BOOK REVIEW

# RECOVERING CLASSICAL LEGAL CONSTITUTIONALISM: A CRITIQUE OF PROFESSOR VERMEULE'S NEW THEORY

## COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION. By Adrian Vermeule. Polity Press. 2022.

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## INTRODUCTION

Professor Adrian Vermeule has provoked renewed interest in the relationship between the classical natural law tradition and the Constitution of the United States with his book, *Common Good Constitutionalism: Recovering the Classical Legal Tradition*.[1] As scholars self-consciously working in that tradition, we welcome contemporary attention to that perennial legal philosophy. Yet in reading and rereading the book, we found ourselves frustrated with it, notwithstanding the apparent agreement we shared with the author at some abstract level of principle. And that abstraction, it turns out, is just the problem with the book's application of the classical legal tradition to constitutional law. All the right concepts are there for a sound approach to constitutionalism: understanding law as a reasoned ordinance, for the common good, authored by one with responsibility for the community, and promulgated. Too often, though, the only thing missing from this theory of constitutional law was *a* law, namely the Constitution of the United States.

Rather, Vermeule follows Ronald Dworkin in seeking to offer "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."[2] This is not, however, "a work of legal history" or "jurisprudence in the technical academic sense."[3] It is a work of Dworkinian "constructive interpretation."[4] Vermeule never makes clear how the written Constitution of the United States

1 ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022).

2 *Id.* at 5.

3 *Id.* at 4.

4 *Id.* at 11.

fits into this construction. His big-picture account is of "the small-c constitutional order."[5] This is "not necessarily the same," he says, "as the formal written Constitution even in polities that have the latter."[6] The United States of America is, notoriously, one of those polities with a formal written Constitution; some might even think its prominence and endurance are aspects of American exceptionalism.

In a coauthored work predating Vermeule's by half a decade, we sketched a framework for understanding the relationships among the formal written Constitution, American constitutional law, and the classical natural law tradition.[7] Although our work started out from a similar orientation in the classical natural law tradition as Vermeule's later account, we followed a different path and ended up at a different place. The more conventional path we charted travels through the Declaration of Independence, the Articles of Confederation, the framing and ratification of the Constitution, early treatises, and classic cases from the Marshall Court. Little of all this figures into Vermeule's account of our constitutional order.

The fundamental point of divergence between us and Vermeule is that the classical legal tradition calls for obedience to the Constitution of the United States as not just *the* law, but also *a* law—an ordinance of reason, for the common good, made by one with authority, and promulgated. Vermeule's version of constitutionalism, which too often substitutes Dworkin's hermeneutics for a classical understanding of law, is attentive to certain conceptions of reason and the common good, but inattentive to authority and promulgation. With respect to all four of these elements, moreover, Vermeule's constitutionalism is unanchored historically. He argues for "classical constitutionalism" that is not "enslaved to the original meaning of the Constitution."[8] But obedience to original law except as lawfully changed is not akin to enslavement that one must overcome. A real law deserves our real obedience, but Vermeule's version of common good constitutionalism is indifferent—rather than obedient—to the promulgated Constitution. That is not good classical lawyering, though it may be a deftly constructed interpretation that fits and justifies a very different constitutional order than the one handed down to us.

This Review proceeds in three Parts. Part I briefly summarizes *Common Good Constitutionalism* and provides a more detailed description of four of the book's distinctive features. Part II critiques Vermeule's argument in light of the classical tradition's four essential

5 *Id.*

6 *Id.* at 10.

7 Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

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

aspects of law, namely that it is an ordinance of reason, for the common good, made by one who has care of the community, and promulgated. Part III draws on those reflections to respond to Vermeule's criticisms of work like ours that argues that original-law-based understandings of the Constitution are at home in the classical legal tradition. A Conclusion briefly reflects on the choices facing the classical natural lawyer in the American constitutional order going forward.

## I. PROFESSOR VERMEULE'S PARTICULAR CONSTITUTIONALISM

We begin with a high-level overview of *Common Good Constitutionalism* followed by a more detailed discussion of four distinctive features.

### *A. Overview of the Book*

*Common Good Constitutionalism* has five chapters bookended by an Introduction and Conclusion. Chapters One and Two present Vermeule's "positive vision of common good constitutionalism, both generally and as an approach to our own constitutional order in particular."[9] This two-chapter exposition of the positive case for common good constitutionalism maps onto an essential distinction that Vermeule highlights at the outset. This is the distinction between "(1) general claims about constitutionalism ordered to the common good," and "(2) specific constructive interpretations of a *given* constitutional order that aim to put that order, as it develops over time, in its best light."[10]

These generic and particular levels of discussing constitutions and the common good are detachable by design. According to Vermeule, his "particular interpretation of our own constitutional order . . . is separable from the general claims about the nature and principles of constitutionalism also offered here."[11] This detachability is the basis of Vermeule's assurance that "[o]ne may subscribe to the general framework of common good constitutional interpretation without subscribing to the full, particular interpretation of the path of American public law that I have laid out."[12]

Chapter One presents his generic understanding: "a general, positive definition of the common good, a sketch of common good constitutionalism, and an account of its basic contours, premises, and

9 *Id.* at 21.
10 *Id.* at 11.
11 *Id.* at 12.
12 *Id.*

commitments."[13] Although this chapter is devoted to common good constitutionalism in general, Vermeule's particular interpretation of the American constitutional order begins to emerge with his assertion that "[t]he 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 just authority, solidarity, and subsidiarity."[14] This follows after a brief discussion of the power of state and federal governments in the United States to act for the general welfare.[15] Vermeule dismisses as a "complication . . . chronically exaggerated by originalists and libertarians . . . the distribution of powers between national and state governments."[16] Although the Supreme Court has denied that the federal government has a "general police power," that denial "was always in tension with the *McCulloch v. Maryland* principle that enumerated powers should be expansively construed over time to accommodate changing circumstances."[17] Through "a development and translation of the original constitutional scheme to new circumstances," "the federal government for all intents and purposes has acquired by prescription, over time, a *de facto* police power."[18]

Chapter Two turns to his particular account of "The Classical Legal Tradition in America."[19] This chapter has two parts. First is a high-level historical sketch "beginning with the *ius commune*—the rich stew of Roman law, canon law, and other legal sources that formed the matrix within which European legal systems developed—and its relationship to Anglo-American law."[20] The second part of Chapter Two discusses a trio of illustrative cases: (1) three opinions from *Lochner v. New York* (a 1905 decision of the Supreme Court of the United States);[21] (2) two opinions from *Riggs v. Palmer* (an 1889 decision of the New York Court of Appeals);[22] and (3) an opinion for the Court in *United States v. Curtiss-Wright Export Corp.* (a 1936 opinion for the Supreme Court of the United States authored by Justice Sutherland).[23]

13 *Id.* at 21.
14 *Id.* at 38.
15 *Id.* at 32–34.
16 *Id.* at 32.
17 *Id.* at 33 (citing 17 U.S. (4 Wheat.) 316 (1819)).
18 *Id.* at 34.
19 *Id.* at 52.
20 *Id.* at 21.
21 *Id.* at 60–71 (citing 198 U.S. 45 (1905)).
22 *Id.* at 71–84 (citing 22 N.E. 188 (N.Y. 1889)).
23 *Id.* at 84–89 (citing 299 U.S. 304 (1936)).

That is it for Vermeule's case-in-chief. The next two Chapters shift to a critique of purported rivals—"positivist originalism"[24] in Chapter Three and progressive living constitutionalism in Chapter Four. In Vermeule's telling, these theories are rivals of each other, but not of the classical legal tradition, which he describes as separated by a wide gulf from these approaches.[25]

Chapter Five adumbrates potential applications. These sketches are just "suggestive illustrations to begin a project that will work itself out over time."[26] Substantive topics covered include: arbitrary-and-capricious review, deference doctrines in administrative law, state sovereignty, statutory interpretation, free speech law, obscenity, blasphemy, and standing in environmental law matters.[27] Vermeule discusses several Supreme Court cases related to the wide variety of topics canvassed in the chapter, though he does not go into any single case at length.[28]

### *B. Four Distinctive Features*

We move now from a high-level overview of the book as a whole to some distinctive features of Vermeule's particular constitutionalism.

#### 1. Neither Legal History nor Academic Jurisprudence, but Dworkinian Fit and Justification

A first distinctive feature of *Common Good Constitutionalism* is its methodologically Dworkinian interpretivism. According to Vermeule, the book is neither "jurisprudence in the technical academic sense" nor "a work of legal history."[29] Rather, Vermeule presents his 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."[30] He writes that he limits himself "to the terms of [his] professional competence, the ordinary work of the civil lawyer."[31] It would be a mistake to fully credit this modest self-description, though. *Common Good Constitutionalism* is, emphatically, an ambitious work of contemporary constitutional theory.[32] Vermeule

24 *Id.* at 109.
25 *Id.* at 17.
26 *Id.* at 134.
27 *Id.* at 147–78.
28 *Id.*
29 *Id.* at 4.
30 *Id.* at 5.
31 *Id.* at 29.
32 In responding to a critical review by law professors William Baude and Stephen Sachs, Vermeule describes *Common Good Constitutionalism* as "not a work of jurisprudence,"

self-consciously develops his arguments by reference to what he describes as Ronald Dworkin's methodological criteria of "fit" and "justification."[33] In Vermeule's view, this method is detachable from Dworkin's moral commitments and priorities.[34] Vermeule asserts that "[t]he principal use [he makes] of Dworkin is negative, invoking him as the unsurpassed modern critic of positivism and originalism in Anglophone legal theory."[35]

More affirmatively, Vermeule presents his book as a *recovery* of "the classical legal tradition" for American public law. This tradition is a given for his argument and he does not purport to make a novel contribution to classical legal jurisprudence. Rather, he offers a constructive interpretation of American legal practices to surface the classical legal tradition as an implicit structuring framework that puts the American constitutional order today in its best light. Vermeule claims that this framework is everywhere to be found once one knows what to look for, but has simply been neglected because "American public law suffers from a terrible amnesia."[36] Accordingly, while he "draw[s] on

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but rather "an argument within constitutional theory, an argument with both a general and a particular part." Adrian Vermeule, *The Bourbons of Jurisprudence*, IUS ET IUSTITIUM (Aug. 15, 2022) (footnote omitted), https://iusetiustitium.com/the-bourbons-of-jurisprudence/ [https://perma.cc/AB25-SXSH]. Vermeule's Harvard Law School colleague, Professor Jack Goldsmith, describes the book in a back-cover blurb as "the most important book of American constitutional theory in many decades." Inside the front cover, University of Notre Dame political philosopher Professor Patrick Deneen describes *Common Good Constitutionalism* as "the most important and original book on constitutional theory for this generation." The book's claimed occupation of the high precincts of constitutional theory also frames Vermeule's coauthored response to criticisms advanced by Chief Judge William Pryor of the United States Court of Appeals for the Eleventh Circuit. *See* Conor Casey & Adrian Vermeule, *Argument by Slogan*, HARV. J.L. & PUB. POL'Y PER CURIAM, Spring 2022, at 1 (attacking Judge Pryor's criticisms as illustrating "occupational hazards for the judge-turned-occasional-theorist").

33 *See* VERMEULE, *supra* note 1, at 69 (asserting that "one might see the common good framework as Dworkinism-plus-deference, just with a better account of justification"). Vermeule does not explain what he means by Dworkinian "fit" in *Common Good Constitutionalism*, but the way that he approaches fit and justification in the book seems consistent with the use he made of these Dworkinian criteria in Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2016). In that Essay, Vermeule purported to operate "[i]n a Dworkinian spirit" by presenting a "theory [that] attempts to combine *justification*, the best account of the principles underlying the precedents, with *fit*, a coherentist account of the law's path in recent decades." *Id.* at 1894.

34 VERMEULE, *supra* note 1, at 5–6 (rejecting Dworkin's "liberal theory of rights, as trumps over collective interests").

35 *Id.* at 5–6.

36 *Id.* at 1.

jurisprudential ideas as necessary," he says he has "nothing original to say in that regard."[37]

### 2. Not the Formal Written Constitution, but the "Small-c Constitutional Order"

A second important feature of Vermeule's constitutionalism is a specification of the first. The Dworkinian interpretive account that he provides is *not* an interpretation of the formal written Constitution of the United States as a legal instrument. Rather, Vermeule's is an interpretation of the contemporary American constitutional order more generally. Vermeule explains in his introduction that the "particular part" of *Common Good Constitutionalism* presupposes and incorporates by reference from his previous work "a particular constructive interpretation that fits-and-justifies our own developing constitutional order."[38] There and elsewhere in the book, Vermeule describes his Dworkinian interpretation to be an account of "the American small-c constitutional order," as distinguished from the formal written Constitution.[39]

In discussing the limits of generic common good constitutionalism, for example, Vermeule writes that "[t]he common good in its capacity as the fundamental end of temporal government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity."[40] These matters of institutional design and authority allocation are "left for specification that gives concrete content to the operative, small-c constitution (which is not necessarily the same as the formal written Constitution even in polities that have the latter)."[41]

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37 *Id.* at 4; *see also* Conor Casey, *"Common-Good Constitutionalism" and the New Battle over Constitutional Interpretation in the United States*, 2021 PUB. L. 765, 772 ("It should be obvious that none of the arguments that post-liberals [like Vermeule] direct against economic, social and political liberalism, or for the common good, is original.").

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

39 *Id.* at 11; *see also id.* at 87 ("The shockingly anti-originalist idea that '[t]he Union existed before the Constitution' may be one of the most consequential sentences ever to appear in the United States Reports—at least for those who overlook the difference between our small-c constitutional order and the written text of the Constitution and its original understanding." (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 317 (1936)); *id.* at 158 ("The so-called sovereignty of the states is best understood as a constitutional principle of respect and comity that the highest authority should take into account, out of prudent respect for legal justice and small-c constitutional arrangements. But like other constitutional principles, it has dimensions of both scope and weight, and is subject to reasonable determination by public authority ordering it to the common good.").

40 *Id.* at 10.

41 *Id.*

This emphasis on the "small-c" constitutional order also features in his account of existing institutional allocations of authority, such as "broad deference to legislatures on social and economic legislation," "broad delegations from legislatures to the executive," and "a strong legal principle of deference . . . to the institutional presidency and administrative tribunals."[42] All of these principles are Dworkinian "interpretations" of the "small-c constitutional order."

### 3. Not *Lex*, but *Ius*

A third distinctive feature of Vermeule's recovery project in *Common Good Constitutionalism* is more classical than contemporary. Vermeule's Dworkinian interpretive account of the American constitutional order relies at root on a distinction between *lex* and *ius* as "two senses of 'law.'"[43] "[T]he role of *ius*, instead of or in addition to *lex*" is a leading theme.[44] He deploys this distinction at the book's beginning, at its end, and many places in between.

As Vermeule uses these terms, what initially seems to be one distinction in fact turns out to be many. Introducing *lex* and *ius* in *Common Good Constitutionalism*, Vermeule writes: "*Lex* is the enacted positive law, such as a statute. *Ius* is the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice."[45]

This passage establishes Vermeule's use of "*lex*" as "enacted positive law, such as a statute." It also introduces two different senses of *ius*. First is "the overall body of law generally, including and subsuming *lex* but transcending it." This is the sense of *ius* captured in the familiar phrase "*corpus juris*." Second is that *part* of "the overall body of law generally" (or *corpus juris*) that consists of "general principles of jurisprudence and legal justice." In Vermeule's taxonomy, then, "*ius*" as "the overall body of law generally" refers to a *corpus juris* comprised of (i) *lex*, and (ii) *ius* in the "general principles of jurisprudence and legal justice" sense.

Further down on the same page, Vermeule deploys a third sense of "*ius*" and a second description of *lex*. The third sense of *ius* appears

42 *See id.* at 11 ("[T]he American small-c constitutional order has come to feature broad deference to legislatures on social and economic legislation and broad delegations from legislatures to the executive."); *id.* at 12–13 ("A strong legal principle of deference by courts to the determinations of legislatures was part and parcel of our law from the beginning. One of my particular claims is that our small-c constitutional order developed over time to extend this principle to the institutional presidency and administrative tribunals.").

43 *Id.* at 3.

44 *See id.* at 134 (identifying this as a theme of the book).

