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PREFACE

I am excited to present the final issue of Volume 46. This issue is mostly the fruit of a symposium on common good constitutionalism held in October of 2022. I would like to thank all of our participants, moderators, and attendees. A few individualized thanks are also in order: to Prof. Stephen Sachs for agreeing to deliver our keynote address, to Prof. Adrian Vermeule for the work that inspired this symposium and his personal participation in it, and last but not least to Prof. Lee Strang who co-coordinated the symposium. As the symposium is lengthy, I will refrain from summarizing each piece here.

In addition to the symposium, the Issue presents Prof. William Baude's 2023 Scalia Lecture entitled "Beyond Textualism?" in which he asks and answers the question: "Do you think textualism has sort of played itself out?" It also presents a student note by Moshe Schwartz which explores the relationship between prophylactic rules and *stare decisis* in light of the Court's recent abortion jurisprudence.

Before I sign off one last time, I want to thank again all the members of the staff of Volume 46. It is a blessing to march off into the legal profession side-by-side with such a wonderful crew.

Finally, I want to thank my wife Monica without whom I would not have had the time or determination to carry this work to its completion.

Mario Fiandero
Editor-in-Chief

ERRATA

Due to the unique posture of the special issue on the jurisprudence of Justice Alito, a few editing errors snuck through to print that ordinarily would not.

In particular, the pin cites in Prof. George's introductory article to other articles in the issue were erroneous because I did not update them after several of other articles' pagination changed. I take full responsibility for the error.

These will be fixed in the version that can be found on our website.

Mario Fiandero
Editor-in-Chief

STRICT SCRUTINY, RELIGIOUS LIBERTY, AND THE COMMON GOOD

STEPHANIE H. BARCLAY*

INTRODUCTION

In *COMMON GOOD CONSTITUTIONALISM*, Adrian Vermeule critiques the “typical formulation” for protection of rights under both strict scrutiny and proportionality, where “rights of the individual . . . are opposed” to the “political collective” and “must be balanced against each other.”¹ Vermeule argues that “[r]ights, properly understood, are always ordered to the common good The issue is not balancing or override by extrinsic considerations, but internal specification and determination of the rights’ . . . proper boundaries or limits.”² In the religious exercise context, Vermeule does not explicitly describe his preferred legal framework for protecting these constitutional rights. But he does identify, with concern, an instance where government interfered

* Professor of Law at Notre Dame Law School and Director of the Notre Dame Religious Liberty Initiative. For very helpful comments, conversations, and encouragement on this draft and earlier versions of this project, the author thanks Marc DeGirolami, Frederick Gedicks, Sherif Girgis, Michael Helfand, Douglas Laycock, Christopher Lund, Michael McConnell, John Meiser, Jim Oleske, Eric Rassbach, Mark Rienzi, Zalman Rothschild, Micah Schwartzman, Geoffrey Sigalet, Mark Storslee, Lael Weinberger, and the participants at the Pepperdine Law School Nootbaar Fellows workshop and Stanford Law School Constitution Center Works-in-Progress Workshop. For excellent research assistance, the author thanks Chris Ostertag.

1. Adrian Vermeule, *COMMON GOOD CONSTITUTIONALISM* 166 (2022) [hereinafter “CGC”].

2. *Id.* at 167.

with the religious exercise of the Little Sisters of the Poor for reasons not actually aimed at the common good.³

Vermeule's criticism of balancing rights echoes the concern of some originalist scholars and jurists, who have argued that strict scrutiny requires a judicial balancing exercise, allowing for moral reasoning the courts are incompetent to perform.⁴

I sympathize with the concerns these scholars share about ensuring the judiciary does not engage in adjudication that it lacks the institutional competence to perform.⁵ Vermeule and other scholars such as Gregoire Webber et al.,⁶ have also done important work drawing our attention to the false dilemma this conception of rights creates, pitting individual rights as at odds with the public interest. However, in this essay I argue that strict scrutiny is not necessarily susceptible to these flaws, at least not as applied by U.S. courts protecting religious exercise.

The critiques of strict scrutiny described above rely on some assumptions about what constitutes the most salient characteristics of that doctrine. This Article challenges the accuracy of this account, arguing that critics are at times critiquing a faux version of strict

3. *Id.* at 119–20.

4. *See, e.g.*, Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 81 (2019); *Ramirez v. Collier*, 142 S. Ct. 1264, 1286–88 (2022) (Kavanaugh, J., concurring). Other scholars similarly critique the standard conception of individual rights under strict scrutiny's international sibling: proportionality. They argue that proportionality's balancing framework problematically places rights in opposition to the common good, rather than constitutive of the common good. Grégoire Webber & Paul Yowell, *Introduction: Securing Human Rights Through Legislation*, in LEGISLATED RIGHTS 13 (Grégoire Webber et al. eds., 2018); *see also* GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 89 (2009); PAUL YOWELL, *CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW* 19 (2018); FRANCISCO J. URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* 288 (2017); John Finnis, *Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR*, in *LORD SUMPTION AND THE LIMITS OF THE LAW* 119 (N.W. Barber, Richard Ekins & Paul Yowell eds., 2018).

5. Indeed, as Vermeule points out, it is often conceptually erroneous to view rights as in tension with the common good. That is particularly true when it comes to religious liberty, a key component of a nation's common good.

6. *See supra* note 4.

scrutiny. Instead, strict scrutiny should be properly understood as primarily (1) a rule of exclusion regarding certain types of reasons, and (2) an evidentiary burden that ensures the government action is necessary to advance the nonexcluded reason the government has itself identified.⁷

The evidentiary analysis in strict scrutiny need not involve any judicial balancing, meaning weighing incommensurate interests and making political or moral judgments about the relative importance of the individual interests pitted against the community.⁸ Rather, it is a mode through which the judiciary assesses things like the causal relationship between the government's stated goal and its action—a discrete type of analysis that the judiciary routinely performs in a variety of other contexts.⁹ This Article argues that it is this sort of rule of exclusion and evidentiary burden that does the real work of strict scrutiny in litigation—precisely the type of work Vermeule points to positively when he mentions *Little Sisters of the Poor*.¹⁰ Such work is necessary to identify situations where the government is not actually advancing the common good in the way it claims, or where it could do so in ways that simultaneously protect religious liberty (an important component of the common good). And as I have described elsewhere, in many important respects strict scrutiny resembles judicial modes of analysis that were employed to protect religious liberty during the Founding Era. In other words, this is a mode of analysis that the judiciary is constitutionally authorized—and perhaps required—to perform.

I. CHALLENGING THE FAUX ACCOUNT OF STRICT SCRUTINY

Critics of strict scrutiny often rely on some assumptions about what constitute the most salient characteristics of strict scrutiny. First, critics express concern about the judiciary's competence in

7. See Stephanie H. Barclay, *Replacing Smith*, 133 YALE L. J. F. 436, 456 (2023).

8. *Id.*

9. See *id.* at 461, 469.

10. CGC, *supra* note 1, at 119–20.

determining whether a government's interest is "compelling." Second, critics question the process of "judicial balancing" through the weighing of the relative importance of incommensurate competing values involving moral and political questions. Third, critics argue that strict scrutiny is an ahistorical judicial invention that did not exist until the post-war, modern era. Fourth, critics point to courts that under the mantle of balancing tests, have engaged in problematic forms of judicial creativity, including inventing new rights or arbitrary tiers of rights.

The first two assumptions primarily relate to arguments about the institutional competency and democratic legitimacy of the judiciary to perform this analysis. The final two critiques relate to the constitutional authority of the judiciary to perform this analysis. This Part challenges and engages with each of these assumptions in turn, arguing that strict scrutiny—at least within the context of religious exercise protections—is analysis that is both within the judiciary's institutional competence and constitutional authority.

A. *Identifying the Compelling Government Interest*

Let us begin with critique that the judiciary is not the appropriate actor to decide the moral and political question of whether the government has a sufficiently "compelling" interest in advancing its challenged policy. Vermeule suggests that assessing this aspect of the common good is a task ill-suited for the judiciary.¹¹ Justice Kavanaugh recently raised concerns about strict scrutiny, asking "what does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?"¹² Alicea and Ohlendorf argue that allowing judges to determine whether an interest is compelling results in the "constitutionality of governmental action depend[ing] on each judge's own subjective assessment of questions that can only be described as quintessentially political."¹³ These critiques raise important concerns about the lack of institutional

11. CGC, *supra* note 1, at 167–68.

12. *Ramirez v. Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring).

13. Alicea & Ohlendorf, *supra* note 4, at 81.

competence for the judiciary to decide this question, the legitimacy of the judiciary deciding these sorts of moral questions in a self-governing society.

Before addressing this concern directly, it's worth noting two things. First, under the Religious Freedom Restoration Act (RFRA)¹⁴ and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA),¹⁵ the legislature has specifically *instructed* the judiciary to determine whether an interest is compelling. So whatever moral analysis the judiciary is engaging in when it performs this statutory analysis, it is doing so with clear authority—and in fact, a mandate—from a democratic institution. At least in this statutory context, then, democratic legitimacy concerns seem unfounded.

But what about the institutional competence of the judiciary to ask this question, both in the statutory context and in the broader constitutional context? If one looks at a common thread running through cases identifying whether a government interest is compelling or not, a potential pattern emerges. Specifically, as discussed below, courts seem to reject government interests that, if allowed to be raised at their particular level of generality, could *always* be used to defeat any request for religious exemption. For example, if a government's desire to avoid ever providing administratively inconvenient exemptions constituted a compelling government interest, then government would never be required to provide a religious exemption. The same is true of the government's desire or to avoid any marginal increase in cost. As Holmes and Sunstein and many other economists have explained, any time society protects individual rights in any respect, this results in additional cost and administrative burden for that society.¹⁶ And if

14. 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

15. 42 U.S.C. §§ 1988, 2000cc–2000cc-5.

16. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 87–89 (2013); *see also* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 2021 FLA. L. REV. 1440 (2021).

government were able to point to an interest in avoiding any marginal increase in risk, as Justice Kavanaugh suggested in his *Ramirez* concurrence,¹⁷ government would be able to read the “least restrictive means” portion of the RFRA and RLUIPA analysis right out of the statute, making that text superfluous. All protection of rights requires marginal increases in costs and risks to society and government, including administrative inconvenience or marginal risks of harm.¹⁸ Thus, one cannot both accept these sorts of government interests and require the protection of a right—those two scenarios are mutually inconsistent. And of course, certain types of government interests, such as open hostility to religious exercise, are inimical to the existence of the right in fairly obvious ways.

In other words, the very existence of a right means that some statutes like RFRA or the Constitution exclude certain government reasons as permissible basis on which to interfere with the constitutional interest (i.e., free exercise). Note that the opposite is also true: a right may also include within its very nature certain limitations whereby it *would* be permissible for the government to interfere with the identified constitutional interest. The “compelling interest” portion of the analysis can thus be understood as, at a minimum, excluding those sorts of reasons from government reliance that would defeat the identified constitutional interest in all contexts. Otherwise, the constitutional or statutory right at issue would be rendered a nullity.

But we need not plumb the depths of that interesting conceptual issue because the way courts deal with the “compelling interest” critique is much more practical. Under modern strict scrutiny analysis, the determination of whether or not a government interest is “compelling” almost always turns out to be irrelevant to the disposition of the case.¹⁹ Courts will generally either agree that a

17. *Ramirez v. Collier*, 142 S. Ct. 1264, 1287–88 (2022) (Kavanaugh, J., concurring).

18. HOLMES & SUNSTEIN, *supra* note 15, at 87–89; *see also* Barclay, *supra* note 16.

19. *See* Justin Collings & Stephanie H. Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453 (2022).

government interest is compelling or else simply assume so for the sake of analysis, and then move on to assess whether the government denial of religious protection is the least restrictive means of accomplishing its asserted interest.

Still, another issue with identifying the government's interest, Alicea and Ohlendorf argue, is the difficulty determining the correct level of generality. For example, when it comes to the contraception mandate, was the government's interest in "public health," or was it in "seamless coverage of cost-free contraception?" Alicea and Ohlendorf state that "in many cases, to decide the level of generality is to decide the case," yet "the Supreme Court has never explained how the level of generality of the government's interest is to be determined."²⁰

There is some irony in this argument, since the level of generality problem is often lobbed at originalists, and those who favor using historical analogs to inform legal tests (including Alicea and Ohlendorf presumably) must grapple with this same issue, perhaps even more acutely. In other words, there is nothing about strict scrutiny as a legal doctrine that raises unique concerns about the ubiquitous level of generality problem. In fact, for reasons discussed below, strict scrutiny may in fact ameliorate this concern.

Specifically, the pedestrian response to this level of generality object is that the argument is both not quite accurate, and also far less of a concern, than Alicea and Ohlendorf suggest. First, determining the level of generality of an interest is not something the judiciary mystically divines; it is generally something the government asserts.²¹ In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,²² for example, the Court analyzed "two of the compelling interests asserted by the Government, which formed part of the

But see *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006).

20. Alicea & Ohlendorf, *supra* note 4, at 80 (emphasis omitted).

21. See Barclay, *supra* note 7, at 461.

22. 546 U.S. 418 (2006).

Government's affirmative defense."²³ In contraceptive mandate litigation, the Supreme Court adopted the articulation of the government's interest set forth in its briefing: providing "contraceptive coverage seamlessly, together with the rest of [a woman's] health coverage."²⁴

The Court has also made clear, in the RFRA and RLUIPA contexts, that the government must articulate its interest at a low level of abstraction aimed at the specific claimant's request, rather than at a high level of abstraction. It has stated that strict scrutiny requires courts to "'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context."²⁵

Finally, the Supreme Court has reminded government officials that the government interest needs to be identified contemporaneously, at the time of the denial of the religious exemption request, rather than years later during litigation. In *Kennedy v. Bremerton School District*,²⁶ the Court rejected an argument from the school district, raised years into litigation, that "it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games."²⁷ The Court noted that "the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy."²⁸ In rejecting this late-coming rationalization, the Court emphasized that "Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'"²⁹

23. *Id.* at 428 (emphasis added).

24. *Zubik v. Burwell*, 578 U.S. 403, 408 (2016).

25. *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014)).

26. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

27. *Id.* at 2432 n.8.

28. *Id.*

29. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

B. *Balancing Incommensurate Interests or Evidentiary Burdens*

Now, setting aside the less significant concerns about identifying government interests, we can get to the heart of the matter. It seems the primary concern of strict scrutiny critics is that they view this doctrine as an exercise in judicial balancing of competing goods. Vermeule explains, “[t]he implicit premise of th[e strict scrutiny] framework is that the interest of ‘government’ as representative of the political collective, on the one hand, and the rights of individual, on the other, are opposed and must be balanced against each other.”³⁰ Vermeule compares this approach to the “proportionality test that is broadly characteristic of European constitutional and human rights law,” and questions the appropriateness of these balancing approaches.³¹ Justice Kavanaugh has similarly stated that “the compelling interest standard that the Court employs when applying strict scrutiny . . . necessarily operates as a balancing test.”³² Alicea and Ohlendorf agree that strict scrutiny “is a balancing inquiry, even if the balancing is structured into distinct stages.”³³

The problem these critics quite fairly worry about is that a balancing framework puts the judiciary in the position of weighing the relative value of incommensurate goods, an inquiry which has no clear factual or legal answers. The vacuum of any analysis dependent on legal learning is thus filled with unbridled judicial discretion and moral judgment, tasks ill-suited to an institution that is neither democratically accountable nor institutionally designed for such analysis. As Alicea and Ohlendorf state, “The scrutiny analysis therefore asks judges to impose on the Constitution a hierarchy of values and interests that—due to their incommensurability—is not

30. CGC, *supra* note 1, at 166.

31. *Id.* at 167.

32. *Ramirez v. Collier*, 142 S. Ct. 1264, 1286–87 (2022) (Kavanaugh, J., concurring) (citing Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1914–19 (2017)).

33. Alicea & Ohlendorf, *supra* note 4, at 77 (emphasis omitted); *see also* *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1053–54 (11th Cir. 2022) (Newsom, J., concurring) (calling for reconsideration of use of balancing tests in First Amendment cases).

objectively justifiable.”³⁴ In a well-known dictum, Justice Scalia once quipped that balancing competing constitutional values is like determining “whether a particular line is longer than a particular rock is heavy.”³⁵ Assuming judges can arrive at the optimal balance for the common good in any particular dispute they adjudicate has been described as “fairy-tale constitutionalism in which every constitutional dispute has a happy-ever-after ending that can be discovered by judges on a case-by-case basis.”³⁶

The concern about the ability of the judiciary to weigh incommensurate values is understandable. And to be fair, in early iterations of modern strict scrutiny cases, the Supreme Court did engage in this type of incommensurate balancing in the past.³⁷ Consider *Wisconsin v. Yoder*,³⁸ which involved a trio of Amish families in rural Wisconsin who refused to send their fourteen- and fifteen-year-old children to school despite a mandatory attendance policy.³⁹ The Court in *Yoder* framed its analysis in terms strongly reminiscent of the global proportionality test. “[A] state’s interest in universal education,” the majority wrote, “however highly we rank it, is not totally free from a *balancing process* when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause.”⁴⁰ The majority further explained that Wisconsin could constitutionally compel school attendance only if “there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”⁴¹ Ultimately, the Court concluded that the marginal contribution of requiring an

34. Alicea & Ohlendorf, *supra* note 4, at 78 (emphasis omitted).

35. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

36. Alicea & Ohlendorf, *supra* note 4, at 78.

37. The vision of the judiciary making moral and political judgments about the weight of incommensurate interests is also more common in some proportionality jurisdictions (though not all of them). See Collings & Barclay, *supra* note 19, at 518–19.

38. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

39. *Id.* at 207.

40. *Id.* at 214 (emphasis added).

41. *Id.*

additional year or two of formal schooling was slight, and that the cost of accommodating the Amish request was small.⁴² On these terms, the balance tilted toward the Amish side.

However, while this sort of judicial balancing may have characterized some of the early strict scrutiny cases of the modern era, it no longer represents the primary mode of analysis the U.S. Supreme Court employs under strict scrutiny to protect religious rights—certainly not under statutes like RFRA or RLUIPA. Rather, the Court has looked to whether the government is relying on a reason not excluded under the right (see discussion above about compelling interests), and whether the government has presented sufficient evidence to demonstrate that denying the religious exemption is necessary to advance the government’s stated reason for interference with the right (or, conversely, that granting the religious exemption will meaningfully undermine the government’s ability to accomplish its stated goal). For example, in *Gonzales*,⁴³ the Court explained that the government must “offer[] evidence that granting the requested religious accommodations would seriously compromise its ability to administer [its desired] program.”⁴⁴ In *Ramirez*,⁴⁵ the Supreme Court ruled against prison officials denying a religious accommodation for audible prayer during an execution because the officials had not presented evidence to explain why they couldn’t allow the religious practice now, when the same prison had allowed it in the past (along with other prisons who also allowed the practice).⁴⁶ In *South Bay II*,⁴⁷ Chief Justice Roberts concurred with the Court’s order granting injunctive relief against a COVID-19 restriction. “[T]he State’s present determination,” he wrote, “that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect

42. *Id.* at 225, 236.

43. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 435 (2006).

44. *Id.* at 435.

45. *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

46. *Id.* at 1279.

47. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

not expertise or discretion”⁴⁸ In *Hobby Lobby*,⁴⁹ the Court noted that HHS had not “provided evidence” to support some of its claims that it could not grant exemptions under the contraception mandate.⁵⁰

Proving necessity as an epistemic matter is likely impossible through evidence available to litigating parties. But there are proxy questions to which the Court looks in assessing this evidentiary question. First, courts often ask whether the government has other means of accomplishing its goal that don’t involve burdening religion. Where the government has other alternatives available identified in litigation, and the government doesn’t present evidence making clear that those alternatives are in fact unfeasible, that suggests that the burdening action is not necessary.

Ruling against the government where such an alternative is available does not involve judicial balancing of incommensurate goods, or at least not the type envisioned by critics of balancing. Instead, it requires the government to select a pareto improvement, whereby government will not be meaningfully less well off in pursuing its goal through a different means, and the individual attempting to exercise religion will be in a better position if the government avoids the action that imposes the burden. To that end, requiring the judiciary to ask this question is premised on the idea that government can *both* pursue its policy goals and protect religious liberty—multiple things that are all constitutive of the common good rather than being at odds with each other.

Another way of looking at this judicial function is that it does not involve weighing of reasons that Joseph Raz envisioned as problematic.⁵¹ Instead, it requires the judiciary to engage in a “sorting” of reasons, between those that are permissible to satisfy the

48. *Id.* at 717 (Roberts, C.J., concurring).

49. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

50. *Id.* at 733.

51. *See, e.g.*, JOSEPH RAZ, *ENGAGING REASON* 47 (1999).

requirements of the relevant prong of the analysis, and those that are not.⁵² Satisfying the conditions at one stage of the analysis just means the analysis continues; it does not mean reasons are being weighed against one another. This is similar to the multi-step satisfaction of conditions that must take place under many other legal burden-shifting frameworks, including antidiscrimination law under Title VII.⁵³

The second type of question courts ask as a proxy for gauging necessity is whether the government is pursuing its interest in an even-handed way, including by not denying protections for religious activities that pose risks to the government's goal comparable

52. See, e.g., William Lucy, *Adjudication*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 241–242 (Jules Coleman & Scott J. Shapiro eds., 2011).

53. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248 (1981).

to secular activity the government allows.⁵⁴ In *Holt v. Hobbs*,⁵⁵ for example, the Court ruled against a government when it could not explain why it needed to deny a half-inch beard for religious reasons, but could allow a quarter-inch beard for medical reasons.⁵⁶ The Court reiterated in *Fulton*⁵⁷ that government policies face greater scrutiny when they “prohibit[] religious conduct while permitting

54. It’s worth noting that scholars and jurists debate what counts as comparable between secular and religious activities. See, e.g., Brief *Amicus Curiae* of Professor Eugene Volokh in Support of Neither Party at 27, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (“[I]f the presence of the exceptions were seen as making the statute no longer ‘generally applicable’ for *Employment Division v. Smith* purposes, that would require more than just the application of strict scrutiny to religious exemption requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness.”); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 195 (2001) (“[I]f the presence of just one secular exception means that a religious claim for exemption wins as well [absent a compelling interest], the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws.” (citing Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1554 (1999))); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, J.L. & POL., Winter 2002, at 119, 199 (concluding that “the very foundation for the most favored nation framework is intellectually incoherent,” and that “[t]here are too many conceptual and practical problems with the [framework] for it to be accepted”); Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 173 (“[T]hink about it. If a law with even a few secular exceptions isn’t neutral and generally applicable, then not many laws are.”); Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10–11, 21–23 (2016) (discussing rules surrounding analogous secular conduct); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL’Y 627, 664 (2003) (describing the most favored nation approach as “an unprincipled and bizarre manner of distributing constitutional exemptions”); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 731 (noting that, “despite the fact that the *Smith* Court specifically cited laws ‘providing for equality of opportunity for the races’ as examples of generally applicable laws to which strict scrutiny should *not* apply,” the most favored nation theory would apply strict scrutiny to such laws because they have small-employer exemptions (quoting *Emp’t Div. v. Smith*, 494 U.S. 872, 889 (1990))); Zalman Rothschild, *Free Exercise’s Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 283–87 (2020) (summarizing the debate surrounding “The Meaning of Religious Discrimination”).

55. *Holt v. Hobbs*, 574 U.S. 352 (2015).

56. *Id.* at 367.

57. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

secular conduct that undermines the government's asserted interests in a similar way."⁵⁸

Evidence of comparable secular exemptions is important because it often suggests one of two things: either the government's stated goal is not important enough to foreclose the possibility of exemptions from its policy in the relevant context, or there are less restrictive alternatives through which the government can accomplish its goal without restricting religious exercise.

How should we assess the judiciary's competence to address these more discrete evidentiary questions? Alicea and Ohlendorf have argued that "[w]hether a challenged law will, in fact, achieve its stated goal is often a contested empirical question, as is the question of whether there are other, less-restrictive means of achieving the same end."⁵⁹ Yet "there is something farcical about a federal judge hearing testimony about fraught and quintessentially legislative questions and pronouncing his conclusions as settled fact."⁶⁰ However, this claim raises the question of what sorts of questions the judiciary *is* competent to answer, if not discrete factual disputes between specific parties. After all, the judiciary is frequently vaunted for its unique role as a factfinder⁶¹ and its ability to assess adjudicative facts.⁶²

Looking to whether government-provided evidence that denying the religious accommodation request necessarily advances its interest is an inquiry not unlike other causation inquiries courts

58. *Id.* at 1877.

59. Alicea & Ohlendorf, *supra* note 4, at 81.

60. *Id.*

61. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) ("[T]he judiciary would appear to be a superior fact-finder both because of its institutional capacity and because of its relative lack of bias. . . . Indeed, the separation of powers supports a de novo judicial role in fact-finding.").

62. See YOWELL, *supra* note 4, at 63–65 (2018). The analysis, of course, is different if a court is deploying heightened scrutiny in a facial challenge to a law, which may be a reason why religious exemption requests subject to strict scrutiny should be limited to as-applied challenges (as RFRA currently limits them). See generally Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1609 (2018).

routinely perform in a variety of legal contexts.⁶³ It assesses the nexus between the government's stated goal and its action, often by relying on circumstantial evidence that the parties present during the course of litigation.⁶⁴ And looking to whether activities are analogous for purpose of comparators is also a mode of analysis courts frequently apply elsewhere. For example, in the realm of antitrust law, courts must address the similar question of whether one good is "substitutable" for another, as a precursor to determining what counts as the "relevant market."⁶⁵

As it turns out, these two inquiries were the same types of questions that some early, Founding-era courts asked when deciding whether to provide a religious exemption from a general law burdening religious exercise.⁶⁶ In other words, as discussed below, strict scrutiny analysis is not as divorced from history and tradition as some critics would suggest.

There is no doubt that strict scrutiny as recognized by its modern label did not develop until the post-WWII era. But from that conclusion, it does not necessarily follow that there are no historical analogs of the judiciary engaging in legal analysis that resembles strict scrutiny in important respects.⁶⁷

To the contrary, I've written elsewhere about how some of the earliest Founding-era courts that provided religious exemptions

63. See generally H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985) (describing the common-sense ways in which courts analyze causation).

64. See generally Russell Brown, *The Possibility of "Inference Causation": Inferring Cause-in-Fact and the Nature of Legal Fact-Finding*, 55 MCGILL L.J. 1 (2010).

65. In *United States v. Columbia Steel Co.*, the Court had to determine whether the relevant market included only steel plates and shapes, or whether the market extended to all rolled steel products. 334 U.S. 495 (1948). Applying supply substitutability analysis, the Court held that the relevant market must include all comparable rolled steel products in the relevant geographic market. *Id.* at 510–11; see also Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist*, 51 ANTITRUST L.J. 689, 693 (1982).

66. Barclay, *supra* note 7.

67. Further, one could also argue that this critique misunderstands the difference between original meaning, and doctrines courts develop to implement that original meaning.

were doing so with analysis that looked remarkably similar to strict scrutiny in its most important aspects.⁶⁸

C. *Problematic Judicial Creativity*

A few final words are appropriate for some criticisms that have been launched at judicial balancing tests. First, some jurists and scholars have criticized the “tiered” approach to scrutiny, through which some rights are given strict scrutiny and others something like intermediate.⁶⁹ I largely agree with this critique. While there is evidence of Founding-era courts engaging in a heightened form of analysis resembling scrutiny, there is nothing I have found to suggest this analysis was tiered in any way. And in fact, some scholars dispute how meaningful (as opposed to muddled) our current tiering doctrine currently is. Justice Barrett raised questions about intermediate scrutiny in the speech context when considering what should replace *Smith*.⁷⁰ Thus, perhaps the speech context should provide a cautionary tale rather than an invitation to duplicate an intermediate scrutiny approach.

Another critique some scholars have raised is that judicial balancing tests have been the method through which jurists have identified new rights housed nowhere in the constitution. For example, Webber rightly draws attention to proportionality’s tendency to allow courts to “see rights everywhere.”⁷¹ I share Webber’s concern about courts feeling entitled to see new rights everywhere and loosely interpreting written legal instruments to invent new rights. I’ve written elsewhere that judicial scrutiny should be limited only to rights that are clearly provided under a constitutional or

68. Barclay, *supra* note 7; Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 70 (2020). Some of the analysis in this Section is pulled from portions of these Articles.

69. *See, e.g.,* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (“The Constitution does not prescribe tiers of scrutiny.”).

70. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

71. WEBBER, *supra* note 4; *see also* YOWELL, *supra* note 4, at 19 (critiquing the way in which a court interpreted the right to life or liberty broadly to include the right to assisted suicide when applying proportionality).

statutory framework.⁷² I do not, however, believe that trends involving the judicial creation of rights are inherent in the conceptual framework of strict scrutiny (or proportionality, for that matter).

II. LOOKING FORWARD: RIGHTS AND THE COMMON GOOD

Common good constitutionalists, some originalists, and other scholars have all leveled criticisms at strict scrutiny. And these critiques often rely on some assumptions about the nature of strict scrutiny analysis. This Article pushes back on this account in a number of ways. First, the compelling interest portion of the test excludes, at a minimum, some government interests that are incompatible with a legal regime that would ever provide exemptions. And perhaps more importantly, this is a legal question that rarely resolves cases. Rather, courts usually just assume that the interest is compelling and then move to the more important aspects of the analysis. Second, strict scrutiny should be understood not primarily as a balancing exercise, but as an evidentiary burden that ensures the government action is necessary to advance the permissible interest it has itself identified, which includes assessing whether other options are feasible to advance the goal, and whether the government pursues its goal in an even-handed way. This sort of evidentiary burden, enforced by the judiciary through fact-finding relevant to the parties before the court, arguably falls particularly within the competence of the judiciary.⁷³ And these type of evidentiary questions have deep historical roots, asked by courts during the Founding-era.⁷⁴ This Article agrees with some of the concerns about judicial creativity in the balancing context but concludes that such creativity is not inherent strict scrutiny.

Vermeule has advocated for the judiciary to replace strict scrutiny with a type of deferential arbitrariness standard under

72. Collings & Barclay, *supra* note 19.

73. See Barclay, *supra* note 7, at 451–52; see also McGinnis & Mulaney, *supra* note 60, at 71.

74. See Barclay, *supra* note 7, at 453–65.

administrative law when adjudicating constitutional rights.⁷⁵ Such an approach, he argues, would recognize a broad set of interests that advance the common good.

However, Vermeule also acknowledges that in contraception mandate litigation, the government sought to force the Little Sisters of the Poor to sign a form not to actually advance any interest related to contraception but instead to force the nuns to accept the government's ideology on this topic.⁷⁶ I would submit that fleshing out the government's improper motives in the contraceptive mandate litigation or other cases is only possible when the government must satisfy a heavy evidentiary burden and explain why it is not regulating in even-handed ways. Under the deferential test Vermeule has set forth that would essentially mirror the Administrative Procedure Act, the government in the Little Sisters case would have had a strong argument that its policy was not arbitrary, as it did in fact provide some authorization for third party insurers of contraception and was advancing its view of common good: broad access to contraception for women. The strength of the government's position from an administrative law point of view is highlighted by the fact that no litigants ever brought a successful APA challenge to the contraception mandate.

By contrast, the strong evidentiary burden of strict scrutiny operates to ensure that governments really *are* acting in pursuit of permissible goals to advance some aspect of the common good, rather than using that as mere pretext to burden religious rights. It also encourages governments to find ways to advance their policies while simultaneously finding ways to protect religious liberty. And it protects elements of the common good like religious liberty that are so important that super-majoritarian institutions like constitutional conventions enshrined them in our Constitution so they could not be overridden by mere administrative action or even normal legislative processes.

75. CGC, *supra* note 1, at 168.

76. *Id.* at 120.

**ORIGINALISM, COMMON GOOD
CONSTITUTIONALISM,
AND OUR COMMON ADVERSARY:
FAIR-WEATHER ORIGINALISM**

HON. JAMES C. HO*

I'm honored to be here. But to be honest, I'm also a bit disoriented to be here. Professor Vermeule was my legislation professor in law school. So *he* graded *my* papers. And now, I'm being asked to grade *his* papers? It feels totally backwards. But I'm honored to do it.

My message today in sum is this: I'm an originalist. And I'll spend a few words explaining what that means. One thing it means is that I'm not an advocate of common good constitutionalism. But I'm not an opponent, either.

To the contrary, I appreciate and respect Professor Vermeule's criticisms of originalism. In fact, I've voiced similar criticisms myself—including the last time I spoke at Harvard Law School, earlier this year.¹ I see quite a bit of overlap in our respective views. In particular, I would say that we share a common adversary—what I have called “fair-weather originalism.”²

In an opinion I wrote a few years ago, I explored the work of various scholars who uncovered a rather troubling insight: many

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1. See James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335 (2022).

2. *Id.* at 349 (“[I]f you’re an originalist only when elites won’t be upset with you—if you’re an originalist only when it’s easy—that’s not principled judging. That’s fair-weather originalism.”).

scientists aren't very good at science.³ Unfortunately, it turns out that the same thing could be said about originalism: many originalists aren't very good at originalism.

I.

This past year was the 40th anniversary of my becoming an American citizen, and the 25th anniversary of my joining the Federalist Society. I've been a profoundly grateful American—and an originalist—for longer than I've been a lawyer. And just as I don't think of myself as a hyphenated American,⁴ I don't think of myself as a hyphenated originalist.

I'm an unhyphenated originalist for one simple reason: when judges decide cases, we don't just resolve disputes as an intellectual or academic exercise. We exercise the formidable coercive power of the government, and we deploy that power in favor of one party in a dispute against another. So in every case, I ask myself: where do I get the authority to act? Answering that question with anything other than legal text (or at least binding precedent) would make me very nervous.⁵ I would worry about any suggestion that anyone on

3. See *Whole Woman's Health v. Paxton*, 10 F.4th 430, 465 (5th Cir. 2021) (en banc) (Ho, J., concurring) ("scientists don't always follow the science themselves"); *id.* at 468 ("The bottom line is this: Of course we should 'follow the science.' But that doesn't mean we should always blindly follow the scientists. Because, like the rest of us, scientists are, first and foremost, human beings. They're susceptible to peer pressure, careerism, ambition, and fear of cancel culture, just like the rest of us.").

4. See, e.g., *Roosevelt Bars the Hyphenated*, N.Y. TIMES, Oct. 13, 1915, at 1 ("There is no room in this country for hyphenated Americans.").

5. See Ho, *supra* note 1, at 338 ("[B]eing an originalist just means being faithful to whatever text you're interpreting. . . . Whether we're talking about a contract or a constitution, our needs are the same. We need to be able to negotiate with one another—compromise—and hopefully, eventually, reach an agreement. But we can't do that—indeed, we *shouldn't* do that—unless we have confidence that our agreement will be interpreted faithfully, not randomly, and certainly not partially. After all, who in their right mind would enter into an agreement, if you know that the agreement is just going to be distorted to favor the other side?").

the bench would subvert legal text in favor of the judge's personal view of the common good.⁶

Originalism must be principled, not partisan. And principled originalism is neither liberal nor conservative. A principled originalist applies the same faithful approach to the text—no matter whose ox is gored. You apply the same substantive rules and the same jurisdictional doctrines—no matter whose interest is served. Some of my biggest fights on my court have been with colleagues who were appointed by a President of the same party—including even colleagues who claim the originalist mantle for themselves.⁷ And that's okay.

In fact, I would hope that it reinforces what originalism is, and what it isn't. It isn't the exclusive province of plaintiffs or defendants, government or citizen, management or labor. Fidelity to text doesn't mean you favor folks on the left or the right.

6. I note that Professor Vermeule does not favor subverting legal text in favor of a judge's personal views. Rather, he aims to use natural law principles to inform one's reading of texts—principles that are objective and knowable through reason, not derived from one's subjective personal views. See, e.g., ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 8 (2022) ("Common good constitutionalism draws upon an immemorial tradition that includes, in addition to positive law . . . principles of objective natural morality (*ius naturale*) . . ."; *id.* at 19 ("[T]he classical tradition does not substitute 'preferences' for law; it claims there are objective principles of legal justice accessible to reason, that it is entirely possible to 'find' rather than 'make' law.")).

7. See, e.g., *Hewitt v. Helix Energy Solutions Group*, 15 F.4th 289 (5th Cir. 2021) (en banc), *aff'd*, 598 U.S. 39 (2023); *Oliver v. Arnold*, 19 F.4th 843, 843 (5th Cir. 2021) (Ho, J., concurring in denial of rehearing en banc); *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022), *vacated on reh'g en banc*, 52 F.4th 265 (5th Cir. 2022); *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc); *Gonzalez v. Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc); *Hamilton v. Dallas County*, 79 F.4th 494, 506–12 (5th Cir. 2023) (en banc) (Ho, J., concurring); *Mayfield v. Butler Snow*, 78 F.4th 796, 797 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

II.

But all that being said, judges are, first and foremost, imperfect human beings. In my experience, there are a number of reasons why avowed originalists sometimes err. I'll focus on two.

First, originalism may in certain cases inevitably lead to results that cultural elites despise.⁸ And when it does, the elites typically don't keep quiet about it.⁹ And for good reason: their attacks are, all too often, all too effective. Psychologists teach us that succumbing to peer pressure, avoiding public opprobrium, falling prey to conformity—all of these are common elements of human personality and experience.¹⁰ But they're absolutely fatal to principled originalism.¹¹

Second, originalism will inevitably lead to results that judges themselves dislike. Justice Scalia often said that a "judge who always likes the results he reaches is a bad judge."¹² But as imperfect humans, judges may be tempted to stray, and to strain, to engineer a result we personally prefer.

So I understand and agree when Professor Vermeule sharply criticizes originalism on these grounds. I'll take each one in turn.

A.

On the first point, Professor Vermeule says that too many originalists "allow principles to be read at dizzyingly high levels of generality," "in ways that are pragmatically indistinguishable from

8. See Ho, *supra* note 1, at 341.

9. See *id.* at 345–46 (collecting examples).

10. See *id.* at 341–42.

11. See *id.* at 349 ("We're not binding ourselves to the text if we only follow it when people like the result. Originalism is either a matter of principle or a talking point. Fair-weather originalism isn't originalism. If you're not an originalist in every case, then you're not really an originalist at all.").

12. Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1601 (2017) (quoting Antonin Scalia).

the [*very*] *progressive constitutionalism* that originalism was created and designed to *oppose*.”¹³ In other words, originalists too often morph originalism into its very opposite—“like the convergence of a predator and its prey”—a colorful, if depressing, metaphor.¹⁴ “[O]riginalist judges have written expressly originalist opinions . . . reaching results that almost no one alive at the time of the law’s enactment would conceivably have thought desirable or even defensible. It is a strange originalism indeed that would be unanimously voted down by the enacting generation.”¹⁵ It “leaves it unclear what originalism stands for and what it excludes.”¹⁶

In sum, Professor Vermeule says that originalism is “an illusion”—it “does not actually exist.”¹⁷

These are sharp criticisms of originalism. But I get them. I’ve made similar comments myself.¹⁸ So I get why Professor Vermeule sees common good constitutionalism as an important “competitor” to originalism.¹⁹

But if we are indeed “competitors,” I would urge that it be a friendly competition. Good faith originalists and common good constitutionalists should be allies, not enemies. Because originalists and common good constitutionalists face a common adversary.

The last time I spoke at Harvard Law School, I warned about the perils of what I call “fair-weather originalism.” My basic premise is that originalism often devolves into fair-weather originalism for one simple reason: judges are human. We’re susceptible to the

13. VERMEULE, *supra* note 6, at 98–99 (emphasis added).

14. *Id.* at 98.

15. *Id.* at 16.

16. *Id.* at 105.

17. *Id.* at 22.

18. See, e.g., Ho, *supra* note 1, at 349.

19. VERMEULE, *supra* note 6, at 22.

same peer pressure, fear of criticism, desire for approval, and tendency to conform that everyone else is.²⁰

If anything, I fear that federal judges are even more susceptible to such weaknesses. When you look at the typical résumé of a federal judge, you often see a bunch of fancy credentials—fancy law schools, fancy clerkships, fancy law firms and government jobs. And folks like that—people who are typically used to collecting gold stars—tend to be motivated by one overarching objective: collecting even more gold stars. I call this “gold star” syndrome.²¹

But if you plan to be faithful to the Constitution in every case, no matter how unpopular that may be, gold stars are not in the cards. Principled originalists aren’t exactly showered with praise from the media, awards from bar associations, recognitions and honors from distinguished institutions.²²

In sum, “gold star” syndrome means there’s a strong temptation to stray. And that’s what I see in Professor Vermeule’s deep frustration with originalism.

But what I see in his work is not just a *complaint* about originalism—it may also be part of the *cure*.

Originalists should be fearless. They should refuse to bend the knee to anyone. We know that we live in a fallen world—a world infected by “gold star” syndrome. That doesn’t mean we can’t practice principled originalism. But it does mean that we have to account for the fact that originalism will sometimes lead to results condemned by cultural elites. It means we must be ready to counter and combat those dynamics when it does.

One promising antidote for social pressure and “gold star” syndrome is to make sure you hear from *all* sides. Judges need to hear

20. See Ho, *supra* note 1, at 341–42.

21. See *id.* at 343–45.

22. See *id.* at 345–46 (collecting examples).

legal arguments from *every* corner of America—not just the 1%. And the arguments need to be forceful, vigorous, and unapologetic.

Take the Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization*.²³ Historically, the debate over abortion has focused on two positions: Is the right to abortion constitutionally required? Or is the Constitution neutral on abortion?²⁴ To that debate, Professor Vermeule added a third option: Is abortion constitutionally forbidden?²⁵

No matter what you may personally think about the competing arguments, we should all agree that every argument should be presented and available to the Supreme Court.²⁶

Common good constitutionalism can help ensure that originalists practice fearless, principled originalism—and resist the competing forces of expediency and elite acceptance. If we can put systems and structures in place that will bolster and strengthen originalists and help them to become full-time rather than fair-weather originalists, we should embrace it.

23. 142 S. Ct. 2228 (2022).

24. Compare *Roe v. Wade*, 410 U.S. 113 (1973), with *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”).

25. See VERMEULE, *supra* note 6, at 199 n.103 (“I believe there is a straightforward argument . . . that due process, equal protection, and other constitutional provisions should be best read in conjunction to grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law. This view is not a mere rejection of *Roe v. Wade*, but the affirmation of the opposite right, and would be binding throughout the nation.”).

26. Compare, e.g., Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners, in *Dobbs v. Jackson Women’s Health Org.*, 2021 WL 3374325 (“The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court’s recent landmark originalist rulings. . . . [T]he unborn are ‘person[s]’ guaranteed equal protection and due process by the Fourteenth Amendment.”), with *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (“On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral.”).

B.

I'll turn briefly to the second criticism of originalism. Professor Vermeule criticizes originalists for catering not only to cultural elites, but also to corporate executives. Here, his concern is not so much bending to peer pressure, but to personal preference. As he puts it, originalist judges "angrily condemn departures from the putative original understanding, *except* in areas" that benefit "corporations . . . in which the law propounded by conservative judges is either expressly or arguably non-originalist."²⁷

Again, I'm sympathetic—indeed, I've voiced such criticisms myself.²⁸ As Justice Scalia once wrote, "such questions as 'Who wins?' 'Will this decision . . . help future defendants?' 'Is this decision . . . good for business?' . . . Questions like these are appropriately asked by those who write the laws, but not by those who apply them."²⁹

I totally agree. Originalists must be principled in *every* case—even when originalists risk being disdained by others, and even when originalism leads to outcomes that originalists themselves disdain. As we like to say in my chambers: Text, not tribe.

A principle isn't a principle until it costs you. You're not an originalist unless you're an originalist "even when it hurts."³⁰

27. VERMEULE, *supra* note 6, at 16 (emphasis added).

28. See, e.g., *Hewitt v. Helix Energy Sols. Group, Inc.*, 983 F.3d 789, 802 (5th Cir. 2020) (Ho, J., concurring), *vacated on reh'g en banc*, 989 F.3d 418 (5th Cir. 2021) ("Those of us who were born, bred, and educated in textualism are unfamiliar with the 'bad for business' theory of statutory interpretation offered by the dissent under the purported flag of textualism."); *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 882 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc) ("[W]hen corporations violate the law, courts should hold them accountable, no less and no more than individuals.").

29. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 352–53 (2012).

30. *Lefebure v. D'Aquila*, 15 F.4th 650, 663 (5th Cir. 2021) (quoting Psalm 15:4).

III.

Even beyond facing a common adversary, there's additional common ground that originalists and common good constitutionalists share.

Professor Vermeule argues that natural law can and should be used “to interpret texts [properly], reading them . . . to square with traditional background principles.”³¹ He explains that, “at the time of the adoption of the Constitution, and for many years afterward, it was sometimes said that the constitutional provisions were ‘declarative of natural law’ . . . and gave more definite shape to certain natural law principles.”³²

I certainly agree with getting the meaning of words right by considering historical context and tradition. We can always debate, to be sure, the extent to which natural law will be relevant or irrelevant in a particular situation or context.³³ But we can all agree that originalists should hear and consider all evidence that helps us

31. VERMEULE, *supra* note 6, at 59.

32. *Id.* at 60. *See also id.* at 2 (“If anything has a claim to capturing the ‘original understanding’ of the Constitution, this does. The classical law is the original understanding. The classical law was deeply inscribed in our legal tradition well before the founding era, and was explicit in legal practice through the nineteenth and into the twentieth century.”).

33. *See, e.g.*, Will Baude, *Beyond Textualism?*, 46 HARV. J.L. & PUB. POL’Y 1331, 1346–47 (2023) (urging his audience to “consider natural law” and suggesting that natural-law principles could “provide a clear statement rule, if you will, for interpreting constitutional text.”); Conor Casey & Adrian Vermeule, *The Owl of Minerva and “Our Law”*, IUS & IUSTITIUM (Mar. 16, 2023), <https://iustitium.com/the-owl-of-minerva-and-our-law/> [<https://perma.cc/LXM2-2RX2>] (“Understanding the importance of unwritten principles to legal practice . . . might even require consideration of—in Baude’s own words—‘natural law,’ whose proper role in the adjudication and interpretation of posited legal texts is one of the oldest legal debates in the American republic.”).

reach an accurate understanding of the original meaning.³⁴ Common good constitutionalism can aid originalism by making sure that judges construe legal terms accurately by considering their proper context.

* * *

President Reagan used to say: “The person who agrees with you 80 percent of the time is your friend and ally—not some 20 percent enemy.”³⁵ Originalists should heed President Reagan’s advice and regard common good constitutionalists as friends and allies. We can do a lot of good together.

Common good constitutionalism can do a lot to push back against fair-weather originalism. In fact, I think it already has. Thank you.

34. See R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* 170 (2015) (discussing “[t]he presence of so many arguments and decisions invoking the law of nature in the American reports” of the eighteenth and nineteenth centuries).

35. See Thomas B. Esdall, *Republicans Offer Mixed Forecast for 1994*, WASH. POST (Dec. 26, 1993), <https://www.washingtonpost.com/archive/politics/1993/12/26/republicans-offer-mixed-forecast-for-1994/eb844f18-e678-4182-bc53-c4f45e239a09/> [https://perma.cc/QSY2-3AL3] (quoting former aide to President Reagan).

**“INDISPENSABLY OBLIGATORY”:
NATURAL LAW AND THE AMERICAN LEGAL
TRADITION**

HON. PAUL B. MATEY*

Good and wise men, in all ages, have . . . supposed, that the Deity, from the relations we stand in to Himself and to each other, has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever.¹

INTRODUCTION

It is popular to affirm that legal analysis begins, always, with the text. Grounding law in the words written, not the intentions thought, is believed to restrain power, divide government, and ensure liberty. But a persistent problem prevents easy application of that prescription: who decides? Not in the structural sense of which actor or what branch, but the more personal challenge of competence. We cannot best determine who decides without acknowledging that not all deciders are equal. Admitting that in the wrong hands, even the right rule can be mangled into something monstrous.

Today, many hands make much mischief misapplying rules. Judges, scholars, advocates, students, commentators (both serious

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1. Alexander Hamilton, *The Farmer Refuted*, in *THE REVOLUTIONARY WRITINGS OF ALEXANDER HAMILTON* 52 (Richard B. Vernier ed., 2008).

and attention-starved), all urging rules for their own work and for the work of everyone else. That should give us pause. Tempting as it is to believe that work is fungible, that familiarity with one idea is enough for anyone to piece together new answers, we would do better each to find our own work.² Not the work that appeals to us, not the work we would like, but the work we are called to do. We should attack, collectively, the two characteristics of our current legal culture that get in the way. One conflates roles; the other conflates rules and theories to create a dogmatism that distracts from our work once properly identified. Both characteristics produce outcomes that fight the natural purpose of the law and sever it from traditional moral reasoning, sweeping aside the law's grounding the "whole teleological conception of the aims of government"³ — always thought essential. Law, of course, did not spring into existence with the advent of written rules, and it cannot depend on amateur dogmatists for its authority.

I. AMATEURISM

Start with the obvious: judges and scholars wear different robes, and a commission does not make a man of letters. The accessibility of the judiciary, particularly in conservative legal circles, is a

2. Every person "should do the work for which he is fitted by nature. . . . [Yet, o]nly feebly, inadequately, and spasmodically do we ever attempt to . . . inquire: What type of worker is suited to this type of work?" DOROTHY SAYERS, *Why Work*, in *LETTERS TO THE DIMINISHED CHURCH* 125, 136 (2004); cf. ROBERT BOLT, *A MAN FOR ALL SEASONS* 73 (1962) ("God made the angels to show him splendor—as he made animals for innocence and plants for their simplicity. But Man he made to serve him wittily, in the tangle of his mind!").

3. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* 62 (2022); see also ARISTOTLE, *NICOMACHEAN ETHICS* bk. X, ch. 7, 1177a11–1177b26 (c. 340 B.C.) (W.D. Ross trans., 1908) (expounding happiness (*eudaimonia*) as the highest end (*telos*)); Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 *HARV. J.L. & PUB. POL'Y* 917, 957 (2021) ("Ideally, judges might attempt to reconcile the *ratio legis* of a transient legislative act with the *telos* of the American political order and its Constitution—the 'supreme Law of the Land'—and thus read the statute's text through that harmonized prism.").

remarkable and wonderful tradition. As a student, I was thrilled to stand in the same room as Antonin Scalia and Robert Bork, listening to men of extraordinary learning. Dreaming, perhaps, that I might dare to aspire to follow their example. Today, I am honored to share one of their accomplishments as a member of the federal bench. But I am neither of those men. And as bright as many federal judges are, most are not, either. Justice Scalia and Judge Bork were, for much of their lives, scholars. Their only job, their comfortable center, was the future of ideas. Most members of the bench are simply lawyers who, through a combination of timing and connections, wound up serving as judges.⁴ Be careful how you view us, mindful of what you ask the generalist judge to do.⁵

Of course, the rush to specialization and expertise can be dangerous. Wendell Berry cautioned against it decades ago,⁶ echoing the sentiments of influential thinkers reaching back millennia.⁷ But let us be honest: we do not live in a Republic still suited for farmer-philosophers, statesmen who timed their service to coincide with the harvest, or judges who rode the circuit in search of fertile ground for crops and clients. The crisis of abandoning general interests and general ability to an ever-increasing legion of certified experts is not solved by allowing everyone a seat at the table, no

4. ANTONIN SCALIA, *The Vocation of a Judge*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED, 169–70 (Christopher J. Scalia & Edward Whelan eds., 2017) (“There is no Judge School from which one must earn a certificate of authenticity. . . . Instead, as the old saying goes, a judge is a lawyer who knows the governor.”).

5. Cf. James V. Schall, SJ, *A Happening That Really Took Place*, in THE NATURE OF POLITICAL PHILOSOPHY 90 (William McCormick, SJ, ed., 2022) (“Not everyone needs to be, can be, or even wants to be a philosopher,” a pursuit that demands isolation from distractions and duties. “The Church’s monastic tradition in part attested to this realization, as did the academic tradition in the ancient city.”).

6. See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 152 (1977) (“The stock in trade of the ‘man of learning’ comes to be ignorance.”).

7. See generally Daniel Silvermintz, *Plato’s Supposed Defense of the Division of Labor: A Reexamination of the Role of Job Specialization in the Republic*, 42 HIST. POL. ECON. 747 (2010) (arguing that Plato’s Republic “offers a radical critique . . . of job specialization and its accompanying psychological orientation toward acquisitiveness”).

matter how unqualified or inexperienced. We can avoid a judiciary of expert scholars without embracing a bench of frustrated amateur professors living out their tenure-track fantasies.

Each, rather, according to his own work, whether poet, farmer, politician, judge, or scholar. Yet always with a healthy interest in the work of others, always ready to learn. There is little point to judges developing principles of law, let alone legal philosophy, outside of their work on cases and controversies. And there is danger when they try. As Professors Vermeule and Casey write, “the occupational hazards for the judge-turned-occasional-theorist are that the necessary concepts and background knowledge, mapped out by intellectual pioneers, are half-remembered and hazily defined.”⁸ This too-generous portrait captures the careless amateurism that causes judges to veer from the path of the law the Framers envisioned when they built our Republic. A path the Framers did not invent, but took from thinkers still central to the American legal tradition.

II. UNDERSTANDING LAW

Many legal opinions give testament to the notion that judges ought to stay in their lane: we are not trained linguists,⁹ engineers,¹⁰

8. Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL’Y: PER CURIAM (Apr. 23, 2022), <https://www.harvard-jlpp.com/argument-by-slogan-conor-casey-and-adrian-vermeule/> [<https://perma.cc/25FU-WJWA>].

9. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 865–66 (2018) (“Judges and lawyers are not linguists. Most all of us, at least, are not professionally trained ones. . . . [T]he judicial analysis of ordinary meaning will be improved in cases in which the parties or their experts proffer corpus analysis that can be tested by the adversary system.”).

10. See, e.g., Thomas W. Hazlett, *Physical Scarcity, Rent Seeking and the First Amendment*, 97 COLUM. L. REV. 905, 926–31 (1997) (explaining that the alternatives to the electromagnetic spectrum that existed during the early 20th century undermined the Supreme Court’s early decisions justifying governmental control of broadcasting).

classicists,¹¹ or statisticians.¹² So we should be conservative, careful when we use the tools of other arts and sciences. Because when judges shed the role of humble carpenter in favor of toolmaker, real risk accrues. It is the work of the scholar, not the judge, to theorize, analyze trends, elevate concepts. Judges are merely *judges*, with a single charge: to faithfully interpret the law. What does faithful interpretation look like? And what must it consider?

Start with what does not matter: argument, as Vermeule and Casey call it, by slogan.¹³ A declaration of fidelity to some isolated methodology, a law review article, or clever turn of phrase. Of course, theories can be helpful, offering useful ways to advance second order goods like predictability, fairness, institutional integrity, and morally grounded judgments. But the contemporary trend of announcing adherence to a legal theory mistakes the accidental for the essential.

Theory must always be in service of the law, meaning that we sometimes need to depart from the former when it offends the latter—that is, when theory fails to protect “the voluntary compact” that constitutes “the origin of all civil government” and alone can establish the limitations “necessary for the security of the *absolute rights*” of the people.¹⁴ And, equally as dangerous, by purporting to place theories first, judges run the risk of transforming methodology into a sort of secular dogma, skipping the thing that transforms teachings into tenets: the source of the authority.

11. See, e.g., Grzegorz Blicharz, *Why Justice Blackmun's Appeal to Roman Law to Justify Roe v. Wade is Wrong*, 2021 HARV. J.L. & PUB. POL'Y: PER CURIAM 16, *1 (Nov. 22, 2021), <https://www.harvard-jlpp.com/why-justice-blackmuns-appeal-to-roman-law-to-justify-roe-v-wade-is-wrong-grzegorz-blicharz/> [https://perma.cc/BFU8-QA6S] (“*Roe*'s unsophisticated grasp of ‘ancient [Roman] attitudes’ toward the unborn generally and abortion specifically ignores both the effect of Christianity on the Roman Empire and the ways in which even the pre-Christian Roman Empire and Roman Republic protected the unborn. A proper historical analysis would account for both, and produces the opposite conclusion than the breezy one reached after two sentences in *Roe*.”).

12. See generally Ryan D. Enos et al., *The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts*, 14 J. EMPIRICAL LEGAL STUD. 618 (2017).

13. See Casey & Vermeule, *supra* note 8.

14. Hamilton, *supra* note 1, at 53.

This new dogma lurks in the background while we weave new “doctrines” into the law. Take the suddenly everywhere discussion about the “major questions doctrine” that spilled from the casebooks into the courtroom.¹⁵ The name is misleading. What we are really doing is treating a scheme devised to explain a given phenomenon—say, when Congress can assign some work to the Executive—as a revealed, incontrovertible truth.¹⁶ That kind of thinking threatens the intellectual curiosity and openness that ought to mark the habits of the judiciary.

It also places an undue emphasis on which philosophy or what theory is best, a focus that threatens to distract judges from the true object of their work—the law itself.¹⁷ Sure, historical criticism helps biblical scholars understand the meaning of scripture, but it does not transform theology into the Word.¹⁸

Nor does legal philosophy create the law that guides the disposition of a given case or controversy.¹⁹ And heaping up new methods risks wasting time trying to wake from history while the time-tested

15. See, e.g., Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/VKD3-4FCT>]; Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

16. Cf. *Matthew* 15:8–9 (lamenting the people’s wont to “teach[]as doctrines human precepts”).

17. Admittedly, law is necessarily cloaked in the “cloudy medium” of language: “Besides the obscurity arising from the complexity of objects and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment.” THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003). But that does not excuse dressing the law in new concealments through whatever -isms rule the day. Instead, acknowledging that the lawmaker’s intent is “rendered dim and doubtful by the cloudy medium through which it is communicated,” *id.*, we should aim for that source using a method that accounts for language’s inaccuracy and imperfections. Thankfully, the Framers identified such a method for us. See *infra* Part III.

18. See Denis M. Farkasfalvy, INSPIRATION AND INTERPRETATION: A THEOLOGICAL INTRODUCTION TO SACRED SCRIPTURE 234–35 n.34 (2010) (“Historical truth is demonstrated in reference to credible witnesses and their testimony, evaluated by the rules of historical criticism. Such instruments are valuable in setting limits of credibility; they do not dictate what may or may not elicit faith in the Incarnation.”).

19. See generally R.R. RENO, THE END OF INTERPRETATION (2022).

tools universally used by the Founding generation²⁰ rust away in the judge's toolbox.²¹

III. RECALLING BLACKSTONE

When a young man interested in becoming a lawyer wrote to Abraham Lincoln asking for "the best mode of obtaining a thorough knowledge of the law," Lincoln told him to start by reading Blackstone's *Commentaries* twice.²² And for good reason: all the formative documents of the Framing Era were drafted by legal

20. See KODY W. COOPER & JUSTIN BUCKLEY DYER, *THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING* 11 (2022) ("The classical natural-law tradition was in the intellectual air that both the future Federalists and the future Republicans breathed."); see also STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 32 (2021); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 195 (1994) ("To the founders, reason and tradition need not be opposed. The two were joined in the classical heritage."); VINCENT PHILLIP MUÑOZ, *RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES* 25 (2022); THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM* 19 (2017).

21. A danger that "not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now." *Obergefell v. Hodges*, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting) ("[T]o blind yourself to history is both prideful and unwise. 'The past is never dead. It's not even past.'") (quoting WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951)).

22. Abraham Lincoln, *Letter to John M. Brockman* (Sept. 25, 1860), <https://www.abrahamlincolnonline.org/lincoln/speeches/law.htm> (last accessed Nov. 29, 2022) [<https://perma.cc/P2D5-WS7W>]. Unsurprising advice, as shown by the book's proliferation: "[B]efore the Revolution, nearly 2500 copies had been sold on this side of the Atlantic." Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 405 (1929). "In all, 16 of the subscribers became signatories of the Declaration of Independence, six were delegated to the 1787 Constitutional Convention, one was elected President of the United States and another became Chief Justice of the Supreme Court." Dennis Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 743-44 (1976). As a result, the *Commentaries* were "read by virtually every student of the law." R.H. HELMHOLZ, *NATURAL LAW IN COURT* 133 (2015).

thinkers steeped in Blackstone's theories.²³ Indeed, at the Virginia convention, Madison directed his colleagues' attention to "a book which is in every man's hand—Blackstone's Commentaries."²⁴

Blackstone opens his commentaries with a discussion on the nature of laws in general. There, he defines the municipal, or civil, law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."²⁵ And it is the *will* of this supreme power—whether vested in an individual or an institution—that a legal interpreter has as her object.²⁶ Blackstone contends that "[t]he fairest and most rational method to interpret" this will is by exploring the lawmaker's "intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."²⁷

As to the first sign, Blackstone wrote that "[w]ords are generally to be understood in their usual and most known signification,"²⁸ a point widely accepted among judges.²⁹ The last sign has caused much consternation: anathema in positivist circles and seminars, invoked as a wraith wriggling free from the "scientific apprehension of the relations of law to society" achieved through a

23. See, e.g., R. A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L.REV. 731, 731 (1976); see generally Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); BLACKSTONE AND HIS CRITICS (Anthony Page & Wilfrid Prest eds., 2018).

24. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (1876). Hamilton also relied on Blackstone, specifically his explication of the natural law, in his rebuttal to those who argued that the Continental Congress should be condemned. See, e.g., Hamilton, *supra* note 1, at 52.

25. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

26. See *id.* at *52.

27. *Id.* at *59.

28. *Id.*

29. See, e.g., *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017) (a unanimous court "begin[ning], as [it] must, with a careful examination of the statutory text").

