

A/the common good

2023

Dominic Burbidge¹

Faculty of Law, Oxford; Regent's Park College, Oxford; Canterbury Institute

Abstract

The emerging school of “common good constitutionalism” takes a classical natural law approach of identifying the central case of law and constitutionalism, recognising that a state may make positive law in part based on circumstance, convenience, or a need for social coordination. While law under the classical approach is rooted in realising the common good of the complete community, this ideal does not dictate all of law’s specifics. Nevertheless, there is a difficulty within the emerging school of common good constitutionalism in the way it seeks to respect the diversity of constitutional orders while retaining a single reference point of the common good. Adrian Vermeule and others appeal to positive law as the *determinatio* through which public authorities make concrete the state’s pursuit of the common good. But there is often a gulf between common good principles and the determinatio of law. The move from principles to the legitimacy or justness of positive law lies, for Vermeule, in joining-up the central case method of natural law with a singular notion of the common good. The article criticises this reliance, arguing that the central case method cannot be used to determine law in the sense of the determinatio of positive law. In his articulation of central case methodology, John Finnis is, by contrast, careful to leave space for varieties of coordination and forms of justice, such that the central case method plays a limited role in establishing what counts as common goods. Rather, the central case method identifies what law is. The same delicacy is present in Aquinas, who does not in fact define law as an ordinance of reason for *the* common good in the way that common good constitutionalists so far would like it to mean, because there are no articles in Latin grammar. In this regard, common good constitutionalism’s mistake is unfortunately in keeping with the majority of jurisprudence, which commits the logical fallacy that an internally consistent account of law is externally authoritative—in other words, that harmony in the way in which laws and legal principles relate to themselves can act as a basis to the body politic’s prioritisation of some goods over others.

¹ I would like to thank members of the Fortescue Reading Group at the Canterbury Institute for numerous debates and exchanges that helped develop the ideas in this article. I am particularly grateful to Howard Anglin, William Bunce, Mariana Canales, Fernando Contreras, Daniel De Haan, Connor Grubaugh, William Nolan, Jim Pennell, Jonathan Price, Clemente Recabarren Vial, Fernando Simón Yarza, Paul Yowell and Kevin Zhang. All my mistakes are theirs. I would additionally like to thank the Programme for the Foundations of Law & Constitutional Government at the University of Oxford, and for the feedback to this article from everyone participating in the Programme’s colloquium on the common good held in June 2023, especially Conor Casey, Richard Ekins and Adrian Vermeule. I would also like to thank Jeffrey Pojanowski for extremely helpful review as the article was nearing completion.

Roger stooped, picked up a stone, aimed, and threw it at Henry – threw it to miss. The stone [...] bounced five yards to Henry's right and fell in the water. Roger gathered a handful of stones and began to throw them. Yet there was a space around Henry, perhaps six yards in diameter, into which he dare not throw. Here, invisible yet strong, was the taboo of the old life. Round the squatting child was the protection of parents and school and policemen and the law. Roger's arm was conditioned by a civilization that knew nothing of him and was in ruins.
—William Golding, *Lord of the Flies* (1954)²

Introduction

‘The hallmark of the classical legal tradition is that law, to be law in the focal sense of that term, must be rationally ordered to the common good of the political community.’³ Here, Adrian Vermeule and Conor Casey provide the basic framework for common good constitutionalism. The theory can be stated as follows:

- i. There is a classical legal tradition
- ii. whose law is, in its focal sense,
- iii. ordered to the common good,
- iv. through which law derives its nature and legitimacy.

Common good constitutionalism has generated much initial debate, for many good reasons, such is the deftness with which it strikes back at both originalism and progressivism. While its struggle against originalism has been emphasised,⁴ the argument being led by Adrian Vermeule also contrasts with progressive approaches towards human rights as positive duties for the realisation of equality,⁵ because its focus is on what the law is and has always been, rather than on what the law needs to be going forward. Common good constitutionalism is to be commended, therefore, on cheerily offending everyone, which is just the sort of shake-up required to demonstrate the need for jurisprudence in establishing common foundations for law.

² Golding, W., *Lord of the Flies* (London: Faber and Faber, 1954), pp. 64-5.

³ Casey, C. & Vermeule, A., ‘Myths of Common Good Constitutionalism’. *Harvard Journal of Law & Public Policy*, Vol. 54, No. 1 (2022), pp. 103-144, p. 105.

⁴ Vermeule, A., ‘Beyond Originalism’. *The Atlantic* (31 Mar 2020).

<https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>; Vermeule, A., *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Cambridge: Polity Press, 2022a), ch 3, ‘Originalism as Illusion’.

⁵ See, for example, Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

One can take aim at a good number of common good constitutionalism's above argumentative steps—whether such a thing as a classical legal tradition can be identified as distinct per se, whether it is truly wise to orientate our judicial interpretation towards what is in the common good, as opposed to what the text says or lawmakers intended, and, of course, whether the whole argument is tautological, in that the consequent of legitimacy is assumed in the premise of a classical legal tradition (both ideas of a classical legal tradition and the common good are defined with respect to each other). The attention of the present article, however, is mostly on the movement between steps (ii) and (iii) in the argument: whether law in its focal sense is ordered to the common good. As such, I am otherwise sympathetic to the understandings and aims of common good constitutionalism. I take for granted that common goods are real things that exist and should be pursued at the community level. I also take for granted that there is a classical legal tradition out there that is, in a certain sense, continuous and communicable through history, and shared among many present jurisdictions. I also agree with the rejection of originalism on grounds of the unworkableness of textual interpretation that ignores the aims for which laws are written. These are each areas of intense debate, but for the sake of deeper exploration of common good constitutionalism's jurisprudential methodology I assume their merits here.

My challenge to common good constitutionalism is to its belief that law, in its “focal sense” or “central case”, is ordered to *the* common good. The central case of law is the legal system of the complete community,⁶ which does not generate criteria for good law or good legal interpretation on its own. Good laws and good legal interpretation require good practical reasoning, which is why it is important that we educate students well in the law (both factually and morally) in an all-rounded way, and why it is essential that good members of our society step forward to become judges. It is not easy to write good law, and it is not easy to be a good judge. When laws and judges are good, it is in service of the common good, but that is not to say that the process for making a bad law or bad judge better lies necessarily in accelerated attention towards the common good (which is the task of politics and the community as a whole). Practical reasonableness may demand different laws in different societies, or different laws in the same society at different times. As such, it is not possible to derive a general theory of legal interpretation or a science of justice through reference to a particular society's common good, nor declare that certain laws are, in general, good laws or moral laws because they foster protection or pursuit of the common good. The civic contributions of state and non-state actors together ensure the common good, and the role of the state and its laws depends to a great deal on this internal societal arrangement of authority, which varies significantly according to variations in cultures of coordination, civic virtue, and forms of civic unity; it has no ideal type legal manifestation.

⁶ ‘The central case of law and legal system is the law and legal system of a complete community, purporting to have authority to provide comprehensive and supreme direction for human behaviour in that community, and to grant legal validity to all other normative arrangements affecting the members of that community.’ Finnis, J., *Natural Law & Natural Rights* (Oxford: Oxford University Press, 2011), p. 260.

