THEISTIC ILLIBERAL CONSTITUTIONALISM: A REVIEW OF ADRIAN VERMEULE'S *COMMON GOOD CONSTITUTIONALISM*

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Adrian Vermeule's Common Good Constitutionalism drew a remarkable amount of attention from constitutional law scholars when it was published in 2020. About eighteen months later, Vermeule published a piece complaining that the critics had missed the point, that they had ignored the natural law jurisprudence that grounds the work. He was correct. This Review addresses Vermeule's natural law jurisprudence, emphasizing the fact that it is a religious natural law jurisprudence. His arguments are in the tradition of Scholasticism-Aristotelian logic incorporated into Christian theology by St. Thomas Aquinas. Scholasticism is a remarkably weak foundation for constitutional jurisprudence. It is a vast system of intuitions, essences, definitions, and deductions from "reason" instead of inferences from empirical observation. The consequences of introducing thirteenth-century metaphysics and epistemology into twenty-first-century law and legal theory are, predictably, catastrophic. When combined with Vermeule's earlier work on the concentration of power in the presidency and the administrative agencies, the outlines of a constitutional theocracy are visible.

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INTRODUCTION

In *Common Good Constitutionalism*, Adrian Vermeule describes a "classical tradition" of law that rests on Saint Thomas Aquinas's maxim that the law is "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[1] Vermeule argues that one can find this "classical legal tradition" in the law of the United States and that this tradition entails the pursuit of the common good in the development and application of our Constitution.[2] This pursuit takes the form of "developing constitutionalism," which has three main features.[3] The first is *determinatio*: the specification of general laws to fit various contexts and developing needs.[4] The second is *subsidiarity*: a correct relationship between the highest public authority and inferior institutions, in which the former has the responsibility and power to support and aid the latter in the promotion of the common good.[5] The third feature is the identification of the executive—the Presidency and the administrative agencies—as the highest public authority.[6] This arrangement curtails the power of the judiciary to state the law definitively and re-assigns its traditional responsibility for the preservation of individual rights. The executive has responsibility for rights because rights are conceptually subordinate to the common good, and the executive has responsibility for the common good.

Eighteen months after the publication of *Common Good Constitutionalism*, Vermeule published a rebuttal of the reviews received so far.[7] He addressed seven critiques: that his thesis substitutes morality for law; that it ignores the text of positive law; that it licenses judges to rule as they see fit for the common good; or, alternatively, that it is synonymous with executive supremacy; that it has no respect for human rights; that it is fatally undermined by the persistence of disagreement over the content of law; and that an official oath requires an originalist approach to constitutional

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[1] *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 3 (2022).

[2] *See id.* at 1, 42.

[3] *See id.* at 23.

[4] *See id.* at 46.

[5] *See id.* at 156.

[6] *See id.* at 42.

[7] *See* Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism,* 45 HARV. J.L. & PUB. POL'Y. 103, 103 (2022) ("The last eighteen months or so have seen an outpouring of remarkable claims, from both originalist and progressive legal scholars, about the classical legal tradition and its emphasis on the common good.").

interpretation.[8] The gist of his response to each of these critiques was that it misses the point.[9]

Vermeule is correct. All of the reviews so far have failed to see that *Common Good Constitutionalism* is not only about the Constitution. It is equally, if not more, a work of jurisprudence. The book offers a theory of constitutional interpretation grounded in a religious conception of natural law.[10] Not surprisingly, then, all the reviews have overlooked the book's main premises. Vermeule cited these: that law is a divine ordinance of reason for the common good, promulgated by a public authority who has charge of the community; that the common good is unitary; that the good is not an aggregation of preferences or a social welfare function; that the community is the highest good for individuals; that the end of government is to secure the flourishing of its citizens; that human flourishing in a political community is the completion or fulfillment of our nature as rational beings; that a primary role of political authority is *determinatio*, or the specification of general law; that *determinatio* employs a faculty of prudential judgment; and that one function of the highest political authority is to restore the functions of subsidiary authorities when they fail to advance the common good.[11]

This Review addresses these premises and arguments of *Common Good Constitutionalism*, attempting to fill the gap in its reviews that Vermeule describes. It is a critical examination of the book's philosophical and theological roots. To carry out this task, this Review necessarily extends the discussion to include Vermeule's non-academic writings on Catholic political theory. We will see that his jurisprudence is a theistic natural law theory in the tradition of Scholasticism: Aristotelian logic received by way of St. Thomas Aquinas.[12] This means that his jurisprudence is teleological and supernatural.[13] The book is framed around the divine ends of natural phenomena, human beings, and social institutions. Everything has its purpose

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[8] *Id.* at 103–04.

[9] *See id.* at 104.

[10] Only one piece of recent legal scholarship, published prior to the publication of *Common Good Constitutionalism*, has addressed the specific religious tradition in which Vermeule lives and works – Catholic Integralism – a tradition which is indeed evident in the book and in Vermeule's non-academic writings. It seems to have been prompted by Vermeule's work, but it does not engage directly with Vermeule's natural law jurisprudence. Instead, it evaluates integralism against John Rawls's concept of unreasonableness in politics. *See* Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1042 (2019).

[11] *See* Casey & Vermeule, *supra* note 7, at 104–106.

[12] *See* SCOTT M. SULLIVAN, INTRODUCTION TO TRADITIONAL LOGIC: CLASSICAL REASONING FOR CONTEMPORARY MINDS i (Aristotelian logic was the dominant logic for late middle-ages philosophers, including Aquinas).

[13] *See id.*

and place in a scholastic cosmology – including the law of the United States, as Vermeule describes it.[14]

Scholasticism is a staple of Catholic theology—as it has been since the thirteenth century—and it is central to Vermeule's thesis and argument.[15] Scholastic logic is primarily deductive, but a deduction is merely valid, not true, unless its premises are true.[16] The scholastics' solution to the problem of true premises was to appeal to intuition; specifically, the prompting of knowledge immanent in the intellect, by the simple apprehension and "real definition" of essences.[17] What is missing from this picture is empirical inquiry as we understand it: hypothesis formulation by abductive reasoning and the testing of hypotheses by peers set on disproving them. So Vermeule's "common good," "classical legal tradition," *determinatio*, and subsidiarity are products of a metaphysics and epistemology that, outside the cloister, were abandoned centuries ago.[18]

Vermeule argues that the Constitution is functionally an unwritten constitution—or, more precisely, a constitution written by "the Divine Hand, which invisibly designs constitutions through the cross-cutting plans and political blunders of the unwitting agents of Providence."[19] He describes this Constitution of Providence as an instrument created for certain ends, or purposes, among which is his scholastic conception of the common good.[20] The touchstone of Vermeule's arguments is Aquinas's description of law as "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[21] In Aquinas's *Summa Theologiea,* from which the quotation is taken, the words "ordinance of reason" describe natural law, not positive law.[22] This is, of course, theistic natural law. The rationality in the ordinance of reason is that of God, not that

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[14] *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (last visited Oct. 13, 2024). ("The Court's jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable under a regime of common-good constitutionalism.").

[15] *See* Brian Davies, *Aquinas and Catholic Universities*, 86 New Blackfriars 276, 276 (2005) (Aquinas's philosophy is relevant to current debates on Catholic university education).

[16] *See id.* at 278. ("For Aquinas, knowledge (scientia) can be expressed by a valid deductive argument with true premises.").

[17] *See* SULLIVAN, *supra* note 12, at 53 (explaining that a real definition is "the goal toward which the logician usually aims because to define an essence is precisely to define *what* something is." *Id.* at 50).

[18] *See* VERMEULE, *supra* note 1, at 1.

[19] *See* Adrian Vermeule, *The Catholic Constitution*, FIRST THINGS (2017), https://www.firstthings.com/web-exclusives/2017/08/the-catholic-constitution [https://perma.cc/86DW-YGEY].

[20] The "Constitution of Providence" is not Vermeule's term.

[21] VERMEULE, *supra* note 1, at 3.

[22] *See id.* at 132 ("[T]he role of the civil authority is determination – to specify the natural law concept within reasonable bounds for purposes of civil law . . . .").

of public authorities such as legislators or constitutional founders.[23] In the scholastic tradition, then, law is a *divine* ordinance of reason.

The role of public authority in promulgating law is *determinatio*; that is, to specify divine natural law as positive law, as circumstances demand, in the temporal realm.[24] In line with his earlier work, Vermeule takes the highest public authority to be the executive; that is, the President and the administrative agencies.[25] So Vermeule's "developing constitutionalism"—his alternative to both libertarian, conservative originalism and liberal "progressive constitutionalism"—entails the determination of divine natural law by the executive.[26] This suggests that the antiquity of Vermeule's premises is extremely problematic. Consider three examples.

First, the *determinationes* of developing constitutionalism resemble familiar legal specifications such as a jury's specifying negligence in a Negligent Driving case; that is, a jury's determination of what would count as reasonable driving under specific circumstances, which necessarily must be done before deciding whether the defendant drove unreasonably. *Determinatio*, however, is quite different. It is a scholastic idea; the "real definition" of law's essence, as discovered through simple apprehension and intuition. This means that *determinatio* specifies law by reasoning about law.[27] This kind of specification is closer to a jury's using a dictionary definition of "negligence" to decide whether the defendant's actions fall within that definition. Seen clearly, constitutional law as *determinatio*—as a process of testing legal rules against definitions—seems odd. It is odd. Vermeule is conceptualizing the principal operations of the Constitution in late medieval terms.

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[23] Aquinas wrote: "[T]he definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated." *See* ST. THOMAS AQUINAS, SUMMA THEOLOGIEA, https://www.newadvent.org/summa/2090.htm#article4 [https://perma.cc/2CR4-5XBB]. A few lines later, Aquinas continues: "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally." *Id*.

[24] *See* Adrian Vermeule, *Interview with Hay Derecho* (2023), https://www.postliberalorder.com/p/interview-with-hay-derecho-english?utm_source=%2Fsearch%2Fvermeule&utm_medium=reader2 [https://perma.cc/UEK2-MC67] ("[W]hile the determinations of civil law are created by human will, they are specifications of the natural and divine law which have an objective, rational existence and integrity of their own, and that law properly so-called is a rational ordinance serving the common good of the polity and of all mankind.").

