

“COMMON GOOD CONSTITUTIONALISM”: RULE OF LAW, RULE BY LAW, OR SOMETHING ELSE ENTIRELY?

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I INTRODUCTION

Adrian Vermeule has achieved something remarkable. His short volume *Common Good Constitutionalism* has created a veritable cottage industry in jurisprudence as well as constitutional and political theory;¹ that industry’s products range from dire warnings about authoritarianism² to adulation of what Vermeule himself calls a “ressourcement of the fundamentals of the classical Western legal tradition.”³ In fact, Vermeule, as an intellectual, has become an object of unusual fascination: which other law professor generates speculation about the meaning of his religious conversion, which other law professor is subject to extensive, often vitriolic controversy on social media—and keeps controversy going through posts that can only be described as learned forms of trolling and triggering?⁴ And which other contemporary theorist has dismissed so many criticisms with a disdainful gesture of claiming that hardly anyone truly understands him?⁵

One might not always take Adrian Vermeule literally, but there are good

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1. Adrian Vermeule, *Common Good Constitutionalism* (2022) [hereinafter CGC].

2. David Dyzenhaus, *Schmitt in the USA*, *Verfassungsblog* (Apr. 4, 2020), <https://verfassungsblog.de/schmitt-in-the-usa> [<https://perma.cc/ENW4-G9XZ>].

3. Adrian Vermeule, *The Constitution of Hierarchy*, 17 *Fudan J. Human. & Soc. Sci.* 547, 548 (2024).

4. Kevin Vallier observes that “Vermeule fused his intelligence, cleverness, and high social status into a fierce digital personality”; he also, according to Vallier, combined “a rapier wit with a national reputation for blocking people by the thousands.” Vallier adds that “integralism began as a movement for spiritual renewal, but today it labors under the yoke of a digital clique in search of political power.” KEVIN VALLIER, *All the Kingdoms of the World: On Radical Religious Alternatives to Liberalism* 15, 17 (2023). See also Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 *San Diego L. Rev.* 1039 (2019) (providing a critique from a Rawlsian perspective). It is important to note that integralism and postliberalism are not the same thing: most integralists would describe themselves as postliberals, but plenty of postliberals would refuse integralism.

5. Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism* 45 *Harvard J. L. & Pub. Pol’y* 103 (2022).

reasons to take him seriously. After all, quite apart from what critics see as a turn to full-blown Catholic integralism, he remains one of the most influential scholars of American administrative law; on a less academic note, it surely matters that he is a central figure in the self-declared post-liberal movement which has gained traction on the Trumpist right. In fact, one of Vermeule's epigones, as far as constitutional theory is concerned, Patrick Deneen, has frequently been portrayed as a major intellectual influence on Vice President JD Vance.⁶

At the same time, Vermeule's work has proven frustratingly elusive for many readers; as mentioned already, Vermeule himself has frequently portrayed himself as a victim of misinterpretations—without, however, necessarily responding to specific requests for clarification from his audience. Perhaps this frustration, and possibly a range of misunderstandings, have something to do with the fact that Vermeule's texts appear to operate at multiple levels—one can state this without assuming some quasi-Straussian conspiracy to mislead the uninitiated.⁷ I want to suggest that we can usefully distinguish four such levels: first, claims about a general framework, Common Good Constitutionalism and what Vermeule keeps referring to as “the classical legal tradition”; second, a somewhat more specific set of arguments about legal and political institutions—a level on which Vermeule is often at pains to emphasize that the general framework does not prescribe a uniquely appropriate set of institutions; third, a series of comments about U.S. law, informed by the overall framework and his previous accounts of the administrative state; and, last but not least, scattered remarks that appear to reveal his preferences about particular policy questions and laws concerning issues such as marriage, free speech, and reproductive

6. PATRICK DENEEN, *Regime Change: Toward a Postliberal Future* (2023) (endorsing common good constitutionalism without really exploring the idea in any depth). US postliberalism is not to be confused with the postliberalism that originated in the UK and remains associated with John Milbank's Radical Orthodoxy, although the two are sometimes run together and even said to “constitute a coherent Anglo-American tradition of thought.” See Stefan Borg, *In Search of the Common Good: The Postliberal Project Left and Right* 27 Eur. J. Soc. Theory, 3, 5 (2024). Vermeule situates himself in this larger development, erasing some of the relevant distinctions and slipping in a mandate for spiritual guidance by the state which many of the thinkers he mentions may well reject entirely: “The New Right isn't identical with Trumpism, and it is internally diverse and to some degree conflicted; it includes strands such as so-called national conservatism, a traditionalist Red Toryism or Blue Labourism and political Catholicism. These sub-movements often disagree, but they broadly converge on the ideas that government isn't the only possible enemy; that ‘private’ corporate power, tech monopolies, banks engaged in ideological policing of financial access, woke universities, and other nongovernmental bodies are at least as worrisome as overweening state power; that widespread impoverishment, immiseration, family breakdown, sexual adventurism, overdosing, environmental degradation, and spiritual anomie might be problematic, and that public action can do something about these crises; and generally that public authority is right and just when devoted to the common good, the classical conception of the proper purpose of government. This last strand of thought has become so pronounced that many now refer to ‘common-good conservatism’.” Adrian Vermeule, *Against Right Liberalism*, Compact (Mar. 22, 2022) <https://www.compactmag.com/article/against-right-liberalism/> [https://perma.cc/R4E4-3GJW].

7. I am not the first to suggest that one needs to analyze multiple levels of CGC. See, e.g., Kevin C. Walsh, *Multiple Levels in Common Good Constitutionalism*, MIRROR OF JUSTICE (May 27, 2022), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2022/05/multiple-levels-in-common-good-constitutionalism.html> [https://perma.cc/2UQB-E4DK]; Martin David Kelly, *Challenging Common Good Constitutionalism*, 15 Juris. 418 (2024).

freedom; here one finds clearly determined law in what Martin David Kelly has lovingly named “Vermeulitania—a fictional state in which Vermeule wields the power.”⁸

A number of interpreters have sought to show that, in the end, the arguments on all the different levels amount to a single vision, and, in particular, that this vision is Thomist through and through—possibly setting up a future constitutional theocracy.⁹ I leave aside this imperative of *cherchez la religion* and, in this essay, wish to concentrate on the level on which institutions are being discussed. My claim is that the picture presented there—with all due respect to possible variations which Vermeule goes out of his way to acknowledge—is not compatible with ideas plausibly bundled under the rubric “rule of law.” Of course, rule of law is itself a contested concept, and I’ll explicate why I make a claim about *tempering power* central to my account of it. But I do not wish simply to measure Vermeule’s theories by a standard that he (and others) could simply reject tout court. Rather, I want to suggest that some of the insights in Vermeule’s earlier work on institutional design and systems theory can be usefully employed to show the weaknesses of the picture with which he now associates the concrete realization of Common Good Constitutionalism. In short, it’s thinking against Vermeule with Vermeule—though, at least on this occasion, not much beyond Vermeule.

