

Book Review

Adrian Vermeule, *Common Good Constitutionalism*, Cambridge, UK: Polity Press, 2022, pp. 241, \$59.95 (hardback)

Reviewed by Wendy E. Parmet

Common Good Constitutionalism: Common Ground or Culture War Battleground

Crises of constitutional legitimacy can make for strange bedfellows, enabling scholars from opposite ends of the ideological spectrum to find common ground. That we now face such a crisis appears beyond dispute. In the past year, we have witnessed a leaked Supreme Court draft opinion¹ overruling *Roe v. Wade*,² the overruling of that landmark decision,³ the enlargement of Second Amendment rights shortly after a horrific school shooting,⁴ the further evisceration of voting rights,⁵ the erosion of the administrative state,⁶ leaks about one justice's refusal to wear a mask to protect the health of another justice,⁷ revelations about the efforts of another justice's wife to overturn the 2020 election and his refusal to recuse himself in a case that might have shed light on his wife's activities.⁸ Following that litany, any pretense that the Court is a neutral arbiter has evaporated. But the Court's legitimacy is not all that is threatened; so too, is the nation's capacity

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1. *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.
2. 410 U.S. 113 (1973).
3. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
4. *N.Y.S. Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).
5. *Wisc. Legislature v. Wisc. Elections Comm'n*, 142 S. Ct. 1245 (2022).
6. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *NFIB v. OSHA*, 142 S. Ct. 661 (2022).
7. Nina Totenberg, *Gorsuch Didn't Mask Despite Sotomayor's COVID Worries, Leading her to Telework*, NAT'L PUB. RADIO (Jan. 21, 2022), <https://www.npr.org/2022/01/18/1073428376/supreme-court-justices-arent-scorpions-but-not-happy-campers-either#:~:text=On%20Wednesday%2C%20Sotomayor%20and%20Gorsuch,not%20say%20that%20she%20did.>
8. Aaron Blake, *The Fix, How Clarence Thomas's Recusal Controversy Compares to Others*, WASH. POST. (Mar. 28, 2022), [https://www.washingtonpost.com/politics/2022/03/28/thomas-ginsburg-past-recusals/.](https://www.washingtonpost.com/politics/2022/03/28/thomas-ginsburg-past-recusals/)

to address its most pressing problems, from climate change to gun violence. No wonder the public's confidence in the Court has tanked.⁹

In this climate, *Common Good Constitutionalism* by Harvard Law Professor Adrian Vermeule offers an intriguing, if not wholly persuasive, proposal. A committed Catholic integrationalist, who supports the integration of Catholic canon law into American law,¹⁰ Vermeule argues that the leading contemporary approaches to constitutional law on the left (living constitutionalism) and the right (originalism) have led us astray. In their place, he calls for a return to constitutional law's classical and natural law roots, under which law "should be seen as a reasoned ordering to the common good" (1). This leads him to argue for a more deferential judiciary, a more robust administrative state, and a jurisprudence that rebalances the relationship between individual rights and the common good.

Given the current Supreme Court's apparent disdain for the public's well-being,¹¹ Vermeule's analysis merits careful consideration, perhaps especially by scholars who do not share his political perspective. Many of his arguments, especially those relating to earlier constitutional law traditions and the weaknesses of contemporary constitutional theories, are largely persuasive. His recognition that the originalism and libertarianism that the Supreme Court frequently (if inconsistently) espouse¹² undermine the nation's ability to tackle critical challenges seems unassailable. The harder question for those of us who do not share his politics is whether *Common Good Constitutionalism* provides a potential road map for a more balanced constitutionalism or a brief for a revanchist, theocratic jurisprudence. The answer is probably "both."

