduct,” society is harmed because the perpetrator indulges “a vulgar prurient interest towards a child” and takes steps toward more serious sexual crimes in doing so.⁸⁷

We learn several things from this opinion:

- Stephens is of the opinion that “legal progressive[s]” cannot state why sexual contact with children ought to be banned absent a law that says so;⁸⁸
- He formulates consent and harm to children who are victims of sexual conduct as legal notions only—rather than recognizing actual physical and psychological harm as relevant considerations;⁸⁹
- This, in turn, leads to the notion that harm to children who are victims of sexual conduct can be hypothesized away;⁹⁰
- On the topic of consent to a sexual act, Stephens states, “[w]here no awareness is had, then there is, and can be, no failure of consent.”⁹¹
- With this groundwork, the only way Stephens can formulate a basis for prohibiting lewd conduct with children is to formulate a principle of natural law;⁹²
- Stephens’s claims that sexual conduct has permeated society, that the judiciary is responsible for this, and his reference to *Lawrence* suggests that Stephens deems the

86. *Id.*

87. *Id.*

88. *Id.* at 672 (Stephens, J., concurring).

89. *Id.* at 672–73.

90. *Id.* at 673 (Stephens, J., concurring).

91. *Id.*

92. *Id.*

sexual abuse of children comparable to consensual sex between consenting gay adults.⁹³

This sort of transparency may be useful for an attorney who hopes to tailor their arguments to a judge's beliefs, move to disqualify a judge, or predict how a judge will rule when evaluating the chances of success in a case.

Consider, as well, what we learn about the goals of common good constitutionalists writing in the academic sphere. In the article announcing the theory, Vermeule announced a goal of "a robust, substantively conservative approach to constitutional law and interpretation."⁹⁴ Vermeule's claimed results are unequivocal. The assertion that people may "'define one's own concept of existence, of meaning, of the universe, and the mystery of human life'" (as stated by the Court in *Planned Parenthood v. Casey*⁹⁵) will be "stamped as abominable, beyond the realm of the acceptable forever after."⁹⁶ Freedom from content-based restrictions on speech and "[l]ibertarian conceptions of property rights and economic rights will also have to go" to the extent they prevent the government from "enforcing duties of community and solidarity in the use and distribution of resources."⁹⁷

93. *Id.* at 672 (Stephens, J., concurring) (claiming that "we use the term 'Lawrence liberty interest' to describe sexual conduct that is consensual and, thus, constitutional" and contending that "if consent is taken off the table" and a lewd act is done in private in the presence of a minor, such an act would, under the logic of *Lawrence*, deserve constitutional protection). Beyond the fact that this hypothetical both removes the crucial condition of consent, and appears to hypothesize away the psychological, as well as legal, difficulties of arguing that minors may consent to sexual conduct, this framing also ignores the language of *Lawrence* itself, which noted that the case did not involve minors or others in a relationship "where consent might not easily be refused." See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

94. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (March 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/7NXX-6WSL>].

95. 505 U.S. 822 (1992)

96. VERMEULE, *supra* note 1 at 42 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

97. *Id.*

It's not just Vermeule. Josh Hammer argues for a "common good originalism," that: permits police to shoot unarmed, fleeing suspects; reads a "mandated deference toward governmental actors tasked with 'search[ing] or 'seiz[ing]' offending citizens" into the Fourth Amendment by reconceptualizing a right as a restriction and imagining away the "un" in "unreasonable;" does away with gay marriage; consigns the Eighth Amendment to irrelevance in cases that involve anything other than "the horrid forms of torture" employed in medieval Europe; and accepts John Eastman's anti-textual proposal to reinterpret the Fourteenth Amendment to eliminate its guarantee of birthright citizenship.⁹⁸

So should progressives follow Randy Barnett's advice and turn to originalism to avoid unchecked conservative results?⁹⁹ To start, it's unclear how conservative outcomes vowed by common good constitutionalists are meaningfully different from the conservative direction the Supreme Court is taking under the guise of originalism. This is partially a result of originalists using originalism as a cover to reach conservative results.¹⁰⁰ But it also may be because history itself skews toward at least some conservative goals.¹⁰¹

Barnett's advice seems pointless if progressives take him and other originalists at their word that originalism may be employed in a disingenuous and inconsistent manner to achieve conservative results.¹⁰² Barnett and originalists, in making this point, do so to

98. Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 946, 949, 950–52 (2021).

