

MYTHS OF COMMON GOOD CONSTITUTIONALISM

CONOR CASEY* & ADRIAN VERMEULE†

“[I]f the goal of any society is the common good of its members, it necessarily follows that the purpose of every right is the common good.”

DANTE ALIGHIERI, *DE MONARCHIA* 40 (Prue Shaw trans. & ed., 1996).

“[T]o govern is to lead the thing governed in a suitable way towards its proper end.”

THOMAS AQUINAS, *DE REGNO* (Gerald B. Phelan trans. 2012).

In this Essay, we take stock of the debate over common good constitutionalism and the revival of the classical legal tradition. In doing so, we suggest that several of the most common critiques of that revival are based on serious misconceptions and tendentious, question-begging claims, especially for the superiority of originalism.

The past eighteen months or so have seen an outpouring of remarkable claims, from both originalist and progressive legal scholars, about the classical legal tradition and its emphasis on the common good. They include the following, or minor variants of the following:

- Legal 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.

*Assistant Professor of Law, University of Liverpool School of Law & Social Justice.

†Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. Some of the text in this post is adapted from Professor Vermeule’s book *Common Good Constitutionalism* (2022). A much shorter version of this article was published at the *Ius et Iustitium* blog. See Conor Casey & Adrian Vermeule, *Myths of Common-Good Constitutionalism*, *IUS ET IUSTITIUM* (Sept. 9, 2021), <https://iusetiustitium.com/myths-of-common-good-constitutionalism/> [https://perma.cc/VZQ6-M4K6]. The authors would like to thank Ethan Harper for excellent research assistance. The authors would also like to thank John Acton, Sean Coyle, George Duke, Michael Foran and Grégoire Webber for their very helpful comments.

- The classical tradition ignores the text and has no respect for posited law.
- An official oath to respect the Constitution and laws requires an originalist approach to constitutional interpretation.
- The classical tradition licenses judges to rule as they see fit for the common good; common good constitutionalism is thus synonymous with judicial supremacy.
- Alternatively, common good constitutionalism is synonymous with executive supremacy and an absence of checks and balances on executive power.
- Common good constitutionalism has no respect for human rights.
- Common good constitutionalism is fatally undermined by the fact that there is and will be disagreement between classical lawyers over the content of the natural law in hard cases.

In what follows, we argue that these claims do not even rise to the level of being either true or false, for they actually fail to join issue with the classical legal tradition; they transparently beg all the critical questions at issue. In other words, they assume their conclusions, assume away the premises of the classical legal tradition, and generally fail to meet the classical arguments on their own terms. They are best understood, not as serious arguments, but instead as myths offered to define and enforce the boundaries of particular socio-legal communities, such as the originalist legal movement, and to comfort its members. Our hope is to clear away these myths so that actual engagement may occur. We hope to inaugurate a new phase of discussion, one in which critics of the classical legal tradition begin with a baseline comprehension of what it is they are criticizing. In a sense, despite all the *sturm und drang*, the real debate over common good constitutionalism has yet to begin.

Part I sketches the largely ersatz debate so far. Part II introduces the essentials of the classical theory of law and of common good constitutionalism, which is nothing more than the core precepts of the classic legal tradition translated, adapted

and applied to current constitutional debates. We do not purport to provide a comprehensive statement of the classical theory, but merely offer an introductory mini-primer, with references to more comprehensive literature. As we will see, the myths we will discuss beg even the elementary questions. Part III explains how the myths are incorrect—or, more precisely, beg the questions in controversy. In the conclusion, we invite genuine engagement with the classical legal tradition.

I. THE DEBATE SO FAR

The hallmark of the classical legal tradition is that law, to be law in the focal sense of that term,¹ must be rationally ordered to the common good of the political community. We have argued, as do others, that the classical legal tradition should be explicitly revived, adapted, and readopted as the intellectual underpinning upon which officials and jurists understand the purpose and ends of political authority, law, and constitutions. The foundation and rapid success of legal theory blogs like *Ius*

1. Use of the “focal case” or “central case” methodology used by Aristotle, and more recently deployed by Finnis, allows us to distinguish and pick out explanatorily rich expressions of a social phenomenon or practice and contrast them with poor or diluted expressions. For example, distinguishing between rich examples of social practices like friendship, medicine, or argumentation from their impoverished or less rich imitations: “so-called friends,” unscientific quackery, and illogical ramblings. Focal cases help to shed light on the good reasons people have for engaging in a social practice—the *purpose* motivating it and sustaining it over time. These reasons can then be used to probe why and how some forms of a practice can be seen as diluted or borderline versions. For example, quack medicine hinders, or at least fails to promote, the good reasons (to secure life and health) people have for engaging in the practice of medicine in the first place, and this sheds light on why quack medicine can be considered an impoverished version of medical practice. Picking out the central or focal case of a phenomenon, including law or constitutionalism, therefore requires the theorist to engage with the question of *why* practices like law and constitutionalism are a good thing to have and what kind of *reasons* would warrant bringing a legal system into being and sustaining it over time, as opposed to opting for other forms of social ordering. In the classical legal tradition, this “why” and these “reasons” are supplied by reference to the need to secure the common good of each and all—the sources of man’s highest temporal happiness. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* Chapter 1 (2d ed. 2011).

& *Iustitium*² and of research projects like the *Common Good Project*³ based at Oxford University are a testament to renewed interest in these questions.

In April 2020, one of us published a short essay in *The Atlantic*⁴ critiquing the dominance of originalist and progressive approaches to law and constitutional interpretation in contemporary legal thought. The essay called for an embrace of ‘common-good constitutionalism’ in its place—the application of core precepts of the classical legal tradition to questions of public law and constitutionalism. It is fair to say the essay did not go unnoticed. Certain responses ranged from hostile to apoplectic. In a rare joint-defense alliance, both originalist-libertarians and progressives condemned the idea as “dangerous” — as subversive of the United States’ important founding principles⁵ and an

2. *Ius et Iustitium* is a legal theory blog which aims to demonstrate “that the classical legal tradition provides powerful justifications for the rule of law, morality, and social order.” *About Us*, IUS ET IUSTITIUM, <https://iusetiustitium.com/about-us/> [<https://perma.cc/KT2Z-9JQU>] (last visited Dec. 31, 2021).

3. The *Common Good Project* is a joint initiative of Blackfriars College and the Aquinas Institute at the University of Oxford. Its main aim is to “foster a discussion of the relationship between law and the common good. The Project explores the notion of common good in law and society from an array of perspectives.” *The Common Good Project*, UNIV. OF OXFORD, FAC. OF L., <https://www.law.ox.ac.uk/research/common-good-project> [<https://perma.cc/GN4X-DASY>] (last visited Dec. 31, 2021). For our contributions to the project, see *The Common Good Project, Toward a Common Good Approach to Constitutionalism. A Conversation with Conor Casey*, YOUTUBE (Mar. 18, 2021), <https://www.youtube.com/watch?v=MpZCKrpE5gw>; *The Common Good Project, What is the Common Good? A Conversation with Adrian Vermeule*, YOUTUBE (Feb. 25, 2021), https://www.youtube.com/watch?v=K89_3Wdi7BA.

4. See Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/KWB5-DMJH>].

5. See, e.g., Randy Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC, (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-nonoriginalist-approach-constitution/609382/> [<https://perma.cc/NTU7-XDQR>]; Richard Epstein, *The Problem with “Common Good Constitutionalism”*, HOOVER INST. (Apr. 6 2020), <https://www.hoover.org/research/problem-common-good-constitutionalism> [<https://perma.cc/PQ88-UXDY>]; Jack Balkin, *Common Good Versus Public Good*, BALKINIZATION (Apr. 3, 2020), <https://balkin.blogspot.com/2020/04/common-good-versus-public-good.html> [<https://perma.cc/QA6P-YRBB>].

extended apologia for authoritarianism.⁶ Rarely have so many advocates of unbridled liberty of thought and discussion encountered an idea that they immediately aimed to stamp as beyond the pale.

Over time, however, the situation has become quite different. The other present author wrote an article in *Public Law* defending common good constitutionalism from the misguided critique that it is an intellectual apologia for authoritarianism. Instead, this piece argued that it is an approach to constitutionalism steeped in the classical legal tradition, due to its identification of the primacy of the common good and human flourishing as the justification for political authority and its close linkage of legal interpretation to principles of legal morality conducive to this end.⁷ Since then, a series of works, many by younger scholars, has started to draw upon the common good framework, either explicating it as a matter of theory,⁸ or applying it in diverse areas of law.⁹

6. See, e.g., Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/> [https://perma.cc/L69D-CCVP]; David Dyzenhaus, *Schmitt in the USA*, VERFASUNGSBLOG: ON MATTERS CONST. (Apr. 4, 2020), <https://verfassungsblog.de/schmitt-in-the-usa/>; Blake Emerson, *Progressive Democracy and Legislative Form*, L. & POL. ECON. PROJECT (Apr. 15, 2020), <https://lpeproject.org/blog/progressive-democracy-and-legislative-form/> [https://perma.cc/S4FP-M3A5].

7. See Conor Casey, “Common-Good Constitutionalism” and the New Battle Over Constitutional Interpretation in the United States, 4 PUB. L. 765 (2021).

8. See, e.g., Stéphane Sérafin et al., *The Common Good and Legal Interpretation, A Response to Leonid Sirota and Mark Mancini*, 30 CONST. F. CONSTITUTIONNEL 39 (2021).

9. See Michael Foran, *Rights and the Common Good*, IUS ET IUSTITIUM (Sept. 20, 2021), <https://iusetiustitium.com/rights-and-the-common-good/> [https://perma.cc/H684-BNGZ]; Jamie McGowan, *The Tyranny of Rights*, IUS ET IUSTITIUM (Sept. 20, 2021), <https://iusetiustitium.com/on-the-tyranny-of-rights/> [https://perma.cc/58N6-FMSD]; José Ignacio Hernández G., *Common-Good Constitutionalism and the “Ius Constitutionale Commune” in Latin America*, IUS ET IUSTITIUM (Sept. 28, 2020), <https://iusetiustitium.com/common-good-constitutionalism-and-the-ius-constitutionale-commune-in-latin-america/> [https://perma.cc/M3AE-PYM4]; Jamie McGowan, *Against Judicial Dyarchy*, IUS ET IUSTITIUM (July 16, 2020), <https://iusetiustitium.com/against-judicial-dyarchy/> [https://perma.cc/YXT8-MALJ].

