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## BOOK REVIEW

### THE “COMMON-GOOD” MANIFESTO

COMMON GOOD CONSTITUTIONALISM. By Adrian Vermeule. Medford, MA: Polity Press. 2022. Pp. viii, 270. \$59.95.

*Reviewed by William Baude\* & Stephen E. Sachs\*\**

*In Common Good Constitutionalism, Professor Adrian Vermeule expounds a constitutional vision that might “direct persons, associations, and society generally toward the common good.” The book must be taken seriously as an intellectual challenge, particularly to leading theories of originalism.*

*That said, the challenge fails. The book fails to support its hostility toward originalism, to motivate its surprising claims about outcomes, or even to offer an account of constitutionalism at all. Its chief objections to originalism are unpersuasive and already answered in the literature it cites. The book does highlight important points of history and jurisprudence, of which originalists and others might need to take account; yet those points remain underdeveloped. In the end, the book might be best understood as what Vermeule once called a “constitutional manifesto”: a work of “movement jurisprudence” whose political aims come into conflict with theoretical rigor.*

#### INTRODUCTION

Two prominent scholars once described a “genre” of literature — the “constitutional manifesto” — that “sits uneasily between the scholarly or theoretical analysis of constitutional law and the buzzwords of day-to-day constitutional politics.”<sup>1</sup> Such a work must “expound a philosophical vision of constitutional law and politics” that’s intellectually serious but “nonetheless accessible to a broad audience.”<sup>2</sup> Not only that, it must be “politically savvy, so that it may guide a political and legal movement in particular directions over time.”<sup>3</sup> Yet the case for its

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\* Professor of Law, University of Chicago Law School.

\*\* Antonin Scalia Professor of Law, Harvard Law School.

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<sup>1</sup> Eric A. Posner & Adrian Vermeule, *Outcomes, Outcomes*, NEW REPUBLIC (Sept. 1, 2009), <https://newrepublic.com/article/62532/outcomes-outcomes> [<https://perma.cc/98RR-P8FN>] (reviewing THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009)).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

constitutional method, “openly defended as a tactic for achieving a political agenda,” can’t succeed as a political matter if it also adheres to traditional academic values like “a commitment to public candor.”<sup>4</sup> If it tries to split the difference, the wires will show.

One of those scholars, Professor Adrian Vermeule, has now tried his own hand at the genre. Three years ago, he announced that originalism had “outlived its utility” for producing a “substantively conservative approach to constitutional law and interpretation.”<sup>5</sup> In *Common Good Constitutionalism*, he offers a new constitutional manifesto, expounding a philosophical vision that might “direct persons, associations, and society generally toward the common good.”<sup>6</sup> Alas, the wires still show.

*Common Good Constitutionalism* has been accompanied by an impressive intellectual and rhetorical campaign, and it has already been widely (if mostly skeptically) reviewed.<sup>7</sup> We share the skeptical bottom line, but we worry that the book’s critics have yet to cut down to the bone. What’s wrong with the book is not that it advances a form of living constitutionalism, that the common good is unknowable, or that pursuing the common good will necessarily lead to untoward results. Indeed, the book highlights important strands of Founding-era and nineteenth-century legal thought, of which scholars of all stripes should take account. What’s wrong with the book is that it fails to hold up at

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<sup>4</sup> *Id.*

<sup>5</sup> Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037> [<https://perma.cc/X82X-4TNP>].

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022); Randy E. Barnett, *Deep-State Constitutionalism*, CLAREMONT REV. OF BOOKS, Spring 2022, at 33; Christopher R. Green, Problems with Vermeule, *Common Good Constitutionalism* (Mar. 22, 2022) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4075031](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4075031) [<https://perma.cc/4P3X-LYHD>]; Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule’s New Theory*, 98 NOTRE DAME L. REV. 403 (2022); William H. Pryor Jr., *Against Living Common Goodism*, 23 FEDERALIST SOC’Y REV. 24 (2022); Steven D. Smith, *The Constitution, The Leviathan, and the Common Good*, 38 CONST. COMMENT. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4098880](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4098880) [<https://perma.cc/JHN2-NBZW>]; Leon Wieseltier, *Christianism*, LIBERTIES, Spring 2022, at 326, 357–62. For shorter reviews along similar lines, see Peter Berkowitz, *Too Good to Be True: The Virtues and Vices of Common-Good Constitutionalism*, WASH. FREE BEACON (Mar. 20, 2022, 5:00 AM), <https://freebeacon.com/culture/too-good-to-be-true-the-virtues-and-vices-of-common-good-constitutionalism> [<https://perma.cc/LQU4-V28F>]; Matthew J. Franck, *Calvinball Constitutionalism*, PUB. DISCOURSE (May 3, 2022), <https://www.thepublicdiscourse.com/2022/05/82092> [<https://perma.cc/698X-KGZB>]; John O. McGinnis, *Originalism for the Common Good*, LAW & LIBERTY (Apr. 28, 2022), <https://lawliberty.org/book-review/originalism-for-the-common-good> [<https://perma.cc/J5DW-TNU2>]; James M. Patterson, *Uncommonly Bad Constitutionalism*, LAW & LIBERTY (Apr. 28, 2022), <https://lawliberty.org/book-review/uncommonly-bad-constitutionalism> [<https://perma.cc/FKS2-AL83>]; and Micah Schwartzman & Richard Schragger, *What Common Good?*, AM. PROSPECT (Apr. 7, 2022), <https://prospect.org/culture/books/what-common-good-vermeule-review> [<https://perma.cc/B7SG-EWRZ>]. For a comparatively sympathetic review, see R.H. Helmholz, *Marching Orders*, FIRST THINGS, May 2022, at 51.

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a *theoretical* level — either on its own terms or as compared to the originalist approach it purports to threaten. Vermeule is a very deep thinker, working with a many-centuries-old legal tradition, yet the results are surprisingly superficial.

The problem, we think, is that the demands of a political and legal campaign and those of a constitutional theory are not the same. Though Vermeule writes with extraordinary skill, the sort of red meat that inspires a movement can, on reflection, seem rather thin gruel. Vermeule once reminded his many Twitter followers “that twitter is a dark arena of rhetorical combat, not an academic seminar. Tweet accordingly.”<sup>8</sup> We fear that the spirit of the dark arena has now spread to the monograph — and that the tools and techniques that serve so well in one medium turn out to be handicaps in another.

Nonetheless, we take the book seriously as an intellectual challenge, which is why we feel compelled to respond. This poses a further issue. If *Common Good Constitutionalism* were more straightforwardly structured, it might be easier to lay out its argument, to explain where we disagree, and then to set out the evidence that might support one position against another. Instead, communicating a full sense of the book sometimes requires careful attention to its rhetorical strategies and direct criticism of what seems to us to be failures of scholarship. Noting such failures can sound *ad hominem*, particularly because you, the reader, have no way of assessing them, short of reading the book yourself and deciding whether we have been fair. If these constraints lead in places to an unusually sharp tone, we apologize for its necessity.

In any event, we proceed as follows. In Part I, we take *Common Good Constitutionalism* on its own terms, arguing that the theory fails to support the book’s hostility toward originalism, to motivate its surprising claims about outcomes, or even to offer an account of constitutionalism at all. In Part II, we argue that its chief objections to originalism are unpersuasive and already answered in the literature it cites. In Part III, we attempt a sympathetic reconstruction of the book’s arguments as contributions to originalist debates, though we find them underbaked as a matter of both history and jurisprudence. In Part IV, we discuss Vermeule’s political aims and their relation to the book’s cult following.

## I. CONSTITUTIONALISM

*Common Good Constitutionalism* purports to offer a theory of constitutional law. On this theory, the Constitution of the United States should be read according to what Vermeule calls “the classical tradition”

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<sup>8</sup> Adrian Vermeule (@Vermeullarmine), TWITTER (Nov. 4, 2021, 6:29 PM), <https://web.archive.org/web/20211105015916/https://twitter.com/Vermeullarmine/status/1456433457874317319> [<https://perma.cc/V56V-FW47>].

(p. 1). His account of this tradition, which relies extensively on the work of St. Thomas Aquinas (pp. 3, 44–47, 74–78, 120–21), presents law as “a reasoned ordering to the common good, the ‘art of goodness and fairness,’ as the Roman jurist Ulpian put it” (p. 1).<sup>9</sup> The common good in question is emphatically not utilitarian; it “is not ‘preferences’ or ‘what I like’” or any “aggregation of individual goods” (p. 14). Instead, it “is well-ordered peace, justice, and abundance in political community,” with the “flourishing” of this political community serving as “the greatest temporal good for the individual” (p. 14). The positive law of our particular society (the *ius civile*, or “law of the city”) is thus tied to “the general law common to all civilized legal systems” (*ius gentium*, or law of nations), as well as to “principles of objective natural morality” (*ius naturale*, or natural law) (p. 8).

Why this might be so, and what exactly all this means, is a complicated tale. But Vermeule is clear from the beginning that he is firmly against “two dominant approaches, progressivism and originalism, both of which distort the true nature of law and betray our own legal traditions” (p. 1). As we follow the argument, this opposition is a puzzle. Vermeule’s own arguments about well-ordered political communities ought to lead him to be sympathetic to the versions of originalism he derides. Instead, they seem to lead him toward a grab bag of policy outcomes — and ultimately into opposing written constitutionalism itself.

#### A. *Anti-originalism*

The villain of Vermeule’s story is originalism: a Miltonian “rebellion against an established order and its developing doctrine” (p. 114). In two chapters on alternative theories, he devotes half again as many pages to the originalists as to their progressive critics (pp. 91–116, 117–33); the latter chapter, ostensibly on a different subject, returns to throw more cold water on originalism at least four times in seventeen pages (pp. 118, 121, 126, 133). A sympathetic reviewer describes these criticisms as “shrill,” expressing surprise at the “harshness of debate in this area of the law.”<sup>10</sup> Indeed, the book’s opening pages announce that any “truly principled originalist would immolate his own method” through “an act of intellectual self-abnegation” (pp. 2–3).

We’re then informed, over the course of the book, that originalism is “an illusion” (p. 16); that “originalism, the main competitor to common good constitutionalism on the American scene, is an illusion” (p. 22); that we moderns are, by our amnesia about natural law, “victims of a kind of illusion” (p. 60); that “[o]riginalism as a theory is an illusion” (p. 92); that originalism “is an illusion, mere talk” (p. 94); that “originalism is necessarily illusory” (p. 95); that originalism has an “illusory character”

<sup>9</sup> A footnote has been omitted.

<sup>10</sup> Helmholz, *supra* note 7, at 52.

(p. 99); that "originalism is illusory" (p. 108); that "[o]riginalism is not so much wrong as illusory" (p. 116); that originalism is "an illusory approach to constitutional interpretation" (p. 172); and so on. (Only some of these references are found in the chapter entitled "Originalism as Illusion" (p. 91).)

We find this hostility rather baffling. Originalism, in what the book itself describes as the "leading" formulation (p. 192 n.34), is about the connection between current and past law. It holds that our law, in America today, happens to be the Founders' law, as lawfully changed from their day to ours: whatever wasn't changed by lawful means was left alone.<sup>11</sup> It's hard to see why Vermeule should oppose this claim, even on his own terms. He argues that the study of law is inherently "a department of political morality" (p. 69), that law is "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community" (p. 3). So the Founders' law was an ordinance of reason for the public good (p. 56); any lawful changes to that law were ordinances of reason for the public good; and today's law is *also* an ordinance of reason for the public good. None of this requires any daylight between today's law and the Founders' law, as lawfully changed. Where is the promised challenge to originalism?

The hostility becomes more baffling still when we consider Vermeule's views on natural law, positive law, and "determination[s]" (pp. 8–11). Except in extreme cases of "intrinsic evils," the common good "does not, by itself, prescribe any particular legal institutions or rules" (pp. 8–9). It might require societies to prevent certain kinds of harm, like traffic accidents, but it says nothing about whether we should drive on the left or the right. Instead, those with care of the community must "determine or specify the content of the positive law" (p. 8) — say, requiring everyone by statute to drive on the right. Determinations like these are contingent, and different societies make them differently, to "take account of local conditions" (p. 8). Natural law doesn't usually override the determinations that authorities make, but it helps us understand which determinations *have* been made, "supplying interpretive principles" and rules of construction (p. 44). As long as a "particular body" making determinations isn't acting (1) "outside its sphere of legal competence," (2) in pursuit of "aims that have no imaginable public purpose," or (3) "in an unreasoned manner, arbitrarily and capriciously," other officials have to respect its discretion and defer to its judgment (p. 46). But if a public authority *is* doing any of these things, its action falls "outside of law," because law "is an ordinance of reason for the common good by one charged with care of the community" (p. 46).

<sup>11</sup> See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838–39 (2015) (cited pp. 192–93 n.34); see also William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

So far, it sounds like originalists and common good constitutionalists might have much in . . . common. To a natural lawyer of Vermeule's persuasion, what is the original Constitution (including all its lawful amendments) but a particularly wide-ranging determination, one that settles for American society a great many questions that natural law leaves unsettled? Determinations, we're told, make the difference between "[p]arliamentary and presidential systems, constitutional monarchies and republics" (p. 10); they tell us whether we have "referendums" or "first-past-the-post voting" or "separation of powers" (p. 47). So they might also tell us about the Senate, the Bill of Rights, and the relative powers of Congress and the states — and also who might be legally competent to change these things, such as by Article V amendment. If we have to identify our determinations through a "special kind of legal positivism" (p. 45), we might also come to appreciate the "reigning positivist version of originalism" (p. 193 n.34), which claims that the modern American legal system still relies on its original law, even if Canada or South Africa don't rely on theirs.<sup>12</sup> Vermeule repeatedly argues that one can have written constitutions without originalism (p. 115),<sup>13</sup> but so what? The issue isn't whether *one can*, but whether *we do*.

Vermeule insists that treating originalism as a society-specific determination "fails to state a view different than the classical law" (p. 109); it "collapse[s] back into the classical law, albeit under the strictly nominal label of 'originalism'" (p. 110). The dismissive reaction is curious. A natural lawyer of Vermeule's mind, one who emphasizes "role morality" and deference to public institutions (pp. 38, 43), ought to care a good deal about the positive law we actually have. If the original Constitution was and is our determination, then its rules are entitled to obedience by judges and officials. A public body claiming new powers not vested under the original Constitution would act "outside its sphere of legal competence" and "forfeit its claim to be implementing law at all" (p. 46).

The only exception would be if originalism were so "unreasoned" or lacking in any "imaginable public purpose" as to fall "outside of law" (p. 46). But while the book claims that originalism undermines important values of "stability" and "settlement" (p. 113), it never goes so far as to indict the reliance on older law, as a *general* matter, as without "imaginable public purpose." Nor could it: both in the 1780s and today, we can imagine it making good sense for a society to agree on a set of rules,

<sup>12</sup> Sachs, *supra* note 11, at 826 & n.23, 834; William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2400–03 (2015).

<sup>13</sup> *Accord* Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL'Y PER CURIAM, no. 10, Spring 2022, at 1, 8–10, <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/04/Vermeule-Casey-Argument-By-Slogan.pdf> [<https://perma.cc/RQS3-AZW3>]; Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022, 1:33 PM), <https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html> [<https://perma.cc/Z2TR-HXBJ>].

to write them down, and to insist on a broad and formal consensus before changing them.<sup>14</sup> The target of Vermeule’s ire seems to be a view in which the common good *requires* a society to pick the original law of some founding moment and to stick with it over time (pp. 115–16). Some originalists may hold this view, but many reject it, including the particular authors whom he purports to criticize.<sup>15</sup> The question facing his theory is whether the common good generally *forbids* a society from relying on an original law, which it does not.

