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Adrian Vermeule's new vision of public law has whipped up a storm. It first aired on 31 March 2020, in his blogpost 'Beyond Originalism', under the rubric 'common-good constitutionalism'.¹ Within a week, several leading scholars had responded, with Randy Barnett describing it as 'dangerous' (for Barnett, 'This wolf comes as a wolf'); Garrett Epps as 'an idea as dangerous as they come' and 'an argument for authoritarian extremism'; and David Dyzenhaus calling it 'more scary than the [COVID] virus itself'.² This backlash did not deter Vermeule: within two years, his blogpost had become a monograph, *Common Good Constitutionalism* (CGC).³ The back-cover blurbs of Vermeule's slender book hail it as 'elegant, insightful, magisterial' (Sohrab Ahmari) and 'the most important book of American constitutional theory in many decades' (Jack Goldsmith). But the (numerous) reviews have largely been negative: one claims that 'Vermeule writes as a prophet trying to start a popular movement rather than a scholar engaged with his professional colleagues' and another calls it 'a mere apologia for brute power and the suppression of difference'.⁴ So what is all the fuss about? And to what extent is the praise — and are the criticisms — justified?

1. Overview

CGC has five chapters (plus a revealing introduction and crisp conclusion) and I read it as making three big claims and aiming at three big targets. But CGC is a challenging book to read. That is not to say that it is poorly-written; in fact, it is a challenging read partly because it is such an easy read. Dan Priel recently said of Vermeule's intellectual (but certainly not moral) hero, Ronald Dworkin, that he writes in 'a mellifluous, story-like style' that makes for 'pleasant reading' but that often makes it 'difficult to pin down his precise views'.⁵

¹Adrian Vermeule, 'Beyond Originalism' (The Atlantic, 31 March 2020) <<https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>> accessed 20 August 2022.

²Randy E Barnett, 'Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution' (The Atlantic, 3 April 2020) <<https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/>>; Garrett Epps, 'Common-Good Constitutionalism: an Idea as Dangerous as They Come' (The Atlantic, 3 April 2020) <<https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/>>; David Dyzenhaus, 'Schmitten in the US' (Verfassungsblog, 4 April 2020) <<https://verfassungsblog.de/schmitten-in-the-usa>> all accessed 7 May 2022.

³Adrian Vermeule, *Common Good Constitutionalism: recovering the classical legal tradition* (Polity Press 2022) References to pages of this book will be in-text. I will use 'CGC' for both the book and the theory.

⁴John O McGinnis, 'Originalism for the Common Good' (Law & Liberty, 28 April 2022) <<https://lawliberty.org/book-review/originalism-for-the-common-good/>>; accessed 10 April 2023; Bernard Keenan, 'Baptizing the State – Vermeule's Common Good' (Critical Legal Thinking, 23 May 2022) <<https://criticallegalthinking.com/2022/05/23/baptizing-the-state-vermeules-common-good/>> accessed 2 July 2022.

⁵Dan Priel, 'Making Sense of Nonsense Jurisprudence' (2020) Osgoode Legal Studies Research Paper, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696933> accessed 3 April 2023.

This strikes me as true also of Vermeule's book. Here, I will reconstruct and evaluate Vermeule's claims in the book (and his other writings), although there are places where I must simply note that Vermeule has not been sufficiently clear. So my first challenge is for Vermeule (and his followers) to state their theory more clearly.

This uncertainty extends even to identifying the main claims of CGC and, in particular, the extent to which it concerns moral/political theory v. legal philosophy v. US public law. At the outset, Vermeule tells us that the 'master principle of our public law should be the classical principle that all public authorities have a duty, and corresponding authority, to promote the common good' [1]. This claim is *normative*, which may suggest that CGC is mainly a work in moral and political theory. But the word 'our' here is most naturally read as referring to the United States — it may not be an accident that the first word of the book is 'American' — and Vermeule has a great deal to say about the content of US law. Vermeule highlights that CGC 'has both a general part and a particular part' in that it 'speaks both to general principles of common good constitutionalism and to the specific institutions of the American constitutional order' [5]. So Vermeule appears also to be making the general claim that *all* public authorities are duty-bound to promote the common good.

Vermeule's first big claim is therefore normative and general, and this is the focus of Chapter 1 ('The Common Good Defined'). Here, Vermeule contrasts the *common* good with the good of individuals — even when aggregated — and his first big target is political liberalism, which he defines (elsewhere) as: 'the doctrine that the central task of politics is to promote individual autonomy and to secure its preconditions'.⁶ CGC explicitly adopts the 'classical' natural law theory of Thomas Aquinas, and its second big claim is *conceptual*: that 'law is ... an ordinance of reason for the common good, promulgated by a public authority who has charge of the community' [3]. Vermeule presupposes this Thomist position on the nature of law — rather than actually arguing for it — but it plays a key role in his theory, as does Vermeule's conception of the common good.

However, Vermeule claims that he has 'nothing original to say' about 'jurisprudence in the technical academic sense' (although he does 'draw on jurisprudential ideas') and he denies that CGC is a 'work of political theory' [4–5]. Instead, it is 'written throughout from the lawyer's point of view, as a work of interpretation'; here, Vermeule appeals to Dworkin's method of 'constructive interpretation' — of presenting an object 'in its best possible light' — in claiming that 'the best overall interpretation' of US public law 'requires us to revive the principles of the classical law' [5]. This claim — the third big claim of CGC — is interpretivist and particular (to the US). So, for Vermeule, US public authorities have both a moral *and* a legal duty to promote the common good.

Vermeule's argument that there is a US *legal* duty to promote the common good is found mainly in Chapter 2 ('The Classical Legal Tradition in America'). He bases this on some historical claims: that the 'classical vision was central to the American legal world until it began to break down, initially in the period before World War I' [2]; and 'the period after World War II, especially during and after the 1960s, was when our law began to deviate from classical principles into ever-more stringent forms of liberal individualism' [176].⁷ For Vermeule, US officials have (at least since the 1960s) forgotten — through a 'terrible amnesia' [1] — their duty to promote the common good.⁸

⁶Adrian Vermeule, "According to Truth" (The Josias, 19 July 2018) <<https://thejosias.com/2018/07/19/according-to-truth/>> accessed 20 August 2022.

⁷Helmholz finds it 'surprising' that Vermeule rejects 'the standard account' that 'in the second half of the nineteenth century American lawyers abandoned natural law': Richard H Helmholz, 'Marching Orders' (First Things, May 2022) <<https://www.firstthings.com/article/2022/05/marching-orders>> accessed 20 August 2022.

⁸Vermeule puts this in Dworkinian terms: 'the last few chapters of the chain novel are impossible to square with the arc of what went before' and they 'mar the integrity of the whole' [5].

So what have US officials been doing since the 1960s? Here we find Vermeule's other two big targets: the 'consequence of this amnesia is that our public law now oscillates restlessly and unhappily between two dominant approaches, progressivism and originalism, both of which distort the true nature of law and betray our own legal traditions' [1]. In Chapter 3 ('Originalism as Illusion') Vermeule attacks originalism, and it is here — for Barnett — that he makes his 'biggest splash'.⁹ Chapter 4 ('Progressive Constitutionalism and Developing Constitutionalism') is Vermeule's critique of an extreme form of living (or 'progressive') constitutionalism and it sets out CGC's alternative, which allows doctrine to 'develop' in accordance with the timeless principles of natural law.

In Chapter 5 ('Applications'), Vermeule defends the US administrative state and advocates a more deferential approach to judicial review. He also defends a curious 'principle of subsidiarity', according to which 'higher' public authorities have the power and duty to intervene if 'subsidiary' authorities fail to promote the common good. Vermeule then explains the position of *rights* in CGC: they exist, but not as 'trumps'; instead, they are shaped and limited by the common good.

2. The normative claim and the common good

Vermeule's key normative claim — that public authorities should promote the common good — seems highly plausible, almost trivially true. But the devil is in the detail of what, exactly, Vermeule means by 'the common good', and what it means for public authorities to 'promote' it.

Vermeule frequently paints the common good with very broad brush-strokes: it consists of 'happiness in a flourishing political community' [14] and is synonymous with 'the general welfare' and 'the public interest' [15]. It is to be achieved by securing 'the classical triptych of justice, peace, and abundance' [35] to which Vermeule adds 'health, safety, and a right relationship to the natural environment' [36]. This, plus his reference to 'the capacious scope of public discretion to promote the common good' [67], suggests that it imposes only very loose constraints on public authorities. Thus far, CGC seems uncontroversial but hollow (or uncontroversial *because* hollow).

But Vermeule also makes very specific claims about what policies promote the common good. For example, he supports censors over free-speech advocates [42] — including religious censors over 'blasphemers' [172–73] — as well as marriage traditionalists over same-sex couples [131–32], and nuns over abortifacient-contraception-users [119–20]. Vermeule also describes 'the *content* of the common good' as 'the rich theory worked out over time by the *ius commune*' [69]. This looks like fine-detail painting; it appears to make CGC far from hollow, but (highly) controversial.

What bridges this chasm between the abstractly-stated ends and these concrete applications? Vermeule does not explain this clearly, which has led to criticisms that the 'specific policy outcomes' that he favours are posited 'almost entirely without argument' (and that this 'striking and telling omission' is explained by 'a specific religious view that he nowhere mentions in this book').¹⁰ Vermeule is certainly devoutly religious: his conversion to Catholicism was well-publicised, and I discuss religious aspects of CGC in §3.5. But these criticisms miss that CGC operates at multiple levels (see §2.2) as well as the key role played in CGC by Aquinas' concept of *determinatio*.

⁹Randy E Barnett, 'Deep-State Constitutionalism' (2022) 22 *Claremont Review of Books* 33, 37.

