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Originalism is dead. Long live originalism.

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Can common good constitutionalism replace originalism?

Has originalism run its course? Yes, says Harvard Law Professor Adrian Vermeule in *Common Good Constitutionalism* (Polity Press, 2022), which advocates for the book's titular theory to replace it. In his view, originalism — the judicial interpretive mode that takes as its lodestar the intended meaning of the Constitution at the time it was written — "has become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation."[1]

Instead, he argues that "the central aim of the constitutional order is to promote good rule," and that "[c]onstraints on power are good only derivatively, insofar as they contribute to the common good." Under this common good constitutionalism, the state has broad authority to "protect the populace" from a host of wrongs, including unjust market forces, corporate exploitation, and the selfish agenda of private rights. It "legislate[s] morality," so to speak, without apology.[2]

Professors William Baude and Stephen Sachs responded in a *Harvard Law Review* article, recognizing the theory as one that "must be taken seriously as an intellectual challenge" to originalism, but ultimately decrying it as "a work of 'movement jurisprudence' whose political aims come into conflict with theoretical rigor."[3] Others critiqued the theory as promoting living constitutionalism, an unknowable common good, and a pursuit that will produce "untoward results."[4]

The newly articulated theory of constitutional interpretation has caused waves in the halls of academia as well as in the courts: In the months following publication of Vermeule's book, half a dozen cases had already cited the theory.[5] We asked two scholars for their views: Professor **CONOR CASEY**, a lecturer in law at the School of Law and Social Justice at the University of Liverpool, and **WILLIAM H. PRYOR JR.**, chief judge of the United States Court of Appeals for the Eleventh Circuit. Their lively back-and-forth follows.

Adrian Vermeule describes "common good constitutionalism" as an approach that "should take as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges)" should read into the Constitution. Should we adopt this mode of interpretation?

CASEY: Yes, but it is important to note that Professor Vermeule's suggested approach is not new. Rather, he is trying to revive core ideas of the classical legal tradition that dominated in Western legal systems until quite recently. In this tradition, a political community's law has two components. One component is positive law — statutes, regulations, constitutional provisions, and case law — generated through human creativity guided by reason. The other component is principles of legal justice that flow from basic precepts of natural law, including respect for basic goods like human life and our need to live in a well-ordered political community.

Law is not understood here as a mere act of a political authority's will, but as an ordinance of reason promulgated by the authority for the common good of the community over which it has care. By promulgating reasoned ordinances, the authority concretizes the open-ended requirements of natural law for the sake of the common good and human flourishing.

Compared to the richly creative role of the lawmaker, the structure of judicial inquiry is highly institutionally bounded. It is primarily to ask what the public authority has done by ascertaining and inferring what reasoned choice it has made, mainly as manifested in the text of the legislative act. The judge's basic charge is to discern the reasoned intention of the authority by reflecting on the relationship between the legal scheme it adopted and the good it wished to achieve. It is certainly not the judge's role to displace positive law by reference to all-things-considered moral decision-making or an ad hoc approach like "palm tree," or purely discretionary, justice. ▸

The classical tradition rejects as impoverished any picture of law that consists merely of posited law on the one hand and shapeless judicial discretion on the other.

Judges lack an independent and ongoing authority to distill precepts of natural law into legally binding principles. Other principles that Professor Casey says he "imagines" lack legitimacy, and judges cannot rely on them.

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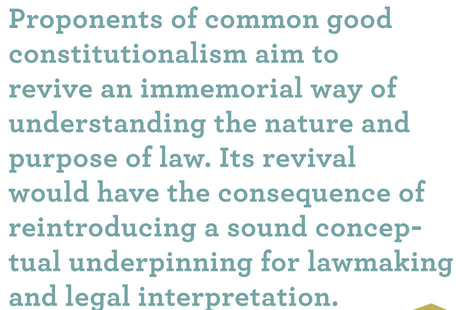
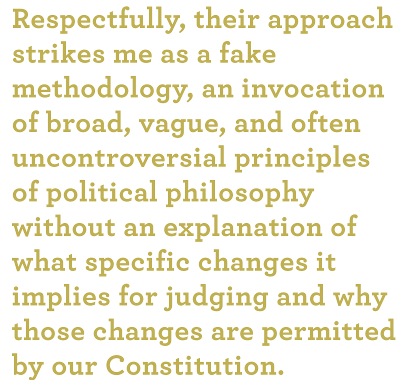


Proponents of common good constitutionalism aim to revive an immemorial way of understanding the nature and purpose of law. Its revival would have the consequence of reintroducing a sound conceptual underpinning for lawmaking and legal interpretation.