Of course it remains open to Vermeule (or anyone else) to argue that originalism’s picture of American positive law is false. Maybe our original law was more like a set of loose guidelines, rather than rules.<sup>16</sup> Or maybe we did have rules, but these rules were superseded later on: say, by a common law constitution,<sup>17</sup> by pluralistic principles,<sup>18</sup> by constitutional moments,<sup>19</sup> or by something else yet more exotic. If we’ve abandoned our original Constitution and evolved a new constitution instead, then public bodies that follow originalism would act outside *their* sphere of legal competence and forfeit *their* claim to be implementing law instead.

These are ordinary positive-law debates, in which originalists engage all the time.<sup>20</sup> For example, we’ve discussed evidence in earlier work that the Founders understood themselves to be laying down rules that would persist over time;<sup>21</sup> that the American legal system continues to treat the rules of the written Constitution as law, and as old law;<sup>22</sup> that legal actors today “don’t acknowledge, and indeed reject, any official legal breaks or discontinuities from the Founding”;<sup>23</sup> that they don’t explicitly repudiate originalism, inclusively understood;<sup>24</sup> that their invocations of precedent, policy, and other considerations are presented as

<sup>14</sup> And to the extent the original Constitution fell short of being an ordinance of reason for the common good — say, because that Constitution (in a late emendation to the theory) “merely fails to prevent” a “predictable stream of morally horrid first-order results” (p. 114) — then Vermeule ought to conclude that whatever law it *truly* made was actually the law at the Founding; thus corrected, it might still be the law today.

<sup>15</sup> See Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 100 (2016) (emphasizing the society-specific nature of American originalism) (cited pp. 108–16).

<sup>16</sup> See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 324 (2021) (cited pp. 186–87 n.4).

<sup>17</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

<sup>18</sup> Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018).

<sup>19</sup> Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

<sup>20</sup> On Gienapp, *supra* note 16, see Evan D. Bernick & Christopher R. Green, *There Is Something that Our Constitution Just Is*, 27 TEX. REV. L. & POL. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4020579](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4020579) [<https://perma.cc/W865-6RH5>]; on Strauss, *supra* note 17, and Berman, *supra* note 18, see Baude & Sachs, *supra* note 11, at 1487–89; on Ackerman, *supra* note 19, see Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2287–89 (2014).

<sup>21</sup> Sachs, *supra* note 11, at 876, 881, 883–84.

<sup>22</sup> Baude & Sachs, *supra* note 11, at 1477–78 (synthesizing prior work).

<sup>23</sup> *Id.* at 1477.

<sup>24</sup> Sachs, *supra* note 11, at 868–71; Baude, *supra* note 12, at 2376–86.

potentially vulnerable to original law, but not the other way around;<sup>25</sup> and so on. In this regard Vermeule, with occasional exceptions,<sup>26</sup> seems to swim in the same originalist waters as everyone else. Recently he and a coauthor claimed that “every developed legal tradition . . . requires respect for historically posited constitutional law unless and until duly changed”; they described as a “banalit[y]” and “truism[.]” the idea that officials must “faithfully adhere to and interpret the meaning of X, Y or Z provisions posited and fixed by a legitimate political authority at a given historical point in time.”<sup>27</sup> We’d like to think so, but on the non-originalist side these notions are actively contested,<sup>28</sup> and they’ve been rejected in practice by a variety of juridical coups d’état elsewhere.<sup>29</sup> To know what American law requires, it would very much help to know who is right.

In these debates, *Common Good Constitutionalism* fails to move the needle. Its critiques of originalism borrow long-standing arguments of others, particularly Ronald Dworkin (pp. 5–6, 95–97, 188–89 nn.11–14); it presents no new reasons to conclude that originalism isn’t our determination and that something else is. (As to some of the old reasons, see Part II below.) Yet even if we’re wrong about all this, the outcome of the positive debate seems crucial to Vermeule’s approach. So if the pursuit of the common good is truly “agnostic[.] about institutional design” (p. 10), why single out originalism for immolation?

### B. Outcomes, Outcomes

Perhaps we could answer that question by turning to the theory’s implications. But here we encounter a new confusion. *Common Good Constitutionalism*’s refusal to commit to any coherent account of American positive law, originalist or not, leaves its author with an

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<sup>25</sup> Baude & Sachs, *supra* note 11, at 1477–78.

<sup>26</sup> Favorable citations to Joseph de Maistre or to Walter Bagehot’s “‘efficient’ Constitution,” and a description of all existing constitutions as “largely unwritten or uncodified” (pp. 41 & 199 nn.101–02), may indicate an affinity for common law constitutionalism. Cf. Pat Smith, *Scissors, Paste, and Aquinas*, IUS & IUSTITIUM (Mar. 25, 2022), <https://iustitium.com/scissors-paste-and-aquinas> [<https://perma.cc/6N97-V9SH>] (arguing that originalism may have been displaced through the people’s “reserved power to make, abolish, and interpret law through custom”). But as Professor Stefan Sciaraffa notes, any constitution “would be a dead letter” without a custom among certain legal actors “of conforming to the constitution’s requirements.” Stefan Sciaraffa, *The Ineliminability of Hartian Social Rules*, 31 OXFORD J. LEGAL STUD. 603, 620 (2011). Whether and to what extent our original Constitution is a dead letter, when American judges and officials resolutely decline to pronounce it so, is precisely what the positive debate is about.

<sup>27</sup> Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), <https://iustitium.com/pickwickian-originalism> [<https://perma.cc/6QCS-MHK7>].

<sup>28</sup> See, e.g., Strauss, *supra* note 17, at 919–20 (describing modern interpretation of the Sixth Amendment assistance-of-counsel right as unfaithful in this sense, but nonetheless proper).

<sup>29</sup> See Alec Stone Sweet, *The Juridical Coup d’État and the Problem of Authority*, 8 GERMAN L.J. 915 (2007) (describing events in Germany, France, and the European Court of Justice); Baude, *supra* note 12, at 2401–02 (France and Israel, among others).

extraordinary freedom in practice to pick and choose among legal outcomes he likes.

Consider a rather important question of American constitutionalism: whether the Taxing Clause’s use of the phrase “general Welfare” confers a “freestanding power” on Congress to pursue the common good (pp. 39–40).<sup>30</sup> An originalist might think this claim unlikely — “violat[ing] every rule of construction and common sense,” Edmund Randolph said at the Virginia Convention.<sup>31</sup> Vermeule, by contrast, sees “general Welfare” as “an obvious place to ground principles of common good constitutionalism” (p. 39). This conclusion isn’t based on a careful judgment about what the phrase meant to the public authorities who used it (to whose public-regarding choices one might expect him to defer), but on “its obvious semantic ambiguity,” which Vermeule takes “to refer to, and incorporate, an elaborate tradition specifying the legitimate ends or purposes of government in light of the common good” (pp. 39–40). In context, of course, the Taxing Clause might have invoked this elaborate tradition (if at all) to specify ends for which Congress may *lay and collect taxes*, without conferring a generic power to legislate. But for Vermeule, the surface-level ambiguity presents a glorious opportunity for improving the law, without any real need to find out what it was.<sup>32</sup>

Vermeule’s approach of reading legal texts to “comport with the natural law” whenever “fairly possible,” as he describes it in recent work,<sup>33</sup> is a recipe for manipulation without some further account of how the texts might be read otherwise: “[F]airly possible” in light of *what?* Semantic ambiguity to *whom*, as of *when?* What the book praises as “expansive reading” (p. 40) is just another term for what Vermeule later

<sup>30</sup> The author quotes U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . .”).

<sup>31</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 600 (Washington, D.C., Jonathan Elliot ed., 2d ed. 1836). For the most prominent exception, see Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2082–83, 2083 n.162 (2014) (describing the view of Judge Alexander Addison of Pennsylvania, and noting that it was “not widely held but . . . frequently invoked in debate,” *id.* at 2083); and see also David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 863 (2022) (arguing for a broad reading of the Clause). *But see* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1 (2003) (providing extensive evidence for a narrower reading); Jeffrey Schmitt, *Slavery and the History of Congress’s Enumerated Powers*, 74 ARK. L. REV. 641, 656–57, 677–80 (2022) (noting that even supporters of broad federal authority envisioned limits much stricter than are allowed by the reading in Schwartz, *supra*).

<sup>32</sup> Vermeule writes that the Clause “has always been a locus of contest” (p. 40), but he cites for this proposition a source that derides the “general grant of power” theory he espouses. *General Welfare Clause*, TENTH AMEND. CTR., [https://perma.cc/K882-TTS8](https://tenthamendmentcenter.com/general-welfare-clause)] (cited p. 198 n.92).

<sup>33</sup> Adrian Vermeule, *How to Read Dobbs*, IUS & IUSTITIUM (June 25, 2022), <https://iusetistitium.com/how-to-read-dobbs> [<https://perma.cc/DQ79-ZAL3>].

accuses originalists of doing — treating constitutional provisions as “cryptic collections of words dropped from the sky,” raw materials to be made fit for new purposes, instead of “rational ordinances” to which deference is owed (p. 83).

(In the alternative, Vermeule suggests that even if the First Congress lacked a General Welfare power *de jure*, it nonetheless “acquired” a “*de facto* police power” only “by prescription, over time” — “a development that preserves the principles of the common good and general welfare that always underpinned that scheme, and is therefore valid” (p. 34). But without more work to cabin this offhand theory of adverse possession, there isn’t much left of the “principles of role morality that allocate lawmaking authority among institutions” (p. 38), or his insistence that public authorities act only within their spheres of legal competence (p. 46).)

Vermeule’s suggestion that he needn’t explain the basic workings of his theory in a mere “sketch” (p. 25), albeit one of monograph length, allows him to combine meek protestations of deference at the level of methods with broad flights of fancy at the level of outcomes. To claim that common good constitutionalism “specif[ies] desirable first-order policies,” we’re told, “would be a category error, a misunderstanding of the role of the common good in legal theory” (p. 136). But we’re also told — as entailments of the method *in general*, and without any careful attention to any specific determinations — that “[l]ibertarian conceptions of property rights and economic rights” must not “bar the state from enforcing duties of community and solidarity in the use and distribution of resources” (p. 42), that trade “[u]nions, guilds and crafts . . . will benefit from the presumptive favor of the law” (p. 42), that “selfish claims of individuals to private ‘rights’” must give way to a “common good principle that no constitutional right to refuse vaccination exists” (pp. 42–43), that arguably state legislatures may not choose even “to *allow* same-sex civil marriage” (p. 219 n.346), and so on. If one wonders what ties these positions to our particular Constitution, the book reassures us of the “legitimate scope for public authorities” to balance “competing principles, within reasonable boundaries” — adding that “there is no metric or algorithm for determining the boundaries of the reasonable,” and indeed that accepting “the absence of such a metric” is “a hallmark of maturity” (p. 70).

On the Internet, the name for such a rhetorical strategy is “the motte and bailey doctrine.” The name comes from a tactic of medieval warfare, in which one retreats when necessary to a cramped but defensible stronghold (the motte), but returns when unthreatened to occupy richer territory (the bailey). It goes like this:

[First,] you make a bold, controversial statement. Then when somebody challenges you, you retreat to an obvious, uncontroversial statement, and say that was what you meant all along, so you’re clearly right and they’re

silly for challenging you. Then when the argument is over you go back to making the bold, controversial statement.<sup>34</sup>

There’s nothing wrong with advancing general interpretive claims as well as more specific arguments; like everyone else, originalists do this too, deriving controversial results from less controversial premises about text and history.<sup>35</sup> The problem is that the book’s substantive judgments don’t follow in any reliable way from its general premises. Rather, they follow one after another, rapid-fire, with little beyond an idiosyncratic political morality to connect them to the theory from which they ostensibly derive.

There’s also nothing wrong with advancing arguments in the alternative or with asserting both stronger and weaker claims, so long as this is done consistently and transparently. As Professor Kevin Walsh has astutely observed, *Common Good Constitutionalism* employs a “two-level presentation”: some parts of the book (such as the first chapter) present a “Generic” theory, while others (such as the second and fifth chapters) offer a specifically “Vermeulean” spin.<sup>36</sup> As Walsh notes, this structure has substantive virtues, “insulat[ing] Generic CGC from warranting rejection just because Vermeulean CGC is shown to warrant rejection.”<sup>37</sup> The problem comes when workings of the generic theory are left unclear, as is their relationship to the “Vermeulean” one. Vermeule’s back-and-forth moves across different levels don’t neatly track his own book’s structure, and only rarely are they explicitly marked. The main *practical* function of this two-level structure may instead be, as Walsh dryly observes, “enabling facile authorial responses to the divergent reactions to the book thus far.”<sup>38</sup>

### C. *Anti-constitutionalism*

*Common Good Constitutionalism*’s unwillingness to be bound by its own theory renders the project quite different from the one advertised by its title. Perhaps the very phrase “common good constitutionalism” is a misnomer. In Vermeule’s hands, the theory is really a form of *anti-constitutionalism*, in which statutes, executive decrees, and court decisions are taken seriously as law but the Constitution of the United States is not.

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<sup>34</sup> Scott Alexander, *All in All, Another Brick in the Motte*, SLATE STAR CODEX (Nov. 3, 2014) (citing Nicholas Shackel, *The Vacuity of Postmodernist Methodology*, 36 METAPHILOSOPHY 295, 298–99 (2005)), <https://slatestarcodex.com/2014/11/03/all-in-all-another-brick-in-the-motte> [<https://perma.cc/PA2W-FKR9>].

<sup>35</sup> See, e.g., William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2d 103, 107–08 (2016).

<sup>36</sup> Kevin C. Walsh, *Multiple Levels in Common Good Constitutionalism*, MIRROR OF JUST. (May 27, 2022), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2022/05/multiple-levels-in-common-good-constitutionalism.html> [<https://perma.cc/7B33-628R>].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

For example: According to Vermeule, a public authority such as Congress may exclude, rigidly, any consideration of costs and benefits from a particular decision — say, whether to shut down a dam project to protect the endangered snail darter (pp. 78–79).<sup>39</sup> These public-regarding choices must be obeyed, unless “palpably without reasonable foundation” (p. 15).<sup>40</sup> But other authorities, such as the state conventions that ratified the Constitution, are presumed never to exclude similar considerations from *their* decisions — say, whether to allocate certain powers to Congress or to the states. Those public-regarding choices needn’t be obeyed, for they “cannot be embodied rigidly in a written code,” and so must be left to “prudential judgment” about “exceptional circumstances” (p. 164).

Similarly, the pronouncements in dicta of Chief Justice Marshall could “embed[] in our law” a “general principle of developing constitutionalism,” eventually emerging from its chrysalis as an “expansive police power” (p. 40).<sup>41</sup> Yet the public authorities who adopted Article V couldn’t embed a similar commitment to written constitutionalism and divided sovereignty, because Vermeule’s reading of the political science literature suggests that such commitments are unwise (pp. 158–60). A public authority’s decision must be obeyed, except when it shouldn’t.

