

Between Authority and Usurpation? Common Good and Constitutional Government

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I. Introduction

Adrian Vermeule's recent book, *Common Good Constitutionalism*,¹ has excited considerable excitement – and alarm – in the academy and beyond. His work challenges modern constitutional thought by outlining a philosophy of government that trenchantly rejects political liberalism. It seems to some critics that the pillars of modern constitutional law and practice are in danger of being toppled, whether by fair means or foul. The scholars in question are anxious that constitutional law is at risk of being unravelled by internal legal development or overcome by judicial or executive fiat. This mixture of anxieties has some grounding in the way that Vermeule's work is framed – if he is right about legal method, his critics have reasons to worry. It may also be grounded in guilty conscience, that is, in partial recognition (recollection) of the way that some developments in modern constitutional law have been secured by subversion and fiat.

The alarmist reaction to Vermeule's work may also depend in part on unfamiliarity with the classical tradition of law and government and its understanding of, and implications for, the stability and contingency of constitutional arrangements. In brief, the tradition supports lawful authority and condemns usurpation. But it also specifies the grounds of legitimate authority, which limits authority's capacity to bind in conscience, envisaging circumstances in which otherwise lawful authority may be deposed and taken up by others. The common good may sometimes provide good reason to sweep existing constitutional arrangements aside.

My concern in this article is to address the way in which authority and usurpation feature in Vermeule's work, and thus to reflect on the nature of constitutional government, which is government that is constituted to secure the common good. Unlike many of Vermeule's critics, I take his work to combine a commendable philosophy of government with a more questionable philosophy of legal reasoning. Vermeule leans too heavily on Ronald Dworkin's theory, which is discontinuous with the classical tradition in its inattention to the exercise of authority in lawmaking and thus in legal reasoning. While Vermeule develops Dworkin's work in intelligent ways, it remains a dubious foundation for an account of law and legal reasoning, which weakens the force of his account of American constitutional law and practice.

The constitution should make provision for a community to secure its common good, which includes settling the location of lawful authority and framing its objects and exercise. This invites reflection on the scope of the common good – on whose common good counts – which has important implications for how, and for whom, authority should be exercised. Vermeule's work may at times take for granted that the scope of the common good is not itself in question. I illustrate these points in the context of some British and European controversies, making clear the proper – limited but fundamental – place of the rule of law in disciplining public authority and the risk that lawful power will be usurped in order to secure a supposed common good.

If Vermeule perhaps attends too little to the bounds (scope) of the common good and the importance of legal limits on jurisdiction, he may also say too little about the importance of collective agency in securing the common good. Such agency does not collapse to democracy, but representative democracy is an important means to unite a people in common action for their good.

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¹ Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022)

Constitutional government should aim to command popular support. The article concludes by returning to the question of the contingency of constitutional arrangements, agreeing with Vermeule that forms of constitutional government are contingent, but stressing that usurpation of lawful public authority is an evil that should be avoided.

II. Principles of rulership

In a recent survey article, Dimitrios Kyritsis and Will Waluchow outline common good constitutionalism by way of contrast with liberal constitutionalism. The latter, they say, sets the role of constitutions in limiting power “against the background of the value pluralism that is characteristic of many modern societies.”² This pluralism entails that:

“constitutions should not be committed to a particular understanding of the good but should, rather, serve to guarantee those essentials of political justice adherence to which is necessary for legitimating government power to citizens who hold a variety of comprehensive doctrines, that is, conceptions of justice and the good life.”³

In sharp contrast, they say, common good constitutionalism provides that “constitutions, even of pluralistic societies like the United States, are geared towards advancing – and must be interpreted in light of – a robust, unitary vision of the common good of society.”⁴ Kyritsis and Waluchow aim to substantiate this claim by quoting Vermeule’s defence of “the principles that government helps direct persons, associations and society generally towards the common good, and that strong rule in the interest of attaining the common good is entirely legitimate.”⁵ They go on to note that Vermeule argues that “substantive moral principles that conduce to the common good” should be “read into the majestic generalities and ambiguities of the written Constitution”,⁶ which means, in particular, that legislation should be founded on, and should promote, sound morality.

In evaluating this new addition, as they see it, to the pantheon of constitutional theory, Kyritsis and Waluchow ask whether Vermeule’s moral argument has any appeal beyond a subset of religious conservatives, and, if not, whether it should “frame our understanding of the nature and role of the constitutions of western liberal democracies”.⁷ But the force of Vermeule’s account of constitutional government does not turn on *who* finds it appealing. It turns on whether Vermeule speaks truly about the principles that should frame the foundation and exercise of public power, principles that do not depend for their truth on the contingent question of how many people – or indeed whether any persons here and now – accept them. The social fact of who accepts some set of principles may well be significant in framing how power is exercised in some community. And if Vermeule picks out principles that do have a standing moral force, then it would be reasonable to expect that in many communities those principles would inform how power is framed and exercised – and understood. But they have as much force in moral argument as they deserve to have, which is what I consider now.

Kyritsis and Waluchow seem to run together their understanding of (or apprehension about) Vermeule’s “substantive moral vision”, as they term it, with his account of the principles of

² Dimitrios Kyritsis and Wil Waluchow, “Constitutionalism” in Edward Zalta & Uri Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Summer 2023),

<<https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/>>

³ Ibid.

⁴ Ibid.

⁵ Ibid. quoting Adrian Vermeule, “Beyond Originalism”, *Atlantic*, 31 March 2020

⁶ Ibid.

⁷ Ibid.

government, of rulership. The proposition that the object of government is (should be) the common good, rather than political fairness amongst those who have different conceptions of the good, is severable from the theorist's specification of the demands of the common good. One may agree with Vermeule about the object of government and yet disagree with him about what comprises the common good and about how best to secure it in some context or other. In any case, note that when Kyritsis and Waluchow outline the bare essentials of Vermeule's theory, their focus is not on political Catholicism or controversies about (sexual) morality, for example, but rather is on the principles that frame and discipline the exercise of public power. It would be a mistake to reject those principles on the grounds that their elaboration will be controversial.

In drawing a contrast with liberal constitutionalism, Kyritsis and Waluchow focus on Vermeule's embrace of the proposition that it is right and just to "legislate morality". One might add, with Vermeule, that legislation is always enacted on some theory of morality,⁸ even if the theory is one that requires the state to leave well enough alone and not to distinguish amongst different conceptions of justice and the good life.⁹ Stated in general terms, a theory that requires one not to make – or to act – on such distinctions is a bad moral theory, one that fails to recognise the responsibility of rulership, which is to serve one's community by securing (introducing, maintaining, defending, promoting, advancing) its common good.¹⁰ This responsibility requires those who rule constantly to make distinctions amongst different options for social life and individual choice and to draw robust conclusions about what states of affairs are better than others. And in fact even in avowedly liberal political communities, law and government constantly act thus, partly because a thorough-going liberal self-denial is hard to maintain, but also because political liberalism is often grounded in a moral theory, viz. sacralisation of autonomy.¹¹