We, of course, fully anticipate and welcome robust debate both within and about the conceptual paradigm we are sketching. Common good constitutionalism is a theoretical and conceptual framework, not a laundry list of positions, and thus supports as much internal debate and dissension as occurs within, for example, legal positivism. (Consider the interesting debate between Michael Foran and Jamie McGowan, conducted within common good premises, over the scope of judicial review).¹⁰ We therefore stress that our goal here is to outline the core precepts of a rich jurisprudential tradition and how they relate to broad issues of public law theory; it is not to set out a checklist of how these precepts would impact specific legal disputes or the interpretation of contested constitutional provisions in a particular legal system. We also anticipate many will disagree with a constitutionalism informed by the classical legal tradition even when some prevalent myths are dispelled. But disagreement about the classical legal tradition and its relationship to constitutionalism should, at a minimum, be grounded in a sound understanding of the concepts at play.

II. THE CLASSICAL LEGAL TRADITION: A MINI-PRIMER

To understand the mistakes and tautologies that underpin the critics' views, we need some basics. Accordingly, we begin our response by sketching the foundational premises of the classical legal tradition, whose precepts underpin the operative principles of common good constitutionalism.

Law in this tradition is understood, as Aquinas famously framed it, as an ordinance of reason promulgated by political authorities for the common good.¹¹ Law is not the product of the arbitrary will of a ruler, nor is it simply whatever is identified by social convention as law. To count as law in the fullest sense, an ordinance of public authority must rationally conduce to the good of the community for which the lawmaker has a duty and privilege of care.

But what exactly is the common good? Given its central status in the classical tradition, we begin our sketch with it. Many of

10. *See id.*

11. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE pt. Ia-IIae, q. 90, art. 4.

the critics seem desperately unaware that the common good is not simply a blank, or a placeholder for whatever subjective preferences any particular official might desire to impose, but rather shorthand for a millennia-old legal framework, worked out over time by a succession of the greatest lawyers in Europe, the British Isles, and the Americas, and absolutely central to Western law as a whole. The claim that the common good is an undefined notion is both spatially and temporally parochial in the extreme.

Nor is it some sort of recondite theoretical concept, one that workaday lawyering can ignore. Legal texts are full of constitutional, statutory and regulatory phrases like “common good,” “social justice” “general welfare,” “public interest,” “public good,” “peace, order, and good government” and other cognates.¹² Such texts must be given some construction or other; it is not as though the issue can simply be avoided. We suggest here that the common good approach worked out in the law over two millennia is the best such construction—and, ironically, the one that is by far the most likely to capture the so-called “original understanding” of the Constitution.

The Common Good in Politics and Law

In the classical account, a genuinely *common* good is a good that is unitary (“one in number”) and capable of being shared without being diminished.¹³ Thus it is inherently non-aggregative; it is not the summation of a number of private goods, no matter how great that number or how intense the preference for those goods may be.¹⁴ Consider the aim of a football team for victory, a unitary aim for all that requires the cooperation of all and that is not diminished by being shared. The victory of the

12. See, e.g., The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*) (1934); MASS. CONST. art. VII, pt. I; Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) at 5 U.S.C. § 553(b)(3)(B).

13. See John Goyette, *On the Transcendence of the Political Common Good*, 13 NAT'L CATH. BIOETHICS Q. 133, 137 (2013); Louis Dupré, *The Common Good and the Open Society*, 55 REV. POL. 687 (1993).

14. See Paul Brady, *Coercion, Political Authority and the Common Good*, 62 AM. J. OF JURIS. 75, 82–84 (2017).

team, as a team, cannot be reduced to the individual success of the players, even summed across all the players.

In the classical theory, the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the *polis*.¹⁵ It is not that “private” happiness, or even the happiness of family life, is the real aim and the public realm is merely what supplies the lawful peace, justice, and stability needed to guarantee that private happiness. Rather, the highest felicity in the temporal sphere is itself the common life of the well-ordered community, which includes those other foundational goods but transcends them as well.¹⁶ Nor is this the same as the good of the state. The good of the community is itself the highest good for individuals and a critical element of their flourishing.

To put it differently, human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities (including ruling authorities) within which humans are always born, found, and embedded. This is not at all to say, of course, that the individual should be absorbed into the political community or subjected to it. The end of the community is ultimately to promote the good of individuals and families, but common goods are real as such and are themselves the highest goods for individuals.¹⁷ No subordinate goods can be fully enjoyed in a dysfunctional community.

The common good, at least the civil or temporal common good,¹⁸ can be described in substantive terms in this way: (1) it

15. See Donald Morrison, *The Common Good*, in THE CAMBRIDGE COMPANION TO ARISTOTLE'S *POLITICS* 176 (Marguerite Deslauriers & Pierre Destrée eds., 2013); see also GEORGE DUKE, *ARISTOTLE AND LAW: THE POLITICS OF NOMOS* (2019).

16. See Goyette, *supra* note 15, at 140–41.

17. See ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* at Chapter 1 (2022).

18. We speak here only of the natural goods of the temporal order, so as to remain within our competence as civil lawyers. Cf. WALTER FARRELL, O.P., *THE NATURAL LAW ACCORDING TO AQUINAS AND SUÁREZ* 13 (Cajetan Cuddy, O.P. ed., Cluny Media 2019) (“The final end of man is his happiness; a supernatural happiness, it is true, but not all communities have to do with leading man to his supernatural end directly. Nevertheless they have at least to do with the attainment of his secondary ends of natural or temporal happiness, which are a means to the supernatural final ends.”) Just as not every community within the larger polity

is the structural political, economic and social conditions that allow communities to live in accordance with the precepts of justice, yielding (2) the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that (3) the common good is not the sum of individual goods, but the indivisible good of a community, a good that belongs jointly to all and severally to each. The conditions that allow communities to live in accordance with justice and secure the flourishing of citizens define the legitimate ends of civil government.¹⁹

Some might argue there is a tension between these components of the common good—for example, a tension between focusing on the structural preconditions of justice versus focusing on the legitimate ends of government. Is the political common good *instrumental* in the sense that it creates the sum of conditions where individuals and families and associations can truly flourish and pursue the good life? Or is it *distinctive* (or, in an equivalent formulation, *transcendent*) in that it is a good of unity, justice, and peace that is distinct from any singular individual's good yet at the same time not alien to his individual good, but indeed his highest good? Here there are competing views.

need concern itself directly with leading man to his supernatural end, not all articles need do so; a scholarly and professional division of labor is perfectly appropriate, and does not entail denying that a comprehensive treatment would examine such questions.

19. HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT: A TREATISE ON POLITICAL PHILOSOPHY* 274 (2016).

One view, defended by John Finnis²⁰ and Robert P. George,²¹ is that the common good at the level of the community is ultimately instrumental. The point of a flourishing political community is to make possible the pursuit of basic goods at the level of the individual and the family. On a competing view, ably captured by Pater Edmund Waldstein²² and John Goyotte,²³ drawing upon the work of Charles de Koninck,²⁴ the political common good transcends private and individual goods and forms the highest good for individuals. To be a citizen of a flourishing polity is not a means to some other good, or a mere precondition for private or family life; it is itself the highest felicity in matters of temporal government. On a third view, advanced by George Duke, there is no reason to see an irreconcilable conceptual tension here; rather, the two formulations just address different and compatible aspects of the same problem—different facets of a unitary conception.²⁵ The common good *is* instru-

20. See George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44-62 (2013); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154-155 (2d ed. 2011). For the sake of completeness, we note that Professor Finnis has appeared to refine his position on the nature of the common good since *Natural Law and Natural Rights*. More recently, he has suggested that the common good of a political community participates in the good of friendship and is, as such, an “intrinsically valuable” and not merely instrumentally good pursuit. See John Finnis, *Reflections and Responses*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 510-15 (John Keown & Robert P. George eds., 2013). We thank Grégoire Webber for bringing this to our attention.

21. See Robert P. George, *The Common Good: Instrumental but Not Just Contractual*, PUB. DISCOURSE (May 17, 2013), <https://www.thepublicdiscourse.com/2013/05/10166/> [<https://perma.cc/7P58-UVVX>].

22. See Edmund Waldstein, *The Good, the Common Good, and the Highest Good*, THE JOSIAS (Feb. 3, 2015), <https://thejosias.com/2015/02/03/the-good-the-highest-good-and-the-common-good> [<https://perma.cc/7Z9N-9C63>]; Edmund Waldstein, *Racial Justice and Social Order*, SANCRUCENSIS (June 2, 2020), <https://sancrucensis.wordpress.com/2020/06/02/racial-justice-and-social-order> [<https://perma.cc/9Z8Z-YZC3>].

23. See Goyotte, *supra* note 15.

24. See CHARLES DE KONINCK, *The Primacy of the Common Good Against the Personalists: The Principle of the New Order*, in 2 THE WRITINGS OF CHARLES DE KONINCK 63 (Ralph McInerney ed. & trans., 2016).

25. See George Duke, *The Common Good*, in THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 382 (George Duke & Robert P. George eds., 2017);

mental in the strictly limited sense that it requires a set of structural conditions where individuals, families, and associations can flourish and pursue the good life in community. But it is also still a distinctive and supreme good in that the flourishing of the polity itself, as a form of civic friendship dedicated to the happiness of all its members, is truly distinct from the good of individuals and subsidiary associations within it. At the same time, the good of a polity dedicated to acting for the perfection of its members is an aspect of the good of each and every individual who is part of it, indeed their highest temporal good.²⁶

For present purposes, we need not arbitrate among these accounts; all are inconsistent with the myths and misconceptions we discuss. It is common ground among all theorists of the common good to condemn a serious misconception, prevalent particularly amongst libertarian critics, that the common good pertains to the political community viewed as some sort of organic whole, where individual persons exist for the good of the State, as one might say bees relate to the hive.²⁷ That is, critics implicitly read “the common good” as “the good of the collective” or, even worse, “the good of the state apparatus” and then oppose that to the good of individuals. In a utilitarian variant, they interpret the common good as the aggregate utility of individuals summed up according to some social welfare function, and then oppose this aggregate good to the rights of individuals.