¹⁰Micah Schwartzman & Richard Schragger, 'What Common Good?' (*The American Prospect*, 7 April 2022) <<https://prospect.org/culture/books/what-common-good-vermeule-review/>> (accessed 28 August 2023).

2.1. *Determinatio*

Vermeule defines *determinatio* (or ‘determination’) as ‘the process of giving content to a general principle . . . , making it concrete in application to particular local circumstances or problems’ [9]. Following John Finnis (and Aquinas), Vermeule likens this to ‘an architect who is given a general commission to build a hospital’ and who has ‘a kind of structured discretion’, in the sense that ‘the purpose or end of the commission shapes and constrains the architect’s choices while not fully determining them’; hence ‘a good hospital may take a number of forms, although there are some forms it cannot take’ [10]. Similarly, the common good establishes the general ends that public authorities must pursue and then, via *determinatio*, they choose the means by which those ends are to be achieved. According to CGC, public authorities must exercise their power of *determinatio* in two types of circumstance: (i) ‘when principles of justice are general and thus do not specifically dictate particular legal rules’; and (ii) ‘when those principles seem to conflict and must be mutually accommodated and balanced’ [9–10]. Thus public authorities have the power to make laws (and policies), but only within the constraints set by the common good (by the ‘principles of justice’).

There are some key points to note here. First, Vermeule’s definition of *determinatio* uses both the words ‘content’ and ‘application’, and we may ask whether it is limited to creating general rules (‘content’) or whether it also extends to particular administrative or judicial decisions (‘application’). The public duty to promote the common good seems broad enough to include both content and application; and, for Vermeule, the courts must promote the common good in some circumstances (see §5.3). But Vermeule tells us that *determinatio* is exercisable via ‘positive civil lawmaking’.¹¹ And an architect chooses, within the constraints of her brief, where to place the surgical theatres (and how large they should be etc.), but not who gets an operation (or when, or by whom, etc.). *Determinatio* principally concerns the content of laws and policies, rather than their application.

Second, the extent of the power of *determinatio* depends on how thin or thick the content of the common good is. We already saw that, for Vermeule, the common good is vague and abstract: time and again, Vermeule emphasises the thinness of its content. For example, he endorses Richard Helmholz’s view that ‘natural law itself did not claim to provide definitive answers to most legal questions that arose in practice’, adding that it merely ‘provides general principles that must be rendered concrete by determination’ [20]. Just as one architect can build a better hospital than another (both satisfying the terms of their brief), so different law-makers can make morally better or worse laws — through *determinatio* — without breaching the constraints set by the common good. Thus the question of who gets to wield the power of *determinatio* is one of vital importance.

Vermeule tackles that question using a distinction between ‘determination of the constitution’ and ‘determination *within or under* the constitution’ [10–11]. The former raises questions of ‘institutional design’ — including who wields the power of *determinatio* over the latter — and here the common good involves only very minimal constraints: CGC adopts a ‘broad agnosticism’, and the ‘institutional arrangements’ which are ‘ruled out’ by the common good are ‘mostly science-fictional and horrific’ [10–11]. In particular, and strikingly, CGC does not require democracy, which ‘is valuable only insofar as it contributes to the common good’ [48]. The practical extent of the power of *determinatio* depends also on who (if anyone) is empowered to review its exercise. CGC’s ‘broad agnosticism’ here includes not requiring any form of judicial review. I will return to these matters in §4.4.

¹¹[10]. See also [131]: ‘the role of the civil authority is determination – to specify the natural-law concept within reasonable bounds **for purposes of civil law**, by making concrete . . . the surrounding network of specific **rules** that put flesh on the bones of the general concept given by the natural law’ (my **emphasis**).

The power of *determinatio* seems, therefore, to be very extensive. But it is worth noting that — if we leave aside that democracy is not required — this is no more troubling, at least in principle, than a state with strong legislative supremacy. The UK Parliament has near-unlimited power to determine laws under the constitution (and to determine the constitution itself), and the UK has no judicial review of primary legislation.¹² Thus there is a sense in which CGC constrains public power more than the UK constitution does: the UK Parliament is not under any formal duty to promote the common good (though its democratic system, imperfect as it is, often performs a similar function).

There is a further, very important, constraint on public power imposed by CGC: the products of *determinatio* (laws and policies) must be *interpreted* so as to present them in their best moral light. This is where CGC's Dworkinian methodology comes in; and, to understand fully the role that morality plays in CGC, we need to distinguish the three different levels at which it operates.

2.2. Three levels of CGC

We saw that CGC involves a general normative claim — that public authorities should promote the common good — and a particular claim about the best constructive interpretation of US public law. Kevin Walsh has noted that some of Vermeule's critics have missed the 'two-level presentation of CGC' by failing to distinguish 'Generic CGC' from 'Vermeulean CGC'; the former consists of the general claim plus an account of 'the key concept of the common good' (which, for Walsh, Vermeule 'deliberately leaves underdeveloped').¹³ Walsh did not say what 'Vermeulean CGC' is; but, in a later article, Walsh and Jeffrey Pojanowski quote (in this context) Vermeule's claim that 'one has to distinguish (1) general claims about constitutionalism ordered to the common good from (2) specific constructive interpretations of a *given* constitutional order that aim to put that order, as it develops over time, in its best light' [11].¹⁴ This distinguishes Generic-CGC from what we might call 'Jurisdiction-Specific-CGC'; and, as the US is the jurisdiction that Vermeule is mainly interested in, this second level really concerns 'US-CGC'.¹⁵ So Walsh's 'Vermeulean CGC' seems to be Vermeule's own personal take on the best constructive interpretation of US law.

Here, it is worth identifying exactly where Vermeule's personal moral convictions influence CGC. Generic-CGC looks like it is a normative ethical theory, but it stops short of being a full-blown normative ethics in two key respects.¹⁶ First, it imposes its duty to promote the common good only on public authorities: it does not extend to individuals *qua* individuals. Second, Generic-CGC's ethical framework is very thin; in a key passage, Vermeule says that the common good is:

[A] kind of framework orientation, not a blueprint or a set of position papers. It is not intended to provide specific answers to questions about the proper level of the minimum

¹²The closest the UK gets to strong judicial review is the 'principle of legality', under which legislation can remove fundamental rights only if it does so clearly: *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131.

¹³Kevin C Walsh, 'Multiple Levels in Common Good Constitutionalism' (Mirror of Justice, 27 May 2002) <<https://mirrorofjustice.blogs.com/mirrorofjustice/2022/05/multiple-levels-in-common-good-constitutionalism.html>> accessed 13 April 2023.

¹⁴Jeffrey A Pojanowski and Kevin C Walsh, 'Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory' (2022) 81 Notre Dame L Rev 403, 406.

¹⁵Or, more accurately, 'US-CGC-c.2022': because the content of US law can, and does, change over time.

¹⁶Indeed, Generic-CGC looks like *consequentialist* ethics: it first defines the *good* and then defines *right* action as that which maximises the good; and, as the good is defined as 'happiness' [14], Generic-CGC looks very much like *utilitarianism*. And, in fact, there is a prominent utilitarian conception of the common good; Vermeule firmly rejects this, although it is unclear what his alternative is (see §4.3).

wage, the circumstances under which abortion should or should not be legal, or whether there should be *de novo* judicial review of administrative action. It is a category mistake, a misconception of the nature of the enterprise, to demand that specific answers to such questions be provided at the analytic level of the definition of the common good ... Rather the enterprise is to, first, specify the major aims or ends of constitutionalism that serve the flourishing of the political community, and then apply those general aims through the lens of prudential judgment to specific circumstances (what we have called 'determination'). To outline the enterprise is to initiate a project that will unfold over time in a community of interpreters who share that framework orientation, even as they disagree, perhaps bitterly, over implementations and details. [35–36]

So, for Vermeule, not only does the common good not dictate specific outcomes, it does not even dictate the legal rules which then dictate those outcomes. Generic-CGC thus leaves much to *determinatio*.

Normative ethics plays a greater role at the second — Jurisdiction-Specific — level of CGC, via its Dworkinian methodology: the law is given by the principles that best fit *and best morally justify* the legal materials (principally the legislation and precedents). The ethics at this second level must, presumably, be more detailed than at the first level. Here, we need a normative ethical theory that is fine-grained enough to enable us to choose between tenable candidates for being the content of a given positive law i.e., which are all consistent with the common good (at level one).

It is here that Vermeule's own moral views start to intrude. He endorses Dworkin's approach but replaces his 'conventionally left-liberal and individualist' morality with Vermeule's own moral commitments [6]; Vermeule describes CGC as 'Dworkinism-plus-deference, just with a better account of [moral] justification than the one Dworkin offers' [69]. Here, Vermeule inherits the well-documented unclarity of Dworkin's methodology, including how the requirements of 'fit' (with the legal materials) and moral 'justification' should be balanced, and he does nothing to dispel them.¹⁷ But there's no doubt that, for Dworkin, justification is the more powerful. So the content of the law can be transformed simply by adopting different moral positions, which is precisely what Vermeule seeks to do. This is a crucial limit on the extent of the power of *determinatio*: its exercise creates new legal materials, and the content of the law must now (at least minimally) 'fit' those materials, but they must be read with a view to maximising how morally justified the resultant law is.¹⁸

Though the requirement of 'fit' may be loose, under Dworkin's (and now Vermeule's) theory, Jurisdiction-Specific CGC must be distinguished from a third level of CGC. Here, we dispense with this requirement of 'fit': we could imagine a new state seeking to exercise its power of *determinatio* for the first time, or we could ask what the laws of a hypothetical CGC-based state would look like. This would depend both on the applicable moral principles and on what results from *determinatio*. The content of the laws of Vermeulitania — a fictional state in which Vermeule wields the power — may be significantly different from the content of the laws of an actual state like the US, even if that content is reached by a process of constructive interpretation that uses Vermeule's moral positions. This third level has the strongest claim to be called 'Vermeulean-CGC' (and I will use this label for it). Vermeule strongly denies that he is operating at this third level:

I will not even attempt to specify desirable first-order policies; to do so would be a category error, a misunderstanding of the role of the common good in legal theory. ... Orienting the

¹⁷For example, John Finnis, 'On Reason and Authority in Law's Empire' (1987) 6 *Law and Philosophy* 357.