Our journey into Vermeule-world will stick to the following itinerary: first, a more detailed overview of the different levels of Common Good Constitutionalism; then an analysis of the parts that are concerned with institutions, and, finally, a critique of the various design choices put forward by Vermeule, undertaken in the name of a notion of the rule of law that will be (briefly) justified. Some more speculative considerations about how Common Good Constitutionalism might gain traction in a political community will be offered at the end.

II

WHAT DO WE TALK ABOUT WHEN WE TALK ABOUT COMMON GOOD CONSTITUTIONALISM?

Common Good Constitutionalism presents a general framework based on what Vermeule calls “the classical legal tradition”—or, more specifically, as he puts it, “the *ius commune*, the classical European synthesis of Roman law, canon law, and local civil law.”¹⁰ What unites these, according to Vermeule, is the notion that “law should be seen as a reasoned ordering to the common good,” with the further implication that public law today must subscribe to the supposed “master principle” of this tradition; to wit: that “all officials have a duty, and

8. Kelly, *supra* note 7, at 423.

9. Kyron Huigens, *Theistic Illiberal Constitutionalism: A Review of Adrian Vermeule’s Common Good Constitutionalism*, 63 U. LOUISVILLE L. REV. 1 (2024).

10. CGC, *supra* note 1, at 1.

corresponding authority, to promote the common good.”¹¹

Vermeule calls this a “deliberately unoriginal framework,”¹² and he does not hide that this approach—in particular, the opening salvo of declaring law “an ordinance of reason for the common good”—is derived from Aquinas. But he insists, in what he describes as a primarily *interpretive* enterprise, that this is not some narrow Catholic pursuit; he claims that centuries of U.S. law are also based on “the classical tradition,” including the notion that there is a crucial distinction between *lex* and *ius*: the former refers to “enacted positive law;” the latter contains *lex* but also “general principles of jurisprudence and legal justice.”¹³ He further asserts—without lowering himself to provide much by way of evidence, though—that, at the founding, “the common law referred more broadly to a concrete order, a living tradition that emphatically included municipal civil or positive law, natural law, and the law of nations.”¹⁴ Whether all these forms of law were widely discussed is a matter open to empirical verification; whether they fit together as a “concrete order”—a Schmittian term, of course, inspired by the work of Maurice Hauriou—would be more difficult to ascertain.

The obvious follow-up question—what defines the common good—is answered by Vermeule in multiple ways. Rather abstractly, he insists that it has to be understood as “unitary and indivisible” and, pace the dismal individualist liberals, not as “an aggregation of individual utilities; it can be shared without being diminished.”¹⁵ In this sense, it might be analogous to some notions of “the public interest.” Furthermore, “the highest felicity or happiness of the whole political community,” according to Vermeule, must be understood as coinciding with “the highest good of the individuals comprising that community.”¹⁶

Somewhat, but only somewhat, more concretely, Vermeule proceeds to specify “the central goods” at which the constitutionalism he seeks to defend should aim: “peace, justice, and abundance” which are translated into more contemporary terms as “health, safety, and economic security” (there are also multiple references to protection of the environment).¹⁷ Understood this way, the common good justifies authority in general and, more specifically, particular forms of public action.

Vermeule readily concedes that different circumstances will call for different conceptions of these very general concepts; general principles are in need of determination, which is to say: Thomistic *determinatio*. These determinations include different constitutional arrangements, such as, for instance, the precise roles to be assigned to courts and administrative agencies.

11. *Id.*

12. Adrian Vermeule, *The Bourbons of Jurisprudence* 3 (Harv. Pub. L. Working Paper, Paper No. 31, 2022).

13. CGC, *supra* note 1, at 4.

14. *Id.* at 201, 203. As he writes in another context: “Law being messy, it is always possible to find some material or other to support a thesis.”

15. *Id.* at 7.

16. *Id.*

17. *Id.*

More controversially, he insists that rights have to be seen as always already structured—and justified—by the common good—again, in supposed contrast with liberalism; the latter is said to defend rights as claims against the state and/or as means to enhance individual autonomy—or, crudest of all: as means to satisfy entirely subjective preferences. The common good, by Vermeule’s definition, cannot be set against anything like an individual pursuit of happiness, for it is in fact essential to that pursuit.¹⁸ In short, the common good comes first; rights are derived from it.

So far, so general—but also, for presumably at least some observers, so counterintuitive: Constitutionalism here is not about constraining various forms of public power in any shape or form; rather, it is a teleological concept which primarily justifies *constituting* public power. The conventional liberal way of thinking about constitutionalism is dismissed as being unable to transcend concerns with “institutional technology or particular institutional arrangements.” Alternatively, he might have dismissed it as being concerned with only one telos, and according to Vermeule, the wrong one: freedom.¹⁹

However, on a different (second, in my counting) level of discussion, Vermeule himself clearly thinks he has something to say about “institutional technologies.” While claiming time and time again that different institutional arrangements might be compatible with Common Good Constitutionalism—all depending on circumstances, as any good conservative would hold—he clearly signals a strong preference for a robust administrative state—in whatever way that might be realized in different historical periods or in different cultural contexts. As Vermeule puts it, “under contemporary conditions of extreme economic and social complexity, bureaucracy properly and intelligently deployed is an engine of unsurpassed power for promoting the common good.”²⁰ The requirement appears to be something like concentration of authority, in contrast with what Vermeule depicts as an exaggerated liberal distrust of authority; that squeamish liberal attitude, obsessed with risks, is to be replaced with an injunction Vermeule enthusiastically adopts from the Spanish lecturer in business ethics Ricardo Calleja: *imperare aude*—dare to command.²¹ It is this aspect that I

18. Even among Thomists, these points are by no means self-evident; witness the debates around Charles de Koninck and Jacques Maritain. See Charles de Koninck, *The Primacy of the Common Good Against the Personalists: The Principle of the New Order*, in *The Writings of Charles de Koninck* (Ralph McInerny ed., 2016). Koninck is celebrated by Vermeule several times in CGC, Maritain, arguably the politically most influential Thomist of the second half of the twentieth century—never.

19. CGC, *supra* note 1, at 19. It is an interesting question whether a refashioned Common Good Constitutionalism could do any interesting work in the analysis of post-war constitutions which replaced liberty with dignity as the master principles.

