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# IS THERE A CONSTITUTIONAL COMMON GOOD?

R. GEORGE WRIGHT<sup>†</sup>

## INTRODUCTION

Identifying and pursuing some widely shared idea of the common good seems central to a sustainable constitutional order. This may seem especially true in an era of deep political division. The problem, though, is that such political division may indeed heighten the need for recognizing and promoting a shared constitutional common good, while, at the same time, preventing such an identification and pursuit of any such common good. What is needed is a way to disrupt this vicious circle. This Article is an illustration of the operation of this vicious circle and, more optimistically, a proffering of the means by which this vicious circle can ultimately be disrupted. To some degree, increased attention to familiar basic virtues can perform the vital constructive role.

Consider first, as an entryway, the idea of polarization itself. The United States has long experienced increasing polarization in the constitutional realm.<sup>1</sup> The idea of polarization, of course, implies clustering at opposite ends of a spectrum. But the idea of increased polarization in this sense actually tells us little. We need to know much more about the specific nature of *our* polarization.

The metaphor of polarization itself does not, for example, tell us whether the polarization process has been accelerating. It does not tell us about the “distance” between the poles—or whether that distance has itself been increasing. It does not tell us whether there is more than one, or perhaps many, distinct axes of polarity. It does not tell us about the causes, grounds, emotional intensity, or stability of the polarization. Nor does the idea of polarization itself tell us about any asymmetries of the polarization, including the relative sizes and differing degrees of fervency and implacability at the relevant poles. And the idea of polarization

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<sup>1</sup> See *infra* Part I.

certainly does not capture any sense of resulting fragmentation, disintegration, or other possible eventual outcomes. The idea of polarization itself thus does not capture anything like the essence of our contentious circumstances in matters of constitutional law. We explore a number of the further complications of polarization below.

One possible response to constitutional-level polarization and its various complications on clearly vital matters would be to encourage increased attention to the idea of a genuine common good in the constitutional realm.<sup>2</sup> How, one might imagine, could anyone responsibly object to an increased focus on identifying and appropriately pursuing a genuine common good at the constitutional level? Attention to a genuine common good need not distract from equally genuine injustice. Indeed, such attention should heighten, and intensify, our concern for basic injustices.

Surprisingly, though, there turns out to be only a modest payoff in focusing directly on the idea of a constitutional common good. There are, to begin with, serious problems in defining and conceptually analyzing the very idea of a common good, in general and at the constitutional level.<sup>3</sup> And there are then even more complex problems in meaningfully identifying the genuine common good, in substantive terms, in virtually any interesting case.<sup>4</sup>

It is not as though there is currently a reasonably broad consensus on the constitutional common good at a fairly general level, with disputes on the details. Instead, what is crucially missing is anything like a reasonably broad consensus on even fundamental constitutional matters. Our basic disputes are then typically compounded, rather than mitigated, across substantive policy issues. The result is that attempting to define, identify, and promote a constitutional common good will, inevitably, largely just mirror the substance, and the pathologies, of our constitutional disputes as they already stand.

Debates that are directly focused on a constitutional common good will thus largely just reinscribe, or unproductively translate, our familiar current constitutional arguments into the terms of the search for a purported common good. And this is hardly a matter of squabbling over issues of relative detail. Largely recasting our present constitutional disputes in terms of identifying and

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<sup>2</sup> See *id.*

<sup>3</sup> See *infra* Part II.

<sup>4</sup> See *infra* Part III.

pursuing a genuine common good, however initially appealing, thus turns out to be hardly worth the effort.<sup>5</sup>

This surprising conclusion indeed holds, but with an important qualification.<sup>6</sup> Even if the idea of a meaningful substantive constitutional common good is otherwise an illusion, investigating that idea can inadvertently steer us, more constructively, toward what most cultures think of as basic virtues and vices of character. Those virtues and vices certainly have, in context, their own controversial constitutional-level implications. It is easy, in our culture, to deny virtue in one's political opponents. But the genuine basic virtues have real survival value for those who cultivate them, and, crucially, much broader social value as well. Basic virtues have important favorable spill-over effects. The basic virtues and vices hold, ultimately, some potential for helping to identify, and then to meaningfully contribute toward furthering, whatever we then may take the constitutional common good to involve.<sup>7</sup>