Pace Dworkin,¹² it is not unjust to enact legislation that is premised on the judgement that some way of living is better than another, that some states of affairs realise true goods and avoid true evils, which should be, but may not in fact be, recognised by all persons. His master principle of law and government is that all persons must be treated with equal respect and concern, a principle which would be unobjectionable if it simply affirmed the basic equality of all persons, but is objectionable insofar as Dworkin deploys it as a standing ground to restrain the rulers of a political community acting for what is truly good for persons. His concern is that for the ruler to act on his judgement about what is truly good, reasonable or choice-worthy is to manifest contempt for those who take a different view. The concern is unfounded – disagreement is not contempt and indeed one often owes it to others to act for their good even when they disagree.¹³

Part of the power of Vermeule's work is its effectiveness in articulating the shallow moral foundations on which much constitutional thought rests. The "substantive moral vision" which animates libertarian thought and (many aspects of) progressive thought is one that centres on the autonomous person (an able-bodied childless adult male, paused forever in youth or middle age), whose exercise of autonomy is to be affirmed, protected, and maximised, with costs on others to be ushered from view and made irrelevant as grounds for action. In prioritising the common good as the object of government, Vermeule dethrones maximal autonomy from the place it otherwise often (if tenuously) enjoys, rejecting the inviolability of contract or property rights, and enjoining government to recognise the goods for which its authority should be exercised. The foundation of individual rights, properly understood, is not autonomy, floating free in a sea of political fairness, but

⁸ Vermeule, *Common Good Constitutionalism*, 37

⁹ John Rawls, *A Theory of Justice* (Belknap Press, 1971)

¹⁰ See Richard Ekins, *The Nature of Legislative Intent* (OUP, 2012), chapters 4 and 5

¹¹ Richard Ekins, "Some Features of Liberalism in a Censorious Age", *Law and Religion Forum*, 7 September 2022 <https://lawandreligionforum.org/2022/09/07/ekins-on-some-features-of-liberalism-in-a-censorious-age/>

¹² Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1973)

¹³ Richard Ekins, "Equal Protection and Social Meaning" (2012) 57 *American Journal of Jurisprudence* 21

rather is the set of goods that rights protect or instantiate,¹⁴ including the good of intelligent self-direction, say in relation to religious conviction or about whether or who to marry.¹⁵

The insight at the heart of Vermeule's work is this:

"The main aim of common good constitutionalism, then, is not the liberal goal of maximizing individual autonomy or minimizing the abuse of power... Instead, it is to ensure that the ruler has both the authority and the duty to rule well."¹⁶

I agree that the point of constitutional government is to rule well and constitutional arrangements should make it possible for the ruler to rule well and make it likely that the ruler will rule well. One must be careful to avoid disarming authority, making it impossible for the ruler to exercise his responsibility for the common good, his duty to govern.¹⁷ Vermeule's reflections on the failure of the Madisonian experiment and the risks of monstrous government, in which private power cannot be subjected to public control, follow from this insight.¹⁸

The classical tradition of government, which Vermeule aims to elaborate, does not mandate a particular institutional form, recognising instead that in different times and places there may be good reason for government to take a different shape. The contingency of legitimate government is important and entails, amongst other things, that compliance with democratic principle is not, or at least is not always and everywhere, a condition of justified rule. I consider further below whether Vermeule goes too far in arguing, in effect, that democracy is not central to well-ordered constitutional thought and practice.¹⁹ I agree with him that in a democracy as much as in any other type of political order the object of government is and should be the common good.²⁰ He is right also that legislatures are a pre-democratic institution.²¹ As I have said elsewhere, authorising an assembly (including an elected assembly) to legislate changes who legislates, not what it is to legislate.²² But I suggest that he underplays the moral force of democratic principle, which informs the common good and frames how it may often best be secured.²³

III. Law, authority and interpretation

In developing common good constitutionalism, Vermeule relies heavily on the truth of Dworkin's theory of legal reasoning. With respect, I think this is a mistake. While Dworkin's theory has its merits, helping illustrate the principled nature of case law reasoning, in which successive decisions may be evidence of the law rather than rules that constitute the law, it cannot be squared with the

¹⁴ Grégoire Webber, Paul Yowell et al, *Legislated Rights* (CUP, 2018)

¹⁵ John Finnis, "Personal Identity in Aquinas and Shakespeare", chapter 2 in his *Intention and Identity: Collected Essays Volume II* (OUP, 2011)

¹⁶ Vermeule, *Common Good Constitutionalism*, 37

¹⁷ Les Green, "The Duty to Govern" (2007) 13 *Legal Theory* 165

¹⁸ Vermeule, *Common Good Constitutionalism*, 27-28; Adrian Vermeule and Eric Posner, *The Executive Unbound: After the Madisonian Republic* (OUP, 2011)

¹⁹ "A Note on 'Democracy'", *Ibid.* 47-48

²⁰ *Ibid.* 48

²¹ *Ibid.*

²² Ekins, *The Nature of Legislative Intent*, chapter 6; see also Richard Ekins, "Intentions and Reflections: *The Nature of Legislative Intent* Revisited" (2019) 64 *American Journal of Jurisprudence* 139, 153

²³ Richard Ekins, "Self-Government and the Kingdom of Heaven" in Nicholas Aroney and Ian Leigh, *Christianity and Constitutionalism* (OUP, 2023), 216

classical tradition's account of (legislative) authority. The tradition is concerned to defend the lawmaker's freedom – the ruler's freedom – to make law by authoritative choice.²⁴

I do not mean to say that I part company with Vermeule's engaging and effective exposition of the merits of the classical tradition of law in general. However, I think he understates the extent to which the classical tradition makes it a moral imperative that legal reasoning should be technical reasoning and the exercise of legislative authority should be upheld in the course of adjudication.²⁵ I do not mean that Vermeule rejects these propositions. But he does sometimes place rather more emphasis on the importance of background moral propositions and constitutional principle than on the authority of the ruler's choice, which is articulated by promulgating a canonical text.

The book rightly affirms the importance of positive law and the exercise of authority, but its discussion of the equity of the statute and, especially, of constitutional interpretation at times discounts the will of the lawmaker, which is a Dworkinian move,²⁶ not a classical one. Vermeule's embrace of Dworkin is jurisprudential jujitsu, turning the strength of one's opponent against him. It makes it hard for some jurists to object to his method without self-contradiction, which partly explains the anxiety noted above. In addition, it opens the door to remaking the law over time, especially in the course of adjudication, by way of sound moral argument. One might admire this move as a technique for law reform in a context where other courses of action – legislation, constitutional amendment – are not open. The drawback is that Dworkin's theory largely dissolves positive law into moral argument, failing to make provision for authority in general or for legislative intent in particular. Dworkin rejects the conclusion that the legislature's choices, which have been made public, settle authoritatively what is to be done.²⁷ But I say that the classical tradition is concerned to make provision for the ruler's choices to be adopted by the ruled.²⁸ The ruler's promulgations are to be read against the rich background of existing law and principle, in light of the axiom that the legislature is an institution that is capable of and disposed to act for common good, which helps frame, but does not eclipse, the ruler's freedom to choose.²⁹ This is a valuable freedom, because it is a vital means to the common good. It should not be let slip.

