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AMERICA'S TWO PASTIMES: BASEBALL AND CONSTITUTIONAL LAW—REVIEW OF ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM

Paul J. Larkin[+]

For the last 50 years, the two prevailing constitutional interpretation methodologies have been Originalism and Living Constitutionalism. The former treats the Constitution almost like a contract and demands that interpreters focus on the ordinary contemporary understanding its terms would have received when they became law. The latter treats the Constitution as a charter for the structure of a new government that would survive and mature as needed to protect both the nation and its people as new threats to government and civil liberties arise. Professor Adrian Vermeule's book Common Good Constitutionalism *offers a new approach to constitutional interpretation, one that gives far greater prominence to the need to protect and advance the good of the nation as a whole than either of the other two theories would require. His theoretical justification for the new approach stems from the classical or natural law principle that a nation may demand that its interests outweigh those of any individual or group. He criticizes Originalism as a morally sterile, positivistic approach to legal interpretation, and Living Constitutionalism as concerned only with the interests of individuals and groups without regard for those of the polity.*

Professor Vermeule, however, does not give sufficient weight to what the Constitution did—viz., create a democratic republic whose elected representatives would make moral judgments—than what a court may do when reviewing their work. He also fails to address a goodly number of issues that any new theory of constitutional interpretation must address to serve the role that he posits for Common Good Constitutionalism. He does not give adequate weight to the rationale endorsed in Marbury v. Madison *that it is the text that governs, not background principles, however weighty they might be. He does not address how his theory affects antidiscrimination law, the application of the Bill of Rights to the states, or principles of* stare decisis*. In sum,* Common Good Constitutionalism, *while valuable, is better seen as a codicil to Originalism (to*

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which it is closer than Living Constitutionalism) than as an entirely new, different will.

INTRODUCTION—COMPETING CONSTITUTIONAL LAW INTERPRETIVE METHODOLOGIES

A principal topic of contemporary legal discussion is the proper methodology for interpreting the Constitution's terms—that is, *how* the Constitution should be interpreted, rather than *what* its individual provisions mean. The reason is that choosing a preferred methodology of legal interpretation defines the rules that courts may use when reading a Constitution with capacious terms adopted, at least in part, in the hope that future generations acting in good faith will be able to apply the Constitution to unforeseen problems to ensure the nation's survival.[1] Success at that preliminary, rule-setting stage of the game does not prevent a bright, clever jurist from attempting to treat those terms like silly putty to impose his or her notion of the right social policy in the guise of interpreting the document. There will always be room to read written words at different levels of reification to achieve a sought-after objective because words are not mathematical symbols with defined and fixed meanings.[2] But controlling how the game is played does make free-lancing more difficult.

Professor Adrian Vermeule's 2022 book *Common Good Constitutionalism*[3] is a new entrant into the debate between the two principal competing constitutional interpretative methodologies that are being mooted throughout the academy, federal judiciary, and legal profession nowadays: Originalism (or Textualism) and Living Constitutionalism (or Progressivism or Purposivism).[4] Simplified of

1. *See* Weems v. United States, 217 U.S. 349, 373 (1910) ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.").

2. *See* Gompers v. United States, 233 U.S. 604, 610 (1914) (Holmes, J.) ("[T]he provisions of the Constitution are not mathematical formulas, having their essence in their form; they are organic, living institutions transplanted from English soil."); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶¶ 68–75, at 32-35 (G.E.M. Anscombe trans., 3d ed. 1973) (1953) (describing the difficulties in defining the term "game"); Larry Kramer, *Two (More) Problems with Originalism*, 21 HARV. J.L. & PUB. POL'Y 907, 913 (2008) ("[L]anguage is unavoidably imprecise. There are always gaps, contradictions, and ambiguities.").

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

4. For concise and excellent analyses of each approach, *see*, for example, ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2016); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

its (numerous) rococo ornamentations,[5] Originalism teaches that, because words—like the ones found in a will, contract, or other legal instrument—have a defined and ascertainable meaning when a document is signed, judges should cabin themselves to determining the then-contemporaneous understanding of an instrument's terms. Because the Constitution and its amendments are legal instruments, judges should apply the same methodology to their interpretation. There is a sizeable (and increasing) literature discussing the meaning, legitimacy, use, and value of Originalism, as well as its application in diverse fields and the role for *stare decisis*.[6]

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5. Some treatments of Originalism are useful, such as works identifying the different categories of Originalism, *see, e.g.*, Josh Hammer, *Common Good Originalism: Our Tradition, Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917, 921–24 (2021) (noting the "three distinctive forms of originalism: progressive, libertarian, and conservative," but arguing in favor of "[a] more descriptively apt and genealogically fitting 'conservative originalism," which ought to be branded as 'common good originalism'") (footnote omitted), and whether there is a distinction between "interpretation" and "construction" of the Constitution, *see, e.g.*, Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); *see also, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL'Y 99 (2011); Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). Other discussions are far more intricate and more for members of the academy than practitioners and judges. *See* Christopher R. Green, *"This Constitution": Constitutional Indexicals As a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009).

6. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2007); ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM (2017); *Symposium: Originalism 2.0*, 42 HARV. J.L. & PUB. POL'Y (2019); *Symposium: Original Ideas on Originalism*, NW. U. L. REV. 491 (2009); Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961 (2008); Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623 (2014); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65 (2011); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947 (2008); Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010); Frank Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901 (2008); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779 (2020); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); John O. McGinnis & Michael Rappaport, *Reconciling Originalism and Precedent*, 34 NW. U. L. REV. 803 (2009); Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037 (2006); James C. Phillips et al., *Corpus Linguistics and Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 21 (2016); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022); Scott Soames, *Originalism and Legitimacy*, 18 GEO. J. L. & PUB. POL'Y 241 (2020); For the opinions of jurists who had or have a direct influence on Originalism, *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE

By contrast, Living Constitutionalism sees our Constitution not as a static assignment of rights and responsibilities with a fixed, permanent meaning, but as a living, embryonic document whose development can and must be allowed to "grow" over time as judges acquire a more mature, refined, and sophisticated understanding of how the law should apply in an evolving society.[7] Advocates for Living Constitutionalism criticize Originalism on a number of grounds, such as the following: Constitutions are not wills or statutes; they are charters of government and safeguards for freedoms that were intended to and must remain vital over time. To do so, they must reach beyond the particular problems that the Framers sought to address. Additionally, lawyers are not professional historians and cannot adequately perform the deep historical analysis that Originalism demands. Originalism, in addition, is not a legitimate constitutional theory. It is a "rhetorical trope,"[8] a "destructive creed,"[9] or parlor trick designed to advance conservative values in the guise of the ostensibly neutral interpretive principles.[10] Finally, proponents of Living Constitutionalism charge that Originalism leads to unacceptable outcomes. They allege (incorrectly) that only Living Constitutionalism could—and did—outlaw racially segregated public schools and "rotten legislative boroughs" in cases like *Brown v. Board of Education*[11] and *Reynolds v. Sims*.[12] They say that America has embraced those rulings, and nothing good can come from abandoning them for a new-fangled theory of constitutional interpretation.[13] Almost everyone in the academy has

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POLITICAL SEDUCTION OF THE LAW (2009); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT (2019); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

7. For criticisms of Originalism or discussions of Living Constitutionalism, *See* ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION (2010); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721 (2013) (opposing Originalism). For jurists endorsing Living Constitutionalism, *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006); William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

8. STRAUSS, *supra* note 7, at 31.

9. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 31 HARV. J.L. & PUB. POL'Y 137, 144 (2008).

10. *See, e.g.*, Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principles, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2008); Kramer, *supra* note 2, at 911–13.

11. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

12. Reynolds v. Sims, 377 U.S. 533 (1964).

13. *See, e.g.*, STRAUSS, *supra* note 7.

signed up for one or the other side[14] (there are a few double agents[15]). The debate between Originalists and Living Constitutionalists resembles the arguments in "Tastes Great! Less filling!" commercials once seen during commercial breaks in sporting events.[16]

In *Common Good Constitutionalism*, Professor Vermeule not only endorses the principle of "Common Good Conservatism" recently discussed by political, social, and religious commentators,[17] but he also elevates it to a constitutional level. The short book builds on the thesis that he set forth in a 2020 *Atlantic* article entitled *Beyond Originalism*, which criticized Originalism as both outdated and morally sterile, but did not propose an entirely new methodology as its successor.[18] *Common Good Constitutionalism* does. Professor Vermeule

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14. *See* Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 297–300 (2016). As an example, consider the debate over the issue whether the Fifth and Fourteenth Amendment Due Process Clauses have both procedural and substantive components. *Compare, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 140–47 (1978); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 78–84 (1982); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 872–73 (1978) [hereinafter Grey, *Origins*]; and Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) (arguing in favor of the legitimacy of substantive due process), *with, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"); JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 28–34 (2005); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (arguing that substantive due process is illegitimate). *See generally* Larkin, *supra* note 14, at 297–300 (summarizing the debate).

15. *See* JACK BALKIN, LIVING ORIGINALISM (2011).

16. *See* Larkin, *supra* note 14, at 297–98 (elaborating on the metaphor).

17. *See, e.g.*, Ryan T. Anderson, *The Promise and Peril of the Political Common Good*, NEW CRITERION 28 (Jan. 2022); Josh Hammer, *Yesterday's Man, Yesterday's Conservatism*, NEW CRITERION 24 (Jan. 2022); Kim V. Holmes, *The Fallacies of the Common Good*, NEW CRITERION 13 (Jan. 2022); Casey B. Hough & Andrew T. Walker, *Toward a Baptist Natural Law Conception of the Common Good*, 63 SW. J. OF THEOLOGY 153 (Fall 2020); Charles R. Kesler, *The Original Strategy*, NEW CRITERION (Jan. 2022); Roger Kimball, *The Right Targets*, NEW CRITERION (Jan. 2022); Daniel J. Mahoney, *The Demanding and Delicate Task of Conservatism*, NEW CRITERION (Jan. 2022); Robert R. Reilly, *Common-Sense Conservatism*, NEW CRITERION 37 (Jan. 2022); R.R. Reno, *Policies Are Not Principles*, NEW CRITERION (Mar. 2022).

18. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/. Since that article, and even after publication of his book, Professor Vermeule has supplemented his views (sometimes with, other times without, a fellow traveler) in a handful of other publications. *See* Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL'Y: PER CURIAM (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081264; Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism/; Adrian Vermeule, *Supreme Court Justices Have Forgotten What the Law Is For*, N.Y. TIMES, (Feb. 3, 2022), https://www.nytimes.com/2022/02/03/opinion/us-supreme-court-nomination.html; Conor Casey & Adrian Vermeule, *Myths of Common Good Originalism*, 45 HARV. J.L. & PUB. POL'Y 103 (2022)

argues that government officials should not be shy about construing legal instruments to advance the collective welfare of the people.[19] He finds support for that approach in classical or natural law legal theory. Originalism and Living Constitutionalism have largely kept natural law on the bench, but Professor Vermeule would put it into the starting lineup.[20]

Professor Vermeule is a brilliant and prolific scholar, principally (but not exclusively) in the field of administrative law.[21] Anything that he writes is worth

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[hereafter Casey & Vermeule, *Myths*]; Adrian Vermeule, *Gnostic Constitutional Theory*, IUS & IUSTITIUM (Nov. 15, 2021), https://iusetiustitium.com/gnostic-constitutional-theory/#more-1250; Conor Casey & Adrian Vermeule, *Myths of Common-Good Constitutionalism*, IUS & IUSTITIUM (Sept. 9, 2021), https://iusetiustitium.com/myths-of-common-good-constitutionalism/; Adrian Vermeule, *What Is the Common Good?*, IUS & IUSTITIUM, (Feb. 25, 2021), https://iusetiustitium.com/what-is-the-common-good/; Adrian Vermeule, *A Series of Unfortunate Events*, MIRROR OF JUST. (Apr. 5, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/04/a-series-of-unfortunate-events.html. Some publications respond fairly to criticisms. Some contain mind numbing displays of academic jargon. *See* VERMEULE, *supra* note 3, at 8 ("I follow Dworkin in believing that inclusive versions of positivism and originalism converge entirely with non-positivism and non-originalism[.]"); Casey & Vermeule, *Argument by Slogan*, *supra* note 18 (manuscript at 1–2) (discussing "thin" versus "thick" versions of Originalism). And some display a thin skin. *See id.* at 3–12. That is surprising. If "Enmity is not a theory" and "Slogans are not arguments," Casey & Vermeule, *Argument by Slogan*, *supra* note 18 (manuscript at 18), condescension is not persuasive rhetoric.

19. VERMEULE, *supra* note 3, at 179–83.

20. *Common Good Constitutionalism* is not the first work to invoke natural rights, morality, or classic liberalism when interpreting the Constitution. For example, Professor Hadley Arkes has often done just that. Susan Black, *Common Good Constitutionalism Considered*, MERE ORTHODOXY (Apr. 1, 2020). Here's the thing: Vermeule's "common good constitutionalism" is not actually that different from, for example, Hadley Arkes' natural law constitutionalism. That tradition of Finnis-inspired Lincoln-loving conservative jurisprudence likewise rejected originalism—despite the fact that Arkes and Scalia were great friends, they disagreed on this—precisely on the grounds that there is no magic in the original text: the justice or injustice of a law depends on whether or not it comports with natural law, and tracing the "intent of the founders" is cultish ancestor worship, not commitment to good government. *See, e.g.*, HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS (2010); HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE (2004); HADLEY ARKES, BEYOND THE CONSTITUTION (1990); HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); Hadley Arkes, *"A Natural Law Manifesto,"* JAMES WILSON INST. (2011), https://jameswilsoninstitute.org/about/a-natural-law-manifesto. So, too, have other scholars. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (Rev. ed. 2013); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2017); HARRY V. JAFFA, STORM OVER THE CONSTITUTION (1999); HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (1994); TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY (2013); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE CONSTITUTION (2019). Professor Vermeule's prominence in the legal academy, his sizeable oeuvre, and the timing of his book, however, has brought him to go to the head of the class in the contemporary debate.

21. *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020); ADRIAN VERMEULE, THE CONSTITUTION OF RISK (2013); ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION (2011); ERIC A. POSNER & ADRIAN

serious consideration. His *Atlantic* article *Beyond Originalism* has already received that—along with some very heavy flak. The journals and blogosphere are brimming with responses and comments from the Right and Left, from lawyers, political scientists, and theological scholars, discussing his criticisms of Originalism. Some (a minority) support and laude his *Beyond Originalism* article (perhaps to generate a groundswell of support to change the law),[22] while others (a majority) criticize and lampoon it (perhaps to avoid generating any type of endorsement-by-silence).[23] His 2022 book *Common Good Constitutionalism*

VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2008); ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. F. 103 (2020); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2016); Adrian Vermeule, *No: Review of Philip Hamburger, 'Is Administrative Law Unlawful?'*, 93 TEX. L. REV. 1547 (2015); Adrian Vermeule & Eric A. Posner, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 786 U. CHI. L. REV. 1613 (2009); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 593 (2009).

22. *See, e.g.*, Conor Casey, *"Common-Good Constitutionalism" and the New Battle Over Constitutional Interpretation in the United States*, 4 PUB. INTEREST 765 (2021); Jonathan Culbreath, *In Defense of "Common Good Constitutionalism,"* CRISIS (Apr. 13, 2020), https://www.crisismagazine.com/2020/in-defense-of-common-good-constitutionalism; Michael Foran, *Rights and the Common Good*, IUS & IUSTITIUM (Sept. 20, 2021), https://iusetiustitium.com/rights-and-the-common-good/; Josh Hammer, *A Common Law Restoration Serves the Common Good*, L. & LIBERTY, (Oct. 7, 2021), https://lawliberty.org/a-common-law-restoration-serves-the-common-good/; Gunnar Gunderson, *Originalism Has Failed*, AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/originalism-has-failed/; Josh Hammer, *Toward a New Jurisprudential Consensus: Common Good Originalism*, PUB. DISCOURSE (Feb. 18, 2021), https://www.thepublicdiscourse.com/2021/02/74146/ [https://perma.cc/S59P-2Z57]; Josh Hamer, *Who's Afraid of the Common Good?*, AM. MIND (Nov. 23, 2020); Josh Hamer, *Common Good Originalism*, AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/; Xavier Foccroulle Menard, *Reclaiming the Natural Law for 21st Century Constitutionalism*, IUS & IUSTITIUM (Sept. 12, 2021), https://iusetiustitium.com/reclaiming-the-natural-law-for-21st-century-constitutionalism/; Michael Ramsey, *Adrian Vermeule on Common Good Constitutionalism*, ORIGINALISM BLOG (Feb. 5, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/02/adrian-vermeule-on-common-good-constitutionalismmichael-ramsey.html; Aaron J. Walayat, *Vermeule's Society and Its Enemies*, CANOPY F. ON THE INTERACTIONS OF L. & REL., (Aug. 18, 2021), https://canopyforum.org/2021/08/18/vermeules-society-and-its-enemies/; Rachael Walsh, *Property and the Common Good—Reviving Old Debates*, IUS & IUSTITIUM (Sept. 14, 2021), https://iusetiustitium.com/property-and-the-common-good-reviving-old-debates/.

