

BOOK REVIEW

Politics by Other Means: The Jurisprudence
of “Common Good Constitutionalism”

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INTRODUCTION

Professor Adrian Vermeule proposes an alternative to what he sees as the two dominant schools of constitutional interpretation in the United States: originalism and what he usually calls “progressivism”¹ (by which he means what others call “living constitutionalism”²). Against these approaches, he advocates for what Freudians might call a “return of the repressed”³: a recognition of the extent to which the “classical” natural law tradition’s concern with the “common good” has continued to animate our public law—explicitly for much of our history, he says, and implicitly more recently.

On Vermeule’s proposed alternative, courts (and other institutional actors⁴) should explicitly interpret⁵ the text of the

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

² See, e.g., W.J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (2007); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); cf. VERMEULE, *supra* note 1, at 117–33.

³ As Vermeule puts it in the first sentence of the book: “American public law suffers from a terrible amnesia . . . [It] has all but lost the memory of its own origins and formative influences in the classical legal tradition—particularly the *ius commune*, the classical European synthesis of Roman law, canon law, and local civil law.” VERMEULE, *supra* note 1, at 1; cf. *id.* at 180 (“The law has officially disavowed its own classical heritage but in practice draws upon and develops it, all while afflicted by a strange amnesia, a near-total lack of self-awareness that it is doing so.”).

⁴ “[A]ll officials have a duty, and corresponding authority, to promote the common good . . .” *Id.* at 1; see also *id.* at 129.

⁵ *Id.* at 18 (“[T]he classical tradition . . . looks to general principles of law and the *ius naturale* precisely in order to understand the meaning of the text, as a mode of interpretation.”).

Constitution, statutes, and administrative decrees with an eye to promoting the “common good” as understood in what he calls the classical tradition, meaning that it should be understood in distinctly nonutilitarian and nonindividualist terms.⁶ Officials should do so using something like philosopher Ronald Dworkin’s method of “constructive interpretation” (CI),⁷ in which the aim is to reach the decision that would follow from legal principles that enjoy some degree of explanatory “fit” with prior official acts (court decisions, legislation, etc.), but in which the inevitable explanatory gap is filled by reliance on those principles that provide the best moral justification for the institutional history of the legal system. For Vermeule, those moral principles are ones that embody the natural law’s idea of the “common good” rather than Dworkin’s “moral commitments and priorities . . . which [are] of a conventionally left-liberal and individualist bent.”⁸ As the last remark implies, Vermeule’s own moral commitments and priorities are of a decidedly anti-liberal (or illiberal) and anti-individualist bent.⁹ Even more importantly, by allying himself with Dworkin, he wants to emphasize that judges who follow this approach are doing what the law requires, not simply exercising discretionary power to make new law.¹⁰

There are nuances to Vermeule’s “common good constitutionalism” (CGC) that I will discuss in Part I, below, but this bracing proposal, even in summary form, raises a host of interesting theoretical questions, of which three stand out:

(1) Is there really a natural law? That is, are there, as Vermeule puts it, “principles of objective natural morality (*ius*

⁶ *Id.* at 14.

⁷ RONALD DWORKIN, *LAW’S EMPIRE* 254–58 (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*].

⁸ VERMEULE, *supra* note 1, at 6.

⁹ Some reviewers have called attention to Vermeule’s explicit embrace elsewhere of “Catholic integralism, a radical view that calls for the establishment of a religious and explicitly Catholic confessional state.” See Micah Schwartzman & Richard Schragger, *What Common Good?*, *AM. PROSPECT* (Apr. 7, 2022), <https://perma.cc/T5PZ-NNP2>.

¹⁰ See VERMEULE, *supra* note 1, at 19.

naturale)”¹¹ and “objective principles of legal justice accessible to [] reason”?¹²

(2) Why should the “common good” be conceived in nonutilitarian and nonliberal terms?

(3) Is Dworkinian CI severable from Dworkin’s own moral commitments (as Vermeule supposes), and is it more plausible as an account of law than the legal positivism Vermeule opposes throughout?

Disappointingly, there are few arguments in this book in support of answers to these interesting questions, although answers are presupposed—or sometimes asserted dogmatically—throughout the text.

In lieu of arguments in response to the first two questions, the phrase “in the classical tradition [or conception]” does most of the work: the “classical tradition” takes there to be a natural law; the “classical tradition” conceives the common good in nonutilitarian and nonliberal terms; and so on.¹³ No reasons, alas, are ever given for thinking that the “classical conception” speaks univocally or that it is even plausible or defensible. As we will see, it is neither univocal nor plausible.

On the third question, Vermeule makes clear that he takes himself to side with Dworkin against legal positivists, although he also, alas, takes over Dworkin’s well-known mistakes about legal positivism.¹⁴ Vermeule, to be sure, is explicit that his audience is not “the professional student of jurisprudence”¹⁵ like me, although the book is nonetheless full of ambitious jurisprudential

¹¹ *Id.* at 8. Oddly, he goes on to subsume Professor Lon Fuller’s “procedural legal morality” in *The Morality of Law* under the category of “principles of objective natural morality.” VERMEULE, *supra* note 1, at 8 (citing LON L. FULLER, *THE MORALITY OF LAW* (1964)). He uses this categorization even though the former can be easily endorsed (as philosopher H.L.A. Hart himself did) as constitutive elements of a legal system, ones quite compatible with, as Hart observed, “great iniquity.” H.L.A. HART, *THE CONCEPT OF LAW* 207 (3d ed. 2012) [hereinafter HART, *CONCEPT OF LAW*].

¹² VERMEULE, *supra* note 1, at 19. “[T]he precepts of legal justice in the classical law” are “to live honorably, to harm no one, and to give each one what is due to him in justice.” *Id.* at 7; *see also id.* at 30. Like many of the bromides of the “classical tradition,” this is meaningless: everything turns on the relevant conceptions of honor, of harm, and of justice, which are never elaborated or defended.

¹³ *See, e.g., id.* at 3–4.

¹⁴ For an overview with references to the literature, see BRIAN LEITER, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 18 AM. J. JURIS. 17 (2003), *reprinted in* NATURALIZING JURISPRUDENCE 153, 155–64 (2007).

¹⁵ VERMEULE, *supra* note 1, at 25.

claims¹⁶—about the nature of law¹⁷ and legal positivism,¹⁸ for example—and stakes out clear (and sometimes astonishing¹⁹) positions on many of them. Not writing for the professional jurist does not, of course, excuse an author from making mistakes about a subject matter. Some of Vermeule’s mistakes about jurisprudential issues are fairly inconsequential, and I let most of

¹⁶ He acknowledges that he “draw[s] on jurisprudential ideas as necessary” although he has “nothing original to say in that regard.” *Id.* at 4.

¹⁷ “We have first to understand the law as it really is.” *Id.* at 179.

¹⁸ He frequently equates legal positivism and originalism, even though one (a theory about the nature of the law) and the other (a theory about how to interpret constitutions) are conceptually unrelated. *See, e.g., id.* at 17. He even claims that progressive constitutionalism is committed to positivism “on the theory that the aim of the legal instrumentalist should be to liberate human will from all unchosen, objective constraints,” *id.* at 180–81, which bears no relationship to any known version of legal positivism, or of progressive constitutionalism. I return to the topic in Part III, below.

¹⁹ He declares, for example, that he “follow[s] Dworkin in believing that inclusive versions of positivism . . . are essentially ways of saving face at the level of names and labels while abandoning all the important substantive positions.” VERMEULE, *supra* note 1, at 8; *see also id.* at 187–88 n.8 (making a similar claim). Legal positivists from Jeremy Bentham to Hart believed that all law is a human creation (there is no “natural law,” as I will discuss in the text below), and that norms can be “legally valid” (that is, part of the law) simply in virtue of a conventional practice among human beings (or some subset of them). While early legal positivists adopted a “command” model, according to which all law was commanded by a sovereign authority, H.L.A. Hart’s innovation was to suggest that at the foundation of a legal system was not a sovereign commander, but a conventional practice of officials of a legal system in embracing certain criteria of legal validity from an “internal point of view” (i.e., treating them as obligatory, or something like that) (a “rule of recognition” as Hart called it), and using them to decide which norms were legally valid and which not. HART, CONCEPT OF LAW, *supra* note 11, at 79–123. Dworkin incorrectly assumed that the criteria of legal validity could only be “source-based” or pedigree criteria, and adduced examples of judges talking about norms that lacked a pedigree *as though they were legally binding*. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17, 22–25 (1967) [hereinafter Dworkin, *Model of Rules*]. Hart pointed out in his “Postscript” to *The Concept of Law* that it was perfectly possible for official practice to embrace content-based criteria of legal validity, as well as pedigree criteria. HART, CONCEPT OF LAW, *supra* note 11, at 250–53, 264–66. This abandoned no “important substantive position[s]” (as Vermeule falsely asserts), VERMEULE, *supra* note 1, at 8, since it was wholly compatible with Hart’s crucial thesis that at the foundation of a legal system was a conventional practice of officials, and nothing more. (Vermeule does not even appear to recognize that Dworkin denies that a legal system requires a rule of recognition.) In a long footnote, Vermeule asserts that he will “prosecute Dworkin’s core points” through examples of “the non-positivist practice and phenomenology of judging and legal practice.” *Id.* at 188 n.8. Hart’s theory was not a theory of judging, since adjudication is a marginal phenomenon in any society with a legal system (most legal questions do not end up in court after all), so the framing of the “prosecution” already reflects serious confusion about the defendant’s views. In fact, it is a virtue of Hart’s theory that it has an easy explanation of why most legal questions are easy and do not end up in court. *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1226–28 (2009) [hereinafter Leiter, *Explaining Theoretical Disagreement*]. But that is simply a bonus, not a central feature of Hart’s view. Vermeule understands none of this.

those pass in silence.²⁰ Some others, however, are actually central to his entire project, and I will address them most fully in Part III below.

