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Common Law and the Common Good

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It is necessarily implicit that ... a legislature, even if sovereign ... must act
for the public good.¹

The law must be regarded as a public asset, intended to serve the public good: it cannot be
merely an instrument for promoting the interests of a ruling elite.²

Political obligation is a matter of what we owe to other members of the community, who
collaborate with us in pursuit of the public good and in defence of the rule of law.³

One might be forgiven for presuming that the author of these quotes was none other than Adrian Vermeule, the Harvard professor who has emerged as a leading natural law critic of originalism and a proponent of what he terms ‘Common Good Constitutionalism.’⁴ They are, in fact, the words of Trevor Allan, grounded within common *law* constitutionalism. In one sense, this should come as no surprise. Common law constitutionalism draws quite explicitly upon an anti-positivist perspective which embraces a morally engaged approach to legal reasoning, rejecting any neat divide between legal and political principle.⁵ Yet, in another sense, the similarities between these statements and the emerging theory of common good constitutionalism invite reflection, particularly in light of some of the alarmed criticism that Vermeule has faced, even from those who would ordinarily be quite sympathetic to Allan.⁶

¹ TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford, Oxford University Press 2013) 293.

² TRS Allan, ‘Why the Law Is What It Ought to Be’ (2020) 11 *Jurisprudence* 574, 575.

³ *ibid* 577.

⁴ A Vermeule, *Common Good Constitutionalism* (Medford, Polity Press, 2022).

⁵ See TRS Allan, ‘Principle, Practice, and Precedent: Vindicating Justice, According to Law’ (2018) 77 *CLJ* 269; J Laws, ‘The Constitution, Morals and Rights’ [1996] *PL* 622; J Laws, ‘Law and Democracy’ [1995] *PL* 72.

⁶ See D Dyzenhaus, ‘The Snake Charmers’ (*Verfassungsblog*, 7 March 2022) verfassungsblog.de/os5-snake-charmers/. One explanation for this is the belief that an opposition to liberalism is necessarily an endorsement of autocracy, tyranny, or totalitarianism, a point Vermeule ardently rejects, the premise of *Common Good Constitutionalism* being that there is an older tradition of constitutionalism which predates liberalism and which does not collapse into totalitarianism. As Welikala notes, ‘it should be clear that the necessarily unitary conceptualisation of the “common good” in the classical tradition is no licence whatsoever for authoritarianism, theocracy, or purely majoritarian forms of political monism ...’: A Welikala “Administrative Law Imagination” and “Legality without Liberalism” in *New Emergencies: Some Reflections from Comparative*

The connection between the common good and the common law tradition, including common law constitutionalism, remains somewhat underexplored. Drawing on the work of TRS Allan, I hope to bridge some of this divide in emphasis by exploring the role of the common law within the classical natural law tradition. However, I also wish to suggest that neutrality on questions of the good life, a hallmark of Dworkin's political liberalism, is not sustainable in light of the commitment, embraced by both him and Allan, that law must serve the public good. If law is to be a public asset – a common good – it cannot refuse to take a stand on the flourishing of legal subjects. Allan's political liberalism, to the extent that it embraces this neutrality principle, is therefore open to challenge for failing to provide adequate content to the concept of the public good which does so much work within his work. To constitute a defensible scheme of justice, law must be defended as a plausible attempt at the common good, intended to improve the lives of its subjects by facilitating their flourishing among a community of moral equals. With this in mind, common good constitutionalism presents a challenge and a rallying cry to anti-positivists, encouraging them to follow through on their commitment to the idea that the rule of law demands good government in the best interests of the governed. To do this, we must think seriously about what those interests require, paying sufficient attention to the specific context and institutional history of our law. Good government cannot be neutral on the good life any more than it can be neutral on the nature and scope of fundamental rights.

A substantive conception of the good life, appropriately respectful of the diverse ways such a life might be lived, is necessary if law is to truly pursue the common good. Requirements of fundamental legal equality, manifesting a commitment to the equal dignity of persons, grounds the rule of law as a defensible scheme of public justice.⁷ But this commitment also demands that law be ordered towards a politics which views the flourishing of each and every member of our community as an essential feature of its own success. Put simply, the normative commitments latent within the ideal of legality are not and cannot be neutral as to the ends of just government. There is an internal moral standard within the rule of law which manifests principled constraints on what officials can do in pursuit of the common good. This much is a hallmark of Allan's extensive and richly nuanced jurisprudence and should serve as a benchmark against which we are to determine whether the common good is genuinely common; whether it is

Constitutional Law' (2023) 27 *Edinburgh Law Review* 364, 369. Another cause of alarm may be the fact that Vermeule has endorsed the descriptive accuracy of the work of Carl Schmitt. Vermeule has also described Schmitt as having fallen into an 'apostasy to Nazism' and has never endorsed Schmitt's positive moral vision beyond his critique of liberalism and his descriptive predictions of the collapse of modernist technocracy: A Vermeule, 'The Ark of Tradition' (*kirkcentre*, 19 Nov 2017), kirkcenter.org/reviews/the-ark-of-tradition. Further still, some may look to the fact that Vermeule is Catholic and has written about Catholic political theory in the past as evidence that *Common Good Constitutionalism* is a prelude to theocracy. Again, this is explicitly rejected by Vermeule, who argues that his theory does not depend upon any theological account of ultimate ends but does draw upon the natural law tradition which has its roots in ancient Greece and in no way presupposes or necessitates a commitment to Catholic legal theory: A Vermeule, 'The Common Good as a Universal Framework' (*Balkinization*, 27 July 2022) balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html; Vermeule, *Common Good Constitutionalism* (n 4) 29. One may be left thinking that some of this alarm has come from a lack of academic charity. But scholarship is far better served by responding to the best version of an opponent's argument.

⁷See M Foran, 'Equal Dignity and the Common Good' (2023) 46 *Harvard Journal of Law & Public Policy* 1009.

appropriately respectful of the fundamental rights of persons. But there must also be plausible limits on what constitutes the common good which are not only grounded in constraints but in what the law can enable and facilitate. This aspect of legality – what law must be directed towards if it is to meet its internal standards of just governance – warrants as detailed elaboration as Allan has provided for the common law method of rights protection.

