A CRITIQUE OF ADRIAN VERMEULE'S *COMMON GOOD CONSTITUTIONALISM*

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Debates about the proper method of interpreting the Constitution are heated in today's polarized political and legal environment. Adrian Vermeule's *Common Good Constitutionalism*[1] contributes to this debate and, due to his prominence as a scholar, is likely to be a highly influential work. Vermeule argues for a method of interpreting and applying the Constitution (and of law-making in general) that he calls "common good constitutionalism." Common good constitutionalism is a natural rights theory which ties law to "general principles of jurisprudence and legal justice"[2] that transcend and undergird positive law, "principles of political morality that are themselves part of the law,"[3] and "general law common to all civilized legal systems."[4] These principles emanate from the classical law that stretches as far back at the Justinian Codes, and that in Vermeule's view have guided the development of the law (at least in the West) throughout its history.

In assessing a particular work, it is often helpful to situate it within the author's overall body of work. Vermeule, a devout Catholic, has made that easy for us in a non-academic piece entitled "A Christian Strategy."[5] In his view, "hostility to the Church was encoded within liberalism from its birth." The believer's response to the liberal onslaught must therefore be a "radical form of strategic flexibility" that entails a willingness "to enter into . . . alliances of convenience with any of the parties, institutions, and groups that jostle under the canopy of the liberal imperium" and to "emphasize, truthfully, one or another of his multiple political loyalties and identities as relevant and helpful to the audience and the occasion"—the "ultimate long-run goal" being "to bear witness to the Lord and to expand his one, holy, Catholic and apostolic Church to the ends of the earth."

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

[2] *Id*. at 4.

[3] *Id*. at 6.

[4] *Id*. at 8.

[5] Adrian Vermeule, *A Christian Strategy*, FIRST THINGS (Nov. 2017), https://www.firstthings.com/article/2017/11/a-christian-strategy.

From this vantage point, one take on *Common Good Constitutionalism*, while written as a traditional academic work and not directly supportive of religion, is that it aims to promote a version of natural law impacted by and supportive of orthodox Catholic ideology. Nonetheless, since the book is likely to influence the scholarly debate over the proper interpretation of the Constitution, it seems worthwhile to assess the strength of its argument as the traditional constitutional scholarship it purports to be—while bearing in mind its relationship to the ultimate goal.[6]

In *Common Good Constitutionalism* Vermeule argues against the currently dominant interpretive methodologies that he calls "originalism" and "progressive constitutionalism." Originalism, which is associated with modern-day conservatism and currently holds sway on the Supreme Court, posits that the Constitution should be interpreted in accordance with the intent of the framers, determined by the meaning that the words in the document had at that time or by how the framers would have applied the contested provision in their time. Progressive constitutionalism, which is associated with modern-day progressivism and influenced many of the Court's progressive decisions in the mid-twentieth century, is a living law approach which posits, because the precise intent of the framers is often unascertainable and because the framers could not possibly have anticipated the myriad of circumstances in which the Constitution would be called into play in the future, that the meaning and application of the Constitution's provisions must be allowed to evolve over time so as to remain relevant as guiding principles.

For Vermeule, anything worthy of being called law "is necessarily founded on some substantive conception of morality."[7] What particularly troubles Vermeule is that the conservative originalist and progressive living law approaches "deny the existence of the natural law,"[8] which is based on the common good of the community as a whole; and that the conception of morality underlying them is overly individualistic—with the originalist

[6] While some elements of Catholic dogma conflict with progressive ideals, in particular its opposition to a woman's right to choose to have an abortion and to same-sex marriage, there are progressive aspects of Catholic dogma, such as its current opposition to capital punishment and its critiques of the excesses of capitalism. Stephen Schneck, *What does the church teach about the death penalty*?, U.S. CATH. (Apr. 29, 2021), https://uscatholic.org/articles/202104/what-does-the-church-teach-about-the-death-penalty; Jonathan Warren, *Capitalism and Catholicism*, SCHOLASTIC (Oct. 9, 2014), https://scholastic.nd.edu/issues/capitalism-and-catholicism.. One should expect to find commonalities in the principles underpinning religious and secular moral philosophies. For example, something akin to the Golden Rule's precept to do unto others as you would have them do unto you can be found in most every religion, and the Golden Rule closely resembles Kant's moral imperative not to treat others solely as means to an end but as ends in themselves.