[25] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 3 (2010) ("In the administrative state, what if anything constrains the enormous power of the executive—including both the presidency and the administrative agencies?").

[26] VERMEULE, *supra* note 1, at 121.

[27] *See id.* at 9 (explaining that *determination* is "the process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems").

Second, Vermeule tells us that the autonomy of the individual is not the aim of common good constitutionalism.[28] This means that the individual is not necessarily a holder of rights against the community. On the scholastic view, this would be to hold rights against oneself. A person has a right if and only if the community is served by their having that right.[29] If this sounds like the individual is a slave to the community, the scholastic reassures us that this is not so. "They are not being ordered to someone else's good (the good of 'the nation' or 'humanity' considered abstractly); rather they are ordered to their own good, but this is a good that they can have only together in a community."[30] If we ask, "'ordered to their own good' by whom?" the answer seems to be something or someone other than the individual.

Subsidiarity is a third problematic scholastic feature of developing constitutionalism. The highest authority in a polity stands in a relationship of subsidiarity to lesser institutions, and this entails responsibility for those institutions' effectiveness in bringing about the common good.[31] This responsibility is accompanied by a power to aid these institutions, which seems unremarkable until this power is exercised. When the lesser institutions fail, subsidiarity requires the highest authority to step in and restore order. If this *subsidium* requires a dictatorship, then so be it.[32] Vermeule assures us that this would be the benign dictatorship of the Roman Republic, but the actual fate of that institution does not inspire confidence, and it is hard to imagine what the corrective actions required by subsidiarity would look like in the twenty-first century. The only certain thing is that the regime of subsidiarity would be decidedly illiberal.[33]

Illiberalism is the point. It is an article of faith for Vermeule and his cohort of the faithful that liberals are engaged in a relentless, aggressive assault on Christianity and are devoted to the personal humiliation of Christian

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[28] *See id.* at 23 ("The key point here is that nothing in a developing, organic account of constitutionalism necessarily presupposes or requires a progressive theory of the good for human beings, with a paramount emphasis on individual autonomy.").

[29] *See id.* at 24 ("On this account, rights exist to serve, and are delimited by, a conception of justice that is itself ordered to the common good.").

[30] Edmund Waldstein, O.Cist., *The Good, the Highest Good, and the Common Good*, *in* INTEGRALISM AND THE COMMON GOOD: SELECTED ESSAYS FROM THE JOSIAS, VOLUME 1: FAMILY, CITY, AND STATE 7, 23 (P. Edmund Waldstein, O.Cist. & Peter A. Kwasniewski eds., 2021).

[31] *See id.* at 28.

[32] *See* VERMEULE, *supra* note 1, at 157 (quoting JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 214 (rev. ed. 1998) ("In such cases, even dictatorship may be compatible with the principle of subsidiarity.")).

[33] *See* VERMEULE, *supra* note 1, at 154 ("[T]he giant's full strength is released in a state of exception – when, under unusual circumstances, the malfunctioning of subsidiary institutions means that the common good requires extraordinary intervention by the highest level of public authority . . . .").

traditionalists.[34] This is a zero-sum contest because it is a battle between a sovereign and a pretender. Liberalism is Christianity's evil doppelganger. Liberalism has its own liturgy, sacraments, and eschatology.[35] Its *telos* is the complete liberation of humanity from all constraint.[36] Given that the prospect is dire and the culprit is liberalism, Vermeule thinks we are approaching the point where "the strong hand of legitimate rule"[37] and "the return of the 'strong gods'"[38] are required. The subsidiary institutions in society are failing their responsibility to carry out the law as a divine ordinance of reason to the common good. In other words, the situation calls for *subsidium*.

In his non-academic work, Vermeule's theistic illiberalism is plain. He frankly describes its objectives in a number of places. The aim is, for example, "to order the nation and its state to the natural and divine law, the tranquility of order, precisely because doing so is the best way to protect and shelter the localities in which genuinely human community, imbued with grace, can flourish."[39] This sounds like a call for theocracy. It is not a call for a totalitarian theocracy, but most theocracies are constitutional theocracies, and this description fits his conception of law, the state, the executive, and subsidiarity.

Vermeule calls his jurisprudence of divine natural law as specified by the executive "developing constitutionalism."[40] Step by step, construing natural law as a divine "ordinance of reason;" construing the Constitution, constitutional law, and agency rules as *determinationes* of divine natural law; granting the executive the powers of subsidiarity; construing the judiciary as a body without exclusive power to say what the law is; construing rights as privileges conditioned on their serving a common good; and construing the common good in terms of Catholic Scholasticism, Vermeule formulates a theistic, illiberal constitutionalism.

The critique that follows is an internal one. Vermeule's project fails because its premises are weak, implausible, and, literally, medieval. The

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[34] *See* Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy [https://perma.cc/Q6AE-9PFV] ("The problem is the relentless aggression of liberalism, driven by an internal mechanism that causes ever more radical demands for political conformism, particularly targeting the Church.").

[35] *See id.* ("Late stage liberalism, which calls itself 'progressive' embodies a distinctive secularized soteriology and eschatology.").

[36] *See* VERMEULE, *supra* note 1, at 119 ("The progressive judge instrumentalizes law in the service of a very particular liberationist narrative, in which 'rights' are continually 'expanded' to free an ever larger set of individuals from unchosen obligations and constraints – legal, moral, and traditional, even biological.").

[37] *Id.* at 42.

[38] Adrian Vermeule, *The Ark of Tradition* 4 (2017), https://www.kirkcenter.org/reviews/the-ark-of-tradition/ [https://perma.cc/QSY8-LC7Y].

[39] Vermeule, *supra* note 19.

[40] VERMEULE, *supra* note 1, at 23.

problem with the "classical tradition" in American law is not that it doesn't exist but that it is dust.

I. THE COMMON GOOD AND "DEVELOPING CONSTITUTIONALISM"

A. Supernaturalism

It would not be clear from earlier reviews of *Common Good Constitutionalism*, but it is clear in the book itself that to describe law as an "ordinance of reason for the common good" of the polity is to describe an ordinance of God.[41] Vermeule's objective is to rescue and restore "the classical tradition" in law, but this is not just any natural law tradition.[42] It is a supernatural natural law tradition.

In *Common Good Constitutionalism*, Vermeule argues that courts and legal scholars have lost sight of a "classical" conception of law that prioritizes the common good over individual autonomy.[43] One might think that a classical conception of law would rest on Greek and Roman jurisprudence, but Vermeule dispels this impression quickly. His "classical" law is Christian law. Aristotle makes an appearance, but only as his logic has been filtered through the theology of Saint Thomas Aquinas—the Scholasticism that is a standard feature of Catholic theology. Vermeule discusses Blackstone's commentary on the *Institutes of Gaius*—"the great introductory text to Roman law"—but his point is that Blackstone did not contest "the ordinary cosmology of the classical law," in his exposition of "divine law, natural law and civil or 'municipal law.'"[44] Blackstone believed that "obedience to superiors is the doctrine of revealed as well as natural religion."[45]

As the sources of his classical legal tradition suggest, natural law is given to humanity by God. Vermeule repeatedly invokes this basic principle: "In the classical tradition, law is seen as – in Aquinas' famous definition – an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[46] Taken out of context, the words "promulgated by a public authority" suggest that the relevant ordinance of reason can be a positive law such as the Constitution. This cannot be right.

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[41] *Id.* at 3.

[42] *Id.* at 1.

[43] *See id.* at 36 ("[C]ommon good constitutionalism is classical constitutionalism that, although not enslaved to the original meaning of the Constitution, also rejects the progressives' overarching sacramental narrative, the relentless expansion of individualistic autonomy.").

[44] *Id.* at 55.

[45] *Id.* at 64.

[46] *Id.* at 3.

An ordinance of reason is a natural law concept, and Aquinas himself understood natural law to be divine law—necessarily so.

> [S]ince all things subject to Divine providence are ruled and measured by the eternal law, as was stated above; it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.[47]

Similarly, Vermeule uses the term *ius naturale* to refer to the natural law. The Church Fathers and medieval canonists understood *ius naturale* to refer to divine commands, such as the Ten Commandments.[48] For Vermeule, then, law is a *divine* ordinance of reason for the common good.

The words "reason," "rational," "natural," and "objective" are used in idiosyncratic ways, or so it must seem to most readers. Vermeule refers to "laws of nature" a number of times, but never in a sense that a student of the natural sciences would recognize.[49] Without explanation, we are told that law has "a true nature,"[50] which appears to include an "inner morality."[51] For example, non-traditional marriage is "an attempt to break a traditional and natural legal institution."[52] There is such a thing as "natural procedural justice,"[53] but we are told that judicial review "is not written in the nature of law,"[54] and that to use law "as a tool for extrinsic ends that warp its true nature."[55] Vermeule tells us that "[m]an is a sacramental animal who cannot

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[47] ST. THOMAS AQUINAS, SUMMA THEOLOGIEA, https://www.newadvent.org/summa/2091.htm#article [https://perma.cc/7NPT-PYEP].

[48] *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 23 (1997) ("In translating and commenting on the Bible [the Christian Church Fathers] used the term ius to mean divine commands, so that, for instance, the Decalogue could be called ius divinum or ius naturale.").

[49] *See* VERMEULE, *supra* note 1, at 45 (specifications of law draw "some of their force from the law[s] of nature"); *id.* at 56 (referring to a historical consensus on "the applications and teaching of the law of nature"); *id.* at 58 (positive law under the Constitution was "derived from the law of nature"); *id.* at 153 ("speaking in one's own defense was recognized in common law as being consistent with the law of nature").

[50] *Id.* at 1.

[51] *Id.* at 42.

[52] *Id.* at 133.

[53] *Id.* at 138.

[54] *Id.* at 12.

[55] *Id.* at 120.

deny his own nature."[56] Vermeule's natural law is, undeniably, supernatural natural law. (There is no hint of irony or cognitive dissonance on this point.)

