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A House Built on Sand: Common Good Constitutionalism's Foundational Flaws

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by

Rio Albert Garvin

Northwest University – College of Business

Professor Joseph McQueen, Ph.D., Thesis Advisor

Dr. William Thompson, Honors Program Director

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Multitudes disappointed with the fruits of American Liberalism have begun scouring for alternatives. Abundantly shallow materialism and its removal of the sacred from the public life has sparked the imagination of some to wonder “can we do better than this?” Some have found their solace in redistributive systems offering an escape from dehumanizing commodification, while others have found their champions in strongmen who offer security and a façade of religion in exchange for virtue. A few, however, find the alternative through the injection of spiritual concepts into the systems of American governance. Some, such as Professor Adrian Vermeule of Harvard Law School, have proposed an alternative to the current judicial philosophies permeating the appellate courts of America. In what follows, I will retrace the roots of Vermeule’s grievances against the status quo; unfolding the internal conflict within his position. He denies the basis of the modern liberal order but which nonetheless accepts many of Liberalism’s assumptions. To probe the contradictions of Vermeule’s position, I draw on the work of other post-liberal thinkers who explore the anti-common good nature of the modern nation-state and the theology underpinning liberal theories. These other post-liberal voices, in turn, allow me to explore how Vermeule unwittingly places his postliberal vision into the hands of a liberal system intolerant of Vermeule’s ideas and how his theological foundations are unable to support his judicial theory.

Sensing a deficiency in modernity’s understanding of law and justice, Vermeule introduces Common Good Constitutionalism.<sup>1</sup> Common Good Constitutionalism is the conceptualization of just law as being explicitly ordered toward the common good and the denial

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1. Adrian Vermeule, *Common good constitutionalism: Recovering the classical legal tradition* (Polity, 2022).

of law as an arbitrary imposition of an authority's will.<sup>2</sup> The common good is defined by Vermeule as "the flourishing of a well-ordered political community," which for him is explicitly non-utilitarian and is connected to goods including peace, justice, and abundance.<sup>3</sup> Vermeule sees Common Good Constitutionalism as a return to the historic understanding of the US Constitution, "somewhere along the way we have rejected our own magnificent legal heritage – partly without understanding that we were doing so, in an ill-considered fit of rebellion."<sup>4</sup> William Baude and Stephen E Sachs in their Harvard Law Review report on Vermeule's establishing book on his project, *Common Good Constitutionalism*, remarks on the lacking evidence that Vermeule provides in proving the founders as extenders of the classical tradition. They argue that the lack of agreement between the framers of the US Constitution and modern positivists, those who believe laws come from the will of lawgivers, does not automatically align the framers with classical ancients like Vermeule seems to assume.<sup>5</sup> Vermeule mentions how Liberals will view Common Good Constitutionalism as "a shorthand for the preferences of those in power" and worry it will lead to the abuse of power. While he gives some responses, he does not address the underlying assumptive gulf between his vision of polity and status quo Liberalism.<sup>6</sup> These foundational theoretics are the reason why Liberals and Vermeule view Common Good Constitutionalism in contradictory and irreconcilable ways. All-important elemental understandings of humanity and the underlying theological differences are not

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2. Ibid., 13

3. Ibid., 18

4. Ibid., 298

5. William Baude and Stephen E. Sachs, "Book Review, the "Common-Good" Manifesto," *Harvard Law Review* 136, no. 3 (2023): 891, accessed April 3, 2023, <https://harvardlawreview.org/2023/01/the-common-good-manifesto/>

6. Vermeule, *Common Good*, 25-27

uncovered; there lies Vermeule's misstep. Scholars ideologically aligned with Vermeule's ideals and background profoundly dissent from Vermeule's narrative of a nation wandering away from its founding. Though Vermeule's reimagining of the liberal legal system firmly places him among postliberal scholars, the division between Vermeule and other postliberals occur where they each identify the divergence of the US legal system and the classical law of Aquinas.<sup>7</sup> While Vermeule identifies the successors to the US's legal foundation to be its corruptors, his peers suggest a more pernicious villain: the liberal foundation itself.<sup>8</sup>

Post-liberals take issue with Liberalism's conception of liberty. First, Liberalism characteristically defines liberty as: "being able to do what one pleases." Second, Liberalism holds liberty as a good in and of itself.<sup>9</sup> To preserve this freedom, the liberal ideology emphasizes rights, both positive and negative, to best facilitate individual liberty.<sup>10</sup> Patrick Deneen has acted as the harbinger of the modern post-liberal movement with his identification of liberal ills coming from the very Enlightenment fathers from whose minds Liberalism came, John Locke and Thomas Hobbes. Deneen argues, in concert with others, such as Andrew Willard Jones and William Cavanaugh, that Locke's and Hobbes's anthropologies of intrinsic violence and denial of natural society is the basis of Liberalism as we know it today.<sup>11</sup> Jones digs deeper and finds the roots of the liberal project in paganism and Augustine's articulation of the City of

