ENRICHING LEGAL THEORY

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Si principi placet quod lex nature non habeat locum in suis actis, tale beneplacitum non est lex

[If the Prince decrees that natural law has no place in his enactments, such a decree is not law]

— Baldus de Ubaldis, commentary on Digest 1.4.1

Every author finds a symposium on his own book downright fascinating, and for this author the symposium on *Common Good Constitutionalism*,[1] held at Harvard Law School on October 29, 2022, was no exception. My thanks to the Harvard Journal of Law and Public Policy and the Harvard Federalist Society for organizing a superb event, and to the participants for their generally excellent contributions.

It seems safe to suggest that the debates over classical legal theory, originalism, and progressive legal theory that have emerged in recent years have only begun and will continue for a long time. Yet similar debates also have an ancient history, in shifting forms. They are iterations, with variation, of discussions that happened in and during the last major revival of classical legal theory[2] in the US and Europe in the 1950s and 1960s, in the shadow of Nuremberg, when legal positivism for a time seemed patently inadequate. And those

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1. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (Polity Books 2022).

2. For an overview, *see* John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J. LEGAL HIST. 553 (2011).

in turn were variants of many earlier iterations, going all the way back to debates over legal interpretation between the schools of Proculeian and Sabinian lawyers in Rome.[3] Indeed, as will become clear shortly, the eternal recurrence of this sort of debate is itself, in my view, one of the great facts of legal history that we have to recover to make sense of discussions underway today.

It's hard to do a response of this kind, in part because the discussion is still very much developing in various fora, in part because one must inevitably be selective. I won't be able to respond to all of the participants, or to all of the points made by even the participants I do address.[4] So let me just try to organize a few positive thoughts, hopefully of general interest, around the theme of *enriching legal theory*, indicating along the way a few areas of agreement and disagreement with (some of) the participants. By legal theory, I very much mean to include legal practice as a central interest of legal theory. As I will explain, American judging and legal practice is in many respects superior to current academic theorizing, albeit in a way that lacks self-awareness; legal practice often draws upon classical principles *de facto* even when the practitioners are officially committed, *de jure*, to a theory like (one version or another of) originalism. American judges, whose intuitions are far better than the theory the academy offers them, have for the most part lost sight of the principles on which their own practice rests.

In some ways, the situational premise for the book is a sense that legal theory, especially American legal theory, has become or had

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3. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539 (1995).

4. In some cases, I pass over topics as to which I have nothing to add to excellent treatments elsewhere. On the relationship between classical legal theory and feminism, for example, I cannot improve upon Erika Bachiochi's work. *See, e.g.*, Erika Bachiochi, *The Rights of Women: A Natural Law Approach*, NEW DIGEST (Jan. 2, 2024), https://the-newdigest.substack.com/p/the-rights-of-women-a-natural-law [https://perma.cc/LJ8K-VDCB]. In other cases, I pass over papers, like Cass Sunstein's contribution, that don't address the arguments of the book in any detail, although I may respond to some of those separately in a more appropriate forum. *See, e.g.*, Cass Sunstein, 46 Harv. J.L. & Pub. Pol'y 1177 (2023).

become rather desperately impoverished. One feels, or at least I have felt for some time, that most of the products of the law reviews are either immediate advocacy arguments in the service of some immediate cause or another, or else examples of theory that had settled into a kind of steady-state equilibrium of alternation or even duopoly between a couple of predictable positions and programs—in the American case, versions of progressive legal realism and originalism. Each of these churned up a great deal of activity, and there have been, especially in the case of originalism, a bewildering proliferation of variants and epicycles on known ideas and positions, not all of which are consistent with one another—law's analogue to what philosophers of science call a degenerating research program.[5] Yet the churn of activity has yielded fewer and fewer substantial contributions.

Meanwhile, judicial and legal practice has increasingly diverged from the theories of the academy, as Judge Matey's illuminating paper points out.[6] Likewise, as Michael Smith put it recently (unfortunately not in the paper for this volume), "academic discussions of originalism and original public meaning are severely disconnected from judicial and political realities."[7] In many respects, the practicing judges and lawyers have been ahead of the theorists, in that, at least in the actual work of judging and lawyering (as opposed to occasional forays into theory), they are more alert to the fundamental condition of legal work that the positive law cannot even be understood or interpreted apart from practical reasoning in light of normatively inflected background principles of legal jus-

5. *See* Graham Harman, *On Progressive and Degenerating Research Programs with Respect to Philosophy*, REVISTA PORTUGUESA DE FILOSOFIA, 2019, 75(4) 2067-2102.

6. Judge Paul Matey, "*Indispensably Obligatory": Natural Law and the American Legal Tradition*, 46 HARV. J.L. & PUB. POL'Y 967 (2023).

7. Michael L. Smith, *Abandoning Original Meaning*, 36 ALBANY L. REV. 43, 91 (2023).

tice - a point the book argues at length, and that putatively originalist decisions issued after the book was complete, such as the *Bruen* case,[8] have only further illustrated.[9]

Against this backdrop, the constructive effort behind the recent recovery or revival of classical legal theory is to in some way re-enrich legal theory—an effort to make it broader, more continuous with our history before the advent of 20th century positivism and with the legal approaches of other nations, in a sense more inclusive.

Now, such an effort does not at all entail originality in any straightforward sense. It is a bad assumption of Romanticism that scholarship should or must strive to be original. Sometimes the way scholarship can make a contribution, in a paradoxical combination of new and old, is a recollection or re-appropriation of enduring principles that have for contingent reasons been temporarily forgotten or abandoned. But it is a feature of the classical law that the possibility of and resources for such a recovery is itself built into the theory, because the theory itself claims to distinguish what is timeless and universal from what is mutable and particular. Michael Foran's paper[10] nicely illustrates this distinction, by drawing upon the principles of equal dignity of all human beings as such, deeply rooted in the natural law and repeatedly identified by (certain) classical lawyers as inconsistent with the positive civil law of their own day.

Here Foran works in a venerable tradition. To choose only one example from a myriad, the great 14th century jurist Baldus de Ubaldis adapted the principles of the *Corpus Juris Civilis* to the cir-

8. New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

9. *See* Conor Casey & Adrian Vermeule, *"Closure Rules" Are Ius For Originalists*, IUS & IUSTITIUM (Sept. 2, 2022), https://iusetiustitium.com/closure-rules-are-ius-for-originalists/ [https://perma.cc/3T79-UY77].

10. Michael L. Foran, *Equal Dignity and the Common Good*, 46 HARV. J.L. & PUB. POL'Y 1009 (2023).

cumstances of the independent city-state republics of northern Italy.[11] In so doing he did not attempt to directly transpose to his own time all the particular rules of the positive civil law of republican or imperial Rome—an absurd program akin to saying that classical lawyers today should wear togas—and a program that the classical law emphatically does not entail or require. The major texts of the tradition themselves begin by pointing out that the law has both a general or universal part common to all polities, the natural law and law of nations, and a particular part, the positive civil law, which varies across polities.[12] But Baldus translated and developed the general principles of the legal corpus for his very different circumstances, resulting in an approach that seamlessly combines what is enduring with what is local and contingent. The watchword should be *non nova, sed nove*—"not a new thing, but in a new way." The book, therefore, is proudly unoriginal as to the general part,[13]

11. *See* JOSEPH CANNING, THE POLITICAL THOUGHT OF BALDUS DE UBALDIS *93 et. seq.* (1987).

