

# THE COMMON GOOD AS A REASON TO FOLLOW THE ORIGINAL MEANING OF THE UNITED STATES CONSTITUTION

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## INTRODUCTION

Common good constitutionalism (CGC)<sup>1</sup> offers a new theory of constitutional interpretation grounded in the concept of the common good.<sup>2</sup> From my perspective, the criticisms of CGC that I offer

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1. *E.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); Conor Casey, *Constitutional Design and the Point of Constitutional Law*, 67 AM. J. JURIS. 173 (2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103 (2022).

2. Professor Vermeule said in his oral remarks at the conference that he "disagree[s]": on his view, CGC is not a "new" theory of constitutional interpretation." Adrian Vermeule, *Enriching Legal Theory*, IUS & IUSTITIUM (Nov. 4, 2022), <https://iustitium.com/enriching-legal-theory/> [<https://perma.cc/N766-8MSF>]. This is surprising. CGC, in material form, was not articulated prior to Professor Vermeule's recent work. There did exist theories of constitutional interpretation grounded in the common good, *see, e.g.*, LEE J. STRANG, ORIGINALISM'S PROMISE (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016), but these were not, at least by Professor Vermeule's lights, CGC. VERMEULE, *supra* note 1, at 108–16. Moreover, the blurbs on Professor Vermeule's book labeled CGC "new."

Perhaps Professor Vermeule meant that CGC was not "new" because, as he has argued, CGC is and always has been America's legal tradition and so CGC is and always

in this Essay are a family affair, offered to family members in charity. There are many, many aspects of the theory that I find attractive: its embrace of the classical, natural law tradition; its focus on the common good as the essential goal of a political community and its legal system; and its emphasis on whether a legal system's positive law secures the common good.

However, at least at this point in its development, the theory lacks a sufficient account of how the common good is secured by the U.S. Constitution through CGC. Originalism, by contrast, offers a sophisticated and persuasive account, likewise from the natural law tradition, of how the Constitution's original meaning secures the United States' common good.<sup>3</sup> Originalist scholars argue that originalism's capacity to secure the United States' common good provides sound reasons for legal officials, and all Americans, to follow the Constitution's original meaning.<sup>4</sup>

This Essay has five main parts. After this introduction, in Part I, I discuss CGC's description of itself and argue that originalism appears to fit easily within that description. I then describe two ways in which CGC criticizes originalism's treatment of legal interpretation, and in doing so sets itself apart from originalism. In Part II, I explain how both CGC and originalism agree that the common good provides the subjects of a political community's law with reasons for action. This part details different conceptions of the common good and defends the instrumentalist conception. In Part III, I briefly summarize my prior arguments that originalism provides sound reasons for the Constitution's subjects to follow the

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has been America's theory of constitutional interpretation. Still, putting aside substantive disagreement with that claim on historical grounds, that would establish that CGC was implicitly, but not patently present until Professor Vermeule recovered it. That is, CGC was in fact the United States' legal tradition, though that fact was largely or entirely unknown (on Professor Vermeule's account), and that implicit fact of America's legal tradition became patent only with the advent of CGC.

3. See e.g., STRANG, *supra* note 2; J. Joel Alicea, *The Moral Authority of the Original Meaning*, 98 NOTRE DAME L. REV. 1, 5 (2022); Pojanowski & Walsh, *supra* note 2, at 126.

4. See generally STRANG, *supra* note 2; Alicea, *supra* note 3; Pojanowski & Walsh, *supra* note 2.

Constitution's original meaning. In Part IV, I compare originalism's reason-giving capacity to CGC's and conclude that originalists have provided a more persuasive account of how the Constitution provides reasons for Americans to follow it. I offer two reasons why—one is jurisprudential and the other is sociological.

#### I. CGC AND ORIGINALISM: HOW A BEST FRIEND BECAME A RIVAL

This Part makes two moves. First, I describe CGC's description of itself along with its criticisms of originalism. I argue that originalism fits well within CGC's self-portrait.<sup>5</sup> I then identify two related moves by CGC that common good constitutionalists appear to believe distinguish CGC from originalism. I then leverage these two distinctions in Part IV to show that CGC fails to provide sound reasons for Americans to follow the Constitution.

##### A. CGC's Self-Understanding

According to Professor Vermeule, CGC has three fundamental commitments. First, that America's legal tradition rests on the older classical legal tradition.<sup>6</sup> Second, that all law, in order to *be* law, is rationally ordered to the common good of the political community.<sup>7</sup> Third, that the political community's positive law is a key aspect of its legal system, one that is necessary to secure the common good.<sup>8</sup> Indeed, this positive law is so important that Professor Vermeule advocates for a "presumptive textualism" under which interpreters

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5. This argument partially follows the one articulated in Steven D. Smith, *The Constitution, the Leviathan, and the Common Good*, CONST. COMMENT. (forthcoming 2023) (manuscript at 14 – 18), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4098880](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098880) [<https://perma.cc/6RWU-Q3KW>].

6. VERMEULE, *supra* note 1, at 1–3.

7. *Id.* at 3–4, 7–8, 14–15. I would add some nuance to this claim by saying that law's focal case is rationally ordered to the common good. See generally FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

8. VERMEULE, *supra* note 1, at 9–11.

of the political community's positive law "stick closely to the ordinary, conventional meaning of text."<sup>9</sup>

*B. Originalism and CGC: A Family Affair*

Originalism, especially those versions articulated by natural lawyers,<sup>10</sup> appears to fit comfortably within CGC. Originalism's first commitment is to the Constitution's fixed original meaning. This is known as the fixation thesis<sup>11</sup> and it fits well with CGC's presumptive textualism and pride-of-place for positive law. Originalism's second key commitment is the constraint principle<sup>12</sup>—the proposition that the Constitution's fixed original meaning constrains constitutional doctrine.<sup>13</sup> This too seems to fit well with CGC's robust role for positive law. The point of having positive law and presumptive textualism is to constrain the practical reasoning of officers and the law's subjects, as Professor Vermeule appears to recognize.<sup>14</sup> Indeed, as noted recently by Professor Steven D. Smith, Professor Vermeule "is basically endorsing both parts of his description of the originalist claim."<sup>15</sup> CGC's embrace of the classical legal tradition is either orthogonal to originalism<sup>16</sup> or it is

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9. *Id.* at 72–77. Professor Vermeule emphasizes that this default textualism is "defeasible when an unusual circumstance falls outside the core central case that was within the rational ordination of the law." *Id.* at 75.