To establish this critique, the article is structured as follows. First, I summarise the place of reflections on the common good in the emerging school of common good constitutionalism. Second, I defend the salience of the argument against the problematic fact/value distinction within most of jurisprudence since John Austin. Despite this heavy praise of common good constitutionalism, I question whether it in the end makes the same mistake, of thinking that the law's internal validity can be evidence for its justness. Third, I point out that Aquinas avoided this mistake in his description of the relationship between law and common good, because in his original texts there is no use of a definite article in describing common good (Latin uses no articles). Fourth, I show that Finnis likewise avoids the mistake by i) discussing the central case of law as the law of the complete community; and ii) separating a notion of basic goods from that of the common good (while the two are obviously mutually supportive). Finnis' avoidance of an assumption of a singular, a-temporal and universal idea of the common good is evident in his critique of Max Weber, whose ideal type approach ultimately points to the same kind of rationalization of the state as might be feared in a common good constitutionalism that takes what is 'rationally ordered to the common good'⁷ as the basis for legal progress. The article concludes that the common good is not a singular expression of natural law, and therefore not a good framework for the interpretation of legal validity or justness (even if it is indeed the aim of law and part of its nature).

1. The “common good” in common good constitutionalism

Common good constitutionalism argues there is a classical legal tradition whose law is, in its focal sense, ordered to the common good, through which law derives its nature and legitimacy. Perhaps because in the United States of America the constitution is taken as a higher law over that of statutes and executive orders, many wonder whether common good constitutionalism purports to be an even higher authority still, in turn allowing for a kind of authority over constitutionally-guaranteed rights.⁸ Common good constitutionalism appears to propose a ‘master “standard” or principle for constitutional government rather than a congeries of rules.’⁹ In response to accusations of authoritarianism, Vermeule and others point to the inclusive nature of the common good, which involves many features of liberal democratic norms, and even the principle of subsidiarity.¹⁰ The theory therefore purports to give a great deal of space for many of the principles of the established American constitutional order, coexisting

⁷ Casey & Vermeule, 2022, p. 105

⁸ Wallison, P. J., ‘Review: Common Good Constitutionalism’. *AEI* (1 Dec 2022).

<https://www.aei.org/articles/review-common-good-constitutionalism/>.

⁹ Vermeule, A., ‘The Common Good as a Universal Framework’. *Balkinization* (27 Jul 2022b).

<https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html>.

¹⁰ Casey, C., “Common-good constitutionalism” and the new battle over constitutional interpretation in the United States’. *Public Law*, No. 4 (2021), pp. 765-787, pp. 776-7; Vermeule, 2022a, p. 11.

happily with state-based pursuit of the common good.¹¹ In any case, neatness of fit with the American constitution is a detachable concern.¹² Overall, common good constitutionalism sets out a direct and open acknowledgement of a constitutional order's inherent normativity, advocating 'openness to interpreting sources of law in light of substantive moral principles conducive to the common good; belief that the proper end of political authority is promoting the common good and that public authorities should enjoy capacious discretion when making determinations about how best to do so, and flexibility about institutional design and allocation of power between state institutions.'¹³ The question naturally arises as to whether basing the nature and legitimacy of law in its pursuit of the common good gives judges the authority to go against precedent and the original meaning of laws when determining what is just and ordered to the common good. The basic answer is yes. Put more carefully, Vermeule writes:

The temporal common good can then be described this way for the purposes of the civil lawyer: (1) the structural political, economic, and social conditions that allow communities to live in accordance with the precepts of legal justice, combined with (2) the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that (3) the common good is not the sum of individual goods, but the indivisible good of a community ordered to justice, belonging jointly to all and severally to each. The conditions that allow communities to live in accordance with justice define the legitimate ends of civil government. To specify those conditions is to specify the ends to which civil authority is rightly ordered and that it should promote.¹⁴

How about having a single-line constitution that states, "Promote the common good."? The common good constitutionalism school accepts the need for detailed law, but not because it fixes rights and obligations through time, but because any collective pursuit of the common good requires laws to be laid down giving more detailed guidance on what must be done to pursue the common good, albeit themselves open to interpretation on common good lines. Why must laws be laid down? It is easy to see the *reductio ad absurdum* on offer in asking: "Who should not interpret in line with the common good?" Should an understanding of the common good inform *citizens'* interpretations of laws? Why are their interpretations less authoritative than a judge's? Normative obligation is reflective and interpersonal, not only commanded from on-high. Some reflection on what our actions mean for the common good should guide us all. Notwithstanding, common good constitutionalism retains a distinct respect for the law in working community-wide towards the common good in particular and tailored

¹¹ Casey, 2021, p. 776.

¹² 'Agreement with the general part does not necessarily entail agreement with the particular part. One may subscribe to the general framework of common good constitutional interpretation without subscribing to the full, particular interpretation of the path of American public law that I have laid out.' Vermeule, 2022a, p. 12.

¹³ Casey, 2021, p. 774.

¹⁴ Vermeule, 2022a, pp. 30-1.

ways. This may be because law is what lawyers think politics is,¹⁵ or because there is no real difference between law-making and state-making on the common good constitutionalism account (it is all administration).¹⁶ This raises doubts on what the basis to the distinctly legal is, with Vermeule and colleagues providing two types of response. The first is to say the question should not be distilled in that way, in that one should be comfortable with the mixture and interdependence between law, its use, and its history of use, as representative of its nature. Vermeule writes:

“The common good” in the legal sense is not to be seen, at least not solely, as an external concept, that the analyst uses to justify or evaluate the legal system. Rather, it is a concept used by actors *within* the system. And it is an absolutely ubiquitous concept. Indeed, it is often literally embodied in the language of enacted provisions and judicial doctrines.¹⁷

He even pushes the point further by stating that the study of law has frequently neglected the way legal practice has influenced legal philosophy.¹⁸ I agree this is an interesting angle and severely neglected.¹⁹ The anthropology of law and socio-legal studies often do take practical law or positive law as informative on ways of seeing law,²⁰ but their methods are rarely applied historically²¹ and rarely the

¹⁵ See Gee, G. & Webber, G., ‘Rationalism in Public Law’. *Modern Law Review*, Vol. 76, No. 4 (2013), pp. 708-734. For an account of the distinct nature of politics (and the weakness of law in determining politics), see Philp, M., ‘Access, accountability and authority: Corruption and the democratic process’. *Crime, Law & Social Change*, Vol. 36, No. 4 (2001), pp. 357-377; Philp, M., *Political Conduct* (Cambridge, MA: Harvard University Press, 2007).