¹⁸I will return to these points in §5.2.

relevant policies to the common good is a matter for political authorities, subject to appropriate judicial review; legal theorists as such can say little about the first-order merits.¹⁹

But Vermeule *does* operate at this third level, and it may even be the most important level for him. It is clear, from his other writings, that Vermeule is an integralist: he believes that our positive laws should replicate religious (Catholic) dogma. In one extraordinary piece, Vermeule revealed that he seeks ‘the eventual formation of the Empire of Our Lady of Guadalupe, and ultimately the world government required by natural law’.²⁰ So we should take his ‘official’ denial with a pinch of salt.

Thus there are three different levels on which we may disagree with Vermeule. First, we could reject Generic-CGC, e.g., by rejecting that public authorities have a duty promote the common good or rejecting Vermeule’s particular account of the common good (its structure and/or its content). Second, we could reject Vermeule’s interpretation of US law: by rejecting his Dworkinian method and/or by rejecting his application of that method (including by rejecting Vermeule’s moral views).²¹ Third, one could reject Vermeulitania i.e., reject how Vermeule would ‘determine’ the common good. It is therefore crucial to identify which level(s) his policy claims are operating at.

3. Policy issues

Vermeule begins discussing ‘how constitutional law might change’ under CGC by saying that ‘The [US Supreme] Court’s jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable’ [41]. This suggests that we are on level two (US-CGC); but Vermeule does not confine himself to this level and, as William Baude and Stephen Sachs have rightly noted, ‘Vermeule’s back-and-forth moves across different levels don’t neatly track his own book’s structure, and only rarely are they explicitly marked’.²² We therefore need to do some considerable work to discover at which level(s) Vermeule’s substantive claims are made.

3.1. Abortion, bodily autonomy, and healthcare

The issue where Vermeule is most clearly operating at level two is, perhaps surprisingly, abortion. Noting that, when he wrote CGC, SCOTUS had agree to hear (but not yet heard) *Dobbs*, Vermeule says that he will ‘leave the issue for future work’; but adds that there is ‘a straightforward argument, not on originalist grounds, that due process, equal protection, and other constitutional provisions should be best read in conjunction to grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law’ [199]. This looks like a claim that a lawyer might make: a legal *interpretation*. But when we turn to the reasons that SCOTUS gave for affirming that there is a constitutional right to an abortion, Vermeule clearly departs from level two (US-CGC):

The claim, from the notorious joint opinion in *Planned Parenthood v. Casey*, that each individual may ‘define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’ should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after. [41–42]

¹⁹[136]. The reference here to ‘appropriate judicial review’ is odd, given that Vermeule had already said that (Generic) CGC does not require any judicial review. Perhaps *no* judicial review may count as ‘appropriate’?

²⁰Adrian Vermeule, ‘A Principle of Immigration Priority’ (Mirror of Justice, 20 July 2019) <<https://mirrorofjustice.blogs.com/mirrorofjustice/2019/07/a-principle-of-immigration-priority-.html>> accessed 18 March 2023 (hyperlinks omitted).

²¹For Walsh (n 13), ‘Generic CGC is to be embraced; Vermeulean CGC is to be abjured’.

²²William Baude and Stephen E Sachs, ‘The “Common-Good” Manifesto’ (2023) 136 Harv L Rev 861, 871.

This extraordinary statement does not even purport to be a constructive interpretation of US law. But is it a claim of Generic-CGC or Vermeulean-CGC? If there is an argument that the common good (justice, peace, abundance, health, safety, etc.) entails this statement, it is not obvious what it is (and Vermeule does not help us out). So this looks like level three: Vermeulitania.²³

Similarly, when Vermeule asserts ‘the common good principle that no constitutional right to refuse vaccination exists’ [42] he cites a SCOTUS decision, suggesting that we are on level two. But he then generalises the point: ‘constitutional law will define in broad terms the authority of the state to protect the public’s health and well-being, protecting the weak from pandemics and scourges of many kinds – biological, social, and economic – even when doing so requires overriding the selfish claims of individuals’ [42–43]. This very wide claim is future-directed, and so it is not a legal interpretation. Is this a claim of Generic-CGC or Vermeulean-CGC? Again, if it follows from Vermeule’s abstract conception of the common good, how it does so is far from clear.

Turning to healthcare, we might think that we can ground a right to health in Generic-CGC: ‘health’ is one of Vermeule’s six broad headings, and healthcare for all is surely a paradigmatic common good (if such a thing exists).²⁴ However, a claim that the common good requires a (constitutional or legal) right to basic healthcare is a remarkable omission from CGC. And, elsewhere, Vermeule describes the notion that ‘providing health care for children ... simply *must* be accomplished through the coercive collective agency of the state and its policies’ as an example of the ‘ideological commitments ... that will have to go’.²⁵ This, as Brian Tamanaha points out, accords with other natural law theorists (like Robert P. George) for whom healthcare provision can be left to the private sector.²⁶ If we assume that basic healthcare promotes the common good, as I think we should, then the fact that the US created Medicare and Medicaid in 1965 undermines part of Vermeule’s historical analysis: that US public officials suffered their ‘terrible amnesia’ [1] — i.e., forgot their duty to promote the common good — precisely from the 1960s onwards.

3.2. Free speech and blasphemy

Another wrong turn that US public authorities supposedly took in the 1960s concerns free speech, one of the *social* ‘scourges’ that, for Vermeule, states must have broad authority to protect us from. He tells us that the ‘libertarian’ assumption that ‘government is forbidden to judge the quality and moral worth of public speech’ is another thing that ‘should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after’ [42]. Again, it looks like we are operating at level three (Vermeulean-CGC) here. Vermeule does not tell us, in any detail, what kinds of speech he thinks the government should control. Instead, we find a very general claim and two rather narrow examples of where Vermeule thinks US free speech law has gone awry.

Vermeule describes these examples as ‘a pair of the Court’s most execrable and also revealing decisions’ [164]. In *Alvarez* (2012), SCOTUS invalidated federal legislation that criminalised falsely claiming — whatever the circumstances and without any need to show

²³It is also in tension (at least) with his support for religious freedom (§3.5), a point he seems not to notice.

²⁴My own health is obviously crucial to my flourishing, and how could I possibly flourish without the good health of my fellow citizens (especially those on whom I rely for vital goods like food, water, and shelter)?

²⁵Adrian Vermeule, ‘A Christian Strategy’ (First Things, November 2017) <<https://www.firstthings.com/article/2017/11/a-christian-strategy>> accessed 17 March 2023.

²⁶Brian Z Tamanaha, ‘Beware Illiberal Natural Law’ (2022) Wash U Legal Studies Research Paper No. 22-05-01, 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109402> accessed 10 March 2023.

harm, or an illicit motive — that you had received one of a specified set of public honours.²⁷ For the plurality, making it a criminal offence simply to say something false (even if in a wholly private setting) went too far, and the Act was swiftly amended to require that there be an intention to obtain a ‘tangible benefit’.²⁸ This all seems quite sensible to me; but, for Vermeule, *Alvarez* is one of the ‘most egregiously misguided decisions’ in US legal history [169]. This might seem to be a level one claim (Generic-CGC), as, for Vermeule, only ‘a Court systematically oblivious to the common good – or, more accurately, in the grip of an implausibly libertarian vision of the common good’ could have reached it [170]. But, again, it is not clear why the common good (justice, peace, abundance, health, security, etc.) favours his position over that of SCOTUS; and so we appear to have returned to Vermeulitania.²⁹

But we need not embrace CGC (or Vermeule’s take on the common good) to criticise *Alvarez*.³⁰ And the same is true of Vermeule’s other example of free speech law gone wrong, *Ashcroft* (2002), in which SCOTUS invalidated federal legislation which prohibited the creation of ‘virtual’ child pornography.³¹ For Vermeule, this decision is ‘a grotesque parody of the common good’ [171], which suggests that his problem with it operates at level one (Generic-CGC). But he then hedges his bets by adding that the invalidated legislation ‘fell comfortably within’ the ‘boundaries of rational determination of the right of free expression’ [171], and so enacting this legislation was, for Vermeule, a valid exercise of Congress’ power of *determinatio*. But why was adopting the First Amendment not a valid exercise of the *determinatio* power; and, assuming that it was, then is Congress’ power not constrained by that norm (at the higher, constitutional, level of the system)? Surely *determinatio* involves some path-dependence, at least where the relevant norms form a hierarchy.³²

Vermeule’s very general claim is that we’ve learned ‘how radically imperfect is the marketplace of ideas’ [128]. This is curious phrasing: no-one suggests that the marketplace of ideas is perfect, and what exactly does it mean for it to be *radically* imperfect? Democracy, for example, might be radically imperfect, yet it may nonetheless be the best system of government (out of a bad bunch). However, for Vermeule, this radical imperfection — as demonstrated by *Alvarez* and *Ashcroft* — entails that public authorities should regulate free speech similarly to how they regulate the ‘market for goods’ or even analogously to ‘traffic regulations’ [128]. Here, the weakness of Vermeule’s argument is mitigated — if at all — only by the vagueness of his claim.