Common good constitutionalism appeals to both natural law and "objective natural morality."[57] That is, a natural law reading of the Constitution squares it with "the objective order of justice."[58] This might sound promising, given that the metaethics of moral realism has an extensive literature with an impressive roster of scholars behind it, but Vermeule does not mention this scholarship, much less rely on it.[59] As we will see, this is because he is working in the ancient scholastic tradition, the purpose of which has always been to defend Christianity, not to understand morality in natural human society.

Common good constitutionalism does not depend on divine intervention, and Vermeule's arguments in support of it do not appeal directly to a deity in any other respect. "For present purposes," he writes, "I neither need advance, nor do advance, any particular account of ultimate ends, and nothing in my claims depends on such an account."[60] This is true. The problem with Vermeule's disclaimer, though, is his commitment to supernaturalism. At best, he suppresses the reliance on supernaturalism that is clear in his non-academic writing.

Vermeule argues in the book that both progressivism and originalism presume that law is a product of human will and that this is a mistake.[61] In an interview published on the Substack site "The Postliberal Order," he completes the thought:

> This is a betrayal of the classical tradition, which held that while the determinations of the civil law are created by human will, they are specifications of the natural and divine law which have an objective, rational existence and integrity of their own, and that law properly so-called is a rational ordinance serving the common good of the polity and all mankind.[62]

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[56] Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), https://www.firstthings.com/article/2017/01/liturgy-of-liberalism [https://perma.cc/TD87-7TM].

[57] VERMEULE, *supra* note 1, at 8.

[58] *Id.* at 59.

[59] *See, e.g.*, ARGUING ABOUT METAETHICS (Andrew Fisher & Simon Kirchin, eds., 2006) (containing chapters on naturalistic moral realism by Nicholas Sturgeon, Peter Railton, Terence Horgan and Mark Timmons, and Frank Jackson); ALEXANDER MILLER, AN INTRODUCTION TO CONTEMPORARY METAETHICS 138–242 (2003) (evaluating reductive and non-reductive moral realism); ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord, ed., 1988) (collecting defenses of moral realism by David Wiggins, John McDowell, Richard Boyd, Nicholas Sturgeon, Geoffrey Sayre-McCord, and Mark Platts).

[60] VERMEULE, *supra* note 1, at 29.

[61] *See* Vermeule, *supra* note 24 ("[T]he key feature shared by the two currently dominant views [progressivism and originalism] is a fundamental tenet of legal positivism: there is not law except that created by human will.").

[62] *Id.*

The specification of legal norms might be commonplace – as it is with objective legal criteria and ordinary administrative law-making – but the specification of divine law in *determinatio* is unambiguously supernatural.

Determinatio, for Vermeule, is more than a useful way of thinking about administrative law-making, or negligence, or the rule of reason in anti-trust law. *Determinatio* operates in a much larger normative space than ordinary law, beyond even that of natural law. It limits proper government to the political forms consistent with "the gospel teaching and sacramental practice of the magisterium"—which is to say that it transmutes supernatural norms into worldly norms.[63] When Vermeule describes *determinatio* as subordinate to "an ordinance of reason for the common good," he is invoking an ordinance of God.[64] Given the centrality of that ordinance to his argument, it is difficult to see how the coordinate operations of *determinatio* in common good constitutionalism can be confined to the earthly plane.

Vermeule's commitment to supernaturalism extends beyond his invoking the *determinatio*. He writes that, "The U.S. Framers and ratifiers, like other constitution-makers, were but agents of Providence, wittingly or unwittingly."[65] He concurs with Joseph de Maistre in seeing the English constitution as "an instrument of the Divine Hand, which invisibly designs constitutions through the cross-cutting plans and political blunders of the unwitting agents of Providence."[66] Liberalism does not have these blessings: "While liberalism curiously attempts to deny its own political character, in a colossal society-wide system of bad faith, the Church is authentically and autonomously political, precisely because it is rooted in the transcendent."[67]

To defend his supernatural constitutionalism, Vermeule relies on a philosophy of supernaturalism.

B. Scholasticism

Vermeule describes a "classical tradition in American law," the gist of which is that "governance and law are themselves suffused with reason,"[68] whereas the prevailing liberal tradition "uncouples law from reason."[69] These claims, among a number of others, suggest that the epistemology and metaphysics of the classical view of the law, of common good

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[63] Vermeule, *supra* note 24 ("Strategically, the Church can be flexible as necessary on all dimensions save one – the gospel teaching and sacramental practice of the magisterium, which perpetuates itself by apostolic succession . . . .").

[64] VERMEULE, *supra* note 1, at 10.

[65] Vermeule, *supra* note 19.

[66] *Id.*

[67] *Id.*

[68] VERMEULE, *supra* note 1, at 71.

[69] *Id.* at 117.

constitutionalism, and of Vermeule's critique of liberalism, is Scholasticism: Aristotelian logic incorporated into Christian theology by way of Aquinas.[70] Aristotelian logic is an extensive body of thought, not all of which is logic proper. Much of it is "bits of metaphysics, epistemology, psychology, rhetoric, and grammar, and not parts of logic at all."[71] These bits include, "[t]he 'categories,' the 'predicables,' 'classification and division,' the 'rules of definition,' the 'enthymeme,' 'material fallacies,' etc."[72] Aquinas retained all of this otiose material. Scholastic logic—as an epistemology and a metaphysics, not merely as a mode of reasoning—is comprised by this mélange. It is a vast system of intuitions, definitions, and taxonomies that occupies the space that, in the modern world, is occupied by scientific inquiry.[73]

Aquinas developed his Aristotelian defense of the faith in the thirteenth century. The first generation of philosophers of science abjured scholasticism in the seventeenth century.[74] It is remarkable that it survives at all and almost incomprehensible that it has made its way into twenty-first-century jurisprudence. To fully appreciate Vermeule's constitutionalism, a brief summary of some basics of scholastic logic will help—not only for its substance (stressing that this is just the basics), but also to get a sense of how strange it all is.

In scholastic logic, substances are things that exist in themselves. They can be primary—a concrete instance of the substance—or secondary: the nature of a thing.[75] An accident is a thing that does not exist in itself; instead, it falls within or under some substance.[76] The "categories" are "all the different ways [that a substance] can exist."[77] The categories are: substance; and then the nine accidents, comprised by quantity, quality, relation, action, passion, location, position, time, and possession.[78] An "unlimited essence such as God," or an unlimited concept such as "being, good, true, and unity,"

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[70] *Id.* at 56 (distinguishing natural rights theory from natural law theory partly on the grounds of the latter's "more Aristotelian premises").

[71] JAMES WILKINSON MILLER, THE STRUCTURE OF ARISTOTELIAN LOGIC 12 (1938, 2016).

[72] *Id.*

[73] *See* Nancy Cartwright, *Aristotelian Natures and the Modern Experimental Method*, *in* INFERENCE, EXPLANATION, AND OTHER FRUSTRATIONS: ESSAYS IN THE PHILOSOPHY OF SCIENCE 44, 44 (John Earman, ed., 1992) ("The science of the Scholastics was involved in endless quarrels about words and very little actual investigation, in large part because it tried to explain the behaviour of things by reference to their natures.").

[74] *See id*. at 44–45 (describing this shift).

[75] *See* SULLIVAN, supra note 12, at 34.

[76] *See id.*

[77] *Id.* at 31.

[78] *Id*. at 34.

cannot be a category.[79] "In scholastic philosophy, these concepts are called transcendentals because they transcend the categories."[80]

The predicables, like the categories, are strangely both abstract and precise. The ways in which something can be predicated of a thing are: genus, specific difference, species, property, and accident.[81] The genus of a thing is its essence. A species is a subcategory of genus, and a specific difference is that which distinguishes one species from another according to their respective properties.[82]

At what point do the substances, accidents, categories, predicables, and the rest touch the world? There must be some such point. Aristotelian logic proper is propositional logic: deductive reasoning from premises. Validity and invalidity are the province of deduction, whereas material logic "covers the process of determining whether or not a certain proposition is true or false."[83] The problem is that to obtain truth by deduction, instead of mere validity, requires true premises. Induction—inference from repeated events—features in material logic but was acknowledged to be a weak basis for inferring truth.[84] The scholastics solved the problem of true premises with the ideas of simple apprehension and real definition.

What is surprising, from a modern perspective, is that the observations that are the material of scholastic logic meet the intellect *as knowledge*—not as evidence—on first contact with the intellect. As one scholastic scholar puts it:

> If one needs a proof for the beginnings of knowledge and it is impossible to find it, then one automatically has no further knowledge. In other words, the demand for proof at the beginning leads to the impossibility of any knowledge at all. But this conclusion is proved false by the fact that every person has at least some practical knowledge, such as that fire burns and that water is necessary for life. Therefore, it is evident that definition, as the clarification of the initial grasp of a thing's whatness, is perceived directly. It cannot rest ultimately on some type of proof.[85]

Simple apprehension is the first act of knowledge.[86]

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[79] *Id*.
[80] *Id.*
[81] *See id*. at 36.
[82] *See id.* at 35.
[83] *Id*. at 7.
[84] *See id*. at 173 ("How many instances of people dying does it take to say that *all* humans are mortal?").
[85] MARY MICHAEL SPANGLER, LOGIC: AN ARISTOTELIAN APPROACH 57 (1993).
[86] *See id*. at 16 ("Knowledge of the whatness of a simple material thing is obtained in the intellect's first operation of simple apprehension.").

> [T]his operation of the mind is a simple reception of some intelligible data, like thinking about "swan" or "water" or "white". In this act of simple apprehension, the knower is merely being passive in the sense that he or she is just grasping the essence of something, and that's all.[87]

From this simple operation, however, we grasp a universal concept.[88]

> The human being, empowered with his senses and intellect, is able to know the material world both in its sensible, singular aspects and in its essential, universal notes . . . . Thus an individual, knowing this yellow tulip in his garden is aware not only of its unique singularity but also of its whatness, essence, or nature.[89]

The next act of knowledge is definition. Definition follows immediately upon simple apprehension in the same moment of intuition.[90] It then progresses, with definitions being formulated by division.[91] Or they can be formulated by classification; that is, by starting with specific things and working from there up to genus and species.[92] Definition can be nominal—the conventional meaning of things—but this plays no role in scholastic logic. Instead, scholastic definitions serve to give shape to, to delineate—in that sense to define—things we come to know. These are real, not nominal, definitions.[93] There are four kinds of real definition: essential, descriptive, causal, and material.[94] The real definition of essences obtained by simple apprehension is the critical step. It is primarily a process of working through the predicables; placing a thing in a genus, a species, and so on.[95]

This prompting of innate knowledge by simple apprehension and essential definition is, from a modern perspective, nothing more than intuition. The scholastic, however, purports to have solved the problem of true premises.