45 *Id.* at 4.

in Vermeule's explanation of "rights" within the classical legal tradition. "In this tradition," Vermeule states, "'rights' very much exist, but they are not defined in the essentially individualist, autonomy-based, and libertarian fashion familiar today. Instead 'rights' are corollaries of justice, which is the constant aim of giving every man his due."[46] Vermeule's third sense of *ius*, then, refers to the object of an act of justice: "*Ius* is what is due to every person, and in this sense, but only this sense, includes rights."[47]

Vermeule's second description of *lex* is broader than his first "enacted positive law" description. In setting his outlook apart from that of "progressives and originalists," Vermeule asserts that "[b]oth [of those other] camps . . . attempt, in different ways, to reduce all law to positive law adopted by officials; for them, all law is in this sense *lex*."[48] The verbal difference between "enacted positive law" and "positive law adopted by officials" may seem slight. But "positive law adopted by officials" is potentially much broader because it could encompass customary positive law adopted by, say, judges. Much of American constitutional law is customary positive law. Whether Vermeule classifies such law as *ius* or *lex* therefore matters a lot not only for understanding his version of common good constitutionalism but also for judging his claims about the absence of *ius* in constitutional originalism.

Another reason for clarifying what Vermeule means by *ius* and *lex* is to help place our written Constitution itself in his legal taxonomy. As we explain below, the Constitution is *lex* because it is an enacted positive law that meets all the essential requirements for a valid law. But Vermeule is surprisingly unclear in *Common Good Constitutionalism* about whether the Constitution is *lex*. On the one hand, Vermeule treats valid positive law as a determination of the natural law, and he distinguishes "determination *of* the constitution" from "determination *within* or *under* the constitution.[49] Vermeule describes "determination" as "the process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems."[50] And he explains

46 *Id.*

47 *Id.* The "object of an act of justice" formulation is ours, not Vermeule's, but we think it best captures how he means to make use of the classical legal tradition in referring to "rights" as "corollaries of justice." *Id.* Our formulation is tied to justice as a virtue. Although Vermeule relays the classical conception of justice as "the constant aim of giving every man his due," he does not analyze this conception within its classical framework, which is as a virtue.

48 *Id.*

49 *See id.* at 9–11.

50 *Id.* at 9.

determination *of* the constitution as the specification of matters such as "the nature of institutions and the allocation of lawmaking authority between and among them in any given polity."[51] This would seem to describe the written Constitution. But Vermeule tamps down this inference. He describes this "determination *of* the constitution" as "specification that gives concrete content to the operative, small-c constitution (*which is not necessarily the same as the formal written Constitution* even in polities that have the latter)."[52] In discussing the constitutional origins of the United States later in the book, further, Vermeule asserts that "the American constitutional order rests, not upon positive written law, but upon the *ius gentium*."[53] All of this leaves it unclear at best whether Vermeule acknowledges that the Constitution is *lex*, an enacted positive law. As we explain below, there is a right way for lawyers operating in the classical natural law tradition to interpret valid *lex*. It therefore matters to one's assessment of *Common Good Constitutionalism* not only whether the Constitution is *lex* (it is), but also whether Vermeule understands and accepts that the Constitution is *lex* (does he?).

4. Not Progressive, but Developing

A fourth feature that defines Vermeule's constitutionalism is the manner in which he purports to distinguish his particular version of common good constitutionalism as *developing*, in contrast with "progressive." "Under developing constitutionalism," Vermeule writes, "the fundamental background principles of the constitutional order, derived from the natural law and the law of nations and then incorporated (by determination) into the positive law, remain constant over time."[54] This description of developing constitutionalism seems like it could be an originalist approach that recognizes the Constitution as *lex* in which the fundamental background principles that are "incorporated (by determination) into the positive law, remain constant over time."[55] As we have seen, though, Vermeule (1) purports to offer an interpretation of the constitutional order rather than the Constitution, (2) does not clearly acknowledge the Constitution as an enacted positive law, and (3) emphasizes the unchangingness of "background principles" rather than *the endurance of the positive legal determinations* of

51 *Id.* at 10.

52 *Id.* (second emphasis added).

53 *Id.* at 85. This claim that the American constitutional order does not rest upon positive written law is essential to his overall account because "[o]nly the classical perspective can explain this [i.e., resting upon the *ius gentium* rather than positive written law], which amounts to a grave problem for positivist originalism." *Id.*

54 *Id.* at 121.

55 *Id.*

those principles.[56] According to Vermeule, the purpose of his common good constitutionalism "is to preserve *the rational principles of the constitutional order* as the circumstances of the political, social, and economic environment change."[57] He asserts that developing constitutionalism "posits that law has . . . an objective integrity that transcends the particulars of any given constitutional order."[58]

"To distinguish developing constitutionalism from progressive constitutionalism," Vermeule notes, "one needs an account of which developments are genuine and which are corrupt."[59] He draws on "the famous treatment of the development of doctrine by St. John Henry Newman" for this purpose.[60] Vermeule explains that "[f]or Newman, development was the process by which enduring principles, themselves unchanging, could find fresh applications in changing circumstances, and by so doing could unfold their real natures."[61] Vermeule writes:

> Newman articulated seven "notes" of genuine development, as opposed to corruption: (1) "preservation of type," which in his language means unity of external expression; (2) "continuity of principles"; (3) "power of assimilation"; (4) "logical sequence"; (5) "anticipation of its future"; (6) "conservative action"; and (7) "chronic vigor."[62]

Vermeule explains that, for Newman, these "notes" are "markers or indicators that the later doctrine is essentially continuous with the earlier one and grows out of it."[63] Vermeule contrasts development of doctrine in this sense from the purported view of progressive living constitutionalism "that the fundamental constitutional principles of the past are themselves seen to have been benighted, and therefore must be overcome."[64] For Vermeule, by contrast, "those [fundamental constitutional principles of the past] are to be tended and developed into full growth."[65] Straying somewhat from the ordinary work of the civil lawyer, Vermeule likens progressive constitutionalism to "modernism in theology, which urges evolution of principles themselves rather than faithful applications of them in different circumstances that

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56 *Id.* at 127.

57 *Id.* at 122 (emphasis added).

58 *Id.*

59 *Id.*

60 *Id.* at 123.

61 *Id.*

62 *Id.* (quoting JOHN HENRY CARDINAL NEWMAN, AN ESSAY ON THE DEVELOPMENT OF CHRISTIAN DOCTRINE 171, 178, 185, 189, 195, 199, 203 (Longmans, Green, & Co., 14th impression 1909) (1845)).

63 *Id.*

64 *Id.*

65 *Id.* at 123–24.

present themselves over time."[66] By contrast, Vermeule asserts that "[a]s circumstances change restlessly over time, principles must develop—in Newman's sense—precisely in order to retain their enduring, inherent shape."[67]

As earlier noted, Vermeule's recourse to unchanging principles that are "incorporated (by determination) into the positive law" and "remain constant over time"[68] would seem to render his approach capable of being understood as an account of American constitutional originalism grounded in the classical natural law tradition. In a 2016 article titled *Enduring Originalism*, we previously provided just such an account, one that—anticipating Vermeule's later-developed common good constitutionalism—explicitly includes the categories of authorized developments and unauthorized departures.[69] We did not rely on St. John Henry Newman, but did offer a criterion for authorized developments very similar to Newman's concept of "preservation of type." The central criterion was whether the legal development was consistent with or authorized by the original law of the Constitution, or rather a departure that contravenes the original law.

Vermeule does not address this aspect of our natural law–grounded originalism, but he does present a number of criticisms culminating in the assertion that "views that attempt to fuse the common good with originalism, however appealing they may seem at a political and rhetorical level, are intrinsically unstable, because they attempt to combine an essentially positivist approach with the classical approach."[70] Whatever he means by instability or "essentially positivist," the view we set out in *Enduring Originalism* explicitly disavowed *positivism* in the course of explaining the Constitution as positive law.[71] This, rejection of positivism is also a feature of our earlier account that Vermeule's current approach converges upon.[72]

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66 *Id.* at 124.

67 *Id.*

68 *Id.* at 121.

69 *See* Pojanowski & Walsh, *supra* note 7.

70 VERMEULE, *supra* note 1, at 116.

71 *See* Pojanowski & Walsh, *supra* note 7, at 108–16 (describing the limits of positivist legal theories like Hart's, Baude's, and Sachs's, which understand social practices like law only in terms of social facts without attending to the moral point or *telos* of the practice).

72 *Compare, e.g.*, Pojanowski & Walsh, *supra* note 7, at 117 ("To understand the importance of *positivity*—the need for human-created law despite its imperfections—we must go beyond *positivism* in theorizing about constitutional interpretation."), *with, e.g.*, VERMEULE, *supra* note 1, at 18 ("Properly speaking, the classical approach to law is not an opponent or alternative to originalism or textualism. . . . The classical conception of *ius civile* . . . can be summed up as *positive law without jurisprudential positivism.*").

Despite the structural similarity with ours of presenting his classically grounded approach as "positive law without jurisprudential positivism," Vermeule attacks our natural law–based originalism as a "hybrid view[]" that attempts "to combine originalism with an emphasis on the common good."[73] He says this is "straightforwardly attractive" when appraised "[a]s a rhetorical posture in what passes for the 'marketplace of ideas,'" but is, again, "unstable in principle."[74] This is puzzling, because Vermeule *also* emphasizes the role of positive law in the nonpositivist classical tradition, without any apparent instability. Yet at the same time he scorns those who more closely (unstably?) attend to the promulgated Constitution as positive law in our constitutional system. This confusion is of a piece with the book's broader lack of clarity about central concepts in the classical legal tradition and how they fit together. Only with a better view of this broader picture can one evaluate Vermeule's argument and the alleged flaws in our approach. Part II attempts to provide just that before discussing in Part III how that broader framework plays out in our respective accounts of American constitutional law and its relationship to constitutional adjudication. In order to understand how Vermeule's criticisms of natural law–based originalism misfire, one must first understand the ways in which his appropriation and rendition of the classical legal tradition is misfocused.

## II. FOUR-CAUSE CONSTITUTIONALISM VS. VERMEULE'S COMMON GOOD CONSTITUTIONALISM

Law is "[1] an ordinance of reason [2] for the common good, [3] made by him who has care of the community, and [4] promulgated."[75] This is the definition of law provided by St. Thomas Aquinas. It provides the structural framework both for our account of natural law–based originalism and also for Vermeule's constitutionalism.[76] Fidelity to the understanding of law set forth in this definition is or ought to be common ground for everyone claiming fidelity to the classical natural law tradition. We therefore use this understanding here as the

73 VERMEULE, *supra* note 1, at 108.

74 *Id.*

75 2 THOMAS AQUINAS, SUMMA THEOLOGICA I-II Q. 90 art. 4 (Fathers of the Eng. Dominican Province trans., Christian Classics Complete Eng. ed. 1981) (c. 1257).

76 *See* Pojanowski & Walsh, *supra* note 7, at 117–126 (explaining the classical natural law foundations of positive originalism by reference to law's four causes of ordinance of reason, for the common good, made by one with care of the community, and promulgated); VERMEULE, *supra* note 1, at 3 ("In the classical tradition, law is seen as—in Aquinas's famous definition—an ordinance of reason for the common good, promulgated by a public authority who has charge of the community.").

measure of the relative adequacy of our respective accounts of American constitutionalism.

Before addressing each of the four elements of St. Thomas's definition of law, it helps to put them in their appropriate metaphysical context. This context is supplied by Aristotle's four causes, or explanatory principles. As Professor J. Budziszewski explains in his commentary on St. Thomas's definition of law, "if by a cause of a thing we mean whatever gives rise to it, whatever explains it, whatever is in any way its *reason why*, then there are four different senses in which the term 'cause' may be used, and to give a rounded account of anything, we must identify all four."[77] These four causes are *formal* cause, *final* cause, *efficient* cause, and *material* cause.[78]

Because these terms may not be familiar, we can use the prosaic example of a sculpted marble statue to show what we mean. The *formal* cause is the pattern or organization of the statue, that which first existed in the mind of the sculptor and then took shape in the marble through the process of sculpting. The *final* cause is the purpose or purposes for which the marble statue exists, the end or ends the sculptor sought to accomplish in sculpting the statue. The *efficient* cause is the sculptor's use of tools and techniques to make the sculpture. (When lawyers think of "causation" they are often thinking in terms of efficient causes—was the breach of duty a link in the chain of events in the world leading to the injury?) Finally, the *material* cause is the marble that makes it up, together with any other material in which the form of the statue is received and manifested, such as paint or polishing agents. This material cause need not be "matter" in the corporeally extended sense in which that term is typically used now. As Professor Budziszewski clarifies, "for St. Thomas, the term 'matter' has a broader meaning than it does in our own day. Matter is anything that can receive a form."[79]

This clarification is important as we discern each of the four causes in St. Thomas's fourfold definition of law. That definition begins with law's formal cause, "ordinance of reason." Next is law's final cause, the common good. Law's efficient cause is its making by one with care of the community, one with lawmaking authority. And law's material cause is the matter through which law is promulgated, that which receives the form of law. This material cause, as with each of the other three causes, varies depending on the kind of law at issue. For law made by humans, promulgation is typically accomplished through

77 J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S *TREATISE ON LAW* 11 (2014).

78 *Id.* (citing ARISTOTLE, METAPHYSICS bk. V, pt. 2 (W.D. Ross trans. 1908) (c. 250 B.C.E.)).

79 *Id.*

words. "In the strict sense of the term," Budziszewski explains, "the essence of law is expressed by its formal cause alone . . . . But St. Thomas brings in its other three causes . . . because they are essentially connected with its formal cause."[80] When considering a written human law made by humans, then, that law is not identical with the words by which it is promulgated; those words are that law's material cause only. That law is more fundamentally the ordinance of reason (its formal cause) as understood to promote the common good of the polity for which it is a law (its final cause), by means of that law's having been authoritatively made (efficient cause) and promulgated (material cause). The following figure may be useful in understanding explanation by means of the fourfold Aristotelian classification of causes.

TABLE 1: FOURFOLD ARISTOTELIAN CAUSES

| **Aristotelian Cause** | **Marble Statue** | **Written Human Law** |
|---|---|---|
| Formal | Sculptor's Design or Plan | Lawmaker's Ordinance of Reason |
| Final | Sculptor's End or Purpose | Polity's Common Good |
| Efficient | Sculptor's Acts of Sculpting | Lawmaker's Authoritative Acts |
| Material | Finished Marble | Law's Promulgated Signs |

With St. Thomas's definition of law and Aristotle's four causes in mind, an immediate difficulty to confront is how to assess a two-level approach like Vermeule's, which distinguishes between generic features of constitutionalism and particular application of the theory to a given polity. This difficulty arises out of the way in which the two levels of this approach are detachable by design, as seen in Vermeule's claim that his "particular interpretation of our own constitutional order . . . is separable from the general claims about the nature and principles of constitutionalism also offered here."[81]

Vermeule claims that "[o]ne may subscribe to the general framework of common good constitutional interpretation without subscribing to the full, particular interpretation of the path of American public

80 *Id.* at 12.

81 VERMEULE, *supra* note 1, at 12.

law that I have laid out."[82] This is true as far as it goes, but there is ample reason for caution. First, at the generic level, the title of *Common Good Constitutionalism* should be a warning sign to a classical legal constitutionalist. That law be for the common good is *one* of law's *four* causes or explanatory principles. One immediately suspects, and it turns out correctly, that Vermeule's general theory overemphasizes one aspect of the classical understanding of law to the neglect of others. This imbalance, which we will discuss below, deforms his particular interpretation of the American constitutional order.

Second, to address Vermeule's accounts of all four causes of constitutional law, it is necessary to abandon his neat methodological separation of the general and the particular. Discussion of general features only goes so far; as with the sculpture, one quickly needs concrete examples to make sense of the abstract features.[83] That is because law as an ordinance of reason requires attention to the actual ordaining of law; law as for the common good requires attention to an actual political community in history; law as made by one with care of the community requires attention to who actually made the law; and law as promulgated requires attention to what its authoritative lawmaker actually promulgated.

### *A. Formal Cause: Ordinance of Reason*

Law in its central case is neither reason floating freely nor is it a sheer product of will. Rather it is a willed choice *ordained* in response to good reasons.[84] The lawmaker's reason draws on the general principles of the natural law to make reasonable determining choices about how this community, with this history, at this time, should promote the common good and human flourishing.[85] To that end, the Preamble states that "the People of the United States . . . do *ordain* and establish this Constitution for the United States."[86] By seeking to "form

82 *Id.*

83 This realization was for us a product of practical insight rather than theoretical speculation. An earlier version of this Review sought to offer separate critiques of Vermeule's generic theory of constitutionalism and his particular interpretation of the American order. As a matter of organization and exposition, the need to toggle back and forth between general idea and particular instantiation was sufficiently important that a sharp separation struck us as artificial and inconvenient.

84 *See, e.g.*, RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 130 (2012) (stating that a lawmaker's act "is a moral choice made in response to reasons").