Free speech is usually a civil matter; but Vermeule turns to its criminal aspects in his comments that blasphemy laws are part of ‘the classical worldview’, and that ‘every polity proclaims and enforces truths that cannot be questioned, at least at certain times or places

²⁷*United States v Alvarez* 567 US 709 (2012); Stolen Valor Act 2005.

²⁸*Alvarez* (n 27) (Kennedy J, plurality opinion); Stolen Valor Act 2013.

²⁹Vermeule is particularly exercised by the plurality’s argument in *Alvarez* that people can ‘police’ such lies for themselves and do not need the Government to do the policing for them. Requiring such a ‘privatization of the enforcement function’ is, for Vermeule, ‘akin’ to the ‘constitutional prohibition on unreasonable searches and seizures’ being enforced by ‘vigilante efforts’ [170]. Whatever your view on the merits of *Alvarez*, this says much about his take on the common good. It seems to allow privatizing basic healthcare provision, but does not allow us to privatize how we tackle those who lie about having been awarded medals.

³⁰We could argue, as many have, that the protection granted by the US First Amendment is properly limited to political speech and/or only forbids prior restraint, and this is how SCOTUS has gone awry.

³¹*Ashcroft v Free Speech Coalition* 535 US 234 (2002). As with *Alvarez*, one could also criticise *Ashcroft* without necessarily embracing CGC, including on the basis that pornography is not ‘speech’.

³²Vermeule broadens this to pornography more generally: the common good requires ‘political authorities’ to ‘protect’ the ‘morals of the public from those who would degrade them’ — a level one claim — but then says the ‘prohibition of pornography ... should be left to the reasonable determination of public authorities’ [171]. But what happened to level two: where is the analysis, and constructive interpretation, of US ‘obscenity’ law?

or in certain ways' [172–73]. This looks like a level one claim (Generic-CGC). Vermeule also quotes a 'student note' claiming that blasphemy laws (and convictions under them) were upheld in the US until after World War II [172], which initially seems to be part of an argument on level two (US-CGC). But this time, for reasons unexplained, Vermeule does not advocate a return to the traditional position: his 'point ... is not to urge the reinstatement of blasphemy laws in their classical form' [173]. Given that, classically, people were frequently burned alive for heresy, this seems like a wise move.³³

3.3. Capital punishment

Whether the death penalty promotes the common good seems to be a key issue, but Vermeule says nothing about it in CGC. He previously supported the death penalty, on utilitarian grounds.³⁴ And Thomas Aquinas — whose theory of law Vermeule seeks to revive — was an enthusiastic supporter of the death penalty. But we might wonder whether Vermeule would now follow modern Catholic doctrine on this, following his conversion to Catholicism in the mid-2010s. The Catholic Church changed its mind, since Aquinas' time, over the morally permissibility of the death penalty: from the Second Vatican Council (in the 1960s, just as US public authorities were — according to Vermeule — forgetting their duty to promote the public good), it has firmly opposed the death penalty, and has campaigned for its abolition.³⁵ We could speculate that this omission is strategic; in any event, the absence from CGC of any discussion of the death penalty is glaring.

Such a change in stance on what is (apparently timelessly) morally right or wrong highlights a serious epistemic issue with CGC: even if we accept the metaphysical claim that there are universal and unchanging principles of the common good, we still need a reliable method of coming to know what they are (and no trace of such a method is to be found in CGC).³⁶

3.4. Same-sex marriage

The connection between CGC and religious doctrine is perhaps also evident in Vermeule's treatment of same-sex marriage. Casting himself as the defender of 'the settled *mores* of millennia' [120] and the 'forces of tradition, authority, and even natural biology' [121] — against those who seek to 'break with the past' [123] — Vermeule takes the fact that 'marriage has for millennia been defined as the union of male and female for the purpose of procreation' as 'powerful evidence of the natural law [131]. Officials must, therefore, act 'within reasonable bounds' that are set by 'the essence of the natural institution [of marriage]'; and, as permitting same-sex marriage 'warped the core nature of the institution', this is 'unreasonable and arbitrary, from the standpoint of CGC [132]. Here, Vermeule is clearly operating at level one (Generic-CGC).

But arguments from tradition, like this, are fallacious. The Catholic Church's u-turn on capital punishment is a prime example: states have for millennia put people to death, so

³³Richard Webster, *A Brief History of Blasphemy* (Orwell Press 1990).

³⁴Cass R Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs' (2005) 58 *Stanford L Rev* 703.

³⁵Howard Bromberg, 'Pope John Paul II, Vatican II, and Capital Punishment' (2007) 6 *Ave Maria L Rev* 109.

³⁶The Catholic Church now justifies its stance on the death penalty by appeal to the very individual atomism — 'the inviolability and dignity of the person' — that Vermeule decries: Pope Francis, *Address to Participants in the Meeting organized by the Pontifical Council for the Promotion of the New Evangelization*, 11 October 2017 <<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html>> accessed 4 March 2023.

why is this not ‘powerful evidence’ that such executions promote the common good? In China, for over 900 years (until 1957), they practiced ‘binding feet’: crushing the foot bones of girls (from as young as four), leaving them deformed and in great pain, because small feet were considered attractive by men.³⁷ Why is this ‘tradition’ not ‘powerful evidence’ that binding girls’ feet promotes the common good? And, if we can change our minds about the morality of the death penalty, binding feet, criminalising blasphemy, and many other issues, why are we bound by a traditional conception of marriage? Many, including myself, think that allowing same-sex couples to formalise their loving commitment to each other, through marriage, actually promotes the common good (if there exists such a thing). If Vermeule has a good argument against this, it is not to be found in this book.

3.5. Religion

The religious underpinnings of Vermeule’s book are perhaps most evident when he discusses the *Little Sisters of the Poor* litigation. This concerned the validity of rules requiring employers (including the Sisters) ‘to either fund abortifacient contraceptives’ for their employees or to file an ‘opt-out’ form with the government [119–20]. The Sisters refused to sign the opt-out form because it would lead to contraceptives being supplied to their employees by a third-party, and this would amount to ‘cooperating with evil’.³⁸ Vermeule criticises ‘the Obama administration’s relentless attempt to force’ the Sisters to act contrary to their religious beliefs, and asserts (without evidence) that the US Government’s ‘objective was ceremonial’: not to ensure that the employees have access to such contraceptives but rather ‘to force the nuns to *acknowledge publicly* the progressive state’s just authority even in matters of religion’ [120]. In a book that is a paean to big government, it is revealing to see where Vermeule thinks that the administrative state should *not* tread.

It is difficult to discern which level Vermeule is operating at here. He does not even mention the common good, but we may infer that his view is that these rules about contraceptives are so contrary to the common good that the public authority had no power to make them (Generic-CGC). Otherwise, they were made through the power of *determinatio* and the right response is deference. However, there is no hint of any argument for that claim, and Vermeule does not explain why he thinks that these rules are contrary to the common good. So it is possible that we are operating on level three here (Vermeulean-CGC). The prospect that a public authority might determine that some (or perhaps even all) organised religion actually hinders the common good — and so must be restricted, or even banned — is not one that receives any consideration in the book.

Brian Tamanaha has charted the Catholic integralist motives of Vermeule’s work, as well as his strategy to conceal them.³⁹ To give a further example, Vermeule has proposed that US immigration policy ‘give lexical priority to confirmed Catholics, all of whom will jump immediately to the head of the queue’; noted that ‘some will convert in order to gain admission; this is a feature, not a bug’; and accused anyone who opposes this of ‘racism’ (despite his

³⁷Wang Ping, *Aching for Beauty: Footbinding in China* (University of Minnesota Press 2000).

³⁸Thomas Reese, ‘Little Sisters of the Poor return to court to fight birth control mandate’ (Signs of the Times 23 January 2020) <<https://religionnews.com/2020/01/23/little-sisters-of-the-poor-return-to-court-to-fight-birth-control-mandate/>> accessed 14 March 2023.

³⁹Tamanaha (n 26) 6–12; Vermeule, *A Christian Strategy* (n 25). Vermeule has criticised reviewers for reading his book in the light of his other recent writings, and this has had some success: Barnett (n 9) 34; Eric J Segall, ‘Ten Observations About Adrian Vermeule’s Book “Common Good Constitutionalism”’ (Dorf on Law, 2 March 2022) <<http://www.dorfonlaw.org/2022/03/ten-observations-about-adrian-vermeules.html>> accessed 5 April 2023. But reading an author’s work in context is not just entirely standard, it is imperative to do so when that author has explicitly stated their intentions to conceal the motivations behind their work.

claims that ‘the Irish will be almost totally excluded’ and that ‘immigration from Canada will rightly become a rare and difficult event’.⁴⁰ This seems to be at level three (Vermeulitania); at least, one can only hope so.

3.6. Policy issues: conclusion

What Vermeule says — and what he does not say — about these key policy issues leaves the reader somewhat confused about the status of his claims. It is often unclear when his claims concern: (1) the content of the principles of justice (Generic-CGC); (2) the content of US law (Jurisdiction-Specific CGC); or (3) what Vermeule thinks the law should be (Vermeulean-CGC). Hopefully, this clarity challenge will be met in future work.

4. The common good: formal features

The relationship between the common good (level one) and the power of *determinatio* (levels two and three) does appear relatively clear. As the principles of the common good constrain the exercise of the power of *determinatio*, those principles are not themselves subject to *determinatio*.⁴¹ Therefore, Vermeule needs to provide an account of the common good that operates exclusively at level one. We’ve seen that his account of the *substantive content* of the common good is not clear enough. But Vermeule also owes us an account of the *formal* or *structural* features of the common good, such as *whose* good is to be promoted, and *when*, as well as what is it for a good to be *common*.