Part I. The Common Good Tradition

Anyone who picks up a Supreme Court decision from the nation's first 140 years quickly discovers the dramatic disconnect between how courts decided constitutional issues then and how they do so today. For most of American history, courts did not apply tiers of scrutiny or the type of multi-prong tests that contemporary law students struggle to learn. Nor, with rare exceptions (*Dred Scott* comes most readily to mind),¹³ did the justices discuss the public meaning of the Constitution's terms at the time of ratification, as contemporary original-

9. Domenico Montanaro, *Poll: Majorities Oppose Supreme Court's Abortion Ruling and Worry About Other Rights*, NPR (June 27, 2022), <https://www.npr.org/2022/06/27/1107733632/poll-majorities-oppose-supreme-courts-abortion-ruling-and-worry-about-other-right>.

10. Adrian Vermeule, *Integration from Within*, II(1) AM. AFFS. 202 (Spring 2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/> (reviewing Patrick J. Deneen's *Why Liberalism Failed*).

11. See *supra* notes 4-7 and accompanying text.

12. Compare *Dobbs*, 142 S. Ct. 2228 (finding that the Constitution provides no right to abortion), with *NFIB v. Dep't of Labor*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (explaining that the major questions doctrine limits the reach of administrative agencies in order to protect the "liberties of millions of Americans").

13. *Dred Scott v. Sanford*, 60 U.S. 393 (1854).

ists would have them do.¹⁴ Instead, the justices relied on precedent, employed common-law reasoning, and imbued their decisions with many explicit and implicit assumptions about the nature of law, justice, and reason.

It is this tradition that Vermeule resurfaces in *Common Good Constitutionalism*. Building on the work of scholars such as William Novak¹⁵ and Richard Helmholz,¹⁶ Vermeule explains that for much of American constitutional history, judges saw themselves as working within a classical tradition, the “*ius commune*, the European synthesis of Roman law, canon law, and local civil law,” the latter of which included the common law (1, 5). Under this tradition, Vermeule argues, law was a form of “ordered reasoning” that sought to secure the common good, which was seen as “unitary and indivisible, not an aggregation of individual utilities (1, 7).” According to Vermeule, the common good included “*peace, justice, and abundance*,” and in its more modern incarnation, “*health, safety, and economic security*, (7)” a grouping that bears more than a scant resemblance to the classical formulation of the police power.¹⁷

Vermeule goes on to explain that the judges who operated within this tradition did not adhere to legal positivism, especially as it is practiced by today’s originalists. Instead, they believed that constitutional and statutory texts must be read and understood “against the backdrop of, and if at all possible in accord with, the broader legal background of natural law, general and traditional legal principles, and the law of nations” (8). As a result, Vermeule explains, “the truth of legal propositions sometimes depends on the truth of moral propositions” (7-8).

From these premises, Vermeule draws several important conclusions.¹⁸ One is that for much of U.S. history, courts did not view individual rights as trumps on state action. Nor did courts attempt to pit individual rights against the government’s interest, as occurs with contemporary balancing tests.¹⁹ Instead, “[r]ights, properly understood, are always ordered to the common good and that common good is itself the highest individual interest” (167). Thus, the common good was not the aggregation of individual interests, as utilitarians insist; it was unitary and prior to the good of individuals.

Second, as James Bradley Thayer would have it,²⁰ courts generally adopted a more deferential stance toward both legislative and administrative bodies than is common today. Accepting that the other branches of government also work within the same overarching tradition as they did, courts accepted that they

14. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021).

15. See generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

16. See generally R. H., *NATURAL LAW IN COURT* (2015).

17. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 658-59 (1887).

18. I leave for others an analysis of Vermeule’s representation of classical and canon law thinkers.

19. See e.g., *Riley v. California*, 573 U.S. 373, 382-85 (2014).

20. James B. Thayer, *The Origin and Scope of American Constitutional Law*, 7 HARV. L. REV. 129 (1893).

“need not be the institutions charged with directly identifying or specifying the common good” (12). In place of aggressive judicial review, courts exercised “prudential judgment,” and affirmed legislative and administrative actions as long as they did not “transgress the intrinsic limitations of legal justice” (21).²¹

