

THE CONSTITUTION, THE LEVIATHAN, AND THE COMMON GOOD

COMMON GOOD CONSTITUTIONALISM. Adrian Vermeule.* Cambridge: Polity Press. 2022. Pp. viii + 241. \$59.95 (Cloth), \$19.95 (Paperback).

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[C]ertain minds, despite their metaphysical inclination, prefer confusion to distinction. This holds especially true when they are engaged in polemics and find it expedient to fabricate monsters which for the lack of anything better . . . are indiscriminately attributed to a host of anonymous adversaries.
—Jacques Maritain²

Adrian Vermeule's *Common Good Constitutionalism* is a curiously strident and yet reticent book—boldly belligerent but oddly timorous. Vermeule seems to be itching to fight, and so he constructs and characterizes chosen opponents so as to preempt possible lines of agreement and thus ensure that there will be something to fight about, or at least to pretend to fight about. And yet at the places where differences are most substantive and consequential, he is regrettably unforthcoming. Thus, Vermeule presents himself as a pugnacious critic of pretty much the entire corpus of contemporary constitutional thought, but his opposition is based on skewed descriptions of that thought that often seemed calculated mostly to provide him with concocted opponents to batter. And although zealously in favor of what he calls the “classical legal tradition,” he seems unwilling to acknowledge and publicly defend essential elements of that tradition. In the end, Vermeule comes across as a Don Quixote who is determined to

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2. JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 14 (John J. Fitzgerald trans., 1966) (1946).

do battle but is hazy about exactly what or whom he needs to do battle with, or where, or why.

In this Review I will consider Vermeule's aggressive but obfuscating treatment of three of his main subjects: the classical legal tradition, the law of the American Constitution, and contemporary constitutional theory.

I. THE REVIVAL OF THE CLASSICAL LEGAL TRADITION?

Through much of Western history and until relatively recently, Vermeule contends, law and government operated in accordance with the "classical legal tradition" (CLT). As Vermeule presents it, this tradition was a sprawling and diverse affair, covering everything from Roman law to medieval natural law thinking to more modern social contract-natural rights conceptions (pp. 54–56). The main point, however, is that in contrast to modern legal positivism, which in Vermeule's understanding recognizes only the positive or written law (p. 4), CLT acknowledged a natural law or *ius* that was not made by governments but that lies behind and informs the positive law or *lex* (pp. 1–4).³ The book's overarching objective is to revive this classical understanding.

That general agenda seems evident enough—and, to my mind at least, potentially promising.⁴ But questions and uncertainties arise.

A. WHATEVER HAPPENED TO CLT ANYWAY?

To begin with, we might wonder exactly what happened to CLT, so that it needs to be revived? On this point, Vermeule is of mixed minds. Sometimes he seems to say that modern legal

3. Someone might of course be a legal positivist but also a moral realist: there are objectively true principles of justice and goodness, this positivist-realist might hold, but those are not in themselves "law." Whether and how Vermeule would disagree with this position is not clear.

4. Thus, I heartily agree with Vermeule's observation that in some circumstances "[t]he best way forward is to look backward for inspiration," (p. 183). I have argued elsewhere that an engagement with classical legal thinking might be the best way for jurisprudence to regain relevance. See Steven D. Smith, *Jurisprudence: Beyond Extinction?*, in *ON PHILOSOPHY IN AMERICAN LAW* 249 (Francis J. Mootz III ed. 2007). And although I fear the honor is undeserved, critics have described my own work as "neomedieval." See Richard Shragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 *V.A. L. REV.* 917, 926–32 (2013).

thought has forgotten or rejected CLT, to its own detriment. Many of his criticisms seem based on this assumption. But his more considered view is that modern law is still grounded in and guided by CLT, except that the natural law or *ius* is no longer openly or consciously recognized: it governs us invisibly, so to speak (pp. 4, 53, 181). CLT “went underground and changed into a kind of disguise” (p. 60). We no longer acknowledge the natural law; even so, a classical or natural law account actually does a better job than the prevailing positivist jurisprudence of explaining what even contemporary lawyers and judges say and do.⁵

These are actually quite different diagnoses, with different implications, yielding different and at times inconsistent prescriptions. Consider an analogy. Suppose someone earnestly insists that we are being abominably governed, and that what we desperately need is the return of that benevolent despot, the Emperor Napoleon. That claim is audacious and eminently contestable, but at least we know what is being urged. But if the would-be imperialist then adds that in reality Napoleon is still governing us, secretly, from his hideout on Elba, the position becomes more confounding. How did we come to be in this peculiar state of affairs in which Napoleon is governing us even though we don’t know it? How should we now take the imperialist’s strident criticisms of features of our current governance if, as he tells us, these features are actually the work of his beloved emperor anyway? And how will it help to bring Napoleon back if he has been governing us all along?⁶

With Vermeule’s claim, similarly, we must wonder: if CLT has been directing us all along, albeit in “disguise,” why is our condition as bad as Vermeule evidently thinks it is? Shouldn’t the assumption that CLT has been silently guiding us lead Vermeule

5. See, e.g., p. 53:

Both [originalism and progressive constitutionalism] reject key premises of the classical law. More accurately, they imagine that they reject those premises. As we will see, the official commitment to legal positivism that is the main common characteristic of the reigning approaches is itself consistently belied by the actual behavior of judges and other interpreters, who are far more classical than they know.

6. It might be that although Napoleon has been in some sense governing us, actual policies are the result of a misguided minister or bureaucrat whom the emperor has ill-advisedly employed. But in that case, bringing Napoleon back into open rule will not improve matters if he continues to govern through the misguided minister; it might even make things worse.

to retract or at least reframe his criticisms of much in the contemporary legal landscape? What caused CLT to go “underground” anyway? And what would it mean to bring CLT back if it has tacitly been with us all along?