12. *See, e.g.*, DIG. 1.1.9 (Gaius) (Alan Watson tr. 1985) ("All peoples who are governed under laws and customs observe in part their own special law and in part a law common to all men. Now that law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile*, civil law, as being that which is proper to the particular civil society (*civitas*). By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium*, as being the law which all nations observe").

13. In other words, the book expressly incorporates, by reference, components of the classical legal tradition that are common ground within the tradition, whose explication would therefore be repetitive and inessential to the book's enterprise. Not every book need rehearse within its own covers all of the background tradition within which it works. Lawrence Solum misses this when he writes that "Vermeule has much to say about the common good, but very little to say about the substantive component of his conception, which he describes as 'happiness or flourishing.'" Lawrence Solum, *Flourishing, Virtue, and Common Good Constitutionalism*, 46 Harv. J.L. & Pub. Pol'y 1149, 1149 (2023). In any event, Solum is factually incorrect; the book explicates at length the ways the tradition fleshes out civil happiness and flourishing in terms of Ulpian's classical precepts of legal justice, their later developments in terms of peace, justice, and abundance, and the extension of these concepts in the legal concept of "police power" and legal regulation of health, safety and morals. VERMEULE, *supra* note 1, at 28–35 , 134–78. (It is possible that Solum neglected the chapter on applications in this regard). Solum goes on to give a perfectly adequate exposition of virtue theory, although he

and I'm afraid my disagreements with Lee Strang's paper begin at the first sentence, when he writes that "Common good constitutionalism (CGC) offers a new theory of constitutional interpretation . . . ."[14]

A nice example of the positive approach I am urging is on display in the paper by Conor Casey on Irish constitutionalism after 1937,[15] which illustrates in a concrete and illuminating way the diversity of determinations, subject to reasonable prudential disagreement but informed by reason, that can occur within the framework of classical principles. This unique combination—stability of universal principle and flexibility of local application—is what creates the famous capacity for the classical tradition to undergo repeated revivals over two millennia, in widely varying circumstances.

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offers some dubious views on the application of virtue theory within law that would take me too far afield to consider here.

14. Lee J. Strang, *The Common Good as a Reason To Follow The Original Meaning of the United States Constitution*, 46 Harv. J.L. & Pub. Pol'y 1243, 1243 (2023); and for a similar error, *see* Jeff Pojanowski & Kevin Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403 (2022). Strang replies that "CGC, in material form, was not articulated prior to Professor Vermeule's recent work." Strang, *supra*, at 1243 n.2. This confuses the name of the theory with its content, confuses the form with substance (as Strang's locution "material form" betrays), or in other words confuses the general part of the theory, which just explicates the traditional classical categories, with the particular interpretations of the American constitutional order that I arrive at by application of those categories. Strang thus says nothing to rebut a central claim of the book, that originalism as an academic doctrine (or rather, an increasingly fractured academic movement, riven by contending versions) does not reflect material judicial practice, which implicitly or expressly draws upon classical principles and the classical legal ontology in case after case. For testimony to this effect from a sitting federal appellate judge, *see* Judge Paul B. Matey, *Learning What Has Been Forgotten*, NEW DIGEST (November 14 2023), https://thenewdigest.substack.com/p/learning-what-has-been-forgotten [https://perma.cc/RL2Y-ZTA5]. As Judge Matey puts it in eloquent terms, "[It] became less about the doing of positivism than nodding to the theory of positivism. . . . [W]e got a nearly entire generation who espoused adherence to a philosophy at night without ever finding occasion to apply it during the workday."

15. Conor Casey, *The Irish Constitution and Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 1055 (2023).

In this light, the latest recovery of the classical approach hopes to enrich legal theory on at least four dimensions: *temporal*, *comparative*, *professional*, and *methodological*. Let me offer a few remarks on each of these dimensions.

Temporally, a legal theory that is richer is one that offers not only justification and fit with present law, synchronically, but also diachronic fit and justification—fit and justification that takes into account the past of our law and legal theory, putting in in its best light, and accounting to the extent possible for the evolution of our current law, legal institutions and legal practice from our own past. It is a chain novel that doesn't start abruptly with the *Erie* case,[16] or with Hart,[17] or with Bork.[18]

Conversely, it is a grievous form of temporal parochialism to talk about law as though everyone before Hart or Bork simply failed to understand the true nature of law or of legal interpretation. Temporal parochialism colonizes the past, creating invented traditions that project modern positivism, originalism or progressivism onto the legal conceptions held by the Americans of the founding era or the 19th century. Here let me mention a scintillating paper by Emad Atiq,[19] a legal philosopher from Cornell, who has no particular stake in the interpretive debates and is interested for philosophical reasons in the historical credentials of legal positivism, or rather the lack of such credentials. Relying on professional legal historians, Atiq walks through the classical legal tradition from its origins right through the Anglo-American common law, the founding era and the 19th century, and discusses a set of illustrative cases to show that American judges offered "[an] exceptionally clear treatment of

16. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). For a powerful treatment of pre-Erie conceptions of law as a fundamental problem for originalism, *see* Jack Goldsmith, *Erie and Contemporary Federal Courts Doctrine*, 46 HARV. J.L. & PUB. POL'Y 727 (2023).

17. H.L.A. HART, THE CONCEPT OF LAW (1961).

18. ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

19. Emad Atiq, *Legal Positivism and the Moral Origins of Legal Systems*, CAN. J.L. & JURIS. 2022, 1-28.

unsourced principles of fairness as *bona fide* law."[20] Overall, in his view, "[classical American] jurists did not explain the legality of moral principle by adverting to social facts, judicial choice, or more fundamental laws; on the contrary, they seemed to treat 'moral laws' as self-evident, unchangeable, and applicable *ex proprio vigore* [of their own force]."[21] In other words, these judges did *not* invoke these background principles only because they were already included elsewhere in social fact, but because they were law of their own force and in their own right. For Atiq, the jurisprudential significance of all this is that it puts a challenge to current legal positivists, who can save "positivism's truth" only by admitting that positivism of the post-World War II variety is historically "parochial," and thereby requires developing very different justifications for positivism than currently exist.[22]

I would add that—especially in light of Judge Paul Matey's clarifying and important discussion of Blackstone's classical account of legal interpretation and its enormous influence on the Founders[23]—the problem of historical or temporal parochialism is most severe for originalists, who stand in the paradoxical and difficult position of claiming to adhere to the original understanding while propounding a conception of law itself that is antithetical to the classical and anti-positivist understanding of law the founders and their successors themselves held, for many generations. As late as 1895, well after not only the founding era but after the enactment of the Reconstruction Amendments, the Supreme Court identified the presumption of innocence in criminal cases as a general unwritten *presumptio juris* or presumption of the law, derived through common law from the Digest of Justinian, Codex of Justinian and canon law.[24] Such examples, which can be multiplied almost indefinitely,

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20. *Id.* at 11.

21. *Id.* at 14. For illuminating detail on this point, *see* Lucas Clover Alcolea, *The Common Law and the Classical Legal Tradition*, 17 UNIV. ST. THOMAS J.L & PUB. POL'Y (forthcoming).