Respectfully, their approach strikes me as a fake methodology, an invocation of broad, vague, and often uncontroversial principles of political philosophy without an explanation of what specific changes it implies for judging and why those changes are permitted by our Constitution.

The classical tradition rejects as impoverished any picture of law that consists merely of posited law on the one hand and shapeless judicial discretion on the other. Principles of legal justice are important for the interpretation of posited law. The classical jurist who seeks the "ordinary," "natural," or "plain meaning" of text to discern the lawmaker's reasoned choice will invariably presume among other things that the lawmaker acted rationally and reasonably. In addition, the interpretation of posited law cannot easily be decoupled from principles of legal justice linked to a substantively moral conception of what lawmakers are for (the common good), how they ought to act (rationally and nonarbitrarily), and the nature of the enterprise of legal interpretation (discerning the reasoned intention of the public authority).

Where the meaning of a provision is unclear (for example, when there is ambiguity, conflicting source materials, or provisions that can be read at multiple levels of generality), it serves legal coherence to interpret them consistently with principles of legal justice, which ultimately stem from natural law.

What might these legal principles look like? While not an expert on United States public law, I imagine that appeal to the following kinds of nonposited principles of legal justice is pervasive in hard cases, just as they are in countless other legal systems: the presumption that no one will be a judge in their own cause, that those affected by a decision will be heard, that no one shall profit from their own wrongdoing, that all public power will be directed to public and not private good, that law is for the sake and good of persons, that retroactivity (especially criminal) is not favored, that legitimate expectations or reliance interests established by state action will be given consideration, that penal statutes — where ambiguous — will be interpreted to avoid imposing criminal liability, that judges will defer to reasonable legislative determinations made in the public interest, that settled legal claims will not be relitigated, that every right will have a remedy, and that rights are not absolute but ordered to the common good and objective needs of society. Judges do not regard such principles as moral norms *external* to law, but as part of its fabric and critical to interpretative practice.

Nor is this mere legal theory. The *Digest of Justinian* enjoined that "in all things, but especially in the law, equity must be regarded,"[6] and this was the standard practice of classical lawyers — very much including lawyers of the American founding era and after.[7]

PRYOR: Of course not. Professor Casey presents common good constitutionalism as the corollary of a universal, "classical" tradition that predominated "until quite recently." But he comes up short proving that proposition even in the eyes of one who accepts natural law theory.

Casey begins with general *philosophical* propositions about the nature of law before jumping to a grab-bag of disconnected moral principles that he says judges must consider. He provides St. Thomas Aquinas's canonical account of the nature and purpose of law and explains that political authorities exercise their discretion to apply the general requirements of natural law to specific societies. That account traces back to at least Aristotle and in that sense can lay claim to being "classical." On its own terms, I have no objection to that philosophical account of law. But even if that account of law can be called "classical," it does not prove that Professor Casey's interpretive theory — or any other interpretive theory for that matter — is likewise "classical" and can claim the same pedigree. General statements of political philosophy do not, by themselves, tell judges how to decide cases.

Instead, as I and others have explained elsewhere, and as Professor Casey has elsewhere admitted, within certain bounds, the natural law is neutral about the kind of constitution that a people can establish to promote the common good. Our founders "concretize[d] the open-ended requirements of natural law," to use Casey's words, by adopting a written Constitution that limits the power of federal judges to interpreting the fixed meaning of

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laws according to settled principles of interpretation in the Anglo-American tradition. To rebut that position, common good constitutionalists — the proponents of what I call "living common goodism" — must prove that their theory of interpretation was part of *our* contingent system of government and cannot rely on broad principles of political philosophy alone. As William Baude and Stephen Sachs have argued, proponents of this approach cannot escape this question of positive law because, according to Casey's own views, "[a] public body claiming new powers not vested under the original constitution would act 'outside its sphere of legal competence' and 'forfeit its claim to be implementing law at all.'"[8] Judges in our system have only the power that the positive law grants them, and the question is whether our written Constitution grants them the powers Professor Casey imagines they have.