10. See *supra* note 3 and accompanying text (listing the recent work on originalism by natural lawyers).

11. Lawrence Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1266–67 (2019).

12. *Id.*

13. Constitutional doctrine includes the rules, standards, principles, and practices that implement the Constitution's original meaning. See STRANG, *supra* note 2, at 91–141, 180–204.

14. See, e.g., VERMEULE, *supra* note 1, at 18 ("[O]riginalism rests on the entirely legitimate insight that public authority may establish rules of municipal positive law . . . and that interpreters should respect the lawmaker's aims and choices when they implement a reasoned determination of the civil law . . .").

15. Smith, *supra* note 5, at 15–16.

16. Because originalism's focal case—fixation and constraint—is not itself in tension with the classical legal tradition, nor does originalism rely on propositions or result in conclusions that are in tension with the tradition.

compatible with it, as Professors Alicea, Pojanowski, Walsh, and myself have argued.<sup>17</sup> The same compatibility is true regarding the common good.

I share Professor Smith's struggle to identify why or how originalism, especially as articulated by natural lawyers, is viewed as a rival to CGC.<sup>18</sup> At some points, Professor Vermeule even seems to agree that originalism is a friend rather than a foe of CGC. For example, he writes, "[p]roperly speaking, the classical approach to law is not an opponent or alternative to originalism . . . . Rather, it includes its own properly chastened version . . . ."<sup>19</sup>

Some of Professor Vermeule's criticisms of originalism are difficult to understand and, when read charitably, implausible. Professor Vermeule seems to think that there is something lacking, empty, missing from originalism "itself" that prevents it from supporting the claims made by natural lawyers. For instance, Professor Vermeule asserts that "[o]riginalism lacks the internal theoretical resources required even to identify meaning without normative argument."<sup>20</sup> It may be true that originalism's focal case—fixation and constraint—cannot "itself" justify use of originalism<sup>21</sup> or answer all questions about how originalism should operate.<sup>22</sup> But leading originalists acknowledge these points. Originalists utilize propositions outside of originalism to justify and explain originalism, so Professor Vermeule's criticisms appear unexceptional.

My view is that the best interpretation of CGC's rejection of originalism is that, by CGC's lights, originalism misunderstands the nature of constitutional interpretation in two related ways. First, according to CGC, *all* interpretation is *essentially* normative,

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17. See *supra* note 3 and accompanying text.

18. See Smith, *supra* note 5, at 14–18.

19. VERMEULE, *supra* note 1, at 18 (emphasis removed).

20. *Id.* at 22; see also *id.* at 94 ("[O]riginalism has no internal theoretical resources with which to pin down the choice between [levels of generality]."); *id.* at 116 ("[O]riginalism as such lacks the theoretical resources needed to solve the dilemmas we have examined.").

21. See *id.* at 109.

22. See *id.* at 111.

and originalism “itself” does not provide adequate guidance for how originalism engages in that normative activity.<sup>23</sup> Second, and relatedly, originalism does not have (within itself) a basis to identify the correct level of generality.<sup>24</sup> These two propositions, I think, explain why CGC treats originalism—even natural law-inspired versions of originalism—as distinct from CGC and as failures.

Professor Vermeule articulates the first criticism of originalism when he describes CGC’s mode of constitutional interpretation. He explicitly employs Ronald Dworkin’s fit-and-justification approach<sup>25</sup> to assert that constitutional interpretation *necessarily* relies on natural law because it is “impossible to do [constitutional interpretation] without considering principles of political morality.”<sup>26</sup>

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23. Other scholars have already responded to this criticism and argued that, in its focal case, interpreting the Constitution’s original meaning does not require resort to natural law. See William Baude & Stephen E. Sachs, *The “Common Good” Manifesto*, 136 HARV. L. REV. 861, 873–89, 894–99 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)); Christopher R. Green, *Problems with Vermeule*, Common Good Constitutionalism 8–13 (Apr. 7, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4075031](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4075031) [HTTPS://PERMA.CC/6QQY-TX6G].

24. See VERMEULE, *supra* note 1, at 96.

25. *Id.* at 5–6, 69.

26. *Id.* at 38. There is some potential ambiguity in Professor Vermeule’s claim because in some instances he appears to cabin the quoted claim to a subset of all constitutional interpretation. For instance, when the Constitution’s meaning is indeterminate. *Id.*

However, there are many instances when Professor Vermeule’s claims are not so cabined. For example, he suggests that “[o]riginalism has never been able to free itself from—or even acknowledge—the implicit normative assumptions and judgments needed to attribute rationality to legal texts, to determine the level of generality . . . , and otherwise make sense of their terms. . . . [I]t proves impossible to avoid interpretation that rests on controversial normative judgments at the point of application, *especially* in hard cases.” *Id.* at 16 (emphasis added); see also *id.* at 15 (“This point only becomes all the more transparent when . . . courts are called up upon to construe legal provisions and clauses that speak in abstract terms . . . . Such provisions merely make the implicit explicit, writing the common good into the terms of the law itself. Those terms must be construed one way or another. The choices are for the court to give them a substantive construction.”). This latter interpretation is supported by Professor Vermeule’s remarks at the conference where he stated: “positive law cannot even be understood or interpreted apart from practical reasoning in light of normatively inflected background

That criticism is potentially devastating to originalism. Originalism claims that the Constitution's original meaning is generally and for the most part<sup>27</sup>—*i.e.*, in originalism's focal case—ascertainable without resort to first-order ethical reasoning.<sup>28</sup> According to originalists, when the constitution's original meaning is determinate, articulating and applying it typically does not require resort to natural law.<sup>29</sup> Most originalists also identify some instances when constitutional interpretation may require resort to non-posit norms such as natural law.<sup>30</sup> My own view is that this occurs in three situations: when the original meaning itself incorporates natural law; when the original meaning is underdetermined and the interpreter must construct constitutional meaning; and when a

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principles." Adrian Vermeule, *Enriching Legal Theory*, IUS & IUSTITIUM (Nov. 4, 2022), <https://iusetiustitium.com/enriching-legal-theory/> [HTTPS://PERMA.CC/N766-8MSF].