22. Atiq, *supra* note 19, at 26.

23. Matey, *supra* note 6, 973–74.

24. Coffin v. United States, 156 U.S. 432, 453-60 (1895).

should cause us to suspect that the classical legal tradition in America had little in common with the originalism and positivism of our own day.[25] And indeed that suspicion is justified by data. A recent and extremely thorough empirical study of American caselaw explains that originalism as a systematic theory is a recent development, and was never American orthodoxy; instead the data lends "important empirical support" to the view that originalism is "new, selective and disruptive."[26]

In curious ways, our own classical legal past has been erased from memory, even as it stands all around us. The monumental front doors of the Supreme Court itself, cast in bronze and erected in the 1930s, during the prime of the last real classically educated generation of lawyers, depict (among other figures) the Emperor Justinian publishing the *Corpus Juris Civilis,* the Roman jurist Julian instructing a student, and a Roman praetor publishing an edict; the praetor is accompanied by a soldier, representing the enforcement power of the state.[27] As the book argues throughout, the cosmopolitan and classical heritage of American law has been subjected to a kind of *damnatio memoriae* at the theoretical level, although not in practice, by positivist and increasingly parochial versions of both legal progressivism and legal conservatism, cut off from the American past.

An analogous picture emerges when we turn from temporal to comparative parochialism. Comparatively, a richer legal theory is one that takes into account what we might call the *ius gentium* or law of nations at a higher-order level, the level of views about law and legal practice. An enriched theory takes into account what is thought about law not only in the United States, but in Europe,

25. For further documentation of this point, *see* the sources cited at COMMON GOOD CONSTITUTIONALISM 55.

26. *See* Kevin Tobia et al., *Is Originalism Orthodoxy?*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551776 [https://perma.cc/9EM5-8S6M].

27. *Building Features*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/buildingfeatures.aspx [https://perma.cc/56ZY-CKKK].

Latin America, and the rest of the world. Here a parochial legal theory is one that offers claims about the inherent nature of law, legal interpretation, legal communication, or constitutionalism that do not capture or even flatly contradict conceptions of law and its practice that appear in the great variety of the world's legal systems, very few of which practice originalism in anything like the American sense, and many of which do not understand themselves in the terms of 20th century Anglo-American positivism. Here Marton Sulyok's paper[28] supplies an especially rich and useful contrast and corrective from a Hungarian and indeed European perspective.

It remains to discuss two other, intertwined dimensions of enrichment, the professional and methodological. Professionally, a richer legal theory is one that both takes into account the internal perspective of practicing lawyers and judges, putting their self-conceptions in their best light. This is central to the book's concerns. As to the activity of judges, it seems to me undeniable that when push comes to shove, most visibly in hard cases but not only in hard cases, judges—very much including judges who profess originalism—routinely read texts in light of general presumptions and background principles of legal rationality and legal justice. These judges often show no real anxiety about any supposed obligation to ground such principles in positive sources of law; rather they take those principles to be an internal part of law's fabric and integral to the activity of interpreting the law,[29] not something imported into law and used to guide an exercise of legislative discretion writ small. Thus the "closure rules" on which originalist judges supposedly rely to resolve cases are themselves normative background principles, just cast in a different vocabulary. As Casey and I recently noted, with particular reference to the *Bruen* decision,

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28. *See* Marton Sulyok, *The "Common Good" in Hungarian Judicial Interpretation: Footnotes for American Debates on Common Good Constitutionalism*, 46 HARV. J.L. & PUB. POL'Y 1091 (2023).

29. In addition to the examples given in *Common Good Constitutionalism*, *see* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2021); Casey & Vermeule, *supra* note 9.

"[r]ules of historical evidence … rest on express or implied normative assumptions and arguments about the costs of decisionmaking and the costs of error, about the collateral and systemic effects of admitting or not admitting certain categories of evidence, and a myriad other topics…. As H. Jefferson Powell put it, 'Rather than avoiding the responsibility of choice, history requires of the originalist a whole new range of contestable…decisions.'"[30]

Methodologically, a richer legal theory is one that has a richer legal ontology and that puts the various sources of law into a well-ordered relationship to one another. The very thin positivist ontology on display in someone like Hart, who can see only rules (at various levels), zones of "discretion," and positive conventions,[31] is profoundly impoverished and cannot account for the felt experience of judging and legal practice, in which lawyers and judges do not take themselves to be doing something other than ascertaining the law when they draw upon background principles of legal justice, seen as such, in order to understand the semantic meaning of texts, to disambiguate, specify, or supplement texts, or otherwise to derive legal meaning from semantic meaning. By contrast, Judge Matey outlines a richer classical approach inspired by Blackstone and drawing upon an ordered hierarchy of sources of law—divine, natural and municipal or civil—and structured by presumptions that read positive law as ordered to the common good. As Judge Matey puts it, "[American] principles and traditions reveal a tool, available all along, that accounts for text and purpose: the classical method of legal interpretation that uses the law's text, context, subject matter, consequence, reason, and spirit to search out meaning. A method that took for granted the law's roots in the natural law and its orientation towards the common good."[32]

30. Casey & Vermeule, *supra* note 9.

31. HART, *supra* note 17.

32. Matey, *supra* note 6, at 979.

This view of course supposes that semantic meaning is fixed in a thin sense. In the stock example, I do very much hope that the "Republican Form of Government" clause[33] does *not* mean that Mitch McConnell is to be our sole governor. But this thin sense of fixation turns out to be absolutely common ground across originalist and non-originalist legal systems. European judges (both judges at pan-European institutions and judges on national constitutional courts), many of whom think originalism is absurd, may and do assent to it just as well.[34] Hence this thin sense does not at all entail any of the further premises of modern American originalism.[35] If in this thin sense everyone is an originalist, then by the same token no one is; originalism gives no specific differentiation and amounts to an empty vessel. This is why a recent trend has seen libertarians and liberals cheerily profess originalism while pouring the content of their views into the vessel, arguing for example that the original understanding creates rights of abortion and same-sex marriage.[36]

This brings us to what I take to be a serious conceptual mistake, an instance of circular reasoning, that unfortunately vitiates Strang's paper among others.[37] It begs all the key questions posed by the classical view to simply assume that the task of identifying *legal* meaning, an exercise of practical reasoning, can be reduced to the task of identifying *semantic* meaning, where the latter is tacitly assumed to be independent of background principles of legal justice. Put otherwise, it begs all the key questions to assume by brute force that the semantic meaning of a positive enacted law or *lex*,

33. U.S. CONST. Art. IV, sec. 4.

34. *See* Conor Casey & Adrian Vermeule, *Argument By Slogan*, 2022 HARV. J.L. & PUB. POL'Y PER CURIAM 10 at *9–11 (2022).

35. *See id.* at 11-12. (This also makes Stephen Sachs' discussion of cases of this sort, which he calls "*argumentum ad homonym* [sic]" puzzlingly irrelevant. *See* Stephen E. Sachs, *According to Law*, 46 Harv. J.L. & Pub. Pol'y 1271, 1288 (2023).