*Common Good Constitutionalism*’s rejection of any “hard constitutional limit on the acts of the highest authority” (p. 158)<sup>42</sup> reflects an attempt to do constitutional theory without the Constitution. How do we know who the “highest authority” is, anyway? Vermeule seems to assume it to be the union of Congress and the President, or perhaps the federal government generally (pp. 158–59). But the Constitution suggests otherwise, as the federal government’s powers derive from the Constitution and could be taken away by it too. In fact, the highest authority in our system turns out to be not the federal government but a strange amalgam of House, Senate, state legislatures, and state conventions, which together enjoy nearly unlimited powers to amend the Constitution under Article V.<sup>43</sup> Maybe the Constitution’s drafters and ratifiers erred in dividing power this way. But if the common good often requires deference to “the reasonable and public-oriented judgments of legislatures” (p. 48), why not to the judgments of constitution writers? Or if deference is limited to judgments made “within [a body’s] constitutional competence” (p. 48), why encourage legislators and judges to acquire new powers beyond their prescribed bounds?

<sup>39</sup> The author discusses *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

<sup>40</sup> The author quotes *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240–41 (1984).

<sup>41</sup> The author discusses *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.).

<sup>42</sup> Except, perhaps, for those rare limits that can’t be “interpreted” away via post hoc clear statement requirements (p. 162).

<sup>43</sup> See U.S. CONST. art. V.

Determining which questions our constitutional arrangements purport to settle, and which appear to be left open to the reasoned judgment of other actors (and which ones), is what we need a constitutional theory *for*. Insisting that such questions are to be answered by the right actors, so long as their answers aren't too wrong, leaves us back where we began.<sup>44</sup> It's hard to avoid concluding that Vermeule simply likes environmental protection and broad federal police power more than he likes federalism. Which is fair enough, but not much of a constitutional theory.

## II. ORIGINALISM

Common good constitutionalism might seem on stronger ground if its competitors were weaker — if originalism were, say, an illusion. At first glance, this seems unlikely: Vermeule does not think the law of Founding-era America was an illusion, so why would borrowing that law be illusory? The book nonetheless advances two main arguments that it is. Both arguments are already addressed in the literature, including in the works that Vermeule cites in his endnotes. But because the book does not discuss these responses, its readers may be left unaware of them, and we feel obliged not to leave them in the dark.

The first, the *level of generality* objection, is that originalism lacks resources to specify “the level of generality at which to read the original understanding” (p. 6). This is a very old objection, and as we will explain, it is partly generic, partly answered, and partly irrelevant. The second, the *exclusivity* objection, is that originalism looks only to *lex*, or posited law, and ignores the *ius* — the “general principles, rooted in political morality, whose origins do not seem to depend on any particular act of positive lawmaking” (p. 6).<sup>45</sup> This objection might have bite against some older originalist instincts, but not the versions of originalism that Vermeule claims to refute. Rather, originalism very much admits common law principles (what Blackstone called the “*lex non scripta*”<sup>46</sup>), which do much of the work that Vermeule mistakenly attributes to the common good.

### A. *The Level-of-Generality Objection*

Originalism tries to do two things at once: to fix constitutional rules at some moment in the past, and to apply those rules to modern

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<sup>44</sup> Hence Walsh argues that once Vermeule's idiosyncrasies are removed, the result is a “classical natural law grounding . . . for fidelity to the U.S. Constitution as positive law”: Vermeule's theory without Vermeule leaves us back at the historically posited Constitution we already had. Walsh, *supra* note 36; cf. Smith, *supra* note 7 (manuscript at 12–13) (asking whether, “given human nature and under current conditions, the constitutional design devised by the framers (with its commitments to limited powers, separation of powers, federalism, and so forth) is a *better* implementation of [the classical legal tradition] — and a better plan for achieving the common good — than anything Vermeule has to offer”).

<sup>45</sup> A footnote has been omitted.

<sup>46</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*63.

circumstances.<sup>47</sup> *Common Good Constitutionalism* presents these tasks as incompatible, at least without a broader account of political morality. “[A]t what level of generality,” it asks, “should interpreters read the (fixed) meaning of abstract constitutional texts like ‘equal protection of the laws’ and ‘due process of law’” (p. 110)? Originalism, it says, offers no answer; we need to consider the common good “*even to understand what texts mean*” (p. 94). For Vermeule, the level-of-generality problem thus leads one naturally to the natural law and the common good.

But the book frames the level-of-generality problem incorrectly. In fact, the problem it imagines is really three problems: one of them generic, one of them already solved, and one of them beyond the scope of legal interpretation. None of these problems defeats originalism, much less points to common good constitutionalism instead.

*I. The Generic Problem.* — Start with the generic problem: how to tell whether a given provision encodes a general principle or a specific rule. On the book’s account, to do this we must always invoke morality, rather than other interpretive techniques: “[J]udges recur to implicit or explicit normative principles of political morality . . . even to determine meaning and to choose the level of generality at which meaning is specified” (p. 94).

As a universal claim about ambiguity, this is false. The text of the Constitution is full of semantic ambiguities over which *nobody* stumbles and which everybody would find it silly to resolve through normative principles of political morality. Examples abound, from the phrase “domestic Violence” in the Guarantee Clause (spousal abuse or insurrection?),<sup>48</sup> to the phrase “for six years” in the Seventeenth Amendment (six years per Senate term, or a six-year sunset on direct elections?),<sup>49</sup> to the phrase “Corruption of Blood” in Article III (inheritance or sepsis?).<sup>50</sup> *Nobody* resolves these ambiguities by asking which rule best advances political morality today. At most, some think political morality tells us to give such phrases their standard readings.<sup>51</sup> But those readings are standard precisely because their historical context makes the meanings obvious.

That’s why the constitutional ambiguities Vermeule selects for exploitation are ones the untutored reader might *imagine* were historically

<sup>47</sup> See Baude & Sachs, *supra* note 11, at 1457.

<sup>48</sup> U.S. CONST. art. IV, § 4. This is a shopworn example. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 281 (2017) (describing “the well-known case of ‘domestic Violence’ in Article IV, § 4”).

<sup>49</sup> U.S. CONST. amend. XVII, cl. 1; see Peter Jeremy Smith, *Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?*, 16 CONST. COMMENT. 7, 13–14 (1999); see also James Grimmelmann, *Parsing the Seventeenth Amendment*, THE LABORATORIUM (Jan. 2, 2009, 9:44 PM), [http://laboratorium.net/archive/2009/01/02/parsing\\_the\\_seventeenth\\_amendment](http://laboratorium.net/archive/2009/01/02/parsing_the_seventeenth_amendment) [<https://perma.cc/9MV5-VCHS>] (noting other textually plausible, but historically implausible, ways to parse the Amendment).

<sup>50</sup> U.S. CONST. art. III, § 3, cl. 2.

<sup>51</sup> See, e.g., Strauss, *supra* note 17, at 912–13.

ambiguous — such as “general Welfare.”<sup>52</sup> But Vermeule highlights these phrases without offering any evidence of the history, and he then uses the claimed ambiguity to bring in his own view of the normative principles.

This is a bait and switch. To find out which rule a past society adopted in a legal text, we might need to know its context in *their* political theory or *their* conception of the common good. But the enactors’ conception and the *right* conception needn’t be the same.<sup>53</sup> Vermeule seems to make a scope error here: one might affirm that “all legislation is necessarily founded on some substantive conception of morality” (p. 37) but still deny that there’s some substantive conception of morality on which all legislation is necessarily founded.

Nothing about “generality” creates any special need for moral principles in interpretation. To move from the easy examples to one of Vermeule’s, consider the Eighth Amendment’s ban on “cruel and unusual punishments”<sup>54</sup> — which might refer to punishments that *are* cruel in a timeless moral sense, or that *were thought to be* cruel at the Founding, or that *are now thought to be* cruel, or . . . The book presents these various possibilities as a grave challenge to originalism (pp. 95–97). But whether a text has implicit temporal limits like these is a bog-standard interpretive issue: we know that the question “have you eaten?” means “(recently?)” rather than “(ever?)” without consulting political morality first. Sometimes the Constitution makes questions of timing explicit, differentiating “States now existing”<sup>55</sup> from those which “may be admitted,”<sup>56</sup> treaties already “made” from those “which shall be made,”<sup>57</sup> and so on. Sometimes it raises them implicitly, the way the Supreme Court understands the Seventh Amendment “right of trial by jury” to be the one that existed at common law in 1791,<sup>58</sup> or “the Writ of Habeas Corpus”<sup>59</sup> to include the one that “existed when the Constitution was drafted and ratified.”<sup>60</sup> And sometimes it speaks without reference to timing: “two Senators from each State”<sup>61</sup> includes

<sup>52</sup> See *supra* notes 31–32 and accompanying text.

<sup>53</sup> Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1145 (2017) (observing that “judges who make different normative judgments may well interpret the same texts differently,” but that “these are ‘normative’ judgments in the sense that they’re *judgments about norms* . . . not in the sense that they involve first-order normative reasoning about what is to be done”). In one place Vermeule does refer to “some conception of *the authors’* rationality and of the subject they are addressing” (pp. 94–95) (emphasis added), which might seem to offer some potential common ground; but he does not stick to that formulation anywhere else (e.g., pp. 108–09).

<sup>54</sup> U.S. CONST. amend. VIII.

<sup>55</sup> *Id.* art. I, § 9, cl. 1.

<sup>56</sup> *Id.* art. IV, § 3, cl. 1.

<sup>57</sup> *Id.* art. VI, cl. 2.

<sup>58</sup> *Id.* amend. VII; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996).

<sup>59</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>60</sup> *Boumediene v. Bush*, 553 U.S. 723, 746 (2008).

<sup>61</sup> U.S. CONST. art. I, § 3, cl. 1; *id.* amend. XVII, cl. 1.

Hawaii, though Hawaii wasn't a state at the Founding and didn't become one until 1959. There's nothing theoretically important here. It's just a matter of understanding old language, where temporal scope is one more feature to be understood. (Thus Professor John Stinneford argues that the Eighth Amendment's "cruel" had the timeless meaning of "unjustly harsh," while "unusual" had the temporally relative meaning of "contrary to long usage," based on evidence of how such language was used at the time.<sup>62</sup>)

Figuring out whether a past enactment adopted a broad principle or a narrow rule is one of many specific questions that arise in a generic process of interpretation, posing the sorts of difficulties that any interpreter assessing any feature of any text might face. There are hard cases and easy ones, but originalists don't lack for means of resolving residual uncertainties,<sup>63</sup> and bringing political morality into the picture might make us more confused rather than less. (For one thing, the common good can *also* be understood at many levels of generality; for another, adding one more thumb on the scale to our existing menagerie of canons might create as many hard cases as it solves.) In any case, the problem has little to do with interpretive *theory*. If interpretive moves like these "could not possibly be made from *within* originalist premises" (p. 96), then it'd be impossible to understand old texts that have nothing to do with the law,<sup>64</sup> when an old newspaper article calls something "cruel," we don't read that text "by seeking [its] best constructive interpretation in light of principles of political morality" (p. 99), and yet we often understand what it's saying anyway.

The book's fallback to this theoretical argument about generality is a "pragmatic" one — that originalism is "illusory in our world" (p. 95), because its actual practice is flawed or incoherent (p. 107). For example, the book presents the Court as having done a poor job construing the independence of presidential electors in *Chiafalo v. Washington*<sup>65</sup> (pp. 102–05) and a worse one applying Title VII to sexual orientation and gender identity in *Bostock v. Clayton County*<sup>66</sup> (pp. 105–08). Many originalists agree: *Chiafalo* was described as a "catastrophe" by one of the most prominent originalists in the field,<sup>67</sup> and *Bostock* attracted

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<sup>62</sup> See John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 464–71 (2017). For more on the incorporation-by-reference of moral principles (such as "unjustly harsh"), see *infra* section II.A.3, pp. 882–83.

<sup>63</sup> Cf. Baude & Sachs, *supra* note 53, at 1142–47 (describing such techniques); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 803–22 (2022) (same).

<sup>64</sup> See Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485 (2008).

<sup>65</sup> 140 S. Ct. 2316 (2020).

<sup>66</sup> 140 S. Ct. 1731 (2020).

<sup>67</sup> Mike Rappaport, *The Originalist Disaster in Chiafalo*, ORIGINALISM BLOG (Aug. 10, 2020, 8:00 AM), <https://originalismblog.typepad.com/the-originalism-blog/2020/08/the-originalist-disaster-in-chiafalo.html> [<https://perma.cc/XP43-WXB7>].

vituperative dissents by some of the Court's self-described originalists.<sup>68</sup> But Vermeule sees this disagreement itself as the problem: "If originalism is not to be found" in the decisions of the Roberts Court, then "it is not to be found anywhere in real space" (p. 100). Either one must maintain that "[r]eal originalism has never been tried" (p. 106), or one must accept that originalism is "a dangerously unreliable technology, one that induces fatal rates of human error" and whose "leading champions cannot apply it correctly" (p. 106).

On the Internet, the name for such a rhetorical strategy is the "isolated demand for rigor," whereby an otherwise-plausible demand is applied to one side of an argument only.<sup>69</sup> For consider what happens if we turn the tables. If what Vermeule calls classical legal theory is to be found anywhere in real space, one might find it in the *Institutes of Justinian*, "an ur-text of the classical law" (p. 54). Yet this "ur-text" opens its discussion of the rights of persons with an extensive slave code.<sup>70</sup> The *Institutes* view slavery as contrary to natural law,<sup>71</sup> but nonetheless binding under the law of nations.<sup>72</sup> Thus the *Institutes* reason, in a common-good way, that a child conceived before her mother's enslavement "ought not to be prejudiced by the mother's misfortune," but a child conceived after her mother's enslavement is indeed so prejudiced and will be born into a life of slavery.<sup>73</sup>

The point here isn't some crude slur that "common good constitutionalism endorses slavery," or that it did so in the time of Justinian. Rather, it's that 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.<sup>74</sup> If "the common good condemns . . . originalism" for "merely fail[ing] to prevent" a "predictable stream of morally horrid first-order results" (p. 114), one might expect no less condemnation of the *Institutes*; if originalism is to be judged by *Bostock*, what should one make of the bustling slave

<sup>68</sup> See 140 S. Ct. at 1754–822 (Alito, J., dissenting, joined by Thomas, J.); *id.* at 1822–37 (Kavanaugh, J., dissenting).

<sup>69</sup> Scott Alexander, *Beware Isolated Demands for Rigor*, SLATE STAR CODEX (Aug. 14, 2014), <https://slatestarcodex.com/2014/08/14/beware-isolated-demands-for-rigor> [https://perma.cc/Z497-9KSQ].

<sup>70</sup> J. INST. 1.3.2–8.2 (J.B. Moyle trans., 5th ed. 1913).

<sup>71</sup> *Id.* 1.3.2 ("against nature"); see also Casey & Vermeule, *supra* note 13, at 18 n.58 (describing other classical jurists as sharing this view).

<sup>72</sup> J. INST. 1.3.2 (J.B. Moyle trans., 5th ed. 1913).

<sup>73</sup> *Id.* 1.4.

<sup>74</sup> The same goes for most individual legal rules: many people might underpay their income taxes, but the book never asks "what it means to say that [the income tax] exists at all" (p. 104), nor does it question whether the income tax "is 'our law'" in anything but "some very special, epicyclical sense" (p. 103).

markets of Constantinople?<sup>75</sup> Perhaps real common good constitutionalism has never been tried. Or perhaps the common good is a dangerously unreliable technology, one that induces fatal rates of human error and whose leading champions cannot apply it correctly.