One possible explanation for Professor Vermeule's criticism that originalism does not have the resources to answer legal questions without resort to normative criteria is that perhaps he believes that originalism attempts to identify and follow (only) the Constitution's semantic meaning. See VERMEULE, *supra* note 1, at 94 (describing originalism as employing "abstract semantic meaning"); *id.* ("semantic content"); *id.* at 95 ("semantic content"); *id.* at 96 ("semantic principle"); see also Vermeule, *supra* (describing originalism as "the task of identifying semantic meaning"). If this were true, then the original meaning would have relatively fewer resources with which to answer legal questions. See Lawrence Solum, *The Public Meaning Thesis*, 101 B.U. L. REV. 1953, 1983–87 (2020) (explaining public meaning originalism's resources beyond semantic meaning); STRANG, *supra* note 2, at 27–29, 53–55 (describing how the original meaning is denser because it employs more than semantic meaning and that this reduces underdeterminacy). However, Professor Vermeule's criticism goes beyond this and argues that all interpretation is normative.

27. Most originalists agree that there are situations of constitutional underdeterminacy, including when the original meaning is vague and in the context of nonoriginalist precedent.

28. See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 10–12, (2015) (describing originalist views on the existence and scope of original meaning underdeterminacy); STRANG, *supra* note 2, at 63–90 (describing moderate underdeterminacy of the original meaning); see also Solum, *supra* note 26, at 1964–2000 (describing the identification of public meaning).

29. In this brief Essay, I do not defend originalism's claim that there is significant determinacy of the Constitution's original meaning. For more on this topic, see STRANG, *supra* note 2, at 63–90.

30. Solum, *supra* note 28, at 10–12.

judge evaluates nonoriginalist precedent.<sup>31</sup> However, Professor Vermeule's criticism cuts to the heart of originalism's focal case. His claim is that natural law is a necessary component of identifying (and, perhaps, following) the Constitution's original meaning in originalism's focal case of fixation and restraint.

As I said, Professor Vermeule's interpretation-is-inherently-normative claim is related to but analytically distinct<sup>32</sup> from a second claim: that the Constitution's meaning<sup>33</sup> is regularly<sup>34</sup> abstract.<sup>35</sup> Professor Vermeule believes that the "sweeping generalities and famous ambiguities of our Constitution afford ample space for substantive moral readings."<sup>36</sup> Professor Vermeule seems to be saying that there are many areas of constitutional underdeterminacy caused by constitutional meaning that is vague.<sup>37</sup> Most originalists would agree with Professor Vermeule's claim, but only in situations when the predicate fact of underdeterminacy exists. However, Professor Vermeule appears to believe that much or most of the Constitution is underdetermined.<sup>38</sup>

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31. Thus, Professor Vermeule's claim that "[i]t is . . . a misstep . . . to argue (as 'natural law originalists' do) that the common good enters in only at the level of justifying the enactment of positive law," Vermeule, *supra* note 26, is inaccurate. See also *id.* at 15 (making a similar claim).

32. Professor Vermeule appears to view these two points to be necessarily related. See VERMEULE, *supra* note 1, at 91 (" . . . and the level of generality at which the text should be read—conceptions that will inevitably be laden with normative assumptions.").

33. It's not clear if this meaning, for Professor Vermeule, is original, and/or fixed, and/or conventional.

34. It's not clear how regularly Professor Vermeule has in mind. My own view is that, with the resources of contemporary rules of interpretation, terms of art, and closure rules, the Constitution's original meaning is infrequently underdetermined. STRANG, *supra* note 2, at 63–90.

35. See VERMEULE, *supra* note 1, at 95–108 (describing the abstractness of original meaning and originalism's purported incapacity to deal with it).

36. *Id.* at 38.

37. See Solum, *supra* note 28, at 11.

38. Professor Vermeule does not expressly state how widespread the purported underdeterminacy is, but since he views it as a knock-down argument against originalism, it is likely he views it as widespread. See VERMEULE, *supra* note 1, at 95–108.



According to Professor Vermeule, what ties together these two moves is the *ius naturale*. The *ius naturale* is, he suggests, an aspect of all (healthy?) legal systems: it is “the general principles of jurisprudence and legal justice.”<sup>39</sup> The *ius naturale* looms large in CGC. It first justifies the law and legal system.<sup>40</sup> But—and here is the important distinction with originalism—it is also “part of the law and internal to it.”<sup>41</sup> Interpreters must “look to . . . the *ius naturale* precisely in order to understand the meaning of the text.”<sup>42</sup> As summarized by Vermeule, “the natural law was used in two major ways after the Constitution’s enactment; first, to interpret texts, reading them where fairly possible to square with traditional background principles and the objective order of justice; and second, to ground the authority of government in the pursuit of the common good.”<sup>43</sup>

Originalism, according to Vermeule, is deviant. It only recognizes and (potentially) incorporates the *ius naturale* “in strictly historical terms, as a background belief potentially incorporated into the law laid down by the framers and ratifiers.”<sup>44</sup> That is insufficient because, as we have seen, Professor Vermeule believes that all interpretation is normative, especially interpretation of abstract legal norms.<sup>45</sup> In other words, interpreters always must employ the *ius naturale* in constitutional interpretation, and not, as originalists have argued, in more limited circumstances.

This account of Professor Vermeule’s criticism of originalism has the virtue of explaining why he occasionally has positive things to say about originalism. He says that

[O]riginalism rests on the entirely legitimate insight that the public authority may establish rules of municipal positive law, the

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39. *Id.* at 4.

40. *Id.* at 19.

41. *Id.*

42. *Id.* at 18.

43. *Id.* at 59.

44. *Id.* at 4. I briefly summarized earlier that this claim is not precise because originalism employs natural law in the contexts of underdeterminacy and nonoriginalist precedent as well. See *supra* note 31 and accompanying text.