Start with the obvious threshold question: why does Vermeule think that CLT has been guiding our law *sub silentio*? Sometimes he seems to say that the at least tacit governance of CLT is inevitable; there just is no other way that law could operate (p. 178). Legal positivism simply cannot account for much of what judges and other officials do, so they must be acting on CLT without realizing it. But Vermeule’s own analysis contradicts this argument. Let us grant that, as he claims (pp. 37–38), every legal system will be guided by some sort of normative vision (a claim, by the way, that legal positivists need not deny). It is surely possible—even probable, one might think—that modern law has been predominantly guided by a utilitarian or consequentialist vision, as in law-and-economics. But Vermeule insists—more on this in a moment—that this sort of “aggregative” approach is contrary to CLT (p. 11). If so, then it seems that we have *not* been tacitly governed by CLT.

Even so, support for Vermeule’s “governance *sub silentio*” interpretation might come from comparing his book to another recent scholarly treatment. In *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped*,⁷ Stuart Banner shows that for the first century or so of the American Republic’s existence, lawyers and judges routinely invoked natural law to support, interpret, and supplement positive legal enactments. And like Vermeule, Banner observes that although lawyers and judges no longer talk in natural law terms, much of what they do still seems to fit the older explanations.⁸ Banner himself, however, seems in thrall to the prevailing positivism; and so, while acknowledging that natural law still resonates in lawyers’ “voice” and might account for much of what they do, he insists that “in their hearts” judges know that when they go beyond what the positive law dictates they are really

7. STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021). Vermeule cites Banner’s book (p. 55) but does not actually use or engage with it.

8. BANNER, *supra* note 7, at 241–49; e.g., “if one ignores the label and looks closely at what judges are doing, their method of deciding these cases is not all that different from the method that was once called natural law. . . .” *Id.* at 247.

just legislating.⁹ But this is a deeply unsatisfying explanation¹⁰; indeed, Banner admits that the situation is “exceedingly strange.”¹¹ As an explanation of what is happening in law, Vermeule’s proposition that judges are still intuitively acting on natural law assumptions seems more promising.

Unlike Vermeule, however, Banner at least tries to understand the reasons for the shift in legal discourse; Vermeule, by contrast, mostly talks as if the change were the result of some strange forgetfulness or “amnesia” (p. 54)—or else of some sort of perverse blunder or gratuitous offense against reason and good sense. He does note in passing that classical jurisprudence was embedded in a “classical legal cosmology” (p. 55). If he were to pursue the point, he would have to confront a central obstacle to his revivalist agenda: CLT passed out of open use, among other reasons, because the classical or natural law account rested upon a metaphysical or ontological foundation—upon a conception of the cosmos as reflecting some kind of inherently normative or teleological order¹²—that is not widely accepted today.

Consider the account of law given by St. Thomas Aquinas, whom Vermeule frequently invokes. Aquinas held that God created a universe infused with purpose and embodying a providential plan that the philosopher-saint described as the “eternal law.” Part of that eternal law governs human conduct and is accessible to human reason: Aquinas called this the “natural law.” But the natural law does not constitute any comprehensive legal code; it consists of general principles that need to be implemented and specified by human authorities in the form of detailed positive law. Aquinas described this implementing function as *determinatio*.¹³

9. *Id.* at 246.

10. I develop these points at greater length in a review of Banner’s book. Steven D. Smith, *Presently Absent or Absently Present? The Curious Condition of Natural Law*, 67 AM. J. OF JURIS., no. 1, 119 (2022), (reviewing STUART BANNER, *THE DECLINE OF THE NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* (2021)), <https://doi.org/10.1093/ajj/auac003>.

11. BANNER, *supra* note 7, at 246.

12. *Cf.* REMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* vii (Lydia G. Cochrane trans. 2007) (explaining that in classical thought, whether Christian, Jewish, or Muslim, “human action had been conceived of as being in phase with cosmological realities that were presumed to furnish humankind with a model, a metaphor, or at least guarantee, of right conduct”).

13. The eternal law, Aquinas explained, is “nothing else than the type of divine wisdom, as directing all actions and movements” and “the plan of government in the Chief Governor.” Thomas Aquinas, *Summa Theologica* I–II, Question 93, arts. 1, 3, reprinted in

In the same vein, Vermeule talks repeatedly about the need for and the pervasiveness of “determination” (pp. 9–10, 44–47). He is clearly trying to invoke something like Aquinas’s classical account for present use. But that account would seem to rest on the premise of a divinely created, providentially ordered, purposive or teleological universe. Without such a premise, it is unclear how the classical account can work: there is no ontological foundation for or intelligible account of the “law” or *ius* that supposedly lies behind the positive law. So it is not surprising that as prevailing views came to conceive of the universe not as a providential creation but rather as the unplanned product of physical particles and forces, lawyers found that they could no longer intelligibly appeal to the natural law.

To be sure, some people still believe in the theistic, purpose-filled universe of Aquinas. Vermeule seems to believe in it. So do I. And it might be that the older account provides a better explanation even of our current legal practices than more modern accounts do: Vermeule thinks so, and, again, so do I. Indeed, I have argued for this point at tedious length elsewhere.¹⁴ But in prevailing modern thought, the natural law universe is one that has largely been demoted to, as Banner puts it, a “subject for philosophers and ministers, not the legal system.”¹⁵ This is the central quandary of modern legal thought and practice: beyond a certain point, the jurisprudential explanations we give of our legal practices are implausible and unilluminating; more illuminating accounts might be available, but we are not allowed to give them.