This leads Vermeule to two additional propositions. The first relates to the concept of “solidarity.” For Vermeule, solidarity, a part of the *ius commune*, establishes duties upon the government to act in furtherance of the public good. The second relates to “subsidiarity,” which he describes as an “empowering principle, one that confers affirmative powers on the highest governing authority” to come to the aide of other (lower-level) institutions of government (155). From these principles, Vermeule argues for a strong national government and a robust administrative state. He writes that “the bureaucracy will be seen not as an enemy, but as a strong hand of legitimate rule” (42).²²

Vermeule points to several well-known constitutional and common-law cases as exemplars of the common good tradition, including *Mugler v. Kansas*²³ and *Riggs v. Palmer*.²⁴ He also describes Justice Peckham’s decision in *Lochner v. New York* as an example of a bad faith application of common good constitutionalism.²⁵ *Lochner*, Vermeule writes, was “an indisputable deviation from the settled framework of the caselaw, with its heavily deferential standard of review” (65). The opinion that got *Lochner* right, Vermeule argues, was not Justice Holmes’s cynical and positivist dissent, which seemed to accept any law that the elected branches enacted, but Justice Harlan’s “unanswerable dissent,”²⁶ which was “clearheaded about the Court’s own limited role and about the need for an authoritative determination of the competing principles of health and liberty” (65).

Justice Harlan’s opinion for the Court in another 1905 case, *Jacobson v. Massachusetts*,²⁷ which Vermeule discusses only briefly, and which the Roberts Court has lately cast aside,²⁸ may provide an even better illustration of common

21. In making this argument, Vermeule overlooks cases that required state action to be “necessary.” *E.g.* *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844) (doctrine of public safety permits town to raze buildings in time of fire when it is necessary).
22. Relying on Messner, Vermeule pushes this point to offer support for a dictatorship in the ancient Roman sense, “not at all the modern strongman or junta” but the “giant” who has “public authority with the jurisdiction to act, under exceptional circumstances where the operation of subsidiary institutions fails, so as to promote the common good throughout the polity (157-58).”
23. 123 U.S. 623 (1887) (upholding state law prohibiting the manufacture of intoxicating liquor).
24. 22 N.E. 188 (N.Y. 1889) (holding that statutes governing wills should be read to preclude murderer of testator from inheriting under a will).
25. 198 U.S. 45 (1905) (ruling that maximum hours law for bakers violated the Fourteenth Amendment).
26. *Id.* at 65-74 (Harlan, J., dissenting).
27. 197 U.S. 11 (1905).
28. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70-71 (2020) (Gorsuch J., concurring).

good constitutionalism. It also reveals some of the ways in which that tradition diverged from Vermeule's description.

Jacobson concerned a Cambridge, Massachusetts, law that required all residents, during a smallpox outbreak, to be vaccinated or pay a \$5 fine. The Reverend Henning Jacobson refused to be vaccinated. After his conviction was upheld by the state's highest court, he appealed to the Supreme Court.

Although Jacobson's opposition to vaccination derived at least in part from his religious beliefs,²⁹ he did not claim that the law violated the Free Exercise Clause. The simple reason for this was that the Supreme Court had not yet "incorporated" the First Amendment into the Due Process Clause. The deeper answer is that the contemporary (positivist) practice of tying constitutional challenges to specific constitutional clauses was not yet well established. Indeed, Harlan never focused on any specific clause of the Fourteenth Amendment.³⁰ Nor did he ask if the generation that ratified the Fourteenth Amendment would have thought that it provided a "right" not to be vaccinated. Instead, Harlan grounded his opinion on past federal and state cases, as well as general principles that appeared to him to be self-evident, but which unquestionably have normative content.

Two of those principles seem to conform to Vermeule's description of common good constitutionalism. First, Harlan accepted that there is a common good that states may affirmatively act to preserve. In perhaps the strongest exposition of this point in the *U.S. Reports*, Harlan wrote:

There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual to use his own, whether in respect of his person or his property, regardless of the injury that might be done to others.³¹

Second, Harlan, like Vermeule, recognized that elected and administrative officials may be better suited than judges to determining what the common good requires in a particular situation. The "authority to determine" how the public's health should be protected, Harlan asserted, "must have been lodged somewhere

29. Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 121 (2020), <https://www.bu.edu/bulawreview/files/2020/07/PARMET.pdf>.