36. For examples, *see* Casey & Vermeule, *supra* note 34, at *11.

37. *See* Strang, *supra* note 14, *passim*; *see also, e.g.*, Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022); Pojanowski & Walsh, *supra* note 14.

even if seemingly fixed, can be understood independently of background principles of law generally or *ius*.[38] The classical view, as the book attempts to argue, is that those principles always already inform and permeate and inhere in *lex*, as it were, because *lex* is itself a determination or concretization of *ius*, inherits the nature and boundaries of practical reason inherent in *ius*, and is therefore interpreted to harmonize with *ius*. On the classical view, *ius* (including *ius naturale*) is promulgated just as much as *lex*,[39] and itself serves, in part, coordinating functions.

Conversely, "natural law originalists" purporting to work within the natural law tradition[40] have quietly dropped, or at least downplayed and materially ignored, a key element of the the classical definition of *lex*. On that definition, even positive law is not only an ordination that serves the common good, but is also, always and essentially, an ordination *of reason*, not merely positive fiat.[41] An ordination of reason is not merely an ordination that is made because there are good second-order reasons (like coordination) to make an

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38. Strang's only response on this crucial point is rather startling: "[i]n this brief Essay, I do not defend orginalism's claim that there is significant determinacy of the Constitution's original meaning"—using determinacy in the bespoke originalist sense that semantic meaning can be identified *apart from* practical reasoning about legal meaning, informed by (express or implied) normative background principles. Strang, *supra* note 14, at 1249 n.29. One would think that is the very claim on which Strang should have spent his energies; if it is false, or to the extent that it is false, Strang's argument collapses. In any event, at the end of this response, I canvass the reasons why it is a shibboleth of originalist discourse to think that the classical approach renders law less determinate. On the contrary, in a range of cases it renders law more determinate.

39. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, IaIIae Q. 90 art. 4, ad. 1 (natural law, like all law, is promulgated by God, who makes it accessible to the human reason).

40. *See, e.g.*, Alicea, *supra* note 37; Pojanowski & Walsh, *supra* note 14. Some years ago now, Professors Pojanowski and Walsh offered half of a theory of their own, attempting to justify originalism while bracketing the question whether the theory extended to originalist adjudication (a rather striking limitation, given that putatively originalist adjudication is, for the most part, the main thing that spurs people to discuss originalism in the first place). *See* Jeffrey A. Pojanowski and Kevin Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 146 (2016). To date, the full theory has yet to be revealed. For the problems afflicting the half they did offer, *see* VERMEULE, *supra* note 1, at 109-116.

41. AQUINAS, *supra* note 39, IaIIae Q. 90 art. 1.

ordination, resulting in a reason-independent or reason-excluding ordination of fiat, full stop. Instead an ordination of reason itself inextricably incorporates reason into its terms; reason inheres even in *lex*. As Richard Helmholz puts it in his wonderful book on *Natural Law in Court*, "[decisions of the *ius commune*] illustrate what might be called *the 'internalist' role played by the law of nature. It was used to discover the meaning of existing laws* [and] to help supply the answer to a legal question where the import of positive law was uncertain …."[42]

42. RICHARD HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE *47* (2015) (emphasis added). An excellent explication of this point is offered by Xavier Foccroulle Ménard, a Canadian lawyer:

> That the legislative act is thus a "reasoned activity," and that the object of legislation is "to secure the common good," is "the central case of the legislature." It follows from this teleological understanding of the legislative act, and of the nature of law generally, that the point of constitutional and statutory interpretation is to understand the lawmaker's reasons for acting.As I have summarized elsewhere with Stéphane Sérafin and Kerry Sun, "[t]o interpret is to inquire about the reason the legislature chose the specific means, the specific determinatio, it adopted in pursuit of the ultimate common good." The added difficulty with constitutional interpretation is that the propositions found in constitutions are, more often than not, underdetermined. To conceptualize a Constitution as an act of reason means that the object of interpretation cannot be reduced solely to the text itself—we must look to what the lawmaker did, not merely what it said. Because the object of interpretation really is the full legislative act as "grounded in an intelligible chain of reasoning," the goal "is not to interpret words but to interpret language use." When conducting constitutional interpretation, therefore, the judge must understand and give effect to the specific means chosen by the constituent body, the determinatio, that is clarified through a genuine reflection on the common good.

Xavier Foccroulle Ménard, *Reclaiming the Natural Law for 21st Century Constitutionalism*, IUS & IUSTITIUM, (Sept. 12, 2012) https://iusetiustitium.com/reclaiming-the-natural-law-for-21st-century-constitutionalism/ [https://perma.cc/8CWL-QK32] (internal citations omitted).

This key feature of the classical view is very much the same point that Professor Veronica Rodriguez-Blanco's paper[43] makes, in powerful terms, about the inextricability of the normative in interpretation of the law. As she puts it, "[t]he idea of law governed by reason towards the common good is the guiding theme that runs through the American and European classical legal traditions and is the way that citizens of these states give meaning to, 'make sense of,' or 'give intelligibility' to the decisions of courts and the activities of judges and legal institutions."[44] The classical view is that even interpretation of semantic meaning presupposes a structure of normative presumptions—often left implicit, even unnoticed—that read legislative texts as rationally intelligible and oriented to the common good or public interest, and (thus) presumptively consistent with background principles of legal justice. Without even noticing that we do so, perhaps, we perforce read legal texts as reasoned efforts to promote the public interest, presuming all but conclusively that they are not to be read, for example, as though the legislator might be joking, or might aim to benefit the legislator's nephew. That approach is pragmatically inescapable—it is just how we naturally read legal texts, whatever we say in recondite academic theory—and it cannot be stipulated away by brute force. To tacitly assume that *lex* can be understood entirely independently of *ius* assumes the very conclusion that the positivist or originalist wants to prove. The claim of the classical lawyer is that reading *lex* in the light of *ius* is the right and indeed unavoidable way the work of law as law reads texts.[45]

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43. Veronica Rodriguez-Blanco, *When Moral Principles Meet the Normative or Deliberative Stance of Judges: The Layers of Common Good Constitutionalism*, 46 Harv. J.L. & Pub. Pol'y 983 (2023).

44. *Id.* at 984.

45. Strang suggests that

> [t]here is some potential ambiguity in Professor Vermeule's claim because in some instances he appears to cabin the quoted claim [i.e. the inevitability of drawing upon *ius* to interpret *lex*] to a subset of all constitutional

The point can be put another way. Various versions of "natural law originalism," all quite close to one another and differing only in details, all commit the same error: the attempt to incorporate natural law within originalism fails on methodological grounds. Such efforts, as the book argues, "yield[] only an ersatz form of respect for the natural law. One obeys the natural law only insofar as it happens to be picked up by an originalist command (a form of soft positivism), not because it has binding force as natural law in its own right. But it is intrinsic to the natural law that it should be followed for its own binding force, not merely because some incumbent ruler commanded that it be followed. The natural law isn't truly followed at all if it isn't followed *as* natural law."[46] The "natural law originalists" seem to understand, or concede, that the framers and ratifiers themselves did *not* think either that all law properly so-called is posited by human will,[47] or that law is ultimately grounded in social convention, or that "the existence of law

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> interpretation. For instance, when the Constitution's meaning is indeterminate. *Id.* [citing to VERMEULE, *supra* note 1, at 38].
>
> However, there are many instances when Professor Vermeule's claims are not so cabined. . . .