23. *See, e.g.*, Sotirio Barber et al., *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, CONSTITUTIONALIST (Jan. 26, 2021), https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/; Randy E. Barnett,

Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution, ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/; Peter Berkowitz, *The Debate Over "Common-Good Conservatism,"* REAL CLEAR POLITICS (Jan. 16, 2022), https://www.realclearpolitics.com/articles/2022/01/16/the_debate_over_common-good_conservatism_147037.html; Jack Butler, *Adrian Vermeule Doesn't Know What Time It Is*, NAT'L REV. (Feb. 4, 2022), https://www.nationalreview.com/corner/adrian-vermeule-doesnt-know-what-time-it-is/; James Ceaser, *Adrian Vermeule's Sixteenth-Century Constitutionalism*, L. & LIBERTY (Apr. 16, 2020), https://lawliberty.org/adrian-vermeules-sixteenth-century-constitutionalism/; Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, ATLANTIC (Apr. 3, 2020); Richard A. Epstein, *The Problem with 'Common Good Constitutionalism'*, HOOVER INST. DEFINING IDEAS (Apr. 5, 2020), https://www.hoover.org/research/problem-common-good-constitutionalism; Matt Ford, *The Emerging Right-Wing Vision of Constitutional Authoritarianism*, NEW REPUBLIC, (Apr. 2, 2020), https://newrepublic.com/article/157132/emerging-right-wing-vision-constitutional-authoritarianism; John Hirschauer, *"Substantive Moral" Originalism?*, NAT'L REV. (Apr. 2, 2020), https://www.nationalreview.com/corner/substantive-moral-originalism/; Thomas Jipping, *The Constitution Must Control Judges, Not Vice Versa*, HERITAGE FOUND., LEGAL MEMORANDUM No. 262 (Apr. 7, 2020); Eric Levitz, *No, Theocracy and Progressivism Aren't Equally Authoritarian*, N.Y. MAG. (Apr. 2, 2020); https://nymag.com/intelligencer/2020/04/vermeule-catholic-integralism-theocracy-progressives-conservatives-constitution.html; Damon Linker, *When Conservatives Interpret the Constitution Like Progressives*, THE WEEK, (Apr. 6, 2020), https://theweek.com/articles/907011/when-conservatives-interpret-constitution-like-progressives; Jamie McGowan, *On the Tyranny of Rights*, IUS & IUSTITIUM (Sept. 20, 2021), https://iusetiustitium.com/on-the-tyranny-of-rights/; Dan McLaughlin, *"Common Good Constitutionalism" Is No Alternative to Originalism,* NAT'L REV. (Apr. 2, 2020), https://www.nationalreview.com/2020/04/common-good-constitutionalism-is-no-alternative-to-originalism/; Joe Patrice, *Hey, Can Someone at Harvard Law School Check in on Adrian Vermeule*, ABOVE THE LAW, (Apr. 6, 2020), https://abovethelaw.com/2020/04/hey-can-someone-at-harvard-law-school-check-in-on-adrian-vermeule/; Ramesh Ponnuru, *Vermeule's Latest*, NAT'L REV. (Apr. 6, 2020), https://www.nationalreview.com/corner/originalism-constitution-debate-adrian-vermeules-latest/; Ramesh Ponnuru, *A Conservative Legal Doctrine for the Age of Trump*, BLOOMBERG (Apr. 2, 2020), https://www.bloomberg.com/opinion/articles/2020-04-02/a-conservative-legal-doctrine-for-the-age-of-trump; David B. Rivkin, Jr. & Andrew M. Grossman, *The Temptation of Judging for "Common Good,"* WALL ST. J. (July 23, 2021), https://www.wsj.com/articles/supreme-court-conservative-liberal-originalist-vermeule-11627046671?mod=article_inline; Anthony Sanders, *The No-Good Constitution*, INST. FOR JUST. (Apr. 1, 2020), https://ij.org/cje-post/the-no-good-constitution/; Frank Scaturro, *Rejecting Originalism from Either Side of the Aisle Does Not Serve the Common Good*, NAT'L REV. (Apr. 3, 2020), https://www.nationalreview.com/bench-memos/rejecting-originalism-from-either-side-of-the-aisle-does-not-serve-the-common-good/; Lee J. Strang, *Rejecting Vermeule's Right-Wing Dworkinian Vision*, L. & LIBERTY (Apr. 2, 2020), https://lawliberty.org/rejecting-vermeules-right-wing-dworkinian-vision/; C. Bradley Thompson, *Tyranny and the Politics of the Common-Good*, AM. MIND (Oct. 9, 2020), https://americanmind.org/features/waiting-for-charlemagne/tyranny-and-the-politics-of-the-comon-good/; Deborah Cassens Weiss, *"Common Good Originalism Is Neither Originalist Nor a Good Way to Judge, Essay Says*, ABA J. (July 27, 2021), https://www.abajournal.com/news/article/some-conservatives-push-activist-brand-of-common-good-originalism;

Ed Whelan, *The Unsoundness and Imprudence of "Common-Good Originalism"*, PUB. DISCOURSE (Mar. 1, 2021),

offers his theory in full. It deserves the same serious, respectful attention as his *Beyond Originalism* article. It already has received some.[24] It should and will receive more. It is my hope that this Book Review will contribute to the debate.

My goal is neither to bury nor to praise his book or the theory it wears as a title. Instead, using the parlance of baseball, I will offer an "Attaboy!" when he gets a hit while identifying some places where he swings and misses or mistakenly leaves the bat on his shoulder. Professor Vermeule correctly identified some problems with Originalism, but his alternative is problematic and incomplete. In my opinion, the best way to analyze *Common Good Constitutionalism* is to ask how it differs from the theory to which it principally responds: Originalism, the conservatives' hoped-for alternative to government by the judiciary.[25]

Part I of this Book Review will give a scouting report on the new batter in the lineup and explain why it deserves a good look. Part II will analyze the hits, swings and misses, and pitches let go by in *Common Good Constitutionalism*. That part will also explain why it's not yet ready to be in the starting lineup.

I will not focus on the legitimacy or reasonableness of Originalism or its moral underpinnings. Other reviewers have already handled those tasks well, and I have little to add to their analysis.[26] Actually, until the publication of *Common*

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https://www.thepublicdis-course.com/2021/03/74424/ [https://perma.cc/FF7F-E5EK]; Keith E. Whittington, *What Good Is Common-Good Constitutionalism?*, WALL ST. J. (July 28, 2021), https://www.wsj.com/articles/supreme-court-judges-common-good-constitutionalism-11627422716; Keith E. Whittington, *Common Good Constitutionalism?*, VOLOKH CONSPIRACY (Mar. 31, 2020), https://reason.com/volokh/2020/03/31/common-good-constitutionalism/.

24. *See, e.g.*, Matthew J. Frank, *Calvinball Constitutionalism*, PUB. DISCOURSE (May 3, 2022), https://www.thepublicdiscourse.com/2022/05/82092/; R.H. Helmholz, *Marching Orders*, FIRST THINGS (May 2022), https://www.firstthings.com/article/2022/05/marching-orders; John O. McGinnis, *Originalism for the Common Good*, L. & LIBERTY (Apr. 28, 2020), https://lawliberty.org/book-review/originalism-for-the-common-good/; Jesse Merriam, *A Common Good Requires a Common People*, L. & LIBERTY (Apr. 28, 2022), https://lawliberty.org/book-review/a-common-good-requires-a-common-people/; James M. Patterson, *Uncommonly Bad Constitutionalism*, L. & LIBERTY (Apr. 28, 2022), https://lawliberty.org/book-review/uncommonly-bad-constitutionalism/; James R. Rogers, *Policing the Common Good*, L. & LIBERTY (Apr. 28, 2022), https://lawliberty.org/book-review/policing-common-good-constitutionalism/; Micah Schwartzman & Richard Schragger, *What Is Common Good?*, AM. PROSPECT (Apr. 7, 2022), https://prospect.org/culture/books/what-common-good-vermeule-review/; Paul Seaton, *Classical Historicism?*, L. & LIBERTY (Apr. 28, 2022), https://lawliberty.org/book-review/classical-historicism/; Andrew T. Walker, *Common-Good Communism?*, NAT'L REV. (Feb. 28, 2022), https://www.nationalreview.com/2022/02/common-good-communism/.

25. As a different Harvard Law School professor once described the work of the Supreme Court. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

26. *See, e.g.*, J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. (2022); J. Joel Alicea, *Why Originalism is Consistent with Natural Law: A Reply to Critics*, NAT'L REV. (May 3, 2022), https://www.nationalreview.com/2022/05/why-originalism-is-consistent-with-natural-law-a-reply-to-critics/; William H. Pryor, Jr., *Against Living Common*

Good Constitutionalism, debates over the relative benefits of Originalism versus Living Constitutionalism were at risk of becoming passé, and disputations over moral philosophy never seem to influence the outcome of cases in the Supreme Court. *Common Good Constitutionalism* hopes to change that. The publication of Professor Vermeule's book intentionally challenges the predominance of Originalism in conservative legal circles, so it makes sense to analyze why he believes that his new theory is superior to the one that has captivated conservative legal discussion for decades. Maybe he is on to something, or maybe Ben Affleck was a better Bat-man than he is. We will see.

For those who want to know the final score without waiting for the first eight innings to play out, let me say this: *Common Good Constitutionalism* is a valuable work, but it functions better as a codicil to an existing will rather than a complete rewrite of the testator's designs. The classical theories that Professor Vermeule believes should inform the meaning of the Constitution generally are too remote in space and time from what the Founders *did* to justify the outsized role that he would have them play in constitutional interpretation. Professor Vermeule also makes a rookie mistake by failing to grasp that the first rule of street fighting—for what other term better describes the battle between Originalists and Living Constitutionalists, especially at judicial nominations time—is not bring a weapon that can be used against you. From a Living Constitutionalism perspective, his approach is to die for: a way to achieve what advocates want while flying a different flag. He also leaves too many areas of law unaddressed for his submission to be on a par with Originalism and Living Constitutionalism. Consider just the rules regulating a government's reliance on race when allocating benefits and burdens, as well as the rules governing the investigative and trial processes in the criminal justice system. Professor Vermeule's failure to address those issues keeps his theory from serving as a new way of reading the Constitution *in crassa*. Nonetheless, even though *Common Good Constitutionalism* is not a completely fleshed out and usable methodological approach to constitutional interpretation, it is a very worthwhile addition to the ongoing discussion. The perfect should not be the enemy of the good, and his arguments will improve our thinking and policy-making.

I. THE NEW BATTER IN THE LINEUP

In the very first paragraph of *Common Good Constitutionalism*, Professor Vermeule starts by consulting history to justify his resort to classical legal principles.[27] He says that "American public law suffers from a terrible amnesia," because it "has all but lost the memory of its own formative influences in the

Goodism, 23 FED'T SOC'Y REV. 24 (2022); William Pryor Jr., *Politics and the Rule of Law*, HERITAGE FOUND. (Oct. 20, 2021), https://www.heritage.org/the-constitution/lecture/politics-and-the-rule-law; Steven D. Smith, *The Constitution, the Leviathan, and the Common Good*, Res. Paper 22-005, Univ. of San Diego Sch. of Law (2022) (SSRN-id4098880); *supra* note 23 (collecting sources).

27. Ironically, consulting history is a standard Originalist technique.

classical legal tradition . . . ."[28] Particularly important is "the *ius commune*, the classical European synthesis of Roman law, canon law, and local civil law."[29] That body of principles "was heavily influential in England" before the Revolution (albeit in a different form) and in this country from the Founding "well into" the twentieth century.[30] Due to that forgetfulness, "our public law now oscillates restlessly and unhappily between two dominant approaches, progressivism and originalism, both of which distort the true nature of law and betray our own legal traditions."[31] His alternative is common good constitutionalism. It would serve as "the matrix within which American judges read our Constitution, our statutes, and our administrative law."[32] The "centerpiece" of his new methodology is the principle that "law should be seen as a reasoned ordering to the common good, the 'art of goodness and fairness,' as the Roman jurist Ulpian put it . . . ."[33] That is, law should be viewed as "an act of purposiveness and reasoned rulership that promotes the good of law's subjects as members of a flourishing political community, and ultimately as members of the community of peoples and nations."[34]

What then is the "common good"? For anyone hoping that it would take the form of a Decalogue-like list of "Dos" and "Don'ts", or a Rosetta Stone usable for translation of classical morality into twenty-first century constitutional law, prepare to be disappointed. The "common good" is not a set of rules[35] or a school of Buddhist enlightenment that someone can pursue. Nor is it the "Force" that someone can "become one with" to guide his or her life (while avoiding the Death Star). It turns out that the "common good" has a more protean nature.

Common Good Constitutionalism states that the "common good," in part, is a desirable end-state, like a utopia—"the happiness o*r* flourishing of the community, the well-ordered life in the *polis*"[36]—and therefore is "the fundamental end of temporal government."[37] It is "the highest felicity in the temporal sphere," which includes "'private' happiness" and "the happiness of family life," but is not limited to them, considered singly or in aggregation, "no matter how great that number or how intense the preference for those goods may be."[38] The common good "includes those other foundational goods but transcends them as well."[39] It is "unitary and indivisible, not an aggregation of

28. VERMEULE, *supra* note 3, at 1.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 8–9.
36. *Id.* at 7, 28.
37. *Id.* at 10.
38. *Id.* at 28.
39. *Id.*

individual utilities," regardless of their number or size.[40] Like an economist's definition of a "public good," such as national defense, the common good is an "inherently non-aggregative," indivisible benefit that can be enjoyed by more than one person without reducing the amount available to other.[41] The common good "is the good proper to, and attainable only by, the community"—viz., "the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community."[42]

Common Good Constitutionalism is primarily concerned with the theory of "the common good in law."[43] In Professor Vermeule's words, the "main aim" of his theory "is not the liberal goal of maximizing individual autonomy or minimizing the abuse of power"—goals that he described as "incoherent," because there are "multiple risks of abuse of power by multiple actors, private and public," who "chronically trade off against one another."[44] Instead, the main goal "is to ensure that the ruler has both the authority and the duty to rule well," with a "corollary" being that "the central aim of the constitutional order is to promote good rule, not to 'protect liberty' as an end in itself."[45]

The starting point is the third-century Roman jurist Ulpian, who wrote that "[t]he basic principles of right are: to live [honorably], not to harm any other person, to render to each his own."[46] For purposes of the civil law, the common good has three components: (1) the societal conditions that enable communities to achieve social justice, (2) the commitment that government officials should strive to attain the community's betterment, and (3) the understanding that society's goal is a singular indivisible achievement "belonging jointly to all and several to each," rather than the sum of individual accomplishments.[47] For a "more specific" understanding of the elements of, and conditions for achieving, the common good, we should "look to the precepts of legal justice in the classic law."[48] Those precepts are "justice, peace, and abundance."[49] Given "modern

40. *Id.* at 7, 26.

41. *Id.* at 28.

42. *Id.* at 7, 26. Professor Vermeule eschews any consideration of the good beyond this life, but he does see it as essential to this temporal sphere. *Id.* at 29. In a more recent work, the professor described the common good as if it were oxygen for the legal system. Casey & Vermeule, *Myths*, *supra* note 18, at 109 (describing the term as "shorthand for a millennia-old legal framework, worked out over time by a succession of the greatest lawyers in Europe, the British Isles, and the Americas, and absolutely central to Western law as a whole.").

43. VERMEULE, *supra* note 3, at 30.

44. *Id.* at 37.

45. *Id.*; *see also id.* 37–38 ("Constraints on power are good only derivatively, insofar as they contribute to the common good; the emphasis should be not be on liberty as an object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler because protecting them promotes the flourishing of the community.").

46. *Id.* at 30.

47. *Id.* at 30–31.

48. *Id.* at 7.

49. *Id.* at 7, 31–35.

conditions," he adds "their modern equivalents and corollaries": safety, economic security, health, and "a right relationship to the natural environment."[50] A just state therefore must have "ample authority to protect the vulnerable from the ravages of pandemics, natural disasters, and climate change, and from the underlying structures of corporate power that contribute to these events."[51]

Yet, the common good is also a means of achieving a utopian-like end, "a type of *justification* for public action."[52] That is because "the common good must be

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50. *Id.* at 7, 36.

51. *Id.* at 37. Atop those concepts, Professor Vermeule also "elicit[s] . . . the key principles of *solidarity* and *subsidiarity*." *Id.* at 7. But they are, at best, pinch hitters. He leaves solidarity undiscussed except for a reference elsewhere. *Id.* at 7 n.18. Subsidiarity means that lower-level government, such as states, should handle problems, but if they cannot, the federal government must be able to step in and do so. *Id.* at 160–64. That concept matters only in emergencies. In addition, in the abstract that theory might represent a reasonable allocation of governing authority, but it ignores the federalism principles built into ou r Constitution's DNA; it fails to appreciate the Supreme Court's insistence that Congress does not have a "police power" like the one that the states enjoy, *see infra* note 111; and it fails to recognize how the Fourteenth Amendment was necessary to alter that scheme. *Compare*, *e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Congress can abrogate a state's Eleventh Amendment Immunity when invoking its power under Section 5 of the Fourteenth Amendment), *with*, *e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (Congress cannot abrogate a state's Eleventh Amendment Immunity when invoking its Commerce Clause power).