To be sure, some of the principles that Casey cites are legitimately considered by American judges because they cohere with *our* legal tradition. Contrary to accusations by proponents of his approach, originalists and textualists do not hold that law consists *only* of the words in enacted statutes and constitutions. Instead, we recognize fundamental principles rooted either in the inherited common law or in the Constitution. The rule of lenity, res judicata, and the prohibition against ex post facto laws are examples, and they have been "posited," to use Casey's term. Those principles may reflect natural-law concepts, but they became legal principles either because of the common-law tradition that this country inherited or because of the enacted Constitution. Judges lack an independent and ongoing authority to distill precepts of natural law into legally binding principles.

Other principles that Professor Casey says he "imagines" lack legitimacy, and judges cannot rely on them. Casey's list includes principles that are either hopelessly vague — "rights are not absolute" and "law is for the sake and good of persons" stand out — or axioms of good governance that are not necessarily rules of law. Principles in the former category, if adopted as part of judging, constitute, in Baude and Sachs's phrase, "a recipe for manipulation." Judges could easily legislate from the bench if they could resolve each ambiguity in a complex legal system in favor of "the sake and good of persons." The principles in the latter category, such as that "those affected by a decision will be heard," must be distilled into legal rules in our system to operate. But federal judges, not being legislators, cannot make those rules by direct recourse to natural law, for that power is vested by our law in others. Casey needs to prove that these principles of justice are rules of law *in our legal system* that federal judges can use to interpret statutes rather than principles of good governance that should guide legislators. The proponents of common good constitutionalism have never made that case. Respectfully, their approach strikes me as a fake methodology, an invocation of broad, vague, and often uncontroversial principles of political philosophy without an explanation of what specific changes it implies for judging and why those changes are permitted by our Constitution. Abstract appeals to the nature of law cannot establish what tools our Constitution permits a federal judge to use to decide concrete cases.

This inquiry into *our* legal system is doubly important because the American legal tradition does not purport to be in perfect continuity with legal systems that predated it or that operate alongside it today. Our Constitution was framed in a unique historical circumstance and with reference to *new* — not necessarily "classical" — political philosophy that demanded a stricter separation of powers in a federal system. Federal judges have only the power that this American tradition gives them, so they are not free to draw on natural-law principles to decide cases if our tradition does not give them that power.

Originalism has been both criticized and praised as a means of allowing a judge to divorce himself from the practical consequences of his decision. Common good constitutionalism, by contrast, seems to be all about consequences. Is it fair to say that the two are fundamental opposites?

CASEY: It depends on what "practical consequences" are taken to mean here. Proponents of common good constitutionalism [CGC] aim to revive an immemorial way of understanding the nature and purpose of law. Its revival would have the consequence of reintroducing a sound conceptual underpinning for lawmaking and legal interpretation. When it comes to resolving a particular dispute, however, judges can only properly have regard to consequences in an institutionally constrained way. This is because, as I put it above, the judicial inquiry aims to resolve legal disputes by discerning the reasoned choice of the lawmaker expressed in and through the text, not by consulting their own moral choices.

Naturally, however, if CGC embraces a mode of interpretation that takes the well-ordered legislature, and reasoned acts of legislation, as the central case and object of the interpretive enterprise, then it will presume that the legislature does not intend to act irrationally or viciously. Moreover, in ▸

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cases where a statutory or constitutional provision is ambiguous or can be read at different levels of generality, normative choices about how to proceed are inescapable. In the classical tradition, judges approach interpretation in these hard cases by drawing on principles of legal justice to ensure posited text remains an ordinance of reason oriented to the common good — its basic purpose and *telos* — and does not devolve into a perversion of law. So, in these types of cases, judges will indeed consider consequences, but only in the very bounded sense that they will draw upon legal principles that best let them determine legal meaning in a manner that renders the text intelligible as a work of reason promulgated by the legitimate authority.

Professor Vermeule and I have argued, jointly and severally, that judges and lawyers *already* consider consequences in this way in our respective legal systems. The *U.S. Reports*, for instance, are replete with opinions where judges read constitutional and statutory texts consistent with general background principles of legal rationality and justice. Judicial opinions abound with appeal to principles of representative democracy, equality, dignity, liberty, the rule of law, etc., and judges — including originalist judges — often take them as inherent in the community's law despite the absence of a positive source. Nor do judges regard their appeal to such principles as being somehow external to law — as a species of moral claims that justify legislating from the bench. Rather, they see them as principles of legal justice internal to its fabric, and critical to soundly resolving interpretative ambiguities or conflicts.