4.1. The common good of whom?

Let’s grant — for now (but see §4.3) — Vermeule’s claim that there exists such a thing as a unitary, non-aggregative, common good which is proper only to a political community (or ‘polity’). Who is part of that polity? Vermeule doesn’t tell us, and some important and controversial issues may turn on the answer. For example, if a polity includes *foetuses* then it seems that a duty to promote the common good requires that its officials ban abortions. We saw, in §3.1, that abortion rights are firmly within Vermeule’s sights; although, perhaps strategically, he does not explicitly claim that foetuses are members of the polity. We may also wonder whether the *dead* are part of the polity. This may seem a strange question until we recognise the religious underpinnings of CGC (§3.5). Vermeule facially limits CGC to promoting the ‘natural or temporal happiness’ of the polity; but these are ‘secondary ends’, with the primary or ‘final’ end being their ‘supernatural happiness’ [29]. The familiar refrain that ‘you’ll get your reward in heaven’ (based on Matthew 5:12) could justify public authorities in taking almost any action, if it is deemed to benefit our souls in an afterlife.

Even confining the polity to the born and living, there remain some key unanswered questions. One is whether the polity stops at the borders. In some places, Vermeule suggests that it does not: he talks of promoting the common good ‘of law’s subjects as members of a flourishing political community, and ultimately as members of the community of peoples and nations’ [1] and of ‘the common good of the whole polity and that of mankind’ [3]. But if US public officials are duty-bound to promote the common good of all human beings, this would require very radical policy changes: for example, to reduce the extensive global

⁴⁰Vermeule, *A Principle of Immigration Priority* (n 20).

⁴¹I’m grateful to an anonymous reviewer for pressing me to clarify my views on this point.

inequalities in wealth and resources. If this is an implication of CGC then I would expect it to play a central role in the book; but it is largely ignored.⁴²

A global — or, at least, international — duty to promote the common good would also sit uneasily with Vermeule’s historical analysis.⁴³ For Vermeule, during (at least) most of the 1800s US public law instantiated the kind of constitutional order that he now exhorts us to bring back. However, Vermeule gives us absolutely no reason to believe that nineteenth-century US public officials were promoting the common good *of all mankind*, and it seems highly implausible that they were. But if public duties to promote the common good apply polity-by-polity, why is that the case? Where is the argument for the claim that the principles of justice stop at the borders? There is no trace of any such argument in CGC, and it is difficult to see what that argument could possibly be. How could, say, an action of a public authority that slightly promotes the common good of a polity but which causes widespread and massive suffering to people who are not members of that polity possibly even be morally *permissible*, never mind being morally required?⁴⁴

Vermeule’s historical claims cast doubt even on whether every person *within* a territory is part of the polity. The US, from before the founding until the Civil War, was a slave society (as were the ancient Greek and Roman polities that Vermeule reveres) and women had a deeply subordinated legal status, as did black and Native American people. It was only with the Civil Rights Act of 1964 — at the time when, for Vermeule, US officials forgot their duty to promote the common good — that discrimination on grounds of race, sex, etc. were prohibited at the US Federal level. I would hope that Vermeule is not limiting the people whose common good must be promoted to white US men; but, at the very least, he owes us an explanation of who is included and excluded (and why).

4.2. *Their common good when?*

Another unanswered question is: *by reference to which time* is the common good to be promoted? We’ve already encountered this question in an extreme form: when we asked whether helping the people to have a rewarding *afterlife* counts as promoting the common good. But we can also ask this question intra-life. Many policy proposals require incurring short- or medium-term costs in order to achieve longer-term benefits (for example, undertaking major infrastructure projects). What balance is to be struck between, for example, a government: (a) providing their people with immediate help with crippling energy costs; (b) investing now to improve the energy supply (and/or energy efficiency) in the medium-term; and (c) adopting policies to tackle the long-term costs of climate change? Are questions like this simply to be answered by an exercise of the power of *determinatio*, or does the common good place some constraints on the tenable answers (and, if so, what constraints)?

Such questions may also be asked at the level of macro-institutional design. Vermeule has sparked controversy with his claims that the common good can be promoted through various systems of government and there is no entailment from the common good to *democracy* [47–48]. But what if a ruler — let’s call him ‘Donald’ — believes that: (a) he will shortly be voted out of office; and (b) his continuing to rule would best promote the common good? Political

⁴²There are glimpses of it, perhaps, in Vermeule’s claim that ‘Libertarian conceptions of property rights and economic rights will also have to go, insofar as they bar the state from enforcing duties of community and solidarity in the use and distribution of resources’ [42]. But this level one (Generic-CGC) claim comes across as a throwaway one, and it has a purely intra-polity reading.

⁴³As Vermeule describes ‘the *content* of the common good’ as ‘the rich theory worked out over time by the *ius commune*’ [69], it is possible that there is yet *another* level of CGC — an ‘International-Legal’ level — where the *ius commune* is seen as the product of an exercise of *determinatio* by the international community.

⁴⁴There is no mention, in CGC, of the literature on nationalist v. cosmopolitan approaches to political theory.

leaders often believe that they are the best person to lead; but they are not always correct (and, even when they are, they don't always *remain* the best person, indefinitely). But even if Donald is actually right about this, does this justify him in subverting — or even ending — democracy? Answering this would require balancing the common good of the people *now* (and for an indeterminate period of years) against the common good of the people in the period *after* Donald is eventually replaced by a new (and presumably unelected) leader. But how is this kind of balancing to be done? Vermeule says nothing about this, and nor does he mention the huge literature on inter-generational justice.

4.3. What is the **common** good?

Even if we can answer those questions, we still need to know what the common good actually is. Brian Leiter, in his review of CGC, has raised serious doubts about whether the natural law, or the principles of the common good, really exist (which I won't rehearse here).⁴⁵ Instead, I will examine Vermeule's claim that the common good is 'unitary and indivisible', which he elaborates as follows: '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' [28]. Vermeule insists that the common good 'is not an aggregation of individual goods, as in utilitarianism' [13] and it is not 'the greatest good of the greatest number' [68]. Ok, but what *is* it? Rather than giving us an analytical definition or an account, Vermeule simply draws an analogy:

Consider the aim of a football team for victory, a unitary aim for all that requires the cooperation of all and that is not diminished by being shared. The victory of the team as such cannot be reduced to the individual success of the players, even summed across all the players. [28]

Vermeule does not explain *how* this is analogous, but I can think of two possible points of analogy. First, that there is something of value which can only be enjoyed by a group: as the game can be won only by a team, the common good can be achieved only by a polity (or maybe by 'mankind'). But that there is something called 'winning a football game', and this can only be done by a team, is true by stipulation: the rules of football *constitute* what counts as a winning a game. What plays this role for the common good? Vermeule does not tell us, and it is not obvious that anything does.

The other point is that this something of value (victory, the common good) cannot be reduced to the relevant individual goods. But it is not obvious to me that there is anything left over once we've subtracted the goods of the relevant individuals, either in the football case or in the case of a polity. Vermeule's football analogy is no substitute for an argument; an account of the metaphysics of his notion of the common good, and its relation to individual goods, is sorely needed. This specific question is addressed in the philosophical literature; but, again, Vermeule makes no mention of this. For example, Mark C. Murphy distinguishes three kinds of formal conception of the common good — 'aggregative', 'instrumentalist', and 'distinctive good' — and argues that aggregative ones are superior, because the others 'gain their plausibility only by way of the aggregative conception'.⁴⁶ Vermeule has no response to Murphy's claim that we have no reason to promote any distinctive good of a community that is not also a good for any of the individual members of that community.⁴⁷ Vermeule also

⁴⁵Brian Leiter, 'Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism"' (2023) 90 U Chicago L Rev 1685, 1699–704.

⁴⁶Mark C Murphy, 'The Common Good' (2005) 59 Review of Metaphysics 133, 136–37.

⁴⁷ibid 153–57. This lack of 'normative force' also affects the 'parasitic' *instrumental* conceptions: ibid 139–43.

never explains *why* he thinks that aggregative conceptions of the common good are problematic. He is critical of ‘selfish’ exercises of individual rights [43]. But, as Murphy notes, it ‘should go without saying that the individualism of the aggregative conception is not egoism ... a conception of the common good as mere means to one’s own private good ... is absurd, vicious’.⁴⁸ Murphy’s arguments here strike me as being persuasive, but the more fundamental problem is: why has Vermeule not even engaged with such arguments?

Facially, Vermeule’s common good is probably closest to a ‘distinctive good’ conception, which is ‘literally the good of the community as a whole’.⁴⁹ But what does this mean, exactly? It seems plausible that an official action which maximally promotes the good of every relevant individual must also maximally promote Vermeule’s (supposed) unitary common good of those individuals. So practical differences between CGC and aggregative accounts of the common good will emerge only if an action does *not* promote the good of all individuals to the same extent: only if there is a *conflict* between individual goods. But how does CGC propose to address such conflicts: what would a common-good response to (say) the infamous ‘trolley problem’ look like? Would it promote the common good to pull the lever, killing the one person tied to the sidetrack, in order to save the five who are going to die if we don’t (or for the law not to impose liability on anyone who does so)? Is this just to be left to be decided, by each polity, through exercising the power of *determinatio*?⁵⁰

4.4. *The common good: who decides?*

One challenge for CGC is, as we’ve seen, that it is not clear that the claimed principles of justice (or the common good) exist or, if they do, what their content is. But even if the metaphysics were clear, we would still face the epistemic challenge raised in §3.3: how do the public authorities come to know what they are? Vermeule explicitly acknowledges this, and he appears to be comfortable that natural law theorists can (and do) disagree on the content at level one.⁵¹ But this, together with how thin the common good seems to be (and thus how loose the constraints that it imposes on the power of *determinatio* are), means that the powers of public authorities under CGC are immense. This is not, of course, objectionable in itself: it is no more problematic than the approach of other moral-political theories which do not require that public power be exercised for the common good. But those theories typically mitigate the dangers inherent in such concentrations of power through placing certain requirements on governance structures, such as a robust separation of powers, extensive sets of checks and balances, and (importantly) democratic legitimacy and accountability. However, as we saw in §2.1, CGC does not require democracy, or any form of judicial review, and the only ‘institutional arrangements’ that it rules out are ‘mostly science-fictional and horrific’ [10–11].