1. The Classical Legal Tradition

It is hard to extract common good constitutionalism from its American context. This is partially due to the focus Vermeule places on using this theory as a foil for originalism, a phenomenon almost unique to the United States of America, that has thankfully not had much influence within the British common law system.⁸ Indeed, a recurring criticism of this project has been the somewhat parochial nature of much of the surrounding debate and discussion. Yet this parochialism is driven as much by the response that has been engendered as by anything that Vermeule himself has consciously encouraged. Indeed, the stated aim of his book is to shift US constitutional theory out of its parochialism by recovering a lost international tradition within which it once operated.⁹ That tradition, referred to as the Classical Legal Tradition, is one which is grounded explicitly within a natural law framework, rejecting legal positivism on both theoretical and historical grounds as inconsistent with our practice from the ancient world through to the modern common law. In this, he draws upon the largely forgotten natural law bedrock of western jurisprudence which, in subtly different guises, has influenced much of our historic and existing constitutional practice.¹⁰

In the classical legal tradition, law is understood in a distinctly anti-positivist manner, one that rejects any account which conflates it with brute political will. Instead, to use Aquinas' famous description, law is an ordinance of reason for the common good and promulgated by a legitimate political authority who demonstrates appropriate care for the community.¹¹ This should not be taken to mean that the classical legal tradition, or the natural law tradition which informs it, collapses into Thomism.¹² Aquinas'

⁸ Vermeule began this project by calling on constitutional scholars and practitioners to move beyond originalism: A Vermeule, 'Beyond Originalism' *The Atlantic* (31 March 2020), www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/. See also Vermeule, *Common Good Constitutionalism* (n 4) ch 3; A Vermeule, 'Pickwickian Originalism' (*Ius & Iustitium*, 22 March 2022), iusetiustitium.com/pickwickian-originalism/; C Casey and A Vermeule, 'If Every Judge Is an Originalist, Originalism Is Meaningless' *The Washington Post* (25 March 2022) www.washingtonpost.com/outlook/2022/03/25/if-every-judge-is-an-originalist-originalism-is-meaningless/.

⁹ Vermeule, *Common Good Constitutionalism* (n 4) 1–3.

¹⁰ See RH Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, Harvard University Press 2015).

¹¹ T Aquinas, *Summa Theologica*, pt I-II, q 90 art 4. See also Vermeule, *Common Good Constitutionalism* (n 4) 3–4.

¹² Indeed, Vermeule expressly rejects this contention, arguing that the conception of the common good embraced by the classical legal tradition is a *legal* one, not a philosophical or theological one: A Vermeule, 'The Common Good as a Legal Concept' (*Ius & Iustitium*, 16 Nov 2022), iusetiustitium.com/the-common-good-as-a-legal-concept/.

account of law is a useful summary of a tradition which stretches back to ancient Greece and Rome, associated with the thought of Aristotle,¹³ Cicero,¹⁴ Augustine,¹⁵ and more recently the likes of Heinrich Rommen,¹⁶ Yves Simons,¹⁷ and John Finnis.¹⁸ The classical tradition is concerned with, in very broad terms, ‘the requirements of practical reasonableness in relation to the good of human beings who, because they live in community with one another, are confronted with problems of justice and rights, of authority, law, and obligation.’¹⁹ A major focus of the jurisprudential aspect of the tradition has been inquiry into the ‘nature, purpose, and obligation of human law.’²⁰ At that level of abstraction, a broadly defined conception of the common good as a political or moral concept can be advanced. This is not what Vermeule is thinking of when describing the common good as a distinctly legal concept, worked out within our existing and historic legal practice, understood not as a mere positivistic social practice but as a living tradition informed by moral reason.²¹

A rejection of positivism entails a conception of legal order which expands beyond mere rules and rulings to include moral and political principles which help to inform their content, placing limits on plausible conceptions of such rules and rulings by reference to reason and justice. To Aquinas, right is the object of justice, a rational ordering of social behaviour, directing us in our relations with fellow members of our community.²² This ordering – right – is either natural, ‘existing in some sense apart from, and normative for, human artifice and institutions’, or it is positive, ‘the product of consensus in the community or of institution by the *princeps*.’²³ This being said, positive right, on this understanding, is not the mere product of will, it is an attempt by a community or a political authority to interpret and provide greater specification to the requirements of justice within their given context.²⁴

Within the classical tradition, the relationship between law and right, be it natural or positive, is complex. Here, the distinction between *lex* and *ius* is illustrative. The classical tradition distinguishes, as many languages do, between these two senses of ‘law.’²⁵ On this view, *lex* is positive law and *ius* is the body of law generally, ‘including and subsuming *lex* but transcending it, and containing general principles of jurisprudence

¹³ G Duke, *Aristotle and Law: On the Politics of Nomos* (Cambridge, Cambridge University Press, 2019).

¹⁴ Cicero, *The Republic and the Laws* (London, Penguin Classics, 2008).

¹⁵ MM Kundmueller and JJ Castle, ‘When a Law Is No Law at All: Martin Luther King, Jr.’s Use of Augustine and Aquinas in the Battle Against Segregation’ in BZ Kabala, A Menchaca-Bagnulo and N Pinkoski (eds), *Augustine in a Time of Crisis: Politics and Religion Contested* (London, Palgrave MacMillan 2021).

¹⁶ HA Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, TR Hanley trans (Indianapolis, Liberty Fund 1998).

¹⁷ YR Simons, *A General Theory of Authority* (South Bend, Notre Dame University Press, 1980) and MD Torre (ed), *The Philosopher’s Calling: An Yves Simon Reader* (South Bend, Notre Dame University Press, 2021).

¹⁸ J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press 1980).

¹⁹ J Pojanowski and K Walsh, ‘Enduring Originalism’ (2016) 105 *The Georgetown Law Journal* 97, 120.

²⁰ Finnis, *Natural Law* (n 18) 351.

²¹ Vermeule, ‘Common Good as a Legal Concept’ (n 12).

²² Aquinas, *Summa Theologica* (n 11) pt II-II, q 57 art 1.