None of this gets at the truly *common* good of happiness in a flourishing political community, which (to repeat) is unitary, ca-

George Duke, *The Distinctive Common Good*, 78 REV. POL. 227, 228–33 (2016). A similar observation is made by JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW 90 (2019).

26. See BRIAN M. MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 34 (2018); HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 214 (Thomas R. Hanley trans., 1998).

27. See JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 47–49 (Univ. of Notre Dame Press 2015). In reality, for the record, the classical trope that envisions the bees and the hive as a centralized absolute monarchy is an entirely erroneous picture of how bees and other social insects operate. See Christian List & Adrian Vermeule, *Independence and interdependence: Lessons from the Hive*, 26 RATIONALITY & SOC'Y 170 (2014).

pable of being shared without being diminished, and the highest good for individuals as such.²⁸ On the classical account, the state is merely one part of the larger political community, and the good of the community is itself the good for individuals and is not alien to them or imposed on them—a crucial point emphasized by the great theorist of the common good, de Koninck.²⁹ The good of the society in which one lives is part of the perfection of each individual as a social *and* political animal.³⁰

On Human Flourishing

What does human flourishing consist of here? There is an extremely rich and extensive philosophical debate in the natural law tradition over this question that we cannot do justice to here—our aim being to elucidate the classical legal underpinnings of common good constitutionalism within the terms of our professional competence as public lawyers. But suffice to say there is clear agreement in this tradition that it approaches human flourishing with fundamentally different assumptions than those underpinning some contemporary liberal and progressive jurisprudence.³¹

Human flourishing as conceived in the classical legal tradition is based on the premise there are ends and goods objectively constitutive of human *eudaimonia* or *felicitas*—happiness.³² These goods and ends are instantiated by acting consistently with the precepts of the *ius naturale* (natural law), whose most basic and self-evident injunction is that good is to be done and evil to be avoided.³³ Broadly speaking, the goods central to human flourishing in this tradition include life and component aspects of its fullness: health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various

28. See Adrian Vermeule, *Echoes of the Ius Commune*, 66 AM. J. JURIS. 85, 93–94 (2021).

29. See generally KONINCK, *supra* note 26.

30. See MCCALL, *supra* note 28, at 34; ROMMEN, THE NATURAL LAW, *supra* note 28.

31. See PATRICK DENEEN, WHY LIBERALISM FAILED 34–35 (2019).

32. See AQUINAS, *supra* note 13, at pt. Ia-IIae, q. 90, art. 2.; ROMMEN, THE NATURAL LAW, *supra* note 28, at 170.

33. See CICERO, THE REPUBLIC AND THE LAWS 103 (Niall Rudd trans., Oxford Univ. Press 2008); AQUINAS, *supra* note 13, at pt. Ia-IIae, q. 94, art. 2.

forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity.³⁴ Our instantiation and participation in these ends and goods constitute the completion or fulfillment of our nature as rational animals.³⁵ While the tradition is emphatic that there are countless ways a people can organize themselves in community to secure the common good—the flourishing of each and all—consistent with different cultural practices and contexts, it is equally emphatic in its rejection of the premise that human flourishing is an ultimately subjective assessment, or the mere satisfaction of preferences.³⁶

The Role of Law and Political Authority in Securing the Common Good

The pursuit of human flourishing in a community involves securing a wide range of goals and conditions. The *ragion di stato* tradition of early modern Europe speaks of the *bonum commune* as comprising a triptych of “abundance, peace, and justice.”³⁷ This became the standard list of both the legitimate ends of government and an idealized description of the polity in which it is possible—as famously framed in the precepts of legal justice laid down in *Justinian’s Institutes*: “to live honestly, to injure no one, and to give every man his due.”³⁸ (Note that under certain

34. See VERMEULE, *supra* note 19 (drawing on and developing the tradition to identify goods of peace, justice, abundance, health, safety, and a right relationship to the natural environment); see also Steven A. Long, *Understanding the Common Good*, 16 *NOVA ET VETERA* 1135 (2018).

35. See MCCALL *supra* note 28, at 119–20; RICHARD BERQUIST, FROM HUMAN DIGNITY TO NATURAL LAW: AN INTRODUCTION 82 (2019); Steven J. Jensen, *Aquinas*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS* 31 (Tom Angier ed., 2019).

36. The fact that the classical legal tradition is built on a conception of the meaning of the nature of man and his good is, of course, not unique to it. As Kahn notes, political theories invariably differ more on their “radically different understandings of the nature of man” than on “different visions of programmatic reform or institutional organization.” See PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 124 (2011).

37. See GIOVANNI BOTERO, *THE REASON OF STATE* 71 (Robert Bireley ed. & trans., 2017).

38. *THE INSTITUTES OF JUSTINIAN, BOOK I TITLE I* (J.B. Moyle ed. & trans., 5th ed. 1915).

prominent liberal conceptions of law, the second precept is made the exclusive condition of political and social interaction.)

This account encompasses the fostering of structural social, economic, and moral conditions that respect human life and health; furnish a healthy environment; promote familial formation, marriage, and stable family life; uphold economic justice and just provision of public goods; and foster a healthy culture oriented to pursuit of truth, civic friendship, and respect for human dignity, and to curbing vices damaging to these ends.³⁹ These conditions are not possible for individuals, families, or associations to achieve solely by their own initiative—solely through decentralized action or “spontaneous order.”⁴⁰

The tradition makes clear, however, that the common good does *not* require the law declare all vices illegal, nor use law to enforce all possible virtues – a common misconception. To be sure, there neither is nor even can be any barrier in principle to “legislating morality.” Any law code assumes some conception or other of morality, if only a libertarian conception. But the prudent lawmaker takes into account that the game is sometimes not worth the candle, and limits the rough engine of the law to addressing serious harms or grave vices.⁴¹ While St. Thomas Aquinas, for example, thought that law’s purpose is to lead people to virtue, he also argued that the lawmaker’s use of imprudent means to suppress vice and promote virtue could create new or greater evils that themselves threaten the common good.⁴²

39. See Sean Coyle, *Natural Law and Goodness in Thomistic Ethics*, 30 CANADIAN J.L. & JURIS. 77, 89 (2017).

40. THOMAS AQUINAS, *DE REGNO: AD REGEM CYPRI 6–13* (Gerald Phelan ed. & trans., Divine Providence Press 2014); J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 125 (2013).

41. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (Stuart D. Warner ed., 1993); Sherif Girgis & Robert P. George, *Civil Rights and Liberties*, in *THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW* 311-12 (John Tasioulas ed., 2020).

42. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. Ia-IIae, q. 96, art. 3; J. BUDZISZEWSKI, *COMMENTARY ON THOMAS AQUINAS’S TREATISE ON LAW* 368–79 (2014).

Making concrete the demanding and open-ended objectives of the *ragion di stato* tradition in a community requires the authoritative co-ordination and ordering of persons, families, and associations to ensure they are pursued efficaciously and harmoniously, and not in a chaotic, disordered manner.⁴³ Posited ordinances, promulgated by political authorities with the capacity to ensure this ordering, are therefore critical to authoritatively securing the conditions just mentioned, where there is the “peace, prosperity, and training in virtue” required to live the good life in a flourishing political community.⁴⁴ The common good requires authoritative institutions and rulers able to specify, apply, and enforce rules which govern and guide our pursuit of the goods of justice, peace, and abundance.⁴⁵ As Timothy Endicott notes, it is the “systematic and authoritative aspects of law [that] secure regulation in the distinctively transparent, stable, prospective, and reflexive fashion that distinguishes the rule of law from military rule, and from gangsterism, and from other forms of arbitrary rule” that do not conduce to the common good.⁴⁶

Legal ordinances also have a critical educative function in the classical tradition, as they can encourage citizens subject to the law to form desires, habits, and beliefs that better track and promote communal, indeed their own, well-being.⁴⁷ Despite outrage from libertarians on this point, it is a routine feature of policymaking. Consider sin taxes; waiting or cooling-off periods for marriage, divorce, gun purchases, and other important transactions; and institutions for instruction and education in civic responsibility, such as jury duty, mandatory public education, and mandatory national service or military duty. Public

43. Legal authority “address[es] one of the pervasive needs of human life, since without a whole range of shared activities, we as rational, social animals could not live—fully, or perhaps at all—in the way characteristic to us as a specific kind of living creature.” JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 82 (2010).

44. MCCALL, *supra* note 28.

45. See AQUINAS, *supra* note 13; Maris Köpcke Tinturé, *Positive Law's Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 183, 193 (2011).

46. Timothy Endicott, *The Irony of Law*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 337 (John Keown and Robert P. George eds., 2013).