Vermeule does make several claims about who should — and who should not — exercise the power to decide what the common good requires (level one) and the power of *determinatio* (level two). But, again, he often fails to make it explicit which of the three levels of CGC his claims operate at. When he claims that ‘the American ... constitutional order has come to feature ... broad delegation from legislatures to the executive’ he is clearly operating at level two (US-CGC); and, when he claims that ‘our executive-centered order can be ordered

⁴⁸ibid 149 (fn 22).

⁴⁹ibid 136. Murphy ascribes this type of conception, although somewhat tentatively, to Aquinas (ibid 148).

⁵⁰If so, does the duty to promote the common good impose any constraints on the exercise of that power (and, if so, what are those constraints)? And, connecting this with the question of territory/borders, would the answer depend whether some or all of the five — and/or the one — are not members of that polity?!

⁵¹For example, Conor Casey and Adrian Vermeule, ‘Myths of Common Good Constitutionalism’ (2022) 45 Harvard Journal of Law & Public Policy 103, 143–44.

to the common good', he clearly shifts to level one (Generic-CGC) i.e., a claim that this is a permissible *determinatio* of the constitution [11–12]. This is more careful than his initial claim that CGC favours 'a powerful presidency ruling over a powerful bureaucracy', which looked like a level one claim but is perhaps now best seen as operating at level three (Vermeulean-CGC), as is his claim that 'there are forms of constitutional ordering—centered on robust executive government—that are likely to be particularly conducive to' the common good'.⁵² Vermeule returns to level one when he claims that CGC does not require democracy and does not rule out monarchy, though he operates at level three when he speaks favourably of 'democracy without voting' and mixed government with 'monarchical and aristocratic elements' (quoting Aquinas' claim that 'kingship is the best form of government') [48], as well certain types of 'dictatorship' [157–58].⁵³

A question that Vermeule doesn't address in CGC is: how does one get to wield public power? Public authorities have the power of determination *within or under* the constitution, but who decides who the public authorities are: who gets to exercise the power of determination of the constitution? Who gets to be the king, or the dictator, or an aristocrat? We might question whether the 'qualities' that would enable an individual to obtain plenary powers over a polity necessarily align with the qualities that might lead a person to exercise those powers to promote the common good.

Vermeule seems largely untroubled by the risk of abuse of power here. He professes to take it seriously: abuse of power is 'an evil' about which he 'will have a great deal to say' in CGC [13].⁵⁴ But he later calls it, dismissively, a 'stock concern'; and his response to it mainly argues against those 'libertarians' who seek to minimise the risk of abuse through 'constitutional design' [49–51]. Vermeule's 'simplest rejoinder' to them is that 'robust governance for the common good prevents or cures abuses as well as risking their occurrence' [51]. It is difficult to know what to make of this: is he really saying that we shouldn't worry about the risk of abuse of power because the powerful governments that he favours will actually promote the common good, so there will be no abuse? Joseph Baldacchino reads him this way: 'Vermeule counts on government officials, notwithstanding the fragility of fallen human nature, always to do the right thing for the simple reason that it is the right thing'.⁵⁵ The principle of charity seems to require that we refrain from ascribing to Vermeule such a breathtakingly naive claim, although it is not at all clear how else we could read him.

The closing words of this 'rejoinder' are connected to one of Vermeule's two objections against these libertarians: that 'liberal theory tends to focus myopically on the risks of abuse by legislatures and (especially) executive actors' while ignoring the risk of abuse by (amongst others) 'corporations' and 'the judiciary' [50–51]. Here, Vermeule commits the fallacy of *tu quoque* (appeal to hypocrisy; or, as we call it in Scotland, 'whitbootery'). If both CGC and liberal theory are open to abuse then that counts against *both* of them, and each needs to mitigate the risk of such abuse. Even if Vermeule is right that liberal theory

⁵²Vermeule, *Beyond Originalism* (n 1); Casey and Vermeule, *Myths* (n 51) 135. Their arguments for 'robust executive government' — that the executive (i) is 'better suited to promoting the integration of substantive and valuable moral precepts into legal ordinances' and (ii) can 'better infuse the technocratic work of the administrative state with an explicit political vision oriented to the common good' (ibid 135–36)— themselves stand in need of substantive argument, and they sail perilously close to begging the question here.

⁵³Vermeule previously claimed that 'the United States is highly unlikely to lapse into dictatorship' and that 'tyrannophobia' is 'a historical relic that interferes with beneficial institutional change': Eric A Posner and Adrian Vermeule, 'Tyrannophobia' (2009) University of Chicago Public Law & Legal Theory Working Paper No 276, 2 <https://chicagounbound.uchicago.edu/public_law_and_legal_theory/364/> accessed 2 April 2023.

⁵⁴Vermeule did not do so when he first aired common good constitutionalism: '[CGC's] main aim is certainly not ... to minimize the abuse of power (an incoherent goal in any event)' Vermeule, *Beyond Originalism* (n 1).

⁵⁵Joseph Baldacchino, 'Common Good Constitutionalism: True and False Versions' (The Brownson Record, 10 May 2022) <<https://brownsonrecord.com/?p=977>> accessed 20 August 2022.

has failed on this, that doesn't get CGC off the hook. Vermeule's other objection is so flawed that it is best to let him speak in his own words:

Without agreement on the good, it is impossible even to find agreement on the bad either ... The better view ... is that the bad is privative and thus defined by the good. Hence it is not possible to agree on an account of bads, of 'abuses', while bracketing the question of what counts as the good and legitimate ends of government. ... [T]here can be no coherent talk of 'abuse of power' without specifying an account of such ends. [49]

Vermeule gives no argument for his claim that this is the 'better view', and it is patently false: we can agree that, say, systematically torturing babies for fun is bad, despite deep and persistent disagreement on what good government is. But it gets worse. CGC hardly counts as 'specifying' the common good; it has anything but garnered 'agreement'; and, even if Vermeule were right that — for talk of abuse of power to be 'coherent' — we must specify what the common good is, it is unclear how such a specification mitigates the risk that the power of *determinatio* will be abused.

Vermeule also disfavours the judges deciding for themselves what the common good requires. He claims that, just because all public officials are duty-bound to promote the common good, 'it does not follow that each official or institution in the system, taken separately, must make unfettered judgments about the common good' [43]. This is because 'the political morality of the common good itself includes role morality and the division of functions' [43]. These seem to be level one (Generic-CGC) claims, although it is unclear why a monarchy or dictatorship — even in a very small polity (such as a tribe) — would necessarily involve a division of functions.

Vermeule then moves, fairly clearly, to level two (US-CGC) when he adds that 'the best interpretation of our [i.e., US] constitutional practices ... is that judges do and should broadly defer to political authorities' [43]. This is a claim about the content of US law. But Vermeule then sets out three grounds for rebutting the presumption of deference: where '(1) a particular body acts outside its sphere of legal competence, or (2) it pursues aims that have no imaginable public purpose, or (3) it acts in an unreasoned manner, arbitrarily and capriciously' [46]. This is not a level one claim — because 'the common good does not, by itself, entail any ... judicial review ... scheme at all' [10] — and there is no hint of this being an interpretation of the law of any specific jurisdiction. Is this then, by a process of elimination, a level three claim (Vermeulean-CGC)? Similar considerations apply to Vermeule's take on the proper role of a judge, which he summarises in this key passage:

[J]udges are not to directly decide for themselves, in an all-things-considered way, what the common good requires; that is for the public authority in the first instance. The structure of the judicial inquiry is different. It is primarily to ask what the public authority has done by ascertaining what the authority has said; and secondarily to ask whether the court faces the nonstandard case in which the authority's rational ordering for the common good has been imperfectly captured by what the authority said, read in light of larger background principles. [83]

At which level is this claim made? It seems to be part of Vermeule's theory, rather than a legal interpretation (level two), but it is unclear how this could be entailed by the common good (level one). So again, this looks like a claim at level three: a claim establishing the role of judges in Vermeulania. And the same appears to be true of Vermeule's endorsement of Dworkin's interpretative methodology as a crucial part — perhaps *the* crucial part — of the role of the judge in CGC.

5. Judges, natural law theory, and legal interpretation

All this raises some important questions about CGC that Vermeule does not adequately answer. One is: what happens when a public authority fails to discharge its (supposed) duty to promote the common good? We saw, in §2.1, that this duty requires public authorities to adopt *laws* that aim to promote the common good; and we also saw, in §1, that Vermeule presents CGC as a revival of Thomist natural law theory. Leaving aside whether there is any need for another (and avowedly unoriginal) revival of natural law theory — as Garrett Epps has quipped, ‘This movie has had more remakes than *A Star Is Born*’ — we can ask where Vermeule stands on the key issues.⁵⁶

5.1. Are laws necessarily morally good?

The debates between legal positivists and natural law theorists tend to focus on whether laws are *intrinsically* morally good; and, here, natural law theory divides into ‘strong’ and ‘weak’ versions. Under the strong version, moral merit is *necessary* for law: a norm is a legal norm only if it meets some moral test. But most natural law theorists endorse a weak version, under which moral merit is a *characteristic* feature of laws. Thus, for weak natural law theorists, an unjust law is still a law, but it is not a law *in the fullest (or focal)* sense, typically meaning that we have no moral obligation to comply with it. Legal positivists claim that if a law has moral merit, it has it only *extrinsically*.