#### I. THE QUESTION OF A CONSTITUTIONAL COMMON GOOD: THE CURRENT CULTURAL CONTEXT

Of late, it has been claimed that our current political culture is one of rising extremism.<sup>8</sup> This may well be true of our present moment.<sup>9</sup> But it is also clearly established that the underlying bases for political extremism<sup>10</sup>—along with polarization,<sup>11</sup> mutual

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<sup>5</sup> See *infra* Parts II–III.

<sup>6</sup> See *infra* Conclusion.

<sup>7</sup> See *id.*

<sup>8</sup> See, e.g., Anne Applebaum, *The Answer to Extremism Isn't More Extremism*, ATLANTIC (Oct. 30, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/left-and-right-are-radicalizing-each-other/616914/> [<https://perma.cc/HLL8-QB2J>]. Given the “Prisoner’s Dilemma” quality of our contemporary politics, it is more common to condemn the extremism of one’s political opponents than to condemn any broader phenomenon of increasing extremism that might also encompass one’s own views. See generally Steven Kuhn, *Prisoner’s Dilemma*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2019), <https://plato.stanford.edu/entries/prisoner-dilemma> [<https://perma.cc/R7XX-GJFJ>].

<sup>9</sup> See Applebaum, *supra* note 8.

<sup>10</sup> See, e.g., LILLIANA MASON, UN CIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 3 (2018); J.M. Berger, *Our Consensus Reality Has Shattered*, ATLANTIC (Oct. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/year-living-uncertainly/616648/> [<https://perma.cc/3ZKR-P9XY>].

<sup>11</sup> See, e.g., JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 319–66 (2012); EZRA KLEIN, WHY WE’RE POLARIZED xiv (2020); ROBERT B. TALISSE, OVERDOING DEMOCRACY: WHY WE MUST PUT POLITICS IN ITS PLACE 95–127 (2019).

distrust,<sup>12</sup> mutual hostility,<sup>13</sup> and elements of fragmentation and disintegration<sup>14</sup>— have actually been developing over a relatively long period.

Unsurprisingly, then, is the survey evidence demonstrating that negative “partisan stereotyping has increased by 50 percent between 1960 and 2010.”<sup>15</sup> As of 1975, the sociologist Robert Nisbet detected “a profound distrust of the political order, . . . and indeed of the whole political habit of mind that has been so ascendant in the West for several centuries now.”<sup>16</sup> Since the 1960s, “[p]olitical trust, trust in government and democracy, has fallen steeply.”<sup>17</sup> This reduced trust has occurred across the political spectrum.<sup>18</sup> And this broad-based increase in distrust has accompanied a similar increase, over a period of decades,<sup>19</sup> in politically-valanced dislike, hostility, and even loathing.<sup>20</sup> In an “escalating cycle,”<sup>21</sup> voters—including political independents<sup>22</sup> and relative moderates<sup>23</sup>—have gradually “grown to dislike the opposing party . . . more than they like their own party.”<sup>24</sup>

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<sup>12</sup> Distrust may, of course, be deserved or undeserved, to any degree. Some regimes and groups are deeply untrustworthy. On declining political trust over an extended time period, *see, e.g.*, ROBERT NISBET, TWILIGHT OF AUTHORITY 14 (1975); KEVIN VALLIER, TRUST IN A POLARIZED AGE 1 (2020); Jack Citrin & Laura Stoker, *Political Trust in a Cynical Age*, 21 ANN. REV. POL. SCI. 49, 59 (2018); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 150 (1995).