Vermeule anticipates and addresses the concern that his approach fails to take positive law seriously. He explains with much care the importance of positive law (and canonical legal texts) in the classical tradition and his development of Dworkin is more disciplined than Dworkin himself. The discussion of the equity of the statute is intelligent and the examples he deploys across the book help nuance the point. However, the book at times underplays legislative authority and the priority that legislative intent should enjoy in statutory interpretation. Consider Vermeule's argument that *Smith v United States* should have been resolved by reference to the equity of the statute.³⁰ I argue instead that the Court should have attended more closely to Congress's intended meaning, which was to utter the phrase "use a firearm" to mean "use a firearm as a weapon".³¹ The majority was insufficiently interested in inferring what Congress had decided and went wrong in fixating on sentence meaning, reading the phrase to mean "uses a firearm for any purpose whatsoever, including as collateral in a drug trade". Justice Scalia in dissent saw that the majority wrongly gave priority to an artificial proposition that Congress would not have intended, but was disarmed by his

²⁴ Aquinas, *Summa Theologiae*, I-II, q. 90 a. 4

²⁵ John Finnis, "Natural Law and Legal Reasoning" (1990) 38 *Cleveland State Law Review* 1

²⁶ Richard Ekins, "Legislative Intent in *Law's Empire*" (2011) 24 *Ratio Juris* 435

²⁷ Ronald Dworkin, *Law's Empire* (Fontana, 1986), chapter 9

²⁸ Aquinas, *Summa Theologiae*, 1-11 q. 91 a. 1c, q. 92 a. 1c; Finnis, *Aquinas*, 255-6.

²⁹ Ekins, *The Nature of Legislative Intent*, 245

³⁰ Vermeule, *Common Good Constitutionalism*, 78, discussing *Smith v United States* 508 U.S. 223 (1993)

³¹ Ekins, *The Nature of Legislative Intent*, 203; Richard Ekins, "Sentences, Statements, Statutes" [2016] *Analisi & Diritto* 321, 328-329

textualist method from himself articulating and defending Congress's intended meaning. Vermeule makes a similar mistake, I think, by moving too quickly to equity.

In relation to *Bostock*,³² Vermeule deploys the judgment to debunk originalism.³³ But his main concern, understandably enough, seems to be that the Court adopted a meaning that was not intended (and would have been rejected) by Congress, because the Court took for granted a dubious theory about the relationship between the text of the statute and the law the enactment of the statute establishes. Perhaps his concern is that the Court's decision was driven by a dubious theory about, or indifference to the true demands of, the common good. The two come together, of course, insofar as one has to reason about the common good to infer what the lawmaker decided in exercising its authority, a course of reflection that is often imperative.³⁴

Overall, Vermeule's discussion of statutory interpretation seems to me to be more consistent with the classical tradition's emphasis on the importance of the ruler's reasoned choice than his discussion of the interpretation of the Constitution, in which the makers (framers) often seem to disappear from view, save to note that they shared his theory.³⁵ The ferocity of Vermeule's critique of originalism waxes and wanes.³⁶ One could reframe part (not all) of the argument as a defence of a better originalism.³⁷ There is a risk that the "originalism" that Vermeule attacks is, if not a straw man exactly, at least an ideal type, combining vices of suppressed libertarianism, indifference to common good, or bloody-minded literalism. Pace Vermeule, some jurisdictions outside the United States, notably Australia,³⁸ but also the UK in relevant part,³⁹ are "originalist" in the sense that the lawmaker's intended meaning and reasoned choice is decisive and that the courts disavow (plausibly) any intention to qualify or remake the legislative choice. Other states, which take a more evolutive (cavalier) approach to constitutional interpretation, such as Canada, do have a rule of law

³² *Bostock v Clayton County* 140 S. Ct. 1731, 590 U.S. (2020)

³³ Vermeule, *Common Good Constitutionalism*, 16-17 and 105-108

³⁴ This process of inference is informed, but not exhausted, by presumptions about legislative intent. Elsewhere I argue that "presumptions help us determine what was in fact intended, by reason of their salience qua context and also by capturing aspects of sound legislative choice and stable public policy". This account "has the advantage that it keeps faith with the practice, in which presumptions are truly understood as (defeasible) *presumptions* about what was intended." I go on to contrast this account with Dworkin's understanding of presumptions as free-standing moral restraints on the legislature. See Richard Ekins, "Sentences, Statements, Statutes" [2016] *Analisi & Diritto* 321, 333-334.

³⁵ Vermeule, *Common Good Constitutionalism*, 53-55

³⁶ The same was true for Dworkin: see Jeffrey Goldsworthy, "Dworkin as an Originalist?" (2000) 17 *Constitutional Commentary* 49.

³⁷ Vermeule, *Common Good Constitutionalism*, 18: "...originalism rests on the entirely legitimate insight that the public authority may establish rules of municipal positive law... and that interpreters should respect the lawmaker's aims and choices when they implement a reasoned determination of the civil law for the common good. ... Properly speaking, the classical approach to law is not an opponent or alternative to originalism or textualism. Rather, it *includes* its own properly chastened versions of those ideas, because it includes the *ius civile* as part of a larger scheme of law, and because it respects the authority that determines the content of positive law."

³⁸ Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (OUP, 2007), chapter 3 "Australia: Devotion to Legalism".

³⁹ See the essays by Lord Sumption, Lord Hoffmann and John Finnis in Nicholas Barber et al (eds), *Lord Sumption and the Limits of the Law* (Hart, 2016); see also *R v Secretary of State for Health, ex parte Quintavalle* [2003] UKHL 13, per Lord Bingham at paragraphs 8 and 9.

problem in consequence.⁴⁰ Some of the book's comparative claims, while rhetorically very effective in damning "originalism", thus seem to me to be open to question.

The Constitution and (American) constitutional government

Vermeule's critique of originalism is in part a reaction to the moral vapidness of (some) originalist adjudication, which is actively hostile to reflection about the common good and embraces, or may be taken over by, warmed up libertarian or political liberal thought. I am sympathetic to the critique insofar as some appellate court adjudication seems to involve transmutation of the framers' under-specified handiwork into hard-edged rules that disarm the ruler, giving priority to unsound moral principles (about autonomy or the sanctity of property and contract) which were not authoritatively adopted and do not fit well with the apparent lawmaking act.⁴¹ It is a mistake to read ordinary statutes as if they could have been enacted for no reason, or for any reason at all.⁴² So too for the Constitution. But in both cases, I say, one should read them in the context of enactment, aiming to recognise and give effect to the lawmaking choice they disclose.

However, Vermeule does not really treat the Constitution as an enactment. He places much stress not only on its open-endedness and generality, which might be features of it qua enactment, but also on developments over time, which would be largely irrelevant in relation to ordinary statutory interpretation. In many of the legal systems spun out of the British Empire, the Constitution was an enactment of the Imperial Parliament, even if drafted by local elites, which fell to be interpreted as such, with courts aiming to infer Parliament's intended meaning. Again, this suggests that one should be cautious about Vermeule's claims that originalism is a uniquely American vice, which the rest of the world rejects out of hand. That said, there may be some particular shortcomings to the Constitution, in view of its age and resistance to formal amendment, which help explain the mismatch between its express terms and the practice of American government over time. This mismatch does force one to reflect on the relationship between the Constitution and the constitution, with statute and custom (and judicial practice) glossing the Constitution, such that it works over time to form a scheme for the ruler (the President?) to rule well.