Judges working within a CGC framework would not pretend that interpretation of posited law can, or should, be exclusively historical and confined to ascertaining socio-historic facts. They would be candid about the inevitability of recourse to principles of legal justice to discern the meaning of legal texts as reasoned ordinances made by the lawmaker, especially in hard cases.

Judges rely on their practical reason to discern what should be done not by resorting to all-things-considered moral judgment, but to help realize harmony between posited law and background natural law principles, both of which inhere in the community's overall body of law.

People disagree about the requirements of the common good, so it is essential for any system to identify the authorities who make the ultimate determinations. Federal judges are not among them.

PRYOR: It is hard to answer this question about what common good constitutionalism would mean on the ground because its proponents frequently change their rhetoric in response to specific criticisms. Professors Baude and Sachs call this the "motte-and-bailey" aspect of their arguments. At times, their claims appear ambitious. For example, in his opening salvo in *The Atlantic*, Professor Vermeule announced that "originalism has now outlived its utility" and that we should eschew "enslavement" to the central feature of originalism — original, fixed meaning — in favor of Dworkinian moral readings of the Constitution that will yield conservative outcomes. But in response to later criticism, he retreated to more modest positions. Professors Casey and Vermeule together announced their support for the "common core" of originalism[9] that Vermeule had previously rejected.[10] And both Casey and Vermeule have even written that their view will function as "a form of textualism in easy cases, which is to say most cases."[11]

But we should take Casey and Vermeule at their word that their view is meaningfully different from originalism. Professor Casey asserts that the "immemorial way of understanding" law requires judges to pick an interpretation that is not "vicious" or "irrational" whenever a text is "ambiguous" or *can* be read at different levels of generality. Understood that way, this approach is inconsistent with the role with which federal judges have been entrusted. Casey gives us no reason to adopt it. Even if only rational and virtuous laws are real "laws" in some philosophical sense, it does not mean that judges in every legal system have the power to apply the interpretive presumptions Casey proposes. Natural law does not itself require that judges have such untrammelled authority, and the theory's proponents have made only half-hearted attempts to ground this approach in our legal tradition.

Insofar as judges have in the past invoked lofty terms like "equality, dignity, and liberty" to skew their interpretation of the Constitution, they have

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erred for all the reasons that originalists have urged against "living constitutionalism," a theory that Casey also purports to reject. Originalists, for their part, may recognize that values like individual liberty are present in our law, but they do not directly appeal to "liberty" and adopt a "more liberating" view of the text except where specific and traditional common-law or constitutional canons, like the rule of lenity, permit it. I cannot imagine what decisions Casey has in mind when he accuses originalists of appeal to these principles.

On the other hand, but to a more limited extent than Casey suggests, originalist judges may consider certain principles of reason to interpret legal texts. Justice Antonin Scalia and Bryan Garner's treatise *Reading Law* is full of canons like the presumption of consistent usage or noscitur a sociis that rely on linguistic usage and common sense to interpret laws reasonably. But these principles of language and logic are, in a real sense, part of a well-established "law of interpretation," as Baude and Sachs have described it, in service of ascertaining the objective meaning of the enacted text, not departures from that inquiry whenever a case is hard. So, they are no embarrassment for anyone but a caricatured textualist. What textualists may not do is adopt an unfaithful reading of the enacted language to "ensure [that the] posited text remains" oriented to the common good. In our system, the power to decide what legal policy best promotes the common good is vested in others.

To what sources would a court look to determine what the "common good" is? Would the court be limited to a particular set of priorities suggested by the Constitution's text, or could it consider other authorities, like empirical data and legislative intent?

CASEY: Executives, legislatures, and the People (acting as a constituent authority or voting in referendums) take the lead in specifying how a particular community will respect the under-determinate principles of natural law and secure the demanding conditions of peace and justice conducive to the common good. The judicial role, which is secondary, involves interpretation of a community's already existing law to resolve disputes. These functions, and the role of morality that attends them if they are to be done authentically, combine to radically restrict courts' ability to make far-reaching determinations that functionally change the law.