45. See *supra* notes 25–26 and accompanying text.

*ius civile*, that vary from place to place and time to time, and that interpreters should respect the lawmaker's aims and choices when they implement a reasoned determination of the civil law for the common good.<sup>46</sup>

Here, he seems to view originalism as a helpful tool to identify a political community's positive law—although not the entirety of proper constitutional interpretation. To do the latter, one must resort to the *ius naturale*.

My argument below takes two tacks with regard to CGC's claim that interpretation is necessarily normative. First, I argue that the necessarily-normative claim is not supported by the natural law tradition. Second, I argue that originalism's capacity to secure the common good is superior to CGC's. Then, I close with a note that scholars have shown that originalism can and does secure the United States' common good, and in doing so provides sound reasons for Americans to follow the Constitution's original meaning.

## II. BOTH ORIGINALISM AND CGC VIEW THE COMMON GOOD AS A REASON FOR ACTION SECURED THROUGH LAW

In this Part, I briefly describe the common good and how it provides reasons for action for subjects of a political community's law. This part briefly details different conceptions of the common good and explains and defends the instrumentalist conception I have elsewhere used to support originalism. I explain areas of agreement and disagreement between CGC and the instrumentalist conception of the common good.

### A. *Three Common Conceptions of the Common Good*

The common good is the good of the political community.<sup>47</sup> According to a recent essay by George Duke summarizing this area,

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46. *Id.* at 18.

47. See generally Mark C. Murphy, *The Common Good*, 59 REV. METAPHYSICS 133 (2005) (summarizing the scholarship on the common good); V. Bradley Lewis, *Is the Common*

the common good is “a state of affairs in which each individual within a political community and the political community as a whole are flourishing.”<sup>48</sup>

Scholars working within the natural law tradition have identified three conceptions of the common good: aggregative, distinctive, and instrumental.<sup>49</sup> The aggregative conception of the common good is that each member’s flourishing is a reason for the political community’s action, and the common good is secured when all individuals are fully flourishing.<sup>50</sup> The distinctive conception of the common good is that there is a good of the whole political community separate and apart from the good(s) of the community’s members.<sup>51</sup>

The instrumental conception of the common good views the common good as a means for a political community to secure the conditions within which members of the political community can flourish.<sup>52</sup> As described by John Finnis in his seminal work, *Natural Law and Natural Rights*, the common good is “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize for themselves the value(s), for the sake of which they have reason to collaborate with

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*Good an Ensemble of Conditions?*, 84 ARCHIVIO DI FILOSOFIA 121 (2016); V. Bradley Lewis, *Personalism and Common Good: Thomistic Political Philosophy and the Turn to Subjectivity*, in SUBJECTIVITY: ANCIENT AND MODERN 175 (R.J. Snell & Steven McGuire eds., 2016); V. Bradley Lewis, *Aristotle, The Common Good, and Us*, 87 PROCS. AM. CATH. PHIL. ASS’N 60 (2013).

48. George Duke, *The Common Good*, in NATURAL LAW JURISPRUDENCE 376 (George Duke & Robert P. George eds., 2017) (emphasis removed).

49. Murphy, *supra* note 47 at 133–64; Duke, *supra* note 48, at 376; STRANG, *supra* note 2, at 241 n.87. Of course, there are other conceptions of the common good in other philosophical traditions; I focus on the natural law tradition because I think it is correct, STRANG, *supra* note 2, at 229–30, and because CGC works within it, see VERMEULE, *supra* note 1, at 3–4.

50. See Duke, *supra* note 48, at 380–81.

51. See *id.* at 381–82.

52. STRANG, *supra* note 2, at 241–46; see also Lee J. Strang, *Originalism’s Promise: An Intentionally Thin, Natural Law Account of Our Fundamentally Just, Complex, Constitutional System*, 12 FAULKNER L. REV. 103 (2020) (further explaining and defending my use of the instrumental conception of the common good).

each other . . . in a community.”<sup>53</sup> On this reading, the common good *is* the common ordering of the political community’s members.

This latter conception of the common good is exemplified by Ohio’s system of private property regulation. Ohioans’ relationships with external goods of the world, and their relationships with each other vis-a-vis these external goods, is ordered by Ohio’s common and statutory law. Two Ohio neighbors can use Ohio’s easement law to create an easement that will enrich both of their lives; in this way, the neighbors’ relationships with each other, and third parties’ relationships as well, are well-ordered by Ohio’s law. These well-ordered relationships are described in the tradition as commutative justice and distributive justice, both essential aspects of the common good.

In my work, I expressly employed the instrumental conception of the common good.<sup>54</sup> I utilized this conception because it is an authentic aspect of the full common good, because it has the capacity to provide sufficient reasons for the Constitution’s subjects to follow its original meaning, and because the instrumentalist conception is accepted by Americans of a wide variety of perspectives.<sup>55</sup> Here, I briefly argue that this instrumentalist conception is a genuine common good. This sets up my later argument that the instrumentalist conception is both the United States’ common good and one that is attractive to more Americans than the one offered by CGC.

The instrumental conception of the common good is focused on the coordination of the members of a political community; its components are aspects of that coordination or mechanisms of it. This conception of the common good contains (at least) three components: justice, the rule of law, and superintending offices. Justice is the rightly ordered relationships between citizens (commutative

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53. FINNIS, *supra* note 7, at 155.

54. See STRANG, *supra* note 2, at 241–46.

55. See Strang, *supra* note 52, at 124–30, 137–40, 144–50 (explaining in greater detail why I employed the instrumental conception of the common good).

justice)<sup>56</sup> and among citizens in a political community (distributive justice).<sup>57</sup> The rule of law is the set of characteristics of law that make it capable of effectively performing its coordination function.<sup>58</sup>

Superintending offices may warrant additional explanation. They are necessary mechanisms of coordination. These are offices identified by a political community's legal system as having authority over a portion of the common good.<sup>59</sup> There is sufficient standardization in the American legal system so that generally, for example, legislators add and subtract legal propositions from the community's law.<sup>60</sup> The office of legislator is a necessary component of a legal system and that system's capacity to secure the common good. That's because there must be an office with authority to determine what the political community's legal norms shall be—legal norms which in turn coordinate the law's subjects. In sum, legislators superintend the political community's coordination (through law), and other offices analogously superintend the law's coordination of other aspects of the common good.