²³ G Postema, *Bentham and the Common Law Tradition* (Oxford, Oxford University Press, 1986) 40. See also Aquinas (n 11) pt II-II, q 57 art 2.

²⁴ As such Aquinas is explicit that human will can, by common agreement, make something just only if it is not, in itself, contrary to natural justice: Aquinas (n 11) pr II-II, q 57 art 2.

²⁵ In French, *loi* and *droit*; in Spanish, *ley* and *derecho*, etc.

and legal justice.²⁶ Posited law is, to Vermeule, a body of precepts or ordinances defined with respect to principles of justice – right – but also the product of attempts by political authority and legal officials to apply these general principles to particular contexts. *Lex* and *ius* are thus co-constitutive: posited law is an application or interpretation of principles of right which are themselves given clearer meaning in the process of interpretation and application.²⁷ As such, *ius* is not simply a body of principles external to our law which acts upon it, even if justice and the common good are the proper ends of law. Rather, *ius* is law in its entirety; a public scheme of justice directed towards the common good. A full understanding of *ius* includes its implementation or application within a given political context: *lex*. Neither can be understood in abstraction from the other. As such, '*lex* is a source of *ius* but does not exhaust its content'.²⁸

On this view, law, in its fullest sense, cannot be separated from the ends that it is to be put to.²⁹ It is not a mere means to pursue whatever ends a political authority wishes. Rather, to rule through law is to adopt a distinctive attitude towards legal subjects, one which views their collective flourishing as a central feature of the systems success as law. The common good is thus the proper end of any juridical order, manifesting within legal officials a requirement to act as custodians for the interests of the governed.³⁰ Within common good constitutionalism this manifests as an overarching constitutional duty, and entailed authority, upon legal officials to pursue a public good.³¹ Public authority 'is bounded and limited by the very condition that gives it legitimacy: that the ruling authority always act through reasoned ordinances conducing to the common good, to public rather than private interest'.³²

This may seem like a banal statement. Few constitutional theorists would argue that public authorities can or should act to further their own private interest. What differentiates the classical legal tradition from more liberal forms of constitutionalism is the rejection of an account of the public good which purports to be neutral on questions of the good life or the proper ends of just government. On the classical view, the public interest is not simply a constraint on state power, it is also an end to which it should be oriented, defined by the natural law triptych of peace, justice, and abundance.³³ Central to this is a robust understanding of the communal nature of political and legal obligation. As TH Green notes, '[A]n interest in the common good is the ground of political society, in the sense that without it no body of people would recognise any authority as having a claim on their common obedience'.³⁴ This does not mean that the individual must be absorbed into the political community or subjected to it. Indeed, Vermeule expressly rejects this claim, describing it as the opposite error to that made by

²⁶ Vermeule, *Common Good Constitutionalism* (n 4) 4.

²⁷ Aquinas, *Summa Theologica* (n 11) I-II, q 95 art 2. See also Finnis, *Natural Law* (n 18) 284–85.

²⁸ Vermeule, *Common Good Constitutionalism* (n 4) 4.

²⁹ See Finnis, *Natural Law* (n 18) ch 1.

³⁰ Raz associates this with the rule of law as distinct from the concept of law, but neatly captures the idea nevertheless: J Raz, 'The Law's Own Virtue' (2019) 39 *OJLS* 1.

³¹ Subject, as any constitutional order must be, to considerations of comity and respect for institutional role morality: Vermeule, *Common Good Constitutionalism* (n 4) 43–47.

³² *ibid* 7.

³³ *ibid* 30–38. See also M Foran 'Legality Without Liberalism: The Rule of Law and the Environmental Emergency' (2023) 27 *Edinburgh Law Review* 345.

³⁴ TH Green, *Lectures on the Principles of Political Obligation* (London, Longman, Green and Co, 1950) 109.

the libertarian who views political morality as wholly contained within the interests of atomistic individuals severed from communal goods.³⁵

How then does the common law fit into this picture? Vermeule draws quite explicitly upon Roman and civilian jurisprudence in describing the classical legal tradition.³⁶ For someone operating within a common law system, this might seem strange. Yet to Vermeule, the common law is ‘a local variant’ of the classical Roman and European tradition, the *ius commune*.³⁷ His claim is that common law shares ‘the classical legal cosmology in which civil positive law gives specification to, and is interpreted in light of, general background principles of natural law and the law of nations, understood as enduring commitments of the legal order’.³⁸ But does this characterisation match how common law theorists would themselves view the common law?

2. Situating the Common Law

Classical common law theory drew upon medieval understanding that law is not made exclusively by a political authority such as a King or a Parliament, but is rather ‘the expression of a deeper reality which is merely discovered and publicly declared by them’.³⁹ To classical common law theorists, this deeper reality was not primarily a set of abstract principles of justice but rather the concrete working out of such principles through the customs and practices of the community.

The presumption is that the traditions and customs of the land maintain their usage through time precisely because they are just and reasonable, accepted by political community as worthy of their allegiance.⁴⁰ Unjust or unreasonable practices will be abandoned such that the common law ‘works itself pure’.⁴¹ But this reveals a tension within common law theory between rival interpretations of its foundational commitments: on the one hand, a positivism focused on social facts, history, and practice, and, on the other, an anti-positivism more attuned to reason, tradition, and justice. If understood in a positivist guise, common law theory ostensibly conflicts with natural law theory because the source of these underlying principles is not a wholly external set of rational principles but instead historically evidenced national custom. Yet, if framed entirely by reference to reason and justification, common law theory collapses into external morality or private politics, unconnected to the practice that it seeks to justify.

³⁵ Vermeule, *Common Good Constitutionalism* (n 4) 29.

³⁶ *ibid* 6–8, 18, 54–56, 84–89, 136–37, 177.

³⁷ *ibid* 5. Indeed, the very name ‘Common Law’ derives from the *ius commune*; F Pollock and F Maitland, *The History of English Law before the Time of Edward I*, 2nd edn (Liberty Fund, 2010 [1895]) 176. See also: TJ McSweeney, *Priests of the Law: Roman Law and the Making of the Common Law’s First Professionals* (Oxford, Oxford University Press 2019).