30. Harlan, however, did reject Jacobson's contention that his claim was supported by the Constitution's preamble, explaining that although the "preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power confirmed on the Government of the United States, or any of its departments." *Jacobson*, 197 U.S. at 22. This discussion and Harlan's insistence that the Court's ability to limit the state's police power must "be found in some express delegation of power, or in some power to be properly implied therefrom," *id.*, evinces Harlan's incipient positivism.

31. *Id.* at 26.

or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions.”³² Harlan then went on, as Vermeule would have him do, to caution that courts should normally defer to such authority, writing:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purposing to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.³³

Yet if *Jacobson* exemplifies common good constitutionalism, Harlan’s opinion also deviates from Vermeule’s approach in several notable ways. For one thing, Harlan shows no affinity for Vermeule’s version of subsidiarity. Harlan, after all, was writing about the police power of the *states*, not the national government. Like other judges of his era, he simply assumed that the pursuit of the common good was left to the states *qua* states. The idea that subsidiarity should compel him to ask whether the federal government was better positioned to make vaccination policy would have struck him as ridiculous.³⁴

Harlan also did not rely on the same authorities as Vermeule. Harlan did not cite St. Aquinas or any Roman or Catholic (not to mention continental) thinkers.³⁵ Instead, like a common-law lawyer, he based his analysis on earlier federal and state cases.³⁶ He also drew upon social contract theory, noting, as the Court had earlier in *Munn v. Illinois*,³⁷ that the Massachusetts Constitution set forth a “social compact” in which the “whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the ‘common good,’ and that government is instituted ‘for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, fam-

32. *Id.* at 27.

33. *Id.* at 31.

34. It also would seem to strike Justice Gorsuch as absurd. *See, e.g., West Virginia v. EPA*, 142 S. Ct. 2587, 2616, 2621-22 (2022) (Gorsuch J., concurring) (saying that EPA’s powers should be read narrowly because they tread on the authority of the states); *Nat’l Fed. Indep. Bus. v. Dep’t Labor*, 142 S. Ct. 661, 670 (Gorsuch, J., concurring) (saying that the power to impose vaccine mandates rests only with the states).

35. Harlan did discuss the history of vaccine mandates in England and the Continent. *See Jacobson*, 197 U.S. at 31 n.†.

36. This is not to say that the authorities that Harlan cited might not have traced the lineage of their own thoughts back to classical times. No doubt some did.

37. 94 U.S. 113, 124 (1877).

ily, or class of men.”³⁸ Vermeule overlooks that tradition, preferring classical to post-Reformation Anglo-American theories.

Harlan’s echo of social contract theory points to another important distinction between his approach and Vermeule’s. Recall that Vermeule sees individual rights as “ordered to the common good and that common good is itself the highest individual interest” (167). Early nineteenth-century jurists largely shared that view, as evident in Justice Lemuel Shaw’s discussion in *Commonwealth v. Alger*:

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.³⁹

Jacobson, however, was decided decades later, after jurists had begun to conceptualize the Fourteenth Amendment as setting limits on the police power. Although Harlan accepted that there was a common good and that liberty was more than the lack of governmental restraint, he also recognized that individual interests could exist apart from that good. And he believed that courts had a role to play in protecting those interests. He explained,

[T]he police power . . . may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases to justify the interference of the courts to prevent wrong and oppression It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination [sic] in a particular condition of his health or body would be cruel and inhuman in the last degree.⁴⁰

He added, “[t]here is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government.”⁴¹ With this, Harlan offered an early recognition that the Fourteenth Amendment might protect individual autonomy, an offering that later judges would recognize as part of a right to privacy.⁴²

To his credit, Vermeule concedes that the tradition he describes was a “living tradition,” and that changes occurred during Reconstruction and in the decades that followed (58-59). But he never focuses on the forces that sparked those changes, sidestepping discussion of slavery, Civil War, Reconstruction, the rise of Jim Crow, women’s suffrage, immigration, and industrialization. Unlike

38. *Jacobson*, 197 U.S. at 27.