The instrumental conception of the common good is both common and good. It is common because it, a common ordering and its components—justice, the rule of law, and coordinating offices—are shared by the citizens of a political community. Justice is the rightly ordered relationships between and among citizens.<sup>61</sup> The rule of

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56. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 8 (1991).

57. *See id.* at 21.

58. FINNIS, *supra* note 7, at 270–71; A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202–03 (10th ed. 1960).

59. *See* YVES SIMON, *A GENERAL THEORY OF AUTHORITY* 144–47 (2nd prtg. 1980) (describing the role of offices).

60. *See* RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2014); John Finnis, *Judicial Power: Past, Present and Future*, *JUD. POWER PROJECT* 9 (Oct. 20, 2016), <http://judicialpowerproject.org.uk/wp-content/uploads/2015/10/John-Finnis-lecture-20102015.pdf> [<https://perma.cc/AN9W-PUP6>].

61. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, qq. 57 – 61 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1265–1274); ARISTOTLE, *NICOMACHEAN ETHICS* 1129a–1138b (c. 340 B.C.); FINNIS, *supra* note 7, at 161–97.

law is the characteristics of the key mechanism of legal ordering.<sup>62</sup> Superintending offices are common because they are the community's offices, open to the community's members, and oriented to the community's good.<sup>63</sup>

The instrumental conception is also good because its components are good. Justice is an aspect of human flourishing.<sup>64</sup> A well-ordered political community means, among other things, that its members are in right relationship with each other: that distributive and commutative justice are instantiated in the community. There is some debate within the natural law tradition over the status of the rule of law, and the two (compatible) views are that the rule of law is both an instrumental good and a good in itself.<sup>65</sup> Under either view, the rule of law is a great good for a political community. Superintending offices are instrumentally good because they create, maintain, and implement the legal coordination.

It is not clear if there is a center of gravity among scholars working within the natural law tradition. Mark Murphy has argued for the aggregative conception.<sup>66</sup> Finnis in his earlier work appeared to advance the instrumental conception.<sup>67</sup> Yves Simon utilized the distinctive conception,<sup>68</sup> and CGC does so as well.<sup>69</sup> George Duke's recent essay on the common good argued that the three conceptions identified above are in fact not distinct and are instead three aspects of one unified common good.<sup>70</sup> At least at this point, the tradition has not definitively settled on one conception, and the instrumental conception is one of the tradition's conceptions. Furthermore, at minimum, the instrumental conception is part of or supports the others. From the perspective of the aggregative and distinctive

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62. FINNIS, *supra* note 7, at 270–71.

63. See SIMON, *supra* note 59, at 146–47.

64. FINNIS, *supra* note 7, at 161.

65. See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 116, 120 (1999).

66. See Murphy, *supra* note 47, at 164.

67. See FINNIS, *supra* note 7, at 155.

68. See SIMON, *supra* note 59, at 28–29.

69. See VERMEULE, *supra* note 1, at 28.

70. See Duke, *supra* note 47, at 376.

conceptions, the instrumental conception identifies the means to intrinsic goods, either the basic human goods of individuals or a distinctive common good.<sup>71</sup> Therefore, the instrumental conception is genuinely part of the tradition.

Common good constitutionalists appear to agree with much of my description of the common good.<sup>72</sup> Common good constitutionalism scholars have, however, adopted and argued that the distinctive conception is the only or best one.<sup>73</sup> Professor Vermeule has written that the common good “represents the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community.”<sup>74</sup> Common good constitutionalists have rejected the aggregative conception of the common good,<sup>75</sup> noting that “[t]he common good . . . is not an aggregation of individual utilities.”<sup>76</sup> With slightly more specificity, common good constitutionalists have argued that the common good includes general justice, which is “to live honorably, to harm no one, and to give each one what is due to him in justice” — which is also described as “peace, justice, . . . abundance, . . . health, safety, . . . economic security, . . . solidarity and subsidiarity.”<sup>77</sup>

Common good constitutionalists claim to have arrived at these conclusions both because they are the correct reading of the classical legal tradition, and it appears also because the distinctive conception is the correct conception. The distinctive conception of the common good is correct, on the CGC account, because the common good must be genuinely common and good.<sup>78</sup> The common good is

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71. *See id.* at 382.

72. *See, e.g.,* VERMEULE, *supra* note 1, at 7.

73. *Id.* (“The common good is unitary and indivisible, not an aggregation of individual utilities.”).

74. *Id.*

75. *Id.*

76. *Id.*

77. VERMEULE, *supra* note 1, at 7 (emphasis removed); *compare id. with id.* at 14 (“[T]he common good is well-ordered peace, justice, and abundance.”).

78. *See* VERMEULE, *supra* note 1, at 14.

common when it is capable of being shared by all members of the community, and the distinctive conception is.<sup>79</sup>

I tentatively agree with common good constitutionalists' argument in principle. The fullest expression of the common good of a political community is the distinctive conception.<sup>80</sup> However, it does not follow that the instrumental conception of the common good does not provide sufficient reasons for action. Instead, so long as the components of that instrumental conception individually and together provide sufficient reasons for action, then the instrumental conception of the common good provides sound reasons for law's subject to follow a political community's law.

I return to the subject of the common good as a reason for action in Part IV, below.

*B. The Legal System, Legal Authority, and Posited Law Are Means to Secure the Common Good*

Under any conception of the common good within the natural law tradition, legal authority and positive law are necessary means for a political community to secure the common good. The legal system is a key means because it provides a mechanism for coordination that overcomes the twin problems of first-order normative disagreement and the natural law's underdeterminacy.

Scholars working within the natural law tradition have concluded that the natural law's underdeterminacy is a product of two primary causes.<sup>81</sup> First, the basic human goods that constitute the good life are incommensurable.<sup>82</sup> Therefore, how one pursues the basic human goods, and consequently how political communities pursue those goods, are rationally underdetermined.<sup>83</sup> There are limits: for instance, one may not pursue so little leisure that one

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79. *See id.*

80. Though, I also agree with George Duke that the distinctive conception includes those goods in the instrumental conception.

81. However, some members of the tradition disagree with the first cause I identify.

82. *See* FINNIS, *supra* note 7, at 92–95.