20. *Id.* at 135.

21. *Id.* at 71. Callejo explains his idea in a blog post: “Dare to rule! Dare to govern! Dare to exercise the rights and fulfill the duties of legitimate authority, which in its higher form the classics called *imperium*. This call challenges authorities of all kinds (familial, academic, ecclesiastical, military, and civil) at every level. It is the anti-Enlightenment principle of rule *by reason*.” See Ricardo Callejo, *Imperare Aude!*, IUS & IUSTITIUM (Oct. 20, 2020), <https://iusetiustitium.com/imperare-aude-dare-to-command/> [<https://perma.cc/8L5W-7M9M>].

seek to explore in greater depth in just a moment.

Before doing so, the picture of the different levels of Vermeule's vision needs to be completed, though. For, apart from general gestures towards institutional design lessons one might associate with Common Good Constitutionalism, there is a specific interpretation of American law. The latter, according to Vermeule, has always been suffused with the "classical legal tradition"—a view facilitated by claiming that such an assessment is backed by a focus on the "unwritten parts" of the real Constitution. More particularly, Vermeule detects general principles of the classical tradition (*ius*, in his scheme) as much as, on a more institutional level, the construction of robust state capacity aimed at pursuing the common good, instantiated in the federal power, that is, the police power.

Here Vermeule re-deploys his influential arguments—sometimes developed in collaboration with Cass R. Sunstein—about the "inner morality" of administrative law; these arguments have yielded an imperative of judicial deference to administrative agencies. He also argues against what he sees as the dominant approaches in US constitutional law, namely originalism and living constitutionalism. Originalism is a sham entirely, whereas living constitutionalism can be understood as misguided, but, in parts, salvageable—not morally, but methodologically.²² The alternative which he advocates is presented as "Dworkinism-plus-deference," a focus on "fit" and "justification" that centers the latter on a distinct morality informed by the common good.²³

Part of Vermeule's project here is to show that plenty of people—jurists, but also politicians and commentators, from the framers onwards—had been speaking prose all along, which is to say: think in and argue according to the "classical legal tradition." At the same time, he can go on insisting that originalists in fact keep speaking in bad faith; they stick to producing ahistorical libertarian (and highly disruptive, as opposed to genuinely conservative) claims, in the process happily inventing traditions to merely serve contemporary political preferences.²⁴

Beyond the double attack on originalism and living constitutionalism, Vermeule seeks to put in place what he regards as a proper model of interpretation: "developing constitutionalism." This approach is said to celebrate "continuity with the enduring principles of the past" ("fit" is covered); and it "recognizes change in applications only insofar as necessary in order for those principles to unfold with their true natures and to retain those natures in new environments."²⁵ In other words, "general principles"—*ius*, that is—oriented towards realizing the common good are supposed to cover "justification."

22. CGC, *supra* note 1, at 67.

23. *Id.* at 69. According to Vermeule, Dworkin "reinvented a version of the classical legal tradition without knowing it, especially when toward the end of his career he categorized law as a department of political morality—albeit a distinctive department, itself including distinctive moral considerations such as qualified continuity with past decisions and respect for institutional roles." Vermeule adds that this particular framing would have had "both Aquinas and the classical lawyers nodding in approval."

24. *Id.* at 92–93.

25. *Id.* at 118.

Of course, it can become difficult here to disentangle claims about the general framework and more provincial arguments about the United States. Presumably, if the entire West can be said to be characterized by at least traces of “the classical legal tradition”—and if the point of Vermeule’s project is a proper revival of that tradition—then the imperative to understand and apply developmental constitutionalism goes beyond American borders. And, in fact, if one accepts the work of justification ultimately being done by natural law (albeit doing its work quietly in the background), one would have thought that developmental constitutionalism ought to apply universally as well.

Now, applications do not remain abstract: Vermeule spells out what the classical legal tradition prescribes when he takes clear positions on same-sex marriage and abortion (I leave aside his rather censorious discussions of free speech).²⁶ It is here that the natural lawyer comes fully into his own: Thomistic talk of “essences” and “definitions” basically closes the argument almost immediately: marriage is simply declared to be a “natural and moral and legal reality simultaneously, a form itself constituted by the natural law in general terms as the permanent union of man and woman under the general telos or indwelling aims of unity and procreation (whether or not the particular couple is contingently capable of procreating).”²⁷

What about those who disagree about the exact contours of the common good? Or those who are not simply ready to accept “the essence of natural institutions?”²⁸ Or those considering applying developmental constitutionalism in a different manner? With what kinds of claims could they possibly insert themselves into the conversation—for every tradition is a conversation?²⁹ It’s relatively clear what they cannot do: they could not simply assert rights as trumps, for instance. For, after all, an individual right to same-sex marriage presumably cannot be conceded because it would not be a right “ordered” to the common good. However, the questions how exactly same-sex marriage would detract from the common good, and why exactly marriage for all would not precisely be a candidate for a good that does not diminish the good in being shared, and why a right to marriage could not be justified “by what is due to each as members of a political community”³⁰—all these have no answers in the scheme that’s being proposed. Your marrying whomever you want to marry does not seem to diminish my ability to marry whomever I want to marry; the only objection would

26. *Id.* at 199. In an endnote, Vermeule states his position clearly (though without specifying how one recognizes an “unborn child”): “I believe there is a straightforward argument, not on originalist grounds, that due process, equal protection, and other constitutional provisions should be best read in conjunction to grant unborn children a positive or affirmative right to life that states must respect in their criminal and civil law. This view is not a mere rejection of *Roe v. Wade*, but the affirmation of the opposite right, and would be binding throughout the nation.” The formulation “opposite right” is somewhat puzzling, especially when one considers it in the context of a larger discussion of a right to privacy.

27. *Id.* at 131–32.

28. *Id.* at 132.

29. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2007).

30. CGC, *supra* note 1, at 128.

be that marriage is diminished because its *meaning* is decisively weakened (or the good is cheapened, so to speak).³¹ And that might have further consequences for the polity as a whole about which one could speculate: unsettling traditions and loss of moral orientation; declining birth rates, something like that.

Here those who seek to convict Vermeule of Thomism all the way down see their case vindicated: His most general framework centered on “reason” and the common good yields highly particular positions on rights; yet these can hardly be deduced directly from “the objective legal and moral order that underpins classical legal theory and the common good”—unless, perhaps, we assume that order as objective in the sense of simply being God-given.³²

I’ll leave for another day the question just how religious—or outright integralist or theocratic, as some of Vermeule’s critics have claimed—common good constitutionalism has to be. For now, I’d like to turn to a more detailed discussion of the various “institutional technologies” which Vermeule regards as compatible with Common Good Constitutionalism.