³⁸ Vermeule, *Common Good Constitutionalism* (n 4) 55.

³⁹ Postema, *Bentham and the Common Law Tradition* (n 23) 4; See also FA Hayek, *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960) 163.

⁴⁰ Allan, ‘Why the Law Is What It Ought to Be’ (n 2) 575; See also R Dworkin, *Law’s Empire* (Cambridge, Harvard University Press, 1986) 90–94.

⁴¹ *Omychund v Barker* (1744), 1 Atk 22, 33; 26 ER 15, 23. See also *James v Price* (1773), Lofft 219, 220; 98 ER 619, 621; *Jones v Randall* (1774), 1 Cowp 37; 98 ER 954, 955.

It is here where Allan does some of his best work: resolving this tension by challenging its frame, premised upon a sharp distinction between legal practice and moral reason. To Allan, legal practice is a moral – not merely social – practice: ‘legal argument is simply moral argument within the context of a specific tradition ... legal practice giving detailed content to what would otherwise be an appeal to very abstract and indeterminate moral standards.’⁴² Each of these aspects of legality is essential. Morally inert description of social practice fails to distinguish between specific rules or rulings and the moral basis of those rules or rulings within general principle.⁴³ But moral reason abstracted from legal practice fails to give adequate expression of the law of a given community: ‘[l]egality qualifies justice, as it might otherwise be understood, by rooting it in practice – the practice of the particular community in which justice is sought as a collaborative endeavor, grounded in a shared tradition.’⁴⁴ As such, ‘[t]he law is always in a process of transition, acquiring greater determinacy and precision as it is applied to novel circumstances.’⁴⁵

We can make sense of this only if we understand that for the classical Common Law theorist, custom is not simply a collection of practices, social facts which can be determined without recourse to moral deliberation.⁴⁶ To constitute a custom capable of grounding legal doctrine, social practices must be underpinned by moral reasons which entail political obligations that bind members of the social community. These customs form an important source of Common Law which are taken to be authoritative expressions of the principles which inform our customary practices. As Postema notes, ‘Common Law is seen to be the *expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good.’⁴⁷ Under the Common Law, custom is a valid source of law, not because it is the *mere* practice of the community, but because it is the *moral* practice of the community, informed by considerations of justice.

Once the common law is understood in this manner, the contention that it is a local variant of a wider classical legal framework grounded within natural law jurisprudence becomes easier to comprehend. This is because, the ostensible conflict between custom and orders promulgated by a *princeps* falls away once one accounts for the role that Aquinas attributed to custom within his own framework:

A law, properly speaking regards first and foremost the order to the common good. Now to order anything to the common good, belongs either to the whole people, or to someone who is the viceregent of the whole people. And therefore the making of a law belongs wither to the whole people or to a public personage who has care of the whole people.⁴⁸

⁴² Allan, ‘Why the Law Is What It Ought to Be’ (n 2) 579.

⁴³ *ibid* 576.

⁴⁴ TRS Allan, ‘Law as a Branch of Morality: The Unity of Practice and Principle’ (2020) 65 *American Journal of Jurisprudence* 1, 6.

⁴⁵ Allan, ‘Why the Law Is What It Ought to Be’ (n 2) 578.

⁴⁶ See F Jiménez, ‘Legal Principles, Law, and Tradition’ (2022) 33 *Yale Journal of Law and the Humanities* 59. Jiménez does recognise moral judgement as a part of custom but sees it as a historical social fact about the views held by members of a community rather than something that demands the engagement of our own moral judgement for its full understanding.

⁴⁷ Postema, *Bentham and the Common Law Tradition* (n 23) 7.

⁴⁸ Aquinas, *Summa Theologica* (n 11) I-II, q 90, art 3.

As such, custom – the moral practices that evolve and maintain themselves within community – can properly be accounted for within a natural law framework as a people’s collective but diffuse practice of determination, applying general moral principles to concrete social context. Custom then becomes a source of common law because it is rooted in the moral practice of the community. Legitimate political authorities in the form of common law judges, or even Parliament, are then tasked with interpreting those principles, where there is dispute, by reference to moral reasons capable of commanding the support of the community. Thus we see classical common law theorists presenting the legislative acts of Parliament as ‘declarative and remedial of ancient Common Law, perhaps enlarging or restricting this ancient custom, but not essentially altering or adding to it.’⁴⁹ Allan, representing the best of this tradition, similarly argues that statute must be seen as a contribution to and interpretation of the principles which underpin previous practices, correcting errors in the law that it amends by reference to the law’s own principles.⁵⁰ Legislative rules are thus ‘subsumed into the larger body of the law’, their content interpreted by reference to background, unwritten principles of justice.⁵¹

This interpretation must extend beyond a detached description of practice or what has come before. The interaction between reason and precedent is a hallmark of common law adjudication which also reveals an important feature of the classical legal tradition: the rejection of an account of law which collapses into either positivistic convention or pure moral judgement.⁵² No natural lawyer working within the classical tradition described by Vermeule would disagree with Allan when he stresses that ‘[w]e cannot properly classify the common law as either critical (universal) or positive morality. It is a complex admixture of both.’⁵³

David Dyzenhaus is thus mistaken when he claims that Vermeule has abandoned the dimension of fit within his theory.⁵⁴ Just as Allan does, Vermeule sees law as reliant upon a complex admixture of critical and positive morality. It is for this reason that he stresses that ‘[c]ommon good constitutionalism shares the [Dworkinian] view that the positive provisions of the *ius civile* ... can only be interpreted in light of principles of political morality that are themselves part of the law’. With this in mind, he stresses that ‘[t]he point is not to reclaim the insights of the classical tradition out of nostalgia’, but because it is ‘the best of our tradition, with the emphasis on both “best” (justification) and “tradition” (fit)’.⁵⁵ Thus, ‘[d]eveloping constitutionalism celebrates continuity with the enduring principles of the past; it recognizes change in applications only insofar as necessary in order for those principles to unfold in accordance

⁴⁹ Postema, *Bentham and the Common Law Tradition* (n 23) 17. See also Sir William Blackstone, *Commentaries on the Laws of England*, W Prest ed (Oxford, Oxford University Press, 2016 [1783]) 73–74, 127–28; Sir Matthew Hale, *The History of the Common Law of England*, CM Gray ed (Chicago, University of Chicago Press, 1973 [1739]) 17.