47. See AQUINAS, *supra* note 13, at pt. Ia-IIae, q. 95, art. 1.

ordinances are, says Pink, invariably “concerned with education—with inducing change in the direction of ethically important truth at the level of citizens’ belief. The state is a coercive teacher.”⁴⁸ In the classical tradition, this is an important but subsidiary role complementary to the primary role played by the family, churches, civic associations, and local communities.⁴⁹

Posited law is also critical to the common good, as it is needed to give specific content to the law where background principles of the *ius naturale* need specificity or leave relevant issues to discretionary choice within reasonable bounds. The need for posited law to make the broad precepts of the natural law reasonably concrete is a central feature of the classical tradition. As Richard Ekens frames it, while the “reason and action” of political authority is at all times cabined and framed by “general moral truths,” its duty is very often to specify these truths by “choosing in what specific forms they shall be given effect in the law” of this or that community and its particular context.⁵⁰

Ekens is, in effect, recapitulating the classical theory of determination. In a famous passage, Aquinas distinguished two ways in which positive law might be derived from the natural law:

It must be noted, however, that something may be derived from the natural law in two ways: in one way, as a *general conclusion derived from its principles*; in another way, as a *specific application of that which is expressed in general terms*. The first way is similar to that by which, in the sciences, demonstrated conclusions are derived from first principles; while *the second way is like that by which, in the arts, general ideas are made particular as to details: for example, the craftsman needs to turn the general idea of a house into the shape of this or that house*. Some things are therefore derived from the principles of the natural law as general conclusions: for example, that ‘one ought not to kill’ may be derived as a conclusion from the principle that ‘one ought not to harm anyone’; whereas *some are derived from*

48. Thomas Pink, *Law and the Normativity of Obligation*, 5 JURIS. 1, 28 (2014).

49. See MARY M. KEYS, AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD 80–82 (Cambridge Univ. Press 2006).

50. RICHARD EKENS, THE NATURE OF LEGISLATIVE INTENT 130–31 (Oxford Univ. Press 2012).

*it as specific applications: for example, the law of nature has it that he who does evil should be punished; but that he should be punished with this or that penalty is a specific application of the law of nature. Both modes of derivation, then, are found in the human law. Those things which are derived in the first way are not contained in human law simply as belonging to it alone; rather, they have some of their force from the law of nature. But those things which are derived in the second way have their force from human law alone.*⁵¹

The first way mentioned by Aquinas is that some precepts of the natural law can be concretized in positive law via a straightforward deductive process.⁵² For example, the preservation of life is an aspect of human good and principle of the natural law. This yields the conclusive precept against the intentional taking of innocent life that is easily posited through laws prohibiting homicide and providing for self-defense.⁵³

But Aquinas says that that concretization of the principles of natural law is typically much less simple than this, as natural law's first precepts are broad and vague and leave only a few principles that can be straightforwardly given force in posited law.⁵⁴ In many circumstances, the principles of natural law require specification in light of the context of a given political community, as they are too vague to co-ordinate conduct to allow persons to flourish. For example, the political common good may demand organizing a just economy able to provide the necessities of life, provision for sound education and

51. THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. Ia-IIae, q. 95, art. II *in* POLITICAL WRITINGS 130 (R.W. Dyson ed. & trans., 2002) (emphasis added).

52. See Coyle, *supra* note 41, at 90.

53. However, we note that even these examples may be only superficially straightforward. For example, even after concretizing a natural law prohibition against the intentional destruction of life, decisions must still be made on a myriad of closely related questions the answers to which are not dictated by the natural law, like whether there are different degrees of culpability that affect the gravity of homicide, the precise bounds of self-defense, and when lethal force may be permissible or impermissibly used, or the appropriate sentence for those convicted of such an offense. These are all intimately related to the natural law injunction to safeguard innocent life, but respecting it through posited law inescapably involves large degrees of prudential choice.

54. See AQUINAS, *supra* note 53.

healthcare, respect for subsidiary units like the family, the promotion of virtue, and ensuring peaceful relations with other nations; but there will be countless ways to proceed along all these fronts consistent with the natural law and common good. The “greater part of a community’s positive settlement of right relations between persons” will always, notes Webber, “confront true choice, where conformity to practical reason will leave matters open for evaluation and decision.”⁵⁵

This is where the concept of prudential *determination* comes into the picture and why it is so important to the classic legal tradition. Determination is the prudential process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to local circumstances or problems. The need for determination arises when principles of justice are general and thus do not specifically dictate particular legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently cabined, directed, and guided—but not dictated—by reason.⁵⁶ There are typically multiple ways to make concrete determinations in posited law which instantiate, respect, reconcile or trade off general principles of the natural law while remaining within the boundaries of the basic charge to act to promote the common good—the basis of public authority.

As Finnis puts it:

The kind of rational connection that holds even where the architect has wide freedom to choose amongst indefinitely many alternatives is called by Aquinas a *determinatio* of principle(s)—a kind of concretization of the general, a particularization yoking the rational necessity of the principle with a freedom (of the law-maker) to choose between

55. GRÉGOIRE WEBBER ET AL., *LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION* 49 (Cambridge Univ. Press 2018).

56. See JOHN FINNIS, *Critical Legal Studies*, in *PHILOSOPHY OF LAW: COLLECTED ESSAYS VOLUME IV* 301 (Oxford Univ. Press 2011).

alternative concretizations, a freedom which includes even elements of (in a benign sense) arbitrariness.⁵⁷

A well-worn example is that of the need for a community to make determinations governing road traffic. Given the need to secure and respect life and health, there is a requirement to authoritatively specify which side of the road persons and vehicles should travel on, even if there is no basis in reason for deciding whether it ought to be on the right or left side. In this case, *not choosing* but instead relying on a policy of *laissez-faire* would be contrary to the need to respect life and health, and thus out of bounds as a reasonable determination oriented to the common good. But at the same time, reason does not *settle* which choice is to be made;⁵⁸ and a determination in this context instead involves a rich intermingling of reason and willed human choice by those wielding political authority.⁵⁹

Leaving aside cases of intrinsic evils, which place deontological side constraints on all public and private action, the common good must be applied to a set of particular circumstances by means of determination using the faculty of prudential judgment.⁶⁰ Determination is a demanding process, one which involves attending to the craft of legislating well, including the need to prudentially capture the “practical choice as to what should be done in a form that both changes the law to this effect and is fit to be adopted by officials and citizens . . . to introduce the state of affairs the legislator seeks”⁶¹ in a world subject to often rapid socio-economic change. But room for prudential judgment is by no means equivalent to unstructured discretion. It is always given shape by an account of the ends for which discretion must be used, that of promoting the good of the

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

58. See WEBBER ET AL., *supra* note 57. MARITAIN, *supra* note 29.

59. See MCCALL, *supra* note 28.

60. For the connections between prudence and natural law, see generally FERENC HÖRCHER, *PRUDENTIA IURIS: TOWARDS A PRAGMATIC THEORY OF NATURAL LAW* (Akademiai Kiado 2000).

61. EKINS, *supra* note 52, at 132.

whole community as a community—not merely as an aggregation of individual preferences. In other words, discretion may never transgress the intrinsic limitations of legal justice. The obligation of the public authority is to act according to law, meaning that the public authority must act through rational ordinances oriented to the common good.⁶²

While discharging all these interlocking functions—making determinations of the principles of natural law via positive law; pursuing conditions of peace, justice, and abundance; or performing the educative function of promoting virtue and suppressing vice—political authority must also have regard to the principle of subsidiarity. That is, the need to respect the authority and integrity of part-wholes of the polity like individuals, families, and associations. This principle can be seen as empowering and constraining of public authority. It does the former by giving it a power and duty to preserve, protect, and restore the functions of subsidiary authorities, and the latter by putting a duty on it not to interfere where unnecessary when subsidiary groups are working as they normatively should.⁶³

Posited law, or *lex*, is therefore in its focal sense not regarded as an expression of the will of the sovereign or its officials, but as intrinsically reasoned and purposive, and ordered to the common good of the whole polity and that of mankind.⁶⁴ *Lex*'s critical role in specifying the temporal requirements of natural law precepts and securing the conditions required for the common good is how it generates normative obligations and secures the normative legitimacy of political authority. Compared to the focal sense of *lex*, posited ordinances which are not rationally ordered to the common good, or which are corrosive to it, are considered radically deficient and diluted examples of law and may not generate the same normative obligations.⁶⁵

62. This ensures respect for rule of law values is an important aspect of constitutionalism oriented to the common good. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (Harv. Univ. Press 2020).

63. See Vermeule, *Echoes*, *supra* note 30.

64. See ROMMEN, *THE NATURAL LAW*, *supra* note 28, at 172.

65. To be sure, the fact that deeply unjust laws contrary to the natural law may not be law in the focal sense of that word does not at all warrant the conclusion

Different Senses of 'Law'

The classical tradition distinguishes, as many European languages do, between two senses of "law": *lex* and *ius*.⁶⁶ *Lex* is the enacted positive law, such as a statute or executive order. *Ius* is the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice. In the classical tradition, then, both natural and positive law are, in somewhat different ways, themselves included within law's larger ordering to the common good.

In the classical conception, then, "law" can take various forms. Among them are *ius civile*, the positive civil law of a particular jurisdiction; *ius naturale*, or the universal law founded on right reason; and *ius gentium*, the law of nations. The classical conception of law emphatically recognizes the existence and value of positive law but does not analytically stipulate that law can ultimately rest only on descriptive conventions recognized in equilibrium within a particular jurisdiction. The classical conception of *ius civile*, in other words, can be summed up as *positive law without jurisprudential positivism*.

The classical legal tradition thus treats enacted texts as products of the reasoned determination of public authorities. In contrast to the classical conception, both progressives and originalists attempt, in different ways, to reduce all law to positive law adopted by officials; for them, all law is in this sense *lex*. The usual progressive view is to deny the existence of the natural law altogether, while the usual originalist view is to deny its relevance to law except in strictly historical terms, as background for the framers' and ratifiers' beliefs underpinning constitutional and legislative enactments.

that citizens are morally entitled to disobey them or that judges *must* have authority to invalidate them as part of their jurisdiction. Citizens may still be obliged to follow deficient commands if not doing so would cause greater harm to the common good. Likewise, how officials in a constitutional system deal with deeply unjust laws is, at an institutional level, a matter for prudential determination.

66. In Spanish, *ley* and *derecho*; in French, *loi* and *droit*; and so on. English, to its misfortune, has no stable version of this distinction and instead uses "law" and "right(s)" in confusing ways.

PART III – COMMON GOOD CONSTITUTIONALISM AS CLASSICAL
CONSTITUTIONALISM

We are now better able to outline how common good constitutionalism is effectively classical constitutionalism and to dispel the myths outlined in Part I. Common good constitutionalism at its core is an approach to generating, sustaining, channeling, and constraining public power⁶⁷ oriented to the common good and human flourishing. To paraphrase Barber, the operative principles of common good constitutionalism are directed towards ensuring the state has an institutional structure that has the capacity to effectively advance the common good.⁶⁸

Common good constitutionalism respects posited law and does not “substitute moral decision making for law.”