52. VERMEULE, *supra* note 3, at 8–9 ("The common good, on this view, is a type of *justification* for public action. It does not, by itself, prescribe any particular legal institutions or rules."). In a later article, Professor Vermeule (and Conor Casey) summarized the common good as follows:

> In the classical account, a genuinely common good is a good that is unitary ("one in number") and capable of being shared without being diminished. Thus it is inherently non-aggregative; it is not the summation of a number of private goods, no matter how great that number or how intense the preference for those goods may be. Consider the aim of a football team for victory, a unitary aim for all that requires the cooperation of all and that is not diminished by being shared. The victory of the team, as a team, cannot be reduced to the individual success of the players, even summed across all the players.
>
> In the classical theory, the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the polis. It is not that "private" happiness, or even the happiness of family life, is the real aim and the public realm is merely what supplies the lawful peace, justice, and stability needed to guarantee that private happiness. Rather, the highest felicity in the temporal sphere is itself the common life of the well-ordered community, which includes those other foundational goods but transcends them as well. Nor is this the same as the good of the state. The good of the community is itself the highest good for individuals and a critical element of their flourishing.
>
> To put it differently, human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities (including ruling authorities) within which humans are always born, found, and embedded. This is not at all to say, of course, that the individual should be absorbed into the political community or subjected to it. The end of the community is ultimately to promote the good of individuals and families, but common goods are real as such and

applied to a set of particular circumstances by means of the faculty of prudential judgment," which the professor identifies as "the virtue that is called 'regnative prudence'"—viz., the wisdom of governance for the betterment of the community.[53] Actions taken to advance the common good are "bounded and limited by the very tradition that gives [them] legitimacy"; that is, the governing authority must "always act through reasoned ordinances conducing to the common good, to public rather than private interest."[54] Neither "self-interested rule" nor "[r]ule for private benefit" nor "rule by faction" can achieve the common good.[55] Positive law, the *lex*, is a necessary ingredient of the common good.[56] Municipal laws are "a legitimate specification by the public authority of general principles of legal morality that need concrete embodiment, the specification of local rules that take account of local conditions," and therefore serve as an *ius civile* ("the law of the city").[57] But the *lex* (or *ius civile*) is not the whole shebang. Also relevant are "the general common law common to all

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> are themselves the highest goods for individuals. No subordinate goods can be fully enjoyed in a dysfunctional community.
>
> The common good, at least the civil or temporal common good, can be described in substantive terms in this way: (1) it is the structural political, economic and social conditions that allow communities to live in accordance with the precepts of justice, yielding (2) the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that (3) the common good is not the sum of individual goods, but the indivisible good of a community, a good that belongs jointly to all and severally to each. The conditions that allow communities to live in accordance with justice and secure the flourishing of citizens define the legitimate ends of civil government.

Casey & Vermeule, *Myths*, *supra* note 18, at 109–11 (footnotes omitted). A later description of the "common good," however, creates more confusion than clarification. *See id.* at 113–14 ("The good of the society in which one lives is part of the perfection of each individual as a social and political animal.") (footnotes omitted). That description is also useless as a means of resolving concrete legal issues, which is what Professor Vermeule hopes to do. *Id.* at 114 (noting that "our aim being to elucidate the classical legal underpinnings of common good constitutionalism within the terms of our professional competence as public lawyers."); *see id.* at 117 ("The common good requires authoritative institutions and rulers able to specify, apply, and enforce rules which govern and guide our pursuit of the goods of justice, peace, and abundance.") (footnote omitted). If all that he means is that the "common good" is what economists call a "public good," he would have made it easier on the reader to draw that analogy expressly.

53. VERMEULE, *supra* note 3, at 9 ("This prudence is by no means unstructured discretion. It is given shape by an account of the ends for which discretion must be used, that of promoting the good of the whole community as a community—not merely as an aggregation of individual preferences.").

54. *Id.* at 7; *id.* at 9 ("[D]iscretion may never transgress the intrinsic limitations of legal justice. The obligation of the public authority is to act according to law, meaning that the public authority must act through rational ordinances oriented to the common good.").

55. *Id.* at 27.

56. *Id.* at 9 (quoted *supra* note 53).

57. *Id.* at 8.

civilized legal systems (*ius gentium*) and principles of objective natural morality (*ius naturale*) . . . ."[58]

Common Good Constitutionalism interprets legal texts not simply by using the dictionary meaning of their terms or elementary rules of grammar, but "against the backdrop of, and if at all possible in accord with, the broader legal background of natural law, general and traditional legal principles, and the law of nations."[59]

Professor Vermeule does not reject *Marbury v. Madison's* doctrine of judicial review.[60] (How could he? In a book that cites a kitchen sink of "classical" authorities, he does not even mention the one Supreme Court decision that can bring the political branches to heel for trespassing where they do not belong under *any* theory of constitutional review, including his own. Interesting, no?) Professor Vermeule leaves room for judicial lawmaking in his theory[61]—perhaps enough to fill the Palace of Versailles, given his "expansive reading" of provisions such as the Commerce Clause, as well as his belief that the reach and meaning of the Constitution are not moored to its text.[62] But he does not anoint

58. *Id.*

59. *Id.*

60. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

61. *Compare* VERMEULE, *supra* note 3, at 39 (referring to the Preamble: "The fundamental teleological aims of government identified in the classical tradition are also the aims of our constitutional order. The text and structure of the Constitution itself should always be read in light of those aims, and construed so as to promote them."), *with Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also* VERMEULE, *supra* note 3, at 136 ("Orienting the relevant policies to the common good is a matter for political authorities, subject to appropriate judicial review[.]").

62. VERMEULE, *supra* note 3, at 38 ("How, if at all, are these principles to be grounded in the constitutional text and in constitutional legal sources? The sweeping generalities and famous ambiguities of our Constitution afford ample space for substantive moral readings that promote peace, justice, abundance, health, and safety, by means of that authority, solidarity, and subsidiarity. These highly general and abstract clauses have to be given some content or other, and it is—by their terms—impossible to do so without considering principles of political morality, which may of course include principles of role morality that allocate lawmaking authority among institutions."); *id.* at 40 ("Despite the cramped reading unnecessarily given to the [General Welfare] Clause in [United States v.] Butler, [297 U.S. 1 (1936)], the spirit of the more expansive, classical reading of the Clause has certainly triumphed in other forms. The expansive reading of the Commerce Clause given in McCulloch v. Maryland—and even more importantly, the general principle of developing constitutionalism that McCulloch embedded in our law, saying that our Constitution was 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'—did much of the same work. As we will *see*, the Court developed the law of federal powers over time to, in practice, all but equate federal power with the expansive police power of the states to promote health, safety, and morals—a conception drawn straight from the classical law.") (footnotes omitted); *id.* at 41 ("The broad generalities of our own constitutional texts will inevitably be saturated with principles of political morality, with some conception of the common good, of one sort or another."). At the end of the day, however, Professor Vermeule says that a textual basis for his theory is unnecessary. *Id.* at 41 ("More important still, thinking that the common good and its corollary principles have to be grounded in specific texts is a mistake; they

courts by placing them at the throne of government; like baseball, constitutional interpretation is a team sport.[63] That is somewhat surprising. As an abstract matter, Article III judges, life-tenured with a guaranteed salary, are more likely to avoid pursuing parochial social interests than elected officials, especially members of Congress, who are chosen by, and must stand for re-election before, the people holding those parochial interests. Nonetheless, he writes that "[i]t is not written in the nature of law that courts must decide all legal or constitutional questions."[64] Rather, the "precise allocation of law-interpreting power between courts and other public bodies is itself a question for "determination"—that is, "the process of giving content to a general principle drawn from a higher source of law"[65] (also known as "fixing" or "liquidating" the law[66]), such as the constitution.

The question that all the above raises is this: "Who cares?" A debate between supporters of Originalism and Living Constitutionalism as a matter of political and moral philosophy would inspire only yawns from anyone not committed to a purely scholarly life. For centuries, various scholars in philosophy, politics, and law have discussed how the state should ideally be theorized, constructed, and operated. Plato's *Republic* and Aristotle's *Politics* in ancient times, Thomas More's *Utopia* in the sixteenth century, John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia* in the twentieth century—those works and others. Why is *Common Good Constitutionalism* anything other than just another ballplayer in a long line of people the game has known, only some of whom made it to Cooperstown, even fewer of whom have had an influence on the game itself? *Common Good Constitutionalism* might or might not be persuasive as a work of jurisprudence or political theory (although Professor Vermeule eschews any intent in that regard[67]). That's a separate issue. But *Common Good Constitutionalism* is offered as "an account that aims to put our constitutional order, including the administrative state, in its best possible light, given our whole history—not merely our most recent history."[68] His retrospective look is also necessary for his prospective guidance. "The point is not to reclaim the insights of the classical tradition out of nostalgia," he explains,

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can be grounded in the general structure of the constitutional order and in the nature and purposes of government.").

63. *Id.* at 12 ("[C]ourts need not be the institutions charged with directly identifying or specifying the common good."); *id.* at 43 ("One sometimes encounters an odd assumption that common good constitutionalism entails that judges should decide everything. That isn't right, it confuses two distinct issues, one of interpretive method and one of institutional allocation . . . . In fact, the best interpretation of our constitutional practices . . . is that judges do and should broadly defer to political authorities, within reasonable boundaries, when legislative and executive officials engage in such specifications.").

64. *Id.*

65. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 299 (1803).

66. WURMAN *supra* note 6, at 94–96.

67. VERMEULE, *supra* note 3, at 4–5.

68. *Id.* at 5.

"but because doing so holds out the greatest promise for a principled and coherent interpretation of our current constitutional order as well as its history."[69]

The two currently predominating theories—Originalism and Living Constitutionalism—generate excitement because they offer competing visions of how constitutional interpretation should be done, and because whichever side prevails in that contest has a decided advantage on how the Constitution will be applied. The prospect for achieving social change through courts instead of legislatures has the effect of energizing different political and social groups to pursue litigation rather than old-fashioned politicking. Having a Supreme Court that is philosophically inclined to read the Constitution the same way that advocates want it to be applied means that litigators always start out with a runner in scoring position. That is why this debate matters.

Will Professor Vermeule's theory make a difference to that debate? If it will, then scholars and judges should engage with his theory. Of course, holding an author to that standard is one that few could meet; sometimes, only time will tell. Yet, if we know now that his book won't or is not likely to gain traction in the legal community—and, by "traction," I mean the willingness of the Supreme Court to use his methodology "to boldly go" where neither Originalism nor Living Constitutionalism has gone before—then all it might accomplish is to generate debate in the academy over yet another offering on the esoteric subject of constitutional law's interpretive methodology. Will *Common Good Constitutionalism* ultimately just take its place among the volumes of books on the shelves of law school libraries offering theories that once streaked across the sky like a meteor, but burned out when they hit reality's atmosphere? To answer that question, we need to scrutinize his theory.

II. THE HITS, SWINGS AND MISSES, AND PITCHES TAKEN BY COMMON GOOD CONSTITUTIONALISM

Dissatisfied with the reigning alternatives to constitutional interpretation, Professor Adrian Vermeule threaded his way between (or around) Originalism and Living Constitutionalism. He developed a Clintonian "third way" (although he likely would hate my use of that term). He doesn't quite say "*A plague o' both your houses!*"[70] (That would be a bit tasteless, given the recent pandemic and all.) He does say that both Originalism and Living Constitutionalism are diseased, and their supporters need some serious medicine (or perhaps just some cold water). The remedy he prescribes is to use the teachings of classical moral philosophy to guide law- and policymaking to achieve a "common good" whenever officials in all branches of the federal, state, and local governments engage in legal analysis or execute the powers of their offices.

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69. *Id.*

70. WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act III, sc. 1, l. 91.

Professor Vermeule's book hit the legal world with a haymaker unseen since 1980, when Professor John Hart Ely published *Democracy and Distrust*, his own new approach to constitutional law decision-making.[71] Professor Ely believed that courts should not use the Due Process Clause as a source for substantive judicial creativity because there was no coherent methodology for divining what would and would not be constitutional under that test.[72] The result was that judges were free to impose their own views on the nation in the guise of interpreting the Constitution. Instead, constitutional law should focus on the political process and ensure that it is open to all.[73] Professor Vermeule comes at the problem from the opposite direction. He is troubled by the widespread agnosticism toward the betterment of society entailed by adherence to Originalism, because it is an entirely positivistic methodology that can lead to political and moral decay if that is the teaching of a legal text.[74] Laws—perhaps the Constitution above all—are not always clear as to their precise meaning. Only background moral principles can guide the reader toward the proper level of generality necessary to understand how they apply to scenarios unforeseen by the Framers. To remedy that problem, the law needs an injection of "common good conservatism" to reorient our government and the public toward advancing the interests of the entire polity, not just its separate "factions."[75]

Whether they are on the Right or the Left (there is considerable crossover), most reviewers of *Beyond Originalism* and *Common Good Constitutionalism* have written either hagiographic or condemnatory reviews.[76] Each side goes too far, in my opinion. Professor Vermeule is right about the unfortunate decisions

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71. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

72. *Id.* at 11–73.

73. *Id.* at 73–104.

74. VERMEULE, *supra* note 3, at 37 ("Promoting a substantive vision of the good is, always and everywhere, a proper function of the political authority. Every act of public-regarding government has been founded on such a vision: any contrary view is an illusion. Liberal and libertarian constitutional decisions that claim to rule out 'morality' as a ground for public action are incoherent, even fraudulent, for the rest on merely a particular account of morality, an implausible account.") (footnote omitted).

75. To quote James Madison from THE FEDERALIST PAPERS No. 10 (Clinton Rossiter ed., 1961).

76. I must say that not every criticism of Professor Vermeule's work has been completely respectful, which might explain his reaction to some of them. *See, e.g.*, Casey & Vermeule, *Argument by Slogan*, *supra* note 18. There is more than a whisper of anti-Catholicism in some challenges to Professor Vermeule publications on this subject. *See, e.g.*, Dan McLaughlin, *The New Republic's Shameful Anti-Catholic Screed*, NAT'L REV., Apr. 2, 2020, https://www.nationalreview.com/2021/02/the-new-republics-shameful-anti-catholic-screed/ (discussing the general phenomenon). I once was but no longer am a Catholic (I'm now a Methodist, with a side-order of Buddhism), but I am troubled by the still-widespread acceptance in some circles of this type of bias. It seems that anti-Catholicism is the only acceptable form of bigotry left in America today, probably because of the Catholic Church's opposition to abortion and gay marriage. The Framers tried to take a stand against such bigotry, at least with respect to the federal government. U.S. CONST. art. VI, cl. 3. But no one can altogether extirpate it from life, despite politicians' specious claims to the contrary.

by the Supreme Court in the 1960s and 1970s that use the nebulous term "privacy" taken from the *zeitgeist* to cloak individual moral judgment with constitutional protection, and he is right about the need to orient society toward overall public advancement, even if that requires individual sacrifice. Some of his individual arguments swing and miss, but that is true about Originalism, Living Constitutionalism, and every other methodological approach to constitutional law. That alone is not a fatal flaw. What are such defects, however, are two other failures: (1) the failure to recognize that the Constitution is a charter allowing voters and politicians to decide where the nation would go, with only a hope—not a command—that morality will guide them, and (2) the failure to appreciate Rule Number 1 in any self-defense class: namely, don't carry a weapon that you can't hold on to, because, if you lose it, your assailant will use it against you. Finally, Professor Vermeule lets too many subjects go unaddressed to serve as a universal field theory of constitutional interpretation.

But no one at Cooperstown hit safely every time. Even top-flight batters failed far more often than they succeeded.[77] So, let's start with Professor Vermeule's hits.

A. The Hits

Professor Vermeule is right that Originalism doesn't precisely tell a reader at what level of generality the Constitution should be read. Take the Fourth Amendment. It applies to "persons, houses, papers, and effects."[78] Does it also apply to an office, a factory, or other commercial premises? The Supreme Court has said that it does, relying on "the origin" of the Fourth Amendment.[79] But the Court has not persuasively explained why all of One World Trade Center, let alone Google's entire Mountain View campus, fits within one of the four categories in the text.[80] The same is true with respect to other provisions, such

77. Ty Cobb leads with a .366 career batting average. MLB Career Batting Leaders, ESPN, https://www.espn.com/mlb/history/leaders (last visited Apr. 14, 2022).

78. U.S. CONST. amend. IV.

79. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Camara v. Municipal Ct., 387 U.S. 523 (1967).