¹⁶ Note the ideas of practical progress of the state’s pursuit of the common good over time through law and administration combined: ‘As the book [*Common Good Constitutionalism*] argues, the best current analogue for this work of the praetors, the imperial bureaucracy, and the imperial and medieval jurists in aiding, supplementing or correcting the baseline civil law in the public interest is the work of the administrative state. Like the praetors, magistrates without the formal power to enact statutes who nonetheless spoke with the force of law through interpretation and supplementation of statutes, so too our agencies interpret, enforce, and supplement the law under broad delegations from Congress. Like the *ius honorarium* of the praetors, the rules made by the administrative state are the “living voice” of our law.’ Vermeule, A., ‘The Common Good As A Legal Concept’. *Ius & Iustitium* (16 Nov 2022c) (emphasis in original). For the coining of the term ‘state making’, and a radically non-legal account of the development of the state, see Tilly, C., ‘War Making and State Making as Organized Crime’. Ch 5 of Evans, P. B., Rueschemeyer, D. & Skocpol, T. (eds.), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

¹⁷ Vermeule, 2022c (emphasis in original). Further in the article he continues, ‘You will notice some names that haven’t appeared in my talk so far: Aristotle, Aquinas, Heinrich Rommen, Charles De Koninck, John Finnis, and so forth. It is not that I do not respect these figures; on the contrary, I have the deepest respect and admiration for them, especially for the Angelic Doctor. But I do mean to highlight that the common good as a legal concept has ancient roots on what we might call the civilian juristic side of the tradition, and that the common good as a legal concept is part of a tradition of thought, legal theory and practical application that is partially independent of the philosophical and theological tradition of the common good.’

¹⁸ *Ibid.*

¹⁹ Though note recent work on Roman law’s historical inextricability from the natural law tradition in Bunce, W., ‘Law and Legislating in the Age of Justinian’. *DPhil thesis* (University of Oxford, *forthcoming*).

²⁰ For an overview of legal anthropology, see Pirie, F., *The Anthropology of Law* (Oxford: Oxford University Press, 2013).

²¹ An important exception is Pirie, F., *The Rule of Laws: A 4,000-Year Quest to Order the World* (London: Profile Books, 2021).

basis to a tradition of universalist legal philosophy.²² It is fair to say that legal philosophy as a whole tends to resist the point, with Leslie Green writing quite dramatically in his introduction to HLA Hart's *The Concept of Law*:

...when the sociology of law drifts so far from the core of what the pertinent concepts pick out, it has changed the subject. Some subjects may need changing—progress in the natural sciences sometimes came about by tearing up an ontology and starting again. But if progress in social science requires tearing up our familiar legal ontology of rules, duties, powers, courts etc., or familiar legal values like the rule of law, it will become a sociology of something other than law. That gives jurisprudence some priority.²³

It seems jurisprudence, in its contemporary form, does not believe its concepts can be truly tested by reality, which is the case for all normative argumentation that adopts uncritically a fact/value distinction (discussed further in section 2). Common good constitutionalism is to be praised for forcing such theorists out of their Platonic cave. One thing, however, is noting the practicality of law as informative of a theory of law, quite another is resenting philosophical attempts to get clarity on the relation of a principle (common good) to a method of interpretation (common good constitutionalism) when evaluating real-life laws. Vermeule sometimes seems to think too much philosophical speculation can be damaging in that it can overrepresent disagreement as to what the common good involves, and therefore misrepresent both the inclusive nature of the common good and the potential of appeals to the common good for obtaining consensus within public administration and legal interpretation:

...for concrete legal purposes one usually does not have to choose between high-level, contested sub-conceptions of the common good. Philosophers and theologians debate so-called distinctive, aggregative, and instrumental conceptions of the common good, among others. [...] [V]ery little in the operative interpretations of our constitutional order offered in the book [*Common Good Constitutionalism*], and very little in the quotidian work of law generally, turns on contested philosophical refinements of the common good at the outer boundaries of debate. [...] [T]he quotidian activity of practical reasoning about the legal common good serves concrete ends, on which different speculative conceptions of the common good usually converge in practice.²⁴

²² A possible exception is HLA Hart's practical distinction between pre-legal and legal societies, which helps form the basis to his view that modern legal systems feature a union of primary and secondary rules. The example is one among many of his general effort to make jurisprudence develop in tune with descriptive sociology. Hart, H. L. A., *The Concept of Law* (Oxford: Oxford University Press, 2012), 3rd Ed., pp. 91-3; Green, L., 'Introduction'. In Hart, 2012, pp. xlv-xlviii.

²³ Green, 2012, p. xlvii.

²⁴ Vermeule, 2022c.

According to who? Would we not need to compile a dataset of all practical reasoning about the legal common good and then see what proportion converge? How many times does the legislator who says ‘public interest’ mean the same as the legislator who says ‘general welfare’?²⁵ Then, is convergence even a guarantor of truth, or does the true common good—however inclusive a notion—involve something different to majority use? Ronald Dworkin seemed to think so.²⁶ Concepts and ideas are part of a wide discourse, but that is not to say their internal distinctions are trivial; sometimes shades of difference are relevant politically, turning ideas into ideologies. Without contestation, there might be no political thought.²⁷ Even if all we want to do is a social science of law, we have to distil something of what the common good is before we can substantiate the claim that it is foundational to legality in practice.

Rather than avoiding the question by presuming convergence or assuming conceptual disagreement is irrelevant, I take, therefore, a second type of response offered by Vermeule and colleagues to be more robust: that a central case method can help us understand what the nature of law is, and that this forms the methodological basis to common good constitutionalism’s claim that law, as ordered to the common good, is truly law and legitimately so. Common good constitutionalism relies on a classical natural law approach of identifying the central case of law and constitutionalism as ordered to the common good by its very nature, while also recognising that a state makes positive law in part based on circumstance, convenience, or a need for social coordination. Crucial in this manoeuvre is a reliance on a distinction between the common good as a higher-order principle and the determination of particular legal ordinance.²⁸ As Vermeule explains, prudence requires a ‘process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.’²⁹ Vermeule understands there to be a good amount of variability and discretion in the formation of laws, but notes a singular notion of the common good to which they must all be directed, in the last analysis:

...the need for determination arises when principles of justice are general and thus do not specifically dictate particular legal rules, or when those principles seem to conflict and must be

²⁵ Vermeule, 2022c, identifies public interest and general welfare as terms that sufficiently overlap with the common good.

²⁶ Dworkin, R., *Taking Rights Seriously* (London: Bloomsbury, 2013).

²⁷ ‘[I]deologies are distinctive configurations of political concepts, [...] they create specific conceptual patterns from a pool of indeterminate and unlimited combinations. That indeterminate range is the product of the essential contestability of political concepts, and essential contestability provides the manifold flexibility out of which ideological families and their subvariants are constructed. [...] Specific structures of political thinking do not exist prior to meaning but are themselves formed by permissible and legitimated codes and norms at the disposal of a given society, or by challenges to those prevailing codes and norms.’ Freedman, M., *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Oxford University Press, 1996), p. 4. See also MacIntyre, A., *Whose Justice? Which Rationality?* (London: Duckworth, 1988).

²⁸ Vermeule, 2022a, pp. 44-7; Casey & Vermeule, 2022, pp. 118-21.

²⁹ Vermeule, 2022a, p. 9.

mutually accommodated or balanced. Those general principles must be given further determinate content by positive civil lawmaking. There are typically multiple ways to determine the principles while remaining within the boundaries of the basic charge to act to promote the common good – the basis of public authority. By analogy, an architect who is given a general commission to build a hospital for a city possesses a kind of structured discretion. The purpose or end of the commission shapes and constrains the architect's choices while not fully determining them; a good hospital may take a number of forms, although there are some forms it cannot take.