It is entirely question-begging to say that interpretation in the classical tradition “departs from the text” or “substitutes morality for law.” Rather the classical tradition, in appropriate cases, looks to general principles of law and the *ius naturale* precisely *in order to understand the meaning of lex*, as a mode of interpretation that puts *lex* in its best light. The law (*ius*) itself includes considerations beyond the enacted text (*lex*). Positive civil law-makers are strongly presumed not to wantonly violate background principles of *ius* and norms of reason that are constitutive of the nature of law. The background principles of *ius* themselves enter into and help to determine the meaning to be attributed to *lex*. This does not at all mean that the classical tradition “ignores the text” or anything of that sort. Enacted texts deserve great respect as a determination of the legitimate public authority, but the law is broader than their temporary and local commands, and it is presumed that those commands can be and

67. See MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 11–12 (Oxford Univ. Press 2010). Loughlin correctly notes how public law and constitutionalism are profoundly power-generating practices and cannot myopically be regarded as only acting as a *fetter* on political power.

68. N. W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 12 (Oxford Univ. Press 2018).

will be harmonized with *ius*, the background general principles of the legal order.

Some argue that even if positive law is a determination of background legal principles, including natural law, it should be interpreted independently of that background in the interests of stability, settlement and durability.⁶⁹ This is a sort of half-truth. As we discuss shortly, the classical approach itself recognizes that interpreters of law typically should not venture an all-things-considered assessment of political morality from first principles. Role morality is itself a fundamental component of law's morality. Interpretation is always limited and conditioned by institutional roles, legal presumptions and standards of review, default rules, and other legal mechanisms for promoting institutional settlement and stability. Moreover, the very nature of determination is that background principles do not fully specify the content of positive law.

Conversely, however, no account of the value of settlement and stability can fully exclude interpretive discretion at the point of application, at least in some subset of hard cases. Those who apply the enacted law (*lex*) must inevitably, in some domain of cases, have recourse to general background principles of law (*ius*), including the *ius naturale* and the *ius gentium*. Aquinas and, much later, modern legal theorists such as H.L.A. Hart⁷⁰ show that the limits of foresight on the part of the lawmaker inevitably give rise to hard cases, in which enacted *lex* contains ambiguities or gaps, or in which the rule the lawmaker prescribed for the general run of ordinary cases misfires—fails to track the common good—due to unusual circumstances.⁷¹

Let us expand upon this point somewhat. In easy cases, where all relevant legal sources point in the same direction and the law's commands neatly track the common good, any version of

69. See generally Jeffrey A. Pojanowski, *Why Should Anyone Be An Originalist?*, 31 DPCE ONLINE 583 (2017); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016). Similar arguments are advanced by LEE J. STRANG, *ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (Cambridge Univ. Press 2019). Vermeule's forthcoming book provides an extended critique of this view; here, we limit ourselves to a few points.

70. See H.L.A. HART, *THE CONCEPT OF LAW* 124–46 (Oxford Univ. Press 2d ed. 1997).

71. See AQUINAS, *supra* note 13, pt. Ia-IIae, q. 96, art. 6.

originalism or textualism or positivist interpretation generally will reach the same result as classical legal interpretation. We are not to imagine that classical interpreters are constantly invoking higher law or claiming that cases are extraordinary; in the great bulk of ordinary cases, they proceed on the basis of a respect for text, albeit justified on different grounds than modern positivism. In easy cases, then, there is no difference between originalist and classical interpretation from the standpoint of considerations of legal predictability, settlement, durability and stability. Classical theory builds in a form of textualism in easy cases, which is to say most cases.

However, when due to the limits of the lawmakers' foresight legal texts (*lex*) are irreducibly ambiguous, can be read at multiple levels of generality, conflict with powerful principles and background norms of the legal system (*ius*), obviously misfire with respect to uncontroversial conceptions of the common good, or otherwise seem absurd as applied to unusual circumstances, a question inevitably arises about how the legal sources are to be applied and reconciled. (For more specific comments on the problem for originalism of levels of generality, see our discussion in the next section). Where the specified determinations are ambiguous or in which the core cases they are intended to address encounter an exceptional situation, the relevant determinations must be interpreted—and in our own legal tradition, historically speaking, have in fact been interpreted—in light of background principles of the *ius naturale* and the *ius gentium*, the ends of rightly ordered law, and the larger ends of temporal government. In such cases, crucially, the justification of originalism by reference to certainty and stability loses all force; there is no escape from normative argument, internal to law, to determine what the law provides. When hard cases arise, justifications sounding in legal predictability, settlement, stability, durability, and the like have *already* failed.

Finally, institutional settlement and stability, however important, are hardly the only common goods. This sort of second-order consideration is important, but so too are first-order ones. The classical tradition emphasizes that justice is the ultimate aim of law, and that peace and justice are both fundamental aims of law. If the originalist regime yields “stability” of a sort

by producing a steady, predictable stream of deeply unjust first-order results, or merely fails to prevent such results, then the common good condemns rather than supports originalism. At a minimum there should be some reflective equilibrium between the second-order goods of settlement and durability, on the one hand, and evaluation of the justice of first-order outcomes, on the other. Otherwise the praise of second-order goods threatens to become a kind of sacred fetish, overriding all first-order considerations in the name of a partial and myopic account of what justice requires.

The sting in this dilemma, of course, is that if (and to the extent that) the view we are discussing *ever* allows interpreters to consider broader principles of legal morality (*ius*) in hard cases, then the game is up. At that point, one is merely arguing over the precise scope of discretion for interpreters in what is essentially a regime of common-good constitutionalism. The theoretical distinctiveness of the originalist view grounded in stability has already been forfeited. To the extent it tries to exclude consideration of principles of law's morality, originalism tries to banish what cannot be banished.⁷² But to the extent forms of originalism explicitly do not seek to do this, they become half-measures—originalism in name and rhetoric only—and conceptually indistinguishable from frameworks within which historical modes of interpretation are given serious, but not decisive, weight. If the name of “originalism” is retained as merely an empty statement of sociological identity, but all the content is classical, our view will have prevailed.

The constitutional oath poses, rather than resolves, the question how “the Constitution and laws” should be interpreted.

The argument for positivism and originalism from the constitutional oath is transparently circular, despite elaborate efforts to infuse it with methodological content.⁷³ In itself, swearing to

72. See Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 664 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (MacMillan 1990)).

73. See, e.g., Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), <https://americanmind.org/features/waiting-for-charlemagne/common->

respect “the Constitution and laws,” or any similar vow, says nothing at all about how the Constitution should be interpreted.⁷⁴ Any such argument is always parasitic on independent assumptions. It is immaterial whether those assumptions are made explicit or, as is usually the case, left implicit and smuggled in. In either case, it remains true that the oath by itself is simply incapable of doing the work that originalist proponents hope to force it to do.

An amazing amount of ink has been spilled in attempts to avoid this obvious conclusion. A remarkable example is an effort by one John Ehrett, who argues that:

[W]hen the political leader pledges to “support and defend the Constitution of the United States” the most natural (and historical) understanding of that commitment is that “support and “defen[se]” entails allegiance to the original public meaning of the Constitution. Put more straightforwardly: a judge embracing the stable textual meaning principle, when she takes the oath of office, *vows before God* that she will uphold the Constitution’s original public meaning.⁷⁵

This comes close to suggesting that it is both a sin and treason not to adopt an originalist mode of interpretation—a fascinating stance, if only at the level of rhetoric and legal sociology. As a matter of interpretive theory and legal history, however, Ehrett’s view that attempts to ground originalism in a “stable textual meaning” principle is silly, for two reasons (in addition to the reasons given above).

First, the vast majority of the world’s legal systems are not originalist,⁷⁶ and our own legal system was not originalist, at least in anything like the modern sense, for much of the greater

good-originalism/ [https://perma.cc/2FP7-BWTT]; John Ehrett, “*Common Good Constitutionalism*” and the Oath Breaking Problem, PATHEOS (Mar. 31, 2020) <https://www.patheos.com/blogs/betweentwokingdoms/2020/03/common-good-constitutionalism-and-the-oath-breaking-problem/> [https://perma.cc/JE4S-QWY4].

74. See Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

75. Ehrett, *supra* note 75 (second alteration in original).

76. Including one of the authors’ home jurisdiction of Ireland, where originalism has virtually no proponents but the country has a robust and stable constitutional order.

part of its history. Neither has had any real difficulty maintaining “stable meanings” for legal texts over time; the constitutional oath argument is both spatially and temporally parochial in the extreme. In the vast majority of cases, there is no divergence between supposedly fixed “original meaning” and the meaning at the time of application. Most cases are, in this sense, easy cases. Second, originalism itself fails utterly in protecting the stability of meaning, because it cannot, by itself, answer the question at what level of generality meaning should be read.⁷⁷ When progressive originalists like Professor Jack Balkin read constitutional texts at a sufficiently high level of generality to encompass abortion,⁷⁸ and when libertarian originalists like Professor Steven Calabresi read constitutional texts at a sufficiently high level of generality to encompass same-sex marriage,⁷⁹ it should be clear that the stabilizing effect of originalism is illusory.⁸⁰ Importantly, neither Professor Balkin nor Professor Calabresi argues for a “change in meaning.” Rather they are offering arguments about what the original meaning has always been; they argue that the meaning has always embodied principles cast at such a high level of abstraction that they encompass any moral novelties the legal professoriate can dream up today. But perhaps Ehrett means to exclude the most-cited originalist scholar (Balkin)⁸¹ and a founding member of the Federalist Society (Calabresi)⁸² from his account of originalism, in which case his argument is also eccentric.

Indeed, and more broadly, the constitutional oath argument for originalism is self-refuting, for the same reason originalism

77. See David Kenny, *Politics All the Way Down: Originalism as Rhetoric*, 31 DPCE ONLINE 661, 662 (2017).

78. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

79. See Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 651–53 (2016).

80. As argued at length in VERMEULE, *supra* note 19.

81. See Michael Ramsey, *Top 20 Most-Cited Originalism Scholars, 2016–2020*, ORIGINALISM BLOG (Sept. 22, 2021), <https://originalismblog.typepad.com/the-originalism-blog/2021/09/top-15-most-cited-originalism-scholars-michael-ramsey.html> [<https://perma.cc/8LVV-PT2N>].