I proceed as follows. In Part I, I describe Vermeule's idea of CGC in more detail, including his conception of the "common good" and his contrast of CGC with both originalism and progressive constitutionalism. In Part II, I take up the question of whether there is a "natural law," or even a univocal tradition of claims about "natural law." In Part III, I consider his use of Dworkin (including, in particular, in connection with the strongest section of his book, on administrative law), and Vermeule's dispute with legal positivism. In the Conclusion, I suggest that given that there is no natural law, that Vermeule's idea of the "common good" is idiosyncratic and objectionable, and that there is not a clear reason to prefer Vermeule's jurisprudential picture to that of the positivists, CGC is best understood as a kind of crude, results-oriented legal realism,²¹ in which the judiciary and the administrative agencies are to be enlisted on behalf of a political agenda that is unlikely to win democratic support.

I. COMMON GOOD CONSTITUTIONALISM AND ITS OPPONENTS

Early on, Vermeule offers the following useful statement of CGC, explicitly drawing on the tradition of natural law deriving from philosopher and theologian Thomas Aquinas,²² which is his primary touchstone:

In the classical [Thomist] tradition, law is seen as . . . an ordinance of reason for the common good, promulgated by a public authority who has charge of the community. Law is seen as

²⁰ I was disappointed by some unfortunate outbursts of anti-intellectualism, as when Vermeule describes the "positivism" of Bentham and Justice Oliver Wendell Holmes as "its earlier, vital form, before it degenerated into a mere thesis of analytic philosophy." VERMEULE, *supra* note 1, at 143. The positivism of Bentham was false as an account of law, as H.L.A. Hart showed; the positivism developed first by jurist Hans Kelsen, and then importantly modified by H.L.A. Hart, had the virtue of offering a far more plausible characterization of the nature of law. The only question is whether Hart's theory of the nature of law is true, not whether it emerged from the bogeyman of "analytic philosophy" (the bogeyman that also gave rise to Dworkin as well). I will largely ignore other examples of this kind of sophomoric rhetoric, appropriate for Twitter but not scholarship.

²¹ The actual American Legal Realists were not so crude. *See generally* Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005).

²² For an introductory overview, see Brian Leiter & Michael Sevel, *Philosophy of Law: Rome and the Middle Ages*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/8Z5G-YKQ8>.

intrinsically reasoned and also purposive, ordered to the common good of the whole polity and that of mankind. Classical law treats enacted texts as products of the reasoned deliberation of public authorities who give specific content to the law where background legal principles need specificity or leave relevant issues to discretionary choice. Where at all possible, classical law reads the law of a particular jurisdiction (the *ius civile*) in light of the *ius gentium* (the law of nations or peoples) and the *ius naturale* (natural law), which the civil positive law is taken to specify or “determine” within reasonable boundaries [e.g., civil defendants should have “repose from the risk of being sued,” which a particular jurisdiction’s statute of limitations makes determinate].²³

Vermeule explains further that the “classical tradition” distinguishes between *lex* and *ius*: “*Lex* is the enacted positive law, such as a statute. *Ius* is the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice.”²⁴ In English, this would be something like the difference between “law” and “right,” although in some European languages the term for “right” can do double duty. Thus, German distinguishes between *Gesetz* (law, roughly *lex*) and *Recht* (right, roughly *ius*), but *Recht* can also mean “law” (for example, philosophy of law in German is *Rechtsphilosophie*.) In English, by contrast, no one would think that “right” and “law” are interchangeable, thus losing a connection important for Vermeule and more apparent in several European languages.²⁵

CGC endorses Dworkin’s “‘moral reading[] of the Constitution,’ implemented through his method of fit and justification,”²⁶ that is, the idea that Dworkin defended in *Law’s Empire* in 1986 that in order to say what the law *really* is in any particular case a judge must ask which principles have some degree of explanatory fit with the prior institutional history of the legal system and then decide the instant case in a way that coheres with the morally best of those principles.²⁷ Thus, Vermeule says that CGC:

²³ VERMEULE, *supra* note 1, at 3.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ *Id.* at 6.

²⁷ See DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 239, 254–58.

shares the view that the positive provisions of the *ius civile*, including at the constitutional level, can only be interpreted in light of principles of political morality that are themselves part of the law. And it urges that the classical law is the best of our tradition, with the emphasis on both “best” (justification) and “tradition” (fit). But it advocates a different set of substantive moral commitments and priorities and a different account of rights from Dworkin’s, which were all of a conventionally left-liberal and individualist bent. I emphatically eschew Dworkin’s particular, substantively liberal account of justification, which I take to be detachable. . . . I reject his liberal theory of rights, as trumps over collective interests, in favor of a classical theory of rights as *ius*, founded in the injunction of justice to give every person what is due to them in a political order devoted to the common good.²⁸

To be clear, CGC matters most in the realm of the *interpretation* of the positive law (the *ius civile*). In general, Vermeule recommends deference to those who make positive law, when the meaning of the positive law is clear.²⁹ As Vermeule argues throughout, the positive law in the United States is often not clear, which makes interpretation by the courts and administrative agencies of paramount importance.

So what is the “common good”? Here Vermeule recapitulates the Thomist conception, without arguing independently for its plausibility. The essential features of the common good on this picture are:

(1) It is a good shared in common, rather than “an aggregation of individual utilities.”³⁰ It is a “genuinely common good that transcends preference aggregation.”³¹

(2) It is the highest good not just of the community, but of the individuals comprising the community,³² because “human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of

²⁸ VERMEULE, *supra* note 1, at 6.

²⁹ *Id.* at 46. *But see infra* note 55 and accompanying text (discussing “determination”).

³⁰ *Id.* at 7; *cf. id.* at 26 (“The sum of separate private utilities, no matter how large, can never add up to the common good, which is the good proper to, and attainable only by, the community.”).

³¹ *Id.* at 66.

³² *Id.* at 28–29 (“[T]he good of the community is itself the good for individuals.”).

the political communities.”³³ Indeed, “common goods are real as such and are themselves the highest goods for individuals.”³⁴

(3) These goods are “in a famous trinity, *peace, justice, and abundance*, which [Vermeule] extrapolate[s] to modern conditions to include various forms of *health, safety, and economic security*.”³⁵

It is easy to see how “health, safety, and economic security” are goods that can be shared in common in the sense that everyone, arguably, can benefit from their existence in a community, directly or indirectly. It is less obvious why “health, safety, and economic security” of the whole society are the “highest goods for individuals.” Vermeule appears to accept a view³⁶ that, in the modern era, is most closely associated with philosopher George Wilhelm Friedrich Hegel and the early Karl Marx, according to which there is a kind of identity of interests between the individual and the community and thus a constitutive relationship between what is good for each.³⁷ This view has led uncharitable critics to label Hegel a totalitarian,³⁸ but the more serious question is why one should think a view like this is correct.

Why not think, for example, that the highest good for the individual may *depend* on certain common goods being realized but still deny that the common good is “the highest good for individuals”? Put differently, why not think the “common good” is instrumentally essential for realizing the good of individuals, but is not in any way constitutive of that individual’s good? One could, however, deny even that weaker claim: perhaps an individual’s good requires that he or she enjoys health, safety and economic security, but it is irrelevant whether those goods are common properties of everyone. Why is that not a possible view? Vermeule never tells us what makes it the case that something is a good for an

³³ VERMEULE, *supra* note 1, at 29.

³⁴ *Id.*

³⁵ *Id.* at 7 (emphasis in original).

³⁶ *See id.* at 166, where Vermeule notes that the “classical” approach rejects the “implicit premise” of the liberal American framework “that the interests of ‘government’ as representative of the political collective, on the one hand, and the rights of individuals, on the other, are opposed and must be balanced against each other.”

³⁷ *See, e.g.*, G.W.F. HEGEL, PHILOSOPHY OF RIGHT 122–23 (T.M. Knox trans., 1942); Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 26–46 (Robert Tucker ed., 1978). Marx in his maturity abandons this view. For the more clearly Thomist version of the argument, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 134–56 (Paul Craig 2d ed., 2011) (1980).

³⁸ *See* KARL POPPER, *The Rise of Oracular Philosophy*, in THE OPEN SOCIETY AND ITS ENEMIES 217, 242–89 (Princeton University Press 2013) (1945) (polemic).

individual (or a community for that matter). He clearly rejects utilitarian views,³⁹ as do many authors, but he gives no arguments or reasons for rejecting such views, or for thinking that treating the “common good” as the highest good of the individual is to be preferred to an aggregative view of communal well-being.