85 *See id.* ("[A legislator] should not aim to identify and give effect to an ideal legal code, fit for any community: no such code exists."); *id.* ("These truths [about moral and political theory] frame good legislative reasoning but do not exhaust it.").

86 U.S. CONST. pmbl.

a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty" to themselves and their "Posterity," the Constitution's framers used their reason to advance what they understood as the common good of the polity.[87] It is crucial to appreciate, however, that they concretized the results of their reasoning in written, positive law. To "ordain," after all, is to issue an ordinance.

A proper approach to our particular Constitution will repair not to free-floating reason or background principles or surface meaning alone, but rather seek to understand the order of reason the Framers proposed and the ratifiers enacted. To that end, the classical approach to legal interpretation seeks "to understand the meaning that those who made the Constitution intended to convey by promulgating the text in question," a position we can contrast with the notion of the Constitution as a "text floating free in the world."[88] Hence, an interpreter like Richard Ekins looks not only to the text, but also to publicly available evidence about the mischief the legislator was trying to remedy as well as the broader context of statutory structure, related statutes, and background law. Such interpretation could resemble at the level of method the often-technically elaborate operations of modern textualism.[89] Indeed, as a practical matter Ekins joins textualists in his epistemic skepticism regarding judicial use of legislative history materials.[90] At the level of justification, however, this intention-attentive approach to ascertaining the law made departs from the stated beliefs of some modern textualists who, like the legal realists and Ronald Dworkin, reject as confused the idea that a joint actor like a legislature or framing conventions can have intentions, let alone make reasoned choices.[91] (And, as Jeremy Waldron shows, one does not have to be an

87 *Id.*

88 Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 1 (2017); *see also* 4 JOHN FINNIS, *Introduction* to PHILOSOPHY OF LAW: COLLECTED ESSAYS 1, 18 (2011) [hereinafter PHILOSOPHY OF LAW] (explaining that legal rules must be understood not as "statements found in the texts of constitutions, statutes, and judgments or judicial orders, but as the *propositions* which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of the legal system's other, already valid propositions").

89 *See* Hillel Y. Levin, *Intentionalism Justice Scalia Could Love*, 30 CONST. COMMENT. 89 (2015) (book review) (arguing that Ekins' intentionalism is similar to modern textualists' at the level of method); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 349 (2005) (arguing that an intentionalist may adopt textualist methods because they lead to more "accurate assessments of legislative intent").

90 *See* EKINS, supra note 84, at 268–74 (rejecting use of legislative history).

91 *See* RONALD DWORKIN, LAW'S EMPIRE 313–27 (1986) (offering a skeptical critique of legislative intention); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV.

intentionalist to believe group actors like legislatures are capable of making particular reasoned choices by enacting canonical, authoritative texts.)[92] Classical interpreters of *lex*, however they may often act in practice like some modern textualists, search for a reasoned choice made in the past and embedded in an authoritative formulation.

Vermeule, at times, sings a similar tune. He criticizes approaches to interpretation that treat enacted texts as a "kind of law without mind, antithetical to the classical conception of the public authority" that makes "purposive, reasoned ordinations to promote the common good."[93] Yet, in operation his approach amounts to a clause-bound, surface-level textualism that is poorly suited to identifying the reasoned ordinances the text enacted, but serves as a well-built springboard for abstract moral readings.

An early clue to this effect comes in his generic discussion of common good constitutionalism. In his glance at the vistas of constitutionalism over time and place, he invokes sundry provisions that, in their generality, he takes to be embodying and embedding Giovanni Botero's *ragion di stato* tradition of "[j]ustice, peace, and abundance, or recognizable modifications and descendants of these."[94] It is possible that the British North American Act of 1867, the Preamble and the General Welfare Clause of the U.S. Constitution, and the limitations in the European Convention on Human Rights Article 9, section 2 are all manifestations of this rich, particular tradition.[95] The surface meaning, after all, is surely consistent with such a reading. Yet Vermeule's generic common good constitutionalism seems profoundly

419, 430 (2005) (arguing that "textualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted"); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (arguing that "the intention of the legislature is undiscoverable in any real sense").

92 *See* JEREMY WALDRON, LAW AND DISAGREEMENT 88–146 (1999); *cf.* Michael Plaxton, Criminal Law, Morality, and the Rule of Lenity 15 (October 11, 2022) (unpublished manuscript) (on file with author) ("But whether we think about legislatures as actors with 'joint intentions' or as Waldronian 'voting machines,' the specific text contained in statutory provisions must be treated as reasoned attempts at legislating for the common good." (footnotes omitted)); *id.* at 16 (discussing how such positive law is "needed to specify or determine what morality requires").

93 VERMEULE, *supra* note 1, at 105–06 (endnote omitted); *see also id.* at 80 (describing *epikeia* as a "virtue for discerning the reasoned choice that the public authority, as an authority, truly made in and through the text, in light of background principles").

94 *Id.* at 31 (citing GIOVANNI BOTERO, THE REASON OF STATE 93 (Robert Bireley ed., trans., Cambridge Univ. Press 2017) (1589)).

95 *See* British North America Act 1867, 30 & 31 Vict. c. 3 (UK); U.S. CONST. pmbl.; *id.* art I, § 8, cl. 1; Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, § 2, Nov. 4, 1950, 213 U.N.T.S. 221.

uninterested in the actual, historical reasoned choices the framers of these charters made in adopting these texts.

*Common Good Constitutionalism*'s engagement with our Constitution is no different. Rather than seeking to identify the ordinances of reason enacted through that document, Vermeule offers a moral reading of what he understands to be our *contemporary* constitutional order with respect to rights and the distribution of powers and authority. In this interpretation of the "small-c" American constitutional order, which he distinguishes from "the formal written Constitution," we find "broad deference to legislatures on social and economic legislation and broad delegations from legislatures to the executive."[96] As a practical matter, "lawmaking is effectively centered mainly on executive government, divided in complicated ways between the presidency and the administrative agencies," both of which act "according to the rule of law" to order the polity to the common good.[97]

Familiar features of the original, written, and enacted Constitution are nowhere to be found. To pick a few, Vermeule's discussions of separation of powers are either abstract or limited to the operations within the administrative state, rather than focusing on the distributed structure of the original Constitution.[98] We learn how the separation of powers in the Constitutions of Melfi during Aquinas's time are roughly analogous to the structure within administrative agencies today,[99] but nothing about what legal propositions were made true by Articles I, II, and III of our actual Constitution. There is no mention of Article IV, either, but the reader is informed that ideas of state sovereignty are "pernicious."[100] The "so-called sovereignty of the states is best understood as a constitutional principle of respect and comity" that the federal authorities should consider "out of prudent respect for legal justice and small-c constitutional arrangements."[101] Similarly, federalism in our constitutional order should be submerged in broader "values of subsidiarity and civil society," and respected to the extent such allocation of powers serves those purposes.[102] To the extent the positive law of our Constitution precommits our order to a

96 VERMEULE, *supra* note 1, at 10, 11–12.

97 *Id.* at 12.

98 *See id.* at 76–77 (discussing Aquinas's ideas about separation of law-making from law-interpretation). *But see id.* at 102 (accusing the current Supreme Court of being exceedingly abstract about separation of powers).

99 *See id.* at 207 n.201.

100 *Id.* at 158.

101 *Id. But see, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819) ("In America, the powers of sovereignty are divided between the government of the Union, and those of the States.").

102 VERMEULE, *supra* note 1, at 159.

different version of federalism, it must be overcome in the name of true subsidiarity (for which Vermeule draws on a theory rooted in the thought of twentieth-century theologian Johannes Messner, among others).[103] "Those who design a written constitution at a given time act under severe limits of foresight and information and cannot possibly anticipate all future contingencies."[104] When "rules protecting rigid spheres of state sovereignty or enacting rigid limits on federal power . . . inevitably clash with exceptional circumstances whose intrinsic logic requires positive federal action," it is better to give that federal power the "flexibility" to treat those rules as "a loose-fitting garment" to "promote and protect genuine subsidiarity."[105]

The same goes for the related point of limits on federal power. Vermeule recognizes, grudgingly, that the original Constitution was long understood to deny the federal government a general police power.[106] He claims that this interpretation, which reigned until the 1930s and 1940s, was in tension with *McCulloch v. Maryland*, and has nevertheless been happily surpassed by the march of constitutional history.[107] In an implicit concession that this departs from the original law of the Constitution, Vermeule accedes that "all this represents a development and translation of the original constitutional scheme to new circumstances," but it is justified because it preserves the "principles of the common good and general welfare that always underpinned that scheme, and is therefore valid."[108] The method here is explicit: departure from (phrased as "development and translation of") the original ordinances of reason is valid if the result serves overarching principles of the common good and general welfare.

Finally, he contends that the original Constitution licenses all this because "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 just authority, solidarity, and subsidiarity."[109] He goes on to note, correctly, that these "highly general and abstract clauses have to be given some content or other."[110] He chooses to regard them as referring to, and incorporating "an elaborate tradition specifying the legitimate ends or

103 *Id.* at 154–58 (citing JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD (B. Herder Book Co. rev. ed. 1965) (1949)).

104 *Id.* at 160.

105 *Id.*

106 *Id.* at 32–33.

107 *Id.* at 33–34.

108 *Id.* at 34.

109 *Id.* at 38.

110 *Id.*

purposes of government in light of the common good," rather than attempting to discern whether propositions with more legal content lurk beneath such beckoning generalities.[111] As for the less malleable particularities of the Constitution, we have seen how overarching principles of the common good and general welfare, bootstrapped in part from the Constitution's "sweeping generalities," allow one to transform ordained rules into prudential reminders of the background values those positive law norms serve.

Our quarrel here is not with the possibility that judges may engage in first-order reasoning about the natural law in connection with their administration of justice under positive law, that unwritten legal backdrops inform inferences about the content of constitutional provisions, or that legislators or administrative agencies could take the lead in realizing a polity's common good. In the abstract, all of these are possible and permissible.[112] Indeed, *some* institution needs to make authoritative judgments about the common good, and the natural law allows a wide range of choices for arrangements for allocating that responsibility. Our complaint here is that the vision of interpretation Vermeule offers is insufficiently attentive to identifying *which arrangement* the constituting authorities chose as an ordinance of reason. This neglect of the particularities of the actual Constitution of the United States is not merely an implementation problem confined to Vermeule's particular interpretation of American constitutionalism. It reflects a more basic problem in his understanding about the relationship between (i) law as an ordinance of reason generally and (ii) particular positive laws that accomplish that ordering in any given legal system.

Overall, Vermeule's approach to interpretation is best understood as continuous with his work before he embraced the classical legal tradition. In *Common Good Constitutionalism*, he presents an argument for "presumptive textualism," which he offers as an interpretation of Aquinas to show that a form of textualism is "entirely compatible with the classical legal tradition."[113] His method for interpreters is:

> primarily to ask what the public authority has done by ascertaining what the authority has said; and secondarily to ask whether the court faces the nonstandard case in which the authority's rational

111 *Id.* at 38–41 (discussing the Preamble, the Commerce Clause, and the Constitution's invocations of liberty and equality).

112 *See, e.g.*, GRÉGOIRE WEBBER, PAUL YOWELL, RICHARD EKINS, MARIS KÖPCKE, BRADLEY W. MILLER & FRANCISCO J. URBINA, LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018) (offering a natural law argument that legislatures, rather than courts, should take the lead in protecting human rights).

113 *Id.* at 75, 80.

> ordering for the common good has been imperfectly captured by what the authority said, read in light of larger background principles.[114]

Vermeule therefore offers a two-step approach: *interpretation* and, in nonstandard cases, *epikeia*, or equitable adjustment to bring judgment in a case in line with the lawmaker's unexpressed intent.

Focusing on the first step here, it is important to note that Vermeule says that "[t]his is the version of textualism I have defended elsewhere" in *Judging Under Uncertainty*.[115] There, he argued that courts interpreting positive law "should sharply limit their interpretive ambitions, in part by limiting themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules."[116] Vermeule, like many textualists, rejected courts' use of legislative history and normative canons.[117] Unlike many textualists, he also contended that courts interpreting a provision should not consult related statutes or even related provisions of the same statute.[118] Rather, judges should stick to a provision's "surface or apparent meaning" when it appears clear in isolation and defer to political actors when it is not.[119] He grounded this austere approach to interpretation in decision theory: if there is no reason to believe courts are more likely to improve their accuracy by using additional tools, and if using those tools is costly for courts and the system, it is better to stay within the very small confines of apparent meaning.[120] The same goes for interpreting constitutions. There, judges should choose the "rule-bound decision-procedure" in which they "enforce clear and specific constitutional texts[,] . . . eschew ambitious forays beyond this baseline," and "defer to legislatures" when provisions are ambiguous.[121]

The Vermeule of *Judging Under Uncertainty* did not embrace the idea that interpretation is something like the search for the reasoned ordinance of an actual legislator; rather, he claimed that philosophical arguments about the point of legal interpretation are pointless.[122] This presumptive textualism is a "firmly [rule] consequentialist" exercise in

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114 *Id.* at 83.

115 *Id.* at 207 n.194.

116 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 4 (2006).

117 *Id.* at 189–93 (legislative history); 198–202 (normative canons).

118 *Id.* at 202–04.

119 *Id.* at 183.

120 *See id.* at 192–96 (applying this reasoning to legislative history).

121 *Id.* at 230.

122 *Id.* at 2–3.

decision-theoretic "interpretive choice."[123] Though we assume Vermeule, now a classical natural lawyer, is not a rule-consequentialist all the way down, his presumptive textualism still bears the mark of the public-choice inflected method of his earlier adherence to decision theory. Judges are better off if they "stick to the ordinary meanings of texts" (also phrased as "apparent meaning[s]") since judges are "prone to error."[124] The classical tradition, by contrast, treats the text as a (very important, but not exclusive) pointer to the legislator's authoritative, reasoned choice, which in its particularity may be different or more complex than what we find with some exercises of clause-bound textualism.[125]

The extent to which Vermeule believes he has adhered to or departed from his earlier approach to interpretation is beside the point.[126] Something very much like the surface-level, clause-bound textualism of that earlier work enables his ascent to moral readings in response to apparent ambiguity or vagueness that interpreters find when they read text in that fashion.[127] After all, these "highly general and abstract clauses have to be given some content or other."[128] In *Judging Under Uncertainty*, judges were not to solve such puzzles with the wide-

123 *Id.* at 5, 66–67 (emphasis omitted); *see* Richard Ekins, *Interpretive Choice in Statutory Interpretation*, 59 AM. J. JURIS. 1, 6 (2014) ("Vermeule does not elucidate the nature of interpretation but instead aims to establish that the merits of *any* interpretive theory turn on 'institutional analysis,' which concerns the capacities of interpreters and the systemic effects of alternative interpretive regimes.").

124 VERMEULE, *supra* note 1, at 74–76; *cf.* VERMEULE, supra note 116, at 2–3 (arguing that both intentionalist and intention-skeptics should reject judicial use of legislative history on the "second-best" ground that "fallible judges are less likely to recapture legislators' intentions successfully by using such documents").

125 *Compare* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (arguing the Eleventh Amendment's protections of state sovereign immunity are limited to its plain text), *with* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the text of the Eleventh Amendment points to an original decision creating a broader limitation on suits against states).

126 His preferred approach is not always entirely clear. He regards "Legal Process Rational purposivism" as an "imperfect echo[]" of the classical tradition due to its "principle of interpretation that would read statutes not to depart lightly from" well-established background principles. VERMEULE, *supra* note 1, at 68. Perhaps clearing this up is for "further work that adumbrates the classical theory of interpretation in modern contexts." *Id.* at 80. In neither mode, however, is he particularly concerned with the historical reasoned choice that the legislator determined.

127 This textualism-enabled ascent above the ordinances of reason is distinct from the second step of his method, where *epikeia* brings an apparently misfiring provision back in line with the rational ordering of the common good in light of background principles, to use Vermeule's formulation. *Id.* at 77–80. For the most part, Vermeule's argument seems to be exploiting surface vagueness or ambiguity.

128 *Id.* at 38.

ranging tools that classical lawyers (and modern textualists and purposivists) use, but rather defer to bodies like administrative agencies or legislatures. Reading between the lines, one sees in Vermeule's generic account of common good constitutionalism a way forward to a regime in which centralized agencies are the living oracles of the natural law and the common good. Vermeule draws such a picture in the particular "Applications" section of his book.[129] The surface-hugging, clause-bound character of presumptive textualism is crucial for realizing that arrangement, however, since a more detailed search to *find* the Framers' reasoned choice may correspondingly limit the remit of agencies (or, if you prefer, legislators) to *give* some content ordering law to the common good. Critics who worry that his book is judicial supremacy for Catholic integralists miss this point.