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7. Ibid., 891

8. Patrick Deneen, *Why Liberalism Failed* (New Haven and London: Yale University Press, 2018).

9. Ibid., 49

10. Ibid., 1

11. Ibid., 31, 165

Man.<sup>12</sup> Augustine characterizes the City of Man as being directly opposed to what he calls the “City of God.” Both Liberalism and the City of Man, seek peace through violence, seek to centralize power and authority, and seek to subjugate or delete all intermediary institutions between the State and the increasingly atomized individual.<sup>13</sup>

This City of Man is now easily found in the modern American State, the very State within which Vermeule seeks to install his postliberal project. The status of democracy within the US and its disintegration is attributed by Deneen to the liberal anthropology of man as inherently antisocial.<sup>14</sup> There is no complex obligation between each person guided by faith in Liberalism. Instead, the State arbitrates between individuals and their “freedoms,” suffocating any hope of actual virtue through self-governance. It is this virtue and self-governance that Vermeule and his post-liberal peers see as an end unto itself.<sup>15</sup> For Liberalism, there is no “Common Good.” There are only the rights and freedoms carved out by the State’s coercive force.<sup>16</sup> Vermeule regrets the idolization of liberty and the State’s centralization, but nevertheless affirms the legitimacy of the authoritarian nature of the liberal State—an authoritarianism that provokes suspicion from other post-liberals, such as Cavanaugh. Vermeule, however, maintains, “The possibility that power will be exercised or not exercised unwisely is undeniable...Power must lie somewhere...thus [the possibility of the abuse of power] cannot be invoked to bar, to

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12. Andrew Willard Jones, *The Two Cities* (Steubenville, Ohio: Emmaus Road Publishing, 2021), 16.

13. William T. Cavanaugh, *Migrations of the Holy* (Grand Rapids, Michigan and Cambridge, U.K.: William B. Eerdmans Publishing Company, 2011), 27

14. Deneen, *Why Liberalism*, 154

15. *Ibid.*, 94

16. Cavanaugh, *Two Cities*, 74

license, or to mandate any action or inaction of the State in particular.”<sup>17</sup> The nation-state as it exists in modernity is by definition antithetical to Vermeule’s conception of the common good, it cannot bear the fruits of his project.

Common Good Constitutionalism has been dissected and criticized by scholars as an unwarranted legal theory, an ineffective political tool, and an idea with potentially horrific implications.<sup>18</sup> Common Good Constitutionalism, however, also has roots in theological ideas that need more scrutiny. Perhaps surprisingly, these theological roots actually cause Vermeule to accept many of Liberalism’s founding assumptions—assumptions that finally create contradictions in Vermeule’s project. Vermeule assumes a separation between the material and spiritual, a reading of Thomas Aquinas that Vermeule’s post-liberal peers vehemently object to as “two-tier Thomism.”<sup>19</sup> Jones indicts this two-tiered understanding as concomitant with the Enlightenment’s jettisoning of the supernatural from politics.<sup>20</sup> For Jones, this move is a reversion to paganism, which sees the power of the sword to be the only real power and which rejects the power of divine Grace and Charity to be efficacious in the world.<sup>21</sup>

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17. Adrian Vermeule, “Skepticism and the State,” *Postliberal Order*, December 21, 2022, <https://postliberalorder.substack.com/p/skepticism-and-the-state>

18. Garrett Epps, “Common-Good Constitutionalism Is an Idea as Dangerous as They Come,” *The Atlantic*, April 3, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/>; Baude, Sachs, *Book Review*

19. David Bentley Hart, “Nature Loves to Hide,” *First Things*, May 2013, <https://www.firstthings.com/article/2013/05/nature-loves-to-hide>

20. Jones, *Two Cities*, 15

21. *Ibid.*, 167

For post-liberal scholars, two-tier Thomism cannot support a framework that sufficiently challenges Liberalism. In fact, in the post-liberal framework, two-tier Thomism's presuppositions acted as the theological rails to Liberalistic ideology. Liberalism's pursuit of "value-neutrality" arises from an assumption of a constant state of violence between men and a belief that "supernatural laws" have no place in the material, "natural" world.<sup>22</sup> While the Christian Bible may instruct to "love your neighbor as yourself," this instruction has no place in human government.<sup>23</sup> This contention is rejected by post-liberals like Jones who deny that humans are unable to rise above their most destructive proclivities.<sup>24</sup> For Jones, the issue does not lie within changing any Constitution, but by embracing a theology-informed anthropology which believes that developing a virtuous polity is possible.<sup>25</sup>