In this context, originalism may well seem a destabilising force,⁴³ encouraging departure from the constitution to vindicate the Constitution, or, worse, helping to rationalise a liberal/libertarian remaking of its express terms and intended meaning. The question is how to answer this risk. One possibility is to attempt to fuse the constitution and the Constitution, such that the latter is read as part – but only part – of a much wider set of constitutional arrangements, which might qualify or even contradict its intended meaning. The other is to attempt to reconcile the two, per the open-ended and general nature of the Constitution, which may often leave room, as Vermeule says, for a reading that is consistent with sound moral principle, when that principle requires one not lightly to trample on the constitution, which consists in relevant statutes and customary norms, the development of which is for Congress and for the political class itself, indirectly and over time, in relation to conventions. On this view, the Constitution would still fall to be interpreted as a

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Bradley Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 *The Canadian Journal of Law & Jurisprudence* 331; Leonid Sirota, "The Rule of Law All the Way Up" (2019) 92 *Supreme Court Law Review* 79, 97-103.

⁴¹ See for example his compelling critique of Supreme Court judgments concerning "stolen valor" and virtual child pornography, *Common Good Constitutionalism*, 169-172.

⁴² Ekins, *The Nature of Legislative Intent*, 256

⁴³ Vermeule, *Common Good Constitutionalism*, 113-114

reasoned lawmaking act, read against a rich background but with a view to identifying and upholding its intended meaning and effect, which might be quite general.

In the life of the political community, the constitution may be more important than the Constitution. But if the latter is (was) an enactment, then it forms part of the positive law of the community until it is repealed or replaced by exercise of lawful authority. Constitutional interpretation should not be a mode of secondary lawmaking, in which the interpreter (the judge) remakes the law that the framers (and/or the people) made in promulgating the Constitution. The rule of law provides powerful reason to maintain continuity with that which was enacted.⁴⁴ That said, there are good reasons to tolerate some divergence between the constitution and the Constitution, which might be a function of a political questions doctrine or a very reserved standard of judicial review, per Thayer,⁴⁵ in which only glaring contradiction of the Constitution is corrected. Vermeule seems attracted to this line of argument, which would clear the space for government to act.⁴⁶

Does Vermeule's approach mean that constitutional law will not much limit the ruler – the President or the Supreme Court – in carrying out whatever course of action the ruler thinks will best secure or advance the common good?⁴⁷ Not exactly. The constitution will provide some constraint and Vermeule does endeavour to ground his account of constitutional government in the detail of American constitutional law, its history and constituent texts, which he argues are relatively vague and open-ended, so as to invite moral reflection and acts of judgement. His argument that the founders of the Constitution reasoned within the classical tradition also addresses the worry that his proposal is effectively for government action regardless of positive law, or for the Supreme Court radically to remake the law. On the contrary, the Court's role will often be to read the constitution, and the Constitution, in such a way as to leave open to the political authorities the freedom to act as they see best for common good.

The important exception may be those cases, such as the lawfulness of legislation authorising abortion save in cases of self-defence, where the Court is the only institution that has an opportunity to correct a grave national injustice, by reading the Fourteenth Amendment to this end. Whether it would be tenable for the Court to act in this way turns on the force of legal argument,⁴⁸ but also on whether the Court can unite the body politic in action. If not, giving judgment to this effect, whatever its moral-legal force, may be imprudent and reckless.

The scope of the common good

I wholeheartedly agree with Vermeule that constitutional government cannot adequately be understood apart from the common good for which it is instituted and maintained. However, interesting questions often arise about the scope of the common good – that is, about whose common good counts. Vermeule largely avoids these questions, perhaps because his focus is largely on illuminating *American* constitutional law and practice. In this section, I reflect on some of these questions, aiming to show how they bear on the proper objects, and the social and political

⁴⁴ On the principle of continuity, see John Finnis, "Revolutions and Continuity of Law", chapter 21 in his *Legal Philosophy: Collected Essays Volume IV* (OUP, 2011) and Richard Ekins, "Constitutional Principle in the Laws of the Commonwealth" in George and Keown (eds), *Reason, Morality and Law*, 396.

⁴⁵ James B Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 HLR 129

⁴⁶ See Vermeule, *Common Good Constitutionalism*, 11-13 and 154, citing Thayer.

⁴⁷ Kyritsis and Waluchow note that it "has the potential to untether constitutional interpretation from both constitutional text and constitutional precedent, thus providing judges with far too much power to use the law to further that particular moral vision."

⁴⁸ John Finnis and Robert George, "Equal Protection and the Unborn Child: A *Dobbs* Brief" (2022) 45 *Harvard Journal of Law & Public Policy* 927

foundations, of constitutional government. This line of reflection leads on to my discussion, in the final sections of this article, of the importance of collective agency and its treatment in Vermeule's work, as well as the contingency of legitimate government and the problem of usurpation.

The shape of the political community turns on who shares a common good and who is willing and able to seek it together.⁴⁹ There is a tension here, as in many other contexts, between what is given and what is chosen. Hard questions arise when the withdrawal of some group of persons, and some territory, from a larger group would put in doubt the common good of the latter. And of course the point can be reversed, where a smaller group's incorporation into a larger puts their common good in doubt, especially if the larger group is indifferent, or worse hostile, to their good, including the civic friendship and intelligent self-direction that is exercising self-government. The unhappy plight of Ireland in relation to Great Britain helps illustrate the point. For the British statesmen of past centuries, unless Ireland formed part of a common political community with Great Britain, the security of Britain from foreign (French) invasion was in grave doubt.⁵⁰ The separation of an independent Irish state, without a dominant Anglo-Irish elite to ensure continuity, was only thought tolerable once these security concerns had subsided. While the honourable solution to such concerns would be good neighbourliness rather than conquest and domination, when the former is insecure, the latter will appeal. The history of Anglo-Irish relations is in part a history of a complex political community, which does share a common good but also has divergent interests and self-understandings, experimenting with various constitutional arrangements, without finding a stable framework for government for common good.

Constitutional government will be distorted if or when institutions misunderstand the scope of the common good that is government's proper object. One sees this in part in the *Bancoult* litigation,⁵¹ where English judges had to consider the lawfulness of the Government's acts of lawmaking in relation to the British Indian Ocean Territory, which administers the Chagos Islands. The Government removed from the Islands the small population that lived there, making way for the construction of a major UK-US military base at Diego Garcia. One ground of challenge to the acts of prerogative legislation in question was the argument that the Crown's power to legislate in its colonies had to be exercised for "the peace, order and good government" of the population of the colony. In this case, the removal of the Chagos Islanders could not be said to be in *their* interests, for their good, and thus was unlawful. This argument persuaded some judges but was rejected by majority in the Appellate Committee of the House of Lords, which recognised that the power to legislate in a colony was properly exercised in the interests of the United Kingdom and its dependent territories which formed one unified realm.⁵² The common good of the imperial whole was in question and acting for the defence of the realm was not a failure to exercise the powers of government. The lawful resolution of the dispute thus required recognition of the Government's right to rule for the good of all. Dispossession of the Islanders, while carried out in high-handed fashion, was effectively an exercise of eminent domain,⁵³ painful but not wrongful.

If the common good is the object of constitutional government, what follows for those who do not form part of our community, including especially the stateless person, the refugee or asylum-seeker?