[7] VERMEULE, *supra* note 1, at 37.

[8] *Id*. at 4.

approach having a libertarian agenda that emphasizes the protection of property rights and opposes the modern welfare state (or as I would put it promotes the interests of the oligarchy); and with the living law approach having a liberationist agenda which promotes "the endless advance of human liberation"[9] and aims to free individuals from "the reactionary past"[10] and "the unchosen bonds of tradition, family, religion, economic circumstances, and even biology,"[11] and which Vermeule views as a "wildly implausible"[12] account of human flourishing. Rather, human flourishing from a common good perspective, while incorporating individual interests and well-being, is "the flourishing of a well-ordered political community"[13] as a whole. And the common good is "unitary and indivisible, and not an aggregation of individual utilities,"[14] and it represents "the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community."[15]

But what, more specifically, does the concept of the common good mean; and how, so defined, does it contribute to the law-making process; and why, so defined, should we adopt it as our lodestar? Vermeule finds the meaning of the common good in "the precepts of legal justice in the classical law," which he identifies as "to live honorably, to harm no one, and to give each one what is due to him (sic) in justice," so as to promote "*peace, justice, and abundance . . . health, safety and common security . . .* [and] *solidarity and subsidiarity*."[16] These precepts are to guide the process of making, interpreting and applying positive law of all types (constitutions, legislation, administrative, as well as the common law), and to guide the design of the institutional structure for engaging in that process. This raises the question of whether the classical precepts are so general and abstract that in practice it would be possible to justify most any positive law. Assuming, as Vermeule believes and as I agree, that abstract principles can and do provide some guidance, the reasons he advances for following the classical law precepts are that they are "enduring, objective principles of just governance,"[17] fixed and unchanging, as shown by their persistence over such a long period of time and (as I think Vermeule implies) by their self-evident truth.

There is much to Vermeule's theory that has appeal to progressives such as us. However, I take issue with his characterization of modern

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[9] *Id*. at 18.
[10] *Id*. at 117.
[11] *Id*. at 22.
[12] *Id*. at 23.
[13] *Id*. at 7.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 7.
[17] *Id*. at 118.

progressivism; and I think that some of the conclusions he reaches in applying classical law precepts to particular issues are either wrong, or if correct call into question the precepts' worthiness and self-evident truth.

First, I think it hard to quarrel with the profundity of the classical law precepts Vermeule identifies, just as it is hard to quarrel with precepts such as the Golden Rule, Kant's moral imperatives, and the Declaration of Independence's maxim that all people are created equal. The devil is in the details of interpreting and applying the precepts in practice.

Second, I think that Vermeule's critique of originalism, which is a major tool of the conservative effort to undermine progressivism, is devastating—much like the Critical Legal Studies movement exposed in the late 1900s the defects of the economic analysis of the law.[18] Originalism is an illusion because, in interpreting the meaning or intended meaning of any legal text judges must recur "to general background principles of law [that cannot be fully found within the text] and to the natural law;"[19] and because, at the high level of generality advocated by some self-proclaimed originalists, originalism becomes "practically indistinguishable from the progressive constitutionalism that originalism was created and designed to oppose."[20]