The problem is not that Vermeule is wrong here or there about what the Constitution provides at the level of legal sources. Rather, it is that *Common Good Constitutionalism* shows little interest in what original positive law the Constitution reasonably ordained. We can contrast Vermeule's approach to interpreting our contemporary constitutional practices in their best light with our work. There, we drew on the classical tradition's understanding of positive law's nature and purpose to argue that the best way to understand the Constitution was to identify the original "propositions of law that became valid by virtue of the addition of the Constitution to the rest of the law then in effect."[130] With other scholars in the classical tradition, we hold that in the central case the legal interpreter's object qua interpreter is identifying the propositions—the reasoned ordinances—the lawmaker introduced into the system of law when it exercised its authority.[131]

This is not because one should obey positive law for its own sake or because one is a moral skeptic. Rather it is a recognition that right practical reason requires reasoned answers to underdetermined questions and that in a large, complex society extending over time,

129 *Id.* at 136–54.

130 Pojanowski & Walsh, *supra* note 7, at 99.

131 *See* EKINS, *supra* note 84, at 246; Ekins, *supra* note 88, at 1 (applying his approach to interpretation to the positive law of the constitution); 4 JOHN FINNIS, *Reason and Authority in* Law's Empire, *in* PHILOSOPHY OF LAW, *supra* note 88, at 280, 297 (explaining that "a sound natural law theory would have no hesitation in tracing the legal and thus the moral authority of most of the law's rules and institutions" to "*rules* whose legal and moral authority is directly and simply ascribed to their *source*, authoritative enactment, or judicial adoption or some other form of 'convention'"); RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 72–78 (2003) (explaining how the classical tradition's emphasis on the moral importance of positive law has roots running back to Aquinas's preference for governance by written law over independent judicial judgment about what the natural law requires in a case).

unanimity and constant recalibration of such determinations is unreasonable, if not impossible.[132] Revisiting reasonable determinations under the guise of interpretation creates afresh the coordination problems legal authority had resolved.[133] Thus, it is morally reasonable for officials to understand interpretation as a search for the reasoned choices the legislators or framers fixed when promulgating positive law to advance the common good. This stance, moreover, does not commit one to legal positivism.[134] Instead, understanding "the moral need for law's positivity is, in many ways, what defines the classical tradition of legal theory."[135] Vermeule scoffs that arguments like these are "banalities, truisms, universally understood and accepted by all remotely sensible legal systems—the vast bulk of which would laughingly, or with some confusion, reject the label 'originalism.'"[136] The problem with this response, however, is that Vermeule *himself* refuses to apply such banal truths to the actual Constitution ordained for our polity.

### *B. Final Cause: For the Common Good*

A different kind of inattention to the relationship between law and human choice shapes Vermeule's account of the final cause of American constitutional law, the political common good. One cannot understand the common good of any true human community, such as a family, without understanding how it came to be one. As with families, so too with political communities. Vermeule's discussion of the generic political common good is simply too detached from the history of the United States of America as a distinct political community. This inattention relates primarily to how the Constitution of the United

132 *Cf.* Maris Köpcke Tinturé, *Positive Law's Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 183, 197 (2011) (book review) ("Because moral requirements are both underdetermined and controversial, it is *morally* necessary that a law's validity does *not* primarily turn on moral considerations.").

133 As John Finnis has argued, law "tries to isolate . . . 'legal thought' . . . from the rest of practical reasoning" and "'systematically restricts' the 'feedback' of moral considerations on legal requirements" for good moral reasons. Maris Köpcke Tinturé, *Finnis on Legal and Moral Obligation*, *in* REASON, MORALITY, AND THE LAW: THE PHILOSOPHY OF JOHN FINNIS 379, 379 (John Keown & Robert P. George eds., 2013) (quoting JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 312, 318 (Paul Craig ed., 2d ed 2011)).

134 *See, e.g.*, Maris Köpcke Tinturé, *Law Does Things Differently*, 55 AM. J. JURIS. 201, 216 (2010) (book review) ("We may thus return to the classical tradition's understanding of law as uniquely suited to secure a community's justice by marking certain courses of conduct and enforcing them so that the law-abiding are not taken advantage of.").

135 Köpcke Tinturé, *supra* note 132, at 197.

136 Conor Casey & Adrian Vermeule, *Pickwickian Originalism*, IUS & IUSTITIUM (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism/ [https://perma.cc/TY7F-FDMZ].

States has advanced the political common good of "We the People of the United States" in history. The Constitution has done this precisely as supreme positive law for the people of the United States: "a fixed and authoritative legal settlement of certain matters contributing to the common good of a complete political community."[137]

The unity of a complete political community defines the scope of commonness of its political common good. To provide a particular account of common good constitutionalism for the United States of America, then, it is necessary to explain how the formation of *one* political community in the United States came about through a transformation of thirteen colonies into an independent nation. Yet neither the Declaration of Independence nor the Articles of Confederation nor the drafting and ratification of the Constitution of the United States in response to the failures of the Articles to serve the political common good of one people of the United States shows up in *Common Good Constitutionalism*. By contrast, we began *Enduring Originalism* by connecting the governmental powers conferred in the Constitution to the consent of the "one People" who "dissolve[d] the Political Bands" holding them together with the people of "the State of Great Britain" in the Declaration of Independence.[138] That same "one People" subsequently prevailed in the War for American Independence and experienced the defects of confederated governments under the Articles of Confederation. This political history explains why "[t]he framers designed the Constitution of the United States to remedy the defects of government under the Articles."[139] The source of those defects was the mismatch between the political community of the United States as one people, and the government of each State with a separate government legally united in confederation only with the others.[140] To properly serve the political common good of one people, it was fitting to empower one government of, by, and for that people to make and administer supreme law of the land. The Constitution of the United States accordingly provided for a common national government in addition to the separate state governments, with the unity of the people of the

137 Pojanowski & Walsh, *supra* note 7, at 126.

138 *Id.* at 127 (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

139 *Id.*

140 *See id.* ("While the *people* were one at this time, their *governments* were not. . . . [E]ach state in this confederacy retained 'its Sovereignty, freedom, and independence . . . which is not by this confederation expressly delegated to the United States, in Congress assembled.'" (quoting ARTICLES OF CONFEDERATION OF 1781, art. II)).

United States accounting for the commonness of the political common good served by the Constitution.[141]

The continued existence of separate state governments together with the new government of the United States, gave rise to many theoretical and practical difficulties. The political and legal relationships between the peoples of the several states and their particular governments, on the one hand, and the people of the United States and the general government, on the other hand, remained to be worked out in time. Each state government was responsible for the common good of the people of each state in the Union as a political community. The federal government was responsible for the common good of the people of the United States as one political community extending over all the states. Disputes over the various ways in which the Constitution as fundamental law would advance the common good of the people of the United States as a single people with distinct state and federal governments have therefore been with us from the beginning—and, crucially, there *was* a beginning.

Without an historically grounded account of the unity of the people of the United States with one political common good, Vermeule cannot offer an account of how the United States government could arise directly from the people of the United States rather than through the several states. One can find such an account, however, in Chief Justice Marshall's opinion for the Court in *McCulloch v. Maryland*.[142] Vermeule quotes *McCulloch* without much elaboration a few times in *Common Good Constitutionalism*, including one occasion in which he misdescribes it as a Commerce Clause case.[143] Vermeule properly

141 As Fr. Aquinas Guilbeau has explained, "the principle distinctive of common goods properly so called . . . is a unity that diffuses its goodness universally." Aquinas Guilbeau, *What Makes the Common Good Common? Key Points from Charles De Koninck*, 20 NOVA ET VETERA 739, 746 (2022). In this understanding, "universally" is to be understood by reference to the unity of the unit whose common good we are assessing. That unity on a level capable of sharing goodness without diminution distinguishes a common good from a collection or aggregate. *See id.* ("Unlike a common good, a 'pure collection' of particular goods does not constitute a unity capable of diffusing its goodness wholly and universally to its participants. Instead, as an aggregate of particular goods, a collection diffuses goodness by dividing and dispersing the goods that it collects."). Consider, for example, the common good of a family. "[A]s a common good properly so called, the good of the family constitutes a single good that extends and communicates itself whole and entire to all the members of the family at once." *Id.* at 747. Similarly, as a common good properly so called, the political common good constitutes a single good capable of extending and communicating itself whole and entire to all the members of the political community at once.

142 17 U.S. (4 Wheat.) 316 (1819).

143 *See* VERMEULE, *supra* note 1, at 33 (citing *McCulloch* and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to argue "the scope of federal powers has become all but equivalent to a general police power in substance"); *id.* at 34 (asserting that "the

estimates Marshall as a preeminent jurist in the classical mold. But he reads Marshall's masterpiece in *McCulloch* more with the mind of Oliver Wendell Holmes, Jr., than Joseph Story, whose later scholarly work synthesized the intellectual legacy of the Marshall Court.[144] Vermeule's main "takeaway," so to speak, is that the federal government possesses a de facto police power.[145] Marshall's fiercest contemporary critics could not have put their claims about *McCulloch* any better. As Gerald Gunther has explained, Marshall took to the newspapers pseudonymously in 1819 to defend against the charge "that *McCulloch's* principles endorsed a virtually unlimited central authority, that the Court had set forth no viable limits on national power."[146] Classical lawyer that he was, Marshall responded not only at the level of constitutional principle; he also replied to his critics' "invocations of common law and international law and engaged them toe to toe on the true meaning of the learned treatise writers, of Vattel and Grotius and Lord Coke."[147] Vermeule's use of *McCulloch* as support for the acquisition of a "*de facto* police power" for the federal government is puzzling. In doing so, he purports to resolve the question of the extent of the

federal government for all intents and purposes has acquired by prescription, over time, a *de facto* police power"); *id.* at 33(describing the denial of a general police power to the federal government as "in tension with the *McCulloch v. Maryland* principle that enumerated powers should be expansively construed over time to accommodate changing circumstances" (endnote omitted)); *id.* at 40 (commending *McCulloch* for its "expansive reading of the Commerce Clause"). *McCulloch* is not a Commerce Clause case. It is a case about implied powers and the Necessary & Proper Clause. *McCulloch*, 17 U.S. (4 Wheat.) at 411–12.

144 On Holmes's "take" on Marshall, see his response granting the motion to adjourn court in honor of John Marshall Day on February 4, 1901. OLIVER WENDELL HOLMES, *John Marshall: In Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice*, *in* COLLECTED LEGAL PAPERS 266, 270–71 (1920). Holmes described that day's celebration as standing "for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty. . . . [T]his day marks the fact that all thought is social, is on its way to action; that, to borrow the expression of a French writer, every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power." *Id.* at 270–71.

145 *See* sources cited *supra* note 143.

146 Gerald Gunther, *Introduction* to JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 1, 18–19 (Gerald Gunther ed., 1969). The charge of consolidated federal power drew the bulk of Marshall's response. *See id.* at 19 ("[T]he thrust of Marshall's response was to deny that charge of consolidation, to insist, with more emphasis than in *McCulloch* itself, that those principles did not give Congress carte blanche, that they did preserve a true federal system in which the central government was limited in its powers—and that the limits were capable of judicial enforcement.").

147 *Id.* at 18.

federal government's powers vis-à-vis the state governments' powers—in favor of the federal government once and for all. This contrasts with *McCulloch* itself, in which Marshall asserts that the question respecting "the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[148]

Vermeule's casual mishandling of *McCulloch* betokens a more general failure to attend systematically to the relationship between lawmaking in service of the political common good, on the one hand, and the administration of legal justice by courts of law, on the other. Vermeule's tendency to nod to role morality as a generic matter but neglect it in the particulars of constitutional adjudication is on display in his account of Justice Harlan's dissent in *Lochner v. New York*.[149] He contends that Justice Harlan's dissent is a "model opinion" for seeing how the "classical framework operated in the cauldron of judicial practice."[150] We agree, but for different reasons. Vermeule glosses Justice Harlan's Fourteenth Amendment Due Process Clause jurisprudence as stemming from a unified framework grounded in the "Constitution's express commitment to the 'general welfare'" and the "tacit postulates of the constitutional plan, as to both the federal government and the states" to advance the common good.[151] This characterization overlooks the extent to which Harlan's dissent turns on more workaday engagement with the way in which the Constitution's positive law, namely the Due Process Clause of the Fourteenth Amendment, supplied the rule of decision.

Justice Harlan's understanding of "general welfare" refers to the state's police powers (not, as Vermeule asserts, the General Welfare Clause of the Constitution), the exercise of which is legitimate under the Due Process Clause as long as it is reasonable in relation to a legitimate end of the state government.[152] (On this point, Harlan and the majority agreed on the applicable doctrinal test but disagreed on its application.) Finding no violation of this *general* reasonableness standard incorporated into the *Federal* Constitution by means of the Fourteenth Amendment, Harlan objected that the majority "transcend[ed] its functions" by holding unconstitutional the application of New York statute's maximum-hours provision to Joseph Lochner.[153] Rather than weighing in on whether the statute in fact advanced the common good, Justice Harlan found as a federal judge that he could not say the

148 *McCulloch*, 17 U.S. (4 Wheat.) at 405.
149 198 U.S. 45 (1905).
150 VERMEULE, *supra* note 1, at 61.
151 *Id.* at 63.
152 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).
153 *Id.* at 70.

legislature acted unreasonably in relation to legitimate ends of government. Given that, "the State is not amenable to the judiciary" for this statute in this case.[154]

Harlan grounded this conclusion on his understanding that state exercises of the police power are permissible under "the Federal Constitution" unless they are "inconsistent with that instrument."[155] That positive law *instrument*[156] indicates that "the health and safety of the people of a State are primarily for the State [not the federal judiciary] to guard and protect."[157] Although the petitioners claimed that the New York statute violated the Fourteenth Amendment, that argument could not be sustained "without enlarging the scope of the Amendment far beyond its *original* purpose."[158] The federal Court had no warrant to prevent the enforcement and regular operation of state law except as authorized by the positive law of the Federal Constitution.[159]

Harlan's dissent is a model opinion for the classical tradition, but not as an antioriginalist appeal to a *generic* common good.[160] It treats the Constitution as a legal instrument that operates as a rule and measure in deciding the matters before it under the Fourteenth Amendment's federally incorporated restrictions on states. Doing that, of course, promotes the political common good of the polity that the Constitution governs. Our particular Constitution recognizes broad police powers in the states to promote the common good of the people of the state subject to positively ordained federal-law limitations that provide an undergirding and overarching orientation to the political common good of the people of the United States as a whole. This plan is one (of many possible) reasonable way(s) to make concrete "the whole teleological conception of the aims of government"[161] toward the political common good of the people of the United States.

154 *Id.* at 70.

155 *Id.* at 73.

156 In the language of the law, we note, an "instrument" is a written artifact.

157 *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting).

158 *Id.* (emphasis added).

159 Beyond recognizing that the implementing judicial doctrine was filtered through the Fourteenth Amendment and was appropriately elaborated as federal law only because of the Fourteenth Amendment, we take no positions on the precise details of the interactions among federal jurisdiction, the doctrine implementing federal review of state law for conformity to the police power, and general law regarding the nature of the police power. For a discussion of relevant background, see, for example, Victoria F. Nourse, *A Tale of Two* Lochner*s: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

160 *Contra* VERMEULE, *supra* note 1, at 68 ("Harlan's opinion . . . is not originalism.").

161 *Id.* at 63. *Cf.* RUSSELL HITTINGER, *supra* note 128, at 133 ("The specific institutional character of the U.S. Constitution is one among many different kinds of constitutional orders. It differs sharply from those constitutions which display the powers and ends of a government of general jurisdiction.").

Adherence to that plan in adjudication also promotes the political common good, but primarily by making that positively entrenched plan a durable reality administrable as a rule and measure of legal justice in courts of law.

### *C. Efficient Cause: Made by One with Care of the Community*

Law is a reasoned ordinance for the political common good. But *whose* reasoned ordinance for the common good should one seek to discover? The classical tradition holds that it is the ordinance of one with care of the community—lawmaking authority. Vermeule's common good constitutionalism offers no account of the higher lawmaking authority that, in the context of the United States, is provided by popular sovereignty. What little Vermeule says about this topic denigrates as irrelevant the lawmaking will historically exercised by "We the People of the United States." In particular, Vermeule contends that "the American constitutional order rests, not upon positive written law, but upon the *ius gentium*."[162] Given this belief, it is understandable that Vermeule neglects the formal, written big-C Constitution in favor of interpreting the small-c constitutional order. The latter is, in his eyes, a more fundamental object of focus. As a consequence of neglecting the ratified Constitution in favor of interpreting the contemporary constitutional order, nowhere in *Common Good Constitutionalism* does Vermeule carefully explain the obligation of obedience to the ratified Constitution as authoritative law.