For Cavanaugh, the status quo is not a self-enclosed "pure nature" that is only subjected to "natural laws" and not "supernatural laws." While the theology of Liberalism waits for divine intervention for the status quo to change, post-Liberalism argues the intervention has already happened; polity does not have to accept the violent status quo but can transcend it. The City of God is not fulfilled through a final destruction of the City of Man. The City of God is already on earth and is brought to its fullness through drawing the City of Man into itself.<sup>26</sup> These two cities are not two separate cities with disparate realities at all for Cavanaugh, but one city over which the City of God's victory is assured. By Vermeule's explicit articulation of the State as wielding

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22. Jones, *Two Cities*, 200; Cavanaugh, *Migrations*, 62, 65

23. Mark 12:31 (ESV)

24. Cavanaugh, *Migrations*, 25; Jones, *Two Cities*, 145

25. Andrew Willard Jones, "The End of Sovereignty: An Essay in Christian Postliberalism," *Communio* 40, no. 3-4 (2018): 446, Fall-Winter 2018

26. Cavanaugh, *Migrations*, 49

legitimate authority and his separation of “natural” happiness and “supernatural” felicity, he accepts a Thomism that would sunder the natural and the supernatural and lend a kind of autonomy to the natural—in this case, the secular State—that Jones and Cavanaugh would want to question.<sup>27</sup>

My critique of the Common Good Constitutionalism project is found through viewing the project through the lens of post-liberal theory. The critique has two fronts. First, Common Good Constitutionalism does nothing to fundamentally shift foundations of the modern liberal State with its anti-common good functions. The Lockean system of legal adversity and registry remains preserved in Common Good Constitutionalism, directly working against the post-liberal goals of Vermeule. Even if legislators and judges come to understand that law has its *telos* in the common good—as Vermeule would advocate—the legal structure’s system of stripping away real relationships and replacing them with de facto legal proxies is one that is inherently liberalistic.<sup>28</sup> Because Common Good Constitutionalism does not dissolve this liberal legal construction, the world under Vermeule’s project would deteriorate back to Liberalism. Second, Liberalism was the American legal tradition the moment natural reason and supernatural reason were conceptually separated.<sup>29</sup> What Vermeule views as a malignant tumor on the US legal foundation is in fact the natural and logical growth of two-tier Thomism that lies at the foundation of both the American tradition and Vermeule’s project. Two-tier Thomism sees a natural world that is self-contained in which supernatural influence is foreign. Therefore, it is

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27. Vermeule, *Common Good*, 60

28. Jones, *Two Cities*, 411, 415

29. Russell Hittinger, “Two Thomisms, two Modernities,” *First Things*, June 1, 2008, <https://www.firstthings.com/article/2008/06/two-thomisms-two-modernities>.; Hart, *Nature Loves*



likely to value a system of value-neutrality in its governments because there is little justification for supernatural values to interfere with the natural, material progression of government. Only through rejecting two-tier Thomist theology can Common Good Constitutionalism incorporate its supernatural values into government. Vermeule's assumed theology does not have the teeth to argue for a universally discernable "natural law." Therefore, failing to acknowledge the overlapping of the natural and supernatural means that morality must be an external bestowing from an otherworldly being that only individual faith can discern. If a polity is full of individuals who believe the ability to discern the Good is conceptually locked behind a wall impossible to break through in the natural plane, the common good will be unable to be found and agreed upon. This is a problem for Vermeule whose project depends on the objective knowability of the natural law. Vermeule finds himself trapped. Vermeule's acceptance of the status quo legal system as legitimate and his two-tier Thomism prevents his theory from realizing his goals of a legal system founded in natural law.

Vermeule's vision of Originalism and Progressivism in American jurisprudence are both rejected on the basis that they both do not reflect the founding of the legal structures of the United States. Originalism focuses on the US Constitution's original public meaning, and Living Constitutionalism interprets the Constitution as a template for a society progressing towards greater individual liberation and moral progress. For Vermeule, Originalism has become a hollow vehicle for judges to push forward their own policy preferences. He finds Originalists on the political Right and Left justify whatever decision on any case that is ideologically expedient at the time by cherry picking pieces of case law and assembling a mosaic image of history and tradition.<sup>30</sup> Progressivism, he finds, is entirely alien from the intended application of American

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30. Vermeule, *Common Good*, 28-30

law as it assumes a particular ideology which sees all things as in a state of progression towards ever-expanding liberation and enlightenment.<sup>31</sup> Vermeule, then, sees both Originalism and Progressivism as distinctly non-traditional, breaking away from the intentions of the Framers of the constitution. For this reason, he sees Common Good Constitutionalism to be more original and principled than Originalism, and better at achieving human flourishing than Progressivism.