Of course, Vermeule might try to escape or reject this quandary by simply defying the dominant naturalistic and positivistic conventions, and boldly asserting and then defending a more theistic or teleological view. He *might* try to do this. But he doesn’t—not in this book anyway.¹⁶ This is one crucial point at which Vermeule’s reticence prevents him from making the

THE POLITICAL IDEAS OF ST. THOMAS AQUINAS (Dino Binongiari ed. 1953). The “natural law” is that part of the “eternal law” that is accessible to human reason without the aid of divine revelation. And “every human law has just so much of the nature of law as it is derived from the law of nature.” Question 95, art. 2.

14. See STEVEN D. SMITH, *LAW’S QUANDARY* (2004); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999).

15. BANNER, *supra* note 7, at 176.

16. Vermeule does note that jurists like Holmes rejected CLT because they were “skeptical that there exists an objective common good that transcends human will.” And he rejects such skepticism as “a mistake” (p. 70)—but does not go on to explain how it is a mistake or to defend the contrary view.

contribution he might have provided and makes his pleas for a return to the classical conception seem hollow and futile. Without some explanation of its ontological foundations, Vermeule's natural law or *ius* seems, to borrow a term he uses over and over again against those he criticizes, an "illusion."¹⁷

B. THE COMMON GOOD TO THE RESCUE?

Vermeule does not face up to this difficulty—not in this book at least.¹⁸ But he does seem to have adopted a strategy for getting around it. That strategy consists of fastening onto a different element of the classical view—namely, "the common good"—that might seem to be more accessible in our metaphysically straitened world. Thus, Vermeule invokes Aquinas's general definition of law as "an ordinance of reason *for the common good*, promulgated by a public authority who has charge of the community" (p. 3, emphasis added). He seizes on the element I have highlighted—the "common good"—and makes it the center of his position. Law and government should serve the common good; consequently, government must have the plenary power it needs to carry out that purpose. This is Vermeule's core prescriptive proposition.

But can the idea of the common good serve to overcome the lack of an ontological foundation for *ius* or the natural law, thereby salvaging CLT? On one level, of course, the proposition that law should serve the common good is one that few will disagree with. Politicians routinely invoke and purport to care about the "common good"—or the "public interest," or the "general welfare"; so do statutes and regulations (as Vermeule points out; p. 30). The very familiarity of this claim raises a doubt: does all of Vermeule's truculent assault on modern law and government really just issue in a proposition that everyone already accepts? Can a radical jurisprudential revival really be achieved on the basis of a well-worn platitude?

So Vermeule tries to clarify the concept of the common good

17. Vermeule sometimes associates the natural law with international law or the *ius gentium* of Roman law (e.g., p. 89), but without ontological foundations it is unclear how international law has any deeper claim on us than our own positive law.

18. I say "not in this book" because the corpus of Vermeule's work is large and I have not read most of it. It is possible that Vermeule elsewhere fills in some of the gaps noted in this review. That will be of little use, however, to readers like myself who take *this* book for what it holds itself out as being—namely, Vermeule's considered proposal for the revival of "common good constitutionalism" and CLT.

to make it less innocuous and to give it more bite. He tries, but does he succeed?

I am skeptical. On the conceptual level, despite Vermeule's efforts, the concept is elusive. On a more concrete level, the concept remains banal. This is not to say that it is wrong—banalities may well achieve their status *as* banalities because they are conspicuously true—but rather that it is unhelpful in resolving genuine disagreements.

Start with the conceptual level. Vermeule begins by emphatically rejecting one familiar notion, or what he calls the “aggregative” conception.¹⁹ Contrary to utilitarian thinking, the common good is not just “[t]he sum of separate private utilities, no matter how large” (p. 26). This rejection is not based merely on the obvious problem that the good aimed at by an aggregative approach is not “common,” because it involves tradeoffs in which one person's utility might be sacrificed in order to achieve a greater total.²⁰ Vermeule contends, rather, that even a policy that works to *everyone's* advantage and that everyone agrees on is not necessarily furthering the common good (p. 26).

At this point, it might seem that Vermeule is positing some kind of communal entity that has its own corporate good apart from the goods of its individual members. Some of his language may seem to gesture toward such a notion: he describes the common good, for example, as “the happiness or flourishing of *the community*” (p. 28, emphasis added). And it may indeed be plausible to describe certain goods—justice and peace are the obvious candidates—as communal goods; they are goods that can be realized only by and in human associations.²¹ Even so, the idea of a communal or corporate good independent of the good of individuals is problematic for more than one reason, and Vermeule explicitly disavows it (pp. 28–29). “The end of the community is ultimately to promote the good of individuals” (p. 29).

19. For a contrary view, see Mark C. Murphy, *The Common Good*, 59 THE REV. OF METAPHYSICS 133 (2005). Murphy carefully defends an “aggregative” view of the common good against both an “instrumentalist” conception, which he attributes to John Finnis, and a “distinctive good” conception, which appears to be close to Vermeule's view. Murphy argues that an aggregative conception is not identical to either a “maximization” view or to utilitarianism and that it need not be vulnerable to objections to those positions.

20. See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (rev. ed. 1999).

21. See Murphy, *supra* note 19, at 152–56.

So then, the common good is not the sum of *individual* goods. It is not even what is good *for everyone* as an individual. Rather, it is the good of *the community*—but not of the community as any sort of entity in and for itself, but rather as something that exists to serve individuals. There seems to be a sort of frustrating circularity here, as the locus of good or value shifts from individuals to the community but then back to individuals. Is this apparent circularity a mark of incoherence? I’m not sure, but the notion is at least elusive.