In fact, Vermeule *knows* of this problem, for he warns us in the introduction that theories of law don't guarantee that their practitioners will live up to them: "Of course, nothing in the nature of law guarantees, or could possibly guarantee, that the public authority will in fact always act for the common good. But that is true whatever theory of law we hold . . ." (p. 9). And he tells us that it doesn't matter that classical lawyers will "disagree[] . . . over the content of the common good and the natural law," for "[t]his arbitrarily selective emphasis on disagreement is an infallible sign of ideology, a kind of myopia" (pp. 20–21). Yet Vermeule judges originalism in the same arbitrarily selective terms in which he refuses to allow his own view to be judged. His choice to present originalism, and only originalism, as responsible for the misjudgments of its self-described adherents is good evidence that the deck is being stacked.

2. *The Solved Problem.* — Next comes the solved problem: whether the authors of a general principle can *control* how general it is. According to *Common Good Constitutionalism*, they can't: the "specific expectations" of the Founders "provide no theoretical criterion for resolving new cases over time" (p. 96). Their decisions were about old cases, and we apply them to new cases (say, extending the Fourth Amendment to GPS tracking<sup>76</sup>) only by extracting from the past some forward-looking principle. But, the book says, "[t]he moment that one begins to generalize, one needs a theory, and that theory will inevitably be normative" (p. 96).

The best originalist solution to this problem is to look not merely to the specific applications that the Founders had in mind, but to the original *law* that they adopted.<sup>77</sup> Most commonly, as reflected in the last four decades of originalist scholarship, this law was expressed through the *original meaning* of the language they employed.<sup>78</sup> Again, the Founders' expectations are a good *clue* to that meaning, as it'd be odd for them to enact language that gets their own paradigm cases wrong.

<sup>75</sup> See Helms, *supra* note 7, at 52 ("[F]or centuries, even in its role as a promoter of the common weal, natural law had not been enough to bring an end to slavery's existence. Will we do better today on similar issues if we embrace common good constitutionalism? One hopes so. But who knows?").

<sup>76</sup> See, e.g., *United States v. Jones*, 565 U.S. 400 (2012).

<sup>77</sup> See, e.g., William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1836–45 (2016) (suggesting a candidate rule of law for the Fourth Amendment).

<sup>78</sup> See generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). For circumstances in which original law adds something important to original meaning, see *infra* section II.B.2, pp. 887–89.

But what matters in our legal system is the norm they adopted, not the “unenacted hopes and dreams” that they didn’t.<sup>79</sup>

Vermeule is aware of this answer, but he believes that it carries a “startling consequence” (p. 97). Because “what texts *say* . . . often outruns the particular applications in the heads of anyone involved in the process of their creation” (p. 97), activists might “read the original and enduring meaning . . . at a sufficiently high level of generality so that, *without change of meaning*, it can encompass whatever strange moral novelties later generations have dreamt up” (pp. 110–11). Originalism lets “a progressive constitutionalist” get away with anything they “might otherwise want to do” (p. 105) — say, reading the Equal Protection Clause to embody an “anti-caste principle,” from which one extrapolates rights to abortion or same-sex marriage (p. 98). So long as it’s “possible” to “contradict[] the unanimous expectations of the enacting generation,” Vermeule argues, then “‘original’ meaning is ‘fixed’ in only the most nominal sense” (p. 97).

This issue, too, has been solved, as one can discover by reading the works cited in the book’s endnotes. A “familiar feature of legal rules is that the same rule can produce changing outcomes over time.”<sup>80</sup> For example, Article IV adopted the abstract principle that new states could be admitted by Congress;<sup>81</sup> that’s how we got from thirteen states at the Founding to fifty states today. But to conclude that this rule excludes nothing that a progressive constitutionalist might want to do — to infer that, because *any* original legal rule might permit *some* changes over time, *any* change over time might be permitted by *some* original legal rule — is just another scope error.<sup>82</sup> As Professor Christopher Green has described, legal norms often operate as functions from facts to legal outcomes.<sup>83</sup> As their designated inputs change, the outputs change accordingly. But the rules themselves remain the same, because not *every* change in facts affects a designated input: Article IV takes no account of the day of the week, the party of the President, and so forth. As

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<sup>79</sup> *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 343 (2011) (Thomas, J., concurring in the judgment).

<sup>80</sup> Sachs, *supra* note 11, at 852 (cited p. 193 n.34).

<sup>81</sup> U.S. CONST. art. IV, § 3.

<sup>82</sup> For a particularly straightforward example of this error, see Eric Segall, *The Concession that STILL Dooms Originalism*, DORF ON L. (May 24, 2022, 7:00 AM), <http://www.dorfonlaw.org/2022/05/the-concession-that-still-dooms.html> [<https://perma.cc/GV5D-L9JQ>] (“Judges can’t reach any decision in every case based on this approach but they certainly can reach a result for either party in any litigated case by simply saying, ‘these or those facts, or beliefs about facts, have changed.’”).

<sup>83</sup> Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 564 (2006).

Green puts it, a choice among rules “is a choice about what sorts of changes should make a difference.”<sup>84</sup>

This is ordinary stuff of ordinary law. Implied warranties under the Uniform Commercial Code (U.C.C.) vary along with the “usage of trade,”<sup>85</sup> not because the progressives are up to something, but because that is what the U.C.C. says. A “19th-century statute criminalizing the theft of goods” applies fully “to the theft of microwave ovens,”<sup>86</sup> an old reference to the color red extends to “red spaceships and other red things . . . unimaginable to the speaker,”<sup>87</sup> and so on. The abstract principles apply to changing circumstances over time, but each principle makes only *some* changes relevant. If microwaves fell from heaven like manna, so that no one cared about stealing them anymore, that might affect whether subjecting them to the stolen-goods statute would serve the common good, but not whether microwaves *are* “goods” within its terms.

The distinction between unchanging rules and changing outcomes is the *pons asinorum* of constitutional law. Understanding it does not a great constitutional scholar make, but failing to understand it leaves one unable to follow the most elementary constitutional arguments.<sup>88</sup> Maybe the Founders could never have imagined the admission of a state like Hawaii, a distant Pacific island chain with a majority nonwhite population.<sup>89</sup> Maybe, if they had imagined it, they would have made provision against it, narrowing Congress’s discretion to admit new states. Even so, it would be risible to suggest that Hawaii’s admission under Article IV, by “contradict[ing] the unanimous expectations of the enacting generation,” rendered the “‘original’ meaning” of Article IV

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<sup>84</sup> *Id.* at 583; see also Sachs, *supra* note 11, at 853 (quoting Green); William Baude, *Originalism and the Positive Turn*, LAW & LIBERTY (Dec. 12, 2014), <https://lawliberty.org/forum/originalism-and-the-positive-turn> [<https://perma.cc/A6YS-VV9E>] (arguing that the Founders’ decision “includes the decision to use a certain set of words,” and to express themselves “at one level of generality rather than another”); Stephen E. Sachs, *Saving Originalism’s Soul*, LAW & LIBERTY (Dec. 17, 2014), <https://lawliberty.org/forum/saving-originalisms-soul> [<https://perma.cc/5VF2-WWUQ>] (noting that the Founders’ decisions “were often decisions to rely on outside facts — even facts that [they] might not have expected, even facts that might lead to outcomes they would have deplored”).

<sup>85</sup> U.C.C. § 2-314(3) (AM. L. INST. & NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2021); Sachs, *supra* note 11, at 853 & n.125.

<sup>86</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 323 (1988) (Scalia, J., concurring in part and dissenting in part).

<sup>87</sup> Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 590 n.289 (2003).

<sup>88</sup> Cf. Eric Posner, *Adrian Vermeule on Philip Hamburger’s “Is Administrative Law Unlawful?”*, ERIC POSNER (Sept. 2, 2014), <https://ericposner.com/adrian-vermeule-on-philip-hamburgers-is-administrative-law-unlawful> [<https://perma.cc/CQ9M-QTB6>] (quoting Vermeule’s claim that another scholar had “failed to pass the pons asinorum of the subject” and so was not “entitled to debunk” it).

<sup>89</sup> RSCH. & ECON. ANALYSIS DIV., HAW. STATE DEP’T OF BUS., ECON. DEV. & TOURISM, THE STATE OF HAWAII DATA BOOK 2001 § 1, at 3 tbl.1.02 (2002), <https://files.hawaii.gov/dbedt/economic/databook/db2001/sec01.pdf> [<https://perma.cc/K5UE-5UZK>] (providing data for 1960).

“‘fixed’ in only the most nominal sense” (p. 97). To criticize originalism as incoherent because one can’t follow this distinction says more about the critic than about originalism.

Now maybe here too, the book should be read as making a practical point rather than a theoretical one. Perhaps its true objection is that, *in practice*, progressive activists are likely to read general provisions in excessively abstract ways, and then to use their incorrect political morality to fill in the abstractions. But the proximate cause of this problem is the excessively abstract reading. One can *say* that the Equal Protection Clause adopted an anticaste principle extending to abortion rights and same-sex marriage, but saying it doesn’t make it *true*, and for originalism the truth matters very much. How general a provision really was, and which abstractions it really invoked or ignored, are falsifiable claims about the law of the past.<sup>90</sup>

Maybe a historically accurate rendering of the Equal Protection Clause does indeed state a generic principle of legal equality: “the protection of equal laws,” as the Supreme Court once put it.<sup>91</sup> On this rendering, the Clause’s stance on abortion or same-sex marriage turns on the best understanding of civic equality. But maybe not. As much modern scholarship suggests, the Clause may have stated a more limited principle about equality *in the protection of the laws*: “those activities of government that secure primary rights against invasion,”<sup>92</sup> per Blackstone’s description of “the protection of the law” as relating to the “remedial part of a law” and not its substantive content.<sup>93</sup> This historical account reads the Clause to address enforcement of existing rules, leaving substantive guarantees to other parts of the Fourteenth Amendment.<sup>94</sup> So activist readings of the Equal Protection Clause might not only take a contested view of civic equality; they might also misunderstand how the Clause *addresses* civic equality, and *that* depends on the original history.

Vermeule describes the distinction between a historically “fixed” meaning and “shifting” contemporary applications as an “epicycle” and a “counsel of despair” (p. 116). He rejects the idea of “an eternal fixed ‘meaning’ floating above any particular application,” which he says “has no cash value in reality” (p. 116). But surely he must know that

<sup>90</sup> See Baude & Sachs, *supra* note 35, at 104–06; William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 810 (2019); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 739.

<sup>91</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>92</sup> John Harrison, *If the Eye Offend Thee, Turn Off the Color*, 91 MICH. L. REV. 1213, 1229 (1993).

<sup>93</sup> 1 BLACKSTONE, *supra* note 46, at \*56 (emphasis omitted) (quoted in Harrison, *supra* note 92, at 1230); see also Green, *supra* note 7, at 8–9 (citing many sources); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1390, 1397, 1433–51 (1992).

<sup>94</sup> The most plausible candidate is the Privileges or Immunities Clause — about which there are once again many theories, but that does not make them all true.

microwaves can be “goods.” And tellingly, as Green points out,<sup>95</sup> Vermeule makes the same distinction himself when discussing *Village of Euclid v. Ambler Realty Co.*,<sup>96</sup> which he praises as a “[m]odel [o]pinion” (p. 124). Vermeule emphasizes *Euclid*’s statement that, “while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions” (p. 125).<sup>97</sup> The opinion then reiterates that “a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles.”<sup>98</sup>

Vermeule happily relies on *Euclid* to conclude that “the legal authority of the state might *expand* over time, through the application of constant principles to changing circumstances” (p. 125). Indeed, the idea that some “legal principles remain constant even as interpreters . . . apply them to new circumstances over time” is central to his project (p. 23). Yet, Green notes, Vermeule “offers no reconciliation” of such claims with his excoriation of the distinction on which they rest.<sup>99</sup> It seems that Vermeule admits a difference between meaning and application to the extent, and only to the extent, that it serves his argumentative purposes.

3. *Beyond Legal Interpretation.* — This leaves a problem beyond the scope of legal interpretation. What if a constitutional rule really does incorporate some vague abstraction or moral principle? How should originalism respond?

Perhaps no response is necessary; originalism’s work here is done. As Professor Timothy Endicott puts it, once “there is no question as to how a person is to be understood,”<sup>100</sup> the interpretive process is over. Originalism, in the version Vermeule purports to address, is a claim about the relationship of present law to past law. If the past law directs us by cross-reference to timeless moral inquiries, then timeless moral inquiries it is; there’s nothing more that interpretive theory, in particular, has to say.

Indeed, should the Constitution contain such provisions, this might seem like a natural place for originalism and common good constitutionalism to work together. Vermeule’s account of the common good, if it really is the moral truth, could fill in whichever provisions of the original Constitution call for moral truth.

*Common Good Constitutionalism* isn’t content with such a possibility. It portrays any potential cross-references to moral facts as fundamental defeats for originalism (p. 190 n.15). Yet in an originalist legal

<sup>95</sup> See Green, *supra* note 7, at 10.

<sup>96</sup> 272 U.S. 365 (1926).

<sup>97</sup> The author quotes *id.* at 387.

<sup>98</sup> *Id.*

<sup>99</sup> Green, *supra* note 7, at 10.

<sup>100</sup> Timothy Endicott, *Legal Interpretation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 109, 121 (Andrei Marmor ed., 2012).

system, *whether* the present law incorporates timeless moral facts, and *which* timeless moral facts it incorporates, are questions that past law is used to answer. That remains true even if the theory doesn't supply, and doesn't pretend to supply, the timeless moral facts themselves, any more than the U.C.C. pretends to supply all the “usages of trade.”<sup>101</sup> Of course, all this turns on which moral facts the Constitution actually cross-references — something that past judicial decisions sometimes blithely assumed.<sup>102</sup> But whenever the original Constitution does incorporate a moral standard, it would be “hard to see a constitutional reason for declining to follow it”<sup>103</sup> — and hard to call this a defeat for originalism, any more than trade usages are defeats for the U.C.C.

Vermeule seems to portray originalists as psychologically unfit to make this concession. He suggests that originalism is motivated by a “horror of judgment” — that once we “cut loose the anchor” to the Founding, we fear we will “drift[] helplessly amidst a welter of normative arguments,” with no true right or wrong to be found (p. 115). This fits well with his portrayal of originalism not just as a set of intellectual claims but as an “extremely well-funded” social movement of “[o]riginalist-libertarians,” who “purport to be horrified by purposive rule for the common good” (p. 16).<sup>104</sup> In moving from an intellectual to a sociological critique, we have again exchanged the seminar room for the dark arena. As a *theory*, originalism isn't relativism; it doesn't claim that the Founders alone can save us from having to decide. Rather, the argument is that *which officials* are authorized to make decisions, and on *which grounds* their decisions may be made, are questions on which societies can have positive law — and that ours happens to make the law of the Founding still binding today. Far from allowing us to escape moral judgments, the theory is crucial to our making them: the questions of role morality we face in today's legal system can't even be posed without first determining what our roles are, which positive law reveals. And to know whether that positive law should be followed, we need care and candor in describing what it is in the first place.

### B. The Exclusivity Objection

Let us see if there's anything to the book's other major critique — that originalism focuses exclusively on written law and so fails to account for “a broader framework of legal principles” (p. 4). *Common Good Constitutionalism* distinguishes *lex*, the “enacted positive law, such as a statute,” from *ius*, “the overall body of law” that contains

<sup>101</sup> U.C.C. § 2-314(3) (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2021).