Through Common Good Constitutionalism, he foresees a future where the American legal system is reoriented toward the common good. This would be achieved, according to Vermeule, through a deeper understanding of the *raison d'être* behind the system of rights, checks and balances, and the deferential role of judges.<sup>32</sup> Instead of a constant struggle between powers to push for their policy objectives, Vermeule envisions a world where judges are not held to some construction of a political side or ideology, instead focusing on the good of the people and the nation. Several example areas of possible “common good” outcomes are listed in his book I, including economic regulation, zoning laws, international human rights, environmental consideration, and nontraditional marriage.<sup>33</sup> These legal reforms will, in Vermeule’s mind, draw the current positive law of the United States further in line with the classical law, which is rooted in natural law.

Vermeule’s project does not meet any ends it aspires to, due to its deep indebtedness to the liberal American system of politics. Vermeule’s claims about the founding fathers and their supposed affinity with natural law theory is optimistic. Even if it was assumed the framers of the

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31. Ibid., 202-204

32. Ibid., 226

33. Ibid., 226

Constitution were primarily influenced by natural law theory, their own project inexorably diverges from a natural law focused polity that is viable with Common Good Constitutionalism's proposed jurisprudence.

Baude and Sachs helpfully counters Vermeule's contention of an American legal system that was designed to run on natural law theory. The framers of the American legal system did not hold Thomas Aquinas's natural law theory in higher regard than Enlightenment thinkers like Hobbes, Locke, John Adams, and others, all names which those who rail against Liberalism vehemently denounce. Even those whom Vermeule quotes from, such as R.H. Helmholz and Jud Campbell, concedes the distinct liberal leanings of the Founders.<sup>34</sup> While the Founders may have been influenced and informed by Thomas and natural law theory, their prized achievement lay in emphasizing liberty as a preeminent good to be held over other virtues.<sup>35</sup>

Their constructions of polity through governmental, economic, and legal structures revolve around the Enlightenment Hobbesian anthropology painting all humans as inherently depraved and power-hungry. The "checks and balances" deliberately written into the US Constitution by the Framers, Capitalism, as well as the adversarial legal system relies on greed to counter greed, ambition to counter ambition, and violence to counter violence are all a result of the political internalization of the liberal anthropology.<sup>36</sup> Vermeule offers no alternative or deconstruction of this system which causes a continuous spiraling of society in to greater and

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34. Baude and Sachs, *Book Review*, 892

35. *Ibid.*, 890

36. John Milbank and Adrian Pabst, *The Politics of Virtue, Post-Liberalism and the Human Future* (London and New York: Rowman & Littlefield, 2016), 159

greater disintegration, atomization, and coercion.<sup>37</sup> Though the Common Good Constitutionalism project believes individuals do not have to act on their base ambitions like the liberal system assumes, it does not realize the structure will break down at this diverging of anthropologies.

This error is evident in Vermeule's conviction that the Framers intended the United States to function in accordance with "classical law."<sup>38</sup> Milbank, however, correctly characterizes the necessity of vice in the liberal governmental structure. If actors in offices of power decide against pursuing ambition or competing, those who do will seize a disproportionate, potentially tyrannical power. The structures of Liberalism act as a perpetual-motion machine promising to bridle power through power. The miscalculation, according to Milbank, is that a perpetual power struggle inexorably escalates to such a degree it becomes impossible to detach oneself without collapsing the entire system.<sup>39</sup> In his essay, "the End of Sovereignty," Jones unfolds the atomizing structure and the destruction of human relationships characterizing liberal legal systems. He identifies the enforcement mechanism as the primary problem. Instead of a structure facilitating mutual understanding and consideration for one another, the liberal legal system expects all to be selfish and greedy and to file lawsuits at every opportune time, and thus, "reinforces the notion that such lawsuits are somehow legitimate."<sup>40</sup> Human relationships cannot flourish within the liberal legal system as it replaces actual individuals with de facto legal proxies, supplanting "qualitative relationships in favor of

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37. Milbank and Pabst, *Politics*, 229, 160

38. Vermeule, *Common Good*, 298

39. Milbank and Pabst, *Politics*, 231

40. Jones, *End of Sovereignty*, 427

quantitative transactions.”<sup>41</sup> The system of rights and standardized relationships eliminates the real nuances and duties between people and power structures that foster true justice.<sup>42</sup>

The very fact Common Good Constitutionalism is meant to be applied to the status quo American legal system denotes no attempt to move away from the liberal structure which sacrifices real human relationships and intermediary institutions such as churches and trade unions in favor of unlimited “liberty” for the individual. Common Good Constitutionalism does nothing to stop the State from trampling all structures of authority aside from itself and assert its power as the only legitimate power. According to Vermeule, the classical understanding of the State is to see it as one part of a larger political community.<sup>43</sup> Though this may be correct, Cavanaugh explains the problematic nature of Vermeule’s justification for treating the American State as a potential force for the common good. Cavanaugh lays out the birth of the modern nation-state which is fundamentally different from the classical articulation of the State. The modern State cannot gain the common good because of its method of atomizing and isolating each individual and finally how it absorbs society into itself.<sup>44</sup> Vermeule’s project does not change the crux of the status quo that prevents it from striving towards the common good. The State cannot concede any good as more important than itself. To do so would be to acknowledge an ultimate authority beyond itself, an impossible contention, as the final say of the arbitrating State is what protects the rights enumerated.<sup>45</sup> The promise of neutrality must mean that all other