Vermeule says other things that may or may not be clarifying. He says, for example, that the common good is “capable of being shared without being diminished” (p. 28). It “belong[s] jointly to all and severally to each” (p. 30). And he gives the example of a football team, for which winning a game is said to be a common good that is not reducible to the success of individual players (p. 28). Maybe these observations help; again, I am honestly not sure.²²

At a lower level of abstraction, however, Vermeule also offers more down-to-earth and accessible descriptions of the common good. He refers repeatedly to health, safety, and morals, and to the “trptych of ‘justice, peace, and abundance’” (pp. 7, 31–32, 35, 134). Just how these more concrete goods fit with the abstract definitions is unclear. Aren’t there always tradeoffs in governmental attempts to promote health, safety, and welfare? Is “abundance” or material prosperity something that “belong[s] jointly to all and severally to each” and that can be shared by all without anyone’s portion being diminished? Not in this world of scarcity, one might think.

But in any case, presented in this more concrete and commonsensical way, the proposition that law and government should serve the common good reverts to being yawningly uncontroversial. True, there are disputes about whether law should promote “morality”—the Hart-Devlin debate is a famous

22. *Cf. id.* at 156:

To whatever extent the distinctive good of a football team, university, and so forth is worth promoting, respecting, honoring, the reasons to act in these ways derive not from the distinctive good of that association but from the good of the persons whose lives that association affects. Inasmuch as a distinctive good view distances itself from the good of persons, its normative hold on us is loosened. It is a virtue of the aggregative conception that it retains its normative hold through being entirely person-regarding.

example²³—but the suggestion that law should promote health, safety, justice, peace, and abundance or prosperity will generate scant opposition. And then one wonders again: Does “common good constitutionalism” merely urge upon us what everyone has taken for granted all along? And if CLT boils down to the uncontroversial view that law and government should promote safety, health, prosperity and such, how could that approach possibly be of any use in answering any of the contentious legal or political questions that confront and divide us today?

In this respect, Vermeule’s book seems analogous to a treatment that earnestly insists that law is supposed to promote “justice,” and then indignantly denounces this or that particular law by declaring—in conclusory fashion—that these laws are not just. Such a treatment seems merely obtuse. Everyone knows that law ought to promote justice; the challenge is to show more concretely what justice entails and why a particular law is not just. In a similar way, Vermeule’s platitudinous invocations of the common goods of health, safety, and such coupled with conclusory denunciations of this legal doctrine or that judicial decision as contrary to the common good do little to illuminate any genuine controversies of our time.

It seems there must be more to the common good position than this. But what? For someone like Aquinas, *the good* and hence the common good belonged to the same purposive framework in which the natural law had its home. Within that kind of framework, it would be understandable how the good of a person and perhaps of a community could be something other than the subjective satisfactions or utilities of individuals. And it seems that Vermeule is likewise trading on some more substantial but mostly unspoken assumptions about what is truly good for human beings, whatever their subjective preferences or “utilities” may be.²⁴ Indeed, he acknowledges that the common good “presuppose[s] a substantive conception of human flourishing” (p. 32). Elaborating on what that substantive conception is might

23. For a review and critique of the debates, see ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 48–71 (1993).

24. Oblique evidence of some such conception surfaces later in the book when, under the heading of “Applications,” Vermeule addresses particular cases. It turns out that pornography is bad for humans, for example, and thus inconsistent with the common good; this conclusion evidently does not depend on whether most or all citizens in a community enjoy looking at pornography. (pp. 170–173) I agree, but the metaethics or philosophical anthropology that would support this judgment are not articulated.

provide a more solid basis for Vermeule's various denunciations and prescriptions, and might illuminate and support his recurring criticisms of liberal, autonomy-based morality. But here again, just when Vermeule might join a real debate and make a valuable contribution, he holds back.

One might put the point this way: it seems what Vermeule's real quarrel with modern law and governance is not so much jurisprudential as moral and even metaphysical. In training his fire on legal positivism (and, later, originalism), he has picked the wrong targets. But where the actual battles need to be fought, Vermeule is pretty much a no-show.

In this respect, Vermeule's presentation contrasts strikingly with others that at least on the surface seem in the same vein. Thus, in his book *The Person and the Common Good*,²⁵ Jacques Maritain discourses carefully and earnestly on the common good. But Maritain's treatment explicitly and probingly discusses the nature of persons—their metaphysical status, the relation between their material and spiritual dimensions, their relation to God, their ultimate ends—and his conception of the common good is grounded in this philosophical anthropology. Vermeule, by contrast, says little directly about what human nature or human beings are,²⁶ nothing about their relation to God; and he expressly foreswears any consideration of people's "ultimate ends" (p. 29). The omission leaves his proposal—that governments should promote the safety, health, and prosperity of their citizens—looking stunningly banal.

But not just banal; if there were any chance of its adoption, Vermeule's proposal would be positively dangerous. Because to the tame proposition that governments should promote safety, health, prosperity and such, Vermeule adds that governments must have plenary power to achieve these goods. He is impatient with limits on that power. His exhilarating (to him at least) or rather ominous motto is "*imperare aude*—dare to command!" (p. 71). But is there anything that governments could *not* command—and command whole-heartedly and imperiously, if they are composed of zealous or true believers—under the headings of safety, health, abundance, and morality? In this respect,

25. MARITAIN, *supra* note 2.

26. For an instance of contemporary legal scholarship that *does* take on such questions, see O. CARTER SNEAD, *WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS* (2020).

Vermeule's preferred government comes much closer to a Leviathan than to the government designed by the American Founders.

II. CLASSICAL LEGAL THOUGHT AND THE AMERICAN CONSTITUTIONAL TRADITION

In contemplating that difference, we might start by remembering some basic civics. The Framers of the American Constitution were attempting to construct a central government with more power to address national concerns than the previous government had enjoyed under the Articles of Confederation. At the same time, fresh off a bloody war fought against what they viewed as a tyrannical government, they were deeply concerned about the risk that the new government would itself become oppressive. The proclivity of men and governments to abuse power was a theme that was sounded over and over again in the Philadelphia convention.²⁷

Consequently, while endowing the new national government with enhanced powers, the Framers adopted various strategies for constraining those powers. Thus, the Constitution embraced the idea that the national government's powers would be limited to those that were enumerated, as well as the strategy of dividing powers, both horizontally among the branches of the national government (separation of powers) and vertically among national and state governments (federalism). That way, too much power would not accumulate in one place, and the different wielders of power could check and balance each other. Measures were designed to promote representation, or responsiveness to the people. An additional strategy that was less prominent in the original document but was implemented thereafter was that of declaring rights in writing and counting on courts to enforce those rights.