Vermeule’s concrete examples of the “common good” later in the book also seem unlikely to persuade the skeptical reader. Against the “Stolen Valor” case,⁴⁰ in which the Supreme Court determined that criminalizing lying about military honors violated the First Amendment, he says that “the military honors system” is “a public and common good” that “is itself inherently reputational, inherently based on speech by people about other people.”⁴¹ Given that, it should have been possible for the government to punish false claims about possessing military honors.⁴² Regarding child pornography, in particular *Ashcroft v. Free Speech Coalition*,⁴³ Vermeule says that on the classical view:

[O]ne of the core tasks of political authority is to protect the health, safety, and morals of the public from those who would degrade them, in several senses. It is not just a matter of ensuring individual consent (the liberal theory of rights, founded in autonomy), but of ensuring a public environment that is not overrun by material damaging to the moral well-being of the political community. Public prohibition of pornography is a form of environmentalism for morals, and should be left to the reasonable determination of public authorities⁴⁴

Absent an account of what constitutes the “moral well-being” of the “political community,” it is hard to know how far this principle reaches, and to what extent it just recapitulates the Hart-Devlin debate about the legal enforcement of morals unrelated to harm.⁴⁵ He concludes his discussion of free speech by noting that blasphemy laws were deemed constitutional for most of American history, adding, “Every polity proclaims and enforces truths that

³⁹ See, e.g., VERMEULE, *supra* note 1, at 14 (“[The common good] is not an aggregation of individual goods, as in utilitarianism.”).

⁴⁰ *United States v. Alvarez*, 567 U.S. 709 (2012).

⁴¹ VERMEULE, *supra* note 1, at 169.

⁴² *Id.* at 169–70.

⁴³ 535 U.S. 234 (2002).

⁴⁴ VERMEULE, *supra* note 1, at 171.

⁴⁵ See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

cannot be questioned, at least at certain times or places or in certain ways; it is idle to pretend otherwise.”⁴⁶ He refrains from saying whether the dogmas of the Catholic Church should be among those truths. So the common good includes a system of military honors, the moral well-being of the community (and thus the regulation of pornography), and the protection of certain truths, including perhaps religious ones. I have no idea why these are all common goods, but I do worry about the implications of this list.⁴⁷

The reader still skeptical about Vermeule’s conception of the “common good” will find no other arguments to assuage the doubts. All we are told, again and again, is that this conception of the “common good” emanates from the “classical tradition”, and, indeed, that “the common good is a centerpiece of our legal traditions.”⁴⁸ The latter claim is false. It is trivially true that courts often reference health, public order, etc.⁴⁹ as relevant considerations in the interpretation of legal texts, but that does not show that they are committed to the “common good” in the Thomist sense as defined by the three claims noted earlier.⁵⁰ Indeed, it would be

⁴⁶ VERMEULE, *supra* note 1, at 173.

⁴⁷ The question is complicated further by some of Vermeule’s later claims that the “common good” includes the well-being of the environment. *Id.* at 173–78. Again, from a theoretical and scholarly standpoint, it is mysterious why all these belong together as instances of the “common good.”

⁴⁸ *Id.* at 30.

⁴⁹ As we have seen, Vermeule adds public morals to the list, even claiming that “‘health’ and ‘safety’ just as squarely presuppose a substantive conception of human flourishing in political community as ‘morals’ does.” *Id.* at 32. This is false: “health” and “safety” depend on facts about human beings and their biology and physiology, in a way “morals” does not, at least insofar as it goes beyond prescriptions and proscriptions related to the former.

⁵⁰ See *supra* notes 30–35 and accompanying text. Vermeule’s creative misreading of the famous case of *Riggs v. Palmer*, 22 N.E. 188 (1889), see VERMEULE, *supra* note 1, at 80–84, is illustrative of his tendency to assimilate, without adequate evidence, U.S. cases to the Thomistic tradition. Vermeule claims “[b]oth the majority and dissent in the case are firmly embedded within [the classical] tradition, and their disagreement is entirely internal to the tradition.” *Id.* at 72. He suggests the “classical” reason for textualism is “an institutional claim” that we will better realize the ends of law by requiring decision-makers “to stick closely to the ordinary, conventional meaning of text.” *Id.* at 74. This leads him into an interesting discussion of Aquinas’s views on textualism and *epikeia* or the “equity of the statute.” *Id.* at 75–80. Since Aquinas had no discernible influence on U.S. law, see *infra* note 51 and accompanying text, it is a non sequitur to move from this to *Riggs*; the resulting anachronistic reading of the case both misdescribes the opinions and their concern with the supposed “common good” and ignores all the actual scholarship about what was really going on in that case. See generally, e.g., Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42 (1990); William B. Meyer, *The Background to Riggs v. Palmer*, 60 AM. J. LEGAL HIST. 48 (2020).

astonishing if that is what they have in mind since, “the cases show that neither Continental nor English lawyers made much use of [Aquinas’s] treatment of the subject.”⁵¹ The actual natural law tradition on which the framers of the Constitution relied (that associated with jurists Hugo Grotius and Samuel von Pufendorf⁵²), as well as the social contract tradition of philosopher John Locke,⁵³ were ones with a far more individualist conception of rights⁵⁴ than Vermeule’s characterization of the “common good” allows.

Vermeule’s allegiance to the Thomist tradition is even more explicit in his emphasis on the role of law in providing “determination,” that is “giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.”⁵⁵ Possibly tortious wrongdoers should enjoy “repose” from possible suit; a statute of limitations makes determinate when that occurs. Wrongful killing of human beings should be prohibited and punished; distinctions between degrees of murder and manslaughter make determinate the prohibitions and the punishments. Indeed, “[a] range

⁵¹ R.H. HELMHOLZ, *NATURAL LAW IN COURT* 5 (2015). Vermeule relies quite a bit on Professor Richard H. Helmholz, but Vermeule is silent on this point. Helmholz acknowledges that, on the evidence, “it may seem tempting to dismiss the significance of natural law in the history of our law,” *id.* at 11, although one cannot doubt its rhetorical influence. Of course, rhetoric is not enough to sustain the Thomist claim.

⁵² See, e.g., ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM*, 18–27, 79–80, 124–26 (2010).

⁵³ *Id.* at 125–28.

⁵⁴ As one leading scholar of the early-modern natural law tradition, Knud Haakonssen, writes: “By insisting on the individual as the owner of rights, Grotius based government on the personal surrender of sufficient rights to such authority as would protect the individual’s remaining rights.” Knud Haakonssen, *Early Modern Natural Law Theories*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 76, 83 (George Duke & Robert P. George eds., 2017). As Haakonssen notes, Grotius’s “focus on individual rights . . . would be taken up in very different circumstances over the following centuries, and in the process the idea itself was profoundly transformed.” *Id.* He traces this development through Thomas Hobbes, John Locke, Samuel von Pufendorf, Francis Hutcheson, and Immanuel Kant, among other philosophers. See generally *id.* The legal philosopher Alf Ross puts the general point this way: the early modern tradition “signified the triumphant breakthrough of the natural law idea of the liberation/emancipation of the individual, pleading his inalienable right to freedom as well as his inalienable human rights.” ALF ROSS, *ON LAW AND JUSTICE* 323 (Jakob v. H. Holtermann ed., Uta Bindreiter trans., 2019) (1953).

⁵⁵ VERMEULE, *supra* note 1, at 9. For a more extensive discussion of the role of “determination” in CGC, see William Baude & Stephen E. Sachs, *The ‘Common-Good’ Manifesto*, 136 *HARV. L. REV.* 861, 865–66 (2023).

of institutional technologies”⁵⁶ are compatible with the Thomist requirement that law pursue the “common good.”⁵⁷

When Vermeule claims, then, that the “classical legal tradition . . . was our law, right from the inception” while “originalism . . . is a latecomer to the American scene,”⁵⁸ he is only partly right: the Thomist conception of “common good” jurisprudence was foreign to the American legal tradition, although “originalism” was indeed a late arrival.⁵⁹ More importantly for Vermeule, originalism is an “illusion,” and for mostly familiar reasons: originalist jurists toggle back and forth between the “abstract semantic content of the words” enacted and the expected applications of the drafters of those words “according to the dictates of opportunism”⁶⁰ rather than principle. To make matters worse, originalists have no stable account of “what level of generality [at which] to determine those (fixed and durable) meanings in the first place.”⁶¹ Originalist scholars have offered some responses,⁶² but it seems to me Vermeule is basically correct about originalist

⁵⁶ VERMEULE, *supra* note 1, at 19.

⁵⁷ Later, Vermeule says that “we would go very wrong to imagine that the natural rights strand of the [classical] tradition supported anything like the sort of robust judicial review and scrutiny of legislation we see in the modern caselaw.” *Id.* at 57. That is probably right, but it’s irrelevant to the question whether the conception of the “good” in the relevant natural law tradition was individualistic or anti-individualistic.

⁵⁸ *Id.* at 89.

⁵⁹ Sometimes, oddly, he also tries to argue that “classical law *is* the original understanding.” *Id.* at 2 (emphasis in original). But as we have already seen, at the time of the founding, Thomist classical law was certainly *not* the “original understanding.” See *supra* notes 50–51 and accompanying text.

⁶⁰ VERMEULE, *supra* note 1, at 94.

⁶¹ *Id.* at 98.