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41. Ibid., 415

42. Ibid., 424

43. Vermeule, *Common Good*, 59

44. Cavanaugh, *Migrations*, 9-27

45. Cavanaugh, *Migrations*, 36, 47

authorities of truth must be passed through the approval of the State to become legitimate.<sup>46</sup> Cavanaugh in *Migrations of the Holy* goes as far to say that “the sovereign state can only be hostile to the common good.”<sup>47</sup> Because Common Good Constitutionalism relies on the State to give up its monopoly on what it believes is right for the polity in exchange for some transcendent standard of goodness, it cannot achieve its goals.

Besides Common Good Constitutionalism’s ineffective advancement of post-liberal ideals through the vehicle of the liberal United States legal body, it does not achieve its ends due to its inherent liberal theological assumptions. This assumption upon which liberal States and systems are founded is the belief of a separate set of realities for the supernatural and the natural realities. When this belief is made concrete and applied to its logical extent, it leaves no room for the spiritual to inform the natural. David Bentley Hart’s analysis on the conclusions of two-tier Thomism prove devastating for Vermeule’s judicial doctrine and its goals.

Hart lays forth four primary problems with two-tiered Thomism and its relationship with finding natural law. First, once the concept of a “pure nature” is accepted, it allows the contesting of final causality as having spiritual consequence. Thus, removing the all-important understanding of the *telos* that connects the material world with any actual meaning. Second, even if the meaning can be gleaned from the material world, there is no reason for someone to believe that the meaning is moral and should be acted upon. Third, though some morality may be gleaned from the material world, there is no reason to believe there is a hierarchy within these morals. The concept of natural law as being derived from “pure nature” that Vermeule claims is

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46. Ibid., 31-32

47. Ibid., 33

knowable to every person, seems evermore dubious. Finally, even though reason might necessarily find its *telos* in the good, it does not mean humans can use reason perfectly to achieve “objectively true moral conclusions.” These four objections stand in the way of Vermeule’s mechanism for implementing a judicial philosophy that employs “self-evident” natural law.<sup>48</sup> Without broader conceptions of how the spiritual has direct dictation over polity, spiritual truths are want to stay inside the individual heart and home, and not in politics.

This fundamental disconnect between believing in “pure nature” and “super nature” alone prevents Common Good Constitutionalism from accessing any of its benefits. The sharp divide it assumes between the natural world and the supernatural world actively undermines its integralist claims. Its claim to the transcendent natural law as its anchor for jurisprudence is nullified as the project provides no reason but assertion as to what the contents of the natural law is.

While Vermeule desperately yearns for a political system of a greater moral fabric, he still disavows the broad enchantment of all things as imprinted with divine significance. He makes this clear by quoting Walter Farrell, a prolific Thomist who wrote a four-volume companion to Thomas’s magnum opus, *Summa Theologica*: “not all communities have to do with leading man to his supernatural end directly. Nevertheless they have at least to do with the attainment of his secondary ends of natural or temporal happiness, which are a means to the supernatural final ends.”<sup>49</sup> To view the world and its spaces to be divided between enchanted spaces and spiritually neutral spaces is what gives rise to the neutrality-enforcing negative-rights Liberalism which cannot produce a virtue-filled people. Though the analysis could conclude here

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48. Hart, *Nature*

49. “Walter Farrell,” goodreads, accessed May 1, 2023, [https://www.goodreads.com/author/show/210079.Walter\\_Farrell.](https://www.goodreads.com/author/show/210079.Walter_Farrell.); Vermeule, *Common Good*, 60

with Vermeule’s tacit endorsement of the liberal view of enchantment, he gives the ball away. “I have referred to ‘the temporal sphere’ because the account I offer here is limited to the ends of natural or temporal happiness.” Vermeule continues, “just as not all communities must concern the supernatural end, so too not all books must do so. In what follows I limit my account to the secondary ends of the political community: it’s temporal felicity, the order of nature rather than the order of grace. I do this not only for substantive reasons, out of respect for the legitimate autonomy of the temporal power within its proper sphere, but to limit myself to the terms of my professional competence, the ordinary work of the civil lawyer.”<sup>50</sup> Vermeule not only strays further from a comprehensible account of the objective standard by which his ideal judiciary will judge, but by disconnecting the “the temporal sphere” from “the supernatural end” of the government, he directly undermines his claims about the *telos* of government, the law, and polity writ-large.