Vermeule's vision of constitutionalism is strikingly different. Though he enthusiastically shares the founders' goal of enhancing governmental power, their commanding concern with limiting that power is almost entirely missing. *Almost* entirely. Early on, Vermeule does notice the concern (pp. 13–14), and he spends a couple of pages explaining that governments are not the only

27. For a collection of some of these statements, see STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 36–42 (1998).

entities that abuse power; private entities like corporations can abuse power as well (pp. 49–51). This is a fair point in itself, and a reader might have hoped that as the book progressed, Vermeule might develop it by showing how the kind of government he favors has checked or would check the burgeoning private power of, say, large corporations or social media platforms. No such development occurs.

As for the practical devices that the Framers put in place to constrain power (like separation of powers, federalism, and judicially-enforceable rights), Vermeule treats these devices with disdain. When he notices them at all, briefly and in passing, his discussions consistently reveal a purpose mainly to deflate or deflect these devices as possible constraints on the plenary governmental power he favors.

Thus, Vermeule is dismissive of the idea of enumerated powers: contrary to both the Framers' own explanations and later tradition, he interprets the powers conferred by the Constitution on the national government as merely a sample or nonexhaustive list of some of the powers that the Constitution conferred (p. 40). The more basic truth, he contends, is that the government had, and has, and must have, whatever powers it needs to promote the common good.²⁸ He has little use for separation of powers, emphasizing the overriding importance of a powerful executive branch and administrative state (pp. 12–13, 42). Scoffing at the idea of state sovereignty (pp. 158–160), Vermeule dissolves federalism into the general theme of “subsidiarity,” and then, in the vocabulary of Carl Schmitt, emphasizes the feature of that doctrine which holds that the central authority should step in and exert itself when lower level or local institutions are not adequately addressing a need (pp. 154–158). Subsidiarity in Vermeule's hands thus becomes mostly a justification for the assertion of centralized power.²⁹

Democracy, or government “of the people, by the people, for

28. In this vein, Vermeule contends (quite plausibly, actually) that the limited powers strategy has largely given way to a *de facto* general police power in the national government: this, he makes clear, is all to the good. (pp. 33–34).

29. See p. 155:

I emphasize here that subsidiarity in this sense is fundamentally a positive, empowering principle, one that confers affirmative powers on the highest governing authority and yet also imposes positive duties to come to the aid of—provide *subsidium* to—jurisdictions, institutions, societies, and corporations that are failing to carry out their work. . . .

the people,” elicits no reverence (pp. 47–48), and Vermeule has little use for the strategy of judicially-protected rights; he assails “our absurdly hypertrophied free speech jurisprudence” (p. 179), for example, and advocates a policy of judicial deference to legislative and especially executive and administrative decrees (pp. 15, 43).

In sum, while wanting to revive the classical legal tradition, Vermeule has little use for the more specific classical tradition of American constitutional law. He does not candidly come out in open opposition to that tradition—not in this book anyway—as bolder critics of that tradition have sometimes done.³⁰ Even so, he makes it clear that *his* loyalty is to the modern administrative state, which he praises as “the main locus for the provision of the goods of peace, justice, and abundance . . .” and “properly and intelligently deployed . . . an engine of unsurpassed power for promoting the common good” (p. 135). He admits that administrative agencies may err or overreach but does not seem troubled by the possibility. “[W]hat if anything ensures that agencies act for the common good? Nothing; asking for certainty is to ask more than any system of government can give” (p. 138).

Vermeule is hardly alone, of course, in thinking that the administrative state is better suited to the needs of the contemporary world than is the more constrained and divided government designed by the Framers. Other enthusiasts, however, have been more forthright in acknowledging the tensions between those governmental forms, and in attempting to bridge the gap between them.³¹ For example, Bruce Ackerman, like Vermeule an enthusiast for the administrative state, devoted hundreds of pages to a careful study of our constitutional features and history, and he devised an imaginative theory of informal constitutional amendment to try to legitimate the administrative state under the American Constitution.³² Vermeule, by contrast, is content to pluck a couple of references to the “general welfare” from the constitutional text (in the Preamble and in what Vermeule calls “the General Welfare Clause”—i.e., the provision in section 8 of Article I that authorizes Congress to tax and spend “for the common Defence and general Welfare of the United

30. See, e.g., CHRISTOPHER A. FERRARA, *LIBERTY: THE GOD THAT FAILED* (2012).

31. See, e.g., Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887).

32. See BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

States” (pp. 39–40)) and to use these as excuses for the plenary national power he favors. And, as noted, he cursorily explains away the Constitution’s power-constraining features.

Beyond these passing glances, Vermeule seems uninterested in any serious engagement with the constitutional design. Contrary to a blurb on the book’s back cover that inexplicably praises it as “the most important book of American constitutional theory in many decades,” the book is not and scarcely pretends to be a serious work of constitutional theory at all—or at least not of theory about the American Constitution. (Nor, as we will see, is the book a serious engagement with contemporary constitutional theory.)