<sup>102</sup> See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 355 (1992); McGinnis & Rappaport, *supra* note 90, at 768, 770–71.

<sup>103</sup> Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 503 (2014).

<sup>104</sup> *Accord* p. 173 (discussing “originalism and its libertarian allies”).

“general principles of jurisprudence and legal justice” (p. 4). Originalists, it says, “reduce all law to positive law adopted by officials; for them, all law is in this sense *lex*” (p. 4). If this were true (which it isn’t, as we explain shortly) it would suggest that originalism is out of touch: lawyers and judges routinely resort to “fundamental general background principles of the legal system” (p. 77), as shown by such well-known cases as *Riggs v. Palmer*<sup>105</sup> (pp. 71–84) or *United States v. Curtiss-Wright Export Corp.*<sup>106</sup> (pp. 84–89). Originalism thus offers an incomplete picture of the law.

To be sure, some originalists have made the mistake Vermeule describes. But to many others, including those he claims to criticize, a recourse to general background principles comes as no surprise. Vermeule has just reinvented the role of the common law, or what Blackstone called “*lex non scripta*”<sup>107</sup> — “a positive law” that can nonetheless be “fixed and established by custom.”<sup>108</sup> Originalists are perfectly capable of reading legal texts in light of other rules that “do not seem to depend on any particular *act* of positive lawmaking” (p. 6).<sup>109</sup> In a common law jurisdiction like ours, each new enactment is assimilated into an existing body of law, both written and unwritten — “like water poured into the sea,” as Jeremy Bentham complained.<sup>110</sup> *Pace* Vermeule, originalists can use these background principles just as well as anyone else, even if we don’t call them by Latin names.

The rhetorical force of the book’s argument rests on equivocation. *Common Good Constitutionalism* repeatedly criticizes “positivists” (p. 187 n.8), those who think all law is grounded ultimately in social facts, by confusing this view with one in which all law is *posited*, or laid down by an enacting authority. The former view, but not always the latter, is perfectly happy to recognize unwritten and customary rules. The book similarly equivocates between two meanings of “originalist”: one that looks to our original *law*, claiming that it remains “our law” in the present (p. 85), and one that looks only to the original *meaning* of the Constitution’s written text. Again, the former view, but not always the latter, can take full account of the general common law, both as it stood at the Founding and as it stands today.<sup>111</sup>

These equivocations are the more damning because, in his end-notes, Vermeule explicitly recognizes and purports to bracket these

<sup>105</sup> 115 N.Y. 506 (1889).

<sup>106</sup> 299 U.S. 304 (1936).

<sup>107</sup> 1 BLACKSTONE, *supra* note 46, at \*63.

<sup>108</sup> *Id.* at \*70.

<sup>109</sup> Emphasis is added. See also Baude & Sachs, *supra* note 53, at 1104–20 (discussing the relevance to interpretation of unwritten law).

<sup>110</sup> JEREMY BENTHAM, OF LAWS IN GENERAL 236 (H.L.A. Hart ed., Univ. of London Athlone Press 1970) (1782); see also Baude & Sachs, *supra* note 53, at 1097–99 (agreeing with Bentham’s description, though disagreeing with him about whether this is a bad thing).

<sup>111</sup> See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 578 (2019) (cited p. 193 n.36).

distinctions. He dismisses the positive-positived distinction as an “awkward issue of exposition,” conceding that “positivism need not involve a written text, merely a conventionally recognized rule of law” (p. 191 n.19). While he presents “written *lex* as the paradigm of a positive enactment of the civil law,” he promises that “all of my points can apply with equal force to a customary rule” (p. 191 n.19). And he also promises that the distinction between “original law” and “original public meaning” won’t “make any difference to the points I will make” (p. 192 n.32).

These promises are repeatedly broken. Whenever Vermeule gets down to specifics, his arguments against originalism depend on the reader’s having overlooked his endnoted concessions: he portrays customary rules as fundamentally inexplicable on originalist grounds. Thus, he claims that only classical lawyers can “distinguish ‘the letter of the statute’ from ‘the statute,’ a locution that sounds nonsensical to the modern positivist” (p. 113) — or that the “reigning positivist version” of originalism, “the version on which I will focus” (p. 193 n.34), can’t possibly explain how “there is far more to ‘law’ than the enacted written text” (p. 87). If one remembers the endnotes, these claims lose their force: competing theories have no trouble looking to “what the authority said, read in light of larger background principles” (p. 83).<sup>112</sup> As a result, much of what Vermeule insists can be done only through the common good is done far more conventionally through common *law*.

*I. Positive Law.* — As proof of its case against positive law, the book offers *Riggs v. Palmer*, a famous case on whether New York’s probate statutes let a grandson inherit from the grandfather he murdered.<sup>113</sup> The court said no, partly because one of the “general, fundamental maxims of the common law” was that “[n]o one shall be permitted . . . to take advantage of his own wrong.”<sup>114</sup> The dissent, meanwhile, reasoned not only from the text of the relevant statutes but also from another common law principle, namely that courts may not impose a second, unauthorized punishment for a crime.<sup>115</sup>

To Vermeule, this reasoning shows the need for “the classical legal tradition” (p. 80): a “positivist account,” he says, would hesitate before “considering ‘extralegal’ sources” (p. 81). Yet rules of common law are hardly extralegal. What did the crucial work in *Riggs* weren’t pure considerations of justice, but asserted “maxims of the common law,”<sup>116</sup>

<sup>112</sup> Cf. Baude & Sachs, *supra* note 53, at 1083 (asking not just “what do these words mean,” but also “[w]hat law did this instrument make? How does it fit into the rest of the *corpus juris*? What do ‘the legal sources and authorities, taken all together, *establish*’?” (quoting 4 JOHN FINNIS, *Introduction to PHILOSOPHY OF LAW: COLLECTED ESSAYS* 1, 18 (2011))).

<sup>113</sup> 115 N.Y. 506, 508–09 (1889).

<sup>114</sup> *Id.* at 511.

<sup>115</sup> See *id.* at 517–20 (Gray, J., dissenting).

<sup>116</sup> *Id.* at 511 (majority opinion).

which New York had received as its own.<sup>117</sup> When the legislature adopted a new probate statute, it didn't override the existing body of common law, any more than a new criminal statute "overrides the rules of evidence, the elevated burden of persuasion, the jury, and other elements of the legal system."<sup>118</sup> These sorts of rules were part of New York's positive law, and the probate statutes were to be read consistently with them, just as we today read federal criminal statutes as subject to a common law duress defense.<sup>119</sup> Unsurprisingly, common law maxims like these tend to track widespread ideas of good policy, and the process of applying them can often *look* like ordinary moral reasoning. But which norms *count* as maxims depends, not on their natural virtues, but on legal custom — on their grounding in the "artificial reason and judgment of law."<sup>120</sup>

So there's nothing threatening to originalism about invoking principles like these. Vermeule argues that judges can "'find' rather than 'make' law," in light of "objective principles of legal justice accessible to the reason" (p. 19). Yet the source he cites for this proposition makes a rather different point — namely that customary rules, grounded ultimately in social facts rather than in objective justice, can *also* give rise to a "system of positive law" that no one ever "enacted."<sup>121</sup> The works that Vermeule takes as emblematic of originalism likewise endorse the use of "common-law methods of statutory interpretation,"<sup>122</sup> determining an enactment's "original legal content" by "processing [it] through whatever legal rules were operative at the time" — including any applicable "common-law doctrines,"<sup>123</sup> in derogation of which a statute must be "narrowly construed."<sup>124</sup>

Vermeule's insistence on a continental division of all legal norms into *lex* and *ius* points his critique of originalism at the wrong target. To be sure, there are familiar versions of originalism that do focus exclusively on text and that have a harder time addressing customary law. If

<sup>117</sup> Cf. N.Y. CONST. of 1777, art. XXXV (reaffirming "such parts of the common law of England . . . as together did form the law of the said colony" at the time of the Revolution).

<sup>118</sup> Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

<sup>119</sup> See generally Baude & Sachs, *supra* note 53, at 1105–07 (discussing how unwritten rules co-exist with written ones).

<sup>120</sup> *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65. We note all this without taking any position on whether *Riggs* or other murdering-heir cases were *correct* about the common law and its competing principles; as it happened, *Riggs* turned out to be the minority rule, prompting most jurisdictions to adopt statutory solutions after all. CALEB NELSON, STATUTORY INTERPRETATION 22–27 (2011).

<sup>121</sup> Sachs, *supra* note 111, at 530–31 (cited p. 193 n.36).

<sup>122</sup> Sachs, *supra* note 11, at 884 (cited p. 193 n.34).

<sup>123</sup> *Id.* at 878.

<sup>124</sup> *Id.* at 840; see also Baude, *supra* note 12, at 2359 ("[A]n originalist must understand [certain constitutional] provisions, as they were originally read, in the context of the common law.") (cited pp. 192–93 n.34). See generally Baude & Sachs, *supra* note 53, at 1104–17 (describing the interrelation of statutory and common law rules).

Vermeule’s critique concerned these versions alone, we might well agree with him.<sup>125</sup> But Vermeule first sets himself the more serious task of refuting *any* version of originalism, then declares his labors complete after addressing only the flimsier versions.

2. *Original Law*. — When it comes to original law in particular, the book’s critique misfires rather spectacularly. As proof of originalism’s defects, it offers the opinion in *Curtiss-Wright*,<sup>126</sup> which it describes as a “rather flagrant affront to originalism, and to the positivism of which the currently reigning version of originalism is a species” (pp. 85–86). *Curtiss-Wright* upheld the President’s delegated authority to ban arms sales to certain countries — but it did so not under the Commerce Clause, which might have raised nondelegation concerns, but on the theory that the federal government had various extraconstitutional foreign affairs powers, some of which had been vested directly in the President.<sup>127</sup> These powers were created by the law of nations,<sup>128</sup> and they “immediately passed to the Union” with the end of British sovereignty over the colonies.<sup>129</sup> Because “[t]he Union existed before the Constitution,”<sup>130</sup> it could exercise powers conferred outside the Constitution itself.

Vermeule sees *Curtiss-Wright*’s attention to the law of nations as “a grave problem for positivist originalism,” because “[o]nly the classical perspective can explain this” (p. 85). His confidence on the point is itself hard to explain. The notion that “[t]he Union existed before the Constitution” (p. 86)<sup>131</sup> — which Vermeule portrays as a “shockingly anti-originalist idea” (p. 87) — will shock no one who has heard of the Articles of Confederation. As a Confederation, the United States existed as a distinct sovereignty, sent ambassadors, concluded treaties, and so on.<sup>132</sup> Vermeule doesn’t mention or consider the continuing legal consequences of the Confederation government, but the works he offers as exemplars of positivist originalism do.<sup>133</sup> So does the Constitution, which acknowledges “Territory or other Property” already “belonging to the United States,”<sup>134</sup> treaties already “made . . . under the Authority of the United States,”<sup>135</sup> and “Debts contracted and Engagements entered into, before the Adoption of this Constitution,” which remain “as valid

<sup>125</sup> See Baude & Sachs, *supra* note 53, at 1088–92; Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157 (2017).

<sup>126</sup> 299 U.S. 304 (1936).

<sup>127</sup> *Id.* at 319–22.

<sup>128</sup> *Id.* at 318.

<sup>129</sup> *Id.* at 317.

<sup>130</sup> *Id.*

<sup>131</sup> The author quotes *id.* (emphasis Vermeule’s).

<sup>132</sup> See ARTICLES OF CONFEDERATION of 1781, art. VI, para. 5; *id.* art. IX, para. 1.

<sup>133</sup> *E.g.*, Sachs, *supra* note 11, at 885 (discussing “the existence of the United States as a real live government before the Constitution”); Baude, *supra* note 12, at 2363.

<sup>134</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>135</sup> *Id.* art. VI, cl. 2.

against the United States . . . as under the Confederation.”<sup>136</sup> In fact, so does *Curtiss-Wright*, in the very sentence after the passage that Vermeule quotes, which describes the extratextual powers as passing directly from the Confederation to the current government.<sup>137</sup>

In considering legal predecessors to the Constitution, the distinction between original law and original meaning is quite important. If the Founders’ law is still law for us today, then it includes any U.S. law that existed before the Constitution and that the Constitution left alone. That includes such parts of the general common law (which, in turn, may incorporate the law of nations) as haven’t yet been abrogated by competent state legislation or through Congress’s enumerated powers. As is noted in one of the originalist sources that Vermeule cites:

When a case arises in which no state’s law controls, and to which no federal statute or treaty provides an answer, the federal courts might be required to apply preexisting sources of law that the Constitution left intact: . . . to look to “known and settled principles of national and municipal jurisprudence,” such as “the common law,” “the law of equity,” or “the law of nations.”<sup>138</sup>

In fact, the originalist critique of *Curtiss-Wright* isn’t that it’s “historical without being originalist,” as Vermeule suggests (p. 86), but rather that it’s ahistorical: that *Curtiss-Wright* got its history badly wrong. The Court claimed that the powers the President exercised had been conveyed as incidents of sovereignty, descending outside the Constitution from the Confederation government.<sup>139</sup> Yet according to one scholar who has studied the period in detail, the Confederation’s contemporaries repeatedly denied that their government *had* any *Curtiss-Wright*-style powers, which is why the Confederation Congress kept begging the states to supply them, and why some of those powers were later included in the Constitution’s text.<sup>140</sup> On this account, *Curtiss-Wright*’s pretense that the powers had been there all along “simply does not describe the constitutional generation’s understanding of foreign affairs power,”<sup>141</sup>

<sup>136</sup> *Id.* art. VI, cl. 1.

<sup>137</sup> 299 U.S. 304, 317 (1936) (“The Union existed before the Constitution, which was ordained and established among other things to form ‘a more perfect Union.’ Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be ‘perpetual,’ was the sole possessor of external sovereignty, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.”).

<sup>138</sup> Sachs, *supra* note 111, at 578 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737, 749 (1838)) (cited p. 193 n.36). In this discussion Vermeule may be trying to rescind his end-noted concessions; he defines an “originalist” opinion as limited to one “resting on the original meaning of constitutional text,” and he discusses “positivist originalism” in connection with “positive written law” (p. 85). But he also says that he is addressing “the currently reigning version of originalism” (p. 86), and what he calls “the reigning positivist version of originalism” is one that looks to original law (p. 193 n.34). The equivocations rear their ugly heads again.

<sup>139</sup> *Curtiss-Wright*, 299 U.S. at 317.

<sup>140</sup> Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 409–24 (2000) (discussing the taxation and regulation of foreign commerce, as well as the enforcement of treaties and the law of nations).

<sup>141</sup> *Id.* at 443.

and it is “essentially incontestable that everyone during the relevant period” considered the *Curtiss-Wright* theory to be false.<sup>142</sup>

*Common Good Constitutionalism* doesn’t look into this history, nor does it inquire into the *reasons* its interlocutors might have for discounting *Curtiss-Wright*. Had it done so, it might not have used such heated rhetoric with so little justification. As it is, all the heat generates quite little light, and it does little to undermine originalism.