I find this puzzling; the cited page nowhere says anything of the kind, as readers may ascertain for themselves, and the supposed cabining is a view I have never advanced. What is true, as I have said repeatedly, is that the need to draw upon *ius* becomes *especially* obvious in hard cases, when legal texts are semantically ambiguous or indeterminate (*see, e.g.*, VERMEULE, *supra* note 1, at 16), but it is by no means *limited* to such cases. The former claim does not logically imply such a limitation; indeed if anything it implies that the need is not so limited. As both the book and my discussion here explain, the structure of normative presumptions and principles that we call *ius* always already informs the interpretation of even the apparent semantic meaning of *lex*. (*See, e.g.*, VERMEULE, *supra* note 1, at 83: "No determination [of positive law] can entirely block out, as it were, consideration of background principles, for on the classical view consideration of such background principles is necessary even to understand the scope and point of the determination"). It is just that background principles of *ius* are so profoundly inherent in the nature of lawmaking and (hence) of legal interpretation, and so ingrained in the way we think about law, that we often do not even notice we are drawing upon them.

46. VERMEULE, *supra* note 1, at 180 n. 290.

47. As explained in text, it is no answer to say that natural law is relevant to the

is one thing; its merit or demerit is another."[48] Hence the framers and ratifiers themselves would, overwhelmingly, reject positivism in any of its major senses, would reject (any and all of) the ideas that natural law has force only when and insofar as it is incorporated in posited civil law, or that the validity of posited civil law is a question that stands separate and apart from its relationship to the natural and divine law. "Natural law originalism" is a kind of methodological oxymoron. It does not escape the fundamentally self-defeating paradox of originalism: to be an originalist is to ground one's source of constitutional meaning in an era that rejected the positivist assumptions of originalism itself.[49]

The key conceptual misstep in all this, however appealing it may appear, is to argue (as Strang and others do)[50] that the common good enters in only at the level of justifying the enactment of positive law by the civil authorities. As Baldus's comment quoted at the outset of this essay shows,[51] that is a view against which the classical tradition resolutely sets its face; for the lawmaker to attempt to bar *ius* from having a role in the interpretation of the lawmaker's own enactments is itself to make a defective and invalid law. To

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originalist only insofar as it is incorporated within positive law. The framers themselves would reject the assumptions on which this saving effort is premised, because the classical view they shared has always been that the natural law is binding *ipso iure*, of its own force, not in virtue of positive enactment. *See* Conor Casey, *Constitutional Design Law*, 67 AM. J. JURIS. 173–97 (2022); *see also* Atiq, *supra* note 19 (founding era lawyers and judges saw natural law as binding *ex proprio vigore*). Hence the circle cannot be squared; "natural law originalism" either offers an ersatz form of natural law theory, or an ersatz form of originalism.

48. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Cambridge University Press: Wilfred E. Rumble ed., 1995).

49. VERMEULE, *supra* note 1, at 89 ("Originalism, paradoxically, flattens and even erases the rich legal world of the classical tradition that the framers originally inhabited"); *see also* Adrian Vermeule, *The Paradox of Originalism*, NEW DIGEST (Nov. 16, 2023), https://thenewdigest.substack.com/p/the-paradox-of-originalism [https://perma.cc/P8H8-KSFL].

50. *See, e.g.*, Alicea, *supra* note 37.

51. *See* Kenneth Pennington, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 209 N.25 (quoting Baldus's comment on *Digest* 1.4.1 and explaining that Baldus here draws upon the decree *Pastoralis Cura* of Clement V (Clem. 2.11.2, 1314)).

claim that such a view is itself based upon the classical tradition is thus a clear and grave misconception. To repeat, this drops an essential element of the classical conception: law is not merely an ordination for the common good, resting on second-order reasons like coordination, but is itself constituted *as* an ordination of reason. As Finnis argues (here quoting Casey both quoting and summarizing Finnis), "[b]asic precepts of the natural law … are therefore best regarded as 'judicially applicable moral rules and principles' and '*ipso iure* (i.e., precisely as morally and judicially applicable) rules of law' belonging to the '*ius gentium* portion of our law'…. [C]onstitutional interpretation can never reasonably strive to be exclusively historical and seek to confine itself to ascertaining socio-historic facts. That is, from a normative perspective officials should not deliberately try to entirely exclude considerations of political morality during interpretation. It is defined into the nature of the posited law of a particular community that it derives from higher law that it determines and specifies…. [Legal] interpretation is an act that 'can and should' be 'guided by moral principles and rules' that are a matter of 'objective reasonableness….'"[52]

To be sure, the attempt to incorporate thick normative background principles of legal justice and natural law into originalism and positivism lowers the practical stakes of the debate. Inclusive positivsts and "natural law originalists" of various stripes have recently taken so many long steps towards the classical view[53] that

52. Casey, *supra* note 47, at 193–94.

53. *Compare* William Baude, *Beyond Textualism?*, 46 Harv. J.L. & Pub. Pol'y 1331 (2023) *with* Conor Casey & Adrian Vermeule, *The Owl of Minerva and "Our Law,"* IUS & IUSTITIUM (Mar. 16, 2023), https://iusetiustitium.com/the-owl-of-minerva-and-our-law/#more-1952 [https://perma.cc/JZN5-M4FD]; *see also* William Baude, Jud Campbell and Stephen Sachs, *General Law and the Fourteenth Amendment*, STANFORD L. REV. (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902 [https://perma.cc/4JQA-T8KJ], at 11 (recognizing that during the founding era and throughout 19th century, federal and state courts relied on "general law," defined as a "*shared body of unwritten law … not derived from any enactment by a single sovereign*," based upon "*known and settled principles of national or municipal jurisprudence, including the common law, the law of equity, and the law of nations*") (emphasis added; internal

the result is a kind of Pickwickian originalism,[54] an originalism in name only that saves the bare label for essentially identitarian and sociological reasons. When academic proponents of originalism start to acknowledge that judges of the founding era and after were committed to "equitably construing statutes to avoid conflict with general [unwritten] fundamental rights";[55] or when a prominent originalist judge starts to say that "[o]ur mature and sophisticated legal tradition is built on principles of natural law, common law, and concepts rooted in the Roman law," reflecting "axioms of reason";[56] or when Stephen Sachs, who calls himself an originalist and who presented an argument for legal positivism at the conference, writes that the general unwritten law, including "principles of equity," prevailed until the *Erie* decision[57] and implicitly continued thereafter;[58] the originalism game is all but up. The law or at least debates over legal theory have reached a kind of Augustan settlement, in which the outward forms of originalism and positivism may be preserved as a sociological piety, but the content is classical, and everyone knows the game.[59]

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quotation omitted). One might even call this shift to a new version of originalism, filled with content from general unwritten law, a classic example of motte-and-bailey tactics. For analyses of the *de facto* convergence between enriched originalism and classical legal theory that are, I believe, quite consistent with my own, see the irenic and thoughtful contributions by Judge James Ho and Josh Hammer in this volume. *See* Josh Hammer, *Common Good Constitutionalism and Common Good Originalism: A Convergence?*, 46 HARV. J.L. & PUB. POL'Y 1197 (2023); Judge James C. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary: Fair-Weather Originalism*, 46 HARV. J.L. & PUB. POL'Y 957 (2023).

54. Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism/ [https://perma.cc/Y47S-2SXS].