So too at the level of the whole constitutional order. The common good in its capacity as the fundamental end of temporal government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity.³⁰

A singular notion of the common good that nevertheless facilitates variety in positive legal manifestation is developed by means of Aquinas' definition of law as 'an ordinance of reason for the common good, promulgated by a public authority who has charge of the community.'³¹ Running through common good constitutionalism is therefore a desire to access a shared sense of law's nature, regardless of jurisdiction, accepting that laws do vary for reasons that are not detrimental to their aim of fostering the common good. Helping tie the approach together is a fairly open-ended conceptualisation of the 'common good', defined by Vermeule as, 'for the purposes of the constitutional lawyer, the flourishing of a well-ordered political community.'³² But a self-sufficient society can exhibit diverse needs, a diversity of membership, flexible solution-building, and ongoing realisation of human freedom.³³ To meet the distance between an overarching aim of the common good and the practical question of what principles of justice are general and what rules understandably specific, a methodology is needed for making sense of the factuality of the common good—what it is as a reliable and robust concept, and how it relates to law in the day-to-day. That is what is offered in "central" or "focal" case approaches to legal ontology.

The central case method is rooted in Aristotle's understandings of the balance and harmony to be found in the growth and flourishing of species, but its importation into modern legal theory comes through Finnis' use of the method for identifying the nature of law. Ultimately, on Finnis' account, there cannot be law without an understanding of law's proper functioning, and law's proper functioning

³⁰ Ibid, pp. 9-10.

³¹ Ibid, p. 3.

³² Ibid, p. 7.

³³ For reflection on heterogeneity in ideal social ordering, and the way in which our individual freedom is essential for the achievement of public goods, see Sen, A., *Development as Freedom* (Oxford: Oxford University Press, 1999); Sen, A., *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002); Sen, A., *The Idea of Justice* (London: Penguin Books, 2009); Alkire, S., *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford: Oxford University Press, 2002).

is revealed through its central case, which is the law of the complete community. While Finnis' account is described as a theory of natural law, his aim is to best explain all of law, which means he is also giving a full account of the determination of positive law as proper to the ontology of law, which in its central case is complete in the sense of coherent and authoritative.

Vermeule and colleagues are right to similarly appeal to a central case method for helping navigate some of the questions raised above about how helpful the common good is as a concept for guiding our making and interpretation of law.³⁴ However, their approach differs from Finnis' because the nature of what is being explained through reference to central case methodology is the common good itself, not law. For the common good constitutionalist, that seems like no difference at all, because law is explained by reference to the common good, so of course the focal meaning of the common good provides the focal meaning of law too. But for Finnis there is a difference, because he takes seriously aspects of the fact/value distinction that have helped establish the functionings of positive law alongside moral considerations. While Finnis' reliance on a fact/value distinction is usually overstated (given his absolute rejection of amoral sociology of law,³⁵ and his ultimate agreement with the idea that laws are necessarily and by definition for the common good of a particular society³⁶), it is true that he does accept a normativity to law from a point of view internal to the legal system, as part of a wider dialogue with legal positivism and especially HLA Hart, his doctoral supervisor.³⁷ Finnis rejects Hart and Raz's internal or legal points of view, but retains the merits to their insights on the nature of positive law and the legal system by substituting-in practical reason as the proper basis to law's internal ordering, so as to arrive at a more complete account of the nature of the law, seen from both within and without.³⁸ Law is internally ordered through practical reason and externally ordered to the common good. From a Finnisian perspective, common good constitutionalism adopts an exclusively external criteria for interpreting legal validity and the nature of law,³⁹ which means common good constitutionalism amounts to a more radical rejection of the fact/value distinction. To properly address this division between two otherwise closely related schools, it is necessary to take a step back to understand the place and importance of the fact/value distinction for modern jurisprudence.

2. The problematic fact/value distinction

³⁴ Casey & Vermeule, 2022, p. 105.

³⁵ Finnis, 2011, ch 1.

³⁶ Ibid, p. 276.

³⁷ Finnis completed his DPhil in Oxford in 1965 supervised by HLA Hart on 'The Idea of Judicial Power, with special reference to Australian federal constitutional law'.

³⁸ Finnis, 2011, p. 15.

³⁹ As a further example: 'Law in this tradition is understood, as Aquinas famously framed it, as an ordinance of reason promulgated by political authorities for the common good. Law is not the product of the arbitrary will of a ruler, nor is it simply whatever is identified by social convention as law. To count as law in the fullest sense, an ordinance of public authority must rationally conduce to the good of the community for which the lawmaker has a duty and privilege of care.' Casey & Vermeule, 2022, p. 108.

Contemporary legal philosophy tends to categorise natural law theory as either a type of law (moral law) or a method of legal interpretation (a method for working out if law is just, legitimate). This is a misleading dichotomy but, perhaps in part because it tracks the distinction between legislating and judging, it is a dominant misunderstanding. Natural law theorists attempting to respond to the false dichotomy must always reject it at some point in their argumentation, but the level and nature of the rejection can differ markedly. One can, for example, emphasise that all laws are moral and involving of moral purpose (common good constitutionalism), or that correct legal interpretation is itself a practice of identifying *both* just law and what law is (Finnis' approach⁴⁰). How did we get to this assumed distinction between law's moral purpose and its nature?

Nineteenth century jurist John Austin believed that we should study law scientifically, which meant for him that we should analyse legal concepts and principles regardless of our views of their moral salience. The methodological approach is distilled in a contemporary of Austin's, the French philosopher August Comte, who held that '[a]ny proposition which is not ultimately reducible to the simple enunciation of a fact, whether particular or general, would not present any real intelligible sense.'⁴¹ In this way, it is sometimes felt that in modern jurisprudence description precedes evaluation.⁴² That is to say, observing what the law is can be made before, and separate to, evaluating whether it is good or bad. In contrast to this, natural law theory seems to hold that evaluation of law is a necessary component to describing what law is. When Austin presents law as being, in its truest sense, of only two types, divine and positive,⁴³ he is presenting the law as a command from someone, either God or the state. That is the *fact* of law (commands), not what we *want* law to be (a normative valuation), which anyone can have an opinion on.⁴⁴ One can include natural law in the idea of the fact of law, if by it we mean universal principles of justice which are demonstrable, and then one has to demonstrate them. As Austin explains in his posthumously published *Lectures on Jurisprudence*, general jurisprudence concerns 'law as it necessarily *is*, rather than with law as it *ought* to be; with law as it must be, *be it*

⁴⁰ Finnis, 2011. See also his care to avoid blanket or simplistic endorsement of 'lex injusta non est lex' in pp. 363-6.

⁴¹ Comte, A., *Cours de philosophie positive* (Paris, 1864), 2nd Ed., Vol. 6, p. 600. Quoted in Fazio, M. & Fernández Labastida, F., *A History of Contemporary Philosophy: Nineteenth and Twentieth Centuries* (New Rochelle, NY: Scepter Publishers, 2011), p. 136.

⁴² Dickson, J., *Evaluation and Legal Theory* (Oxford: Hart, 2001); Gardner, J., 'Legal Positivism: 5½ Myths'. *American Journal of Jurisprudence*, Vol. 46 (2001), pp. 199-227; Leiter, B., 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence'. *American Journal of Jurisprudence*, Vol. 48 (2003), pp. 17-51.

⁴³ Austin, J., *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995), p. 10.