> [O]ne might say that Mr. Collins is a rational animal. That statement will always be true, for rational animal states the very essence of Mr.

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[87] SULLIVAN, *supra* note 12, at 19.

[88] *See id.* at 18.

[89] SPANGLER, *supra* note 85, at 15.

[90] *See id.* at 56 ("As the clarification of the initial concept obtained by the intellect, definition is not reasoned about; rather it is something accepted or admitted as the definer follows either of the above methods [of definition by division or composition].").

[91] For example, containers can be deep or not deep, open at the top or not open at the top, rounded or not rounded, so a bowl is a container. *See id.* at 53.

[92] For example, a bowl is rounded, open at the top, deep, and a container. *See id.*

[93] *See* SULLIVAN, *supra* note 12, at 52–53.

[94] *See id.* at 50.

[95] *See id.* at 53–56.

> Collins, while his coming and going are only accidental. Therefore, the only permanent knowledge one can have is that stating the essence or something inseparable from the essence. Hence it is critical that one understand which predicates state such essential knowledge and which do not. In other words, one must distinguish between predicates which are always true (genus, species, specific difference, property, and inseparable accident) and predicates which need not be true (separable accident).[96]

In the scholastic tradition, there is no empirical inquiry as we understand it: no hypothesis formulation or attempts to falsify hypotheses by testing and peer review. It is a vast system for the elaboration of intuitions.

Notice that to obtain knowledge by simple apprehension and real definition has a particular attraction for the religious believer. It can describe the immediate experience of the divine, spiritually inspired readings of sacred texts, or both; and from this alone, the scholastic scholar can build and defend a religious edifice of considerable strength. Vermeule does not offer a theory of ultimate ends in *Common Good Constitutionalism*, but his insistence on reason as the essence of law, and his continual assertions that liberalism, progressivism, and originalism are contrary to law's true nature are shot through with such a theory.

A classic statement of the scholastic case against liberalism gives one a sense of the underlying logic of Vermeule's constitutionalism. Vermeule is one of a number of Catholic intellectuals, known as "integralists," who reject the separation of church and state. Integralism is a revival of an older Catholic tradition.[97] Liberalism has been a target of the scholastics since well before Vermeule or the integralists appeared. In a perfect instance of scholastic reasoning, Louis Cardinal Billot made the case against liberalism in the 1920's.[98] It is a *tour de force* of deductions from simple apprehension and real definition.

> But no greater absurdity [than liberalism] is conceivable, once a personal God is recognized, the Creator of heaven and earth, who is above all things which are or can be imagined as distinct from him, and ineffably above them. For then, in that God, living and true, by inevitable necessity we must recognize the Supreme Lord and Law-

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[96] SPANGLER, *supra* note 85, at 48–49.

[97] *See* Gladden Pappin, *Contemporary Christian Criticism of Liberalism, in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 43, 56 (Andras Sajo, Renata Uitz & Stephen Holmes, eds., 2022) ("While the term has attached to a variety of political movements . . . in its classic sense it refers to an alliance or union between church and state of the sort the antiliberal Popes of the nineteenth century outlined.").

[98] *See generally* Louis Cardinal Billot, S.J., Liberalism: A Critique of its Basic Principles and Various Forms, *trans*. George Berry O'Toole (2019).

> giver of the universe, before whom man and society, and those who preside over society, must of necessity bow down. Then not the State, not public opinion, not the whims of progress, but the immutable principles of morality divinely imprinted upon our minds must be accepted as the supreme rule of human action in both the private and the public order. Then, finally, the highest human authorities will appear to have no right to govern other than a power which is subordinated to God's authority, so that it is only authorized to rule people in accordance with the will of God, to whom all human authority is subject.[99]

This all follows nicely "once a personal God is recognized," but Billot gives no one any particular reason to accept that premise.[100] The simple apprehension and real definition of God does not carry all before it.

In *Common Good Constitutionalism*, unlike Vermeule's non-academic writing, scholastic logic rarely rises to the surface, but it plainly appears in his argument against the Constitutional recognition of a right to same-sex marriage, in *Obergefell v. Hodges*.[101] The case against same sex marriage usually proceeds from definition, and Vermeule's argument is no exception. "Even the *Obergefell* majority acknowledged that in global and historical perspective, marriage has for millennia been defined as the union of male and female for the purpose of procreation."[102] This argument has always been puzzling to non-initiates because we think of definitions as nominal, as they appear in dictionaries. Dictionary definitions are descriptive, not normative; they change as usage changes. Some of us define marriage that way and some of us do not. A scholastic definition, however, is the real definition of an essence. Marriage, Vermeule writes,

> is a natural and moral and legal reality simultaneously, a form itself constituted by the natural law in general terms as the permanent union of man and woman under the general *telos* or indwelling aims of unity and procreation (whether or not the particular couple is contingently capable of procreating).[103]

The essences and accidents of scholastic logic also make an appearance. The three marriage cases decide before *Obergefell*, including *Loving v. Virginia,* were correctly decided, because "[i]n all three, the civil authority

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[99] *Id.* at ix.
[100] *Id.*
[101] *See* VERMEULE, *supra* note 1, at 131; *see also* Obergefell v. Hodges, 576 U.S. 644 (2015).
[102] VERMEULE, *supra* note 1, at 131.
[103] *Id*. at 131–132.

had confused the core and essence of the natural institution with its accidents, attempting to cripple or mutilate the institution by grafting onto it naturally irrelevant or arbitrary accidents – for example, by defining marriage not to include marriage between differing races."[104] In *Obergefell*, the Court failed to grasp that marriage has an essence. "The Court purported to discern, under new circumstances what justice had always required with respect to marriage, but in fact it warped the core nature of the institution by forcibly removing one of its built-in structural features."[105]

Scholastic logic permeates *Common Good Constitutionalism*, which is obvious if one pays attention to the terminology. Vermeule contrasts his theistic conception of the common good with libertarianism and utilitarianism with these words: "None of this gets at the truly common good of happiness in a flourishing political community, which is unitary, capable of being shared without being diminished, and the highest good for individuals as such."[106] The idea of the good as unitary, and as something that can be shared without being diminished, is a standard scholastic definition.[107]

Virtually everything Vermeule says about the rationality of law makes sense only on scholastic assumptions. When Vermeule writes that "governance and law are themselves suffused with . . . reason,"[108] he means that the dictates of law and governance are deduced from intuitions: premises obtained by means of the simple apprehension of the essence of law, the real definition of law, and knowledge of law that is immanent in the intellect. When he tells us that the purpose of common good constitutionalism "is to preserve the rational principles of the constitutional order,"[109] he has in mind only one kind of normativity and the rationality of only one being. When Vermeule writes that liberalism "uncouples law from reason," he means that liberals ignore what scholastic reasoning reveals.[110] When he writes that Holmes's *Lochner* dissent "lost sight of the rational ordering of the law to the natural moral ends of the community," he means that Holmes lost sight of a truth known by means other than the critical evaluation of natural observations.[111] When he writes that both progressivism and originalism "distort the true nature of law,"[112] he means it.

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[104] *Id*. at 132.
[105] *Id*.
[106] Casey & Vermeule, *supra note 7, at* 113–114.
[107] *See, e.g.,* Waldstein*, supra* note 30, at 23 ("A common good, on the other hand, is a good that is not diminished by being shared.").
[108] VERMEULE, *supra* note 1, at 71.
[109] *Id*. at 122.
[110] *Id.* at 117.
[111] *Id.* at 67.
[112] *Id*. at 1.

C. The Constitution of Providence

Vermeule argues that the Constitution is a teleological charter. In moral theory, teleology—the logic of purposes and objectives—describes the pursuit of the good. As Vermeule describes this end, "[T]he common good is well-ordered peace, justice, and abundance in the political community; the flourishing of the political community is also the greatest temporal good for the individual."[113] A teleological reading of the Constitution gives *determinatio* a central place in constitutional law as Vermeule understands it.

> We have here simply two [complementary] aspects of common good constitutionalism: giving the public authority sufficient scope to allow it to promote the common good, and judicial respect for the legitimate roles of other public bodies constituted by that authority, when those other actors are engaged in reasonable specifications of legal principles – what the classical tradition calls *determinationes* or determinations.[114]

Given that, for Vermeule, these *determinationes* are specifications of divine law,[115] his appeal to "the best interpretation of our constitutional practices,"[116] points to common good constitutionalism as a supernatural, scholastic, teleological regime.

