The Dream of the Common Good: Not a Nightmare

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ABSTRACT

JACKSON G. DELLINGER: The Dream of the Common Good: Not a Nightmare

(Under the direction of Dr. Steven Skultety)

This paper examines an emerging position in the philosophy of law, common-good constitutionalism. In the first two parts of the paper, I explain the position and constitutionalism more generally, examining how common-good constitutionalism fits within the definition of constitutionalism providing by a neutral scholar. In the next five parts, I attempt to show that common-good constitutionalism’s preference for explicit adherence to the common good does not violate constitutionalism. In doing so, I provide an examination of common-good constitutionalism’s relationship with three important constitutional principles and the separability of common-good constitutionalism as a whole and the infamous views of its most popular adherent. In the final part, I explore some possibilities that this position makes available for the future.
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PART I. INTRODUCTION: AN IDEA AS DANGEROUS AS THEY COME?

Recently, a debate has surfaced over a method of legal interpretation, common-good constitutionalism, which relies on the classical legal tradition to form and interpret the constitution and law more generally. This theory provides a method which avoids the Scylla and Charybdis of totalitarianism, socialism and fascism, while also avoiding positivism.

The goal of common-good constitutionalism is to conceptualize the body of legal principles as working towards a single principle, the common good, and to explicitly interpret laws as determinations of that common good. This theory is, admittedly, quite broad. Whereas totalitarians abuse the language of the common good, eroding important constitutional principles, and positivists avoid the common good in legal interpretation, common-good constitutionalism views legal interpretation as necessarily considering relevant constitutional principles to ensure the law is indeed, as one old common-good constitutionalist put it, “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”¹

Given the extreme generality of this theory, there are people who criticize this alternative. Indeed, considering it rests on the application of a concept as disputed in content

as the common good, it is understandable that critics have argued common-good constitutionalism is a pretext for their own political nightmares. In this paper, against these critics, I will attempt to show that common-good constitutionalism is not a mere pretext for political evils, especially authoritarianism. Indeed, as I will argue in this thesis, common-good constitutionalism is a view which supports and explains the value of subordinate constitutional principles such as the Rule of Law, Democracy, and Rights.

In light of such criticisms, the following sections will explain common-good constitutionalism and address worries brought against it by legal philosophers and scholars. Following my defense of common-good constitutionalism against worries of erosion of constitutional principles, I will explain what I believe has caused its critics to be so troubled by the theory. Finally, I will examine potential for a future in which common-good constitutionalism is widely adopted as a theory with institutional legal power.
PART II. CONSTITUTIONALISM – WHAT IS IT? WHAT ARE ITS PRINCIPLES?

In order to assess the strengths and weaknesses of common-good constitutionalism, we should first get clear about constitutionalism in general. After setting out the parameters that any sort of constitutional approach would bring to legal interpretation, the specific claims of the common-good version of constitutionalism can be assessed.

For this paper, I am adopting a stipulative sense of constitutionalism that will not, I believe, strike readers as particularly dangerous or eccentric. I will follow the view of constitutionalism held by a respected, widely celebrated scholar, Nicholas William Barber. No one has attacked Barber as a totalitarian, or accused him of promoting despotism in his scholarly assessments of constitutionalism. In Barber’s 2018 book, *The Principles of Constitutionalism*, the author outlines a theory of constitutionalism that shows how a constitution helps the state.

Barber’s account of constitutionalism specifies that the best understanding of constitutionalism is positive. That is, his definition is in reference to the goals of the state, rather than merely a set of restrictions on the state. Indeed, Barber notes that his positive constitutionalism “acknowledges the need for constitutional structures to guard against abuses of state power… but is focused on creating a strong state able to work for the good of
its people.”2 For Barber, constitutionalism exists as a set of principles, such as the rule of law, democracy, and rights which constitute a middle ground between the abstract moral principles and its positive laws. A state’s abstract moral principles might include an adherence to truth or progress, whereas its positive law would be its enacted statutes and applicable case law. These constitutional principles are the state’s fundamental legal norms, guiding the state in its formation of positive law.