Vermeule does assert, to be sure, that the American constitutional tradition is broadly consistent with CLT. This claim may well be right; indeed, if as Vermeule and I both think, a natural law jurisprudence actually gives a better account than modern positivism not only of eighteenth- and nineteenth-century legal practice but even of today’s practice, this claim would pretty much have to be right. But then the pressing question is not whether the American constitutional tradition is compatible with CLT—it is—but whether given human nature and under current conditions, the constitutional design devised by the Framers (with its commitments to limited powers, separation of powers, federalism, and so forth) is a *better* implementation of CLT—and a better plan for achieving the common good—than anything Vermeule has to offer.

III. CLT AND CONTEMPORARY CONSTITUTIONAL THEORY

That vital question is one that Vermeule might have squarely taken on in his discussions of contemporary American constitutional theorizing. But he doesn’t. Instead, he frames the debates so as to obfuscate and avoid the question.

Thus, Vermeule divides contemporary constitutional theory into two main schools—progressivism (often described as “living constitutionalism”) and originalism—and he contends that both schools are on the opposite side of “a gulf separating them from the classical legal tradition” (p. 72). Having described the contemporary landscape in this way, he lobbs rhetorical grenades against progressivism and originalism from his ostensible stronghold in CLT. But this description seems a kind of category

mistake, on Vermeule’s own premises at least, and so his grenades mostly fly past their targets. On *his* premises, as he himself occasionally acknowledges (e.g., p. 18), it seems that the contemporary schools of constitutional thought are better understood not as competitors or alternatives to CLT, but rather as (sometimes incognizant or unconfessing) *versions* or implementations of CLT. And the live controversy is not, for example, “originalism versus CLT”; the relevant question, once again, is whether the common good is better served by the version(s) of CLT embraced or tacitly assumed by originalists, or rather by the Vermeulean version dedicated to the plenary power of the administrative state.

The misdescription in Vermeule’s account is perhaps most conspicuous in his treatment of progressive or living constitutionalism. Most self-styled progressives no doubt have a substantive moral vision that is radically different from Vermeule’s—one more centered on individual autonomy as the central normative criterion. This is a difference that, as noted, Vermeule repeatedly registers but does not develop in any systematic way. In their *jurisprudence*, however, or their approach to constitutional law and interpretation, the progressives and Vermeule seem remarkably similar—a similarity that is evident in Vermeule’s effusive praise of Ronald Dworkin’s approach to constitutional interpretation (pp. 41, 69, 92, 145, 147). Like Vermeule, progressives like Dworkin have wanted to free up government and constitutional law from constraints imposed by strict fidelity to the original constitutional design.³³ Rather than accepting a partial peace with his half-way friends, however, Vermeule seems determined to include the progressives in his general fulmination against modern constitutional thought, and so he attempts a distinction between “progressive” and “developmental” constitutionalism.

The difference, supposedly, is that the progressives claim that normative principles themselves should change and evolve, while his preferred “developmental” approach sees constitutional law as evolving in its implementation of true normative principles that remain constant (pp. 17–18, 118, 123). But Vermeule’s characterization of progressives as radical moral relativists or

33. *Cf.* p. 36 (arguing for a constitutionalism that is “not enslaved to the original meaning of the Constitution”).

revisionists seems doubtful at best—Dworkin, for example, perhaps the quintessential example, explicitly declared himself a moral realist—and Vermeule does not support his characterization with evidence of or citations to progressives who actually take the dubious position that he attributes to them.³⁴ Consequently, his effort to distinguish himself *jurisprudentially* from the progressive view seems artificial and unconvincing—another manifestation of Vermeule’s eagerness to do battle (or at least to appear to be doing battle) even when his ostensible opponents share his premises.

Vermeule’s assault on originalism is more extensive and impassioned: he repeatedly contends that originalism is an “illusion” (pp. 22, 91–116), and without actually examining the rationales that originalists give for their position he charges or insinuates that they are acting from ignorance, political motivation, or bad faith.³⁵ Surely here there must be a genuine disagreement? And yet upon closer examination, it becomes quite unclear exactly what or whom Vermeule thinks he is disagreeing with, or how he disagrees, or why.

Thus, Vermeule himself provides a cogent explanation for how originalism, far from being a competitor to CLT, might fit comfortably *within* CLT; and yet he seems determined to refuse admission. He explains how CLT supports or even entails an extensive although limited positivism: in performing their *determinatio* function and seeking the common good, authorities will promulgate positive law³⁶; and in interpreting such positive

34. Vermeule cites *Obergefell v. Hodges* as a quintessential example of “what legal progressivism looks like when it has become detached from the objective legal and moral order” (p. 130). But his own discussion of the case shows that it does not fit his description of progressivism as the view that basic normative principles themselves change. Rather, “the Court purported to discern, under new circumstances, *what justice had always required* with respect to marriage . . .” (p. 132, emphasis added). But this is just what Vermeule says a “developmental” as opposed to “progressive” jurisprudence is supposed to do. So the problem with *Obergefell*, it seems, is not that the decision treated principles themselves as changeable, but just that the Court misunderstood or misinterpreted the applicable principles.

35. In this respect, Vermeule’s polemic contrasts sharply with the presentations of an originalist theorist like Lawrence Solum, who consistently strives to state claims and criticisms as fairly and precisely as possible, and who interprets criticisms of his position charitably and respectfully. See, e.g., Larry Solum, *Smith on Originalism & Levels of Generality*, LEGAL THEORY BLOG (Apr. 3, 2017, 11:28 AM), <https://lsolum.typepad.com/legaltheory/2017/04/peter-j-smith-george-washington-university-law-school-has-posted-originalism-and-level-of-generality-georgia-law-review.html>.

36. “Positive law is hardly lacking; it represents a legitimate specification by the public authority of general principles of legal morality that need concrete embodiment, the

enactments, textualism might be the best approach, because there are very good reasons to interpret an enactment according to the understanding of those who made it (pp. 73–75). Indeed, any other approach would lead to a kind of “law without mind,” because the positive law would be determined in ways that no one who made those laws wanted or intended (pp. 97, 105).