82. Steven G. Calabresi, YALE L. SCH., <https://law.yale.edu/steven-g-calabresi> [<https://perma.cc/B7YB-BWUE>] (last accessed Nov. 10, 2021).

generally is self-refuting: as has been made indisputably clear by recent scholarship, the lawyers and politicians of the founding generation, and for a long time afterwards, were themselves *not* originalists.⁸³ Whether or not the framers and ratifiers had any legal training, their fundamental legal assumptions were those of the classical law. They believed that the law (*ius*) had objective, discernible content beyond, or above, that specified in particular positive texts (*lex*). They did not share the modern positivist assumption that the *ius naturale* is “nothing more than subjective preferences” or is somehow riven by fatal and intractable disagreements.⁸⁴

It is no answer to this that the Reconstruction Amendments were enacted later. Even if the framers and ratifiers of those amendments were not classical lawyers, the point would remain untouched for large and critical stretches of the written Constitution, involving its central structural and institutional provisions and the Bill of Rights (at least as applied to the federal government). In any event, the point is wrong; the classical legal world did not begin to break down until well after the Civil War, with the flowering of legal positivism.⁸⁵

As for originalism, in its theoretically elaborated form it is a creation of the post-WWII era, and indeed did not fully flower as a theory until the 1970s and after. In one account, its genesis lies in the desire of political actors for a constitutional tool to fight desegregation.⁸⁶ In a somewhat different but compatible account, it was theoretically elaborated by jurists like Robert

83. See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 355–56 (2021). The point resurfaces periodically, as every generation rediscovers that the founding generation inhabited a very different legal world than we do. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

84. *Id.*

85. See STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 167 (Oxford Univ. Press 2021); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 529–30 (2019); see, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

86. See Calvin Terbeek, “*Clocks Must Always Be Turned Back*”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821 (2021).

Bork⁸⁷ in the 1970s who needed a tool to appeal over the heads of the Warren Court.⁸⁸ On either view, the claim of originalism to represent the original approach to interpretation, as it were, is bogus; originalism has instead invented a tradition⁸⁹ projecting itself back onto the past.

To be sure, originalism has its precursors in caselaw and commentary. The law is vast and messy, and never speaks entirely with a single voice, in a single note. Perhaps the clearest and most prominent originalist precursor is *Dred Scott v. Sanford*,⁹⁰ the decision that excluded persons of African descent from citizenship. Later decisions in an originalist register relied heavily upon *Dred Scott*.⁹¹ But this 19th Century proto-originalism does not closely resemble the current, theoretically elaborated version, and was never an established approach. It was at most merely one modality among others, and did not claim to be inconsistent with the classical legal framework or to represent the exclusive method of interpretation.⁹² “Unlike their ideological descendants . . . [19th Century originalists] did not understand themselves as self-consciously setting forth a ‘theory.’ Such as it was, the intent construct was invoked at a high level of generality.”⁹³ Those examples, as a class, are thus unlike modern originalism,⁹⁴ an elaborate body of theory allied to a particular, legal-political movement with distinctive commitments.⁹⁵

87. See Randolph J. May, Book Review, 1990 B.Y.U. L. REV. 665, 666–67 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)).

88. See Vermeule, *Beyond Originalism*, *supra* note 6.

89. Cf. Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1–2 (Eric Hobsbawm & Terence Ranger eds., Cambridge Univ. Press 2012).

90. 60 U.S. (19 How.) 393 (1857).

91. See, e.g., *South Carolina v. United States*, 199 U.S. 437, 448–49 (1905).

92. Professors Philip Bobbitt and Richard Fallon have persuasively demonstrated how U.S. constitutional practice has long recognized several legitimate modes of argumentation, including doctrinal, ethical, textual, structural, as well as historical. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 26 (Oxford Univ. Press 1984); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987).

93. Terbeek, *supra* note 88, at 825.

94. See *id.* at 824 n.10.

95. See Jamal Greene, *Selling Originalism*, 97 GEO L.J. 657, 708–14 (2009).

Common good constitutionalism does not equate to judicial or executive supremacy.

There is one argument against common good constitutionalism that has lingered on despite being clearly and utterly rejected and refuted. This is argument that common good constitutionalism is somehow synonymous with judicial supremacy or executive authoritarianism.⁹⁶ There is simply no substance to these kinds of arguments. The simple fact is that advocacy of common good constitutionalism, and the classic legal tradition underpinning it, is emphatically not the same as advocating a particular allocation of institutional and interpretive power among different branches of government.

As noted above, the concept of *determination* is critical to the classic legal tradition, and this includes determination at the level of institutional design, indeed the specification of the whole constitutional order. The 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. But aside from the loose constraints imposed by this conceptual frame, the design of institutions and allocation of authority between and among them in any given polity will be within a wide scope of reasonable determination. A range of regime types can be ordered to the common good, or not. If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any particular set of institutional forms.⁹⁷ Thus, parliamentary, semi-presidential, and presidential systems, monarchies and republics—all these and more can in principle be ordered to the common good.

Likewise, the common good does not, by itself, entail any particular scheme of (for example) judicial review of constitutional

96. See, e.g., Yuval Levin, *The Future of Conservative Constitutionalism*, NAT'L REV. (Sept. 17, 2021, 6:30 AM), <https://www.nationalreview.com/2021/09/the-future-of-conservative-constitutionalism/> [<https://perma.cc/UR44-VPYY>]; Anthony Sanders, *The No Good Constitution*, INST. FOR JUST., <https://ij.org/cje-post/the-no-good-constitution/> [<https://perma.cc/98UZ-Y2GV>] (last visited Nov. 11, 2021).

97. See Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49 (2021); RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 143–44 (Oxford Univ. Press 2012).

questions. The common good takes no stand, *a priori*, on the well-known and worn debate over political constitutionalism *versus* legal constitutionalism,⁹⁸ so long as the polity is ordered to the good of the community through rational principles of legality. A constitutional order in which judges are bound to respect reasonable determinations in the public interest by the legislature and executive (perhaps under legislative delegation) can be entirely conducive to the common good,⁹⁹ as can similar distributions of interpretive authority like Thayerian deference¹⁰⁰ or departmentalism of various stripes.¹⁰¹

Promotion of the common good is a duty incumbent upon all officials in the system: on legislators, executive, and bureaucratic officers, as well as judges. As a logical matter, however, 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 legal morality of the common good itself includes role morality and division of functions.¹⁰² How a constitution should be interpreted and how judges should decide cases are not necessarily the same question. A system that conduces to promoting the common good overall may do so precisely *because* there is a division of roles across institutions, such that not every institution aims directly to promote the common good. Indeed, many deferential frameworks suppose that judicial deference is itself conducive to the common good, because public authorities make better judgments of determination, within reasonable boundaries, than do courts.¹⁰³ All of which is to say it takes serious illiteracy about the classical legal

98. For an excellent overview of that many-faceted debate, see generally Aileen Kavanagh, *Recasting the Political Constitution: From Rivals to Relationships*, 30 KING'S L.J. 43 (2019). For a debate within the classical legal framework about the merits of political constitutionalism, see Foran, *supra* note 11; McGowan, *supra* note 11.

99. See Adrian Vermeule, *Deference and Determination*, IUS & IUSTITIUM (Dec. 2, 2020), <https://iusetiustitium.com/deference-and-determination/> [<https://perma.cc/U9CB-R4RB>].

100. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

101. See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 495–97 (2018).

102. See Oran Doyle, *Legal Positivism, Natural Law, and the Constitution*, 31 DUBLIN U. L.J. 206, 226 (2009).

103. See Vermeule, *Deference and Determination*, *supra* note 101.

tradition to suggest it mandates a form of strong judicial supremacy where judges can overturn legislative determinations as inconsistent with the Court's *de novo* understanding of the *ius naturale*.¹⁰⁴

This broad agnosticism does not mean that there are no boundaries whatsoever; it just means that the boundaries are set by the nature of law itself, as an ordination of reason to the common good. Certain institutional arrangements, mostly science-fictional and horrific, will be clearly ruled out even if no one set of arrangements is uniquely specified. But they will be ruled out because they are arbitrary and unreasoned, and thus do not participate in the nature of law, not because the common good directly commands particular institutional forms. Likewise, strictly aggregative-utilitarian arrangements will be ruled out by the non-aggregative nature of the common good, an example being a substantial class of invisible-hand arrangements justified as an indirect way of maximizing aggregate utility.¹⁰⁵ But the ruling out of certain arrangements, and the need to put concern for the common good at the heart of determinations of institutional design, still leaves a very wide scope for choice that adapts institutional forms to local circumstances.

As it is for Large-C Constitutional design, so it is equally the case for small-c unwritten constitutional ordering.¹⁰⁶ Many dif-

104. Some may argue that allowing judges to review whether an ordinance is a "reasonable determination in the public interest" will inevitably lead to judicial supremacy. This is based on the fear judges may apply their own standards of reasonableness in light of their understanding of the natural law to displace legislative ones. There are several responses to this concern. One response is simply to reiterate that providing for judicial review – whether of a "hard" or "soft" variety – is not mandated by the tradition, which is entirely compatible with a system of political constitutionalism. Another response is that to accept judicial overreach or error is always a risk inherent in a constitutional system providing for judicial review. There will always be a risk a judge may misapply doctrine requiring they generally defer to reasonable legislative determinations, for example by engaging in overly intrusive judicial scrutiny beyond a judge's competence that veers into a correctness standard of review. But it simply does not follow that the risk of judicial error or overreach under a classical legal framework means that judicial supremacy is an inevitable part of the tradition.