Third, I think that Vermeule's assertion that our law and culture have become overly individualistic has much merit, although I don't think it fair to say this is as true of the progressive movement as he asserts. Yes, progressives emphasize individual rights, and rightly so because individual rights have been neglected for much of history (including the classical era from which Vermeule derives his common good constitutionalism) and because there is much unfinished work to be done in liberating individuals and disfavored groups from exploitation and oppression. But progressives are also at the forefront of the battle against the oligarchs who dominate this society and who have promoted, in order to line their pockets, an ethos of rampant consumerism and self-gratification that threatens to destroy humanity through armed conflict and environmental catastrophe. We progressives recognize that a stable and flourishing society and world-order requires people to live honorably, meaning that we are to concern ourselves with everyone's well-being and not just our own. We recognize that abundance doesn't mean an endless supply of material things no matter how they are distributed, but a sustainable system that provides collective as well as individual goods, non-commodifiable as well as commodifiable goods, and that meets spiritual as well as material needs. And we recognize that a

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[18] *See* Duncan Kennedy, *Law-and-Economics from the Perspective of Critical Legal Studies,* 2 NEW PALGRAVE DICTIONARY ECON. & L. 1123-1132 (Peter Newman ed., 2002).

[19] VERMEULE, *supra* note 1, at 111.

[20] *Id*. at 99.

more egalitarian social order, where the goods of social life are fairly shared (which is akin to the classical precept of according each their due), is necessary for society to thrive and avoid conflict, even if that means less overall wealth and limits on what people are allowed to accumulate.[21] And so, we believe that the living law approach that progressives advocate is closer to the mark of what a just and good society entails than the originalist approach, which tends to support the interests of the well-to-do over those of the many and a return to the unjust hierarchies of the past.

Fourth, while Vermeule sees a legitimate role for the judiciary in making, interpreting and applying the law, he thinks that the judiciary currently plays an outsized role and that it should defer more to other public bodies and officials (legislatures, executives, administrative agencies) that are directly or more closely accountable to the electorate. The main role of the judiciary under common good constitutionalism is to police these other entities under a highly deferential standard of review, overturning their decisions only when they are arbitrary and not supported by "prudential judgment,"[22] a requirement that "public authorities act rationally and with a view to legitimate public purposes;"[23] or when their decisions serve illegitimate ends, consist of "intrinsic evils"[24] that no government has the right to impose, or reach absurd results that no reasonable lawmaker could be thought to have intended.

Progressives supported Supreme Court decisions advancing civil rights during the latter half of the 1900s. What we have learned since then is that we cannot rely on the Court for the protection of rights over the long run, that the same Court that upheld a woman's right to choose can undo that right and even (watch out for it) hold state laws permitting abortion invalid for violating the fetus' fundamental right to life,[25] and that it is debatable whether overall the Court has advanced more the rights of the disempowered or those

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[21] *See, e.g.*, DONELLA H. MEADOWS, JORGEN RANDERS & DENNIS L. MEADOWS, LIMITS TO GROWTH: THE 30-YEAR UPDATE (2004); JEFFREY D. SACHS, THE AGE OF SUSTAINABLE DEVELOPMENT (2015).

[22] VERMEULE, *supra* note 1, at 9.

[23] *Id*. at 15.

[24] *Id*. at 127.

[25] This is Vermeule's view. *Id.* at 199 n.103; *see also* Melissa Quinn, *Supreme Court declines to take up fetal personhood dispute*, CBS NEWS (Oct. 11, 2022, 7:52 AM), https://news.yahoo.com/supreme-court-declines-fetal-personhood-145214171.html?fr=sycsrp_catchall; Julie Rovner, *How an Abortion Fight in Supreme Court Could Threaten Birth Control, Too*, NPR (Nov. 3, 2020, 5:00 AM), https://www.npr.org/sections/health-shots/2020/11/03/930533103/how-an-abortion-fight-in-supreme-court-could-threaten-birth-control-too.

of the powerful.[26] We should expect the oligarchs to be able to dominate the judiciary through their ability to dominate the political process generally. We should expect that, ultimately, the protection of the rights of the less powerful demands a political movement that wrests power away from the oligarchs.