Many of Barber’s principles can be understood in two different ways. On the one hand, there is a thin understanding which presents a binary. For example, on this binary understanding, the rule of law might apply in countries in which rules are written and followed and be simply absent in countries in which this is not the case. On the other hand, there is a thicker understanding which allows a principle to be operative to different degrees. For instance, Barber argues that even authoritarian states such as Communist China have applied the rule of law to some degree, as they saw its use for maintaining sovereignty. That said, it would be ridiculous to claim, in a binary way, that Communist China correctly embodied the rule of law. Barber argues that, when the rule of law is virtually abandoned, it will, counterintuitively, lead to something more like chaos than total control. Whereas one might think that the rule of law is abandoned in an attempt for autocracies to maintain order, abandoning previously constructed codes of justice, this attempt has unexpected consequences. Indeed, he notes that, during the Cultural Revolution, “Mao incited groups of

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students… to attack ‘counter-revolutionaries’, and ordered the police not to intervene in their activities,”³ thereby virtually abandoning “the use of law as a tool for the government.”⁴

If the principles of constitutionalism were mere binaries which did not conflict with one another, it might be supposed that they were all of equal worth and status. For example, if there were an analogous set of principles of veganism, we might say that there are two binary principles which qualify an item as acceptably vegan, that it is edible and that it contains no animal products. Because both principles are binaries which do not preclude one another, it might be said that there is no interplay necessary between them: it is simply necessary that both are present rather than absent in the item.

However, if we were dealing with a set of principles for eating more generally, there might be principles which are not binary and might preclude one another to some extent when they applied to various degree. Indeed, if these principles included taste, nutrition, and price, it is easy to see how they would preclude one another. For example, if the eater has the choice between an expensive, tasty dish and a cheap, less tasty one, he must sacrifice his adherence to one of the principles to decide which dish to eat. In this sort of case, we can see why an eater would try to resolve the conflict by finding a necessary ordering principle which would give the eater a guide for which of these principles to prioritize in which eating situations.

For Barber, constitutional principles work in much the same way. The constitutional principles he identifies are sovereignty, separation of powers, rule of law, civil society,

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⁴ Ibid.
democracy, and subsidiarity. Understood as thin, binary concepts, they can be applied without precluding one another in many communities. However, when such constitutional principles are non-binary and potentially mutually exclusive, a new necessary ordering principle would be needed to resolve conflict among them. For example, in a nation in which slavery persists in certain regions, whereas the inhabitants of the region desire its continuation while the overall population desires its abolition, an ordering principle would be necessary to decide between the principles of subsidiarity and democracy.

When thick constitutional principles collide, and a new ordering principle is needed, where shall such a principle be found? Barber’s account of constitutionalism allows for two options: on the one hand, one of the particular principles of constitutionalism (e.g. rule of law) could act as the ordering principle; on the other hand, there could be ordering by an outside, non-constitutional principle that resolves the conflict among non-binary principles of constitutionalism. Every constitutionalism must accept one of these two options, if conflict among the principles is to be resolved in a principled manner.

Of course, if we turn to an outside principle, it is of the highest importance that this principle be appropriate and adequate for the constitutional task. For example, if one were to choose the non-constitutional principle of maximizing population, there could be great erosion of the rule of law or other central constitutional principles in favor of decisions which allow for greater population growth. Moreover, because this ordering principle has no clear relation to the constitutional principles themselves, it would likely be a poor guide to decision making regarding which principles to prioritize over others. This example illustrates two requirements for such an outside guiding principle: [1] the principle must be able to be plausibly applied without conflicting substantially with the constitutional principles.
themselves, and [2] it must also be related to the principles in such a way that it could plausibly be used for decision making concerning prioritization of the principles.
PART III. THE COMMON GOOD IS NOT SUFFICIENT FOR YIELDING A
CONSTITUTIONAL NIGHTMARE

Having set out a brief account of constitutionalism, we can better appreciate the theoretical position being advocated by common-good constitutionalists. They are constitutionalists who offer the notion of the common-good as the outside ordering principle for the principles of constitutionalism. Indeed, in his article for The Atlantic, “Beyond Originalism,” perhaps the most prominent defender of common-good constitutionalism, Harvard law professor Adrian Vermeule, adopts this approach by stating that a common-good constitutionalist outlook would be “based on the principles that government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate.”5 Can the common-good meet the two requirements for an outside ordering principle that we identified above?