⁴⁹ Richard Ekins, "The State and Its People" (2021) 66 *American Journal of Jurisprudence* 49

⁵⁰ Paul Bew, *Ireland: The Politics of Enmity 1789-2006* (OUP, 2007)

⁵¹ See especially *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2007] EWCA Civ 498, [2008] QB 365; and *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (No. 2) [2008] UKHL 61, [2009] 1 AC 453

⁵² See the majority judgment in *Bancoult* (No 2) [2008] UKHL 61, relying on John Finnis "Common Law Constraints: Whose Common Good Counts?" Oxford Legal Studies Research Paper No.10/2008; for discussion, see Ekins, "Constitutional Principle in the Laws of the Commonwealth", sections IV and V.

⁵³ Compensation was paid, more than once, although it is questionable whether the funds were adequate and, especially, whether they reached the persons who should have been compensated.

States plural share a common good in international order, in the division of the world into states (and people into citizens), and in protection of refugees from violence and persecution. Thus, it is reasonable, and indeed morally obligatory (even if the obligations are underdeveloped), for states to agree not to make persons stateless, to protect those who are, and to make provision for the just and decent treatment of persons who have fled their country.⁵⁴ The character of the global political community is such that there are sharp limits on authority in this context – there is no body capable of ruling well in the way that is true in a domestic polity – which means that progress on solving collective problems, securing our common good, is often slow, requiring the development of custom or the agreement of treaties amongst many states.

In this context, international institutions may be tempted to take up the responsibility of ruling in order to address the limitations they see in state action. An appeal to a common good that lies beyond the reach of any one state's unilateral capacity to secure, or to which it is presumed to be relatively indifferent, may thus be a technique to ground a novel assertion of authority. Arguably one sees this in the development of European human rights law. Across the past few decades, the European Court of Human Rights has invented a new law of asylum,⁵⁵ glossing the requirements of domestic law, which themselves follow from the terms of the Refugee Convention 1951, and imposing limits on states in relation to excluding non-citizens from their territory. This body of case law cannot be squared with the terms of the European Convention on Human Rights and is to this extent lawless. The Court's intervention is open to challenge on the merits because the Court lacks the capacity to take responsibility for the common good of Europe. It cannot reason effectively about what should be done and cannot develop or implement an intelligent strategy to address the problem in question, which would include negotiation with other states. Further, its intervention takes the form of imposing new legal rules that disable member states from defending the common good from risks imposed by non-members.⁵⁶

The Strasbourg Court attempts to rule, in relation to asylum and migration, without taking responsibility for ruling, which would require it to integrate legislative and executive capacities and not to misrepresent the member states' past commitments as requiring certain (in)action. This may be an instance of what Vermeule characterises as a fear of judgement,⁵⁷ in which the Court denies to member states the power to rule well, without itself taking up the duty to govern. One sees a similar phenomenon in the European Union, which is a project that aims to banish the need for political rule (and thus responsible rulers).⁵⁸ The European community was constructed in part by European judges and officials sharing a vision of a common good for Europe, which they pursued without adhering closely to the treaties the member states had agreed, but instead glossing those treaties as they judged appropriate. This was an act of constitution-making, attempting to summon into existence a more complex political community than in fact existed, with the arrangements a frame for action for this later community, albeit a frame that, over time, was intended to make political rule redundant.⁵⁹ The series of constitution/polity-making acts in excess of lawful power were a usurpation of the authority of member states, which had conferred power limited by treaty, even if states often acquiesced, grafting onto the newly built structure further new commitments and limitations. Appeal to a common good that went beyond the shape of any existing political community, which was intended in part to create that community, was thus a rationale for

⁵⁴ Refugee Convention 1950; Convention on the Reduction of Statelessness 1961.

⁵⁵ John Finnis and Simon Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, 2021)

⁵⁶ Richard Ekins, "The State's Right to Exclude Asylum-Seekers and (Some) Refugees" in David Miller and Christine Straehle (eds.), *The Political Philosophy of Refuge* (Cambridge University Press, 2019) 39

⁵⁷ Vermeule, *Common Good Constitutionalism*, 116; he deploys the term "horror of judgment" in criticism of originalism, but I suggest the point may hold with some force against "living instrument" interpretation.

⁵⁸ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso, 2013)

⁵⁹ Stefan Auer, *European Disunion: Democracy, Sovereignty and the Politics of Emergency* (Hurst, 2022)

usurpation, with the hope, not altogether unfounded, being that Europeans yet to come would ratify the acts in question.

The limitations of this mode of constitution-making are, however, real, as one can see in relation to the European Union's response to the migration crisis and the Euro crisis.⁶⁰ Here, an appeal to the common good of Europe to justify the Union in imposing an obligation on particular member states to accept refugees or to implement a policy of austerity may fail to persuade. The member states in question, or large fractions of the citizenry of them, reasonably perceive the rule in question to be indifferent to their common good and ask, again not unreasonably, why they lack government able to rule well.⁶¹ In addition, the Union's actions may be responsive to the common good of only some (powerful, influential) member states, rather than truly ordered for the good of all, or even for the good of the Union as a collective project regardless of the implications for (poorer, marginal) member states. If, as in relation to the Euro crisis, the acts of European institutions involve action in excess of lawful power – usurpation of member state competences or assumption of powers deliberately denied to the Union – then one has a failure of constitutional government.

The German Constitutional Court has attempted to redress this failure by declaring certain actions of the European Central Bank *ultra vires* the Treaties and limiting (briefly) the German government's freedom to participate in them.⁶² The riposte from the European Central Bank, if it were able to speak freely, might be that the design of the Euro disabled anyone from taking such action as was required to secure the common good of member states (*viz.* avoidance of financial disaster), which made it reasonable, regardless of treaty limits, for the Bank to take up responsibility for ruling. The predicament for the German government may be how to square its support for the institutions of the European Union, which are nominally ordered to the common good of the Union, with its primary responsibility for the common good of Germany, which requires government that is disciplined by the rule of law and which does not alienate sovereignty or acquiesce in otherwise lawless action. Other member states are in a similar predicament, even if the German Constitutional Court's decisions heightens the contradictions for Germany in particular. (The Court's decisions arguably blaze a trail for other member states.)

The migration crisis and Euro crisis raise questions about the scope of the common good for which the European Union is responsible, which in turn raises the question about the extent to which the Union is a complete political community, within which constitutional practice must be somewhat uniform. Perhaps such disputes are inevitable in the slow founding and bedding in of a new federation,⁶³ in which member states, formerly truly sovereign states, create a supra-national government that aims to secure the common good of a new community and disarms the states accordingly. The question for European statesmen and citizens is whether this form of government is well-placed to rule, or whether the limitations on its institutions make it incapable of securing the common good at large, as opposed to in narrowly specified domains. This is not simply a question about institutional design or the scope of legal or constitutional limitations as such. It is also a question about social and political foundations and constitutional identity. Specifically, the question is whether the peoples of Europe understand themselves to share a common good and are willing and able jointly to act in support of, and by means of, common European institutions.