"sociological jurisprudence" that shunned "Blackstone's wisdom."³⁰ If the "spirit of the law" really were standardless and indeterminate, then fears over judges thieving the vested functions of the coordinate branches and veering into unaccountable policy-making would be well-founded.

But those fears fall when Blackstone is read in full. His definition and methods, which informed the Framers,³¹ begin from the proposition that human law serves the natural law and seeks the common good. The natural law, for Blackstone, signifies those "certain immutable laws of human nature" laid down by the Creator to regulate and restrain free will.³² Natural law brings with it "the faculty of reason to discover the purport of those laws."³³ An understanding of this natural law is essential,³⁴ Blackstone writes, because "no human laws are of any validity, if contrary to [it]; and such of them as are valid derive all their force, and all their authority, mediately

30. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 30 ANN. REP. A.B.A. 911, 918 (1907), quoted in BANNER, *supra* note 20, at 221.

31. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3(1941) ("In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 39 (1991) ("It would be hard to exaggerate the degree of esteem in which . . . the Commentaries were held [at the Framing].").

32. BLACKSTONE, *supra* note 25, at *40. As R.H. Helmholz catalogues, Blackstone was not the first or only English lawyer to connect the common and natural law. R.H. Helmholz, *Natural Law and Human Rights in English Law*, 3 AVE MARIA L. REV. 1, 5–12 (2005).

33. BLACKSTONE, *supra* note 25, at *40.

34. Although some scholars claim the natural law was mere window dressing for Blackstone, see, e.g., H.L.A. Hart, *Blackstone's Use of the Law of Nature*, BUTTERWORTHS S. AFR. L. REV. 169, 170 (1956), the notion that the natural law was a "rule of human action prescribed by the Creator and discoverable by reason . . . [was] no more peripheral to Blackstone than a chapel was peripheral to the foundation of an English university college at any time between the thirteenth and nineteenth centuries." John M. Finnis, Note, *Blackstone's Theoretical Intentions*, 12 NAT. L. F. 163, 175 (1967). In Blackstone's day, as Finnis notes, "God's will for man was a subject of interest and concern, and the divine order of creation was reasonably seen as a pattern and precondition for man's ordering of his soul and thus of his society." *Id.*

or immediately, from this original.”³⁵ And if a person lived “unconnected with other individuals, there would be no [need] for any other laws, than the law of nature.”³⁶ But since all persons living in society are necessarily “connected with other individuals,” something in addition to the natural law is required.

According to Blackstone, “it is the *sense* of their weakness and imperfection that *keeps* [humanity] together; that demonstrates the necessity of th[eir] union; and that therefore is the solid and natural foundation . . . of civil society.”³⁷ From this collective acknowledgment flows the agreement that “the whole should protect all its parts, and that every part should pay obedience to the will of the whole.”³⁸ This agreement ultimately leads to the creation of a state, “a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together . . . by one uniform will.”³⁹

That is why human laws must have their root in the natural law and have as their end the common good. We are not wandering through a dark forest when interpretation requires us to turn to the “reason and spirit” of our law. Because as Blackstone makes clear, and the Framers agreed,⁴⁰ the “reason and spirit” — manifesting the lawmaker’s intentions through language—*are* the law. We have been given a map and key, and what we ought to consult is each

35. BLACKSTONE, *supra* note 25, at *41. For a defense of originalism rooted in this principle, see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

36. BLACKSTONE, *supra* note 25, at *43.

37. *Id.* at *47. Cf. *Xavier Le Pichon: The Fragility at the Heart of Humanity*, ON BEING (July 21, 2016) (“[H]uman life is really so fragile that it needs to create a whole new way of culture, of dealing with . . . others. Th[is] fragility is the essence of men and women, and it is at the heart of humanity.”).

38. BLACKSTONE, *supra* note 25, at *48.

39. *Id.* at *52.

40. Hamilton, *supra* note 1, at 53 (“Upon this law depend the natural rights of mankind: the Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest.”).

law's foundations in the natural law⁴¹ and the role that law serves in advancing human flourishing.⁴²

IV. RECLAIMING THE COMMON GOOD

The current debate roiling the conservative legal world over what originalism is and ought to be, and where common good constitutionalism fits in,⁴³ misses two points. First, once more, that debate ought to consume scholars and advocates, not judges. The former work out the details and the contours, see what methods help advance difficult legal arguments, and the latter will do the best they can with what they are given to resolve cases and controversies. Second, that battle seems a bit like the one fought in New Orleans two centuries ago: the war has already been decided, and yet the combatants fight on.⁴⁴ Blackstone's discussion of interpretive method was not only normative, but descriptive. He ably synthesized the methods of interpretation that jurists like Pufendorf and Grotius, and statesmen like Cicero and Justinian, used with a reasonable degree of success throughout the development of Western

41. *See, e.g.,* *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33–34 (1812) (“[U]pon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results to it. But, without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited Government, belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.”) (emphasis added).

42. Indeed, the promotion of human flourishing, or what could be styled the pursuit of happiness, was the motivating principle of Blackstone's project to create a “simpler science of jurisprudence.” CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS IN THE FOUNDING ERA: AN INTELLECTUAL HISTORY* 24 (2019).

43. *See, e.g.,* Conor Casey, “Common-Good Constitutionalism” and the New Battle over Constitutional Interpretation in the United States, 4 *PUB. L.* 765, 768–73 (2021).

44. *See* JON MEACHAM, *AMERICAN LION* 32 (2008) (“[T]he battle came after the war had ended—news of the treaty signed in Ghent on Christmas Eve would not reach New Orleans for several weeks.”).

civilization.⁴⁵ And that was the method the Framers⁴⁶ and jurists of the early Republic embraced.⁴⁷

45. Works by all these thinkers appear on the list of books James Madison hoped would “constitute the intellectual nucleus for a library for the Congress.” *List of Books Prepared by James Madison in 1783 to Constitute the Intellectual Nucleus for a Library for the Congress* (photograph), LIBRARY OF CONGRESS (1783), <https://www.loc.gov/item/2002707211/> (last visited Nov. 30, 2022) [<https://perma.cc/X3C4-R4B8>]; *Report on Books for Congress*, [23 January] 1783, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-06-02-0031> (last visited Nov. 30, 2022) [<https://perma.cc/UUT5-CN2R>].

46. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 910 (1993) (“[I]n the late eighteenth century . . . natural law was assumed to have a role in constitutional analysis.”); GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 10 (1969) (“The general principles of politics that the colonists sought to discover and apply were not merely abstractions that had to be created anew out of nature and reason. They were in fact already embodied in the historic English constitution—a constitution which was esteemed by the enlightened of the world precisely because of its ‘agreeableness to the laws of nature.’”); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (1967) (“It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment texts and fought for the legal recognition of natural rights The ideas and writings of the leading secular thinkers of the European Enlightenment—reformers and social critics like Voltaire, Rousseau, and Beccaria as well as conservative analysts like Montesquieu—were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and government contract, Montesquieu and later Delolme on the character of British liberty and the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”); THE FEDERALIST NO. 2 (John Jay) (“Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights in order to vest it with requisite powers.”); John Adams, “VI. A Dissertation on the Canon and the Feudal Law, No. 4,” 21 October 1765, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/06-01-02-0052-0007> [<https://perma.cc/SNG2-D6ZN>] (“Let us study the law of nature; search into the spirit of the British constitution; read the histories of ancient ages; contemplate the great examples of Greece and Rome; set before us, the conduct of our own British ancestors, who have defended for us, the inherent rights of mankind, against foreign and domestic tyrants and usurpers, against arbitrary kings and cruel priests, in short against the gates of earth and hell.”).

Near the advent of the twentieth century, courts started skipping the text, all the text sometimes, and emphasizing social purpose fixed on modern needs.⁴⁸ As the century closed, the judiciary began overcorrecting and ignoring everything but the text, sometimes supplementing it with a dose of statutory structure or broader context.⁴⁹ Now here we are trying to devise something new that accounts for both: posited law and purpose. We need not look far, because, as Professor Vermeule establishes, "[t]he principles of the classical legal tradition are our own principles, written into our own traditions."⁵⁰ And those 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. One not contrived by today's judges and scholars to further second-order goals, but one given to us by the thinkers who framed our form of

47. See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 397–456 (1833); *Vowels v. Craig*, 12 U.S. (8 Cranch) 371, 375 (1814) (citing "writers on natural law," including Pufendorf's *Law of Nature and Nations*); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 222 n.p (1827) ("Natural law is the cause, mediately at least, of all obligations, for if contracts, torts, and quasi torts, produce obligations, it is because the natural law ordains that every one should perform his promises, and repair the wrongs he has committed.") (quoting Pothier and citing Grotius, Burlamaqui, and Vattel); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 625–26 (1834) (referencing "[t]he notions of personal property of the common law, which is founded on natural law" but acknowledging the need for "positive enactments" where desired rights "[are] not to be found in natural law or common law") (citing Lord Coke, Lord Mansfield, and Vattel).

48. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892).

49. Cf. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . and (2) most compatible with the surrounding body of law into which the provision must be integrated.").

50. VERMEULE, *supra* note 3, at 53.

government and tasked the judiciary with safeguarding it. Their method is how we can best help the People keep their Republic.⁵¹

CONCLUSION

Once, our law followed Blackstone's declaration that positive law could restrain liberty as much "as is necessary and expedient for the general advantage of the public,"⁵² because legitimate positive law, whether legislative or judicial, is always "bound by the laws of nature."⁵³ Judges must follow the path of the law that begins with text, as ordinarily understood by the People when adopted, a people who reached for their common good by relying on the natural law. But judges cannot honestly inquire into legal history without engaging the natural law foundations against which, as Blackstone argued, "depend all human laws; that is to say, no human laws should be suffered to contradict."⁵⁴ If judges are to carry on their work faithfully, they must embrace the "canons of moral reasoning that guided the Founders themselves when they had set about to frame a new government,"⁵⁵ ones that for thousands of years have helped build governments with the best chance at safeguarding natural rights.⁵⁶

51. To see what this method looks like in practice, *see* *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 165–66, 169–70 (3d Cir. 2023) (using history and tradition to discover the legislature's intent in enacting the FSIA) and *Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, 80 F.4th 223, 229–32 (3d Cir. 2023) (interpreting Federal Rule of Civil Procedure 19 by "consulting history, context, and the reason behind the Rule").

52. BLACKSTONE, *supra* note 25, at *125.

53. HELMHOLZ, *supra* note 22, at 120.

54. BLACKSTONE, *supra* note 25, at *42.

55. HADLEY ARKES, *BEYOND THE CONSTITUTION* 23 (1990).

56. *See* Adams, *supra* note 46 (acknowledging that the governments of Greece, Rome, and Britain, despite the failings of each, provided a model for defending the "inherent rights of mankind"); *cf.* 1 *Corinthians* 2:6 ("We speak a wisdom to those who are mature, not a wisdom of this age, nor of the rulers of this age who are passing away.").

WHEN MORAL PRINCIPLES MEET THE NORMATIVE OR DELIBERATIVE STANCE OF JUDGES: THE LAYERS OF *COMMON GOOD CONSTITUTIONALISM*

VERONICA RODRIGUEZ-BLANCO*

INTRODUCTION

The way in which human beings engage with the world is radically different from how nonhuman animals engage with the world. Nonhuman animals do what they do without trying to “make sense” of what they are doing. By contrast, human institutions and practices such as law, family, states, art, literature and so on depend on our “making sense” of them.¹ They cannot be built, changed and sustained unless we answer the basic question of what is their point or meaning. But the way we try to give meaning or “make them intelligible” is very peculiar and particular. When we are engaging with any human practice or institution, for example following a statute or legal directive, we are trying to settle an answer to the question “What shall I do?” in order to answer the

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1. Charles Taylor, *What is Human Agency?*, in *Human Agency and Language: Philosophical Papers*, Volume I, 15–44 (Cambridge Univ. Press, 1985).

question what the law is or what “this” or “that” institution is.² Similarly, when we engage with short-, medium- or long-term ends, such as writing a poem or forming a family, we are trying to settle an answer to the question “What shall I do?”

Professor Adrian Vermeule’s *Common Good Constitutionalism*³ is a lucid defense of this platitude, that is, in engaging with any human practice or institution, we are effectively in pursuit of an answer to the “What shall I do?” question, located at the heart of the classical legal tradition. Adrian Vermeule aims to show that the common good is non-aggregative⁴ and that values or ends that aim at the flourishing of citizens are embedded in the law, including institutional and government arrangements. The idea of law governed by reason towards the common good⁵ 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 judges⁶ and legal institutions.

Vermeule’s theory of constitutional thought is in stark opposition to the two predominant constitutional theories, that is, originalism and progressivism. The former relies, Vermeule tells us, on the illusion of fixed semantic content. This semantic content is determined by either the expected results from the enacted

2. The primacy of this question has an ancient pedigree in ancient and medieval legal philosophy. It is also the centre of the new natural law theory. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); John Finnis, “The Thing I Am”: *Personal Identity in Aquinas and Shakespeare*, 22 *SOC. PHIL. & POL’Y* 250 (2005); Germain G. Grisez, *First Principle of Practical Reason: A Commentary on the Summa Theologiae*, 1–2, *Question 94, Article 2, Note*, *NAT. L.F.* 168 (1965).

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

4. *Id.* at 7. “Non-aggregative means that the plurality of values or goods that constitute the “common good” cannot form a whole or unity.”

5. *Id.* at 1–4; see also THOMAS AQUINAS, *SUMMA THEOLOGICA*, ST II-I, q. 90 a4 (Thomas Gilby ed., Cambridge Univ. Press 2006) (1485) “Law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”

6. VERMEULE, *supra* note 3, argues that the vision of the common good extends to administrative organs of the state, but in this paper I will only focus on the activities of judges.

language of the relevant actors or abstract semantic content of the enacted words.⁷ Consequently, the originalist position presupposes that a normative stance of essentially contested and normative substantive conceptions such as “liberty”, “right”, “legal obligation”, “duty”, “immunity” or “equality” and so on will not contaminate the meaning of the text.⁸ This entails that originalists are under the illusion that a constitutional text is self-explanatory, and the text’s meanings have either fixed references across time or a “shareable” or public ordinary meaning.

On the other hand, progressivism portrays itself as a process of interpretation in continuous confrontation with and resistance against an imaginary oppressor to achieve liberty.⁹ Thus, this conception of liberty is neither anchored in a substantive conception that gives “intelligibility” to court decisions, nor does it give any guidance to judges and citizens as it aims at liberty for its own sake as the only intrinsic value for human flourishing. This is a conception of liberty with no vision and no embodiment, so to speak, as it is not embodied in other values. This means that the conception of liberty of progressivism is empty, abstract and non-informative for citizens and judges.

Thus, the semantic theory advocated by both old and new originalists is implausible as it overlooks how meaning, both textual and publicly shareable, is essentially normative or value-laden. The conception of liberty advocated by progressivists is blind and cannot guide us. This would be a tragic tale of pessimism if no third position could be found. Let me explain. In terms of constitutional theory we are forced to choose on one hand between the illusory and the implausible and, on the other, blindness and an

7. VERMEULE, *supra* note 3, at 94. See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, B.U. L. REV., 1953 (2021). Solum defends originalism as “ordinary meaning”; the problem with this approach is that it is also subject to the objection that there is no shareable meaning in interpreting normative contestable concepts.

8. Vermeule argues, rightly so, that there are not two stages, i.e., “interpretation” and “construction.” See VERMEULE, *supra* note 3, at 94.

9. *Id.* at 117.

unintelligible conception of political community.¹⁰ However, there is a third way, Vermeule tells us, and the possibility of stability arises if we are able to retrace the historical and jurisprudential roots of the classical legal tradition.

In this paper I would like to explore the underlying assumption of Vermeule's architectonic argumentation, which strongly overlaps with Dworkin's theory regarding the nature of law and constitutions. I will also argue, however, that despite the overlaps there are profound differences, which concern matters beyond the conception of right, and that if the retracing of the classical legal tradition is to be successful, we need to examine more closely these differences. Moreover the idea that principles can guide the legal decisions of judges can be misleading if we do not scrutinize closely the way practical reason in the classical legal tradition is conceived and the way principles are generated by judges' engagement with practical reasoning.

In Section I, I abstract the most important lesson from Vermeule's insightful analysis on the classical legal tradition and show the overlap with Dworkin's constructive interpretative theory of law and constitutions.¹¹ In Section II, I advance what I think is a plausible and powerful view of the classical legal tradition based on an Aristotelian-inspired conception of immersive and aspirational deliberation and practical reason, and show how this is applicable in the context of the law.¹² In Section III, I provide some final reflections on the consequences of adopting the Aristotelian-inspired conception of deliberation to defend the classical legal tradition, and demonstrate what I call "the plight of the inexorability of a normative stance" which lies at the core of our legal reasoning and interpretation of what the law is.

10. This theoretical dichotomy on constitutional interpretation has a profound impact on everyday political and legal discourse. Consequently, the population is deeply polarized regarding the legitimacy of constitutional law.

11. *See infra* Section II.

12. *See infra* Section III.

I. VERMEULE'S CLASSICAL LEGAL TRADITION AND DWORKIN'S
CONSTRUCTIVE INTERPRETATION:
THE LIMITS OF AN UNHOLY ALLIANCE

Vermeule's and Dworkin's theories of constitutional interpretation and adjudication¹³ aim to undermine originalism in its different forms. Vermeule aims to show that originalism cannot be a stable position.¹⁴ He says that if originalism adheres to textual meaning at the time of creation of the text, it is impossible to trace the meaning as it is impossible to trace the original intention.¹⁵ If originalism is semantic, then the problem that arises is how meaning should be determined. If meaning is based on expectations, it faces the difficulty of, for example, how we should ascertain the expectations of framers and ratifiers of the U.S. Constitution. If meaning is based on public or shareable meaning, then to disambiguate meaning, the originalist needs to resort to normative premises and is forced to rely on *nonoriginalist* premises precisely because it is impossible to determine "public meaning" due to its ambiguity. "Public meaning" is based on either expected applications or the principles embodied in semantic content. Consequently, originalism cannot choose between these two different conceptions of "public meaning" within the theoretical resources provided by the

13. Some authors argue that we need to separate the question of what the law is from theories of adjudication. See Michael Berman & K. Toh, *On What Distinguished New Originalism from Old: A Jurisprudence Take*, *FORDHAM L. REV.*, 545 (2013). However, this argument in favor of the distinction artificially suppresses the important point advanced by authors like Dworkin which is that at the core of the nature of law is an inexorably normative and interpretative stance because adjudication cannot be separated from the question of what the law is.

14. There is much in common here with Finnis's criticism of Hart's internal point of view and the instability that emerges when we do not closely analyze the central or paradigmatic case of the law and engage with practical reason, or misunderstand the way practical reasoning works. See Veronica Rodriguez-Blanco, *Tracing Finnis's Criticism of Hart's Internal Point of View: Instability and the "Point" of Human Action in Law*, in *CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 695 (Torben Spaak and Patricia Mindus eds., Cambridge University Press 2021).

15. VERMEULE, *supra* note 3, at 92, 95–97.

originalist theory.¹⁶ In a similar vein, Dworkin¹⁷ has argued that semantic theories of law and, arguably, originalism as a paradigmatic example of a semantic theory of law and meaning, cannot explain the “genuine” theoretical disagreements that judges and legal practitioners have.¹⁸ The reason why semantic theories cannot explain genuine disagreements on what the law is, is because the law depends on varying conceptions of the “point” or “value” of our social practices and institutions, including constitutions. Genuine disagreements inexorably arise because the different parties to a legal dispute have different *normative* or *deliberative* stances. Genuine disagreements concern the best possible interpretation of what the law is in a particular case and since judges need to advance a justification for state coercion, they need to advance an answer to the question of what the law is in its best light. For Dworkin, originalism fails to notice that the *normative* aspect of the law is inexorable, and is the only feasible lens for grasping and “making intelligible” legal and social practices.¹⁹ Vermeule and Dworkin recognize that a normative or deliberative stance on the side of legal participants, judges, lawyers, administrative officials, and citizens, is inescapable. I will call this the “*plight of the inexorability of a normative stance.*”²⁰

For Dworkin this normative or deliberative stance is inexorable because we need to attribute meaning or intelligibility to our social practices, institutions and legal texts.²¹ Similarly, for Vermeule the normative stance emerges as the result of “judges” and “legal

16. *Id.* at 95.

17. RONALD DWORKIN, LAW'S EMPIRE 1–86 (1986).

18. *See id.*

19. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 FORDHAM L. REV., 1249, 1249–50, 1254–55 (1997).

20. I think this plight is endorsed by Vermeule. *See supra* note 3, at 14 (“In the end, every legitimate act of government works with some conception or other of the common good; that is inescapable.”). This view is also revealed in other passages. *See e.g., id.* at 16 (arguing that “no law can operate without some implicit or explicit vision of the good to which law is ordered[.]”).

21. *See* DWORKIN, *supra* note 17.

participants” engaging with reasoning towards the common good, which includes the instrumental values to achieve objective goods and the flourishing lives that citizens have in the state.²² Furthermore, because we are engaged with human activities and institutions, ends need to be intelligible to us as rational creatures, and therefore these ends are necessarily normatively laden and constitutive of our activities and institutions, including legal institutions and court decisions. Judges and legal practitioners inexorably engage with practical judgements to answer the question “What shall I do?” But, arguably, the answer to the question of what the law is depends on the answer to the question “What shall I do?” I defend this point in Section II.

However, the overlapping features between Dworkin’s and Vermeule’s constitutional thoughts stop here. Dworkin is a constructivist and principles are at the core of his views, but in the classical legal tradition *principles are the result of practical deliberation* and, therefore, practical reason towards the common good.²³ This is a subtle difference but an important one that I would like to emphasize. Let me explain.

For Dworkin, principles are the starting point for judges and legal participants to construct legal materials in their best light. Herculean judges, Dworkin tells us, look at the pre-interpretative practice and legal material and *impose* meaning through the underlying principles in the text to advance the best possible answer to the question of what the law is in the particular legal case.²⁴ By contrast, for the classical legal tradition, principles are the general and abstract formulation of engagements and understandings of values

22. I will not discuss the nature of the common good. For detailed conceptions in the context of the law, see MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2006); George Duke, *The Distinctive Common Good*, 78 REV. POL. 227 (2016).

23. Vermeule argues that the law of the civil law maker is contained within the “larger objective order of legal principles and can only be interpreted in accordance with those principles.” VERMEULE, *supra* note 3, at 2. At other key passages he states that the rational order of the common good is, “embedded in a broader framework of legal principles.” *Id.*

24. DWORKIN, *supra* note 17, at 245.

at the particular level.²⁵ They are at the *end of a process* of practical reasoning and deliberation, and can be taken as the starting point of further decisions *only because* we have previously engaged with their content at the particular level.²⁶ Tradition, historical context and previous cases provide a thick web of understandings of values at the particular level towards the common good of the specific political community.

Thus, for the classical legal tradition, to answer the question of what the point or meaning of our institutions or practices is, judges and legal practitioners do not engage in an abstract exercise of moral justification *à la* Dworkin where principles of political morality guide them in constructive interpretation. The Dworkinian conception of constructive interpretation misses the character of practical reason and therefore the richness and complexity of human deliberation, and its “making sense” or “intelligibility” *becomes abstract rather than particular*. At the core of the classical legal tradition is human deliberation and practical reason which starts with the particular.²⁷ This is why historicity *qua* evaluation and the grasping of values within a particular historical tradition is key for the classical legal tradition.

Dworkinian-type constructive interpretation is not the best guide for understanding the classical legal tradition of *ius naturale* and *ius gentium*. True, like in the classical legal tradition, for Dworkin the text is a constraint on any interpretative exercise that relies on principles of political morality.²⁸ However, this way of thinking overlooks the way that *legal practice, and legal texts together with the law have emerged* which is the result of practical deliberation and engagement with values at both the immersive and

25. Veronica Rodriguez-Blanco, *Ways of Inhabiting the Deliberative-Aspirational Point of View: Practical Reason and Objective Goods*, 67 AM. J. JURIS. 293(2022).

26. *Id.*

27. ARISTOTLE, VI NICOMACHEAN ETHICS, 1141 b14–25 (H. Rackham trans., Harvard University Press 1999).

28. See DWORKIN, *supra* note 17.

aspirational levels through the history of a particular political community.

Legal texts together with the law and legal practices are constituted by reasonings and deliberations, and specific ways of *describing and re-describing values*, or so I will argue. For Dworkin, by contrast, the text or the practice are “given” and constructive interpretation imposes a *new meaning* on them.²⁹ Arguably, for Dworkin, principles provide the “ends” or values, the “making sense” of the institution or text. For example, according to Dworkin’s interpretation of *McLoughlin*³⁰ the principle of compensation for nervous shock or psychiatric injury that arises in cases of harm that is foreseeable is the result of the “imposed” meaning on past legal materials in the law of negligence.

Dworkin’s understanding of principles undermines and confuses the role of practical reason in the classical legal tradition. Thus, the judge or jurist in the classical legal tradition starts with the view that legal texts together with the law are the result of *ways of perceiving* and describing values, and she aims to use this understanding to move herself forward, so to speak, to settle an answer to the practical question “What shall I do?” in order to determine *what the law is*.

In this paper I will not concentrate on a criticism of Dworkin’s idea of legal principles and how they operate so that we can impose meaning on our legal practices as I have engaged with this task elsewhere,³¹ but will proceed *via positiva* by advancing an Aristotelian-inspired conception of practical reason in the context of legal reasoning. The contrast with principles and the Dworkinian-type of constructive interpretation will become apparent.

I think that this way of understanding the classical legal tradition offers a better ground of what Vermeule’s insightful analysis

29. See DWORKIN, *supra* note 17; see also Veronica Rodriguez-Blanco, *Action in Law’s Empire: Judging in the Deliberative Mode*, 29 CAN. J. L. & JURIS. 431 (2016).

30. *McLoughlin v O’Brian* [1983] 1 AC 410; see DWORKIN, *supra* note 17 (discussing this English case as an application of his constructive interpretation).

31. See Rodriguez-Blanco, *supra* note 29.

in *Common Good Constitutionalism* aims to demonstrate, namely that originalism and progressivism rely either on illusion or blindness. The illusion is that practical reason is not constitutive of human practices and institutions. The blindness is that we can move forward building and shaping institutions and social practices without a vision or trying to articulate a conception of the common good and flourishing lives.

My proposal in terms of an Aristotelian-inspired conception of practical reason aligns well with the idea that “goodness” and therefore the “goodness” of the common good cannot be seen as a property or predicative adjective that can be aggregated or maximised. On the contrary, the goodness of the common good is an attributive adjective like, for example, small, tall, big and so on. There is no “plain goodness” of the common good as there is no plain smallness of a table. However, unlike the possibility of determining whether a table is bigger or smaller in regard to another table, which can be done by measuring the surface area of the two tables, judges cannot measure the good-making characteristic of a legal decision in comparison to the good-making characteristic of an alternative choice. This means, therefore, that inevitably we need to engage with valuing to determine ways in which the good-making characteristics of a legal decision advanced by a judge towards the common good and the flourishing of “citizens” lives in a specific political community. The common good serves then as “*an indispensable directive element in the practical thinking by which one deliberates towards choice and rational action.*”³²

Thus, the common good of the community is an ongoing affair of practical reason, not a *final state of affairs* that can be “perceived” or “theorized.” The common good is an achievement of our engagement and effort exercising practical reason and this is why it is closely connected to the virtuous life of each member of the political community, including legal officials and the judiciary. Thus, there

32. John Finnis, *What is the Common Good, Why Does It Concern the Client's Lawyer?*, 40 S. TEX. L. R., 41, 44 (1999).

are many types of political and legal arrangements and institutions that can satisfy a rational life-plan for their citizens.³³ Consequently, if we do not correctly understand the operations of practical reason, we are either condemned to believe that we need to be attached to the fixed meanings or “shareable” or public ordinary meaning of constitutions or legal texts. In these circumstances, inevitably, either the ugly head of anxiety resulting from uncertain and unstable texts appears, or we are condemned to constantly and arbitrarily inventing and reinventing new meanings and new values that are not anchored in our rationality and the way rationality emerges as result of who we are, that is, historical beings located in social practices and particular circumstances.

Dworkin’s constructive interpretative theory seems attractive because he combines two key features of the classical legal tradition, albeit adumbrating them in a mistaken way. These key features are: a) the importance of principles underlying the law and b) the need for legal judgments to fit the text or practice to be interpreted.³⁴ Dworkinian order and understanding in terms of constructive interpretation are mistaken because principles are neither the bridges nor the underpinning layer that makes intelligible a text. Neither is it sound to argue that principles enable us to “impose” meaning on a text. On the contrary, principles are *the “formal” and abstract formulation* of the results of a long and complex engagement with deliberation and therefore with values in a narrow and aspirational form. I will argue that we cannot understand principles unless we have previously understood the complex deliberations from which they emanate. Legal principles extracted from previous cases can only play a role because there has been a

33. I will not engage here with the discussion of whether the common good should be instrumental as defended by Finnis, *see supra* note 2, at 176–224, or distinctive and non-instrumental as interpreted by Duke, *see supra* note 22. In my judgement, Finnis’s view on the common good is more nuanced and it should not be interpreted as merely “instrumental.”

34. *See* DWORKIN, *supra* note 17.

previous effort and engagement with *the values that are the content of such principles*.

II. ARISTOTELIAN-INSPIRED DELIBERATION: NARROW AND ASPIRATIONAL PERSPECTIVES

In this Section I will briefly defend an Aristotelian conception of practical reason to shed light on the process of "*determinatio*" in terms of descriptions of values and our vision of the common good within a political community. I think that this conception is more fruitful and psychologically realistic in terms of how legal judges and practitioners engage with what is good and valuable in our lives. I will use an example of a legal decision in tort law to show the differences and establish a contrast between the proposed view of the classical legal tradition and the use of principles by Dworkin.

My arguments start with the thought that the internal logic of law is not reducible to narrow juridical relational thinking, but rather is a continuum with ethical and moral thinking and experience where values and common ends of the political community play a key role. Like the values of love or friendship, the values of law have an internal logic, but this internal logic is inescapably expansive and includes underlying moral and ethical values as learned and grasped in both legal and ethical experience.

I will use the "love" and "friendship" analogy to undermine the narrow notion of an "internal" logic of law and justice reducible to rights and duties. Thus, for example, if I am asked why I love my friend, I would say that I love her because she is "kind," "gracious" and "intelligent." I have learned to describe and re-describe these features, and later attribute them to my friend because of all the experiences that we have shared. More precisely, and following the Aristotelian-inspired model, my friend possesses these three features for me as a result of a development of my thinking together with what I have learned from our shared experiences, that is, as a result of my own struggles in determining the correct descriptions and re-descriptions of our shared experiences, my actions and her

actions. My response is, so to speak, according to the internal logic of the value of friendship. This means that I do not resort to descriptions that are scientific or empirical, I refer to the *experience* of love and friendship itself, and to the concepts related or close to friendship, such as love, or kindness.

But my appreciation of the love of my friend has a *temporality and historicity*. I learned to grasp this set of values by engaging in both narrow and aspirational deliberation and, therefore, by engaging in practical reasoning. Thus, when I act and advance decisions, I aim to answer the question “What shall I do?” and in the context of the friend/love analogy, it aims to address deliberation and action in relation to my actions towards my friend. This means that I need to settle an answer to this question. For Aristotle, deliberation and the exercise of practical reasoning is a seeking as opposed to the contemporary conception in which deliberation is seen as “the balancing” of reasons, motives, desires, rights or interests.³⁵

Aristotle presents us with a uniquely innovative model that is different from the Socratic idea of deliberation as the science of measurement in which deliberation is reducible to a skill or craft, and also very different from the contemporary model of “balancing.”³⁶ According to the “balancing” model, beliefs and desires are “given” and the only task for the deliberator is to weigh or measure beliefs against beliefs, or beliefs against desires or desires against desires.³⁷ Aristotle aims to show that deliberation and its outcome, a rational decision (*prohairesis*)³⁸ is not a skill or craft but has

35. The “balancing” approach is present in both legal philosophy and moral philosophy. See Rodriguez-Blanco, *supra* note 25, at 8–9.

36. For an emphasis on the difference between the contemporary model and the Aristotelian model. See Agnes Callard, *Aristotle on Deliberation*, in THE ROUTLEDGE HANDBOOK OF PRACTICAL REASON 126–40 (Ruth Chang and Kurt Sylvan eds., Taylor and Francis 2021); see also Karen Margrethe Nielsen, *Deliberation as Inquiry: Aristotle’s Alternative to the Presumption of Open Alternatives*, 120 PHIL. REV. 383, 386 (2011).

37. See Rodriguez-Blanco, *supra* note 25.

38. There is a variety of translations of the Aristotelian term *prohairesis*. *Prohairesis* or rational decision can be interpreted as the end of deliberation. Hardie advances a good

important elements that overlap with what we understand as a craft or skill. At the same time Aristotle shows that there is an important overlap between theoretical reasoning³⁹ and deliberation. However, deliberation has a proper way of functioning and, consequently, Aristotle's explanation navigates between the Scylla of being a craft or skill and the Charybdis of theoretical reasoning,⁴⁰ aiming to show that deliberation is neither reducible to craft nor to theoretical thinking.

We see also that a plausible interpretation of practical reason involves rejecting the "grand end" view of practical deliberation in the context of the political community. This is the idea that we already have an *a priori* knowledge of the "the grand end" of our flourishing lives or "living well" within the political community, and our engagement with practical deliberation is simply an exercise in determining the means to achieve larger and medium ends that can be subsumed under the "grand end" of the political community. As opposed to this position, we might defend the "upward journey towards the specification of the *what*."⁴¹ Thus, there is no need to recognize or validate the procedure towards correctness, and there is no anxiety about the instability or arbitrariness of practical judgement.

This is still very cryptic but perhaps the simile of Neurath's boat⁴² can help us to explain the Aristotelian type of deliberation. If

analysis of the word as "efficient cause." W. F. R. HARDIE, *ARISTOTLE'S ETHICAL THEORY* 162 (2d ed. 1980). It is not an intellectual opinion, rather after choosing and acting we show our character. *Id.* at 165 (2004, originally printed in 1968). We show, within our model, the key element of becoming or transformation. *See also* Rodriguez-Blanco, *supra* note 25. According to Segvic, *prohairesis* is used only once by Plato, in the *Parmenides*. HEDA SEGVIC, *FROM PROTAGORAS TO ARISTOTLE* 162 n.25 (Miles Burnyeat ed., 2008). *See also* ARISTOTLE, *supra* note 27, at 1139 a30 (1999). *Prohairesis* combines cognitive and emotional elements as a result of deliberation. ARISTOTLE, *supra* note 27, at 1113.

39. *See* HARDIE *supra* note 38, 225–228.

40. There is a tendency to collapse theoretical and practical reasoning. This leads to a mistake about the role of practical syllogism.

41. *See* Rodriguez-Blanco, *supra* note 25.

42. *See* Otto Neurath, *Anti-Spengler*, in *EMPIRICISM AND SOCIOLOGY* 158, 199 (Marie Neurath & Robert S. Cohen eds., 1973).

we are at sea in a boat that must be repaired we need to repair the boat plank by plank, because if we try to reconstruct the boat from the bottom up, we will certainly sink. As sailors we are engaged in the activity of sailing, we are at sea and there is no choice but to repair the boat. Similarly, in the Aristotelian model of deliberation we are in the world of acting and we need to deliberate about *what* we should do.⁴³ However, our vision of the *what* is indeterminate and key aspects of the substantive *what* are unknown to us. This is a corollary of one key feature of deliberation, that is, that it concerns only what is contingent and, therefore, particular and circumstantial.⁴⁴ Consequently, we need to hold the vague and indeterminate *what* at the same time as we hold the other planks of Neurath's boat and focus only on one plank at a time. Each plank is a set of particular circumstances that supports the *how*. Thus the focus of deliberation is the *how*. The *how* gives us more clarity on the *what* and in the process we can revise the *how* in light of what we have learned from the *what*. Furthermore, this process goes backwards and forwards, that is, we revise the *what* in light of what we have learnt from the *how*, and reconsider the *how* in light of what we have learnt from the way the *what* is now presented to us, at this new stage of the deliberation. This continues until we reach a point of insight, that is, we have brought the *what*, or what is now "the end", to ourselves. The means impregnates and illuminates the end and *vice versa*. The cycle will continue with further "what" and "how" questions in light of our deliberations and performed actions.⁴⁵

We aim to defend the following view. *Deliberation is the shaping of the What on the basis of the How and vice versa*. This position presupposes the following:

43. This is also central to Finnis's explanation of practical reason, see John Finnis, "The Thing I Am": *Personal Identity in Aquinas and Shakespeare*, 22 SOC. PHIL. & POL'Y 250 (2005); see also JOHN FINNIS, *Practical Reasons's Foundations*, in REASON IN ACTION, COLLECTED ESSAYS: VOLUME I, 19, 19–40 (2011).

44. See ARISTOTLE, *supra* note 27, at 1141 b14–25.

45. For Broadie, Aristotle requires "continual re-evaluation in the light of means, means to means, and their consequences." SARAH BROADIE, *ETHICS WITH ARISTOTLE* 245 (1991).

- a) The *what* of deliberation is indeterminate.
- b) Deliberation is an inquiry into the *what* to make it more specific and determinate.
- c) At the first stage an inquiry into the *how* illuminates the *what*.
- d) The *what* is presented under a new light and, more specified, we can then proceed to revise the *how*.
- e) This process can be repeated a number of times, including at moments when we are performing the action.

The fact that we do not have a precise and determinate “grand end” does not deny that we cannot reflect upon and approximate objective goods. It rather means that we need to articulate a vision of values and good-making characteristics for the political community that is embedded in legal decisions. There is reflection on the *what* and the *how*. It does not operate externally but internally in terms of practical judgment and deliberation, however.

The “upward journey towards the specification of the *what*” admits that while we are exercising our capacity we are also perceiving, learning to perceive, acquiring insights and the quality of this learning depends on the quality of deliberation and rational decision (*prohairesis*).⁴⁶ Furthermore, the particulars of the action are the essence of the action as opposed to a product.⁴⁷ The particulars can only be seen from the deliberative perspective and what is “seen” can be improved through reflection. Similarly, desires are the work of intelligence which implies a process of thinking and transformation, and the concept of a virtuous life and virtuous political community becomes crucial. Within the Aristotelian-inspired model of deliberation our desires and character are transformed through thinking.⁴⁸

46. Reeve highlights perception in deliberation. C. REEVE, ACTION, CONTEMPLATION AND HAPPINESS, 181–82, 183 (2012); see also JOHN M. COOPER, REASON AND THE HUMAN GOOD IN ARISTOTLE, 65 (1975).

47. See BROADIE, *supra* note 45, at 205, 209. Broadie uses the appropriate expression “happiness is an act”. This means that our understanding and grasp of living well can only be achieved through deliberating and acting.

48. See Rodriguez-Blanco, *supra* note 25.

Thus, the deliberative-aspirational perspective is key. We learn of the possibility of a deliberative-aspirational perspective through others. These “others” include not only family and friends, but also our political and legal institutions, the decisions of our courts that try to “make sense” or give “intelligibility” to our legal actions and legal practices, and our constitutions. Through engaging in immersed deliberation within a political community, we learn through legal decisions ways of inhabiting an aspirational perspective as citizens. In a nutshell, this means that the “making sense” of our legal actions and practices, including inhabiting a deliberative-aspirational perspective, is always a collective enterprise.

But judges also engage with the aspirational perspective of past legal decisions. Avoidance of an aspirational perspective might lead us to fantasy. Recognition is the way we inhabit the deliberative-aspirational perspective. Once judges recognize a particular feature of values, rooted in history, tradition, and past cases, in its specificity and context we can think about it and change their views on it but, at the same time, citizens and judges transform their emotions and desires when this recognition and thinking becomes part of their deliberations. Because the transformation includes the emotions and desires of citizens, officials, and judges, it has an impact on the development of our character as a political and legal community. But transformation does not occur *only* as a result of training our desires, emotions and character to recognize a particular feature of values in its specificity and context, but as the *consequence of taking a perspective*, that is, thinking about the subject matter and recognizing it, or avoiding it and not examining it.

But how does inhabiting this deliberative-aspirational perspective enable judges to engage with medium- and long-term goals and ends without losing the immersed or narrow deliberative perspective? Changing our perspectives through both thinking and experience does not involve contemplating our inner experiences and thoughts as if they were mere events or objects, and I reject the view that we can be impartial or detached from our experiences without losing something important. I reject the perception model of self-

reflection and the objectification of self,⁴⁹ and advocate a model of transparent self-reflection where the agent tries to settle the question “*What shall I do?*”, and gives careful attention and thought to thinking about the features of the subject matter, that is, relationships and connections between values, what is good and what is right. The agent looks outward to the world and either finds or does not find that her interactions with others are lacking. This recognition or avoidance can be taken on as material for further narrow deliberations. This means that when we avoid the deliberative-aspirational perspective, there is an absence of any object for future rational deliberation. When we are confronted with others through relationships and experiences, through legal decisions and practices within the political community, we are invited to avoid or recognize. When we pay careful attention to the features of the world and our relationships, we become able to aspire to medium- and long-term goals and ends within the narrow or immersed deliberative perspective. The depth and richness of the latter enable us to better understand if or how our current position is lacking. Grasping these medium- and long-term ends is possible because there is a trajectory from the immersed perspective to inhabiting the deliberative-aspirational perspective. In this way, once we grasp these medium- and long-term ends, we can use these ends in further immersed or narrow deliberations. It is still within the confines of the immersed perspective, however. The medium- and long-term goals and ends are uncertain but they can form part of future immersed or narrow deliberations.

Returning to the question of why I love my friend, if someone asks me to summarize my experiences, I could say in a simple and abstract manner, “I love my friend because she is kind, gracious

49. On perceptual reflection, see DAVID ARMSTRONG, MATERIALIST THEORY OF MIND (1968). Cf. Sydney Shoemaker, “*Self-Knowledge and the Inner Sense*,” 54 PHIL. & PHENOMENOLOGICAL RSCH. 249, 249–314 (1994); RICHARD MORAN, AUTHORITY AND ESTRANGEMENT: AN ESSAY ON SELF-KNOWLEDGE (2001).

and intelligent.” My description does not reflect the complexity of my deliberation, both narrow and aspirational, the transformations and changes in relation to my friendship, e.g., moments in which I lost patience with my friend and needed to reflect on her best qualities, moments in which her gracious attitude and intelligence manifested in unique ways, and so on. When I use the words “kind”, “gracious” and “intelligent”, I use the internal logic of love and friendship, but this does not mean that other elements, including other values and the changes in my emotions, are not key in my grasping and correctly describing the phenomena.

Analogically, I argue, in law, the internal logic of the law has the appearance of doctrinal concepts and underlying abstract moral concepts such as rights and duties and legal principles, including substantive and institutional principles. Rights and duties operate as the grounding reasons of my relationships and interactions with others.

If our Aristotelian-inspired model of deliberation is sound, then from the forward-looking standpoint the judge and the citizen cannot grasp the values of their actions, cannot determine the *what* in terms of the *how* and cannot avoid or recognize an aspirational point *unless* they determine the basic components of their actions, (that is, features “a₁” and “a₂” as components of “a”, “b₁” and “b₂” as components of “b”, “a” and “b” to achieve “X”, and finally “X” in order to achieve the end “Y”).⁵⁰ The judge also needs to transform her emotions and desires in light of her descriptions and thoughts about the indeterminate aim or end of “living well”, the flourishing of the lives of members of the political community. Furthermore, there is also the recognition or avoidance of an aspirational point that is presented to the citizen and the judge. I argue that the forward-looking standpoint of the judge’s decision is not presented *as an abstract principle*.

50. See Rodriguez-Blanco, *supra* note 25, for a detailed explanation of this Aristotelian-inspired model of deliberation.

However, this does not mean that it cannot be formulated as such, only that we must first answer the question “What shall I do?” to determine “What is the law in this particular case?” This means that there is an internal, but not reductive, logic within legal reasoning. The judge from the standpoint of the backward-looking perspective will consider values that can only be learned and grasped through the forward-looking perspective. This new grasp of values will enrich the doctrinal concepts and be applied in the backward-looking perspective. To illustrate this let us analyze a landmark case of negligence law, but this could be extended to constitutional law. Arguably, in both constitutional and tort law, the courts are trying to grasp the sound description of the values at stake. For example, in tort law, the value of physical integrity, and in constitutional law, the value of freedom of speech, within the law in the particular case and the internal logic of the law.

In the case *Donoghue v Stevenson*,⁵¹ Mrs. May Donoghue went to a café where her friend ordered an ice-cream and a bottle of ginger beer.⁵² They were supplied by the shopkeeper who poured the ginger beer over the ice-cream.⁵³ Mrs. Donoghue ate part of the ice-cream and as she finished pouring the rest of the ginger beer, a decomposed snail floated out.⁵⁴ As a result of consuming part of the liquid Mrs. Donoghue contracted a serious illness.⁵⁵ The bottle was made of dark glass so its content could not have been determined by inspection.⁵⁶ Mrs. Donoghue initiated an action for negligence against the manufacturer, David Stevenson, who had produced a drink for general consumption by the public.⁵⁷ The presence of the snail rendered the product dangerous and harmful, and the

51. *Donoghue v Stevenson* [1932] AC 562 (HL) (appeal taken from Scot.).

52. *Id.* at 601.

53. *Id.*

54. *Id.* at 566.

55. *Id.* at 601.

56. *Id.* at 602.

57. *Id.*

plaintiff alleged that it was the duty of the manufacturer to avoid producing harmful and dangerous products.⁵⁸

The facts and circumstances of the case provide a concrete particularity to the value of physical integrity. The aim of the judge's reasoning is to determine the specific content of the plaintiff's rights, but she also has a forward-looking perspective. If her decision is to guide citizens it needs to advance values manifested in particularities, and needs to provide appealing descriptions of values for the guidance of citizens' actions.

Lord Atkin in *Donoghue v Stevenson* stated:

But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be— persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁵⁹

In these passages Lord Atkin states that there is a duty to avoid acts or omissions which would likely harm others, to the extent that "I ought reasonably to have them in contemplation."⁶⁰ Lord Atkin establishes a general principle that "*you must not injure your neighbour.*"⁶¹ This doctrinal duty is empty and abstract but it acquires special content in the particular circumstances and facts of the case and due to the descriptions and re-descriptions of the judge. The

58. *Id.*

59. *Donoghue v. Stevenson* [1932] AC 562 at 580.

60. *Id.* at 582.

61. *Id.*

judge applies her knowledge and grasp of values. This means she is engaged in the question “What shall I do?” to determine “What is the law?” and in order to provide guidance to the citizen. But, simultaneously, the judge needs to look at the relational dimension of the case in order to determine whether the plaintiff’s right has been violated and whether the defendant had a duty which has been breached. These attributions are sound and possible only if the judge understands the values that are at stake and can grasp the complexity of such values *as if she acted* from the forward-looking perspective.

Lord Atkin redescribes the facts of the case and the values at stake.⁶² It is an example that illustrates how the realizability of specific values is presented as a description of values by the judge as if she were taking the forward-looking perspective, which is the perspective of the citizen. The citizen who engages in the activity of manufacturing a drink is asked to consider the value of being attentive and *careful when producing an article of food*.⁶³ This is put as follows:

A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison.⁶⁴

The issue is now not only between Mr. Stevenson, the manufacturer, and Mrs. Donoghue, but between *any* manufacturer and *any* consumer. The manufacturer is asked to consider the fact that the consumer is not able to inspect the bottle prior to purchasing it.⁶⁵ The right of the consumer and the duty of the manufacturer are the grounding of the attribution, but the engagement, realizability and determination of these abstract rights and duties are in terms of

62. *See id.*

63. *See id.* at 580–583.

64. *See id.*

65. *See id.*

values and therefore demands sound deliberation and the exercise of the judge's and citizens' practical reasoning.⁶⁶

III. PRACTICAL REASONING IN SEARCH OF THE COMMON GOOD AND VERMUELE'S COMMON GOOD CONSTITUTIONALISM

We can now grasp the ancient philosophical platitude advanced by Bernard Williams⁶⁷ when he criticizes utilitarianism, which states that we cannot *pursue the good life directly*.⁶⁸ Can we pursue the common good *directly*? I have argued so far that we cannot. At first glance it might seem that principles can guide us to the common good and flourishing lives. However, I have tried to show that they cannot enter directly into the citizens', judges' or legal practitioners' practical reasoning. They are abstract and our actions cannot engage with abstraction *and* narrow or aspirational deliberation.

The problem of determining an answer to the question "What is the law?" inexorably involves an answer to the question "What shall I do?" that judges pose to themselves. The judge poses this question from the forward-looking perspective *as if she were a citizen who ought to act upon it*. But the judge also needs to look back at the doctrinal conceptions and plethora of legal concepts and settled principles, whose content is particular and entails descriptions and redescriptions of values. The judge and legal practitioners need to carefully consider the particular case and the right description of values and ends to give an answer to the question of what the law is.

In *Eudemian Ethics*, book II, chapter 6, Aristotle⁶⁹ draws a parallel between mathematical principles and the man's principles of his

66. *See id.* at 580–583.

67. Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 112 (J. J. C. Smart & Bernard Williams, 1973).

68. *Id.*

69. *See* ARISTOTLE, *EUDEMIAN ETHICS* bk. II, ch. 6, 1222b15–1223a20 (Brad Inwood & Raphael Woolf, trans., Cambridge University Press 2013).

own acts.⁷⁰ The man needs to articulate the acts he performs as descriptions and redescriptions of values which can reach generality and abstraction and therefore a formulation as principles.⁷¹ For example, the act of giving money to someone in need is different from the act of giving money to someone to whom I owe money.⁷² The description of the respective underlying value changes the moral significance of giving money and the description of the values embedded in this action define the contours of practical judgements and the “making sense” of the action.⁷³ An act of “beneficence” is different from an act of “paying a debt.”⁷⁴

Vermeule’s focus on principles in relation to the common good might give the impression that principles are the starting point of practical reasoning and deliberation. Arguably, for Vermeule, at some key passages, “*determinatio*” is presented as a deductive process from principles to specificity,⁷⁵ from abstraction and generality to the particular case in searching for values and ends constitutive of the common good of the political community.⁷⁶ We have offered a model that starts from engagement with values and the respective description embedded in the law as if the judge were to act upon these values. But the judge needs also to have a backward-looking

70. *Id.*

71. See Rodriguez-Blanco, *supra* note 25.

72. *Id.*

73. *Id.*

74. *Id.*

75. Vermeule seems to defend the view that the background principles enable us to engage in the practical reasoning of the legal texts, see VERMEULE, *supra* note 3, at 80, 83. Vermeule states *à propos* of a discussion of Curtiss-Wright: “For the classical tradition, the written law does not exhaust the law. Although written positive enactments (*lex*) are undoubtedly part of the law, the law in a broader sense as a body of general principles (*ius*) includes the *ius gentium*, the (often) unwritten customary law of nations—even when not adopted by positive enactments. See *id.* at 88. Those principles not only inform the interpretation of our written documents, but operate as sources of law in their own right.” At 112, he states: “the relevant determinations must be interpreted ...in light of background principles of the *ius naturale* and the *ius gentium*, the ends of rightly ordered law, and the larger ends of temporal government.” VERMEULE, *supra* note 3.

76. See *id.* at 83–84.

perspective and scrutinize the doctrines, settled principles and plethora of legal concepts and their embedded values to advance an answer of what the law is in the particular case. There is no direct access to the common good and the richness and complexity of ends and values of a political community. Abstract principles and general specifications can be formulated, but they are the result of a previous engagement with particular values and ends embedded in the law. They are the result of a historicity and ways of thinking about the subject matter from acts of beneficence in the context of moral thinking to constitutional liberties and immunities in the context of constitutions. To overlook the values embedded in this historicity and their respective description is to ignore the core of our exercise of practical reasoning within our political community and we do this at our peril. This is the way that I read Vermeule's *Common Good Constitutionalism*, which proposes an important view to escape the moral conundrum of constitutional interpretation.

The proposed analysis of deliberation and practical reasoning gives a precise and plausible meaning to the idea that *law is an ordinance of practical reason and deliberation towards the common good*.

CONCLUSION

We have defended the ancient philosophical platitude that we cannot seek and reach the common good of a political community directly. We need to engage directly with values and their descriptions embedded in the law in the particular cases.

I show that the common presupposition shared by Vermeule's *Common Good Constitutionalism* and Dworkin's Theory of Law and Constitutions is the "*plight of the inexorability of the normative stance*." However, I have argued that principles are the result of abstract formulations of values and descriptions of values embedded in the law. They are the outcome of our engagement with "making sense" of and giving "intelligibility" to the law. Thus, *contra* Dworkin, we aim to demonstrate that principles are not the starting point of practical reasoning. The classical legal tradition advocates the plight of

the inexorability of the normative stance but also presupposes a *strong historicity* and *temporality embedded in values*, and this means that judges and legal practitioners need to engage with the particular values embedded in past decisions, doctrinal views, legal concepts to advance an answer to the question “What shall I do?” as an answer to the question “What is the law?.” Principles come *after* we have engaged and grasped particular values. They are the abstract formulation of these embodied values or so I have tried to argue.

EQUAL DIGNITY AND THE COMMON GOOD

MICHAEL FORAN*

Common Good Constitutionalism manifests a commitment to equality in two distinct ways. The first is a rejection of any notion of a greater good which pits the individual in conflict with the rest of society. On that view, the purpose of constitutional law is to mediate this tension, protecting the individual from the encroaching collective or sacrificing them for the sake of the majority. In contrast, common good constitutionalism sees the good of the individual and the community as co-constitutive, grounding the basis of a conception of the political order in shared, mutual interest. The second is a deep commitment to the collective flourishing of the polity, presupposing the equal dignity of persons and positing that a constitutional commitment to respecting this dignity demands the embrace of a substantive conception of human flourishing. Together, these commitments form the basis of a constitutionalism capable of making sense of comparative and communitarian claims which are uncomfortably placed within a liberal constitutionalism focused solely on individual rights claims.

Constitutional theory comes in many divergent forms. Some of it is grounded primarily in doctrinal analysis, purporting to explain and sometimes to justify the decisions of constitutional courts. Other forms of theory are indistinguishable from political philosophy, positing ideal forms of constitutional arrangement, unmoored from any grounding within a particular social or historical context. Further still are theories which emerge from jurisprudential accounts of the nature of law itself. Common Good Constitutionalism falls into this category.¹ It begins first and foremost with a theory of

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

law that many working within constitutional theory will reject: an anti-positivist account which ties law intimately to morality. It is impossible to make sense of common good constitutionalism without understanding that it emerges from a distinct theory of law as an ordinance of reason directed towards the common good and promulgated by a legitimate political authority.²

There are several jurisprudential premises which inform this account of law, many of which have been subject to extensive analysis elsewhere.³ Here I want to explore the conception of the legal subject inherent in this account of law. If law, properly understood, is tied to and directed towards the collective flourishing of its subjects, this presupposes important facts about the kind of thing a legal subject is. To be a legal subject on this account is not only to be an autonomous agent capable of guiding one's conduct in response to legal ordinances. It is also to be a valued member of a community, capable of flourishing and leading a good life wherein the equal dignity of all members is properly respected. Because common good constitutionalism is premised upon a theory of natural law, these presumptions about the legal subject are directly grounded within the natural law conception of the human person. Positive law may be jurisdictionally bounded such that it is possible for someone to not be a subject of French law or Irish law. But, on this view, we are all subjects of the natural law and so deserve to be treated as persons by virtue of our equal human dignity.

This paper will begin by setting out some of the core features of what it means to be treated as a legal subject according to this theory of law. Specifically, it will begin by examining the conception of the dignity of persons presupposed by a commitment to the common good. What gives humans value on this view is our radical

2. *Id.* at 3.

3. See Conor Casey, *Common-Good Constitutionalism and the New Battle over Constitutional Interpretation in the United States* 2021 4 PUB. L. 765 (2021); Conor Casey and Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J. L. & PUB. POL'Y 103 (2022); Stéphane Sérafin et al., *The Common Good and Legal Interpretation* 30 CONST. F. 39 (2021).

capacity to flourish as persons.⁴ This value cannot be disentangled from individuals such that they become mere vessels of what is actually considered to be of fundamental value — utility, pleasure, freedom, etc. Rather, it is one's value as the thing that one is (and not the experiences one has or the consequences one produces) that grounds the natural law commitment to the dignity of persons. Recognition of this value requires appropriate respect be shown to each and every person. As such, moral and political decision-making cannot ever be purely consequentialist or aggregative, justifying the sacrifice of some for the betterment of the rest.

From here, there can be a deeper exploration of the implications of the *equal* dignity of persons for constitutional theory. If one's value derives from the kind of thing one is — a person — then others of the same kind share that value and do so with no variance in degree. This being the case, the bonds of civic friendship inform a conception of law which must account for and respect this equality. It is this which grounds the principle of equality before the law and the related commitment that governance proceed by reference to general standards, only discriminating between subjects where it is appropriate to do so in order to adequately reflect differences in circumstances. Since there is no difference in moral worth, no discrimination premised upon such a difference can be capable of justification.

Finally, this paper will examine the positive obligations that a commitment to equal dignity gives rise to. It is not sufficient — although it is necessary — for legal officials to refrain from acts which disrespect the equal dignity of persons. To truly respect our radical capacity to flourish, those charged with care for the community

4. Non-persons such as plants and animals may also have the capacity to flourish — to lead good and fulfilling lives — but only persons have the radical capacity to flourish *as persons*. All humans are persons but there may arguably be non-human persons. This paper does not reject that possibility and would stress that, were non-human persons to exist, they would be entitled to the same recognition of dignity as human persons by virtue of their personhood.

must take steps to facilitate the actualization of this capacity where it is possible to do so, given existing circumstances.

I. DIGNITY

All human beings possess a special kind of value or dignity which forms the basis for our fundamental rights and the duties that others, including legal officials, owe us. That is the foundational premise of the natural law tradition, even if there is debate about how best to articulate the upshots of dignity.⁵ Thus, the early sophists drew upon ideas of a natural law to ground a commitment to the unity of all men, whether Greek or barbarian, as belonging to the same race and possessive of the same fundamental essence.⁶ From here, Alkidamas advances the core insight that “nature made no one a slave” which was eventually taken up by Roman imperial jurists, such as Florentinus and Ulpian, preserved in Justinian’s *Corpus iuris civilis*. Florentinus stressed that slavery is “against nature,”⁷ and Ulpian similarly argues that under the law of nature, there are no slaves because “all human beings are equal.”⁸ Where slavery exists, it is by virtue of the positive law and in direct contrast with the natural law.⁹ In this, Ulpian identified the ground for the natural law rejection of slavery: that all humans possess the same fundamental value by virtue of the kind of being they are: persons. Dignity is not something which is confined to humans, but

5. For example, the role of individual rights within the natural law tradition is contested (although this is mostly an issue of terminology, with alternative framings focusing on fundamental duties). See Dominic Legge, *Do Thomists Have Rights?* 17 NOVA ET VETERA 127 (2019); cf. Ernest Fortin, *The New Rights Theory and the Natural Law*, 44 REV. POL. 590 (1982). See also Erika Bachiochi, *Rights, Duties and the Common Good: Reviving the Finnis/Fortin Debate*, AM. J. JURIS. (2022) (forthcoming); cf. John Finnis, *Grounding Human Rights in Natural Law*, 60 AM. J. JURIS. 199 (2015).

6. See HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* ch. 1 (Thomas Hanley tr., Liberty Fund 1998).

7. DIG. 1.5.4 preface.

8. DIG. 50.17.32.

9. This contention was central to the common law rejection of slavery. Thus, Lord Mansfield held that slavery “is so odious, that nothing can be suffered to support it, but positive law.” *Somerset v Stewart* [1772] 98 ER 499 (KB).

humans all possess the same *kind* of dignity because they are the same kind of being. Thus, Aquinas concludes that dignity signifies something's goodness on account of itself, its intrinsic value.¹⁰ Humans all share this same intrinsic value by virtue of us all being human persons.¹¹ Other beings can and do possess their own kind of dignity, by virtue of their being the thing that they are. Thus, we can speak of the dignity of the lion or the mouse or even potentially the river. But humans have our own kind of dignity which connotes the intrinsic value of our shared humanity, manifest equally within each and every individual person.

This view is in direct contrast to that of Aristotle, who argued not only that slavery can be morally defended but that it can be defended on the ground that some humans are naturally inferior to others. In response to unnamed adversaries¹² who claimed that slavery is contrary to the natural law, Aristotle advances a theory of natural slavery. He begins by setting out his opponents' position:

But other thinkers consider ruling slaves on the part of an owner to be against nature. They think that the differentiation between owner and slave obtains merely by convention, whereas by nature there is no difference between the two. The relationship between an owner and a slave is grounded in force/violence; therefore, it is not based on justice.¹³

In response to this, Aristotle maintained what he deemed to be the "evident" distinction, found in nature, between those who rule people and those who are ruled: "some people are free and others slaves by nature".¹⁴ He denied the personhood of barbarians

10. THOMAS AQUINAS, IN III SENT., d. 35, q. 1, a. 4, q1a 1, corp. See also MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 16–17 (Harvard University Press 2012).

11. See Tianyue Wu, *Aquinas on Human Personhood and Dignity* 85 THOMIST 377 (2021).

12. There are good reasons to think that these adversaries were (at least some of) the Sophists who very probably elaborated a criticism of the institutional of slavery as against nature. See ILARIA L. E. RAMELLI, SOCIAL JUSTICE AND THE LEGITIMACY OF SLAVERY: THE ROLE OF PHILOSOPHICAL ASCETICISM FROM ANCIENT JUDAISM TO LATE ANTIQUITY 26–27 (Oxford University Press 2016).