Does Vermeule think that an unjust putative law is a law? On this battleground question, Vermeule is all at sea: at various points in the book, he seems to answer ‘yes’, ‘no’, and ‘it doesn’t really matter’.⁵⁷ Some passages might suggest that Vermeule endorses *strong* natural law theory. He claims that ‘intrinsic evils ... place deontological side constraints on all public and private action’ [9] and adds that ‘no government may command them’ [127]. Ok, but — alas — governments sometimes do command intrinsic evils, and our question is: do they nonetheless make *law* when they so command? Similar uncertainties arise with Vermeule’s claim that ‘to act outside or against inherent norms of good rule is to act tyrannically, forfeiting the right to rule’ [37]. Ok, but what does this imply for law? And, for Vermeule, if a public authority — in a purported exercise of its power of *determinatio* — fails to pursue a tenable vision of the common good then this ‘puts the act of the public authority outside of law’ and it ‘thus forfeits its claim to be engaged in determination of the natural law’ [46].⁵⁸ Vermeule’s language here is frustratingly opaque: what does it mean for an authority to ‘forfeit its claim to be implementing law’ or for an official act to be ‘outside of law’?

Readers who consider that the above quotations establish that Vermeule endorses a version of *strong* natural law theory may then be surprised by his claim that: ‘As Aquinas observed, a law that is out of step with natural justice (procedural or substantive) does not

⁵⁶Epps (n 2). Most notably, it was revived in 1980 by John Finnis in his *Natural Law and Natural Rights*. There are key differences between CGC and Finnis’ natural law theory: for example, Finnis provides a much more detailed account of the common good than Vermeule does. But, remarkably, Vermeule mentions Finnis only once in CGC [46], and there is no mention of the groundbreaking work on natural law theory by Robert Alexy or Michael Moore, nor any of the recent interesting work by (among others) Mark C. Murphy and Jonathan Crowe, nor even any mention of Mark Greenberg’s influential ‘Moral Impact Theory of Law’. Vermeule’s complete lack of engagement with this literature is a major flaw in his scholarship.

⁵⁷Baude and Sachs (n 22) 897 also find that Vermeule’s ‘position on these points is hard to nail down’.

⁵⁸This echoes the ‘Radbruch formula’: ‘Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not even merely ‘flawed law’—rather, it lacks completely the very nature of law’: Gustav Radbruch, ‘Statutory Lawlessness and Supra-statutory Law’ (2006) 26 OJLS 1, 7 (Bonnie Litschewski Paulson and Stanley L Paulson, trs).

simply become no-law, as though it had never been created; rather, it results in a perverted caricature of law' [120–21]. This strongly suggests that Vermeule instead endorses the (far more popular) *weak* natural law theory. But then, in a piece co-authored with Conor Casey, Vermeule goes even further:

[T]he 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 that citizens are morally entitled to disobey them or that judges must have authority to invalidate them ... Citizens may still be obliged to follow deficient commands if not doing so would cause greater harm to the common good.⁵⁹

Here, Vermeule echoes Finnis' well-known claim that we may be morally obligated to comply even with unjust laws (Casey and Vermeule go even further than Finnis by adding the word 'deeply').⁶⁰ This is about as far away as one can get from the strong natural law claim that Vermeule seemed to endorse — that unjust 'laws' are not laws — while (tenably) claiming to be a natural law theorist.

The confusion is deepened by Vermeule's attempts to focus our attention away from this question. He claims that the 'classical tradition does not, at least not primarily, see the point of natural law as overriding the positive civil law' [19]. But which is it: 'not', or 'not primarily'? The latter seems to win out in Vermeule's claim that 'Contrary to a pervasive modern assumption, the main point of invoking the *ius naturale* was not to "strike down" statutes contrary to the natural law. Indeed, such an approach was extremely rare' [57].⁶¹ If imposing a moral test on laws is not the 'main point' of natural law, may we safely infer that it is *one of* its points? And, as 'striking down' of statutes did happen (even if it was 'extremely rare'), does this mean that it was permissible?⁶² Vermeule also claims that 'the question whether [natural law] in some sense "trumps" [positive law] in cases of irreconcilable conflict ... was not central' to the 'classic lawyer' [44]. Again, Vermeule's text is frustratingly opaque: why does he use the phrase 'in some sense' here? He evidently thinks that this question is fairly unimportant, but he should nonetheless express a clear view on it.

5.2. Constructive interpretation

If striking down immoral or capricious 'laws' is not central to CGC, what is? Although, again, Vermeule's language is tentative, it seems clear that one CGC's main functions is interpretative: the classical tradition 'mainly draws upon the natural law ... to construe the civil law' [19]. CGC has 'roles' that are 'much more central in actual practice, such as supplying interpretive principles and default rules for construing statutes'.⁶³ So laws — adopted by exercising the power of *determinatio* — should be interpreted in a way that promotes the common good. Here, as we saw in §2.2, Vermeule adopts Dworkin's method of constructive interpretation, but he replaces Dworkin's 'conventionally left-liberal and individualist' morality with his own moral commitments [6].⁶⁴

⁵⁹Casey and Vermeule, *Myths* (n 50) 122–23.

⁶⁰John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 361–62.

⁶¹For doubts about this, see Benjamin Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (OUP 2016). I'm grateful to Paolo Sandro for this point.

⁶²Vermeule also says, cryptically, that in 'the Institutes of Gaius it was said that "considerations of civil law can destroy civil but not natural rights." But natural right and natural law had many other roles ... much more central in actual practice, such as supplying interpretive principles and default rules for construing statutes' [44]. Why does Vermeule tell us what Gaius said without telling us whether or not he endorses it?

⁶³[44]. The other roles mentioned are 'supplying principles of just procedure, and suggesting remedies' [44].

⁶⁴This exposes a serious weakness in Dworkin's method: by making legal content turn on what best morally justifies the legal materials, it re-opens the very moral questions that, for legal positivists, our law-making processes are designed

Approaches that require laws to be interpreted in a way that advances particular principles or goals are quite familiar, and the crucial question with all such approaches is: how far can we go? That is, to what extent does it require us to interpret laws in ways that are in tension with (or depart from) what the lawmaker meant by them? It is common to resolve ‘ambiguities’ in legal content using morality (that of the judge, or that of wider society).⁶⁵ And many jurisdictions require under-determinacies in their laws to be resolved in a way that makes those laws constitutionally valid.⁶⁶

However, some interpretative approaches go beyond this and require a *strained* interpretation (to a greater or lesser degree). For example, the *Marleasing* principle of EU law requires national courts to ‘interpret’ national legislation ‘as far as possible, in the light of the wording and the purpose’ of any relevant EU Directive to bring about the ‘result pursued by’ the Directive; and this is not limited to resolving ambiguities: ‘it is proper to strain’ the national legislation even if doing so ‘departs boldly from the ordinary meaning’.⁶⁷ The similarly-worded ‘interpretative’ obligation under the UK’s Human Rights Act is perhaps even bolder: it is ‘of an unusual and far-reaching character’ in that courts ‘may depart from the unambiguous meaning the legislation would otherwise bear’.⁶⁸ Taking the UK’s ratification of the European Convention on Human Rights as a *determinatio* of the common good, we might conclude that the main thrust of CGC is already practiced in UK law.

In this light, applying Dworkin’s method of constructive interpretation — that laws must be read to be optimally morally justified, subject to fitting the language used — does not seem particularly objectionable (or particularly new). What is new is that the moral values which laws should be interpreted to promote are Vermeule’s, not Dworkin’s. But this is no part of CGC itself: the generic common good is very thin (see §2.2) and requires *determinatio* in each jurisdiction. If we view, say, the US Bill of Rights as an important part of its *determinatio* of the common good, why is the jurisprudence of the US courts not a bona fide attempt at a constructive interpretation of it? Vermeule’s main issue seems to with the morality that should be used to interpret US law, and perhaps he should have written – or he should now write – a book on normative ethics.

5.3. Textualism and equity

Vermeule claims that his adoption of Dworkin’s method is consistent with his earlier work [207]. Vermeule was (in)famous for advocating an extreme version of textualism under which legislative words must be read in isolation from all context — including, remarkably, the rest of that statute — and applied as written, regardless of the consequences.⁶⁹ In CGC,

reach policy compromises on. The judges, in at least some of the decisions Vermeule reviles, were *trying to promote* morality (or the common good); they just had different moral views.

⁶⁵The ‘rule of lenity’, under which ambiguities in penal laws should be resolved in the defendant’s favour, is an example: see Andrew Ashworth, ‘Interpreting criminal statutes: a crisis of legality?’ (1991) LQR 419, 431.

⁶⁶For jurisdictions adopting this approach, see Matthias Klatt (ed), *Constitutionally Conforming Interpretation – Comparative Perspectives Volume 1: National Reports* (Hart Publishing 2023).

⁶⁷Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8; *Cutter v Eagle Star Insurance Co Ltd* [1998] 1 WLR 1647, 1656 (Lord Clyde). The extent of the straining that is permissible is not, however, unlimited: Lord Clyde added that ‘even in this context the exercise must still be one of construction and it should not exceed the limits of what is reasonable’ (ibid).

⁶⁸Human Rights Act 1998, s 3(1): ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 (Lord Nicholls).