<sup>13</sup> Hostility may also be either deserved or undeserved. For a sense of the development of increased hostility and political animus over time, *see* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART 5 (2009); MASON, *supra* note 10, at 6; Alan Abramowitz & Steven Webster, ‘*Negative Partisanship Explains Everything*, POLITICO MAG., <https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534/> [<https://perma.cc/6ZP3-VPLQ>] (last visited Oct. 27, 2022); Lee Drutman, *How Hatred Came to Dominate American Politics*, FIVETHIRTYEIGHT (Oct. 5, 2020, 6:00 AM), <https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics/> [<https://perma.cc/LTG3-TXB9>].

<sup>14</sup> *See, e.g.*, Alasdair MacIntyre, *Politics, Philosophy and the Common Good*, in THE MACINTYRE READER 235, 243 (Kelvin Knight ed., 1998).

<sup>15</sup> MASON, *supra* note 10, at 3 (citing Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 420 (2012)).

<sup>16</sup> NISBET, *supra* note 12, at 14.

<sup>17</sup> VALLIER, *supra* note 12, at 1.

<sup>18</sup> *See id.* Some or all of this reduced trust may again be entirely justified.

<sup>19</sup> *See* Abramowitz & Webster, *supra* note 13; Drutman, *supra* note 13.

<sup>20</sup> *See* sources cited *supra* note 19.

<sup>21</sup> Drutman, *supra* note 13.

<sup>22</sup> *See* Abramowitz & Webster, *supra* note 13.

<sup>23</sup> *See id.*

<sup>24</sup> *Id.*

Again, political distrust and animosity may, depending on context, be entirely justified and appropriate—if not actually insufficient, under the circumstances. Distrust is the sensible response to sustained injustice. For our purposes, we need make no such assessments. Our present aim is merely to provide data points for the inference that broad agreement, across partisan lines, on any substantively meaningful content of a constitutional common good seems to have been evaporating over time.

Decades ago, Alasdair MacIntyre argued that “we now inhabit a social order whose institutional heterogeneity and diversity of interests is such that no place is left any longer for a politics of the common good.”<sup>25</sup> Accordingly, one might easily argue that political polarization, extremism, distrust, and hostility—whether fully justified or not—impair the possibility of a collective pursuit of a meaningful constitutional common good.

It is far from clear, though, that a healthy constitutional politics can survive the absence of a collective pursuit of a meaningful common good. Further, it is similarly unclear that there can be a legitimate constitutional order in the absence of a sufficiently recognized common good. There are certainly mainstream traditions that have emphasized the central importance of identifying, and promoting, a political common good. These traditions clearly have a distinguished pedigree.

Thus, for Aristotle, the *raison d'être* of the city-state is promoting the cooperative arrangements by which persons and families can genuinely live well.<sup>26</sup> More simply, “[l]iving well . . . is the end of the city.”<sup>27</sup> Cicero<sup>28</sup> and Augustine<sup>29</sup> similarly refer, in their own terms, to a civic common good. Thomas Aquinas devotes substantial attention to the idea of civic, legal, or political common

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<sup>25</sup> MacIntyre, *supra* note 14, at 239. MacIntyre goes on to argue that legitimate political authority requires a sufficient pursuit of the political common good. *See id.* at 243.

<sup>26</sup> *See* ARISTOTLE, *POLITICS* bk. 3, at 95 (Carnes Lord trans., Univ. Chi. Press 2d ed. 2013) (c. 350 B.C.E.).

<sup>27</sup> *Id.*; *but cf.* Thomas W. Smith, *Aristotle on the Conditions for and Limits of the Common Good*, 93 *AM. POL. SCI. REV.* 625, 626 (1999) (“Aristotle is not optimistic about the possibility of [a] common good.”).

<sup>28</sup> *See* MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH AND ON THE LAWS* bk. 1, at 21 (James E. G. Zetzel ed., Cambridge Univ. Press 1999) (c. 56–51 B.C.E.) (referring to an original unity of belief as to appropriate laws and the desire for mutual advantage).