Because the judge's charge is to administer justice according to law, their tools will largely be confined to consideration of legal materials like statutory and constitutional text, the reasoned intent of the lawmaker (which may be imperfectly captured by the letter of the text), prior judicial precedents, and background legal principles. Judges rely on their practical reason to discern what should be done not by resorting to all-things-considered moral judgment, but to help realize harmony between posited law and background natural law principles, both of which inhere in the community's overall body of law. Simply put, their sources will be internal to legal argumentation and practice.

PRYOR: This question is directed more to my interlocutor, but I will make two observations. First, his answer is circular. He explains that we should interpret law in the light of the common good but that we should identify that good only through "sources internal to legal argumentation and practice." That is, we should interpret law in the light of the sources we should use to interpret law. The problem is that freestanding evaluation of the "reasoned intent of the lawmaker" divined separately from consideration of the text and attendant traditional interpretive canons is not a legitimate "legal source." People disagree about the requirements of the common good, so it is essential for any system to identify the authorities who make the ultimate determinations. Federal judges are not among them. Second, I am also curious about the "largely" qualifier that Professor Casey adds. When exactly can a judge resort to nonlegal materials? Perhaps more often than he lets on.

Justice Scalia famously quipped that all federal judges should receive a stamp marked "stupid, but constitutional" that they could apply to some laws they review. Would common good constitutionalism eliminate the "stupid-but-constitutional" category?

CASEY: No. For a start, CGC is, following the classical tradition, flexible about how to design constitutional institutions and allocate authority among them. Whether a legal system has a form of judicial review of legislation, whether it is "weak-" or "strong-" form, etc., is a matter of prudential choice. A legal system like the United Kingdom, where no court can impugn the legality of statutes enacted by the Crown-in-Parliament — even the stupid ones — can be entirely consistent with the classical tradition.

But let's say a legal system does provide for a form of judicial review permitting judges to declare that statutes are unconstitutional. For the classical jurist, in this kind of system it will still be critical that respect for institutional-role morality permeates the work of judges. It is imperative for the common good that ordinances

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of the lawmaker — as the legitimate authority charged with care of the community — be upheld and respected. As such, the judge's contribution to the common good is largely through discerning, and faithfully applying, the reasoned determinations chosen and enacted by the lawmaker to secure ends conducive to the general welfare.

But it will often be the case that ordinances will be reasoned and consistent with principles of legal justice — in that they rationally pursue reasonable ends consistent with human flourishing and the conditions of justice, peace, and abundance that foster it — and yet still be seen as imprudent, or "stupid," in the eyes of the judge. A judge might well consider that it would have been more prudent if an ordinance before them opted to set higher penalties for a criminal offense, made it easier to purchase and own firearms, or reduced fines levied on those in breach of labor regulations, etc. A judge might well be right in thinking that they could have recommended a wiser path if they enjoyed legislative authority, but that alone does not make the *actual* legislative choice made by the political authority unreasoned, nor does it provide grounds for invalidity.

WILLIAM H. PRYOR is chief judge of the U.S. Court of Appeals for the Eleventh Circuit. A member of The American Law Institute, he co-authored (with Bryan Garner, Justices Neil Gorsuch and Brett Kavanaugh, and other judges) *The Law of Judicial Precedent*. He has taught law at the University of Alabama and Samford University.

CONOR CASEY is an associate professor in public law and legal theory at the University of Surrey School of Law. His research focuses on administrative law, constitutional law, and legal theory. He holds an LLB and PhD from Trinity College, Dublin, and an LLM from Yale Law School.

PRYOR: I agree with much of what Professor Casey says here. General principles of natural law do not provide all the interpretive rules available to a judge in each legal tradition. I agree that our political system requires a judge to interpret and apply laws even when he concludes that the legislature has made a mistake, even a grave mistake. I suspect, however, that we disagree more than might appear from his answer.

The correct meaning of a statute enacted by another authority bears no necessary connection with the common good or natural justice. Perhaps for the purposes of individual conscience, an unjust law is not a "true," binding law for an individual. But a federal judge has no duty to ensure that statutes are just. He instead must faithfully ascertain and apply the meaning of those statutes. He cannot decline to faithfully interpret and apply a statute no matter how unreasonable or unjust *he* thinks it is — save for the rare application of the absurdity canon. In an extreme case, an individual judge may be forced to resign or recuse himself if enforcement of that statute would violate his conscience, but his judicial office gives him no authority to alter or ignore that statute and issue legal judgments based on something other than the enacted law. In contrast, Casey's view is that natural law will directly affect the disposition of cases whenever there is the difficulty of an "ambiguous" statute or a provision that *can* be read at different levels of generality.