39. 61 Mass. 53, 85 (1851).

40. *Jacobson*, 197 U.S. at 38-39.

41. *Id.* at 29.

42. Parmet, *supra* note 29, at 127.

Harlan, who dissented in *Plessy v. Ferguson*⁴³ and the *Civil Rights Cases*,⁴⁴ Vermeule seems oblivious to the possibility that struggles over who belongs within the “commons” affected the courts’ understanding of what constitutes the common good and their role in advancing it. I return to this point in Part III.

Part II. The Illusion of Originalism

One of the more noteworthy features of *Common Good Constitutionalism* is Vermeule’s critique of the favorite interpretative theories of the conservative legal movement: originalism, textualism, and libertarianism.⁴⁵ Although he also criticizes progressive constitutionalism, largely for its “mythology of endless liberation,” (117) Vermeule points his most potent arrows at conservative approaches to constitutional interpretation. In contrast, Vermeule often offers praise to Dworkin, the theorist most closely associated with living constitutionalism, especially for his critique of originalism, which Vermeule remarks has “never been successfully answered” (95).

In brief, Vermeule, following Dworkin, argues that “originalist judges and other interpreters constantly toggle uneasily between” two accounts of meaning (95). In one, “meaning is based on expected applications; in another, meaning is based on the principles embodied in semantic content” (95). Neither approach, Vermeule argues, is “wholly satisfactory” (96). The former leaves judges free to choose (presumably on normative, nonoriginalist grounds) the level of specificity to be required when determining “expected applications” (96). The latter allows for a type of living originalism that admits the possibility that words will be applied in ways that are quite contrary to their public meaning at the time of their codification.

To illustrate the problem, Vermeule turns to Justice Gorsuch’s opinion in *Bostock v. Clayton County*,⁴⁶ which held that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation and gender identity. To Vermeule, this “debacle” illustrates that originalism can lead to “an outcome that, very possibly, not one of the legislators who enacted the statute, or the voters who elected them, would have thought included within the language they enacted” (105). Further, citing Justice Kavanaugh’s dissent,⁴⁷ which argued that Gorsuch misapplied textualism, Vermeule argues that textualism (and originalism) are “too unstable and unreliable to be applied ‘correctly’ in real cases” (107). In short, they are Dworkinism in conservative clothing.

43. 163 U.S. 537, 552 (1896) (Harlan J., dissenting).

44. 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

45. Following Vermeule, I will skip over the distinctions between these different aspects of contemporary conservative jurisprudence and henceforth use the term “originalism” to describe all three.

46. 140 S. Ct. 1731, 1743 (2020).

47. 140 S. Ct. at 1822 (Kavanaugh, J., dissenting).

Other scholars have argued that originalism is less normatively neutral than it pretends to be.⁴⁸ But Vermeule makes another point that seems especially apt at the current constitutional moment. In “our world, originalism is quite often practiced as a disruptive method, an essentially Protestant method of hermeneutic that, taken to its logical extremes, invokes *sola scriptura* to unsettle doctrines long established in the law” (113). Thus, rather than restraining judges, originalism, as now practiced, emboldens them to cast aside precedent in the name of fidelity to their own (cherry-picked?) conclusions regarding original meaning. Thus, originalism can lead Justice Thomas to assert that *stare decisis* is but a “mantra when we don’t want to think,”⁴⁹ and the Court itself to cast aside a fifty-year-old precedent in the name of fidelity to original scripture.⁵⁰ To justices confident in their unique capacity to divine original meaning, no precedent, practice, or norm seems safe.