III

AGENTS OF THE COMMON GOOD UNBOUND?

Vermeule is at pains to stress that thinking about the concretization of the common good and about the institutions best suited to pursue it must be highly sensitive to different contexts. He posits, for instance, that “the common good is, above all, a structure of justification. So long as methods, procedures, and institutions are justified with reference to the common good, rather than to other ends, they are perfectly respectable in classical terms, although they will of course still have to be assessed for prudential value.”³³ What really matters, to pick up his own terms, is performance, not design.³⁴

Such Burkean calls for respecting circumstances and exercising prudence notwithstanding, Vermeule is willing to tip his hand when it comes to his preferred institutional designs. The latter are not all just a result of being attentive to historical evolution, or the standard nods to “complexity” that contemporary political and social theorists would make. Rather, Vermeule does not hesitate to take inspiration, of all things, from the *lex regia* and ideals of Roman emperors (which is not to deny that Roman emperors faced complex challenges). The idea here was that the Roman people would hand over authority

31. One way of reading the connection between common good and marriage as a “natural institution” with an unchanging essence is that weakening the understanding the latter will lead to falling birth rates; after all, as Vermeule claims, “the telos of the institution is oriented toward the common good through reproduction, the *sine qua non* of a continuous political community and of a flourishing, fully human polity.” One might wonder what “fully human” is exactly meant to mean here? What would be the partially human polity? Charles Péguy held that *Tout commence en mystique et finit en politique*—here everything begins with high-minded natural law talk and ends with banal natalism. *See id.* at 133.

32. *Id.* at 131.

33. *Id.* at 135.

34. Adrian Vermeule, *Democracy, Disagreement, and Authority: A Response to the Symposium on Common Good Constitutionalism*, 69 AM. J. JURIS. 241 (2024).

and power, *imperium* and *potestas*, to the emperor—who was then, of course, assumed to pursue the common good—though sovereignty, supposedly, remained with the people. Vermeule emphasizes that the *lex regia* was motivated by what some today might call a populist impulse: In the face of rule by illegitimate elites—self-seeking and corrupt *optimates*—the people had to put their trust in a centralized authority capable of reining in the *optimates*: the emperor and his administration.

Anticipating the obvious objections to such a seemingly autocratic move, Vermeule stresses that the emperor, while concentrating all authority in his hands, had not somehow become a lawless actor—nor was he really a single actor, according to Vermeule: it was always the emperor and advisors, administrators, *et cetera*: Law made the king (to pick up a formula from Bracton), and the king stood simultaneously above and below the law. For good measure, Vermeule emphasizes that such a vision shows distinct similarities with classical Chinese political philosophy, the role envisaged for the Chinese emperor in particular. While not subject to anything resembling direct accountability to citizens, in both contexts, the ruler is constrained by a mandate to pursue the common good.

It feels like a bit of a jump, to put it mildly, from these more or less learned historical interpretations of the *lex imperio* to the finer points of *Chevron* and *Loper Bright*. But it's the jump Vermeule effectively makes when he generalizes about the importance of concentrated power and authority. There must be hierarchy, he insists; there must be willingness and capacity to command, he insists; and there must be flexibility in how those tasked with commanding are being treated. They simply cannot be put in a legal straitjacket; constitutions should be more like “loose-fitting garments.” After all, the point of constitutions is not to minimize all possible risks, but to make (common) good things happen.³⁵ The point holds even more clearly for the administrative state; Vermeule declares himself entirely in agreement with its architects who “believed that a government that always forms undistorted judgments, and that never abuses its power, will do too little, do it too amateurishly, and do it too slowly.”³⁶

Hence Vermeule links Common Good Constitutionalism with his well-known, long-standing arguments for deferring to agents of the administrative state. Read carefully, it is astonishing how often the term “common good” already appears in an apologia for administrative law which Vermeule published together with Cass R. Sunstein in 2000; claims about the “internal morality” of administrative law (largely inspired by Fuller) can then neatly fit into the larger framework that now provides a more comprehensive justification for extensive “police power” in the name of the common good.³⁷

35. Presumably designing constraints that are too tight would just reflect the wishes of the *optimates*. Or such constraints could at least be manipulated to their advantage. The flexible ruler, by contrast, has room to react to their efforts to usurp his authority. For earlier arguments against the pitfalls of “precautionary constitutionalism,” see ADRIAN VERMEULE, *The Constitution of Risk* (2013).

36. Adrian Vermeule, *Optimal Abuse of Power* 109 Nw. U. L. Rev., 673 (2015). Why minimizing risks leads to amateurism is hardly evident, though.

37. CASS R. SUNSTEIN & ADRIAN VERMEULE, *Law and Leviathan: Redeeming the Administrative*

It is also in this context that older arguments for why “tyrannophobes” should tone it down a bit can be re-deployed.³⁸ After all, Vermeule had long argued that a liberal obsession with “abuse” of state power could in fact be counter-productive: It leaves the executive with too little authority in cases of emergencies or, less obviously, when attempting to rein in abuses by powerful private actors. It also, more specifically, makes the authors of constitutions overinvest normative hopes in schemes like the separation of powers and strong forms of judicial review.

Vermeule does not deny that constraints matter; it’s just that they are only good “derivatively”—that is to say, as long as they contribute to the common good (though it’s a bit mysterious who supposedly makes the case for constraints as intrinsically valuable³⁹); the deeper problem, though, is simply that liberals are too anxious—something liberals could concede as a fact, and yet also justify with reference to historical experience, or just leave as a matter of reasonable pluralism and disagreement which anyone who does not imply wants to lord it over their opponents somehow has to deal with in their theory.

Yet Vermeule’s vision is misunderstood if it is read as a high-octane version of political constitutionalism, which is to say: theories that minimize judicial review, or deny it a role altogether in the name of the “dignity of legislation.”⁴⁰ Rather, the scheme is so open-ended that virtually all the constraints on the executive one could imagine, at least in a more conventional vein, might potentially vanish: Judicial review is largely dispensable—after all, it didn’t come with the *lex regia* or for that matter the classical tradition more broadly⁴¹, but so is the very majoritarian democracy which theorists of political constitutionalism like to uphold. After all, as Vermeule writes: “a range of regime-types can be ordered to the common good, or not. If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any particular set of institutional forms. Democracy—in the modern sense of mass electoral democracy—has no special privilege in this regard.”⁴² To be sure, he is willing to concede that other conceptions of democracy might play a useful role, but for reasons that do not necessarily quieten any liberal anxieties about the

State (2020); LON L. FULLER, *The Morality of Law* (1969). For good measure, Vermeule emphasizes the *ius* behind administrative law and claims that “the APA is the modern equivalent of the ‘natural law codes’ of the Napoleonic era, codes built around general principles.” CGC, *supra* note 1, at 146.