83. *See* SIMON, *supra* note 59, at 31–33.



harms one's capacity to pursue the other basic human goods.<sup>84</sup> But, within these broad limits, individual humans and political communities have creative discretion to construct life plans.<sup>85</sup> This fact of practical reasoning at least partially accounts for the countless areas of community life where there is not one correct answer to questions of coordination. From humdrum highway regulations to crucial constitutional text, and most things in between, political communities may coordinate their lives in a variety of reasonable though rationally underdetermined ways.

Second, the natural law is epistemically underdetermined because of the difficulties individual humans and communities of humans have accessing ethical truth. One cause of this difficulty is the limitations of the human intellect.<sup>86</sup> Another is the practical limits on human ethical inquiry, such as little time to study an issue or the rise of new circumstances to be studied. For instance, the development of political communities from city-states to large, pluralistic nation-states required the tradition to (re)evaluate whether and how such new political arrangements could support human flourishing.

Over time, the tradition has responded to these sorts of epistemic difficulties by developing and applying a variety of analytical tools to ethical issues. A powerful example of this phenomenon is the natural law tradition's developing approach to loaning money at interest.<sup>87</sup> As part of this process, the tradition has developed subsidiary mechanisms to address particular epistemic difficulties.<sup>88</sup> Despite the tradition's best efforts, however, ethical underdeterminacy remains. In all the realms that bear on ethical questions, from ethics-proper, to religion, to philosophy, to law, Americans

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84. See FINNIS, *supra* note 7, at 92–95.

85. See *id.*

86. For Christian natural lawyers, at least partially from original sin.

87. See ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* 193 (1989).

88. One of these is casuistry, in which casuists, building on and responding to other casuists, advise individuals and communities as they navigate thick ethical contexts. For an excellent modern example of the genre, see generally 1 GERMAINE GRISEZ, *THE WAY OF THE LORD JESUS* ch. 3 (1983).

disagree about why and how they should act. First-order normative disagreement is a fact of American life that is unlikely to be disputed.

Here's the key point: in response to these twin causes of deep ethical underdeterminacy, the legal system presents itself as a seamless web that provides exclusionary reasons to law's subjects. These reasons guide citizens' practical conduct in a coordinated fashion.<sup>89</sup> To say that the law is a seamless web means that the law is integrated. Each particular legal proposition is nested and made consistent (or attempted to be made consistent) with other, surrounding legal propositions.

This seamless web of law provides guidance to law's subjects on major and minor aspects of community life. It must provide relatively determinate guidance in order for the legal system to meet its goal of providing comprehensive coordination to the community, so that community members can live well—despite the practical disagreements they have that are caused by the natural law's underdeterminacy.

The law's guidance to its subjects comes in the form of exclusionary reasons.<sup>90</sup> Exclusionary reasons operate in an individual's practical reasoning as not simply another typical reason for (or against) action; instead, they exclude one's other reasons for (in)action and direct one to take (or not take) action as directed by the exclusionary reason.<sup>91</sup> The reasons are exclusionary and not merely one more reason among many because, if the law's reasons were not exclusionary, the twin problems of first-order ethical disagreement and ethical underdeterminacy would resume operation in the practical deliberations of law's subjects, and they would make reasonably different and incompatible judgments about how to act. By so acting upon their first-order ethical judgments, members of a political community would not be coordinated.

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89. See John Finnis, *Law's Authority and Social Theory's Predicament*, in 4 COLLECTED ESSAYS OF JOHN FINNIS 50 (2011); STRANG, *supra* note 2, at 255–56.

90. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 17, 22–23, 26–27, 32–33 (2d ed. 2009).

91. STRANG, *supra* note 2, at 252–53.

Stated differently, the law must be a seamless web of exclusionary reasons to achieve its goal of coordination. This is because, if law's subjects could pick and choose which of law's reasons to follow and which to disregard, then the legal system's reasons would not be comprehensive and law's capacity to coordinate would be diminished or destroyed. Only the legal system as a whole has the capacity to coordinate members of a political community. It makes system-wide judgments that are best understood as reasonable when viewed from a system-wide perspective—a perspective not shared by an individual citizen facing a conflict between the law's reasons and the citizen's practical judgments.

The key perspective for my analysis is that of a practically reasonable member of a political community.<sup>92</sup> This person recognizes the basic human goods and crafts a reasonable life plan to pursue the goods reasonably. This practically reasonable citizen has sound reasons to follow a political community's law when that law secures the community's common good.<sup>93</sup> These reasons fall into two general (though ultimately related) categories: first, reasons directly tied to the person's own flourishing; and second, reasons directly tied to the political community's common good, and therefore indirectly tied to the person's flourishing.

Stepping back, a practically reasonable person typically uses his first-order normative evaluation to make practical decisions. Should I go out to dinner tonight with my spouse? Should I discipline my child? Should I be a lawyer? To take practical action, a practically reasonable person will use his own best judgement to evaluate how to pursue the basic human goods, how to do so consistent with the principles of morality, and how to do so consistent with his life plan.<sup>94</sup> How does the common good change that person's analysis?

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92. FINNIS, *supra* note 7, at 100 – 03. This perspective is appropriate for two reasons. First, it is the focal case of law's subjects. Second, it is part of the natural law tradition.

93. I describe this argument in greater detail in *Originalism's Promise*. See STRANG, *supra* note 2, at 253–61.

94. *See id.*

As I laid out above, the common good provides an additional, comprehensive, and interrelated set of reasons, conveyed through law.<sup>95</sup> These reasons exclude other first-order reasons for action. The law's reasons become part of a practically reasonable person's deliberations by excluding the person's inconsistent first-order reasons.

The first set of reasons offered by the common good, through law, relate to the person's own flourishing. A person who did not take into account the common good would act unreasonably, and in a number of ways. For instance, such a person would violate distributive justice—and thus develop the vice of injustice—by taking for himself an action the law had not assigned to him, but instead had assigned to another citizen or a legal officer.<sup>96</sup>

The second set of reasons relate to the common good's capacity to secure the practically reasonable person's and his fellow citizens' flourishing.<sup>97</sup> A person that rejected the common good would undermine the common good's capacity to provide the background conditions for that person and his fellow citizens to flourish. The coordination that is the common good is dependent on the law's subjects employing the law's exclusionary reasons. If citizens perceive that that is not the case in numbers sufficient to eliminate or harm the coordination, then the law's reasons lose their exclusionary status, leading to a breakdown in coordination.