Vermeule’s indictment of originalism also suggests, though he doesn’t quite say it, that originalism empowers judges to cast aside any and all deference to the political branches, undercutting *their* capacity to act on behalf of the common good. Empowered by their certitude about what the original meaning commands, judges feel free to ignore the warnings of experts, as well as the politically accountable branches.⁵¹ Originalism, in short, has become a narcotic that intoxicates judges to discard prudential reasoning and exceed the limits of their own knowledge. Common good be damned.

Part III. A Gift Horse or Trojan Horse

With multiple crises confronting us, Vermeule’s invocation of a more humble jurisprudence that accepts that government has a role to play in promoting the common good is tempting,⁵² at least to those of us who do not share the direction that the Roberts Court has taken. Yet, before deciding whether to treat Vermeule as an ally, it seems prudent to consider the warnings offered by his critics and dive a bit deeper into his conception of the common good.

To the chagrin of some conservative theorists, many of Vermeule’s conclusions seem surprisingly progressive. For example, Randy Barnett laments that

48. See, e.g., ERIC J. SEGALL, ORIGINALISM AS FAITH (2018). I will leave it to originalist scholars to discuss why they believe Vermeule misstates originalism. See, e.g., Randy E. Barnett, *Deep-State Constitutionalism*, GEO. L. FAC. PUBL’N AND OTHER WORKS (2022), <https://scholarship.law.georgetown.edu/facpub/2450>.

49. Matt Ford, *Clarence Thomas is Throwing the Supreme Court’s History Out the Window*, THE NEW REPUBLIC (May 19, 2022), <https://newrepublic.com/article/166534/clarence-thomas-roe-stare-decisis>.

50. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (June 24, 2022); *N.Y.S. Rifle & Pistol Ass’n v. Bruen*, 597 U.S. ____ (June 23, 2022).

51. Wendy E. Parmet, *The Antiscience Supreme Court is Hurting the Health of Americans*, SCI. AM. (May 17, 2022), <https://www.scientificamerican.com/article/the-antiscience-supreme-court-is-hurting-the-health-of-americans/>.

52. I draw upon the same tradition that he describes to reach somewhat similar but also quite different conclusions in CONSTITUTIONAL CONTAGION: THE COURTS, COVID AND PUBLIC HEALTH (forthcoming 2023).

Vermeule “endorses the administrative state as the institution best charged with implementing the natural law” and would even accept a national vaccine mandate.⁵³ Vermeule also writes favorably about international human rights law (129) and would revive the public trust doctrine (177). He is also very supportive of environmental interests (173) and rejects the Supreme Court’s current approach to standing (174-77) while endorsing a version of the administrative state that would make FDR smile.

Nevertheless, scholars from the center to the left have reason to worry that Vermeule’s approach to common good constitutionalism is a classic Trojan horse. For one thing, he is clear that he believes that Catholic thought should help determine the content of the common good on a wide range of issues, including marriage equality, abortion, and LGBTQ+ rights. Perhaps more importantly, he simply takes it as a given that the church’s position states what constitutes the common good and hence should inform legal outcomes. In effect, the nature of the good is whatever the canon law tradition teaches.

Yet canon law was not the go-to authority for jurists in the era that Vermeule seeks to resurrect. U.S. judges relied far more on common law and Anglo-American sources, including those that endorsed social contract theory, limited government, and a far more liberal conception of individual rights than Vermeule acknowledges.⁵⁴ Thus if common good constitutionalism accepts that the law provides a tradition of ordered reasoning that builds upon its own past, in the United States at least, that past may lead to some very different conclusions than those Vermeule embraces. In this sense, the future he seeks would mark a breach with the past as great as the one required by today’s originalists.