38. ERIC POSNER & ADRIAN VERMEULE, *The Executive Unbound: After the Madisonian Republic* (2010).

39. Vermeule writes that “constraints on power are good only derivatively, insofar as they contribute to the common good; the emphasis should not be on liberty as an abstract object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler because protecting them promotes the flourishing of the community.” CGC, *supra* note 1, at 37–38.

40. JEREMY WALDRON, *The Dignity of Legislation* (1999).

41. Vermeule writes that “we would go very wrong to imagine that the natural rights strand of the tradition supported anything like the sort of robust judicial review and scrutiny of legislation we see in the modern caselaw.” CGC, *supra* note 1, at 57.

42. *Id.* at 47

need for constraints. What is needed, according to Vermeule, are simply some “popular elements.”⁴³ It remains unclear whether there is a minimum, some kind of threshold for that expectation of public participation to be fulfilled.

Given the vagueness of all these institutional prescriptions, what faith should one have that Common Good Constitutionalism will be properly understood and properly implemented? One possible response is present in Vermeule’s work but remains rather oblique: Common Good Constitutionalism might mandate a kind of public pedagogy. Why? Because it might not reliably produce what political scientists would call “output legitimacy” (the system delivers justice, abundance, *et cetera.*); nor is it really good enough to find agents who “dare to command.” For even members of a polity following commands will not render a political community devoted to pursuing the common good stable and moral in the right kind of way: as Vermeule writes in a revealing endnote: “it is intrinsic to the natural law that it should be followed for its *own* binding force, not merely because some incumbent ruler commanded that it be followed. That natural law isn’t truly followed at all if it isn’t followed as natural law.”⁴⁴

According to Vermeule, law is always based on some kind of morality or other; law always teaches a moral lesson; it is both coercive and directive.⁴⁵ What matters is that law can more consciously be shaped to provide the right kind of moral environment and counter “spiritual anomie;” hence the legitimacy, for instance, of restrictions on free speech. Among other proposals, Vermeule advocates a ban on pornography as a form of “environmentalism for morals.”⁴⁶ To be sure, the public pedagogy that might need to accompany common good constitutionalism is not really specified. But given the empowerment of state agencies and the absence of meaningful constraints on public action justified in the name of the common good, liberals might have good reasons to be anxious: for instance, broadcast licenses might be denied or retracted because content is deemed to be damaging to the moral environment by highly partisan actors, with a very narrow conception of the common good. Evidently, existing states do implement all kinds of content restrictions (for instance, to protect minors); the worry is not about action of this kind as such, but about the absence of checks, constraints, and clearly specified institutional contexts in which different understandings of the common good could be contested and legitimate decisions be made.

IV

LIBERAL ANXIETIES, AGAIN

What, if anything, is problematic about this grand, ostentatiously learned vision? What can be said by those who do not simply want to dismiss it out of

43. *Id.* at 48.

44. *Id.* at 214.

45. Vermeule, *supra* note 3.

46. CGC, *supra* note 1, at 171.

hand for historical reasons (after all, there is no homogeneous classical legal tradition) or as a matter of normativity (the point of the law is not to push people in a particular direction of realizing a stipulated “common good”)? I should like to articulate two instances of what no doubt will be dismissed as liberal squeamishness: one has to do with democracy, the other with, broadly speaking, the rule of law. As will become clear, the two concerns are connected.

Who and what defines the common good? Vermeule has vociferously rejected criticisms along the lines that his core concept is ultimately indeterminate (the fact that there is disagreement about it is deemed irrelevant)⁴⁷; in any case, he has conceded from the outset that the common good needs proper *determinatio* and concretization. Little, however, has been said about how one is to envisage such a process. Who has a voice in the conversation, and who decides which conception of the common good should ultimately prevail (the Schmittian question of *quis iudicabit*)? The scattered remarks about institutions always contain the reminder that “mass democracy” is not the only possible political system, but little is said about the alternatives—and, more problematically, little is said as to the criteria on the basis of which one would choose among such alternatives, beyond gestures towards “circumstances.”

Procedures somehow being based on the notion that citizens are free and equal clearly is not a criterion; hence also apparently no aspiration to anything like an equal voice for all—and, importantly, the point of law is also not to communicate to citizens their status as free and equal.⁴⁸ It also is not an option to embed a story about institutions into one about rights, because, as we saw, we can only start talking about rights when the question about the common good has been settled, for rights need to be shaped in line with the common good. Vermeule at one point writes that “polities without mass electoral democracy use small-d democratic elements of representation and consultation—what one might call *democracy without voting*—to obtain information about popular preferences and to generate solidarity.”⁴⁹ Tellingly, it does not seem one needs processes in which citizens can confront each other with different conceptions of the common good; rather, with revealingly paternalistic language, we are told that authorities need to gather “information.” How such an exercise “generates solidarity” remains mysterious, unless one assumes that mass consultations or plebiscites also become popular festivals, à la Rousseau’s idealization of political fêtes during which citizens would observe each other acting in such a way as to

47. “It 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.” *Id.* at 20. Compare his remark apropos originalism: “there are endless, variant definitions of originalism, the sign of an unstable research program” *Id.* at 192. Of course, nobody would deny that it’s good to aim at the common good; but presumably the point of a “research program” on common good constitutionalism would be to have some agreed-on definition to start with.

48. Cf. SEANA SHIFFRIN, *Democratic Law* 18 (2021) (arguing for “democracy’s intrinsic communicative value and law’s special constitutive role in that communicative endeavor through which we represent our institutional, collective expression of justice and other forms of collective morality”).

49. CGC, *supra* note 1, at 48.

express commitment to the polity—and to each other.⁵⁰ Meanwhile, other suggestions like “subsidiary democratic mechanisms of petitioning, consultation, and local and provincial democracy” sound suspiciously like the institutions marshalled in defense of contemporary Chinese meritocracy as a justification of the one-party state.⁵¹

Obviously, Vermeule could simply reply, as he often does, that the problem goes away if liberals cease being liberals: Put differently, it’s all only a problem for those obsessed with individual autonomy who then link individual autonomy to democracy understood as collective autonomy (to be sure, not an easy link to establish, in fact).⁵² But that would be a bit too quick: either one has to make it plausible that people can just grasp “true natures,” “definitions” and “essences”—and of course plenty of those following the *Doctor Angelicus* would simply say that yes, *they can*—or one has to commit to a very strong version of the (paternalist) public pedagogy at which Vermeule hints coyly. What one cannot do is simply stipulate that there will be no or little disagreement.