Fifth, when it is possible to pass progressive laws, Vermeule's common good approach and deferential standard of review could be helpful, if the Supreme Court could be convinced to adopt it, in upholding laws of the type that the Court has heretofore blocked and that living law progressivism supports. To illustrate, I'll discuss a few cases dealing with free speech, federalism, and administrative law.

One way of combatting the disproportionate political power of moneyed interests, given that money facilitates speech and enhances the voice of those with money, is to equalize the ability of those with less money to speak, either by limiting the expenditures of moneyed interests or subsidizing the speech of the less powerful. Both of those moves have been blocked by the Supreme Court on free speech grounds. In *Citizens United v. Federal Election Commission*,[27] the Court struck down, as a violation of corporations' free speech rights, a federal statute limiting how much money corporations could spend in support of or opposition to candidates in federal elections in the weeks preceding an election. And in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[28] the Court struck down an Arizona public financing statute that increased the funding of publicly financed candidates to match the funds raised by or spent on their privately financed opponents, on the ground that the statute unduly impinged on the free speech rights of privately funded candidates and their supporters in that fund matching might discourage them from raising and spending money to speak. Underlying both decisions is the Court's refusal to accept, as a legitimate rationale for the statutes, the equalization of political power (or what it has called the "leveling of the playing field"[29]). The basis of the decisions was not that the statutes were irrational in that there was a lack of evidence that money buys disproportionate influence, of which there is ample empirical evidence,[30] but (at least implicitly) that protecting the individual right of free speech is a more important value than the collective interest in equalizing political

[26] *See. e.g.*, JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022); Thomas Kleven, *Separate and Unequal: The Institutional Racism of the Supreme Court*, 12.2 ALA. C.R. & C.L. L. REV. 276 (2021).

[27] Citizens United v. Fed. Election Commission, 558 U.S. 310 (2010).

[28] Airzona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

[29] *Id*. at 749.

[30] *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: INEQUALITY AND POLITICAL POWER IN AMERICA (2012).

power. This is the very kind of policy judgment that Vermeule would leave to the rational judgment of the legislature, balancing competing interests (fostering free speech and equalizing political power) that both derive from the classical law's precepts of legal justice.

As regards states' rights, in *Shelby County v. Holder,*[31] the Court struck down, as "a drastic departure from basic principles of federalism,"[32] the preclearance provision of the Voting Rights Act, which requires states with a history of voting discrimination on account of race or membership in a language minority group to obtain clearance from the Attorney General or a federal court for any changes in their voting practices. The purpose of the preclearance requirement was to place the burden on states to show, before implementing changes, that they would not abridge the right to vote of racial and ethnic minorities in violation of the Fifteenth Amendment. The rationale for the decision was that, while the criteria for determining the states whose past discriminatory practices warranted preclearance were valid when the Voting Rights Act was initially adopted, the criteria had not been updated to confine the preclearance requirement to states still practicing discrimination; coupled with the fact that there was insufficient evidence that voting discrimination was significantly more severe in covered jurisdictions than elsewhere to warrant singling them out for preclearance, that the discriminatory voting practices in place at the time of the Act's adoption (such as literacy tests and good moral character requirements) had long since been abolished, that minority registration and turnout in covered jurisdictions now compares favorably to non-covered jurisdictions as against the gross disparities that existed when the Act was adopted, and that substantial numbers of minorities are now being elected in covered jurisdictions. Yet, in so ruling, the Court failed to address or rebut the voluminous evidentiary record that supported the Court of Appeals' finding of substantially more severe and on-going discrimination in covered jurisdictions;[33] and the Court rejected Congress' rationales for retaining the preclearance criteria that the gains that have been achieved are due to the Act, and that the preclearance requirement is still needed to prevent retrogression in states with a history of discrimination through the adoption of newer discriminatory devices (such as racially motivated gerrymandering and at-large elections). Again, the Court is treating one constitutional value, states' rights, as a higher priority than another, the right to vote. And again this is the very kind of policy judgment to which the classical law's precepts of legal justice do not provide a definitive answer and which, absent a finding of irrationality or