Collective agency

⁶⁰ Ashoka Mody, *Euro Tragedy: A Drama in Nine Acts* (OUP, 2018); Ivan Kraztev, *After Europe* (University of Pennsylvania Press, 2017)

⁶¹ Kraztev, *After Europe*

⁶² BVerfG, Judgment of 5 May 2020 – 2 BvR 859/15

⁶³ Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP, 2021)

The central insight of Vermeule's work, as I say, is that the constitution should ensure "that the ruler has both the authority and the duty to rule well."⁶⁴ Constitutional government involves exercise of authority, which is lawful freedom to act as the ruler thinks is required to secure common good and, especially, lawful power to impose legal, and thus moral, duties on others. The common good is in peril if the ruler lacks capacity to rule well, which includes the human and material resources, and infrastructure, necessary to act when required, including in defence of the realm, to keep the peace, or to respond to other crises or pressing needs. But the central way in which the ruler rules is by summoning the community to action, demanding obedience and support for his, her or its decisions about how to act, about what should be done. The willingness of members of the community, including the subset who serve as officials, to accept the ruler's direction is the foundation of his authority and thus capacity to secure the common good.⁶⁵ In the emergence from the time of troubles, this willingness may at first be secured by military victory and the putative ruler's sheer capacity (due to fighting prowess and the support of an effective subset of the community) to execute his will. But amongst the very first obligations of authority is to settle the future location of authority by exercise of authority, making lawful provision for succession in office and thus introducing order in relation to the question of who rules.⁶⁶

The ruler represents the political community in summoning it to joint action.⁶⁷ One might say with equal force that the institutions of the state, which form an ordered set, represent the political community and lead the people in action for their common good. In this narrow sense, all constitutional government is representative.⁶⁸ In some times and places, ruling the community well may require widespread coercion, without which order cannot be maintained and just relations between citizens cannot be upheld. But it is much better, in every sense, for a ruler to enjoy the willing support of the ruled, with coercion needed only in relation to a small number of criminals or rebels, who unreasonably fail to discipline themselves for common good. One might say that constitutional government involves voluntary support on the part of the governed, which is true insofar as the duties of citizenship are to be taken up willingly as reasonable moral obligations, rather than grudgingly tolerated or endured for the time being. The obligations are not voluntary insofar as one has no reasonable course of action save to support authority. In accepting the ruler's authority, which is exercised in good faith for common good, one does justice to one's neighbours, acts honourably and takes up an important collective responsibility.

The responsibility of the ruler includes minimising the need for coercion, such that his authority rests not simply on fighting prowess, but on voluntary support, grounded in lawful exercise of power. How should the ruler (or the whole ordered set of state institutions) encourage a people to accept its rule and to sacrifice their individual interests in its service? This is, I suggest, an important question to address when thinking through the relationship between constitutional government and common good. The first and most important part of the answer, I say, is that the ruler must make clear to the ruled that they share a common good, for which he acts. That he shares the common good with them, that his rule is not foreign but local, may help to this end. But even foreign rule has its place, especially if limited in time and responsive to some disaster in local rule, which warrants intervention from outside the political community. The challenge over time is to make clear to the ruled, especially to those who are open to reason and are conscientiously seeking the common good of their community, that public power is exercised for the objects for which it was instituted, that it is not being distorted or corrupted in its exercise. Compliance with law, and adherence to the ideal

⁶⁴ Vermeule, *Common Good Constitutionalism*, 37

⁶⁵ Richard Ekins, "The Balance of the Constitution" (2022) 67 *American Journal of Jurisprudence* 199, 212

⁶⁶ John Finnis, *Natural Law and Natural Rights* (OUP, 1980), 249-250

⁶⁷ Oliver O'Donovan, *The Ways of Judgment* (Eerdmans, 2003)

⁶⁸ Finnis, *Aquinas*, 264

of the rule of law, is part of the way in which this disposition is made manifest, as well as forming a constitutive part of the common good itself. Reciprocity between ruler and ruled, the ruler's obligation to treat the latter as persons capable of taking up duties and responsibilities and congruence between official action and the law, is vital.⁶⁹

However, lawful power exercised in good faith for common good is often not enough. That is, there is good reason, in many (most) times and places, for the ruler to make further provision in order to secure voluntary compliance with, and support for, his rule. What is required is constitutional provision for the sharing of public power, for the creation of multiple offices and the arrangement of offices to enable many to participate directly in government, more directly than only by accepting and upholding legitimate authority, fundamental though that is. This line of thought is articulated with great power in Aquinas's reflections on mixed government,⁷⁰ which note the contribution that an intelligent arrangement of offices can make to keeping the peace. In making this argument, Aquinas does not propose compromising good government in order to avoid conflict, although this may be a necessary evil (see Northern Ireland).⁷¹ Instead, he envisages the mixture of forms of government as building up a form of rule that is well-placed – better placed than unmixed government – to secure common good.

In many times and places, it is reasonable for the constitution to make provision for political competition to determine who is entitled to rule, with continuing competition serving as a means to discipline the exercise of authority (to secure “the duty to rule well”). This competition can, under certain conditions, prove destructive to the unity and common purpose that is foundational to constitutional government for common good. But, it can also help reinforce this unity and common purpose, with citizens sharing together a public conversation about what is to be done, in which they treat one another as persons and as equals. This reinforces – helps make reasonable – the perception that government is ordered for their common good, responsive to their plight, and open to their reasoned participation to these ends. Such a virtuous circle, in which the sharing of authority and recognition of others as equals deepens the unity of the political community (hence the tragedy of the delay of Catholic emancipation in the wake of the Acts of Union 1800),⁷² may presuppose and require deeper, less voluntary foundations, such as a shared language and public culture, including a historical tradition that is a common patrimony.⁷³ Or at least, such foundations must quickly be laid down and shored up if an experiment in living together by means of democratic forms is to prove non-destructive and enduring. Vermeule's work is consistent with these claims, I am sure, but may understate them, saying relatively too little about the moral importance of democracy, about the injustice in many circumstances of excluding the ruled from a share in rule, and about the imprudence of constitutions that practice such exclusion – as so many do in authorising open-ended judicial review of legislation or in agreeing treaty commitments that alienate far-ranging responsibilities in relation to social and economic policy. The constitution that is well-ordered to constitutional government – the central case – is a constitution in which the authority of the ruler is supported by active citizens,⁷⁴ who have a share in authority, and who take an active part in public conversation about how and by whom we should be ruled.

One important theme of Vermeule's recent book is the importance of the exercise of judgement, of taking responsibility for decision and not distorting one's action to avoid such. This insight should

⁶⁹ Lon Fuller, *The Morality of Law* (Yale University Press, 1964)

⁷⁰ Aquinas *Summa Theologiae*, I-II q. 105 a. 1

⁷¹ Arend Lijphart, “Consociational Democracy” (1969) 21 *World Politics* 207

⁷² Bew, *The Politics of Enmity*

⁷³ John Finnis, “Patriation and Patrimony: The Path to the Charter” (2015) 28 *Canadian Journal of Law & Jurisprudence* 51

⁷⁴ Richard Tuck, *Active and Passive Citizens: A Defense of Majoritarian Democracy* (Princeton University Press, 2024)

frame how we think about the shape of the political community and relations between ruler and ruled. If we are to secure the common good of the political community, the ruler must have the authority to rule well, upholding unchanging requirements of justice and promoting unchanging goods, but also responding to the changing needs and conditions of the community. One cannot discharge this responsibility by alienating it. The experiment in many constitutions, and notably in the institutional structure and self-understanding of the European Union, in substituting reasoned political rule with apolitical rule by law or algorithm is misconceived and only succeeds in disarming those communities from ruling well, while at the same time and relatedly alienating the ruled from their rulers, which is to court disaster. The common good of a people cannot stably be secured over time unless and until they adopt an institutional form that exercises agency in response to reasons, in which the collective decision (by the ruler, representing the ruled) settles what the group does, how they live together. An institutionally ordered people exercises sovereignty and warrants recognition as a sovereign state, as an equal in international law that has a share in responsibility for governing some part of the world.