⁵⁰ Allan, ‘Why the Law Is What It Ought to Be’ (n 2) 576; Allan, ‘Law as a Branch of Morality: The Unity of Practice and Principle’ (n 54) 14.

⁵¹ Allan, ‘Law as a Branch of Morality’ (n 44) 14–15.

⁵² *ibid* 15.

⁵³ Allan, *Sovereignty of Law* (n 1) 64.

⁵⁴ D Dyzenhaus, ‘More Protestant than Luther or Dworkin? TRS Allan on Law and Morals’, ch 2 in this volume.

⁵⁵ Vermeule, *Common Good Constitutionalism* (n 4) 5–6.

with their true natures and to retain those natures in new environments.⁵⁶ This is contrasted with corruptions, where ‘the relevant principle is *itself* taken to change’, representing ‘a break with the past that mutilates or fundamentally transforms the core and essence of the doctrine.’⁵⁷ Far from abandoning requirements of fit, Vermeule posits a theory of constitutionalism with the express purpose ‘to preserve the rational principles of the constitutional order as the circumstances of the political, social, and economic environment change.’⁵⁸

This being the case, the frequent references that Vermeule makes to natural law theory in his book are perfectly germane, given the deep and intimate connection between common law and natural law as a matter of both history and theory. The Natural Law was heavily influential to the development of the common law and the doctrine of common law rights, at least as they were traditionally understood.⁵⁹ Far from being something to contrast the common law with, natural law was integral to its development, both as a source of common law and as a model for the systematic interconnectedness of legal concepts.⁶⁰ It was widely accepted at the seminal points of common law exegesis and by the seminal institutional writers, from Coke to Hale to Blackstone, that ‘Natural Law was a body of self-evidently valid ideas antecedent to the Common Law and in some way superior to it.’⁶¹ Coke and his contemporaries, in their description of common law, constantly referenced the law of nature as a source of common law doctrine.⁶² General understanding that the natural law was integral to the common law was so widespread as to be banal.⁶³

The fusion of critical and positive morality within classical common law is illustrated by the role that natural law principles played within common law doctrine, being invoked in hard cases to help further or correct the common law and tacitly accepted in ordinary legal practice. As such, natural law informed settled doctrine and could also be relied upon as a source of common law where no positive law could be found. Its general principles could be drawn upon to answer concrete questions.⁶⁴ They were not themselves independently justiciable when freed from common law principle or rule, however. Even in some of the more blatant examples of natural law directly informing common law principle such as the neighbour principle grounding the law of negligence, one needed to concretise such arguments into more discrete doctrine.

Yet this is precisely how natural law theory envisages the process of application, concretising general principles of *ius* into posited rules and doctrines of *lex*, understood

⁵⁶ *ibid* 118.

⁵⁷ *ibid* 122–23.

⁵⁸ *ibid* 122. See also A Vermeule, ‘The Theory and Practice of Common Good Constitutionalism’ (*Ius et Iustitium*, 8 August 2022) iusetjustitium.com/the-theory-and-practice-of-common-good-constitutionalism/.

⁵⁹ See the many examples provided in DJ Ibbetson, ‘Natural Law and Common Law’ (2001) 5 *Edinburgh Law Review* 4. See also Helmholz, *Natural Law in Court* (n 10).

⁶⁰ Ibbetson, ‘Natural Law and Common Law’ (n 59) 6–7.

⁶¹ *ibid* 8.

⁶² AD Boyer, ‘“Understanding, Authority, and Will”: Sir Edward Coke and the Elizabethan Origins of Judicial Review’ (1997) 43 *Boston College Law Review* 43.

⁶³ See Helmholz, *Natural Law in Court* (n 10) 96–100; Ibbetson, ‘Natural Law and Common Law’ (n 59) 7–9.

⁶⁴ See eg *Manby v Scot* (1661–1662), 1 Keb 69, 363; 83 ER 826, 996: ‘There being no presidents we must resort to the law of Nature’.

not merely as an act of will, but as an interpretation of *ius*. The classical legal method is virtually identical to the common law method, at least with regard to the interplay between critical and posited morality. Most of the positivistic criticism of natural law theory is premised upon the false contention that the natural law is a creature of pure speculative morality and that natural law theorists wish to impose this morality onto our existing, morally inert practice. But this is a mistake, compounded by the co-opting of the phrase ‘natural law’ to describe the speculative theories of enlightenment liberals and their progeny. Indeed, many prominent common law writers drew heavily upon these speculative theories in their description of natural rights, to be contrasted with the embedded nature of common law rights. This can be described as a ‘Hobbesian turn’ within common law theory, whereby natural rights began to be conceived as a-social, a-political, external entitlements which are then filtered through the practice of the common law.⁶⁵ The pre-Hobbesian natural law tradition is distinct from the natural rights tradition which grew up around the common law as an external set of rights which may or may not be reflected in common law. Those rights were then presented as given up or set aside ‘for the sake of justice and the general good’.⁶⁶ Thus, while there is general agreement among classical common law theorists that natural law is a source of common law, there was disagreement over the nature of natural rights as creatures of pure speculative morality and their relationship with the embedded nature of common law rights. On one view, natural rights are an expression of natural law and are set aside or given up when common law doctrine developed ways to balance these absolute entitlements against the needs of the community. On another, this balancing is the working out of the requirements of natural law within context.