In the next sections of my thesis, I’ll address [1] whether this principle conflicts with the constitutional principles it would be ordering. In this section I’ll address a prominent worry concerning [2] the second criteria. Some believe that the common good cannot guide prioritization of the various principles, and that it is not appropriate for governance in general. Such critics believe that the “common good” is little more than a rhetorical cover for totalitarian regimes, and that any political or legal theory that deploys the “common good” as

an organizing principle is a recipe for tyranny. One such critic is legal scholar Garrett Epps, who, in his article “Common-Good Constitutionalism is an Idea as Dangerous as They Come,” compares Vermeule’s constitutional preference for the common good to the authoritarian regime of Francisco Franco.6

This objection has some truth to it: the common good is, indeed, a very general goal and we can imagine it being deployed by aspiring despot. Indeed, the abstract notion of a common good is so general that some might accuse it of being without any useful content at all. However, as the example of maximizing population suggests, this generality is a potential benefit. If the principle were too simple or specific, it would not be successful in capturing the enormous amount of political and ethical complexity which are needed for an organizational principle of this level of authority and generality. That said, if the notion of the common good is to be supported, it needs to be given some specific content and definite meaning. To this end, it will be helpful to look at some examples in the history of political thought of conceptions of the common good.

One potential view is that of the American founders, who certainly incorporated the language of the common good into their various letters and declarations. In John Adams’s draft for the Constitution of Massachusetts, he wrote that “[g]overnment is instituted for the common good,” which he identifies with “the protection, safety, prosperity, and happiness


of the people.”” ⁸ He opposes the common good and its categories with what might be termed 
private goods, or “the profit, honor, or private interest of any one man, family, or class of 
men.”” ⁹ This Constitution, indeed this specific article, is still the highest state law in 
Massachusetts.

This understanding of the common good, harkening back to the republicanism of 
Machiavelli, has some distinct features. First, this version of the common good is used 
explicitly to support a democratic view of government, as the article states immediately 
following the defense of the common good as the purpose of government, “therefore the 
people alone have an incontestable, unalienable, and indefeasible right to institute 
government, and to reform, alter, or totally change the same when [the subcategories of the 
common good] require it.”” ¹⁰ Furthermore, on this understanding of the common good, the 
principle constitutes the personal wellbeing of the people, wherein the people refers to the 
entire group of citizens rather than one person or class. In this sense, this understanding of 
the common good is democratic and egalitarian.

Of course, this example should not be taken to be representative of the American 
founders as a whole. The founders were individuals with differing beliefs, and an 
examination of their agreement regarding the nature of the common good is beyond the scope 
of this paper. However, it should be noted that positive references to the common good or

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⁸ Adams, “Constitution of Massachusetts,” Art. VII.

⁹ Ibid.

¹⁰ Ibid.
public good are numerous among some of the most prominent founders, including Thomas Jefferson\textsuperscript{11}, Alexander Hamilton\textsuperscript{12}, and James Madison\textsuperscript{13}.

Likewise, there are progressive accounts of the common good. Rachael Walsh from the University of Dublin has outlined how the common good informs the progressive view of property rights. In doing so, Walsh draws from the classical tradition, recounting the various ways Thomas Aquinas’s views on property contribute to the progressive view that private property can be justified only after the needs of all individuals have been met. Specifically, Walsh draws from Professor John Finnis’s understanding of Aquinas as supporting property rights “based on the contribution private property can make to the common good, as opposed to any metaphysical connection between the possessor and the property.”\textsuperscript{14}

Indeed, there is a classical understanding of the common good as well. The classical view features the beliefs of Aristotle, Plato, and the natural law tradition and renders the common good as “that members have in taking part in a complex activity that involves all or


most members of the community.”

Even within this classical view, there are different schools and individual accounts of the common good. For example, the extent to which private property serves the common good would receive a different answer from Plato and Aristotle. In Plato’s ideal Republic, the city’s guardians hold most of the property as a form of public control of resources, whereas Aristotle prefers private ownership with expectations placed upon individuals to uphold the common good.