Vermeule tries to find a way out by claiming that liberals always exaggerate disagreement; supposedly, they are projecting what happens in the seminar room, where clever disagreements are at a premium, onto “the real world.” Beyond this gratuitous faux anti-elitism he ups the ante by claiming that an “arbitrarily selective emphasis on disagreement is an infallible sign of ideology.”⁵³ How so? Because the number of those disagreeing with one’s favored position is exaggerated by nefarious ideologues? Because pointing to pluralism always ends up legitimating liberal ideology? If there are arbitrary selections, presumably there are non-arbitrary ones, too; what is the right, non-ideological selection criterion? Some kind of empirical assessment? Are Hobbes and Locke ideologues because they arbitrarily emphasized disagreement—to put it mildly—in the state of nature? We are not being helped to make further sense of the accusation of “ideology.”

In any case, Vermeule’s own complaints about over-reaching liberals who allegedly want to remove all constraints on humanity (including all biological ones) demonstrate the obvious fact of disagreement—never mind that he accuses liberalism simultaneously of having erected “pluralism” into a master principle *and* of being monists devoted exclusively to individual autonomy.⁵⁴ The point is

50. Jean-Jacques Rousseau, *Considerations on the Government of Poland*, in *The Social Contract and Other Later Political Writings* 177–260, (Victor Gourevitch ed. 1997).

51. DANIEL BELL, *The China Model: Political Meritocracy and the Limits of Democracy* (2016).

52. James Lindley Wilson, *An Autonomy-Based Argument for Democracy* 7 Oxford Stud. Pol. Phil. 194 (2021).

53. CGC, *supra* note 1, at 20.

54. This is the oscillation of liberalism diagnosed by Schmitt, but switching between liberalism as too strong or too weak is also possible among commentators. Vermeule sometimes accuses liberalism of hypocrisy, then of wanting hierarchy—that is, a desire to rule all in the name of liberalism. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 2007); Adrian Vermeule *Why I Lost Interest in the Liberalism Debate*, NEW DIGEST (Feb. 3 2024) <https://thenewdigest.substack.com/p/why-i-lost-interest-in-the-liberalism> [https://perma.cc/YT6P-CYKS] (noting that “Extant liberalism relentlessly frames every policy debate in terms of the value of

this: The fact of pluralism cannot just be wished away; it will remain even if one assumes that all non-Thomists are simply deluded and that letting humans figure out their own conceptions of the good life is “abominable.”⁵⁵ Somehow, Common Good Constitutionalists will have to do something with all these people.

The fact of disagreement exacerbates a second concern. Vermeule is right that constitutionalism is not simply about constraints. It is, as a distinguished line of theorists have long pointed out, as much about *creating* power as it is about limiting power.⁵⁶ But that does not invalidate the notion that—especially in light of the fact of deep and persistent disagreements—it is important to constrain authorities and make it possible for those subject to authority to voice views that authority might have become illegitimate, or may have overstepped its bounds. And that such voice has consequences. Or at least that authority, in the face of deep and persistent disagreement, opts for something like a tempered exercise of power.

Simply gesturing at the presence of law will not do here: Vermeule, giving another Roman history lesson, writes “the emperor and the imperial bureaucracy, as the apex of the legal hierarchy, themselves had an institutional interest in preserving the rule of law to regulate confrontations between citizens and governments.” This sounds plausible enough as a matter of “rule *by* law”—and, as Jeremy Waldron has pointed out forcefully, rule *by* law, compared to some of the alternatives, is not something to be sniffed at: It is already significantly better than rule that declines to observe any rules and regularity at all.⁵⁷ But it is hardly obvious how just having law amounts to rule *of* law if one understands the latter crucially to involve constraints on power, or, as Martin Krygier has put it in a series of justly celebrated writings, “tempering power.”⁵⁸

individual autonomy and an endless project of human liberation” and that “political liberalism, even if possible in principle, simply turned out to be unsustainable as a matter of the deep facts of human anthropology and human psychology”).

55. For even then the reasons that Rawls gave as to why we’ll continue to face “reasonable pluralism” remain in force. It is striking that the strongest language in CGC is reserved for what can be read either as reasonable pluralism or, going beyond that, value pluralism: “The claim, from the notorious joint opinion in *Planned Parenthood v. Casey*, that each individual ‘may define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’ should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after.” CGC, *supra* note 1, at 41–42.

56. For instance, see generally HANNAH ARENDT, *On Revolution* (1993).

57. Waldron insists that “using law as an instrument of rule is already the acceptance of a demanding discipline—formally, procedurally, and in the acceptance of a need for legal authorization for government action. It already implicates government in a compact of legality—where citizens’ subjection to law is matched with an assurance that the rules laid down in advance are the ones that will be applied to her conduct and applied as law, with legal procedures and legal safeguards. Jeremy Waldron, *Rule by Law: A Much Maligned Proposition* 23 (New York Univ. Sch. of L., Pub. L. & Legal Theory Rsch., Paper No.19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378167# [<https://perma.cc/LP95-ZKDA>]. This is not a minimal assurance. Though you can array it under the heading ‘rule by law’ if you like, it already captures a considerable element of what the rule of law is supposed to involve.” Of course, there’s a question of whether “legal safeguards” really amount to protections and robust means of recourse.

58. See Martin Krygier, *Well-Tempered Power: “A Cultural Achievement of Universal Significance”* 16 *Hague J. on R.L.* 479 (2024); See also Jeff King, *Martin Krygier and the Tempering of Power*, 11 *Hague*

The latter refers to a check on arbitrary government, something that Vermeule might find a problematic category since, presumably, his kind of government will always find reasons to justify its exercise of public authority in the name of the common good. In other words, deployment of the police power will hardly ever be arbitrary in the sense of random or without publicly avowable reasons. Arbitrary is not the same as tyrannical; in case of the latter one can more plausibly think of conduct that dispenses with justifications altogether and simply aims at the mute satisfaction of the appetites of the powerful. In other words, Vermeule’s approach might *prima facie* meet Philip Pettit’s seminal criterion for what it means to avoid arbitrariness: “[a]n act is perpetrated on an arbitrary basis, we can say, if it is subject just to the arbitrium, the decision or judgment, of the agent [. . .] that is chosen or rejected without reference to the interests or the opinions, of those affected.”⁵⁹ Vermeule would no doubt defend his unashamedly paternalistic constitutionalism with the claim that the pursuit of the common good by state agents is of course based on the interests of those affected; what he has no real room for is what Pettit would call contestations of such claims, beyond the meager concessions to “consultations” and “petitions.” The rule of law, as Gerald Postema has underlined, is not just about regularity (plus all of Fuller’s well-known criteria); it is about providing “*protection and recourse against the arbitrary exercise of power through law’s distinctive instrumentalities.*”⁶⁰

Note how Vermeule could also not reject anxieties based on the rule of law as yet another ideological attempt to vindicate libertarianism: true, one can describe the rule of law as “limited government,” but the point is not to minimize the reach of the state, nor even to minimize discretion on the part of the executive; the point is to temper power, to ensure that the state’s strength is not used “tyrannically” (to echo Shakespeare’s Isabella). Maxims like *legibus solutus* or *quod placuit principi, habet vigorem legis* do not necessarily have to result in the tyrannical exercise of power—the ruler might be genuinely devoted to the common good, and, let us stipulate, everyone entirely agrees on what the common good entails.⁶¹ But, obviously, in the absence of protections and recourse, betting everything on a benign ruler is a large risk.