He describes "common good constitutionalism" as "classical constitutionalism that, although *not enslaved to* the original meaning of the Constitution, also rejects the progressives' overarching sacramental narrative, the relentless expansion of individualistic autonomy."[163] The correct next step would be to explain how *obedience* to the original law of the Constitution—unless lawfully changed—is distinct from being *enslaved* to it.[164] Obedience, after all, is the proper posture toward the command of legitimate lawmaking authority.[165] But Vermeule

162 *Id.* at 85.

163 *Id.* at 36 (emphasis added).

164 *Cf., e.g.*, Pojanowski & Walsh, *supra* note 7, at 99 ("The particular type of constitutional originalism we propose understands the Constitution as enduring original law that remains fixed and authoritative until lawfully changed."); 3 AQUINAS, *supra* note 75, at II-II Q. 57 art. 4 (developing Aristotelian distinctions distinguishing paternal right and dominative right from civic or political right); *id.* Q. 58 art. 7 (distinguishing domestic justice, involving relations of husband and wife, father and son, and master and slave, from "justice simply").

165 *See* 3 AQUINAS, *supra* note 75, at II-II Q. 104 art. 2 ("[T]he proper object of obedience is a precept, and this proceeds from another's will. Wherefore obedience makes a

provides no account of legal justice with the legal Constitution as its rule and measure by virtue of its authority, nor of obedience to the legal Constitution as the appropriate response of those subject to its requirements. Indeed, the authority of those who, with care of the community, made the Constitution as law is nowhere to be found. Rather, one moves from the *ius gentium* to the practices of a small-c constitutional order without asking whether or how those practices square with the intervening choices of the Constitution's lawmaking authority.

Consider Vermeule's proposal that common good constitutional interpretation "should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution."[166] This proposed approach differs from ours in its starting point and in its resulting interpretive attitude. The Vermeulean common good constitutionalist starts constitutional interpretation with "substantive moral principles that conduce to the common good"; the classically grounded originalist starts the same activity with the Constitution as enacted law. The Vermeulean common good constitutionalist reads these substantive moral principles into the Constitution's words; the classically grounded originalist discerns the legal propositions

man's will prompt in fulfilling the will of another, the maker, namely, of the precept."); *id.* art. 3 ("All acts of virtue, in so far as they come under a precept, belong to obedience. Wherefore according as acts of virtue act causally or dispositively towards their generation and preservation, obedience is said to ingraft and protect all virtues."). The requirement of obedience to the will of a lawmaking superior as set forth in a precept is, of course, subject to limits. *See, e.g.*, *id.* art. 5 (identifying "two reasons, for which a subject may not be bound to obey his superior in all things," namely "on account of the command of a higher power," and "if the [superior] command[s a person] to do something wherein he is not subject to him"); *id.* art. 6 ("Man is bound to obey secular princes in so far as this is required by the order of justice. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger."). The key point here is that subsequent interpreters of the Constitution are required to be obedient to precepts proceeding from the superior authority that promulgated the Constitution.

166 The formulation quoted in text is from Vermeule's earlier exposition in Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/4XA8-XJJP]. The corresponding formulation in *Common Good Constitutionalism* has minor differences in wording and structure but appears to be intended as substantively indistinguishable. *See* VERMEULE, *supra* note 1, at 38 ("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 just authority, solidarity, and subsidiarity.").

determined by means of the promulgated Constitution and other principles of legal right.

An illuminating exposition of the limits of Vermeule's approach in this regard comes from the response that Vermeule and coauthor Professor Conor Casey provided to Professor Joel Alicea's article, *The Moral Authority of Original Meaning*.[167] In this article, Alicea offers "a natural law justification for originalism grounded in the legitimate authority of the people-as-sovereign, authority that is necessary for achieving the common good."[168] Alicea observes that Vermeule "acknowledges the importance of legitimate authority, but he provides no account of *who* the legitimate authority that promulgated the Constitution was or what implications that has for constitutional adjudication."[169] Alicea's observation is accurate. And devastating.

Casey and Vermeule dodge the issues of authority and obedience in their response. They summarize Alicea's argument as establishing two propositions:

> [F]irst, all officials are compelled to faithfully adhere to and interpret the meaning of X, Y or Z provisions posited and fixed by a legitimate political authority at a given historical point in time . . . unless and until those provisions are lawfully repealed or replaced; and second, interpreters of the law (such as judges) ought not to displace the posited law by reference to all-things-considered moral decision making.[170]

Casey and Vermeule accept these propositions as "banalities, truisms, universally understood and accepted by all remotely sensible legal systems."[171] This thin-gruel, lowest-common-denominator, generic originalism, they say, avoids "the immensely more difficult question of how to *interpret* the posited law—how precisely one ought to faithfully respect the meaning of this or that historically posited and fixed provision."[172] This is where Casey and Vermeule stumble. They rely on Professor Cass Sunstein's claim that "there is nothing that interpretation 'just is.'"[173] But that sort of objection misses the mark when directed at a classical account of interpreting valid enacted law.

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167 J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

168 *Id.* at 5.

169 *Id.* at 7 (footnote omitted).

170 Casey & Vermeule, *supra* note 136.

171 *Id.*

172 *Id.*

173 Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015). Casey and Vermeule adapt this phrase to say, "there is nothing that originalism just is." Casey & Vermeule, *supra* note 136. Sunstein's principal claim is that "[a]ny approach [to constitutional interpretation] must be defended on normative

One reading of their argument is that what it means to "interpret" positive law is sufficiently contested such that originalist approaches do not have a claim on the term without normative argument. The classical tradition, however, takes a such normative stance when it comes to interpreting authoritative legal acts (as opposed to poems, dreams, or other texts). That tradition emphasizes the need for authority to bind actors going forward through the expression of lawmaking acts. Therefore, in the central case of interpreting a legal instrument, the legal interpreter's object as legal interpreter should be identifying the propositions the lawmaker introduced into the system of law when it exercised its authority.[174] One must go back to the origins.

But how? The classical tradition's emphasis on authority guides us on this question of interpretive choice. Legal authorities use texts "to convey their intended meaning-content."[175] If one is seeking to identify that authoritative content, it reasonable to presume[176] that the originally intended legal impact of that enacted text is whatever propositions correspond to the communicative content of the text as ascertained by a reasonable member of the public at the time (or that content as modified by then-prevailing norms about textual interpretation).[177] If one abandons original meaning in favor of moral readings, "one is not understanding [the enactment] as an act of language use but rather simply deeming it a canvas on which one projects the meanings one wishes had been intended."[178] Understanding interpretation as the search for original meaning, therefore, best treats the Constitution as "a deliberate lawmaking act the intended of meaning of which is to be upheld."[179] Or, in other words, as authoritative.[180]

Locating a constitutional interpreter's activity within the broader category of obedience to the past acts of a lawmaking superior does

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grounds—not asserted as part of what interpretation requires by its nature." Sunstein, *supra*, at 193. An account of interpretation rooted in the classical tradition offers such normative grounds.

174 EKINS, *supra* note 84, at 246. *See generally supra* Section II.A.

175 Ekins, *supra* note 88, at 22.

176 *Id.* at 10 ("In conveying some meaning to a large and distant audience, speakers and authors have good reason to attempt to speak clearly and directly.").

177 *Id.* at 22 ("The continuity of law and the importance of self-government over time both provide very powerful reasons to consider the original meaning of the Constitution decisive.").

178 *Id.*

179 *Id.*

180 Casey and Vermeule also suggest that the variety of originalist theories is fatal for this more general defense of originalism. *See* Casey & Vermeule, *supra* note 136. As our preceding paragraph suggests, deliberation about how best to account for authority (or any other of the three Thomistic causes) can guide the classical lawyer through these thickets.

not necessarily solve the sometimes-difficult problems of identifying those propositions of law that are to be obeyed. But the charge that a would-be interpreter is "reading in"—rather than reading off or reading out—is a criticism with real bite. It is to accuse the interpreter of operating with an attitude of insufficient obedience. The appropriate response of one who holds himself out as a faithful interpreter but is accused of insufficient obedience is to deny the charge, not to embrace the illegitimate activity. That is the right response, in any event, for a classical natural lawyer who respects the moral point of this kind of legal interpretation of this kind of legal instrument.

Vermeule at times appears sensitive to this objection. Consider his coauthored essay, *Myths of Common Good Constitutionalism*. There, he and Casey describe as a "myth[]" the claim that "[l]egal and constitutional interpretation in the classical tradition substitutes morality for law and reduces legal questions to all-things-considered moral decision-making from first principles."[181] Another "myth[]" is that "[t]he classical tradition ignores the text and has no respect for posited law."[182] These are both myths, say Casey and Vermeule, "about the classical legal tradition and its emphasis on the common good."[183] We agree. But as Vermeule acknowledges, his own account of how the classical legal tradition is instantiated within the constitutional order of the United States is separable from the generic version of common good constitutionalism defended in *Myths*. The salutary disclaimers and clarifications defending the generic theory in *Myths* are missing in action in *Common Good Constitutionalism*'s application of the theory to the United States and its formal written Constitution as an authoritatively promulgated law. Without any account of the higher lawmaking *authority* that makes the Constitution fundamental positive law, Vermeule is unable to explain the interpreter's obligation of *obedience* to the promulgated Constitution.[184]

181 Casey & Vermuele, Essay, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y 103, 103–04 (2022).

182 *Id.* at 104.

183 *Id.* at 103.

184 Similar flaws plague Vermeule's disclaimer that common good constitutional theory in general includes "principles of role morality that allocate lawmaking authority among institutions." VERMEULE, *supra* note 1, at 38. This invocation of "role morality" is nested in his discussion of how to make moral readings of the "sweeping generalities" of the Constitution. *Id.* His discussion shows little interest in exploring the extent to which the positive law of the Constitution specifies *who* has authority to make law in pursuit of those principles of the common good and *how*.

### *D. Material Cause: Promulgated*

Promulgation—the act that announces a legal norm in a particular form—is critical for law's task. If citizens and officials cannot identify the authority's determinations, those choices will be inert and fail to serve their purpose. For this reason, practically wise legislators will fix their chosen norms in durable forms. This does not mean all law has to be codified, though the classical tradition prefers fixing law in canonical, systemic text.[185] Nor should we identify the law with the words with which it is promulgated; those words are that law's material cause, signs by which the law as an ordinance of reason for the common good is authoritatively promulgated. Nevertheless, the promulgated instrument fixes for posterity, and points its readers toward, those reasoned, authoritative choices for the common good.

As with authority and obedience, Vermeule has very little to say about promulgation. We see a passing note that "the nature of institutions and the allocation of a lawmaking authority . . . are left for specification that gives concrete content to the operative, small-c constitution (which is not necessarily the same as the formal written Constitution even in polities that have the latter)."[186] The generic character of "specification" does not clarify how authority will embed those choices, but the proviso suggests that any such choices operate independent of the (or any) promulgated, large-C Constitution. When he later emphasizes that courts generally should defer to promulgated, specifying decisions by legislatures and executive actors, he emphasizes that this is a function of "the political morality of the common good" and "the best interpretation of our constitutional practices."[187] Promulgation of ordinary law, while important to his theory, appears to be the task of authorities acting under the color of an unpromulgated (small-c) constitutional order.

Thus, while Vermeule may be attentive to the classical tradition's preference for promulgation at the level of ordinary law, he appears to abjure it at the level of constitutional law. This is odd, especially as a prelude to an argument about American constitutionalism, which gives a central role to promulgation of a fixed, durable, written instrument. In fact, this aspect of the book's general framework seems custom-

185 *Cf.* EKINS, *supra* note 84, at 125 ("Public promulgation and canonical formulation [in legislation] make the legal change easier to locate and grasp than that found in unwritten custom or in the best understanding of a line of cases."); HITTINGER, *supra* note 131, at 72–78 (discussing St. Thomas's prudential assessment of the relative superiority of "administering justice on the basis of written laws" rather than "on the basis of the virtuous discernment of a wise judge").

186 VERMEULE, *supra* note 1, at 10.

187 *Id.* at 43.

made to elide this feature of our current constitutional order, allowing the theorist to interpret our "small-c" practices without the constraint of entrenched "large-C" propositions. In this respect, Vermeule's generic level of common good constitutional theorizing is not in fact "separable" from his particular account of the American constitutional order. Like a filter designed to block certain wavelengths on the spectrum, Vermeule's generic approach to constitutionalism renders the particular promulgations of the ratified Constitution invisible from the start, or at least drains them of their color.

A more robust rendition of the classical framework at the generic level builds in attention to the actual history of the particular constitutional order. And our order, emphatically, is one which, in line with the classical tradition, emphasizes promulgated constitutional law. The instrument the Framers chose for securing the people's rights and conferring the government's powers was a written Constitution that was to be legally authoritative for future generations by remaining fixed in writing until annulled or changed in the manner it prescribed.[188] Indeed, a central point of contention in ratification debates was whether the written, promulgated Constitution would constrain *enough*. Brutus feared, and Hamilton sought to rebut, the possibility that equitable interpretation by courts and Congress would expand the government's powers beyond the limits of the promulgated Constitution.[189]

After ratification, the same beat went on. Chief Justice Marshall in *Marbury v. Madison* linked the Constitution's written promulgation to its capacity to bind in the future and understood it as a "superior, paramount law, *unchangeable by ordinary means*."[190] The same holds for early commentators of various stripes, such as St. George Tucker, Thomas Sergeant, William Rawle, Chancellor James Kent, and, most prominently Justice Joseph Story.[191] His 1833 treatise, which consolidated the legacy of the Marshall Court, rejected arguments, based in

188 See Pojanowski & Walsh, *supra* note 7, at 127–28.

189 See *id.* at 129–30 (first citing THE FEDERALIST NO. 81, at 406 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); and then citing Brutus, ESSAY XI (Jan. 31, 1788), *reprinted in* THE ESSENTIAL ANTIFEDERALIST 185, 187 (W.B. Allen & Gordon Lloyd eds., 2d ed. 2002)).

190 See *id.* at 130–31 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Marshall himself took the newspapers to dispel the notion that his decision in *McCulloch v. Maryland* was inconsistent with the notion of a fixed constitution. *See* John Marshall, *A Friend of the Constitution, Letter IX* (July 14, 1819), *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 146, at 207, 209.

191 *See* Pojanowski & Walsh, *supra* note 7, at 133–34 (discussing Tucker, Sergeant, Rawle, Kent, and Story).

"policy" and "convenience," against a fixed constitution.[192] Such fluctuations were unsuitable to the kind of law that the Constitution is, which is "to have a fixed, uniform, permanent construction" and not be "dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever."[193]

In sum, any generic theory of constitutionalism in the classical tradition must attend to the particularities of constitutional promulgation in a given order. Failure to do so not only neglects a crucial cause of legal ordering, but renders it incapable of offering a complete account of an order like ours, which emphasizes promulgation of a written Constitution as a legal instrument establishing authoritative, reasoned choices for the common good. Vermeule's general approach to constitutional theorizing falters on this factor, with predictable results when he turns to our particular order.

For example, Vermeule's canonical case on the relationship between constituent authority and the Constitution is *United States v. Curtiss-Wright Export Corp.*[194] He relies on the opinion for its "methodological" implications, holding it up as a model of how "the well-trained reason of the informed lawyer" should apply "general principles of constitutionalism accessible to the reason."[195] He describes Justice Sutherland's opinion for the Court in this case as an "example of the lost classical tradition in American law, erased by originalism's rewriting of our history, and desperately in need of recovery."[196] Vermeule exalts the opinion for its account of the "powers of external

192 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 326 (Melville M. Bigelow ed., William S. Hein & Co., Inc. 5th ed. 1994) (1891).

193 *Id.*

194 299 U.S. 304 (1936). In that case, the Supreme Court reversed a trial court's dismissal on demurrer of criminal charges brought against three corporations and four corporate officers. This reversal meant these defendants had to answer for their violation of a federal prohibition of certain arms sales in connection with an ongoing international conflict. *Id.* at 314, 333. The prohibition they violated arose from a power to prohibit arms sales that Congress had effectually delegated to the President to activate, and that the President had activated by proclamation. *Id.* at 311–14. The Supreme Court held that the trial court erred in determining that this executive activation of delegated authority involved an unconstitutional delegation of legislative power. *Id.* at 329. The trial court's decision rested on the *Schechter Poultry* case in which the Supreme Court held government action unconstitutional on nondelegation grounds the prior Term. *See* United States v. Curtiss-Wright Exp. Corp., 14 F. Supp. 230, 235 (S.D.N.Y. 1936) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Justice Sutherland's opinion for the Court in *Curtiss-Wright* set aside that and all other precedents involving domestic matters by distinguishing between internal affairs (at issue in *Schechter Poultry*) and external affairs (at issue in this case). This move set the stage for the discussion of principle that Vermeule finds so decisive.