105. See Vermeule, *Beyond Originalism*, *supra* note 6.

106. By small-c constitution we refer to the "amorphous and ever-changing body of constitutional norms, customs, and traditions—'constitutional conventions'"

ferent evolving institutional allocations of decision-making authority are consistent with the common good. To be sure, both¹⁰⁷ of us¹⁰⁸ are sympathetic to the view that there are forms of constitutional ordering—centered on robust executive government—that are likely to be particularly conducive to pursuing the common good under contemporary socio-economic conditions. We do not take this position because the executive has claim to be the “most accountable and democratic” branch due to its national constituency,¹⁰⁹ or for the sheer fact it can act with more expedition and flexibility than the legislature.¹¹⁰ Instead, we agree with the premise that—unlike diffuse and procedurally cumbersome legislative assemblies, or low-capacity judicial bodies—hierarchical bureaucracies with very wide regulatory reach, when commanded by an energetic and motivated political executive, are better suited to promoting the integration of substantive and valuable moral precepts into legal ordinances.¹¹¹ From the perspective of common good constitutionalism, then, a core advantage of an executive-led separation of powers above other ways of allocating authority is that it can allow the executive to better infuse the technocratic work of the administrative state with an explicit political vision oriented to

which suffuse and give concrete effect to the Large-C codified Constitution. See Adrian Vermeule, *The Small-C Constitution, Circa 1925*, JOTWELL (October 2010) (reviewing HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925)), <https://classic.jotwell.com/the-small-c-constitution-circa-1925/> [<https://perma.cc/7HZ4-KRR3>].

107. See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (Harv. Univ. Press 2016).

108. See Conor Casey, *Between Dominance and Subservience: A Comparative Study of Executive Power* (Ph.D. Thesis, Trinity College Dublin) (on file with author).

109. This is a normative argument which in many constitutional systems frequently undergirds textual and structural arguments for a strong political executive delegated broad authority and given robust discretion over how to organize and direct the permanent bureaucracy. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2021 SUP. CT. REV. 83 (2021); see also Max Weber, *The Reich President*, 53 SOC. RES. 125, 125–32 (1986).

110. See THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed. 2003) justifying a robust executive branch; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS 1, 21–22 (1994).

111. See Adrian Vermeule, *Bureaucracy and Mystery*, MIRROR OF JUST. (Mar. 22, 2019), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2019/03/bureaucracy-and-mystery-.html> [<https://perma.cc/P7BZ-HDQD>]; Casey, *supra* note 9, at 781.

the common good, aligning its extensive regulatory outputs to goals conducive to this end.¹¹²

Crucially, this sort of view is not itself dictated by the classical legal tradition and certainly not by myopic appeals to “democracy” or “efficiency.” It is an independent, constructive interpretation of the path of the law in some particular polity or other. The critics miss that questions of institutional design are largely prudential ones, guided by the concept of determination *after* careful consideration of which form of institutional structure is most suited to securing the common good in a particular polity in light of its socio-economic conditions. Institutional forms are not settled *a priori* but involve determination, ideally following painstaking and non-myopic analysis of the trade-offs between different political risks¹¹³—the “dangers on all sides” which invariably attend institutional design, of which thinkers like Aquinas were clearly cognizant.¹¹⁴

Rights (properly understood) are critical to common good constitutionalism.

Rights are critically important to common good constitutionalism. The crucial distinction, however, between classical legal and modern juristic conceptions involves the question of the *justification* of rights.¹¹⁵ Even where rights may be held and asserted by individuals, such rights may be justified in strictly individualist terms or instead in terms of the common good, which is also the good of individuals, their highest good.¹¹⁶ Property or speech rights, for example, may be justified either on individualist and autonomy-based grounds, or instead on

112. See Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017); Conor Casey, *Political Executive Control of the Administrative State: How Much is Too Much?*, 81 MD. L. REV. 257 (2021); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339–42 (2001).

113. ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* (Cambridge Univ. Press 2014). For the importance of being non-myopic in the design and interpretation of the scope of executive power, see Adrian Vermeule, *The Publius Paradox*, 82 MOD. L. REV. 1 (2019).

114. See AQUINAS, *supra* note 42, at para. 35.

115. See JAVIER HERVADA, *CRITICAL INTRODUCTION TO NATURAL LAW* 9–16 (Mindy Emmons trans., Wilson & Lafleur 2006).

116. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150–1625* (1997).

grounds that emphasize their contribution to the flourishing of the community.¹¹⁷

The latter sort of justification for rights is the ordinary case for the classical account of law. Contemporary accounts of constitutional rights and of rights adjudication differ from the classical account “primarily because they have lost sight of the truth that justice, law, and *ius* all depend on, and are facets of, a wise or reasoned ordering of individuals to the good.”¹¹⁸ On the classical conception, rights are *iura* (the plural of *ius*) because *ius* is justice—affording to each what is due to each. Crucially, what is due to each—to individuals, families, associations—on the classical view, is itself determined by the common good, right from the ground up. Rights are due to persons as they are states of affairs and arrangements within a polity that are “just, in the right”¹¹⁹ and help conduce to the flourishing of each and all.

Here the contrast with prominent strands of liberal theory is critical. In mainstream liberal accounts, respect for personal autonomy is the conceptual anchor of individual rights, powers, and liberties.¹²⁰ The need to respect autonomy on this account often ensures the scope of these rights is interpreted in an expansive and open-ended manner,¹²¹ even if they appear to be *prima facie* claims to engage in activities which clearly “threaten the social fabric.”¹²² For Webber, it is only a “partial

117. See Rachael Walsh, *Property, Human Flourishing and St. Thomas Aquinas: Assessing a Contemporary Revival*, 31 CANADIAN J.L. & JURIS. 197 (2018).

118. Dominic Legge, O.P., *Do Thomists Have Rights?*, 17 NOVA ET VETERA 127, 137 (2019).

119. WEBBER ET AL., *supra* note 57.

120. See Kai Moller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, 29 OXFORD J. LEG. STUD. 757, 765–86 (2009) (identifying and defending an emerging trend for constitutional courts to move toward “an autonomy-based understanding of constitutional rights: increasingly, rights are interpreted as being about enabling people to live autonomous lives”).

121. See WEBBER ET AL., *supra* note 57, at 33; see also KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 76 (2012); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

122. See R.H. Helmholz, *Natural Human Rights: The Perspective of the Ius Commune*, 52 CATH. U. L. REV. 301, 325 (2003); see also Michel Villey, *Epitome of Classical Natural Law (Part II)*, 10 GRIFFITH L. REV. 153, 171 (2001); Petar Popovic, *The Concept of “Right” and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada*, 78 PERSONA Y DERECHO 65, 68 (2018).

exaggeration” to say that some jurists and courts approach rights from the premise that “each and everyone has the right to do whatever each and everyone wishes to do”¹²³ under broad headings like liberty, privacy, property, speech, and association.¹²⁴

This does not, of course, mean that rights claims are absolute. Once the scope of a right is ascertained,¹²⁵ courts will proceed to probe whether their exercise has been subject to justifiable “interference” by the State to “balance” conflicting rights, or to advance collective goals in the “public interest.”¹²⁶ In practice, Greene notes that in many systems a “certain promiscuity in declaring rights to exist is accompanied by a certain austerity in elevating interference with rights into violations of them.”¹²⁷

123. See WEBBER ET AL., *supra* note 57, at 34; see also Dimitrios Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, 34 OXFORD J. LEG. STUD. 395, 403 (2014) (explaining that “constitutional rights practice” in Germany, Canada, South Africa and in the Council of Europe “tends to include a very wide range of activities, even trivial ones, within the ambit of prima facie rights”); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 85 (2d ed. 2018) (“Many courts tend to take the position that liberal constitutions guarantee a general right to liberty, that is, a right to do whatever one wants unless some law prohibits the action.”).

124. Webber outlines some examples of the kind of prima facie rights claims apex constitutional or human rights courts have been prepared to recognize following an exceptionally wide and amorphous interpretation of the scope of a right. Take *Regina v. Sharpe*, 1 S.C.R. 45 (Can. 2001), where the Canadian Supreme Court held that a provision of the Criminal Code which banned child pornography, as applied to Mr. Sharpe, violated his freedom of expression but was justified as a proportional measure designed to protect children from “exploitation.” Another odd example cited is the ECtHR case of *Stübing v. Germany*, App. No. 433547/08 (ECtHR, Apr. 12, 2012), para. 55 where the Court found that the applicant’s criminal conviction for incest “possibly” fell within the scope of his Article 8 right to respect for private life, as he “was forbidden to have sexual intercourse with the mother of his four children.” The UK House of Lords judgment in *Belfast City Council v. Miss Behavin’ Limited* [2007] UKHL 19, para 10 saw the Law Lords prepared to casually “assume, without deciding, that freedom of expression includes the right to use particular premises to distribute pornographic books, videos and other articles.”

125. A small number of rights in the liberal constitutional tradition are considered inviolable and not subject to override in the interests of the public interest or collective good. Prominent examples include categorical prohibitions on torture and slavery common to human rights instruments. See European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

126. WEBBER ET AL., *supra* note 57, at 35–36.

127. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 58 (2018).

In American law, the courts say—roughly speaking, but in a typical formulation—that individual rights can be trumped or overridden when there is a “compelling governmental interest” and the government can show that the law at issue is the “least restrictive alternative.”¹²⁸ The implicit premise of this framework is that the interests of “government” as representative of the political collective, on the one hand, and the rights of individuals on the other are opposed and must be balanced against each other. It is, implicitly but unmistakably, an aggregative conception of rights.

A similar point can be made about the proportionality test that is broadly characteristic of European constitutional and human rights law.¹²⁹ At root the test is designed to provide a rigorous analytical tool for judges and officials to probe whether the “interests of society as a whole” justifiably “override the interests of the individual.”¹³⁰ Under most formulations of the proportionality test, roughly speaking, an acknowledged right can be overridden and an interference “justified” when but only when the government acts in accordance with law, for a legitimate public or democratic aim, in the least intrusive manner necessary, and without imposing gratuitous or disproportionate harm on individuals. At the heart of proportionality is a concern for balance: whether the cost of an “interference with the right is justified in light of the gain in the protection for the competing right or interest”¹³¹ at stake. Here too, talk of “balancing” collective and individual interests already betrays a departure from the classical conception.