⁴⁴ 'The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.' Ibid, p. 36.

good or bad, rather than with law as it must be, *if it be good*'.⁴⁵ As such, '[t]he matter of jurisprudence is positive law'.⁴⁶

Thus began a transformative project of seeking to understand what the law is on its own terms: the nature of law rather than natural law within the order of creation.⁴⁷ Austin's views have of course been debated and criticised, but the criticism mainly falls on his conceptualisations of sovereignty and authority, rather than his positive/moral distinction, perhaps given how banal that aspect of his theory has become in the context of the wider fact/value distinction that dates back at least to David Hume and Immanuel Kant about a century earlier, and has come to dominate the social sciences and humanities. Whether because of Austin or because of wider tidal shifts in epistemology, a positive/moral distinction has endured within jurisprudence from the 19th century onwards. Indeed, thinking that he was criticising Austin, HLA Hart wrote that Austin's definition of positive law as the sovereign's coercive orders 'failed to fit the facts'.⁴⁸ That is to recite Austin's method back to him! Of course, careful advancement from Hans Kelsen, Lon L. Fuller, Hart and many others developed the understanding of positive law on its own terms and derived standards of its authoritativeness internal to its nature (whether we call this legal science, law's inner morality, or law's internal point of view), which is a kind of natural law in the sense of a study of what is natural to law, what is law's nature. This makes the question of whether one is a legal positivist now hard to distinguish from the question of whether one is rational, because our modern notion of human reason rests on an ability to maintain a fact/value distinction. Even admirers of Aquinas started to claim he was the one who put the term 'positive law' into wide philosophical circulation in the first place,⁴⁹ proving that he, too, was rational on modern terms. With the drama of the Nuremberg trials and post-war confrontation of evil regimes, the separation of positive law and morality seemed dangerous and perhaps in keeping with totalitarian trends, but was rescued among jurists through the Hart-Fuller debate in 1958 in the *Harvard Law Review*.⁵⁰ Ongoing use of the distinction seemed even to better fit the facts of a decolonising world of multiple jurisdictions and a plurality of value systems.

Encountering modern jurisprudence is like walking into a friend's house and seeing a puzzle scattered on the floor. You ask, "Why is there a puzzle on the floor?" And the friend replies, "Each

⁴⁵ Rumble, W. E., 'Introduction'. In Austin, 1995, p. xiii (emphasis in original).

⁴⁶ Austin, 1995, p. 18.

⁴⁷ Green commenting on Hart's *The Concept of Law*: 'This book advocates a kind of legal theory Hart calls "general and descriptive". He means that it is a theory of law *as such*, not a theory of English law, or common law, or capitalist law—and it "is morally neutral and has no justificatory aims..."'. Green, 2012, p. xlviii (emphasis in original).

⁴⁸ Hart, 2012, p. 80.

⁴⁹ Finnis, J., 'Natural Law Theories'. *Stanford Encyclopedia of Philosophy* (2014).

⁵⁰ Hart, H. L. A., 'Positivism and the Separation of Law and Morals'. *Harvard Law Review*, Vol. 71, No. 4 (1958), pp. 563-629; Fuller, L. F., 'Positivism and Fidelity to Law: A Reply to Professor Hart'. *Harvard Law Review*, Vol. 71, No. 4 (1958), pp. 630-672. See also Fuller, L. F., *The Morality of Law* (New Haven: Yale University Press, 1969). I thank Jeffrey Pojanowski for helpful guidance on this point. See also Purcell, E. A., 'American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory'. *The American Historical Review*, Vol. 75, No. 2 (1969), pp. 424-446; Purcell, E. A., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (Lexington: University Press of Kentucky, 1973).

piece can be fitted together to make a complete whole.” You repeat, “Why is the puzzle on the floor?” He expands his account: “Puzzles are based on images—photos or paintings—and when you put the pieces together, they form a complete picture.” You sit on the floor and do the puzzle, and your friend’s account holds true. Engrossed in the challenge, you forget your original question.

Legal positivism is operating under a logical fallacy, which common good constitutionalism exposes. Legal positivism says that the law’s internal ordering sufficiently explains its nature, which is to ignore its place within politics, the political nature of human beings, and the wider ambition of society’s self-sufficiency through realisation of common goods. Legal positivism says that constitutionalism can be derived from its internal order, which is akin to a mathematician saying physics can be derived from maths. It is true that physics uses maths, and that the logic of maths is in harmony with the logic of physics. But physics encounters reality where it is, and asks what type of maths can make sense of that reality and its laws. The inner workings of maths do not explain away physics, nor mean that a view of maths internal to itself—its inner harmony—would justify separation of maths and physics. Common good constitutionalism is likewise right to hold law to wider account, namely its place in political ordering towards the common good. The mistake, however (which I nevertheless believe is rectifiable through recourse to Finnis’ more careful account of the central case of law), lies in thinking that law’s external ordering to the common good is to a single idea of the common good, which is neither what Aquinas meant nor what would properly extract jurisprudence from the fact/value fallacy. Through a simplistic understanding of the common good, common good constitutionalism is in danger of repeating the assumption of fact/value separation by being a value-only account. In this very early stage of common good constitutionalism, both the premise and conclusion are value claims only, so there is no real progress being made for jurisprudence. This is evident in the tautology of a consequent of legitimacy assumed in the premise of a classical legal tradition (both ideas of a classical legal tradition and the common good defined with respect to each other). The tautology is not required in natural law theory, and natural law’s central case method avoids the difficulty by discussing common good contextually and in tune with the practical reasonableness of the complete community, tying the fact of the authoritative legal system with its external ordering to common good in focal meaning.

3. Aquinas’ definition of law

In footnote one of ‘Myths of Common Good Constitutionalism’, Casey and Vermeule write:

Picking out the central or focal case of a phenomenon, including law or constitutionalism, [...] requires the theorist to engage with the question of *why* practices like law and constitutionalism are a good thing to have and what kind of *reasons* would warrant bringing a legal system into being and sustaining it over time, as opposed to opting for other forms of social ordering. In the

classical legal tradition, this “why” and these “reasons” are supplied by reference to the need to secure the common good of each and all—the sources of man’s highest temporal happiness.⁵¹

Both the terms ‘the common good’ and ‘the central or focal case’ use the definite article. There is also a description of ‘the classical legal tradition’. An indefinite article, however, is used for ‘bringing *a* legal system into being’ (emphasis added). The footnote uses the definite article for the common good in a way that is explicitly expansive: ‘the common good *of each and all*’ (emphasis added). While use of the definite article does not necessarily signify there is only one, when it would not be confusing to use the indefinite article (i.e. there was no other common good the reader could have been confused with), its choice is likely purposeful. Indeed, throughout the article and the book *Common Good Constitutionalism*, the definite article is preferred when discussing the common good, referring to something that is ‘unitary and indivisible’.⁵² All this seems to be in line with the English translation from Latin of Aquinas’ definition of law. The usual English translation is:

...an ordinance of reason for the common good, made by him who has care of the community, and promulgated.⁵³

This is a good translation, but we often forget, when reading the English, that Latin has no definite or indefinite article. The Latin original is:

...quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.⁵⁴

The phrase ‘quaedam rationis ordinatio ad bonum commune’ translates literally as ‘certain ordinance of reason to common good’. We know we are talking about a single common good, not common goods, because ‘bonum’ is in the singular (the plural being *bona*), but that is not to say that it would be necessarily correct to translate it as ‘*the* common good’, because the indefinite article would likewise be usable for the singular (as in ‘*a* common good’).⁵⁵ Indeed, elsewhere Aquinas uses words such as *illam* to signify the equivalent of a definite article, and chooses not to do so for describing the place of

⁵¹ Casey & Vermeule, 2022, p. 105 (emphasis in original).