This relates to another issue that Vermeule conspicuously downplays: the role of democracy to constitutional legitimacy. As noted above, to Vermeule, the content of the good seems to be determined largely by the teachings of classical and canon law scholars. That leaves living Americans, most of whom do not share Vermeule’s particular theology, with little say about the most salient normative issues of the day, from abortion to gun control to whether or not to be vaccinated. Indeed, while Vermeule castigates originalists for empowering judges to block the elected branches for transgressing the sacred text of the

53. Barnett, *supra* note 70, at 48. Barnett adds that “Vermeule’s European approach would deprive us of this freedom, and the public health benefits that have resulted,” *id.*, a remark that somehow seems to forget that the United States has experienced far worse outcomes during the pandemic than European nations, and also had shorter life expectancies before the pandemic. Whatever the normative benefits of the U.S. approach, it certainly has not led to better public health. *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?*, COMMONWEALTH FUND (Jan. 30, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019> (comparing health outcomes in the United States to those in other countries pre-pandemic); *Mortality Analyses*, JOHNS HOPKINS CORONAVIRUS RESOURCE CTR., <https://coronavirus.jhu.edu/data/mortality> (last visited Apr. 11, 2022) (showing per capita deaths from COVID in different countries).

54. Vermeule never considers the possibility that mostly Protestant judges in an era of strong anti-Catholic animosity might have rejected the notion that the Catholic teachings should supply the content of the common good.

framers, he seems similarly willing to disempower voters from having much of a say about the nature of the good. Either way, democracy be damned.

Vermeule might respond that his approach would not threaten democracy because he seeks a more humble judiciary. But does he do so only because he is confident that all political power is now (and forever more will be) on his side? In short, is he willing to abandon the restraining potential of individual rights and federalism today only because he is confident that democracy is sufficiently impaired so that his views will prevail, notwithstanding public opinion?

Vermeule has hinted at his own stealth motives. Writing in *American Affairs* in 2018, he wrote: “It is a useless exercise to debate whether or not this shaping from above is best understood as coercive, or rather an appeal to the ‘true’ underlying preferences of the governed. Instead it is a matter of finding a strategic position which to sear the liberal faith with hot irons, to defeat and capture the hearts and minds of liberal agents, to take over the institutions of the old order that liberalism has itself prepared and to turn them to the promotion of human dignity and the common good.”⁵⁵

So, is Vermeule’s nod to the first Justice Harlan, whom liberals respect for his dissents in *Plessey v. Ferguson*,⁵⁶ *Lochner*,⁵⁷ and the *Civil Rights Cases*⁵⁸ (not to mention majority opinion in *Jacobson*), as well as his own support for environmentalism and human rights, simply that “strategic position” from which Vermeule can “defeat and capture the hearts and minds of liberal agents” in his quest to impose his own view of the common good, in which the voices of many have no purchase? Is his common good constitutionalism but a strategy for the constitutionalization of a particular form of theocracy? Quite possibly.

Nevertheless, as we observe the embers of the Supreme Court’s 2021 term, what matters far more than Vermeule’s own motives is his cry for a different constitutional law, one that goes beyond scholastic analysis of eighteenth-century dictionaries and the type of crude libertarianism that leaves us incapable of addressing climate change, gun violence, a continuing pandemic, and a host of other problems. “We must never forget that it is a constitution we are expounding.”⁵⁹ It is a charter, meant to enable a nation to endure. If the way we interpret it precludes that, there’s something very wrong with our jurisprudence.

As to what constitutes the common good, and what policies and rights can promote it, the answers in a democracy cannot be found solely in ancient texts (though those might be considered), nor even in our legal traditions (though they can help guide us). They also should not come solely from five justices’ determination of how generations long dead would have understood

55. Adrian Vermeule, *Integration from Within*, II AM. AFF. 202 (2018), <https://americanaffairsjournal.org/2018/02/integration-from-within/>.

56. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

57. 198 U.S. 45, 74 (1905) (Harlan, J., dissenting).

58. 109 U.S. 3, 26 (1883) (Harlan J., dissenting).

59. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

the capacious words they used. The answer must also consider the voices and experiences, including those etched by oppression and suffering, of those who face today's challenges. Without their input into what constitutes the common good, constitutional law can never secure it. With it, we just might have the chance to rescue constitutional law and our polity.