⁶² Two law professors have written a brief for originalism in response to Vermeule’s critique. See *generally* Baude & Sachs, *supra* note 55. Although I think Professors William Baude and Stephen Sachs make several sound critical points about Vermeule’s project, their overriding concern with defending originalism leads them to give, I think, a misleading impression of the actual structure of Vermeule’s argument. I also find unpersuasive the idea that originalism is “our law,” or that this follows from any plausible version of legal positivism, but this topic would take me too far afield.

practice,⁶³ as are other critics of originalism⁶⁴—a theory, which Vermeule correctly notes is, in any case, an idiosyncrasy of American constitutionalism.⁶⁵

If originalism is easily dispatched as an opponent of CGC, matters are more complicated with regard to progressive constitutionalism. Indeed, one might reasonably wonder whether CGC is just a conservative (Thomist) version of progressive constitutionalism rather than the liberal (Dworkinian) version.⁶⁶ Vermeule is sensitive to this concern, but his supposed explanation of the difference just raises more questions. Vermeule allows that CGC represents “*developing constitutionalism*,” which “celebrates continuity with the enduring principles of the past; it recognizes change in applications only insofar as necessary in order for those principles to unfold in accordance with their true natures and to retain those natures in new environments.”⁶⁷ So according to CGC, “enduring, objective principles . . . do not themselves evolve, although their applications may develop, over time, in changing circumstances.”⁶⁸

The contrast, according to Vermeule, is with progressive constitutionalism’s commitment to “endless liberation through the continual overcoming of the reactionary past” and “the will of individuals who seek liberation from any and all unchosen constraints.”⁶⁹ He describes this view as committed to “a further liberation of the human capacities” which “thereby uncouples law from reason, the exercise of which is grounded in the natural law and directed toward the common good.”⁷⁰ He reserves special

⁶³ I was surprised, however, by Vermeule’s critique of the Supreme Court’s opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which treats it as an example of originalism run amok. See VERMEULE, *supra* note 1, at 105–08. In fact, *Bostock* represents an intratextualist debate about whether the unit of semantic analysis is each word in the text considered in isolation (Gorsuch’s majority opinion) or the entire sentence or phrase (Kavanaugh’s dissenting opinion). For a useful discussion, see generally Sam Capperelli, Comment, *In Search of Ordinary Meaning: What Can Be Learned from the Textualist Opinions of Bostock v. Clayton County*, 88 U. CHI. L. REV. 1419 (2021).

⁶⁴ See generally, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022).

⁶⁵ VERMEULE, *supra* note 1, at 115.

⁶⁶ One prominent conservative jurist thinks that is all it is. See generally William H. Pryor, Jr., *Against Living Common Goodism*, 23 FED. SOC. REV. 24 (2022).

⁶⁷ VERMEULE, *supra* note 1, at 118 (emphasis in original).

⁶⁸ *Id.*

⁶⁹ *Id.* at 117.

⁷⁰ *Id.*

scorn for the Supreme Court's decision in *Obergefell v. Hodges*,⁷¹ recognizing a constitutional right to same-sex marriage,⁷² a decision "detached from the objective legal and moral order that underpins classical legal theory and the common good."⁷³ So, too, it appears is most of the recent constitutional jurisprudence (a "liturgy" he calls it derisively⁷⁴) on "race relations, women's rights, gender identity, or what have you"⁷⁵ as well as the general tendency of "progressivism" towards "ever-more radical forms of individual liberation and social egalitarianism."⁷⁶

The preceding is plainly an unserious characterization of the theoretical disagreement between "progressive constitutionalism" and CGC. Proponents of progressive constitutionalism, after all, can obviously view the "liberation of human capacities" (to use Vermeule's clunky characterization for something like an ideal of individual autonomy) as a controlling and objective moral principle, and indeed many of them do. Vermeule's occasional ally Dworkin quite explicitly takes his own "moral commitments and priorities . . . which [are] all of a conventionally left-liberal and individualist bent"⁷⁷ to, in fact, be objectively true moral principles.⁷⁸ Dworkin's claim for the objectivity of his moral commitments is implausible in my view,⁷⁹ but no more so than Vermeule's, as we will see—and at least Dworkin offers actual arguments for the objectivity of his moral views, unlike Vermeule!

A less dismissive (if obviously potted) characterization of the "progressive" view might begin with the idea that emerges, more or less, with philosopher Immanuel Kant and receives powerful articulation in Hegel, that modernity represents the progressive

⁷¹ 576 U.S. 644 (2015).

⁷² VERMEULE, *supra* note 1, at 118–20, 131–33.

⁷³ *Id.* at 131.

⁷⁴ *Id.* at 119.

⁷⁵ *Id.*

⁷⁶ *Id.* at 121.

⁷⁷ VERMEULE, *supra* note 1, at 6.

⁷⁸ See generally, e.g., Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFFS. 87 (1996).

⁷⁹ See generally, e.g., Brian Leiter, *Objectivity, Morality and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66 (Brian Leiter ed., 2001) [hereinafter Leiter, *Objectivity, Morality and Adjudication*]. For more recent doubts about Dworkin's view, see Sharon Street, *Objectivity and Truth: You'd Better Rethink It*, in 11 OXFORD STUDIES IN METAETHICS 293 (Russ Shafer-Landau ed., 2016), as well as my critique of this kind of non-naturalist moral realism in BRIAN LEITER, MORAL PSYCHOLOGY WITH NIETZSCHE 103–07 (2019).

realization of freedom, the latter demanding rational self-governance at both the individual and communal levels: no individual or community is free unless it acts rationally. Rational self-governance entails critical scrutiny of all inherited ideas, examining their justifications and shedding those which cannot withstand such scrutiny. Rational scrutiny of inherited ideas has led to the abandonment of many merely socially and historically contingent prejudices—including, most recently, prejudices about women, non-European peoples, gay people, and so on.⁸⁰ So understood, the “liberation” Vermeule bemoans represents the actual coupling of reason with law, which is certainly how Kant, Hegel and many other believers in an objective moral order conceived their view.

As the preceding discussion suggests, to really distinguish CGC from progressive constitutionalism, one would have to establish that there is an objective natural law discoverable by “reason” that is incompatible with these progressive principles about individual freedom. If there is not, then Vermeule’s constitutionalism really is just reactionary rather than progressive.

II. WHICH NATURAL LAW?

It is perhaps a symptom of the times in the U.S. legal academy that a highly regarded public law scholar like Vermeule can write a book that talks endlessly about the “natural law,” about “principles of objective natural morality (*ius naturale*),”⁸¹ “the objective order of justice,”⁸² and so on, without ever recognizing the need to take up the question whether any such thing exists or whether it is just an illusion. Consider, by way of contrast, the famous assessment of “natural law” in the 1950s by one of the major figures of European legal philosophy, Alf Ross:

Like a harlot, natural law is at the disposal of everyone. There is no ideology that cannot be defended by invoking the law of nature. And indeed, how could it be otherwise when

⁸⁰ The claim is not, obviously, that Kant and Hegel rejected such prejudicial stereotypes, but that the method of rational scrutiny of inherited concepts led to their rejection. Kant commends in *What Is Enlightenment?*, “[T]he freedom to make public use of one’s reason at every point” and thus rejects dogmatic views, like that of the cleric who says, “Do not argue but believe!” IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT?* 84–85 (Lewis White Beck trans., 2d ed. 1990). Use of reason has led people to question and reject the idea of homosexuality as a sickness, the inferiority of women and non-white races, and so on.

⁸¹ VERMEULE, *supra* note 1, at 8.

⁸² *Id.* at 59.

the ultimate basis for every natural law is to be found in a . . . direct insight, a self-evident contemplation, an intuition Self-evidence as a criterion of truth explains the utterly arbitrary character of metaphysical assertions. It raises them above any form of inter-subjective control and opens the door wide to unbridled fantasy and dogmatism.⁸³

The entire history of natural law—nowhere treated seriously by Vermeule—shows exactly this. Let us consider some examples of the extraordinary variety of claims made on behalf of a “natural law.”

The Athenian Ambassadors, in Thucydides’s recounting of their dialogue with the vanquished Melians, were, for example, believers in a natural law:

Nature always compels gods (we believe) and men (we are certain) to rule over anyone they can control. We did not make this law, and were not the first to follow it; but we will take it as we found it and leave it to posterity forever, because we know that you would do the same if you had our power, and so would anyone else.⁸⁴

One distinguished historian (on whom Vermeule often relies) claims, by contrast, that the Golden Rule is a central tenet of natural law: “Right reason had led to its recognition in every age of human history.”⁸⁵ Unfortunately, human history does not seem to

⁸³ ROSS, *supra* note 54, at 338. Earlier in the same volume, Ross describes this entire view as a kind of “infantilism.” *Id.* at 305. Finnis tries to deny that Ross’s kind of characterization is what is meant by “self-evidence.” FINNIS, *supra* note 37, at 69. I return to his discussion in the Appendix. Another commentator writes that for Aquinas:

propositions can be said to be self-evidently known, not because knowledge of them is innate, or because they are immediately known with certitude, but because reason, operating practically, recognizes the desirability, and hence actionability, the to-be-doneness, of the goods immediately upon a true apprehension of the nature of those goods.

Christopher Tollefsen, *Natural Law, Basic Goods, and Practical Reason*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 133, 135 (George Duke & Robert P. George eds., 2017). Without a plausible, substantive account of how it is reason achieves this cognitive feat—there is none—it confirms, in practice, Ross’s assessment.

⁸⁴ THUCYDIDES, *ON JUSTICE, POWER, AND HUMAN NATURE* 106 (Paul Woodruff trans., 1993). Thucydides here gives expression to a view defended by many philosophers in the fifth century BCE, according to which “it is human nature to . . . dominate others wherever possible” and, indeed, that it is “not only inevitable but right and proper.” W.K.C. GUTHRIE, *THE SOPHISTS* 99, 101 (1971). Thucydides himself clearly thought that the attitude expressed by the Athenians in the Melian Dialogue was not in the long-term self-interest of the Athenian Empire, as subsequent events made clear.