In sum, the common good, instrumentally conceived, through the law's seamless web of exclusionary reasons, provides members of a political community with reasons for action because it—and only it—has the capacity to effectuate the coordination needed to secure the community's common good and the individual's human flourishing.

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95. See *supra* notes 90–91 and accompanying text.

96. See STRANG, *supra* note 2, at 256.

97. See *id.* at 256–57.

### III. ORIGINALISM'S CAPACITY TO SECURE THE COMMON GOOD, INSTRUMENTALLY CONCEIVED, PROVIDES REASONS FOR ACTION

Here, I briefly summarize the argument I presented in *Originalism's Promise*<sup>98</sup>: that the Constitution's original meaning provides officers and citizens with sound reasons to follow it because it is our political community's essential mechanism to secure the common good of the United States, instrumentally conceived.

The Constitution is American society's solution to basic coordination problems. The Constitution embodies numerous authoritative, prudential,<sup>99</sup> social-ordering decisions, crafted by the Framers, authorized by the Ratifiers, and followed by officers.<sup>100</sup> These authoritative decisions run from the fundamental to the mundane: How many branches of government should there be? What powers shall Congress have? How long shall the President's term be? When shall Congress meet? There isn't one right answer to any of these questions. But, in order for the Constitution to be effective—that is, to overcome coordination problems—it has to authoritatively answer these questions.

First, the Constitution was adopted by our political community through means recognized as authoritative. Then and today, only the document that is the "Constitution of the United States" in the National Archives is the document that went through the Framing and Ratification process. Second, the Constitution is the result of prudential determinations about how our political community could best coordinate for the sake of human flourishing, under the

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98. STRANG, *supra* note 2, at 253–61.

99. Professor Vermeule criticized this and other natural law justifications for originalism in his conference response because these theories "dropped a key element of the classical definition of *lex*": "*reason*." Vermeule, *supra* note 26, at 12. This is incorrect for two reasons. First and theoretically, my argument was explicitly that the Constitution's original meaning was the product of the Framers' and Ratifiers' political wisdom, which itself is the form of practical reasoning employed by legislators to make reasonable laws. Second and practically, the actual Framers and Ratifiers of our Constitution in fact employed this faculty when they crafted and authorized the Constitution.

100. A similar process of crafting, authorizing, and coordinating was followed for subsequent amendments.

circumstances. For instance, there is no uniquely right answer about the length of the President's term of office, though there are clearly wrong answers.<sup>101</sup> Employing their prudential judgement, the Framers deliberated and the Ratifiers adopted an all-things-considered coordination point. Third, the Constitution coordinated, and coordinates, members of our political community toward the end of the common good. For instance, the Commerce Clause authorized Congress to eliminate or preserve state trade barriers as Congress deemed wise.<sup>102</sup> The Clause re-coordinated the United States to correct the Articles of Confederation's failure to provide a national commerce power.

The Constitution's original public meaning is necessary to effectuate this coordination because it gives us access to the authoritative meaning that communicated the Constitution's coordinating reasons between and among the Framers and Ratifiers and officers.<sup>103</sup> The reasons contained in the original meaning secure the common good, instrumentally conceived. The Constitution's original meaning provides officers (and citizens) with sound reasons to follow it because it is an essential mechanism to secure the common good of the United States. The Commerce Clause, for instance, was designed to prevent the trade disputes that had occurred under the Articles<sup>104</sup>—and it mostly succeeded because federal and state officers recognized this and followed it.<sup>105</sup>

As I said, this is a very high-level version of a longer and more-complex argument. The key, however, is that the Constitution's original meaning is an essential mechanism for our political community to secure the common good, instrumentally conceived.

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101. For example, one day and lifetime tenure.

102. See U.S. CONST. art I, § 8, cl. 3.

103. STRANG, *supra* note 2, at 57–60.

104. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 259 – 260 (4th ed. 1873).

105. Either immediately or through the legal system's mechanisms of articulation, such as the Supreme Court's decisions. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209–10 (1824) (describing Congress' supremacy in this area).

IV. ORIGINALISM'S CAPACITY TO SECURE THE COMMON GOOD OF  
THE UNITED STATES IS SUPERIOR TO CGC'S

Here, I bring together my prior claims about interpretation and the common good. Both originalism and CGC claim that their respective approaches to the U.S. Constitution secure the United States' common good. Both characterize the Constitution as a means to secure that common good. And both argue that their respective modes of interpretation are the best way for the Constitution to be able to do so. However, here I provide two arguments that CGC does not provide Americans with sound reasons to follow the Constitution, while originalism does. I show that originalism's account of constitutional interpretation is more persuasive for both jurisprudential and sociological reasons.

There are three ways in which originalism provides sound reasons for Americans to follow the Constitution, while CGC does not, at least not yet. First, CGC's conception of law and legal interpretation, which necessarily resorts to natural law, would prevent the legal system from being a seamless web of exclusionary reasons, and first-order normative disagreements and ethical underdeterminacy would re-enter the legal system at the point of interpretation and application, and the legal system could not effectively coordinate. Second, originalism's instrumentalist conception of the common good is more attractive to more Americans than CGC's thicker conception, therefore providing those Americans with reasons to follow the original meaning. Third, originalists have articulated the connection between the Constitution's original meaning and the common good: they have identified how it in fact secures the common good.

First, my jurisprudential argument: CGC's claim that constitutional interpretation necessarily involves use of natural law fatally undermines the Constitution's capacity to secure the United States' common good. I showed earlier that, within the natural law tradition, a legal system and its positive law is a key means to secure the

common good.<sup>106</sup> Common good constitutionalists agree with this claim.<sup>107</sup> The legal system is a key means because it provides a mechanism for coordination that overcomes the twin problems of first-order normative disagreement and the natural law's underdeterminacy. The legal system is a seamless web that provides exclusionary reasons to law's subjects, and these reasons guide citizens' practical conduct in a coordinated fashion. The law must be a seamless web to achieve its goal of coordination because, if the law's subjects could pick and choose which of the law's reasons to follow and which to not, then its reasons would not be exclusionary and law's capacity to coordinate would be diminished or destroyed. Moreover, the law's reasons must be exclusionary to prevent citizens' first-order ethical reasons from detracting from the law's coordination.