Vermeule cites the Constitution's Preamble as support for this interpretation.[117] The ends cited in the Preamble, one might think, are instrumental and unremarkable. *Of course* the function of a constitution is to form a union, establish justice, ensure domestic peace, provide for the common defense, promote the general welfare, and secure liberty. Vermeule, however, places great weight on a pair of value-laden words—a "perfect" union and the "Blessings" of liberty—and construes the pursuit of "the general Welfare" as an ordinance of divine reason.[118] He concludes:

> The aim of recognizing liberty is not to maximize individual choice, subject to the like liberty of all, but instead teleological and ordered to the end of the good, in exactly the same way the classical tradition of

[113] *Id*. at 14.
[114] *Id*. at 43–44.
[115] *See* Vermeule, *supra* note 24. ("[W]hile the determinations of civil law are created by human will, they are specifications of the natural and divine law which have an objective, rational existence and integrity of their own . . . .").
[116] VERMEULE, *supra* note 1, at 43.
[117] *See id.* at 39 (noting that it is "[o]nly when we read the Preamble against the backdrop of the classical tradition," that we see the teleological nature of the Constitution as a whole).
[118] *See id.*

> *ragion di stato*, specifying the substantive aims and purposes of government, is teleological.[119]

Vermeule also notes the General Welfare Clause's reference to the "Power" of Congress, and inserts natural law and the process of *determinatio* into the open texture of "power" as a legal concept.[120] The reason we ought to insert natural law principles into the General Welfare Clause is that the Supreme Court erred in *United States v. Butler* when it read this clause as not establishing a general, unspecified power in Congress to provide for the common good.[121] "Despite the cramped reading unnecessarily given to the Clause in *Butler*, the spirit of the more expansive, classical reading of the Clause has certainly triumphed in other forms."[122] This triumph occurred under the Commerce Clause in *McColloch v. Maryland*, in its assertion that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[123]

The features of the Constitution that Vermeule invokes in support of his teleological reading of the Constitution, then, are few, tendentious, and unrepresentative. To make his argument go through in spite of this thin support, he invokes an unwritten Constitution. "America's real, 'efficient' Constitution," he writes, "is largely unwritten or uncodified, as is true of constitutions everywhere."[124] It is true that there are unwritten constitutions everywhere, but written constitutions that are "largely unwritten"[125] are very rare. This is a telling equivocation. Vermeule endorses Joseph de Maistre's belief that "constitutions are begotten, not made; grown, not engineered; so that there is in effect no such thing as written constitutionalism."[126] Does this "there is no such thing"[127] apply even where a written constitution has been enacted? "It's complicated," Vermeule says, but he manages to straddle his way to an answer.[128] "The U.S Framers and ratifiers, like other constitution-makers, were but agents of Providence, wittingly or unwittingly."[129] This sounds less like an unwritten constitution than an invisible constitution, but either way it is a fine opportunity to set up one's preferred constitution.

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[119] *Id.*

[120] *See id*. at 39–40; *see also* H.L.A. HART, THE CONCEPT OF LAW 127–128 (1961) (describing the "open texture" of legal rules as an unavoidable indeterminacy of language in law, in contrast to "subsumption and the drawing of a syllogistic conclusion . . .").

[121] *See* VERMEULE, *supra* note 1, at 40.

[122] *Id*.

[123] *Id*.

[124] *Id.* at 41.

[125] *Id.*

[126] Vermeule, *supra* note 19.

[127] *Id.*

[128] *See id.*

[129] *Id*.

Vermeule argues, in line with his earlier work, that the executive—the President and the administrative agencies—renders natural law useful by providing specifics; by *determinatio*.

> Perhaps agency rules and adjudications can also, sometimes, be seen as ways in which agencies themselves supply specifying content directly to the natural law, rather than through the medium of some earlier act of positive lawmaking. Agencies, that is, could be taken to have the authority to invoke general principles of the natural law as starting points for their own actions . . . .[130]

The question then becomes, who else is responsible for these *determinationes* of our unwritten constitution? Vermeule makes one thing clear: not the courts.[131] The classical tradition assigns determinations of the common good to the executive, and so long as these determinations are not irrational, deference by the courts is required.

> One of my particular claims is that our small-c constitutional order developed over time to extend this principle to the institutional presidency and administrative tribunals. Today our constitution supports the legitimacy of broad delegations to the executive, shaped and constrained by principles of legality that ensure that the executive acts rationally in ways ordered to the common good.[132]

This spells trouble for a rights-based rule of law, but Vermeule argues that rights are not essential to a rule of law regime. Rights exist only to the extent they conform to the common good because this is the only basis for them.[133] Rights and personal autonomy generally are exercised only in the limited space legislative bodies are willing to cede to them, in the legislative pursuit of the common good.[134]

The through-line in this scholastic style of constitutional interpretation—from a divine ordinance of reason for the common good, to the unwritten

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[130] VERMEULE, *supra* note 1, at 152.

[131] *See id*. at 12 ("It is not written in the nature of law that courts must decide all legal or constitutional questions.").

[132] *Id*. at 13.

[133] *See id*. at 128 ("[R]ights themselves are based on and justified by what is due to each as members of a political community, and are thus to be ordered to the common good."); *see also id.* at 24 ("On this account, rights exist to serve, and are delimited by, a conception of justice that is itself ordered to the common good.")

[134] *See id*. at 61–62 ("This body of law used the concept of the common law to define the 'police powers' of government, a term whose contemporary usage referred broadly to the power of government to 'enact and enforce public laws regulating or even destroying private right, interest, liberty, or property for the common good (i.e., for the public safety, comfort, welfare, or health).'").

Constitution of Providence, to the identification of the executive as the authority responsible for the common good, to the subordination of Congress and the judiciary, to subsidiarity, to dictates by an unbound executive——is *determinatio*. The whole scheme of constitutional *determinatio* is unsustainable, however, because *it* is a process of scholastic definition.

Determinatio is similar to specifications in modern law—but only similar, not the same. In a case of, say, Negligent Driving, the jury must specify what counts as unreasonable driving, in terms of a particular time, under particular conditions, and so on. There is a difference between this specification and *determinatio*, however. A jury does not begin with a definition of "negligence"—real or nominal—and then determine whether the facts of the case fall under that definition. Instead, it begins with the facts (a blizzard, dusk, one headlight) and specifies the substance of the prohibition on "negligent driving" in terms of those facts (driving in a blizzard at dusk with one headlight is negligent). It then renders a verdict based upon whether the driver was doing something that violated the specified prohibition (guilty of negligent driving if he was driving in a blizzard at dusk with one headlight).

In contrast, *determinatio* defines the ordinance of reason for the common good down to legal norms that fit within that definition. The *determinatio* of rights, for example, begins with the divine ordinance of reason for the common good and ends with "the right's proper ends and, therefore, its proper boundaries or limits,"[135] after being run through a division of predicables: something like divine norms *versus* human norms; then legal norms *versus* moral norms; then right *versus* no right; then rights that serve the common good *versus* rights that do not serve the common good. If a norm fits the definition, it is valid; if it does not fit, then it is not valid. If it is valid, it is applied to the facts. Thus, *determinatio* runs in the opposite direction from the specification of Negligent Driving. *Determinatio* is the specification of law, then a consideration of facts; instead of the consideration of facts, then a specification of law. We might say that in *determinatio*, the law engages with the facts, left to right, whereas, in the specification of norms in modern law, the facts engage with the law, right to left.[136]

The agnostic reader of *Common Good Constitutionalism* might be willing to accept a non-supernatural version of this scheme. It might seem that the "divine" part of a divine ordinance of reason for the common good can be dropped, resulting in a more plausible version of natural law

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[135] VERMEULE, *supra* note 1, at 167.

[136] Karl Popper drew the distinction between Aristotelian logic and the scientific method in these terms. Scholasticism proceeds from the definition of an essence (puppy), on the left, to an application of the definition to a thing on the right (a young dog). In the scientific method, the inquiry starts on the right (what about this dog?), and its results might be summed up, for convenience and practical purposes, in a definition, on the left (it's young and small, so, for now, let's call it a "puppy"). *See* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 230–231 (1945, 1994).

constitutionalism. The agnostic reader might assume, furthermore, that the legal norms—legislation, judicial decisions, and administrative regulations—that appear at the end of *determinatio* have their familiar empirical basis. They do not. They are no more empirical than is the divine ordinance of reason they specify. Instead of starting with facts, shaping the norm to address these facts, and then enforcing the resulting norm, Vermeule prescribes a system of trimming legal norms to fit a divinely tailored legal regime, then fitting the world to these tailored norms, whatever the worldly consequences might be.

The scholastic Constitution of Providence has a matching jurisprudence of scholastic definitions; a jurisprudence of bald assertion that is visible everywhere in *Common Good Constitutionalism*. Vermeule tells us that, "[T]he whole point of the classical view is that governance and law are themselves suffused with reason;"[137] that the Court has "confused the core and essence of the natural institution with its accidents, attempting to cripple or mutilate the institution by grafting onto it naturally irrelevant or arbitrary accidents,"[138] that the Court has "purported to discern, under new circumstances what justice had always required with respect to marriage, but in fact it warped the core nature of the institution by forcibly removing one of its built-in structural features,"[139] that liberalism "distorts the real nature of law;"[140] that the "principles of political morality are themselves already part of the law and internal to it;"[141] that law includes a "natural procedural justice;"[142] that judicial review "is not written in the nature of law;"[143] that to conceptualize law instrumentally "warp[s] its true nature;"[144] that law has an "objective natural morality;"[145] and that a natural law reading of the Constitution squares it with "the objective order of justice."[146] This scholastic jurisprudence uses its peculiar conceptions of nature, reason, and objectivity to define theistic constitutional norms.

The consequences of importing the theistic epistemology and metaphysics of the thirteenth century into contemporary law and government are predictably catastrophic.

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[137] VERMEULE, *supra* note 1, at 71.
[138] *Id.* at 132.
[139] *Id.*
[140] *Id.* at 117.
[141] *Id.* at 19.
[142] *Id.* at 138.
[143] *Id.* at 12.
[144] *Id.* at 120.
[145] *Id.* at 8.
[146] *Id.* at 59.

D. Scholastic Illiberalism

Vermeule established his illiberal *bona fides* many years ago. In *The Executive Unbound*, he argued that government power ought to be concentrated in the executive and exercised with minimal interference from the other branches.[147] In *Law's Abnegation*, he made a similar case for the administrative state that is part of the executive, arguing that the judiciary has found itself marginalized in an era of executive dominance.[148] *Common Good Constitutionalism* merely completes the picture.[149] The other branches should defer to the executive because it is better suited to the task of *determinatio*: specifying natural law conceived of as a divine ordinance of reason.

The executive's power to ensure that law serves the common good is potentially unlimited.

> In the best constructive justification of these arrangements, our executive centered government acts through principles of administrative law's inner morality, with a view to promoting solidarity and subsidiarity. The bureaucracy will be seen not as an enemy, but as the strong hand of legitimate rule.[150]

Subsidiarity—a prominent feature of Catholic social thought[151]—confers "affirmative powers on the highest governing authority and yet also imposes positive duties to come to the aid of – provide *subsidium* to – institutions, societies, and corporations that are failing to carry out their work in an overall scheme that serves the common good."[152] The only question is whether and how much of this power will be used.

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[147] *See* POSNER & VERMEULE, *supra* note 25, at 5 ("We do claim that politics and public opinion at least block the most lurid forms of executive abuse, that courts and Congress can do no better, that liberal legalism goes wrong by assuming that a legally unconstrained executive is unconstrained overall, and that in any event there is no pragmatically feasible alternative to executive government under current conditions.").