80. In *Barlow's*, Justice Byron White (author of *Camara*) explained the extension of the amendment as follows:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed 'general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed.' The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. '[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the

as the Fifth Amendment Self-Incrimination Clause. Textually speaking, it should apply only when someone is "compelled in any criminal case to be a witness against himself."[81] Yet, the Court has created "prophylactic rules" designed to protect the core guarantee, rules "not themselves rights protected by the Constitution" but designed as a perimeter around the rights that are.[82] The result is that a person in a civil proceeding can invoke the privilege unless he is first granted immunity against the later use of his statement in a criminal case.[83] That result makes sense as a policy matter. It keeps the government from ginning up a demand for information from a party, ostensibly for use in a civil proceeding that later, quite coincidentally of course, works its way into a prosecutor's case-in-chief against the defendant. But Originalism doesn't tell us if and precisely when such prophylactic rules are appropriate. That can be a difficult interpretative problem.

Professor Vermeule is right again by pointing out that the Supreme Court's Free Speech Clause jurisprudence is not remotely originalist.[84] In 1964, the Warren Court (per Justice William Brennan) made up from thin air the *New York Times Co. v. Sullivan* libel standard,[85] and the Burger, Rehnquist, and Roberts Courts have marched in lockstep even since.[86] Even Justice Scalia has followed that parade.[87] (*Say it ain't so, Nino!*[88]) Perhaps the Court does not want to pick

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> King to search at large for smuggled goods.' Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Barlow's, Inc., 436 U.S. at 311–12. That explanation reads more like the excuse offered by someone who has been caught red-handed of taking an extra cookie than a candid justification for covering up a mistake that the First Congress made when it drafted what became the Fourth Amendment. An honest explanation would have forced the Court to note the First Congress' omission and offer a persuasive reason why the Court can legitimately read "house" to include "commercial buildings."

81. U.S. CONST. amend. V.

82. Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality opinion) (punctuation omitted).

83. *Id.* at 770–71; *see also* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."). The amendment bans government policies that officially compel someone to forfeit his self-incrimination rights on pain of, for example, being fired. *See, e.g.*, Lefkowitz v. Cunningham, 431 U.S. 801, 805–806 (1977); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968).

84. VERMEULE, *supra* note 3, at 167–69.

85. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

86. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–72 (2010) (opinion by Roberts, C.J.) (ruling that animal "snuff films" are protected by the First Amendment).

87. *See, e.g.*, Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 790 (2011) (Scalia, J.) (ruling that violent video games are entitled to First Amendment protection). Justice Scalia also joined the Chief Justice Robert's opinion in *Stevens*.

88. Charles Boswell & Lewis Thompson, *Say It Ain't So, Joe*, AM. HERITAGE MAG. (1960), https://www.americanheritage.com/say-it-aint-so-joe (last visited Mar. 5, 2023).

a fight with people who buy ink by the barrel, paper by the ton, and video time by the gigabyte. The Free Speech Clause is for Originalists what the Battle of Fredericksburg was for the Union Army and Dien Bien Phu was for the French: a big loss. Accept it and move on.

Professor Vermeule is also spot on by despairing about the widespread abandonment of any felt responsibility among the vast, vast majority of the citizenry to work toward the betterment of the polity, the community, or the public—anyone, in fact, other than themselves. No society can survive without the support of its citizens. Sometimes that support must include actions that put someone, or many someones, at grave and immediate risk of death or serious bodily harm. Today, most people disavow any such sense of responsibility. Most of our citizenry holds an attitude saying, "That is what I pay other people to do." Public service, especially tasks posing a risk of injury or death, in pursuit of a greater common good for common men and women is the last thing on their mind. Self-improvement, self-satisfaction, self-gratification—those are goals worth achieving. Self-sacrifice is for losers.

Yet, more than a century ago—in a context exquisite for its contemporary relevance: mandatory public inoculation against history's greatest pathogenic scourge, smallpox—the Supreme Court recognized that each of us as citizens bears the responsibility of making certain sacrifices for the common good. As the Court wrote in *Jacobson v. Massachusetts*:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others . . . . The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.[89]

Thirteen years later, the Court reiterated that point in *Arver v. United States* as part of the rationale for upholding the constitutionality of the Great War draft, stating that "[i]t may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."[90]

89. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (punctuation omitted).

90. Arver v. United States, 245 U.S. 366, 378 (1918).

As the Court elaborated in response to the claim that a draft was a "involuntary servitude" forbidden by the Thirteenth Amendment:

> Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.[91]

How times have changed. For more than half a century, the nation has gone in an entirely different direction. Gone is the belief that public service, let alone military service, is a noble undertaking for everyone in every class of society, regardless of where you were born, whether Sutton Place, New York, or Clairton, Pennsylvania. Liberalism, Libertarianism, Libertinism, and Leftism—the four horsemen of the Twenty-First Century Apocalypse—have reigned. They are ubiquitous and have a corrosive effect on the public's acceptance of the obligation that Americans have long felt that each of us, when called upon, must serve the public in one way or another atop the legal duty to pay taxes and abide by the law. Sadly, the number of people who embrace that belief today is a paltry one.[92]

The problem starts at the top. Being President is a form of public service, and it indisputably places enormous physical and mental stresses on whoever holds that office. That is especially true nowadays given the media's 24/7/365 news (err, entertainment) cycle and the need felt by print and electronic media outlets to pick a side and thereafter preach to its audience (a/k/a choir). But the stresses felt by Presidents do not compare to the ones that domestic life imposes on others, like police officers. They are "the foot soldiers of an ordered society,"[93] yet because of the crimes of a few committed in 2020 the remainder have been not just vilified but also killed in increasing numbers ever since.[94] Presidents

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91. *Id.* at 390.

92. *See, e.g.*, Matthew Hennessey, *Most Democrats Say They'd Flee, Not Fight, a Ukraine-Style Invasion*, WALL ST. J., Mar. 10, 2022, https://www.wsj.com/articles/home-of-the-brave-rip-war-poll-democrats-fight-enlist-vietnam-soldiers-invasion-ukraine-patriotism-culture-war-isolationist-military-recruitment-11646929607.

93. Roberts v. Louisiana, 431 U.S. 633, 642 (1977) (Rehnquist, J., dissenting).

94. The number of police officers shot in the line of duty increased 63 percent since April 1, 2020, with thirty-two officers shot and five killed, in 19 separate ambush-style attacks over the last year. Nat'l Fraternal Order of Police, Monthly Update, Apr. 1, 2022, https://national.fop.net/report-shot-killed-20220401#page=2 (last visited Apr. 23, 2022); *see also* Anders Hagstrom, *FBI Director Says Violence Directed at Police Officers Unlike Anything He's Seen Before*, FOX NEWS, Apr. 25, 2022, https://www.foxnews.com/us/fbi-christopher-wray-police-officer-murders. The article states:

> FBI Director Christopher Wray addressed the skyrocketing rate of murders against police officers Sunday, saying the surge is far outpacing general violent crime . . . . "Violence

don't face the same risk. They have scores of U.S. Secret Service agents to keep them physically safe.[95] Urban police officers and federal agents might have one partner or a radio to call for back-up. So, Professor Vermeule is right to urge the public and elected officials to consider the "common good" when exercising the powers of their offices and to fault them when they act with some other goal in mind. We need to do better in that regard.

But that rule goes too far in two places: (1) elected officials might violate classical principles of governance when they fail to work on behalf of the nation's common good, but do not act unconstitutionally when they have ignoble reasons for their conduct, and (2) the injunction to work toward the common good does not apply to judges, whose role is narrower than politicians' function. That is where Professor Vermeule swings and misses, as the next subsection explains.

B. The Swings and Misses

1. The Preamble

Generally speaking, the beginning is as good a place as any to start, so consider the Preamble to the Constitution. Professor Vermeule argues that the Preamble is a textual source of the nation's "common good" goals.[96] Because, after *Marbury*, Article III contemplates the existence of (and the common good can find a use for) judicial review, the courts have a role in ordering the government to achieve them.[97] The Preamble sets forth legitimate, sensible, time-tested common good ideals for all government officials, including judges, rigorously to follow and to be held accountable by each other and the public when they do not. That argument is unpersuasive.[98]

> against law enforcement in this country is one of the biggest phenomena that I think doesn't get enough attention," Wray said, adding that officers are being murdered at a rate of nearly "one every five days."

Id.

95. *See* 18 U.S.C. § 3056(a)(1) (2018).

96. *See* VERMEULE, *supra* note 3, at 39 ("Only when we read the Preamble against the backdrop of the classical tradition can we *see* that, properly understood, it aims to assert a political authority for the purpose of promoting justice, peace ("tranquility"), and the flourishing of the res publica ("the general welfare"). These are of course just the classical trinity of peace, justice, and abundance, merely stated and ordered in a different form, but not essentially different.").

97. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

98. Interestingly, some Originalists also start with the Preamble in their response to Professor Vermeule. *See, e.g.*, David Forte, *Originalism and Its Discontents*, L. & LIBERTY, May 6, 2021, https://amgreatness.com/2020/07/30/the-crisis-of-the-conservative-legal-movement/; Hammer, *supra* note 5, at 927–32; Josh Hammer, *Who's Afraid of the Common Good?*, AM. MIND (Nov. 23, 2020), https://americanmind.org/salvo/whos-afraid-of-the-common-good/. They point to the Constitution's use of the word "this" in the Preamble and elsewhere. U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish *this* Constitution.") (emphasis added); *id.* art. II, § 1, cl. 5; *id.* art. III, § 2, cl. 1; *id.* art. VI. They argue that Originalism is a preferred interpretive methodology because the term "*this* Constitution" fixes the meaning of the charter as

The Preamble states that Constitution's first goal is to create a "*more perfect* Union." Because nothing can exceed perfection, that goal is linguistically and logically impossible, which means that the Preamble's own words proves that its text can't be read literally. Metaphorically, perhaps, but that reading does not help either side of this debate. Metaphorical interpretations should be an anathema to Originalists because they lead to constitutional rights to welfare and medical care, which the Supreme Court has consistently rejected.[99] They also don't help Common Good Constitutionalists because they do not unerringly point to the particular goals—such as the overthrow of the Supreme Court's "privacy" decisions—that the latter want. The Preamble also should not be interpreted as a separate basis of, or goals for, the use of federal power. If it did, that conclusion would render superfluous the specification in Article I of the particular authorities Congress possesses[100] and in Article II of the ones that President may exercise.[101]

The Framers likely intended a far more prosaic role for the Preamble. It serves the same role as broad statements of purpose in documents establishing a corporation: namely, to avoid a later claim that the entity has acted in an ultra vires fashion.[102] Or perhaps the Preamble does no more than signal (as every fan of science-fiction films has heard before), "We come in peace. We mean you no harm." Otherwise, the Preamble has no practical, operational consequence; certainly, none that the Supreme Court has heeded—which might

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of 1787, when it was drafted, or 1789, when it was ratified and took effect. I find that argument unpersuasive as well, for several reasons. There was no debate at the Philadelphia Convention over the methodology of constitutional interpretation. It took another 16 years after the Convention adjourned before *Marbury* even made judicial review an issue for the Supreme Court. The Supreme Court decisions like *Roe* that triggered this debate lay 180 years in the future. Consider also that the present-day disagreement between Originalists and Living Constitutionalists was not an issue that gave rise to the Revolution or led the failure of the Articles of Confederation. Indeed, those terms had not yet even been invented. Finally, the Framers declined to create a political system that, like the New York Constitution of 1777, which used a Council of Revision with the power to revise and veto legislation. *See* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 237–57 (1989); Rehnquist, *supra* note 6, at 694–706. They did not rely on matters like the difference between "*this* Constitution" and "*the* Constitution." In sum, it makes far more sense to read the term "this" as a means of distinguishing the charter that was the Convention's work product from the earlier one, the Articles of Confederation, which also effectively was a "constitution," than as imposing particular interpretive methodology on the nation.

99. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317–18 (1980) (ruling that the Due Process Clause does not create a right to have the government fund decisions that it cannot prohibit someone from making).

100. U.S. CONST. art. I, § 8, cls. 1–18.

101. U.S. CONST. art. II, §§ 2–3.

102. The Framers would have been aware of that practice. *See* Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2182 (2019) ("[T]he general legal idea that agents had an obligation to hew closely to their authorization and not veer outside it was well established in the common law at the time of the framing.").

explain its value to Common Good Constitutionalists. Because the Supreme Court has ignored it, there are no precedents to distinguish away.

2. The Text of the Constitution and the Common Good

My major criticism (and the most surprising feature) of *Common Good Constitutionalism* is that it does not adequately address strong implications of the text of Articles I and II that the Constitution does not force a morality of any type on the people or their representatives. Just as actions speak louder than words, what the Constitution *did* is more significant than the words it used to get there. Step back from the individual words and passages that create its text and consider their overall effect. (And do not get me started by talking about any "broad structural postulates and background principles, derived from the classical tradition and the natural law. . . ."[103])

The text of Articles I and II reveals that the charter did not seek to compel the nation to choose any particular moral code—whether from the common or natural law—but to establish an elected government—a Congress and the Presidency—for them to make those choices in the hope (not the certainty) of uniting the states into a workable nation. The Framers left to the political institutions the Constitution created the task of deciding which moral principles should guide their decision-making and how that should be done. Indeed, insofar as the Constitution addressed morality at all, it decided that no religious judgments should disqualify someone as a matter of law from holding federal office.[104] *Common Good Constitutionalism* does not give sufficient weight to the Constitution as a charter of government rather than as an invitation for courts to impose on the public effectively unalterable moral judgments that our legislators should make and unmake as the public sees fit.

The story of the drafting, adoption, and ratification of the Constitution is well known.[105] The Framers arrived in Philadelphia with instructions to recommend amendments to the Articles of Confederation. The states' internecine economic warfare combined with a feeble central government kept the thirteen states from uniting into one consolidated nation.[106] Rather than compile amendments, the

103. VERMEULE, *supra* note 3, at 41.

104. U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

105. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1992); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788 (2011); SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 171–281 (1965); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–87 (1998).

106. MICHAEL S. GREVE, THE CONSTITUTION: UNDERSTANDING AMERICA'S FOUNDING DOCUMENT, 6 (2013) ("The convention was a response to a failed political experiment. The Articles of Confederation, under which the states had operated since 1781, had saddled the union with grave political problems—for example, a mountain of public debt at level that tends to spell public rebellion and the ruin of nations."); *see also, e.g.*, THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

members of the Convention of 1787 devised an entirely new governmental framework, one that separated powers among three branches of the central government while also dividing authority between the state and federal governments. It was the most important frolic and detour in the nation's history, and it helped give birth to the world's oldest, still-functioning, written constitution.

Once you get past the individual words and clauses, what should be obvious to everyone is that the Constitution was a charter of government. It created a legislature roughly similar to the English Parliament; a President, not a king, to manage the central government; and a Supreme Court to resolve legal disputes over matters of federal law (with an executive bureaucracy and some lower courts thrown in). What it did to achieve those results is more important than any reified, long-term, hoped-for goals the new government would seek to accomplish. Of the Constitution's seven articles, Article I is not only the first component with any practical effect; it also is where the Convention of 1787 spent most of its time and effort.[107] Its text is where analysis should begin, and I will start there.

Article I created a "Congress" as a bicameral legislature consisting of a Senate and House of Representatives.[108] The article specified who may serve in each branch[109] and gave each chamber the power to govern itself.[110] Rather than vest Congress with the same inherent "police power" that every state enjoys,[111] the

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107. *See* JACK RAKOVE, ORIGINAL MEANINGS ch. VI (2010) ("Debating the Constitution").

108. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

109. *See* U.S. CONST. art. I, § 2; *id.* amend. XVII.

110. *See* U.S. CONST. art. I, § 5, cl. 1. As the Constitution states:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Id.; id. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings[.]").

111. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905) (stating that "what is commonly called the police power" empowers a state "to enact quarantine laws and 'health laws of every description[]'" that "will protect the public health and the public safety.") (citation omitted). Professor Vermeule is right that the "'[p]olice power' is nowhere mentioned in the in the written Constitution at the federal level," but he is wrong that it "is broadly recognized as a matter of federal law, including due process, as the measure of state authority." VERMEULE, *supra* note 3, at 41. State constitutions decide what police power states have; the U.S. Constitution does not. If Vermeule means that states violate the Due Process Clause by exceeding their authority under state law, he should consider the Supreme Court precedents that a state's violations of its domestic laws do not have that effect. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 119 (1992) ("Although the statute [42 U.S.C. § 1983 (2018)] provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law."); Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); Engle v. Isaac, 456 U.S. 107, 120–21 & n.21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process.") (citation omitted); Spencer v. Texas, 385 U.S. 554, 564 (1967)

Framers limited the range of issues that Congress may address by specifying what those subjects are.[112] Congress may regulate the conduct of a state or private party only by identifying a specific justification. Article I identifies those justifications by granting Congress authority to legislate with regard to certain discrete subjects,[113] as well as authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its specific powers and those granted to any other central government official.[114] What the Framers gave with one hand, however, they took away with the other.