If, on CGC's account, legal interpreters must necessarily resort to the natural law, then the twin problems of disagreement and underdeterminacy re-emerge within the heart of the legal system. In principle—on CGC's account of interpretation—judges and executive officials will resort to the natural law in *every* act of interpretation. Indeed, every citizen will likewise resort to his own first-order practical deliberations to decide what the law means for them. The common good's coordination cannot be secured under these conditions. The common good cannot be secured through the legal system on CGC's assumption that the positive law, at its point of interpretation and application, necessarily requires resort to natural law. Using a CGC framework, the legal system would not be a seamless web of exclusionary reasons, and first order normative disagreements, caused by first-order ethical disagreement and natural law underdeterminacy, would reenter the legal system at the point of interpretation and application. As a result, the legal system would be unable to coordinate the activity of individuals and the political community. Originalism, by contrast, provides that, in

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106. See *supra* notes 8–9 and accompanying text.

107. See *id.*



originalism's focal case, fixed original meaning constrains constitutional doctrine and coordinates officers and Americans without resort to natural law.<sup>108</sup>

As with his book, Professor Vermeule's remarks at the conference did not deny either the premises or conclusion of my argument.<sup>109</sup> Instead, he simply re-asserted that legal interpretation is necessarily normative.<sup>110</sup> He did not explain how law had the capacity to coordinate if officers' first-order ethical reasons were a necessary component of law's interpretation and application.

Second, my sociological claim is that originalism's instrumental conception of the common good is more attractive to more Americans than CGC's distinctive conception, therefore providing those Americans with reasons to follow the original meaning. Earlier I described the instrumentalist conception of the common good with its three components of justice, the rule of law, and superintending offices.<sup>111</sup> These common goods are individually valuable and collectively very valuable. And importantly for my purposes here: Americans of all stripes—including those who are not common good constitutionalists or originalists—see their value. These three components are relatively epistemically assessable, and, partly for that reason, they have nearly universal assent among Americans. There is, for instance, a robust literature on the rule of law with significant consensus on what it means both theoretically and practically.<sup>112</sup> Moreover, people across the legal landscape agree that the

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108. Again, originalists have elsewhere shown that the Constitution's fixed original meaning provides determinate answers to many or most legal questions without resort to normative inquiry.

109. See Vermeule, *supra* note 26. He also stated that my argument "begs all the key questions." *Id.*

110. See *id.*

111. See *supra* Part II.A.

112. For some prominent statements of the rule of law, see generally A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1915); LON FULLER, THE MORALITY OF LAW (1964); FINNIS, *supra* note 7, at 270; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

rule of law has significant value.<sup>113</sup> The same is true for justice and offices that superintend the common good. I won't belabor the point.

Now, compare that to CGC's distinctive conception of the common good. Whatever the distinctive conception of the common good is, it is thicker than the instrumental conception. And though I personally believe that this fuller conception is more attractive, I also know that many and perhaps most of my fellow citizens will not be attracted to it, and many will find aspects of it to be positively wicked.<sup>114</sup> Therefore, CGC's distinctive conception of the common good is sociologically less likely to provide reasons to Americans to follow the Constitution than originalism. This is especially true for the relatively more sophisticated Americans who are the officers in the federal and state judiciaries, legislatures, and executive branches, and who generally follow liberal legality.<sup>115</sup>

In his response, Professor Vermeule alleged that the different conceptions of the common good do not practically matter. He suggested that "for concrete legal purposes the lawyer or judge usually need not choose between high-level philosophical conceptions of the common good."<sup>116</sup> That is true materially and efficiently in the day-to-day of legal practice, but it is orthogonal to my criticism of his *theory* of constitutional interpretation. My criticism is that if, as Professor Vermeule and I both believe, the common good provides reasons for action, and *if*, as I argued, his conception of the common good is relatively unattractive to most Americans compared to the instrumentalist conception, then his theory is weaker as a result.

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113. See G.A. Res. 217 (III) A, UNIVERSAL DECLARATION OF HUMAN RIGHTS, at 6–10, 29 (Dec. 10, 1948).

114. See, e.g., Ian Ward, *Critics Call It Theocratic and Authoritarian. Young Conservatives Call It an Exciting New Legal Theory.*, POLITICO (Dec. 9, 2022), <https://www.politico.com/news/magazine/2022/12/09/revolutionary-conservative-legal-philosophy-courts-00069201> [<https://perma.cc/VC47-AD82>]; see generally ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

115. See generally LEWIS D. SARGENTICH, LIBERAL LEGALITY (2018).

116. Vermeule, *supra* note 26, at 17–18.

Professor Vermeule has provided no reason to undermine my argument.

One last note on this point: if the fullest conception of the common good is thicker than the instrumentalist one—a claim with which I and (it appears) common good constitutionalists both agree—then that suggests that one should support the instrumentalist conception and originalism, at least provisionally. That is, support it unless and until one is able to show that the Constitution in fact supports, and Americans in fact are attracted to, that thicker conception of the common good.

Third, I briefly summarized above<sup>117</sup> and scholars have described<sup>118</sup> how the Constitution's original meaning secures the United States' common good. Originalists have provided a detailed account of the common good's operation within originalism, one that is both jurisprudentially sound and sociologically attractive. Common good constitutionalism, at least at this stage in its development, has not. And to do so will be a tall order, at least from the perspective of the natural law tradition and the current United States.

#### CONCLUSION

The natural law originalists' account of our Constitution has shown that the Constitution's original meaning plays a crucial role: transmitting the Constitution's exclusionary reasons from, between, and to the Framers, the Ratifiers, officers, and to all Americans. These exclusionary reasons today secure the United States' common good, instrumentally conceived, so that Americans of all stripes have sound reasons to follow the original meaning. Thus far, common good constitutionalists have not provided sufficient reason to believe that CGC is different from originalism or, if it is, that it more effectively secures the United States' common good than originalism.

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117. See *supra* Part III.

118. See, e.g., Pojanowski & Walsh, *supra* note 2, at 100.