13. POL. 1253b20–25.

14. *Id.* 1255a1–2.

because—he asserts—they lack “the deliberative faculty of the soul in the least.”¹⁵ A similar argument is advanced to justify the subordination of women, recognizing their personhood or humanity in the form of a soul, “but without full authority.”¹⁶

A shared premise here is the contention that one’s worth or dignity depends upon the possession of a variable characteristic which serves as the source for value. Aristotle justified the category of natural slaves on the basis that natural slaves are deficient in their deliberative faculty, something one can possess to greater or lesser degrees. Slaves are said to be similar to animals or even a kind of living tool, precisely because they lack deliberative faculties in their entirety: a natural slave “participates in reason only to the point of apprehending it, but not to the point of possessing it.”¹⁷ Similarly, women are portrayed as superior to slaves but inferior to free men because, while they can make decisions, they cannot do this on their own, dependent as they are upon their adult male relatives.¹⁸ The consequence of this view is that slaves and women cannot flourish as full persons and so need to cultivate only a minimal virtue. For the slave, who is deemed to lack personhood, this entails such minimal cultivation as avoiding cowardice or passions which might prevent him from carrying out his tasks efficiently.¹⁹ For women, who are, on this view, naturally less than full persons, this purports to both justify their subordination and explain why they should not be educated.²⁰

In contrast, the Stoics rejected this theory of natural slavery and the natural inferiority of women because they rejected the grounding of human value upon a variable characteristic such as deliberative faculty. Instead, they argued that all human beings have “a share in the logos.”²¹ Thus, while some may be better able to

15. *Id.* 1260a10-12.

16. *Id.* 1260a12-13.

17. *Id.* 1254b22-3.

18. GEN. AN. 1.728a; 1.82f; POL. 1254b10-14.

19. POL. 1260a33-b5.

20. *Id.* 1254b10-14; 1260a12-14.

21. RAMELLI, *supra* note 12, at 46.

actualize their participation within the logos by fostering wisdom and virtue, all humans share a common nature as rational beings, *logikai*.

This understanding of all humans as rational beings developed to become a central tenant of natural law theorizing of dignity, emphasizing a shared nature united by reference to the kind of being that humans are, rather than any actual abilities possessed.²² It is the radical, from *radix*—root—capacity of all humans to flourish as persons by directing our rational mind towards the good that grounds our dignity. This capacity is actual in that it exists even if the potentialities it involves are not yet activated.²³ Similarly, one has the capacity to be truthful or deceitful, generous or miserly, kind or callous without engaging in any action at all. The root capacity of all humans to be full moral agents entitles us to be recognized and respected as such, even if, by virtue of infancy or impairment, we may not be able to fully realize that potential immediately or ever. It is on this basis that Rawls argues that “the capacity for moral personality is a sufficient condition for being entitled to equal justice.”²⁴ Human dignity signifies our ontological unity and radical moral equality. It forms the basis of moral claims that all persons can make against others. Any conception of human rights which seeks to live up to their foundational vision as universal moral claims grounded in humanity must account for what it is about humanity which is of moral worth and why this worth does not and cannot vary between persons. The classical natural law tradition has, over more than two thousand years, developed an account for this value. The insights that the early stoics and sophists gave us, by grounding human value in human nature, remain pertinent today in the face of new challenges to human dignity.

22. See Patrick Lee & Robert P George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173 (2008).

23. John Finnis, *Equality and Differences* 2 *SOLIDARITY* 1, 2 (2012).

24. JOHN RAWLS, *A THEORY OF JUSTICE* 504 (Clarendon Press, 1972).

II. EQUALITY

While Aristotle's account of the inferiority of ethnic minorities or women has now rightly been rejected, the idea that human value depends upon variable characteristics has proven to be stubbornly resilient. Many have argued that only some human beings have full moral worth, precisely because their worth derives from their possession of some characteristic in addition to their humanity. This is usually motivated by compassion for animals and a desire to ground moral duties owed to them not in anything about the kind of being they are but in their capacity to experience enjoyment and suffering. More perniciously, this tactic has been used to base full moral status on traits such as intelligence to deny the full humanity or moral agency of some. Yet, while we are now very unlikely to hear arguments grounded in intelligence, those grounded in the capacity to suffer remain popular among animal welfarists and this may indirectly be a proxy for intelligence-based worth. Drawing on the utilitarian tradition, Singer argues that the capacity for suffering or enjoyment is both necessary and sufficient for a being to have interests which ground moral duties.²⁵ But here 'capacity' does not mean the radical capacities that natural lawyers associate with the kind of being one is. Rather, Singer is concerned with the experience of suffering or enjoyment itself. As such, individuals, be they human or animal, are simply vessels for what is truly of value: enjoyment, pleasure, utility, etc. The vessel itself can be interchanged with no impact upon moral obligation: so long as the suffering or enjoyment remains the same, so too do the moral duties or entitlements. As such, "it would logically follow that if a human child had a toothache and a juvenile rat had a slightly more severe toothache, then we would be morally required to devote our resources to

25. PETER SINGER, *ANIMAL LIBERATION* 7 (2nd edn, The New York Review of Books 1990).

alleviating the rat's toothache rather than the human's."²⁶ It is for this reason that Singer concluded that "All animals are equal."²⁷

But this equality is profoundly misguided and manifestly *denies* equal moral worth. Rather than grounding equality within dignity—one's intrinsic value—this view renders the value of all beings, human or animal, (equally) contingent upon the variable experience of enjoyment or suffering. All animals are equal, on this account, but that is because they are all equally reduced to mere vessels, only valued to the degree to which they can experience enjoyment or suffering. This necessitates a denial of equal moral status in favor of a hierarchy informed by these variable characteristics. Yes, on Singer's view animals now feature within this hierarchy such that there has been an expansion of the circle of moral value: the boundary between human and animal which grounds the distinctiveness of human dignity has been dissolved such that there is no moral difference in kind between humans and animals. But all this does is permit some animals to rank above some humans in the ordering of value such that the suffering of a dolphin might take precedence over the life of a disabled human child. It does not flatten the moral landscape such that all humans and all animals are of equal value. Nor will they be given equal consideration. Those who can suffer more are of more value and those who cannot suffer at all may be of no value whatsoever, viewed not as persons but as resource-hogs; a drain on a system that can be, and on some views should be, killed to free up resources for those who matter more.²⁸ Lee and George capture this concern when they note that:

this difference between degrees of capacity for suffering and enjoyment, will also apply to individuals within each species. And so, on this view, while a human will normally have a greater

26. Lee & George, *supra* note 22, at 177.

27. Peter Singer, *All Animals Are Equal*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS (Tom Regan & Peter Singer eds., Oxford University Press 1989).

28. PETER SINGER, PRACTICAL ETHICS 181–191 (2d ed., Cambridge University Press 1993).

capacity for suffering and enjoyment than other animals, and so will have a higher moral status (indirectly), so too, more intelligent and sophisticated human individuals will have a greater capacity for suffering and enjoyment than less intelligent and less sophisticated human individuals, and so the former will have a higher moral status than the latter.²⁹

The only way to avoid this hierarchy is to base moral worth on features or characteristics which do not vary between individuals of the same kind. Here, it is important to stress that the distinctiveness of human dignity does not entail the non-existence of dolphin dignity, nor does it mean that animals are of no value or that their suffering does not carry moral weight.³⁰ Rather, dignity provides the foundation of genuinely fundamental human rights which cannot be aggregated over within some utilitarian calculus because these rights are not based on or grounded in a variable characteristic. All humans have dignity and we all have the same dignity because human dignity signifies the moral worth of humans *qua* humans—the intrinsic value that we all possess. The alternative is to value persons only in so far as they are vehicles for something else which is regarded to be of real or genuine value. But then, “it would follow that the basic moral rule would be simply to maximise those variable attributes.”³¹

It is here where the conception of equal dignity embraced by the classical tradition runs headlong into conflict with spurious notions of the “greater” good. A constitutionalism premised upon a view of persons as mere vessels for interests can very quickly collapse into a form of aggregative consequentialism, assigning no particular value to individuals themselves and instead seeking only the maximization of overall happiness or utility.³² The result is a

29. Lee & George, *supra* note 22, at 178. See also DAVID S. ODERBERG, APPLIED ETHICS: A NON-CONSEQUENTIALIST APPROACH 101 (Oxford University Press).

30. See R. Debes, *Dignity's Gauntlet*, 23 PHIL. REFLECTIONS 45, 61 (2009).

31. Lee & George, *supra* note 22, at 181.

32. John Stuart Mill, *Utilitarianism*, in 10 THE COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON ETHICS, RELIGION AND SOCIETY (John M Robson ed., University of Toronto Press 1969).

conceptual framework which presumes there to be a conflict between the individual and society such that the role of politics is to mediate this tension.³³ But this framework only makes sense if the public interest is either an aggregation of the interests of the majority or an expression of their will. In either case, the public good is presented as something apart from the community as a whole: it constitutes the interests, good, or will of a subset of the community, severed from the nature of the individuals who make up the set. By this I mean that these accounts of the 'greater' good deny the moral separateness of persons.

Many trace the idea of the separateness of persons as a critique to utilitarianism to the work of John Rawls, who argued that:

The most natural way, then, of arriving at utilitarianism ... is to adopt for society as a whole the principle of rational choice for one man ... On this conception of society separate individuals are thought of as so many different lines along which rights and duties are to be assigned and scarce means of satisfaction allocated ... so as to give the greatest fulfillment of wants ... This view of social co-operation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. Utilitarianism does not take seriously the distinction between persons.³⁴

Rawls was not alone in his use of moral separateness as an argument against aggregative consequentialist theories such as utilitarianism. Thomas Nagel claimed that consequentialist ethics "treats the desires, needs, satisfactions, and dissatisfactions of distinct persons as if they were the desires, etc., of a mass person."³⁵ Even Robert Nozick, eternal foil to Rawls, agreed that the separateness of

33. See J.A.G. Griffith, *The Political Constitution*, [1979] MODERN L. REV. 1 (1979).

34. RAWLS, *supra* note 24, at 26–27.

35. THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 134 (Princeton University Press 1970).

persons places moral restrictions on what one ought to do, particularly the state:

There is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.³⁶

Nozick in particular (unintentionally?) captures the problem of the “greater” good from the perspective of common good constitutionalism: in framing the good of the community in such a way that one can sacrifice the good of some within the community in order to further the good of the whole, the “greater” good undermines the very basis of social cooperation.³⁷ Nozick is wrong to imply that there is no such thing as community, however. We may be separate persons but that alone cannot explain why utilitarianism is wrong.

It should come as no surprise at this point to note that Rawls, Nagel, and Nozick have all presented a new way of framing an insight that the stoics understood millennia ago: the moral worth of individuals depends upon their shared humanity—their dignity. The distinction between persons tells us that we are separate individuals, a locus of value that cannot be aggregated over. But it is the unity of the human race which tells us that we are separate individuals with *equal* moral worth. Recognition of one’s own worth by reference to the kind of being one is, a human person, implies recognition that other persons have the same kind of worth because they are the same kind of being. While we are each thoroughly individual, unique, and particular in that we are separate persons, we do not exist in a social or moral vacuum. To recognize one’s own

36. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32–33 (Basic Books 1974).

37. See VERMEULE, *supra* note 1, at 26.

worth but fail to see the same in others is to experience profound moral failure or worse, psychopathy.

A jurisprudence focused on respect for this understanding of equal dignity cannot permit a consequentialist calculus that treats some members of the community as less than full human persons. Nor could it permit a framing of politics as the mechanism by which we determine who is (on some views literally) sacrificed for the sake of the rest. But this then raises important questions relating to how constitutional order is to be structured. If constitutional theory is not a response to this conflict between the individual and the majority such that politics either permits the individual to be sacrificed or purports to protect the individual from a community they are in fundamental conflict with, then what is it? More precisely, how can we conceive of a public good which is not simply an aggregate of disconnected interests or the mere will of the majority? It is here where the idea of the common good is revelatory.

III. FLOURISHING

It may seem obvious, but it is important to stress that the common good has two constituent parts: common and good. Each of these speak to and rely upon the idea of equal dignity in subtly different ways. The “common” aspect of the common good manifests the comparative, equality-based aspects of the concept, rejecting a hierarchy of moral value or a vision of politics premised upon a tension between the individual and the majority. As Vermeule puts it, “In the classical account, a genuinely *common* good is a good that is unitary (‘one in number’) and capable of being shared without being diminished. Thus it is inherently non-aggregative; it is not the summation of a number of private goods.”³⁸ As such, the common good presupposes the moral equality of persons and conceives of politics as properly ordered towards those goods which can genuinely be shared in common; peace, justice, and abundance; “extrapolate[d] to modern conditions to include various forms of health,

38. *Id.* at 28 (emphasis in original).

safety, and economic security.”³⁹ Each of these goods can be enjoyed by all members of a community without diminishing them. What is more, the full enjoyment of such goods can only be achieved when one shares in their enjoyment with a community of moral equals. Indeed, rather than the interests of the community being in some conceptual tension with the individual, for the classical tradition, “the good of the community is itself the good for individuals.”⁴⁰ A commitment to the common good is therefore to be contrasted with tyranny and factionalism, where state power is either used for private benefit or so weak that it cannot or will not prevent the abuse of the vulnerable at the hands of powerful private actors.⁴¹

The “good” aspect of the common good directs our attention towards not just things that can be shared without being diminished, but things which are *good for* those who participate in or enjoy them. In this, “the common good is, for the constitutional lawyer, the flourishing of a well-ordered political community.”⁴² Goodness here must be objective, even if it is also contingent upon context for much of its concrete articulation and thus open to reasonable disagreement. By this I mean that the good cannot collapse into mere preference or experience, nor can it consist in merely satisfying desires or preferences. Instead, such preferences or desires are rational or reasonable only if they are directed towards what is genuinely good and thus genuinely fulfilling or conducive to flourishing.⁴³ As such, the pleasures or desires of a sadist or pedophile to torture or abuse children are themselves bad, independent of any harm caused should they be acted upon. As Lee and George note, in this context it is simply wrong to say, “it was bad for him

39. *Id.* at 7 (emphasis removed from original).

40. *Id.* at 29. See also Charles de Koninck, *The Primacy of the Common Good against the Personalists: The Principle of the New Order*, in, 2 THE WRITINGS OF CHARLES DE KONINCK (Ralph McInerny ed., Notre Dame Press 2016).

41. VERMEULE, *supra* note 1, at 26–27.

42. *Id.* at 7.

43. Lee & George, *supra* note 22, at 180.

to cause so much pain, but at least he enjoyed it."⁴⁴ There is nothing good about the desires of a pedophile. They are bad as desires and they are bad for the pedophile because they frustrate flourishing. If someone were to act on such desires, they would be debasing themselves, quite apart from the gross harm caused. Equally, the bigoted views or preferences of the racist or sexist are bad in abstraction (because they are wrong) but are also bad *for* the racist/sexist because they inhibit their ability to flourish as members of a community of moral equals.

This is an important point that is necessary for any account of the common good to be distinguished from these ideas of the 'greater' good mentioned above: the flourishing of the individual necessitates their participation within a community of moral equals who are also flourishing such that the community as a whole (not merely the majority) can flourish. The good of an individual cannot be separate from the good of the community: my life is better when my friends' lives are better.⁴⁵ My membership within a civic community grounds the bonds of a civic friendship that connects all members of a polity.⁴⁶ It is in our shared common interest that all members of our community be capable of leading flourishing lives and that they be treated justly.⁴⁷ To diminish the flourishing of others in the name of the common good is to fundamentally misunderstand what makes the common good common. It also fundamentally misunderstands what it means to pursue a good life, of which membership within a flourishing political community of equals is essential.⁴⁸ This flourishing is intimately tied to human dignity. Dignity is the value that we have by virtue of being the thing that we are. It speaks to an intrinsic worth which finds its character in human

44. *Id.* n.6.

45. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 4, 6 (Oxford University Press 1980).

46. See JACQUE MARITIAN, *THE PERSON AND THE COMMON GOOD* ch. 4 (University of Notre Dame Press 1966).

47. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 64, art. 4; II-II, q. 65, art. 1; II-II q. 61, art. 1; I-II, q. 96, art. 4.

48. FINNIS, *supra* note 45, at ch. 6.

nature and that nature is tied intimately to our radical capacity to flourish as persons. Thus, we can describe affronts to dignity as “dehumanization.”⁴⁹ In this sense, we can see (human) dignity manifest in three distinct but unified ways, centered on humanity.

Firstly, an affront to human dignity occurs where a human is treated as less than a person. In being treated in this manner, one is dehumanized because humans are persons. To be treated as less than a person is to be treated as less than human, as a *thing* or a mere means, rather than an end in oneself or a locus of intrinsic value. Thus, being enslaved, murdered, raped, coerced, falsely imprisoned, objectified, or exploited constitute various ways in which one’s dignity can be disrespected. Indeed, this may occur even when one is unduly advantaged as a result of stereotypes about one’s group identity – the association of your ethnicity with musical abilities for example.⁵⁰ In such contexts, one is no longer truly treated as an individual, separate person. Dignity operates here as the ground for fundamental entitlements—rights correlatively entailed to one’s duties under justice.⁵¹ In this context, the role of dignity has come under sustained critique for its apparent vagueness or emptiness.⁵² Some have even argued that we should abandon all talk of dignity within human rights and instead focus on humanity

49. R. A. Duff, *Harms and Wrongs*, 5 BUFFALO CRIM. L. REV. 13 (2002).

50. Benjamin Eidelson, *Treating People as Individuals*, in PHILOSOPHICAL FOUNDATIONS OF INDIRECT DISCRIMINATION (Deborah Hellman & Sophia Moreau eds., Oxford University Press 2013); see also BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* (Oxford University Press 2015).

51. See Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MODERN L. REV. 599 (2023). Note, however, that this claim is not in conflict with Vermeule’s argument that it is the common good which is the ground of rights. Human dignity is not simply a negative concept. It is intimately tied to our collective flourishing within a community of moral equals and so respect for it is an essential component of the common good.

52. Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257 (2006); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008); Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (2008); cf. JACOB WEINRIB, *DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW* (Cambridge University Press 2016).

or moral equality alone.⁵³ This has a certain appeal to it, given that on any sound conception, dignity, humanity, and moral equality are intimately connected such that we all have equal moral worth by virtue of our shared humanity. But this argument also runs the danger of collapsing dignity into rights and obscuring the connection between dignity and the common good.

Secondly, to act with dignity is to actualize one's radical capacity to flourish: it is to manifest and demonstrate one's humanity in the fullest sense of that term. When we speak of someone adopting a dignified attitude or facing adversity with dignity, we are appealing to the same idea that we call upon to describe the value or moral status that one has by virtue of the kind of being one is. To act with compassion and fortitude while dying of cancer, to pray for and forgive one's abuser, and to hold fast to one's duty when fulfilment demands the impossible all manifest a preservation of one's humanity in the face of adversity. Equally, when we associate nobility, heroism, and valor with dignity we take them to symbolize the pinnacles of human achievement, the actualization of the radical capacity to flourish as a person and a community. It is here where we can see associations between dignity and the respect afforded to symbols of history and tradition.⁵⁴ Even in a trivial manner, slipping on a banana peel is undignified because it entails "being reduced for a moment to a passive object."⁵⁵ More seriously, one can feel a loss of dignity when one loses independence or privacy, unable to control one's own life or to exclude others from improper intrusions into it. In these cases and those where someone debases themselves, there is no actual loss of humanity: we always remain the same kind of being. But there is a reduction in one's ability to actualize one's potential: to flourish. Equally, acting with dignity does not translate to an increase in value or humanity merely

53. ANDREA SANGIOVANNI, *HUMANITY WITHOUT DIGNITY: MORAL EQUALITY, RESPECT, AND HUMAN RIGHTS* (Harvard University Press 2017).

54. See WALTER BAGESHOT, *THE ENGLISH CONSTITUTION* (Oxford World Classics ed., Oxford University Press 2001).

55. Lee & George, *supra* note 22, at 174.

because one has been able to actualize human potential in particularly laudatory ways. The single greatest mistake in the theory of dignity is to associate it with high rank (necessarily implying a lower rank or inferior worth).⁵⁶

Thirdly, proper respect for equal dignity demands more than mere forbearances. Fuller captures this idea when he distinguished between the morality of duty and the morality of aspiration. The morality of duty represents bare minimum requirements below which one is not permitted to fall. It is the morality of rights protection; it “lays down the basic rules without which an ordered society is impossible or without which an ordered society directed towards certain specific goals must fail of its mark.”⁵⁷ In contrast, the morality of aspiration is not about rights (or principles of right action); it is about the good: “[i]t is the morality of the Good Life, of excellence, of the fullest realization of human powers.”⁵⁸ It is grounded in the firm realization that a person, or citizen, or official, may fail to live up to their potential and so may be found wanting. Crucially “in such a case he [is] condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing.”⁵⁹ This is not to imply that rights are somehow removed from the good. But they are indirectly informed by conceptions of the good life.⁶⁰ Duty and Aspiration are two sides of the same coin, each essential for equal dignity to be fully respected.

A constitutionalism seeking to fully respect the equal dignity of persons must be directed towards the collective realization of human potential. Foster is entirely correct to stress that “Dignity-enhancement is the process of humanization.”⁶¹ Constitutional actors, if they are to realize the conception of law embraced by the classical tradition, must take the flourishing of individuals and the

56. See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (Oxford University Press 2012).

57. LON FULLER, *THE MORALITY OF LAW* 5–6 (Revised ed., Yale University Press 1969).

58. *Id.* at 5.

59. *Id.*

60. Foran, *supra* note 51.

61. CHARLES FOSTER, *HUMAN DIGNITY IN BIOETHICS AND LAW* 7 (Hart 2011).

community to be constitutive of their own success. As such, “human energies must be directed towards specific kinds of achievement and not merely warned away from harmful acts.”⁶² As such, the rule of law appeals to “a sense of trusteeship and the pride of the craftsman” on the part of the lawgiver.⁶³ In acting in the best interests of the governed, in facilitating their flourishing, legal authority attains and maintains its legitimacy. This cannot be done simply by setting up and maintain a system of individual rights. It demands that the good itself be pursued, that the vulnerable and disadvantaged are not merely protected from the abuse of bad actors but positively provided with the mean needed to actualize their potential. To flourish as a person is to flourish in community. It is not within the scope of this paper to provide a comprehensive account of human flourishing (not least because the answer to that question would depend to a great extent upon the specific context that one finds oneself in) except to argue that the questions “what does dignity require?”, “what constitutes the common good?” and “how can we flourish?” are all, on this framework, broadly the same question and will be afforded broadly the same answer.

62. FULLER, *supra* note 57, at 42.

63. *Id.* at 43.

COMMON GOOD GUN RIGHTS

DARRELL A. H. MILLER*

INTRODUCTION

With *Common Good Constitutionalism*, Professor Adrian Vermeule has done what I didn't think possible in our polarized age. He's written a book that both progressives and conservatives hate. Conservatives detest his take-down of originalism, including an oblique swipe at *District of Columbia v. Heller*¹—the golden child of that interpretive method. Progressives rankle at his contempt for living constitutionalism, and his unmitigated disdain for that movement's triumph, *Obergefell v. Hodges*.² Progressives and conservatives both hate *Common Good Constitutionalism*, which is a testament to a project as uncompromising in its intellectual honesty as this one.

Vermeule's object with *Common Good Constitutionalism* is to invigorate debates in public law that, for many, have become tedious and predictable. His book is unsparing in its hostility to the shibboleths of the left and the right and has invited some pointed rebukes.³

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1. 554 U.S. 570 (2008); see ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 93 (2022) (citing *Heller*, 554 U.S. at 570).

2. 576 U.S. 644 (2015).

3. See, e.g., William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, 136 HARV. L. REV. 861 (2023); Brian Leiter, *Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism,"* 90 U. CHI. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4318904 [https://perma.cc/Y73V-AVDQ];

For all the twitter *Common Good Constitutionalism* has generated, its ingredients—excepting the Thomist twist—are hardly exotic. Burkeans have maintained for decades that institutions have both intrinsic and instrumental value.⁴ It's in there. Crits, and before them, the Legal Realists, wrote volumes insisting that private coercion can be as menacing as public coercion.⁵ That's in there too. Indeed, one can thumb through the major insights of both conservative and liberal legal scholars over the last century, and close to all of them are recognizable in Vermeule's critique of our existing constitutional order. This is not to say that *Common Good Constitutionalism's* combination isn't fresh. It's just to say that, in large part, it's a fusion of different schools that have been talking past each other for the last twenty years, heavily marinated in Catholic legal thought.

But one can appreciate the brio of Vermeule's book, cheer its Mercurian disdain for the left and right, and still be concerned about its substance. Vermeule offers common good constitutionalism as more than a rejoinder to originalism and progressive

Linda C. McClain, *Reasons to Doubt Whether "the Best Way Forward Is To Look Backward": Commentary on Adrian Vermeule, Common Good Constitutionalism*, BALKINIZATION (July 12, 2022), <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [https://perma.cc/3ZNH-CDYV]; William H. Pryor, *Against Living Common Goodism*, <https://fedsoc.org/commentary/publications/against-living-common-goodism> [https://perma.cc/AM3J-EQ48]; Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (April 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/> [https://perma.cc/8BMU-LTY7]. For a defense of common good constitutionalism against charges of authoritarianism, see generally Conor Casey, "Common Good Constitutionalism" and the New Battle of Constitutional Interpretation in the United States, 4 PUB. L. 765 (2021).

4. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 649 (1994) ("[I]nstitutional arrangements reflect the accumulated wisdom of centuries of political decisions.").

5. See Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, L. & CONTEMP. PROBS. 37, 38 (2009) ("Legal Realists pointed out long ago, there is no such thing as a 'free market' without the backstop of state coercion to enforce private promises.").

constitutionalism; it is supposed to supply, in the Dworkinian sense,⁶ the “right” answer to legal questions. Perhaps not in the sense of specifying a precise numerical value for the minimum wage,⁷ but certainly in the sense of articulating the conditions under which a specific interpretation of a minimum wage law can be deemed correct.⁸

Rising to the challenge, I offer a thought experiment to test how common good constitutionalism works as a theory: common good gun rights.⁹ I choose gun rights as an area to apply Vermeule’s approach because Second Amendment theory is still inchoate, its precedent thin, and it’s an area with which I have some familiarity. Imagining a common good constitutionalist’s answers to the welter of unanswered questions in Second Amendment doctrine is a perfect beta test for how well common good constitutionalism can prescribe as much as criticize. I conclude that common good constitutionalism does provide a method for deciding whether a Second Amendment opinion is correct, albeit in a way that does not neatly map onto current ideological arrangements.

The rest of this Article proceeds as follows: Part I outlines four contentions of common good constitutionalism—its critique of the private-public distinction; its understanding of institutions; its conception of rights; and its belief in law’s inherent normativity—and connects them to some familiar theoretical disputes about law. Part II applies these four aspects of common good constitutionalism, in roughly reverse order, to pending issues of Second Amendment

6. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 336 (1997).

7. VERMEULE, *supra* note 1, at 35.

8. *Id.*

9. I take no position whether this is the “right” approach to deciding Second Amendment cases in all applications. I merely explore what such an approach to Second Amendment cases *could* look like. Common good constitutionalism, like any theory of constitutional interpretation, cannot supply its own normative justification. *Cf.* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 38 (2014) (“As careful originalists acknowledge, originalism cannot establish its own validity.”).

doctrine after *New York State Rifle & Pistol Ass'n v. Bruen*.¹⁰ The last part offers some concluding remarks.

I. THE FAMILIAR INGREDIENTS OF COMMON GOOD CONSTITUTIONALISM

The composition of Vermeule's *Common Good Constitutionalism* is new, but it hits notes that have been the stock of public law commentary for a century. I focus on four: skepticism of the public-private distinction; understanding of institutions in their own right, and not solely as preference aggregates; hostility to the "rights as trumps" frame of constitutional law; and the belief that law is ineluctably normative, which requires constitutional actors to confront moral claims about the Constitution.

A. *Skepticism of the Public-Private Distinction*

Vermeule appears skeptical of the jurisprudential foundations of modern state action doctrine and its normative desirability. Consider this passage:

[C]onstitutional theory often takes a libertarian form that becomes obsessed with the risks of abuse of power created by state organs in particular, while overlooking the risks of abuse of power that public authorities prevent through vigorous government. . . . The state, narrowly understood as the official organs of government, is hardly the only source of abuses. Actors empowered directly or indirectly by law—including the property entitlements of corporate law and common law—may abuse their power throughout the society and economy.¹¹

10. 142 S. Ct. 2111 (2022).

11. VERMEULE, *supra* note 1, at 50.

A passage like this could have been written a century ago by legal realists such as Morris Cohen,¹² Robert Hale,¹³ or Louis Jaffe,¹⁴ to name just a few. Indeed, Vermeule acknowledges his intellectual debt to Hale and the Realists in the text.¹⁵

Yet, one need not go back one hundred years to Columbia or Harvard Law School to find such sentiments. Mavens of critical legal studies, including feminist and critical race approaches, have been making similar observations about this distinction since the late twentieth century.¹⁶ In the 1980s, Professor Duncan Kennedy pronounced an inability “to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything.”¹⁷ Professor Frances Olsen in 1993 castigated how “society draws distinctions between public and private [that] perpetuate[] the subordination of women.”¹⁸ And again, more recently, Professor Emily Houh has remarked how “critical race realism seeks to deconstruct explicitly the public/private distinction where that distinction masks and enables conditions of subordination.”¹⁹

12. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 29 (1927) (“There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.”).

13. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–75 (1923).

14. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 220 (1937) (“[T]he great complexes of property and contract . . . the monopolistic associations of capital, labor, and the professions which operate it, exert under the forms and sanctions of law enormous powers of determining the substance of economic and social arrangement . . . irrespective of the will of particular individuals.”).

15. VERMEULE, *supra* note 1, at 14 (citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)).

16. Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 235 (1996) (“Attacks on the public/private distinction have been a common component of critical race, feminist and civic republican literature for many years.”).

17. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982).

18. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 327 (1993).

19. Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 491 (2005); *see*

Vermeule writes that “[i]t is a mistake to focus myopically on direct abuses of power by officials themselves, as opposed to indirect abuses of power made possible by the law.”²⁰ Again, this is a species of the public-private dichotomy, framed as the action-inaction distinction. And again, this kind of observation is very familiar to those in the critical legal studies tradition.²¹ It appears that in some select areas—especially dealing with information platforms and social media—otherwise committed conservatives and professed originalists have made common cause with liberals and progressives for this kind of approach.²²

Vermeule’s common good constitutionalist approach provides a classical legal underpinning as to why the boundaries between the public and private spheres should be more permeable than they’ve developed over the past century of American constitutional law.

B. *Institutions Matter*

Vermeule insists that institutions—in the broadest sense of that term—have value and cannot be reduced to the aggregated preferences of institutional stakeholders. This is another feature that

also Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1098 (1989) (“The [public/private] distinction is no longer viewed as somehow natural or inevitable.”).

20. VERMEULE, *supra* note 1, at 14.

21. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2279 (1990) (“[T]he distinction between action and inaction is far too arbitrary and simplistic to describe the complex web of acts and omissions through which government conducts its business.”); Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890*, 77 FORDHAM L. REV. 1479, 1508 (2009) (describing early arguments that “state inaction had the result of denying inherent political and civil rights on account of race just as profoundly as might acts of state action” as harbingers of critical legal and critical race critiques of this distinction).

22. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (“Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.”). *But see* *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (“We hold that it is substantially likely that social-media companies—even the biggest ones—are ‘private actors’ whose rights the First Amendment protects . . .”).

common good constitutionalism shares with prior critiques of American constitutional jurisprudence.

Consider how Vermeule describes marriage: “Marriage is not (merely) a civil convention, a mere corporate form created by the civil authority to allocate some package of legal benefits. It is a natural and moral and legal reality simultaneously.”²³ Or how he understands federalism: “The values attributed to federalism are, in many cases, really values of subsidiarity and civil society: they are benefits of local or city government, of professional groups and trade associations, and of other civil society corporations. . . .”²⁴ Even the Constitution itself is subject to this institutional lens. The common good constitution in Vermeule’s model is not a meager assemblage of a little over seven thousand words, but “a concrete set of real, extratextual, political institutions, arrangements and ever-changing norms, unwritten in crucial respects.”²⁵

This seems descriptively correct, even if his conclusion about *Obergefell* strikes me as morally blinkered. We don’t usually think of marriage just as a set of arms-length transactions that can be replicated through contractual agreements;²⁶ this is why giving to same sex couples the dignity of the name *marriage* is essential.²⁷ In a similar vein, we don’t typically think of a university or a synagogue as just a nexus of contracts.²⁸ And there are all types of written and

23. VERMEULE, *supra* note 1, at 131.

24. *Id.* at 159.

25. *Id.* at 87.

26. *Lieberman v. Lieberman*, 154 Misc.2d 749, 753 (N.Y. Sup. Ct. 1992) (“Thus New York courts traditionally have recognized that premarital and other marital agreements must be viewed differently from other types of contracts in which the parties are strangers to each other . . . and the rules appropriate to commercial agreements cannot strictly be applied to the marital situation.”).

27. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (“[Marriage] is an institution of transcendent historical, cultural and social significance, whereas the [civil union] most surely is not.”).

28. Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989, 993 (2009) (“If we thought of nonprofits as merely a nexus of contracts and their behavior as instrumental, there would not be so much worry about the tarnishing of the nonprofit halo.”).

unwritten norms, conventions, and customs that glue these and other political and social institutions together and give them a character that goes far beyond just a “sum of [their] parts.”²⁹

Here again, Vermeule marches lock-step with thinkers on both the left and the right, both old and new. Burkeans for decades have extolled the virtues of well-established institutions.³⁰ The entire literature on corporate personhood is constantly reckoning with the sociological reality that corporations are hard to understand only as aggregations of innumerable arms-length transactions.³¹ Dean Heather Gerken has written about “federalism all the way down” — the intermediary and *intermediating* organizations that have value and purpose in their own right.³² And arch-Realist Karl Llewellyn offered similar arguments in his article *The Constitution as an Institution* when he described our Constitution as not only a text but

29. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 968 (2018) (“According to [religious institutionalist thought], religious institutions have intrinsic as well as instrumental value and prove uniquely able to protect individual conscience through their independent and autonomous existence. Their autonomy proves distinguishable from the rights of the individuals who constitute the whole.”).

30. David A. Strauss, *Legitimacy, “Constitutional Patriotism,” and the Common Law Constitution*, 126 HARV. L. REV. F. 50, 54 (2012) (“A central Burkean idea is that institutions and practices that have survived for a long time are likely to embody a latent wisdom, even if those institutions and practices cannot be easily justified in abstract terms.”); Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 590 (2018) (“Burke thought the French Revolution was deeply misguided because it was based on abstract ideals and ignored established traditions and institutions that reflect an embedded wisdom which cannot be reduced to any simple formula.”); Young, *supra* note 4, at 697–98.

31. Carla L. Reyes, *Autonomous Corporate Personhood*, 96 WASH. L. REV. 1453, 1491 (2021) (“Under the real entity theory, the corporation ‘is an independent reality that exists as an objective fact and has a real presence in society.’”); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994) (“Real entity theories . . . all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components.”).

32. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010). While Dean Gerken is concerned primarily with sub-state units of government, others have discussed the institutional importance of other kinds of associations and organizations. See, e.g., Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 237–38 (2003).

also a set of practices, customs, attitudes, and assumptions that are loosely coordinated to the written document.³³

C. *Rights Are Not Trumps*

Another critique common good constitutionalism shares with previous theories is doubt that the “rights as trumps” frame is normatively desirable or descriptively accurate. The rights as trumps terminology entered the constitutional lexicon with Ronald Dworkin a quarter-century ago,³⁴ and has dominated the discourse ever since. The typical approach to constitutional rights within this frame is that of judicial displacement: the metes and bounds of the right occupy the field, and considerations of politics or general welfare are simply irrelevant to the legality of the regulation.³⁵

This framing for constitutional rights has been under sustained criticism for decades, and Vermeule has joined the skeptics. As Vermeule writes: “rights exist to serve, and are delimited by, a conception of justice that is itself ordered to the common good.”³⁶ It’s not that there’s no rights; it’s that rights are not designed to “maximize the autonomy of each person” but are, instead, “component parts of the common good and contributors to it.”³⁷

In this sense, Vermeule sounds very much like his rough contemporary, Professor Richard Pildes, who challenged the rights as trumps framing over two decades ago. As Pildes wrote, rights are not trumps so much as they are means of “construct[ing] . . . a

33. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934).

34. Some doubt whether this frame is, in fact, an accurate reading of Dworkin’s model. See generally Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301 (2000) (casting doubt on the conventional description of Dworkin’s concept of rights as trumps).

35. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1978) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do . . .”).

36. VERMEULE, *supra* note 1, at 24.

37. *Id.*

political culture with a specific kind of character.”³⁸ Rights “realiz[e] certain collective interests; [and] their content is necessarily defined with reference to those interests. . . .”³⁹ In sum, “the justification for many constitutional rights cannot be reduced to the atomistic interest of the right holder alone.”⁴⁰ Rights have a function of “realizing various common goods through the work they do to protect the integrity of distinct common goods, such as democratic self-governance, public education, religion, and other domains.”⁴¹ To which, Vermeule might add, “health, safety, and economic security.”⁴²

In the more recent past, Professors Jamal Greene and Jud Campbell have sounded similar themes, from different perspectives: Greene as a matter of jurisprudence; Campbell as a matter of history.

Greene writes that rights should be subject to proportionality analysis, which “sharpens the government’s ends and means to those that are necessary to vindicate its interests and are respectful of the impact on individuals.”⁴³ Constitutional law, under this view, “does not treat rights as trumps, but neither does it simply subject them to utilitarian balancing. Its aim is to take individual rights, the government’s reasons, and the government’s methods for no more and no less than they are worth.”⁴⁴

Vermeule seems to agree when he says the correct way to think about rights “is *not* that the individual’s rights are ‘overridden’ by collective interests. It is that rights are always already grounded in and justified by what is due to each person and to the community.”⁴⁵ Making them proportional—“adjusting them” in

38. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998).

39. *Id.*

40. *Id.*

41. *Id.*

42. VERMEULE, *supra* note 1, at 7.

43. Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 70 (2018).

44. *Id.*

45. VERMEULE, *supra* note 1, at 127.

Vermeule's terminology—"is to unfold their true nature . . . not to compromise or overpower them."⁴⁶

Jud Campbell, whom Vermeule cites with approval, has come to a similar conclusion, drawing upon the understanding of natural rights at the Founding. Rights were not trumps, in the modern sense of "determinate legal privileges or immunities." Instead, natural rights were a "*mode of reasoning*", the ambition of which was "to create a representative government that best served the public good."⁴⁷ In this way, "Founding-Era natural rights were not really 'rights' at all, in the modern sense. They were the philosophical pillars of republican government."⁴⁸

Common good constitutionalism is the latest entrant in a multi-generational effort by those on the left and the right to recover a more subtle, and accurate, understanding of rights in the American legal tradition, and to rescue our constitutional vocabulary from its incessant lapse into "rights talk."⁴⁹

D. *Law is Normative*

Finally, Vermeule, like Dworkin, like Martin Luther King,⁵⁰ and like natural law theorists before them, is dubious that law can be separated from morality. As Vermeule writes, "[c]ommon good constitutionalism shares the view that the positive provisions of the *ius civile*, including at the constitutional level, can only be interpreted in light of principles of political morality that are themselves part of the law."⁵¹ Vermeule follows Dworkin in this regard, and

46. *Id.*

47. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)).

48. *Id.* at 112.

49. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

50. Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963) ("I would agree with St. Augustine that 'an unjust law is no law at all.'").

51. VERMEULE, *supra* note 1, at 6.

it's this proposition that has generated the most hostility from positivists on both the left and the right.⁵²

However, even this divergence between Vermeule's theory of law's normativity and those of other thinkers may appear wider than it actually is. Consider what Lawrence Lessig wrote many decades ago in response to Justice Robert Jackson's oft-quoted line in *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."⁵³ Nonsense, says Lessig,

[I]t has never been the case that "officials," whether high or petty, have been forbidden from prescribing "what shall be orthodox" in politics, nationalism, and other matters of opinion: Think of the government's view of unsafe sex, or abortion, or family values. . . . Government has always and everywhere advanced the orthodox by rewarding the believers and by segregating or punishing the heretics. The permissible means for advancing such orthodoxy may be limited, and the instances may be few, but the end has always been the place of government.⁵⁴

It's not that positivist accounts of law cannot include normativity—it's that positivists reject the notion that law originates in, or depends on, some objective theory of morality.⁵⁵ Vermeule, Lessig, Raz, and Dworkin do not disagree that law dictates what is orthodox and what is not; the grounds of disagreement are whether there are moral grounds *from within law* to challenge the imposition of any dictate as unlawful. Vermeule's viewpoint is that there are first-

52. See Baude & Sachs, *supra* note 3, at 867; Leiter, *supra* note 3, at 6–8.

53. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

54. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 945–46 (1995).

55. See Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 54 (2011) ("[I]nclusive legal positivism rejects the idea that normative or moral facts cannot contribute to the law's content, but it does not endorse thereby the claim that law and morality are necessarily connected. It holds that they can be connected: that there is nothing in positivism that precludes law and morality being connected.").

order rules—grounded in the classical legal tradition—by which one can decide whether second-order rules count as “law.”

Positivists blanch at this maneuver. Some, the inclusive positivists, try to make peace with it by assuming that moral considerations can become part of the law as a descriptive reality.⁵⁶ Others, the exclusive positivists, reject this proposition entirely.⁵⁷ Fellow natural law theorists, like Dworkin, agree that law must ineluctably include moral propositions; but then disagree with Vermeule about the source of those moral propositions.⁵⁸

Vermeule would have the “ought” in law come from classical and Catholic legal thought; Dworkin would have it come from principles of political morality and fit.⁵⁹ The inclusive positivists would find the source of moral claims in law from sociological facts.⁶⁰ The Austinians reduce the “ought” of the law to nothing more than the command of the sovereign.⁶¹ But none of these approaches would say that law, to be law, can be agnostic as to orthodoxy.

II. COMMON GOOD GUN RIGHTS

Assuming that common good constitutionalism does as well in delivering answers as in raising questions, how might a common

56. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1166 (2015) (“[I]nclusive legal positivists . . . hold that moral facts might play a part in determining the content of the law, but only if the relevant social practices assign them that role.” (emphasis deleted)).

57. *Id.* (“According to exclusive legal positivists, the content of the law is determined solely by social facts.”).

58. Lloyd L. Weinreb, *Law’s Quest for Objectivity*, 55 CATH. U. L. REV. 711, 728 – 29 (2006) (“Natural law affirms that the natural order is a moral order, that the normative imperatives of human conduct are not superimposed but are immanent—‘real,’ if you like that word.”); *see also id.* (identifying Ronald Dworkin as a natural law theorist).

59. R. Lea Brilmayer & James W. Nickel, *Book Review of Ronald Dworkin’s Taking Rights Seriously*, 77 COLUM. L. REV. 818 (1977).

60. Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1093 (2008) (defining “inclusive positivism” is that approach that “allow[s] moral considerations as grounds of law so long as there is some social fact that warrants this . . .”).

61. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 93 (Campbell ed., 1885) (“It is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil, that duties are sanctioned or enforced.”).

good constitutionalist examine gun rights and regulation post-*Bruen*? This next section lays out the doctrinal landscape post-*Bruen*, the questions *Bruen* left unresolved about text, analogy, and levels of generality, and then articulates a potential common good constitutionalist approach to these issues.

A. *The Second Amendment after Bruen*

Less than six months after Vermeule published *Common Good Constitutionalism*, the Supreme Court of the United States upended over a decade of lower-court precedent on the Second Amendment. In *New York State Rifle & Pistol Ass'n v. Bruen*,⁶² the Supreme Court, in a 6-3 opinion authored by Justice Clarence Thomas, jettisoned the prevailing two-part framework that lower courts had employed to evaluate Second Amendment challenges since the watershed *District of Columbia v. Heller*⁶³ decision, in favor of an approach that focuses intensely on history and tradition.

Heller was the first Supreme Court case to hold that the right to keep and bear arms protected a right to possess arms unrelated to the participation or maintenance of a well-regulated, organized militia. In the wake of *Heller*, lower courts had scrambled to patch together some kind of workable doctrine from *Heller's* often-enigmatic passages. The two-part framework they assembled took the form of a conventional mix of categoricalism and balancing.⁶⁴ A court first asked whether the conduct or regulation even implicated the Second Amendment.⁶⁵ Assuming it did, the court then proceeded to a conventional tiers-of-scrutiny analysis, which often, but not exclusively, took the form of intermediate scrutiny.⁶⁶

Bruen dispensed with this approach. “Despite the popularity of this two-step approach,” Justice Thomas wrote, “it is one step too

62. 142 S. Ct. 2111 (2022).

63. 554 U.S. 570 (2008).

64. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

65. *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017).

66. *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013); *United States v. Marzarella*, 614 F.3d 85, 93–99 (3d Cir. 2010).

many.”⁶⁷ Step one, according to the Court, was “broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.”⁶⁸ But the second step’s reliance on conventional “means-end scrutiny” was unwarranted.⁶⁹

In its place, the Court articulated its own two-step approach: At step one, a court asks if “the Second Amendment’s plain text covers an individual’s conduct,”⁷⁰ if it does, “the Constitution presumptively protects that conduct.”⁷¹ The government is then obliged, at step two, to “not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”⁷² Historical regulations that form part of this tradition need not be a “twin” or “dead ringer”;⁷³ courts are allowed to search for historical analogs, but these analogs must be “representative” and “*relevantly*” similar.⁷⁴

Bruen shattered the lower court settlement on doctrine at a moment when the theory of the right to keep and bear arms was, and has remained, tender. Although the Supreme Court minted an enforceable Second Amendment right just over a decade ago, Second Amendment theory has remained in a state of relative adolescence. Other than a largely unhelpful proposition that the Second Amendment is related in some way to “self-defense,” there has been very little in the way of rigorous and sustained attempts to articulate a

67. *Bruen*, 142 S. Ct. at 2127.

68. *Id.*

69. *Id.*

70. *Id.* at 2126.

71. *Id.*

72. *Id.*

73. *Id.* at 2133.

74. *Id.* at 2132 (emphasis added) (“Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are ‘*relevantly similar*.’” (quoting Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993))).

comprehensive theory of the Second Amendment.⁷⁵ Nothing like the tomes of theorizing about the Equal Protection Clause, or Due Process, or the First Amendment right to free expression exists for the Second Amendment. And certainly, there is nothing at the federal level comparable to the piles of precedential cases adjudicating disputes under these other constitutional provisions. Without a theory of the Second Amendment and its goals, the textual and historical analysis in gun cases tends to careen into unguided casuistry.⁷⁶

Because the Second Amendment's theoretical development is slender and its binding precedent thin, it provides a fairly clear field to test whether common good constitutionalism can work as a method of constitutional jurisprudence.

B. Post-Bruen Puzzles and the Common Good Approach

One of the most urgent and perplexing problems *Bruen* loosed upon lower courts is also one of the most familiar: at what level of generality are we to understand the right to keep and bear arms?⁷⁷ Choosing the "right" level of generality has been a recurrent problem of jurisprudence, for which scholars have offered various

75. *But see* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131 (2008); *see also* JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION AND THE FUTURE OF HELLER* (2018).

76. I mean this term in both its senses. *See* Aziz Z. Huq, *What We Ask of Law*, 132 YALE L.J. 487, 516 (2022) (casuistry is "deduction from general principles, and the related application of analogical reasoning."); *see also* OXFORD DICTIONARY OF ENGLISH 272 (3d ed. 2010) (casuistry is "the use of clever, but unsound reasoning").

77. This is a central challenge Vermeule, following Dworkin, says that originalism has no answer to. VERMEULE, *supra* note 1, at 29, 95–96.

solutions.⁷⁸ Almost always, it is presupposed that the choice of a level of generality involves a value judgment.⁷⁹

Vermeule's answer is that the level of generality should be the one that promotes the "flourishing of a well-ordered political community."⁸⁰ Specifically, constitutional decisions should be calibrated to ensure that public authority is capable of providing the "common goods" of the classical legal tradition—"peace, justice and abundance"—which he extrapolates to include "various forms of health, safety and economic security."⁸¹

Common good constitutionalists could use this metric to guide both prongs of the *Bruen* test: interpretation of text and the relevance of historical analogs. In this sense, the text of the Second Amendment must be understood in light of the classical legal tradition of which—Vermeule says—it is a part. The words "people," "keep," "bear," and "arms" in the Second Amendment are not to be understood at the broadest level of linguistic meaning; nor are they to be understood in a narrow, technical sense; they are to be applied at the level of generality that ensures that government is able to provide the common goods of the classical legal tradition. As to the second prong of the *Bruen* test, the evaluation of analogs and tradition, the common good approach would consider a historical and modern regulation *relevantly* similar when they both can be understood as designed to promote the common goods that a well-ordered political community in the classical tradition is empowered to provide.

78. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1107 (1990) ("We must justify the choice extratextually, but we may and should then implement it in ways that draw as much guidance as possible from the text itself."); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 380 (1992) ("You must search for a level of generality simultaneously suited to the Constitution and to the judicial role. One that will be neither broad nor narrow all of the time, neither pro- nor con- state power. We must demand not that it conform to the reader's political theory, but that it be law.").

79. Tribe & Dorf, *supra* note 78, at 1087.

80. VERMEULE, *supra* note 1, at 7.

81. *Id.*

Vermeule's presumption about the purpose of constitutional rights and the lawfulness of regulations has significant Second Amendment implications. As explained below, it broadens the scope of what the Second Amendment is "for" beyond just personal self-defense, to something more like safety; it forces us to rethink the gun-rights-as-trumps framing of Second Amendment challenges; it obliges us to be more sensitive to the institutional contexts in which the right to keep and bear arms occurs; and it calls into question the typical public-private distinction both as to gun regulations and gun rights.

1. The Purpose of Gun Rights

Ask what the Second Amendment is "for" and you'll usually get some kind of response that it's "for" self-defense. But this purpose—at this level of generality—is clearly not born out in either the existing doctrine or in logic. As I've mentioned elsewhere, there are numerous people who may have rights to self-defense but no rights to armed self-defense.⁸² Minor children, the incarcerated, the severely mentally ill—while all of these persons have rights to defend themselves, none, it is usually thought, have a right to keep and bear arms for that purpose.

Similarly, the proposition that there are some "sensitive places" into which firearms may not be brought⁸³ belies the notion that the Second Amendment is solely "for" self-defense. If, as Professor Eugene Volokh wrote "[s]elf-defense . . . is something you must engage in where and when the need arises,"⁸⁴ then the need is insensitive to location. One can anticipate the "need" for self-defense arising just as easily at a presidential address, on board a passenger plane, in a judge's courtroom, or in a legislative chamber.

The Second Amendment is and must be "for" something far more nuanced than just self-preservation. It must be about providing

82. BLOCHER & MILLER, *supra* note 75, at 152–54.

83. N.Y. State Rifle & Pistol Ass'n, 142 S.Ct. 2111, 2133 (2022); District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

84. Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 232 (2009).

safety.⁸⁵ And not just safety in the atomized sense of personal physical safety, but safety for society. Moreover, this safety is not limited to safety in the sense of physical safety, but safety in the sense of the “flourishing of a well-ordered political community” capable of supplying the classical common goods of “peace, justice and abundance.”⁸⁶

Hence, rather than focus on whether a particular regulation or practice promotes or inhibits individual self-defense, or whether some undirected aggregation of individuals with the right to bear arms contributes to the physical well-being of the community; 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.

2. Gun Rights as Trumps

Understanding the Second Amendment as designed for something more nuanced than “self-defense” means rethinking the gun-rights-as-trumps framework. Currently, gun rights and regulation are thought of as antonyms—a “zero-sum game” between rights on the one hand and police power on the other.⁸⁷

Common good constitutionalism would have us reevaluate this dynamic. It’s not that regulation “outweighs” gun rights; or that gun rights “trump” regulation. It’s that the very definition of the right to keep and bear arms is to be understood by reference to the classical legal tradition of what is owed to each individual and to the community as a whole.⁸⁸ Such a rethinking, according to

85. For more on this point, see BLOCHER & MILLER, *supra* note 75, at 154–159.

86. VERMEULE, *supra* note 1, at 7; see also Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U.L. REV. 139, 141 (2021) (“Government has a compelling interest in regulating weapons, not only to deter injury, but also to promote the sense of security that enables community and the exercise of all citizens’ liberties, whether or not they are armed.”).

87. Geoffrey Thomas Sigalet, *American Rights Jurisprudence Through Canadian Eyes*, 23 U. PA. J. CONST. L. 125, 135 (2021) (using this terminology).

88. VERMEULE, *supra* note 1, at 127 (“[R]ights are always already grounded in and justified by what is due to each person and to the community.”).

Vermeule, would recover what Jud Campbell argues was the original understanding of natural rights at the Founding, which was the means to provide “good government, not necessarily less government.”⁸⁹

As noted above, rethinking of the rights frame along the lines of the classical legal tradition would implicate both prongs of the *Bruen* test. Justice Thomas in *Bruen* says that the test for whether something implicates the Second Amendment is not just the strict grammatical meaning of the Second Amendment’s text, but its “text, as informed by history.”⁹⁰ That history, a common good constitutionalist might argue, includes the classical legal tradition.

Accordingly, in this common good constitutionalist vein, whenever a judge considers whether a particular activity is preemptively protected by the Second Amendment, the question is not whether the interpretation of the words “people,” “keep,” “bear,” or “arms” contributes to an atomized, individualistic expression of rights; instead, the level of generality of these terms are calibrated to whether they contribute to the natural law tradition of the Founding—the flourishing of the “well-ordered political community” and the provision of the public good of safety.

The same approach applies to the level of generality at which to examine historical regulations. Currently, post-*Bruen* litigants and judges go on quixotic searches for historical analogs to prohibitions of guns in the hands of domestic abusers,⁹¹ or those under felony indictment,⁹² or at summer camps.⁹³ Common good

89. Campbell, *supra* note 47, at 87.

90. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (2022).

91. *United States v. Rahimi*, 59 F.4th 163, 179 (5th Cir. 2023) (striking down federal prohibition on guns in the hands of those under domestic violence restraining orders).

92. *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *10 (W.D. Tex. Sept. 19, 2022) (striking down federal regulation on guns received by those under felony indictment).

93. *Antonyuk v. Hochul*, No. 122 CV 0986 GTSCFH, 2022 WL 5239895, at *17 (N.D.N.Y. Oct. 6, 2022) (“[T]he Court cannot find these historical statutes analogous to a prohibition on [concealed weapons at] ‘summer camps.’”). *But see id.*, 2022 WL 16744700, at *22 n. 35 (N.D.N.Y. Nov. 7, 2022) (stating in dicta that “summer camps” for children are sensitive places).

constitutionalism would reject these efforts as a fool's errand. The level of generality to look for an analog is not something like an eighteenth-century summer camp, but whether the modern and historical regulation is designed to promote safety and abundance in the political community, broadly defined.

3. Institutional Gun Rights

On the common good constitutionalist view, institutions, oriented to the public good, are valuable in themselves. Such a view complicates the often-clumsy "rights versus regulation" posturing of gun rights litigation. Instead, every assertion of a gun right must be understood within the institutional context in which it is asserted. I'm on the record as saying that the Court is going to have to approach Second Amendment questions in a more institution-sensitive frame.⁹⁴ A common good approach is consonant with more solicitude for the institutions that both enable and constrain the right to keep and bear arms.

So, for example, a common good constitutionalist approach would understand that claims of a right to keep and bear arms are often intermixed and can conflict with other deeply rooted institutions with their own essential character that must also be preserved.⁹⁵ This changes, for example, how one may look at prohibitions on firearms in houses of worship. Such regulations are not just about maximizing the personal safety of the worshippers; nor are they simply a manifestation of a general police power. Instead, a common good constitutionalist approach would examine both the right and the regulation by reference to the traditions and customs

94. Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 117 (2016).

95. VERMEULE, *supra* note 1, at 126 ("As economic and social relations become increasingly interdependent, it becomes ever more obvious that no rights are truly 'individual' and that one person's exercise of rights invariably affects others and society generally.").

of places of collective worship as institutions of a specific character in our constitutional culture.⁹⁶

The same kind of analysis could apply when we think of other kinds of institutions, whether they be educational,⁹⁷ political,⁹⁸ or municipal.⁹⁹ A common good constitutionalist approach recognizes these institutions as something more than mere aggregations of individual rights-holders; and it recognizes these institutions' role in facilitating and constraining rights in a way that is more nuanced than the liberty-maximizing framework of classical liberalism.¹⁰⁰ Instead, a common good constitutionalist would recognize that these institutions—cities, churches, schools, clubs—have an independent identity and function that shapes the contours of the right to keep and bear arms and provides a way of guiding the level of generality at which to assess Second Amendment challenges.

4. Gun Rights and the Private-Public Distinction

A common good constitutionalist approach to gun rights implicates private regulation of firearms, but also private use of firearms. Currently, there's no coherent theory of firearms and private law.¹⁰¹ The traditional private-public/action-inaction distinction prevails in Second Amendment law, if not in Second Amendment politics. So, for example, it remains a category error to say that a coffee shop owner's prohibition on firearms raises any Second Amendment

96. Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 467 (2019).

97. *Id.* at 471.

98. *Id.*

99. Dave Fagundes & Darrell A. H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 720 (2021) ("The city, among other things, is a self-defense institution.").

100. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

101. For some scholarship on this issue, see generally Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016); Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 586 (2022); Cody J. Jacobs, *Guns in the Private Square*, 2020 U. ILL. L. REV. 1097, 1102 (2020).

issue.¹⁰² It's a similar mistake to argue that a private party's use of a firearm for self-defense in any way implicates state action.

Common good constitutionalism confounds this traditional demarcation. On the one hand, it would mean that nominally "private" institutions and decisions, left unchecked or unregulated by government, must be evaluated by reference to whether they promote or frustrate the public goods of safety, peace, justice, and abundance. The easiest application of this frame would be to disputes over whether public housing can impose rules against the keeping and bearing of arms.¹⁰³ But the implications of this approach are much broader and could frame the ability of private businesses to ban firearms from their parking lots, corporate choices to divest from the gun industry, and related issues.

By the same token, however, a common good constitutionalist would need to re-think both the practice and the effect of private arms bearing for self-defense. The predominant classical liberal conception of the Second Amendment contemplates a "marketplace of violence" where both the tools and the power to deploy violence are democratized as matter of right.¹⁰⁴ In this vision, there will be bad uses of guns and good uses of guns; but the invisible hand of the market will lead to a desirable equilibrium that benefits everyone.¹⁰⁵ To those that hold this classical liberal view, the answer to the bad uses of guns is more gun rights, not less.¹⁰⁶

102. See *Allstate Ins. Co. v. Barnett*, No. C-10-0077 EMC, 2011 WL 2415383, at *2 (N.D. Cal. June 15, 2011) (no Second Amendment cause of action against private insurance company); Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 53 (2012) ("If private parties wish to ban guns in their homes, on their property, or otherwise in their 'possession,' the Second Amendment provides no recourse for those people who wish to carry guns there.").

103. See *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 529 (D. Del. 2012), *rev'd in part*, 568 F. App'x 128 (3d Cir. 2014).

104. BLOCHER & MILLER, *supra* note 75, at 352.

105. *Id.* at 353.

106. *Id.* at 352. The sentiment is summed up by the National Rifle Association's policy solution to the Sandy Hook massacre: "The only thing that stops a bad guy with a gun, is a good guy with a gun." Eric Lichtblau & Motoko Rich, *N.R.A. Envisions 'a Good Guy*

Common good constitutionalism is skeptical that this unregulated model is consonant with the classical tradition or that it is normatively desirable. The premise of constitutional rights, to the common good constitutionalist, is to calibrate the right through the lens of what is good both for the individual and for the community.

Therefore, regulations designed to mediate the good for the individual and the community—like training and proficiency requirements, or insurance mandates, or guarantees of capacity or virtue in order to carry firearms—would have to be viewed not by reference to whether they impinge upon individual self-defense, but whether they are geared towards making certain the private possession, carriage, and use of deadly weapons contribute to the common good.

CONCLUSION

I've offered a thought experiment about what a common good constitutionalist's approach to the Second Amendment may look like.¹⁰⁷ Neither time nor space permit a full accounting of every discrete Second Amendment issue still unresolved after *Bruen*. Following Vermeule's caution, I do not see common good constitutionalism as providing answers to specifics about how many hours of training for a concealed carry license is constitutional, or how many rounds must be available in a magazine under the Second Amendment, or how much private land must be available for individuals to carry a firearm. Instead, I understand Vermeule's common good constitutionalism as providing what Professor Stephen Sachs has

with a Gun' in Every School (NY Times, Dec 21, 2012), [<http://perma.cc/XXE2-NKWF>] (quoting NRA Executive Vice President LaPierre).

107. Although I've applied elements of the foregoing analysis from sources prior to Vermeule writing his book, see e.g., Miller, *Institutions*, *supra* note 94, I'll reiterate that this essay is not intended to be prescriptive as much as evaluative; it's a way of putting common good constitutionalism through its paces to see if it's a functional theory of constitutional interpretation.

said is on offer with originalism—rules for deciding whether any given result is “right.”¹⁰⁸

I know a little about the Second Amendment and firearms law. And thinking through a common good constitutionalist’s approach to that topic is useful, if only to reveal how it can potentially reshuffle some fairly entrenched ideological positions. How common good constitutionalism could guide decisions on other politically divisive issues like abortion, climate change, religious freedom, or executive power, I leave to others. My deep reservations about common good constitutionalism—given the potential for, and reality of, bad men—I must, for now, keep to myself.

108. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 828 (2022) (originalism provides “rules for judging answers, rather than means of reaching them”).