⁸⁵ HELMHOLZ, *supra* note 51, at 3.

include fifth-century Greece, on the evidence of Thucydides. Even in the post-Christian era, the purely formal principle of the Golden Rule—do unto others as you would have them do unto you—has admitted of wildly divergent interpretations. After all, it could comport with the Golden Rule to believe that those guilty of murder should be executed, since the executioners presumably believe that *if they were guilty of murder*, they too would deserve to die. So perhaps Thucydides's Athenians adhered to the Golden Rule, after all: they believed that *if they were powerless*, then the Melians should rule over them as they see fit. If that were right, then one might worry that the supposed natural law of the Golden Rule is an utterly empty formal principle (as Hegel did, indeed, complain about Kant's moral philosophy,⁸⁶ which was a formalization of the Golden Rule).

Ross himself surveyed all the diverse claims made on behalf of "natural law,"⁸⁷ showing that:

Clad in the noble garb of natural law, one has over the years defended or fought for every conceivable kind of claim, evidently arising out of a specific situation in life, and determined by economic and political class interests, by the cultural traditions and prejudices of the time as well as its aspirations.⁸⁸

For example, he notes, derisively, that for Aquinas "the indissolubility of marriage . . . is, of course, an evident truth of reason,"⁸⁹ consistent with Aquinas's general approach of "incorporating the fundamental dogmas of Christian morality" as part of the natural law.⁹⁰ The Enlightenment version of "[n]atural law divests itself now of its theological garb,"⁹¹ and instead, "[s]tarting from the principle of sociability, which demands that man, in accordance with his social nature, unites with his fellow men in peaceful and rational social life, one deduced a comprehensive system of legal rules, frequently down to the minutest details."⁹² Ross gives the example of jurist K.D.A. Röder's 1860 treatise on

⁸⁶ HEGEL, *supra* note 37, at 89–90.

⁸⁷ ROSS, *supra* note 54, at 304–34.

⁸⁸ *Id.* at 336.

⁸⁹ *Id.* at 337. It was a "truth of reason" not evident to the ancient Romans, among many others.

⁹⁰ *Id.* at 322.

⁹¹ *Id.* at 323; *see supra* note 54.

⁹² ROSS, *supra* note 54, at 324.

natural law,⁹³ according to which “elementary violations of the law of nature” include “to enter unbidden; to make journeys troublesome; the stiff leather stocks worn by soldiers.”⁹⁴

Even a less polemical scholar than Ross has acknowledged that early modern natural law “has often appeared as an amorphous group of ideas, many of them in obvious conflict with each other” which looked “as nothing but a pale, incoherent derivative” of the scholastic tradition.⁹⁵ Or as the political theorist Judith Shklar put it in 1964: “One of the delights of those who do not happen to be partial to natural law theory is to sit back and observe the diversity and incompatibility among the various schools of natural law, each one insisting upon its own preferences as the only truly universally valid ones.”⁹⁶

The basic problem with the “natural law” tradition is really the one philosopher Friedrich Nietzsche famously diagnosed, taking the Stoics as his target:

[W]hile pretending with delight to read the canon of your law in nature, you want the opposite, you strange actors and self-deceivers! Your pride wants to dictate and annex your morals and ideals onto nature—yes, nature itself—, you demand that it be nature “according to Stoa” and you want to make all human existence [*Dasein*] exist in your own image alone [W]hat happened back then with the Stoics still happens today, just as soon as a philosophy starts believing in itself. It always creates the world in its own image⁹⁷

On this view, “natural law” is always just a projection onto “nature” of whatever the moral prejudices of the time (or the author) have been.⁹⁸ Its proponents hope to score a rhetorical advantage by claiming that “nature” and/or “reason” themselves are on their side.

We can now state more carefully the argument against the existence of a purported “natural law” consisting of “objective

⁹³ See generally K.D.A. RÖDER, GRUNDZÜGE DES NATURRECHTS ODER DER RECHTSFILOSOFIE [FUNDAMENTALS OF NATURAL LAW OR PHILOSOPHY OF LAW] (1860).

⁹⁴ ROSS, *supra* note 54, at 324 n.4.

⁹⁵ Haakonssen, *supra* note 54, at 76.

⁹⁶ JUDITH N. SHKLAR, LEGALISM 68 (1964).

⁹⁷ FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 10–11 (Rolf-Peter Horstmann & Judith Norman eds., Judith Norman trans., 2002) (with a small modification to the translation).

⁹⁸ In this respect, Vermeule is, indeed, part of the natural law tradition.

principles” of morality.⁹⁹ If there were really a “natural law,” one might have expected some convergence on it over the course of two thousand years by the philosophers and scholars concerned with it. There has been none. Instead, what we find are various and sundry claims being presented as “the law of nature,” reflecting the interests and prejudices of those making these claims. That suggests there is no such thing as “natural law.”¹⁰⁰ More formally:

(1) If there were a natural law, one would expect epistemically well-situated observers to converge upon it after two thousand years.

(2) Philosophers and scholars are epistemically well-situated observers, many of whom have benefitted from the work of prior philosophers and scholars.

(3) Philosophers and scholars have not converged upon a “natural law,” instead presenting many different moral claims as evincing the natural law.

(4) The best explanation of the preceding is that there is no natural law.

There are other arguments for skepticism about the existence of objective principles of morality,¹⁰¹ but the consideration adduced here create a *prima facie* case for being skeptical that there is any such thing. The only actual claim that can be made on behalf of “natural law” is the one H.L.A. Hart acknowledged sixty years ago as its “minimum content”: any legal system must try to deal with the “bare bone” facts about the human situation (that we are vulnerable to harm, that there are limited resources, that we are creatures of limited altruism, that we want to survive).¹⁰² Legal systems can do that well or very poorly and still be legal systems. The only constraint nature imposes is that a legal system cannot be wholly unresponsive to the human situation, whether that system is Thomist or liberal or authoritarian.

⁹⁹ This borrows from Brian Leiter, *Disagreement, Anti-Realism About Reasons, and Inference to the Best Explanation*, *ETHICAL THEORY & MORAL PRACTICE* (2021).

¹⁰⁰ Even an author who wants to resist that conclusion would have to explain why one should think their preferred version of the “natural law” is the objective one. Vermeule, needless to say, does not discharge that argumentative burden, or even acknowledge it.

¹⁰¹ See, e.g., GILBERT HARMAN, *THE NATURE OF MORALITY* 3–10 (1977); BRIAN LEITER, *Moral Facts and Best Explanations*, 18 *SOC. PHIL. & POL'Y FOUND.* 79 (2001), *reprinted in* *NATURALIZING JURISPRUDENCE* 203 (2007) (building on Harman); cf. Leiter, *Objectivity, Morality, and Adjudication*, *supra* note 79.

¹⁰² HART, *CONCEPT OF LAW*, *supra* note 11, at 193–200.

Vermeule shows no awareness of any grounds for skepticism about natural law, in part because his treatment of it is so selective. At one point, he asserts that “[i]t is irrelevant that there was, is, and will be disagreement between classical lawyers over the content of the common good and the natural law, in hard cases,” noting that there is also disagreement about what the positive civil law is.¹⁰³ What is at issue here, however, is not simply disagreement over “natural law” in hard cases, but about what the natural law is quite generally. Absent an argument to the contrary, it is not at all obvious that disagreement about what the law is in any jurisdiction is as deep or profound as disagreement about what the putative natural law is.

Vermeule similarly asserts that Holmes was mistaken in being “skeptical that there exists an objective common good that transcends human will.”¹⁰⁴ Vermeule gives no argument explaining what the mistake was. He further asserts:

The great mistake of the modernist is to assume that such imperative rule [by authorities oriented towards the common good] can only be a matter of will, not reason (here projecting the modernist’s own will to power). But the whole point of the classical view is that governance and law are themselves suffused with and constituted by reason.”¹⁰⁵

There is, to be sure, much talk about “reason” in the natural law tradition, and Vermeule mimics that rhetoric faithfully, even though there is very little reasoning or argumentation on offer for his central claims. Indeed, when one examines the actual quality of reasoning and argumentation in the natural law tradition, one may be sorely tempted by Nietzsche’s joke about Kant, namely, that he “invented a special kind of reason [“practical reason”] for cases in which one need not bother about reason.”¹⁰⁶ This topic would, alas, take us far afield, but for interested readers I include an extended discussion of a leading contemporary example in the Appendix.

¹⁰³ VERMEULE, *supra* note 1, at 20.

¹⁰⁴ *Id.* at 70.

¹⁰⁵ *Id.* at 71.

¹⁰⁶ FRIEDRICH NIETZSCHE, *The Antichrist*, in *THE PORTABLE NIETZSCHE* 569, 578 (Walter Kaufmann, ed., trans., 1976) (1895).

III. LEGAL POSITIVISM, DWORKIN, AND CGC

Legal positivism is a tradition in legal philosophy that claims, in the first place, that all law is positive law, that is, all law has been created by human beings: it is thus a denial of the existence of a “natural law” that has its source in God, nature, or truths of reason.¹⁰⁷ Early on in the modern era, legal positivists proposed “command” models of law, but that changed in the twentieth century, first with jurist Hans Kelsen, and then with H.L.A. Hart. Hart’s version is Dworkin’s target (and Vermeule’s), so we can focus solely on his version of positivism. According to Hart, the existence of law and legal systems depends on the existence of what he calls a “rule of recognition,” a rule specifying the criteria other rules must satisfy to count as rules of the legal system.¹⁰⁸ The existence of a rule of recognition itself, however, is a complicated psychological and sociological fact about a particular society: the rule’s content consists in whatever criteria of legal validity “officials”¹⁰⁹ of the system converge upon¹¹⁰ and which they accept from what Hart calls an “internal point of view” (that is, the criteria they treat as obligatory or something like obligatory¹¹¹). In this sense, then, law rests not, at bottom, on commands, but rather on a complicated conventional practice of officials (a practice that can, to be sure, make it the case that commands by others can be sources of law, but only because of the official practice).