In light of Vermeule’s bisection of the natural and supernatural, his other claims are found problematic. Vermeule’s repeatedly writes of the *ius* versus *lex*. *Lex* is defined by Vermeule as enacted positive law, while he defines *ius* as “the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice.”<sup>51</sup> Vermeule believes a deeper understanding of *ius* is necessary for a society ordered toward the common good and thus makes it a key part of Common Good Constitutionalism. However, Vermeule’s articulation of the *ius* is natural law writ small. Just as natural law cannot be argued for through two-tier Thomism, the *ius* also cannot be argued for as it has to do with the supernatural, that is, unempirical principles of legal justice.

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50. Ibid.

51. Ibid., 14



The purpose of law, as Vermeule clearly states, is “intrinsically reasoned and also purposive, ordered to the common good of the whole polity and that of mankind.”<sup>52</sup> This concept is one borrowed from the idea of “true law,” enacted positive law which is aligned with divine moral law, that is, the natural law. The Christian ideal of liberty is to do what one ought to, being “a slave of Christ.”<sup>53</sup> To follow the base desires of the heart would be to be “a slave to sin,” which is the true bondage. Milbank’s statement, “for law to be law as just law, it must point beyond itself,”<sup>54</sup> is in reference to this legal alignment between positive law and transcendent moral truth.

Vermeule wholeheartedly agrees with this sentiment with his “ordered to the common good” language, and laments like his peers that moderns deny or treat this concept as only context of otherwise “legitimate” positive law.<sup>55</sup> However, while other post-liberal thinkers then write about how this “true law” exists to bring virtue and true liberty to the denizens of polity, Vermeule does not. Jones, for example, remarks on how “true law” interacts with Biblical teachings of the “New Law.” In Jesus’s teachings, He does not lay forth commandment upon commandment like Moses, but rather provided men with primarily principles and divine Grace. Jones reads this as to mean men and women are “restored as legislators.”<sup>56</sup> Those filled with Grace become virtuous and can act justly for the common good without any byzantine set of laws which remains the status quo under Common Good Constitutionalism.

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52. Ibid., 13

53. English Standard Version, (2016), Romans 6:22

54. Jones, *End of Sovereignty*, 449-450

55. Vermeule, *Common Good*, 14, 107

56. Jones, *End of Sovereignty*, 446

The different readings of Thomas Aquinas arrive from a historic schism where Thomas's metaphysical teaching was divorced from his practical, ethical teaching. Hittinger's extrapolation on this topic is illuminating. When various political and social issues were brought to the forefront in the Roman Catholic Church's mind, there was a move to reinstate orthodoxy within the Roman Church. Pope Leo XIII wished to use Thomas's profound and lucid wisdom to buttress Christians against the wave of modern science, so he instructed teachers to "spread it far and wide for the defense and beauty of the Catholic faith, for the good of society, and for the advantage of all the sciences."<sup>57</sup> Through this uplifting of Thomas's works, he was held as a Saint whose doctrine was preeminent over others. Over time, the weaponization of Thomas against the tide of modernity turned his doctrine into a kind of party line. No longer something to be studied deeply through the primary text of writings like *Summa Theologica*, but through the various "manuals" which were erected in the sixteenth century to instruct the faithful on what the Saint said on X or Y social issue.<sup>58</sup>

For this reason, Thomas's thought on the fundamentally spiritual and sacramental nature of the world stopped informing the social doctrine he taught. This becomes a major problem for those then espousing his ideas on the natural law without adopting concomitantly Thomas's broader worldview. Simultaneously stating the law has an intrinsic obligation to a spiritual common good and arguing government can only achieve secondary, temporary happiness is a prima facie contradiction. Cavanaugh uses Augustine's concepts of the City of Man and the City of God to illustrate the sameness of the goods of both the supposedly distinct "natural" world and "supernatural" world.

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57. Hittinger, *Two Thomisms*, 2008

58. David Bentley Hart, "Romans 8:19-22," *First Things*, June 2015, <https://www.firstthings.com/article/2015/06/romans-81922>; Hittinger, *Two Thomisms*, 2008

Augustine has no theory of church and state, no spatial carving up of one society into spheres of influence. There is no sense that there is a single given public square in which the church must find its place. Augustine complexifies space by arguing that the church itself is a kind of public; indeed, it is the most fully public community. The city of God has to do with ordering matters that are considered public, because the city of God makes use of the same temporal goods as does the earthly city, but in different ways and for different ends. There is no division between earthly goods and heavenly goods, secular and sacred; There is no sphere of activities that is the peculiar responsibility of the earthly city. The city of God, therefore, is not part of a larger whole, but is a public in its own right. Indeed, the city of God is the only true “public thing,” according to Augustine, as pagan Roman rule had failed to be a *res publica* by refusing to enact justice and serve God.<sup>59</sup>

All goodness, in the thick sense, is God’s goodness. Apart from God, nothing good can be found. There is no account of a transcendent common good that can be found in only the City of Man. Only through pursuing “supernatural” ends are these goods found. Vermeule declares his project is for “temporal felicity, the order of nature rather than the order of grace”<sup>60</sup> but as Cavanaugh retorts, “there is no such thing as ‘pure nature.’”<sup>61</sup> Therefore, Vermeule cannot both argue Common Good Constitutionalism only aims to grasp in its hand “natural” good and deny its intrinsic inseparability from the “supernatural” good. His adherence to this theology means his Common Good Constitutionalism project will be inevitably absorbed into the liberal structure and fail to have the intended effect: to create and foster a legal system which acknowledges the teleological ends of law as pointing toward transcendent flourishing.