There are, of course, many such institutionally ordered peoples, groups who share public and social life and thus can perceive a common good that they may jointly secure. These sovereign states must cooperate with one another, at least avoiding certain kinds of trespass on one another's domain, if their peoples are to live well and if the common good of all the peoples of the earth is to be secured. The law of nations makes provision for this, not by specifying how all jointly should be ruled, but by providing a framework for the exercise of sovereignty, by affirming some moral limitations on states, and by making it possible for states to reach agreements. In thinking about the future of constitutional government for common good, one important question is how the common good that obtains between states may reasonably be secured, without losing sight of the importance of strong rule for (national) common good and the importance of the ruled participating in their own rule. The difficulty with dynamic treaties is that they let this slip,⁷⁵ introducing supra-national institutions that are likely to have a different vision of the community for whose good authority is exercised, and yet who may lack the duty to exercise authority well, partly because of their distance from local conditions and the absence of political competition, one virtue of which is that it makes vividly clear the importance of judgement and choice. In this context there may be a particular need to take care to avoid usurpation of lawful authority, which introduces a form of half-hearted rule that disarms states but does not replace them.

Contingency and usurpation

In his reflections on the classical tradition, Vermeule rightly notes the importance of contingency in constitutional arrangements.⁷⁶ The tradition does not prescribe one form of government that must be instituted in every time and place. On the contrary, who should rule and the form that rule should take may reasonably vary by time and place. Relatedly, the provision that is made by a constitution for who should rule and how they should rule is not sacrosanct, but instead is answerable to the demands of the common good. This raises the question of the role of positive law in constituting government and the extent to which departure from law is proscribed.

The rule of law is a very great good and it is very important that the location of authority is settled by lawful means, with rules of succession clearly providing for entitlement to take up office. Uncertainty about who is entitled to rule is likely to prove disastrous.⁷⁷ In determining how public

⁷⁵ See Barber et al, *Lord Sumption and the Limits of the Law*

⁷⁶ Vermeule, *Common Good Constitutionalism*, 9-13

⁷⁷ Ekins, "Constitutional Principle in the Laws of the Commonwealth", 398; but compare John Finnis, "Reflections and Responses" in Keown and George, *Reason, Morality and Law*, 459, 558.

power is to be exercised, it is certainly reasonable to rely on non-legal constitutional restraint, including constitutional conventions and the dynamics of political competition. But positive law is indispensable, even if (maybe especially if) it provides that some institution, say the King-in-Parliament, has unlimited authority to make or change any law, save that it may not alienate the lawmaking authority of its successors in office.

Every decent constitution makes provision for constitutional change by lawful means. The inability to amend the Constitution, save perhaps in relation to a very narrow set of provisions, is a crisis in waiting for constitutional government, inviting extra-lawful (unlawful) action and/or trapping the community in a form of bad rule.⁷⁸ But the moral importance of adhering strictly to positive law should not be downplayed. The classical tradition explores the conditions under which unjust law may reasonably be disobeyed, affirming the importance in many cases of suffering under injustice, without oneself acting unjustly. The classical tradition provides an anchor for lawful authority, which is an indispensable means to lead a people in joint action for their common good.

Properly understood, the tradition undergirds and buttresses lawful authority, articulating compelling moral reasons to build up and maintain such authority, which includes standing ready to resist usurpation, forcefully if need be, and certainly to regard it as a serious wrong. The widespread refusal of officials and other citizens lightly to accept usurpation makes it more difficult for such to succeed, for the usurper is likely to find it difficult to lead the political community in joint action, which helps reinforce and defend existing lawful authority.

The usurper who succeeds in overthrowing legitimate authority, in making himself or itself master of the political community by reason of superior force, is under a moral duty to govern well, which may not require restoration of the deposed authority (although it may) but will require making provision for future lawful succession in office. The members of the political community will be obliged to support the usurper's rule to the extent that this is exercised for common good. Usurpation is unjust, seizing authority that is not one's own and thus recklessly putting in jeopardy the goods of social peace, innocent life, and the rule of law. Deposing the tyrant is not usurpation, but rather is an exercise in self-defence that is warranted by natural law.⁷⁹ But whether to attempt to depose the tyrant, which will be resisted as if usurpation, is a question that cannot be answered with precision, for it turns on speculation about (highly uncertain) consequences.

The common good is not a usurper's charter. Legitimate authority is justified by its capacity to secure the common good and may be surrendered if it is turned against the common good. But existing lawful authority should not lightly be undermined or deposed, especially if the people, or some subset of the people, are otherwise able to discipline and correct the ruler. That is, there are very good reasons for a strong presumption against the overthrow of the established authorities and in favour of enduring injustice patiently and attempting to make use of the constitution's provision for self-correction and reform. The presumption is defeasible and the revolution or the coup d'état may be a licit means to defend the common good. But the worry that animates some scholarly response to Vermeule's articulation of the classical tradition is misplaced, or at least much overstated, for it mistakes contingency for transparency. That is, Vermeule's critics wrongly assume that he counsels the overthrow, or subversion, of constitutional government in order to secure his programme for government, whereas in fact he aims to show that existing institutions have the authority to rule and should not be disabled from ruling.

⁷⁸ Juan Linz, "Presidential or Parliamentary Democracy: Does it Make a Difference?" in Juan Linz and Arturo Valenzuela (eds), *The Failure of Presidential Democracy* (Baltimore, Johns Hopkins University Press, 1994), 3

⁷⁹ Patrick Martin and John Finnis, "Caesar, Succession, and the Chastisement of Rulers" (2003) 78 *Notre Dame Law Review* 1045

None of this is to say that the common good, like any other object of government, might not be invoked as a ground for unjust action, by government or by the usurper. The common good is not a self-validating slogan. But properly understood, it does provide reasons for constitutional government and for conscientious adherence to positive law, which should be open to reasoned change but should not be lightly cast aside. Usurpation is unjust and unfair, seizing for the usurper alone the authority that the ruler otherwise enjoys, which in a mixed constitution is shared widely. One sees this wrong not only in the brazen coup d'état but also in the way in which some courts have lawlessly expanded their jurisdiction, taking upon themselves authority to disarm the political authorities from ruling. See for example the Israeli Supreme Court's invention (or at least aggressive expansion) of a new jurisdiction to quash primary legislation.⁸⁰ Or the Indian Supreme Court's invention of the basic structure doctrine, which limits the power of constitutional amendment.⁸¹ Or the Canadian Supreme Court's adoption of substantive due process in defiance of the clear intention of those who enacted the Charter of Rights and Freedoms.⁸² Or the European Court of Human Rights's invention of a power to grant interim relief, a power that cannot be squared with the express terms of the European Convention on Human Rights.⁸³

Each of these judicial developments follows from the relevant court's failure to discipline itself by reference to a past exercise of authority, which should have limited its action. In each case, the relevant court may rationalise the usurpation in question by doubting the capacities of legislatures, or member states, to act well without judicial supervision and control. The courts in question, and their scholarly outriders, thus fail to observe the discipline of constitutional government, shrugging off the limits that constitutional law (or treaty) impose upon them, expanding their jurisdiction and seizing the lawful power of others, which confers upon them greater power and prestige. When political authorities attempt to respond to this usurpation, including by exercising lawful powers of legislation or constitutional amendment, the response is decried as an attack on constitutional government, as democratic backsliding, which warrants extreme measures in turn. (In *some* cases, there may be some merit in the argument. An attempt to limit an over-mighty court might be constitutional restoration or might go further and destroy the proper judicial role.)