195 VERMEULE, *supra* note 1, at 88–89.

196 *Id.* at 89.

sovereignty" flowing from the British Crown "not to the [American] colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[197] Vermeule describes as "shockingly anti-originalist" Justice Sutherland's statement that "[t]he Union existed before the Constitution."[198] This idea that the Union preexisted the Constitution, Vermeule says, "may be one of the most consequential sentences ever to appear in the United States Reports—at least for those who overlook the difference between our small-c constitutional order and the written text of the Constitution and its original understanding."[199] This case study purportedly illustrates how "the American constitutional order rests, not upon positive written law, but upon the *ius gentium*."[200]

Vermeule's description of what he is up to with *Curtiss-Wright* should alert the well-formed reader to a false dilemma. (As should his focus on a case that even nonoriginalists view as a poorly reasoned outlier.)[201] Within the classical natural law tradition, the positive written law and the *ius gentium* contribute in different ways to a particular constitutional order. The municipal constitutional law of a particular polity and the *ius gentium* have a common source in the natural law. But their specifications are not necessarily of equal weight and authority within a given constitutional order. For purposes of decisions in federal courts of the United States, the way that the *ius gentium* interacts with the positive law of the United States is a function of the Constitution of the United States, not the *ius gentium* directly.

In deploying *Curtiss-Wright* as authority for denying that the American constitutional order rests upon a promulgated legal instrument, Vermeule does not forsake an origin story for the American constitutional order, but rather replaces the actual origins with a substitute. This substitution enables Vermeule to bypass the inconvenient facts of the formal written Constitution and its relationship to the lawmaking authority, which in the American context is rooted in popular sovereignty. As with most fables, there is an element of truth to Vermeule's incomplete origin story. The *ius gentium* at the time of ratification

197 *Id.* at 86 (quoting *Curtiss-Wright*, 299 U.S. at 316).

198 *Id.* at 87 (quoting *Curtiss-Wright*, 299 U.S. at 317) (alteration in original).

199 *Id.*

200 *Id.* at 85.

201 See H. Jefferson Powell, *The Story of Curtiss-Wright Export Corporation*, *in* PRESIDENTIAL POWER STORIES 195, 231 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (describing Justice Sutherland's opinion as "obsolete or unimportant" and arguing that it is "truly bizarre to think that profound questions about the foreign policy of the United States might turn on Sutherland's words: no one embraces Sutherland's cherished theory about the twofold nature of federal power and the opinion probably doesn't make sense without the theory").

informs what Stephen Sachs has described as constitutional backdrops; it remains a source of law to be considered with other sources today.[202] It is not, however, supreme law of the land under the Supremacy Clause.[203] Nor is there anything "shockingly anti-originalist" about the idea that "the Union existed before the Constitution." The Supremacy Clause itself speaks directly to treaties made pursuant to the authority of the United States before the Constitution.[204] Even more straightforward textual evidence for the Union's existence before the Constitution is, of course, in the Preamble (as Justice Sutherland himself notes). The first professed object of "We the People of the United States" is "to form a more perfect Union."[205] The preexisting Union was to be made more perfect, made more through-and-through a Union. Direct evidence for the true legal relationship between the written Constitution and the small-c constitutional order is right there in the text. Once one identifies the promulgated Constitution as the product of the highest lawmaking authority for the Union, it is a mistake to appeal over its head to the *ius gentium* for the purposes of identifying the supreme federal law. There is no higher federal law than the Constitution according to the authoritatively promulgated positive law in the Supremacy Clause and the lawmaking intentions expressed in the Preamble.

As a competing canonical case on constituent authority and promulgation we offer *Barron v. Baltimore*.[206] Chief Justice John Marshall's opinion for the Court in *Barron* provides a superior example of how a well-trained classical lawyer should understand the promulgated nature of the legal Constitution, including its rights language. There, the Court held that it lacked jurisdiction to review a state court's denial of the claim that Baltimore took an individual's property for public use

202 *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1818 (2012) (defending "the existence, utility, and legitimacy of constitutional backdrops," understood as preexisting legal rules that enjoy continuing legal force under the Constitution); *cf. id.* at 1884 ("*If* the Union enjoyed a foreign affairs power before the Constitution or the Articles of Confederation, and *if* that power descended specifically to the executive branch, and *if* that power is outside the scope of textual provisions (such as the Tenth Amendment) that might limit it, and *if* that power is immune from ordinary means of change, *then* the reasoning in *Curtiss-Wright* might be correct." (footnote omitted)).

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

204 The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* The distinction between treaties already made and those yet to be made speaks directly to pre- and post-ratification treaties. The Constitution distinctly identifies the two categories and explicitly affirms both as "the supreme Law of the Land."

205 U.S. CONST. pmbl.

206 32 U.S. (7 Pet.) 243 (1833).

without just compensation in violation of the Fifth Amendment's Takings Clause.[207] The decision turned on lack of appellate jurisdiction, which depended, in turn, on the absence of a federal-law determination by the state court that was reviewable by the Supreme Court of the United States.[208] Barron contended that Baltimore had rendered his property valueless.[209] Marshall reasoned that Barron had no recourse for his injury under the Fifth Amendment's Takings Clause because that protected only against actions of the *federal* government.[210]

Marshall described the Constitution of the United States as an "instrument" that had been "ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[211] He contrasted the Constitution of the United States with the various state constitutions; those were instruments establishing "distinct governments, framed by different persons and for different purposes."[212] Marshall acknowledged that the Federal Constitution imposed some restrictions on the state governments. But these restrictions—in Article I, Section 10—"are brought together in the same section, and are by express words applied to the states."[213] By contrast with the express words of Article I, Section 10, the prohibition imposed by the Takings Clause was framed in general terms through use of the passive voice. It was contained in the first set of amendments to the Constitution, which were "universally understood . . . [as] a part of the history of the day, . . . [to provide] security

207 *Id.* at 247–51.

208 *Id.* at 250–51.

209 *Id.* at 243–44.

210 *Id.* at 247–51.

211 *Id.* at 247. Reasoning that "[t]he people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests," Marshall asserted that "[t]he powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument." *Id.*

212 *Id.* In those state constitutions, Marshall contended, the people of each state "have imposed such restrictions on their respective governments as their own wisdom suggested, such as they deemed most proper for themselves." *Id.* at 247–48. The content of the restrictions imposed by the people of each state on the government of each state "is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest." *Id.* at 248.

213 *Id.* This design and wording supported a straightforward structural inference that "in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms." *Id.* at 248–49. The "application to states" of the restrictions in Article I, Section 10 was "not left to construction," but was "averred in positive words." *Id.* at 249. These positive words specifying the entities prohibited from acting in Article I, Section 10, were "No State shall." U.S. CONST. art. I, § 10.

against the apprehended encroachments of the general government—not against those of the local governments."[214] Because "[t]hese amendments contain no expression indicating an intention to apply them to the state governments," Marshall reasoned, "[t]his court cannot so apply them."[215]

There is no question that the kind of injury alleged by Barron could have counted as a legal injury actionable under some other body of law, like state law or the general law.[216] But because of the jurisdictional allocations then in effect, the dispositive issue in *Barron v. Baltimore* was whether Barron's injury was cognizable as a matter of *federal* law. The Constitution created a new government and gave rise to a corresponding new body of positive law—the law of the United States. One cannot identify the content of this new positive law by reasoning immediately from first principles.[217] While it would be a mistake to identify the positive law of the Constitution with the words of the Constitution alone, it is also a mistake to untether the law of the Constitution from the history of the Constitution. The history of that law has a beginning—an origin.

This historical origin of constitutional law in the promulgated Constitution is why Vermeule is wrong that "all attempts to combine originalism with the classical view of law are ultimately incoherent, an attempt to mix oil and water."[218] Vermeule argues that "precisely to the extent that American lawyers are genuinely originalist, they should have the courage to discard originalism altogether in favor of the classical law, the fundamental matrix for the thinking of the whole founding generation."[219] But this is precisely backwards. "The fundamental matrix for the thinking of the whole founding generation" is why classical lawyers should be original-law originalists today. The basic claim of original-law originalism rooted in the classical legal tradition is that the original law of the Constitution contributes to the content of our constitutional law today insofar as it has been carried forward from its origin in the promulgated Constitution.

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214 *Barron*, 32 U.S. (7 Pet.) at 250.

215 *Id.*

216 Barron had won a damages verdict of $4,500, but a Maryland appellate court reversed. *Id.* at 246.

217 Our description of *Barron* is designed to leave open the possibility that the best understanding of the case is that it did not resolve the still-ongoing "debate about the declaratory nature of enumerated rights." Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1435.

218 VERMEULE, *supra* note 1, at 2.

219 *Id.*

The foundational contribution of the original law of the Constitution *then* to our constitutional law *now* is the key insight of Professor Stephen Sachs in *Originalism as a Theory of Legal Change*.[220] As Sachs explains:

> Originalism is . . . a theory of our law: a particular way to understand where our law comes from, what it requires, and how it can be changed.
>
> This view starts with a common assumption of legal systems, that the law stays the same until it's lawfully changed. . . .
>
> To an originalist, . . .[w]hatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way. Preserving the meaning of the Founders' words is important, but it's not an end in itself. It's just a means to preserving the content of the Founders' law.[221]

Sachs in that article, and Professor William Baude in another from around the same time, presented a version of original-law originalism grounded in legal positivism.[222] We wrote *Enduring Originalism* shortly thereafter because we agreed with their approach of grounding constitutional law in an understanding of the Constitution as positive law, but we disagreed with their Hartian legal positivism at the level of jurisprudential foundations. What Vermeule waves off years later as a clever "rhetorical posture in what passes for the 'marketplace of ideas,'"[223] was in fact a project of recovery and rehabilitation.

The argument in *Enduring Originalism* draws on the classical tradition's understanding of positive law's nature and value to argue that the best way to understand the Constitution is to identify the "propositions of law that became valid by virtue of the addition of the Constitution to the rest of the law then in effect."[224] An interpreter seeks to understand the original law the Constitution created not because a positivist rule of recognition happens to say so and not because lawyering should be a morally neutral enterprise. Rather, one does so because of the classical natural law tradition's teaching on the crucial role that the positive law of the promulgated Constitution plays in securing the common good of the people of the United States.

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220 Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015).

221 *Id.* at 818–19.

222 *See* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

223 VERMEULE, *supra* note 1, at 108; *see also id.* at 116 (writing off our proposal as a "political and rhetorical" gambit).

224 Pojanowski & Walsh, *supra* note 7, at 99.

Vermeule relies on the scholarship of legal historian Professor Jonathan Gienapp asserting that "[o]riginalists' understanding of constitutional writtenness . . . is anachronistic, a species of modern constitutional thinking that they unwittingly and uncritically impose on the eighteenth century."[225] Whatever force this charge may have as pressed against others, though, the indictment does not cover our understanding of the promulgated words of the written Constitution as the material cause of the law of the Constitution.[226] Four-cause legal constitutionalism *is* the classical understanding, not "a species of modern constitutional thinking that [we or Vermeule] unwittingly and uncritically impose on the eighteenth century."[227] Because of the

225 VERMEULE, supra note 1, at 186 n.4 (quoting Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 324 (2021)) (omission in original).

226 To be sure, there are aspects of *Enduring Originalism* that we would have described differently if we had written with the benefit of Professor Gienapp's scholarship on the development of the concept of constitutional fixity through the 1790s in his later-published book, JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018). For example, Gienapp shows how it is far from a "simple claim" that "the Constitution was designed to be fixed and authoritative fundamental law." Pojanowski & Walsh, *supra* note 7, at 126. The relationship between our classically grounded original-law originalism and Gienapp's rich historical account deserves more detailed consideration than we provide here. In particular, our treatment of Marshallian constitutionalism as canonical requires an explanation that addresses Gienapp's claims regarding other could-have-been contenders for canonicity, such as (James) Wilsonian constitutionalism. *See, e.g.*, GIENAPP, *supra*, at 99–101. We note, nevertheless, that the "Second Creation" that Gienapp heralds in his book's title is the emergence of operative consensus around an idea of constitutional fixity through postratification debates in the 1790s. *See* GIENAPP, *supra*, at 7–12. This development provides further support for the centrality to constitutional practice of the relationship between writtenness and fixity described in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803). It also explains the common contrast from the late 1790s onwards between the customary unwritten British constitution and America's written Constitution. *See* Pojanowski & Walsh, *supra* note 7, at 126 & n.153. Despite convergence on a shared conception of constitutional fixity, various constitutional debates continued to turn on competing conceptions of the nature of the union and the relationship of the Constitution. *See, e.g.*, Kevin C. Walsh, *Statutory Jurisdiction and Constitutional Orthodoxy in* McCulloch, Cohens, *and* Osborn, 19 GEO. J.L. & PUB POL'Y 73, 107–10 (2021) (summarizing ways in which debates over the Supreme Court's statutory jurisdiction and the extent of federal legislative power were intertwined with conceptions of the nature of the Union). Although we reject social contract theory, we agree with Gienapp that "[w]hat the Constitution said was a function of the kind of a people and union it spoke for." Gienapp, *supra* note 216, at 355; *see also* Part II.B, *supra*. A challenge for us, for Vermeule, and for any others who aim to understand the Constitution within a classical legal framework while accounting for the pervasive influence of social-contract theory is to explain how the endurance of the classical legal framework over time underwrites the endurance of the Constitution as law over time.

227 *See also* Pojanowski & Walsh, supra note 7, at 126 ("Our recourse to the classical natural law framework does not impose a theoretical import on our law, but reintroduces our predecessors' framework for positive law to their posterity."); VERMEULE, *supra* note 1,

foundational role of the promulgated Constitution, it remains our view that original-law originalism jurisprudentially grounded in the classical legal tradition is still the best way in which "the core theoretical insights and jurisprudential principles of the classical legal tradition can be recovered, adapted, and translated into our world, so as to yield a better interpretation of the past and present of our operative constitutional order."[228]

## III. PROMULGATED AMERICAN CONSTITUTIONALISM: VERMEULE'S CRITICISMS REVISITED

The critique above builds on and extends our prior work in *Enduring Originalism*, which sought to show how the best version of constitutional originalism fits in with the classical legal tradition's understanding of law. Vermeule gave our work sustained attention and criticism in *Common Good Constitutionalism*.[229] Now that we have restated our approach to understanding the law of the Constitution and offered our criticisms of Vermeule's rendition, we can contextualize and address his objections to ours.

Vermeule characterizes our approach as a kind of "hybrid view[]" that attempts "to combine originalism with an emphasis on the common good."[230] For reasons we discuss below, we reject this characterization. Yet, for ease of organization, we will group Vermeule's objections and our responses under two headings that track his hybrid construct: (i) arguments about our approach's fidelity to the classical understanding of law, and (ii) criticisms about originalism in operation.

### *A. Contesting the Place of Originalism in the Classical Tradition*

Vermeule writes that "[w]hile . . . the classical law includes *positive law* in the sense of the *ius civile*, and indeed puts positive law into a

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at 18 ("Properly speaking, the classical approach to law is not an opponent or alternative to originalism or textualism. Rather, it *includes* its own properly chastened versions of those ideas, because it includes the *ius civile* as part of a larger scheme of law, and because it respects the authority that determines the content of the positive law.").

228 VERMEULE, *supra* note 1, at 3 (endnote omitted).

229 *Id.* at 109–15 (citing Pojanowski & Walsh, *supra* note 7). Although we are honored by the critical notice, an even better foil would have been Professor Lee Strang, whose book, *Originalism's Promise*, brings together several strands of argument worked out in several law review articles over several years and offers a far more fleshed out argument than our jointly authored article and one of our solely authored essays. LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 267 (2019). As it is, Strang receives a perfunctory, general citation as an example of this rival "hybrid" approach. *See* VERMEULE, *supra* note 1, at 213 n.290 (citing STRANG, *supra*).