While brief, this historical survey shows that the concept of the common good can be given definite meaning, and it shows that different schools of thought have offered different accounts of the common good. However, this malleability should not be taken to imply uselessness. The fact that this concept is difficult to define perfectly, and the fact that it has been understood in different ways by competing interpretive schools, does not suggest it is philosophically worthless. Indeed, the opposite is the case: it shows many profound thinkers have looked to this notion as capturing deep truths about the human political experience. In this way, the common good is like the concepts of justice, liberty, and equality. We do not dismiss these concepts because they are understood in different ways by different thinkers. Instead, we take that as evidence that they provide insight into some necessary aspect of political life.

This brief survey also gives us reason to doubt that, when the common good is given specific meaning, that meaning is necessarily despotic. As I acknowledged earlier, a tyrant could take this concept and interpret it in a way that suits his anti-constitutional goals. But


it’s just as clear that the common good has served as a useful guide for many political bodies which would likely not be considered tyrannies, and certainly not totalitarian states. Indeed, the Supreme Court of the United States ruled in *Jacobson v. Massachusetts* (1905) that there exist “manifold restraints to which every person is necessarily subject for the common good.”\(^\text{17}\) The Court went further, arguing that “organized society could not exist with safety to its members”\(^\text{18}\) on any other basis. Other polities have even included language supporting the common good in their most fundamental legal documents. For example, the German Basic Law states that the use of property “shall also serve the public good.”\(^\text{19}\) Likewise, the Constitution of Ireland states in its preamble that the purpose of adopting the constitution is to seek “promot[ion] [of] the common good.”\(^\text{20}\) Elsewhere, the Constitution defines the state as a guardian of the common good and notes the central importance of the common good in establishing rights of regulation by the state.

In short, it is clear that the common good has many different interpretations and schools of through surrounding its content and application. However, this does not preclude the possibility of its use as an organizational principle for government, as is evident from examples from the highest authorities in both the United States and Europe. Therefore, those who argue that the notion of the common good *cannot* be an appropriate ordering principle of

\(^\text{17}\) *Jacobson v. Massachusetts*, 197 U. S. 11 (1905), 197.

\(^\text{18}\) Ibid.


constitutional principles, or who argue that it is impossible for the common good to provide guidance for resolving conflicts among constitutional principles, are wrong.
PART IV. ADDRESSING WORRY #1: THE RULE OF LAW

Having addressed the general worry that the notion of the common good is simply not suited for playing a constitutional role, I will now deal with more focused arguments that claim that common good constitutionalism threatens the specific constitutional principles of the Rule of Law, Democracy, and Rights.

Legal philosophers Leonid Sirota and Mark Mancini, in their blogpost “Interpretation and the Value of Law,” argue that common good constitutionalism would violate the rule of law because it introduces substantive extra-legal content into the law.\(^{21}\) For Sirota and Mancini, common-good constitutionalists violate the necessary objective neutrality of judges because they “look to extraneous moral and policy commitments as guides for legal interpretation, disregarding the law’s role as the authoritative record of the settlement of disagreement and point of reference for citizens whose views of what is good and just differ, seeking to impose pre-ordained results regardless of whether they are consistent with what the law actually is.”\(^{22}\)

However, this argument is both question-begging and self-defeating. As authors Stéphane Sérafin, Kerry Sun, and Xavier Foccuroule Ménard, in their article “The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini,” argue, it is


\(^{22}\) Sirota and Mancini, “Interpretation and the Value of Law,” paragraph 12.
question begging to presume that the natural law is outside of the realm of law.\textsuperscript{23} For adherents of natural law theory, like Vermeule and other natural law common-good constitutionalists, “[natural law] principles are every bit a part of the law, just as much as any legal text, rule or doctrine.”\textsuperscript{24} That is to say, Sirota and Mancini argue that natural law theorists import extra-textual content into the law, and therefore import important extra-legal content into the law, but they are assuming, against the natural law theorists, the very point of dispute, that there is law beyond the mere text. It is self-defeating because even positivists like Sirota and Mancini utilize content outside the letter of the law: these critics themselves define law as an aid to “social cohesion” rather than defining law as acts of the sovereign, and so they themselves appeal to extra-legal standards for something to be law.\textsuperscript{25} In much the same way, originalists, including common-good originalists like Josh Hammer, look towards other texts from the period of legislation such as preambles or dictionaries which they utilize to interpret the law.