55. Baude, Campbell & Sachs, *supra* note 53, at 16.

56. Judge Neomi Rao, *Lecture: 2022 Sumner Canary Memorial Lecture: Textualism's Political Morality*, 73 CASE W. RESERVE L. REV. 191, 193, 202 (2022).

57. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

58. *See* Stephen E. Sachs, *Life After Erie*, (Nov. 30, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4633575 [https://perma.cc/2J6V-AE2P] at 2–3. For the idiosyncratic character of Sachs' particular version of legal positivism, *see infra* note 57.

59. *See* Conor Casey & Adrian Vermeule, *Judge Rao's Unintentional Surrender: On the*

Let me now give two examples of the inextricability of the normative in practical reasoning about legal meaning. The first is the rules of chess, which Sachs, speaking at the conference, offered as an example (indeed the only example he mentioned) of a domain in which interpretation proceeds solely on the basis of social fact. I'm tempted to just say that law is not like chess, because it is not. Law, unlike chess, is not a closed system. But it turns out in any event that interpretation of the rules of chess does not at all operate the way Sachs described; quite the opposite. Periodically a debate breaks out in the chess community over whether tacit, unspoken agreement on draws between grandmasters (as by repetition of moves), in tournaments where express verbal draw offers are banned (at least before a certain move), counts as circumvention of the rules or even a kind of cheating. Although of course there are fixed rules of chess, whose terms are settled by an authoritative body, participants on all sides of this debate offer interpretive arguments about the *point* of the rules, arguments sounding in fit and justification—arguments that try to reach reflective equilibrium among the point and purpose of all the written and unwritten rules of chess jointly and severally, and also among competing conceptions of sporting honor. With even chess gone, we have no example on the table of an activity in which interpretation is not inevitably normative.[60]

Augustan Settlement of Our Law, (Sep. 13, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552214 [https://perma.cc/Q9VV-98BX].

60. Sachs' published paper tries to save the example by arguing that:

> [t]here's normative reasoning here, yes, but reasoning from their norms, not ours. So too for chess: the best account of a particular tournament's norms (as distinct from how its players really ought to act) might involve a conception of 'sporting honor' accepted within the league, not some idiosyncratic conception that we'd nonetheless defend as best. Our answer might be a better one, but it wouldn't be *their* answer, and it's *their* norms we're trying to apply.

Sachs, *supra* note 35, at 1282–83. Trivially, however, this begs the question. The whole problem is that the members of the relevant interpretive community are arguing precisely over competing conceptions of sportsmanship that each claims to be not

Putting chess aside, however reluctantly, here is a serious legal example from a modern judge of the view that even semantic meaning is always already to be understood and interpreted in light of background principles of *ius*. The case is called *Webster v. Doe*,[61] and the judge is none other than Justice Scalia. The text at issue in *Webster* authorized the Director of the CIA, "in his discretion," to terminate any CIA employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." The question was whether a termination was or was not reviewable by the courts on various grounds. The majority said that the text

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merely attractive but also embodied, expressly or implicitly, in the chess federation's norms. None of them advances an idiosyncratic moral conception defended as best *apart from* public shared norms. (Who on earth would say: "I think your tacit draw offer counts as a form of cheating in an official tournament with cash prizes on the line, but that's just my idiosyncratic and private view of morality"?) The very distinction that, in Sachs' view, draws the line between legal and moral argument is in fact just the subject of the argument; the location of the line between shared public norms and private or idiosyncratic moral views is just what the argument is about, an argument that is, for all participants, inextricably *both* legal and moral, 100% one and 100% the other. All this is familiar in debates over positivism; consider, for example, the claim that games and sports have an internal evaluative rationality that suffuses and grounds their particular rules, Robert L. Simon, *Internalism and Internal Values in Sport*, 27 J. PHIL. SPORT 1-16 (2000). (Thanks to Emad Atiq for pointing me to the citation).

Sachs' essay otherwise does little to engage or address the particular controversies the book has stirred up. The essay merely attributes to the common-good constitutionalist various views that Sachs imagines critics of positivism might hold (some of which are, in my view, patently straw men, but I leave such matters to the professional legal philosophers), and then rehearses Sachs' own views of positivism—views that, as I have explained elsewhere, are themselves seen as idiosyncratic even among philosophers of law, a discipline into which Sachs has recently ventured. *See* Adrian Vermeule, *The Bourbons of Jurisprudence*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192796 [https://perma.cc/2USN-KAVQ]. As the book does not aim to make any contribution to the philosophy of law, but rather works *within* law, as an exercise in the very different genre of constitutional theory (see COMMON GOOD CONSTITUTIONALISM, at 5), I have little to add to the extant critiques of Sachs' jurisprudential efforts—other than to note that Sachs and his sometime co-author, Will Baude, along with various originalist judges, have recently moved very far towards a strictly nominal positivism that in effect incorporates classical legal theory by another name. *See supra* notes 53–59 and accompanying text.

61. Webster v. Doe, 486 U.S. 592 (1988).

created a pure zone of discretion such that there was "no law to apply," and the text authorized termination for any reason whatsoever[62]—although the majority then immediately undermined its own holding by appealing to traditional background principles of deference in national security matters, and also by saying that Congress had not meant to preclude review on constitutional grounds, as opposed to statutory grounds.[63]

Justice Scalia took an entirely different and entirely classical view, as indeed he commonly did until surprisingly late in his legal career.[64] He observed that "there is no governmental decision that is not subject to a fair number of legal constraints precise enough to be susceptible of judicial application—*beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest*."[65] This is to understand both the legal and indeed semantic meaning of the text at issue as *already* embodying a set of fundamental structuring presumptions and background principles, here the bedrock classical conception that law rightly understood must be rationally oriented to the public interest or common good. That conception is, on the classical view, a principle of the *ius naturale* itself. As Cicero put it in a treatise on public offices, "*sed communis utilitatis derelictio contra naturam est: est enim injusta*" (to disregard the common good is against nature; it is injustice itself).[66] Note here, crucially, that Scalia goes well beyond the central idea of the "natural law originalists" like Strang that the common good serves merely as a justification for positive lawmaking by civil authorities. Instead, like the classical lawyers,

62. *Id*. at 599–601.

63. *Id*. at 601–05.

64. *See* Adrian Vermeule, *The Original Scalia*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 2 (2023).

65. *Webster*, 486 U.S. at 608 (Scalia, J., dissenting) (emphasis added).

66. CICERO, DE OFFICIIS BOOK III, available at https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/de_Officiis/3A*.html [https://perma.cc/RM26-T8P4]. (The editors here give a slightly different translation: "disregard of the common interests is repugnant to Nature; for it is unjust." The difference is immaterial to the point in text).

he invokes the common good *within* adjudication itself, as a ground or precondition of lawmaking that is always constitutive of and inherent within even the semantic meaning of legal texts.