THE IRISH CONSTITUTION AND COMMON GOOD CONSTITUTIONALISM

CONOR CASEY*

INTRODUCTION

A core part of the intellectual project classical lawyers like Professor Adrian Vermeule are engaged in has involved probing foundational questions about law and political authority: what their purpose and justification are, and what the proper relationship between principles of legal justice and morality stemming from the natural law, and posited law created by human deliberation and choice, should look like. While these questions remain of evergreen importance, if the revival of the classical tradition in the form of common good constitutionalism is to have any vibrancy or longevity, scholars and jurists must also probe how the basic precepts of the tradition are best made concrete under contemporary social, economic, and political conditions.¹ It should go without saying, this does not mean something like taking particular laws and customs from a point in time and applying them uncritically today. Rather, those interested in reviving the classical legal tradition in the domain of public law must engage in the demanding

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1. This fact was recognized by classical jurists during the post-WWII revival of the natural law tradition. Johannes Messner argued that “the chief task” for classical jurists was “the application of the natural law principles to the changing world in the political, social, economic, cultural field.” Johannes Messner, *Postwar Natural Law Revival and Its Outcome* NAT. L.F. 101, 105 (1959) (emphasis omitted).

methodological project of adapting, translating, and specifying the foundational elements of the classical legal ontology, and its justificatory framework, to contemporary circumstances.² Scholars have already begun to precisely undertake this task in the context of concrete questions of public law, or through study of a range of different legal systems.³

My symposium essay adds to this growing body of literature by analyzing the concrete application and elaboration of precepts of the classical tradition within the Irish legal system. I offer an extended case study of the Irish constitutional order's long engagement with the classical legal tradition, by showing how lawyers, jurists, and judges tried to work out and elaborate many of its basic precepts over several decades in the context of a common law constitutional democracy with a codified constitution. With this in-depth case study, which blends doctrinal and theoretical analysis, I hope to provide an intellectual resource featuring the classical legal tradition 'in action' that can yield useful points of reflection for jurists and scholars interested in ongoing debates over common-good constitutionalism.

I proceed in four parts. Part I gives an overview of the drafting history of the 1937 Irish Constitution and the main intellectual inspirations behind its text. It documents how the drafters of the Irish Constitution were influenced by a rich fusion of natural law thinking, Catholic social teaching, American and continental

2. Adrian Vermeule, *The Common Good as Universal Framework*, BALKINIZATION (July 27, 2022), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/3773-2ZRZ>].

3. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103 (2022); Michael Foran, *Rights, Common Good, and the Separation of Powers*, 86 MOD. L. REV. 599 (2023); Stéfane Sérafin et al., *Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order*, 110 SUP. CT. L. REV. 135 (2023); Conor Casey, *'Common-Good Constitutionalism' and the New Battle over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021). See generally Michael Foran, *Equal Dignity and the Common Good*, 46 HARV. J.L. & PUB. POL'Y 1009 (2023).

constitutionalism, and commitment to Westminster-style parliamentary democracy.

Part II offers an eclectic study of several domains of Irish public law doctrine, which showcase the Irish Courts' engagement with a diverse set of classical legal precepts. I begin by outlining the Court's approach to constitutional interpretation, which bears several of its hallmarks. I outline how Irish Courts see posited constitutional text as an important part, but not exhaustive of, the polity's overall legal commitments, which also include background principles of legal justice. In hard cases, Irish Courts approach interpretation by attempting to understand the meaning of posited constitutional text considering the principles of political morality and legal justice underpinning them. This approach is visible across a range of influential cases concerning the duties placed on political authorities to safeguard and vindicate the flourishing of citizens from unjust attack, and in cases providing robust protection to the institution of the Family from state overreach. It is also visible in the fact that Irish public law doctrine works from the premise that the Constitution envisages the common good and true social order as the proper ends of political authority.

Part III examines the pressures being placed on the classical legal tradition as the methodological lodestar of the Irish Courts and legal community. Finally, Part IV offers some points of reflection for ongoing debates over common good constitutionalism. Overall, I hope this contribution will serve as a useful intellectual resource for those interested in both encouraging and critiquing the revival of classical thinking in public law theory.

I. THE DRAFTING HISTORY AND INTELLECTUAL INSPIRATION FOR THE IRISH CONSTITUTION

In 1934, the President of the Executive Council of the Irish Free State, Éamon De Valera, set out to draft and enact an entirely new

constitution to replace the 1922 Free State Constitution.⁴ The 1922 Free State Constitution had been drafted with considerable political constraints imposed on its drafters by the United Kingdom. Now freed from such constraints, De Valera hoped to constitute a new Irish State complete with its own entirely indigenous basic law that would “represent the aspirations of Irish people to a politics which was adequate to their own culture and values.”⁵

The core team behind the drafting of the new Constitution included De Valera himself and a team of elite civil servants.⁶ Between them, the team was well versed in British, American, continental, and Commonwealth constitutional law, a breadth of learning reflected in the diverse range of constitutional sources the drafting team drew upon in their work. Recent archival work has shown that the drafting of the Constitution was influenced by the conventions and practice of the UK and Commonwealth constitutions, the 1789 United States Constitution, 1919 Weimar Germany Constitution, 1921 Polish Constitution, 1933 Portuguese Constitution, and 1934 Austrian Constitution.⁷

Many provisions of the Constitution were also enormously influenced by the comments and submissions of a group of Irish Jesuits led by Edward Cahill, S.J.,⁸ and suggestions offered by the future Archbishop of Dublin, John Charles McQuaid, C.S.Sp.⁹ The authors

4. See Arthur W. Bromage & Mary C. Bromage, *The Irish Constitution: A Discussion of Its Theoretical Aspects*, 2 REV. POL. 145, 145 (1940).

5. V. Bradley Lewis, *Natural Law in Irish Constitutional Jurisprudence*, 2 CATH. SOC. SCI. REV. 171, 172 (1997).

6. Of singular importance were the contributions of John Hearne, the chief legal advisor to the Department of Foreign Affairs.

7. For unrivalled accounts of the drafting of the 1937 Irish Constitution, see DONAL K. COFFEY, *DRAFTING THE IRISH CONSTITUTION, 1935–1937: TRANSNATIONAL INFLUENCES IN INTERWAR EUROPE* (2018); GERARD HOGAN, *THE ORIGINS OF THE IRISH CONSTITUTION, 1928–1941* (2012).

8. Cahill was a noted political theorist in his own right, authoring *THE FRAMEWORK OF A CHRISTIAN STATE: AN INTRODUCTION TO SCIENCE* (1934) shortly before the drafting process began.

9. See Finola Kennedy, *Two Priests, the Family and the Irish Constitution*, 87 *STUD.: IRISH Q. REV.* 353 (1998).

also drew on high-profile papal encyclicals dealing with Catholic socio-economic and political teachings, including *De Rerum Novarum*,¹⁰ *Quadragesimo Anno*,¹¹ *Casti Connubi*,¹² and *Divini Illius Magistri*.¹³ The drafters also liaised and solicited input from figures in the Church of Ireland and Methodist, Jewish,¹⁴ and Presbyterian congregations on the Constitution's draft provisions concerning religion.

The draft Constitution was approved by Dáil Éireann (the lower house of the legislature) in June 1937, approved by the People in a referendum on July 1st, 1937, and came into force on December 29th of the same year.¹⁵ Given the range of diverse actors and sources involved in the drafting process, it is unsurprising that the final text of the 1937 Constitution displayed a "mélange of different, and sometimes conflicting, influences" throughout.¹⁶ However, it is fair to say some intellectual influences eclipsed others.

Outside the provisions concerning the structural elements of the Constitution, which centre on a Westminster-style parliamentary

10. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (May 15, 1891), https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html [https://perma.cc/A7TK-L9EK].

11. Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* (May 15, 1931), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html [https://perma.cc/N4FU-F9ZJ].

12. Pope Pius XI, Encyclical Letter, *Casti Connubii* (Dec. 31, 1930), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html [https://perma.cc/TFA8-8SNE].

13. Pope Pius XI, Encyclical Letter, *Divini Illius Magistri* (Dec. 31, 1929), https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri.html [https://perma.cc/9HW4-GGHL].

14. The Jewish Rabbinate of Ireland wrote a letter to President De Valera congratulating him on production of a "fair and just" document and noted with "satisfaction" the recognition of the Jewish congregations of Ireland. HOGAN, *supra* note 7, at 547.

15. See CONSTITUTION OF IRELAND 1937.

16. Professor Donal Coffey argues it is a mixture of "Commonwealth constitutionalism; popular constitutionalism; the liberal democratic constitutionalism in the immediate aftermath of the First World War; and Catholic corporate thought." COFFEY, *supra* note 7, at 1-4.

system,¹⁷ the dominant intellectual influence of the Irish Constitution undoubtedly stems from the Aristotelian-Thomistic natural law tradition. From start to finish, the influence of this tradition permeates the document and can be discerned in how it understands theoretical questions like the point and purpose of governmental power and the State, the nature and value of personal rights, and the centrality of institutions like marriage, religion, and Family to true social order.¹⁸ The drafters' understanding of natural law was in many instances filtered through Catholic social teaching's interpretation of the same. The provisions on education, property, and the family were deeply influenced by high-profile papal encyclicals like *Rerum Novarum* and *Quadragesimo Anno*.¹⁹

The preamble of the Irish Constitution provides that:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.²⁰

17. ORAN DOYLE, *THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS* 19 (2018).

18. See *CONSTITUTION OF IRELAND 1937* arts. 40.3, 41–44.

19. COFFEY, *supra* note 7, at 187–252.

20. See *CONSTITUTION OF IRELAND 1937* pmbi.

Moving beyond the preamble, which announces the core goals of the State as pursuing the common good and human dignity, the personal rights provisions of the Constitution are also clearly steeped in natural law thinking. These provisions, housed within Articles 40–44 of the Constitution, all share common themes: they emphasize the State’s responsibility to promote and vindicate human flourishing by respecting what is due in justice to individuals, families, and associations like schools, churches, unions, while ensuring all rights are properly ordered to the common good and true social order. These rights provisions also demonstrate deep respect for subsidiarity and the legitimate role of non-state actors in promoting this same end, particularly the Family.

The 1937 Irish Constitution’s precise alignment with Catholic magisterial teaching can be, however, overstated. An earlier draft of the Constitution contained a more forthright alignment of the State to the Catholic Church, but was quickly jettisoned in favor of a “special position” provision.²¹ De Valera’s compromise was no doubt motivated by a prudent desire not to inflame religious tensions in the island or scupper the prospect of eventual Irish reunification with the majority protestant North.²² The Holy See itself famously withheld public comment on the draft Constitution, to the disappointment of De Valera. Cardinal Eugenio Pacelli, the future Pope Pius XII, delivered the formal opinion of Pope Pius XI regarding the draft: “We do not approve nor do We disapprove: We shall remain silent in the matter, but his silence does not signify consent”.²³ While this response disappointed De Valera, it did not prompt any amendments to the draft.

21. Which stated: “The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.” CONSTITUTION OF IRELAND 1937 art. 44.1 (repealed 1973).

22. HOGAN, *supra* note 7, at 214.

23. *Id.*

II. IRISH CONSTITUTIONAL JURISPRUDENCE AND THE CLASSICAL TRADITION

Irish legal practice—reflected in the argumentation and reasoning of lawyers, jurists, and judges—has, for much of the existence of the Irish constitutional order, firmly reflected a distinctive jurisprudential ethos and principled worldview: one steeped in the classical tradition. This was a mindset and worldview that regarded positive law like constitutional text as part of a broader web of law also including principles of legal justice stemming from the natural law; that accepted that these different sources of law should be harmonized wherever possible; that viewed the purpose and point of State power as promoting the common good; that regarded rights as a necessity for “free moral action”²⁴ and human flourishing, but understood they had to be properly ordered to fit within the overall context of the common good; and that put a premium on subsidiary institutions like marriage and the Family. In other words, Irish Courts were committed to a form of common good constitutionalism long before the current American debates began.

Methodologically, this account of Irish legal practice is internal and doctrinal; neither purely normative nor descriptive, but interpretative and deeply embedded in Irish constitutional argumentation and reasoning articulated through many years of doctrine.²⁵ As

24. V. Bradley Lewis, *Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate*, in REASSESSING THE LIBERAL STATE: READING MARITAIN'S MAN AND THE STATE 140–58 (Timothy Fuller & John Hittinger eds., 2001).

25. With this approach, I am obviously taking inspiration from Professor Ronald Dworkin and his account of how legal practice and argumentation proceed in hard cases. In Dworkin's account, lawyers and judges make arguments about what the law is by reference to its point and by offering principled accounts of what the law requires in a given case that fit the prior web of legal materials coherently and in a morally sound way. In other words, it is an account of what the law is that, along these dimensions of fit and soundness, puts it in a compelling moral light. See RONALD DWORKIN, *LAW'S EMPIRE* (1986). However, I adopt this method in a qualified way. I do not follow Dworkin in saying that legal actors like judges *impose* meaning on legal practice when engaged in interpretation. Rather, following Professor Rodriguez-Blanco I think it is

such, I try to give a persuasive account of the great thrust of the law's internal trajectory in several key domains of public law doctrine; and argue that the principled underpinning of a great run of Irish public law jurisprudence is best understood and justified as setting the law in identifiably classically infused directions.

The classical tradition is emphatic that legal interpretation will be heavily distinct from all-things-considered-moral-reasoning and from deciding legal questions by reference to the "flow of general ("extra-legal") straightforward practical reasoning"²⁶ about what should be done. Professor John Finnis says a system of positive law should be understood, legally, "as internally complete" and "thus as sealed off (so to speak) from the unrestricted flow of practical reasoning about what is just and for the common good."²⁷ The main task of the judge, in the classical natural law tradition, is discerning the reasoned intention of the legitimate authority, by reflecting on the relationship between the legal scheme it adopted and the good it wished to achieve. However, scholars like Professor Finnis also note that "[t]his drive to insulate legal from moral reasoning can never. . . be complete."²⁸ In cases where provisions are ambiguous or under determinate, officials will invariably approach interpretation by reading legal materials like constitutional text, precedent, and historical practice in light of moral standards "prevalent in the judge's community but in the last analysis just those standards that

better to say we argue about and discern what the law requires in a given case by understanding how judges' practical reasoning engages with values, goods, and objectives immanent in the legal practice (in the deliberate acts, choices, and reasoned intentions of Constitution makers, legislators, judges, etc.) they are engaging with. As Professor Rodriguez-Blanco puts it, judges do "not engage in a theoretical exercise of imposing 'value,' 'meaning' or 'purpose' on the social practice because the practice itself has a structure that manifests values, meanings and purposes. Consequently, judges need to engage with the activity of deciding what is of value and why we should value it to produce decisions and actions." Veronica Rodriguez-Blanco, *Action in Law's Empire: Judging in the Deliberative Mode* 29 CAN. J.L. & JURIS. 431, 456 (2016).

26. JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 473 (2d ed. 2011).

27. *Id.* at 355.

28. John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 12 (1990).

the judge can accept as in truth morally sound,"²⁹ to reach a judgment that fits the community's existing law in a morally sound way. As I strive to document, Irish public law strongly reflects this classical picture of adjudication.

Irish courts have rejected the contention that there is one uniquely legitimate method for discerning constitutional meaning and discerning the reasoned choices of the People in promulgating the Constitution.³⁰ To invoke Professors Philip Bobbitt and Richard Fallon, Irish courts instead work with several modalities of interpretive method to discern the reasoned choices of the People in adopting the provisions of the Constitution.³¹ In some cases, where plain textual meaning is clear and unambiguous, such as provisions concerning numbers, places, and persons, Irish Courts will adhere to it.³² Irish Courts will also probe historical context as a helpful tool to discern the reasoned choice of the lawmaker, as expressed through the propositions they enacted into law.³³ Another consistent feature of constitutional interpretation in Ireland is that judges draw on what they take to be the Constitution's background principles of legal morality, to help determine the meaning of posited constitutional text where modalities like plain meaning textualism and historical understanding yield ambiguity, uncertainty, or several reasonable alternatives.³⁴

From the 1960s through the 1990s, judges understood the Constitution to be rooted in the natural law tradition, and its text a specification of its principles. Judicial invocation of natural law precepts

29. John Finnis, *Natural Law Theories*, STAN. ENCYC. PHIL. (June 3, 2020), <https://plato.stanford.edu/entries/natural-law-theories> [https://perma.cc/KG3R-SNBX].

30. The current Chief Justice summarized this attitude well when he wrote extrajudicially that "there is no single or correct approach to the interpretation of the Constitution". Donal O'Donnell, *The Sleep of Reason*, 40 DUBLIN U.L.J. 191, 213 (2017).

31. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 26 (1984); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987).

32. GERARD HOGAN ET AL., *KELLY: THE IRISH CONSTITUTION* 10–14 (5th ed. 2018).

33. *Id.* at 29–44.

34. *Id.*

came in several different formulations over this time. Sometimes it came through reference to preambular principles of prudence, justice, charity, dignity, and respect for the common good and true social order; principles which serve as the objectives and orienting aim of the constitutional order. Other times it came through reference to the Christian and democratic nature of the Constitution and State it established. Finally, in many cases judges simply referred directly to the natural law as an appropriate interpretive aide.

A. *Classical Legal Revival in Ireland*

Perhaps to the disappointment of its drafters, it is fair to say enactment of the 1937 Constitution did not spark a classical legal revival overnight.³⁵ In some ways, the rather limp impact of the Constitution was unsurprising, given that its jurisprudential commitments were initially at odds with the prevailing outlook of the Irish bench and bar, which was ambivalent to the natural law tradition's relevance to legal practice, and steeped in the individualistic and liberal traditions of nineteenth-century English jurisprudence.³⁶ As such, from around 1937 until the early 1960s, many of the Constitution's more classically influenced provisions were simply rarely deployed by lawyers and not commented upon by judges.³⁷

This was to change with remarkable speed in the early 1960s, when a new generation of lawyers and judges well-versed in the natural law tradition, came to prominence. This group included Donal Barrington, Thomas Conolly, Declan Costello, Seamus Henchy, Cearbhall Ó Dálaigh, John Kenny, and Brian Walsh. All of these jurists (the vast majority of whom would proceed to become members of the superior courts) were educated at University

35. Edward McWhinney, *The Courts and the Constitution in Catholic Ireland*, 29 TUL. L. REV. 69, 86 (1954).

36. Thomas Mohr, *Natural Law in Early Twentieth Century Ireland: State (Ryan) v Lennon and its Aftermath*, 42 J. LEGAL HIST. 1, 24 (2021); V.T.H. Delaney, *The Constitution of Ireland: Its Origins and Development*, 12 U. TORONTO L.J. 1, 9–10 (1957).

37. See Gerard Hogan, *Irish Nationalism as a Legal Ideology*, 75 STUD.: IRISH Q. REV. 528, 531–32 (1986).

College Dublin³⁸ against an intellectual backdrop of a revival in natural law thinking in Ireland.³⁹ Many influential jurists of Ireland's classical legal revival were impacted by the instruction of the likes of Professors Daniel Binchy and Patrick McGilligan. The former was a famed scholar of jurisprudence and Roman law and fierce critic of legal positivism.⁴⁰ The latter was an Attorney General and firm proponent of natural law reasoning in constitutional adjudication, which he dubbed the 1937 Constitution's "sheet anchor".⁴¹

1. Natural law principles as interpretive aides

The opening salvo of judicial invocation of natural law precepts to aid legal interpretation came in the landmark case of *Ryan v. Attorney General*.⁴² *Ryan* concerned a challenge to the constitutionality of the Health (Fluoridation of Water) Act 1960, which obliged local government bodies to maintain a designated level of fluoride in public water supplies.⁴³ The statute was intended as a public measure to improve dental health amongst children and teenagers. The plaintiff's argument was that the statute breached Article 40.3 of the Constitution, by subjecting her and her son to a dangerous and unwanted health measure. As outlined above, this constitutional provision commits the State to the vindication and protection of the "personal rights" of citizens from unjust attack and provides that "in particular" the State will protect the life, person, property, and good name of citizens.

38. James Rooney, *Judicial Culture and Social Rights* at 98 (Feb. 2021) (Ph.D. thesis, Trinity College Dublin), <http://www.tara.tcd.ie/handle/2262/95213> [https://perma.cc/J9RK-3SYV].

39. See, e.g., Vincent Grogan, *The Constitution and the Natural Law*, 8 CHRISTUS REX 201, 201–18 (1954); Declan Costello, *The Natural Law and the Irish Constitution*, 45 STUD.: IRISH Q. REV. 403, 403–14 (1956); Seamus Henchy, *Precedent in the Irish Supreme Court*, 25 MOD. L. REV. 544, 549 (1962).

40. See Daniel A. Binchy et al., *The Law and the Universities*, 38 STUD.: IRISH Q. REV. 257, 262 (1949).

41. JOHN MAURICE KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* 40 (1961).

42. [1965] IR 294.

43. *Id.* at 336.

In the High Court, Judge Kenny found that the combination of the phrase “in particular” and the fact two of the rights explicitly posited in Article 40.3—protection of one’s life and good name—did not otherwise appear elsewhere in the Constitution, made it reasonable to infer that the reference to “personal rights” was intended to encompass rights not explicitly enumerated.⁴⁴ This premise raised important additional questions: what did these personal rights encompass? How were they to be discerned? Did they include a right to be free from State action that could imperil one’s health?

Responding to these questions, Judge Kenny said that in discerning the content and scope of the under-determinate phrase “personal rights,” regard should be paid to the underlying ethos of the Constitution’s preamble and its other rights provisions. As Judge Kenny framed it, any rights reasonably implicit within the “personal rights” the State is charged with vindicating must derive from what he referred to as the “Christian and democratic” nature of the Constitution. Judge Kenny cited the right to marry or travel within the State as examples of such personal rights, any arbitrary restriction of which would be flatly contrary to the Constitution’s underlying ethos.⁴⁵ Judge Kenny considered a similarly bedrock right of the citizen to be an individual’s right to bodily integrity—the entitlement not to be exposed to bodily harm or mutilation by the State. Judge Kenny was bolstered in his view that this flowed from the Christian nature of the state—and by implication the natural law—by citing the recently issued papal encyclical *Pacem in Terris*.⁴⁶ This encyclical, which Professor Russell Hittinger describes as an emphatic account of the natural law’s non-negotiable requirements

44. *Id.* at 311–13.

45. *Id.* at 313.

46. *Id.* at 314 (citing Encyclical of Pope John XXIII: On Establishing Universal Peace in Truth, Justice, Charity, and Liberty (Apr. 11, 1963), https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html [<https://perma.cc/8VZ6-U2L8>]).

for legitimate domestic political order,⁴⁷ cites bodily integrity as a “universal” and “inalienable” right states must respect.⁴⁸ Based on the facts before him, Judge Kenny was satisfied that the evidence adduced by the State’s expert witnesses overwhelmingly demonstrated that the impugned measure posed no threat to human health or bodily integrity, but was in fact a benign public health measure for the common good.⁴⁹ Although the plaintiff’s legal challenge failed,⁵⁰ Judge Kenny’s dicta proved to be immensely influential; kickstarting a period of juristic reliance on natural law precepts as interpretive aides.

Natural law precepts also played a significant role in the landmark Supreme Court judgement of *Healy v. Donoghue*.⁵¹ Natural law theorists like Professor R.H. Helmholz have long recognized that an “operative principle of the European *ius commune*” was that “procedure must be consistent with the law of nature.”⁵² In *Healy*—a case about criminal procedure⁵³—the Court relied heavily on the natural law precept that no one should be subject to punishment without a fair hearing consistent with natural justice. The plaintiffs in *Healy* were two minors who had been tried and convicted before the District Court. Both had minimal formal education and were tried and convicted without the benefit of access to legal counsel. Legislation provided for a scheme of legal aid for defendants of limited means. While the plaintiffs were eligible to access this scheme, the 1962 Act did not explicitly require a defendant be made aware of their entitlement to legal aid by the presiding judge. In this case, the defendants were not informed by the judge of their entitlement

47. Russell Hittinger, *Introduction to Modern Catholicism*, in THE TEACHINGS OF MODERN ROMAN CATHOLICISM ON LAW, POLITICS, AND HUMAN NATURE 22 (John Witte, Jr. & Frank S. Alexander eds., 2007).

48. Pope John XXIII, *supra* note 46, at 2.

49. *Ryan*, [1965] IR 294, 312-313.

50. *Id.* at 353.

51. [1976] IR 325.

52. R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 46-49 (2015).

53. *See* [1976] IR 325, 345.

to access legal aid until a very late stage in proceedings and could not secure counsel.⁵⁴ The District Court, plainly of the view there was no constitutional impediment in advancing to trial, rejected further requests to postpone proceedings and eventually convicted and sentenced the defendants.

The plaintiffs mounted a constitutional challenge arguing that the Constitution's guarantee of a "trial in due course of law" for a criminal charge encompassed an entitlement to representation by professional counsel and, where necessary, an entitlement to be informed of this.⁵⁵ The State advanced a proto-originalist argument, to the effect that the reasonable citizen at the time of the Constitution's ratification would not have understood the requirement a criminal charge being brought in due course of law to encompass a constitutional entitlement to legal aid for indigent criminal defendants. A well-informed observer at the time of the Constitution's enactment, argued State counsel, would be aware that legal aid was only available for defendants in capital cases. While there was a common law right to *engage* and be represented by counsel, there was no entitlement to have one funded by the State if the defendant could not afford one.

Rejecting the State's submissions, the Supreme Court followed the path set by Justice Kenny in *Ryan* in holding the phrase "due course of law" fell to be considered in light of the Constitution's underlying principles, like the preamble's commitment to "dignity" and "justice."⁵⁶ For the Supreme Court, basic regard for such principles required that any criminal trial that put a person's life or liberty at risk had to be in accordance with natural justice and therefore *substantively* fair, not merely done in compliance with procedures historically viewed as fair.⁵⁷ This meant that the precise requirements of what constitutes a trial in due course of law might develop and unfold to accommodate new circumstances and

54. *Id.* at 352–53.

55. *See id.* at 347.

56. *Id.* at 349.

57. *Id.*

knowledge. The Court effectively affirmed that the core principle determined by the text—that of a fair trial prior to conviction—does not change. Rather, the concrete requirements needed to concretely vindicate it might. Concluding that the right to counsel had constitutional and not merely statutory pedigree, Justice Henchy noted the clear inequality of arms a young, poorly educated, and unrepresented defendant faced in the “alien complexity of courtroom procedures . . . confronted with the might of a prosecution backed by the State.”⁵⁸ In such circumstances, a defendant could be at serious risk of an unfair trial, regardless of whether this would have been apparent to the reasonable observer in 1937.

The Supreme Court went on to hold that criminal court judges had a constitutional duty to exercise their Article 34 judicial power in a manner harmonized with the Constitution’s underlying principles of legal morality like natural justice and fairness. This meant, at a minimum, judges had to conduct proceedings to ensure a defendant was made aware of, and facilitated in availing of their constitutional and statutory right to counsel.⁵⁹ A District Court judge that attempted to proceed to trial and sentencing of a defendant where they had not been informed of their right to these procedural safeguards, would stray beyond their jurisdiction. *Healy* proved to be an enormously influential decision, leading to widespread changes in Irish criminal procedure and defendants’ access to counsel.⁶⁰

In other significant cases, judges swapped indirect references to the natural law—whether under the rubric of the ‘Christian and democratic nature of the state’ or preambular principles—for its direct invocation. Arguably the most famous case in Irish constitutional history, *McGee v. Attorney General*⁶¹ showed Irish Courts at

58. *Id.* at 354.

59. *Id.* at 352.

60. Professor Gerry Whyte highlights how *Healy* led to an enormous five-fold increase in public expenditure on the provision of legal aid. See GERRY WHYTE, SOCIAL INCLUSION AND THE LEGAL SYSTEM: PUBLIC INTEREST LAW IN IRELAND 430 (2015).

61. [1974] IR 284.

their most emphatic in directly relying on natural law principles as interpretive aides to understand constitutional text. *McGee* concerned a challenge to constitutionality of legislation that, while not prohibiting their use, sale, or manufacture within the State, prevented the importation of contraceptives into the State. The challenge was brought by a young married woman who had four children in quick succession. She had suffered cerebral thrombosis in her second pregnancy and had been medically advised not to become pregnant again as her life might be placed in serious danger. Acting upon this medical advice and in agreement with her husband, the plaintiff attempted to import contraceptives into the State for personal use by the couple, but these were promptly seized by customs officials.

The Supreme Court, by a 4-1 majority, found the statutory prohibition unconstitutional.⁶² Justice Walsh began his judgment by noting that while the impugned legislative provisions did not forbid the sale or use of contraceptives, by prohibiting their import its effect was to make them entirely unavailable to married couples like the plaintiffs, unless they were willing to run the risk of criminal investigation and prosecution. Justice Walsh then proceeded to outline how provisions of the Constitution concerning the family, marriage, and property:

emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control.⁶³

62. *Id.* at 320.

63. *Id.* at 310.

In other words, for Justice Walsh the posited text in Article 41, concerning the natural rights of the individual and Family, were *determinations*⁶⁴ making more specific the basic principles of natural law which serve as the “ultimate governor of all the laws of men.”⁶⁵ As such, Justice Walsh made it clear the precepts of the natural law were critically relevant to discerning the meaning and scope of the posited text of Article 41 and the appropriate relationship it anticipates between the individual, Family, and State.⁶⁶

Decisions concerning the sexual relations of spouses and the conception of children were, for Justice Walsh uniquely within the natural and thus constitutional authority of the Family, such that the State required very pressing justification to assert authority to intervene. Decisions that may be securely within the natural authority of spouses to decide—to refrain from sexual relations for instance—would in contrast be an intolerable intrusion by the State if it deigned to assert similar authority.⁶⁷ Justice Walsh similarly found that the decision of spouses in respect of whether to use contraceptive methods for family planning purposes, was peculiarly within the authority of the Family unit.⁶⁸ Respect for the authority of the marital Family ensured it had an entitlement to privacy over these kinds of decisions, an entitlement that operated to restrict the State’s capacity to intrude into this highly intimate domain through coercive tools like investigation, surveillance, interrogation, and criminal prosecution.

That many might regard the importation of contraceptives to use within marriage as immoral, and even contrary to natural law, did

64. The need for determination arises when principles of justice are general and thus do not specifically dictate particular legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently cabined, directed, and guided—but not dictated—by reason. See Casey & Vermeule, *supra* note 3, at 120.

65. *McGee*, [1974] IR 284, 317.

66. *Id.* at 317–20.

67. *Id.* at 311–12.

68. *Id.* at 312.

not necessarily mean that the common good *required* State investigation and possible prosecution of married couples for doing so. Unless criminalizing the private conduct of a marital couple was conducive to *public* order and upholding *public* morality, then it would involve unjust and excessive intrusion into the domain of the marital Family's decision-making to enforce. In sharp contrast, Justice Walsh issued a strong caveat, one that applied to all his remarks, when he noted that State regulation of internal familial decisions for the common good would be entirely justified for purposes like preventing damage to, or the destruction of, unborn human life. For the Court, these latter kinds of decisions implicated entirely different considerations in respect of the common good—concerning protection of the basic demands of justice and, as such, fell outside the legitimate authority of the family to make.⁶⁹

Natural law-anchored argumentation also featured in what is arguably Ireland's second most famous constitutional case—*Norris v. Attorney General*⁷⁰—which concerned a challenge to statutory provisions which criminalized male same-sex conduct (but not female same-sex conduct). At the time of challenge, this law was largely unenforced, but there was also no real legislative momentum for its imminent repeal.

In a 3-2 decision, the Supreme Court voted to uphold the statute. Writing for the majority, Chief Justice O'Higgins anchored the judgment on substantively originalist grounds, based on what the ratifying citizen would understand the effect of the Constitution to be in 1937. The Chief Justice took this understanding to mean it would be "incomprehensible" to suggest that a Constitution so infused with religious and natural law thinking could be invoked to invalidate the impugned statute. The Chief Justice found that:

The preamble to the Constitution proudly asserts the existence of God in the Most Holy Trinity and recites that the people of Ireland humbly acknowledge their obligation to 'our Divine Lord, Jesus

69. *Id.* at 312 – 13.

70. [1984] IR 36.

Christ.’ It cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs. Yet it is suggested that, in the very act of so doing, the people rendered inoperative laws which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful. It would require very clear and express provisions in the Constitution itself to convince me that such took place. When one considers that the conduct in question had been condemned consistently in the name of Christ for almost two thousand years and, at the time of the enactment of the Constitution, was prohibited as criminal by the laws in force in England, Wales, Scotland and Northern Ireland, the suggestion becomes more incomprehensible and difficult of acceptance.⁷¹

In a very highly influential dissent, Justice Henchy found that the provisions violated an essential component of the plaintiff’s right of privacy—one of the “personal rights” protected by Article 40.3.⁷² Like the Courts in *Ryan* and *McGee*, Justice Henchy interpreted the scope of the personal rights protected in Article 40.3 by considering the Constitution’s underlying moral principles from which the posited text sprang and made more concrete, which he found encompassed its “purposive Christian ethos,” commitment to the “common good . . . Prudence, Justice and Charity” and “dignity and freedom of the individual.”⁷³ With these precepts in mind, Justice Henchy said that the Constitution’s personal rights must be interpreted to safeguard a “range of personal freedoms or immunities” necessary to ensure the plaintiff’s “dignity and freedom as an individual” in a social order ordered to the common good and human flourishing.⁷⁴ For Justice Henchy, the “essence” of those range of personal freedoms and rights is that they “inhere in the individual

71. *Id.* at 64.

72. *Id.* at 71–72 (Henchy, J., dissenting).

73. *Id.* at 71.

74. *Id.*

personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.⁷⁵ One of these freedoms was an entitlement to privacy from State interference or coercion in respect of a “secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality.”⁷⁶ Justice Henchy accepted that this area of privacy may well sometimes be used for “purposes not always necessarily moral or commendable” but still merited “recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good.”⁷⁷ While the moral order envisaged by the Constitution gives the Oireachtas (the Irish legislature) the duty and right to legislate for public order and morality, consistent with its Thomistic⁷⁸ underpinnings, the legislature does not have the competence to legislate to prohibit all vices or immoral conduct or compel all acts of virtue.⁷⁹ Sanctions of the criminal law may be attached to “immoral acts only when the common good requires their proscription as crimes.”⁸⁰

In other words, for Justice Henchy it was an important element of the common good that political authorities show respect for the individual’s capacity and possibility to freely develop one’s personality and make autonomous moral decisions about intimate aspects of one’s life, and this necessarily involved affording to people an area of privacy to make these decisions free from direction of the State, provided such decisions do not implicate or degrade public

75. *Id.*

76. *Id.* at 72.

77. *Id.*

78. Aquinas consistently held that there was good reason, linked to the common good, why human law should not seek to promote all virtue, nor suppress all vices prohibited by the natural law. Instead, the coercive force of posited laws exist to restrain the more grievous vices that threaten the maintenance of human society and neighborliness. See Thomas Aquinas, *Treatise on Laws*, in ed R.W. Dyson, *AQUINAS: POLITICAL WRITINGS* 140–41 (Cambridge Univ. Press, 2015).

79. *Norris*, [1984] IR at 78 (Henchy, J., dissenting).

80. *Id.*

order or morality. No doubt such a zone of autonomy could sometimes be used to make bad and immoral decisions in private, but to snuff out this zone of autonomy by deterring all vice by the rough engine of law and prosecution—even if it did not harm the public good or morality—would be an overbroad incursion by the State into a domain necessary for genuine human flourishing. The central issue in the case for Justice Henchy then turned on whether the plaintiff's claim to be entitled to engage in consensual homosexual acts in private must give way to the right and duty of the State to uphold considerations of public order and morality.⁸¹ Justice Henchy said that very many sexual acts could be prohibited by the Oireachtas for many reasons linked to public order and morality, including “the protection of the young, of the weak-willed . . . the maintenance inviolate of the family as the natural primary and fundamental unit of society; the upholding of the institution of marriage; the requirements of public health.”⁸² But on the facts in *Norris*, Justice Henchy found the State failed to present evidence as to why investigating, criminalizing, and prosecuting *private* consensual homosexual conduct between adult males was required to uphold the above kind of considerations, particularly when similar acts were not criminalized for heterosexual or lesbian couples. As the State did not advance evidence why these measures were required to protect public order and morality, they went beyond the requirements of the common good and beyond the constitutional competence of the Oireachtas.⁸³

Following *McGee*, some of the most consequential judicial invocations of natural law principles have concerned cases involving the appropriate relationship between the family and State. *G v. An Bord Uchtala*,⁸⁴ for instance, concerned the proper statutory interpretation of adoption legislation. Irish law provided that the consent of a child's natural mother was required before it could be

81. *Id.* at 72.

82. *Id.* at 79.

83. *Id.* at 78.

84. [1980] IR 32 [hereinafter *An Bord Uchtala*].

placed for adoption, and that any such consent could be withdrawn prior to an adoption order becoming finalized.⁸⁵ Where consent to an adoption order was withdrawn, the applicant seeking the adoption order could apply to the High Court to dispense with the need for consent and to proceed with finalization of the adoption.⁸⁶ The statutory test the Court was to apply in deciding whether to dispense with consent was whether “it is in the best interests of the child so to do.”⁸⁷ *An Bord Uchtala* concerned a young unmarried mother of modest means who initially kept her pregnancy hidden from her family and, upon birth of the child, placed the child for adoption.⁸⁸ Shortly after the child was placed in the custody of prospective adoptive parents, the mother (now with the support of her family) changed her mind and withdrew consent to the adoption and began proceedings seeking return of the child to her custody.⁸⁹ The prospective adoptive parents, in turn, applied to retain custody, with a view to ultimately having the mother’s consent dispensed with and the adoption finalized.⁹⁰

In interpreting the statutory meaning of “best interests of the child,” both the High Court and Supreme Court noted that the phrase had to be understood within the broader context of the underlying principles of the Constitution.⁹¹ Chief Justice O’Higgins stated that while the plaintiff could not avail of Article 41, which refers to the rights of the marital family, the Court proceeded to draw on natural law principles to hold that the “personal rights” guaranteed to all individuals by Article 40.3 encompassed the right and duty to custody and care of one’s biological children.⁹² The Chief Justice added—again drawing on natural law principles—that the child also had a personal right through Article 40.3 to the

85. *Id.* at 42.

86. *Id.* at 43.

87. Pursuant to § 3 of the Adoption Act 1974. *See id.* at 43.

88. *Id.* at 52–53.

89. *Id.* at 53.

90. *Id.* at 32–34.

91. *Id.* at 44–46. Per Finlay P. in the High Court.

92. *Id.*

care and protection of its biological mother.⁹³ Justice Walsh, who delivered the opinion of the Court, referred to these as “natural rights”⁹⁴ that flowed from “the natural law.”⁹⁵ While this natural and constitutional parental right was not absolute, it was an important consideration in assessing where the best interests of the child lay. With this context in mind, the Court found that the phrase “best interests of the child” had to be understood in a manner respectful of the mother’s natural and constitutional rights to care and custody of her child—effectively imposing a statutory presumption.⁹⁶ In this case, application of the test led to the return of the child to the plaintiff, with the majority of the Court accepting it was permissible for the trial judge to presume that the child’s best interests would be met through the care provided by their natural mother.⁹⁷

Cases concerning the autonomy of the family to arrange its own domestic affairs free of State interference have seen Irish Courts strongly rely on natural law principles, deploying them to understand the family unit as a juridical entity and locus of authority responsibility to which the State should defer—when acting within its appropriate domain—save in limited circumstances. In *Northwestern Health Board v. HW*,⁹⁸ for example, the Court refused to grant an injunction sought by state medical officials that would compel the parents of an infant to permit a PKU test to be performed on their child.⁹⁹ This test involved blood being extracted from the heel of the infant by a needle.¹⁰⁰ This test is a screening test designed to identify certain metabolic conditions which, if undiagnosed, can lead to a range of negative physical and mental outcomes; it was

93. *Id.* at 67–68.

94. *Id.* at 67.

95. *Id.* at 68.

96. *Id.* at 33.

97. *Id.* at 93.

98. [2001] 3 IR 622.

99. *Id.* at 623.

100. *Id.* at 671.

standard practice in Irish hospitals at the time.¹⁰¹ The Court heard evidence that the likelihood of any of these conditions being present in an infant was small, but not negligible, and that the damage that could occur from them was serious.¹⁰² The parents' refusal was based on their dislike of the violation of bodily integrity the heel-prick test involved.¹⁰³ The relevant authorities sought an injunction to override the parents' decision to refuse consent to the test.¹⁰⁴

A majority of the Court rejected the application for an injunction.¹⁰⁵ Although the justices in the majority did not endorse the wisdom or prudence of the parents' choice, it noted that the terms of Articles 41 & 42—when understood against the backdrop of their natural law foundations—put a strong premium on the autonomy of the family unit against the State, especially as it pertained to how it organized its internal and domestic affairs, like what medical treatment a child will undergo.¹⁰⁶ Justice Murray accepted as uncontroversial the fact the State had a subsidiary role and duty to intervene to protect children in the interest of the common good. But this duty was reserved for “exceptional” circumstances where the parents had failed in their duty towards their children.¹⁰⁷ The Supreme Court was not convinced that this high threshold for intervention had been met.¹⁰⁸ Justice Murphy explicitly linked this high threshold for intervening in internal familial affairs to the fact that:

Thomistic philosophy—the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh, J.—confers an autonomy on parents which is clearly reflected in th[e] express terms of [Article 42 of] the

101. *Id.* at 670.

102. *Id.* at 670–71.

103. *Id.* at 674–75.

104. *Id.* at 672–73.

105. *Id.* at 623.

106. *Id.* at 739.

107. *Id.*

108. *Id.* at 623.

Constitution which relegate the State to a subordinate and subsidiary role.¹⁰⁹

A contemporary demonstration of the vibrancy of natural law reasoning in the domain of Familial-State relations can be found in *Gorry v. Minister for Justice*.¹¹⁰ *Gorry* concerned the interaction between the state's laws on deportation of migrants and the Constitution's protection of the family.¹¹¹ The plaintiffs were a married family, one of whom was an Irish citizen and the other a non-national who was served with a deportation order.¹¹² The core issue in contention was whether Article 41 — which refers to the “inalienable and imprescriptible” rights of the Family, and which command the State to protect its “constitution and authority”—included a right to cohabit together as a Family in the jurisdiction of their choosing, in this case Ireland.¹¹³ If this was the case, then the Minister for Justice would have to offer exceptional justification for deciding to deport the plaintiff.¹¹⁴

The Supreme Court began by stating that notwithstanding amendments permitting divorce and introducing provision for same-sex marriage, the text of Article 41 and the juridical status of the Family it posits still fell to be understood with reference to principles of the natural law tradition.¹¹⁵ Thus understood, the Family had to be conceived consistent with that tradition as a “moral institution, with which the institution of the State could not readily interfere, at least within the area of authority of the Family.”¹¹⁶ For Justice O'Donnell, areas within the authority of the Family were largely those concerned with “home/life” decisions, including:

109. *Id.* at 732.

110. *Gorry v. Minister for Justice* [2020] IESC 55 [2020].

111. *See id.* ¶¶ 1, 11 – 13, 16–17.

112. *Id.* ¶ 1.

113. *Id.* ¶¶ 13, 15.

114. *Id.* ¶ 26.

115. *Id.* ¶¶ 38–43.

116. *Id.* ¶ 43.

how property will be held within the family . . . how tasks will be allocated between spouses; whether both spouses will work or only one, and if so which, and whether fulltime or part-time; how children will grow up and, in that regard, can make decisions which society more generally may consider foolish about, for example, the length of a child's hair, the time at which they may go to bed, whether they should drink alcohol at home, whether and when they should learn to ride a bicycle, what time to come home at, and even whether a child should avail of standard health screening procedures... and the State is obliged to protect the Family's authority in that regard unless and until the separate rights of the children are jeopardised.¹¹⁷

Justice O'Donnell went on to point out that there was a conceptual point where decisions the family wish to undertake start to move outside the natural authority the Family enjoys as an institution and begin to engage issues that are more properly within the domain of the State, and where the State is not obliged to defer to the Family.¹¹⁸

Justice O'Donnell considered that entry and removal from the political community as a core competence of the State as an institution, and not a matter within the Family's authority.¹¹⁹ As such, it could not be said that a decision to reside and cohabit within the State was one squarely within the authority of the Family to make, such that the State would require very compelling reasons to countermand it. Rather, it was an area that the State had considerable autonomy and authority to organize as it was fit. Nonetheless, Justice O'Donnell went on to conclude that because a decision to deport a member of a Family would have a large impact on that Family and their marriage—perhaps preventing a couple from living together *tout court*—the Minister did still have an obligation to reasonably consider and give weight to the interests and well-being of that Family, alongside other relevant considerations like upholding the integrity

117. *Id.* ¶ 51.

118. *Id.* ¶ 53.

119. *Id.* ¶ 54.

of the immigration system or suppressing crime, when exercising their statutory discretion to remove a non-national.¹²⁰

B. *Contemporary Caselaw: Classical Approach Endures*

As I will discuss more in Part III, since the late 1990s, explicit judicial invocation of natural law terminology has declined. But while *explicit* reference to natural law has become more sparse in recent years, in constitutional adjudication judges still regularly have recourse to the Preamble and principles of substantive legal morality it is taken to reflect.¹²¹ In other words, while explicit reference to natural law might be more rare, Irish legal practice still retains a robustly classical flavor in understanding the relationship between *lex* and *ius*.

This is particularly evident in cases concerning the interpretation of Article 40.3 and the previously underexplored right to the protection of one's person. Judicial engagement with this right was kick-started by Justice Gerard Hogan, one of the foremost constitutional scholars of his generation, who was appointed to the High Court in 2010 and the Supreme Court in 2021.¹²² In *Kinsella v. Governor of Mountjoy Prison*¹²³ and *Connolly v. Governor of Wheatfield Prison*,¹²⁴ two cases concerning the constitutionality of prison conditions and use of solitary confinement, Justice Hogan expanded the scope of Article 40.3's right to protection of the person.¹²⁵ Common to both cases was the interpretive approach taken to the pithy

120. *Id.* ¶¶ 53–54.

121. I am not the first to identify this element of continuity. See Aileen Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice*, 48 IRISH JURIST (N.S.) 71, 99–100 (2012).

122. Mary Carolan, *New Chief Justice Takes Over at an Exciting Time for Supreme Court*, IRISH TIMES (Oct. 18, 2021), <https://www.irishtimes.com/news/crime-and-law/new-chief-justice-takes-over-at-an-exciting-time-for-supreme-court-1.4703067> [<https://perma.cc/VF22-UZEV>].

123. [2011] IEHC 236 [2012] 1 IR 467 (H. Ct.).

124. [2013] IEHC 334 (H. Ct.).

125. See David Kenny, *Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights* 36 DUBLIN UNIVERSITY L.J. 322 (2013).

and under-determinate text of Article 40.3's guarantee to protect "the person" from "unjust attack".¹²⁶ Justice Hogan read the text consistent with the background principles of political morality prominently on display in the preamble, including dedication to the dignity and freedom of the individual.¹²⁷ Trying to harmonize the posited text of Article 40.3 and these preambular principles appear to have led Justice Hogan to understand the right to protection of the person as setting a constitutionally mandated floor of respect for human flourishing which the State could not breach.¹²⁸ For Justice Hogan, this constitutional baseline not only included protection of the person from physical harm or molestation, but an entitlement to have one's psychological integrity respected as well.¹²⁹ Justice Hogan found that respecting the person meant practices like solitary confinement for anything beyond a very short period and for pressing reasons would unconstitutionally breach this floor, as the practice placed prisoners at risk of both serious psychological anguish and psychiatric disturbance.¹³⁰ It certainly ruled *extensive* use of solitary confinement as beyond the constitutional pale as inconsistent with basic human flourishing.¹³¹

This invigoration of the right to protection for the person was eventually matched by the Supreme Court's own efforts. In a series of cases, the Supreme Court—like Justice Hogan—read the under-determinate text of Article 40.3 harmoniously with the Constitution's underlying moral principles, such as those found in the preamble. In *Fleming v. Ireland*, for instance, the Supreme Court invoked the preamble's reference to the dignity of the individual to disarm arguments that the right to life and person protected by Article 40.3, extended to determining the timing of one's life, including ending it via assisted suicide.¹³²

126. CONSTITUTION OF IRELAND 1937 art. 40.

127. *Connolly*, [2013] IEHC 334 ¶ 14.

128. *See id.*

129. *See id.* ¶ 20. *See also Kinsella*, [2011] IEHC 236 ¶ 9.

130. *See Conolly*, [2013] IEHC 334 ¶¶ 20, 22.

131. *See id.*

132. [2013] IESC 19 [2013] 2 IR 417 ¶¶ 111–113.

Chief Justice Denham noted that it might be possible to construct a “libertarian argument” that the State is prima facie not “entitled to interfere with the decisions made by a person in respect of his or her own life up to and including a decision to terminate it” by reading the text at a high level of generality and understanding dignity in an autonomy-centric fashion.¹³³ But Chief Justice Denham went on to emphatically reject this approach.¹³⁴ While Chief Justice Denham did not explicitly invoke natural law principles, she went on to implicitly acknowledge their relevance to the Constitution’s understanding of what dignity means, as she concluded its moral understanding of the concept ensured it was not possible to invoke it to support a libertarian approach to the right to life or person “without imposing upon it a philosophy and values not detectable from it.”¹³⁵ In other words, the Constitution’s understanding of the basis for human dignity was not an autonomy-centric account, but one anchored on the intrinsic value of the human person and life.¹³⁶ This meant the right to person and life could not, consistent with the value placed on the inviolability of human life, be construed in light of this principle to as permitting their intentional destruction.

Simpson v. Governor of Mountjoy Prison concerned a challenge by a prisoner to his detention conditions, particularly his lack of access to very basic hygiene and sanitary facilities, which were caused by overcrowding.¹³⁷ Building on cases like *Kinsella* and *Connolly*, in *Simpson*, the Supreme Court held that when one took Article 40.3’s explicit protection of the person and read it in light of the preamble’s emphasis on the importance of individual dignity, it meant “each individual has an intrinsic worth which is to be respected and protected” by the State and its officials.¹³⁸ The respect owed to a person’s intrinsic worth included the right to be treated with a

133. *Id.* ¶ 113.

134. *Id.*

135. *Id.*

136. *Id.*

137. [2019] IESC 81 [2020] 3 IR 113, ¶ 22.

138. *Id.* ¶ 89.

minimal level of decent treatment when in the care and custody of state authorities.¹³⁹ For the Supreme Court, respect for the person and basic human flourishing clearly ruled out subjection of the plaintiff to humiliations and degradations like being locked in a cell twenty-three hours a day, having inadequate access to hygiene facilities, and having to defecate or urinate without any privacy.¹⁴⁰ The plaintiff was awarded damages for this breach of rights.¹⁴¹

Finally, in *NHV v. Minister for Justice* the Supreme Court considered a challenge to an absolute statutory ban on asylum-seekers entering the labor market.¹⁴² Given the frequency of delays in the asylum process, the statutory ban ensured that in practice many asylum seekers remained unemployed for several years, being maintained by the State through a small weekly stipend and provision of bed & board accommodation.¹⁴³ The plaintiff challenged this as a breach of the right to seek employment protected by Article 40.3.¹⁴⁴ Although this case did not concern the rights claims which attached to protection for the person, it thematically echoed the above cases. The Supreme Court accepted that some rights in the Constitution are reserved exclusively to citizens, particularly those concerning political rights like voting or standing for election.¹⁴⁵ The key question in *NHV* was whether the right to seek employment was similarly reserved to citizens.¹⁴⁶ In finding that the plaintiff, a non-citizen, could also invoke the right to seek work, Justice O'Donnell held that the Constitution fixed the 'essential equality of the human person' as the baseline for political life.¹⁴⁷ This essential equality ensured all persons in the State—not just citizens—were

139. *Id.*

140. *See id.* at ¶ 42.

141. *Id.* ¶ 131.

142. [2017] IESC 82 ¶ 1.

143. *Id.* ¶ 3.

144. *Id.* ¶ 12. This right was first considered by the Irish High Court in the case of *Murtagh Properties v. Cleary*, [1972] IR 330 (H. Ct.).

145. *NHV*, [2017] IESC 82 ¶ 11.

146. *Id.*

147. *Id.* ¶ 15.

entitled to a minimum set of rights and entitlements closely linked to their dignity, intrinsic worth, and basic flourishing.¹⁴⁸ The Supreme Court held that the ability to seek employment was closely connected to these values, providing as it does a critical sense of purpose, self-reliance, and self-worth.¹⁴⁹ In contrast, the Supreme Court noted that the denial of access to employment for long periods of time could cause aimlessness, demoralization and, ultimately, psychological difficulties and, in some instances, psychiatric disturbance destructive to human flourishing. Because of its close connection to basic human flourishing, the ability to seek employment was a constitutional right applicable to all persons, one that could be regulated but not be withheld in *absolute* terms from asylum seekers.¹⁵⁰

The Article 40.3 line of jurisprudence I have outlined has at its heart a unifying constitutional and moral vision: that the text and structure of the Irish Constitution, when read against its background principles of political morality, envisage and demand a specific kind of political order and moral relationship between the State and individual. It specifies that securing the true social order and common good mentioned in the preamble hinges, in large part, on the State protecting each person's intrinsic dignity and worth from the kind of legal and socio-economic degradations and humiliations, injuries and omissions, that seriously impede human flourishing in both its physical and psychological dimensions.

III. DECLINE OF NATURAL LAW REASONING AND THE FUTURE OF IRISH PUBLIC LAW

In his lauded 1992 work *A Short History of Western Legal Theory*,¹⁵¹ the leading Irish scholar of constitutional law and jurisprudence Professor John Maurice Kelly could justly observe with confidence

148. *Id.*

149. *Id.* ¶¶ 16, 20.

150. *Id.* ¶ 21.

151. JOHN MAURICE KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 42 (1992).

that Ireland was the only place in the Western world where natural law thinking was thriving in legal practice.¹⁵² Thirty years on, however, the picture looks quite different, with Irish law seeing a weakening of the grip of the natural law tradition on mainstream legal thinking in law faculties, the bar, and the bench.¹⁵³

Assenting to this description is not to deny that natural law reasoning retains a sizeable level of vibrancy, especially in jurisprudence concerning parental autonomy and the rights of the Family vis-à-vis the State. Moreover, there is no denying that considerations of background principles of legal justice and political morality still regularly factor into constitutional interpretation, which is partly why I maintain that a classical flavor remains in Irish adjudication even as use of explicitly natural law terminology has dwindled. Doctrines giving the State ample authority to pursue the common good and which regard legitimate exercises of public power as purposive and reasoned also clearly bear classical hallmarks. However, *it is to say* that below the surface of Irish public law doctrine lies an increasingly deep uncertainty about its ultimate normative foundations.

By the late 1990s, many Irish jurists had undoubtedly come to accept the argument that the natural law tradition was *inextricably* linked with a very strong form of judicial supremacy. This made many people deeply uncomfortable because they felt it prompted judges to overstep the kind of appropriate institutional role of morality suitable in a constitutional democracy.¹⁵⁴

It is beyond the scope of this essay, and indeed my competence as a public lawyer, to offer fulsome or causal explanations of how, in addition to internal legal reasons related to fears of judicial overreach, external socio-economic factors may have impacted judicial reliance on natural law reasoning. But I think it should be uncontroversial to suggest, in broad terms, that it cannot be a coincidence that judicial skepticism about use of natural law principles began

152. *Id.* at 424–25.

153. HOGAN ET AL., *supra* note 32, at 44–45.

154. Lewis, *supra* note 24, at 142.

to spike roughly around the same time as the ascent of economic and social liberalism in Irish politics and culture became increasingly rapid. It is likely that several interlocking factors played a role in the rapid erosion of the central role played by the natural law tradition in legal and political life, including rapid secularization, the near-total collapse of the Catholic Church's moral authority because of several appalling scandals, Ireland's deep reliance on global—especially American—corporate investment and goodwill, and the State's increasingly deep integration into the European Union's liberal legal order. All of these developments no doubt also fed into judicial discomfort about having recourse to principles of legal justice they, and other elites, understood had strong historical and intellectual links to Catholic juristic and social thought. As of 2023, then, the precise future of the natural law tradition in Irish jurisprudence remains uncertain.

IV. INSIGHT FOR CONTEMPORARY DEBATE

How might this case study add to our current debates about the revival of classical approaches to public law? My position, perhaps unsurprisingly, is that Ireland's experience should offer considerable encouragement to proponents of common good constitutionalism, by offering cogent examples of how precepts of the classical tradition might be adapted and translated across several domains of public law.

I think the Irish example is a robust and normatively justifiable example of how actors in a political regime and legal system might translate and specify the basic principles of the classical tradition, and that it contains useful lessons, rules of thumb, and conceptual heuristics for jurists interested in how to do so in respect of their own regime. But I do not here claim the Irish experience is, for instance, a uniquely compelling example of how to institutionally concretize the operative principles of the classical tradition, such that other regimes should uncritically seek to ape it. Common good constitutionalism is ultimately an intellectual and theoretical

framework of justification for understanding the point and purpose of public law, whose basic precepts require a great deal of discretionary and prudential specification in light of concrete social, political, and economic circumstances and are compatible with a wide range of regime types.

I also hope this case-study will help take the air out of some overheated critiques of the classical tradition, which misfire from the outset by misidentifying it as a form of authoritarian legalism. The Irish example highlights the banal reality that it is perfectly possible to have a legal system dedicated to central elements of common good constitutionalism within an institutional framework with considerable democratic elements, a strong State, prudent checks and balances and division of institutional functions, respect for subsidiarity and autonomy of the Family, and respect for the dignity of individuals and their flourishing.

The Irish example also shows that embrace of common good constitutionalism cannot be equated with a collapse into judicial supremacy, where judges can willy-nilly invoke natural law principles directly to overturn legislative determinations. Recognizing this fact is certainly not to uncritically endorse how Irish judges have worked within the broad framework of the classical tradition, but it is to say that judges have largely invoked principles of *ius* and legal justice *not* to displace positive law, but precisely to understand its meaning—the reasoned choice of the lawmaker—where it is otherwise ambiguous, uncertain, or admits of several alternative readings.

Now for the cautionary element of my case study for proponents of common good constitutionalism: Ireland's experience should render sharper the potential scale of the challenge for those of us aiming for a revival of the classical tradition in legal systems where there is marked skepticism about the natural law. Current judicial skepticism of natural law jurisprudence in Ireland has doubtless walked hand in hand with the more widespread embrace of liberalism as the State's ideological lodestar by political and social elites like academics, lawyers, politicians, and civil servants. There is thus

no avoiding the reality that promoting, reviving, and maintaining a classical legal approach to public law in countries like Ireland and the United States will inevitably be a long-term multi-front engagement. Any sustainable classical revival will require careful study and rigorous articulation of the classical tradition in the scholarly arena—recovering its core concepts and working through their application to contemporary legal questions; its promotion in political and bureaucratic forums as a legitimate and compelling theory for approaching questions of public law; and its diffusion in law schools so that it becomes the default orienting vision and worldview of future jurists. This is to name just a few possible lines of necessary engagement.

While a profound challenge for classical lawyers in constitutional systems where the natural law tradition is in retreat, or endures as a minority insurgent faction, this should not necessarily be cause for despondency. History has frequently shown us—including the Irish legal system’s own remarkable and rapid transformation in the mid-twentieth Century—that natural law theory and the classical legal tradition have an enduring capacity to bury their undertakers time and again and reemerge with renewed vigor.¹⁵⁵

155. HEINRICH ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* 236–37 (1998).

**THE “COMMON GOOD” IN HUNGARIAN JUDICIAL
INTERPRETATION:
FOOTNOTES FOR AMERICAN DEBATES ON COMMON
GOOD CONSTITUTIONALISM**

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Professor Adrian Vermeule of Harvard Law School has recently put forward the theory of Common Good Constitutionalism (CGC), arguing against originalism because it no longer serves its purpose and cannot address challenges in modern Constitutional interpretation or the conservative legal movement. Vermeule also argues that modern challenges of interpretation cannot be answered satisfactorily by the “living constitutionalism” methodology either. He first wrote about CGC in *The Atlantic*,¹ and “[i]t is fair to say the essay did not go unnoticed.”² Professor Vermeule’s book *Common Good Constitutionalism* explains his “original public meaning” of CGC,³ and it was widely debated, cited, and criticized for

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1. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [perma.cc/X2Y7-83VZ].

2. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 106 (2022).

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

the better part of the past year.⁴ Given this momentum, the Harvard Journal of Law and Public Policy and the Harvard Chapter of the Federalist Society organized a CGC Symposium in October 2022, where I had the honor of moderating a panel on the Common Good comprising American, Irish, and Canadian legal scholars.⁵

The academic debate, the book, and the symposium all offer an opportunity to look at the common good in the context of the Fundamental Law of Hungary, as it contains a General and a Specific Interpretation Clause, the latter of which mandates the presumption of the service of the common good—as well as other factors—when interpreting the purpose of laws and the constitution. The relevant constitutional provisions were partially amended in 2018 and Hungarian scholarship disagrees on the extent of changes to the interpretive methodology.

Offering empirical and theoretical underpinning for these debates, two Presidents of the Supreme Court of Hungary (*Kúria, Curia*) have tasked two working groups over the past ten years to look at how the Specific Interpretation Clause of the Fundamental Law (cf. Part I., *infra*) has been applied in judicial practice, including constitutional case law. This second aspect is important as decisions of “ordinary jurisdictions” are subject to constitutional review before the Constitutional Court of Hungary (cf. *infra*) through “constitutional appeals” called complaints.⁶ During my assignment to one

4. See, e.g., William H. Pryor Jr., *Against Living Constitutional Goodism*, 23 FEDERALIST SOC'Y REV. 24 (2022); William Baude & Stephen E. Sachs, *The “Common Good” Manifesto*, 136 HARV. L. REV. 861 (2022) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

5. I want to thank Prof. Lee Strang (University of Toledo College of Law) and Mario Fiandero (Editor-in-Chief of the Harvard Journal of Law and Public Policy) for this opportunity, and the Editorial Team for their valuable comments in the process of review.