In short, while it is hardly trivial that law has an internal morality, as Vermeule, following Fuller, insists, this does not answer questions about constraints in schemes of Common Good Constitutionalism. The problem is exacerbated by Vermeule’s long-standing view that administrative law—at least in the U.S. version, but the point presumably generalizes—is “Schmittian” through and through, by which he means that it is full of “black holes” and “grey holes.” The former means no law, the latter means the appearance, but not the

J. on R.L. 363 (2019). I shall not enter here the debate between what Jeff King helpfully calls the “legal essentialist” approach to the rule of law on the one hand and the “limited government” one on the other. See Jeff King, *The Rule of Law* (Fac. L. Univ. Coll. London L. Rsch., Paper No. 09, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4487306 [<https://perma.cc/6PR3-DVR5>].

59. PHILIP PETTIT, *REPUBLICANISM* 55 (1997).

60. GERALD POSTEMA, *Law’s Rule: The Nature, Value, and Viability of the Rule of Law* 62 (2022).

61. King, *supra* note 58.

reality, of law; these holes then require someone to make a decision that cannot be justified with fully conclusive reasons, though it might count as “rationally arbitrary.”⁶² Disagreement about these decisions is likely, but judges are largely taken out of the equation as a check—for they should defer to agents of the administrative state—and so are the people, at least when it comes to giving a mass electorate the authority to bring about a change in policy direction through voting.

That might still leave two other actors who could serve the function of constraining those fully, but perhaps falsely, convinced that they are pursuing the common good: one is the head of the executive. In what must count as a deliberate provocation (constitutional theory, again, as sophisticated triggering and trolling), Vermeule gestures at Max Weber’s notion of the *Reichspräsident* as a guardian of the political order.⁶³ It would be facile to point to the fate of the Weimar Republic and just leave it at that. But, overall, it seems just peculiar to think that a chief executive single-handedly could somehow check a state apparatus the agents of which have gone rogue, given the complexity of regulation and, as pointed out before, the persistence of disagreements about many aspects of the common good. What’s more, the guardian of the guardians of the common good could of course herself go rogue.

In this case, one might be tempted to fall back on some of Vermeule’s earlier work, co-authored with Eric Posner. There the two jurists had argued against “liberal legalists,” that law could play only a very limited role in constraining the executive; instead, a kind of ultimate check would be provided by “public opinion.” I leave here aside the discussion of “credibility” which complements their claims about “popularity.”⁶⁴ As they had it, the “central fallacy of legal liberalism” consisted in “the assumption that the only possible constraints on the executive are *de jure* constraints. Because of this fallacy, liberal legalists see the legally unconstrained executive as a tyrant. Yet the executive is buffeted by

62. Adrian Vermeule, *Our Schmittian Administrative Law* 122 Harv. L. Rev. 1095 (2009). Vermeule’s defense of the “rationally arbitrary” is masterfully analyzed in Alexander Somek, *An Irrefutable Presumption of Legitimacy: Vermeule on the Administrative State*. Somek concludes that Vermeule’s agents “authority is based on an irrebuttable presumption of authority. This is very much like the authority endorsed by professing authoritarians . . . The abdication of law makes for *faith* in agency action.” *Id.* at 53.

63. Vermeule, *supra* note 3.

64. To be sure, the reflections about popularity and public opinion by Posner and Vermeule are either common-sensical or lacking in evidence when it comes to more contentious claims. For instance, they assert things like “if the president can credibly claim to the public that the violation was necessary, then the public will be unlikely to care too much about the legal niceties” POSNER & VERMEULE, *supra* note 38, at 88. Above all, one wonders about the validity of the idea that president are “constrained de facto by the reaction of a highly educated and politically involved elite, and by mass opinion” *Id.* at 177. I thank Nikhil Menezes for first drawing my attention to the implausibility of Vermeule’s claims about the public. See also Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, U. Chi. L. Rev. (forthcoming) (manuscript at 10) (criticizing that “Posner and Vermeule seem to take public opinion’s decisive role in separation-of-powers struggles as a given, a jumping-off point for further theorizing more than a hypothesis in need of empirical testing and refinement”); for an effective critique of political constraints on the executive, see Aziz Huq, *Binding the Executive (by Law or by Politics)*, 79 U. Chi. L. Rev. 777 (2012).

political winds and the criticism of elites, and is thus highly sensitive to shifts in public opinion.”⁶⁵

Now, if the claim is ultimately similar to more or less Lockean ideas of the people rising up against rulers (or, a variation, the Machiavellian notion of the *popolo* standing up to the *grandi*), then that’s fine, though, obviously not particularly novel.⁶⁶ For such a scenario, discontent must be deep and widespread, and even then, of course, people do not necessarily rise up. However, if the idea is that simply negative public opinion can constrain a ruler—short of, let’s say, something like mass insurrection—then this thought is of course parasitic on the notion of a half-way functioning public sphere. It is almost trite at this point to lament that such robust public spheres can no longer be taken for granted in many democracies.

Are there any other candidates for what Sunstein and Vermeule once called “surrogate safeguards”?⁶⁷ I cannot think of any. Note how, in his reflections on institutional design for Common Good Constitutionalism, Vermeule seems to have given up entirely on trying to work out a systems approach, such that, even if officials in one institution (or one part of the constitution) fail to pursue the common good, there might be mechanisms to ensuring that the whole might still produce the common good.⁶⁸ It is not an accident that even his very sympathetic readers now understand him to call for a kind of legal aristocracy trained to discern and implement the common good; such a trust in personnel and in their acting all in “good faith”⁶⁹ is, to put it mildly, very different from his earlier insistence that “institutional design must consider margins beyond or in addition to the quality of beliefs that officials form.”⁷⁰

We are left, then, with an unsatisfying picture—quite irrespective of any discussion as to whether, from the start, the entire approach is so Thomist that it

65. POSNER & VERMEULE, *supra* note 38, at 204.

66. John P. McCormick, *Machiavellian Democracy* (2011) (emphasizing the ultimately freedom-preserving battle between elites and ordinary people analyzed by Machiavelli in the *Discorsi*).