Besides rebutting the specific criticism of Sirota and Mancini, I think a positive argument can be made that the principles of the common good and the rule of law support one another, rather than conflict with one another. Barber makes a distinction between


\textsuperscript{24} Sérafin, Sun, and Ménard, “The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini,” section 3.

\textsuperscript{25} Ibid.
minimal rule of law and maximal (unachievable) rule of law. Rather than be in tension with
the rule of law, the common good (which itself may never be fully achieved) helps us to
deploy the rule of the law in a way that allows it to be the most effective and coherent given
other principles. Sometimes, the common good may promote minimal rule of law, other
times it may promote maximal rule of law, and still other times it may recommend something
between these extremes. The common good presents a coherent goal for which the law can
be promulgated, just as social utility acts as a goal for other legal theorists like Sirota and
Mancini.26

Moreover, because the common good acts as an exterior or transcendent organizing
principle, rather than as one more constitutional principle among many, its dictates may
include the prioritization of different constitutional principles in different situations. For
example, the principles of subsidiarity and the separation of powers allow methods for
navigating the intricacies of the rule of law. Both principles provide substantive devotions to
epistemic humility for particular offices, recognizing their particular place in promotion of
the common good, which is not unlimited.

Therefore, given these two essential principles, common-good constitutionalists need
not endorse judicial reversal of positive law in favor of the natural law. Vermeule in
particular favors a model of courts in which judges defer to the legislature’s interpretation of
how positive laws are derived from the common good, noting the possible origin of such
dereference in the classical legal principle of determination.27 Indeed, Vermeule specifically

26 Sérafin, Sun, and Ménard, “The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark
Mancini,” section 3.

emphasizes throughout his new book, *Common Good Constitutionalism*, released during the drafting stages of this paper, that “courts need not be the institutions charged with directly identifying or specifying the common good.”\textsuperscript{28}

\textsuperscript{28} Vermeule, *Common Good Constitutionalism*, 25.
PART V. ADDRESSING WORRY #2: DEMOCRACY: HOW DOES IT LOOK WHEN THE COMMON GOOD IS PRIMARY?

As noted earlier, legal scholar Garrett Epps argues that common-good constitutionalism threatens democracy by encouraging authoritarianism. The evidence he and others provide for this argument is that multiple authoritarian regimes have utilized the language of the common good in their edicts, or even in their constitutions, despite the clear injustice of their regimes.

As we saw in the last section, it is true that common-good constitutionalism does not absolutize any individual constitutional principle and apply it in the same manner and intensity to differing polities: different levels of each principle are recommended insofar as they serve the common good. In the same way, the level of democracy which best serves the common good in a particular society is the level of democracy that this society should have, and this will differ between societies.

This is clearly true across societies which are different in kind, e.g., between the family and the state, but it can also occur between individual societies of the same kind, e.g., different nations. For example, some countries might have strong referendum cultures, furthering the common good by direct democratic actions. Others might better serve the common good by appealing mostly to democratically elected legislators. This may also not be a question of how much but of what kind of democracy best serves a society. For instance,
the common good of some societies might be better served by utilizing democratic methods such as sortition to select legislative bodies, such as town councils, than by direct election.

However, this recognition of the variability to which democracy serves the common good across societies does not imply that whatever level of democracy exists in a given society is the legitimate or correct amount for that society. Some levels of democracy, such as totalitarianism or total direct democracy, may be necessarily opposed to the common good. An objector might argue that the possibility of this recognition is not enough: a lack of democracy must be excluded by common-good constitutionalism’s very nature. However, there are a couple problems with this objection. First, it is unreasonable to contend that even appalling political scenarios must be inherently precluded by a general theory or position. One might describe themselves as an adherent of democratic theory, even though being a democrat might not inherently preclude dangerous majoritarianism. There is no reason to conclude a common-good constitutionalist must view all other broad adherents of common-good constitutionalism as reasonable allies. Second, without the recognition that a lack or excess of democracy would be deleterious to the common good, the argument against these political situations is weaker, a mere violation of procedure or theoretical boundary rather than a total breakdown of society.