⁵² Vermeule, 2022a. Take, for example, the subsection ‘The Common Good Defined’, which goes on to outline, ‘Chapter 1 defines the common good, at successively specific levels – conceptually, legally, and constitutionally. In brief, the common good is, for the purposes of the constitutional lawyer, the flourishing of a well-ordered political community. The common good is unitary and indivisible, not an aggregation of individual utilities.’ (p. 7).

⁵³ Aquinas, T., *Summa Theologiae* (London: Blackfriars, 1964-1981 [1265-1274]), I-II, q. 90, a. 4, c.

⁵⁴ *Ibid.*

⁵⁵ A comparable misrepresentation through translation into the definite article is noticed by Michael Nolan when discussing Aquinas’ views on the ethics of venereal acts. Nolan, M., ‘Aquinas and the Act of Love’. *New Blackfriars*, Vol. 77, No. 902 (1996), pp. 115-130, p. 118. I thank Connor Grubaugh for pointing this out.

common good in his definition of law.⁵⁶ Aquinas even chooses to emphasise ‘one common good to all’ elsewhere when discussing love of neighbour, again suggesting there is some implicit choice in omitting as much in his definition of law.⁵⁷ It is perfectly acceptable, and probably best all things considered, for translations of Aquinas to describe law as ordered to *the* common good, because it is the singular he is referring to. But common good constitutionalism has developed a whole theory of constitutional government and legal interpretation that assumes the definite article in particular is representative of Aquinas’ view of the place of common good within our understanding of the nature of law, treating Aquinas as claiming that various different political communities can all be understood as ordered to one notion of the common good.

4. Nuance in Finnis’ central case method of law

Casey and Vermuele argue that ‘[i]n the classical account, a genuinely *common* good is a good that is unitary (“one in number”) and capable of being shared without being diminished.’⁵⁸ The reason for this focus is to counter utilitarian conceptions, which tend to see public goods as aggregates of individual utility or individual preference satisfaction. Again, this is an apt approach. What it does not do, however, is establish a singular notion of the common good applicable to law regardless of a society’s overall political biography and architecture. In this sense, Finnis offers a more careful account that defines the central case of law as the legal system of a complete community, and which therefore does not challenge political architecture in the same way. I am purposefully using the strange term “political architecture” because societies have a political history of coordination that is partly legal and partly associative, and these together “build the city” to the common good. If I were to use the terms “structure” or “constitution”, it would already give imaginative priority to the law or rules of the game, which is an incorrect prioritisation for considering what matters for the common good, just as the best expression of justice is friendship, not fair law, because good friendship is fairer than good law. In the same way, families and associational groups are, in their perfection, more coordinating than laws for purposes of pursuing common goods. Casey and Vermeule give an account of the ordering of law to the common

⁵⁶ Although one should not put too much weight on it, Aquinas is also implicitly omitting words he uses elsewhere in the *Summa* to specify a noun further (akin to a definite article), such as *iste / ista / istud*, or *ille / illa / illud* (that / those). For example, at II-II, q. 118, a. 4, ad. 1 he states, ‘Ad primum ergo dicendum quod avaritia connumeratur peccatis mortalibus secundum *illam* rationem qua est peccatum mortale’, which translates as ‘Covetousness is numbered together with mortal sins, by reason of *the* aspect under which it is a mortal sin’ (emphasis added). ‘*Illam*’ used as a definite article modifying the noun ‘*rationem*’. I thank William Nolan for pointing this out and offering the example.

⁵⁷ ‘Et ideo amor non diversificatur specie propter diversam quantitatem bonitatis diversorum, dummodo referuntur ad *aliquod unum bonum commune*, sed honor diversificatur secundum propria bona singulorum.’ / ‘Hence love is not differentiated specifically on account of the various degrees of goodness in various persons, so long as it is referred to *one good common to all*, whereas honor is distinguished according to the good belonging to individuals.’ Aquinas, *ST*, II-II, q. 25, a. 1, ad. 2 (emphasis added).

⁵⁸ Casey & Vermeule, 2022, p. 109 (emphasis in original).

good without a deep enough account of political architecture (though the common good constitutionalism school is unfolding before our eyes, so we may well see this fully compensated for in the years ahead). They state:

Picking out the central or focal case of a phenomenon, including law or constitutionalism, therefore requires the theorist to engage with the question of *why* practices like law and constitutionalism are a good thing to have and what kind of *reasons* would warrant bringing a legal system into being and sustaining it over time, as opposed to opting for other forms of social ordering. In the classical legal tradition, this “why” and these “reasons” are supplied by reference to the need to secure the common good of each and all—the sources of man’s highest temporal happiness. See John Finnis, *NATURAL LAW AND NATURAL RIGHTS* Chapter 1 (2d ed. 2011).⁵⁹

It is true that the purpose of a thing is part of its nature, and so in this sense without understanding why something is made, one will not really understand what it is. But even on this count it is not possible to use common good as a standard for interpreting legal validity, because the common good is manifested heterogeneously and is irreducible to law in its realisation. Positive law is optional to the common good. The public hospital, for example, may be part statutory provision, part charitable, part in debt to a local bank, part made up of volunteers, part reliant on habits of love and care, part profit-making. It will likely continue its work in the midst of constitutional upheaval. Hospitals support the common good and the statutory provisions that help facilitate them are oriented to the common good too, but the legal validity of those statutory provisions do not turn on the realisability of the common good of health care, not because health care is not a common good, but because health care can happen independently of the law. Hospitals have often become legal as an afterthought; their main concern, historically, is not their legal personhood but how to care for those who turn up in need but with limited funds. The legal incorporation of hospitals is ideally in sync with their operation, and supportive of it, but legal incorporation is not a *sine qua non* of a hospital’s contribution to the common good. The state can help fund health services that are not legally incorporated. And hospitals and clinics sometimes operate in service of the common good in stateless places. All this variety in the possible state-society relationships that realise the common good demonstrates that it is not solely the task of law. The common good is a goal of the political community as a whole. A legal system shares that goal, but does not exhaust it. The statesman, and citizens more generally, identify the best combination of means to arrive at the end. The end does not dictate legal means necessarily, as a number of varied combinations can arrive at the same goal. It is like a family hosting a meal for a guest. Rules can play a part (instructions about how to cook certain dishes, rules about what children help with what chores), but any given family might have its

⁵⁹ Ibid, p. 105 (emphasis in original).

own combination of rules or its own level of reliance on rules. The family prudentially navigate what rules work best for them, and the goodness of the rules is in the part they play in realising the meal-through-community. Use of rules is contextually sensitive to what is needed for realisation of the common good; rules develop as part of the family's practical reasoning.