⁶⁹Adrian Vermeule, *Judging Under Uncertainty* (Harvard University Press 2006). For a recent defence of a ‘formalistic textualism’, although one that at least allows words to be disambiguated by the ‘semantic context’ (the other words of the statute), see Tara Leigh Grove, ‘Which Textualism?’ (2020) 134 Harv L Rev 265. The most sophisticated exposition and defence of this kind of position, which draws on recent work in the philosophy of language (especially ‘semantic

Vermeule claims to distinguish ‘two versions of textualism’: (i) the ‘modern’ and ‘positivist’ one (which is ‘incompatible with’ CGC); and (ii) the ‘classical version’, which he calls ‘presumptive textualism’, under which the ‘ordinary meaning’ is ‘defeasible when an unusual circumstance falls outside the core central case’ [73–75]. In non-central cases, judges may appeal to ‘*epikeia*’ — the ‘equity of the statute’ — to depart from the apparent meaning [75–77]. This leads Vermeule to frame the judicial disagreement in *Riggs v Palmer* as ‘internal’ to (classical) textualism: for the majority in *Riggs*, the murdering grandson inheriting the estate is a ‘non-central’ case (justifying departure from the facial meaning of the text); but, for the minority, it is a central case (so the presumption of textualism is not rebutted).⁷⁰

The problem is that Vermeule’s so-called ‘presumptive textualism’ just isn’t textualism (at all). Not only that: it is an instance of the position that textualism explicitly sets itself against. Vermeule notes the Eskridge-Manning debate ‘over the importance of equity in the founding era’ [79] but fails to acknowledge that denying judges an equitable power to depart from ‘plain meaning’ is *constitutive of* textualism.⁷¹ The *Bostock* decision, which Vermeule c.2022 rightly calls a ‘debacle’ [105], is a prime example of the iconoclastic textualism that Vermeule c.2006 pioneered.

5.4. Originalism

Vermeule attacks ‘originalism’ and ‘progressivism’ — which, for him, are ‘the main competitors’ [22] of CGC (as a methodology of constitutional interpretation) — in chapters 3 and 4 respectively. There’s much that can be, and has been, said about his claim that originalism is an ‘illusion’ [91].⁷² But Vermeule’s challenge can be addressed quite simply. Despite his claim that there are ‘endless, variant definitions of originalism’ — which Vermeule takes to be a ‘sign of an unstable research program’ [192] — he summarises originalism fairly well, as the ‘view that constitutional meaning was fixed at the time of the Constitution’s enactment (or that of relevant amendments), and that this fixed meaning ought to constrain constitutional practice by judges and other officials’ [91].

But Vermeule then errs in taking originalism to be ‘a full-fledged [*sic*] normative theory of how judges and other officials ought to interpret the Constitution’ [91–92]. Few would deny the claim that the meaning of legal instruments should constrain judges.⁷³ The distinctive claim of originalism is that this meaning is *fixed at origin*. It is an answer to a specific question: *by reference to which time* is the meaning of a (constitutional) provision to be determined? Originalists then disagree about *which notion(s) of meaning* are fixed at origin; far from indicating an ‘unstable research program’, this shows that originalism is compatible with a wide range of interpretative methods.⁷⁴

minimalism’) is found in Paolo Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law* (Hart Publishing 2022) 169–210.

⁷⁰[84]. Vermeule is rightly criticised for not clarifying the notion of a ‘non-standard’ case: Michael A Wilkinson, ‘The Authoritarian Nature of Common Good Constitutionalism’ (2024) 68 *Am J Juris* (forthcoming).

⁷¹Vermeule (n 69); ‘judges should stick close to the surface-level or literal meaning of clear and specific texts, resolutely refusing to adjust those texts by reference to the judges’ conceptions of statutory purpose, legislators’ or framers’ intentions or understandings, public values and norms, or general equity.’

⁷²For example, Barnett (n 9); Pojanowski and Walsh (n 14); Baude and Sachs (n 22).

⁷³Vermeule recognises this when he says that ‘Respect for enacted texts is hardly unique to originalism’: Adrian Vermeule, ‘On “Common-Good Originalism”’ (*Mirror of Justice*, 9 May 2020) <<https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/05/common-good-originalism.html>> accessed 25 March 2023.

⁷⁴For example, for a *textualist* originalist this is the *ordinary meaning of its text* when it was adopted; whereas, for a *Dworkinian* originalist, it is the *meaning at that time* which the legal principles must best fit and morally justify. For an interesting argument that Dworkin was — despite his vehement denials — an originalist, see Jeffrey D Goldsworthy, ‘Dworkin as an Originalist’ (2000) 17 *Constitutional Commentary* 49.

All theories of law which take the meaning of lawmaking acts to be relevant to legal content — i.e., all (tenable) legal theories — need a response to this question about *time*.⁷⁵ The irony is that Vermeule gives the same general response as the originalists do: the meaning of a constitutional provision is fixed at the time when that provision was first adopted. Vermeule even recognises this: CGC, he tells us, ‘includes its own properly chastened version’ of originalism, ‘because it respects the authority that determines the content of the positive law’ [18]. Vermeule goes so badly wrong here because he thinks that originalism is ‘essentially a form of [legal] positivism’ [15]. In confecting this false opposition between originalism and CGC — via the all-purpose bogeyman that is legal positivism — Vermeule exposes his own lack of understanding. He even equates legal positivism with literalism, claiming that it ‘sounds nonsensical to the modern positivist’ to distinguish ‘the letter of the statute’ from ‘the statute’ [113]. It is legal *formalism* — of the very kind that he previously advocated (see §5.3) — not originalism, or legal positivism, that Vermeule actually opposes.

5.5. ‘Progressive’ and ‘developing’ constitutionalism

In the fourth chapter of CGC, Vermeule criticises a position he calls ‘progressive’ constitutionalism: a caricature of living constitutionalism that is ‘restless and aggressive’ in its insistence that law ‘must be bent toward the realization of ever-more radical forms of individual liberation and social egalitarianism’ [119–20]. It is telling that Vermeule identifies no actual adherents of progressive constitutionalism: it appears to be a mere figment of his imagination, the flimsiest of straw men.⁷⁶ It exhibits ‘a very particular liberationist narrative, in which “rights” are continually “expanded” to free an ever-larger set of individuals from unchosen obligations and constraints’ [119].⁷⁷ But Vermeule misses that rights have correlative duties: a complete absence of individual obligations leads not to a maximal set of rights, but to the *state of nature*: where we may all do whatever we please, just so long as no-one stronger and tougher (or better armed) decides otherwise. Perhaps he meant that progressive constitutionalism only pursues the continual expansion of *vertical* legal rights (held by individuals against the state). But even these impose duties on individuals: the state can act only through its human agents (if same-sex couples have the right to marry then registrars have a duty to marry them).⁷⁸ And Vermeule’s own example here — the *Little Sisters of the Poor* case (§3.5) — involves *horizontal* rights: those of employees against their (non-state) employer.

His alternative — ‘developing constitutionalism’ — allows the ‘development of doctrine, but not for progressive, liberationist, and disruptive ends’ [122]. Here, Vermeule recognises that he ‘needs an account of which developments are genuine and which are corrupt’, and he seeks to draw this distinction by using Cardinal Newman’s ‘seven “notes” of genuine development’ [122–23]. However, Vermeule just lists their names, which are not self-explanatory (e.g., ‘chronic vigor’), and declines to ‘parse through these individually, because their essential aim and thrust is clear enough’ [123]. This is, apparently, that developments are genuine if ‘the core and essence of the doctrine’ is preserved, just as an ‘acorn’ may change into an ‘oak’ but cannot develop into a ‘walnut’ [123]. But such vaguely-worded claims and unhelpful analogies do not a tenable theoretical position make.

⁷⁵For my own response, see Martin D Kelly, ‘Speaking Through Time’ (Legal-Phi, 4 January 2022) <<https://legalphi.wordpress.com/2022/01/04/martin-kelly-speaking-through-time/>> (accessed 22 January 2024).

⁷⁶Vermeule mentions William Waluchow and David Strauss [117], in this context, but — advisedly — stops short of explicitly asserting that they are progressive constitutionalists (which they are patently not).

⁷⁷The quotation marks here are seemingly used as scare quotes: Vermeule does not cite anyone.

⁷⁸Subject to any rights of conscientious objection etc. (which, in turn, qualify the rights of same-sex couples).

6. Conclusion

It is often said that a good book raises more questions than it answers. But the converse claim — that a book which raises more questions than it answers is a good book — does not follow. Vermeule says, near the start of the book, that it could have been ‘either seventy thousand words or seven hundred thousand’ and that he ‘opted for the former’ for reasons of ‘timeliness’ [25]. These are, of course, not the only two options; and Vermeule provides no good reason for the claimed urgency, proffering merely that ‘there is widespread and increasing dissatisfaction with establishment progressive rights-talk and establishment originalism’ [25]. But Vermeule offers no evidence for these empirical claims, nor gives any reason why — even if they are true — they require this particular (doubtful) take on Aquinas.⁷⁹ Natural law has been debated for over 2,500 years and I, for one, would be happy to have waited a few more while Vermeule did the hard yards. A book that is much better argued, even if a little longer, would have been vastly preferable.


There are many who think that, at least in some parts of the world, we have gone too far in promoting individual autonomy at the expense of our mutual interests and that, if we’re going to solve existential problems like climate change and global pandemics, some rebalancing is needed. I’m probably one of them. But anyone hoping to find, in *CGC*, a well-researched and thoughtful reflection on how we should perform this kind of delicate rebalancing exercise will be disappointed. Vermeule’s scholarly contribution is too thin — in failing to engage with the literature, and in leaving so many key questions unanswered (or entirely unaddressed) — and, as a political manifesto, it is unlikely to persuade any well-informed ‘floating voters’ to embrace his vision of Vermeulitania.

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<https://doi.org/10.1080/20403313.2024.2311599>



⁷⁹Joshua Jowitt, in a forthcoming paper, criticises Vermeule for seriously misunderstanding Thomist natural law theory: ‘A house built on sand’ (‘The concept of *ius* in Thomas Aquinas’ conference, Pontifical University of the Holy Cross / Pontifical University of St Thomas Aquinas, Rome, 22–23 April 2023).