6. Constitutional Court Act, § 26-27, No. CLI, Acts of Parliament, 2011 (Hungary), <https://hunconcourt.hu/act-on-the-cc> [perma.cc/G9NL-PYEZ]. The Supreme Court (*Kúria*) in Hungary oversees ordinary jurisdictions as the ultimate appeals forum, without any constitutional authority. It is separate from the constitutional jurisdiction (*Alkotmánybíróság, AB*), but responsible for the uniformity of the application of law and the consistency of judicial practice.

such working group in 2021, I prepared a comparative review of academic literature on judicial interpretation in light of the Specific Interpretation Clause.

In this article, I share insights from my work and add to other works that seem relevant to judicial interpretation in light of the common good, specifically focusing on constitutional case law.

Part I looks at the various approaches to constitutional interpretation clauses in Hungarian constitutional scholarship.⁷ These approaches reflect an intendedly “purposivist” approach, and the academic sources analyzed will describe what role the common good might have in the context of judicial interpretation.⁸

Part II contextualizes the common good by mapping out scholarly definitions of the concept, followed by examples from the post-2012 case law of the Hungarian Constitutional Court (AB).

Part III briefly summarizes why and how, in light of American debates on Common Good Constitutionalism, the Hungarian context for the incorporation of common good argumentation in constitutional interpretation—thereby creating a “common good jurisprudence”—could be characterized as a missed opportunity.

I. INTERPRETING INTERPRETATION—FOR WHAT PURPOSE?

For as long as courts have had the power to interpret constitutions, judicial interpretation and its constitutional scope and extent have been central to global debates. The birth of “constitutional justice” was a feat of interpretation carried out by the Supreme Court of the United States in *Marbury v. Madison*,⁹ which shaped future European regimes. The Hungarian Constitutional Court (*Alkotmánybíróság*, AB) was first established in 1989 and was molded in the Kelsenian (German-Austrian, centralized) tradition after the fall

7. HUNGARY CONST. art. R(3); art. 28 (amended by the Seventh Amendment to the Fundamental Law), 2018. For all references to the currently effective English text, see: <https://njt.hu/jogszabaly/en/2011-4301-02-00> [<https://perma.cc/2EVY-X259>].

8. HUNGARY CONST. art. 28.

9. 5 U.S. 137 (1803).

of communism.¹⁰ The AB received exclusive *erga omnes* interpretive powers through the adoption of the first democratic constitution and a preceding “constitutional convention” (National Roundtable, NEKA)¹¹ before the first freely elected democratic parliament voted on the constitutional text adopted by this “convention.”

After more than twenty years without them, specific provisions on interpretation were introduced with the National Assembly’s 2011 adoption of Hungary’s new constitution, the Fundamental Law.¹²

In my reading, the following preliminaries apply to these provisions:

- (i) The interpretation of the provisions of the constitution is expressly purposivist;
- (ii) Courts shall interpret the law in accordance with the constitution in this approach; and
- (iii) 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.

In exact constitutional terms:

- (A) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal [i.e., preamble] contained therein and the achievements of our historical constitution.¹³

10. Cf. Csaba Erdős & Fanni Tanács-Mandák, *Use of Foreign Law in the Practice of the Hungarian Constitutional Court—With Special Regard to the Period between 2012 and 2016*, in JUDICIAL COSMOPOLITANISM: THE USE OF FOREIGN LAW IN CONTEMPORARY CONSTITUTIONAL SYSTEMS 618 (Giuseppe Franco Ferrari ed., 2019).

11. László Trócsányi & Márton Sulyok, *The Birth and Early Life of the Basic Law of Hungary*, in THE BASIC (FUNDAMENTAL) LAW OF HUNGARY: A COMMENTARY OF THE NEW HUNGARIAN CONSTITUTION 4 (András Zs. Varga, András Patyi, Balázs Schanda, eds., 2nd ed. 2015).

12. As specified hereunder in points (A) and (B) with relevant citations provided there.

13. HUNGARY CONST. art. R(3) (General Interpretation Clause).

(B) Courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law. In the course of ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification [i.e., reasoning] of the [draft legislative] proposal or a proposal for amending the law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and [economical]¹⁴ purposes which are in accordance with common sense and the [common] good.¹⁵

Over time, the Interpretation Clauses have led scholars and practitioners to revisit fundamental questions of judicial interpretation.¹⁶ According to civil procedure scholar Krisztina Szigeti, for instance, the purpose of the Specific Interpretation Clause, particularly its sentence containing the reference to the common good, was to move the judiciary out of its comfort zone.¹⁷ Others, like law professor Péter Sólyom,¹⁸ think that “the contradictions and misunderstandings in the interpretation rule stem from the fact that it is not clear whether it is a fiction or a matter of content.”¹⁹ The analysis laid out herein takes it to be a matter of content and gives special focus to the common good.

14. The English version of the Constitution falls into a linguistic trap and uses economic where it should use economical. There are two words in Hungarian: ‘gazdaságos’ (economical) and ‘gazdasági’ (pertinent to the economy, i.e., economic). In the Constitution, the purpose (cél) in this clause is indicated as ‘gazdaságos’ (i.e., economical or sparing—obviously economic, but also other—resources).

15. HUNGARY CONST. art. 28 (Specific Interpretation Clause)

16. The introduction mentioned those Supreme Court working groups that have been specifically tasked with examining judicial interpretation in this context, but other scholars and practitioners have expressed themselves on this matter in the past two decades.

17. Szigeti Krisztina, *A Bírói Jogértelmezés és a Hetedik Alaptörvénymódosítás*, 4 ELJÁRÁSJOGI SZEMLE 15–16 [Procedure Law Review] (2019).

18. Péter Sólyom JD, PhD, D. habil., is the Head of Department of Constitutional Law at the Faculty of Law and Political Sciences at the University of Debrecen in North-Eastern Hungary.

19. Péter Sólyom, *Alapjogok Nyomában: A Magyar Alkotmánybíróság Esete a Gyűlekezési Szabadsággal*, MTA Law Working Papers 2018/9, 9 (Jan. 10, 2022), http://real.mtak.hu/121510/1/2018_09_Solyom.pdf [https://perma.cc/E7AT-JKSQ].

My conclusion explains why the Specific Interpretation Clause is special when it comes to interpreting Hungary's constitution (the Fundamental Law of Hungary). This "specialness" is relevant, as we will see from the synthesis of the many different arguments below, to the judicial role and to the different attaching "interpretive positions" that judges shall take when interpreting laws and the constitution, and more specifically their purpose in light of the public or common good, common sense, morality, and economical purposes as defined by the Specific Interpretation Clause.

To begin, based on our preexisting theoretical concepts, we can admit that the first sentence of the Specific Interpretation Clause requires teleological interpretation, but it remains to be seen "how the purpose of the legislation can be determined, [and] whether the Fundamental Law can be interpreted in light of objective, subjective or according to both purposes."²⁰

Rita Galántai²¹ points to a tension between the first and third sentences of the Specific Interpretation Clause, namely that it is not clear whether the four values in the third sentence (i) relate to the purpose of the legislation, (ii) are independent interpretative criteria, or (iii) serve as a "check" on the result of interpretation.²² The sitting President of the Supreme Court, law professor András Zs. Varga, sees the third sentence as a "verification rule."²³

At this point, I would like to point out that:

(A) It is debated in relevant literature whether the Specific Interpretation Clause implies an expectation that judges must also interpret the constitution (the Fundamental Law) in every case in which they interpret laws.²⁴

20. Galántai Rita Tünde, *Paradigmaváltások a Hazai Bírói Jogértelmezés Elméletében és Gyakorlatában*, Themis 2020/2, 60 (Jan. 10., 2022).

21. PhD student at ELTE Law School (Budapest) working on a dissertation on the freedom of limits of judicial interpretation.

22. Galántai, *supra* note 20, at 60.

23. Varga Zs. András, *Törvényjavaslatok Indokolása—az Alaptörvény Hetedik Módosításának 8. Cikkéről*, Pázmány Law Working Papers 2018/13 (Jan. 11, 2022, 11:00 PM).

24. Galántai, *supra* note 20, at 63.

(B) It is undisputed that the post-2018 Specific Interpretation Clause explicitly directs the judge into previously uncharted territory regarding the definition of the purpose, particularly through the general obligation to examine preambular provisions, legislative justifications (including explanatory memoranda) when engaging in the interpretation of law.²⁵

Regarding (A), Hungarian constitutional law professor and scholar Johanna Fröhlich²⁶ argues that the distinction between the interpretive standards for the constitution and those for ordinary laws exists only in the constitutional text. This is because the Specific Interpretation Clause expressed the subjective intention of the legislator before the 2018 amendment, and the change that year was merely a refinement of that original intent. “On the other hand, it could be argued that [. . .] the [2018] Seventh Amendment²⁷ has at most changed the interpretation of the ordinary courts [i.e., by clarifying the purpose of the legislation], but not the rules of interpretation of the Fundamental Law.”²⁸

Supreme Court President Varga approaches this argument similarly, stating that the Specific Interpretation Clause was not born “anew” with the Seventh Amendment:

- (i) “It does not define a new interpretative criterion, [but] merely elaborates on an existing one”;²⁹
- (ii) It does not change the existing canon of interpretation, since “the new provision does not override the previous rule that the

25. Cf. HUNGARY CONST. art. 28, *supra* note 15.

26. Assistant Professor at the Law School of Pontificia Universidad Catholica de Chile, a graduate and former colleague of the Law School of Péter Pázmány Catholic University in Budapest, with a PhD in constitutional law. She has an LLM from Notre Dame and has formerly served as an advisor at the Constitutional Court of Hungary.

27. The Seventh Amendment of the Fundamental Law was adopted on June 18, 2018, and entered into force on January 1, 2019. Besides ten other points, this was the amendment to introduce the current text of the Interpretation Clauses under Article 28 of the Fundamental Law, analyzed in detail throughout this paper.

28. Fröhlich Johanna, *Alkotmányértelmezés*, INTERNETES JOGTUDOMÁNYI ENCIKLOPÉDIA, para. 39 (Jan. 11, 2022), <http://ijoten.hu/szocikk/alkotmanyertelmezes> [perma.cc/PHV9-QYEB].

29. Varga, *supra* note 23, at 2.

interpretation must take into account not only the purpose of the legislation but also its conformity with the Fundamental Law.”³⁰

(iii) The Specific Interpretation Clause channels the General Interpretation Clause. In other words, in order to declare conformity with the constitution, the interpretation of the Fundamental Law will always be required,³¹ mindful of the requirements of both Clauses.

Regarding (B), Hungarian academic literature seems largely settled on the issue that purposivist (teleological) interpretation is to be determined from the text of the law to be interpreted and that the preamble of the law plays a decisive role.³² The “constitutional content” can then be determined by taking into account the social purpose of the law as revealed by the preamble, the title of the law, its (regulatory) scope, and the social function inherent in the text.³³ There are, however, contrasting conclusions arguing that, irrespective of the changes of the Seventh Amendment:

(i) it was and remains typical in practice to take into account narratives and commentary laid out in explanatory memoranda, and

(ii) judicial practice also applies a variety of findings in determining legislative intent, such as reference to the explanatory memorandum (justification), examination of the preamble, examination of the difference between the legislative proposal and the adopted legislative text, etc.³⁴

The Specific Interpretation Clause orients the interpreter with regard to the quality of the aim by an ex-post “verification rule”³⁵ with reference to the principles (values) of morality, economy, common sense, and common good. In this view, once all the questions

30. *Id.*

31. *Id.* at 3.

32. See Szigeti, *supra* note 17, at 8.

33. *Id.*

34. *Id.*

35. Varga, *supra* note 23, at 3.

of principle have been clarified, the interpretation must be weighed against the four values.³⁶ However, if we accept this “verification thesis,” then

- (i) the result of the interpretation must always be weighed against the criteria of the interpretation, and
- (ii) the interpretation opens up to metajuristic layers.³⁷

With all this in mind, we should not forget that the Hungarian Constitutional Court (AB) and Supreme Court (*Kúria*) may interpret the constitution in light of different justifications.³⁸ The AB may inquire into what justified the adoption of a piece of challenged legislation, as well as look at how the legislation implicates constitutional provisions. Moreover, the AB may assess whether the constitutional provisions implicated have been applied in harmony with the case law of the Constitutional Court in the course of judicial interpretation by ordinary courts. Ordinary courts (including the *Kúria*) may not engage in such a task beyond the point of examining the possible implications of legislation on constitutional provisions. They then must restrict themselves to applying the *erga omnes* interpretation given by the Constitutional Court when interpreting the law in the *inter partes* case before them.

Péter Sólyom considers the constitutional rules on interpretation a source of unnecessary uncertainty, seeing the Specific Interpretation Clause as a “futility of futilities” that sets in stone many uncertainties that pitted the interpretation of the ordinary courts against each other and the AB’s “interpretive authority” against the interpretation of ordinary courts.³⁹ In the context of fundamental rights, he argues that:

[Ordinary courts and judges h]ave a constitutional duty to interpret legislation in accordance with the Fundamental Law, but the Constitutional Court determines the constitutional limits of the scope of interpretation of a statute. Another important obligation of the courts is to

36. *Id.* at 5.

37. Galántai, *supra* note 20. In her example, through looking at “moral purpose.”

38. *See id.* at 374.

39. Sólyom, *supra* note 19, at 9.

be able to identify the fundamental rights implications of the case before them and to interpret the legislation in the light of the content of the fundamental right concerned. The Constitutional Court is empowered to review whether the courts give effect to the content of the fundamental right.⁴⁰

Arriving at the conclusions of Part I, I now present my reasoning for considering the Specific Interpretation Clause to be special. A judge's interpretative position is that of a "participant," but interpretation also creates an "observer" position that, according to Fröhlich, is not bound by the rules governing the situation, is neutral, and allows the judge to look at the legal problem "from an external perspective from which the facts of the situation observed can be objectively described."⁴¹

As regards the Specific Interpretation Clause, I would also add that, as a "participant," the judge is bound by the concrete, specific legal rules "governing the situation" and is "an active part of the interpretative decision," but—as an "observer"—he must also have an external (i.e., superior) point of view, not only determined (objectively) by the facts of the observed situation, but also by a "hermeneutic layer" above and beyond them. This layer is intrinsically linked to the constitution and its content, being in this sense objective. In addition, the above-mentioned "verification rule"⁴² specifies "teleological constraints" (public/common good, common sense, morality, economical purpose) in interpreting the Fundamental Law or laws.

The Specific Interpretation Clause defines the aim of judicial interpretation as the "reconstruction of the original thought behind the law" achieved through a chain of interpretative decisions and influenced by the complexity of legal language and the principles

40. *Id.* at 6. See generally Sándor Lénárd, *Fundamental Rights Adjudication in the Central European Region*, in *COMPARATIVE CONSTITUTIONALISM IN CENTRAL EUROPE: ANALYSIS ON CERTAIN CENTRAL AND EASTERN EUROPEAN COUNTRIES* 385–400 (Csink Lóránt & Trócsányi László eds., 2022).

41. Fröhlich, *supra* note 28, at 5.

42. See Galántai, *supra* note 20; Varga, *supra* note 23.

of rule of law and separation of powers.⁴³ This reference to the reconstruction of the original thought behind the law brings us to the interpretive method to deconstruct legislative intent. Regarding this, Supreme Court President Varga differentiates between a “textualist” (objective and “preamble-bound”) and an “originalist” (subjective and “justification-bound”) approach.⁴⁴

Finally, it could be argued in the context of this Hungarian “originalist” approach, that the objective, “textualist” concept prevailed until recently, and the novelty (or “specialness”) of the Specific Interpretation Clause is that it renders the “originalist” (subjective teleological) interpretation inescapable—though not exclusive.⁴⁵ If the interpretation intended by the legislator is not in line with the constitution, the AB may still declare the norm or the judgment based thereon unconstitutional.⁴⁶

II. INTERPRETING COMMON GOOD

A. *In Hungarian Legal and Constitutional Scholarship*

In this Part, I first present some approaches from Hungarian legal scholarship to the notion of the common good. The textualist approach to judicial interpretation provides a suitable segue into this. As it was very aptly put by legal theory scholar and professor of law Péter Szigeti,⁴⁷ “the mystery of public interest, public will, public or common good and of general interest has been a topic of discussion for more than 3000 years.”⁴⁸ In this sense, the second part of the preamble of the Fundamental Law⁴⁹ provides a vision of the

43. Sólyom, *supra* note 19, at 7.

44. Varga, *supra* note 23, at 3–4.

45. *Id.*

46. *Id.* at 4.

47. Graduate of ELTE Law School in Budapest, Professor of Legal Theory, CSc. in Political Sciences, DSc., currently the Chair of the Legal Theory Department at the Ferenc Deák Law School of Széchenyi University in Győr in North-Western Hungary.

48. Szigeti Péter, *A Minden Egyes Akaratától az Általános Akaratig Vezető Út*, in *KÖZ/ÉRDEK: ELMÉLETI ÉS GYAKORLATI MEGOLDÁSOK EGY KLASSZIKUS PROBLÉMÁRA* 20 (Lapsánszki András, Smuk Péter, Szigeti Péter eds., Gondolat 2017).

49. HUNGARY CONST. National Avowal.

Hungarian state and its communities that is anchored to natural law through the following narrative declarations:

- (i) “human existence is based on human dignity”⁵⁰
- (ii) “individual freedom can only be complete in cooperation with others”⁵¹
- (iii) “the family and the nation constitute the principal framework of our coexistence, and [...] our fundamental cohesive values are loyalty, faith and love”⁵²
- (iv) “the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty.”⁵³

I can agree that “the foundational idea of the ideal of the common good is that the association and cooperation of humans necessarily creates a unique group of goods, which in turn decisively affects the order of their relationships as well.”⁵⁴ Early notions of the common good are often related to principles of “commutative justice,” bearing on the mutual relationships of the members of the community by harmonizing (ordering) their activities with each other as well as by respecting and representing common and mutual interests.⁵⁵ According to Hungarian scholarship, due to the lapse of time and the appearance of modern capitalist structures and relations, the notion of the common good was replaced in Hungary by the dualistic structure of private vs. public interest.⁵⁶ (I suspect this to be a global trend, but the source cited remains silent on the issue.)

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Péter Takács, *A Közjó: a Közakarat és a Közérdek az Állam Kontextusában*, in *KÖZ/ÉRDEK*, *supra* note 48.

55. Samu Mihály, *Az Igazságosság—Az Alkotmányos Irányítás és a Társadalmi Elit Erkölcsi-jogi Felelőssége*, 9 *POLGÁRI SZEMLE* 184 [Civic Review] (2013); *see also* Casey & Vermeule, *supra* note 2, at 111.

56. Szigeti, *supra* note 48, at 23.

In this approach, the public or common good is a concept that strives to realize and protect the public interest.⁵⁷ Historically and in the context of different legal systems, it may have a rich variety of meanings.⁵⁸ In other words: “any eternal, timeless concept of the common good may only be a thin husk of an abstraction.”⁵⁹

In turn, those who think that the reference to the Holy Crown in the Fundamental Law⁶⁰ represents a recognition of the common good and that the common good necessitates that the state becomes more active in social matters are wrong according to renowned Hungarian state theory expert Prof. Péter Takács.⁶¹ He characterizes the abundant and exuberant references to the common good as the corollaries and consequences of “shallow relativism,” operating based on the assumption that the content of the common good changes with the age, culture, or community of reference and is therefore impossible to define.⁶²

Adrian Vermeule and Irish constitutional law and legal theory scholar Conor Casey⁶³ strike a similar tone reacting to claims that the common good

- (i) “is not simply [...] a placeholder for whatever subjective preferences any particular official might desire to impose”⁶⁴
- (ii) “is an undefined notion [...] both spatially and temporally.”⁶⁵

Considering these views extremely shortsighted, they conclude that the legal field cannot ignore its manifold representations in the

57. *Id.* at 21.

58. *Id.* at 20.

59. *Id.* at 21.

60. HUNGARY CONST. National Avowal; *id.* art. I).

61. Takács, *supra* note 54, at 52.

62. *Id.*

63. University of Surrey; LLB and PhD (Trinity College, Dublin), LLM (Yale Law School). Prof. Casey has also been a panelist on the Common Good Panel at the Symposium on Vermeule’s Common Good Constitutionalism that gave the *à propos* for this article and has been published earlier in JLPP as well, writing with Adrian Vermeule on this very topic.

64. Casey & Vermuele, *supra* note 2, at 109.

65. *Id.*

form of “cognates” such as “common good,” “social justice,” “general welfare,” “public interest,” “public good,” “peace, order, and good government.”⁶⁶ Péter Takács also addresses how and why “public will” (*közakarat*) and “public interest” (*közérdek*)—both terms related to the common good—started being used as substitutes for “public/common good.”⁶⁷ He also argues that the use of “public interest” is the continuation of the “common good” in modern times.⁶⁸ Others hold that all of these concepts are *prima facie* synonymous⁶⁹ and categorize expressions such as “national interest” (*nemzeti érdek*), “state interest” (*államérdek*), and “public interest” (*közérdek*) as the “political relatives” of the “public/common good” (*közjó*).⁷⁰

Péter Takács also reflects upon why common good became an issue. Did people foresee and therefore plan for the common good before their decision to associate and cooperate, or instead did they formulate their views of the common good in the process of their association for cooperation?⁷¹ We can agree with his argument that, once these goods have been created, they will authoritatively influence the most fundamental facets of the life of the community, and thus the notion of the common good is directly tied to the most all-encompassing association of humans, the most supreme community: the state. Thus, the common good is a concept that is highly relevant to states and to the law that is determinative in creating order in these states. In addition, this common good has a width, a depth, and an intensity that is relevant to many questions related to states.⁷² Also in my view, the Specific Interpretation Clause⁷³ is therefore relevant in this sense here as it creates a rule that defines

66. *Id.*

67. Takács, *supra* note 54, at 50.

68. *Id.*

69. Szigeti, *supra* note 48, at 20.

70. Kiss Barnabás, *Az Alapjogok Korlátozása és a Közérdek*, in *KÖZÉRDEK ÉS KÖZIGAZGATÁS* 169 (Szamel Katalin ed., MTA Jogtudományi Intézet 2008).

71. Takács, *supra* note 54, at 51.

72. *Id.*

73. HUNGARY CONST. art. 28.

how state institutions that apply the law should interpret it so as to maintain order in Hungary for the benefit of the community and the individual.

The common good is what justifies cooperation between members of a community (individuals) and is therefore conducive to certain conditions that support this cooperation. Peace may be one such condition, as the peace and order of a community is a common good to be upheld against both internal and external threats and attacks.⁷⁴ This, however, also translates into the safety and security of individual pursuits of “happiness” and individual goals (cf., “individual freedom can only be complete in cooperation with others,” *supra*). In other words, the members of the community share certain values (ideals), which direct their efforts to achieve certain specific goals.

A quote from *Jacobson v. Massachusetts*⁷⁵ seems fitting here:

In the constitution of Massachusetts adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for “the common good,” and that government is instituted “for the common good,” for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of anyone man, family or class of men.⁷⁶

These values or ideals are aggregated under notions of justice, more specifically commutative justice, in the context of the common good, as mentioned above. The role of the state in securing the common good through harmonizing, “ordering” interests is very important, and here we can see that states have an at least two-fold task. It is not the state or state-issued law that creates common good. Rather, the state is a part of the common good, “merely

74. Takács, *supra* note 54, at 53.

75. 197 U.S. 11 (1905).

76. *Id.* at 27.

codifying” and safeguarding it.⁷⁷ It does so by securing for itself the right to use coercion to enforce the constitution and the laws.⁷⁸

On the other hand, the state has a mandate for active action as well, through “creating peace” (i.e., structuring relationships) in economic and financial terms and through the protection of the intellectual, moral, etc. products of community cooperation. These are not created by the state, but are to be sustained by it.⁷⁹ The constitutional protection afforded for the environment⁸⁰ or for sign language⁸¹ could serve as two good examples for such common good(s) in the Fundamental Law.

B. *In Constitutional Case Law*

In this Part, AB decisions contextualizing the common good will be presented based on two key resources:

- (i) The official digital AB case law database⁸²
- (ii) The most recent commentary of the 100 most influential decisions of the AB in the past thirty years (jointly published in 2021 by the AB and the Social Sciences Research Institute of the Hungarian Academy of Sciences).⁸³

A term search was run on “közjó” (Hungarian for public or “common good”) for the text of the Specific Interpretation Clause.⁸⁴ For many historical, cultural, and terminological reasons outlined above, explicit references to it do not appear—contrary to some

77. Takács, *supra* note 54, at 53.

78. As reflected by the Fundamental Law as well. *Cf.* HUNGARY CONST. art. C.

79. Takács, *supra* note 54, at 54.

80. HUNGARY CONST. art. P.

81. HUNGARY CONST. art. H.

82. Available at the AB website: <https://www.hunconcourt.hu> [<https://perma.cc/KG4G-U8ET>]. As many decisions of the AB are only available in Hungarian (or through translated summaries provided for the CODICES database operated by the Council of Europe), the cited texts are my own translations, except as otherwise indicated. As indicated below, a term search has been conducted in the AB database, and it took place January 2023.

83. ALKOTMÁNYBÍRÓSÁGI GYAKORLAT: AZ ALKOTMÁNYBÍRÓSÁG 100 ELVI JELENTŐSÉGŰ HATÁROZATA (Gárdos-Orosz Fruzsina, Zakariás Kinga eds., Társadalomtudományi Kutató, HVG-Orac 2021).

84. HUNGARY CONST. art. 28

initial expectations—as part of substantial and substantive argumentation in many majority decisions other than in the enumeration of the constitutional provisions that pertain to the dispute at hand.⁸⁵ Concurring and dissenting opinions as well as academic analyses of certain key decisions tend to rely on the common good to a greater extent.

Based on the listing of cases below, one may rightfully wonder at first reading about these decisions’ apparent lack of a pattern to follow or any other overarching characteristic or issue that might bind them together. The reason for this has become apparent through the research focused on the explicit and express mentions of the common good (as instructed by the Specific Interpretation Clause) in constitutional case law issued from the AB. It demonstrates that there are not in fact any guiding lines in the past ten years along which any (literal) “common good jurisprudence” could be constructed. The explicit references to the common good in the context of constitutional interpretation

- (i) are sporadic at best, turning up only once or twice every few years;
- (ii) might only appear in scholarly interpretations or analyses of certain decisions in an attempt to shed light on some of the considerations that the AB did not explicitly put to paper;
- (iii) surface in a variety of unconnected subject matters, ranging from freedom of information through consumer protection in the face of loan contracts to the acquisition of agricultural land and the right to property.

In light of this, I list those examples and short contexts⁸⁶ to which the roots of a “common good jurisprudence” might be traced in the future with the aim of pointing out junctures and points of convergence that may to some extent render certain patterns visible.

85. In AB decisions, this section generally follows the operative part and the description of the content of the petitioner’s arguments.

86. In this effort, I will adhere to the logic of the IRAC method as much as practicably possible due to the characteristics of Hungarian constitutional jurisprudence.

One 2013 decision [21/2013 (VII.19) AB⁸⁷] took up the issue of the lack of public availability and accessibility of data used to prepare decisions and addressed it under freedom of information (FOI) claims.⁸⁸ The National Opera House had been subjected by a ministerial commissioner assigned by the Ministry of National Resources to full-scale financial and economic screening regarding future decisions to be made due to a change in management.⁸⁹ Based on FOI legislation effective at the time, the petitioner filed an electronic disclosure request to the Ministry and asked them to provide the report prepared by the ministerial commissioner.⁹⁰ Arguing that the report was being used as data in preparation of decisions, the ministry refused to comply with the disclosure request, stating that no decision had yet been made regarding the Opera House.⁹¹ The petitioner challenged with administrative decision in court, requesting access to such public interest information.⁹² In first and second instances, the trial and appellate courts upheld the conclusions of the ministry, pointing out that the data requested was being used in preparing decisions, and therefore, refusing access to it was lawful.⁹³ The petitioner turned to the AB arguing a violation of the right to access public information.⁹⁴ Among the more relevant findings of the decision, the AB established a constitutional requirement⁹⁵ that in any litigation filed to gain access to public interest information, the trial courts need to examine both the legal grounds for refusing the provision of data and the justification of such

87. See Alkotmánybíróság Határozatai (Decisions of the Constitutional Court: Official Gazette of the Constitutional Court) [AK] Issue 16, 24 July 2013, 810–26.

88. *Id.* at 810–11, [1]–[8].

89. *Id.* at 810, [3].

90. *Id.*

91. *Id.*

92. *Id.*, at 810, [4]

93. *Id.*

94. HUNGARY CONST. art. VI.

95. Constitutional Court Act, § 46(3), No. CLI, Acts of Parliament, 2011 (Hungary).

refusal as to its content, and that refusal of such requests can only occur in the case of absolute necessity.⁹⁶

References to the Specific Interpretation Clause⁹⁷ can only be found in the joined dissenting opinions, but these do not go further than merely mentioning the common good. Commenting on the case, constitutional law expert and information rights advocate Zsuzsa Kerekes remarks that it is quite easy to find compelling arguments based on the sixty years of international and thirty years of domestic FOI practice that the broadest possible assurance of the accessibility of public interest data and the availability and accessibility of effective remedies against its infringement is the solution that corresponds with common sense and the common good.⁹⁸

In another case from this year [3175/2013 (IX.9.) AB⁹⁹], a trial court judge suspended the proceedings before they began and asked the AB (via a judicial initiative¹⁰⁰) to engage in the control of the conformity with the constitution of several provisions of the 1988 Act regulating Traffic on Public Roads¹⁰¹ and petitioned the AB to declare these provisions null and void. In the judge’s view, the challenged statutory provisions conflicted with constitutional provisions¹⁰² protecting the rights of consumers as well as with those protecting the right to remedy as part of fair trial rights.¹⁰³ The provisions of the Act regulated the payment of gradually increasing penalty supplements for illegal parking under specific circumstances and a relevant decision of the *Kúria* on the uniformity of law

96. *Id.* at 810. [1] – [2].

97. HUNGARY CONST. art. 28.

98. Kerekes Zsuzsa, 21/2013 (VII. 19) *AB Határozat—A Döntés-előkészítő Adatok Nyilvánossága in* ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 229–31.

99. AK, Issue 18, 9 October 2013, 995–98.

100. Constitutional Court Act, § 25 (1), No. CLI, Acts of Parliament, 2011 (Hungary)

101. Public Roads Traffic Act, § 15/C (1)-2), 15/D (2), No. I., Acts of Parliament, 1988 (Hungary).

102. HUNGARY CONST. art. M(2) (“Hungary shall ensure the conditions for fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.”).

103. HUNGARY CONST. art. XXVIII

to be applied to these situations.¹⁰⁴ In the petitioner's view, this violates the rights of consumers.¹⁰⁵ The petitioner also maintained that the fact that the placement of the payment notification behind the windshield-wiper made it unsuitable to convey to the illegally-parking party that their payment obligation was due and because of this their right to remedy had also been infringed.¹⁰⁶

In assessing the arguments of the initiative, the AB did not refer to the Specific Interpretation Clause as relevant to the decision, but in the reasoning reflected on the "common good" element from a different angle. It refers back to the explanatory memoranda of the draft bill on the constitutional text of the Fundamental Law and cites it insofar as it mentions that Article M) was intended to incorporate a reference to competition and to limit said competition "as reasonably required by the common good."¹⁰⁷ This limitation is reflected in the "fair" indicator given to competition and to the references to consumer protection and the protection against abuse of dominance. This was done, however, without explicitly mentioning specific consumer rights. Considering these and other arguments (the detailing of which is omitted here), the AB finally refused the initiative by concluding that the violation of Article M) (2) cannot be determined solely based on the fact that the parking authority has a statutory power to impose gradually increasing penalty supplements and that the payment notification of these sanctions shall be placed on the windshield-wiper or on other clearly visible surfaces of the vehicle.¹⁰⁸

Based on these two cases from 2013, a partial conclusion can be drawn. The insignificance of the common good angle in shaping majority points of view of the AB is signaled by the fact that even at the beginning of the "reign" of the Specific Interpretation Clause, only two cases referred to it explicitly. I detect an allusion to the

104. AK, Issue 18, 9 October 2013, 995, [2].

105. *Id.*

106. *Id.* at 997, [15].

107. *See supra* note 99, at 996, [10].

108. *Id.* at 997, [14].

role of the state in the reference to serving the common good by assuring the broadest possible freedom of information in relation to the academic arguments presented on 21/2013 above.

Two years later, another two cases explicitly mentioned the common good.

In 2/2015 (II.2.) AB¹⁰⁹, another aspect of consumer protection came into the foreground in a majority decision regarding judicial initiatives petitioning the AB to declare the unconstitutionality of the 2014 Act on regulating certain questions in the *Kúria*'s decision on the uniformity of law regarding consumer (retail) loan contracts.¹¹⁰ The AB refused the initiatives and in the majority decision looked at when and how the state can be a litigant in cases in which it acts as a legal subject in private law.¹¹¹ The majority concluded that the public and private law faculties of the state cannot be sharply separated in this case because the state acts in the enforcement of clearly private law claims in a civil procedure that is based on the equality and heterarchy of the parties.¹¹² The state, moreover, carries this out as a public duty, in the interest of the common good, to protect the public interest.¹¹³ Furthermore, in this case, this task is carried out to protect the weaker parties in the hundreds of thousands of retail consumer loan contracts that lack any form of balance. Such an act on the part of the state clearly follows from Article M) (2) and on other acts of public power (i.e., laws that make this possible).¹¹⁴

109. AK, Issue 3, 9 Feb 2015, 132–60. An English summary of the decision is available from the CODICES database of the Venice Commission here: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2015-2-001> [<https://perma.cc/2S7K-6JLP>].

110. Regulating Issues Regarding Consumer Loan Contracts Act, § 4 (2)-(3), 6-15, No. XXXVIII., Acts of Parliament, 2014 (Hungary).

111. AK, Issue 3, 9 Feb 2015, at 133, [3].

112. See the various arguments summarized as above at *id.* at 138–140, [24]–[42].

113. *Id.* at 138, [31].

114. See *supra* note 109, at 138, [29]–[31].

In 17/2015 (VI.5.) AB,¹¹⁵ the issue concerned limitation of the right to property in the context of decision-making by the so-called (agricultural) land committees.¹¹⁶ Several judicial initiatives were unified in the AB proceedings, resulting in the determination that these committees shall always reason their decisions as a constitutional requirement.¹¹⁷ However, the fact that they have statutory powers to prevent the sale and purchase of agricultural land is not contrary to the Fundamental Law as it allows for the limitation of the acquisition of such lands in the form of organic laws (called cardinal in the Hungarian context), requiring a qualified (two-thirds) majority of the elected legislature (National Assembly).¹¹⁸

In the part of the majority decision in which a reference to the common good eventually surfaces, the legal issue is elaborated as follows. Under the legal framework (of the Act on the sale and purchase of land) examined in the majority decision, the provisions that have been alleged by petitioners to limit the right to property (and thus were eventually declared null and void by the AB) set forth the following: 1) that the sale of agricultural land needed to be approved by the competent agricultural administrative agency (authority) and 2) that the land committees had the option to exercise a tacit veto. Thus, by not declaring themselves on the request to approve, they hindered the administrative approval of the sale in question. This obviously brings about a nexus between the right to remedy against such decisions and judicial—and administrative—proceedings (or, more precisely, a lack thereof, as in the case of a tacit veto, in which there is no decision to appeal or challenge).¹¹⁹

115. AK, Issue 13, 9 Jun 2015, 773–803. An English summary of the decision is available from the CODICES database of the Venice Commission here: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2015-2-004> [<https://perma.cc/3CDT-A79V>].

116. AK, Issue 13, 9 Jun 2015, 773, [1].

117. On the unification of the complaints see *id.* at 778, [36], and on the constitutional requirement see *id.* at 773, [2].

118. *Id.* at 780, [48]–[50].

119. Remedy in administrative proceedings is assured by HUNGARY CONST. art. XXIV.

After detailing its vast case law on the right to remedy (herein omitted due to content limitations and irrelevance to the common good), the AB makes a general reference to the Specific Interpretation Clause,¹²⁰ but does not elaborate further on the common good aspect. The AB merely holds that in reaching its decision it had to take the Clause into account and thus presume that the laws serve the common good.¹²¹

Analyzing the decision, agricultural law expert István Olajos argues that because the tacit veto violates the right to remedy, administrative courts are in no position to exercise their rights originating in Law XXVI of 1896¹²² to review the facts of the case and to assess the acts of the proceeding authorities from the point of view of legality.¹²³ Here he adds that such a situation also prevents courts from assessing the discretion exercised by the administrative bodies in light of the common good and the other purposes specified in the Specific Interpretation Clause.¹²⁴

To draw another partial conclusion: 2015 seems to mark the year when considerations of the common good made it to the level of majority decisions. In reference to what I have outlined in Part II.A. regarding scholarly contexts of the common good, we can see that 2/2015 makes reference to the state carrying out a public duty “in the interest of the common good, to protect the public interest.”¹²⁵ This formulation (i.e., the state protects the public interest in the interest of the common good) seems to be in somewhat of a contradiction with earlier scholarly determinations that the “common good” and the “public interest” are synonymous (elaborated in Part

120. HUNGARY CONST. art. 28.

121. *See supra* note 115, at 787, [88].

122. As such, in other contexts of Hungarian constitutional interpretation under HUNGARY CONST. art. R(3), this could be considered an achievement of the historical constitution, if recognized as such by the AB.

123. Olajos István: 17/2015 (VI.5) AB Határozat—Földforgalmi Törvény, *in* ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 579.

124. *Id.*

125. *See supra* note 109.

II.A. above) by clearly separating them and stating that protecting the public interest is necessary to realize the common good.

The same decision mentions the role of the state, an angle that is picked up again in a 2016 decision in which a concurring opinion by Justice Ágnes Czine makes reference to the common good [3091/2016 (V.12.) AB¹²⁶]. Czine points to an approach in relation to the state's *Schutzpflicht* (obligation to protect) of fundamental rights and its scope taken by the BVerfG, the German Federal Constitutional Court:

The decisions, representations, acts of the different levels of state decision-making brought in the name of citizens, fall under the obligation to protect fundamental rights, extending this obligation to all acts of state bodies and organizations, because this realizes the carrying out of such mandatory (public) duties that are intended to serve the common good. [...] [T]he state takes charge of tasks entrusted to it for the benefit of individuals and is accountable to them.¹²⁷

Another two years pass and the common good becomes relevant once again in scholarly commentary, tied to a very controversial issue of constitutional law, namely the standing and the right of public (state) organs to file constitutional complaints when their fundamental rights are violated.¹²⁸ The fact that in the case subject to scholarly commentary (introduced below) a public organ filed a constitutional complaint raised many dogmatic problems in constitutional law, especially because

(i) A constitutional complaint is an instrument specifically designed to offer protections for individuals and their organizations against state violations of their fundamental rights protected by the constitution; and

126. AK, Issue 11, 12 May 2016, 588–601.

127. *Id.* at 598, [72].

128. Constitutional Court Act, § 27 (2)-(3), No. CLI, Acts of Parliament, 2011 (Hungary), <https://hunconcourt.hu/act-on-the-cc> [<https://perma.cc/PMF7-5FWV>].

(ii) The complaint filed by the state organ in the case at hand was admitted for review and the AB annulled the challenged judicial decision of the *Kúria*.

In this case [23/2018 (XII.28.) AB¹²⁹] the Hungarian National Bank (MNB) filed a constitutional complaint against two judicial decisions brought by a trial court and the *Kúria*.¹³⁰

To briefly summarize the facts: MNB conducted ex officio review proceedings (through the Financial Stability Council, PST) against an investment company monitoring the compliance of their operation.¹³¹ During this review, among other sanctions imposed, the license of the company was revoked and its liquidation initiated. A member of the company’s board of directors has been compelled to pay a review fine for a material breach of fiduciary duties and responsibility of the members of the directorial bodies of such enterprises.¹³² When the decision was served, it had the signature of the Deputy Governor of MNB, indicating that the power to make the ruling was transferred to him under the 2013 Act on the MNB.¹³³ Challenging this decision, the board member affected by the sanctions asked the court to render the PST’s administrative decision ineffective given that the power of the PST was taken away by the Deputy Governor, who thus brought his decision in his own discretion. The court complied.¹³⁴

Upon appeal by the petitioner (MNB), the *Kúria* upheld the lower court’s decision and remanded the proceedings back to MNB, ordering it to be done anew and specifying that the Deputy Governor could not have brought the decision in his own discretion because it was specified on the document in question that his powers would only have allowed for the signature of the decision as a mere formality.¹³⁵ The *Kúria* also specified that it did not feel the necessity

129. AK, Issue 1, 7 Jan 2019, 2–19.

130. *Id.* at 2, [1].

131. *Id.*, [2].

132. *Id.*

133. *Id.* at 2, [3].

134. *Id.* at 2, [4]–[5].

135. *Id.* at 2, [7]–[8].

to apply the Specific Interpretation Clause¹³⁶ to the issues at hand for reasons of the clarity of the underlying administrative rules. In petitioner's view, however, the *Kúria's* challenged decision violated both the right to a fair trial¹³⁷ and the Interpretation Clauses,¹³⁸ along with other constitutional provisions (hereby omitted).

Petitioner's (MNB's) argument was that, pursuant to the General Interpretation Clause, the constitutional provisions protecting the right to remedy and a fair trial may in practice only be assured if the courts apply the law in harmony with the Specific Interpretation Clause. Then, if the proceeding courts (within their own discretion) are to decide to discard the Specific Interpretation Clause—and therefore do not apply the laws in accordance with their purpose to realize the common good—it is to the detriment of rule of law, separation of powers, and fair trial, resulting in a violation of fundamental rights, such as the right to remedy.¹³⁹

The relevance of the common good to the interpretation of the law at hand is also touched upon in scholarly commentary dissecting the meaning of the Specific Interpretation Clause in a similar vein that was presented *supra* in Part I (regarding its implications on judicial decision-making). As a reminder: in interpreting certain terms and the intent of the legislator, the Specific Interpretation Clause requires judges to presume (while interpreting a law or the constitution) that they have a purpose that corresponds with common sense and the common good and are both moral and economical.

136. HUNGARY CONST. art. 28.

137. HUNGARY CONST. art. XXVIII.

138. HUNGARY CONST. art. R(2); art. 28.

139. As summarized by Nóra Chronowski and Attila Vincze. Chronowski Nóra, Vincze Attila, *23/2018 (XII.28.) AB—Közhatalmi Szerv Alkotmányjogi Panasza*, in ALKOTMÁNYBÍRÓSÁGI GYAKORLAT, *supra* note 83, at 893–94.

The way in which leading Hungarian constitutional law scholars Nóra Chronowski¹⁴⁰ and Attila Vincze¹⁴¹ interpret the Specific Interpretation Clause also reflects on the common good, by providing the following alternative approaches:

(i) the law is unambiguous and is in harmony with both the Fundamental Law and the common good and thus shall be applied,

(ii) the law is ambiguous but clear as per the intent of the legislator and is in harmony with both the Fundamental Law and the common good and thus shall be applied;

(iii) the law is ambiguous, including in light of the legislator’s intent (necessitating the choice of an interpretation that is in harmony with the Fundamental Law and thus with the common good), and shall be applied;

(iv) the law is ambiguous but clear as per the legislator’s intent, but its interpretation is not in harmony with the Fundamental Law and the common good and therefore an interpretive choice which brings it in accordance with these becomes necessary; and finally,

(v) the law is ambiguous and cannot be clarified as per the legislator’s intent and there is no interpretation of it which would be in harmony with the Fundamental Law and thus common good. In this case, as well as in the case in which the law is ambiguous and not in harmony with the Fundamental Law, its review of conformity with the constitution (norm control) should be initiated.¹⁴²

To close the constitutional case law sample, one last case needs to be mentioned from 2022 [3083/2022 (II.25) AB¹⁴³], where the issue of admissibility¹⁴⁴ of a constitutional complaint petition was at hand.

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141. JD, LL.M., and PhD (Ludwig-Maximilians Universität München), D. habil. (Wirtschaftsuniversität Wien), former Professor of Law at Andrassy University of Budapest. At present, Asst. Professor at the Judicial Studies Institute at the Masaryk University in Brno (Czech Republic).

142. *Id.* at 895.

143. AK, Issue 6, 25 Feb 2022, 516–20.

144. Examining if a set of conditions are met before a case is taken for review, similar to the systems applied by the BVerfG or the European Court of Human Rights.

A petitioner (a private individual) asked the AB whether it was constitutional to disregard any income previously earned in the United Kingdom as the baseline for monthly wages when calculating the financial basis for disability benefits due to the petitioner.¹⁴⁵

In reviewing the application, the AB explained that such a calculation is not necessary in Hungary to award benefits, and the constitutional rules on social security rights¹⁴⁶ merely set forth that the state is obliged to provide access to the healthcare system by operating it. The AB repeated an already settled notion that creating the balance between individual rights and the common good is typically “not a question of constitutional law” and therefore subject to adjudication by the AB, but is rather an issue of lawmaking to be handled by the legislature (in this case the National Assembly).¹⁴⁷ As the petitioner failed to substantiate the doubt of unconstitutionality that would have influenced the judicial decision challenged on its merits, the AB rejected the complaint and did not review the issue any further.¹⁴⁸

This last case again contextualizes the role of the state in serving the common good, with apparent judicial deference to legislative action instead of engaging in constitutional interpretation. This is the thread that leads me to look at whether in terms of establishing a “common good jurisprudence” Hungary may be considered the land of missed opportunities.

III. CONCLUSIONS: HUNGARY, THE LAND OF (MISSED) OPPORTUNITIES?

From the very few explicit and substantial references to the common good in AB case law as presented above (especially in the context of the Specific Interpretation Clause¹⁴⁹) one may deduce that Hungarian constitutional jurisprudence does not provide fertile

145. AK, *supra* note 143, at 516, [1]; 517, [6].

146. HUNGARY CONST. art. XIX.

147. AK, *supra* note 143, at 518, [15].

148. *Id.*

149. HUNGARY CONST. art. 28.

grounds for establishing a “common good jurisprudence.” But why is this?

In general, we can find much more references to other elements of the Specific Interpretation Clause in AB case law, such as “common sense” and “moral purposes,” but the “common good” frame of reference is scarce, sporadic, and seemingly unsystematic as has been represented by the five examples found in ten years of extensive case law. Thus, if CGC is at any point to be considered in Hungary to create a “common good jurisprudence” of constitutional interpretation, it might not at all become as influential as one might think despite a specific constitutional reference to the common good, which orients judicial interpretation of the law and of the constitution. *Prima facie*, this might seem like a missed opportunity.

In our sample presented above, we can find only one case from 2022 which clearly and explicitly explains why it is most unlikely that the AB is going to take it upon itself to interpret the constitutional contexts of common good in protecting fundamental rights. As an institution designed to protect the constitution and if necessary engage in its interpretation under standards defined by the General and Specific Interpretation Clauses, the AB may only engage in interpretation without prejudice to the constitutionally reserved legislative powers, i.e., the AB may not engage in what US constitutional scholarship phrases as “legislating from the bench” (with reference to the judicial activism of the Supreme Court), a tendency that—according to some—upsets the balance and separation of powers.

Consequently, this seems to be a good point to react to what Conor Casey and Adrian Vermeule talk about in terms of an “executive-led separation of powers above other ways of allocating authority,”¹⁵⁰ which they consider advantageous from the point of view of CGC.

In Europe, in those countries that have adopted a parliamentary form of government, an “executive-infused” (if not -led) separation

150. Casey & Vermeule, *supra* note 3, at 135.

of powers became predominant over time (termed as “fusion of powers”), in which actual executive and legislative functions are blended and bound to each other in many respects.¹⁵¹ Hungary is such a country, and this means that the fusion of powers might eventually leave a bit of legroom for the government (headed by the Prime Minister) to influence parliamentary lawmaking (legislature) in the service of the common good.

For instance, this could happen through governmental instructions to the ministries (the equivalents of U.S. departments) on what core values to focus on when preparing regulatory concepts for such laws to be adopted by the National Assembly which might help the government realize its working program and legislative agenda. However, the draft legislative proposals (for Acts of Parliament to be adopted by the National Assembly) – after having been prepared by the executive—still have to go through the bodies of the elected legislature and be deliberated on more than once before being put to a closing vote in the plenary session. The elaboration of these procedural issues, however, is not pertinent to the subject matter of the article on some Hungarian aspects of the American CGC debates.

In the two Parts above, I examined many issues related to the relevance of the common good in the Hungarian context of judicial interpretation of the constitution. In this effort, I first introduced the Interpretation Clauses of the Fundamental Law of Hungary and the terms in which they relate and refer to the presumption of serving the common good in the context of purposive (teleological) interpretation.

In Part I, I discussed many different scholarly points of view regarding judicial interpretation and discussed the terms in which the Specific Interpretation Clause of the Fundamental Law becomes a “verification rule” of judicial interpretation, introducing

151. See generally Matthew Søberg Shugart, *Comparative Executive–Legislative Relations*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 344 (Sarah A. Binder et al., ed., 2008); Richard Albert, *The Fusion of Presidentialism and Parliamentarianism*, 57 AM. J. COMPAR. L. 531, (2009).

“teleological constraints” for the judge, only one of which is the common good.

In Part II, I have introduced the theoretical footing of the common good concept in Hungarian legal theory and constitutional scholarship.

(i) In Part II.A. I reflected on the nature of the role of the state in “codifying” certain aspects of the common good, recognizing its role in social ordering.

(ii) In Part II.B. I introduced Hungarian constitutional case law (2012-2022) issued from the state institution in charge of *erga omnes* constitutional interpretation, i.e., the Constitutional Court of Hungary (AB). Herein, I focused on those decisions in which the common good was mentioned as a point of reference that impacted the decisions of the Court to some degree.

In closing, I posit that due to the appearance of the dualism of public and private interests after the transition to democracy, the broad notion of the common good was generally deemed inappropriate and was replaced by references to the “public interest” and its “cognates” or “political relatives,”¹⁵² which is probably the reason why there is only a very low number of instances to date in which the “common good” explicitly appears in constitutional case law.

Consequently, one may argue that the lack of a clear focus on the common good as well as the lack of actual grounding in the common good of the AB’s very few relevant decisions signals that the momentum of Common Good Constitutionalism in the American mold is not present in Hungarian constitutional interpretation and may thus be characterized as a missed opportunity.

However, it might as well be that it is merely still too early to tell if the Specific Interpretation Clause has fulfilled its originally intended role and function in the very short ten years of its existence within the grand scheme of Hungarian constitutional case law.

152. For the positions of Péter Szigeti, *see supra* note 48.

TOWARD A LIBERAL COMMON GOOD CONSTITUTIONALISM FOR POLARIZED TIMES

LINDA C. MCCLAIN* & JAMES E. FLEMING**

Adrian Vermeule urges his fellow conservatives to change the way they think about the American Constitution. Instead of maintaining a constitutionalism that emphasizes aggregating popular preferences, limiting government, and securing individual rights, he promotes a constitutionalism that emphasizes the common good and cultivates the attitudes and competences requisite to its pursuit. Vermeule calls his constitutionalism a “common good constitutionalism.”¹ For the common good

* Robert Kent Professor of Law, Boston University School of Law. Professor McClain was uncertain initially whether to accept the invitation to contribute to this symposium after, to put it diplomatically, Professor Vermeule’s dismissive treatment of her feminist commentary on his book, *Common Good Constitutionalism*, in the *Balkinization* symposium on the book. However, after consulting with her colleague Gary Lawson, a prominent conservative legal scholar, who assured her that this journal has a broad readership, she agreed. The old hymn she used to sing as a child at Redeemer Lutheran Church in Toledo, Ohio came to mind: “Untold millions are still untold, untold millions are outside the fold.”

** The Honorable Paul J. Liacos Professor of Law, Boston University School of Law. In this article, we have drawn from, while reworking, two blog posts we previously published. We are grateful to Jack Balkin and to Sotirios A. Barber and Stephen Macedo for permission to do so. Linda C. McClain, *Reasons to Doubt Whether “the Best Way Forward Is To Look Backward”*: Commentary on Adrian Vermeule, *Common Good Constitutionalism*, *BALKINIZATION* (July 12, 2022), <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [https://perma.cc/T7HW-MLGB]; Sotirios A. Barber, Stephen Macedo & James Fleming, *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, *THE CONSTITUTIONALIST* (Jan. 26, 2021), <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [https://perma.cc/9M5R-DKMA].

1. ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION* (2022).

constitutionalist, a government is established primarily to do good things for people. Pursuing what it sees as real goods, not just apparent goods, Vermeule's constitutionalism assumes objective standards of political morality. It envisions an active government, including a strong president, a strong administrative state, and judges exercising reasoned judgment about which results would contribute to the general welfare, correctly understood, not necessarily as understood by the American founders. Above all, Vermeule's constitutionalism would raise Americans above their unreflective preferences and self-indulgent inclinations.²

Thus, Vermeule's version of common good constitutionalism is a species of positive constitutionalism, and these two types of constitutionalism are neither new nor inconsistent with American traditions. Both the Declaration of Independence and the Constitution's preamble assume a government dedicated chiefly to public purposes.³ A pro-government ends-orientation pervades the *Federalist Papers*.⁴ Representatives of a common good constitutionalism include Alexander Hamilton, John Marshall, Abraham Lincoln, and Franklin Roosevelt.⁵ Liberals in the positive tradition include Cass Sunstein and Stephen Holmes, Joseph Fishkin and William Forbath, Frank Michelman, Walter Murphy, Lawrence Sager, Sotirios Barber, and Stephen Macedo.⁶ We put

2. *Id.* at 7–9, 42–43.

3. For example, the preamble proclaims public purposes for which the Constitution and government are established: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." It hardly states, as negative constitutionalists seem to presuppose, that We the People established government primarily to limit government.

4. See SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 35–55 (2007).

5. See SOTIRIOS A. BARBER, WELFARE AND THE CONSTITUTION 150 (2003).

6. See STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (2000); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY

ourselves in this group as well.⁷ Label it a common good constitutionalism, a positive constitutionalism, or an ends-oriented constitutionalism: This is the only constitutionalism that can make sense of the American Founding as a rational act, for no rational agent would establish a government *de novo* for the chief purpose of restraining its operations. As Barber, Macedo, and one of us (Fleming) have argued, when the American story is told, power wielded for the common good, and therewith a common good constitutionalism, will be the only constitutionalism that has a chance against challenges like climate change, rolling pandemics, economic injustice, racial and gender injustice, uncontrolled technological change, advancing oligarchy, and recrudescing white Christian nationalism in the United States.⁸

The version of antiliberal common good constitutionalism offered by Vermeule, however, is not appropriate to our circumstances of moral pluralism, and would not be acceptable to our morally and politically diverse and divided people. We need instead a forward-looking liberal common good constitutionalism for our polarized times. In *Common Good Constitutionalism*, Vermeule asserts that breaking with the last few generations of constitutional interpretation by looking “backward for inspiration” to “classical law” is the “best way forward” to “restore the integrity

CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (1979); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY* (2007); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2006), BARBER, *supra* note 5; STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* (1990).

7. See JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 9–10 (2013).

8. Sotirios A. Barber et al., *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, *THE CONSTITUTIONALIST* (Jan. 26, 2021), <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [https://perma.cc/9M5R-DKMA].

of our law and of our legal traditions.”⁹ Vermeule bluntly contends that “our public law” oscillates fruitlessly between two interpretive “camps,” originalism and progressivism. He would replace this “exhausted opposition” with a third approach, “common good constitutionalism.”¹⁰ This approach would recover and adapt “the classical tradition” as “the matrix within which American judges read our Constitution, our statutes, and our administrative law.”¹¹ This classical legal tradition, Vermeule contends, predated “the founding era” and remained “central” to the American legal world until the mid-twentieth century.¹² Vermeule describes this tradition variously, for example: (1) the “*ius commune*”—“the classical European synthesis of Roman law, canon law, and local civil law;” (2) the “ordinary cosmology” of “divine law, natural law, and civil or ‘municipal’ law;” (3) a blend of natural law and natural rights; and (4) a mix of civil law, natural law, and the law of nations.¹³ But whatever the description of the classical tradition to which Vermeule would look backward, there are good reasons to resist this disruptive move.

For disruption is, indeed, what Vermeule seeks. Using Ronald Dworkin’s famous image of legal interpretation as writing a long “chain novel,” Vermeule calls for “rip[ping] up . . . the last few chapters of” or “substantial segments” of that novel—sometimes reinterpreting certain “chapters” in “drastic terms.”¹⁴ Vermeule does not spell out the full scope of the disruption, but the examples that he does give concerning constitutional liberty and equality are deeply troubling, as is his fiery rhetoric. For example, he would have some of the Court’s prior articulations of the scope of personal autonomy protected by Due Process liberty “stamped as abominable,

9. See VERMEULE, *supra* note 1, at 183.

10. *Id.* at 1.

11. *Id.*

12. *Id.* at 2.

13. *Id.* at 54–56.

14. *Id.* at 181.

beyond the realm of the acceptable forever.”¹⁵ He characterizes the Court’s landmark decision, *Obergefell v. Hodges*, which held that same-sex couples have the fundamental right to marry, as “an attempt to break a traditional and natural legal institution [marriage] by sheer force of will in the service of a liberationist agenda.”¹⁶ Furthermore, Vermeule says little about how a revived and adapted classical tradition would address problems of gender and racial inequality recognized by current Supreme Court jurisprudence as incompatible with the Fourteenth Amendment.

Again, what he does say is troubling. One of the few times he discusses racial and gender inequality is in a mocking account of the “liturgy” of “progressive constitutionalism,” in which he contends, “Whatever the question, whether race relations, women’s rights, gender identity, or what have you, the *bien-pensant* judge should always be able to say, ‘We have made progress, but there is still much to do.’”¹⁷

In this article, we will begin with two points on which we agree with Vermeule: the necessity for (1) a “moral reading” of the U.S. Constitution rather than an originalist reading and (2) a positive constitutionalism instead of a view of the Constitution as simply a charter of negative liberties. We will then raise several concerns about Vermeule’s disruptive project: (1) the historical role of appeals to natural law and divine law in justifying sex and race inequality, including in family law, marriage, and civil society; (2) Vermeule’s caricatured depiction of what he calls “progressive constitutionalism”¹⁸ and his emphatic rejection of autonomy as a basis for Due Process liberty; and (3) the seeming absence of the role of deliberation by the people about the common good and of

15. *Id.* at 42 (criticizing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added). See *infra* text accompanying notes 108–111 for further discussion.

16. *Id.* at 133.

17. *Id.* at 119. For more on his caricatured depiction of “progressive constitutionalism,” see *infra* text accompanying notes 52–54.

18. See *id.* at 117–20 (describing “progressive constitutionalism” as the “main competitor” to originalism).

appreciation of reasonable moral pluralism in his conception of common good constitutionalism. We close by sketching an alternative liberal common good constitutionalism for our morally pluralistic and politically polarized people.

I. TWO POINTS OF AGREEMENT:
MORAL READING OF THE CONSTITUTION AND POSITIVE
CONSTITUTIONALISM

First, we agree with Vermeule that originalism is an “illusion” because it fails to recognize that constitutional interpretation requires judgments about the best understanding of principles of political morality.¹⁹ Here, Vermeule credits Dworkin’s call for “moral readings of the Constitution” — though he “emphatically” rejects Dworkin’s liberal moral commitments and liberal account of rights.²⁰ Vermeule is right to characterize “living originalists” as moral readers.²¹ Here he echoes²² the earlier argument of one of us (Fleming), in *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*, that once originalists—including proponents of “living originalism” such as Jack Balkin—recognize that the Constitution includes broad and abstract moral terms (such as “liberty” and “equality”) whose meaning embodies broad, abstract principles of political morality, and not just relatively specific original meanings or a deposit of concrete historical

19. *Id.* at 91–92.

20. *Id.* at 5–6. The term “moral reading of the Constitution” is from RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

21. VERMEULE, *supra* note 1, at 97–99.

22. Randy E. Barnett, *Enter Conservative Living Constitutionalism*, REASON (Apr. 3, 2020, 8:21 AM) <https://reason.com/volokh/2020/04/03/enter-conservative-living-constitutionalism/> [https://perma.cc/73WJ-5SUA] (“Sound familiar? Jim Fleming call your office. You have a new convert, though he’s not exactly what you hoped for (and he doesn’t cite you). He’s just across the river, so you guys should get together and hash this out over lunch.”).

practices as of 1791 or 1868, they have left originalism behind.²³

We also agree with Vermeule's project of common good constitutionalism to the extent that it recognizes the need for a *positive constitutionalism* and appeals to the positive aims for establishing a government set out in the preamble. Again, as Barber, Macedo, and Fleming argue, "positive constitutionalism is neither new nor inconsistent with American traditions" and properly moves from protecting "negative liberties" against government to pursuing positive ends through government.²⁴ It views government as dedicated chiefly to public purposes. In *Ordered Liberty*, we embraced this view, arguing that the Constitution is "a charter of *positive benefits*: an instrument for pursuing good things like the ends proclaimed in the Preamble, for which We the People ordained and established the Constitution."²⁵

Of course, there is no single account of how to interpret those ends or "the common good"—here, Vermeule and we part company. We have argued for a constitutional liberalism that includes, among other things, a "formative project" of cultivating civic virtues and capacities necessary to secure ordered liberty.²⁶ Both in *Common Good Constitutionalism* and in other writings, Vermeule is a sharp critic of liberalism and would likely characterize our approach as a species of problematic "progressive constitutionalism" (more on that below). Vermeule instead offers a "moral reading" that looks to the classical tradition to flesh out the common good. We now turn to why this is a disruptive, even subversive project.²⁷ Below, we sketch our own long-term project of developing a common good liberalism for polarized times.

23. JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 125–41 (2015) (analyzing JACK M. BALKIN, *LIVING ORIGINALISM* (2011)).

24. Barber et al., *supra* note 8.

25. FLEMING & MCCLAIN, *supra* note 7, at 114. See also *id.* at 277 n.25 (criticizing, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

26. *Id.* at 9–10, 112–45.

27. Barber et al., *supra* note 8.

II. APPEALS TO NATURAL LAW AND DIVINE LAW IN JUSTIFYING SEX AND RACE INEQUALITY

Consider again what's in the "stew"²⁸ of the classical legal tradition that Vermeule would revive and adapt. For example, Vermeule explains that Blackstone's *Commentaries*, "the main legal resource for many of the Constitution's framers and ratifiers," were structured "around divine law, natural law, and civil or 'municipal' law—the ordinary cosmology of the classical law."²⁹ Divine law, natural law, and civil law have all starred in justifying status hierarchy in marriage as well as the exclusion of women—married or unmarried—from full participation in civic, political, and economic life.

Blackstone's account (in the *Commentaries*) of the disabilities to which wives were subject under the common law model of "coverture" marriage—during which "the very being or legal existence of the woman' was suspended 'during the marriage or . . . incorporated and consolidated into that of the husband'"—traveled to the colonies.³⁰ It became "the common currency of legal and political descriptions of marriage," shaping the law of domestic relations in the states.³¹ Coverture's marital unity meant that the husband became the "one *full* citizen in the household," the political and legal representative of his wife, with his "authority over and responsibility for" her and his other "dependents" enhancing his

28. VERMEULE, *supra* note 1, at 21 (referring to the *ius commune* as "the rich stew of Roman law, canon law, and other legal sources that formed the matrix within which European legal systems developed" and that shaped "Anglo-American law"). *See also id.* at 54–56 (giving other formulations of what is included in the classical legal tradition).

29. *Id.* at 53–54.

30. *See* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 115–16 (2000) (observing that Blackstone's description of coverture was "relied on by voices on all sides of the political spectrum" in eighteenth and nineteenth century America).

31. *Id.*

“citizenship capacity.”³² Further, as Nancy Cott explains, the founders assumed that Christian monogamous marriage would “underpin” the “new nation.”³³ Christian doctrine of spousal unity (“one flesh”) found in the Bible support for husbandly governance (headship) and wifely obedience.³⁴ In 1873, in *Bradwell v. Illinois*, concurring Justice Bradley famously appealed to “the constitution of the family organization, which is founded in the divine ordinance” as well as to “the nature of things” to rationalize the “domestic sphere” as that “which properly belongs to the domain and functions of womanhood” and “unfits” women for “many of the occupations of civil life” including, in that case, the practice of law.³⁵

The gender revolution in the Supreme Court’s interpretation of the Equal Protection Clause in the 1970s and 1980s contributed to the dismantling of coverture marriage, a process that began through feminist advocacy and state law reform even in the nineteenth century.³⁶ In cases such as *Planned Parenthood v. Casey*,³⁷ the Court has looked back to Justice Bradley’s concurrence (joined by two other justices, reaffirming the “common-law principle” of a woman having no legal existence separate from her husband) to chart the gulf between those earlier conceptions of the family, marriage, women’s role, and the Constitution itself and present-day understandings.

32. NANCY COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11–12 (2000); see also LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 56–60 (2006) (discussing role of marriage as model for self-government).

33. COTT, *supra* note 32, at 10.

34. *Id.* at 10–13.

35. 83 U.S. 130, 141 (1872).

36. For informative overviews, see generally LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998); SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011).

37. 505 U.S. 833, 896–97 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2248 (2022).

Similarly, in *Obergefell v. Hodges*, the Court observed that the “centuries-old doctrine of coverture” articulated by Blackstone was abandoned as society “began to understand that women have their own equal dignity,” and as women gained “legal, political, and property rights”³⁸ When Vermeule, alluding to Dworkin, speaks of ripping up recent chapters in the chain novel³⁹—chapters that are “impossible to square” with the principles of classical law that offer the “best overall interpretation overall [sic] of our public law”⁴⁰—he does not tell us of the fate of the transformation of family law and the law of marriage away from status hierarchy. Are these, under his distinctions, genuine developments, or are they “corrupt” and false ones?⁴¹ By what criteria will revivers of the classical tradition separate what they carry forward from what they leave behind? Presumably, Vermeule does not seek to revive coverture marriage, with a wife’s suspension of identity, loss of property rights, duty to obey and serve her husband, or the husband’s right to physically “chastise” his wife and his immunity from the law of rape. But how will common good constitutionalists following Vermeule’s invitation decide how to adapt the classical tradition with respect to marriage and family?

In raising these questions, we want to disclaim a common tactic in our current circumstances of political and intellectual polarization: engaging in guilt-by-association attacks. For example, do you defend *Roe v. Wade*’s protection of a right to decide whether to terminate a pregnancy? So (allegedly) did the early twentieth century birth control movement. And since Margaret Sanger, a founder of Planned Parenthood, made racist remarks about population control and (allegedly) was a eugenicist, therefore, you and *Roe* support racial genocide and eugenics. We see suggestions

38. 576 U.S. 644, 659–60 (2015).

39. VERMEULE, *supra* note 1, at 181.

40. *Id.* at 5.

41. *See id.* at 122 (enlisting Newman’s “notes” of “false or corrupt development” to assess *Obergefell*).

of guilt-by-association along these lines in Justice Thomas's statements in *Box v. Planned Parenthood of Ind. and Ky.*, where he traces the "foundations" of legalizing abortion to the early twentieth century birth control movement, observes that the American eugenics movement also developed at this time, and then falsely claims that "[m]any eugenicists therefore supported legalizing abortion . . ."⁴² In *Dobbs*, discussing the supposed "motives of proponents of liberal access to abortion[,]" Justice Alito cites both to Thomas's *Box* concurrence and to a section of an amicus brief titled "The Eugenics Era Lives on through the Abortion Movement."⁴³

We do not mean to make similar moves in the criticisms we make of Vermeule or the questions we pose about how he will adapt the classical tradition to contemporary constitutional controversies. For example, we do not mean to suggest: Vermeule favorably cites to sixth century Byzantine emperor Justinian's account of marriage in criticizing *Obergefell's* extension of the right to marry to same-sex couples;⁴⁴ Justinian believed (based on the Biblical story of Sodom's destruction) that same-sex sexual conduct caused natural disasters like earthquakes and he castrated persons found guilty of homosexuality;⁴⁵ and, therefore, Vermeule is consorting with

42. 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). For a rebuttal of this false claim, see Paul A. Lombardo, "A Vigorous Campaign against Abortion": Views of American Eugenic Leaders v. Supreme Court Distortions, 51 J. L. Med. & Ethics 473 (2023); see also Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

43. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2256 n.41 (2022) (citing Brief for African-American Organization et al. as Amici Curiae 14–21, and *Box*, 139 S. Ct. at 1782–84 (Thomas, J., concurring)). See also Lombardo, *supra* note 42.

44. VERMEULE, *supra* note 1, at 218–19 n.344 & n.346.

45. See John Corvino, *Homosexuality and Morality, Part 3: The Harm Arguments*, <https://johncorvino.com/2002/12/homosexuality-and-morality-part-3-the-harm-arguments/> [<https://perma.cc/8FJK-JRMW>] (earthquakes); VERN BULLOUGH, *HOMOSEXUALITY: A HISTORY* 33 (1979) (cited in Gayle Zive, *A Brief History of Western Homosexuality*), <https://www.csustan.edu/sites/default/files/honors/documents/journals/sexinstone/Ziv>

irrational retrograde ideas that may lead to appallingly reactionary conclusions today. Instead, we mean to suggest that when Vermeule claims to apply the classical tradition as a “method” or “framework” to contemporary controversies—but rejects the conclusions his preeminent forebears in that tradition reached—we need to know what is truly doing the work here, the classical “method” or a modern conservative sense of what positions are mandatory “fixed points”?

If we are to look to principles of Roman law, for example, presumably we reject practices such as Roman society’s status hierarchy of free citizens versus slaves, or its practice of “concubinage.”⁴⁶ Family law and religion scholar John Witte, Jr. has detailed the “creative convergence” or synthesis of, on the one hand, classical and early Christian ideas and traditions about marriage and family with, on the other hand, “modern liberties” concerning sex, marriage, and family life.⁴⁷ It took Enlightenment thinkers such as Mary Wollstonecraft and Frances Hutcheson, Witte concludes, to help push the Western legal tradition to “remove the many layers of patriarchy and coverture” and, eventually, to more fully realize in law itself ideals of sex equality in marriage and in the broader society.⁴⁸

We would argue, as even some conservative critics of *Common Good Constitutionalism* such as James Stoner have done, that Vermeule doesn’t acknowledge the necessary role of liberalism in challenging unjust status hierarchies, including the status of women, and fostering the capacity for personal and deliberative

e.pdf [<https://perma.cc/KK5N-CDRA>] (mentioning castration, although penalty was death).

46. JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* 17–30 (2d ed. 2012) (detailing that, “[m]uch to the dismay of the early Church Fathers, Roman law recognized the institution of concubinage”).

47. JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES* 521–22 (2019).

48. *Id.*

self-government.⁴⁹ Vermeule does not tell us a similar tale of shedding status hierarchies, although he tells readers that constitutional law should elaborate “subsidiary principles” that include respect for “the hierarchies needed for society to function.”⁵⁰ He elaborates: “common good constitutionalism does not suffer from a horror of legitimate hierarchy, because it sees that law can encourage those subject to the law to form desires, habits, and beliefs that better track and promote communal well-being.”⁵¹ Of course, we need to know: what is “legitimate” hierarchy and by what criteria do we make judgments about which forms of hierarchy to preserve or reject?

Vermeule mentions status hierarchies when he criticizes—or caricatures—progressive constitutionalism. He claims that progressive constitutionalism, with its “saint” of Justice Ruth Bader Ginsburg, has an “overarching sacramental narrative” of “the relentless expansion of individualistic autonomy.”⁵² He characterizes it as driven by a “mythology of endless liberation through the continual overcoming of the reactionary past,” always seeking to produce rather than to fend off change.⁵³ As noted earlier, race relations, women’s rights, and gender identity are areas in which, on his account, a judge is expected as a progressive constitutionalist to say, “We have made progress, but there is still much to do.”⁵⁴ These mocking formulations prompt us to ask: were none of the race and gender hierarchies involved in prior Supreme Court cases properly challenged as unduly limiting human freedom and failing to realize equality? For example, Vermeule suggests that progressives seek liberation from family, but how

49. James Stoner, *Wanted: A Constitutional Ethos*, LAW & LIBERTY (Aug. 31, 2022), <https://lawliberty.org/forum/wanted-a-constitutional-ethos/> [https://perma.cc/S5S8-K3MG].

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

51. *Id.* at 38.

52. *Id.* at 119.

53. *Id.* at 117–19.

54. *Id.* at 119.

would he evaluate the role of constitutional law—invoking evolving understanding of the status of women under the Constitution and in society—in dismantling the gender-based status hierarchy embedded within the classical law’s model of marriage discussed above? We heard more in a single panel at the conference about sexism and racism being affronts to human dignity than we can find in Vermeule’s entire book.⁵⁵

Vermeule clearly believes that one legitimate family hierarchy would limit the definition of marriage to one man and one woman. Enlisting natural law and the writings of Justinian,⁵⁶ he criticizes *Obergefell*’s extension of the fundamental right to marry to same-sex couples. Vermeule argues that common good constitutionalism would recognize that marriage is “a natural and moral and legal reality simultaneously.”⁵⁷ Marriage is “a form . . . constituted by the natural law in general terms as the permanent union of man and woman under the general *telos* or indwelling aims of unity and procreation (whether or not the particular couple is contingently capable of procreating).”⁵⁸ On that view, “for the civil authority to specify in law that marriage can only be the union of a man and a woman fits the *telos* of the institution and thus determines through the civil law what the natural law prescribes in any event.”⁵⁹ *Obergefell*, thus, “warped the core nature” of marriage by “forcibly removing one of its built-in structural features,” namely, reproduction.⁶⁰ Instead, Vermeule praises Justice Alito’s dissent for observing that, “for millennia, marriage was inextricably linked to

55. Emphasizing “equal dignity,” panelist Professor Michael Foran stated that racism and sexism were inconsistent with a natural law approach. See Michael Foran, *Equal Dignity and the Common Good*, 46 HARV. J. L. & PUB. POL’Y 1009 (2023).

56. VERMEULE, *supra* note 1, at 218 n.344.

57. *Id.* at 131.

58. *Id.* at 131–32.

59. *Id.* at 132.

60. *Id.*

the one thing that only an opposite-sex couple can do: procreate.”⁶¹ Vermeule also embraces the *Obergefell* dissenters’ unjustified charges that Justice Kennedy’s majority opinion tarred traditional religious believers with the brush of “bigotry.”⁶²

While Vermeule invokes Justinian, this teleological argument closely parallels familiar contemporary arguments about marriage asserted (unsuccessfully) in constitutional litigation by conservative political theorist Robert George and coauthors Sherif Girgis and Ryan Anderson.⁶³ Elsewhere we have challenged that argument against civil marriage equality as inconsistent with contemporary family law and constitutional law,⁶⁴ and will not repeat those arguments here. Our concern here is what present-day interpreters of the U.S. Constitution take on board when they look to the classical tradition for guidance about constitutional rights, including the right to marry. In the United States, well into the twentieth century, defenses of racial segregation, including restrictions on interracial marriage, frequently appealed to divine law and natural law, along with unchanging moral principles on which the U.S. was established.⁶⁵ Further, as one of us (McClain)

61. *Id.* at 133 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 738 (2015) (Alito, J., dissenting)).

62. *Id.* at 131. For an argument that Justice Alito’s charge is unjustified, see LINDA C. MCCLAIN, WHO’S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW 154–57, 178–79 (2020).

63. *United States v. Windsor*, 570 U.S. 744, 814–16 (2013) (Alito, J., dissenting) (citing SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23–28 (2021), as offering a “philosophical” account of the “conjugal” view of marriage).

64. FLEMING & MCCLAIN, *supra* note 7, at 170–76 (criticizing Manhattan Declaration drafted by Robert George, Timothy George, and Chuck Colson); Linda C. McClain, *Civil Marriage for Same-sex Couples, “Moral Disapproval,” and Tensions between Religious Liberty and Equality*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 87, 92–94, 108–115 (Timothy Samuel Shah et al. eds., 2016).

65. A familiar text is the lower court opinion in *Loving v. Virginia*, 388 U.S. 1, 3 (1967). See generally FAY BOTHAM, ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, & AMERICAN LAW (2009). For examples of appeals to divine and natural law offered in defense of racial segregation and in criticism of *Brown v. Board*

elaborated in *Who's the Bigot?*, the “theology of segregation” and the “theology of integration” offered starkly contrasting appeals to divine law as well as to how “founding” principles should shape constitutional interpretation and civil rights laws.⁶⁶ Vermeule’s book is notably silent about problems like religiously-inspired racism and white supremacy.

One of us (McClain) made these criticisms and posed these questions in a symposium on Vermeule’s book on the legal blog, *Balkinization*.⁶⁷ In his dismissive reply, Vermeule stated that he had nothing to say about these criticisms and questions because McClain had failed to understand that *Common Good Constitutionalism* proposes a “methodological framework for approaching questions of constitutional lawmaking and interpretation” rather than taking on “particular laws and customs from a point in time and apply[ing] them uncritically today.”⁶⁸ He added, “Some historically existing rules and customs were

of Education, 347 U.S. 483 (1954), see MCCLAIN, WHO’S THE BIGOT?, *supra* note 62, at 76–102. Preventing interracial marriage (or racial “amalgamation” contrary to divine law) was a key argument offered against desegregation in education. *Id.* at 81–86.

66. MCCLAIN, WHO’S THE BIGOT?, *supra* note 62, at 76–102. In using the term, “theology of segregation,” WHO’S THE BIGOT? refers to several “characteristic features” in sermons, speeches, and other texts from the 1950s responding to *Brown*, among them: (1) “the appeal to the Bible to identify God as the author of racial differences, as segregating the races, and as prohibiting intermarriage and amalgamation;” (2) “the positing of a God-given natural instinct in human beings to preserve racial purity;” and (3) the premise that “segregation is in keeping with American history, traditions, and constitutional principles.” *Id.* at 83. The “theology of integration” of the same era—reflected in denominational statements as well as sermons and speeches—includes such premises as: (1) “the practice of racial segregation is a blight on the Christian conscience;” (2) neither the Bible nor science supports racial segregation; and (3) *Brown* is in harmony with scriptural and constitutional principles. *Id.* at 86–91.

67. Linda C. McClain, *Reasons to Doubt Whether “the Best Way Forward Is To Look Backward”*: Commentary on Adrian Vermeule, *Common Good Constitutionalism*, BALKINIZATION (July 12, 2022) <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [<https://perma.cc/XY69-QYEX>].

68. Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (Jul. 27, 2022), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/D23G-PP8N>].

justifiable and others were unjust, according to the criteria of the classical approach itself,"⁶⁹ and further, "the methodological project is to translate and adapt the principles of the classical legal ontology into our world and to elicit the justificatory structure they imply."⁷⁰ But McClain's post on *Balkinization* acknowledged this distinction:⁷¹ the point was to press Vermeule to articulate more fully what the criteria of the classical approach were and to spell out more fully how he would apply them to modern problems. The post asked him to illuminate how his common good constitutionalism would translate and adapt the classical tradition.

In other words, Vermeule objected that McClain did not understand that his project is to develop the classical tradition as a "method" or "framework"⁷² for judgment, not as applications of that method. But his own arguments elide that distinction. For example, Vermeule refuses or declines to address questions of gender equality on the ground that he is developing a method or framework, but still confidently proclaims that the federal government must ban abortion⁷³ and that no state may choose even "to allow same-sex civil marriage."⁷⁴ Plus, to repeat the question which Vermeule has not adequately answered: if he wishes to detach the classical tradition, as a method, from its historical manifestations in racism and sexism, what are the criteria he will use in deciding when to criticize, and seek to eradicate, those historical manifestations and when to uphold them as "legitimate hierarchy" that accords with the telos of an institution?

In response to McClain's post on *Balkinization*, Julia Mahoney posted "A Common Good Constitutionalist Feminism?"⁷⁵ She

69. *Id.*

70. *Id.*

71. McClain, *supra* note 67.

72. VERMEULE, *supra* note 1, at 71, 72.

73. *Id.* at 199 n.103.

74. *Id.* at 219 n.346.

75. Julia D. Mahoney, *A Common Good Constitutionalist Feminism?*, LAW & LIBERTY

repeated Vermeule's distinction between method and specific practices, and added: common good constitutionalism "should not necessitate the reinstatement of practices that contravene modern values[,] which she finds reassuring. But then she adds: "the fact that common good constitutionalism can be so readily adjusted to changed circumstances compounds the mystery of whether it has much in the way of actual content."⁷⁶

We agree that there is some "mystery" as to the actual content of Vermeule's common good constitutionalism. What we do know is hardly reassuring. Vermeule sketches an approach (adapted from St. John Henry Newman) for distinguishing between "legitimate and corrupt development"—or "genuine" and "corrupt" development—in constitutionalism to contrast the "developing constitutionalism" that he favors with the "progressive constitutionalism" that he rejects.⁷⁷ Vermeule explicates that Newman "articulated seven 'notes' of genuine development, as opposed to corruption;" "armed" with these, he labels *Obergefell* a "false or corrupt development"—an "anti-model" rather than a "model opinion."⁷⁸ He explains that the "essential aim" of Newman's theory of legitimate development is "profoundly conservative."⁷⁹ Using a tree analogy, he contrasts an acorn developing eventually into an oak (change that is consistent with growth) from an acorn mutating into a walnut.⁸⁰ Vermeule then contends that, although progressives claim the metaphor of the "living tree" for themselves, they actually seek not the "full growth" of principles and "faithful application of them," but, as "exemplified by *Obergefell*" and akin to "modernism in theology,"

(August 24, 2022), <https://lawliberty.org/forum/a-common-good-constitutionalist-feminism/> [<https://perma.cc/54CS-8V23>].

76. *Id.*

77. VERMEULE, *supra* note 1, at 122–23.

78. *Id.* at 122–23, 131–33.

79. *Id.* at 123.

80. *Id.*

the “evolution of principles.”⁸¹ Progressives, he argues, view the fundamental constitutional principles of the past as “benighted” and something to be “overcome.”⁸²

What, exactly, is the difference between the “full growth” and “development” of constitutional principles like “liberty” and “equality” and their “evolution”? As one of us (Fleming) has argued elsewhere, the best interpretation of the broad clauses of the Constitution is as “aspirational principles,” not historical practices.⁸³ Further, sometimes the best interpretation requires breaking from traditions (understood as historical practices) (as Justice Harlan famously observed in his influential dissent in *Poe v. Ullman*⁸⁴). *Obergefell* is in that vein. Observing that “the nature of injustice is such that we may not always see it in our times,” the Court noted that “new insights” about the meaning of the Constitution’s “central protections” (e.g., liberty and equality) led to striking down coverture laws (and other marriage laws upholding the husband/wife hierarchy), antimiscegenation laws, sodomy laws, and the marriage laws before the Court.⁸⁵ Vermeule scathingly criticizes progressive constitutionalism’s emphasis on evolution and new insights. At the same time, he insists that his project embraces recovering, adapting, and translating “into our world”⁸⁶ the classical tradition’s “principles” without taking on board and applying uncritically “the particular laws and customs from a point in time.”⁸⁷ In response to McClain’s earlier critique, Vermeule states that some of those historical practices were “justifiable” and “others were unjust according to the criteria of the classical tradition itself;” however, he declines to explain whether

81. *Id.* at 124.

82. *Id.* as 123.

83. JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 28–30 (2022).

84. 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

85. *Obergefell*, 576 U.S. at 663–75.

86. VERMEULE, *supra* note 1, at 3.

87. Vermeule, *The Common Good as a Universal Framework*, *supra* note 68.

and how these internal criteria would apply to the classical tradition about marriage and gender hierarchy.⁸⁸

Justice Ginsburg observed, in the VMI case, “[a] prime part of the history of our constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”⁸⁹ In this sense, the story of We the People has expanded. And so, we put the question as directly as we can to Vermeule: Agree or disagree? Has this been a proper extension within a common good constitutionalism? In the colloquy at the conference on his book, Vermeule avoided this question, protesting that it was not fair to expect him to have the expertise to answer every question that a disagreeing theory would pose.⁹⁰ Yet a commitment to gender equality is, as Cass Sunstein put it in his remarks at the conference, a “fixed point” in our constitutional practice that every theory, to be acceptable, must be able to fit and justify.⁹¹ It is hardly an arcane, peculiar matter on which Vermeule should not be expected to have a view!

III. DELIBERATION BY THE PEOPLE AND APPRECIATION OF REASONABLE MORAL PLURALISM

Remarkably, given his claim to be developing a common good constitutionalism, Vermeule gives no indication that he understands that the common good is a generic concept that is common to many political and constitutional theories, not a

88. *Id.*

89. *United States v. Virginia*, 518 U.S. 515, 557 (1996).

90. By way of answer, Professor Vermeule also referred to the work of symposium moderator ERIKA BACHIOCHI, *THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION* (2021). We do not attempt to evaluate Bachiochi’s theory of feminism in this essay, but notably, her book (published before *Dobbs*) criticizes abortion rights as a “putative right in search of constitutional justification” in *Roe* and *Casey* and also rejects Justice Ginsburg’s justification of abortion (in her dissent in *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007)) in terms of women’s autonomy and equal citizenship. *Id.* at 219–37.

91. Cass R. Sunstein, *Experiments of Living Constitutionalism*, 46 HARV. J. L. & PUB. POL’Y 1177 (2023).

concept that is peculiar to what he calls the classical tradition. For example, conceptions of civic republicanism like Michael Sandel's, conceptions of civic liberalism like William Galston's, Stephen Macedo's, or our own,⁹² and conceptions of deliberative democracy like Cass Sunstein's are all theories of common good constitutionalism.⁹³ Sotirios Barber has given the literature's most thorough argument for such a theory.⁹⁴ Vermeule does not engage with any of these prominent and influential varieties of common good constitutionalism. Furthermore, unlike these theories of common good constitutionalism, Vermeule does not seem to contemplate deliberation by the people as public-spirited citizens concerning what constitutes the common good. Instead, he seems to contemplate that rulers will reason in the manner of the classical tradition and ascertain what is good for the people in common. Put another way, his common good constitutionalism does not appear to be government of the people, by the people, and for the people. It seems to be only one out of three: government for the people.

Let us imagine what would happen if proponents of a liberal variety of common good constitutionalism—for example, a civic liberal political theorist like Stephen Macedo—were to write extensively on the virtues of a comprehensive liberal perfectionism like that of John Stuart Mill,⁹⁵ and then were to write a book on common good constitutionalism. Let us suppose further that Macedo were to contend that his common good liberalism was a freestanding view that was ecumenical among competing comprehensive conceptions of the good life, that is, that it did not rest upon or presuppose any particular comprehensive liberal view

92. See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); FLEMING & MCCLAIN, *supra* note 7, at 3, 183.

93. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

94. BARBER, *supra* note 5.

95. See JOHN STUART MILL, *ON LIBERTY* (1859).

like Mill's. We can be certain that many critics, especially conservatives who reject Mill, would be dubious and would argue that Macedo's common good liberalism not only would presuppose, but indeed would impose, a comprehensive liberal conception of the good life upon the polity.

Therefore, we want to make the corresponding point concerning Vermeule's common good constitutionalism. In other writings, he embraces a "Catholic integralism," which is a deep perfectionism concerned not merely with developing people's civic character but also with making them moral and saving their souls.⁹⁶ In his criticism of Patrick Deneen's *Why Liberalism Failed*, Vermeule advocates "bring[ing] about the birth of an entirely new regime, from within the old" by having true-believing antiliberals occupy its courts and bureaucracies and "nudge" the country in the right direction.⁹⁷ This paternalistic nudging would continue until liberalism "'is rooted out to the last fiber, the place where it grew being seared as with a hot iron.'"⁹⁸

To be sure, in *Common Good Constitutionalism*, Vermeule indicates that he seeks to put aside or bracket deeper comprehensive religious views (like "Catholic integralism") from his common good constitutionalism,⁹⁹ which implies that he would maintain that the latter does not stem from the former. But liberals and non-perfectionist conservatives understandably will be uneasy and dubious concerning whether Vermeule can detach his common good constitutionalism from his comprehensive religious view, or whether he even wants to detach them.

In any case, Vermeule has complicated the task of positive

96. See Micah Schwartzman & Richard Schragger, *What Common Good?*, THE AMERICAN PROSPECT (Apr. 7, 2022).

97. Adrian Vermeule, *Integration from Within*, 2 AM. AFF. 202 (2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> [<https://perma.cc/RW46-F9YF>].

98. *Id.* (quoting JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (Stuart D. Warner ed., Liberty Fund 1993) (1873), an emphatic rejection of Mill's *On Liberty*).

99. VERMEULE, *supra* note 1, at 29.

constitutionalists. Before he appeared, they could have argued that the negative constitutionalism of William Rehnquist¹⁰⁰ and John Roberts¹⁰¹ had hobbled the national government's ability to serve the common good and that the nation should return to the positive constitutionalism of Alexander Hamilton and the New Deal. More is needed now, however, because of Vermeule. Before positive constitutionalists can make their affirmative case now, they must show that they create no more opening to rule by Catholic orthodoxy or a counter-reformation than to any other revolution.

Finally, Vermeule does not offer a persuasive reason why personal autonomy in making significant decisions is not a more persuasive reading of the "liberty" protected under the Due Process Clause than his antiliberal classical conception. On his conception, "rights, properly understood, are always ordered to the common good and that common good is itself the highest individual interest."¹⁰² But there is no unitary understanding of the common good. It is not clear that Vermeule's trio of "peace, justice, and abundance"¹⁰³ maps well onto the practice of modern constitutional law, or, in any case, exhausts the common good.

Despite Vermeule's agreement with Dworkin's arguments for a moral reading of the Constitution over and against originalism, his own substantive moral reading fares poorly on Dworkin's two criteria of interpretation, fit with and justification of the extant constitutional practice.¹⁰⁴

Vermeule promises that common good constitutionalism will render vulnerable the Court's jurisprudence on "abortion, sexual liberties, and related matters."¹⁰⁵ Vermeule wrote these words before Justice Alito's majority opinion in *Dobbs* overruled *Roe* and

100. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

101. *Obergefell*, 576 U.S. at 701–02 (Roberts, C.J., dissenting).

102. VERMEULE, *supra* note 1, at 167.

103. *Id.* at 15, 35–40.

104. *Id.* at 6, 69.

105. *Id.* at 142.

Casey,¹⁰⁶ using the narrow approach to liberty taken in *Washington v. Glucksberg* and putting in question the entire “fabric” of constitutional liberty.¹⁰⁷ *Dobbs* itself portends disruption of constitutional practice, or tearing up chapters of the chain novel. Vermeule presumably supports the ruling in *Dobbs*, given his rejection of *Roe* and his characterization of the *Casey* joint opinion as “notorious.”¹⁰⁸ In dramatic rhetoric, he argues that *Casey*’s language about the right to “define one’s own concept of existence, of meaning, of the universe and of the mystery of human life”¹⁰⁹ should be “not only rejected but *stamped as abominable*, beyond the realm of the acceptable forever after.”¹¹⁰ Vermeule’s non-recognition and non-response to the well-developed arguments justifying *Casey* and other substantive due process cases¹¹¹ is emblematic of his abandonment of public reason, reasoned judgment in constitutional interpretation, and pluralism. In a footnote, Vermeule shares his view that the best reading of due process, equal protection, along with “other constitutional provisions” would “grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law.”¹¹²

IV. CONCLUSION: TOWARD A LIBERAL COMMON GOOD CONSTITUTIONALISM FOR POLARIZED TIMES

Vermeule’s common good constitutionalism is the ultimate

106. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

107. *Id.* at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting); James E. Fleming, *How Justice Alito’s Hidebound Conservatism in Dobbs Shreds the Fabric of Ordered Liberty*, FORUM (Fall 2022).

108. VERMEULE, *supra* note 1, at 41, 199 n.103.

109. 505 U.S. at 851.

110. VERMEULE, *supra* note 1, at 42 (emphasis added).

111. *See, e.g.*, the arguments developed between *Casey* (1992) and the publication of Vermeule’s book (2022) to justify *Casey*’s framework for substantive due process. For vigorous formulations of such arguments, see FLEMING, *supra* note 83.

112. VERMEULE, *supra* note 1, at 199 n.103.

conservative reaction against liberal “orthodoxy.” Over the next few years, building upon our prior work as well as Barber’s, we plan to develop a liberal common good constitutionalism in contradistinction from Vermeule’s view. Like Vermeule, we reject “originalism” and argue for what Dworkin called a “moral reading” of the Constitution: that it is a basic charter of normative principles, not a code of historical rules. But he proposes an unsustainable moral reading—rooted in Catholic integralism—one to which a morally pluralistic people would not submit. Like Vermeule, we conceive the Constitution as a charter of not merely negative liberties—protecting people from government—but also positive benefits—obligating government to promote the positive ends proclaimed in the preamble. Contrary to Vermeule, the benefits government should promote do not stem from a unitary, comprehensive conception of the good life for all—but are ecumenical, all-purpose goods enabling persons to pursue a plurality of conceptions of the good life.¹¹³ Like Vermeule’s theory, ours will be oriented toward the common good. Whereas his theory seemingly conceives the common good as what our rulers, reasoning from the classical tradition, conclude is good for all people in common, our theory will contemplate civic-minded deliberation about the common good by a people engaged in constitutional self-government. In its commitment to equality and affirmative governmental obligation to support social reproduction, our common good liberalism will have affinities with forms of feminist common good constitutionalism.¹¹⁴

Hence, Vermeule’s supposedly common good constitutionalism does not respect but indeed denies and evidently would expunge moral pluralism. That is why he wrongly “stamp[s] as abominable” any right of autonomy to enable people to make certain decisions

113. FLEMING & MCCLAIN, *supra* note 7, at 190.

114. See, e.g. JULIE C. SUK, HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 180–209 (2023) (looking to examples of constitutional reform in Ireland and elsewhere to argue for a “constitutionalism of care” that embraces gender equality).

fundamentally affecting their identity, destiny, or way of life. Vermeule's theory amounts to a conservative counter-reformation. The common good liberalism we will develop is the antithesis of Vermeule's putative common good constitutionalism and is more suitable to morally pluralistic constitutional democracy.

We close by expressing our profound doubt that a free people such as the American people—characterized by reasonable moral pluralism and the capacities to reason about justice and their own conception of the good life—would (or even could) submit to rule by Vermeule's authoritarian common good constitutionalism.¹¹⁵

115. See Barber et al., *supra* note 8.

FLOURISHING, VIRTUE, AND COMMON GOOD CONSTITUTIONALISM*

LAWRENCE B. SOLUM**

INTRODUCTION

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

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

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

2. *Id.*

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

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

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

I. THICK AND THIN CONCEPTIONS OF THE COMMON GOOD

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

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

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

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

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

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

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

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

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

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

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

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

A. *Thin Conceptions of the Common Good*

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

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

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

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

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

11. *Id.*

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

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

B. Thick Conceptions of the Common Good

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

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

12. *Id.*

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

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

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

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

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

In this Part, I will offer an account of the common good as human flourishing. That account begins with human nature: humans are rational and social creatures. A flourishing human community is one where members of the community engage in social and rational activities that express the human excellence or virtues. This view draws on Neo-Aristotelian ideas about human nature, human flourishing, and the human excellences or virtues; the account offered here relies heavily on the work of Rosalind Hursthouse¹⁵ and Gavin Lawrence.¹⁶

A. *Human Nature: Rational and Social Creatures*

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

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

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

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

B. Metaethics: Natural Goodness

What is the moral significance of human nature? Again, this is a large topic. My approach is based on what we might call a “naturalist” account of metaethics. That is, I will assume that what is morally good for humans is a function of human nature. This assumption can be clarified by thinking about flourishing in the case of other natural creatures. A flourishing life for an Eagle involves successful flying, hunting, and mating. A flourishing life for a beaver involves the building of dams and lodges, eating various plants, and monogamous family life. Likewise, we can draw conclusions about what constitutes a flourishing human life by observing humans. This account of the good for humans assumes that goodness is a natural property, and hence that moral philosophy is in many ways continuous with the natural sciences. This account of metaethics draws on the ideas of Philippa Foot¹⁷ and Michael Thompson.¹⁸ For the purposes of this Article, naturalist metaethics is simply assumed and not justified.

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

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

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

What then is flourishing (or *eudaimonia*) for humans? I will begin with a stipulated definition that expresses an aretaic¹⁹ (virtue centered) conception of flourishing:

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

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

D. *Virtue: The Human Excellences*

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

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

virtue of justice as a moral virtue,²⁰ I will treat justice as a distinct category.

1. The Moral Virtues

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

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

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

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

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

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

2. The Intellectual Virtues

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

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

3. The Virtue of Justice as Lawfulness

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

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

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

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

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

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

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

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

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

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

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

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

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

E. *Solidarity as Civic Friendship*

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

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

III. THE COMMON GOOD AS THE END OF LAW

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

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

28. See *infra* Part IV.

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

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

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

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

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

A. *Peace, Health, and Prosperity*

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

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

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

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

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

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

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

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

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

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

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

B. Facilitating Acquisition of the Virtues

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

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

C. Meaningful Work and Recreation

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

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

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

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

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

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

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

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

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

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

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

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

IV. THE CONSTITUTION OF VIRTUE

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

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

A. *Constitutional Design and Virtuous Officials*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Justice as Lawfulness and Constitutional Practice

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

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

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

34. *Id. passim*.

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

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

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

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

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

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

37. See *id.* at 1251.

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

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

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

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

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

41. See Solum, *supra* note 36.

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

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

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

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

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

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

CONCLUSION

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

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

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

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

EXPERIMENTS OF LIVING CONSTITUTIONALISM

CASS R. SUNSTEIN*

ABSTRACT

Experiments of Living Constitutionalism urges that the Constitution should be interpreted so as to allow both individuals and groups to experiment with different ways of living, whether we are speaking of religious practices, family arrangements, political associations, civic associations, child-rearing, schooling, romance, or work. Experiments of Living Constitutionalism prizes diversity and plurality; it gives pride of place to freedom of speech, freedom of association, and free exercise of religion; it cherishes federalism; it opposes authoritarianism in all its forms. While Experiments of Living Constitutionalism has considerable appeal, my purpose in naming it is not to defend it, but to contrast it to Common Good Constitutionalism, with the aim of specifying the criteria on which one might embrace or defend any approach to constitutional law. My central conclusion is that we cannot know whether to accept or reject Experiments of Living Constitutionalism, Common Good Constitutionalism, Common Law Constitutionalism, democracy-reinforcing approaches, moral readings, originalism, or any other proposed approach without a concrete sense of what it entails—of what kind of constitutional order it would likely bring about or produce. No approach to constitutional interpretation can be evaluated without asking how it fits with the evaluator’s “fixed points,” which operate at multiple levels of generality. The search for reflective equilibrium is essential in deciding whether to accept a theory of constitutional interpretation.

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I. A PROPOSAL

Here is a proposal, for your consideration: Experiments of Living Constitutionalism. The central idea, emphatically liberal¹ in character, is that the Constitution should be interpreted to allow both individuals and groups to experiment with different ways of living, whether we are speaking of religious practices, child-rearing, family arrangements, romance, schooling, or work. Experiments of Living Constitutionalism prizes diversity and plurality; it opposes (what it sees as) authoritarianism in all its forms.

The operative phrase comes from John Stuart Mill, who said this in *On Liberty*:

That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognising all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.²

1. I am speaking of course of the liberal political tradition, not of any "left-right" political divisions; Experiments in Living Constitutionalism cuts across such divisions.

2. See JOHN STUART MILL, ON LIBERTY 859. See also Elizabeth Anderson, *John Stuart Mill and Experiments in Living*, 102 ETHICS 4 (1991). Anderson's essay is deeply illuminating, but it does not explore Mill's relationship with Harriet Taylor, which was, in

Experiments of Living Constitutionalism insists on the importance of allowing and encouraging “varieties of character” and on the value of “different modes of life.” It does so in part because it values the dignity of every individual, who should be entitled to find his or her own way. It does so in part because it sees experiments of living as essential to social as well as individual progress. For those who embrace Experiments of Living Constitutionalism, experiments of living also contribute to the common good. If each of us is able to see what each of us has tried, we will have more options to consider; all of us will be able to learn from each of us. Failed experiments of living may be nothing to celebrate, but they contribute to both individual and social progress.

As its name (accidentally!) suggests, Experiments of Living Constitutionalism is a form of living constitutionalism. Its advocates firmly reject originalism. They do not believe that the Constitution should be understood in accordance with its original public meaning. But they claim that their preferred approach has deep roots in Anglo-American traditions, and that it can be understood in a way that is faithful to the text of the Constitution.

Those who favor Experiments of Living Constitutionalism prize freedom of speech. They embrace Justice Robert Jackson’s words: “Compulsory unification of opinion achieves only the unanimity of the graveyard.”³ They agree with this suggestion: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁴ To be sure, they do not believe that the first amendment is “an absolute.” They would allow restrictions on bribery, perjury, and fraud, and they would permit restrictions on free speech when there is a clear and present

my view, central to his argument in *ON LIBERTY*. See Cass R. Sunstein, *John and Harriet: Still Mysterious*, N.Y. REV OF BOOKS (Apr. 2, 2015), <https://www.nybooks.com/articles/2015/04/02/john-stuart-mill-harriet-taylor-hayek/> [<https://perma.cc/K33K-3E53>].

3. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

4. *Id.*

danger. But they are broadly comfortable with current First Amendment doctrine, and they would resist efforts to authorize any kind of censorship.

In the same vein, those who favor Experiments of Living Constitutionalism prize freedom of religion. They would allow a plurality of faiths to flourish. They would stand in the way of federal or state efforts to impose secular values, even widely held ones, on people whose religious traditions are inconsistent with those values. For related reasons, Experiments in Living Constitutionalists have no problem with home schooling and the idea of a constitutional right, held by parents, to make choices with respect to their children's education.⁵ Experiments of Living Constitutionalists are enthusiastic about freedom of association, whether we are speaking of civic associations, political associations, or associations of some other kind. Those who favor Experiments of Living Constitutionalism would also be strongly inclined to protect contemporary rights of privacy, including the right to use contraceptives, the right to live with members of one's family,⁶ the right to engage in consensual sodomy,⁷ and the right to same-sex marriage. Experiments of Living Constitutionalism takes the right to choose abortion seriously, but greatly struggles with that issue. Those who embrace it might not commit themselves to a right to choose, because of the importance and the value of protecting human life.

Experiments of Living Constitutionalism is a great friend to federalism, seeing the diversity of the states as an engine for the creation of experiments of living. Those who embrace it much like the idea of "laboratories of democracy"; they will strongly resist efforts to override values and approaches that are prized by citizens of (for

5. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce v. Society of Sisters*, 268 US 510, 535 (1925).

6. *Moore v. City of East Cleveland*, 431 U.S. 494, 503–06 (1977).

7. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

example) California, Mississippi, or Wyoming.⁸ They will not favor preemption of state law. At the same time, they will be open-minded on separation of powers questions; the commitment to Experiments of Living Constitutionalism does not entail a particular approach to grants of discretion to administrative agencies, or to the idea of a unitary president. But that commitment does entail approaching those issues with Mill's cautionary note in mind: "Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress."⁹

At this point, you might have numerous questions. What is the pedigree of the Experiments of Living Constitution? Where does it come from? Does the U.S. Constitution enact Mr. John Stuart Mill's *On Liberty*? Those who embrace the Experiments of Living Constitution think that they can answer these questions. They believe that their defining ideals are rooted in the distinctive form of liberal republicanism that defined and launched the U.S. Constitution,¹⁰ and that Mill was essentially summarizing principles, rooted in the liberal tradition and also congenial to republicanism, that predated and informed the American founding. They insist that the Fourteenth and Fifteenth Amendments are animated by a commitment to freedom that fits comfortably with the Experiments of Living

8. Suppose, for example, that one of those states takes a distinctive approach to environmental protection or to motor vehicle safety. General propositions do not decide concrete cases (as someone once said), but Experiments of Living Constitutionalists would be strongly inclined to allow such an approach, unless it is plainly inconsistent with federal law.

9. MILL, *supra* note 2 at 859.

10. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). There is a nice question, by the way, about the relationship between Common Good Constitutionalism and the Republican Revival of the 1980s and 1990s. The traditional of civic republicanism owes a great deal to, and to some extent is, the foundation for longstanding understandings of the common good.

Constitution.¹¹ In their view, the idea of experiments of living has a long tradition behind it; Montesquieu and Locke defended versions of that idea, as did Madison, Hamilton, and Jefferson.¹² Mill was hardly writing on a clean slate; the idea of experiments of living is anything but a bolt from the blue.

Skeptics might ask how Experiments of Living Constitutionalism relates to our existing Constitution, and whether it promises, or threatens, to produce radical reforms. Would there be a right to polygamous marriages? To incestuous marriages? To pornography? To these questions, defenders of Experiments of Living Constitutionalism have two things to say. First, they are respectful of precedent. Followers of Ronald Dworkin,¹³ they believe that judges must fit as well as justify existing rulings. In that light, they would be reluctant in the extreme to say that the Constitution protects a right to polygamous marriages, incestuous marriages, or pornography. Indeed, they believe that Experiments of Living Constitutionalism is, to a significant degree, reflected in existing constitutional law. Second, defenders of Experiments of Living Constitutionalism would give respectful attention to democratic processes; they would be willing to consider Thayerism.¹⁴

Experiments of Living Constitutionalists will have to make some hard choices there, but if Congress or a state legislature has made a decision, supporters of Experiments of Living Constitutionalism might well be reluctant to reject it. In other words, Experiment of Living Constitutionalism could take on board a degree of Thayerism, or could reject it; that is a separate debate. We could imagine both Thayerians, broadly committed to Experiments of Living Constitutionalism but also deferential to democratic processes, and

11. Consider Lincoln's statement: "No man is good enough to govern another man, without that other's consent. I say this is the leading principle—the sheet anchor of American republicanism." Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854).

12. I am not offering citations here, for reasons that will appear shortly; see *infra* note 15.

13. See Ronald Dworkin, *Law's Empire* (1986).

14. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

non-Thayerians, broadly enthusiastic about the same idea, and not so deferential to democratic processes; there could be interesting arguments between them.

II. EXPERIMENTS IN LIVING CONSTITUTIONALISM AS A THOUGHT EXPERIMENT

My goal here is not to defend Experiments of Living Constitutionalism (though I do find it interesting). I mostly mean to use it as a thought experiment¹⁵ in connection with current debates about constitutional interpretation and Common Good Constitutionalism.¹⁶ Suppose, as is plausible, that Experiments of Living Constitutionalism and Common Good Constitutionalism overlap in important respects. For example, both of them reject originalism, and they will converge on some important matters.¹⁷ Suppose too that the two diverge on some important matters, as is quite likely. As Vermeule puts it, “[T]he libertarian assumptions central to free speech law and free speech ideology—that government is forbidden to judge the quality and moral worth of public speech . . . will fall under the ax.”¹⁸ Experiments of Living Constitutionalism may or may not embrace “libertarian assumptions,” but it will not be inclined to allow government “to judge the quality and moral worth of public speech.” Those who embrace Experiments of Living Constitutionalism are committed to Mill’s general proposition,

15. Hence a paucity of citations in the preceding section! If my goal were to offer a full-throated defense of Experiments of Living Constitutionalism, many more details would of course be required. (I do like it more than I expected when I started.)

16. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022).

17. See *infra* (discussing the shared antipathy for both *United States v. Alvarez* and *Ashcroft v. Free Speech Coalition*). It is important to note that those who adopt a general approach to interpretation can disagree about applications. Originalists can disagree, for example, about affirmative action programs; moral readers can disagree about abortion. Those who embrace Experiments of Living Constitutionalism might disagree about any number of free speech cases. I believe that something similar can be said about Common Good Constitutionalism; it offers a general orientation but allows reasonable disagreement about particular cases.

18. VERMEULE, *supra* note 16, at 42 (2021).

which Common Good Constitutionalists would appear to reject: “It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.”¹⁹

To be sure, general propositions do not decide concrete cases, and those who embrace Experiments of Living Constitutionalism need not be inclined to strike down minimum wage laws, maximum hour laws, compulsory seatbelt laws, and occupational safety laws, even if those laws cannot be justified on “harm to others” grounds.²⁰ But to say the least, Common Good Constitutionalism does not ally itself with John Stuart Mill, and, as Vermeule makes clear, it is not inclined to favor the robust understanding of free speech that lies at the heart of Experiments of Living Constitutionalism. To say the least, Common Good Constitutionalism does not give pride of place to experiments of living; its foundation lies in the idea of the common good, which may or may not accommodate, permit, or forbid experiments of living. Some such experiments might be inconsistent with the common good, properly understood.

How shall we choose between Experiments of Living Constitutionalism and Common Good Constitutionalism? Should we reject both in favor of originalism, democracy-reinforcing judicial review,²¹ or some other approach? Any answer to that question would have to offer criteria of selection, which are urgently needed. I suggest that the only possible answer is another question: *What would make our constitutional order better rather than worse?* That is an admittedly daunting question, but there is no alternative to asking

19. MILL, *supra* note 2 at 859.

20. Mill of course would restrict interferences with liberty to cases involving “harm to others.” *Id.* He also offered qualification to that restriction, which I cannot explore here. Those of us who are at least interested in Experiments of Living Constitutionalism need not (and in my view should not) adopt the harm-to-others restrictions for purposes of constitutional law. For relevant discussion, see SARAH CONLY, *AGAINST AUTONOMY* (2013).

21. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1983).

it.²² The Constitution does not contain the instructions for its own interpretation.

Some originalists seem to think that their preferred approach follows from the very idea of interpretation,²³ but it really does not;²⁴ many different approaches, including Experiments of Living Constitutionalism and Common Good Constitutionalism, can fall within the domain of interpretation, so long as they operate by reference to and within the space of the Constitution itself. In their best moments, the most careful originalists argue that their preferred approach would, in fact, make our constitutional order better, because it would appropriately discipline judges, promote democratic ideals, and safeguard both institutions and rights.²⁵ Bracket the question whether that argument is convincing; it has the advantage of defining the terrain on which a theory of interpretation must be defended.

III. REFLECTIVE EQUILIBRIUM AND CONSTITUTIONAL LAW

To be more specific: In order to choose a theory of constitutional interpretation, judges (and others) must seek “reflective equilibrium,” in which their judgments, at multiple levels of generality, are brought into alignment with one another.²⁶ In *A Theory of Justice*,

22. This is the basic theme of Cass R. Sunstein, *How to Interpret the Constitution* (2023).

23. See Walter Benn Michaels, *A Defense of Old Originalism*, 31 *W. NEW ENGLAND L. REV.* 21, 21 (2009). For an analogous argument, see STEVEN SMITH, *LAW’S QUANDARY* (2007); for an analogous argument with a focus on meaning rather than intentions, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO L. J.* 1823 (1997).

24. See Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 *CONST. COMMENTARY* 193 (2015).

25. This is my preferred reading of Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CINN. L. REV.* 849 (1989).

26. My colleague Richard Fallon has explored the idea of reflective equilibrium, and its relationship to constitutional law, to superb effect in RICHARD FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018). The idea of reflective equilibrium is also used to good effect in Lawrence Solum, *Themes From Fallon on Constitutional Theory*, 18 *GEO. J. OF L. & PUB. POL’Y* 287 (2020); Mitchell N. Berman, *Reflective Equilibrium and*

John Rawls elaborates the basic idea for purposes of moral and political philosophy.²⁷ He begins with this suggestion: “There are some questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust.”²⁸ On some issues, we are confident that we “have reached what we believe is an impartial judgment,”²⁹ and the resulting convictions are “provisional fixed points which we presume any conception of justice must fit.”³⁰ At the same time, there are some questions on which we lack clear answers, and our aim might be to “remove our doubts.”³¹ We might want our “principles to accommodate our firmest convictions and to provide guidance where guidance is needed.”³²

As Rawls understands the matter, fixed points are only provisionally fixed; we might hold some judgment (say, the death penalty is morally unacceptable) with a great deal of confidence, and we might be exceedingly reluctant to give it up. But we should be willing to consider the possibility that we are wrong. In recent decades, many people opposed same-sex marriage quite firmly, but their judgment shifted, in part because their opposition did not fit well with what else they thought, and with the general principles that they hold.

As Rawls understands the matter, “we work from both ends,”³³ involving both abstract principles and judgments about particular cases. If some general principles “match our considered convictions”³⁴ about those cases, there is no problem. In the case of discrepancies, we might “revise our existing judgments” about

Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause, 2011 FACULTY SCHOLARSHIP AT PENN CAREY LAW 2349.

27. See John Rawls, *A Theory of Justice* 18 (1971).

28. *Id.* at 17–18.

29. *Id.* at 18.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

particular cases, “for even the judgments we take provisionally as fixed points are liable to revision.”³⁵ We go back and forth between principles and judgments. When we produce “principles which match our considered judgments duly pruned and adjusted,” we are in “reflective equilibrium,” defined as such because “our principles and judgments coincide,” because “we know to what principles our judgments conform and the premises of their derivation.”³⁶

To be sure, the equilibrium might not be *stable*. It might be upset if, for example, reflection “lead[s] us to revise our judgments.”³⁷ It is important to emphasize that on Rawls’ account, a “conception of justice cannot be deduced from self-evident premises or conditions on principles”; it is a matter “of everything fitting together into one coherent view.”³⁸ And importantly, Rawls suggests that we consult “our considered convictions at all levels of generality; no one level, say that of abstract principle or that of particular judgments in particular cases, is viewed as foundational. They all may have an initial credibility.”³⁹

Rawls’ motivation was “the hypothesis that the principles which would be chosen in the original position are identical with those that match our considered judgments and so these principles describe our sense of justice.”⁴⁰ But Rawls urges that this view is too simple, because our considered judgments might be wrong. They might be “subject to certain irregularities and distortions.”⁴¹ For example, we might think that meat-eating is acceptable, or that meat-eating is not acceptable, and we cannot know whether we should continue to think that until we test the proposition against our other judgments. When we are given “an intuitively appealing account” of what justice requires, we may well revise our “judgments to

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 19.

39. John Rawls, *Political Liberalism* 8 n.8 (1993).

40. RAWLS, *supra* note 27, at 42.

41. *Id.*

conform to its principles even though the theory does not fit" our existing judgments exactly.⁴²

Whether or not we agree with Rawls for purposes of moral and political philosophy, there is a close analogy in constitutional law. Theories of constitutional interpretation are standardly defended or rejected, embraced or discarded, by asking how well they fit with our considered judgments at multiple levels of generality. There is no alternative. We cannot know what approach would make our constitutional order better rather than worse without seeking reflective equilibrium. In the United States, most people would be reluctant to accept a theory of interpretation that leads to the conclusion that *Brown v. Bd. of Education*⁴³ was wrongly decided. If a proposed theory would allow racial segregation by state governments, the theory might well (in their view, and mine too) have to be rejected for that reason. At the very least, a theory of interpretation that would allow racial segregation must meet a heavy burden of justification. The reason, in short, is that a constitutional order that allowed racial segregation would be intolerably unjust, and we should not understand our constitutional order to authorize intolerable injustice unless we are required to do so. So long as a theory of interpretation is optional, we should not adopt one that allows intolerable injustice. What is taken as intolerably unjust by some is not so taken by others, which helps explain why different people have different fixed points.

Suppose that a theory would mean that *District of Columbia v. Heller*,⁴⁴ protecting the individual right to possess guns,⁴⁵ was incorrectly decided. Some people would conclude that if so, the theory is questionable. Many people would think that if a theory suggests that *Brandenburg v. Ohio*,⁴⁶ broadly protecting political speech

42. *Id.*

43. 347 U.S. 483 (1954).

44. 554 US 570 (2008).

45. *Id.* at 595.

46. 395 US 444 (1969).

through a version of the “clear and present danger” test,⁴⁷ was wrong, the theory is much less appealing. Other people will think that if a theory suggests that *Brandenburg v. Ohio* was right, or might be right,⁴⁸ we had better find another theory.

Fixed points might not be limited to *existing* rulings. People care about the constitutional future, not merely the constitutional present. Many people would reject a theory of interpretation that might make space for, or require, a (future) return to *Lochner v. New York*,⁴⁹ which struck down maximum hour laws,⁵⁰ or anything like it. People might reject a theory of interpretation that might, in the future, allow or require government to restrict political dissent. (Advocates of Experiments of Living Constitutionalism would certainly do that.) One might reject a theory of interpretation that puts the administrative state in (future) constitutional jeopardy, and that would (for example) cast constitutional doubt on the Clean Air Act or the Occupational Safety and Health Act.

More fundamentally, many people would reject a theory of interpretation that would rule out new and (to us) surprising developments that would expand prevailing conceptions of liberty and equality. They would insist on opening the ground for something like a *Brown v. Board of Education*,⁵¹ or an *Obergefell*,⁵² for new and future generations. They would also make a bet that a Supreme Court, operating under a theory that makes space for decisions like *Brown* or *Obergefell*, appropriately expanding equality and liberty, would produce a similar decision in 2030, or 2040, or 2090, also

47. *Id.* at 448.

48. There is a lurking question about how much judicial discretion a theory authorizes. A pervasive concern about “moral readings,” see RONALD DWORKIN, *FREEDOM’S LAW* (1998), is that different judges will offer different moral readings. On one moral reading, for example, *Brandenburg* is right; on another, *Brandenburg* is wrong, and states can do as they like; on another, *Brandenburg* is wrong, and states may regulate dangerous speech.

49. 198 U.S. 45 (1905).

50. *Id.* at 53.

51. 347 U.S. 483 (1954).

52. *Obergefell v. Hodges*, 576 US 644 (2015).

appropriately expanding equality and liberty (not the worst bet, though also perhaps not the best).⁵³

In short: Judges (and others) must consider the consequences of their choice for particular judgments that operate, for them, as provisional “fixed points,” understood as judgments that seem both clear and firm. If a theory of interpretation would allow the federal government to discriminate on the basis of race and sex, it is unlikely to be a good theory of interpretation; it is at least presumptively unacceptable for that reason.

I have used the term “provisional fixed points,” and in this respect I am following Rawls, who emphasizes their provisional character in moral and political philosophy. A judge might believe something with real conviction. Even so, a judge ought to be willing to listen to counterarguments; humility is a good thing. Few points are so fixed that nothing at all could dislodge them. Still, people have beliefs about constitutional meaning that would be exceptionally difficult to dislodge. They might have an assortment of such beliefs. What I am urging here is that that is entirely fine. Fixed points about particular cases are central to assessments of theories of constitutional interpretation.

It might be tempting to respond that the choice of a theory of interpretation cannot possibly depend on the results that it yields. One might think that that choice has to be made on the basis of some commitment that might seem higher or more fundamental. If we focus on results, and choose a theory of interpretation on the basis of results, perhaps we are biased, or unforgivably “result-oriented,” and engaged in some kind of special pleading.

The problem with that response is that it rests on an illusion of compulsion. Among the reasonable candidates, judges (and others) are not compelled to adopt a particular theory of interpretation; they must make a choice. One more time: To do that, judges (and

53. Some people would of course believe that to be a terrible bet, on institutional grounds. They might believe that the democratic process would and should make any expansions. They might believe that judicial expansions, as the judges might see it, would likely be grave mistakes.

others) are required to think about what would make our constitutional order better rather than worse. To be sure, we should not consider, as fixed points, only results about particular cases (though they matter a great deal). We must also consider defining ideals (including self-government and the rule of law), and we must think about processes and institutions. There might be fixed points there as well.

Note that there is a large and critical difference between fixed points and preferred results. You might want the Supreme Court to issue certain rulings, but if it does not, you will think it reasonable, and even if you think it unreasonable, you might not think that something horrible or horrific has happened. A theory of constitutional law might not yield *all* of one's preferred results (it had better not!), but it might also yield, or at least not foreclose, all, most, or many of one's fixed points. Note as well that I am suggesting that for judges (or others), thinking about theories of constitutional interpretation, the relevant fixed points really are, and must be, their own. And it is important to see that we are not speaking of a small number of fixed points or a handful of iconic cases; a theory of interpretation might be acceptable if it undoes just a few. The real problem comes if such a theory operates as a wrecking ball.

IV. THE MATTER AT HAND

We have seen that Common Good Constitutionalism rejects originalism.⁵⁴ Vermeule's own focus is mainly on defining ideals; he emphasizes "peace, justice, and abundance."⁵⁵ Speaking broadly, Vermeule states that "[t]he main aim of common good constitutionalism . . . is not the liberal goal of maximizing individual autonomy or minimizing the abuse of power—an incoherent goal in any event. . . . Instead it is to ensure that the ruler has both the authority and the duty to rule well."⁵⁶ *Experiments of Living*

54. See VERMEULE, *supra* note 16, at 1.

55. *Id.* at 7.

56. *Id.* at 37.

Constitutionalists will not entirely welcome that formulation, though they will be keenly interested in understanding what it means for a ruler “to rule well.”⁵⁷

Much of Vermeule’s discussion focuses on general considerations, but he does offer a number of details. For example, he is sharply critical of *United States v. Alvarez*,⁵⁸ giving constitutional protection to a candidate’s false claim about having won the Congressional Medal of Honor.⁵⁹ He is also sharply critical of *Ashcroft v. Free Speech Coalition*,⁶⁰ giving constitutional protection to sexually explicit images, sometimes called “virtual child pornography,” that appear to depict minors but are produced through computer-imaging technology.⁶¹ Vermeule also thinks that in cases involving restrictions of freedom of speech, judges who embrace Common Good Constitutionalism “would defer to the legislative specification within broad boundaries of reasonableness,” in a way that is close to “(forgiving versions of) arbitrariness review under the Administrative Procedure Act.”⁶² Vermeule is hospitable toward the administrative state, which, he says, “is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory.”⁶³ In Vermeule’s view, “[a]gencies are the living voice of our law.”⁶⁴

57. In various places, Vermeule is sharply critical of “liberalism,” though in *Common Good Constitutionalism*, he objects to “progressive constitutionalism.” Liberalism is of course a capacious tradition, and many critics, on both the left and the right (including those drawn to “postliberalism”), understand it in a way that would be unrecognizable to most liberals. I should add that Experiments of Living Constitutionalism is one form of liberalism, but it is only one form, and sensibly understood, it does not reject the claims of tradition (even if it is willing to scrutinize them), and it need not and should not turn Mill’s Harm Principle into a dogma, let alone a constitutional dogma. For a relevant discussion of norms, bearing on how to think about traditions, see EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1978).

58. *United States v. Alvarez*, 567 U.S. 709 (2012)

59. *Id.* at 730.

60. 535 U.S. 234 (2002).

61. VERMEULE, *supra* note 16, at 170–72.

62. *Id.* at 170.

63. *Id.* at 135.

64. *Id.* at 138.