In spite of these theological contradictions, Vermeule does have allies, such as Josh Hammer, Sohrab Ahmari, and R.H. Helmholz. Exploring their alliance with Vermeule will aid in understanding the appeal of Vermeule’s project and its weaknesses. Each one of these allies find

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59. Cavanaugh, *Migrations*, 57-58

60. Vermeule, *Common Good*, 60

61. Cavanaugh, *Migrations*, 120

themselves exhausted with the current state of the United States and feel as though the arbitrariness of positivism and the idolization of liberty has drawn the laws and culture of America away from what creates human flourishing. They share Vermeule’s concerns of the Originalist judicial philosophy as the flagship conservative position on the Constitution.

For Vermeule’s allies, Originalism seems impotent to the conservative cause while Living Constitutionalism continually seems to bring to fruition left-wing policy preferences. Hammer in particular has written on how a more “muscular and masculine” conservatism is needed in the face of what he views as a national slide towards leftist values.<sup>62</sup> Ahmari is well-known for his very vocal objections against “drag-queen story hour” and his language in how conservatives ought to oppose to left-wing values, “to fight the culture war with the aim of defeating the enemy and enjoying the spoils in the form of a public square re-ordered to the common good and ultimately the Highest Good.”<sup>63</sup> Helmholtz in his praise of Vermeule’s project, mentions *en passant* of how Common Good Constitutionalism may aid in abolishing violent movies as “they make no contribution to the common good.”<sup>64</sup> This sample of Common Good Constitutionalism’s supporters all diagnose the primary ill of current society as the lack of acknowledgement to moral and ethical foundations in our legal and governmental system. Hammer and Ahmari are particularly characterized by a desperate attitude about modernity. Hammer’s reference to Ben Weingarten’s piece on the severity of the stakes in western politics is

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62. Josh Hammer, “Why the Right Needs a More 'Muscular' and 'Masculine' Conservatism,” *Newsweek*, December 3, 2021, <https://www.newsweek.com/why-right-needs-more-muscular-masculine-conservatism-opinion-1655672>

63. Sohrab Ahmari, “Against David French-ism,” *First Things*, May 29, 2019, <https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism>

64. R.H. Helmholtz, “Marching Orders,” *First Things*, May 2022, <https://www.firstthings.com/article/2022/05/marching-orders>

indicative of the broader mindset.<sup>65</sup> In an era where their values and what they hold sacred are being increasingly rejected from the Overton window and the general polity, an inducement of panic is comprehensible.

In this moment, where personalities on the political right are declaring, “if you don’t know what time it is, get out of politics now,” Vermeule’s project holds much promise.<sup>66</sup> For them, in what they see as a lifetime of slow decay and retreat away from the halls of governmental and cultural power, Common Good Constitutionalism reaches a hand of legitimization to their causes. Common Good Constitutionalism offers “a ‘movement jurisprudence’ for the imagined conservative advance.” Many like Hammer and Ahmari see a necessity for conservatives to “emerge from the ‘defensive crouch’ of outcome-independent legal theory.”<sup>67</sup> Their chase of outcomes like Vermeule, leaves them blind to the very assumptions they stand on. The rotten foundation, the liberal State and its two-tier Thomism, will subsume Vermeulean integralism into itself.

Vermeule’s project fails, perhaps most importantly, in how it will bring about substantive change. The only mechanism provided by Vermeule is the status quo legal system with a different set of judges. There is no principled reason to believe any other catalysts will appear beside Common Good Constitutionalism to shape the legislative, let alone cultural and popular landscape. As given, Common Good Constitutionalism differs from contemporary Liberalism in

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65. Ben Weingarten, “If You Don’t Know What Time It Is, Get Out Of Politics Now,” *the Federalist*, December 1, 2021, <https://thefederalist.com/2021/12/01/if-you-dont-know-what-time-it-is-get-out-of-politics-now/>

66. Ibid.

67. Baude and Sachs, *Book Review*, 899, 904

only the assertion of what set of values are best. Liberalism asserts individual autonomy as the highest good, while Common Good Constitutionalism asserts “traditional” conservative values which conveniently line up with Vermeule’s policy preferences.<sup>68</sup> Liberalism cites Hobbes and Locke and articulates a human anthropology that requires a heavy defense of negative rights through a sovereign State. Common Good Constitutionalism cites Thomas and the Bible and lays forth an anthropology requiring enforcement of public morality through the same sovereign State. It is the lack of differentiating radicalism that doom Vermeule’s project. Liberalism and Common Good Constitutionalism, under the same premises, engage in a tug-of-war of basic assertions. The mad scramble over the gun of the State in the status quo does not change.