67. SUNSTEIN & VERMEULE, *supra* note 37.

68. Where one core argument had been that “constitutional orders are aggregates of aggregates—nested systems of systems.” Adrian Vermeule, *The System of the Constitution* 3 (2012). Now, we are merely told that “the political morality of the common good itself includes role morality and division of functions.” Vermeule, *supra* note 1, at 43.

69. Vermeule writes that “the classical tradition rests, in the end, on the overarching principle of *bona fides*, good faith. Where such good faith is systematically absent, the law may misfire, but in such a scenario the misfiring of the law would be the least of the polity’s problems.” *Id.* at 70. His sympathetic reader Aaron Bondar observes: In this way, legal training is moral training. Lawyers must be trained in history, doctrine, principle, and structure—but they must also be familiar with a prudential understanding of what it means to make law for human societies. They must further have a deeper understanding of the West—they must be acquainted with the Bible, with Roman and canon law, with the entire corpus of the Western legal tradition—the *ius commune*. The Western lawyer, then, is more than merely a student of law; he or she is a student of the *West*, a recipient of that grand tradition, formed by it and forming it in turn.” Aaron Bondar, *The Living Voice of the Law: Debates about Common Good Constitutionalism* 7 *American Affairs* 159 (Spring 2023). It’s worth thinking about whether the role morality of lawyers and civil servants is also meant to prevent the emergence of a soulless Weberian *Fachmenschentum*.

70. Vermeule, *supra* note 36, at 676.

must be rejected by, for instance, liberals devoted to some notion of public reason. There seems to be no robust account that could possibly count as securing the rule of law through proper protections and recourse—at most, it would seem to be rule *by* law, with the hope that the ruler ruling by law will turn out to be benign and weep “when the poor cry.”⁷¹ Mass electoral democracy is dismissed in a self-declared “paternal” framework, so cannot possibly fulfill the function of “tempering power” either.⁷²

In the end, one might simply wave away the risks here, just as much as it is not verboten to wave away the fact of disagreement (or, to say, nonchalantly, that for the liberal anxiety one has “no real treatment to recommend, other than not to be liberal”).⁷³ And waving it all away is perhaps what Vermeule does when he says that his account of constitutionalism is just the correct one—and that the rest is history. History in the sense of different actors struggling over political outcomes. This, however, puts a curious twist on the seemingly “populist” justification of Common Good Constitutionalism that had been offered at one point. Clearly, it is elite actors who will fight it out, and we should just count ourselves lucky if those capable of discerning and implementing the common good win the fight.⁷⁴ “The people themselves” are only ever considered from a profoundly paternalist perspective.

V

CONCLUDING THOUGHTS

Adrian Vermeule has achieved something remarkable: he has integrated his earlier very technocratic approach to the administrative state, his reflections on “the constitution of risk,” and his Thomist take on the supposed “classical legal tradition;” all has been brought together. The synthesis has attractive features: the rejection of a libertarianism for which abuses of power by “private giants” never come into view as it celebrates “the rule of law” as equivalent not just to limited, but minimal government;⁷⁵ the realistic take on what it means for a modern administrative state to take on complex, ever-changing challenges, from pandemics to new technologies; the clear-eyed critique of originalism as a highly

71. “Caesar serves the whole *res publica*, not the other way around, and acts for the common advantage and welfare to promote the flourishing of the political community. When the poor cry, then as a matter of constitutional principle and justice, Caesar ought to weep”. This apparently then also allows Vermeule to call his “constitution of hierarchy” democratic. Vermeule, *supra* note 3, at 562.

72. *Id.* at 560.

73. *Id.*

74. Of course, one scenario is that the right people win the battle and all the institutions of, for instance, the United States remain more or less the same. This is what Vermeule’s post-liberal—*de facto*, of course, anti-liberal—co-combatant Deneen seems to envisage when he advocates a “peaceful but vigorous overthrow of a corrupt and corrupting liberal ruling class and the creation of a postliberal order in which existing political forms can remain in place, as long as a fundamentally different ethos informs those institutions and the personnel who populate key offices and positions” DENEEN, *supra* note 6, at xiv.

75. See also Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U J. L. & Liberty 516 (2008).

problematic—and, not least, arbitrary—form of positivism that simply serves more or less ideological agendas in the present; and, not least (at least from my perspective), a mandate for the state to alleviate poverty and be serious about protecting the environment.⁷⁶

Yet Common Good Constitutionalism, as a supposed alternative to a liberalism both morally overbearing and intellectually underwhelming, leaves much to be desired. It is one thing to call one’s approach “deliberately unoriginal” and to invite as many possible followers by leaving all kinds of institutional design and policy questions open. It is another, however, simply to wave away questions about indeterminacy, about the role of disagreement, and, ultimately, the rule of law as a means to temper power—the very ambition that Vermeule seems to endorse when, on multiple occasion, he quotes Shakespeare’s *Isabella*. No serious thought is given to what Postema has called “protections and recourse” as crucial elements of the rule of law; ultimately, it seems, we are simply to hope that those who dare to command us will have figured out the common good in the right way.

This is all the more disappointing because Vermeule’s earlier work—whether on the need to understand constitutions systematically, or on the array of “surrogate safeguards” that can do the work of the rule of law—had taught important lessons about the crucial role of institutional design. One can make many concessions to Vermeule’s declared view that “full, thick legality is infeasible” and yet insist that more must be said about minimizing the risks of abusing power and inflicting arbitrary decisions on citizens.⁷⁷ That a focus on the common good, unlike liberalism, makes for more authority and discretion provided to state agents—and less focus on liberty, to be ensured by constraints—is clear; but simply pointing to the different starting points for thinking about general frameworks does not make the substantial challenge of power abuses go away.

On several occasions, Vermeule has faulted Carl Schmitt’s work for being “jargon-laden, excessively conceptual and obscure,” while lauding Schmitt for offering “several important mid-sized and largely institutional or empirical insights.”⁷⁸ As they said in ancient Rome: *tu quoque*. Except that, with the move to Common Good Constitutionalism, there are hardly any plausible institutional or empirical insights left.

76. CGC, *supra* note 1, at 79 (“Principles of man’s duty of stewardship to nature are close to the heart of the common good.”).

77. POSNER & VERMEULE, *supra* note 38, at 107.

78. *Id.* at 91.