Under Finnis' approach, the central case of law can be identified both normatively and empirically in conjunction. The oldness of law and its tradition provides a normalcy to what is known, and therefore acts as tried-and-tested information on the civic habit of justice and the very nature of the rule of law. There is therefore this third element to identifying the common good constitutional order aside from principles of human flourishing and recognising the determination of positive law: the past.⁶⁰ Law works with the political architecture of history and society. As much is already loosely acknowledged in Vermeule's account of the *ius commune* (the classical synthesis over time of Roman law, canon law, and local civil law), but it is not just about a continued featuring of the common good over time in legal history: a central case method appreciates that the past and legal precedent are both empirically valid and normatively authoritative (albeit not final) in establishing the balance of what is just, because the central case of law is the legal system of a complete community. Law's normalcy habitually evidences stable connection between the common good and coercive ordinance. It is both internally harmonious in practical reasonableness and externally harmonious in direction to the common good.

Learning about the common good is inevitably going to involve an iterative process of getting-to-know reality and trying-out what might better coordinate the community towards realisation of common goods. What is good to do is, in part, settled by what is within reach. It is for this reason that the central case method understands law as ordered internally in its practical reasonableness without being the only means for pursuing the common good,⁶¹ which is an acknowledgement that the task of prudentially mastering the relationship of means to ends for society's fruitful coordination is going to stay with us,⁶² in contrast to utopian accounts that think the challenge of ordering society towards the common good can be settled once and for all.

⁶⁰ Finnis, J., 'Ruptura, Transformación y Continuidad en la Tradición de la Razón y la Justicia' ['Rupture, Transformation and Continuity in the Tradition of Reason and Justice']. Charla Magistral, Inauguración del Año Académico 2013 de la Facultad de Derecho (22 Apr 2013), translated by Cristóbal Orrego.

⁶¹ '[W]e should expect the application and even the meanings of "central case" and "focal meaning" to shift as we move from (1) natural orders (physical and other natural sciences, metaphysics, and so forth), to (2) logical orders (of thought bringing order into its own operations), to (3) the order of morally significant deliberation and action, and fourth to (4) the arts and techniques that bring order into matter within our control. We should expect the centrality of central cases in the natural and/or metaphysical sciences to be grounded in kinds of reasons (among them doubtless statistical frequency) notably different from the kinds of reasons that ground the centrality of central cases in the domain of self-shaping and community-shaping morally significant action.' Finnis, J., 'Grounds of Law and Legal Theory: A Response'. *Legal Theory*, Vol. 13, No. 3-4 (2007), pp. 315-344, p. 317.

⁶² 'For our purposes, physical, chemical, biological, and psychological laws are only metaphorically laws. [...] The similarity between our central case and the laws of arts and crafts and applied sciences is greater; in each case we are considering *the regulation of performances by self-regulating performers whose own notions of what they are up to affects the course of their performance*.' Finnis, 2011, p. 280 (emphasis added). See also

In discussing methods of interpretation, there is a tendency to assume that if a right theory of interpretation could be established, judges would follow it. This in turn assumes that there is a right theory that is possible out there, which we need to grasp hold of: *that well-interpreted law*. It exists outside of ourselves; we must bring it from its hiding place and into the courts if we are to make sure the law is justly applied. The same logical misstep is frequently made in the study of ethics, where it is assumed that if we truly established what right conduct was, we would do it. In this sense, it is also a refinement in Finnis' account of the common good that practical reasonableness is not only a way of understanding law's internal ordering, but also a basic good that must be protected at the level of the individual human person.⁶³ Common good constitutionalism is in danger of making the same dual error of developing a science of the common good applicable regardless of political architecture, and assuming that if only one grasped what the common good involves, the challenge of having the virtues to carry it out would be minor. On both fronts, the project might be in danger of becoming Weberian, in the sense that the principle of the common good becomes a rationalising ideal for all public bureaucracy—a required destination for any state's development over time as part of a science of efficient administration. Finnis rightly takes particular issue with Max Weber on this front,⁶⁴ because Weber's ideal type methodology suggests that a legal-rational ordering of the state can be obtained without regard to the practical and contextual, which must be part of law's central case because its ordering is through a practical reasoning more nuanced than a universalising or singular conception of *the common good* applicable to all societies invariably.

Conclusion

The idea “common good” does not do the work needed by Vermeule and others to establish a theory of constitutional government or legal interpretation, though they are otherwise right to draw natural law theory into the debate over the basis to political and legal authority. The central case of law is the legal system of the complete community, which is directed toward the common good, and yet this finding does not generate criteria for good law or good legal interpretation, which depend on good practical reasoning. As Finnis puts it, ‘the central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable’.⁶⁵ The central case of law is, should be, and needs be directed towards the common good, but how much laws hit the mark in achieving the common good is not the exclusive evaluative criteria for assessing whether laws are laws,

MacIntyre, A., ‘Is a Science of Comparative Politics Possible?’ Ch 10 of Ryan, A. (ed.), *The Philosophy of Social Explanation* (Oxford: Oxford University Press, 1973).

⁶³ Finnis, 2011, pp. 85-90.

⁶⁴ See, especially, Finnis, J., ‘On “Positivism” and “Legal Rational Authority”’. *Oxford Journal of Legal Studies*, Vol. 5, No. 1 (1985), pp. 74-90.

⁶⁵ Finnis, 2011, p. 15 (emphasis in original).

or what laws really mean. Laws are part of a legal system, and the validity of each is intertwined with the validity of the whole, as is their meaning. So the being of law is irreducible to whether the common good is being realised, even though the common good is the intelligible purpose for creating law. Indeed, common goods are not even exclusively the object of law, with associational orderings also aimed at the realisation of common goods,⁶⁶ even though they may have no legal recognition, execution or personhood.⁶⁷ Politics brings all of these efforts together, with one of its plethora of activities the making of laws. Whether the common good is arrived at can be evaluated following a combination of activities and efforts.

There are thus good reasons why Thomas Aquinas and John Finnis resist the assumption of a single notion of the common good, opting instead to leave room for common good(s) understood practically and contextually within any given political community, and frequently featured in terms of partnered action between state and non-state actors. Both Aquinas and Finnis are moral “absolutists” in the sense of acknowledging objective moral universals and a natural law that applies to all human beings everywhere, and yet both stop short of claiming that there is a single notion of the common good that can act as an interpretive tool for determining what laws are valid or what laws are needed. The law is, by its nature, ordered to the common good, which is singular for the political community in the sense of a cause of that community’s self-sufficiency, but it is not singular in the sense of dictatorial of one way of doing or valuing law. Practical reasonableness may demand different laws in different societies, or different laws in the same society at different times. As such, it is not possible to derive a general theory of legal interpretation or a science of justice through reference to *the* common good, nor declare that certain laws are, in general, good laws or moral laws simply because they foster protection or pursuit of the common good. To return to the example of a family preparing a meal for a guest, the rules are ordered to the common good of the meal, and generally such family-based rules are ordered to common goods, but the aim of the meal does not dictate what rules are good or bad in abstract, nor what the correct way of interpreting rules must be. There are many ways the family might go about achieving the goal, and the use of rules will be a product of the family’s practical reasoning. Rules can be adopted or discarded through evaluation of whether they help achieve the common good of the meal, but that does not tell us whether the rules are truly rules, or illegitimate for other contexts. While common good constitutionalism plays an excellent role in drawing attention to the type of end towards which all laws aim, and an equally excellent role in confronting the widespread and yet illogical adoption of a

⁶⁶ ‘[T]he purpose of subsidiarity is not, as is often thought, the promotion of smaller units just for the sake of having smaller units. [...] Against all of these options, subsidiarity exists in order to promote the common good through all of their various intermediate ends and modes. [...] Thus, when the state, following the model of authority promoted by subsidiarity, refrains from interfering with the primary units or does intervene to bring assistance, it is always ordered away from itself and towards the good of those primary units, and through them towards the common good...’. Cahill, M., ‘Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity’. *American Journal of Jurisprudence*, Vol. 61, No. 1 (2016), pp. 109-132, pp. 122-3.