This speculative turn is in sharp contrast with the practice-centred methodology of the classical legal tradition, including perhaps especially the common law tradition, from Bracton to Allan. Thus Wu laments

that practically all of the seventeenth, eighteenth and nineteenth century philosophers of Natural Law departed from this great tradition. They proceeded *more geometrico*; they wove whole systems of so-called Natural Law just as a spider would weave a net out of its own belly. To mention a few, Hobbes, Spinoza, Locke, Pufendorf, ... Kant, Hegel, and even Bentham with his felicific calculus, all belong to the speculative group.⁶⁷

If anything represents an abandonment of the requirement of fit, it is this speculative philosophy. Natural law has historically been intimately connected to the common law and it remains so today, even if the term ‘natural law’ has fallen out of favour. There remains a steady continuity between this history and the underlying principles of justice which inform, to use but one example, our conceptions of reasonableness and the principles of natural justice within modern administrative law. As Justice Farwell noted in *Bradford v Ferrand*, ‘the conception of *aequum et bonum* and the rights flowing therefrom which are included in the *ius naturale* underly a great part of English

⁶⁵ See M Foran ‘A Great Forgetting: Natural Law, Common Law, and the Human Rights Act’ in R Johnson and Y Yi Zhu (eds), *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Oxford, Hart Publishing, 2023) 77–105, 88–93.

⁶⁶ *Entick v Carrington* [1765] EWHC J98; 95 ER 807.

⁶⁷ JCH Wu, ‘The Natural Law and Our Common Law’ (1954) 23 *Fordham Law Review* 13, 22.

Common Law; although it is not usual to find “the law of nature” or “natural law” referred to in so many words in English cases.⁶⁸ This is entirely to be expected, given that development of doctrine involves recourse to the moral principles embodied within our practice rather than abstract notions of natural reason. Indeed, this forms the foundation of Coke’s notion of artificial reason; the application of natural reason to a shared tradition.⁶⁹ Thus, Wu notes that ‘[n]atural law must be supplemented by human law, for art perfects nature; and this too is a precept of the natural law’.⁷⁰ As our system has matured, the principles of the common law have built upon and concretised the principles of natural reason and justice such that recourse can be made to them in the resolution of disputes in most cases.

Within the classical legal tradition there is a similar scepticism of speculative theorising. To Vermeule, the precise content of the common good is worked out as a developing and evolving legal concept through time, informed by background principles of justice but attuned to the context and history of a given community. It is a distinctly *legal* concept, not an abstract moral or political (or theological) one. Principles of natural reason are not external to our practice but a central aspect of it, our practice being the working out of a public scheme of justice. It only makes sense to describe reliance on these principles as an abandonment of fit if our law collapses into the mere practices of the community – a positivism – rather than the moral practices of the community which are guided by considerations of justice according to law. Decisions of common law courts are *lex* – but the content of the common law, its general principles, are the principles of justice – this is how common law theory can rest both on a seemingly positivistic commitment to customary practice and a natural law foundation of reason: the practice is a moral one, custom is the community’s attempt at determination, providing concrete application of principles of justice to their specific context; applying the general law and making it more concrete, eventually being shaped and interpreted by legal and political authorities into doctrine and statute. It is only when viewed as such that we can account for why certain customs or practices are abandoned over time. Time is a great test for custom precisely because it is expected that unreasonable custom will be jettisoned such that the common law can work itself pure. When Lord Mansfield held that the Common Law ‘works itself pure by rules drawn from the fountain of justice’,⁷¹ he meant the law of nature.⁷²

Dyzenhaus suggests that Vermeule is drawing his conception of the natural law from outside of the law – what he sees as timeless principles, abstracted from our practice. But this characterisation is in danger of collapsing into positivism, by presuming that our law consists only in the decisions of courts or the proclamations of legislatures. Unwritten principles of justice are internal to the concept of law itself. They are constantly being

⁶⁸ *Bradford v Ferrand* 2 Ch. D. 655, 662 (1902).

⁶⁹ *Prohibitions Del Roy*, 12 Co. Rep. 63 (KB 1612). On legal practice as a collaborative endeavour, grounded in a shared tradition, see Allan, ‘Law as a Branch of Morality’ (n 44) 5; G Postema, ‘Integrity: Justice in Workclothes’ (1997) 82 *Iowa Law Review* 821, 851.

⁷⁰ Wu, ‘The Natural Law and Our Common Law’ (n 67) 27.

⁷¹ *Onychund v Barker* (1744), 1 Atk 22, 33; 26 ER 15, 23. See also *James v Price* (1773), Lofft 219, 220; 98 ER 619, 621; *Jones V Randall* (1774), 1 Cowp 37; 98 ER 954, 955.

⁷² See NS Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal, McGill-Queen’s University Press 2013) 214–16.

refined and applied to changing contexts, even if certain commitments – such as to the equal dignity of subjects – remain constant. These commitments, because they are fixed at such a general level, must be interpreted and applied to our developing context, remaining true to the values which justify our practice in so doing. They are not external to law. The natural law is an important part of our practice. It fits.

3. Legal Reasoning and the Common Good

Allan has rightly argued that ‘constitutional theory cannot rest content with a narrow, formal conception of the rule of law, neutral between different accounts of justice and fairness ... Both judge and legal theorist must address substantive questions of political philosophy in seeking justification of legal decisions.’⁷³ Yet, this stands in tension with aspects of Ronald Dworkin’s political liberalism which have informed the distinction that Allan relies on between principle and policy within his work.⁷⁴ The sharp contrast drawn between the rights of legal subjects and the pursuit of their collective flourishing in the form of ‘policy’ misconstrues the basis of each. If the rule of law sets limits upon plausible conceptions of the public good, as Allan rightly contends, then it cannot remain neutral on questions of the good life. Legal principle must be grounded within an understanding of law as ‘a set of collaborative arrangements for the pursuit of justice and the public good’⁷⁵ wherein the public – common – good is the ground of justice. Neutrality on the good is not compatible with this.

Dworkin characterises liberal constitutionalism by the neutrality principle: the requirement ‘that governments must be neutral on what might be called questions of the good life ... that political decisions must be, so far as is possible, independent of any particular conception of the good life or of what gives value to life ... liberalism takes [this] as its constitutive political morality.’⁷⁶ Dworkin argued that this neutrality is what distinguishes liberalism from rival left-wing and right-wing doctrines which all embrace non-neutral conceptions of the good life and attempt to mobilise state power to establish a flourishing society.⁷⁷ Yet this is difficult to reconcile with his account of policy, informed by arguments pertaining to how a given decision will work to promote the general welfare or the public interest.⁷⁸ How can it be the case that government must remain neutral on the good life while policy decisions about the public interest remain the unique purview of government? This only makes sense if the public interest is not related to members of the public leading good lives. Indeed, this is exactly how Dworkin

⁷³ TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) 39. See also M Foran, ‘The Rule of Good Law: Form, Substance and Fundamental Rights’ (2019) 78 *CLJ* 570.