128. See, e.g., The Religious Freedom Restoration Act's standard for burdening free exercise rights at 42 U.S.C. § 2000bb-1.

129. The proportionality test, as Kenny puts it, is now a “worldwide principle of human rights protection.” David Kenny, *Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*, 66 AM. J. COMP. L. 537, 538 (2018).

130. BERNADETTE RAINEY ET AL., JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 342 (7th ed. 2017).

131. Kai Möller, *Proportionality: Challenging the Critics*, 10 INT'L J. CONST. LAW. 709, 715 (2012); see also Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 75–76 (2008); WEBBER ET AL., *supra* note 57, at 198–99.

It is not true, therefore, that liberal legalism takes no account of collective interests. But—at least in actually-existing liberalism, reflected in the practice and argument of constitutional courts in liberal regimes,¹³² as opposed to the recondite nth-decimal liberal theory of the academics¹³³—it takes account of them (1) aggregatively, as a summation of individual interests (“weighing the greater good the ‘interfering’ measure is purporting to achieve against the harm done to the individual right at issue”) or (2) as a collective override to rights justified in individualist terms, as when liberal jurisprudence talks of a “public order” override to rights whose scope is determined elsewhere.¹³⁴ As Yowell surmises, this approach works from the premise that “sufficiently strong general or ‘state’ interests can override human rights.”¹³⁵ A striking aspect of this way of conceiving of rights and their limits, is that it puts rights squarely in tension with the common good, and the good of individuals in opposition to the common good of the polity.¹³⁶

The classical conception is entirely different. The common good enters into the very definition of rights themselves, from the beginning. There is no question of “overriding” or “interfering” with the rights of individuals and families—what is due to

132. Throughout *Legislated Rights*, Webber et al. identify Germany, Canada, the European Convention on Human Rights, and the United Kingdom as legal systems where this approach to rights is prominent. See WEBBER ET AL., *supra* note 57.

133. To quote Kahn, it is possible to distinguish between analysis and critique of the “liberal state . . . liberal theory, or . . . something in-between that might be characterized as the self-understanding of those who operate in the liberal state, that is, the ethos of liberal constitutionalism.” KAHN, *supra* note 38, at 148. Here we are more concerned with the latter. Whether liberal constitutionalism as practiced in apex constitutional courts and understood by officials and jurists, does not faithfully reflect some particular (and perhaps obscure) stripe of ideal-type liberal theory, is not our concern.

134. *Id.*

135. WEBBER ET AL., *supra* note 57, at 130.

136. As Webber puts it, by “reading the ‘limitation’ of a right as synonymous with the ‘infringement’ or ‘overriding’ of a right,” the contemporary approach to rights adjudication “characterizes a limitation clause as akin to . . . ‘savings clause’ or a ‘defence’, whereby the infringement of a right may be saved or defended in the name of the public interest The result is an expansive reading of all rights” and “the frequent infringement of rights by the State in pursuit of the public interest.” GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 56 (2009).

them—for the common good. Rather it is a question of tailoring the scope of rights to the common good because that is the justification that already animates those rights, at every stage. The issue is not balancing, but reasonable specification and reasonable determination of the right's proper ends and, therefore, its boundaries or limits.¹³⁷ Deference to the political authority within reasonable limits—analogous to the “margin of appreciation” of human rights law—is built into this conception from the start, rather than tacked on as a controversial addition.¹³⁸ The common good of family, city, and the nation, as determined (in a strict sense) by legitimate political authority, is itself the good of individuals, and rights must be ordered accordingly.

But the fact that rights must be ordered to the common good of each and all also means that they act as real limits on legitimate exercises of State power, limits stemming from the need to give to each what is their due in order to have a well-ordered and just polity.¹³⁹ Intrinsic evils are intrinsic evils, and no government may command them, which includes absolute prohibitions on evils such as intentional killing of the innocent, torture, rape, or slavery. As already discussed, there are also limits on the scope of reasonable determination that stem from a need to respect more open-ended, but still important principles, like the

137. Finnis puts this well when he argues that the “language of ‘interference’ with exercises” of human rights provisions often “carries an inappropriate implication: that when I am arrested in my cellar for making drugs, bombs, or freeze-proofed wines down there, the unwelcome irruption is not merely into my privacy but also into my exercise of my right. Would it not be more accurate to say that in such use of my cellar, I take myself outside the true ambit of my right? The limitations indicated by . . . references to public health, prevention of crime, and so on, are limitations which specify the limits of my right; they are in fact a part—or at least a compendious reference to an intrinsic part—of the right's own definition.” JOHN FINNIS, *Human Rights and Their Enforcement*, in HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS VOLUME III 40 (2011).

138. See George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J.L. STUD. 705, 709–710 (2006).

139. A polity that governs without concern for justice, Augustine famously remarked, is akin to rule by robber bands or “criminal gangs” on a grander scale. See AUGUSTINE, *CITY OF GOD* 139 (Henry Bettenson trans., Penguin Classics 2003); ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 21, at 21.

need to respect subsidiarity¹⁴⁰ and the fact families and associations have “partial ends of their own which cannot be permanently absorbed by the higher community.”¹⁴¹ For example, it is not within the legitimate scope of State power to usurp the primary role of parents as the natural educators and guardians of their children, even if the political authority has the duty to intervene where they are delinquent in this duty.¹⁴² A more general formulation, with a great deal of support in the classical caselaw,¹⁴³ is that (1) the public authority acting within its jurisdiction as a matter of *ius*, and its constitutional sphere of competence (2) may act on a reasonable conception of the common good (defined by reference to the legitimate ends of government we have discussed) by (3) making reasonable, non-arbitrary determinations about the means to promote its stated public purposes.¹⁴⁴

Far from being hostile to the concept of rights then, common good constitutionalism provides a sounder conceptual grasp of their source and a more intelligible account of their point than liberal constitutionalist approaches—their contribution to the flourishing of each and all and the political community as a whole. Liberal constitutionalist accounts, in contrast, are prone in practice to place the good of the individual and the community in constant tension,¹⁴⁵ and risk carrying the concept of rights to the “point where one’s being in community is the source of the infringement of one’s right.”¹⁴⁶

140. See Vermeule, *Echoes*, *supra* note 30, at 90–92.

141. ROMMEN, *THE NATURAL LAW*, *supra* note 28, at 210.

142. *See id.* at 212.

143. *See* Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iustitium.com/common-good-constitutionalism-a-model-opinion/> [<https://perma.cc/B7EB-UN3H>]; Adrian Vermeule, *A Euclid for Civil Liberties*, IUS & IUSTITIUM (Oct. 30, 2020), <https://iustitium.com/a-euclid-for-civil-liberties/> [<https://perma.cc/Y75H-XCSQ>].

144. *Id.*

145. *See* Grégoire Webber, *Human Goods and Human Rights Law: Two Modes of Derivation from Natural Law*, in *THE CAMBRIDGE HANDBOOK OF NATURAL LAW AND HUMAN RIGHTS* 12 (Tom Angier et al. eds., Cambridge Univ. Press forthcoming 2022), available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930249.

146. WEBBER ET AL., *supra* note 57, at 36.

Common good constitutionalism is not fatally indeterminate.

It is irrelevant that there was, is and will be disagreement between classical lawyers over the content of the common good and *ius* in hard cases. The same is chronically true of the positive civil law, indeed of any body of law (whether *lex* or *ius* or both) that is more than trivial. Disagreement, by itself, is neither here nor there, and it is hardly unique to *ius* or the common good. Every year apex courts across the world give ample illustration that a body of lawyers may split almost down the middle as to the meaning of positive laws, yet without undermining the belief of any of those judges that there is nonetheless a right answer. Ironically, critics who propound the claim that the common good and *ius* are fatally indeterminate rarely ask whether the same claim might be made about abstract constitutional texts such as “liberty” and “equality,” or abstract statutory texts such as the Administrative Procedure Act’s injunction to overturn agency action that is “arbitrary and capricious.” In those settings, the critics generally trust jurists and public authorities to work out legal principles and doctrines over time, determining the constitutional abstractions in reasonable and attractive ways. In some contexts, in other words, the critics take preliminary indeterminacy as a project to be worked out through jurisprudence, rather than a conclusive objection to any such project. But their concerns are conspicuously selective.

As Richard Helmholz puts it, partial indeterminacy “is true of virtually all fundamental statements of law — Magna Carta, the Bible, the United States Constitution, for instance. They have not lost their value or forfeited their respect among lawyers despite long-continued variations in the conclusions to be drawn from their contents.”¹⁴⁷ And, Helmholz continues, “natural law itself did not claim to provide definitive answers to most legal questions that arose in practice.”¹⁴⁸ Rather it provides general principles that must be rendered concrete by determination.

147. R. H. Helmholz, *What Explains the Disappearance of Natural Law?*, SYNDICATE (Mar. 17, 2021), <https://syndicate.network/symposia/theology/common-law-and-natural-law-in-america/> [<https://perma.cc/G9TJ-6PQA>] (responding as part of a symposium about ANDREW FORSYTH, *COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS* (2019)).

148. *Id.*

In short, the possibility of “disagreement” is a typical nirvana fallacy. It implicitly compares an idealized, even fantastic, image of determinate positive text that yields stable meaning, on the one hand, with an exaggerated image of *ius* as “a sea of competing, unentrenched norms”¹⁴⁹ on the other. It is almost always cast as an objection to classical constitutionalism by those who ignore profound and systematic disagreements over the positive constitutional law, and over the best interpretive conception of abstract constitutional concepts embodied in that law, such as “liberty” and “equality,” which are ambiguous or can be read at multiple levels of generality. This arbitrarily selective emphasis on disagreement is an infallible sign of ideology.

CONCLUSION

Our hope is that critics of common-good constitutionalism will begin to engage more substantively, forswearing the transparently circular and unsuccessful slogans that have appeared so far. Despite almost two years and an enormous outpouring of words, much of the debate has been ersatz. In any real sense, the debate has yet to begin. We hope it will do so.

149. Pojanowski, *supra* note 71, 586.