¹⁰⁷ It is an oddity of recent legal positivism that some of its proponents do believe in objective moral norms, but I put that to one side. Those who do so, however, do not believe that moral considerations are necessary to legal validity, so in that sense they remain legal positivists.

¹⁰⁸ See HART, CONCEPT OF LAW, *supra* note 11, at 100–10, 263–68; see also *supra* note 18 and accompanying text.

¹⁰⁹ Officials certainly include judges, but not only them: the behavior of political leaders, lawyers, and, in rare cases, even other actors can be relevant.

¹¹⁰ Their convergence is often a matter of *presupposing* certain criteria in their judgments. This should not be conflated with Kelsen’s notion of presupposition, which is a very different (Kantian) claim. See Brian Leiter, *Theoretical Disagreements in Law: Another Look*, in DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 249, 257 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019).

¹¹¹ Hart, who is an anti-realist about morality, does not think there exist *actual* obligations. In addition, under the influence of philosopher Gilbert Ryle’s behaviorism about the mental, he analyzes mental states (attitudes) exclusively in terms of the behaviors that manifest them—thus his emphasis on the internal point of view as being made manifest by behavioral practices of criticism and justification, and the use of normative language like “right,” “wrong,” “ought,” and “must.” See HART, CONCEPT OF LAW, *supra* note 11, at 56–57. And on these general points about Hart, see Brian Leiter, *Back to Hart*, 69 ANNALS FAC. L. BELGRADE L. REV. 749, 756–57 (2021).

Hart, crucially, sees that law exists primarily outside the courts: law in modern societies guides conduct outside the courts. Those buying real property, making a will, seeking tax advice, or entering a contract need to know what the law is and how to comply with it, even though their aim is (almost always) not to end up in court.¹¹² In a functioning legal system, lawyers and others provide regular guidance on what the law is, and are able to do so precisely because there exists a rule of recognition, even if it is complex and can, itself, be indeterminate in some measure. Legal questions that end up in court, and especially in the appellate courts, are often those where the indeterminacies in the existing law or its rule of recognition are important, and thus courts must step in to fill the gaps.

Vermeule correctly says that legal positivism is incompatible with CGC, since the latter “allows that the truth of legal propositions sometimes depends on the truth of moral propositions.”¹¹³ Later he says, “The classical tradition [] claims that principles of political morality are themselves already part of the law and internal to it.”¹¹⁴ Following Dworkin again, he says, “[L]aw itself contains general principles, rooted in political morality, whose origins do not seem to depend on any particular act of positive law-making.”¹¹⁵ Insofar as CGC has all these commitments, it is inconsistent with legal positivism, even the “soft” form Hart famously endorsed¹¹⁶ which allowed that officials might, in some jurisdictions, converge on “moral” criteria of legal validity. Even in such a jurisdiction, the truth of legal propositions depends on the conventional practice of officials, including their judgments about what morality requires, and not on the “truth of moral propositions.” Vermeule believes there is “law” that has nothing to do with human conventions, and positivists deny that. As we saw in Part II, there is, alas, no reason to believe Vermeule is correct that any such “natural law” exists, and he also gives no additional arguments for thinking the truth of legal propositions sometimes depends on the truth of moral propositions.

Vermeule, however, goes much further in denouncing legal positivism. He says, falsely, that “both progressivism and

¹¹² See, e.g., HART, CONCEPT OF LAW, *supra* note 11, at 28, 96.

¹¹³ VERMEULE, *supra* note 1, at 7–8.

¹¹⁴ *Id.* at 19.

¹¹⁵ *Id.* at 6.

¹¹⁶ HART, CONCEPT OF LAW, *supra* note 11, at 250–54.

originalism . . . are positivist approaches,”¹¹⁷ and says that the positivist approach “is itself consistently belied by the actual behavior of judges and other interpreters.”¹¹⁸ This is confused in several respects. First, legal positivism is a view about law, not a view about the interpretation of law by courts (law exists mostly outside courts, after all): there is no distinctively legal positivist approach to interpretation. Second, one can accept Hart’s view about the nature of law, and be an originalist, or living constitutionalist (what Vermeule calls “progressivism”)—again, the latter are only views about interpretation of one valid source of law, namely, a constitution. There may be jurisdictions in which the rule of recognition incorporates, for example, originalist criteria of legal validity, but that is a contingent fact about some legal systems, not about the nature of law. Third, Vermeule’s “progressivism” is just Dworkin’s “moral reading” of the Constitution (CI), and a reader might have thought that Vermeule recognized that Dworkin was not a positivist.

Vermeule writes that “Dworkin reinvented a version of the classical legal tradition without knowing it.”¹¹⁹ This is of a piece with his general view that CI as a method of legal interpretation is severable from Dworkin’s liberal moral commitments, which, as we have seen, Vermeule rejects without explanation. I want to conclude with some comments on this central argumentative move.

Dworkin advanced CI in 1986 not as an account of legal interpretation in hard cases, but as an account of the nature of law, simpliciter: to say what the law is we have to ask what interpretation of our institutional history (precedents, statutes, etc.)¹²⁰ would show it in its best moral light. (No one who consults a lawyer asks these questions, of course, but Dworkin, unlike Hart, did not view law as existing primarily outside the courts.) Dworkin claims the “central concept[ion] of [the] institution” of law is one that “insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble those ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions

¹¹⁷ VERMEULE, *supra* note 1, at 17.

¹¹⁸ *Id.* at 53.

¹¹⁹ *Id.* at 69.

¹²⁰ Dworkin asserts that “we have no difficulty identifying collectively the practices that count as legal practices in our own culture.” DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 91. He adds that, we “enjoy[] a fairly uncontroversial preinterpretive identification of the domain of law, and with tentative paradigms to support [our] argument.” *Id.* at 92.

about when collective force is justified.”¹²¹ Although Dworkin calls this concept “sufficiently abstract and uncontroversial,”¹²² it is nothing of the kind. Neither philosophers Jeremy Bentham, nor John Austin, nor Hans Kelsen, nor H.L.A. Hart, nor Norberto Bobbio thought this was the concept they were trying to explain or the one that was generally shared: Why think law necessarily justifies coercion? Dworkin, as was his wont, had simply changed the topic.

What matters here, however, is that Dworkin’s justification for utilizing the method of CI was his presumption that an account of law had to show how “law provides a justification *in principle* for official coercion.”¹²³ On Dworkin’s view, when judges use the method of CI, the legal system as a whole exemplifies the virtue of “integrity” (it treats individuals in a principled and coherent way), which, says Dworkin, gives rise to an “associative obligation” to obey the law.¹²⁴

Vermeule plainly does not believe CI is needed to explain how there is an obligation to obey the law. Perhaps Vermeule’s account could be expanded to make that connection (although Dworkin would deem it mistaken, since it rests on what Dworkin would adjudge an objectively incorrect moral view). Vermeule’s argument for CI, unlike Dworkin’s,¹²⁵ is that it is descriptively accurate. There is no doubt that the practice of trying to figure out

¹²¹ *Id.* at 92–93.

¹²² *Id.* at 93.

¹²³ *Id.* at 110 (emphasis in original).

¹²⁴ DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 190–216. An “associative obligation” is one that arises simply in virtue of the association one has with certain others, independent of any individual choice about that association. *Id.* at 196–97. The paradigm case is the family: many find it intuitive that one has obligations to parents, to children, and to siblings, simply in virtue of being related to them. *Id.* The legal system, for Dworkin, is like a very big family! The view is absurd, of course, and one would have to appeal to the sociology of the academy to explain why it was not laughed off the stage immediately. For one criticism of Dworkin’s argument, see Leslie Green, *Law and Obligations*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 514, 532–35 (Jules Coleman & Scott Shapiro eds., 2002).