230 VERMEULE, *supra* note 1, at 108.

right relationship with law generally, originalist *positivism* is a different approach altogether."[231] According to Vermeule, the natural law–based approach we presented in *Enduring Originalism* is "non-positivist at the level of justificatory method, even if it tries to preserve a kind of positivist originalism at the operative level."[232]

Vermeule describes our approach as grounded on a "series of second-order propositions":

> (1) the common good requires that society coordinate on a settled, stable, and adequately just constitutional framework for common life; (2) within the space of determination, where the choice is among reasonably just frameworks, the natural law does not take sides, as it were, on questions like what the precise scope of presidential powers is, or whether judicial review is available for given questions; and finally (3) applying originalism to such questions provides the stability and durability of legal meanings that allow a reasonably just framework to operate over time.[233]

Vermeule then contends that "[t]he argument either fails to state a view different than the classical law, or, to the extent that it is distinctive, fails on its own terms."[234]

We count ourselves successful if we state a view that is no different than the classical law and, to the extent our account is distinct from Vermeule's, we do not see that as a failing. Yet his description of our work is imprecise and confusing. Vermeule misdescribes our theory when he states it is grounded on "a series of second-order propositions." Rather, as Part II shows, our approach to constitutionalism is grounded in, and accounts for, the four crucial dimensions of law in the classical tradition.[235] Vermeule also fails to explain how our approach to human positive law, which is grounded in St. Thomas's, is "kind of positivist" at any level. In fact, his appreciation of the classical tradition's solicitude to *positivity* in law mirrors ours at times. Like us, he holds that the master technique of the classical law is *determination*: making and fixing reasoned choices for the common good among a panoply of reasonable options. Deference to those determinations is not positivism but rather, as Vermeule recognizes, "is essentially that favorite tool of the classical lawyer."[236] As Professor Steven D. Smith observed in his own review of Vermeule's criticisms of us, it "would be

231 *Id.* at 108–09.

232 *Id.* at 109.

233 *Id.*

234 *Id.*

235 *See* Pojanowski & Walsh, *supra* note 7, at 120–26 (discussing the role the four causes play in a theory of constitutionalism).

236 *Id.* at 46.

more accurate and less tendentious simply to say that natural law originalism is self-consciously 'grounded in' or 'embedded in' CLT [classical legal theory]—in the position that Vermeule says legal thinkers should adopt and yet oddly wants to deny them."[237]

Any differences between us and Vermeule in this respect show how our understanding of American constitutional law is closer to the classical tradition. Our approach to interpretation seeks to identify the reasoned propositions an actual authority enacted in a promulgated text, rather than ahistorical surface readings. Our approach also treats our promulgated Constitution as *a law*—*lex*—rather than skipping past it to engage in a Dworkinian constructive interpretation of our small-c constitutional order. And, as we noted, *Common Good Constitutionalism*'s superficial approach to textualism facilitates this effacement of posited law in the name of broader principles. We do not reject Vermeule's notion that our constitutional order is permeated by unwritten legal principles of *ius*. But in our polity these principles sit above, below, and around a written, posited Constitution. Not only do all of these principles inform the law of the Constitution, but some also emanate from it. Vermeule does not seem to have a place in his legal taxonomy for positive *ius*; his taxonomy of *lex* and *ius* seems at points to map on to a distinction between positive law (*lex*) and nonpositive law (*ius*). But just as natural law can be described as *lex*, so too can positive right be described as *ius*. Because of the dependence of constitutional *ius* on constitutional *lex*, Vermeule's account of common good constitutionalism fails as an account of constitutional law of the United States to the extent that he neglects the Constitution as *lex*. It is our account of the Constitution that "puts positive law into a right relationship with law generally."[238]

At other times, Vermeule also seems skeptical about the possibility of fixed determination of the legal Constitution at all. He repeats Dworkin's well-known level-of-generality objection that "the putative fixation of original meaning by itself cannot guarantee durability."[239]

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237 Steven D. Smith, *The Constitution, The Leviathan, and the Common Good*, 37 CONST. COMENT. (forthcoming 2022) (manuscript at 18) (footnote omitted), http://ssrn.com/abstract=4098880; *see also id.* ("[T]here is no apparent reason why such originalism is any more inherently positivistic or any more unstable (whatever that means) than the positivism Vermeule himself commends as part of CLT, or than the textualism that he sensibly approves.").

238 VERMEULE, *supra* note 1, at 108–09. We do not address in this Review the consequences of Vermeule's imprecision in reintroducing *ius* to American constitutional theory in the manner that he has. *Caveat lector.*

239 *Id.* at 110; *see also id.* ("Absent further normative judgment at the point of application, of the very sort [of normative judgment] the theory is intended to exclude, *fixation of*

Dworkin's argument is that there are always moral considerations at the point of application, particularly in the choice about whether to read a given provision at a low or high level of abstraction.[240] Originalists have answers to that objection that Vermeule does not consider, let alone rebut.[241] More importantly for present purposes, any interestingly strong version of that argument undercuts Vermeule's own method. Again, like us, he holds that deference to reasonable, authoritative determinations is central to the classical tradition. But to defer, even rebuttably, one must go back and discover the content of the reasoned choice that lawmaking authority fixed in place at a given time. There is no determination without the ability to establish a reasoned ordination. But if the Dworkinian level-of-generality objection renders the quest for such original ordinances of reason as elusive as Vermeule claims, determination in *Common Good Constitutionalism* itself is an illusion. There may be an attempt to "mix oil and water" here, but it is not the combination of an originalist understanding of the law of the Constitution with the classical legal tradition.[242] Rather, it is Vermeule's grafting of Dworkinian hermeneutical skepticism about the limits of "fit" onto a classical framework that presumes the durability of posited law. Any softer version of the argument—that it can sometimes be difficult to identify the original law that preexists interpretation—collapses into a classical framework that takes the positive law of the promulgated Constitution seriously.[243]

### *B. Pressing the Limits of Originalism in Adjudication*

Vermeule's other objections to our classically grounded original-law originalism press primarily on its purported incompleteness for constitutional adjudication. This comes through in Vermeule's argument that "[t]hose who apply the law must inevitably, in some domain

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*meaning does nothing to prevent the mutable, progressive form of 'living originalism'* championed by [Professor Jack] Balkin and others.").

240 *See id.*

241 *See, e.g.*, William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. (forthcoming 2023) (reviewing VERMEULE, *supra* note 1) (discussing the objection and cataloging originalist arguments in response); John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737. For a careful argument that one can distinguish the immediate mischief a legal enactment sought to remedy from the broader purposes, see Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

242 VERMEULE, *supra* note 1, at 2.

243 Vermeule could fall back and argue that identifying reasoned ordinances in sources of law besides the Constitution is easier. But that is a contingent, debatable fact about our legal order. A few invocations of the Constitution's generalities and utter lack of interest in probing for reasoned propositions beneath them does not get us there.

of cases, have recourse to general background principles of law and to the natural law in order to decide how texts should best be read."[244] He says that we do not "clearly come to grips with the problem . . . [of] 'hard cases,' in which the rule the lawmaker prescribed for ordinary cases is ambiguous, or is vague, or otherwise misfires—fails to track the common good—due to unusual circumstances."[245]

This is mostly a convenient way of changing the subject from how best to understand the law of the Constitution. Elsewhere in the book, Vermeule acknowledges that "[t]he classical tradition, in itself, does not license judges in particular to rule as they see fit for the common good. It takes no *a priori* position on questions like the appropriate scope of judicial review . . . ."[246] Vermeule insists that "the political morality of the common good itself includes role morality and division of functions," and he specifies further that "[h]ow the Constitution should be interpreted and how judges should decide cases are not necessarily the same question."[247] But Vermeule's criticism of original-law originalism for supposedly running out in hard cases is not simply a matter of the author of Chapter 3 ignoring what he said about role morality and division of functions in Chapters 1 and 2. In an endnote, Vermeule identifies as "[a] wrinkle" our expressed self-limitation of having offered a theory of law rather than a theory of adjudication in *Enduring Originalism*.[248] He describes our adherence to the distinction between these two different kinds of theories as confusing.[249]

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244 VERMEULE, *supra* note 1, at 111.

245 *Id.*

246 *Id.* at 19.

247 *Id.* at 43; *see also id.* ("[W]hile the promotion of the common good is a duty incumbent upon all officials in the system, legislators and executive officers as well as judges, as a logical matter it does not follow that each official or institution in the system, taken separately, must make unfettered judgments about the common good for itself; the political morality of the common good itself includes role morality and division of functions.").

248 *See id.* at 215 n.292.

249 *Id.* One wonders to whom this clear distinction is confusing. After all, he recognizes the distinction himself. *See supra* notes 244–46 and accompanying text. Vermeule asserts that we "trade on terms, like 'originalism,' that are usually offered as centrally relevant to adjudication." VERMEULE, *supra* note 1, at 215 n.292. This confusion of his may simply reflect unfamiliarity with or indifference to the extensive originalism scholarship that has long distinguished between theories of interpretation and theories of adjudication. *See, e.g.*, Gary Lawson, *Equivocal Originalism*, 27 TEX. REV. L. & POL. (forthcoming 2022) (manuscript at 1) ("Originalism-as-interpretation and originalism-as-adjudication ask very different questions and may well call for application of different skill sets, decision procedures, evidence sets, and standards of proof."); Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to* Originalism: Standard and Procedure, 135 HARV. L. REV. F. 133, 134 (2022) (observing that this point "has been pressed vigorously by more than a few legal philosophers and constitutional theorists especially over the past decade"); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV.

But the distinction between a theory of law and a theory of adjudication is easy to apprehend. Different activities call for different kinds of theories. The activities of ascertaining the law and of rendering judgment according to it are different activities and the relationship between the two is complex. This is not to say a theory of law is unconnected to adjudication. A theory of law plays a crucial, anchoring role in determining what makes easy cases easy, hard cases hard, and which arguments are more probable when cases are close.[250] Even so, adjudication is not limited to the identification of a particular piece of positive law.

To illustrate the distinction between the activities of ascertaining the law, and of rendering judgment according to it, let us consider a couple of constitutional classics, beginning with *Marbury v. Madison*.[251] There, Chief Justice John Marshall and the Supreme Court declined to order Madison to deliver Marbury his commission as justice of the peace. This was not because Chief Justice Marshall was confused about how to carry out his judicial duty to render to each his due. Among the principles Chief Justice Marshall invoked in resolving the case were two variations on the classical legal maxim *ubi ius, ibi remedium*.[252] Indeed, Marshall determined not only that Marbury had a vested legal right to his commission, but also that a writ of mandamus directed to the Secretary of State to compel its delivery was an appropriate remedy.[253] The Court nonetheless dismissed the case for lack of jurisdiction because the grant of statutory jurisdiction to the Court exceeded a constitutional ceiling for original jurisdiction purportedly in Article III.[254] Interpreting and applying the relevant legal materials to ascertain Marbury's right under the law was a distinct activity from rendering judgment according to the whole law, including that specifying the limits of judicial power.

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1739, 1748–49 (2013) (distinguishing the activity of "finding out what the constitutional law is" from "the wider question of how judges should decide constitutional cases"). Or it just might have served Vermeule's rhetorical purposes.

250 We can contrast this with Vermeule's approach, which speaks of the need to "fit" the legal materials without explaining what is in the legal materials that an interpreter should fit an interpretation with. *See* VERMEULE, *supra* note 1, at 69.

251 5 U.S. (1 Cranch) 137 (1803).

252 *See id.* at 163 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."); *id.* ("[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.").

253 *Id.* at 155–73.

254 *Id.* at 173–80.

A second illustrative example is *Gibbons v. Ogden*.[255] This was a dispute over the right to run steamboat passenger ferries on New York waters.[256] Ogden claimed an exclusive right based on New York state laws granting him a monopoly.[257] Gibbons contested this on two grounds.[258] He contended, first, that New York law granting exclusivity to Ogden was unconstitutional because the power to regulate commerce is exclusively federal, and second, that the federal license Gibbons had obtained under a federal law regulating the coasting trade overrode any exclusivity granted by state law.[259] The Supreme Court ruled for Gibbons on the grounds that his license under a valid federal law, combined with the Supremacy Clause, overrode the state-law grant of exclusivity.[260] This was the second ground advanced by Gibbons. Much of Chief Justice Marshall's opinion for the Court discusses the first ground, though he ultimately left that issue of constitutional law unresolved. This was not because Marshall had any difficulty deploying originalist reasoning to answer questions about the reach of the Commerce Clause.[261] Nor was it because Marshall thought it appropriate to decide or explain the absolute minimum necessary to resolve the case.[262] Nor did Marshall shy away from addressing the question of

255 22 U.S. (9 Wheat.) 1 (1824).

256 *Id.* at 1–2.

257 *Id.*

258 *Id.* at 2.

259 *Id.* at 2–3.

260 *Id.* at 240.

261 *See, e.g.*, *id.* at 188–89 ("As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it is given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."); *id.* at 190 ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government . . . .").

262 *See e.g.*, *id.* at 221–22 ("The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.").

federal exclusivity because it had not been adequately aired or because he had no inclinations regarding the right answer.[263] Rather, Marshall exercised his judicial discretion to leave the issue unresolved because the duty to render judgment in the case did not require its resolution; adjudication is a distinct activity from ascertaining the law.

The more recent case of *Dobbs v. Jackson Women's Health Organization*[264] provides a textbook illustration of the difference between (i) answering a question of what the Constitution, correctly understood, provides; and (ii) deciding how to rule in the face of inconsistency between a correct understanding of the Constitution, on the one hand, and decades-old decisions interpreting the Constitution incorrectly, on the other. The distinction between these two questions in *Dobbs* is but one of the many ways in which courts regularly encounter the more general distinction between the activities of (i) ascertaining the best understanding of the Constitution as law, and (ii) rendering judgment in a case according to all applicable law.

*Dobbs* concerned whether to affirm or reverse a lower-court decision that held unconstitutional a state law providing: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."[265] Lower federal courts had held this law unconstitutional under the Supreme Court's 1973 decision in *Roe v. Wade*[266] and its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[267] The Supreme Court not only reversed the judgment of unconstitutionality under review but also entirely overruled *Roe* and *Casey*. Justice Alito wrote the opinion of the Court on behalf of a five-Justice majority. Chief Justice Roberts joined in the reversal of the lower-court judgment but dissented from the majority's complete repudiations of *Roe* and *Casey*. Three dissenting justices would have affirmed both the lower court judgment and the Court's precedents.

Justice Alito's opinion for the Court begins "by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion."[268] Quoting Chief Justice Marshall's

263 *See id.* at 209–10 (stating with respect to the argument for federal exclusivity that "[t]here is great force in this argument, and the Court is not satisfied that it has been refuted").

264 142 S. Ct. 2228 (2022).

265 MISS. CODE ANN. § 41-41-191 (2022).

266 410 U.S. 113 (1973).

267 505 U.S. 833 (1992).

268 *Dobbs*, 142 S. Ct. at 2244.

1824 opinion for the Court in *Gibbons v. Ogden* and Justice Story's 1833 *Commentaries on the Constitution of the United States*, the opinion's analysis opens by stating: "Constitutional analysis must begin with 'the language of the instrument' [*Gibbons*], which offers a 'fixed standard' [Story's *Commentaries*] for ascertaining what our founding document means."[269] Finding no reference to an abortion right in the Constitution, *Dobbs* considered whether it was implicit in the Fourteenth Amendment's Due Process Clause. Rather than treat "liberty" as an invitation to read in moral content,[270] the Court surveyed the history and tradition of abortion law up to ratification of the Fourteenth Amendment and found it implausible to conclude that it implicitly included any such right.[271] Recognizing the stabilizing function of precedent, the Court then considered whether *Roe* and *Casey*'s departure from the Constitution's original law merited the protection of stare decisis.[272] After doing so at length, it decided to overrule those decisions and order judgment on the basis of its understanding of the allocation of authority in the Constitution.

The dissenting Justices followed a similar two-step approach but reversed the ordering of the steps and arrived at opposite outcomes under both. After first finding *Roe* and *Casey* to be decisions that "are rooted in—and themselves led to—other rights giving individuals control over their bodies and their most personal and intimate associations,"[273] the dissenters next explained why *Roe* and *Casey* should be understood as authorized interpretations of "the majestic but open-ended words of the Fourteenth Amendment—the guarantees of 'liberty' and 'equality' for all."[274]

The point here is not to relitigate *Dobbs*. Our initial purpose in invoking the decision has been to illustrate the familiar distinction

269 *Id.* at 2244–45 (first citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186–89 (1824); and then citing 1 STORY, *supra* note 192 § 399, at 305).

270 *See id.* at 2247 (stating "the term 'liberty' alone provides little guidance" and warning "we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy").

271 *See id.* at 2248–53. Although the Court emphasized abortion law up to 1868, its conclusion that abortion was not a deeply rooted tradition also considered postratification practice and assumed "for the sake of argument" that the specific practices of states at ratification do not "mar[k] the outer limits of the substantive sphere of liberty." *Id.* at 2258 (quoting *Casey*, 505 U.S. at 848).

272 *See id.* at 2261–78. That approach was consistent with that of natural law originalists like Lee Strang who argue that precedent should play an important role in constitutional adjudication. *See* STRANG, *supra* note 229, at 91.

273 *Dobbs*, 142 S. Ct. at 2320 (Breyer, Sotomayor & Kagan, JJ., dissenting).