[31] Shelby County v. Holder, 570 U.S. 529 (2013).
[32] *Id*. At 535.
[33] Shelby County v. Holder, 679 F.3rd 848, 865-71 (D.C. Cir.212).

arbitrariness that the record in *Shelby County* in no way supports, Vermeule would therefore leave to Congress.

One more states' rights case is *National Federation of Independent Business v. Sebelius*,[34] in which the Court struck down the Affordable Care Act's attempt to induce states to expand their Medicaid programs to include beneficiaries with incomes somewhat above the poverty line by withholding the existing Medicaid funding of states who declined. The impact of the ruling is to require the federal government to take over the declining states' Medicaid programs in order to expand their coverage. While the federal government is certainly free to attach strings to money it provides states who choose to implement federal programs, the Court's rationale was that states' reliance on existing Medicaid funding effectively compelled them to participate in its expansion. Even if so, and even if there should be some limits on the federal government's authority to mandate states to do things, *National Federation* elevates states' rights to a higher constitutional status than the federal government's authority to promote the general welfare. In light of the fact that millions of people would and did lose access to health care if states could opt out of Medicaid expansion,[35] and of the arguable merits of continued state participation in implementing Medicaid as against a federal take-over, the balance that Congress struck between states' rights and people's health needs was surely not arbitrary or irrational. So, again, Vermeule's common good constitutionalism would defer to Congress' determination.

Finally, as regards administrative law, in *West Virginia v. Environmental Protection Agency*,[36] the Court pronounced the major questions doctrine and struck down an EPA regulation designed to induce power plants to convert in producing electricity from coal to alternative energy sources such as natural gas, wind, and solar energy as a means of combatting global warming. The Court's rationale was that administrative agencies may not regulate with respect to questions of such magnitude without a clear delegation from Congress, which the Court found lacking in the Clean Air Act. The likely impact of the decision is to severely undermine the ability of Congress to delegate authority to administrative agencies to address matters it deems in need of regulation in furtherance of the general welfare. Vermeule himself

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[34] Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[35] As of 2021, an estimated 3.5 million adults are uninsured due to the opt-out in the ten remaining states who have yet to adopt the Affordable Care Act's Medicaid expansion. Patrick Drake et al, *How Many Uninsured Are in the Coverage Gap and How Many Could be Eligible if All States Adopted the Medicaid Expansion*, KFF (Feb. 26, 2024), https://www.kff.org/medicaid/issue-brief/how-many-uninsured-are-in-the-coverage-gap-and-how-many-could-be-eligible-if-all-states-adopted-the-medicaid-expansion.

[36] West Virginia v. EPA, 142 S.Ct. 2587 (2022).

has roundly criticized the major questions doctrine and the improper delegation doctrine from which it derives.[37] And he vigorously supports the role of administrative agencies as comporting with common good constitutionalism: "[T[he administrative state is today the main locus and vehicle for the provision of the goods of peace, justice, and abundance central to the classical theory. . . [B]road deference to administrative determinations is itself a juridical principle, rooted in political morality, that can serve the common good."[38]

Sixth, like the living law approach, Vermeule's common good constitutionalism allows for positive law, including constitutions, to evolve over time as conditions change and unforeseen circumstances arise—a process he calls "developing constitutionalism."[39] He adamantly denies, though, that developing constitutionalism is a form of or akin to living law's progressive constitutionalism. Developing constitutionalism starts with the classical law precepts, "enduring, objective principles of just governance [that] inform positive law, the law of nations, and the natural law alike,"[40] principles that "remain constant over time"[41] and "do not themselves evolve."[42] These principles guide the positive law and allow its evolution over time so as to enable the principles "to unfold in accordance with their true natures"[43] and "to preserve the rational principles of the constitutional order as the circumstances of the political, social, and economic environment change."[44] Progressive constitutionalism, on the other hand, "treats legal principles themselves as changing over time in the service of an extrinsic agenda of radical liberation."[45]