All of this seems quite sensible. And applied to constitutional provisions, this approach would amount to . . . originalism. The core claim of originalism, Vermeule tells us, is that “constitutional meaning was fixed at the time of the Constitution’s enactment (or that of the relevant amendments), and that this fixed meaning ought to constrain constitutional practice . . .” (p. 91). But Vermeule himself seemingly concedes the logic of at least the first part of this position: he does not assert that the meaning of the constitutional text can change over time. To take a familiar example: If Article IV’s authorization of the national government to protect states against “domestic Violence” referred to rioting or insurrection, the provision cannot today be plausibly interpreted to authorize national legislation against spousal abuse.³⁷ Indeed, Vermeule could hardly contend for changing linguistic meaning without running into the problem of “mindlessness” with which he charges the majority opinion in *Bostock v. Clayton County*, which interpreted the 1964 Civil Rights Act to prohibit sexual orientation discrimination even though no one who enacted it supposed or intended any such meaning.³⁸ (pp. 105–106)

Does Vermeule then disagree with the second part of his description—namely, that original meaning “ought to constrain constitutional practice”? Presumably not; he is not arguing for the irrelevance of constitutional text. And indeed, at one point he concedes that “originalism rests on the entirely legitimate insight that the public authority may establish rules of municipal positive law, the *ius civile*, that vary from place to place and time to time, and that interpreters should respect the lawmaker’s aims and choices when they implement a reasoned determination of the

specification of local rules that take account of local conditions” (p. 8).

37. Of course, Vermeule himself wouldn’t actually need to adopt any such interpretation because, as noted, he doesn’t believe national power should be limited to enumerated powers anyway.

38. For development of the point, see Steven D. Smith, *The Mindlessness of Bostock*, LAW & LIBERTY (July 9, 2020), <https://lawliberty.org/bostock-mindlessness/>.

civil law for the common good” (p. 18). This language of “respect[ing] . . . *aims and choices*” is admittedly a bit squishy³⁹; even so, it seems that Vermeule is basically endorsing both parts of his description of the originalist claim.

And indeed, Vermeule himself will occasionally acknowledge that “[p]roperly speaking, the classical approach to law is not an opponent or alternative to originalism or textualism. Rather it *includes* its own properly chastened versions of those ideas . . .” (p. 18). So then why all the sound and fury—the denunciations and accusations? What in originalism so provokes Vermeule’s ire? What in it does he actually even disagree with?

The blunderbuss character of his attack makes it hard to be sure. But the gist of his complaint seems to be that originalism “*in itself*” will be inadequate to guide and account for our law. Thus, tacitly acknowledging that originalists have responses to many of the criticisms leveled against them by himself and others, Vermeule repeatedly complains that these responses do not come from “within originalism,” or from “originalism as such,” or from “originalism by itself,” or that such reasoning is not “distinctively originalist,” or that originalism itself does not have the “internal theoretical resources” or the resources “from within its own premises” to address such criticisms (pp. 22, 94, 96, 99, 109, 111, 116). He argues repeatedly, for example, that originalists have never come up with a response to a criticism made decades ago by Ronald Dworkin—namely, that they cannot explain the level of abstraction or generality at which the meaning of a constitutional

39. In fact, it is quite unclear exactly what Vermeule thinks should be done with the constitutional text. He says repeatedly that under CLT the text should be read “in light of”—or “in harmony with,” or so as to “square with”—background natural law principles (pp. 19, 59, 113). That sounds nice, but what exactly does it mean? That if the constitutional text is at odds with background principles the text should be deemed overruled and thus disregarded? Vermeule impatiently dismisses this suggestion as a misinterpretation of the natural law tradition (p. 57). Well, then, maybe the words should be read to mean something different than what they meant to those who enacted a provision, if a different meaning would be more consistent with background principles? But this approach would raise serious problems of the “mindlessness” noted by Vermeule—a law could come to have meanings and consequences quite divorced from anything that those who made the law contemplated or wanted—and Vermeule does not appear to endorse it. In my academic infancy I once attempted to outline a nonpositivist “natural law” theory under which enactments—statutes and constitutional provisions—would count as (potentially defeasible) reasons and “sources” of law but not as binding “law” in themselves, much in the way John Chipman Gray characterized statutes as “sources” of law but not law in themselves. See Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113 (1988). Is this the sort of thing Vermeule has in mind? Who knows?

text should be stated (pp. 95–97). Or he *seems* to say this, but then he quietly slides into an importantly different criticism. In fact, originalist theorists have said a good deal about the abstraction question,⁴⁰ but Vermeule seems utterly uninterested in what they have said (on this and various other disputed questions). He is not interested, it seems, because he thinks—and this seems to be his real criticism—that even if the responses are cogent they do not come from *within originalism*.

But this is a puzzling complaint, and one that originalists have no apparent reason or obligation to resist. Why *should* an originalist—someone who thinks the Constitution should be construed according to its original meaning—have to defend and elaborate that proposition on exclusively originalist grounds?⁴¹ What would it even mean to defend originalism from “within originalism”? (“We should follow the original meaning of the Constitution because that was the original meaning of the Constitution”?) Indeed, wouldn’t a purely originalist defense and explication of originalism be vulnerable to a charge of begging the question—of assuming what is at issue? Originalists typically defend their approach by arguing that it produces good consequences,⁴² or that it enhances liberty,⁴³ or respects democratic authority,⁴⁴ or something of that sort. Are these kinds of rationales somehow forbidden to originalists because they do not come from “within originalism”?

In a similar vein, Vermeule seems to insist on identifying originalism with a narrow form of legal positivism, so that he can then castigate the approach for all of the inadequacies he ascribes to positivist jurisprudence. The identification is not wholly unfounded: originalists *are* likely to be positivists at least in the

40. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. no. 1, 42–56 (2015).