274 *Id.* at 2326. Although the dissent places "equality" in quotation marks in describing the "open-ended words of the Fourteenth Amendment," that word is not actually one of the "words of the Fourteenth Amendment," *id.* *See* U.S. CONST. amend. XIV.

between (i) ascertaining what the Constitution requires and (ii) rendering judgment according to all applicable law, including not only judicial precedent that departs from the law of the Constitution but also law concerning how to approach such departures. In addition to illustrating the distinction, attending to *Dobbs* also serves two additional purposes in this critique of Vermeule's *Common Good Constitutionalism* and comparative commendation of *Enduring Originalism*. One is to suggest the relative attractiveness of our respective approaches in action. That is implicit enough in what we have written already.

Another purpose of adverting to *Dobbs* here is to address a distinct objection that Vermeule levels against classically grounded original-law originalism. This is the charge of disruption. Vermeule contends that originalism's claims of continuity are illusory, and he excoriates its reformist vices. His genealogy of modern originalism emphasizes its "disruptive, occasionally even revolutionary quality."[275] He contrasts originalism's claims of stability through enduring legal meaning over time with its destabilizing potential in constitutional adjudication today.[276] He decries originalism as "an essentially Protestant method of hermeneutic that, taken to its logical extreme, invokes *sola scriptura* to unsettle doctrines long established in the law."[277] Originalism is not about fidelity to established law, according to Vermeule, but "[a]s with the Protestantism it instantiates, originalism is at bottom a mode of rebellion against an established order and its developing doctrine."[278] By contrast, Vermeule claims continuity with the classical legal tradition that truly grounds our constitutional order. Indeed, he seeks to restore our order to its fullness after a period of originalist- and progressive-induced amnesia.[279]

But Vermeule also calls for change. Immediately after criticizing originalism's doctrinal iconoclasm Vermeule hastens to add, "[t]his is not, of course, to say that disruption is necessarily bad—it depends on what is being disrupted, and why."[280] This qualifier makes sense in light of his prescriptions for constitutional adjudication. In the book's Conclusion, Vermeule advocates for precisely the kind of disruption that originalism—in his view—offers. Shredding Dworkin's famous

275 *See* VERMEULE, *supra* note 1, at 93; *see also id.* ("[O]riginalism was initially created in order to unsettle the evolving doctrine of the Warren and Burger Courts, which conservatives despised. Disruption was baked into originalism from the beginning.").

276 *Id.* at 113 ("The idea is that originalism conduces to stability and durability over time, but there is little reason to think this is true.").

277 *Id.*

278 *Id.* at 113–14.

279 *Id.* at 1–3, 118.

280 *Id.* at 114.

analogy of legal interpretation, Vermeule asserts that "[t]he last few chapters of a long chain novel have to be partly ripped up, partly reinterpreted in drastic terms."[281] Going even further than originalism would authorize, and indeed directly against the continuity-with-origins that serves as originalism's ballast, the title of Vermeule's group blog heralds *iustitium*. This is a Roman-law term meaning a "suspension of normal juridical proceedings" that the blog's founders "extend[] by analogy to refer to the kind of action that is necessary when the juridical establishment has become corrupt."[282]

We sympathize with the sentiment, and we recognize the realities underlying its grim assessment. But we reject recourse to rupture. This rejection is necessarily provisional, but we believe it appropriate to repeat right now. After all, the claim of corruption was put even more strongly by the author of the opinion for the Court in *Dobbs*. Writing seven years earlier in dissent in *Obergefell v. Hodges*, Justice Alito lamented "the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation."[283] Yet Justice Alito did not surrender then (thank goodness), and neither do we.

Vermeule is right that originalism-in-adjudication can disrupt an established order. But it does so under the banner of longer-term continuity. Our distinction between developments and departures in *Enduring Originalism* serves a similar function as Vermeule's later-drawn distinction between (good) developing constitutionalism and (bad) progressive living constitutionalism. Every theory of how to implement the law of the Constitution requires an account of change-within-continuity. Although we did not offer a theory of adjudication in *Enduring Originalism* and have not done so in this critique, our account of original law and its interpretation lays the groundwork for one that brings the original law "off the shelf, returned from exile, substituted in from the sidelines, or whatever you like"[284] in a way that is not available for other rules that lack such pedigree.

Implementation of classically grounded original-law originalism across time also offers a particular kind of transtemporal stability. For cases of first impression, it can inform reasonably just positive-law answers to emerging questions of constitutional law—answers continuous with the ongoing constitutional order in which these questions emerge. Furthermore, when such originalism is deeply rooted in the practices of adjudication, it reduces the expected value of deliberate deviations from original law that has not been lawfully changed. This

281 *Id.* at 181.

282 *About Us*, IUS & IUSTITIUM, https://iusetiustitium.com/about-us/ [https://perma.cc/2P26-LGW9].

283 Obergefell v. Hodges, 576 U.S. 644, 742 (2015) (Alito, J., dissenting).

284 Pojanowski & Walsh, *supra* note 7, at 152.

flows from the recognition that later interpreters will be authorized to review the deviation and to call back into action the original, unlawfully displaced law. As *Dobbs* demonstrates, original-law originalism can show that juridical deeds like *Roe* and *Casey* have clouded claims of title. The vulnerability of such decisions to revision or overruling, moreover, increases to the extent they are recognizably out of place within the broader framework of positive law and the traditions and practices of the polity. Adjudication anchored to the original law does not slough off doctrine through facile proof-texting. Rather it aspires to identify the propositions of law that were made true by the enacted text in time and, where prudent, just, and authorized by other applicable law, make contemporary practice more continuous with those original commitments.

## CONCLUSION

Having considered both areas of agreement and disagreement with Vermeule, it is fitting to consider where to go from here. Vermeule addresses this question in *Common Good Constitutionalism* by forcing a choice among three alternatives: "positivist originalism"; "progressive living constitutionalism"; and "common good constitutionalism." Having exposed the limits of this false trilemma, we believe we have also revealed the staying power of *Enduring Originalism*. That said, we do not wish to repeat in reverse one of the least attractive aspects of Vermeule's constitutional dialectic. That is simply to privilege one essential element of legality above all others and assert "the game is up" once one's interlocutor acknowledges the essential role of that element.[285] Rather, we encourage jurists to aim to understand constitutional law (and all human positive law, for that matter) in the light of all four of law's four causes.[286]

Vermeule is right that understanding human law rightly always depends explicitly or implicitly upon some notion of the common good;

285 This is what Vermeule does with Casey in asserting that "the game is up" for originalism rooted in the classical natural law once one "allows interpreters to consider broader principles of legal morality (*ius*) in hard cases." Casey & Vermeule, *supra* note 181, at 127–28. At that point, they insist, "one is merely arguing over the precise scope of discretion for interpreters in what is essentially a regime of common-good constitutionalism." *Id.* at 128.

286 Based on Vermeule's responses to other critical reviews of *Common Good Constitutionalism*, the rhetorical attractiveness of the *tu quoque* seems sufficiently strong that some version of "overemphasis on the Constitution as *lex*" and "overemphasis on promulgation" is likely to feature prominently in any sustained reply he makes to us. In anticipatory defense, we plead the particularities of our legal Constitution as understood within a classical law framework as well as the importance of all four causes.

the same is true of reasoned ordering, authority, and promulgation. He underestimates, in our view, the common ground handed forward from the past for arguing over the actual instantiations of these essential elements within our polity today. These are the particulars of constitutional text, constitutional history, and constitutional tradition, all understood within a framework of the continuity of the United States of America as a political unit. In his new theory's best moments, though, Vermeule's views converge with ours as previously expressed with respect to the relationship between American constitutional positivity and legal positivism.[287]

Yet despite this shared framework, we suspect we are engaged in very different enterprises. Vermeule's highly abstract notion of continuity with the original Constitution and its order suggests that he may be more interested in laying the theoretical foundation for a new order than in identifying the law of this one. All told, the book seems less a classical approach to our actual Constitution than a permission structure for a new and improved constitutional order. In this respect, the best reading of Vermeule's two-level approach in *Common Good Constitutionalism* is one between the lines.[288]

On continuity, Vermeule contends that common good constitutionalism "embodies the best of our own tradition" and that the classical law "*is* the original understanding" that we must recover.[289] If we understand common good constitutionalism in its abstract, generic form, that is true as far as it goes. The notions that "law should be seen as a reasoned ordering to the common good" of a "flourishing political community" by political officials acting "in a manner consistent with requirements of their particular roles"[290] strike us as, well, "banalities, truisms, universally understood and accepted by all remotely sensible legal systems."[291] When *Common Good Constitutionalism* descends from unassailable generalities, though, the case for continuity is far weaker. This weakness is a direct function of the book's abstract, constructive, Dworkinian interpretation of our small-c constitutional order and its

287 *Compare, e.g.*, Pojanowski & Walsh, *supra* note 7, at 117 ("To understand the importance of *positivity*—the need for human-created law despite its imperfections—we must go beyond *positivism* in theorizing about constitutional interpretation."), *with, e.g.*, VERMEULE, *supra* note 1, at 18 ("Properly speaking, the classical approach to law is not an opponent or alternative to originalism or textualism. . . . The classical conception of *ius civile* . . . can be summed up as *positive law without jurisprudential positivism*.").

288 *See generally* ARTHUR M. MELZER, PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING (2014).

289 VERMEULE, *supra* note 1, at 2.

290 *Id.* at 1.

291 Casey & Vermeule, *supra* note 136.

neglect of our actual Constitution as *lex* worth interpreting in its own right and that shapes and particularizes surrounding *ius*.

Vermeule's discussion of the body of legal thought surrounding the origins of our constitutional order is instructive. As other reviewers have noted, *Common Good Constitutionalism* discusses Ulpian, Bartolus, Aquinas, John Henry Newman, and Giovano Botero, but never mentions Edward Coke, John Locke, Thomas Jefferson, Alexander Hamilton, James Madison, or Joseph Story.[292] St. Thomas Aquinas is a profound influence on our general jurisprudential approach, and we are hardly card-carrying members of the Locke or Jefferson fan clubs. But if one, like Vermeule, claims to have captured the original understanding of a constitutional order that particularizes a generic form of classical legal constitutionalism, one should at least account for the law shaped by that original understanding. (Other postliberals would contend that, given its liberal founding, the United States is one of the *worst* candidates for embodying the classical tradition, but that is a debate for another day.)[293]

Moving on from the Founding, the case for continuity does not improve. Recall the three examples that compose his affirmative argument that his rendition of the classical tradition is the best reading of our constitutional order: (a) a misinterpretation of a 1905 Supreme Court dissent in *Lochner*;[294] (b) Ronald Dworkin's favorite statutory interpretation case, from the New York Court of Appeals in 1889, no less;[295] and (c) a 1936 Supreme Court foreign affairs opinion that even nonoriginalists think is a poorly reasoned outlier.[296] *Marbury v. Madison*, *Gibbons v. Ogden*, and *Barron v. Baltimore*, to select a few canonical cases, make no appearance. *McCulloch v. Maryland* (again, misdescribed as a Commerce Clause case) is selectively cited to bolster the notion of a de facto federal police power.[297]

We are not the first to note the book's lack of engagement with the actual Constitution and its surrounding jurisprudence.[298] To be

292 Baude & Sachs, *supra* note 241 (manuscript at 33).

293 *See, e.g.*, PATRICK J. DENEEN, WHY LIBERALISM FAILED 101 (2018) (describing the U.S. Constitution as "the 'applied technology' of liberal theory" and the "embodiment of a set of modern principles that sought to overturn ancient teachings and shape a distinctly different modern human").

294 VERMEULE, *supra* note 1, at 60–71 (discussing Harlan's dissent in Lochner v. New York, 198 U.S. 45 (1905)).

295 *Id.* at 71–84 (discussing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)).

296 *Id.* at 84–89 (discussing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936)); *see supra* note 201 and accompanying text.

297 *See* VERMEULE, *supra* note 1, at 40.

298 *See, e.g.*, Jack M. Balkin, *Liberalism, Republicanism, and Common Good Constitutionalism*, BALKINIZATION (July 7, 2022), https://balkin.blogspot.com/2022/07/liberalism-

fair, this is not a long book, and every theoretical exposition implicitly chooses between focal cases and peripheral ones. The principles of selection here, however, appear indifferent to most chapters of the American constitutional law canon at least until we arrive at the twentieth century. At that point the book offers continuity with selected areas of more recent jurisprudence, including those protecting state police power,[299] expansive federal power (especially compared to states),[300] the central role of the administrative state in governance,[301] and a strong executive.[302] American constitutional law is a complex story, but it is understandable if one concludes that the most substantial element of continuity in the book is with Vermeule's earlier writings on constitutionalism and the administrative state.

What next? A major impetus for Vermeule's writing is the belief that the Constitution in the hands of the legal establishment since the 1960s or 1970s has been a blunt instrument for imposing a secular liberal or libertarian order hostile to the common good of the people of the United States. *Common Good Constitutionalism* accordingly seeks to tear out the last few chapters of our constitutional story. Vermeule subjects *Obergefell v. Hodges*[303] to a withering critique for ignoring the

republicanism-and-common.html [https://perma.cc/7C5N-JHYZ] ("Vermeule has surprisingly little to say about constitutional structure or about the various clauses of the U.S. Constitution."); Baude & Sachs, *supra* note 241 (manuscript at 13–14); Matthew J. Franck, *Calvinball Constitutionalism*, PUB. DISCOURSE (May 3, 2022), https://www.thepublicdiscourse.com/2022/05/82092/ [https://perma.cc/XYZ3-Y2DW] ("Vermeule, the holder of an endowed chair in constitutional law, has relatively little to say about the Constitution in this book on constitutionalism, or about the history of its adoption and interpretation."); Smith, *supra* note 237 (manuscript at 11) ("[W]hile wanting to revive the classical legal tradition, Vermeule has little use for the more specific classical tradition of American constitutional law.").

299 *See, e.g.*, VERMEULE, *supra* note 1, at 61, 79–80 (discussing Jacobson v. Massachusetts, 197 U.S. 11 (1905)); *id.* at 124–28 (discussing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

300 *Compare id.* at 33 (first citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); and then citing Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591 (1944)) ("[T]he scope of federal powers has become all but equivalent to a general police power in substance . . . ."), *with id.* at 158–59 (sniffing at "so-called 'federalism'" and contending "American states as such are poorly situated to promote the relevant values").

301 *See, e.g.*, *id.* at 151–54 (discussing Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984); Auer v. Robbins, 519 U.S. 452 (1997); and Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), and arguing that administrative agencies are crucial for implementing federal and natural law).

302 *See, e.g.*, *id.* at 42 (arguing "our . . . constitutional order has developed to center on a powerful presidency"); *id.* at 151 (concluding that "[a]gencies are in this sense the living voice of our positive law").

303 576 U.S. 644 (2015).

"powerful evidence of the *ius gentium* and *ius naturale*."[304] He also contends that in substantial part "[l]ibertarian conceptions of property rights and economic rights will also have to go."[305] In his penultimate Applications chapter, he seeks to read down the "pernicious" doctrine of state sovereignty to mere principles of "respect and comity,"[306] rein in free speech doctrine,[307] and liberalize standing doctrine to advance environmental protection.[308] He is more laconic on abortion jurisprudence. Although *Casey*'s subjectivist rhetoric should be "stamped as abominable, beyond the realm of the acceptable forever after,"[309] he leaves his substantive discussion of the issue to a single endnote.[310] To be fair, Vermeule wrote *Common Good Constitutionalism* before *Dobbs* and other important decisions from the Supreme Court's most recent Term were decided. But *Dobbs*' rejection of *Casey* and *Roe* complicates Vermeule's unargued-for assumption that original-law originalism is inadequate for rewriting the chapters he wishes to rip out.

Now, not everything will break for classically oriented critics of corrupted elements of the American constitutional order. The original law will not give you everything you want or prevent everything you fear. And even when it does, there remain prudential judgments about whether to return the original law to its rightful place in adjudication. The answers to these morally laden questions of *lex*, *ius*, and prudence call for careful jurists in the mold of Marshall and Story to undertake, with patience, thoroughness, and determination, the difficult lawyers' work of maintaining the law of the Constitution. Natural lawyers working in the classical tradition in *this* constitutional order must decide whether that effort is worth it and whether the law of the Constitution we discover, that mixture of bitter, bland, and sweet, merits our obedience to its reasonable ordinances for the common good, as promulgated.

304 VERMEULE, *supra* note 1, at 131.
305 *Id.* at 42.
306 *See id.* at 158.
307 *See id.* at 167–73.
308 *See id.* at 174–77.
309 *Id.* at 42.
310 *See id.* at 199 n.103.