With a nod toward the apothegm stating "[t]hat government is best which governs least,"[115] the Founders made it difficult for the federal government to engage in lawmaking. Articles I and II limit tenure in the House, Presidency, and Senate to two, four, or six years, respectively.[116] Members of Congress may serve as often as their electorates choose,[117] but a person can be President for only two full terms.[118] Article I also defines a rigorous process for Congress to exercise its legislative power in any field assigned to it. For a "Bill" (and "[e]very Order, Resolution, or Vote" requiring the approval of both chambers)[119]

("It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."); Gryger v. Burke, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.").

112. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 618 (2000) (noting that "the Founders denied the National Government" the "police power"); United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This [federal] government is acknowledged by all to be one of enumerated powers.").

113. *See* U.S. CONST. art. I, § 8, cls. 1–17.

114. *See* U.S. CONST. art. I, § 8, cl. 18.

115. *See* HENRY DAVID THOREAU, RESISTANCE TO CIVIL GOVERNMENT (1849).

116. *See* U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years). In the case of the President a later amendment capped the number of terms (and years) anyone can serve in that position. *Id.* amend. XXII, § 1.

117. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (ruling that the states may not limit the number of terms that members of Congress may serve).

118. A Vice-President who ascends to the presidency may serve two additional years. U.S. CONST. amend. XXII, § 1.

119. *See* U.S. CONST. art. I, § 7, cl. 2–3. The Congress need not present every proposal to the President. The most common example is a joint agreement to adjourn for more than three days, *see id.* art. I, § 5, cl. 4, but the most important example is the submission to the States of a proposed amendment to the Constitution, *see id.* art. V; Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). The Constitution also vests certain powers in one chamber. The House alone has the power to initiate impeachment. U.S. CONST. art. I, § 2, cl. 5. The Senate alone has the power to try impeachments, to approve or reject presidential appointments, and to ratify treaties. *Id.* art. I, § 3, cl. 6; *id.* art. II, § 2, cl. 2. *See generally* INS v. Chadha, 462 U.S. 919, 955–56 n.21 (1983) (collecting authorities).

to become a "Law," Article I requires that the House and Senate pass the same text, that they transmit it to the President for review, and that the President sign it (or return it to the Congress for an opportunity to override the veto).[120] That's a lot of moving parts, all of which must align to pass legislation. Only "Laws of the United States" are "the supreme Law of the Land," and members or the President can sidetrack a "Bill" in numerous ways before it become a "Law."[121]

The Framers devoted less time to drafting Article III, because they saw it as the least powerful branch of the three.[122] Article III creates a "Supreme Court of the United States" and empowers Congress to create whatever lower federal courts, with whatever authority, it deems necessary.[123] All judges, however, hold office during "good Behavior," which effectively guarantees them salaried life tenure.[124] The authority of federal courts is limited to the resolution of "Cases" and "Controversies" arising under the Constitution or other federal law.[125]

Guardrails limit the role that each branch may play. Congress may pass a law; the President may veto any bill that Congress passes (and Congress may override that veto, to turn a bill into a law); and the President may (indeed, must) execute the bills he signs into law. The Supreme Court may interpret the Constitution and those laws but only in the course of adjudicating "Cases" or "Controversies."[126] But each branch must stay in its lane. Congress cannot

120. *See* U.S. CONST. art. I, § 7, cl. 2–3; *Chadha*, 462 U.S. at 944–51. If the President vetoes the bill, Congress has the opportunity to override that veto. *See id.* at 951.

121. U.S. CONST. art. VI, cl. 2.

122. *See* RAKOVE, *supra* note 107, at 53–93 (noting that the Convention debated the Constitution from May to September), 123 (same, the Convention discussed Article III for four days), 256 (same, the Convention considered the presidency from June 1–6, July 17–26, and September 4–8); *cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

123. *See* U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

124. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

125. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof; —and foreign States, Citizens or Subjects."); *id.* amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

126. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity,

administer the laws,[127] appoint the people who do,[128] or adjudicate disputes arising under them.[129] Those are jobs for the President and judiciary. The President may veto bills, and the Supreme Court can review one that a President signs, but neither one may legislate. That job is for Congress. The President may not fund activities even if he deems them essential to the operation of the government, and the Supreme Court cannot pass a spending bill even though the Constitution guarantees that justices must be paid.[130] Only Congress can appropriate funds.[131] However much Congress or the Supreme Court might deem necessary a particular military action, the President, as "Commander in Chief of the Army and the Navy of the United States," has plenary authority to decide how to manage a "War"[132]—although he cannot declare one. That is Congress's responsibility.[133] Regardless of how Congress and the President might want a particular case to be decided, the "judicial Power" is for the federal courts alone to exercise, not only insofar as they may say "what the law is,"[134] but also by issuing a binding judgment that the President must execute.[135]

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arising under this Constitution, [and] the Laws of the United States, and . . . to Controversies to which the United States shall be a Party . . . .").

127. *See* U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

128. *See* U.S. CONST. art. II, § 2, cl. 2 (expressly grants the Senate alone the privilege of offering "Advice and Consent" to the President's appointments and implicitly prohibits members of either chamber from selecting executive branch officials); Bowsher v. Synar, 478 U.S. 714, 726 (1986); Buckley v. Valeo, 424 U.S. 1, 138–39 (1976); Myers v. United States, 272 U.S. 52, 161 (1926).

129. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, and . . . to Controversies to which the United States shall be a Party . . . ."); INS v. Chadha, 462 U.S. 919, 960–67 (1983) (Powell, J., concurring) (concluding that Congress cannot adjudicate immigration disputes).

130. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

131. *See* U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

132. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *Gunfight at the New Deal Corral*, 19 GEO. J.L. & PUB. POL'Y 477, 481–83 (2021).

133. *See* U.S. CONST. art. I, § 8, cl. 1, 11 ("The Congress shall have Power . . . [t]o declare War . . . .").

134. *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

135. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146–47 (1872) (ruling that when Congress "prescribe[s] rules of decision to the Judicial Department of the government in cases

Neither Congress nor the President can tell the Supreme Court what judgments to enter.[136] All those restrictions are legal rules or principles built into the architecture of the new government.

I apologize if this summary is pedantic to anyone familiar with constitutional law. The point I am trying to emphasize is that the Constitution was adopted as a framework for the governance of the new nation, particularly the new central government, not as a vehicle for the imposition of any particular morality upon the public—good, bad, or neutral. Yes, the Framers were classically educated men. Yes, in the eighteenth century all classically educated men believed in the existence of, and the need to protect, natural rights. Yes, classical, natural rights theory taught that there was a difference between the *lex* (enacted laws) and the *ius* (background principles of natural law) and that the latter should (or must) influence government decisions regarding what *lex* to adopt or how adopted *lex* should be interpreted. And, yes, the Framers and average Americans likely believed that their elected representatives would never trespass on the rights given them by their Creator and articulated in the Declaration of Independence.[137] But the charter of government that the Framers adopted to make all that happen did not create a procedure that would guarantee any such result.

The Constitution allows for politics to play an important role in the legislative process, and politics does not guarantee that a law will always advance the nation's welfare rather than the interests of the politicians who voted for it or

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pending before it," then "Congress has inadvertently passed the limit which separates the legislative from the judicial power."); *see also, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222–23 (1995) ("The essential balance created by this allocation [between Articles I and III] of authority was a simple one. The Legislature would be possessed of power to 'prescribe the rules by which the duties and rights of every citizen are to be regulated,' but the power of 'the interpretation of the laws' would be the proper and peculiar province of the courts . . . . The Judiciary would be, 'from the nature of its functions . . . the [department] least dangerous to the political rights of the constitution,' not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. Thus, 'though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislative and executive.'") (punctuation omitted).

136. *See Klein*, 80 U.S. at 146.

137. *See* Paul J. Larkin, Jr., *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 21–22 (2016) ("The Colonists' decision to break from England was different in character from contemporary revolutions. Seeing English customs and rights as an invaluable benefit, more valuable than even England's military or commercial power, the Colonists brought their legal traditions with them to the New World. One of them was the "rule of law." Americans in the seventeenth and eighteenth centuries believed in the concept of "higher-law constitutionalism," the principle that the Crown and Parliament alike were obligated to follow the "natural and customary rights recognized at common law." Belief that law traced its legitimacy to natural law, as well as to the unwritten customs of the people, along with the expectation that law could protect against government tyranny, had become part of the shared heritage of the English. Like their countrymen across the Atlantic, the Colonists put their reliance on the law because they believed that only it could shield them from arbitrary government power.") (footnotes omitted).

their constituents. A variety of factors can motivate legislators to act one way or another, such as their constituents' opinions, regional interests, interest group requests, past voting record, re-election needs, individual higher-office ambitions, party loyalty, personal favors, self-preservation, or (yes, sometimes) the national interest. To pass or defeat a bill, politicians can use a variety of measures—formal or informal, kosher or not—that includes vote-trading, logrolling, virtue-signaling, arm-twisting, interest-group activating, media-campaigning, name-calling, or anything else that they think helps get the job done.[138] Senators have an additional tool. They can filibuster, or threaten to do so, to gain a favor from a colleague, in one or the other party, or, as often occurs in the case of a nomination, a concession from the committee chair, the nominee, an executive branch official, or the President.[139] Notably, there is no constitutional directive that federal elected officials must abide by classical moral principles by exercising the powers of their offices or put the nation's interests ahead of everything else.[140]

The Framers did not select principles of morality for the new nation to implement through legislation, implementation, or adjudication. On the contrary, except for the types of laws that Section 9 of Article I took off the table,[141] the Constitution empowered Congress to pass legislation regulating conduct within the authority granted Congress by any clause in Section 8 of Article I. Regulations of public or private morality did not find a home in any of those niches. Besides, insofar as laws reflect and incorporate private morality into public law and policy, the Constitution gave the elected officials in Articles I and II the power and responsibility only to decide what morality to implement as *federal law*, regardless of whatever decisions the states and private society might make in that regard. The Constitution does not empower Congress and the President to create *state* law.[142] For example, it is now widely acknowledged that, before the Supreme Court incorporated the Establishment Clause through the Fourteenth Amendment, [143] the First Amendment Establishment Clause did

138. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . . ").

139. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring that the President obtain the "Advice and Consent of the Senate" to appoint "Officers of the United States").

140. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring that the President obtain the "Advice and Consent of the Senate" to appoint "Officers of the United States").

141. *See* U.S. CONST. art. I, § 9, cl. 1–8 (among other things, prohibiting Congress from "suspend[ing] the "Writ of Habeas Corpus" and from enacting "Bill[s] of Attainder," "ex post facto Laws," "Capitation or other direct Tax," any "Tax or other Duty . . . on any Article exported from any State," any "Preference . . . to the Ports of one State over those of another," and any "Title of Nobility").

142. *See* Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J. L. & PUB. POL'Y 523, 568–70 n.177 (2021).

143. *See* Everson v. Bd. of Educ., 333 U.S. 1 (1948).

not bar any state from adopting its own state religion.[144] That is true not merely because the Supreme Court held in *Barron v. Baltimore*[145] that the Bill of Rights limits only the power of the federal government, but also because the Framers were clear that they did not intend to trespass on a state's right to regulate the morality of its citizens through a state-approved religion.[146] To make that point clear, Article VI of the Constitution states that "no religious Test shall ever be required as a Qualification to any Office or public Trust *under the United States*."[147] What the federal government could not do as to public morality, the states were free to continue doing as their own representatives and electorates saw fit.

We know from history that the nation did not have a single unified interest on every issue facing the nation at the time of the Philadelphia Convention.[148] Slavery was a particularly divisive issue, but the states also had divergent interests on matters such as the representation of large and small states, western territorial claims, and the economy.[149] The electorates in the states from each

144. *See, e.g.*, Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 604–07 (2014) (Thomas, J., concurring in part and concurring in the judgment); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107 (2003).

145. Barron v. Baltimore, 32 U.S. 243 (1833).

146. *See* McConnell, *supra* note 144 ("It has been so long—about 170 years—since any state in the United States has had an established church that we have almost forgotten what it is. When the words 'Congress shall make no law respecting an establishment of religion' were added to the Constitution, virtually every American—and certainly every educated lawyer or statesman—knew from experience what those words meant. The Church of England was established by law in Great Britain, nine of the thirteen colonies had established churches on the eve of the Revolution, and about half the states continued to have some form of official religious establishment when the First Amendment was adopted. Other Americans had first-hand experience of establishment of religion on the Continent—of the Lutheran establishments of Germany and Scandinavia, the Reformed establishment of Holland, or the Gallican Catholic establishment of France. Establishment of religion was a familiar institution, and its pros and cons were hotly debated from Georgia to Maine.").

147. U.S. CONST. art. VI, cl. 3 (emphasis added).

148. *See* Lawrence B. Solum, *We Are All Originalists Now*, *in* Bennett & Solum, *supra* note 4, at 1, 56 ("If we are looking for unambiguous agreement on the purposes and goals that motivated those who produced arguments for (and against) that Constitution of 1789 (or all but a few of the subsequent amendments), we are likely to be disappointed. We are likely to discover that there were many groups and that they varied by cultural affiliation, economic stats, and region. South Carolinians who supported the Constitution may have had different motives than Rhode Islanders had; rural South Carolinians from the interior might have seen things differently than Charleston merchants did.").

149. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (noting that "to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"); JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789, at 5–14 (2015) (noting state disagreements over matters such as slavery, national representation based on state population or equality, claims to western territories); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 18–19 (2009)

region could choose as their delegates people who saw issues their way, even when doing so conflicted with positions on issues held by people in neighboring states. Congress may have the power to regulate the "Times, Places and Manner" for the election of members of Congress, but each state (within the limits fixed by later amendments[150]) may choose the requisite qualifications to vote in those elections.[151] The electorate in each state therefore can protect its own interests at the expense of its neighbors. Indeed, before the Seventeenth Amendment established popular election of Senators, state legislatures chose each state's Senators to make sure that they did not get out in front of their skis.[152] Plus, Representatives and Senators must stand for re-election after their two- or six-year terms expire,[153] allowing their electorates to decide how well the members represented their own interests.

The Constitution not only contemplated that elected officials would vote in the manner that best protects their own constituents, or even their own sinecures, rather than advances the public good; it placed no restraints on a member's ability to reject the public good in favor of his constituents' parochial interests, or even just his own. Article I empowers members of Congress to vote on a bill; it makes clear that both houses of Congress must approve any bill before it can be presented to the President for his signature or veto; and it allows the Congress to override a presidential veto by a two-third vote of each chamber.[154] But Article I does not direct Representatives and Senators to consider only the public welfare in voting, or to consider (or not consider) anything else for that matter. Yes, some of the powers vested in Congress by Article I qualify how a power should be exercised. For example, Congress may "provide for the common Defence and general Welfare of the United States"; all "Duties, Imposts and Excises shall be uniform throughout the United States"; and naturalization and

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(noting the different interests of farmers, artisans, merchants, creditors, debtors, bondholders, and so forth).

150. U.S. CONST. amend. XII (race), XIX (sex) & XXVI (age 18 or older).

151. U.S. CONST. art. I, § 2, cl. 1; *id.* § 4, cl. 1; *id.* amend. XVII, cl. 1; Ariz. v. Inter Tribal Council of Az., Inc. 570 U.S. 1, 7–8, 15–20 (2013).

152. U.S. CONST. art. I, § 3, cl. 1.

153. U.S. CONST. art. I, § 2, cl. 1 & 2; *id.* § 3, cl. 1; *id*. amend. XVII, cl. 1.

154. U.S. CONST. art. I, § 3, cl. 1 ("[E]ach Senator shall have one Vote."); *id.* § 7, cl. 2 ("Every Bill which shall have passed the House or Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated it, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

bankruptcy laws must be "uniform" across the land.[155] But Article I does not forbid vote trading, log-rolling, or any other practice that collegial bodies pursue every day to see legislation passed. And Article I does not direct members to abstain from any vote on a matter affecting each one of them (which it could have done with the exception of legislative branch appropriations).[156]

Professor Vermeule makes the same mistake in *Common Good Constitutionalism* that he made in his earlier book (co-authored with his colleague, Professor Cass Sunstein) *Law & Leviathan: Redeeming the Administrative State*:[157] namely, he relied on a theory developed in the context of monarchial rule as a basis for appraising legislation passed by a democratic republic. In Professor Lon Fuller's classic book, *The Morality of Law*,[158] he posited that any command issued by a kindly monarch must nonetheless reflect an underlying morality, regardless of its substance; otherwise, it is not worthy of the connotations befitting the label of "law."[159] Fuller's understanding of the essence of a "law" reflects Thomas Aquinas' belief that law is not simply whatever the ruler issues as a decree, regardless of its ethical content. As Professor Vermeule (and a co-author) explained in an article on Common Good Constitutionalism, "[t]o count as law in the fullest sense, an ordinance of public authority must rationally conduce to the good of the community for which the lawmaker has a duty and privilege of care."[160]

It's not clear, however, why that must be true in a democratic republic, such as the one created by our Constitution.[161] Lawmaking in any such system is an untidy affair. Different people, different groups, and different parties come together to form temporary shifting alliances to pass particular legislation by cobbling together a sufficient number of votes to form a majority (or, in the case of the Senate, a 60-vote supermajority to cut off debate and vote on a measure). What appeals to one group might not interest another one, but both might join

155. U.S. CONST. art. I, § 8, cl. 1 & 4.

156. U.S. CONST. art. I, § 9, cl. 7.

157. CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020).

158. LON L. FULLER, THE MORALITY OF LAW (3d ed. 1969).

159. To do so, a mandate cannot violate any one of a set of widely accepted principles: the edict cannot be secret; it cannot operate retroactively; its terms cannot be vague, ambiguous, or indecipherable (or its terms, though clear, cannot be contradictory or applied inconsistently); it cannot demand the impossible; and its text cannot change with such frequency that no one can know what it requires. Fuller described those requirements as moral demands. *Id.* at 4–8, 34–39.