I hope this example also clears up what I take to be another side-issue that appears in Strang's paper,[67] the question of different philosophical conceptions of the common good. As a first-order matter, the book adopts, straight from the tradition that runs consistently from Aristotle to Augustine to Aquinas, the classical conception of the common good, most clearly and concretely illustrated in my view when Aquinas says that "the individual good is impossible without the common good of the family, state, or kingdom. Hence Valerius Maximus says of the ancient Romans that 'they would rather be poor in a rich empire than rich in a poor empire.'"[68] (*Pace* a common misconception, this does not at all mean that the good of the political community exists apart from and above the good of its members. Rather it means that the good of the community is itself the highest good for individuals; "what is bad for the hive is bad for the bee."[69]). Strang opts for a different conception of the common good, the instrumental conception, one which is idiosyncratic even among natural lawyers, and which John Finnis more or less abandoned after (and perhaps because) his work was critiqued by Ernst Fortin, as discussed in another recent paper by Erika Bachiochi.[70]

That said, here is the more important point: for concrete purposes there is usually no need to choose between high-level philosophical conceptions of the common good.[71] (*Pace* a suggestion by Strang, I

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67. *See* Strang, *supra* note 14. *See also* Pojanowski & Walsh, *supra* note 14.

68. AQUINAS, *supra* note 39, IIa IIae Q. 47, art. 10., ad. 2.

69. MARCUS AURELIUS, MEDITATIONS VI: 54.

70. *See* Erika Bachoichi, *Rights, Duties and the Common Good: How the Finnis-Fortin Debate Helps Us Think More Clearly About Abortion Today*, 67 AM. J. JURIS. 143 (2022).

71. *See* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 113 (2022). *Cf.* GEORGE DUKE, THE COMMON GOOD, IN THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 382 (George Duke & Robert P. George eds., 2017) (arguing that the instrumental and distinctive conceptions of the common good are different facets of a unitary concept).

fail entirely to see any inconsistency between that point and the first-order view I happen to hold).[72] Holding a particular first-order view does not logically bar the view that, in the practical work of lawyers, a range of first-order views will often converge upon similar conclusions). In particular, for the quotidian legal purposes of the classical lawyer or judge, who work with the rough instruments of the law, refinements at the contested outer edges of the philosophical debates are usually irrelevant. Law is a department of political morality, but as it were a special department with its own distinctive problems and commitments, particularly the eternal tension in law between substantive norms and the need to respect institutional roles. Principles of *ius* are thus not co-extensive with "morality" *tout court*; they are, as the tradition puts it, principles of distinctively legal justice, and law is not seminar-room reasoning about morality, but rather the distinctive practical craft or "art" of harmonizing positive law with the good and the equitable (*ars boni et aequi*),[73] with *aequitas* conceived as internal to law in the more general sense.[74]

The cases thus involve the sort of questions of practical legal reason Justice Scalia adverted to in *Webster v. Doe*, such as whether the CIA director really should be able to fire an employee in order to, say, give the job to his nephew.[75] Thus I would urge that we lawyers pay rather less attention to debatable philosophical refinements of the common good and rather more attention to the civil-lawyer side of the *ius commune*, in which *bonum commune* or common good does not refer immediately to some contested philosophical conception.[76] Instead it serves very concrete ends - not least when, as often

72. Strang, *supra* note 14, at 1268.

73. DIG. 1.1pr.

74. DIG. 50.17.90 ("In every context but particularly in the law, equity must be considered").

75. Webster v. Doe, 486 U.S. at 610 (Scalia, J., dissenting).

76. *See* Adrian Vermeule, *The Common Good as a Legal Concept*, IUS & IUSTITIUM (Nov. 16, 2022), https://iusetiustitium.com/the-common-good-as-a-legal-concept/ [https://perma.cc/68C3-SRW6].

happens, the lawyer has to interpret legal provisions that themselves refer, in terms, to "the common good," the "general welfare," or "the public interest."[77] The common good condemns the abuse of official power for private purposes like nepotism or peculation; it underwrites equitable and public-regarding interpretations of semantic and legal meaning; and it helps to prevent a kind of pointless and fetishistic legal formalism that benefits few and harms all.

In general, there are here two risks to avoid, two dangers between which we have to steer. Legal justice has two functions that are inextricably intertwined, settlement or coordination of social disputes and rational governance for the common good, and (hence) two aspects, fiat and reason.[78] These aspects co-exist in a kind of perpetual tension, captured in a dictum of Paul Ricoeur: justice looks both ways to law and the good, caught between them.[79] The twin errors arise when one or another side of the antinomy is made the master of the other—either near-exclusive concern for the settlement and

77. For examples of such provisions from both federal and state constitutions in the United States, and from other nations, *see* VERMEULE, *supra* note 1, at 30-32; Vermeule, *supra* note 76; Sulyok, *supra* note 28, at 1094, which includes this example from the Hungarian Constitution: "When interpreting the constitution or laws, the ordinary and constitutional jurisdictions shall presume that the constitution and the law serve moral and economical purposes, which are in accordance with common sense and the common good." The Second Amendment, due to its introductory clause ("A well regulated Militia, being necessary to the security of a free State"), is another plausible example. As Darrell Miller suggests in an excellent paper, "rather than focus on whether a particular regulation or practice promotes or inhibits individual self-defense, . . . the common good constitutionalist would ask whether the particular construction of the right promotes or inhibits the public provision of safety, broadly understood according to the terms of the classical tradition." *See* Darell A. H. Miller, *Common Good Gun Rights*¸46 HARV. J.L. & PUB. POL'Y 1029, 1047 (2023).

78. *See generally* Adrian Vermeule, *Reason and Fiat in the Jurisprudence of Justice Alito*, 46 HARV. J.L. & PUB. POL'Y 875 (2023).

79. *See* Paul Ricoeur, *The Just Between the Legal and the Good*, *in* READING RICOEUR THROUGH LAW (Marc de Leeuw et al., eds. 2021).

coordinating function of law on the part of originalists and positivists,[80] or excessive attention to pure speculative and normative reason on the part of the philosophers and jurisprudes. The classical lawyer, working *as* a lawyer, aims to hold these in a productive balance, using both fit and justification. The book is thus very much a lawyer's book, working *within* law in a way that is interpretive rather than purely positive or purely normative. It is a misapprehension of genre to read it as a philosophical exercise.[81] Following another excellent paper by Emad Atiq and Jud Mathews,[82] my suggestion for doctrinally trained law professors as such is that we rarely have much to contribute to technical debates in legal philosophy, but happily we rarely have any need to do so.

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80. I'm not quite sure where to mention it, but perhaps this is the place: A centerpiece of Strang's essay is a kind of argument from public opinion, conducted without benefit of data. an Strang here argues that "originalism's instrumentalist conception of the common good is more attractive to more Americans that CGC's thicker conception, therefore providing those Americans with reasons to follow the original meaning." Strang, *supra* note 14, at 1265. One very much doubts that Americans as a class have any views whatsoever on competing philosophical conceptions of the common good, nor is it at all obvious that Strang's methodological conclusion follows; it would depend on what these very refined Americans believe is instrumentally desirable. And in any event, it flagrantly begs the question in favor of conventionalist views of the nature of law to assume that what (a majority of) the population believes is conclusive or even relevant to the nature and interpretation of law. For whatever it is worth, finally, the empirical premise of the argument is probably just wrong; the best currently available empirical work in experimental jurisprudence suggests that Strang has it exactly backwards. *See* Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law Is Intrinsically Moral*, AUSTRALASIAN J. PHIL. 100(1):165-79 (2020) (finding that widespread popular intuitions about law contradict central theses of legal positivism). A corollary is that legal positivism, and for that matter legal realism, contradict the intuitions that law students bring to law school in the first instance; it has been a project of elite law schools and elite legal theories to train them out of their intuitions, so to speak. Hence a claim one sometimes encounters, that "our legal culture" is now inevitably positivist and realist, rests on empirical premises that are shaky at best; it is by no means obvious that a legal culture resting on intuitions congenial to the classical legal ontology could not be revived simply by changing the character of the elite project.