⁷⁴ Allan, *Law, Liberty, and Justice* (n 73) 54–55.

⁷⁵ Allan, ‘Law as a Branch of Morality’ (n 44) 7–8.

⁷⁶ R Dworkin, ‘Liberalism’ in S Hampshire (ed), *Public and Private Morality* (Cambridge, Cambridge University Press, 1978) 127.

⁷⁷ *Ibid* 128.

⁷⁸ R Dworkin, *A Matter of Principle* (Oxford, Clarendon Press, 1986) ch 4; Dworkin, *Law’s Empire* (n 40) 221 ff. See also Allan, *Law, Liberty, and Justice* (n 73) 54.

construes the public interest; either a utilitarian calculus or an aggregate of majoritarian preferences.⁷⁹

If framed in this way, it is easy to see why one might argue for the primacy of the right over the good: the public or common good is conflated with an aggregative idea of the ‘greater’ good,⁸⁰ to be contrasted with rights under justice which can then act as ‘trumps’ against the collective will.⁸¹ But this conception of both rights and the common good is mistaken. Properly understood, rights and the common good do not conflict.⁸² This can only be fully understood once one breaks from the mistaken belief that the common good is some utilitarian aggregative concept.⁸³ Thus, while Laws contends that ‘[p]oliticians, governments, are by necessity utilitarians,’⁸⁴ this should be replaced with an understanding that legislatures and governments are engaged in reasoned deliberation in pursuit of the common good, which can include deliberation over rights, obligations, and goals.⁸⁵ As Vermeule notes, ‘Classical law treats enacted texts as products of the reasoned deliberation of public authorities who give specific content to the law where background legal principles need specificity or leave relevant issues to discretionary choice.’⁸⁶

This understanding of the legislative and administrative process is far more closely aligned with Allan’s more recent work, akin to the classical common law tradition, than with the Dworkinian view of policy. Properly understood, political authority in the form of legislative or administrative action is reasoned action, furthering the principles which underpin our existing practice, and not a mere act of aggregative will.⁸⁷ But if we accept that ‘policy’ cannot be sharply distinguished from principle, then neutrality on the good life or on the common good of the community is unsustainable. The commitment to a morally engaged legal practice is not compatible with attempts to remain neutral on the good life. Moral neutrality is impossible on matters of legal principle and the actions of legislatures and executives when they pursue the common good are far more a matter of legal principle than they are of aggregative will.

This does not mean that judges should necessarily create ‘policy’ or pursue some private version of the public good, however. The role of the common law judge is not to ‘decide’ within a realm of discretion how best to order society to the common good

⁷⁹ See R Dworkin, ‘Social Sciences and Constitutional Rights – the Consequences of Uncertainty’ (1977) 6 *Journal of Law and Education* 1, 10; Dworkin, *A Matter of Principle* (n 78) 366; R Dworkin, *Taking Rights Seriously* (Cambridge, Harvard University Press, 1977) 22, 90.

⁸⁰ See JS Mill, ‘Utilitarianism’ in JM Robson (ed), *The Collected Works of John Stuart Mill, Vol X, Essays on Ethics, Religion and Society* (Toronto, University of Toronto Press 1969); P Singer, *Practical Ethics*, 2nd edn (Cambridge, Cambridge University Press, 1993); R Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford, Clarendon Press 1981). cf D Brink, ‘The Separateness of Persons, Distributive Norms, and Moral Theory’ in RG Frey and C Morris (eds), *Value, Welfare, and Morality* (Cambridge, Cambridge University Press, 1993).

⁸¹ See Dworkin, *Taking Rights Seriously* (n 79).

⁸² See M Foran, ‘Rights, Common Good, and The Separation of Powers’ (2023) 86 *MLR* 599–628.

⁸³ See P Yowell, ‘A Critical Examination of Dworkin’s Theory of Rights’ (2007) 52 *American Journal of Jurisprudence* 93.

⁸⁴ J Laws, *The Constitutional Balance* (Oxford, Hart Publishing, 2021) 41.

⁸⁵ See G Webber and P Yowell, ‘Securing Human Rights through Legislation’ in G Webber and others (eds), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge, Cambridge University Press, 2018).

⁸⁶ Vermeule, *Common Good Constitutionalism* (n 4) 3.

⁸⁷ Allan, ‘Why the Law Is What It Ought to Be’ (n 2) 576; Allan, ‘Law as a Branch of Morality’ (n 44) 14.

but rather to interpret the decisions or actions of other actors, either political authorities such as legislatures or the community as a whole in their customs, presuming that such decisions are reasonably directed towards the common good. There is a space for political authority to engage in reasoned action to pursue the common good within a realm of discretion which may even involve a degree of arbitrary choice among a range of defensible options.⁸⁸ But this should not be sharply removed from the reasoned elaboration of legal principle that Allan associates with the determination of legal rights and duties.⁸⁹ In all areas of legal reasoning, including legislative or administrative reasoning, will and reason must operate in harmony, reflecting the vital admixture of critical and positive morality such that no action of a legal authority can be described as a mere act of will. This is so, even if courts must respect the legitimate acts of legitimate political authority to make choices in pursuit of the common good: that respect must be given, but it cannot amount to an abandonment of a court's duty to uphold the rule of law and the related commitment that government proceed in the interests of the governed.