160. Casey & Vermeule, *Myths*, *supra* note 18, at 108.

161. Nor is it the case that the individual rules that Fuller described must be seen as moral requirements. For example, today we would say that the Due Process Clause demands that a criminal law be intelligible to be valid under what is known as the Void-for-Vagueness Doctrine. *See generally* Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (the still-classic discussion of that doctrine). "In our constitutional order," Justice Gorsuch has noted, "a vague law is no law at all." United States v. Davis, 139 S. Ct. 2319, 2321 (2019). Yet, that is a legal requirement, not a moral demand, and was even when Fuller wrote *The Morality of Law*.

to vote for a bill that contains something each faction wants. There might be no "common good" that such a bill serves, let alone any rhyme or reason to its provisions (particularly in today's omnibus bills). The need for compromise to pass some bill might erase any unifying principle tying its provisions together or any identifiable way that the bill promotes the *common* good, rather than the interests of particular groups. But why legislators vote in favor of a law—to advance the interests of the nation, their constituents, their party, their fundraisers, their friends, their staff, or just themselves—cannot be reviewed under the same standard of purity that we demand for pharmaceuticals—at least not if we want to see much legislation passed. Equally important is the fact that a legislator's rationale for his or her vote—in particular, whether that vote served the common good—doesn't matter for constitutional purposes. In *Fletcher v. Peck*, Chief Justice John Marshall said that it was irrelevant to a law's validity whether the legislators who passed it had been bribed for their votes.[162] Legislation that is the self-interested product of bribery hardly conduces to the good of the community. If so, I don't think that the failure of legislation to promote today's—let alone ancient Rome's—view of the common good really matters.

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162. In Chief Justice Marshall's words:

> That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights required, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means much be applied to produce this effect. [1] Must it be direct corruption, or would interest or undue influence of any kind be sufficient? [2] Must the vitiating cause operate on a majority, or on what number of the members? [3] Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810). His answers were (1) "We don't know." (2) "We don't care." (3) "No" and "No." *Id.* at 130, 131 ("Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration . . . . This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.").

In sum, Article I created a political system without forbidding its members from being politicians. We all would like elected officials to pursue the common good (just as I would like to be rich, thin, and good-looking), but that's not going to happen (ditto). Any vision that our politicians are statemen is a hallucination. Politicians will do what politicians have always done: play politics. Deal with it. If saying that makes me an incorrigible positivist, so be it. I have been called worse.[163]

3. Turnabout Is Fair Play

My third—but in some ways most important—criticism is that Professor Vermeule assumes that judges, particularly ones committed to Living Constitutionalism, would faithfully apply his methodology if a majority of the Supreme Court were to adopt it as law. That is, judges, particularly Supreme Court justices, would hold unconstitutional laws that serve narrow partisan or special interests at the expense of the entire polity and only those laws, never striking down laws that violated Originalism's or (particularly) Living Constitutionalism's precepts. There is no good reason to assume that life-tenured judges, especially Supreme Court justices, who lack any risk of appellate reversal or congressional removal, won't go over to the dark side to avoid entering a ruling that they believe leads to a morally distasteful result. *Common Good Constitutionalism*, however, does not explain how to avoid the problem of the Fifth Columnist. This is a mistake. An interpretive theory offered as a substitute for Originalism must justify why it is a superior approach in the hands of friendlies *and hostiles*.

Think I'm being overly cynical? Well, read what two Living Constitutionalists have had to say about the matter. Start with Professor David Strauss. In his book, *The Living Constitution*, he endorsed a common-law approach to constitutional interpretation, which elevates precedent above the constitutional text.[164] Rather than start with the Constitution's text and rely on eighteenth-century dictionaries and rules of grammar to interpret its provisions, Professor Strauss urges courts to use the same common-law approach that the English and American courts have long used when examining tort or contract law: start with precedent but also consider the policies that the earlier decisions found persuasive. As he explained, "a well-established aspect of the common law" is that legal decision-making "is not simply a matter of following precedent."[165] When precedent does not dictate an answer, "[t]here is a legitimate role for judgments about things like fairness and social policy."[166] That is, "often, when the precedents are not clear, the judge will decide the case before her on the basis of her views about which decision will be more fair or is

163. And if the past is prologue, *see infra* note 177, I soon will be again.

164. DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

165. *Id.* at 38.

166. *Id.*

more in keeping with good social policy."[167] He sought to limit the vast constitutional law-making potential that his approach granted courts by saying that "judgments about fairness or social policy come into play . . . only in the narrow range left open by the precedents"[168]—viz., a narrow range *as the courts define it*.

But that is the near beer style of Living Constitutionalism. For the grain alcohol version, consider what Professor Mark Tushnet said in a blog post entitled *Abandoning Defensive Crouch Liberal Constitutionalism* published in May 2016, when Hillary Clinton was still measuring drapes for the Oval Office.[169] No longer would "generations of law students and their teachers [who] grew up with federal courts dominated by conservatives" be consigned to "wandering in the wilderness, looking for any sign of hope."[170] The cavalry was about to arrive. Liberals should abandon the "defensive crouch" they had assumed for decades and should compile "lists of cases to be overruled at the first opportunity on the ground that they were wrong the day they were decided."[171] Conservatives had characterized constitutional disputes as "culture wars," so liberals should rub their faces in it by proclaiming that "[t]he culture wars are over: they lost, we won."[172] Now, it's time for payback. The professor urged his compadres to follow the lead of U.S. Court of Appeals Judge Stephen Reinhardt and "exploit ambiguities and loopholes" in conservative Supreme Court precedents.[173] Better yet, shout from the highest heaven that "[o]ur models are Justices William Brennan and Thurgood Marshall," not wimpy liberals like "David Souter or John Marshall Harlan."[174] Professor Tushnet enthusiastically directed fellow travelers to (how can I quote him in a journal like this one? Oh, yes; I've got it) "*Be fruitful and multiply Anthony Kennedy*."[175]

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167. *Id.*

168. *Id.* at 40.

169. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION, May 6, 2016, https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.

170. *Id.*

171. *Id.*

172. *Id.* ("For liberals, the question now is how to deal with the losers in the culture wars. That's mostly a question of tactics. My own judgment is that taking a hard line ('You lost, live with it') is better than trying to accommodate the losers, who—remember—defended, and are defending, positions that liberals regard as having no normative pull at all. Trying to be nice to the losers didn't work well after the Civil War, nor after Brown."). For musical accompaniment to that portion of the Tushnet blog posting, go to Steam, "*Na Na Hey Hey Kiss Him Goodbye*" (1969), https://www.youtube.com/watch?v=QaG2Acg8n60 (last visited July 25, 2023).

173. *Id.* (perhaps referring to Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015)).

174. Tushnet, *supra* note 169.

175. *Id.* (emphasis in original; G-rated-version substituted for R-rated-version of the quotation).

While Professor Tushnet explained that "I don't mean that liberals should treat *him* with disrespect"[176]—after all, he had been useful to Living Constitutionalists over the years—but liberals should treat his *opinions* with contempt, because his vote is no longer necessary and his "'thought'" was so 20 minutes ago that it can be safely ignored.[177]

Do conservatives want to hand their bête noire a tool that the latter could use to great effect to achieve its sought-after results, but now do so by flying a different, arguably neutral flag? I think not. Not sure? Think about the problem from a different perspective. Imagine that you have a cupcake; you have to divide it between your two children; each one loves cupcakes; and each one would fight like contestants in Thunderdome over the portion each one should receive.[178] How do you ensure an equal distribution between them? Simple. Let one cut the cupcake and give the other one first choice over which portion to take. That will result in two equal halves. The same principle works here.[179] When deciding what methodology to endorse, do not ask yourself which methodology *you* want to use when you are in power, ask yourself which one you are willing to let *your opponent* use when he or she holds the reins.

Conservatives run a risk by signing onto Common Good Constitutionalism. The doctrine lends itself to mischief in the wrong hands.[180] A Living Constitutionalist could say, in the manner of the prodigal son,[181] "I have sinned, but now I have seen the light and repent of my mistakes. I am no more a Living Constitutionalist"—all while reaching the same results as before under his old flag. After all, no one—whether batting from the Left or the Right—boldly and baldly declares that judges may write into the Constitution whatever he or she thinks is good policy (at least not before being confirmed).[182] If Justice Scalia

176. *Id.* (emphasis added).

177. Tushnet, *supra* note 169 ("There's a lot of liberal constitutional scholarship taking Anthony Kennedy's 'thought' and other conservative opinions as a guide to potentially liberal outcomes if only the cases are massaged properly. Stop it."). Professor Tushnet concluded by creating an escape hatch: "Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries." *Id.*

178. "*Mad Max Beyond Thunderdome*" (Warner Bros. 1985), https://www.youtube.com/watch?v=9yDL0AKUCKo (last visited Apr. 22, 2022).

179. If a cupcake doesn't cut it for you (horrible pun, I know), here's another option. Outmanned and outgunned, Ukraine needs advanced weaponry to repulse the Russian invasion. President Joe Biden must decide whether to give the Ukraine's defenders some of America's most lethal military tools, such as missile-carrying drones. Those devices would help Ukrainians repulse the Russian invasion, but there is a risk involved. If they fell into Vladimir Putin's hands, his army might be able to devise ways to defeat their use in battle, which would harm the Ukraine in the short run, but also render them useless if we need them later on.

180. *See, e.g.*, Barnett, *supra* note 23.

181. *See* Luke 15:11–32.

182. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) ("It may surprise the layman, but it will surely not surprise the lawyers here, to learn that originalism is not, and had perhaps never been, the sole method of constitutional exegesis. It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful

was right that, when it comes to constitutional interpretation, Originalism is "the lesser evil"[183]—and, at the end of the day, I think that is the best argument for Originalism—there is no good reason to knowingly endorse (to borrow another metaphor of his) a wolf in sheep's clothing.[184] That is what I fear Common Good Constitutionalism would become.

4. The Role of the Judiciary and the Common Good

There is a limit as to how far back it is reasonable for a court to consider evidence that bears on the interpretation of a legal document, even one like the Constitution, whose basic architecture was fixed 234 years ago. The Supreme Court has often cited sources such as Jonathan Elliott's *Debates on the Adoption of the Federal Constitution*, Max Farrand's *The Records of the Federal Convention*, the *Federalist Papers*, and correspondence written by one of the Framers as "sources we have usually regarded as indicative of the original understanding of the Constitution."[185] Those sources are valuable because they come from the horses' mouths. The classical references that Professor Vermeule cites[186] are not among them. Some of the Constitution's provisions expressly draw on common law doctrines—such as habeas corpus—or English parliamentary practices—such as the passage of bills of attainder—that have roots reaching back into English history before the first American settlement at Jamestown, Virginia.[187] In those instances, it is reasonable to infer that the

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head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean. That is, I suppose, the sort of behavior Chief Justice Hughes was referring to when he said the Constitution is what the judges say it is. But in the past, nonoriginalist opinions have almost always had the decency to lie, or at least to dissemble, about what they were doing—either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support.").

183. *Id.*

184. Justice Scalia actually reversed the reference. *See* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."). I don't think he'd mind my switcheroo.

185. Printz v. United States, 521 U.S. 898, 910 (1997) (referring, for example, to THE FEDERALIST (Clinton Rossiter ed., 1961). *See also, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (citing James Madison to Thomas Jefferson (June 30, 1789), 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)). *See generally* Megan Cairns, *Originalism: Can Theory and Supreme Court Practice be Reconciled?*, 19 GEO. J. L. & PUB. POL'Y 263, 268-70 & n.31 (2021) (collecting references).

186. *See, e.g.*, GIOVANNI BOTERO, THE REASON OF STATE (Robert Bireley trans., 2017) (1589). Some of the sources cited in *Common Good Constitutionalism* could not have been known to the Framers. *See, e.g.*, JOHN HENRY NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE (1845).

187. *See, e.g.*, Nixon v. GSA, 433 U.S. 425, 473–75 & n.35–38 (1977) (describing bills of attainder in English and American history); Cummings v. Mo., 71 U.S. 277, 323–25 (1866);

Framers knew the English and early American history behind those provisions and intended that their background principles would guide courts when interpreting them.[188] The same inference, however, is unreasonable in the case of other, far older authorities. That is true for well-known ones, such as Thomas Aquinas, who lived in Italy and died before Christopher Columbus landed at San Salvador in 1492. It is certainly the case for ones who were far less well-known, such as Giovanni Botero, an Italian Jesuit priest who authored *The Reason of State* in 1589 and died in 1617, two years before the *Mayflower* landed at Plymouth Rock.

Yes, there are timeless moral precepts that we can expect the Framers to have known and endorsed. But there is a limit to the forward movement of some notions. The concept of proximate cause embodies that principle. "The term," as the Supreme Court has noted, "is shorthand for a concept: [i]njuries have countless causes, and not all should give rise to legal liability."[189] Justice Ruth Bader Ginsburg once noted that, "'because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'"[190] That rule is no modern-day contrivance slapped together to respond to *Common Good Constitutionalism*. It is "a maxim," "a well-established principle of law,"[191] an "ancient and simple" rule,[192] as Supreme Court Justice Joseph Story noted in 1840.[193]

WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS (2003) (1886); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2012).

188. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice."); *see also, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World . . ."); Kerry v. Din, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke['s] Institutes 'were read in the American Colonies by virtually every student of law . . .'" (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)); Alden v. Maine, 527 U.S. 706, 715 (1999) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation"); *Ex parte* Wells, 59 U.S. (18 How.) 307, 310–11 (1855) (quoting United States v. Wilson, (7 Pet.) 162) ("As the [clemency] power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.").

189. CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011).

190. *Id.* (quoting Palsfgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. Ct. App. 1928) (Andrews, J., dissenting)).

191. Waters v. Merch. Louisville Inc. Co., 36 U.S. (11 Pet.) 213, 223 (1837) ("It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: *causa proxima non remota spectatur*: and this has become a maxim.").

192. Comcast Corp. v. Nat'l Ass'n of African-Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020).

193. *See, e.g.*, Peters v. Warren Ins. Co., 39 U.S. (14 Pet.) 99, 108 (1840) (Story, J.); *see also* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (W. Page Keeton ed., 5th ed. 1984).

It makes sense to apply that teaching here. If the Framers believed that the wisdom of Ulpian, Aquinas, and Botero should govern what is moral throughout the life of a new nation, one of the Founders would have made that point in the text of the Constitution, at the Convention in Philadelphia, in the *Federalist Papers*, or in the state ratification debates. And if they had, someone would have noticed it before 234 years of our history had passed. That no one did it is powerful evidence that it doesn't exist and should matter for little when interpreting the Constitution.

5. Politics and the Administrative State

These two misses could be listed separately, but there might be an "non-aggregative" (Professor Vermeule's term[194]) benefit from lumping them together. The reason is that, in Professor Vermeule's opinion, no economic, political, or legal system can achieve the common good if it leaves to each person the freedom to advance his or her own peculiar desires, even if the sum of those combined actions would enhance society's overall wealth and happiness. Only collective goals, and channeling individual liberty toward their achievement, can do the trick.[195] (*Begone, Adam Smith!*[196]) Plus, only a large, powerful, administrative state can provide communal safety, macro- and microeconomic security, quality public health, protection against (what we are incessantly told is the "existential" challenge of) "climate change," and a defense against the "corporate power" that contributes to our present misfortunes.[197]

Those goals of *Common Good Constitutionalism* read like they were taken from FDR's Second Bill of Rights, LBJ's Great Society, or AOC's Green New Deal.[198] All that Professor Vermeule omitted (as goals) were "truth," "the

194. *See* Casey & Vermeule, *Myths*, *supra* note 18, at 109 (describing the "common good" as a "non-aggregative" concept).

195. VERMEULE, *supra* note 3, at 39 ("On the classical conception, 'liberty' is no mere power of arbitrary choice, but the faculty of choosing the common good. The aim of recognizing liberty is not to maximize individual choice, subject to the end of the liberty of all, but instead teleological and ordered to the ends of the good, in exactly the same way the classical tradition of *ragion di stato*, specifying the substantive aims and purposes of government, is teleological.") (internal citation omitted).

196. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (2007); *see also* Alexander William Salter, *Common Good Conservatism's Catholic Roots*, WALL ST. J. (May 20, 2021), https://www.wsj.com/articles/common-good-conservatisms-catholic-roots-11621527530 ("Especially among Catholic intellectuals, there's a growing enthusiasm for common-good politics and economics. According to the Catechism of the Catholic Church, 'By common good is to be understood "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily.'" Common-good thinkers are comfortable with government interventions into the economy to achieve these ends.").

197. VERMEULE, *supra* note 3, at 36–37.

198. "A Second Bill of Rights," Radio Speech of President Franklin D. Roosevelt, Franklin Delano Roosevelt Found, (Jan. 11, 1944; posted Aug. 2, 2016), https://fdrfoundation.org/a-second-

American Way," and (as a necessary means of accomplishing them) the Man of Steel.[199] I doubt that Plato, Aristotle, Aquinas, or Botero worried about Climate Change. I really doubt that they (or Professor Vermeule) engaged with the science underlying that subject in the same way that President Barack Obama's former Undersecretary of Energy Steven Koonin has done.[200] But I have no doubt that handing Climate Change-focused constitutional interpretation over to a high priest of Common Good Constitutionalism is like giving a drunken teenager the keys to a Corvette (or giving John Kerry the treaty-making power[201]). The professor's list is not a set of classical moral principles or goals; it is a political wish embedded inside a campaign slogan that, in the hands of Living Constitutionalists masquerading as Common Good Constitutionalists, would become a Global Environmental Marshal Plan imposed via judicial diktat or executive order.[202] Professor Vermeule cheapens the intellectual value of his book by linking arms with the 117th Congress's House Democratic majority to select his "common good" goals.[203] Legislators troll for votes; academics should not.

Atop that, it is far from clear why Professor Vermeule felt a need to defend a massive regulatory state in a book that does not travel down the lane of administrative law. He argues that "the closest modern Anglo-American legal theory has come to recognizing the *ius*"—viz., the synthesis of classical Roman

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bill-of-rights-video/; *see also President Lyndon B. Johnson's Remarks at the Univ. of Mich*., (May 22, 1964),

https://web.archive.org/web/20020602041420/http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/640522.asp; Press Release, Ocasio-Cortez, Markey Reintroduce Green New Deal Resolution (Apr. 20, 2021), https://ocasio-cortez.house.gov/media/press-releases/ocasio-cortez-markey-reintroduce-green-new-deal-resolution-0.

199. "*Adventures of Superman*" (Warner Bros. Television Distribution 1952-1958), www.youtube.com/watch?v=Q2l4bz1FT8U&list=PLJSh44xks5pe2IB2cI0YfaqtuS2laz20Q.

200. STEVEN E. KOONIN, UNSETTLED: WHAT CLIMATE CHANGE TELLS US, WHAT IT DOESN'T, AND WHY IT MATTERS (2021).

201. *See, e.g.*, Editorial Bd., *John Kerry's Ukraine Emissions*, WALL ST. J., (Feb. 24, 2022, 6:41pm), https://www.wsj.com/articles/john-kerrys-ukraine-emissions-climate-russia-vladimir-putin-11645736997 ("Former U.S. Secretary of State John Kerry warned in an interview this week about 'massive emissions consequences' from a Russian war against Ukraine, which he also said would be a distraction from work on climate change. Nevertheless, he added, 'I hope President Putin will help us to stay on track with respect to what we need to do for the climate.'").

202. Yes, Virginia, people have made that argument—and one federal judge has even bought it. *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Ore. 2016) ("[T]he right to a climate system capable of sustaining human life is fundamental to a free and ordered society."), *rev'd*, 947 F.3d 1159 (9th Cir. 2020); *see also* Mark P. Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 469, 477 (2015); Ylan Nguyen, *Constitutional Protection for Future Generations from Climate Change*, 44 HASTINGS CONST. L.Q. 347, 362, 364 (2017); Rachel Shuen, *Addressing a Constitutional Right to a Safe Climate: Using the Court System to Secure Climate Justice*, 24 J. GENDER RACE & JUST. 377 (2021).

203. He also turns out to be a tease, because he limits his discussion of the application of Common Good Constitutionalism in the case of environmental issues to only Article III standing and the public trust doctrine. VERMEULE, *supra*, note 3, at 173–78. Hardly worth the corsage.

law, canon law, and local civil law—is the contemporary "administrative state."[204] Maybe. But administrative law is in the midst of considerable intellectual ferment. Long-settled doctrines are now up for grabs.[205] Perhaps Professor Vermeule decided that he could not create a new constitutional methodology without explaining how it would affect an issue being hotly debated. Or perhaps he felt a need to explain why his new theory would not wipe away the powerful administrative state he has found legitimate and necessary.[206] Either way, it is odd to see more pages devoted to that topic (18) than to the application of the Bill of Rights to the state criminal justice systems (0), because the latter clearly raises constitutional issues far greater in number, and controversy, than the former. But, hey, it's not my book.

I am not being critical because there is no discussion in his book "of highway policy, of the limits of free trade, or of the social costs of carbon."[207] I am actually grateful for that. I also agree with him that today's agencies "act under the authority of great, often very general statutes and executive orders that are in many cases"—like the Public Health Service Act[208]—"quite old and need to be fleshed out, supplemented, and adapted to changing circumstances over time."[209] Agencies have to decide how statutes apply to the myriad situations that arise in life. How far agencies can engage in substantive lawmaking—which is just the flipside of granting agencies deference when they interpret statutes—is a critical issue.[210] Agencies lack inherent, common law-like, substantive lawmaking power; agencies must act within the statutory restraints that Congress has imposed on them.[211] It is for Congress to flesh out,

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204. VERMEULE, *supra*, note 3, at 136.

205. *See* Larkin & Canaparo, *supra* note 132, at 477, 481–83 (reviewing CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020) and RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW (2020)).

206. *See, e.g.*, ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (2016); *see also* Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 42 (2015).

207. VERMEULE, *supra* note 3, at 136.

208. Ch. 373, 58 Stat. 682 (codified as amended at 42 U.S.C. §§ 201–300mm-61 (West 2021)).

209. VERMEULE, *supra* note 3, at 137.

210. Professor Vermeule even recognizes the importance of that issue, describing it as "arguably the most important controversial topic in administrative law." *Id.* at 151.

211. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dept. of Lab., 142 S. Ct. 661, 665 (2022) [hereinafter *NFIB*] ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); *see also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) [hereinafter *Alabama Realtors*] ("It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); La. Pub. Serv. Comm'n v. Fed. Commc'n Servs., 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

supplement, or modernize statutes, not agencies. Good fences make good neighbors, and good statutes make good agencies.[212]

Ironically, when it comes to defending the Supreme Court's deference doctrine decisions,[213] Professor Vermeule does not invoke Ulpian, Aquinas, or another classical scholar. He points to a 2009 Supreme Court decision.[214] That is not what *Common Good Constitutionalism* claims to add to the debate, and it is not the professor's general theme. Elsewhere in his book, Professor Vermeule claims that "[t]o understand the modern administrative state, we must first look to the remote past"[215]—and by remote, he really means "*remote*," because he cites the first book of Justinian's *Digest*, which was published circa 530-533 *anno domini*, 500-plus years before the Norman Conquest. Maybe the work of the "urban praetors—high magistrates of Rome, just beneath the consuls, with jurisdiction over suits between citizens"[216]—has value when analyzing the effect of the Roman legal system on Gaul or other lands that came under Roman rule through conquest. Why their actions tell us anything about important administrative law issues in 2022, however, is a mystery. At some point past actions have, at best, a de minimis effect on today's.[217] Besides, adjudication of *inter partes* disputes tells us little about suits between *the government* and private parties, or the government's use of junior varsity statutes called agency "rules"—an extraordinarily expansive term[218]—as a common means of

212. Assuming that agencies, and the White House, are willing to follow them, which has not been the case recently. *See, e.g.*, *NFIB*, 142 S. Ct. at 665; *see also Alabama Realtors*, 141 S. Ct. at 2490; Paul J. Larkin & Doug Badger, *The First General Federal Vaccination Requirement: The OSHA Emergency Temporary Standard for Covid-19 Vaccinations*, 6 ADMIN. L. REV. ONLINE 379 (2022); Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, HARV. J.L. & PUB. POL'Y: PER CURIAM (2021).

213. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019) (in a badly split opinion, ruling that an agency is entitled to some degree of deference when interpreting its own rules); *see also* Chevron, U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844, 862–64 (1984) (in a unanimous opinion of only six justices, same as to an agency's interpretation of an ambiguous statute).

214. VERMEULE, *supra* note 3, at 152 (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)).

215. *Id.* at 136.

216. *Id.* at 137.

217. *Cf.* Peters v. Warren Ins. Co., 39 U.S. 99, 108 (1840) (Story, J.) ("Causa proxima non remota spectatur."); *supra* text accompanying notes 189–93.

218. *See, e.g.*, 5 U.S.C. § 551(4) (2018) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . ."); *see also* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 204 (2018) (20) (internal citation omitted) ("Oliver Wendell Holmes characterized a rule as 'the skin of a living policy.'").

substitute congressional governance.[219] Maybe (but I doubt it) a comparably large administrative state was necessary in Justinian's day, or through the Middle Ages, when rule by a monarch or emperor was the standard method of governance. Maybe the courts deferred to the judgment of Roman officials when the latter interpreted the law because the Roman Senate intended that result (the professor doesn't say) rather than to save their jobs or necks. But it is a mistake to posit that natural law demands that we have a rule of deference simply because an entirely different Roman legal system might have had one more than two millennia ago. Rome did not have a written Constitution with the Article III requirements of an independent judicial system; we do.[220] It would have been helpful to understand why Article III courts can and should defer to Article II agencies. The professor does not say.

C. The Pitches Taken

A constitutional law treatise should canvass that subject, discussing how it would apply to the cases that the Supreme Court has already decided and would hereafter adjudicate. Yet, there are several fields that Professor Vermeule does not address. It is worth noting them since they weaken the value of his theory.

1. Racial Discrimination

Over the last two years, the single most frequently—and usually vehemently—discussed legal, policy, and political issue has been racism. You can't swing a dead cat anywhere near a university without hitting scores of people with one opinion or the other on the subject of systemic racism.[221] The

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219. *See Kisor*, *supra* note 213 at 2446–47 (Gorsuch, J., concurring in the judgment) ("Now, in the 21st century, the administrative state wields vast power and touches almost every aspect of daily life. Among other things, it produces reams of regulations—so many that they dwarf the statutes enacted by Congress. As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U.S. Code. And agencies add thousands more pages of regulations every year.") (internal citation and punctuation omitted); *see also* RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY, 2 (2019) ("By some estimates, more than 90 percent of American law is created by . . . agencies."); Kevin R. Kosar, *Reasserting Congress in Regulatory Policy*, in 2 UNLEASHING OPPORTUNITY: POLICY REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 19, 19 (Yuval Levin & Emily MacLean eds., 2017) ("In recent years, Congress has enacted approximately 50 statutes annually on significant subject matter; the executive branch proposes 2,700 new regulations and finalizes another 4,000 rules each year.") (internal citation omitted).

220. The concept of "life tenure"—or as Article III puts it, tenure "during good Behaviour," U.S. CONST. art. III, § 1—traces its lineage to battles between the English Crown and Parliament as a means of protecting judges from improper royal influence. *See* Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 673 (1969); C.H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 218–25 (1913). The Framers deemed such tenure necessary to guarantee judicial independence. *See* FEDERALIST PAPERS No. 78, at 465–70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

221. Although only one side is allowed to voice an opinion. Criticizing the received academic orthodoxy that all whites are racist ensures immediate assignment to Dante's little-known eighth

law on the subject, however, is well settled. A government official can violate the Equal Protection Clause by enforcing a law that facially discriminates on the basis of race, or a government official could enforce a facially neutral statute in a racially discriminatory manner—that is, with the intent to harm one racial class.[222] An adverse effect is relevant, but it is not dispositive. A disparate impact on a racial group is not unconstitutional for that reason alone.[223]

Professor Vermeule does not say whether *Common Good Constitutionalism* would change those rules. He also does not discuss how his theory would resolve cases involving an allegation of generalized societal discrimination, like *McCleskey v. Kemp*, which was a race-based challenge to the constitutionality of the death penalty.[224] Professor Vermeule does not say how *McCleskey* would

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circle of hell. So much for the academic pursuit of *veritas*. Even the New York Times has recognized that, as a 2022 editorial boldly stated, "America Has a Free Speech Problem," N.Y. TIMES, Mar. 18, 2022, https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html. Of course, the Times does not acknowledge its own role in creating a toxic climate for open debate on race. But maybe its editorial is a start. Baby steps.

222. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 463–67 (1996); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 365 (1886).

223. *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2234, 2240–43 (2019); *see also* Foster v. Chatman, 578 U.S. 488, 499 (2016); Schuette v. Coalition . . . any Means Necessary, 572 U.S. 291, 318 (2014) (Scalia, J., concurring in the judgment); Felkner v. Jackson, 562 U.S. 594, 594, 598 (2011); Rivera v. Illinois, 556 U.S. 148, 153 (2009); Snyder v. Louisiana, 552 U.S. 472, 474, 476–77 (2008); Rice v. Collins, 546 U.S. 333, 338 (2006); Miller-El v. Dretke, 545 U.S. 231, 237–39 (2005); Johnson v. California, 545 U.S. 162, 168 (2005); Vieth v. Jubelirer, 541 U.S. 267, 334 (2004) (Stevens, J., dissenting); Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372–73 (2001); United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000); M.L.B. v. S.L.J., 519 U.S. 102, 125–27 (1996); Lewis v. Casey, 518 U.S. 343, 375–76 (1996) (Thomas, J., concurring); United States v. Armstrong, 517 U.S. at 467; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995); Purkett v. Elem, 514 U.S. 765, 767 (1995); Georgia v. McCollum, 505 U.S. 42, 47–48 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 618–19 (1991); Hernandez v. New York, 500 U.S. 352, 358–60 (1991) (plurality opinion); *id.* at 372–74 (O'Connor, J., concurring in the judgment); Powers v. Ohio, 499 U.S. 400, 404, 409 (1991); Holland v. Illinois, 493 U.S. 474, 486–87 (1990); Batson v. Kentucky, 476 U.S. 79, 93–96 (1986); Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 590 (1983) (opinion of White, J.); Rogers v. Lodge, 458 U.S. 613, 617–18 (1982); Hunter v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 544 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484–85 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66–68 (1980) (plurality opinion); Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413, 419–20 (1977); Columbus Bd. of Ed. v. Penick, 443 U.S. 449, 464–65 (1979); Sch. Dist. of Omaha v. United States, 433 U.S. 667, 668 (1977); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–66 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).

224. McClesky v. Kemp, 481 U.S. 279, 286 (1987). Relying on a statistical study of the relationship between the race of homicide victims and the race of capital defendants, McCleskey alleged that capital punishment was being administered in a racially discriminatory manner in Georgia because juries were more likely to sentence offenders to death for killing a white victim than a black one. The Supreme Court assumed that the study was valid, but rejected McCleskey's claim on the merits. *Id.* at 291 n.7. "Even a sophisticated multiple-regression analysis," the Court explained, "can only demonstrate a risk that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision." *Id.* That was insufficient to establish a constitutional violation; a defendant must prove that

fare under his theory. That is a major omission. No new methodological proposal for constitutional interpretation can offer itself as an alternative to the two warring theories without addressing how it would handle one of the two most divisive issues of our time (abortion is the other one).[225] I expected that *Common Good Constitutionalism* would take a position on the legitimacy of current equal protection law. I was disappointed to learn that it did not.

2. The Incorporation and Reverse Incorporation Doctrines

The Federalists proposed the Bill of Rights to assuage the Anti-Federalists' concern that the Constitution would empower the new federal government to deprive the people of certain fundamental liberties they had enjoyed under English law. Initially, the Bill of Rights applied only against the federal government, not the states.[226] Beginning in 1897, the Court has held that numerous Bill of Rights provisions now do apply to the states under what has become known as the Incorporation Doctrine—that is, the (textually incoherent) proposition that the Fourteenth Amendment Due Process Clause incorporated a host of different Bill of Rights guarantees. Today, there are few Bill of Rights provisions not applicable to the states.[227] In fact, perhaps because it likes a door that swings both ways, the Supreme Court has even created a "Reverse Incorporation" Doctrine. The Court has ruled that the Fifth Amendment Due Process Clause, which applies only against the federal government, incorporates equal protection principles that, textually speaking, apply only against the states, because the text of the Fourteenth Amendment quite clearly does not.[228]

Professor Vermeule does not address the issue how his theory would have answered the issues that the Supreme Court addressed in the Incorporation or Reverse Incorporation Doctrines. That—especially when coupled with the absent role of stare decisis in his theory—would have been an important subject to discuss, because most of the Supreme Court's Incorporation Doctrine

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invidious discrimination infected the decision in *his or her* case, *id.* at 292–93, which even the study's authors admitted they could not do. *Id.* at 293 n.11.