Sucked into the materialist perspective of the world, both Liberalism and Common Good Constitutionalism only acknowledges the power of the sword as the only efficacious power in the world. Both sides operate with the ethics of the City of Man where divine Grace is not at work; where there is no Divine Grace, people must be coerced to do what is good and just. In order to shape a polity characterized by a pursuit of the common good as Vermeule defines it, the coercive liberal State must have no part in that society. The sanctification of a community cannot occur through the power of the sword, the power of the liberal legal system, but through Grace. The actions that happen in the material world are not fundamentally different from the movements of the spirits in the “supernatural” world. We humans are spirits. Thus, governmental actions are in direct connection and are synonymous with supernatural action.<sup>69</sup> There is, then, no bisection between temporal goods that human government can achieve and the eternal goods that are supposedly out of government’s reach.

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68. Adrian Vermeule, “Beyond Originalism,” *the Atlantic*, March 31, 2020, <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>

69. Cavanaugh, *Migrations*, 56-58

Vermeule critiques liberal presuppositions and allies himself with the burgeoning post-liberal movement. He attacks the value of liberty for liberty's sake as well as the conceptualization of rights as trumps to all other goods. He believes the natural law tradition of Thomas Aquinas informs how polities should view laws. Through an exploration of law beyond positivism to the *ius*, he believes the common good can be objectively found. To move toward human flourishing, Vermeule's project revolves around a jurisprudence rejecting Originalist and Living Constitutional judicial philosophies for one which seeks to align American law with the *ius* and natural law. The United States would use the levers of the sovereign State to enforce these laws, and the nation would turn from its misguided ways, and onto a path of wisdom and justice.

This pleasant dream is shattered when two distinct prongs tear through its misty haze. First, Common Good Constitutionalism in practice functions as a judicial philosophy within a legal structure that is intrinsically liberal. While Common Good Constitutionalism's legal perspective itself is profoundly illiberal, the philosophy does not fundamentally alter the liberalistic legal structure. To pursue the common good, Liberalism must be confronted at its ideological core. Its anthropology of distrust between human beings and its belief in humanity's perpetual greed and selfishness are a direct denial of efficacious Divine Grace in society. Common Good Constitutionalism does not contest this anthropology, it cannot make the incisions deep enough to move the institutions away from Liberalism.

Second, the failure to escape the liberal framework results from Vermeule's concurrence with Liberalism's theology, a two-tiered reading of Thomas Aquinas. Through conceding a distinct separation between the natural and supernatural, it prevents Vermeule's cause from accessing any of its supernatural claims to transcendent natural law. Creating a judiciary of

Common Good Constitutionals with a consistent vision on the specifics of natural law is impossible when Vermeule holds that “natural reason” can only discern the natural and not the supernatural. Natural law is supernatural insofar as it makes claims based on supernatural realities, such as the *telos* of phenomena or the transcendent morality behind actions. If there is no intrinsic connection between the supernatural and natural, natural logic cannot bridge the chasm to make supernatural claims or conclusions. For the postliberal, Liberalism rests on a kind of materialism, the supernatural may exist, but is not to be concerned with in the public sphere.<sup>70</sup> St. Augustine’s articulation of the grand eschatology of societies through the two cities also illustrates the problematic nature of Vermeule’s two-tier Thomism. The City of Man, full of vice and violence, and the City of God, abundant with Grace and Charity, are not two separate places, but exist within the same plane. Vermeule’s call for orienting the legal system toward the common good should be a project to expand the City of God within the City of Man. While an honorable aim, Vermeule’s two-tier Thomism necessarily must see the City of God and the City of Man as occupying different dimensions. A distant and distinct City of God, however, does not have the power to change the City of Man from the inside out—a polity aligned with the natural law is a polity transformed by the Grace of the City of God. In juxtaposition, Liberalism theologially resolves its eschatology by insisting the City of Man must have its way and violence must rule until a historical *deus ex machina* occurs where the Christ returns to supplant the City of Man with the City of God. Common Good Constitutionalism builds its fortifications on sand. Vermeule’s judicial philosophy allies itself with Liberalism’s child, the American State, and is rooted in Liberalism’s theology which does not have the apparatus to defend supernatural ends like natural law. Therefore, Common Good Constitutionalism’s tacit usage of both liberal

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70. Jones, *Two Cities*, 12



systems and liberal theological background severs it from the common good it seeks to promote in the United States of America.