### III. POSITIVISM

If Vermeule’s theory neither succeeds on its own terms nor manages to take down originalism, then what of it is left? Despite his protestations, *Common Good Constitutionalism* might be read to make important contributions to *originalist* debates. The book advances the essentially originalist claim that “[t]he common good was the ordinary and original framework of American public law right from the beginning” (pp. 63–64). And it makes the essentially positive argument that “our law” today incorporates “a unified framework ultimately drawn from the classical legal tradition” (p. 62). Rather than dismantling originalism, the book turns out to support one side of an intraoriginalist dispute. It argues that the American legal system happened to incorporate natural-law concepts at the Founding and that this reliance has never since been sundered by lawful means. Even if Vermeule might resist such description tooth and nail, the best way to make use of his arguments may be to reframe them in originalist terms.

This isn’t to say that we fully *agree* with these claims; indeed, we think them flawed in important ways. Where the book is at its strongest is in highlighting prior generations’ interest in natural rights and natural law; it argues that ideas about the common good were “a centerpiece of our legal traditions,” not an “alien irruption” (p. 30). Where it goes wrong is in suggesting that the views of these prior generations precisely match the contours of Vermeule’s own — and in forwarding a theory of law under which, even if the common good *were* an alien irruption, we might be legally obliged to follow it anyway.

#### A. History

Like other apparent challenges to originalism,<sup>143</sup> *Common Good Constitutionalism* nonetheless takes pains to establish its own originalist pedigree, as “the fundamental matrix for the thinking of the whole founding generation” (p. 2). Certainly natural-law ideas were circulating in some fashion at the time of the Founding and for a long while after.

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<sup>142</sup> *Id.* at 425; see also Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 32 (1973) (describing *Curtiss-Wright*’s history as “shockingly inaccurate” (internal quotation marks and citation omitted)).

<sup>143</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

The book usefully incorporates the arguments of other scholars on this point, such as Professors Richard Helmholz<sup>144</sup> and Stuart Banner,<sup>145</sup> and it will likely draw further attention to this history. And we certainly agree with Vermeule about the flaws of the “revolution led by Justice Holmes around World War I” (p. 202 n.132), which sought to reduce unwritten law to “decision by judge-made precedent” (p. 203 n.136).<sup>146</sup>

Unfortunately, Vermeule overplays this hand, exaggerating the centrality to American jurisprudence of his own vision of the common good. On Vermeule’s account, the Preamble’s reference to “the Blessings of Liberty” must be understood not as aimed “to maximize individual choice” but as “teleological and ordered to the ends of the good” (p. 39). In this respect it resembles “the classical tradition of *racion di stato*, specifying the substantive aims and purposes of government” (p. 39). Given “the backdrop of the classical tradition,” the Constitution must be read “so as to promote” not liberty in the colloquial sense but “the classical trinity of peace, justice, and abundance” (p. 39).

This could be originalism, but not *good* originalism. Not every nineteenth-century American reference to the “public interest” employed the same notion as Aquinas.<sup>147</sup> Indeed, others argue that the American or common law traditions broke from the classical tradition in very important ways, particularly as to the centrality of liberty.<sup>148</sup> Vermeule

<sup>144</sup> R.H. HELMHOLZ, *NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE* (2015) (cited pp. 44, 55, 56, 153, 185 n.2, 200 nn.108 & 110, 203 nn.135 & 142, 204 nn.144, 148 & 150).

<sup>145</sup> STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021) (cited pp. 55, 203 n.137, 204 n.145).

<sup>146</sup> The hostility to unwritten law of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny left an unwritten-law-shaped hole in the modern legal landscape. This hole is sometimes patched by overreading written law, see Baude & Sachs, *supra* note 53, at 1085–93, or by the raw judicial revision of unwritten law, see Sachs, *supra* note 111, at 579–81 — efforts that carry precisely the sorts of dangers that Vermeule attributes to originalism and progressivism, respectively. The main text of *Common Good Constitutionalism* doesn’t address *Erie* or *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (cited p. 202 n.132), despite their potential centrality to the project. Yet careful attention to the distinction our legal tradition draws between general and local law might shed light on Vermeule’s use of these concepts (pp. 8, 18), or even vice versa. See *generally Swift*, 41 U.S. at 18–19; Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 924–49 (2013); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514 (1984).

<sup>147</sup> This conclusion might seem self-evident, but Vermeule argues that “[p]rovisions that make reference to ‘the public interest’ or any of its many variants must be given some reading or another,” and therefore that they should be understood with respect to the “ancient and exceedingly rich history of legal provisions invoking, in one way or another, the common good and its subsidiary principles of public order, justice, peace, and abundance” (p. 35).

<sup>148</sup> See Berkowitz, *supra* note 7; Michael P. Zuckert, *Do Natural Rights Derive from Natural Law?*, 20 HARV. J.L. & PUB. POL’Y 695, 730–31 (1997) (contrasting Locke and Aquinas); see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 27 (1975) (arguing that some Founders, “like James Otis, actually came to associate principles of

criticizes “excessive focus on the natural rights strand of the classical tradition” (p. 19), but at the Founding this strand may have been the dominant one. As the Declaration says, it’s “to secure these *rights*” that “Governments are instituted among Men.”<sup>149</sup> And though we might frame our governments differently “[i]f angels were to govern men,” in “framing a government which is to be administered by men over men” — one aimed at “the preservation of liberty” — the government must be “oblige[d] . . . to controul itself.”<sup>150</sup>

According to Professor Jud Campbell, on whom Vermeule repeatedly relies (for example, pp. 57, 64, 167), the reigning “social contract” theory of political obligation at the American Founding held that “political society should protect natural liberty and should limit freedom only to promote the public good.”<sup>151</sup> On this theory, liberty came first, and the deprivations of liberty inherent in government were thought to require public justification. This vision is opposed to Vermeule’s account of the “classical conception,” in which the relationship of ruler and ruled is natural, and liberty is useful only instrumentally: “‘liberty’ is no mere power of arbitrary choice, but the faculty of choosing the common good” (p. 39). Vermeule’s source for this latter proposition specifically distinguishes classical and Christian traditions of freedom from those of the Enlightenment<sup>152</sup> — and elsewhere argues that “classical common good and natural law thinking” were “transformed” in the American Founding “by a liberal understanding of rights,” which saw “the end of politics as being *liberty*, rather than the common good of human life.”<sup>153</sup> Vermeule partly concedes this in an endnote, arguing that the Founders at least lacked “anything like modern positivism” (p. 203 n.133). But that isn’t the question: the Founders didn’t have to agree with modern political theorists in order to disagree with ancient or medieval ones.

Indeed, *Common Good Constitutionalism* is notable for its lopsided reliance on sources that the Founders were unlikely to invoke. For a work ostensibly on the *American* legal tradition, there are surprisingly many more references in the main text to Aquinas (pp. 3, 44, 45, 46, 48, 69, 73–77, 80, 84, 111, 120), St. John Henry Newman (pp. 23, 118, 122–24, 131), and the *ragion di stato* tradition of Giovanni Botero (pp. 7, 31, 39, 168, 173), than to Edward Coke (none), Matthew Hale (none), John

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natural law and natural equity with positive law,” but that many more of them “used nature to take the measure of law and to judge their own obligations of obedience, but not as a source for rules of decision”).

<sup>149</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

<sup>150</sup> THE FEDERALIST NO. 51, at 348–49 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>151</sup> Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 272 (2017).

<sup>152</sup> Edmund Waldstein, *Contrasting Concepts of Freedom*, THE JOSIAS (Nov. 11, 2016), <https://thejosias.com/2016/11/11/contrasting-concepts-of-freedom> [https://perma.cc/2AKT-7CKU] (cited p. 198 n. 89).

<sup>153</sup> Edmund Waldstein, *Hard Liberalism, Soft Liberalism, and the American Founding*, THE JOSIAS (Apr. 11, 2018), <https://thejosias.com/2018/04/11/hard-liberalism-soft-liberalism-and-the-american-founding> [https://perma.cc/WFV9-RKRM].

Locke (none), John Adams (none), Thomas Jefferson (none), Alexander Hamilton (none), James Madison (none), or Joseph Story (none). Indeed, practitioners of the civil law did not rely so heavily on Aquinas; as Helmholtz writes, while many “modern commentators regard St. Thomas Aquinas as the classic expositor of the subject,” his work “rarely appears among the many citations to authorities found in European accounts of litigation,” and “the cases show that neither Continental nor English lawyers made much use of his treatment of the subject.”<sup>154</sup>

This difference in theoretical orientation has real consequences for doctrine. *Common Good Constitutionalism* argues, perhaps correctly, that natural rights at the Founding “typically were not ‘rights’ in the modern sense of being absolute or presumptive barriers to governmental regulation” (p. 57).<sup>155</sup> Some were, however, at least in the forms in which the Constitution protected them: for example (according to Campbell, on whom Vermeule here relies), the rule that “the government could not prohibit well-intentioned statements of one’s thoughts” (which implicated rights considered inalienable, and therefore incapable of being surrendered),<sup>156</sup> or the “fundamental positive right” of “freedom of the press”<sup>157</sup> (which put “fixed limits on federal power”).<sup>158</sup> These rights might have been narrower than today’s First Amendment doctrines, yet still far more protective than the book’s account of speech rights, on which “the market for ideas should no more be seen as presumptively immune from authoritative guidance than is any market for goods” (p. 128). The suggestion that *all* constitutional reasoning follow the model of Fourteenth Amendment police power cases (pp. 61–64), in which the state’s authority to regulate is at its zenith, ignores the possibility that different parts of the Constitution might impose different degrees of restraint.

When American lawyers talked about the common good, they often did so in a very different style than Vermeule does. In the 1875 case of *Loan Ass’n v. Topeka*,<sup>159</sup> for example, the Court invalidated local taxation for the aid of manufacturers on the ground that such taxation was aimed at private advantage rather than the public good.<sup>160</sup> So the case might seem a clear example of common good constitutionalism. But the Court’s explanation was not at all what *Common Good Constitutionalism* would suggest:

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and

<sup>154</sup> HELMHOLTZ, *supra* note 144, at 5.

<sup>155</sup> The author quotes Campbell, *supra* note 151, at 276.

<sup>156</sup> *Id.* at 280.

<sup>157</sup> *Id.* at 287–90.

<sup>158</sup> *Id.* at 306.

<sup>159</sup> 87 U.S. (20 Wall.) 655 (1875).

<sup>160</sup> *Id.* at 659.

the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.<sup>161</sup>

Not only did the Court focus on natural rights rather than natural law, it did so by means of “implied reservations” — understandings of which powers the people had or hadn’t conferred on a particular government at a particular point in time.<sup>162</sup> We can often understand such background principles in historical rather than normative terms — as concerning which powers were reserved by the public back *then*, rather than which powers the correct conception of political morality would reserve *now*.<sup>163</sup>

The same goes for an even more famous invocation of natural law, the opinion of Justice Chase in *Calder v. Bull*,<sup>164</sup> which Vermeule mentions briefly (pp. 58–59). Discussing various forms of retroactive and special legislation, Justice Chase described it as

against all reason and justice for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature*, and the *spirit* of our State Governments, amount to a prohibition of *such acts of legislation*; and the *general principles of law and reason* forbid them.<sup>165</sup>

When a state constitution was silent on such legislation, then, he thought it “a *political heresy*, altogether inadmissible in our *free republican governments*” to attribute to the legislature “*such powers*, if they had not been *expressly* restrained.”<sup>166</sup> Justice Chase’s views were contested, of course; Justice Iredell famously disagreed, arguing that judges could not declare “a legislative act against natural justice . . . [to] be void.”<sup>167</sup> And maybe Justice Chase was too quick in his description of contemporary background norms.<sup>168</sup> But either way, the whole dispute was about the correct historical inference to draw from constitutional silence.

<sup>161</sup> *Id.* at 663.

<sup>162</sup> Cf. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1885–87 (2012) (discussing the possibility of such reservations).

<sup>163</sup> Perhaps this case is one of the “anachronism[s]” the book ascribes to post-Civil War “property rights libertarians” (p. 57). But if so, the latter category would have to include Justice Harlan, who is praised for his dissent in *Lochner v. New York*, 198 U.S. 45, 65 (1905) (pp. 65–67), and who had approvingly quoted this *Loan Ass’n* passage in incorporating the Takings Clause against the states, see *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 237 (1897).

<sup>164</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>165</sup> *Id.* at 388.

<sup>166</sup> *Id.* at 388–89.

<sup>167</sup> *Id.* at 398 (Iredell, J., dissenting).

<sup>168</sup> See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., rev. ed. 1966) (statement of Daniel Carroll); *id.* at 640 (statement of George Mason).

In drawing these inferences, originalists may not need to share the metaphysical commitments of the Founding era. Just as one can understand and apply an eighteenth-century ban on arson without sharing the phlogiston theory of fire, perhaps one can understand and apply a set of historically reserved natural rights without sharing the same theories of political obligation.

In other contexts, Founding-era law might call for consulting the *truth* about natural law, even if the Founders were gravely mistaken about it.<sup>169</sup> Either way, we're happy to let the research go where it leads. If American law at the Founding called for reasoning about natural law, then an originalist would resort to it; if not, then not.

### B. Jurisprudence

*Common Good Constitutionalism* cannot rest content with this answer. At times, the book seizes on any potential reference to moral principles as an occasion for a victory dance. Vermeule takes his "argument as having been carried, in substance, to the extent that originalists try to take such moral readings on board" (p. 190 n.15); if an originalist approach "*ever* allows interpreters to consider principles of political morality in hard cases," he declares, "then the game is up," and one has "a regime of common good constitutionalism" (p. 115). (This is another isolated demand for rigor;<sup>170</sup> Vermeule frequently takes arguments about Founding-era law on board without conceding victory to originalism.)

At other times, the book worries that its victory is incomplete so long as any role remains for originalism, even as "the positive-law part of the classical framework" (p. 108). Any involvement of "originalist *positivism*" would make the role of natural law contingent on what "the positive lawmaker itself happens to adopt," so it "cannot be combined in a stable way with common good constitutional interpretation" (p. 109). Because "it is intrinsic to the natural law that it should be followed for its *own* binding force," the natural law "isn't truly followed at all if it isn't followed *as* natural law," or if followed "only insofar as it happens to be picked up by an originalist command" (p. 214 n.290).

Partly this is overreaction and confusion. If originalism turns out to be our positive law, then it's the only sensible candidate for "the positive-law part" of the book's framework. And one might — indeed, must — follow the natural law, in the sense of obeying any "principles of objective natural morality" (p. 8), whether or not those principles happen to be part of American law too. What *Common Good Constitutionalism* actually rejects is the idea that originalism, or any other theory about the positive law around here, would have the last

<sup>169</sup> Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 39 (1980) (comparing natural law to a constitutional provision "for the protection of ghosts").

<sup>170</sup> See *supra* note 69 and accompanying text.

word on the content of American law. But to see why, we have to take a detour into jurisprudence.

Oversimplifying mightily, the basic intuition behind "positive" theories is that laws are different from place to place; what the law is in a given society depends on facts about that society. If we discovered a new society on Mars, we couldn't know much about their language without hearing them talk, or about their etiquette without watching them interact; similarly, we couldn't know much about their law without knowing what sorts of rules they recognize. Maybe we Earth-theorists could instruct the Martians in political morality (or they could instruct us), but it would be odd to tell them that they're all speaking Martian the wrong way, or that they all have the wrong notions of Martian etiquette, or that they're all wrong, all the way down, about the content of Martian law.<sup>171</sup>

So what happens when the law makes reference to moral norms? Say that Martian Congress passes a statute allowing venue transfers among Martian trial courts "[f]or the convenience of parties and witnesses, in the interest of justice."<sup>172</sup> On one view, this is a proper occasion for a victory dance: moral readings are taken on board, and the game is up! But there are other views too. Again oversimplifying, some "inclusive positivist" theories would say that statutes like this one are law only because they're recognized as such among Martians. These social sources can in turn direct us to follow moral principles instead.<sup>173</sup> So if that lets us lecture the Martians about justice, it's only because they opened themselves up to it, choosing to make "the interest of justice" part of their law. Other "exclusive positivist" theories argue that law is there to tell you what to do; telling you to pursue the interest of justice (which you ought to do anyway) doesn't help. All this statute really does is give certain Martian officials, like Martian trial judges, discretion to do what they think justice requires.<sup>174</sup> We can still lecture the Martians on justice, but we'd be lecturing their officials about how to use their discretion, not telling them that they're doing Martian law wrong.