Finally, even though some authoritarian societies utilize the language of constitutional principles, such as democracy, this does not mean that these concepts encourage authoritarianism. Rather, it means evil regimes \textit{distort} these concepts. The common good is no different.
PART VI. ADDRESSING WORRY #3: RIGHTS: HOW DOES IT LOOK WHEN THE COMMON GOOD IS PRIMARY?

In a complete reversal from the previous worry, some legal scholars, such as Randy Barnett, believe that common-good constitutionalism, rather than eroding democracy, will necessitate a rampant majoritarianism that crushes individual rights. In his article, “Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution,” Barnett even implies that, under Vermeule’s system, segregation could not have been eliminated. He bases this on Vermeule’s adherence to Thayerian deference, or the doctrine that the courts should generally defer to the legislature in legal interpretation.

There is some weight to Barnett’s objection. Vermeule, against the professed views of political liberals, believes that it is imperative to “legislate morality.” However, this does not necessitate majoritarianism in the way Barnett believes. Indeed, Vermeule explicitly rejects this interpretation, insisting that the classical legal tradition he favors includes the notion of rights, though they are not constructed in an “essentially individualist, autonomy-based, and libertarian fashion,” as are rights under modern progressivism or libertarianism.

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30 Vermeule, “Beyond Originalism”

31 Vermeule, Common Good Constitutionalism, 14.
Vermeule is not alone: while many common-good constitutionalists posit different sorts of relationships between rights and the common good, none of them maintain that rights play no positive role in common-good constitutionalism. A brief survey of recent theories shows this quite clearly.

One possibility is that rights are an inherent part of the common good: a participation in these rights (or the legal system of rights) is a participation in the common good itself. On this theory, participation in a legal system oriented to the common good, as it is universally accessible and not diminished by participation, is a common good. This is the position of the common-good constitutionalist Michael Foran, a Lecturer in Public Law at the University of Strathclyde, which he argues for in his piece, “Rights and the Common Good.”

Conversely, another theory among common-good constitutionalists is that rights are merely instrumental for achieving the common good (or are predications of the common good), and, in the end, they are only private goods, even if they are universal. That is, rights may be universal goods in that they are accessible to everyone and are not diminished by their use, but they are not shared between individuals. This is the position of common-good constitutionalist Jamie McGowan, a Ph.D. Candidate at the University of Glasgow, expressed in his reply to Foran, “On the Tyranny of Rights.”


Of course, these different common-good constitutionalists may disagree with one another about the \textit{content} of rights, but such disagreement isn’t a problem for common-good constitutionalism since it is found in every type of political philosophy. Take, for example, political liberals. Their disagreements over rights to freedom of movement, healthcare, ownership of weaponry, and drug use provide only a few of a plethora of examples. Moreover, such disagreement about the content of rights among common-good constitutionalists does not imply that there is no content upon which they agree. Indeed, Vermeule contends in \textit{Common Good Constitutionalism} that legally recognized rights such as the right to liberty of speech developed as legislative agreement upon the understanding that certain rights, such as liberty of expression, contributed to the common good.\textsuperscript{34}

\textsuperscript{34} Vermeule, \textit{Common Good Constitutionalism}, 268.
PART VII. THE CONTROVERSY ADDRESSED

Thus far, I have presented an argument that common-good constitutionalism fits within a non-totalitarian conception of constitutionalism, showing why the objections presented towards common-good constitutionalism fail to prove that common-good constitutionalism is necessarily totalitarian. In brief, I have argued that merely accepting the common-good as an ordering principle does not necessitate the demise of constitutionalism, and I’ve also show that common-good constitutionalism does not erodes the three major constitutional principles of the Rule of Law, Democracy, and Rights. Those who believe that the common-good, and common-good constitutional are threats to these values, tend to misunderstand common-good constitutionalism’s essence and goals. As a result, they often tend to provide criticism that isn’t particularly substantive or useful because they are arguing against a false view of their target.