To take two recent cases, how might *Dobbs* and *Bruen* come out under common good constitutionalism? Are there other landmark cases you think would come out differently (or perhaps the same) using this approach?

CASEY: There is much to commend in *Dobbs*. But from the classical legal perspective, it failed to uproot one of the main problems at the heart of *Roe v. Wade*. Namely, the fact the Supreme Court did not recognize that law is for the sake of all persons, no matter how weak or vulnerable. *Roe* failed to ensure that the reasoned intentions of lawmakers expressed in posited legal texts were understood, insofar as possible, in favor of the most basic, fundamental, natural law right enjoyed by every person equally — the right to life.

In *Dobbs*, the justices missed a good opportunity to course correct, and to interpret the guarantees and reasoned intention behind the Fourteenth Amendment — which is both under-determinate and can be read at multiple levels of generality. They could have done so consistently with basic principles of the natural law that are always reasonable to consider part of our law, and a necessary feature of resolving hard cases in a morally sound way.

I would be stretching the bounds of my professional competence to get into the weeds of *Bruen*.

PRYOR: I am puzzled by Professor Casey's response. He criticizes *Dobbs* because it did not interpret the Fourteenth Amendment "in favor of" the right to life. Perhaps he wanted the Court to declare that the unborn have a constitutional right to life. But the question presented in *Dobbs* was

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whether a Mississippi statute that prohibited abortions after 15 weeks was prohibited by the Constitution. The *Dobbs* Court answered that question in the negative. What exactly should a court applying the principles of living common goodism have done in *Dobbs*? Should the Court have ordered a criminal prosecution of abortionists *beyond* what Mississippi law provided? Should it have decreed a federal abortion ban in other states? Casey's objection misunderstands the nature of the case, our Constitution, and our tradition. He does not explain why his principles required going so far beyond the question presented and the parties' arguments.

As to *Bruen*, the answer from the main proponent of living common goodism is clear, even if Professor Casey himself is agnostic. Vermeule has criticized *Heller* and *Bruen* and maintains that all constitutional rights should be freely regulable by the political branches, subject only to "arbitrariness review." And Casey's view that "rights are not absolute but ordered to the common good and objective needs of society" suggests that he endorses the same framework. Judicial review of legislation affecting Second Amendment rights under that framework would never produce *Bruen* or *Heller*, despite "unqualified" constitutional text.

1 Vermeule articulated his views prior to publishing his book in: Adrian Vermeule, *Beyond Originalism*, The Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037.

2 *Id.*

3 William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, 136 Harv. L. Rev. 861, 861 (2023).

4 *Id.* at 862.

5 Michael Smith, *Common Good Constitutionalism Could Influence Judicial Practice*, Bloomberg Law (Dec. 7, 2022), https://news.bloomberglaw.com/us-law-week/common-good-constitutionalism-could-influence-judicial-practice.

6 The digest of Justinian is a collection of Roman law compiled by the emperor Justinian around 530 AD. Rather than creating new law, it clarified Roman law as previously decided. 4 Digest of Justinian, bk. 50, § 17, 90 (Alan Watson trans., Univ. of Penn. Press 1998).

7 1 William Blackstone, Commentaries *59 ("spirit and reason" are "signs" of the legislator's intention); R. H. Helmholz, Natural Law in Court: A History of Legal Theory in Practice (2015) 165–72.

8 Baude & Sachs, *supra* note 3, at 866 (quoting Adrian Vermeule, Common Good Constitutionalism 46 (Polity Press, 2022)). According to Vermeule, the "common core" of originalism is simply "the view that constitutional meaning was fixed at the time of the Constitution's enactment." Vermeule *supra* note 1.

9 Adrian Vermeule & Conor Casey, *Pickwickian Originalism*, Ius & Iustitium (Mar. 22, 2022), https://iusetiustitium.com/pickwickian-originalism (last visited July 18, 2023).

10 *See generally* Vermeule *supra* note 1 (advocating for "common-good constitutionalism" because "originalism . . . has outlived its utility, and has become an obstacle to the development of a robust, substantively conservative law and interpretation").

11 Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 Harv. J. L. & Pub. Pol'y 103, 126 (2022).

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