41. For a careful consideration of the question by a leading originalist theorist, see Lawrence Solum, *The Case for Originalism, Part Two: Methods of Justification*, LEGAL THEORY BLOG (Apr. 4, 2017, 9:00 AM), <https://lsolum.typepad.com/legaltheory/2017/04/the-case-for-originalism-part-two-methods-of-justification.html>. Solum discusses the variety of approaches that might be taken to justifying originalism but seems to favor “external” rationales based on broader considerations of “political morality.” *Id.*

42. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

43. See, e.g., RANDY BARNETT, RESTORING THE LOST CONSTITUTION (2004).

44. See, e.g., Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013).

sense that Vermeule himself approves as a feature of CLT. In other words, they treat constitutional provisions as positive legal enactments. Originalists *may* also (but need not) participate in a more general or comprehensive positivism, and to that extent they may share in positivism's shortcomings.⁴⁵ But originalism is not equivalent to legal positivism in any general sense; Vermeule notwithstanding, originalism can implicitly or even overtly ground itself in nonpositivistic jurisprudential premises, or in pragmatic or consequentialist considerations. It can even ground itself in a classical or natural law framework. And indeed some contemporary originalists explicitly do just that.⁴⁶

You might suppose that Vermeule would welcome these natural law originalists into the fold of CLT. Instead, he spurns and attacks them; his reaction to originalists moving in on his turf almost exudes (to borrow a phrase) a kind of “panicky, bewildered outrage” (p. 67). But his objections seem contrived and hollow. Thus, he argues that originalism is inherently positivistic in character, so that embedding it in a natural law framework renders it “intrinsically unstable” (pp. 108, 116). But there is no apparent reason why such originalism is any more inherently positivistic or any more unstable (whatever that means) than the positivism that Vermeule himself commends as part of CLT, or than the textualism that he sensibly approves. Vermeule also complains that natural law originalism “collapses back” into CLT (p. 110). Describing the position as “collapsing back” makes it sound as if he has identified some sort of failing. But it would be more accurate and less tendentious simply to say that natural law originalism is self-consciously “grounded in” or “embedded in” CLT—in the position that Vermeule says legal

45. Vermeule correctly notes that originalists like William Baude and Stephen Sachs describe their position as positivist (p. 192 n. 32). But “positivism” is a broad term and, as noted, Vermeule himself acknowledges a substantial role for positivism in his own preferred jurisprudence. More analysis would be needed to sort out the sense in which Baude, Sachs and other originalists are using positivism, and to determine whether that positivism makes them vulnerable to the criticisms Vermeule wants to make. But Vermeule does not develop these criticisms with respect to Baude and Sachs specifically, or with respect to other specific originalists. His typical method is to attack generic, unidentified originalists.

46. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. no. 1, (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049069; LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016).

thinkers should adopt,⁴⁷ and yet oddly wants to deny them.

The claim of natural law-based originalism is basically that the constitutional design, understood according to its original meaning, is the best way to achieve the common good. To such natural law originalists, Vermeule objects, “You’re really just embracing CLT.” To which the response would be: “You can describe it that way if you like. Isn’t that precisely what we said we were doing? And what you’ve urged us to do? So, what exactly is your problem?” Vermeule: “Look, you guys are supposed to be positivists, dammit, and you’re betraying your own positivism.” Response: “Who ever said originalists had to be positivists in any comprehensive sense? Only you—apparently so that you can have someone to beat up on.”

In sum, Vermeule wants to confine originalists in the narrow cage of a particularly rigid positivism, where he can flay them at his pleasure, and he is unwilling to let them out. But the cage is Vermeule’s own contrivance, and his polemics often seem to be thrashing at empty space.⁴⁸ More generally, he insists on characterizing both progressives and originalists so as to provoke a fight, even if there is nothing serious to fight about.

IV. CONCLUSION

The irony is that there *are* important issues to fight about—or, to use less militant terms, there is much of substance to debate and contend over—but Vermeule does not seem to want to engage *those* issues. Thus, the fundamental disagreements that divide the liberal modernity that Vermeule deplors from the “classical” positions he favors are not about whether governments should promote safety, health, and prosperity. The real underlying disagreements can be put in cosmological terms: is the

47. Thus, Vermeule appears at one point to approve originalism, but says that “[t]he problem arises when originalism attempts to liberate itself from the larger framework of the law overall”, i.e., CLT. (p. 18). And yet when originalists attempt to locate themselves within that framework, he attacks them.

48. To say that Vermeule’s core attack on originalism is misconceived is not to say, of course, that originalism is a fully adequate or viable position or that all of his specific criticisms (many of which repeat objections made by Dworkin and others) are necessarily mistaken. I have often registered reservations of my own, some of which are similar to some of Vermeule’s specific criticisms. See, e.g., STEVEN D. SMITH, *FICTIONS, LIES, AND THE AUTHORITY OF LAW* 54–71 (2021); Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY* (Grant Huscroft ed. 2012).

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universe purposeful, created according to a providential plan, or is it a merely fortuitous concatenation of particles in motion and combination and collision? Or the disagreements can be put in terms of a philosophical anthropology: are human beings created in the *imago dei*, with a divinely conferred dignity and an indwelling *telos* and destiny, or are they merely the chance products of an accidental evolutionary development?

Vermeule says next to nothing about those real points of divergence—not in this book anyway.⁴⁹ And at the moment, the prevailing answers to those questions lean very much toward the positions and policies that he detests. In these circumstances, he should be profoundly grateful that his prescription of a powerful administrative Leviathan largely unconstrained except by its vision of “the common good” is unlikely to be adopted. Or at least we can, and he should, hope so.

49. See *supra* note 18.