However, if common-good constitutionalism is as benign as I have described it, and if supporting the principles of common-good constitutionalism is no more threatening than supporting common practice in the historical United States and contemporary liberal democracies such as Ireland, the reader might be perplexed. If common-good constitutionalism is quite harmless, why would it elicit so much ferocious criticism from so many critics? The reader might suspect that there is more to the story than I have been admitting.
To be candid, there is some truth to this worry. The criticisms of common-good constitutionalism have generally been directed towards Adrian Vermeule, who wrote the article that was, in many ways, the genesis of the contemporary discussion surrounding the view. This regular connection between Professor Vermeule, on the one hand, and common-good constitutionalism as a theory, on the other, has caused considerable harm and confusion in two important ways.

First, it is important to note that Vermeule’s initial article was incredibly incendiary in tone. Vermeule opens his essay by claiming originalism is a “faith” which has been pushed onto conservatives as “all but mandatory.” Furthermore, he denigrates the conservative legal institution the Federalist Society for “talk[ing] and think[ing] of little else” besides originalism. Moreover, Vermeule is dismissive of his intellectual opponents throughout the article. For example, he states plainly that originalism “has now outlived its utility, and has become an obstacle” to the conservative legal movement. He further describes his various opponents as “enslaved to the original meaning,” adopting “incoherent goal[s],” and “often plac[ing] their own satisfactions (financial and sexual) and the good of their class or social milieu above the common good.” It should come as no surprise that this incendiary dismissiveness has incited criticism that deploys the same tone. The impassioned arguments

36 Ibid.
37 Ibid, paragraph 3.
38 Ibid, paragraph 7.
39 Ibid, paragraph 11.
40 Ibid, paragraph 18.
for the authoritarianism and banality of common-good constitutionalism offered by Barnett and Epps, I suspect, are at least partially explained by none other than wounded pride.

However, this attempt at explanation should not be taken as an indictment of Vermeule’s critics as merely overly sensitive interlocutors. For there are substantive positions taken by Vermeule that are genuinely unpopular, to say the least, especially among liberal conservatives. In the Atlantic essay, for example, Vermeule announces his firm support for the administrative state, or “a powerful presidency ruling over a powerful bureaucracy,”\(^{41}\) the latter of which should “be seen not as an enemy, but as the strong hand of legitimate rule.”\(^{42}\) Another controversial position he takes in this article is that constitutional law should feature a broad state authority to protect society from “biological, social, and economic” scourges, prompting Vermeule to spitefully and gleefully dismiss the downfall of libertarian conceptions of rights to free speech and property, which must “fall under the ax.”\(^{43}\)

Perhaps none of these positions are as controversial, however, as a position for which Vermeule has argued outside of the Atlantic. As Barnett points out in his critical response to “Beyond Originalism,” Professor Vermeule is a Catholic integralist.\(^{44}\) That is, he holds the position outlined by Pater Edmund Waldstein, O. Cist. that “the temporal power must be

\(^{41}\) Vermeule, “Beyond Originalism,” paragraph 18.

\(^{42}\) Ibid.

\(^{43}\) Ibid, paragraph 17.

subordinated to the spiritual power.”45 In other words, Vermeule believes that, on matters which pertain to faith, the Roman Catholic Church should, ideally, have power over the state. To say that such a position is merely unpopular would, of course, be an understatement. Indeed, Pew Research has indicated that, in 2021, only 19 percent of Americans support the federal government ending their enforcement of the separation of church and state, and a measly 15 percent support the federal government declaring the United States a Christian nation.46 This is not even to mention the potential disputes over which Christian church, if any, would act as the authority on matters of faith. Given his adherence to this controversial doctrine, it is not difficult to imagine why Vermeule’s opponents might brand him as a reactionary authoritarian, and then also worry that it affects common-good constitutionalists more generally.

But this sort of worry, it seems to me, is not well founded. It’s true that any discussion of Vermeule’s thought will probably need to say something about integralism. But there’s no reason to think that every discussion of common-good constitutionalism needs to be grounded in Vermeule’s ideas. Indeed, Vermeule himself distinguishes the two. In his recent book, the professor states that his belief that “[the United States’] executive-centered order can be ordered to the common good”47 is a “particular interpretation… separable from

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47 Vermeule, Common Good Constitutionalism, 24.
the general claims about the nature of constitutionalism also offered in the book. Indeed, the complaint that some critics make, that a constitutionalism based merely in the common good is too general, acts here as a good line of defense. There is no reason to think that a common-good constitutionalist’s views about the common good, empirical or definitional, must cohere with Vermeule’s any more than a political liberal’s views about liberty must cohere with those of John Locke or John Rawls or John Stuart Mill.