I think Vermeule's work is wrongly understood to counsel usurpation, to encourage those in authority to subvert the constitutional limits on their authority. This misunderstanding may, as I say, have some foundation in the extent to which modern constitutional law and practice involves widespread judicial usurpation of the authority of political institutions. That is, the guilty conscience of those who support this law and practice primes them to see in others a disposition to commit the same wrong if and when opportunity presents itself. Nonetheless, I think Vermeule may risk encouraging this misreading of his work insofar as he stresses the contingency of constitutional arrangements, notes that the common good may require existing authority to be deposed, and forcefully rejects the concerns of originalists. Pojanowski and Walsh,⁸⁴ I say, are not animated by a fear of judgement, but are concerned about usurpation, which is a warranted concern in view of the development of constitutional adjudication over time.

This may simply be a question of emphasis, for as I say I largely share Vermeule's elaboration of the fundamentals of the classical tradition. But the framing matters because it bears on the social and

⁸⁰ C.A. 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village*, 49(4) P.D. 221 (1995)

⁸¹ *Kesavananda Bharati* (1973) 4 SCC 225

⁸² *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486

⁸³ *Mamatkulov v Turkey* [2005] ECHR 64 and *Paladi v Moldova* [2009] ECHR 450; for criticism, see Richard Ekins, *Rule 39 and the Rule of Law* (Policy Exchange, 2023).

political foundations of legitimate authority, which require a measure of charity in how we deal with other members of the political community, with whom government is shared. Fear that one's opponents do not share one's own concern for common good, that they will not exercise constitutional government but will instead abandon the constitution, provides one with a reason to frustrate succession in office, to challenge and subvert their lawful authority. The common good requires rulers and subjects to strive to break this cycle of mutual distrust, which tempts us to break faith with one another and to abandon constitutional government. Making clear that one sees and abhors the wrong of usurpation is an important contribution to this end.

Conclusion

The nature of constitutional government is illuminated by reflecting on the demands of the common good and on the institutional arrangements and social conditions that make it possible for a people to share a common good and to act jointly for it. Vermeule's work vividly explains the importance of strong rule for common good, which is not disabled by political liberalism's aversion to making true judgements about right and wrong, good and evil. I have outlined, without running to ground, some objections to Vermeule's account of legal reasoning. Moral principle helps frame lawmaking and legal reasoning, but the object of statutory interpretation is and should be the intended meaning and reasoned choice of the legislature, an analysis that seems to have much (moral and explanatory) force in relation to constitutional interpretation as well. If the Constitution falls to be interpreted like any other enactment, then judges and others are subject to a prior act of authority, which they should faithfully uphold. In adopting Dworkin's theory, Vermeule obscures the relevance of authority and invites judges to continue to make and remake constitutional law by way of open-ended moral argument.

Like Vermeule, I aim to draw on and contribute to the classical tradition of reflection on law and government. Unlike Vermeule, I am not an American but an Anglo-New Zealander, living and working with a form of constitutional government that centres on parliamentary sovereignty and responsible government. The constitutional law that anchors this scheme is sharply different to American constitutional law and is reasonably understood to confer vast legislative authority on Parliament, and very considerable political power on government, which leads Parliament. This seems to me, in general, a better way to rule and be ruled, more consistent with Vermeule's schema, than the mode of government that the American constitution helps generate. I share his concern that the Constitution might prove to be an ill-fitting garb if strictly upheld. The constitution that has developed over time might reasonably have glossed or displaced the Constitution. But this is hard to square with the proposition that the Constitution remains good law until it is remade by authority. In using Dworkin's theory, Vermeule deploys a technique to remake the Constitution over time, rounding off its rough edges and arguably making space for the constitution. Perhaps this is a reasonable response to the peculiarities of the American constitution, including the difficulty of amending the Constitution, and over time will make a better constitution. A more direct analysis might simply be to argue that some of the Constitution's limitations on rule are unjust.

In reasoning about constitutional government, it seems to me important to engage with the complexity of the political community and the significance of specifying the common good for which the government is responsible. If one mistakenly narrows the scope of the common good in question, then one may wrongly challenge justified acts of government, as in the early stages of the *Bancoult* litigation. Something similar may be at work in some federal-state dynamics. But an appeal to a wider, higher common good may itself be a technique for self-aggrandisement, for institutions to expand their apparent authority, almost literally to empire build. This may, in some time or place, be an act of audacious but reasonable constitutional entrepreneurship. It may also be

an act of usurpation, wrongly seizing another's lawful power, resulting in unreasonable rule, when the institution in question finds itself having asserted responsibility for a common good it cannot secure, while having disarmed other institutions from acting. Relatedly, the attempt to rule may misfire because it would only be successful if it was capable of supporting collective agency, which it fails to do because the people (or peoples) in question do not recognise the institution as leading them in joint action. The non-responsiveness of this would-be ruler to the ruled, as well as the lack of assurance that the ruler acts for *their* good, frustrates joint action.

In expounding the classical tradition, with particular reference to America, Vermeule is rightly concerned to stress the contingency of constitutional arrangements. He aims to outline the principles of good rulership and to show how those principles have a foothold in American constitutional thought and practice and can now be revived and extended. I have questioned his deployment of Dworkin. Many of his scholarly critics cannot do so without self-contradiction. But they fear that Vermeule's work is a charter for the imposition of strong (executive) rule regardless of constitutional law or history, and in particular regardless of the scholarly consensus in support of political liberalism, which they may mistake for the foundations of the constitution. They may also fear that Vermeule's (admirable, if underdeveloped) programme of government will be imposed by judicial fiat, just as soon as five of nine Supreme Court justices can be assembled. In view of the other important changes made by way of judicial fiat, the fear is understandable – subjection to the arbitrary rule of an unbound court is objectionable and should be resisted.

Vermeule's stress on contingency is not a counsel for usurpation. However, his embrace of Dworkin, at least in relation to interpretation of the Constitution, and his partial indifference to democratic principle, at least in stressing that other legitimate forms of government are possible, risks underplaying the moral significance of legislative authority and of sharing authority widely, disciplined by political competition. In expounding the classical tradition, Vermeule may risk understating the wrongfulness of usurpation and thus the paramount importance of lawful authority. In the long and painstaking process of building up, restoring and defending constitutional government for common good, all who work in the tradition should strive to unite our fellow citizens in joint action led by lawful authority and resisting usurpation.