[148] *See* ADRIAN VERMEULE, LAW'S ABNEGATION 7 (2016) ("By and large courts have become marginal actors highly deferential to the administrative state, with occasional exceptions that are more salient than consequential.").

[149] *See* VERMEULE, *supra* note 1, at 42. ("As for the structure and distribution of authority within government, as I have argued elsewhere, our own constitutional order has developed to center on a powerful presidency, reigning and in part ruling over a powerful bureaucracy with quasi-independent elements.").

[150] *Id.* at 42.

[151] *See id.* at 7 (citing JOHN PAUL II, ENCYCLICAL LETTER CENTESIMUS ANNUS: ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM (1991); PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CATHOLIC CHURCH (2004)).

[152] *Id.* at 155.

> [T]he giant's full strength is released in a state of exception – when under unusual circumstances, the malfunctioning of subsidiary institutions means that the common good requires extraordinary intervention by the highest level of public authority in the juridical order, for the purpose of helping those subsidiary institutions function correctly in an overall scheme that conduces to the common good.[153]

This intervention can entail the "highest level of public authority"[154]—for Vermeule, the executive—acting as a dictator. Vermeule quotes Johannes Messner on subsidiarity, the common good, and this authority:

> Where the will to moral responsibility in a society shrinks, the range of validity of the subsidiarity principle contracts and the common good function [of the state] expands to the extent that the moral will to responsibility in society fails. In such cases, even dictatorship may be compatible with the principle of subsidiarity.[155]

Translating the operations of subsidiarity to the American legal system, the institutions subordinate to the dictatorial executive include not only Congress and the judiciary, but also state and local governments, private corporations, labor unions, and other social institutions.[156] Vermeule assures us that Messner is referring to "the carefully cabined Roman model of dictatorship – a fundamentally legal and constitutional authority, limited by term, granted for a certain purpose, and authorized by the Senate."[157] As explained below, however, most theocracies have legal and constitutional authorities instead of direct rule by religious authorities. In any case, no one with more than a passing familiarity with Julius Caesar's career will be reassured by the strict legal definition of a Roman dictatorship.

Under the principle of subsidiarity, the executive "will be seen not as an enemy, but as the strong hand of legitimate rule."[158] The main aim of common good constitutionalism is certainly "not [to] maximiz[e] individual autonomy or [to] minimiz[e] the abuse of power . . . [but i]nstead to ensure that the ruler has the [power needed] to rule well. A corollary is that to act

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[153] *Id.* at 154–155.

[154] *Id.*

[155] VERMEULE, *supra* note 1, at 157 (quoting MESSNER, *supra* note 32, at 214).

[156] *See* VERMEULE, *supra* note 1, at 157 (quoting MESSNER, *supra* note 32, at 215 ("[T]he more strongly the character of society develops in its federative and corporative branches, both regional and occupational, in conjunction with a plurality of free associations based on economic group interests, the more clearly does the common good principle call for a state with strong authority which will enable it, in a pluralistic society with diversified competencies and interests, to carry out its essential functions, namely to care for the common good and the general interest."))

[157] VERMEULE, *supra* note 1, at 158.

[158] *Id.* at 42.

outside or against the inherent norms of good rule is to act tyrannically."[159] The corollary is not reassuring, given that "the inherent norms of good rule" are determinations of a divine ordinance of reason.[160] An ungodly government is a tyranny.

In another non-academic piece, Vermeule completes the thought:

> [C]ommon good constitutionalism does not suffer from a horror of political domination and hierarchy, because it sees that law is parental, a wise teacher and an inculcator of good habits. Just authority in rulers can be exercised for the good of subjects, if necessary even against the subjects' own perceptions of what is best for them - perceptions that may change over time anyway, as the law teaches, habituates, and re-forms them. Subjects will come to thank the ruler whose legal strictures, possibly first experienced as coercive, encourage subjects to form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being.[161]

Part of Vermeule's confidence in this re-education project is his conviction that "[m]an is a sacramental animal who cannot deny his own nature."[162] This being the case, "[t]he populace craves the return of the 'strong gods' . . . and summons them," in the process of rejecting liberalism.[163]

Vermeule calls the regime of *determinatio* and subsidiarity "developing constitutionalism."[164] He describes developing constitutionalism as the natural law counterpart of the living constitutionalism of the current liberal imperium.[165] In fact, it is much more than this. Living constitutionalism is a theory of interpretation. Developing constitutionalism is a theory of the state. Democracy—not merely the meaning of the Constitution—is subject to the demands of law as a divine ordinance of reason in *determinatio*.

> On the classical view, a range of regime-types can be ordered to the common good, or not. If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any

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[159] *Id.* at 37.
[160] *Id.*
[161] Vermeule, *supra* note 14.
[162] Vermeule, *supra* note 56.
[163] Vermeule*, supra* note 38.
[164] VERMEULE, *supra* note 1, at 118 ("Developing 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 with their true natures and to retain those natures in new environments.").
[165] *See id.* ("Progressive constitutionalism, by contrast, treats legal principles as themselves changing over time in the service of an extrinsic agenda of radical liberation.").

> particular set of institutional forms. Democracy – in the modern sense of mass electoral democracy – has no special privilege in this regard.[166]

On this account, acceptable forms of government include monarchy and aristocracy, but Vermeule does at least seem to prefer an unelected legislature to these options.[167]

The legal regime that Vermeule actually finds most congenial to developing constitutionalism is, of course, administrative law, which he calls "the living voice of our law."[168] He argues that administrative regulations are, potentially, *determinationes* of a divine ordinance of reason to the common good. Referring to the Administrative Procedure Act, Vermeule writes: "Our great charter of administrative procedure is full of generally stated principles whose interpretation inherently requires judgments of political morality . . . and whose application is situational."[169] A few pages later, he adds, with some disingenuous hedging, that, "Perhaps agency rules and adjudications can also, sometimes, be seen as ways in which agencies themselves supply specifying content directly to the natural law, rather than through the medium of some earlier act of positive lawmaking."[170]

The most troubling implications of developing constitutionalism, however, are found at the boundary of regime design and constitutional interpretation, where rights lie. According to Vermeule:

> Rights, properly understood, are always ordered to the common good and that common good is itself the highest individual interest. The issue is not balancing or override by extrinsic considerations, but internal specification and determination of the right's proper ends and, therefore, its proper boundaries or limits. Deference to the political authority within reasonable limits – the "margin of appreciation" of human rights law – is built into this conception from the start, rather than tacked on as a controversial addition.[171]

With its references to *determinatio* and "proper ends," this conception of rights is boilerplate scholasticism. In that tradition, the good of the individual

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[166] *Id.* at 47.

[167] *See id.* at 48 ("Polities without mass electoral democracy use small-d democratic elements of representation and consultation – what one might call *democracy without voting* – to obtain information about popular preferences and to generate solidarity.").

[168] *See id.* at 138 ("Agencies are the living voice of our law.").

[169] *Id.* at 146.

[170] *Id.* at 152.

[171] *Id.* at 167.

is unfailingly incorporated into the common good.[172] Edmund Waldstein, a prominent integralist, puts it this way:

> [A] true common good is good for each of the persons who partake of it – a good to which they are ordered. This cannot be emphasized enough: the common good is a personal good. The subordination of persons to this good is thus not enslaving. They are not being ordered to someone else's good (the good of "the nation" or "humanity" considered abstractly): rather they are ordered to their own good, but this is a good that they can only have together in a community. The common good is a universal cause in the order of final causality. And the fact that it extends its causality to more effects than a private good shows how much better it is.[173]

Rights, on this conception, are *determinationes* of the common good.[174] The common good, of course, is a divine ordinance of reason. Rights, like the Constitution, owe their existence and legitimacy—and their scope—to God.[175]

To take stock, developing constitutionalism is a theory of government (not merely constitutional interpretation), that does not necessarily favor democracy. Rights are a function of, and limited to the service of, the common good. People do not hold rights, and this is for their own good. Courts are not competent to make determinations about such rights and are generally marginalized in favor of granting primary responsibility for government to the executive. The executive stands in a relationship with other social institutions, public and private, of subsidiarity—meaning that it has a responsibility to ensure that these institutions are oriented toward the common good.[176] Should this fail, a dictatorship might be required to put society back on track toward the common good. Add to all of this that the arguments for each feature are formulated in scholastic terms from the thirteenth century, cutting off common good constitutionalism from modern metaphysics, epistemology, and scientific inquiry.

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[172] *See id.* at 165 ("Even where rights may be held and asserted by individuals, such rights may be justified in strictly individualist terms or instead in terms of the common good, which is also the good of individuals, their highest good.").

[173] Waldstein, *supra* note 30, at 23.

[174] *See* VERMEULE, *supra* note 1, at 127 ("Those determinations legitimately aim to order rights to the common good, setting the boundaries of rights and adjusting apparent conflicts among rights to that end.").

[175] *See id.* ("Adjusting [rights] in light of the common good is to unfold their true nature and to identify their scope and limits, not to compromise or overpower them.").

[176] *See id.* at 37 ("Constitutional law should also elaborate subsidiary principles that help public authorities direct persons, associations, and society generally toward the common good.").

If developing constitutionalism is this radical, one must wonder how bad things must be, in Vermeule's eyes, to justify it.

E. Satan's Black Mass

Vermeule describes himself as a "political Catholic," which is to say he is a Catholic integralist.[177] Adherents to the radical Catholic doctrine of Integralism believe that their church should have dominion over secular governments. Integralism "in its classic sense refers to an alliance or union between church and state of the sort the antiliberal Popes of the nineteenth century outlined."[178] Contemporary Integralism, however, is different from that of the nineteenth century in that it asserts the supremacy of the Church.