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PART VIII. OPPORTUNITIES FOR PROGRESS IN A WORLD OF GOOD

Importantly, a common-good constitutionalist understanding of rights provides ample space for dialogue between the left and right over new possibilities of agreement. For instance, if common-good constitutionalists of the right consider the flourishing of family life to be an important step to achieving the common good, perhaps they could be convinced of the good of rights to a just wage, family stipends, or family healthcare plans. Likewise, especially natural law common-good constitutionalists might be inclined to accept more typically cosmopolitan human rights accepted by the left.

Conversely, more progressive common-good constitutionalists might be more inclined to accept rights of the family, rights to freedom of conscience, and rights to freedom of worship. Perhaps more centrally, progressives might be inclined to accept more conservative duties to society over individual claims to liberty.

If common-good constitutionalism were to be adopted, some constitutional orders would change more drastically than others. Imagining what developments would be made in particular polities upon adoption of common-good constitutionalism is difficult, as the common good inherently depends on the needs of each particular polity in each particular political, social, and economic situation. However, broad generalizations about the effects of common-good constitutionalism’s replacement of positivist theories of law may be made.

In the Republic of Ireland, for example, the supreme court has already decided that both the common good and the natural law are elements of the law proper. O’Donnell v.
South Dublin County Council⁴⁹, in particular, found that it was the right of a family of Travellers, an Irish minority ethnic group, to have the state provide for them ample access to basic sanitation facilities. Likewise, Ireland’s High Court decision in Fleming v. Ireland⁵⁰ rejected arguments that interpreted the constitution’s guarantee to a right to life as a right to suicide or voluntary euthanasia.

In the United States, changes would be more drastic. Take, for example, the recent Mississippi Supreme Court decision, Butler v. State of Mississippi⁵¹, in which the Court overturned the decision of the people on behalf of the legislature on a mere technicality, with no consideration of the common good or constitutional principles which guided the legislature’s promulgation of the law. I imagine a court more devoted to the common good would have avoided such a decision, given the judges’ lack of consideration for the intentions of the legislature in supporting the common good in the decision of the court.

This world would be especially helpful to legal conservatives. Although the case Dobbs v. Jackson Women’s Health⁵² has yet to be decided as of the drafting of this thesis, it seems unlikely to result in a national ban of abortion on constitutional principles. Instead, the best conservatives can hope for is an overturn of Roe. If there were six conservative

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⁴⁹ [2015] IESC 28
⁵⁰ [2013] IESC 19
⁵¹ In Re Initiative Measure NO. 65: Mayor Mary Hawkins Butler, In Her Individual and Official Capacities and the City of Madison v. Michael Watson, In His Official Capacity as Secretary of State for the State of Mississippi, NO. 2020-IA-01199-SCT
common-good constitutionalists on the Court, rather than six more-or-less-devoted
originalists, I somehow doubt that would be the case.

In conclusion, I have presented the case that the standard arguments directed against
common-good constitutionalism rely upon misunderstandings of common-good
constitutionalism or double standards with regards to other political and legal views.
Common-good constitutionalism is not a totalitarian view but rather a possible interpretation
of constitutionalism given a stipulative view of constitutionalism I have taken from the
thought of respected legal scholar N. W. Barber. Furthermore, common-good
constitutionalism offers an interesting solution to the problem of how to make decisions
given a variety of potentially conflicting constitutional principles.

Against the claims of critics, I have shown that common-good constitutionalism does
not conflict with respect for three fundamental constitutional principles, the Rule of Law,
Democracy, and Rights. Though these critics may have substantive arguments against the
views of Adrian Vermeule, the leading proponent of common-good constitutionalism, they
unnecessarily conflate this individual’s positions with common-good constitutionalism more
generally.

Indeed, I have argued that common-good constitutionalism is not a nightmare to be
feared but a dream to be realized. Specifically, I have illuminated ways in which adoption of
this view might provide ground for compromise between legal progressives and
conservatives and attempted to provide some predictions about what changes would occur in
the legal system given an adoption of common-good constitutionalism over positivism.
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