⁶⁷ Burbidge, D., ‘The Inherently Political Nature of Subsidiarity’. *American Journal of Jurisprudence*, Vol. 62, No. 2 (2017), pp. 143-164.

fact/value distinction in jurisprudence, it cannot take the place of natural law theory's appeal to practical reasonableness. As such, common good constitutionalism successfully articulates the end of a legal system, but errs if it thinks that that end can form the basis to what laws are good or legitimate in abstract, or what practical reasonableness entails. Laws find their nature in the central case of a complete legal system, and it is the civic contributions of state and non-state actors that together ensure the common good. The role of the state and its laws depends to a great deal on this internal societal arrangement of authority, which varies significantly according to variations in cultures of coordination, civic virtue, and forms of civic unity; it has no ideal type legal manifestation.

Bibliography

- Alkire, S., *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford: Oxford University Press, 2002).
- Aquinas, T., *Summa Theologiae* (London: Blackfriars, 1964-1981 [1265-1274]).
- Austin, J., *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995).
- Bunce, W., 'Law and Legislating in the Age of Justinian'. *DPhil thesis* (University of Oxford, forthcoming).
- Burbridge, D., 'The Inherently Political Nature of Subsidiarity'. *American Journal of Jurisprudence*, Vol. 62, No. 2 (2017), pp. 143-164.
- Cahill, M., 'Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity'. *American Journal of Jurisprudence*, Vol. 61, No. 1 (2016), pp. 109-132.
- Casey, C., "'Common-good constitutionalism" and the new battle over constitutional interpretation in the United States'. *Public Law*, No. 4 (2021), pp. 765-787.
- Casey, C. & Vermeule, A., 'Myths of Common Good Constitutionalism'. *Harvard Journal of Law & Public Policy*, Vol. 54, No. 1 (2022), pp. 103-144.
- Comte, A., *Cours de philosophie positive* (Paris, 1864), 2nd Ed., Vol. 6.
- Dickson, J., *Evaluation and Legal Theory* (Oxford: Hart, 2001).
- Dworkin, R., *Taking Rights Seriously* (London: Bloomsbury, 2013).
- Fazio, M. & Fernández Labastida, F., *A History of Contemporary Philosophy: Nineteenth and Twentieth Centuries* (New Rochelle, NY: Scepter Publishers, 2011).
- Finnis, J., 'On "Positivism" and "Legal Rational Authority"'. *Oxford Journal of Legal Studies*, Vol. 5, No. 1 (1985), pp. 74-90.
- _____, 'Grounds of Law and Legal Theory: A Response'. *Legal Theory*, Vol. 13, No. 3-4 (2007), pp. 315-344.
- _____, *Natural Law & Natural Rights* (Oxford: Oxford University Press, 2011).
- _____, 'Ruptura, Transformación y Continuidad en la Tradición de la Razón y la Justicia' ['Rupture, Transformation and Continuity in the Tradition of Reason and Justice']. Charla Magistral, Inauguración del Año Académico 2013 de la Facultad de Derecho (22 Apr 2013), translated by Cristóbal Orrego.
- _____, 'Natural Law Theories'. *Stanford Encyclopedia of Philosophy* (2014).
- Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).
- Freeden, M., *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Oxford University Press, 1996).
- Fuller, L. F., 'Positivism and Fidelity to Law: A Reply to Professor Hart'. *Harvard Law Review*, Vol. 71, No. 4 (1958), pp. 630-672.
- _____, *The Morality of Law* (New Haven: Yale University Press, 1969).
- Gardner, J., 'Legal Positivism: 5½ Myths'. *American Journal of Jurisprudence*, Vol. 46 (2001), pp. 199-227.
- Gee, G. & Webber, G., 'Rationalism in Public Law'. *Modern Law Review*, Vol. 76, No. 4 (2013), pp. 708-734.
- Golding, W., *Lord of the Flies* (London: Faber and Faber, 1954).
- Green, L., 'Introduction'. In Hart, H. L. A., *The Concept of Law* (Oxford: Oxford University Press, 2012), 3rd Ed.

- Hart, H. L. A., 'Positivism and the Separation of Law and Morals'. *Harvard Law Review*, Vol. 71, No. 4 (1958), pp. 563-629.
- _____, *The Concept of Law* (Oxford: Oxford University Press, 2012), 3rd Ed.
- Leiter, B., 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence'. *American Journal of Jurisprudence*, Vol. 48 (2003), pp. 17-51.
- MacIntyre, A., 'Is a Science of Comparative Politics Possible?' Ch 10 of Ryan, A. (ed.), *The Philosophy of Social Explanation* (Oxford: Oxford University Press, 1973).
- _____, *Whose Justice? Which Rationality?* (London: Duckworth, 1988).
- Nolan, M., 'Aquinas and the Act of Love'. *New Blackfriars*, Vol. 77, No. 902 (1996), pp. 115-130.
- Philp, M., 'Access, accountability and authority: Corruption and the democratic process'. *Crime, Law & Social Change*, Vol. 36, No. 4 (2001), pp. 357-377.
- _____, *Political Conduct* (Cambridge, MA: Harvard University Press, 2007).
- Pirie, F., *The Anthropology of Law* (Oxford: Oxford University Press, 2013).
- _____, *The Rule of Laws: A 4,000-Year Quest to Order the World* (London: Profile Books, 2021).
- Purcell, E. A., 'American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory'. *The American Historical Review*, Vol. 75, No. 2 (1969), pp. 424-446.
- _____, *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* (Lexington: University Press of Kentucky, 1973).
- Sen, A., *Development as Freedom* (Oxford: Oxford University Press, 1999).
- _____, *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002).
- _____, *The Idea of Justice* (London: Penguin Books, 2009).
- Tilly, C., 'War Making and State Making as Organized Crime'. Ch 5 of Evans, P. B., Rueschemeyer, D. & Skocpol, T. (eds.), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).
- Vermeule, A., 'Beyond Originalism'. *The Atlantic* (31 Mar 2020).
<https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.
- _____, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Cambridge: Polity Press, 2022a).
- _____, 'The Common Good as a Universal Framework'. *Balkinization* (27 Jul 2022b).
<https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html>.
- _____, 'The Common Good As A Legal Concept'. *Ius & Iustitium* (16 Nov 2022c).
- Wallison, P. J., 'Review: Common Good Constitutionalism'. *AEI* (1 Dec 2022).
<https://www.aei.org/articles/review-common-good-constitutionalism/>.