> Catholic Integralism is a tradition of thought that, rejecting the liberal separation of politics from concern with the end of human life, holds that political rule must order man to his final goal. Since, however, man has both a temporal and an eternal end, integralism holds that there are two powers that rule him: a temporal power and a spiritual power. And since man's temporal end is subordinated to his eternal end, the temporal power must be subordinated to the spiritual power.[179]

This supremacism seems to be a product of two fundamental beliefs. First, the integralist is convinced that liberalism is engaged in an aggressive, relentless attack aimed specifically at Christianity.[180] Second, the integralist believes that liberalism is a quasi-religious doctrine, so that liberalism and Christianity are on the same footing philosophically—that is, liberalism is concerned with the ends of humanity and has its own forms of worship—though they are directly opposed in substance.[181] The contemporary integralist is committed to the supremacy of the Church because he sees a supernatural sovereign engaged in a life or death struggle with a pretender.

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[177] Adrian Vermeule, *Liberalism's Good and Faithful Servants*, COMPACT (Feb. 28, 2023), https://compactmag.com/article/liberalism-s-good-and-faithful-servants [https://perma.cc/EE8A-62BV] ("The only intellectual movement on the American scene that is genuinely political, is so-called integralism or, as I think a more accurate term, political Catholicism.").

[178] Pappin, *supra* note 100, at 56.

[179] INTEGRALISM AND THE COMMON GOOD: SELECTED ESSAYS FROM THE JOSIAS, VOLUME 1: FAMILY, CITY, AND STATE 1, 3 (P. Edmund Waldstein, O.Cist. & Peter A. Kwasniewski eds., 2021). *See also* Edmund Waldstein, O.Cist., *Integralism in Three Sentences*, THE JOSIAS (Oct. 17, 2016), https://thejosias.com/2016/10/17/integralism-in-three-sentences/ [https://perma.cc/NX6S-JX2S].

[180] *See* Pappin, *supra* note 97, at 57 ("As liberal states become more aggressive in their secularism and cultural progressivism the number of Christian intellectuals seeking alternatives to liberalism is growing.").

[181] *See id.* ("As liberalism has begun to take on religious characteristics in the view of many conservatives, interest in the political character of the Church has also increased.").

Vermeule dismisses the tame quietism of corporate-funded conservatism, preferring Integralism because it is "genuinely critical of the endless revolution of liberalism, genuinely interested not merely in slowing its progress but in defeating it, undoing it, curing its ills, and then transcending it to rebuild a civilization."[182]

> What is at stake is no less than authority, the full authority of a reasoned political order, composed of both temporal and spiritual powers in right relation to the natural and divine law, that would put a mere Rome to shame. That limitless ambition is why liberalism finds a genuinely political Catholicism intolerable; why the liberal order will accept only a version of Catholicism that submits to be ruled . . . .[183]

Vermeule embraces this no-quarter Armageddon. He insists that Integralism's challenge to liberalism "doesn't mean 'overthrowing the government,' . . . nor does it mean 'betraying the Constitution," . . . nor does it mean 'theocracy,'"[184] but he describes the aims of political Catholicism in terms that are difficult to reconcile with these disclaimers.

> The political Catholic wants to order the nation and its state to the natural and divine law, the tranquility of order, precisely because doing so is the best way to protect and shelter the localities in which genuinely human community imbued with grace, can flourish. Conversely, those localities are to be protected as the best way to generate well-formed persons, who can rightly order the nation and the world towards truth, beauty, and goodness, rooted in the divine.[185]

To this end, he quotes Saint Paul from his First Epistle to the Corinthians. "'To the Jews I became like a Jew, to win the Jews . . . . To the weak I became weak, to win over the weak. I have become all things to all men, to save at least some. All this I do for the sake of the gospel.'"[186] Vermeule recommends this approach to engagement with secular politics.

> This radical flexibility as to means . . . is hard counsel; it means that ultimate allegiances to political parties, to the nation, even to the Constitution, may all have to go if conditions warrant it. It is not that the strategic Christian may not respect, support, and participate in

[182] Vermeule, *supra* note 177.
[183] *Id. See also* Vermeule, *supra* note 34 ("The ultimate goal is the same as it ever was: to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth.").
[184] Vermeule*, supra* note 177.
[185] *Id.*
[186] 1 *Corinthians* 9:20–23.

> upholding such things – that is of course often sensible, indeed mandatory (as St. Peter instructs us), when and so long as there is no conflict with the Church's teaching and mission. Alliances of common goals, as opposed to allegiances, are useful and appropriate, depending upon local conditions. But politically speaking there can be no "progressive Christians" or "Republican Christians" or even "American Christians."[187]

Is this alarming? Perhaps not. It might be nothing worse than the bland affirmation of a Christian politician that he is "a Christian, a conservative and a Republican, in that order."[188] This seems a fair reading, given that Vermeule's illustration of the point is that the Christian can support providing food, health care, and child welfare through the state, but at some point might have to pursue these ends through volunteer organizations.[189] He also writes that "[f]rom the Church's standpoint, many (although not all) political forms lie within the space of the *determinatio*—certainly a far broader range than liberalism permits."[190]

The difficulty with a benign interpretation of Vermeule's political Catholicism is that it runs up against his not-so-benign fury toward liberalism. In *Common Good Constitutionalism* and elsewhere, Vermeule describes liberalism with astonishing asperity. In a non-academic piece, he writes that:

> [L]iberal intolerance represents not the self-undermining of liberalism, but a fulfillment of its essential nature. When a chrysalis shelters an insect that later bursts forth from it and leaves it shattered, the chrysalis has in fact fulfilled its true and predetermined end. Liberalism of the purportedly tolerant sort is to militant progressivism as the chrysalis is to the hideous insect.[191]

In this metaphor, liberalism is the chrysalis and progressivism the insect, but the point of the metaphor is one that he makes repeatedly: there is no difference between the two.[192] Liberalism is hideous. It is a parasite: "The fear at the base of liberalism is that it will be left alone and visibly alone,

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[187] Vermeule, *supra* note 34.

[188] Michelle Boorstein, *What it means that Mike Pence called himself an 'evangelical Catholic'*, THE WASHINGTON POST (July 18, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/07/15/what-it-means-that-mike-pence-called-himself-an-evangelical-catholic/ (last visited Oct 13, 2024).

[189] *See* Vermeule, *supra* note 34.

[190] *Id.*

[191] *Id.*

[192] *See id.* ("Late stage liberalism, which calls itself 'progressive,' embodies a distinctive secularized soteriology and eschatology.").

expelled from the host within which it has fed and sheltered for so long."[193] *Casey*'s recognition of the right to "define one's own concept of existence, of meaning, of the universe, and the mystery of human life"[194] should be seen as "abominable, beyond the realm of the acceptable forever after."[195] Liberals themselves exhibit an "insufferable cultural smugness, born of conviction of their own merit."[196] This is nothing, however, in light of liberalism's true nature. "Liberalism's greatest enmity, it seems, is ultimately reserved for the Blessed Virgin—and thus Genesis 3:15 and Revelation 12:1–9, which describe the Virgin's implacable enemy, give us the best clue as to liberalism's true identity."[197] Liberalism is Satan.

Most of this waspish language describes liberalism as Christianity's evil doppelganger. "Progressive liberalism has its own cruel sacraments—especially the shaming and, where, possible, legal punishment of the intolerant or illiberal—and its own liturgy, the Festival of Reason, the ever-repeated overcoming of the darkness of reaction."[198] Liberalism has a "sacramental narrative, the relentless expansion of individualistic autonomy."[199] In particular, abortion is one of its "holiest sacraments."[200] The Obama administration attempted to "force the Little Sisters of the Poor to . . . fund abortifacient contraceptives," the objective being a "ceremonial," and "sacramental celebration" of "progress and of the overcoming of reactionary opposition."[201] Liberty is an "object of quasi-religious devotion."[202] Liberalism has a "liturgy" consisting of "the repetitive impulse of liberal political theology to celebrate a sacramental moment of overcoming of [sic] the unreason and darkness of the traditional past."[203] Vermeule's continual imposition of religious terminology on liberalism gives it the aspect of a Black Mass.[204]

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[193] Adrian Vermeule, *Liberalism's Fear*, *in* INTEGRALISM AND THE COMMON GOOD: SELECTED ESSAYS FROM THE JOSIAS, VOLUME 1: FAMILY, CITY, AND STATE 306, 309 (P. Edmund Waldstein, O.Cist. & Peter A. Kwasniewski, eds., 2021).

[194] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[195] VERMEULE, *supra* note 1, at 42.

[196] Adrian Vermeule, *According to Truth*, *in* INTEGRALISM AND THE COMMON GOOD: SELECTED ESSAYS FROM THE JOSIAS, VOLUME 1: FAMILY, CITY, AND STATE 310, 312 (P. Edmund Waldstein, O.Cist. & Peter A. Kwasniewski, eds., 2021).

[197] Vermeule, *supra* note 34.

[198] *Id.*

[199] VERMEULE, *supra* note 1, at 36.

[200] *Id.* at 122.

[201] *Id.* at 119–120.

[202] *Id.* at 37.

[203] *Id*. at 119.

[204] A Black Mass is "a blasphemous and usually obscene burlesque of the true mass performed by satanic cults." ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/black-mass-satanic-rite [https://perma.cc/47HW-LCGD].