Natural lawyers don't have to take sides in this debate, because often they're asking a different sort of question. According to Professor John Finnis, for example, positivist theories are perfectly capable of describing "what any competent lawyer — including every legally competent adherent of natural law theory — would say are (or are not) intra-

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<sup>171</sup> On the importance of the qualifier "all the way down," see Sachs, *supra* note 20, at 2268–72, discussing "global error" in law.

<sup>172</sup> See 28 U.S.C. § 1404(a).

<sup>173</sup> See, e.g., JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 108–09 (2003).

<sup>174</sup> See, e.g., Scott J. Shapiro, *Was Inclusive Legal Positivism Founded on a Mistake?*, 22 *RATIO JURIS* 326, 334 (2009).

systemically valid laws, imposing ‘legal requirements.’”<sup>175</sup> What they can’t do, he argues, is tell you what to do when those intrasystemically valid laws are binding in conscience, providing “*authoritative reasons*” for “conscientious action,”<sup>176</sup> given not only their intrinsic merits but also the fact of their promulgation or wide acceptance. Similarly, for Aquinas (as some scholars read him), the problem with socially supported but unjust laws “is not whether they create *legal* obligations — we should assume they do — but whether they create *moral* obligations.”<sup>177</sup> As Finnis puts it, we might talk about the law of a particular community “as (i) a complex fact about the opinions and practices of a set of persons at some time,”<sup>178</sup> or “as (ii) good reasons for action”;<sup>179</sup> “[c]lassical natural law theory is primarily concerned with this second kind of enquiry.”<sup>180</sup>

We think it helpful to reserve the term “law” for the first kind of inquiry and “political morality” for the second. Others prefer to use “positive law” for the first and “law” *simpliciter* for the second. Thus *Common Good Constitutionalism* portrays law (in the second sense) as “a department of political morality,” one that “includ[es] distinctive moral considerations such as qualified continuity with past decisions and respect for institutional roles” (p. 69). So long as one keeps one’s definitions straight, maybe the difference wouldn’t matter much.<sup>181</sup>

But for Vermeule, the difference may matter a great deal. Occasionally he agrees that immoral legal rules can still be valid as a positive matter, even if they fail to partake in the full nature of law. Thus a law “out of step with natural justice . . . does not simply become no-law, as though it had never been created,” but merely “results in a perverted caricature of law” (pp. 120–21),<sup>182</sup> one that “misfires in its *telos* of ordering a community to the common good.”<sup>183</sup> Yet Vermeule also

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<sup>175</sup> John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1611 (2000); see also *id.* at 1601–02.

<sup>176</sup> *Id.* at 1611.

<sup>177</sup> Norman Kretzmann, *Lex Iniusta Non est Lex: Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99, 117 (1988).

<sup>178</sup> Finnis, *supra* note 175, at 1603.

<sup>179</sup> *Id.* at 1604.

<sup>180</sup> *Id.*

<sup>181</sup> However, it would matter to the extent that our deployment of “law” or “political morality” reflects particular ways of carving up the conceptual world. See David Plunkett & Timothy Sundell, *Dworkin’s Interpretivism and the Pragmatics of Legal Disputes*, 19 LEGAL THEORY 242, 263–65 (2013) (discussing metalinguistic negotiation).

<sup>182</sup> Cf. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL’Y 103, 123 n.65 (2022) (denying, if “deeply unjust laws” should be made, “that judges *must* have authority to invalidate them,” for “how officials in a constitutional system deal with deeply unjust laws is, at an institutional level, a matter for prudential determination”); Casey & Vermeule, *supra* note 13, at 18 n.58 (noting that even a law that “clearly and utterly clash[es] with background principles” might “be enforced by judges and officials[] and be referred to as law by those officials”).

<sup>183</sup> Casey & Vermeule, *supra* note 13, at 18 n.58.

occasionally denies that facts about a society can fully establish a law as valid within its own legal system, no matter what a competent lawyer might think (pp. 7–8). On the latter picture, even if no one on Mars had ever thought about the common good, Martian law would still be “ordered to the common good,” because “it is law’s nature to be so ordered” (p. 2); its “positive provisions . . . can only be interpreted in light of principles of political morality that are themselves part of [Martian] law” (p. 6). The natural law is incorporated necessarily, and not contingently or by social commitments (p. 214 n.290).

*Common Good Constitutionalism*’s position on these points is hard to nail down, because it explicitly declines to “offer an argument about jurisprudence in the technical academic sense” (p. 4). This is a shame, for many of the book’s arguments rest on controversial claims about jurisprudence in the technical academic sense, and it would be useful to read defenses of those claims rather than have their defects hand-waved away as “narrow and elaborate debates” (p. 6). One can’t “make clear that the classical law has the right account of the real nature and structure of law” (p. 179) while avoiding arguments about the nature and structure of law. (This also brings to mind Trotsky’s famous aphorism, that “you may not be interested in academic jurisprudence, but academic jurisprudence is interested in you.”)

To the extent that the book does attempt to defend its theoretical moves, it borrows heavily from Ronald Dworkin — particularly the categories of “fit and justification” (p. 6). These categories allow Vermeule, in identifying “the best of our tradition” (p. 6), maximum license to look over a crowd and pick out his friends. Yet they fit awkwardly with the larger theory, and not because they’re tied to Dworkin’s substantively “left-liberal and individualist bent” (p. 6). To Dworkin, fit and justification served to articulate law’s special virtue of “integrity,” a “distinct political ideal”<sup>184</sup> requiring “an interpretation that both fits and justifies what has gone before, so far as that is possible.”<sup>185</sup> But prioritizing the integrity of past political decisions can easily conflict with present- or future-regarding values such as fairness or substantive justice,<sup>186</sup> or indeed with the common good. And because a society might misunderstand the best moral justification for its law, balancing “justification” against “fit” might result in intrasystemically valid law that no competent lawyer would recognize.<sup>187</sup>

<sup>184</sup> RONALD DWORKIN, *LAW’S EMPIRE* 215 (1986).

<sup>185</sup> *Id.* at 239.

<sup>186</sup> See Denise Réaume, *Is Integrity a Virtue? Dworkin’s Theory of Legal Obligation*, 39 U. TORONTO L.J. 380, 391–400 (1989).

<sup>187</sup> See, e.g., Ronald Dworkin, *The Law of the Slave-Catchers*, *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437 (arguing that “[t]he general structure of the American Constitution presupposed a conception of individual freedom antagonistic to slavery,” the Fugitive

Perhaps other theorists than Dworkin might serve better.<sup>188</sup> But whoever's theory is borrowed, the borrowing requires a serious philosophical explanation, which *Common Good Constitutionalism* declines to offer. In particular, following down Dworkin's path leads Vermeule to strange places, where Aquinas might have feared to tread. Suppose that Martian society is exactly like Earth-society — with statutes, courts, rules of civil procedure, and so on — except that the Martians all take *their* norms to be ordinances of reason for maximizing aggregate individual utility. Do the Martians not have laws, because real laws are necessarily oriented toward a truly *common* good, even if every competent Martian lawyer would disagree? Or are there intrasystemically valid Martian laws that nobody knows about, distinct from the norms that the Martians *call* laws, because those norms fail “to read the existing fabric of law in the best constructive light, by reference to considerations of political morality” (p. 101)?

In short, common good constitutionalism faces a dilemma. If Vermeule's claims about the moral sources of valid legal norms are necessary, based on the nature of law always and everywhere, then he has to offer an implausible account of valid legal norms in societies that fail to share his priors. If his claims about moral sources are contingent, based on his empirical claim that our legal system shares in a “classical tradition,” then they aren't really about what he's willing to call natural law. One solution to this dilemma is consistently to accept Finnis's account over Dworkin's, which allows the positivists to know what they're talking about with respect to certain laws' validity within a given system, but which also retains the natural lawyer's right to criticize an admittedly valid law as “misfir[ing] in its *telos*.”<sup>189</sup> But accepting that

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Slave Clause notwithstanding, and that judges should regard this conception as intrasystemically valid even though a competent lawyer would have recognized “that the constitutional provision and the congressional statutes were designed to appease the South”).

<sup>188</sup> What Vermeule may instead be after, especially with respect to determinations under the natural law, would less resemble Dworkin's law-as-integrity approach than Professor Mark Greenberg's moral impact theory — under which “interpreting [a] statute will require determining what the moral impact of the statute is, after all of the relevant values have been given their due,” such that “the semantic content and the communicative content of the statutory text are relevant if, and to the extent that, moral considerations . . . make them relevant.” Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1293 (2014). Greenberg argues that his theory is on all fours with Dworkin's later views, which had shifted substantially over time. See *id.* at 1299 n.28. Of course, Greenberg's theory has worries of its own, some of which are shared by Vermeule's account. See, e.g., Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 RATIO JURIS 187, 198 (2021) (“[The theory] surely does not demonstrate why, say, the provisions in the Constitution creating Congress, or the statutes creating administrative agencies, are laws only by virtue of their moral impacts. Rather, it seems much more plausible to assert that these norms have the moral impacts they have *because they are laws*.” (footnote omitted)).

<sup>189</sup> Casey & Vermeule, *supra* note 13, at 18 n.58. Our point here is by no means to portray Finnis as a positivist, as suggested by Adrian Vermeule, *The Bourbons of Jurisprudence*, IUS & IUSTITIUM (Aug. 15, 2022), <https://iusetiustitium.com/the-bourbons-of-jurisprudence> [https://perma.cc/8PLA-

solution might entail some sort of rapprochement with the originalists, which the book continues to refuse.

#### IV. POLITICS

While we believe the book’s arguments are unsuccessful, it’s possible that we’re missing the point. So far we’ve been engaging with its arguments internally, as ordinary intellectual claims about law. But we also must understand it as a political phenomenon. One of the book’s impressive features is its ability to describe a movement of “widespread and increasing dissatisfaction with establishment progressive rights-talk and establishment originalism” (p. 25), while at the same time helping to will that very movement into being. This review would be incomplete if we didn’t grapple with this phenomenon — which we view as similarly underbaked.

##### A. *On Liberty*

While it doesn’t earn a chapter of its own, a recurring theme in *Common Good Constitutionalism* is its rejection of “libertarianism,” its label for a range of extreme and apparently quite nefarious positions. We’re told that libertarians “find the classical tradition appalling or, worse, irrelevant” (p. 13); that “an extremely well-funded libertarian vision” has “hollowed out and taken over” the “conservative legal movement” (p. 16); that “[o]riginalist-libertarians purport to be horrified by purposive rule for the common good even as they defend the role of common-law judges in defining and protecting property rights” (p. 16); that they’re “outrage[d]” by the point that “subjects’ own perceptions of what is best for them may change . . . as the law teaches, habituates, and re-forms them” (p. 38); that originalism is marked by its “libertarian allies” (p. 173); and so on. As to liberty itself, we’re instructed to “make[] no fetish of Liberty” (p. 24); told not to treat “liberty as an abstract object of quasi-religious devotion” (p. 37); and warned that liberty is “a bad master, but a good servant” (p. 24). This hostility is very much of the times, as right-wing thinkers (among others) celebrate a “postliberal order”<sup>190</sup> or distance themselves from principles of liberty that were once celebrated.<sup>191</sup>

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B9ZD]. Rather, the claim is that there is more than one way to be an *anti*positivist, and that Finnis and Dworkin often give importantly different answers to the sorts of questions that Vermeule is asking.

<sup>190</sup> See, e.g., THE POSTLIBERAL ORDER, <http://postliberalorder.substack.com> [https://perma.cc/98CF-RUY4].

<sup>191</sup> See, e.g., *Against the Dead Consensus*, FIRST THINGS (Mar. 21, 2019), <https://www.firstthings.com/web-exclusives/2019/03/against-the-dead-consensus> [https://perma.cc/MG7V-BDKM] (“[E]conomic libertarianism isn’t nearly as popular as its Beltway proponents imagine.”).

So it's possible that the book's internal shortcomings are partly beside the point. These claims might be a form of broader stage setting, making clear to the reader that Vermeule is a supporter of a postliberal order and that he can supply a "movement jurisprudence"<sup>192</sup> for the imagined conservative advance. We aren't sure that Vermeule in fact delivers what such a movement might want,<sup>193</sup> but the topic is sufficiently important that it's worth flagging these arguments and some objections to them.

1. — As we've discussed, Vermeule does make an intervention on the role of natural law in our rights tradition. But he does this anachronistically, without sufficient credit to the ways in which "natural rights shaped how the Founders thought about the structure and purposes of government."<sup>194</sup> To the extent that Vermeule intends to show that all constitutional rights were "regulable to promote the public good,"<sup>195</sup> relying on Campbell's work, he neglects the important categories of positive law rights and "inalienable natural rights,"<sup>196</sup> which Campbell shows to have been more firmly preserved against regulation.<sup>197</sup>

2. — At a more normative level, the book's definition of liberty is idiosyncratic. It twice invokes "the insight of progressives like Dewey that *power is always conserved*. Any claim to 'liberty' is a claim for a legal allocation of power to do or not to do or to prevent others from doing or not doing" (pp. 14 & 192 n.28).<sup>198</sup> And again: "a claim that one's 'liberty' should be protected by law is itself, necessarily, a claim to exercise coercive power over others" (pp. 50 & 201 n.123).<sup>199</sup> Dewey used this definition to argue that laissez-faire economics was no more liberty protective than extensive regulation and redistribution<sup>200</sup> — a claim echoed in Vermeule's argument that private actors may abuse power just as easily as public ones (p. 50).

It's true that liberty can be defined in many ways. But this definition is confusing, perhaps deliberately so. Discussing liberty solely as an allocation of power (or vice versa) makes it hard for us to capture the easiest cases of political freedom. If liberty-qua-power were truly conserved, and if no society could have any more or less of it, then this account would make it hard for us to say that the system of antebellum

<sup>192</sup> Posner & Vermeule, *supra* note 1.

<sup>193</sup> See *infra* section IV.B, pp. 903–06.

<sup>194</sup> Campbell, *supra* note 151, at 265; see also Zuckert, *supra* note 148, at 731 ("[T]he priority of natural right and the derivativeness of natural law are clear. . . . [N]atural rights do not derive from natural law.").

<sup>195</sup> Campbell, *supra* note 151, at 280.

<sup>196</sup> *Id.* (emphasis omitted).

<sup>197</sup> See *id.* at 280, 307; see also *supra* notes 151–58 and accompanying text.

<sup>198</sup> The author cites JOHN DEWEY, *Liberty and Social Control*, in 11 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 360 (Jo Ann Boydston ed., 1987); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923).

<sup>199</sup> The author cites DEWEY, *supra* note 198; and Hale, *supra* note 198.