Again, Vermeule grossly mischaracterizes the progressivist living-law approach. As I have shown above, the progressive agenda is not one of radical liberation over and above or at the cost of all other values. Of course, progressivism aims to liberate people from the enormous oppression that still exists in the world. But collective values and the public good are central to the progressive agenda as well, and progressives recognize the necessity of balancing individual and collective interests, as well as the debatability of the

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[37] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that "a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power"); *see also* Adrian Vermeule, *There is no conservative political movement*, WASH. POST (July 6, 2022) (arguing that the major questions doctrine is not grounded in any "maxim or principle of our law").

[38] VERMEULE, *supra* note 1, at 135, 138

[39] *Id*. at 121.

[40] *Id*. at 118.

[41] *Id*. at 121.

[42] *Id*. at 118.

[43] *Id*.

[44] *Id*. at 122.

[45] *Id*. at 118.

proper balance and that the chosen balance may differ among societies and over time and still be consistent with progressive ideals.[46] Nor do progressives deny the importance of tradition to a flourishing society. But we do distinguish between good and bad traditions, between traditions that advance and those that undermine progressive values, between traditions that should be maintained and those that should be discarded.

Vermeule infers that, unlike common good constitutionalism, progressive living law has no abstract core values to which positive law must conform, which enable positive law to evolve over time, and which are (given our deconstructionist bent) at least relatively enduring. But that criticism, too, is wrong. Progressive living law is committed to core values—such as that all people are created equal, or that the benefits and detriments of social life should be fairly shared among everyone,[47] or that people have a duty to contribute to society in accordance with their abilities and are entitled to receive from society in accordance with their needs. These precepts are arguably grounded in versions of natural law and implicit even in Vermeule's classical law precepts.

To show that and how common good constitutionalism differs from progressive living law, Vermeule singles out for criticism, as an example of progressive overreach, *Obergefell v. Hodges*,[48] which invalidated state laws prohibiting same-sex marriage as violating people's constitutionally protected liberty to choose whom to marry. Here, I think, is where we see the influence (in my view the distorting influence) of conservative aspects of Catholic dogma on Vermeule's jurisprudence. Vermeule contends that *Obergefell* represents nothing more than an effort to disrupt "traditions and views that have constituted the very foundations of our law;"[49] and that it constitutes a "radical and public dismissal of a legal restriction that prevailed in Western law for millennia," namely that "marriage has for millennia been defined as the union of male and female for the purpose of procreation."[50] Thus, he asserts, the Court "tacked on arbitrary and artificial criteria that were

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[46] *See, e.g.,* Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020); Lucy A. Jewel, *The Biology of Inequality*, 95 DENV. L. REV. 609 (2018); Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for 'We the People*' 35 YALE L. & POL. REV. 271 (2016); Athena D. Mutua, *ClassCrits Time? Building Institutions, Building Frameworks*, 1 J. LAW & POLIT. ECON. 333 (2021); MICHAEL J. SANDEL, THE TYRANNY OF MERIT: CAN WE FIND THE COMMON GOOD? (2020); Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609 (2013).

[47] *See* THOMAS KLEVEN, EQUITABLE SHARING, DISTRIBUTING THE BENEFITS AND DETRIMENTS OF DEMOCRATIC SOCIETY (2013).

[48] Obergefell v. Hodges, 576 U.S. 644 (2015).

[49] VERMEULE, *supra* note 1, at 119.