225. Professor Vermeule concludes not only that there would be no such right, but also that "unborn children" should have "a positive or affirmative right to life that states must respect in their criminal and civil law." VERMEULE, *supra* note 3, at 199 n.103. A lifetime (even season-long) .500 batting average will get you elected to the Hall of Fame, but no one wants to be thought of as a legal Alex Rodriguez, someone who was a star during the regular season but (with one exception) was just ordinary during the playoffs.

226. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

227. The only Bill of Rights provisions not incorporated are the Third Amendment's protection against quartering of soldiers, the Fifth Amendment's Grand Jury Clause, the Seventh Amendment's right to a civil jury trial, and the Tenth Amendment (which logically could not be applied *against* the states). McDonald v. Chicago, 561 U.S. 742, 765 n.13 (2010).

228. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 774–75 (2013); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

decisions regulate how states can implement their criminal justice systems.[229] Disincorporating the Fourth, Fifth, Sixth, and Eighth Amendments would return the law to where it was before the Supreme Court decided *Wolf v. Colorado* in 1949.[230] It would be easy for someone on the Right or the Left to argue that the Supreme Court's criminal procedure decisions hinder the "common good" of preventing crime by enforcing the criminal law because the relevant Bill of Rights provisions impose procedural and substantive restraints on how the states can run their criminal justice systems. Put aside the easy cases like *Miranda* and *Mapp*.[231] For example, a state might decide that a jury's mistaken decision to acquit someone of murder—say, O.J. Simpson or Kyle Rittenhouse—should not bar the prosecution from retrying him on that crime, because the jury might have let him walk due to sympathy, rather than insufficient evidence. Or someone might argue that black jurors should vote to acquit black defendants to protest racism in the criminal justice system even when the proof of a defendant's guilt is overwhelming.[232] If the Bill of Rights provisions are disincorporated, there would be no federal limit on how far back—or how often—states could seek to bring offenders to account.

Common Good Constitutionalism does not explain how to apply its principles to the criminal justice system. I also do not know from Professor Vermeule's other works what he would say about those "determinations." And that is my point.

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229. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (Eighth Amendment Excessive Fines Clause); Benton v. Maryland, 395 U.S. 784, 787 (1969) (Double Jeopardy Clause); Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967) (Speedy Trial Clause); *In re* Oliver, 333 U.S. 257, 271–73 (1948) (Public Trial Clause); Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (Jury Trial Clause); Pointer v. Texas, 380 U.S. 400, 403 (1965) (Confrontation Clause); Washington v. Texas, 388 U.S. 14, 18–19 (1967) (Compulsory Process Clause); Aguilar v. Texas, 378 U.S. 108, 110, 115–16 (1964) (Fourth Amendment Warrant Clause); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (Self-Incrimination Clause); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (Counsel Clause); Robinson v. California, 370 U.S. 660, 664, 666–67 (1962) (Eighth Amendment Cruel and Unusual Punishments Clause).

230. Wolf v. Colorado, 338 U.S. 25, 28, 31–32 (1949) (ruling that the Fourth Amendment applies to the states through the Fourteenth Amendment Due Process Clause, but also that the Fourth Amendment Exclusionary Rule created in Weeks v. United States, 232 U.S. 383 (1914), does not.

231. Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961); *see* Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL'Y 961, 964 (2008) ("Consider the Fourth Amendment: It establishes general parameters . . . . It does not say that the exclusion of evidence is the proper response to an illegal search.").

232. In fact, someone has made that argument. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) ("I argue that the race of a black defendant is sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction.") (internal citation omitted).

3. Stare Decisis

Professor Vermeule hopes that *Common Good Constitutionalism* will upset the results that we have seen in many areas of constitutional law, perhaps especially the "culture war" issues, such as abortion and gay marriage. That might even be the hope of the people who applaud its entry into our law. But there are two questions that goal poses: (a) What advantage does *Common Good Constitutionalism* have over Originalism to win that game?, and (b) Has the last inning already been played? Professor Vermeule makes a great locker room speech to get us motivated (to mix sports metaphors) to win one for the Gipper, but his game plan is, well, not so good.

a. The Alleged Advantage of Common Good Constitutionalism

A weakness in *Common Good Constitutionalism* is its failure to explain how to conduct its analysis in concrete cases. It is not enough to say that, given *Roe*, *Obergefell*, and *Bostock*,[233] we know that Originalism cannot get the job done, because we had the best originalist justice bar none (Justice Neil Gorsuch) flub the last grounder hit his way. Everyone makes mistakes. Even Omar Vizquel made an error once or twice.[234] Critics mistakenly want perfection. Even if perfection were possible, there is no guarantee that *Common Good Constitutionalism* will supply it. As explained above, that theory would offer Living Constitutionalists a wonderful opportunity to say that they are changing their spots by endorsing this new theory, while using it in a manner that is indistinguishable from how Living Constitutional theory can be played out. If so, *Common Good Constitutionalism* is just a new, stylish facade for old-fashioned dissembling and leftward judicial lawmaking.

Besides, Professor Vermeule's book is a little short on instructions for performing his analysis. Which classical moral principles count? How are they ranked? What is the tiebreaker? Which authors do we look to for insight? Are they Greek? Roman? Italian? French? Persian? Chinese? How about English? Since that is the nation that gave America its legal system, one would hope that common law scholars would count—and count far more than any others. Chief Justice Marshall certainly thought so.[235] How far back do we go for authority?

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233. Roe v. Wade, 410 U.S. 113 (1973); Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

234. Vizquel earned eleven Gold Gloves at shortstop, including nine straight from 1993 to 2001; he holds the American League record for most games played at shortstop without committing an error; and he has the highest career fielding percentage for a shortstop (.985). Andrew Robeson, *Omar Vizquel and the 10 Best Defensive Shortstops in MLB History*, MLB (Jan. 20, 2011), https://bleacherreport.com/articles/578943-mlb-power-rankings-the-10-best-defensive-shortstops-in-mlb-history-with-video.

235. *See* United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("The constitution gives to the president, in general terms, 'the power to grant reprieves and pardons for offences against the United States.' As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon,

Why don't the views of the Framers count for more than the opinions of people who came and went centuries beforehand? Can today's scholars—Robert George—for example, qualify? (Professor Vermeule seems fond of John Finnis,[236] so my guess is that he would say, "Yes" to him and George.) Or do we need to await the judgment of history to learn the value of today's ethicists? There is no obvious answer to those questions, there is no way to answer them without drawing arbitrary lines, and there is nothing in the Constitution's text that helps figure out where to draw them. If so, why are *Common Good Constitutionalism*'s arbitrary lines better somehow than Originalism's (or Living Constitutionalism's)? It is no answer to say that *Common Good Constitutionalism* is a "framework" for the future development of constitutional law, not a "blueprint," and that courts can fill it out over time. Yes, courts will offer different answers to those questions, but we should know which answers Professor Vermeule thinks are correct. I am sorry, but if you are asking the Supreme Court to rely on your theory when deciding whether to take issues away from the political process the Constitution established—and Professor Vermeule must have that in mind, because he endorses judicial review—then perhaps you should have drafted a blueprint.

b. The Innings Left

This is 2022, not 1822. That matters. What might have been a good theory 200 years ago—when the body of Supreme Court case law, let alone its treatments of the Constitution, was small—might not be a good decision today given the disruption that it might entail.[237] Post-1822 decisions certainly had an effect on the development of the nation. Consider just the ones dealing with the Commerce Clause. They gradually expanded Congress's authority over virtually every aspect of the nation's economic and social life.[238] Much of the

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and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.").

236. VERMEULE, *supra* note 3, at 46.

237. An April 24, 2022, Westlaw search revealed that there were 745 Supreme Court decisions before January 1, 1823, and 10,000-plus decisions before January 1, 2023.

238. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276–80 (1981) (ruling that Congress may regulate intrastate activities if it could rationally conclude that they might affect interstate commerce); Perez v. United States, 402 U.S. 146, 155–56 (1971) (same); Katzenbach v. McClung, 379 U.S. 294, 299–300, 303–04 (1964) (same); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964) (same); Wickard v. Filburn, 317 U.S. 111, 125–28 (1942) (same, intrastate activities that, considered as a class, might affect interstate commerce); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (same, "those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power"); United States v. Darby, 312 U.S. 100, 118 (1941) (same, intrastate commerce if it "so affect[s] interstate commerce . . . as to make regulation of [the former an] appropriate means" to protect Congress's authority over the latter); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (same, intrastate activities that have "a close and substantial relation to interstate commerce" if doing so is necessary to protect interstate commerce); Houston, E. & W. Tex. Ry. v. United States (Shreveport Rate Cases), 234 U.S. 342, 351–53 (1914) (same, interstate and intrastate

federal administrative state has come into being because the Supreme Court has been willing to grant Congress almost whatever regulatory authority it wants.[239] Maybe some Common Good Constitutionalists want to chuck it all. Professor Vermeule, however, certainly does not. Either way, advocates for this view have a duty to explain why the Supreme Court should overturn all or some of its precedents, or should retain a few but quarantine any now-disfavored ones so that they cannot infect the doctrines favored today.

A critical feature of any new methodology, accordingly, would be a discussion of *stare decisis*. There are numerous questions that need to be answered, some of which are the following: Must every Supreme Court ruling be re-examined in light of the need to focus on whether it advances the nation's welfare? If not, what is the dividing line? Is that a subject matter line—cases dealing with the federal government's authority go into one pile, structural or separation of powers cases fit into a different one, civil liberties and Bill of Rights issues slide into a third? Or is the line a temporal one? Do eighteenth- and nineteenth-century rulings get a pass? What about post-New Deal (or pre-New Deal) precedents? If every decision is up for grabs, how confident do we need to be that a new result will (or might) advance society toward that the common good? Does some (textually unidentified) risk of severe and irremediable disruptive effects on our polity outweigh our advance, or are pyrrhic victories worthwhile? How do we balance short-term benefits and long-term costs, and their flip sides? What weight do we give to the public's favorable or unfavorable reaction to our

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commerce where the two are closely intermingled); Hoke v. United States, 227 U.S. 308, 320–22 (1913) (same, the use of interstate transportation for the conduct of prostitution); Hipolite Egg Co. v. United States, 220 U.S. 45, 55 (1911) (same, impure food and drugs); Champion v. Ames (The Lottery Case), 188 U.S. 321, 363–64 (1901) (same, lottery tickets and prize lists).

239. *See generally* RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 11 (2020) (arguing that the Supreme Court's decision in *Jones & Laughlin Steel Corp*. "rubber-stamped a vastly expanded federal power under the Constitution's Commerce Clause"); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 36, 158–93 (2014); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006); Robert Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 945–46 (1946); Robert Stern, *The Commerce Clause and the National Economy, 1933–1946, Part Two*, 59 HARV. L. REV. 883, 885 (1946); *id.* at 946 (describing the state of the law in 1946: "The Commerce Clause was now recognized as a grant of authority permitting Congress to allow interstate commerce to take place on whatever terms it may consider in the interest of the national well-being, subject only to other constitutional limitations, such as the Due Process Clause.") (internal citation omitted). There are some recent examples of the Supreme Court placing limits on Congress's Commerce Clause authority. *See* United States v. Morrison, 529 U.S. 598 (2000) (holding unconstitutional, as exceeding Congress's commerce power, a federal statute making rape an actionable civil claim); United States v. Lopez, 514 U.S. 549 (1995) (holding unconstitutional, as exceeding Congress's commerce power, a federal law that made it a crime to possess a firearm in the vicinity of a school); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (five justices, one in the majority and four in dissent, concluded that Congress lacked authority to enact the Patient Protection and Affordable Care Act). The future course of those recent decisions is uncertain. *See* Paul J. Larkin, *Constitutional Challenges to the OSHA COVID-19 Vaccination Mandate*, 20 GEO. J.L. & PUB. POL'Y 367 (2022).

new course? There are beaucoup issues that must be analyzed before we commit to one.

To be sure, answering questions like those might be more a lifetime's work than a job for a single publication. But maybe Professor Vermeule should have spent more time fleshing out his theory. John Rawls did so before publishing *A Theory of Justice*, so it can be done. Nor is it an answer to say that the book "is not intended to provide specific answers to questions about the proper level of the minimum wage, the circumstances under which abortion should or should not be legal, or whether there should be *de novo* judicial review of administrative action."[240] There certainly was no need for him to explain why a minimum wage should be $*X* or $*Y* dollars per hour, but there is a need to justify the conclusion that federal courts should make that decision. Professor Vermeule elsewhere says that *Roe v. Wade* would not survive his theory, and he comes close to saying that abortion should be *verboten* under almost all circumstances.[241] Yet he does not explain why Common Good Constitutionalism demands either proposition. If truly "we are here as on a darkling plain, [s]wept with confused alarms of struggle and flight, [w]here ignorant armies clash by night,"[242] it would have helped us if he had done so.

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My final thoughts are these: The problem with *Common Good Constitutionalism* is not that Professor Vermeule's effort to construct a new interpretive methodology is misguided. It is not. Professor Ely made the same attempt in 1980, and his book *Democracy and Distrust* was a valuable contribution to our learning. So, too, with *Common Good Constitutionalism*. The problem is not that Professor Vermeule is wrong to encourage elected officials to try out a new decision-making approach to see how it works, one that demands statesmanlike behavior to advance the common good rather than discrete interests on either side of the divide. Elected officials should. The cynic in me (which predominates) says that any such effort would be like trying to persuade water to run uphill, but the optimist in me (there is a small remnant left) tells me that the effort is worth making. I might be in the same position as someone about to enter into a second marriage—that is, a living example of "the triumph of hope over experience."[243] In the world of elected officials, I am willing to take that risk. But not in the case of judges whom the electorate cannot vote from office.

The problem with *Common Good Constitutionalism* is that, unless courts are exempted from relying on that decision-making methodology when interpreting

240. VERMEULE, *supra* note 3, at 35–36.

241. *Id.* at 199 n.103.

242. MATTHEW ARNOLD, *Dover Beach*, *in* NEW POEMS 35–37 (1867).

243. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 327 (David Womersley ed., Penguin Classics 2008) (1791).

the Constitution, whatever results the Supreme Court reaches will be etched in granite. The political process cannot change them,[244] so we could be stuck with those results for a very long time. Remember, the Supreme Court decided *Roe v. Wade* in 1973, and neither constitutional law nor Supreme Court nominations nor national politics has been the same over the last half-century. In the wrong hands, the *Common Good Constitutionalism* methodology could be worse than Living Constitutionalism. So, unless we are willing to endure another series of painful and possibly inconclusive Supreme Court decisions and appointments—or to dynamite the enterprise of judicial review, which would be tantamount to amputating a patient's head to save a gangrenous limb—we might have to suffer through very damaging consequences imposed on us by an experiment that, in the wrong hands, would have unintended consequences far worse than the disease it seeks to treat.

CONCLUSION

We might someday run out of breathable air, fertile land, and potable water, but we will never run out of new books discussing constitutional law. Like watching baseball, offering opinions about our Constitution, what it means and how it should be read, is America's pastime. Ninety-nine percent of Americans are not physicians and know that they are not qualified to offer medical opinions, but hardly anyone, including non-lawyers, treats constitutional law the same way. Of course, some opinions are worth more than others. Professionals play a better game of baseball than Little Leaguers, and professionals do a better job of analyzing what our Constitution means than amateur, lay interpreters. Professor Vermeule is a professional, and *Common Good Constitutionalism* is an excellent addition to the corpus of work in that field.

But it is not a persuasive substitute for Originalism. At the end of the day, the book does not give sufficient weight to the Framers' decision to let politicians be politicians, a choice the Founders made because they knew that it would be unreasonable to hope that politicians would do otherwise. That judgment was a sensible one. Since 1789, others have made the mistake of building a plan to restructure society on the premise that men are angels. Karl Marx made that assumption, believing that people have a character enabling them to make the personal sacrifices that communism demands of every individual. We know how well that turned out. Adam Smith and James Madison, by contrast, realized that men and women are inherently selfish, interested more, and more often, in advancing themselves, rather than society. Their idea was to devise economic and political systems that allowed each person to better him- or herself, while still improving the lot for everyone else, even if only as an unintended

244. *See* City of Boerne v. Flores, 521 U.S. 507, 516–36 (1997) (ruling that Congress cannot reverse a Supreme Court ruling by statute); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217–40 (1995) (same, Congress cannot alter the effect of an Article III court's judgment); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (same, Congress cannot direct the Supreme Court how to enter judgment by manipulating the Court's appellate jurisdiction).

consequence. They chose wisely. Communism failed, but capitalism survived, our democratic republic has endured, and both of the latter two have continued moving forward. We should heed the lessons taught by the histories that followed those divergent choices. If we do not, we cannot complain that we were not warned.