81. *See* Vermeule, *supra* note 76.

82. Emad Atiq & Jud Mathews, *The Uncertain Foundations of Public Law Theory*, Cornell J.L. & Pub. Pol'y (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032904 [https://perma.cc/2PSC-HZCF].

Here I should briefly re-emphasize a point I and others have made before. On the classical view, judicial assessment of the common good is by no means an open-ended and unstructured imposition of judicial views of the common good in the name of higher constitutional law. To think this way is to adopt a framework oriented fundamentally to constitutional judicial review as a check or trump that invalidates political action—a quite recent framework that, as Helmholz has repeatedly pointed out, is marginal at best in the classical tradition. Originalists especially ought to internalize the demonstrations by Helmholz, Jud Campbell, and others that constitutional review was by and large a sideshow in the Founding era. As Campbell puts it, "[a]s a general matter, natural rights did not impose fixed limitations on governmental authority. Rather, Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good— generally defined as the good of the society as a whole."[83]

Rather, on the classical approach, judicial assessment of the common good is sharply limited and structured in at least three ways. First, it is primarily a subconstitutional interpretive tool, which reads and interprets legislative texts by means of a series of structured presumptions that assume legislative rationality, incorporation of higher sources of law into the civil positive law, and orientation to the common good—that read legislation, in other words, within the horizon of the principles of legal justice that constitute *ius*, including an orientation to the common good as a key element of *ius*. On this approach, putative acts of lawmaking that violate natural law or natural rights are seen as defective or perverse pseudo-lawmaking. But it is an entirely separate question whether a court, for example, has the authority to ignore, set aside or "strike down" the law, as both Aquinas and the classical lawyers make

83. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE. L.J. 246, 259 (2017).

very clear,[84] and it is usually a marginal question.[85] Second, as the mainstream of classical American caselaw shows, classical judicial assessment of the common good is presumptively deferential within reasonable boundaries, not only or not primarily because of concerns about limited judicial capacities, but more fundamentally because the inherent office of the lawmaker is to provide reasonable specification or determination of background principles of *ius*. Third and consequently, as the book makes clear, the deferential framework of judicial review in classical American law is at bottom analogous to what we would see today as an administrative-law conception of judicial review, one that asks whether the action of the civil authorities is based on plausible reasons oriented to the public interest.[86] In this regard, Stephanie Barclay seems to suggest that asking government to "explain why it is not regulating in even-handed ways," and to offer a proper public-regarding motive, is not a part of the classical administrative law model of review.[87] On the contrary: as to the former, Aquinas himself argues that equal sharing of burdens is constitutive of the common good,[88] and Michael Foran's paper explains the important role of equality in the tradition.[89] As to the latter, the classically-oriented Scalia opinion in *Webster v. Doe*, and indeed a quite recent decision of the Court in

84. *See* AQUINAS, *supra* note 39, IaIIae Q. 96, art. 4 responsio (sitting forth a nuanced framework in which putative laws that are unjust because contrary to the common good of a human political community, and thus a perversion of law, may nonetheless be treated as though they are binding in order to avoid "scandal or disturbance," unless they violate core precepts of divine law).

85. *See* HELMHOLZ, *supra* note 42, at 92: "[I]n actual cases the law of nature was almost always treated as a source of positive law, not as a rival or alternative to it…. [I]n the great majority of litigated cases, natural law did serve to interpret statutes or local customs and to answer difficult or unanswered questions. Its normal use was not to invalidate existing positive law…. An unfortunate accident of the dominance of the modern practice of judicial review in American courts has been to suggest that 'striking down' legislative acts was the main purpose natural law was meant to serve."

86. VERMEULE, *supra* note 1, at 63, 151-54

87. Stephanie H. Barclay, *Strict Scrutiny, Religious Liberty, and the Common Good*, 46 Harv. J.L & Pub. Pol'y 937, 955 (2023).

88. AQUINAS, *supra* note 39, IaIIae Q. 96, art. 4 *responsio.*

89. *See* Foran, *supra* note 10.

the census case,[90] illustrate that although general principles of law afford a presumption of regularity to official action, administrative law review for invalid purpose or pretext is possible, where no public-regarding motive is plausible in light of the scope and design of the action.

A final methodological point: it is important not to run together two distinct issues that I fear are often conflated. Enrichment of our legal ontology need not produce more indeterminacy and disagreement at the level of interpretation in particular cases; indeed it will, in some range of cases, produce less. As Helmholz argues,[91] and as Conor Casey illustrated from recent Irish law,[92] a standard way classical lawyers draw upon *ius* is to invoke settled and traditional background principles in order to *reduce* indeterminacy that would otherwise obtain in the positive *lex*. As against stock talking-points on the indeterminacy of *ius* or on disagreement about the content of *ius*, consider both the extraordinary proliferation of mutually opposed originalisms at the academic level and the chronic disagreements that afflict originalist and positivist judges in hard cases. Of course there are cases that are easy on any view, but these are just as easy for the classical lawyer as for the originalist. One wonders why so many academic defenses of originalism implicitly assume that positive texts are fully determinate (although practicing judges and lawyers are less susceptible to this assumption), while also assuming that *ius* is chronically indeterminate. And one wonders why the points about indeterminacy and disagreement are rarely run through consistently and comparatively across legal theories.[93]

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90. Department of Commerce v. New York, No. 18–966, 588 U.S. ___ (2019) (endorsing limited "pretext" inquiry under arbitrary and capricious review).

91. HELMHOLZ, supra note 42, *passim*.

92. Casey, *supra* note 15, notes how Irish Courts have drawn on principles of legal justice flowing from the natural law to make more determinate the legal meaning of vague constitutional text concerning the right to a fair trial, to bodily integrity, and parental autonomy against the State in respect of educational and medical decisions for their children.

93. One recalls here the many academic encomiums of *Obergefell* that praised Justice

If there is one thing that is apparent every May and June at the Supreme Court, it is that originalism and textualism allow enormous scope for disagreement.

The fact is that disagreement, like fallibility, is just a universal condition of life for cognitively bounded and constrained human beings. It is just a condition of the fallen state of man. It applies to all legal theories if it applies to any; it cuts in all directions at once. At the symposium, a question from the audience raised the old trope that "natural law theories are subject to bad-faith hijacking." Any theory or class of theories, however, can be inserted into that sentence. No legal theory, as such, can guarantee or enforce the conditions necessary for good-faith judicial compliance with the theory. To do so is not the province of legal theory as such.

The theme of disagreement is a good place to end. If history is any guide, these debates will continue *ad infinitum*, in cyclical fashion. None of that is inconsistent with believing that there is a right answer, as Dworkin used to stress. But it is perhaps at least a good reason to take a broader, more cosmopolitan attitude to those disagreements and to appreciate or even savor the rich variety both of law's history and of law's manifold forms around the world today.

Kennedy's opinion precisely because it advanced professedly open-ended conceptions of "liberty" and "equality." *See, e.g.*, Kenji Yoshino, *A New Birth of Freedom? Obergfell v. Hodges*, 129 HARV. L. REV. 147 (2015).