<sup>200</sup> DEWEY, *supra* note 198, at 362–63; accord Hale, *supra* note 198, at 470–72.

slavery was less free, on the whole, than the system of universal emancipation, or to describe Stalin's Russia or contemporary North Korea as less free than their western rivals. The impossibility of drawing these sorts of intuitive comparisons should give us pause — which is why this confusing definition earned well-known rebukes from scholars such as F.A. Hayek.<sup>201</sup> Vermeule and Dewey can redefine liberty as they wish, but it's useful to have *some* word to capture the thing that slavery, totalitarianism, and far less extreme systems of coercion all lack. Traditionally, that word has been "liberty."<sup>202</sup>

3. — That brings us to a related running complaint of the book, which is that American constitutional law focuses too much on freedom from government interference. To Vermeule, "constitutional 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" (p. 50). Vermeule argues that private actors can abuse power too. But he laments that, "for essentially historical rather than theoretical reasons, liberal theory tends to focus myopically on the risks of abuse by legislatures and (especially) executive actors" (pp. 50–51).

American constitutional law's focus on the abuse of government power is historically contingent, yes. But that shouldn't surprise us, for our Constitution is historically contingent too. Our constitutional restraints happen to be addressed primarily to *government* power, both because the Constitution was superadded onto a system of already-existing state governments, and because such limits were the ones most urgently sought by successive generations of constitutional lawmakers (especially in the Bill of Rights and the Fourteenth Amendment). The book's argument that "the true calculus should consider all relevant risks of abuse of power, from whatever quarter" (p. 51), may be useful as a program for law reform. But how much it has to say to our own constitutional tradition depends on what that tradition actually is.

<sup>201</sup> As Hayek pointed out in response to Dewey:

Once this identification of freedom with power is admitted, there is no limit to the sophisms by which the attractions of the word "liberty" can be used to support measures which destroy individual liberty, no end to the tricks by which people can be exhorted in the name of liberty to give up their liberty.

F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 16 (1960) (footnote omitted); *see also id.* at 17 (discussing Dewey); *cf.* ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 125 (1969) ("Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience.").

<sup>202</sup> HAYEK, *supra* note 201, at 11–13; *cf.* David Plunkett & Tim Sundell, *Disagreement and the Semantics of Normative and Evaluative Terms*, PHILOSOPHERS' IMPRINT, Dec. 2013, at 24 (noting that, even if an acceptable replacement for words such as "freedom" could be found, "it will be very hard to advocate for the sorts of concepts that one thinks should play a certain functional role without drawing on rough attitudes that people already have to the . . . word itself").

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4. — This brings us to a final theme in the book’s discussion of liberty: that the government need not, even cannot, be neutral on questions of morality. Hence, it argues that “[l]iberal and libertarian constitutional decisions that claim to rule out ‘morality’ as a ground for public action are incoherent, even fraudulent, for they rest on merely a particular account of morality, an implausible account” (p. 37). And we’re told that “[a]n infallible diagnostic symptom that an American legal theorist is in the grip of an invented libertarian tradition is horror, or professed horror anyway, at the thought that promotion of public morality is an ordinary and indeed essential component of political rule” (p. 62).

While the book asserts that promotion of morality is, “always and everywhere, a proper function of the political authority” (p. 37), a more constitutionally serious analysis would again look at the specifics of our constitutional tradition. Perhaps Vermeule just means that cases like *Lawrence v. Texas*<sup>203</sup> are wrongly decided, or at least wrongly reasoned, which some originalists think too.<sup>204</sup> But Vermeule does not cite *Lawrence* and seems to be after something bigger. And to the extent he attributes to American governments a noncontingent power to abridge any claim of individual freedom, he moves much too fast. The actual powers of those governments depend neither on the imagined preferences of originalism’s “libertarian allies” (p. 173), nor on Vermeule’s claims about political functions “always and everywhere” (p. 37), but on the specifics of our constitutional tradition: the Founders’ law and the lawful changes since.

5. — This is enough said. But given the short shrift liberty gets from Vermeule and many of his fans, we feel compelled to say a little more, even at the price of stepping out of our usual academic bailiwick. Unlike some of Vermeule’s critics, we don’t necessarily disregard the notion of a public interest or a common good. Presumably that’s what legislatures should aim at when they legislate — and perhaps what other officials should promote when given lawful discretion. But one can appreciate this while also appreciating the American emphasis on protecting private commitments and pursuits.

Our constitutional tradition emphasizes liberty for a reason. The reason isn’t that the Founders were genteel, quaintly indifferent to the real world, or even especially libertarian in their personal lives and views. The Constitution’s commitments to liberty reflect a hardheaded realism that makes governance of divided societies possible.

Take, for instance, religious freedom. The Constitution’s explicit protection for religious freedom, and the extensive discussions of religious freedom at the Founding, didn’t reflect a view that religious

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<sup>203</sup> 539 U.S. 558 (2003).

<sup>204</sup> See *id.* at 599 (Scalia, J., dissenting) (arguing that the Court, by holding that “the promotion of majoritarian sexual morality is not even a *legitimate* state interest,” had “effectively decree[d] the end of all morals legislation”).

beliefs were unimportant, inherently private, or irrelevant to governance — much less that there could be no religious truths worth the state’s respect. Nor did they reflect the view that it was illogical or impossible to imagine a state trying to enforce the true religion and to suppress false ones. On the contrary, it’s precisely because the subject of religion is of such *cosmic importance* to so many — calling it a matter of life and death would be understatement — that we’ve pushed it partly beyond the power of the fallible humans who compose the state.<sup>205</sup>

Something similar is true regarding free speech. Both we and Vermeule have harsh words for each other’s vision of the law and advice to government officials. It isn’t hard to imagine a world (and one needn’t look far back or far abroad for examples) in which we might be forced into a zero-sum battle for our lives or careers, each struggling to obtain suppression or prosecution of the other, lest he be suppressed or prosecuted first. But one argument for freedom of opinion is that such ideas are too important to be made into fighting words. We can be fellow citizens and fellow colleagues precisely because we’re part of communities that provide for extensive liberty on such grounds. Judged from the long sweep of human history, the fact that we might still break bread together in a faculty lounge is a *miracle*, and we should not be ungrateful for it.<sup>206</sup>

As in the comfort of the faculty lounge, so in the country at large. Our constitutional tradition has supported abstract principles of individual liberty not because the moral stakes are low but because they are high. Our Constitution “was not designed for a nation of high-school civics teachers, full of corny enthusiasm for powdered wigs and tricorne hats”; it was designed for “those who had lived through civil war, economic crisis, and profound moral disagreement,” including “over human slavery.”<sup>207</sup> If those with real skin in the game saw the need to “focus myopically” on certain abuses of power (pp. 50–51), perhaps those of us writing from our faculty offices shouldn’t be so quick to look away.

### B. Theory and Rhetoric

As Vermeule’s own “context of discovery” framework suggests (p. 92), the substance of *Common Good Constitutionalism*’s arguments fails to explain why the book has already become so prominent. The times are especially ripe for a work like this one, and Vermeule has crafted it

<sup>205</sup> See, e.g., Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1160–62 (2013); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–66 (1991).

<sup>206</sup> See Scott Alexander, *In Favor of Niceness, Community, and Civilization*, SLATE STAR CODEX (Feb. 23, 2014), <https://slatestarcodex.com/2014/02/23/in-favor-of-niceness-community-and-civilization> [<https://perma.cc/R8JQ-7V3G>] (“Please try not to be insufficiently surprised by this. Every time a Republican and a Democrat break bread together with good will, it is a miracle.”).

<sup>207</sup> Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 107 (2019).

with particular skill to take advantage of that opportunity. Indeed, *Common Good Constitutionalism*'s greatest achievement may be as a work of rhetorical moment-seizing rather than of constitutional theory.

These are good times for a conservative rebellion against originalism and positivism. Some of this is simply generational: every cohort feels some impulse to reject the music and styles of its elders. Vermeule's theory, combined with his broader self-presentation, offers something very important to this crowd. Difficult though our colleagues may find it to believe, well-known originalists are often considered frustratingly moderate by many on the right, who hunger for redder meat. Current legal developments provide an additional opening: the rise of self-described originalist judges, especially on the Supreme Court; increasingly frank skepticism of precedent and doctrines of judicial restraint; and a widespread (if fragile) sense of conservative judicial triumph. These things all contribute to a sense that conservatives have won the final battle for the Constitution and it is time to divide the spoils.<sup>208</sup> When Justice Kennedy or even Chief Justice Roberts remained a necessary vote for key judgments, conservatives had more reason to hang together under conventional jurisprudential theories, and less to gain through departing from them. But now, with *Roe v. Wade*<sup>209</sup> overruled, some see it as high time to emerge from the "defensive crouch" of outcome-independent legal theory.<sup>210</sup>

In a superficial sense, then, it's no surprise that some conservative activists are interested in casting off originalist rhetoric in favor of something new and putatively more ambitious. But it's puzzling that *Common Good Constitutionalism*, in particular, could satisfy this need. What the book primarily delivers isn't right-wing *substance*, but right-wing *feeling*. Generating this feeling is the book's true genius, which will likely make it a prominent bible of conservative discontents in the next generation. Yet while the book is sometimes discussed as if it were a bill of particulars for a theocratic (or at least extremely conservative) ruling agenda, the text has little payoff of that kind.

The book's effectiveness as a political organizing tool rests in part on the vagueness of its theory. As we've discussed, the account of common good constitutionalism is theoretically capacious, allowing Vermeule to give weight to text and precedent as needed and to reject them when he prefers (a capaciousness that other interpretive methods

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<sup>208</sup> Vermeule, *supra* note 5 ("The hostile environment that made originalism a useful rhetorical and political expedient is now gone. Outside the legal academy, at least, legal conservatism is no longer besieged. . . . Assured of this, conservatives ought to turn their attention to developing new and more robust alternatives to both originalism and left-liberal constitutionalism.").

<sup>209</sup> 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

<sup>210</sup> Vermeule, *supra* note 5 (citing Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/3F47-9DYE>]).

are denied). The intellectual resources to give or deny weight are sufficiently supple, in Vermeule’s hands, that they provide him with a kind of oracular status.

This flexibility might make the theory seem overly weak or accommodating. But Vermeule avoids this impression through a second device: the use of pugilistic rhetoric. This ranges from the immolation scene in the introduction (pp. 2–3) to his claim that a passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>211</sup> “should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after” (p. 42). A subtler effect is achieved through unusual choices of reference and citation. Though the book’s substantive arguments are secular, John Henry Newman is repeatedly cited as an authority on doctrinal development (pp. 23, 118, 123–24),<sup>212</sup> as is Fr. Edmund Waldstein on liberty’s relation to the common good (pp. 198 n.89, 202 n.133).<sup>213</sup> Above-the-line references to Carl Schmitt (pp. 139, 144, 150) give the book an impression of political edginess,<sup>214</sup> even if that impression doesn’t ultimately pay off: aside from brief gestures at “the carefully cabined Roman model of dictatorship” (p. 158), any political extremes are kept carefully off-stage.

By contrast, when one turns to substance, the book’s central implication is support for the administrative state, described as “The Living Voice of the Law” (p. 136). Its harshest condemnations are reserved for “selfish” opponents of vaccine mandates (pp. 42–43)<sup>215</sup> and for “pernicious” limits on the federal government (p. 158). To be sure, the book also defends the regulation of pornography (p. 171) and bans on gay marriage (pp. 218–19 n.346), but that hardly gives the average conservative grounds for a full-throated attack on originalism. The book devotes

<sup>211</sup> 505 U.S. 833, 851 (1992) (stating that each individual may “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”).

<sup>212</sup> See Patterson, *supra* note 7 (“[P]erhaps the strangest inclusion was that of St. John Henry Newman and his account of the development of Catholic doctrine. Vermeule simply inserts Newman’s views on Church doctrine as analogous to that of legal doctrine, although such an insertion demands a considerably more robust defense than he gives.”); Helms, *supra* note 7 (expressing “surprise” that “Vermeule invokes John Henry Newman’s defense of the development of Christian doctrine”).

<sup>213</sup> Cf. Edmund Waldstein, *Integralism and the Lamb that Was Slain*, SANCRUCENSIS (Mar. 20, 2019), <https://sancrucensis.wordpress.com/2019/03/20/integralism-and-the-lamb-that-was-slain> [<https://perma.cc/2CNK-3JAZ>] (defending the Church’s occasional need “to call in the secular arm to put heretics to death,” and explaining that “[t]he Mortara Case did not involve the kidnapping of a Jewish child, but rather the rescuing of a *Christian* child from the custody of those who would have defrauded him of the inheritance that he was promised in Baptism”).

<sup>214</sup> See Patterson, *supra* note 7 (“His use of Joseph de Maistre, Louis Veillot, and Carl Schmitt are all out of place, as they are hardly bearers of any classical legal tradition and bring with them all kinds of baggage . . .”). To be fair, Vermeule’s use of Schmitt is longstanding, not a ploy for this book. See, e.g., Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009).

<sup>215</sup> Accord Adrian Vermeule, *Biden’s Vaccine Mandate Serves the Common Good*, COMMON SENSE (Sep. 22, 2021), <https://bariweiss.substack.com/p/vaccine-mandates-the-end-of-covid?s=r> [<https://perma.cc/D9WC-NTG6>].

many more words to supporting broader standing to sue for environmental plaintiffs (pp. 174–77) than to the constitutionality of abortion restrictions, limited to a rather muted footnote (p. 199 n.103). Vermeule is of course entitled to his own politics, which no one would confuse with the Republican Party's.<sup>216</sup> But if one were going to be results oriented about the whole enterprise, there would be little reason for most right-leaning Americans to prefer Vermeule's constitutional theory to that, say, of Justice Thomas.

### CONCLUSION

*Common Good Constitutionalism* is both an achievement and a disappointment. While Vermeule performs a real service in refocusing attention on the American natural-law tradition, his account of that tradition may mislead as much as it enlightens. And while his forceful writing will win him wide readership and some applause, it also keeps him from engaging carefully with alternative views or recognizing potentially shared ground. Opposing views are composed of “myths,”<sup>217</sup> “shibboleths,” “chatter,” “horror,” and “panicky, bewildered outrage” (pp. 18, 34, 62, 67), while his own views are pugnaciously, though inconsistently, expressed. A rhetorical pose in which common good constitutionalism must always be victorious, its enemies always cringing and pitiful, lends itself more to political than to intellectual advance.

Some readers might not mind. They might favor common good constitutionalism for the outcomes it promises to license, or even just for the combative posture it lets them take. We have little to say to these readers: one doesn't need to read a book to lobby for preferred outcomes or to start fights online.

What *Common Good Constitutionalism* purports to add to the project is an intellectually rigorous foundation. If it had, it could have moved the scholarly ball forward, persuading some to share its views and obliging the rest to refine their own views in its light. Unfortunately, it too often lets other goals get in the way. So while we can't root for the book's success as a manifesto, movement, or call to arms, we wish it were better as a book.

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<sup>216</sup> Cf. Adrian Vermeule (@Vermeullarmine), TWITTER (Apr. 24, 2021, 10:38 PM), <https://web.archive.org/web/20210425185154/https://twitter.com/vermeullarmine/status/1386192832059346945> [<https://perma.cc/4SYH-FB8C>] (suggesting that “the tyrannophobic, country-party, low-Anglo culture is irredeemable and can only be eliminated, not baptized”).

<sup>217</sup> Casey & Vermeule, *supra* note 182.