¹²⁵ There are other ways of reading Dworkin as arguing for the centrality of CI. Thus, early in *Law’s Empire*, Dworkin claimed that *all* interpretation was CI. DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 52–53. No one, in any field concerned with interpretation, has found that convincing, compared to the ordinary idea that interpretation tries to represent its object as it is, not as we might wish it to be. Even if one rejects that view, Dworkin can still try to claim, as he does, that law is an “interpretive concept,” therefore one that requires CI. *Id.* at 45–86. His argument for that conclusion depends on what he calls the “semantic sting”: disagreement about law is impossible if speakers do not share criteria for application of the concept, yet it seems there is plenty of intelligible disagreement. *Id.* at 45–46. As philosopher Joseph Raz pointed out many years ago, the argument wrongly

how some line of cases “hang together” (under some rule or principle) is familiar to common lawyers (that is the “fit” component of CI); what is less clear is the role or status of claims about moral justification in choosing a principle. The examples Vermeule lays most weight on come from the administrative law context (one of his areas of expertise). As he says, “Our great charter of administrative procedure is full of generally stated principles whose interpretation inherently requires judgments of political morality . . . and whose application is situational.”¹²⁶ Thus:

In an administrative law setting, as elsewhere, the basic Dworkinian enterprise of law as integrity is to combine ‘fit’ and ‘justification.’ It deploys arguments that fit past legal decisions and that justify those decisions in light of arguments about which conceptions of arbitrariness [in administrative decisions] are most attractive on grounds of political morality, attempting to bring those conceptions into coherence with the wider body of law.¹²⁷

Vermeule, alas, does not describe the reasoning of the cases in enough detail to convincingly argue that these are cases of making judgments of political morality that the law requires as opposed to officials exercising discretion because the law has run out. The essence of the “conservative” legal movement in the United States for forty years has been opposition to “judicial activism,” that is, opposition to judges reaching beyond the settled law to impose their moral and political views. This is why Vermeule needs to marry his political agenda to Dworkin’s CI, since then CGC jurists will simply be doing what the law requires, rather than imposing their own moral views. Vermeule acknowledges that “the whole problem in concrete cases [of possibly arbitrary administrative decision] is uncertainty as to what counts as

assumes semantic individualism (to use a concept, each speaker must have in mind criteria for its application), when (following philosophers Tyler Burge, Hilary Putnam, and some later readings of the philosopher Ludwig Wittgenstein), an anti-individualist view of meaning is more plausible, according to which speakers use concepts whose criteria of application they may not fully understand, but they do so trying to answer to whatever the correct criteria are (as set by experts, or the community, or the nature of the world). See Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 *LEGAL THEORY* 249, 254–63 (1998). Neither Dworkinian argument is in evidence in Vermeule, which is just as well since neither is successful.

¹²⁶ VERMEULE, *supra* note 1, at 146.

¹²⁷ *Id.* at 147.

arbitrariness, since the concept admits of many possible conceptions. This is all grist for the Dworkinian mill.”¹²⁸ It is also grist for the mill of the legal positivist who thinks that when the sourced law runs out, authorities exercise discretion, even when they deny they are doing so.

Vermeule assures us that “the administrative state . . . is shot through with principles of *ius* that structure and channel its legality on behalf of the common good,”¹²⁹ but the fact that moral principles influence decision-making in difficult cases does not show that they do so in service of a unitary “natural law” or Vermeule’s conception of the “common good.” He is no doubt correct that judges and other officials talk of the “general welfare” and “public interest,”¹³⁰ of “fundamental fairness”¹³¹ and the like, but that fact about their rhetoric shows nothing about whether they have in mind Vermeule’s “common good,” let alone whether they are “following the law” as opposed to exercising discretion in accordance with their own moral and political judgment. Vermeule, like Dworkin, wants to deny that the latter is what is happening.

Dworkin, among his many talents, was the master of the “just so” story: every decision he agreed with represented the correct application of the method of CI, and every decision he disagreed with was a mistake about “law.” He even thought Justice Benjamin Cardozo, the quintessential legal realist on the bench, utilized CI.¹³² That seems to me dubious,¹³³ but the real question is why we should accept an account of the nature of law according to which the rhetorical moves Vermeule identifies (judges talking about the public interest, general welfare, fundamental fairness, etc.) should be conceived as their observing legally binding standards about the “common good” rather than exercising discretionary judgment about what should be done when the law runs out.¹³⁴ That is the hard jurisprudential question at the core of

¹²⁸ *Id.*

¹²⁹ *Id.* at 180.

¹³⁰ *Id.* at 15.

¹³¹ VERMEULE, *supra* note 1, at 60 (“The natural law still appears today, in substantive due process and equal protection cases, cloaked in the language of ‘fundamental fairness’ and similar formulations.”).

¹³² RONALD DWORKIN, JUSTICE IN ROBES 54–55 (2006).

¹³³ See generally Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L. J. 865 (2012).

¹³⁴ Some of Vermeule’s examples might be subsumed under Fuller’s principles of “legality.” See LON L. FULLER, THE MORALITY OF LAW 33–94 (1964). Vermeule complains, for example, about a 1988 Supreme Court case that says early on that “retroactivity is not

Vermeule's book, but his only argument for his preferred interpretation is obviously fallacious: he appeals to how judges and other officials talk about their decisions, but this admits of many explanations, positivist and antipositivist, so from a theoretical point of view it decides nothing.¹³⁵ Although Dworkin himself made such arguments early on,¹³⁶ by the time he tried to produce a scholarly monograph in defense of his views in 1986, he had largely abandoned that approach in favor of arguing that law as integrity had to be true if law were to justify the exercise of coercive power.¹³⁷ Since his opponents never thought that the exercise of power in accordance with law was necessarily justified, this move was equally puzzling. Vermeule, alas, seems wholly unaware of the actual jurisprudential dialectic into which he has entered.¹³⁸

CONCLUSION

Early on, Vermeule notes that both libertarians and liberals “express, along various lines, the fear that talk of ‘the common good’ is just a shorthand for the preferences of those in power.”¹³⁹ Vermeule admits there can be abuses of power—both by public and private actors—but says nothing to dispel the worry that “the common good” (like the “natural law”) is just high-minded rhetorical cover for a political agenda. This concern deserves to be taken much more seriously. Recent, important work on Nazi jurisprudence¹⁴⁰ should drive the worry home—not because Vermeule is

favored in the law,” even though it cites no legal source. VERMEULE, *supra* note 1, at 181. Fuller could be correct, as Hart agreed, that nonretroactivity is constitutive of a legal system, even if exceptions must sometimes be made. See HART, CONCEPT OF LAW, *supra* note 11, at 206–07. Most of Vermeule's examples are not like this, however.

¹³⁵ See generally RICHARD POSNER, HOW JUDGES THINK (2008); cf. Leiter, *Explaining Theoretical Disagreement*, *supra* note 19, at 1223–24, 1238–39 (noting that positivist theory fails to explain the “Face Value” character of theoretical disagreement and discussing theoretical virtues that lead to the preference of one explanation over another).

¹³⁶ Dworkin, *Model of Rules*, *supra* note 19.

¹³⁷ See *supra* text accompanying notes 121–24.

¹³⁸ One irony of Vermeule's response to Baude & Sachs, *supra* note 55, is that he accuses them of “doing jurisprudence without a license.” Adrian Vermeule, *The Bourbons of Jurisprudence*, IUS & IUSTITIUM (Aug. 15, 2022), <https://perma.cc/QYV6-2XAA>. Vermeule, as should be clear by now, is “doing jurisprudence” without even a learner's permit. Although Vermeule takes positions on many major jurisprudential issues, his take is consistently amateurish.

¹³⁹ VERMEULE, *supra* note 1, at 13.

¹⁴⁰ See generally HERLINDE PAUER-STUDER, JUSTIFYING INJUSTICE: LEGAL THEORY IN NAZI GERMANY (2020).

a Nazi (to state the obvious), but because Nazi jurisprudence illustrates the extreme way in which moral language in a jurisprudential theory can be appropriated on behalf of venal political agendas.

Nazi legal theory rejected positivism,¹⁴¹ in favor of the view that “moral ideals should form an integral part of the law.”¹⁴² As one SS officer and influential Nazi jurist put it: “[L]aw is the expression of the community order. Justice is not outside the law.”¹⁴³ For Nazi legal theorists:

a fundamental flaw of legal positivism was its lack of a supra-positive idea of law. Law had to incorporate an idea of justice and would thus exceed written positive law. In other words, the positive legal order should be a means of ‘realizing the concept and idea of law (*Rechtsidee*).’¹⁴⁴

Although Nazi legal theorists spoke of justice and morality and *Recht*, and not the “common good,” that is a difference only at the level of vocabulary, not substance: what the Nazi case illustrates is that abhorrent ideas can travel under the antipositivist banner of integrating “morality,” or the “good,” or the “right,” into law, precisely because the rhetorical power of those concepts can be, and has been, enlisted on the behalf of almost any agenda the speaker supports.

Vermeule gives the reader no reason to think there is a natural law, let alone one that embraces his view of the “common good.” He also gives no arguments for thinking that judges who invoke fairness, the public interest, the general welfare, and so on are applying the law, rather than exercising discretion to make law. In denying the existence of discretion, Vermeule is just a conservative Dworkin without even the dialectical fig leaf of an argument. My conclusion is that Vermeule’s CGC is best understood as a crude form of legal realism, in the sense that it is wholly results oriented, with only a rhetorical pretense of method and principle. Vermeule has a reactionary Catholic agenda¹⁴⁵ he wants the

¹⁴¹ *Id.* at 3.

¹⁴² *Id.* at 206.

¹⁴³ *Id.* (quoting Reinhard Höhn, *Volk, Staat und Recht*, in *GRUNDFRAGEN DER RECHTSAUFFASSUNG* 1, 9 (Theodor Maunz & Ernst Swoboda eds., 1938)).

¹⁴⁴ *Id.* at 207 (quoting Otto Koellreutter, *DEUTSCHES VERFASSUNGSRECHT: EIN GRUNDRISSE* 56 (3d ed. 1938)).

¹⁴⁵ As he has written elsewhere: “Catholics need to rethink the nation-state. We have come a long way, but we still have far to go—towards the eventual formation of the Empire of Our Lady of Guadalupe, and ultimately the world government required by natural law.”

courts and agencies to enact under the guise of interpretation. War may be “politics by other means” as Clausewitz famously said, but so too is constitutional jurisprudence in Vermeule’s hands. I am sympathetic to the general view that appellate judges must make quasi-legislative choices based on moral and political considerations,¹⁴⁶ although I am generally unsympathetic to Vermeule’s preferred and provincial choices.¹⁴⁷ Absent a real defense of the merits of Vermeule’s religiously informed politics (there is none), the book gives readers not already committed to his politics no reason to take his position seriously.