[50] *Id*. at 131.

extrinsic to marriage properly understood, and were thus unreasonable in just the way the classical law condemns."[51]

Even if Vermeule's reading of the classical law's view of marriage is accurate, this doesn't necessarily mean that the view is consistent with the classical law's moral precepts. The main argument advanced for laws prohibiting same-sex marriage and homosexual sex is that to allow those practices would somehow undermine traditional marriage and thereby damage children. But there is little to no empirical evidence to support that proposition, and in fact the evidence is to the contrary—as with studies showing that heterosexual marriage is still by far the dominant practice, that children raised in same-sex families fare as well as children raised in opposite sex families, and that children raised in two-parent families fare better than those raised in single parent families.[52] This raises the question of whether the state should be able to ban same-sex marriage and homosexual sex solely on the basis of tradition and the majority's disapproval of those practices. If so, then why shouldn't the majority be allowed to ban women from receiving a formal education or from working outside the home or even from voting, so as to promote the long-standing patriarchal tradition in the West of the woman as childrearer and the man as breadwinner and of the man as the head of the family and of society as a whole. But, as noted above, some long-standing traditions are inherently reprehensible and consequently inconsistent with classical law precepts, such as giving to each their due. Surely, it could strongly be argued that patriarchy fits into that inherently reprehensible category and is one of the intrinsic evils that Vermeule says no government has the right to impose.

Vermeule wanders even further from the classical law precepts he advocates in inferring in a footnote that states (and presumably the country as a whole) should not have the right to legalize same-sex marriage, meaning that the Supreme Court should strike down laws permitting same sex marriage as unconstitutional.[53] To do so under Vermeule's deferential approach to judicial review, the Court would have to find that it is irrational for the people's representatives or the people themselves to believe that allowing same-sex marriage would promote the common good and even that

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[51] *Id*. at 132. If so, this implies that Lawrence v. Texas, 539 U.S. 558 (2003), which invalidated sodomy laws criminalizing consensual sexual relations among same-sex adults as violating a constitutional right of privacy, was wrongly decided as well, and that legislatures should be free to ban homosexual sex even if behind closed doors and to imprison those who engage in such acts.

[52] *See* Jimi Adams & Ryan Light, *Scientific consensus, the law, and same sex parenting outcomes*, 53 SOC. SCI. RSCH. 300, 300-10 (2015); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 3-22 (2010); Yun Zhang, *Family outcome disparities between sexual minority and heterosexual families: a systemic review and meta-analysis*, 8 BMJ GLOB. HEALTH (2023), https://gh.bmj.com/content/8/3/e010556.

[53] Vermeule, supra note 1, at 218-19 n.346.

same-sex marriage is one of the intrinsic evils that government may not allow. Surely, this is incorrect. To so rule would make the exclusivity of heterosexual marriage a tradition that is written in stone and may not be allowed to change, even if the people reject that tradition and come to view marriage as having purposes beyond procreation that serve the common good, and even if there is empirical evidence that allowing same-sex marriage contributes to a more flourishing society—the very goal of the classical law's precepts.

So, if Vermeule has gotten it wrong simply because he has misinterpreted the classical law precepts he supports, then what we have is a disagreement over the proper application of those precepts, the type of disagreement that always arises in interpreting and applying abstract first principles. If so, he should acknowledge, which he doesn't, that the proper application of the classical law precepts is contestable and that there is a viable argument supportive of same-sex marriage within the classical law approach but with which he just disagrees. And he should acknowledge as well that there are alternative versions of natural law whose precepts support same-sex marriage as a fundamental right.

If the result in *Obergefell* could obtain under the classical law approach he supports, then Vermeule has not shown a fundamental difference between it and progressivism's living law approach. But if he is correct that *Obergefell* is inconsistent with the classical law approach and that the classical law approach may not even permit the legalization of same-sex marriage, then progressives have much to fear from Vermeule's common good constitutionalism despite its potential for helping to advance progressive values in some instances, and we should reject it as inconsistent with the more progressive natural law precepts we favor.