F. The Executive Theocrat Unbound

Is Vermeule advocating a theocracy? He tells us that he is: "The political Catholic wants to order the nation and its state to the natural and divine law . . . ."[205] Regardless of his suppressions and evasions in *Common Good Constitutionalism,* it is clear in his non-academic corpus that the common good is the good of a Christian church. He avoids saying so, but the "ordinance of reason for the common good" at the base of his argument is a divine ordinance. In his "classical legal tradition," laws "are specifications of the natural and divine law . . . ."[206] The United States Constitution is "an instrument of the Divine Hand, which invisibly designs constitutions through the cross-cutting plans and political blunders of the unwitting agents of Providence."[207] All forms of government are permissible, provided they concur with "the gospel teaching and sacramental practice of the magisterium, which perpetuates itself by apostolic succession."[208] The church is "authentically and autonomously political, precisely because it is rooted in the transcendent."[209] Vermeule never loses sight of his church's political eschatology. "What is at stake is no less than authority, the full authority of a reasoned political order, composed of both temporal and spiritual powers in right relation to the natural and divine law that would put a mere Rome to shame."[210]

Vermeule does not argue for the principal features of a theocracy: the adoption of a state religion; a ban on laws that contradict the injunctions of a religion; or the establishment of religious tribunals. Most importantly, he does not advocate direct rule by a prophet or religious authorities acting without legal restraints. In short, he does not propose a totalitarian theocracy. The problem is that many modern theocracies are not totalitarian. They are constitutional theocracies. These states have at least some of the following features: the political leadership and religious authorities are formally separate; power resides in the political leadership; the political leadership is subject to the constitution, but not to religious authorities; the constitution is one of separated powers; there is a constitutional court that actively carries out judicial review; religious tribunals operate in tandem with a civil court system; an apex constitutional court has jurisdiction over some religious tribunals; and there are legal protections for religious minorities.[211] It is

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[205] Vermeule, *supra* note 177.
[206] Vermeule, *supra* note 24.
[207] Vermeule, *supra* note 19.
[208] *Id.*
[209] *Id.*
[210] Vermeule, *supra* note 177.
[211] *See* Ran Herschl, *Theocracy, in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 152, 155 (Andras Sajo, Renata Uitz & Stephen Holmes, eds., 2022) (describing constitutional theocracies).

tempting to dismiss constitutional theocracy as a sham, like a shell corporation through which the Imam or Bishop works undetected. It is at least as likely, however, that states with official religions that impose religious constraints on governance are nevertheless states with organized governments, government officials with defined responsibilities, and functioning bureaucracies.

To combine the theses of *Common Good Constitutionalism* with Vermeule's other recent academic work produces the outlines of a constitutional theocracy. The most overtly theocratic feature of Vermeule's common good constitutionalism is, of course, subsidiarity. Should the subordinate institutions of government, public or private, fail to secure the common good, then the principle of subsidiarity empowers a single, preeminent authority to step in and set things right.[212] This political authority might have to assume the powers of a dictator.[213]

Vermeule seems to believe that this possibility is regrettable, but acceptable—not in theory, but in fact. In *The Executive Unbound*, Vermeule and co-author Eric Posner argue that "legal liberalism" has failed.[214] From the early twentieth century on, the powers and responsibilities of the executive have expanded while those of Congress and the judiciary have contracted. One driver of this evolution is the national emergencies that the non-executive branches cannot adequately respond to.[215] For example, the Supreme Court was in no position to deal with the immediate consequences of the 9/11 attacks, but even when these consequences entered their domain, and even when they were assertive with respect to the other branches, the Court's rulings had little impact.[216] The Court held that the government had violated the Suspension Clause when it denied habeas corpus to Guantanamo Bay detainees.[217] The impact of the decision was minimal, however, given the unwillingness of the Court to directly order release of suspected terrorists.[218] Fewer than four-percent of subsequent detainee releases were due to judicial orders.[219] The rest were released when the circumstances aligned with the interests of the President.[220]

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[212] *See* VERMEULE, *supra* note 1, at 154–155.
[213] *See id*., at 157.
[214] *See* POSNER & VERMEULE, *supra* note 25, at 7.
[215] *Id.*
[216] *See id.* at 35–37.
[217] *See id.* at 36.
[218] *Id.*
[219] *Id.* (citing Aziz Huq, *What Good is Habeas?*, 26 Const. Comm. 385 (2010); Benjamin Wittes & Zaahira Wyne, *The Current Detainee Population of Guantanamo: An Empirical Study* (2008), https://www.brookings.edu/articles/the-current-detainee-population-of-guantanamo-an-empirical-study/ [https://perma.cc/BBB5-UCU9].).
[220] *See id.* at 37.

In short, the principle of subsidiarity kicked in. When the judiciary was unable to advance the common good, even within its own sphere of authority, the highest political authority—the executive—stepped in to set things right. This radical power imbalance between the Court and the President is troubling from a liberal legalism point of view, but it is not undemocratic. The *de facto* power of the executive traces directly to the popular will—as evinced in the political timing of detainee releases. The problem is that the non-executive branches of the United States government can be progressively hollowed out by perceived exigencies and executive action, leaving them in a condition not unlike the sham legal institutions of constitutional theocracies.[221]

The history of legal abortion from *Roe v. Wade* to *Dobbs v. Jackson Women's Health Organization* can be seen in this light.[222] When *Roe* found a right to abortion in the Constitution, the backlash was fierce, sustained, and based almost entirely on religion.[223] From the point of view of many Christians and other people of faith, *Roe* was a grave violation of the divine ordinance of reason for the common good.[224]

For nearly five decades, all efforts to overturn *Roe* were turned away by the Court. In the eyes of the faithful, the judiciary was unable to secure the common good. In the end, only the executive could set things right. *Roe* was overturned only because a President who did not win the popular vote had campaigned on a promise to overturn it.[225] With the help of a Senate majority that bent its own legislative norms to this president's advantage (even before he was elected), he was able to appoint three justices to the Court.[226] In the

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[221] *See id.* at 89 (quoting WAYNE S. COLE, ROOSEVELT & THE ISOLATIONISTS 1932-1945 397 (1987)) (explaining that laws imposing minimal constraints on executive action "thus present 'the façade or form of the rule of law rather than any substantive protections'").

[222] *See generally* Roe v. Wade, 410 U.S. 113 (1973); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[223] *See* Alex Schulman, *Kulturkampf and Spite: The Rehnquist Court and American "Theoconservatism"*, 22 LAW & LITERATURE 48, 48 (2010) ("But as angry as parties across the political spectrum have periodically become about Supreme Court jurisprudence, nothing compares to the anger of the Christian Right, an anger, which—especially, but not exclusively, after the failure to overturn *Roe v. Wade*—has frequently flirted with the advocacy of anti-judge violence or open resistance to the government.").

[224] *See* Trent Horn, *Catholics Can't Be Pro-choice,* CATHOLIC ANSWERS, (May 23, 2022), https://www.catholic.com/magazine/online-edition/why-catholics-cant-be-pro-choice [https://perma.cc/JT92-R89B] (explaining that any right of an individual to define when life begins undermines the common good).

[225] *See* Timothy Noah, *Women Wouldn't Lose Their Right to Choose If We Elected Presidents by Popular Vote*, THE NEW REPUBLIC (May 4, 2022), https://newrepublic.com/article/166296/blame-electoral-college-roe-wade-overturned [perma.cc/7KPY-DH4B] ("Four of the five justices who are prepared to overturn *Roe* were installed by popular vote-losing presidents.").

[226] *See,* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and shaping the Court,* NEW YORK TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html (last visited Oct. 26, 2024) (stating that in confirming Amy Coney-Barrett's appointment, Republican senators "shredded their own past pronouncements and bypassed rules in the process. . .").

end, it was the executive, with a prostrate Senate, who stepped in to restore the common good by packing the Court.[227] The principle of subsidiarity had operated slowly, but successfully.[228] In *Dobbs*, then, we can see a constitutional theocracy in action, or at least a clear and presently dangerous precursor. The laws of a liberal democracy were observed, but this was done disingenuously, in the service of theistic ends.[229] The fact that the process is so easily described in scholastic terms of a divine ordinance for the common good and subsidiarity only darkens the picture, because Scholasticism is inherently religious. We might be tempted to call the legal institutions of constitutional theocracies mere shams, but on the evidence of *Dobbs* the same might be said of the United States—if not today, then in a frightening future.

II. CONCLUSION

Vermeule's complaint that his critics have missed his point is a remarkable one. Most of them have been engaged with his constitutional and administrative law scholarship for years, and they reasonably read *Common Good Constitutionalism* as a new round in their debates. There is plenty of straight constitutional analysis in the book. Why, then, would he try to redirect their attention? Why would he point them to his natural law jurisprudence, and then, of all things, to its theology? This is especially odd given that he actively suppresses this dimension in the book itself. He avoids saying that the ordinance of reason to the common good is a divine ordinance—as Aquinas clearly took it to be—and also offers a careful disclaimer of any theistic agenda.

One obvious possibility is that this legal theology is what matters most to him. The furious anger toward liberalism that is so evident in his non-academic writings is relatively muted in the book (stressing "relatively"), and

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[227] *See* Jonathan Capehart*, Want to Know All About Court-Packing? Ask Mitch McConnell*, THE WASHINGTON POST (Oct. 13, 2020), https://www.washingtonpost.com/opinions/2020/10/13/want-know-all-about-court-packing-ask-mitch-mcconnell/ (last visited Oct. 26, 2024) (describing the Senate Majority Leader's refusal to advance the nomination of Merrick Garland to the seat of the late Antonin Scalia nine months before the election of 2016, and his subsequent push to confirm Amy Coney Barrett's nomination 30 days before the 2020 election).

[228] *See* VERMEULE, *supra* note 1, at 156 ("The idea is to restore a previously functioning normative order of subsidiarity, in which subsidiary jurisdictions and corporations are aided so that they might function as they normatively should and normally do.").

[229] The use of existing liberal-democratic institutions to privilege and incorporate religion in government is a common practice in illiberal regimes. *See, e.g.,* Jennifer L. McCoy & Murat Somer, *Political Parties, Elections, and Pernicious Polarization in the Rise of Illiberal* Regimes, *in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 486, 495 (Andras Sajo, Renata Uitz & Stephen Holmes, eds., 2022) (describing the party of Viktor Orban in Hungary using existing legal and constitutional structures to entrench its government); *see also,*Gabor Halmai, *Illiberalism in Central Europe, in* ROUTLEDGE HANDBOOK OF ILLIBERALISM 813, 817–818 (Andras Sajo, Renata Uitz & Stephen Holmes, eds., 2022) (noting the entrenchment of religion in the constitution and laws of Hungary by the Orban regime).

his Scholasticism rises above the surface only once, in his discussion of *Obergefell*. As for the importance of illiberalism and Scholasticism to the rest of the book, they are obvious only once one knows what to listen for. Perhaps Vermeule felt he had been too restrained. If he had a change of heart, we can only be grateful. Vermeule's illiberalism is well-known, but it is a strange variety of illiberalism. Catholic Integralism (or, as Vermeule prefers, political Catholicism) is inextricably bound up in an indefensible medieval philosophy. Why on earth, at this point in human history, should we rely on intuition for truth? Whether Vermeule's constitutional Scholasticism is morally indefensible remains to be seen, but if it is meant to give intellectual cover to theocracy, then it is that too.