99. Barnett, *supra* note 16.

100. SEGALL, *supra* note 29, at 156–70 (2018); CROSS, *supra* note 68, 173–89 (2013).

101. See *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2324–25 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

102. *Id.*; see also Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 BOSTON L. REV. 1745, 1761 (2015) (addressing the argument that originalists "twist the evidence in the direction they would prefer it to go," and admitting that "[h]owever depressingly accurate this critique may be, it is not logically an argument against originalism. Every methodology can be abused."); William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, 136 HARV. L. REV. 861, 877 (2023) ("[A] legal system's explicit commitment to the common good is no guarantee of achieving it, any more than an explicit commitment to originalism is a guarantee of achieving that instead.")

claim that originalism as a theory itself—as a standard—remains untouched.¹⁰³ While this may be an effective way to preserve a theory, this defense is unconvincing to those who care about how originalism manifests itself through judicial practice and legal results.

In the end, a world of originalist judges will bring about conservative outcomes, but also a robust environment of legal commentary and literature. Progressive converts to originalism will have ample opportunity to publish scintillating op-eds and law review articles critiquing case outcomes using the transparent standard of originalism. A common good constitutionalist judiciary will likely generate the same conservative outcomes. But if the standard of correct constitutional meaning is little more than a few dozen morally laden terms that allow interpreters to impose their political and moral views on the cases before them, the universe of legal literature and commentary may be a bit less robust.

But in the common good constitutionalist world, the process is transparent. The political motivations for the outcomes reached will be explicit and readily observable by other political branches and the public. These other actors may be more motivated to seek reform of the Court should it admit that it is nothing more than an outcome-oriented institution. Concern over political backlash may prompt judges to self-constrain—perhaps by giving precedent more weight.¹⁰⁴ Common good constitutionalism’s explicit focus on political goals and manipulable standards may, ironically, result in the constraint and democratic legitimacy that less-transparent theories like originalism are able to bypass.¹⁰⁵

103. *Id.*

104. *Contra Dobbs*, 142 S.Ct. 2228, 2284 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)); *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2427 (2022) (asserting that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), had been overruled).

105. See, e.g., Jonathan R. Macey, *Originalism as an “Ism”*, 19 HARV. J.L. & PUB. POL’Y 301, 304 (1996) (arguing that originalism’s indeterminacy will lead to manipulation by judges, and that alternative approaches to interpretation that are “outcome-oriented” are “more honest”).

CONCLUSION

I've previously argued originalism lacks transparency in its implementation. This argument may be furthered by reference to a hypothetical theory for comparison, one that simply calls for constitutional interpreters to read the Constitution in a manner that comports with their preferred moral and political views. Such a theory fails on other normative grounds, but it's at least so transparent that it is nonsensical to claim that it could be abused for political ends. This, in turn, raises interesting questions regarding originalists' claims that theories of interpretation aren't self-enforcing and cannot hinder those who only wish to achieve their political goals.¹⁰⁶

Common good constitutionalism may not be as extreme as this hypothetical theory, but it's close. It also seems that at least some people are taking it seriously. I suspect its practical impact will remain limited due to concerns over courts retaining legitimacy and a potential lack of political motivation to support the theory after the Court did away with the right to abortion without reference to the common good.¹⁰⁷ Still, common good constitutionalism is of instrumental use as it highlights how originalism's lack of transparent implementation warrants greater attention from its defenders.

106. See, e.g., Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 BOSTON L. REV. 1745, 1761 (2015) ("All methodologies can be executed well or poorly. Poor execution is not a reason for dispensing with them").

107. See *Dobbs*, 142 S.Ct. 2228, 2284 (2022) (concluding that there is no constitutional right to abortion); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 136 (2018) (arguing that judges and citizens at least "should care" whether the Supreme Court exercises legitimate authority).