Vermeule is especially critical of *Obergefell*, stating that it “is what progressive constitutionalism looks like when it has become detached from the objective legal and moral order that underpins classical legal theory and the common good.”⁶⁵ Marriage, he writes, “is a natural and moral and legal reality simultaneously, a form itself constituted by the natural law in general terms as the permanent union of man and woman”⁶⁶ In these circumstances, a “civil specification that distorts the essence of the natural institution would be unreasonable and arbitrary, from the standpoint of common good constitutionalism.”⁶⁷ *Obergefell* “warped the core nature of the institution by forcibly removing one of its built-in structural features.”⁶⁸

For the record, I agree with Vermeule on the administrative state⁶⁹ and on both *Alvarez* and *Ashcroft*, but I do not agree with him on freedom of speech in general or on *Obergefell*.⁷⁰ (Those who embrace Experiments of Living Constitutionalism would likely concur with me.) With respect to freedom of speech, recall Mill’s words: “unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good.”⁷¹ This is a point about human fallibility, even in democratic arenas. But defending a robust system of freedom of speech is not my goal here. The real point has to do with the criteria for choosing a theory of interpretation. For those drawn to Common Good Constitutionalism, the question is what kind of constitutional order it would produce. What would it do with, or to,

65. *Id.* at 131.

66. *Id.* at 131–32.

67. *Id.* at 132.

68. *Id.*

69. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW AND LEVIATHAN* (2021).

70. For many reasons, *Obergefell* is a complicated decision, and one could reject it for any number of reasons (for example, they might be Thayerian, Burkean, or originalist). When I say that I do not agree with Vermeule, I mean that I do not agree with his claims about the nature of marriage. (I know that he has reasons for his view.) I am keenly aware that a defense of my view, and a rejection of his, would require some details, which would take me well beyond the present topic.

71. MILL, *supra* note 2 at 859.

self-government? What would it do to, or with, existing free speech doctrine? How would it handle the privacy cases, past and future? To know whether to accept or reject any proposed approach, we need to have a kind of map of the system of constitutional law to which it would lead. It would be too much to expect a full specification of results; but it would not be too much to ask for a general understanding of what it would entail (more or less).

In my view, Thayerism, writ large, must be rejected because it would lead to a constitutional order that is far inferior to our own.⁷² Something similar can be said, I think, for originalism.⁷³ I greatly admire Vermeule, and I have learned a great deal from him, but I am not sure about Common Good Constitutionalism.⁷⁴ I favor experiments of living.⁷⁵

72. The reason is that it would require elimination of numerous current constitutional rights, including the right to be free from racial segregation, *see* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and racial discrimination, *see* *Loving v. Virginia*, 388 U.S. 1, 12 (1967), at the hands of the states, and certainly the right to be free from racial discrimination from the federal government, *see* *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). *See* Cass R. Sunstein, *Thayerism* (Sep. 10, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816.

73. This is a complicated matter, because originalism can be understood in many different ways, and its implications for specific cases are hardly uncontested. *See* CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* (2023); for a valuable discussion, *see* RANDY BARNETT AND EVAN BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* (2021). In my view, the original public meaning, properly understood, would lead to too many unacceptable results, and for reasons stated in text, that unhappy fact is highly relevant to the decision whether to embrace originalism. *See* Cass R. Sunstein, *Is Living Constitutionalism Dead? The Enigma of Bolling v. Sharpe* (Harvard Public Law Working Paper No. 22-30, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192758.

74. The reason is that it might produce a system of constitutional law that would, in crucial respects, be inferior to the one we have, or to an imaginable alternative. I am thinking in particular of what Vermeule says about freedom of speech, though I do not know if his view should be seen as a necessary part of Common Good Constitutionalism, or simply as one possible specification. My main submission here is that any theory of interpretation, including Common Good Constitutionalism, stands or falls on the system of constitutional law that it would support or bring about.

75. I say that I favor experiments of living, because I am certain that I do; I do not say that I favor Experiments of Living Constitutionalism, because I am not certain that I do.

COMMON GOOD CONSTITUTIONALISM AND COMMON GOOD ORIGINALISM: A CONVERGENCE?

JOSH HAMMER*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Again, some important distinctions remain.

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

* * * * *

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

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

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

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

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

9. Vermeule, *supra* note 1.

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

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

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

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

14. *Id.*

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

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

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

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

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

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

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

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

20. VERMEULE, *supra* note 3.

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

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

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

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

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

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

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

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

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

25. U.S. CONST. pmb.

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

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

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

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

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

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

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

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

* * * * *

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

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

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

29. Hammer, *supra* note 3.

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

31. Hammer, *supra* note 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

38. *Id.* at 4.

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

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

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

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39. *See id.* at 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

44. See *id.* at 21.

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

* * * * *

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

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

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

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

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

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

ORIGINALISM, COMMON GOOD CONSTITUTIONALISM, AND TRANSPARENCY

MICHAEL L. SMITH¹

ABSTRACT

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

6. *Id.*

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

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

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

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

I. THEORIES OF INTERPRETATION: STANDARDS AND PROCEDURES

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

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

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

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

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

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

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

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

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

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

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

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

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

II. TRANSPARENCY'S NORMATIVE FORCE

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

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

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

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

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

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

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

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

III. ORIGINALISM AND TRANSPARENCY

A. *Originalism as a Standard*

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

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

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

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

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

B. *Originalism as a Procedure*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. COMMON GOOD CONSTITUTIONALISM AND TRANSPARENCY

A. *Common Good Constitutionalism as a Standard*

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

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

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

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

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

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

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

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

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

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

38. *Id.* at 3.

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

40. *Id.* at 7.

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

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

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

41. *Id.* at 37.

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

43. *Id.* at 12.

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

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

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

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

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

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

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

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

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

50. *Id.*

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

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

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

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

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

53. *Id.* at 131–32.

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

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

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

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

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

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

57. *Id.* at 6.

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

59. *Id.*

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

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

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

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

B. *Common Good Constitutionalism as a Procedure*

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

62. *Id.* at 1–2 & n.4, 13.

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

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

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

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

V. IMPLEMENTING COMMON GOOD CONSTITUTIONALISM

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

65. Barnett, *supra* note 16.

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

67. Barnett, *supra* note 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

78. *Id.*

79. *Id.*

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

81. *Id.* (emphasis added).

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

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

84. *Id.*

85. *Id.*

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

We learn several things from this opinion:

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

86. *Id.*

87. *Id.*

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

89. *Id.* at 672–73.

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

91. *Id.*

92. *Id.*

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

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

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

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

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

95. 505 U.S. 822 (1992)

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

97. *Id.*

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

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

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

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

99. Barnett, *supra* note 16.

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

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

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

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

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

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

103. *Id.*

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

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

CONCLUSION

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

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

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

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

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)¹ offers a new theory of constitutional interpretation grounded in the concept of the common good.² 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.³ 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.⁴

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

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.⁵ 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.⁶ Second, that all law, in order to *be* law, is rationally ordered to the common good of the political community.⁷ 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.⁸ Indeed, this positive law is so important that Professor Vermeule advocates for a "presumptive textualism" under which interpreters

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://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."⁹

B. Originalism and CGC: A Family Affair

Originalism, especially those versions articulated by natural lawyers,¹⁰ appears to fit comfortably within CGC. Originalism's first commitment is to the Constitution's fixed original meaning. This is known as the fixation thesis¹¹ and it fits well with CGC's presumptive textualism and pride-of-place for positive law. Originalism's second key commitment is the constraint principle¹²—the proposition that the Constitution's fixed original meaning constrains constitutional doctrine.¹³ 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.¹⁴ Indeed, as noted recently by Professor Steven D. Smith, Professor Vermeule "is basically endorsing both parts of his description of the originalist claim."¹⁵ CGC's embrace of the classical legal tradition is either orthogonal to originalism¹⁶ or it is

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.¹⁷ 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.¹⁸ 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"¹⁹

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."²⁰ It may be true that originalism's focal case—fixation and constraint—cannot "itself" justify use of originalism²¹ or answer all questions about how originalism should operate.²² 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,

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.²³ Second, and relatedly, originalism does not have (within itself) a basis to identify the correct level of generality.²⁴ 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 approach²⁵ to assert that constitutional interpretation *necessarily* relies on natural law because it is “impossible to do [constitutional interpretation] without considering principles of political morality.”²⁶

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://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 part²⁷—*i.e.*, in originalism's focal case—ascertainable without resort to first-order ethical reasoning.²⁸ According to originalists, when the constitution's original meaning is determinate, articulating and applying it typically does not require resort to natural law.²⁹ Most originalists also identify some instances when constitutional interpretation may require resort to non-posit norms such as natural law.³⁰ 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

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.³¹ 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 distinct³² from a second claim: that the Constitution's meaning³³ is regularly³⁴ abstract.³⁵ Professor Vermeule believes that the "sweeping generalities and famous ambiguities of our Constitution afford ample space for substantive moral readings."³⁶ Professor Vermeule seems to be saying that there are many areas of constitutional underdeterminacy caused by constitutional meaning that is vague.³⁷ 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.³⁸

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.”³⁹ The *ius naturale* looms large in CGC. It first justifies the law and legal system.⁴⁰ But—and here is the important distinction with originalism—it is also “part of the law and internal to it.”⁴¹ Interpreters must “look to . . . the *ius naturale* precisely in order to understand the meaning of the text.”⁴² 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.”⁴³

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.”⁴⁴ That is insufficient because, as we have seen, Professor Vermeule believes that all interpretation is normative, especially interpretation of abstract legal norms.⁴⁵ 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

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.⁴⁶

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.⁴⁷ According to a recent essay by George Duke summarizing this area,

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.”⁴⁸

Scholars working within the natural law tradition have identified three conceptions of the common good: aggregative, distinctive, and instrumental.⁴⁹ 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.⁵⁰ 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.⁵¹

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.⁵² 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

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.”⁵³ 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.⁵⁴ 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.⁵⁵ 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

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

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.⁵⁹ 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.⁶⁰ 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.⁶¹ The rule of

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.⁶² Superintending offices are common because they are the community's offices, open to the community's members, and oriented to the community's good.⁶³

The instrumental conception is also good because its components are good. Justice is an aspect of human flourishing.⁶⁴ 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.⁶⁵ 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.⁶⁶ Finnis in his earlier work appeared to advance the instrumental conception.⁶⁷ Yves Simon utilized the distinctive conception,⁶⁸ and CGC does so as well.⁶⁹ 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.⁷⁰ 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

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.⁷¹ 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.⁷² Common good constitutionalism scholars have, however, adopted and argued that the distinctive conception is the only or best one.⁷³ 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.”⁷⁴ Common good constitutionalists have rejected the aggregative conception of the common good,⁷⁵ noting that “[t]he common good . . . is not an aggregation of individual utilities.”⁷⁶ 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.”⁷⁷

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.⁷⁸ The common good is

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.⁷⁹

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.⁸⁰ 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.⁸¹ First, the basic human goods that constitute the good life are incommensurable.⁸² Therefore, how one pursues the basic human goods, and consequently how political communities pursue those goods, are rationally underdetermined.⁸³ There are limits: for instance, one may not pursue so little leisure that one

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.⁸⁴ But, within these broad limits, individual humans and political communities have creative discretion to construct life plans.⁸⁵ 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.⁸⁶ 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.⁸⁷ As part of this process, the tradition has developed subsidiary mechanisms to address particular epistemic difficulties.⁸⁸ 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

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.⁸⁹ 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.⁹⁰ 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.⁹¹ 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.

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.⁹² 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.⁹³ 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.⁹⁴ How does the common good change that person's analysis?

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.⁹⁵ 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.⁹⁶

The second set of reasons relate to the common good's capacity to secure the practically reasonable person's and his fellow citizens' flourishing.⁹⁷ 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.

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*⁹⁸: 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,⁹⁹ social-ordering decisions, crafted by the Framers, authorized by the Ratifiers, and followed by officers.¹⁰⁰ 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

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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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 Articles¹⁰⁴—and it mostly succeeded because federal and state officers recognized this and followed it.¹⁰⁵

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.

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.¹⁰⁶ Common good constitutionalists agree with this claim.¹⁰⁷ 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

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.¹⁰⁸

As with his book, Professor Vermeule's remarks at the conference did not deny either the premises or conclusion of my argument.¹⁰⁹ Instead, he simply re-asserted that legal interpretation is necessarily normative.¹¹⁰ 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.¹¹¹ 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.¹¹² Moreover, people across the legal landscape agree that the

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.¹¹³ 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.¹¹⁴ 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.¹¹⁵

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."¹¹⁶ 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.

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 above¹¹⁷ and scholars have described¹¹⁸ 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.

117. See *supra* Part III.

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

ACCORDING TO LAW

STEPHEN E. SACHS*

What we ought to do, according to law, isn't always what we ought to do, given the existence of law. Sometimes we need to know what a legal system says we should do, under rules prevailing in a certain time and place. And sometimes we need to know what we should actually do, in the moral circumstances this legal system presents.

Many fights between positivists and natural lawyers result from muddying these two inquiries. But we have good reasons, intellectual and moral, to keep them distinct. Even if prevailing social rules have no moral force of their own, those who make claims about them still owe their audiences a moral duty of candor. And the stronger our moral commitments, the more we ought to approach existing legal systems warily.

Insisting that the law already reflects good morals can blind us to some very real flaws in our prevailing rules—and to the need for some very hard work in reforming them. To this extent, common-good-constitutionalist claims too often have all “the advantages of theft over honest toil”: they can lead us to wish away precisely those disagreements and failings that make social and political institutions so necessary.

As a legal positivist—indeed, an originalist—asked to address a symposium on common good constitutionalism, I feel somewhat like a giraffe being asked to address a meeting of the American

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Chemical Society. Despite a keen sense of being somewhat out of place, I hope I can nevertheless be useful here, offering a view from the sidelines.

As one might expect, I see common good constitutionalism as getting some important things wrong. I won't address specific disagreements with Professor Adrian Vermeule's instantiation of the theory; I've already written about those at length in a book review with Professor William Baude,¹ and I see no need to repeat them here. I also won't say much about the details of the American constitutional order—whether our system is originalist, what that might mean, and so on.²

Instead, I want to lay out some basic intuitions of those who might be critical of the common-good project, along with some of the disagreements they might have with common good constitutionalism—or, indeed, with any theory that rests partly on natural law. (I don't claim any theoretical novelty for these reflections, which are likely familiar to many of you. But they may not be familiar to everyone, and either way, we shouldn't lose sight of them.)

My most basic disagreements with the common-good project are disagreements about *is* and *ought*. Sometimes we want to know what an existing legal system, in all its complexity, *says* we should do. At other times we want to know what, in the circumstances presented by that legal system, we should *actually* do. Or, to put it another way, sometimes we ask what we ought to do *according to* a legal system, and sometimes we ask what we ought to do *given the existence of* that legal system.

The first kind of question is fundamentally about complex social and political facts—facts “about the opinions and practices of a set

1. William Baude & Stephen E. Sachs, *The “Common-Good” Manifesto*, 136 HARV. L. REV. 861 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

2. See generally Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

of persons at some time.”³ To know the rules that prevail in a certain society and in a particular time and place, you need to know the beliefs and behavior of the people who live there. The second kind of question is fundamentally about the “good reasons for action” we might have.⁴ To know what we should actually do, you need to know the truth about matters of morals, as applied to the circumstances under which we act.

Unfortunately, many people mix up these two questions, which has led to an epidemic of people talking past each other. The positivists who separate law and morals aren’t all ignoring morality or dismissing it as relative. They might instead be offering a burning moral *critique* of our legal rules, or just distinguishing which social rules do or don’t ask about our good reasons for action (say, granting leave to amend complaints “when justice so requires”⁵). And the natural lawyers who say things like “an unjust law is no law at all”⁶ aren’t all ignoring the Constitution, deciding cases however they like. They might instead be arguing that not all laws bind equally in conscience, or just recognizing that our good reasons for action, according to our role moralities as citizens or as officials, are partly shaped by what social rules lead everyone else to expect of us.⁷

But at their core these two inquiries, into social rules and into reasons for action, are still distinct. They ask about different things, they look to different sources, and they often generate different answers.

Given these differences, my message is partly one of peace and reconciliation. Why do positivists and natural lawyers have to fight all the time? Can’t we both declare victory and go home? Can’t we

3. John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1603 (2000). On claims (such as Ronald Dworkin’s) that even this first kind of question looks to more than social and political facts, see *infra* text accompanying notes 27–34.

4. Finnis, *supra* note 3, at 1604.

5. FED. R. CIV. P. 15(a)(2).

6. Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214 (Dennis Patterson ed., 1996).

7. *Id.* at 213–15.

be interested in social and political facts, and *also* in good reasons for action, and just keep things straight in our heads as we go?

In this peace settlement, some people could use the word “law*,” with one asterisk, to talk about rules put forward by social and political arrangements in a particular time and place. Other people could use the word “law**,” with two asterisks, to talk about the good reasons for action we’d actually have under the circumstances. If we hear the right number of asterisks in our heads whenever we hear someone talking about “law” *simpliciter*—something I hope you’ll do when I use the term here—we won’t talk past each other, and hopefully we’ll be able to agree on every question of substance.

But this effort to keep things straight—the “separation of law and morals”⁸—is something that supporters of the common-good project might contest. They might object to the idea that one can speak of law, with *any* number of asterisks, as ultimately based on social or political facts.⁹ Their objections might come in at least three different kinds.

First, looking to social and political facts might leave you unable to identify or even to *understand* the law. If you leave out the moral point of having a legal system, you’re not going to understand that system very well. Sticking to social facts means that you can’t figure out the law whenever the positive law is ambiguous, or whenever your social rules run out.

Second, even if you could derive law from social and political facts, you might have no reason to *care* about it. Social rules are morally arbitrary. Knowing that a society approves or disapproves of something, or formally licenses or prohibits it, is “normatively inert”:¹⁰ it might not give you any reason for action or tell you what

8. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958).

9. See, e.g., VERMEULE, *supra* note 1, at 179 (describing such a division of labor as a “positivist misconception”).

10. See John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 202 (2001); cf. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 114 (2016) (critiquing positivism on these grounds).

you really ought to do. And if law is all about telling you what you really ought to do, then social and political facts can't be all there is to the law.

Third, trying to reduce law to social and political facts might itself be a moral failing, evidence of a personal lack of *commitment* to morals. Only someone unswayed by moral arguments, one might say, could rest content with law's ignoring those arguments—adopting a false Stephen-Douglas-style neutrality, leaving burning questions like slavery up to the vagaries of popular sovereignty or state constitutions.¹¹ Treating law's content as a social and political matter, not a moral one, allegedly shows a deliberate indifference to morals.

Today I want to defend from each of these objections the peace settlement I sketched out earlier.

First, the advantage in *understanding* law may in fact go the other way. We may get more analytic clarity—and just make fewer intellectual errors—if we treat what's to be done *according to* a particular legal system, and what's to be done *given the existence of* that legal system, as fundamentally separate questions.

Second, if separating these questions is analytically useful, then we have plenty of reason to *care* about it. The social side of law “may not have a claim to our obedience, but it certainly has a claim to our honesty.”¹² People who make claims about the law, whether judges, lawyers, scholars, or ordinary citizens, have a moral duty to try to get them right. That sometimes means keeping law's social side and its moral side distinct. If we're going to be candid with our audience, then we ought to be careful not to deceive them, such as by referring to “law**” with two silent asterisks when our audience thinks we're using only one.

11. See *The End of Originalism*, IUS & IUSTITIUM (Dec. 7, 2021), <https://iusetiustitium.com/the-end-of-originalism/> [https://perma.cc/3V5H-UW3Q]; Pat Smith, *Little Giant Constitutionalism*, IUS & IUSTITIUM (Dec. 8, 2021), <https://iusetiustitium.com/little-giant-constitutionalism/> [https://perma.cc/5M72-57HQ].

12. Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST'L L. & PUB. POL'Y 103, 111 (2018).

Third, we should be careful not to let a debate over law's nature devolve into a strange one-upsmanship over *commitment*—that is, over who's really hardcore about morals. The strength of our moral commitments might be precisely *why* we'd approach legal systems warily, taking them to be artificial systems of norms, and perhaps not very good norms. As C.S. Lewis pointed out, there's a moral danger in "any attempt to make our intellectual inquiries work out to edifying conclusions"; "[t]hat would be, as Bacon says, to offer to the author of truth the unclean sacrifice of a lie."¹³ Insisting that the law reflect good morals can blind us to the very real flaws of our one-asterisk legal system—and to the need for some very hard work in reforming it. In this respect, common-good-constitutionalist claims too often have all "the advantages of theft over honest toil";¹⁴ they lead us to wish away precisely those disagreements and failings that make social and political institutions so necessary.

I.

A.

Let's begin with the first objection, on identifying and understanding the law. Often, contrasts between social rules and natural law tend to focus on epic conflicts of law and morals: slavery, or Nazi law, or so on.¹⁵ But consider a more pedestrian example, a literally pedestrian example, namely jaywalking:

Through no fault of your own, you find yourself running late to attend a friend's surprise birthday party. Arriving too late could mean letting down your friend, if not spoiling the surprise. You come upon a "Don't Walk" signal on an empty street in broad daylight, with no traffic to endanger anyone and no

13. C.S. LEWIS, *Learning in War-Time*, in *THE WEIGHT OF GLORY* 43, 49 (1949).

14. BERTRAND RUSSELL, *INTRODUCTION TO MATHEMATICAL PHILOSOPHY* 71 (1919).

15. See, e.g., Hart, *supra* note 8, at 619 (Nazi law); see generally Anna Lukina, *Making Sense of Evil Law* (Univ. Cambridge Faculty of Law, Research Paper No. 14/2022), <http://ssrn.com/id=4180729> [<https://perma.cc/ZS3S-3ACX>].

impressionable children to scandalize. Should you jaywalk across the street to get to the party on time?

According to the American legal system, the standard answer is no. Jaywalking is generally prohibited. The fact that it's perfectly safe in your case is generally no excuse, and neither is your running late. Every state might recognize a necessity defense, but none might extend so far as a late-for-the-party defense. No judge, no police officer, and no defense lawyer could honestly conclude that your legal duty not to jaywalk has been suspended or overridden.

At the same time, what you ought to do, *given the existence of* the American legal system, is nonetheless to go ahead and cross the street. We might owe some deference to the rational ordinance, formally promulgated by those with care of the community, that restricts jaywalking in service of the common good.¹⁶ And we might understand that the legal system has excellent reasons for narrowing the necessity defense: if we had to hear your story about being late to a party, we'd have to listen to everyone else's sob story too, and we'd never hear the end of it. But none of this outweighs *your* ordinary reasons in favor of crossing the street, the reasons that determine what *you* should actually do.¹⁷

(Maybe you disagree; maybe you'd say people should never jaywalk, because legal duties always outrank mere personal concerns like your friend's party. But then change the example slightly: say, that you're running late to appear in court to represent a client as appointed counsel. You might have a legal duty to appear in the courtroom on time; still, there's no getting out of the ticket. Or if you don't like that example, choose another. All that matters is that the necessity defense might fail to cover *every* case in which jaywalking is the moral answer.)

16. Cf. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I-II, q. 90 art. 4 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1265–1274) (defining “law” along these lines).

17. Cf. Hasan Dindjer, *The New Legal Anti-Positivism*, 26 *LEGAL THEORY* 181, 188–89 (2020) (presenting similar cases).

We can pose similar dilemmas for officials charged with enforcing the law. If police officers see you and hear your story, maybe they really *ought* to let you off with a warning. If you're brought before a judge, maybe the judge really *ought* to find some tenuous reason to dismiss your case. Or maybe not: maybe, given the role morality of police officers and judges, they ought to apply the law to you in all its exacting majesty. But either way, those moral questions about how officials should really act aren't the same as the question of what the law tells *you*, the pedestrian, to do. And they're not even the same as the question of what the law tells the *officials* to do. (Maybe the law requires ticketing every jaywalker, but this is a "jaywalking case" for police officers too.)

To be clear, this jaywalking example doesn't prove positivism true, or natural law false, or anything like that. But it does show that there's some analytic use to distinguishing what you ought to do, *according to a particular legal system*, from what you ought to do, *given the existence of that legal system*. The legal system takes a certain point of view on how people should act, and its point of view sometimes turns out to be wrong.

And once you admit a distinction like this, the first argument against the peace settlement mentioned above seems substantially weaker. Everyone can understand that the law forbids jaywalking, and also that we sometimes have good reasons to break it. In such cases it doesn't help to see "the law of a particular community precisely as . . . good reasons for action,"¹⁸ in the two-asterisk sense, because here our good reasons for action tell us not to follow the law. We can't say that the law forbids jaywalking only when jaywalking is *actually* wrong: that would make a hash of the necessity defense. And we can't say that the law forbids jaywalking only when it makes jaywalking *a little bit* wrong, or wrong all-else-being-equal: any old one-asterisk social rule can do *that*.¹⁹

18. Finnis, *supra* note 3, at 1604.

19. Cf. Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism*, 17 J. ETHICS & SOC. PHIL. 1, 6 (2020) (arguing that "if a rule is widely accepted, then quite

Instead, if we want to tie law to good reasons for action, then we'll need to know why some of our good reasons for jaywalking provide a legal defense while other, similarly good reasons don't. The simplest explanation seems to be the one-asterisk explanation: that our system happens to select only some reasons as legal defenses, and we make our moral choices with that in mind. If we're just trying to understand what's going on, it seems simpler to say that we identify the single-asterisk rules first, and then figure out whether we should actually comply with them. By contrast, it just seems backwards to say that we can understand the scope of a jaywalking ban only once we've identified our good reasons for obeying it.²⁰

B.

If all this is right, it casts some of the objections above in a new light. Consider the claim that the *point* of a legal system is to promote human flourishing—and that, if we don't understand this goal, we can't really understand the law.²¹ That's fair enough, as far as it goes; any good social scientist ought to consider what a given social institution means to the people who live under it, what they think it's supposed to achieve.²² Maybe we can't really understand a jaywalking ban without knowing about traffic, or public safety, or the value of human life. But that wouldn't make the scope of the ban reflect whatever balance of these interests *actually* serves

plausibly there is always some moral reason for agents to follow it, albeit a very weak reason").

20. Cf. Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 *RATIO JURIS* 187, 198 (2021) (rejecting the view that "the provisions in the Constitution creating Congress, or the statutes creating administrative agencies, are laws only by virtue of their moral impacts," in favor of the view that "these norms have the moral impacts they have *because they are laws*"); Dindjer, *supra* note 17, at 200–09 (discussing failed efforts to demarcate legal obligations from moral ones).

21. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 16–17 (1980).

22. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 *AM. J. JURIS.* 17, 43 (2003) ("[T]o account for the extension of a [concept] . . . that figures in the *evaluations* of agents who employ the concept[,] we must attend (descriptively) to *their* evaluative practices.").

human well-being. It might just reflect whatever seemed like a good idea at the time.

The same goes for other systems of norms, each with their own point of view. We can talk sensibly about what one ought to do *according to* the law of modern Brazil or of Meiji Japan, *according to* the social mores of Regency England or ancient Rome, *according to* the standard rules of chess or dodgeball or the dress code of the Oxford-Cambridge Club, and so on.²³ Understanding these systems sometimes involves understanding the goals, beliefs, or desires of the people taking part in them. Maybe the point of Regency social mores was to help the English act rightly in a certain kind of hierarchical society; without knowing that, we couldn't get a good grasp on what Regency social mores were. Yet if you wanted to know what Regency social mores were, knowing what would *actually* have helped the English act rightly wouldn't be very useful. Instead, you'd want to know what English people back in the Regency period *thought* would help them act rightly. Maybe they were all wrong about acting rightly, and so they had lousy mores!²⁴

Each of these different norm systems gives an account of how people ought to act. But we don't have to acknowledge these accounts as true, or even plausibly true, to make truth-apt claims about what they'd recommend in particular cases—"detached" statements, as Joseph Raz put it.²⁵ Or, to repeat our formula above: to figure out what someone ought to do *according to* these systems, we don't need to know what anyone really ought to do, *given the existence of* these systems. Instead, what lets us identify a particular norm as being among the social mores *of* Regency England, or among the rules *of* chess, or *of* dodgeball, are presumably facts about how these different systems are understood in the actual communities in which they're practiced.²⁶ We might well come up

23. See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 553 (2019).

24. Cf. Leiter, *supra* note 22, at 35–37 (making a similar argument regarding cities).

25. JOSEPH RAZ, *Legal Validity*, in THE AUTHORITY OF LAW 146, 153 (1979).

26. See William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 181–82 (2023).

with better norms, but not with better candidates for being *their* norms. And if that's true for games or Regency mores, then it also seems likely for (one-asterisk) American law.²⁷

Here the common good constitutionalist might offer three different responses. One response would accept these one-asterisk accounts as good enough for frivolous things like social mores or chess or dodgeball, but not for serious business like law. But that response needs a missing account of *why* legal systems are so different from other systems of norms—which can also vary from place to place, which are also used to serve important moral purposes, and which can also be of enormous moral interest, with plenty of people killed for violating them. (“[T]hink of the *code du-ello*, or ‘honor killings,’ or the bloody unwritten rules of Jim Crow.”²⁸) Insisting that some norms can be fully understood by facts about the society in which they're held, but that other norms also held there can *never* be so understood, seems unmotivated and peremptory. It also seems inconsistent with the fact that different societies use legal systems in many different ways, as just one means of regulating conduct among others.

A second, more interesting response would say that one-asterisk accounts are *always* insufficient—that *no* social system of norms, whether Regency mores or chess or dodgeball, can ever be understood without considering its actual moral aims and its actual moral standing. Even chess can give rise to hard-fought debates (say, whether formal tournament rules implicitly bar informal efforts to circumvent them), and people taking part in these debates will reliably make moral arguments.²⁹ But this response just proves how vast our “normative universe” turns out to be.³⁰ There are rules

27. See H.L.A. HART, *THE CONCEPT OF LAW* 140 (3d ed. 2012); Mitchell Berman, *Of Law and Other Artificial Normative Systems*, in *DIMENSIONS OF NORMATIVITY* 137, 138–39 (David Plunkett et al. eds., 2019).

28. Sachs, *supra* note 23, at 553.

29. See Adrian Vermeule, *Enriching Legal Theory*, *IUS & IUSTITIUM* (Nov. 4, 2022), <https://iusetiustitium.com/enriching-legal-theory/> [<https://perma.cc/FZAG-BFFX>] (discussing such a conflict in chess tournaments).

30. Berman, *supra* note 27, at 155.

of chess *tout court* (the number of pieces, the shape of the board); rules of informal or “casual, friendly chess”;³¹ house rules in particular families; rules of formal organizations that run chess tournaments; and so on, each with its own customary practices or written commands, and each giving rise to its own two-asterisk moral obligations, which players and fans have every reason to argue about. This ubiquity of moral argument over how people should act, *given* the rules, doesn’t show that the rules themselves depend on the right moral answers—much less that we need to know those right answers to act correctly *according to* the rules. Everyone in Regency England could have been all wrong about morality, but it’d be strange to argue that they could have all been wrong, all the way down, about how to act according to their own prevailing mores.³² And it’d be odd, too, to claim that chess-players, being morally fallible, could therefore all be wrong about the true number of squares.

A third response might let the social facts control in easy cases (such as the number of squares) but contend that moral facts show their influence whenever the rules are unclear. Hard cases, it’s said, show how we rely on “fit and justification”: say, seeking “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.”³³ But the relevant justifications needn’t always be the *right* justifications. If we needed to fill in the blanks of what to do according to Regency social mores, we might put ourselves in the shoes of a Regency-era Miss Manners—asking how *they* understood the point and purpose of their social mores, and not what the point and purpose of Regency social mores really *ought* to have been. There’s normative reasoning here, yes, but reasoning from their norms, not ours. So too for chess: the best

31. *Id.*

32. On the “all the way down” qualifier, see Stephen E. Sachs, *The ‘Constitution in Exile’ as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2268–72 (2014) (discussing global error).

33. Vermeule, *supra* note 29.

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.

The same response works for law. To quote H.L.A. Hart, judges facing unclear cases don't "just push away their law books and start to legislate without further guidance"; instead, they "proceed[] by analogy," invoking "principles or underpinning reasons recognized as already having a footing in the existing law."³⁴ An unclear negligence case, for example, needn't be resolved by looking for the moral principles found in "the best justification of negligence law as a whole," as Ronald Dworkin would have it.³⁵ Instead, we might seek out the best application of *conventional* principles figuring in the *accepted* justifications of negligence law—the principles that best fit our existing negligence law, whether or not they truly justify it. If, for example, the accepted theory is that negligence law provides redress for wrongs,³⁶ to call for law-and-economics reasoning as a morally better justification in hard cases would be to call for law reform, not for enforcing the rules as they stand. Rather than balancing fit with an objectively best justification, we might approach hard cases with an eye to the justifications that already fit our practices best—with apologies to Martin Luther, to "justification by fit alone."

C.

At some point, of course, the social sources run out: there won't be one-asterisk rules for everything. When this happens, moral norms arguably fill the gap. To some, this might prove that moral

34. HART, *supra* note 27, at 274.

35. RONALD DWORKIN, JUSTICE IN ROBES 14 (2008).

36. *See, e.g.*, JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

norms are always part of legal reasoning, because they always come in when all other sources run out.

Yet when the social sources of law have run out, and we have to do something next, why should we assume that what we do next is done *according to* those rules, rather than merely as a decent course of action *given the existence* of those rules? If no legal rules or principles apply, or if multiple legal rules and principles apply equally, one can only choose on nonlegal grounds. Yet the morally required choice in such situations might not be legally required; the correct answer to what one ought to choose, *given* the legal sources, isn't always what one ought to choose, *according to* the legal sources.

Legal actors make all sorts of decisions that are *in* the law without being *of* it. Police officers decide which cases to pursue, judges decide how to structure their dockets or how much work to put into opinions, and so on. These are all important decisions for the life of the law. But that doesn't make them decisions *of* law, in the sense of resolving specifically legal questions according to specifically legal criteria. Sometimes the law takes a view of how a docket should be structured; sometimes not.³⁷ Sometimes a calendaring decision is just that—a decision—and neither a source nor a conclusion of law. In the same way, a judge's choice to apply principle *A* over principle *B* might just be a decision, neither legally mandatory nor legally forbidden. It might be the morally right decision, or it might not. If other legal rules treat judicial decisions as precedents, then it might turn out to have legal force for other cases. But its normative advantages didn't make it the *legally correct* decision beforehand, nor do they cause it to *become* the legally correct decision afterwards.

So this God-of-the-gaps-style argument gives moral reasoning too much role in the law. But it may also give it too little. The idea that we invoke moral reasoning as a second-best, once our other materials have run out, overlooks the fact that moral reasons are

37. See FED. R. APP. P. 45(b)(2) (giving priority to criminal appeals, but expressing no priorities within that category or among civil cases).

always operative, *always* on the job, both when our legal materials are uncertain and when they're clear.

Giving moral considerations some special role in cases of uncertainty assumes that, when our *other* materials are clear, our obligation to follow them is clear too. But that claim is false. We might just be facing another jaywalking case, in which our moral obligations tell us to depart from a clear rule. We *always* ought to do what we ought to do morally, given the circumstances in which we find ourselves. That's what "ought to do morally" means!

So we needn't see our moral reasons as filling in for legal ones; each simply proceeds on its own track. Sometimes there's an answer to what one ought to do according to the American legal system; sometimes there's an answer to what one ought to do given the existence of the legal system; occasionally one answer informs the other.

The point here, again, isn't to claim that positivism has been forever proven true and natural-law approaches proven false. The point is purely negative: that some standard arguments *against* a focus on social facts appear to fail. All I want to claim is that a one-asterisked understanding of law seems to be a perfectly legitimate concept in its own right—even if a more richly normative understanding of law would be a legitimate concept too, and even if one could in theory deploy either concept with the proper number of asterisks attached.

II.

This brings us to the second common-good objection: why we should *care* about a bunch of social facts. The lesson so far is that we get a real analytic benefit from keeping distinct two kinds of inquiries, one into social facts and another into good reasons for action. If that's right, then we already know why we should care! If the social sources teach us something true and useful, then, as thinkers, we *ought* to pay attention to them: we have a *duty* to report

them accurately, whenever we describe the norms of a particular time and place.

For example, it's true in one sense that the social mores of Regency England are "normatively inert": most of the time, no one should care what they say. But if you already have reason to talk about Regency social mores—if, say, you're teaching a social history class, or explaining *Pride and Prejudice* to the unfamiliar—then you might have reason to get them right. As the philosophers say, knowledge is the norm of assertion.³⁸ To the extent that you have reason to talk about the social sources of legal rules, you have a moral duty to get those right too.

A.

Consider the following comparison. Natural lawyers sometimes distinguish the idea of something being law in a superficial sense from its being law in a deep sense, with the latter incorporating more richly moral content. Thus, Brian Bix suggests,

we might say of some professional who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "She's no lawyer" or "He's no doctor." This only indicates that we do not think that the title in this case carries with it all the implications it usually does. Similarly, to say that an unjust law is "not really law" may only be to point out that it does not carry the same moral force or offer the same reasons for action as laws consistent with "higher law."³⁹

Now, Bix's account may be too mild for many common good constitutionalists. If the injustice only affects our good reasons for action, and not necessarily what we should do according to the legal system, then it might be perfectly compatible with the peace settlement sketched out above.

38. See generally Timothy Williamson, *Knowing and Asserting*, 105 PHIL. REV. 489 (1996).

39. Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209, 214 (Dennis Patterson ed., 2d ed. 2010).

But even setting this aside, there's another worry, which is that we often talk about important concepts in the superficial sense. You might be able to sue the quack who's "no doctor" for malpractice, but not for false advertising or for practicing without a license. The *problem* is that he *is* a doctor, in the only sense that's relevant here, which is why we need to get the Medical Board involved. To assert that he's "no doctor" in a false advertising suit, because he's "no doctor" in the deep sense, would violate one's duty of candor to the court.

When legal institutions talk about law, they're often talking in the superficial sense. The problem with the Yazoo Land Act in *Fletcher v. Peck*,⁴⁰ which was passed only because the members of Georgia's legislature had been bribed to pass it,⁴¹ wasn't that it failed to take part in the deep nature of law. That was certainly a problem, but it wasn't the problem facing the Court. The problem facing the Court was precisely that the Yazoo Land Act *was* a law, in the superficial sense relevant to its future repeal and to the Court's decision under the Contracts Clause.⁴²

So the duty to care about social facts is primarily a *duty of candor*. We often speak of law in the superficial sense—and when we do, we have good moral reasons not to represent to others that the law, even superficially, is anything other than it is.

B.

This duty of candor sounds obvious, but it can have real bite. I hope to illustrate this with an example drawn not from common good constitutionalism, but from the common-*law* constitutionalism of Professor David Strauss.

Professor Strauss argues that American constitutional law sometimes develops in a way

that can be squared fairly easily with the text but is plainly at odds with the Framers' intentions. . . . The Sixth Amendment gives a

40. 10 U.S. (6 Cranch) 87 (1810).

41. *See id.* at 129.

42. *See id.* at 132–36.

criminal defendant the right “to have the assistance of counsel for his defence.” There is little doubt that the original understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel. Today, of course, *Gideon v Wainwright* and subsequent decisions have established that in serious criminal prosecutions the government must provide counsel even for defendants who cannot afford it. That rule fits comfortably with the language, and the language has been used to support it.⁴³

But, he says,

in fact it is just a coincidence—almost a matter of homonymy—that the modern right to counsel is supported by the language of the Sixth Amendment. The drafters of the Sixth Amendment might have used some other language to express their intentions, language that would have made it more difficult to find support for the modern right (for example, that the accused shall have the right “to retain counsel for his defense”). At first glance it seems odd to use the language of the Sixth Amendment to support *Gideon* when it is only a coincidence that it does so.⁴⁴

He justifies this *argumentum ad homonym* on the following grounds:

It is important to show that *Gideon* is consistent with the text because that helps preserve the overlapping consensus. So long as a judge can show that her interpretation of the Constitution can be reconciled with some plausible ordinary meaning of the text—so long as she can plausibly say that she, too, honors the text—she has maintained some common ground with her fellow citizens who might disagree vehemently about the morality or prudence of her decision. But once a judge or other actor asserts the power

43. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 919–20 (1996) (footnotes omitted); see *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (“The Sixth Amendment provides, ‘In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’ We have construed this to mean that in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.”).

44. Strauss, *supra* note 43, at 920 (footnotes omitted).

to act in ways inconsistent with the text, the overlapping consensus is weakened. If there is one unequivocal departure from the text, there can be others. Society's ability to use the text as common ground—to provide a basis of agreement or a limit on disagreement—will be eroded. That is why the text must be preserved, even though the Framers' intentions need not be.⁴⁵

We could imagine our society agreeing to use texts in this way, as common-ground placeholders for whatever plausible meanings might emerge.⁴⁶ Of course, we might need some exceptions for what Professor Michael Dorf calls “wacky” readings, when it'd be obvious even to contemporaries that the Constitution departs from modern usage⁴⁷: “domestic Violence”⁴⁸ doesn't mean partner abuse, “Republican Form of Government”⁴⁹ doesn't mean Republican Party control, and so on. These readings are “unequivocal departure[s] from the text,”⁵⁰ even if they parrot the Constitution's words. In cases like these, ordinary Americans can immediately recognize that the terms are very old and that their meanings have changed over time.⁵¹

The problem comes when the terms are very old and ordinary Americans *don't* know that their meanings have changed over time. Here the recommended response, in effect though not in intent, seems to be to hide the ball. Rather than “reject the text overtly,” Professor Strauss suggests, we might instead “reinterpret it, within the bounds of ordinary linguistic understandings, to reach a

45. *Id.*

46. See generally Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022) (imagining such a society).

47. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2044 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2014)).

48. U.S. CONST. art. IV, § 4.

49. *Id.*

50. Strauss, *supra* note 43, at 920.

51. See Dorf, *supra* note 47, at 2044 (“Any competent reader of modern English will understand from the context that the Guarantee Clause uses ‘domestic Violence’ to mean civil conflict and ‘Republican Form of Government’ to mean representative government.”).

morally acceptable conclusion.”⁵² So long as “the words themselves provide a focal point, something on which people can agree, whatever their moral or policy disagreements,”⁵³ we can resolve our disputes through “appeals to common premises,” maintaining “stability and bonds of mutual respect.”⁵⁴ That’s how, “in the face of widespread disagreement about criminal justice, the Court could take advantage of the fact that everyone thinks the words of the Constitution should count for something”⁵⁵:

People who might have disagreed vigorously about the merits of various reforms of the criminal justice system could all treat the specific rights acknowledged in the Bill of Rights as common ground that would limit the scope of their disagreement. A reform program that had a plausible connection to the text of the Bill of Rights was therefore more likely to be accepted than one that did not.

... The point is not that the Framers, or “we the people,” commanded the reforms that the Court undertook. The Court undertook those reforms, and the reforms lasted, because they made moral and practical sense, and because, by virtue of their connection to the text, society could reach agreement (or at least narrow the range of disagreement) on a legal outcome even in the face of deep moral disagreement. That is why the text matters even if the Framers’ intentions were to the contrary.⁵⁶

Here I think Professor Strauss goes quite wrong—quite wrong morally, in ways that should also concern the common good constitutionalist. Whether a given reform program enjoys a “*plausible* connection to the text” isn’t a fact about that text, or even about the

52. Strauss, *supra* note 43, at 914.

53. *Id.* at 921.

54. *Id.* at 915.

55. *Id.* at 923.

56. *Id.* (discussing incorporation of the Bill of Rights against the states). Strauss notes that the old “received wisdom” against incorporation “was at least too simple,” *id.* at 922; today many originalists defend incorporation.

law: it's a fact about the public's *knowledge*.⁵⁷ For if the public were to learn more about the Sixth Amendment, then what now strikes many people as a "plausible ordinary meaning"⁵⁸ might not strike them as all that plausible. It might even strike them as "almost a matter of homonymy"⁵⁹—akin, perhaps, to reading the Republican Government Clause to favor the Republican Party, which is hardly an appeal to common ground. Scholars and judges can get away with calling certain meanings "plausible" only because most other people don't know what we know.

If our legal system *openly* treated the words as mere placeholders, then maybe this extra information shouldn't make a legal difference, and the judges shouldn't feel obliged to mention it.⁶⁰ But as Professor Strauss's work suggests, his style of interpretation isn't one we "usually associate with a written constitution, or indeed with codified law of any kind."⁶¹ And if our system *doesn't* proclaim the words to be mere placeholders, then undisclosed efforts to "re-interpret" those words might seem to abuse, rather than uphold, our "common premises" and "bonds of mutual respect."⁶² Certainly the Court has never openly admitted that neither "the Framers, [n]or 'we the people,' commanded the reforms that [it] undertook."⁶³ Nor could it do so and still "take advantage"⁶⁴ of the

57. *Id.* at 923 (emphasis added); cf. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 299 (2007) (describing various post-Founding developments as "plausible constructions of constitutional principles that underlie the constitutional text"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 204 B.U. L. REV. 204, 236 (1980) (portraying amendments as less necessary when "the language already in the Constitution is capable of encompassing the change").

58. Strauss, *supra* note 43, at 920.

59. *Id.*

60. See Baude & Sachs, *supra* note 26, at 5–12 (discussing the importance of public acceptance to law's content).

61. Strauss, *supra* note 43, at 885.

62. *Id.* at 914–15.

63. *Id.* at 923.

64. *Id.*

public's attachment to the text, if much of the public still looks to that text to learn who commanded which reforms.⁶⁵

In a world of full knowledge, then, a judge could no longer invoke the Sixth Amendment's language to pursue a reform program that the public hadn't endorsed, in the hopes of quieting her "fellow citizens who might disagree vehemently about the morality or prudence of her decision."⁶⁶ Nor could she blame the text for reforms that she refuses to acknowledge as her own moral and political responsibility. Her attempt to exploit her fellow citizens' ignorance would fail.

In our world, of course, the public doesn't know very much about "Assistance of Counsel."⁶⁷ But a judge who *does* know about the change in meaning (and who knows it would make a legal difference for her audience, which does *not* know) may be deceiving her audience as to a material fact. If so, she could no longer apply a "plausible" meaning *sotto voce* while telling her audience "that she, too, honors the text."⁶⁸ That would seem to be a kind of lying—something we all have moral reason to avoid.

C.

What does this mean for the common good constitutionalist? It means that, to the extent one places a thumb on the scale for a morally favorable rather than unfavorable understanding of the law, one runs the risk of misleading one's audience. Emphasizing that a given source can *plausibly* bear particular content—that a source is *susceptible* to a particular understanding, and so on—can be a form of hiding the ball. Indeed, there's a danger of implicit misrepresentation even when authors aren't hiding anything about the social

65. Cf. Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 301 n.36 (Jules Coleman & Scott Shapiro eds., 2002) (discussing whether "courts consistently employ an originalist rhetoric that persuades citizens, who do not quite acknowledge that a number of decisions they like fail under originalist standards").

66. Strauss, *supra* note 43, at 923.

67. U.S. CONST. amend. VI.

68. Strauss, *supra* note 43, at 920.

sources, but merely choosing not to take the trouble to find out very much about them, resting on claims of ambiguity rather than running the social and political facts to ground.⁶⁹

Of course, there's room in scholarship for tentative conclusions as well as firm ones, and some decisions have to be reached under uncertainty: the legally necessary quantum of evidence for a decision often depends on the legal context.⁷⁰ But to the extent that we cut interpretive corners, resting substantive assertions on what *might* be the content of social sources, we're potentially engaging in the same fault as Professor Strauss's imagined judge⁷¹: implicitly offloading to the Founders, or to Congress, or to a state legislature, a political or moral decision we're really making ourselves.

To be clear, this temptation is in no way unique to common good constitutionalism. (Lord knows, adherents of other theories have cut interpretive corners before!) Yet the existence of this temptation shows that we have real moral duties relating to the social sources of law, even if those social sources are themselves "normatively inert." Insofar as we talk about them, we're obliged to meet standards of candor and accuracy, and to be up front with our readers about which of our claims rest on social sources and which on moral ones. Otherwise, the desire to "make our intellectual inquiries work out to edifying conclusions" may lead only to "the unclean sacrifice of a lie."⁷²

III.

This brings us to the third objection: that too much attention to the superficial sense of law reflects a lack of *commitment*, a culpable indifference to law's deeper concerns.

On first glance, this objection seems plainly false, and not necessarily unique to common good constitutionalism. Plenty of

69. See Baude & Sachs, *supra* note 1, at 869.

70. See Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 803–19 (2022) (discussing the law governing decisions made under uncertainty).

71. See *supra* note 45 and accompanying text.

72. LEWIS, *supra* note 13, at 49.

commentators from other traditions make similar claims. “If you have a broad reading of the Second Amendment, you must be okay with guns being used in school shootings”; “if you have a narrow reading of the Free Exercise Clause, you must be hostile to religion”; and so on.⁷³ What I’ve long regarded as the worst legal argument in the world—that “X is constitutional if and only if one should approve of X”—is a staple of political argument on both left and right.⁷⁴ But common good constitutionalism does run a particularly high risk of generating such arguments, to the extent that it encourages unannounced shifts in the use of “law” with one asterisk or two.

Consider, for example, the question whether the Fourteenth Amendment’s Equal Protection Clause includes fetuses as “person[s].”⁷⁵ There are nonfrivolous arguments for this. As Professors John Finnis and Robert George note, a fetus was traditionally capable of inheriting property from conception onward—and was referred to in a leading early nineteenth-century case as “a person *in rerum naturâ*.”⁷⁶ But there are also nonfrivolous arguments to the contrary. As Edward Whelan notes, fetuses were not included in

73. Cf. Stephen E. Sachs (@StephenESachs), TWITTER (Feb 6, 2017, 4:59 PM), <https://twitter.com/StephenESachs/status/828724779389681664> [<https://perma.cc/EGL8-NYPG>] (discussing Cass Sunstein, *Originalists Put Politics Over Principle*, BLOOMBERG (Jan. 30, 2017), <https://www.bloomberg.com/opinion/articles/2017-01-30/originalists-put-politics-over-principle-for-supreme-court> [<https://perma.cc/RZ87-69WX>]); Will Baude, *Stephen Sachs on the Wrong Way To Criticize Originalism*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/07/stephen-sachs-on-the-wrong-way-to-criticize-originalism/> [<https://perma.cc/2FFZ-JHWT>] (same); Andrew Koppelman, *Why Do (Some) Originalists Hate America?*, 63 ARIZ. L. REV. 1033, 1061 (2021) (arguing that, to support originalism, one needs “to feel that there is something fundamentally rotten about America as it exists today. You need to really hate it.”).

74. See generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (discussing this phenomenon).

75. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

76. See John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J.L. & PUB. POL’Y 927, 940 (2022) (quoting *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257–58 (1834)).

“the whole number of persons in each State” that Section Two of the same Amendment counted for apportionment.⁷⁷ And so on.

To some, treating these issues as intellectual debates about Reconstruction-era legal history may be a source of abhorrence. Why care so much about legal niceties when lives are at stake? Only someone obsessed with formal compliance, with abstract adherence to social sources, could discuss those sources so bloodlessly. As one writer asked, “If you believe, as Whelan sincerely does, that abortion is the murder of untold millions, why reject a more than plausible argument, framed in your preferred judicial philosophy, just so that you can reserve matters to the individual states?”⁷⁸

The answer, as we’ve already seen, is that “plausible” isn’t always good enough. We also want to know what’s true. There were plausible claims by abolitionists that the Constitution already forbade slavery,⁷⁹ but unfortunately those claims were false; wishing didn’t make it so.

Assume, for sake of argument, that the social sources underlying the Fourteenth Amendment—including any social cross-references to the common good, and so on—simply fail to extend to fetuses the equal protection of the laws. In that case, abortion opponents might face a situation similar to that faced by the abolitionists: what they regard as a grave moral evil might be legally restricted only through implausible state-by-state legislation, a federal statute of doubtful constitutionality, or a constitutional amendment with no real hope of success.⁸⁰ Why should committed opponents of

77. See Edward Whelan, *Doubts About Constitutional Personhood*, FIRST THINGS (Apr. 8, 2021), <https://www.firstthings.com/web-exclusives/2021/04/doubts-about-constitutional-personhood> [<https://perma.cc/Y3JQ-DYGV>] (discussing U.S. CONST. amend. XIV, § 2).

78. JAF, *The Rule that Brought Us to This Place*, IUS & IUSTITIUM (March 26, 2021), <https://iusetiustitium.com/the-rule-that-brought-us-to-this-place/> [<https://perma.cc/PN9U-BLDZ>].

79. See, e.g., Lysander Spooner, *The Unconstitutionality of Slavery* (Boston, Bela Marsh 1845).

80. See Stephen E. Sachs, *Lincoln, Douglas, and the Law*, VOLOKH CONSPIRACY (Dec. 9, 2021), <https://reason.com/volokh/2021/12/09/lincoln-douglas-and-the-law/> [<https://perma.cc/HM4B-88PP>].

abortion not then reject the Constitution? Why not regard it, as some abolitionists did, as “a covenant with death and agreement with hell”?⁸¹ How can one at the same time maintain “that abortion is a first-order evil, that the Constitution leaves abortion to the states where many will opt for unrestricted abortion, and that the Constitution is just”?⁸²

Here the only answer is the obvious one: that the Constitution has never been fully just. It may be sufficiently just to deserve our allegiance; it may provide for order and justice better than any other alternative on offer. But we should never assume that just because the law allows something, it is right, or that just because the law forbids something, it is wrong. That, indeed, is the most important lesson positivism has to teach.

Instead, some try to rescue the law’s merits by resorting to its other meanings—resorting to law in the deep sense, or to the two-asterisk sense of good reasons for action. When speaking in these senses we needn’t worry that the law permits any first-order evils. All those have been taken care of already, by our very definition of law—under which any constitution allowing slavery would be “void, and not law.”⁸³ But this is precisely why these shortcuts may have all the advantages of theft over honest toil. By moving too quickly past the social sources, by either muddling or abandoning debates about law in the superficial sense, they run the risk of distracting us from the very disagreement and lack of consensus that make legal and social institutions *necessary*.

We only really need a legal settlement, one that takes its own point of view on various matters, when people might otherwise disagree about what’s to be done. Often the reason we don’t already have a settlement of some pressing social issue is that we *lack* the necessary consensus. No matter how strong your opposition to abortion, there simply isn’t the popular demand for a constitutional amendment on the topic that there was for Prohibition or the

81. See *The Union*, LIBERATOR (Boston), Nov. 17, 1843, at 182.

82. JAF, *supra* note 78.

83. SPOONER, *supra* note 79, at 10.

income tax. (Indeed, the same is true no matter how strong your *support* for abortion.)

For the clear-eyed activist, this disagreement is part of the problem, and it's not clear why a more intense commitment to a particular side should lead one to think the disagreement any the less. In fact, those who emphasize the social sources of law may be the ones who take the situation *more* seriously. Not only do they agree on the urgent moral problem, they also recognize that the present social consensus is arrayed against them!

Admitting that the social sources of law fail to provide for the right moral outcome is admitting that there's more work yet to do, more people yet to convince. Pretending that this social disagreement can be waved away—that victory is already at hand—can be useful for rallying the troops. But what's useful isn't always what's true, and our moral commitment is also on display in how much we care about truth.

At the very least, one shouldn't attach moral opprobrium to those who read the social sources differently, "mistaking attempts at precision of thought in these matters for indifference or weakness of will."⁸⁴ The moral demand on us to describe the social sources of law accurately, and the moral demands on us to act within or even without that law, can occasionally pose a true moral quandary. But as Hart noted, "Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it."⁸⁵ That is good moral advice, even from a scholar who afforded little place for moral reasoning in the law.

84. Sachs, *supra* note 80.

85. Hart, *supra* note 8, at 619–20.

ENRICHING LEGAL THEORY

ADRIAN VERMEULE*

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 theory² 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 Proculian 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

3. Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHL.-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 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 paper¹⁰ 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.

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 Founders²³—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,

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 paper²⁸ 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,

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” clause³³ 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 tradition⁴⁰ 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

38. Strang’s only response on this crucial point is rather startling: “[i]n this brief Essay, I do not defend originalism’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 Focroulle 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 Focroulle Ménard, *Reclaiming the Natural Law for 21st Century Constitutionalism*, IUS & IUSTITIUM, (Sept. 12, 2012) <https://iustitium.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 paper⁴³ 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

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

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

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 and the Point of Constitutional 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 positivists and “natural law originalists” of various stripes have recently taken so many long steps towards the classical view⁵³ 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://iustitium.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* decision⁵⁷ 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

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 Summer 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

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 whatsoever⁶²—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

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

68. AQUINAS, *supra* note 39, *Ila Ilae Q. 47, art. 10., ad. 2.*

69. MARCUS AURELIUS, *MEDITATIONS VI: 54.*

70. See Erika Bachiochi, *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 speculation; 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 jurists. 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.

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. Strang here argues that "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." 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 Helmholtz 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

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

91. HELMHOLTZ, *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? Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

THE 2023 SCALIA LECTURE: BEYOND TEXTUALISM?

WILLIAM BAUDE*

Last fall I was at another law school visiting with a friend, a co-author. So of course, we started talking about legal interpretation. I went into his office, he shut the door, and then the first thing he asked me was, “Do you think textualism has sort of played itself out?” This lecture is about the answer to that question.

I. TEXTUALISM

Let’s start with what the lecture is not about. The *reductio ad Bostock*.

You may have heard this argument made by conservatives in the past couple of years.¹ It goes something like this:

- Textualism brought us *Bostock*. (*Bostock* is of course the interpretation of Title VII to prohibit discrimination on the basis of sexual orientation.)²
- *Bostock*, the argument goes, is bad.
- Therefore, textualism is bad.

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1. See, e.g., Senator Josh Hawley, *Was It All For This? The Failure of the Conservative Legal Movement*, THE PUBLIC DISCOURSE (Jun. 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/> [https://perma.cc/QWS2-J254] (“[I]f textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism and all of those phrases don’t mean much at all.”)

2. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

I have very little patience for this argument, so I'm going to dispose of it very quickly. If your complaint about a method of interpretation is that some judges failed to use that method of interpretation correctly, you are not complaining about that method of interpretation. You are complaining about some judges. If your complaint about a method of interpretation is that even properly applied, it led to a result you dislike in a particular case, you are thinking about things in the wrong order. That is not how law works.

All right, enough about *Bostock*.

I am talking about a much bigger question: Is textualism . . . missing something important? Can we answer that question, "yes," without apostasy? Can we answer that question, "yes," without giving up on all of the useful and valid things the textualism helped us see?

Now, I think the answer is indeed "yes." But let's start by acknowledging the importance and success of textualism. One could say that textualism has won, and we have Justice Scalia to thank for it. The kinds of open and notorious anti-textualist opinions that made Justice Scalia's approach seem so necessary when he was forcefully advocating for it—a lot of them are now almost unthinkable today. You can pick your favorite examples: *Tennessee Valley Authority v. Hill*³ and its 20 pages of unnecessary legislative history to make the obvious point of what the statute said;⁴ *Citizens to Preserve Overton Park v. Volpe*,⁵ and its famously mocked claim that the ambiguity in the legislative history requires us to eventually turn

3. 437 U.S. 153 (1978).

4. *Id.* at 174–93.

5. 401 U.S. 402 (1971).

to the text.⁶ You can find more examples in the literature and in Justice Scalia's writings.⁷

As Dean John Manning has chronicled, in many ways the kind of purposivism that exists today is a "new" purposivism which is not that different from a lot of the fundamental tenets of textualism.⁸ These days, the idea that courts might just not care what the text says at all, or take the text as a vaguely interesting policy statement, has gone by the boards.

The same thing is true in constitutional cases. For example, take the pending Supreme Court case of *Moore v. Harper*,⁹ the so-called independent state legislature doctrine case.¹⁰ The Court is considering Article I's declaration that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."¹¹ The Court faces the question whether the word "legislature" there means something or whether it is as if the Constitution just said "in each state" *without* any reference to "the legislature thereof."

I don't predict what the Court will say. But by the end of the Supreme Court oral argument, there seemed to be common ground among everybody—from the Justices to the advocates—that the word "legislature" *does* mean something.¹² The struggle was to figure out exactly how much it meant, how thick it was, what the

6. *Id.* at 412 n.29. *But see* Richard Primus, *The Scalia Legacy and the Overton Park Meme*, BALKINIZATION (Sept. 22, 2016), <https://balkin.blogspot.com/2016/09/the-scalia-legacy-and-overton-park-meme.html> [<https://perma.cc/43JR-AENY>].

7. Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017); Patricia C. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983).

8. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011).

9. No. 21-1271 (U.S. argued Dec. 7, 2022).

10. *Moore*, No. 21-1271; *see also* William Baude & Michael McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, THE ATLANTIC (Oct. 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/> [<https://perma.cc/YB7H-ZF5B>]. These remarks were delivered in February 2023, while *Moore* was still pending.

11. U.S. CONST. art. 1, § 4, cl. 1.

12. *E.g.*, Transcript of Oral Argument at 77, 80, 120-24, *Moore*, No. 21-1271.

Court's role was in second-guessing the views of others, and so on. Even if we don't know why the word "legislature" is there, or don't think it serves an important policy, it is there and that is a fundamental fact of our law.

Now, it is possible that to get us to this place, Justice Scalia sometimes made textualist claims that were a *bit* overbroad. For instance, at times he came close to insisting that the use of legislative history was completely illegitimate.¹³ In fact, it probably is okay to use legislative history so long as you're very careful and clear about how you're using it and what proposition you're using it to reflect.¹⁴ But that overstatement may have been the best way to make the point, practically speaking, in the world Justice Scalia confronted.

In general, the textualist revolution was correct and salutary. But it is getting to be time to solve some problems where standard textualist teaching might lead us astray. If we think of textualism, or the phrase, "the plain text," as just *mantras*—prayers to ward off the demons of bad judging—we will not find salvation. We need to understand *why* textualism is right. If we do, then it may mean that *sometimes* in *some* cases our analysis will have to move *a little bit* beyond the text.

What do I mean?

The key insights of textualism are really two things: positivism and formalism.