The forced depopulation of Diego Garcia, the largest of the Chagos Islands, serves as a powerful illustration. The Commissioner, established as a legislature for the colony under the British Indian Ocean Territories Order 1965, made an Immigration Ordinance in 1971, providing that no one could enter or remain in the territory without a permit which would not be granted as by this time the British government had already removed the population of the island to make way for the construction of a military base by the United States of America. In 2000, the High Court quashed this provision, holding that this exclusion was not within the Commissioner's power to make law for the 'peace, order and good government' of the territory.⁹⁰

Initially the government accepted the ruling, lifting the restrictions, but subsequently reimposed them by Order in Council. The Court of Appeal upheld the conclusion of the High Court that these restrictions were invalid, but eventually a majority of the House of Lords disagreed. The Court agreed that the legality of the Order in Council was subject to judicial review, rejecting the argument that this exercise of the royal prerogative was immune from judicial oversight: the ordinary principles of legality, reasonableness and natural justice applied.⁹¹ Nevertheless, the majority concluded that the Order was not irrational. The decision of the majority reflected a refusal to accept that the legislative powers of the Crown were limited by the requirement that laws must be ordered towards the 'peace, order and good government' of the territory. Rather than placing restrictions on government power, informed by the rule of law, this clause was construed exclusively as an empowering provision, 'the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of independence.'⁹²

Allan is right to question these conclusions, stressing that even though it is claimed that 'a power to make laws for the peace, order, and good government of a territory

⁸⁸ A Vermeule, 'Rationally Arbitrary Decisions in Administrative Law' (2015) 44 *The Journal of Legal Studies* S475.

⁸⁹ Allan, *Law, Liberty, and Justice* (n 73) 55.

⁹⁰ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

⁹¹ *ibid* para 57 per Laws LJ.

⁹² *ibid* para 47.

connotes “the widest lawmaking power appropriate to a Sovereign”,⁹³ it is necessary to ask whether there are inherent limits to “sovereign” legislative power.⁹⁴ As such Sedley LJ was correct to distinguish in *Bancoult (No 2)*, between what the British government claimed to be in the well-being of the colony and what, as a matter of law, fell within the constitutional limits of a legal order directed towards furthering the interests of its citizens. It is not appropriate for the court ‘to substitute their own view of what is best for a colony’. But it is nevertheless ‘their constitutional function to decide whether what has been enacted, or what it is proposed to enact, is rationally and legally capable of providing for a colony’s well-being’.⁹⁵

Allan is thus entirely correct to stress that ‘[i]t is one thing to deny a broad judicial power to question the wisdom of legislative determination of the public interest, made in good faith, especially when the legislature is properly representative of the people; it is quite another to suppose that a legislature (democratic or otherwise) might act for purposes entirely inimical to the well-being of all or some of its subjects’.⁹⁶ But it is simply not possible to conceive of this constraint if one remains neutral as to what constitutes the well-being of legal subjects. The protection of fundamental rights is a centrally important aspect of this.⁹⁷ But this does not capture those considerations of peace, order and good governance which are not confined to individual rights claims and which are instead grounded in considerations of the collective wellbeing and flourishing of the polity. The *Bancoult* cases can be described exclusively by reference to an individual constitutional right of abode, but this would be an impoverished account that would not give due regard to the requirements of peace, order, and good government. It is only when examined by reference to the effect this policy had on the community as a whole that it can be said that the Orders fell foul of standards which, while generally requiring comity, demand that the authority of political bodies rests on their legitimate and reasonable pursuit of the common good.

Common good constitutionalism offers a framework for thinking about cases such as this which place emphasis on the common good as the ultimate guiding ideal for legal and political institutions. It grounds a theory of constitutionalism, and thus the interpretation and legitimacy of constitutional principles and structures, in a manner which is conducive to the flourishing of all members of a given community. This will demand reasoned and principled interpretation of our legal practice in a manner which rejects any attempt to remain neutral between rival accounts of justice and fairness, as Allan has himself stressed. But it also rejects neutrality on what constitutes flourishing, well-being, or a good life. One cannot make full sense of requirements of good governance if one refuses to think critically about the good. Common law constitutionalism has been a shining light for analysis of the connection between the rule of law and fundamental rights protection. But it has neglected analysis of the enabling function of constitutional principle which demands reasoned interpretation of the proper ends of government:

⁹³ *Ibralebbe v R* [1964] AC 900, 923.

⁹⁴ Allan, *Sovereignty of Law* (n 1) 291–92.

⁹⁵ *Bancoult (No 2)* [2007] EWCA Civ 498 at para 51.

⁹⁶ Allan, *The Sovereignty of Law* (n 1) 293.

⁹⁷ *ibid* 294; TRS Allan, ‘Constitutional Rights and Common Law’ (1991) 11 *OJLS* 453; Foran, ‘The Rule of Good Law’ (n 73).

what the flourishing of a community requires, always attentive to our shared practice, customs, and traditions. This has occurred, in my view, because of the false distinction that Dworkin drew between principle and policy and the insistence that government must remain neutral on questions relating to human well-being or flourishing. Properly understood, legislative and governmental action cannot be utilitarian or aggregative, sacrificing the minority for the sake of the majority. Instead, legal officials, including courts, must proceed from the presumption that political authority is exercised reasonably as acts of law: not brute will, not unmoored reason, but the careful fusion of each. When viewed in that manner, law *qua* law is properly ordered towards the best interests of the governed, duly respectful of their fundamental rights but not aloof to the quality of their lives.

Legality demands that presumptions are made about the reasonableness of public authority, rejecting any attempt to conflate law with the mere will of a sovereign. This cannot be confined to rights analysis on the basis that rights are the product of principled reason and that legislation or executive policy is not. Once we accept that policy is also the product of reasoned deliberation about how best to achieve peace, order, and good governance (necessary aspects of the common good),⁹⁸ then reason is demanded from judges: presumptions are and have been made on the basis that acts purported to be in the public interest are simply not in any such interest. This is so, not necessarily because they have breached fundamental rights, but because they are not directed towards any plausible vision of the common good. Our legal practice has all of the resources needed to facilitate reasoned interpretation of the requirements of peace, order and good government. Our administrative law principles of legality, reasonableness, and natural justice can just as easily enable the pursuit of the public good as they restrict abuses of power. That is the foundation of our law, grounded in the customs and traditions of the community, founded upon principles of justice and fairness. A commitment to the common law is a commitment to the common good.

⁹⁸ Vermeule, *Common Good Constitutionalism* (n 4) ch 1.