Adrian Vermeule, *A Principle of Immigration Priority*, MIRROR OF JUSTICE (July 20, 2019), <https://perma.cc/ZU3M-VBMF>. For other articulations of this view, see Jose Gomez, *Mary, Foundress of America*, FIRST THINGS (Aug. 28, 2017), <https://perma.cc/HA4Y-BSW7>; *World Government Is Required by Natural Law*, JOSIAS (June 24, 2015), <https://perma.cc/62UF-P6R3>; cf. Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), <https://perma.cc/8YP2-3RPK>:

If we are to be entirely flexible about means, to what ends? The ultimate long-run goal is the same as it ever was: to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth. . . . [T]he Church can be ‘all things to all men,’ politically speaking, precisely because political forms are merely possible means for carrying the core mission into execution. From the Church’s standpoint, many (although not all) political forms lie within the space of the *determinatio*—certainly a far broader range of political forms than liberalism permits.

¹⁴⁶ See generally Brian Leiter, *The Roles of Judges in Democracies: A Realistic View*, 6 J. INSTIT. ST. 346 (2020), reprinted in JUDGES AND ADJUDICATION IN CONSTITUTIONAL DEMOCRACIES: A VIEW FROM LEGAL REALISM 7 (Pierluigi Chiassoni & Bojan Spaić eds., 2021); Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L. J. 1601 (2015).

¹⁴⁷ See *supra* notes 40–46, 69–76 and accompanying text.

APPENDIX

Readers unfamiliar with natural law theory may not recognize the extent to which Vermeule adopts its rhetorical device of solemnly intoning that “reason” demands or establishes sundry and often dubious moral and political claims, even when there is very little actual reasoning on offer in support of these claims. The actual natural law tradition contains more reasoning, although not of a high quality. We can put to one side easy targets (e.g., comical arguments by recent natural law theorists about the supposed “metaphysical essence” of marriage, which excludes same-sex couples¹⁴⁸) and focus instead on the central text of contemporary Thomist natural law theory, philosopher John Finnis’s 1980 *Natural Law and Natural Rights*.

Finnis’s work has been most influential in legal philosophy for its challenge to H.L.A. Hart’s claim that a jurisprudential theory can describe what law is without taking any position on what it ought to be.¹⁴⁹ Much of his magnum opus, however, is an exercise in Thomist moral and political philosophy, arguing for the “basic goods” of human life that are the basis of practical reasoning (and which law is also essential to realize). These arguments, however, have had very little influence outside of sectarian circles.

Finnis began by identifying the “basic goods” (or “values”) that structure practical reasoning.¹⁵⁰ He wanted to show that they are “obvious (‘self-evident’) . . . and even unquestionable,”¹⁵¹ but realized there is “something fishy about appeal to self-evidence”—that self-evidence seems a “relic of the discredited Aristotelian conception of axiomatized sciences of nature.”¹⁵² His response to the skeptics was to try to argue that even outside the Aristotelian framework, there are “principles or norms of sound empirical

¹⁴⁸ SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012). For representative critiques, see Andrew Koppelman, *More Intuition Than Argument*, COMMONWEAL MAG. (Mar. 25, 2013), <https://perma.cc/ZS8K-C6GR>.

¹⁴⁹ FINNIS, *supra* note 37, at 3–19 (1980). Other natural law theorists have pointed out why the argument fails. For a concise account, see generally Mark Murphy, *Natural Law Theory*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 15 (Martin P. Golding & William A. Edmundson eds., 2005).

¹⁵⁰ These “basic goods” include, for example, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. FINNIS, *supra* note 37, at 85–90.

¹⁵¹ *Id.* at 59.

¹⁵² *Id.* at 67.

judgment” that are also “self-evident.”¹⁵³ So practical reason, according to Finnis, is on a par with theoretical reasoning, even in the empirical sciences, in this respect.

According to Finnis, the allegedly “self-evident” norms of sound empirical judgment include:

(1) “an adequate reason why anything is so rather than otherwise is to be expected, unless one has a reason not to expect such a reason”;

(2) “phenomena are to be regarded as real unless there is some reason to distinguish between appearance and reality”;

(3) “an account or explanation of phenomena is not to be accepted if it requires or postulates something inconsistent with the data for which it is supposed to account”;

(4) “theoretical accounts which are simple, predictively successful, and explanatorily powerful are to be accepted in preference to other accounts.”¹⁵⁴

The first two epistemic norms are meaningless without specification of their “unless” conditions. The first norm might be a sensible presumption in deterministic sciences, but one can only establish that an empirical science is deterministic on the basis of *a posteriori* evidence over an extended period of time, not self-evidence. The second norm is even more vacuous: phenomena are to be regarded as real unless there is a reason to be skeptical they are real. All of modern physics (which has no use for the world of chairs, tables, trees, and persons that appear to us) would have ground to a halt on this principle, except that the “unless” clause renders the antecedent meaningless. The third norm would seem to run afoul of the well-known fact that scientists embrace and develop theories even in the face of inconsistent data all the time.¹⁵⁵ Finally, the fourth norm will come as a surprise to all his-

¹⁵³ *Id.* at 68.

¹⁵⁴ *Id.* at 68–69.

¹⁵⁵ No one has rejected the theory of gravity, for example, despite its being incompatible with the increasing rate of expansion of the universe. As philosopher of science Paul Feyerabend observed, “no theory ever agrees . . . with the available evidence,” giving as an example that “[n]ot a single planet moves in the orbit calculated in accordance with Newton’s celestial mechanics (this has nothing to do with relativistic effects). There exist other as yet unexplained discrepancies exceeding the error of measurement by a factor of 10.” 1 PAUL FEYERABEND, REALISM, RATIONALISM AND SCIENTIFIC METHOD: PHILOSOPHICAL PAPERS 106 & n.7 (1981). Despite that, Feyerabend noted, it “would be rather imprudent” to abandon Newton’s theory. *Id.* at 106 n.7. See also the discussion and examples in 2 PAUL FEYERABEND, PROBLEMS OF EMPIRICISM: PHILOSOPHICAL PAPERS 24, 198–99, 209 (1981) (discussing this point further and providing examples).

torians and philosophers of modern science. Simplicity, plus predictive and explanatory power, are often attractive desiderata in theory choice, but they are hardly the only ones.¹⁵⁶ Moreover, “predictive” success is rarely deemed central to the historical or backward-looking sciences like geology or evolutionary biology. Trade-offs with simplicity are always permissible when there are gains along other theoretical dimensions (like consilience), but there is no formula for how those trade-offs are made. All of this is well-known to serious philosophers of science.

It is especially ironic that Finnis’s list of supposedly “self-evident” principles of empirical science is, in fact, a crude rendition of epistemic norms that emerged from the scientific revolution, and that were triumphant not because they were at all self-evident (which is why most were unrecognized prior to the sixteenth and seventeenth centuries), but because they turned out over the long haul to be practically fruitful, doing a much better job than Aristotelian science at enabling both prediction and control of the natural world.

Perhaps Finnis’s superficial understanding of the epistemology of the sciences in modernity is an anomaly, and he fares better when it comes to practical philosophy, when “practical reason” at last appears on the stage? Alas, Finnis’s claims about the “self-evident” “basic goods” suggest otherwise. For example, Finnis claimed that “to say that such knowledge is a value [(a basic good)] is simply to say that reference to the pursuit of knowledge makes intelligible (although not necessarily reasonable all things considered) any particular instance of the human activity and commitment involved in such pursuit.”¹⁵⁷ Claiming “knowledge” is a “basic good” also does not mean that all knowledge is worth having, or that everyone ought to pursue knowledge, or that knowledge is the supreme good.¹⁵⁸ By parity of reasoning, then, we can say that “getting high” is also a “basic good,” in the sense that “reference to getting high makes intelligible (although not necessarily reasonable all things considered) any particular instance of human activity and commitment involved in such pursuit,” for example, smoking marijuana. Of course, as with

¹⁵⁶ See generally W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (2d ed., 1978).

¹⁵⁷ Finnis, *supra* note 37, at 62.

¹⁵⁸ *Id.*

knowledge, this “is not to say that everyone actually does recognize the value” of getting high (or knowledge).¹⁵⁹ “On the contrary,” as Finnis said regarding knowledge, “the value . . . becomes obvious only to one who has experienced the urge to question” and so on.¹⁶⁰ So, too, only those who have experienced the urge to escape the tedium of everyday experience can appreciate the value of getting high. (I suspect Finnis has not had this experience.) One reason philosophers outside the sectarian tradition of Thomism have ignored Finnis’s arguments in moral philosophy is because his arguments are so vapid, as this example shows. They are fairly typical, alas, for what passes for the use of “reason” in natural law.¹⁶¹

Vermeule tells us near the end of his book, “[T]he main thing that is to be done, first and foremost, is to think clearly.”¹⁶² It is an ironic claim, given the evidence of his book and the tradition with which he has allied himself.

¹⁵⁹ *Id.* at 65.

¹⁶⁰ *Id.*

¹⁶¹ To be clear, there are exceptions to this generalization. Professor Mark Murphy’s work, for example, is philosophically sophisticated and challenging. *See, e.g.*, MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2009).

¹⁶² VERMEULE, *supra* note 1, at 179.