The insight of textualism is positivism in the sense that judges are supposed to follow external sources of law rather than treat jurisdiction as necessarily giving them the power to make decisions in

13. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29–37 (1997).

14. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 359–368 (2005); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI. KENT. L. REV. 441 (1990); William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539 (2017).

their own discretion.¹⁵ When it comes to the question: *What does the statute mean?* or *what should we do in this case where the agency or somebody else's behavior is governed by statute?* the key question judges are supposed to be asking is, *what did the law say they should do?* The answer comes from law outside the judge.

The argument for textualism as opposed to policymaking, for text over policy, comes from this kind of positivism. It is not the judge's job to decide what is the best thing, all things considered, or what would make our legal order better rather than worse, all things considered. It is the judge's job to ask what *something else* says about those things.

The other key insight of textualism is formalism, in the sense that it recognizes that the rule does not always match the *reasons* for the rule.¹⁶ Sometimes rules go beyond their reasons; a rule can be overbroad compared to the reasons for enacting it. And sometimes rules are underbroad; a rule cannot quite do all the things that you might want to do given the reasons for enacting the rule. Textualism recognizes that when the judge enforces the law, the law's rule might sometimes be different from what the people who enacted the law would have wanted had they thought about the situation.

This is the argument for textualism as opposed to intentionalism. The reason to follow text rather than the imagined or even the known intent of the people who enacted the law, comes from this kind of formalism. Judges, when they're enforcing a rule that comes from outside themselves, might have to enforce a rule that isn't exactly the same as the reasons for the rule.

These two things work together. Textualism reflects an insight—central to the structure of our government and central to the fabric of our law as it has evolved in our legal system—that the job of an interpreter (let's call her a "judge") is usually to enforce rules that

15. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 96 (2006).

16. Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

come from someplace else, not to make the rules herself and not to imagine rules that were never actually made law anywhere.

Those insights are the *reasons* for textualism, but those insights don't necessarily *stop* at textualism. If we are going to continue to honor the basic structure of our government and of our own legal order, we are sometimes going to need to think more deeply about the jurisprudential insights that underlie textualism. The problem is that the text itself, even the text supplemented by something like the original meaning of the text, is incomplete. It gives incomplete or misleading answers to important questions about the law. It needs to be supplemented with attention to our entire legal framework because our legal system relies not just on written texts but also on an unwritten law. We need to supplement textualism with this unwritten law, law that governs both interpretation and background principles against which interpretation takes place.

II. TEXTS AND UNWRITTEN LAW

What do I mean by this?

Let's start with some simple examples. One place to start is with immunity doctrines, such as official or sovereign immunity, that bar claims against officials and governments. In the main, these doctrines are unwritten.¹⁷ They are common law principles of jurisdiction and liability that say that even if the federal courts have jurisdiction under Article III, even if Congress has created a cause of action codified in 42 U.S.C § 1983, even then sometimes unwritten law operates to stop the claim from going forward. You see this in countless cases about official immunity where the court will say: yes, the text of the law supports a claim, but even so, is there some unwritten principle that says we're not supposed to hold the whole legislature liable for having enacted an unconstitutional statute,¹⁸

17. See generally William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 611 (2021).

18. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

or that says (near and dear to the hearts of the judges, of course) that the fact that a judge ruled erroneously does not necessarily mean they owe damages for their error?¹⁹ And more controversially—I think more questionably—courts will say that various officials in charge of enforcing the law might not be liable for their own mistakes based on the doctrine of qualified immunity.²⁰

We see the same thing in sovereign immunity. While the Eleventh Amendment makes reference to *one* form of sovereign immunity—one that operates as a bar on subject matter jurisdiction—the Supreme Court’s cases mostly make reference to a *common law* immunity that exists in many more cases than are reflected in the text of the Constitution.²¹ This common law immunity is older than the text of the Constitution; it was explicitly promised to skeptics of the Constitution at the ratification conventions in Virginia, New York and elsewhere; and the Court has recognized it as an indispensable part of unwritten common law.²²

The need for unwritten law is true of the canons of construction more generally.

Just last term, at an oral argument in *Ysleta del Sur Pueblo v. Texas*,²³ Justice Kagan made an arresting, textualist challenge. She said to one of the arguing attorneys that she wanted to ask him about “an interesting question that I’ve been thinking about a good deal about, what these substantive canons of interpretation are, and when they exist, and when they don’t exist? They’re all over the place, of course.”²⁴

19. *Randall v. Brigham*, 74 U.S. 523, 537 (1868); *Stump v. Sparkman*, 435 U.S. 349 (1978).

20. *But see* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018).

21. Baude & Sachs, *supra* note 17.

22. *Id.* at 617; William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017).

23. 142 S. Ct. 1929 (2022).

24. Transcript of Oral Argument at 00:52:35, *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022).

She started to recite various aspects of the so-called substantive canons.²⁵ In that case, it was the Indian canon (which might actually be three different canons)²⁶ about the interpretation of law dealing with Indian tribes. Then she said:

Next week we're going to be thinking about the supposed major question canon. There are other canons. I mean, if you go through Justice Scalia's book, you'll find a wealth of canons of this kind, these sorts of substantive canons [H]ow do we reconcile our views of all these different kinds of canons? Maybe we should just toss them all out.²⁷

Justice Kagan is a textualist,²⁸ and she recognized that the growth of these substantive canons was hard to reconcile with any of the conventional teachings about textualism and the Court's role in interpreting the text.

Of course, Justice Kagan's colleague, Justice Amy Coney Barrett, had written about the problem as a professor more than a decade earlier, writing that:

Substantive canons are in significant tension with textualism insofar as their application requires a judge to adopt something other than the most textually plausible meaning of a statute. Textualists cannot justify the application of substantive canons on the grounds they represent what Congress would have wanted, because the foundation of modern textualism is its insistence that

25. *Id.* at 60.

26. Evan D. Bernick, *Are the Indian Canons Illegitimate? A Textualist-Originalist Answer for Justice Alito*, THE ORIGINALISM BLOG (Mar. 28, 2022), <https://originalismblog.typepad.com/the-originalism-blog/2022/03/are-the-indian-canons-illegitimate-a-textualist-originalist-answer-for-justice-alitoevan-d-bernick.html> [<https://perma.cc/AYW9-5BSF>]; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019).

27. Transcript of Oral Argument at 60, *Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022) ("Justice Scalia's book" is a reference to ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2011)).

28. See Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:28 (Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg> [<https://perma.cc/GGA8-D9H9>].

congressional intent is unknowable. While textualists do not believe that language should be pushed for any meaning it can bear, many substantive canons require judges to do just that.²⁹

At the end of a long article in which she tries to justify some of the substantive canons as best she can, then-Professor Barrett comes away saying that maybe, “when a substantive canon promotes constitutional values,” it could be permissible, because “the judicial power to safeguard the Constitution can be understood to qualify the duty that otherwise flows from the principle of legislative supremacy.”³⁰ The canons operate as an adjunct to judicial review. “Even so,” she says, “the obligation of faithful agency is modified, not overcome. A court cannot advance even a constitutional value at the expense of a statute’s plain language; the proposed interpretation must be plausible.”³¹ Moreover, as she goes on to explain, the rationale of many of these substantive canons is not at all clear.³²

Finally, of course, there’s Justice Scalia. As he put it: “Whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. The rule of lenity,” he concedes, “is almost as old as the common law itself, so I suppose that it is validated by sheer antiquity. The others I am more doubtful about.”³³

Now, these are not just theoretical questions, and these are not just minor questions. As Justice Kagan alluded to above, last term, in *West Virginia v. EPA*,³⁴ the Supreme Court “announce[d] the arrival” of the major questions doctrine—a new substantive canon

29. Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010).

30. *Id.* at 181.

31. *Id.*

32. *Id.* at 137, 144, 158.

33. SCALIA, *supra* note 13, at 28.

34. 142 S. Ct. 2587 (2022).

that holds that “where [a] statute . . . confers authority upon an administrative agency” the scope of that authority “must be shaped, at least in some measure, by the nature of the question presented.”³⁵ In particular, “there are extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority.”³⁶

Is this . . . textualism? Critics on both the right and the left have argued that it is not.³⁷ A few brave souls have tried to defend the major questions doctrine. Professor Ilan Wurman has argued that it is consistent with linguistic principles of statutory interpretation, such as the ordinary rule advanced by Professor Doerfler, that we need more evidence for certain propositions when the stakes are higher.³⁸ Justice Gorsuch has argued that this is just another example of a constitutionally inspired clear statement rule, like the rules for retroactivity and waivers of sovereign immunity.³⁹ But that just takes us back to where Justice Kagan and Justice Scalia started:

35. *Id.* at 2633 (Kagan, J., dissenting); *id.* at 2602.

36. *Id.* at 2608 (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1291 (2000)).

37. Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1038–41 (2023); Benjamin Eidelson & Matthew Caleb Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y. 463, 464–65 (2021).

38. Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. at 43 (forthcoming); Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 528 (2018); *cf.* SCALIA, *supra* note 13, at 28 (“Some of the [dice-loading] rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a ‘clear statement’ rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.”).

39. *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

Where do judges get the authority to introduce these clear statement rules that neither directly state constitutional requirements nor reflect the best interpretation of the text?

Now, it is not a coincidence that textualists have been debating the role of substantive canons, and they are right to do so. But the right way to think about these canons requires us to step beyond textualism. To repeat: *Our system relies on not just textualism but unwritten law. We need to supplement textualism with the unwritten law that governs both interpretation and background principles against which interpretation takes place.*

As I have written with Professor Stephen Sachs, “Legal canons don’t have to be recast as a form of quasi-constitutional doctrine. They don’t need to outrank the statutes to which they apply, because the canons can stand on their own authority as a form of common law.”⁴⁰ Now, not every clear statement will pass this test, but this is the right test to apply to them.

For instance, many of the so-called clear statement rules are really just applications of the rule against implied repeals. There is an unwritten doctrine of sovereign immunity, and the rule against implied repeals says that we don’t lightly assume that a statute repeals that doctrine, just as we don’t lightly assume that it repeals another statute without enough evidence that the repeal is required by the text. The same thing is probably true of the rules against retroactivity and a number of other clear statement rules the court has described. These are just applications of the canon against implied repeals to well-established doctrines of common law that apply in federal courts.

The major questions doctrine is trickier to justify, and I don’t think Justice Gorsuch’s account is satisfactory. Maybe Professor Wurman’s argument, that the doctrine is an application of the principle of high-stakes interpretation, will get us closer. Even on Professor Wurman’s account, we will need a little more than textualism

40. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017).

because we need to know what the baseline is. *Which* is the extraordinary high-stakes claim?⁴¹ Is it the agency's claim to have a broad authority that it otherwise wouldn't, so the baseline is one of limited government, state law, or private ordering? Or is it the court's decision to set aside an agency action under the APA, so the baseline is one of judicial restraint and executive action? If it is the latter, the major questions doctrine would be backwards: You would expect courts to be *more* deferential on major questions because they need to be extra cautious before displacing the policies of the executive. We need to figure out what the actual underlying legal rules are and how the APA interfaces with them, not continue to scrutinize the text of the Food and Drug Act, the environmental protection statutes, or the latest ambiguous grant of agency authority. The answers come from law, not necessarily the text.

Now, this model of statutory interpretation I'm describing has been a part of our law for a very long time. Indeed, it was criticized more than two centuries ago by Jeremy Bentham, who lamented about the interpretation of statutes that:

At present, such is the entanglement of these statutes to the rest of the Corpus Juris that when a new statute is applied, it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another. There is no saying which of these laws it repeals or qualifies, nor which one it leaves untouched. It is like water poured into the sea.⁴²

This, but uncritically!

The point of Justice Scalia's textualism was to vindicate the law, which people were getting wrong because of their aversion to being bound by choices made in the text, or because of their failure to accept that the text can reflect a compromise between competing purposes, going *this far* but *no further*.

41. For discussion, see Wurman, *supra* note 38, at 45–46.

42. Baude & Sachs, *supra* note 40, at 1098 (quoting JEREMY BENTHAM, OF LAWS IN GENERAL 236 (H.L.A. Hart ed., Univ. of London Athlone Press 1970) (1782)).

That same insight requires us to recognize that *sometimes* the legislature's choice was to stop making any choices in the text *either way* and leave the remaining questions up to the law that came before, whatever that was, whether it was written or unwritten. Hence the need to move beyond the text sometimes, but without moving beyond the law.

III. THE (REAL) COMMON LAW

Now even these subjects are ephemeral—important ephemera, but ephemeral. The problems with pure textualism go much deeper than this.

Consider Justice Scalia's *A Matter of Interpretation*,⁴³ a published volume centered around his lecture-turned-essay, *Common-Law Courts in the Civil-Law system*. It is now given out, like a handbook, every time a 1L suddenly discovers that he or she has an interview with a federal judge and needs to be able to talk intelligently about originalist and textualist methods of interpretation. It is a great book, but it has an important blind spot.

Justice Scalia advances his powerful argument for textualism in this book based on its favorable contrast with the judge-made common law. In his telling, common law and unwritten law are judge-made law for judges to make up however they want to. He writes:

[Y]ou must appreciate that the common law is not really common law except insofar as judges can be regarded as common. That is to say it is not customary law or a reflection of people's practices, but is rather law developed by the judges . . . from an early time, as early as the yearbooks, any equivalence between custom and common law has ceased to exist, except in the sense that the doctrine of stare decisis rendered prior judicial decisions custom.⁴⁴

43. SCALIA, *supra* note 13, at 3.

44. *Id.* at 4.

Describing the 1L's experience with common law cases—arguing about which judge-made rule will lead to better consequences—Justice Scalia writes:

What intellectual fun all of this is! It explains why first-year law school is so exhilarating: because it consists of playing common-law judge, which in turn consists of playing king—devising out of the brilliance of one's own mind those laws that ought to govern mankind. How exciting! No wonder so many law students having drunk at this intoxicating well, aspire for the rest of their lives to be judges!⁴⁵

Now, according to Scalia, textualism was the way to escape “the attitude of the common law judge—the mind-set that asks, ‘What is the most desirable resolution of this case? How can any impediments to the achievement of that result be evaded?’”⁴⁶

But here is the problem with Justice Scalia's account. Maybe this is how some common law courts, or at least some common law judges, function today. Maybe it is how a lot of them function. But it is not how they were *supposed to* function. Students who today are raised only on a diet of textualism and the alternatives of purposivism and policymaking lack the tools to grapple with the more foundational part of our legal system. How are judges to decide cases in cases that are not governed by statute? This art has been lost. Textualism has helped it become lost, and we need to help recover it.

For another example, consider *Erie Railroad Co. v. Tompkins*,⁴⁷ another staple of the first-year curriculum. *Erie*, of course, held that:

[E]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. *And whether the law of the State shall be declared by its*

45. *Id.* at 7.

46. *Id.* at 13.

47. 304 U.S. 64 (1938).

*Legislature in a statute or by its highest court in a decision is not a matter of federal concern.*⁴⁸

That is, state court decisions about the law should be treated exactly the same way as statutes enacted by legislators about the law. Courts and legislatures both make law, and the federal courts don't care which one it is.

The problem is, why does *Erie* assume that state courts make law?⁴⁹ Who gave state courts the power to make law? Not necessarily their state constitutions, which give legislative power to state legislators and judicial power to state courts. Indeed, *Erie* says this is just a fact about jurisprudence. *Erie* relies on the claim of Justice Holmes that it's just impossible to have courts deciding common law cases without having them be legislators and make law. But it's not impossible.⁵⁰ Indeed, we saw it done for a large period of history until we started to forget about it, and *Erie* helped us collectively repress the memory.

The deeper problem here is that we have forgotten that there is any other possible way to do common law than the method invented by the legal realists and then brought to fruition by law and economics scholars. Justice Scalia himself forgot. On the rare occasion he did get a federal common law case, such as the infamous military contracting case of *Boyle v. United Techs. Corp.*,⁵¹ he decided to manufacture his own tort rule with little basis in law.⁵² This was his rare chance as a federal judge to “play[] king.”⁵³ Why not be a benevolent king establishing an immunity rule that he thought was a good idea?

48. *Id.* at 78 (emphasis added).

49. Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013).

50. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527 (2019).

51. 487 U.S. 500 (1988).

52. See generally Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1259–60 (2017).

53. SCALIA, *supra* note 13, at 7.

Many state courts have forgotten as well. It is possible that states are *allowed*—notwithstanding the Due Process Clause and the Republican Form of Government Clause⁵⁴—to confer law-making power on adjudicatory bodies called courts who make that law retroactively and then apply it to the parties before them. It is possible. But today, everybody just assumes that is the system we have without any comprehensive attempt to show that is the system that was actually enacted, or that that is the way it should work.

This forgetting runs throughout the law school curriculum, from Judge Cardozo, to Judge Traynor, to today. For instance, I teach a very recent decision by the New Mexico Supreme Court where it decided to become the first court ever to abolish the spousal communications privilege, openly adopting the role of lawmaker.⁵⁵ Now, to the New Mexico Supreme Court's credit, the court had second thoughts, wisely granting rehearing and referring the issue to the rulemaking process.⁵⁶ But both halves of that episode simply confirm that we need better legal tools and we need to move beyond textualism to understand the role that courts have in these kinds of cases.

Or even more broadly, consider natural law. I know that may be a dangerous invitation, but the role of natural law principles and positive legal adjudication is one of the oldest legal debates in the Republic.⁵⁷ They were a backdrop of our legal tradition for a long time, even when they are not enacted into law in American courts. We need to know what to make of that. I'm not going to solve the entire problem here, but I am going to say that if textualism has no

54. U.S. CONST. art. IV, § 4.

55. *State v. Gutierrez*, 482 P.3d 700 (N.M. 2019) (retracted on rehearing, Nov 5, 2020).

56. *Id.* at 724–25. For a critical analysis of the original majority opinion, see Edward J. Imwinkelried, *State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States*, 53 N.M. L. REV. 71 (2023).

57. R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL HISTORY IN PRACTICE* (2015).

way to grapple with those problems at all, then it is missing something important. Indeed, to some, natural law is so foundational that textualism's inability to deal with it might be cause for discarding textualism entirely. But in our tradition, natural law principles, to the extent they functioned as positive law, functioned through unwritten law. You can go back to the foundational debate between Justice Chase and Justice Iredell about how to understand these principles and whether they provide a clear statement rule, if you will, for interpreting constitutional text.⁵⁸ But to think clearly about these problems, to make use of the insights behind textualism, we must move slightly beyond textualism itself.

In the current regime, courts assume that when the statutes really run out, there must be nothing to do but some kind of judge-made law. Maybe it is somewhat restrained, Burkean judge-made law,⁵⁹ or maybe it is a more aggressive judge-made law. But those are not the choices that lawyers thought about when our constitutional system was created or when it grew to maturity in the nineteenth century. They had a view that law could be, that law was supposed to be, found and not made.⁶⁰ It might be found in custom. It might be found in first principles that were customary only in some baser sense. But it involved the same underlying jurisprudential insight behind textualism. The judge is supposed to enforce rules that come from someplace else, not to make the rules herself and not to imagine rules that were never actually made law anywhere.

Justice Scalia begins *Common-Law Courts in the Civil-Law System* by lamenting "the current neglected state of the science of constru-

58. William Baude & Stephen E. Sachs, Book Review, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 893 (2023) (citing *Calder v. Bull*, 3 U.S. 386 (1798)).

59. Cf. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

60. Sachs, *supra* note 50; Micah Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279 (2022).

ing legal texts and offering a few suggestions for [their] improvement.”⁶¹ Today, that same neglect is true of the science of expounding the common law, and the same suggestions for improvement are very much needed.

Now, I will say that I am open to the critique that these old ways of thinking are *dead*—an unfortunate casualty of the success of *Erie* and legal realism, and of the destruction of the legal culture that made it possible to talk about general law principles. That is different from what *Erie* said, and from the kind of unthinking acceptance we see today. I am open to accepting this, but I am not yet convinced. I am not sure that the old ways of legal culture are entirely destroyed. And even if they were, might it not be our obligation to try to help bring them back?

IV. THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

Once we unlock the secrets behind textualism, even the text of the Constitution itself becomes more comprehensible to us. Consider, just briefly, Section One of the Fourteenth Amendment,⁶² perhaps the most important single clause to modern constitutional litigation. In particular, consider the Privileges or Immunities Clause: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”⁶³ In 1873, the Supreme Court told us that this provision was basically meaningless.⁶⁴ And many decades later, Justice Scalia urged us not to look too closely under the hood. At oral argument in *McDonald v. City of Chicago*,⁶⁵ he famously mocked the petitioner’s lawyer for suggesting that the Court might want to look at that part of the Constitution that actually was *supposed to* guarantee individual

61. SCALIA, *supra* note 13, at 2.

62. U.S. CONST. amend. XIV, § 1.

63. *Id.*

64. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

65. 561 U.S. 742 (2010).

rights. He asked “Why are you asking us to overrule . . . 140 years of prior law when you can reach your result under substantive due [process]? . . . I mean, unless you’re bucking for a place on some law school faculty [W]hat you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence.”⁶⁶

Justice Scalia’s reticence comes in part from a long-standing mystery about what on earth the Constitution is referring to here, especially in light of the seemingly contradictory debates about its meaning.⁶⁷ Proponents of the Privileges or Immunities Clause simultaneously argued that it granted no new rights, but that its passage would have important consequences for the civil rights of newly-freed slaves and Black Americans more generally.⁶⁸ How could it be that the Clause was simultaneously revolutionary and yet redundant?

The answer, I argue, in a new article with Jud Campbell and Stephen Sachs, lies once again in unwritten law.⁶⁹ Under our argument, the Fourteenth Amendment’s Privileges or Immunities Clause is referring to the body of unwritten general law that was familiar to the amendment’s drafters, even if many of us have forgotten about it in the post-*Erie* world.⁷⁰ General law, the unwritten law that in the nineteenth century was taken to be common throughout the nation rather than produced by any particular state,

66. Transcript of Oral Argument at 04:54, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521).

67. Compare, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014), with Randy Barnett and Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499 (2019); and Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93 (2015)

68. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (remarks of Sen. Poland) (declaring that the proposed amendment “secures nothing beyond what was intended by the original provision in the Constitution”).

69. William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024).

70. *Id.*

was legal orthodoxy when the Fourteenth Amendment was written.⁷¹

In the eyes of the Republicans who created the Fourteenth Amendment, we argue, general law supplied the rights secured in Section One. That is why the Fourteenth Amendment was not thought to confirm new rights of citizenship. It secured preexisting rights found in unwritten law, rights that were already thought to circumscribe state power. But it was thought to do something important because it shifted the enforcement of those rights from state courts and state legislatures to federal courts and to Congress. This kind of approach to the Fourteenth Amendment would help us figure out the unenumerated rights that the Amendment really is supposed to protect without necessarily opening Pandora's Box to judges being able to decide to include any unenumerated rights they want. Once more, we need to learn to read unwritten law.

V. THE RISKS

Now before I gave this lecture, Dean Manning confessed to me that he was very nervous about it. Frankly, I am too. I am sure that this lecture will be misunderstood, miscited, and misquoted by people who did not hear or read it and who miss the basic point I am trying to make here. I won't give them any ideas, but you can probably imagine.

So let me try to state it clearly one more time before we finish.

Textualism, to a first approximation, is central to the rule of law.

But to a second approximation, we sometimes need to use other legal rules, unwritten law, and doing so is completely consistent with the reasons that we use legal texts.

- We need unwritten law as a backdrop against which to read legal texts.
- We need unwritten law to understand the common law system—the real common law system, not the system of judge-made law that has usurped it.

71. *Id.*

- We need unwritten law because our legal texts sometimes point us toward it. We need to know how to accept the invitation.

Admitting these things has risks, but denying these things has risks too.

- Denying them risks sending us in statutory interpretation circles, unable to explain how we can avoid being literalists and also avoid being opportunists.
- Denying them risks leading people to abandon textualism, and positivism, and formalism, and even the rule of law itself because they mistakenly think that we have no other way to make sense of the central legal traditions such as natural rights.⁷²
- And it risks leading us to close our eyes to the meaning of the constitutional text itself, because sometimes the text requires us to engage with unwritten law. The text requires us to go beyond the text.

If we do not teach our students how to do these things, if we do not revive the more fundamental pre-realist tenets of our legal tradition, then our students will be misled into thinking that the only choices are the plain text and judicial policymaking. That is not true, and I will take my chances in saying so.

72. Baude & Sachs, "Common-Good", *supra* note 58.

PRIVACY AND PROPHYLACTICS

MOSHE SCHWARTZ*

INTRODUCTION

Constitutional prophylactics give the Supreme Court an avenue to protect enumerated rights. These prophylactics are not constitutional rights in themselves, but are instead merely preventative measures taken by the Court to ensure a constitutional right will not be violated.¹ The constitutionally recognized right to privacy has retained a unique and scattered trajectory in constitutional jurisprudence.² While a careful reading of the Constitution will not uncover the word “privacy,” constitutional-rights doctrine has

* J.D. Candidate, Harvard Law School Class of 2024. I dedicate this Note to my late mother, Dr. Karen Weingarten Schwartz, who was an academic neuroradiologist for many years and began publishing at a young age. I am grateful to the JLPP Notes team, especially Juliette Turner-Jones, Arianne Minks, and Joel Malkin for their editing and careful comments. I am grateful to Ari Spitzer for assisting me in formulating the thesis for this paper. Thank you to Samuel Lewis and Richard Dunn for their amazing and tireless efforts in helping me throughout the process of authoring this Note. Most importantly, thank you to my wife Ilana for your love and support.

1. See *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (explaining that prophylactics are judicially created rules designed to protect core constitutional rights).

2. See *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (noting, in the First Amendment context, that the “Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.”); *Katz v. United States*, 389 U.S. 347, 350 (1967) (noting that the Fourth Amendment “protects individual privacy against certain kinds of governmental intrusion . . .”); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (noting, in the Fifth Amendment context, that “strict application of the federal privilege against self-incrimination reflects the Constitution’s concern for the essential values represented by our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.” (internal quotation marks omitted)).

developed two distinct lines of prophylactics: first, in criminal procedure and, second, in contraception and abortion.³

This Note will consider the links between the privacy prophylactic framework employed in the criminal procedure setting and the Court's jurisprudence leading up to and after *Roe v. Wade*.⁴ The Note argues that decisions that announced prophylactic rules do not have the same *stare decisis* weight that is afforded to decisions establishing "true constitutional rules."⁵ Thus, our analysis of the prophylactic cases for their precedential value becomes less restricted compared to cases that announced constitutional rules.

"Privacy" played a central role in the development of criminal procedure. In the seminal criminal procedure case *Mapp v. Ohio*,⁶ the Court noted that the Fourth Amendment creates "[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people."⁷ The "Miranda Rights" established in *Miranda v. Arizona*⁸ protects an individual's Fifth Amendment rights and the underlying privacy concerns of self-incrimination.⁹ Notably, the Court has repeatedly described the

3. See Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 9 (2009) ("Constitutional privacy developed along two trajectories. First, by focusing on matters of procreation, family, and marriage, the Supreme Court recognized a right to privacy. Although the Constitution does not specifically refer to privacy, the Court grounded the right of privacy in both particular Bill of Rights provisions and in the structure of particular rights taken in combination. Second, by articulating the value protected by the Fourth Amendment prohibition against unreasonable searches and seizures, the Court recognized a core right to privacy in one's person, home, papers, and effects. Again, the Constitution does not explicitly name privacy for protection. Nonetheless, the Court developed a Fourth Amendment jurisprudence focused on protecting reasonable expectations of privacy.").

4. 410 U.S. 113 (1973).

5. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985).

6. 367 U.S. 643 (1961).

7. *Id.* at 656.

8. 384 U.S. 436 (1966).

9. Charles Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968) ("Privacy, thus, is control over knowledge about oneself." (explaining that self-incrimination reveals information to the authorities that the suspect would not otherwise do if not pressured and coerced)).

“Miranda Rights” as “prophylactic”¹⁰ in the years following the *Miranda* decision.

Within familial life, the Court decided two landmark constitutional-rights cases on privacy concerns: *Roe v. Wade*¹¹ granted a constitutional right to abortion on the basis of a woman’s right to privacy.¹² And *Obergefell v. Hodges*¹³ constitutionally protects same-sex marriage because it would be contradictory to recognize a right to privacy that did not extend to the choice of which relationships to enter.¹⁴

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,¹⁵ which struck down the constitutional right to abortion, can also be explained using the prophylactic framework that the Court has adopted to understand *Miranda*. On closer inspection, *Roe* announced a prophylactic rule. Thus, departing from *Roe* becomes less exceptional and severe.

I. PROPHYLACTICS DEFINED

A prophylactic rule creates “a judicial work product somehow distinguishable from judicial interpretation of the Constitution . . .

10. *E.g.*, *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (“Since *Miranda*, the Court has repeatedly described *Miranda* rules as ‘prophylactic.’”); *see also, e.g.*, *Howes v. Fields*, 565 U.S. 499, 507 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010).

11. 410 U.S. 113 (1973).

12. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

13. 576 U.S. 644 (2015).

14. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. . . . *Indeed, the Court has noted it would be contradictory to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.*” (internal quotations omitted) (emphasis added)).

15. 142 S. Ct. 2228 (2022).

[I]t is that sort of extraconstitutional rule that overenforces what the Constitution, as judicially interpreted, would itself require; it expand[s] or sweeps more broadly than the constitutional constraints that do or would emerge from straightforward judicial interpretation.¹⁶ In sum, prophylactics are judicially fashioned rules that go further than necessary to protect what the Court sees as a fundamental constitutional right. To employ an example from Talmudic law, consider the prohibition against consuming meat and milk together. The literal prohibition, as written in the Torah, forbids one from cooking a kid in the milk of its mother.¹⁷ One might conclude that the prohibition covers only the act of cooking red meat in the milk of that animal's actual mother. But the prohibition extends to cooking—or eating—*any* meat with the milk or dairy product of *any* other animal. To shore up the Torah's prohibition, the Sages of the Talmud prohibited even the consumption of chicken (which is not considered "meat") and milk to fence off any chance that one would come to eat meat and milk together.¹⁸ Like the Sages, the Court has employed a prophylactic framework in the realm of criminal procedure, protecting Fifth Amendment rights by establishing an over-inclusive rule in *Miranda*. Prohibiting eating chicken and milk to protect against the possibility of eating red meat and milk parallels how the *Miranda* framework protects against the possibility of violating someone's right against compelled self-incrimination.

16. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 28–29 (2004) (internal quotations omitted); see Grano, *supra* note 5, at 105 ("What distinguishes a prophylactic rule from a true constitutional rule . . . is that [a] prophylactic rule" . . . is a court-created rule that can be violated "without violating the Constitution itself and that functions as a preventive safeguard to insure that constitutional violations will not occur." (internal quotations omitted)).

17. See Exodus 23:19.

18. Mishnah Torah, Halachot Maachalot Assurot 9:4.

II. PRIVACY, PROPHYLACTICS, AND *MIRANDA*

Privacy plays a central role in criminal procedure doctrine. *Boyd v. United States*¹⁹ described the Fourth and Fifth Amendments as protection against all governmental invasions into “the sanctity of a man’s home and the privacies of life.”²⁰ Privacy concerns form the foundation of the Fourth Amendment. That Amendment prohibits the government from conducting unreasonable searches and seizures without first obtaining a warrant.²¹ The warrant must be supported by probable cause, particular in its description of things to be searched or seized, with the officer swearing an affirmation to that effect.²² The Amendment especially targeted “general warrants.”²³ To protect the privacy of one’s home, the Constitution put limits on when and how the government can access this sacred area. The Fifth Amendment brings a more individualized privacy concern: one’s own incriminating statements.²⁴ One’s own statements are private and should only be made public if the individual freely chooses to speak.²⁵

19. 116 U.S. 616, 630 (1886).

20. *Id.* at 630.

21. U.S. CONST. amend. IV.

22. *Id.*

23. See *Henry v. United States*, 361 U.S. 98, 100–01 (1959) (explaining that colonial revulsion against general warrant and writs of assistance is reflected in Fourth Amendment); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 285 (1984) (“[T]he Framers did not build the warrant clause into the Constitution to prevent warrantless searches. Instead, they sought to prohibit the newly formed government from using general warrants—a device they believed jeopardized the liberty of every citizen.”).

24. See *Fisher v. United States*, 425 U.S. 391, 399 (1976) (holding that Fifth Amendment protection of privacy does not prevent every invasion of privacy but only compelled, self-incriminating invasions of privacy).

25. Efen Lemus, *When Fingerprints Are Key: Reinstating Privacy to the Privilege Against Self-Incrimination in Light of Fingerprint Encryption in Smartphones*, 70 SMU L. REV. 533, 559 (2017) (“When the government compels an individual to reveal the contents of his mind . . . the individual risks disclosing private information that he intends to keep away from the rest of the world. Therefore, [there is] . . . the value of an individual’s capacity to modulate the amount and character of information that he

Before incorporation of the Fifth Amendment, the Court struggled to develop a doctrinal test to easily gauge if one voluntarily incriminated oneself. Cases such as *Brown v. Mississippi*²⁶ and *Ashcraft v. Tennessee*²⁷ relied on fact-intensive analyses to assess if the defendant voluntarily made self-incriminating statements. For example, the Court would ask whether the facts eliciting the confession “shock[ed] the conscience.”²⁸ If yes, the confession would be inadmissible because it violated the Due Process Clause of the Fourteenth Amendment.²⁹

After the Fifth Amendment was incorporated,³⁰ the Court moved away from this fact-intensive approach that focused solely on voluntariness. In *Miranda v. Arizona*, the Court instituted “Miranda Rights” to assess if one voluntarily or involuntarily incriminated oneself. Chief Justice Warren, writing for the majority, explained that,

The current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.³¹

In practice, in order to dispel the inherent compulsion and coercion in custodial interrogations, the police are obligated to

makes known to others. After all, privacy . . . is the control we have over information about ourselves.” (internal quotations omitted)).

26. 297 U.S. 278 (1936).

27. 322 U.S. 143 (1944).

28. See *Rochin v. California*, 342 U.S. 165, 209 (1952).

29. See *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (“Prior to *Miranda*, the admissibility of an accused’s in-custody statements was judged solely by whether they were ‘voluntary’ within the meaning of the Due Process Clause.”).

30. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

31. *Miranda*, 384 U.S. at 458.

administer a series of warnings to the suspect.³² As a way of protecting the suspect's privacy interests, the warnings remind the suspect of his right to remain silent. Without these warnings, a suspect may very well succumb to the pressure and coercion of the interrogation room. These warnings not only remind the suspect of his rights, but they also reinforce that the police respect the suspect's choices.

The Court emphasized that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."³³ Yet, in the next paragraph, the Court noted that,

[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. *Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect . . . [U]nless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.*³⁴

The question then remains: are the "Miranda Rights" constitutional rights? On the one hand the Court demands that the suspect be informed of his rights and these safeguards must be followed;

32. *Id.* at 444–45 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. likewise, if the individual, is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.").

33. *Id.* at 467.

34. *Id.* (emphasis added).

on the other, the Court draws back by saying that there could be other ways to mitigate the compulsion and coercion of custodial interrogation. The Court's current jurisprudential outlook frames the "Miranda Rights" as a prophylactic to the Fifth Amendment's right against self-incrimination.³⁵ But the Court's opinion in *Miranda* nowhere describes the rule it announces as "prophylactic" in nature. From a strict reading of *Miranda*, the "Miranda Rights" emerge as constitutional rights in and of themselves.³⁶

*Michigan v. Tucker*³⁷ first described the "Miranda Rights" as a "prophylactic," but the full force of this categorization took hold in *Oregon v. Elstad*.³⁸ The Court, quoting *Michigan v. Tucker*, noted that "[t]he prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected'. . . . Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."³⁹

Miranda's prophylactic framing reached new heights in the beginning of the 1990s, as the Court supplemented the prophylactic warnings with another layer of protection. In a colorful dissent in *Minnick v. Mississippi*,⁴⁰ Justice Scalia scolded the majority for adding protections⁴¹ that veered too far from any grounding in the Constitution:

35. *United States v. Patane*, 542 U.S. 630, 636 (2004) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self Incrimination Clause.").

36. *See Dickerson v. United States*, 530 U.S. 428, 447 (2000) (Scalia, J., dissenting) ("It was once possible to characterize the so-called *Miranda* rule as resting (however implausibly) upon the proposition that what the statute here before us permits—the admission at trial of un-*Mirandized* confessions—violates the Constitution. *That is the fairest reading of the *Miranda* case itself.*" (emphasis added)).

37. 417 U.S. 433, 439 (1974).

38. 470 U.S. 298, 305 (1985).

39. *Id.* at 305-07.

40. 498 U.S. 146 (1990).

41. The Court ruled that once counsel is requested, no interrogation of the accused can happen without the counsel present.

Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards'* prophylactic rule . . . which was needed to protect *Miranda's* prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.⁴²

Miranda's characterization as a prophylactic, with no available constitutional claim, remained steady for many years. Yet, with the prophylactic framework fully entrenched in the Court's criminal procedure jurisprudence, the Court in *Dickerson v. United States*⁴³ moved away from the "prophylactic" language. In response to *Miranda*, Congress enacted 18 U.S.C. § 3501 with the clear objective of restoring voluntariness as the only inquiry into whether confessions should be admissible.⁴⁴ The Court held in response to this statute, "*Miranda*, being a *constitutional decision* of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."⁴⁵ The Court noted that "*Miranda* is constitutionally based"⁴⁶ and "*Miranda* announced a constitutional rule."⁴⁷

How can *Miranda* be classified as both a "constitutional rule" and a "prophylactic" with no cause of action attached to it?⁴⁸ Justice Scalia summed up this inconsistency: "Since there is in fact no other

42. *Id.* at 166.

43. 530 U.S. 428 (2000).

44. Under the statute, statements made by criminal defendants were to be admitted as long as they were made voluntarily, irrespective of if the defendant received the *Miranda* warnings.

45. *Id.* at 432 (emphasis added).

46. *Id.* at 440.

47. *Id.* at 444.

48. For example, in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022), the Court ruled that a failure to administer the *Miranda* Rights does not provide a basis for a claim under § 1983.

principle that can reconcile today's judgment with the post-*Miranda* cases that the Court refuses to abandon, what today's decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extra-constitutional Constitution, binding on Congress and the States."⁴⁹ In fact, Justice Scalia's "extraconstitutional" concern surrounding prophylactics existed before *Miranda* was ever decided. To appreciate the origin of these concerns, we begin with *Griswold v. Connecticut*.⁵⁰

III. *GRISWOLD* AND *ROE*: PROPHYLAXIS ON PROPHYLAXIS

In *Griswold*, the Court struck down a state law prohibiting the possession, sale, and distribution of contraceptives to married couples under the Due Process Clause of the Fourteenth Amendment.⁵¹ Justice Douglas, writing for the majority, reasoned that this statute violated one's privacy interests.⁵² While he understood and appreciated the absence of "privacy" in the Constitution,⁵³ Justice Douglas instead relied on prior cases to conclude that a "privacy" violation raises a constitutional concern. In developing his opinion, he noted that the First Amendment protects a wider range of issues than those written in the text.⁵⁴ Summing up, he concluded, "Without those peripheral rights the specific rights would be less secure."⁵⁵ Upholding the Constitution means protecting the "spirit"

49. *Dickerson*, 530 U.S. at 461; see Yale Kamisar, *The Rise, Decline and Fall(?) of Miranda*, 87 WASH. L. REV. 965, 989 (2012) ("Although these earlier cases seemed to be based on the view that *Miranda* was not a constitutional decision, their significance has not been diminished one whit. Despite the invalidation of the federal statute, the downsizing of *Miranda* brought about by these earlier cases remains in place today."). The Court in *Vega* likewise dealt with this tension. *Vega*, 142 S. Ct. at 2105 ("[O]ur decision in *Dickerson* did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision." (citations omitted)).

50. 381 U.S. 479, 485 (1965).

51. *Id.* at 485.

52. *Id.*

53. *Id.*

54. *Id.* at 482 (citations omitted).

55. *Id.* at 483.

of the enumerated rights by solidifying the peripheral rights. If the Constitution fails to protect peripheral rights, then those enumerated rights stand in jeopardy of being neglected and violated.

Justice Douglas reasoned, “The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁵⁶ The enumerated rights in different amendments created “zones of privacy” where the State could not enter.⁵⁷ The bedroom fell in this zone. As the Court noted, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”⁵⁸ For Justice Douglas, ensuring the sanctity of the marital bedroom creates a peripheral right, intended to protect those rights enumerated in the Constitution that have their roots in underlying privacy concerns.

Without explicitly saying, Justice Douglas described the right of privacy in the bedroom as a prophylactic to enumerated rights.⁵⁹ The government’s ability to regulate what happens in the bedroom creates a fear that the government would enter homes without warrants or require people to incriminate themselves, violating enumerated rights in the Fourth and Fifth Amendment. Justice Douglas saw privacy as the underlying concern behind many of the enumerated rights and attempted to fence off any chance of violation.

56. *Id.* at 484.

57. *Id.*

58. *Id.* at 485.

59. See Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2178–79 (2014) (“The conventional explanation of Justice Douglas’s opinion starts with the conception of particular Bill of Rights guarantees ‘emanat[ing]’ a sphere of additional rights whose judicial protection is necessary to protect the core rights specified in the constitutional text. . . . Though judicial enforcement of such ‘peripheral’ or ‘prophylactic’ rights is not entirely free from controversy, such rights are now a familiar part of constitutional law.” (emphasis added)); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA* 97 (1990); Anthony R. Blackshield, *Constitutionalism and Comstockery*, 14 U. KAN. L. REV. 403, 445–47 (1966); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 190–96 (all analyzing and understanding *Griswold* as announcing a prophylactic rule.).

Using *Griswold* and “privacy” rights emanating from various amendments as a foundation, the Court took up the question of abortion in *Roe v. Wade*. Roe argued that the abortion statute violated some combination of her “personal liberty embodied in the Fourteenth Amendment’s Due Process Clause,” her “personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras,” or “among those rights reserved to the people by the Ninth Amendment.”⁶⁰ The Court largely echoed the sentiments raised in *Griswold* regarding the grounding of “privacy” rights in the Constitution.⁶¹ After listing the myriad of cases recognizing the right to privacy, the Court added the caveat that only those privacy rights “implicit in ordered liberty”⁶² are within the reach of constitutional protection.⁶³

The Court noted that this right of privacy extended to marriage.⁶⁴ Using a combination of factors, the Court concluded that a woman has a choice whether to terminate her pregnancy.⁶⁵ The Court’s reasoning unfolded in two parts. First, a right to privacy emanates from the Constitution, which the Court has applied in several

60. *Roe v. Wade*, 410 U.S. 113, 129 (1974) (internal quotations omitted).

61. *Id.* at 152 (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” (internal quotations omitted)).

62. *Id.*

63. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 667–68 (2005) (noting that “the concept of implicit ordered liberty” has “evolved into a device as easily invoked to declare invalid ‘substantive’ laws that sufficiently shock the consciences of at least five members of this Court” (quoting *In re Winship*, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting)); see also *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (“[T]he development of this Court’s substantive-due-process jurisprudence . . . has been a process whereby the outlines of the ‘liberty’ specially protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition.”)).

64. *Roe*, 410 U.S. at 152–53 (listing cases).

65. This right was not absolute. The Court implemented the “trimester” framework to govern when a women’s right to terminate a pregnancy is operative. See *id.* at 155, 164.

different contexts. However, the guarantee of privacy only applies to rights deemed fundamental or implicit in the concept of ordered liberty. Second, allowing access to abortion paralleled the Supreme Court's rationale in prior precedents regarding marriage and familial life. Logically, abortion sat at the crossroads of privacy and familial life. Therefore, a law that prohibited abortion violated the Fourteenth Amendment's Due Process Clause, since such a law undermined a woman's privacy rights. The Court concluded that the right of privacy "encompass[ed] a woman's decision whether or not to terminate her pregnancy."⁶⁶

At first glance, *Roe* fashioned another prophylactic, with its foundation in the prophylactic instituted in *Griswold*.⁶⁷ Like Justice Douglas in *Griswold*, the Court in *Roe* expressed concern with governmental intrusion into peoples' personal and intimate lives. But the Court's ruling protected a more distant concern than the one addressed in *Griswold*. Disguising the decision as the logical outgrowth of *Griswold*, the Court's prophylactic scheme ran as follows: The Constitution guarantees a right to privacy. *Griswold* protected this right by restricting the government's access to the marital bedroom. *Roe*, aiming to protect the marital bedroom, in turn, gave women the right to obtain an abortion. In other words, the Court in *Roe* protected the judicially created right from *Griswold*, which itself ensured an enumerated right. *Roe* illustrates yet another application of "prophylaxis built upon prophylaxis."⁶⁸

After a conservative turn in the composition of the Court, *Planned Parenthood v. Casey*⁶⁹ reaffirmed "the essential holding of *Roe v.*

66. *Id.* at 153.

67. Cf. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1575 (2021) ("Although some commentators criticized *Roe* for its prophylactic character, many women's-rights advocates praised the Court's decision to paint with a broad brush." (emphasis added)).

68. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990).

69. 505 U.S. 833 (1992).

Wade.”⁷⁰ The Court began its analysis with a justification for “substantive due process”⁷¹ and used that as a springboard to argue that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.”⁷² Privacy was one such right. As the Court noted,

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.⁷³

While the Court thoroughly focused on the word “liberty” and the rights encompassed therein, “privacy” remained at the forefront of the Court’s reasoning in reaffirming *Roe*. The Court implicitly drew on Justice Harlan’s conception of “liberty” from *Poe v. Ullman*.⁷⁴ There, Justice Harlan explained that the “liberty” guaranteed by the Due Process Clause spans “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”⁷⁵ The right to privacy falls under the all-encompassing concept of “personal liberty.” Thus, any abridgment of the right to privacy fuels an attack on personal liberty. With

70. *Id.* at 846. *But see* Paul B. Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 34–37 (1993) (arguing that *Casey* actually overruled *Roe*).

71. *Casey*, 505 U.S. at 846 (“Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, . . . the Clause has been understood to contain a substantive component as well. . . .”).

72. *Id.* at 847 (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (concurring opinion)).

73. *Id.* at 847, 851.

74. *Poe v. Ullman*, 367 U.S. 497 (1961).

75. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

its grounding in an underlying privacy concern, the right to abortion ensures the protection of personal liberty.

IV. PROPHYLACTICS AND *STARE DECISIS*

As recounted here, prophylactics appear throughout our legal tradition.⁷⁶ First Amendment doctrine includes many prophylactics.⁷⁷ Furthermore, the Court continues to employ prophylactics within Fourth Amendment jurisprudence. Four years after *Dickerson* quibbled on the constitutionality of *Miranda*, the Court held once again in *United States v. Patane*⁷⁸ that “the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.”⁷⁹ Most recently, the Court in *Vega v. Tekoh* affirmed the same understanding.⁸⁰

Miranda's underpinnings encompass the privacy concerns inherent in custodial interrogation, and the “*Miranda* Rights” aim to alleviate those concerns. However, the “*Miranda* Rights” protect more than what the Constitution requires. As the Court noted in *Oregon v. Elstad*, “The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.”⁸¹ Given the broad nature of the “*Miranda* Rights,” failure to administer the warnings produces no constitutional violation.⁸²

76. See generally David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing for the legitimacy and necessity of prophylactic rules).

77. *Id.* at 198.

78. 542 U.S. 630 (2004).

79. *Patane*, 542 U.S. at 636.

80. *Vega v. Tekoh*, 142 S. Ct. 2095, 2102 (2022) (“Since *Miranda*, the Court has repeatedly described the rules it adopted as ‘prophylactic.’”).

81. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

82. *Id.*

Likewise, *Griswold* and *Roe* put in place prophylactics based on underlying privacy concerns.⁸³ In striking down the Connecticut statute in *Griswold*, the Court overprotected the enumerated rights in the Constitution.⁸⁴ The same holds true for abortion in *Roe*, which built upon the *Griswold* decision. Recall the reasoning in *Griswold*: “Without those peripheral rights the specific rights” — that is, those enumerated in the Bill of Rights — “would be less secure.”⁸⁵ With prophylactics, even if protective measures are violated, the core right remains safe. As Joseph Grano explains, “[W]hat distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution.”⁸⁶ Accordingly, “prophylactics” are not constitutional rights in and of themselves but rather court-created rules to protect core enumerated rights.⁸⁷

Since prophylactics are not constitutional rights, I argue that they not be afforded the same deference as “true constitutional rules” when evaluating prior decisions for purposes of *stare decisis*.⁸⁸ The protection of a core constitutional right forms the foundation of a prophylactic. If we assume as the Court concluded in *Elstad*, *Patane*, and *Vega*, that a prophylactic violation sets off no constitutional violation, this “weakens the judicial commitment to *stare decisis*” in cases involving prophylactics “because it allows courts to invoke

83. It should be noted that *Griswold* and *Miranda* were decided only one year apart on the Warren Court. Chief Justice Warren authored *Miranda* and joined the majority opinion in *Griswold*.

84. See Williams, *supra* note 59, at 2178–79.

85. *Griswold*, 381 U.S. at 482–83.

86. Grano, *supra* note 5, at 105.

87. See Berman, *supra* note 16, at 38 (“This is what Grano means in claiming that [prophylactics] are “court created,” not “true constitutional rules.” “Prophylactic rules” and “constitutional rules” are not simply synonyms” (quoting Grano, *supra* note 5, at 105; Joseph D. Grano, *Miranda’s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. Chi. L. Rev. 174, 187 (1988))).

88. Grano, *supra* note 5 at 105; see also *Dobbs*, 142 S. Ct. at 2235 (“The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.”).

writtenness as a generically valid reason to depart” from prior decisions.⁸⁹ Furthermore, the “prophylactic rules must protect constitutional rights: The legitimacy of proposed prophylactic rules diminishes as the distance from constitutional rights grows.”⁹⁰ As explained, the Court in *Roe* simply protected an already existing judicially-created right. *Griswold* stands one step removed from the constitutional right of “privacy.” *Roe*, which built off of *Griswold* stands two steps removed. When the rule in question involves a prophylactic and not a “core right,” the belief that *stare decisis* is not an “inexorable command”⁹¹ holds even more weight.

This prophylactic framework can help explain *Dobbs*. The majority in *Dobbs* completely rejected the *stare decisis* argument made in *Casey*. The Court in *Casey* laid out “a series of prudential and pragmatic considerations”⁹² that ought to be weighed in order to decide whether the costs of overruling a prior case are too great. Those considerations include: (1) whether the central rule of the prior case proves unworkable; (2) whether the rule caused reliance and its removal would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether the facts of that case have changed or been viewed differently.⁹³

89. Jane Pek, *Things Better Left Unwritten?: Constitutional Text and the Rule of Law*, 83 N.Y.U. L. REV. 1979, 1998–99 (2008); see also Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL’Y 479, 486 (1996) (“Judicial review came from a theory of meaning that supposed the possibility of right answers—from an originalist theory rooted in text.”).

90. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 964 (1999). This sentiment is also echoed in Talmudic law. See Babylonian Talmud, Beitzah 3a (“The Rabbis did not institute a new law to prevent one from violating an existing Rabbinic law, which was instituted to prevent one from violating a Biblical law.”).

91. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–406 (1932).

92. *Casey*, 505 U.S. at 854.

93. *Id.* at 854–55.

The Court easily dismissed the first three factors.⁹⁴ The final consideration carried the decision. The Court reasoned that no underlying change had occurred in the facts since *Roe* or in the understanding of them. The Court analogized to *Lochner v. New York*⁹⁵ and to *Plessy v. Ferguson*,⁹⁶ where the facts or the understanding of the facts changed over time, leading to their demise in *West Coast Hotel Co. v. Parrish*⁹⁷ and *Brown v. Board of Education*,⁹⁸ respectively. The Court reasoned that “*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.”⁹⁹ But *Roe* did not rise to the level of *Plessy* or *Lochner*. As the Court explained,

Because neither the factual underpinnings of *Roe*’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.¹⁰⁰

94. *Id.* at 855–57.

95. 198 U.S. 45 (1905).

96. 163 U.S. 537 (1896).

97. 300 U.S. 379 (1937).

98. 348 U.S. 886 (1954).

99. *Casey*, 505 U.S. at 863–64.

100. *Id.* at 864. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (“[S]tare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion.’” (quoting *THE FEDERALIST* No. 78, at 490 (Hamilton) (H. Lodge ed. 1888))); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (“The doctrine of *stare decisis* would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter.”); Frederick

Thus, the *Casey* Court upheld the prophylactic regime of *Roe* using privacy and *stare decisis* as anchors of the reasoning.

In *Dobbs*, the Court dismissed this approach and adopted a five-factor test to assess whether a prior precedent should be overruled.¹⁰¹ The Court focused on the implausible interpretation of the Constitution and reasoning in *Roe* and *Casey*. “*Roe’s* constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed. *Roe* was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people.”¹⁰²

If prophylactic privacy concerns laid the foundation for *Roe* and *Casey*, then the Court’s ruling in *Dobbs* mirrors Justice Scalia’s argument in *Minnick v. Mississippi*. *Roe* and *Casey*, to borrow from Justice Scalia’s dissent, stood as “prophylaxis built upon prophylaxis.”¹⁰³ *Roe* built upon the prophylactic nature of *Griswold*, and *Casey* reinforced the judicially created right to abortion. Consistent with the Court’s prophylactic understanding of the “Miranda Rights,” abortion falls to the same logic: a prophylactic with no constitutional claim attached. The Court, in overruling *Roe*, did not depart from a constitutional right, but merely removed the fence around the constitutional right of privacy. The Constitution, as our governing text

Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 387 (2007) (“[I]f a court under a purported regime of *stare decisis* is free to disregard any previous decisions it believes wrong, then the standard for disregarding is the same when *stare decisis* applies as when it does not, and the alleged *stare decisis* norm turns out to be doing no work. If this is so, then *stare decisis* does not in fact exist as a norm at all. But if, by contrast, it requires a better reason to disregard a mistaken precedent than merely that it is believed mistaken, a *stare decisis* norm can be said to exist even if it is overridable.”).

101. *Dobbs*, 142 S. Ct. at 2265 (“In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the ‘workability’ of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.”).

102. *Id.*

103. *Minnick v. Mississippi*, 498 U.S. 146, 166 (1990).

and final arbiter, upholds this interpretation. As Jane Pek notes, having “the presence of an authoritative text...implies definitive answers to constitutional questions, expressed in the words of the constitutional document—that is, it implies that a true meaning of the Constitution exists.”¹⁰⁴ Pek’s argument holds even more weight in this context because *Roe* centered around a prophylactic, not a true constitutional rule. The Court in *Dobbs* commented that *Roe* lacked any foundation in the constitutional text.¹⁰⁵ As already mentioned, prophylactic decisions hold less weight than cases that announce true constitutional rules. Accordingly, departing from a prophylactic precedent is much less dramatic and extreme.

We can think of prophylactics as “federal common law.” As Professor Martha A. Field explained, federal common law refers “to any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional.*”¹⁰⁶ Thus, “a court makes federal common law when it decides that the due process clause of the fourteenth amendment protects a married couple’s right to use contraceptives in the privacy of the home.”¹⁰⁷ Likewise, the Court makes federal common law when it creates an exclusionary rule (like “Miranda Rights”) that enforces the Fifth

104. Pek, *supra* note 89, at 1999.

105. *Dobbs*, 142 S. Ct. at 2266.

106. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986). Thomas Merrill has a similar conception of the federal common law. See Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (“Federal common law . . . means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of ‘interpretation’ in either a conventional or an unconventional sense.”).

107. Field, *supra* note 106, at 892.

Amendment's protection against self-incrimination.¹⁰⁸ These prophylactic rules constitute federal common law.¹⁰⁹

Since judges manufacture these prophylactics, "in formulating the rule, the judiciary chooses the best rule based upon its own notions of policy and upon whatever policies it finds implicit in the constitutional and statutory provisions it does have an obligation to follow."¹¹⁰ This lends a lot of flexibility to the chosen rule because a subsequent court might employ different notions of "policy," leading to divergent results in what they find "implicit" in the Constitution. Intuitively, this proposition holds weight because "constitutional principles bind judges in a way that federal common law does not. . . . Because the application of federal common law principles depends on prudential considerations[,] . . . judges can distinguish or disregard them when prudential considerations. . . . dictate. Constitutional principles, on the other hand, are unaffected by prudential concerns. The Constitution binds absolutely."¹¹¹ With this framework in mind, the right to "abortion," seen as a prophylactic, belongs to federal common law, subject to the different considerations of the Court. By overturning *Roe*, the Court in *Dobbs* exercised its federal common law ability to fashion a new rule (or to take one away).

But what restraint exists in limiting the judiciary from fashioning new federal common law? Operating in the arena of "substantive due process," the Court in *Dobbs* relied heavily on the reasoning set forth in *Washington v. Glucksberg*.¹¹² The Court reasoned that the

108. *Id.* at 892 ("[A] court also makes federal common law when it adopts an exclusionary rule in order to enforce the fourth amendment's prohibition of unreasonable search and seizure.").

109. *Id.* ("Whether such prophylactic rules are compelled by the Constitution or are simply inspired by it . . . they constitute federal common law."); see also Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 33 (1975) (arguing that prophylactic rules are federal common law).

110. Field, *supra* note 106, at 893.

111. Robert L. Nightingale, *How to Trim A Christmas Tree: Beyond Severability and Inseparability for Omnibus Statutes*, 125 YALE L.J. 1672, 1693 (2016).

112. 521 U.S. 702 (1997).

“‘established method of substantive-due-process analysis’ requires that an unenumerated right be ‘deeply rooted in this Nation’s history and tradition’ before it can be recognized as a component of the ‘liberty’ protected in the Due Process Clause.”¹¹³ The Court in *Glucksberg* warned that “[w]e must . . . exercise the utmost care whenever we are asked to break new ground in this field, . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”¹¹⁴ A cursory look at this cautionary tale may initially seem to contradict Professor Field’s account of the discretionary role that judges use in crafting federal common law. One might wonder how “the judiciary chooses the best rule based upon its *own notions of policy and upon whatever policies* it finds implicit”¹¹⁵ in the Constitution without transforming the Due Process Clause into the policy preferences of the individual Justices, as *Glucksberg* warned. Professor Field’s approach sounds like a subjective inquiry performed by judges. But in fact, these two propositions do not oppose each other. From the majority’s perspective in *Dobbs*, choosing the rule based on policy considerations and what the Justices find implicit in the Constitution is an *objective* inquiry done by surveying vast amounts of history to assess if the rule is deeply rooted in our history and tradition.¹¹⁶ Thus, the Court accomplished exactly what Professor Field instructed without turning the “liberty protected by the Due Process Clause” into the Justices’ own “policy preferences.”¹¹⁷

This approach to federal common law rule making goes hand in hand with the first two factors of the Court’s analysis of when to

113. *Dobbs*, 142 S. Ct. at 2260 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

114. *Glucksberg*, 521 U.S. at 720.

115. Field, *supra* note 106, at 893 (emphasis added).

116. See *Dobbs*, 142 S. Ct. at 2247 (“Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of ‘Anglo-American common law tradition,’ and made clear that a fundamental right must be ‘objectively, deeply rooted in this Nation’s history and tradition.’” (quoting *Glucksberg*, 521 U.S. at 720–21 (citations omitted))).

117. *Glucksberg*, 521 U.S. at 720.

turn away from *stare decisis*. The Court explained that the “nature of the error” in *Roe* “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.”¹¹⁸ Furthermore, the “quality of the reasoning” in *Roe* “found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. . . . [W]ithout any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules.”¹¹⁹ Fashioning a federal common law rule and overturning precedent collapses into a single inquiry in *Dobbs*. When the Court evaluated the “nature of the error” and the “quality of the reasoning” behind the prior decision, they were fashioning a new rule “based upon its own notions of policy and upon whatever policies it finds implicit”¹²⁰ in the Constitution. The *Dobbs* Court’s new test for evaluating prior decisions can be viewed as an application of the Court’s federal common law rule making ability.

CONCLUSION

Is the “right to privacy” within substantive due process in jeopardy after *Dobbs*? The Court dismissed this concern by ensuring that “we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”¹²¹ But using the arguments I set forth would certainly put *Miranda* in peril. *Miranda* exists as a bona fide prophylactic, a quintessential common law rule. The Court in *Dickerson* dodged the

118. *Dobbs*, 142 S. Ct. at 2265.

119. *Dobbs*, 142 S. Ct. at 2266.

120. Field, *supra* note 106, at 893.

121. *Dobbs*, 142 S. Ct. at 2277–78; *but see id.* at 2301 (Thomas, J., concurring) (“As I have previously explained, ‘substantive due process’ is an oxymoron that “lack[s] any basis in the Constitution.”). This prophylactic framework that I have applied to *Roe* and *Dobbs* might apply to other areas of substantive due process, but I do not address that here.

constitutionality issue of *Miranda*. *Patane*, and more recently, *Vega*, have reaffirmed the prophylactic nature of *Miranda*. The Court could once again exercise their federal common law-making ability by evaluating the “Miranda Rights” using their own conceptions of policy and what they find implicit in the Constitution.

This could lead the Court to scrap the “Miranda Rights” entirely using the test put forward in *Dobbs*. If the Court overruled *Roe* and *Casey*, which were viewed as establishing a constitutional right for almost fifty years, does that mean *Miranda* is next?¹²²

122. See Comment, *Vega v. Tekoh*, 136 HARV. L. REV. 430, 438–39 (2022) (“*Roe* and *Miranda* share some similarities: Both were landmark decisions from a half century ago establishing rights not explicitly mentioned in the Constitution . . . Now that *stare decisis* has failed to save even *Roe*, which protected a . . . constitutional right, *Miranda*—protecting only a prophylactic constitutional rule now shaken and subject to aspersion by the *Vega* Court—may fall next.”).