<sup>29</sup> *See* SAINT AUGUSTINE, *THE CITY OF GOD* 74 (Vernon J. Bourke ed., Gerald G. Walsh et al. abridged trans., Image Books 1958) (c. 426 A.D.) (asserting that some genuine common good is required for there to be a genuine “people” or “commonwealth” in the first place).

good.<sup>30</sup> In the modern era, Rousseau's famous notion of the "General Will" may be best understood as akin to the idea of the common good.<sup>31</sup> At the time of the Constitution's framing, James Madison argued that "[t]he aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society."<sup>32</sup> And the great English progressive T.H. Green later linked the idea of genuine self-realization, or flourishing, to an expanded scope of the common good.<sup>33</sup>

In particular, the broadly conceived "republican tradition in political theory has long insisted on the centrality of the notion of the common good."<sup>34</sup> The public interest, understood as synonymous with the common good, is often taken to be the ultimate goal—and the final appeal—in matters of public policy.<sup>35</sup> That is, the pursuit of the common good has been said to be "[t]he most essential function of authority."<sup>36</sup>

On the other hand, the traditional sense that the common good can be identified and promoted, or at least that there is some practical need for the concept,<sup>37</sup> is not, at present, uniformly

<sup>30</sup> See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II, Question 90, Article 2 (Kevin Knight online ed. 2017) (1266–1273), <https://www.newadvent.org/summa/2090.htm> [<https://perma.cc/54X7-UJ5Y>]; see also ST. THOMAS AQUINAS, *DE REGNO: ON KINGSHIP TO THE KING OF CYPRUS* bk. 1, at paras. 8–9 (Gerald B. Phelan trans., 1949), <https://isidore.co/aquinas/english/DeRegno.htm> [<https://perma.cc/HJ24-8WJD>]. For commentary, see generally MARY M. KEYS, *AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD* (2006); Richard A. Crofts, *The Common Good in the Political Theory of Thomas Aquinas*, 37 THOMIST: SPECULATIVE Q. REV. 155 (1973).

<sup>31</sup> See Patrick Riley, *A Possible Explanation of Rousseau's General Will*, 64 AM. POL. SCI. REV. 86, 88 (1970).

<sup>32</sup> James Madison, *The Federalist No. 57*, in *THE FEDERALIST WITH LETTERS OF "BRUTUS"* 277, 277 (Terence Ball ed., 2003).

<sup>33</sup> See T.H. GREEN, *PROLEGOMENA TO ETHICS* § 244, at 287–88 (David O. Brink ed., Oxford Univ. Press 2003). For commentary, see David O. Brink, *PERFECTIONISM AND THE COMMON GOOD: THEMES IN THE PHILOSOPHY OF T.H. GREEN* 53 (2003). For a brief but helpful survey of historical understandings of the political common good, see generally B.J. Diggs, *The Common Good as Reason for Political Action*, 83 ETHICS 283 (1973).

<sup>34</sup> Philip Pettit, *The Common Good*, in *JUSTICE AND DEMOCRACY: ESSAYS FOR BRIAN BARRY* 150, 150 (Keith Dowding et al. eds., 2004).

<sup>35</sup> See C.W. Cassinelli, *Some Reflections on the Concept of the Public Interest*, 69 ETHICS 48, 48 (1958); Michael Pakaluk, *Is the Common Good of Political Society Limited and Instrumental?*, 55 REV. METAPHYSICS 57, 57 (2001) (discussing the common good as the aim of political society).

<sup>36</sup> Yves R. Simon, *Common Good and Common Action*, 22 REV. POL. 202, 228 (1960) (emphasis omitted).

<sup>37</sup> See DAVID HOLLENBACH, *THE COMMON GOOD AND CHRISTIAN ETHICS* 18 (2002) (citing MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 183 (1982)).

endorsed. A merely “thin sense of the common good”<sup>38</sup> may now seem more plausible than any of the traditional, more robust formulations.<sup>39</sup> There may currently seem to be no set of public policies that promote a good that is genuinely common or uniformly shared.<sup>40</sup>

In that sense, it has been argued, “our search for the common good has become increasingly problematic.”<sup>41</sup> More broadly, it has been said that the idea of a genuine, meaningful common good is losing its traditional cultural hold.<sup>42</sup> At the extreme, it has even been claimed that “talk about the common good has been all but abandoned.”<sup>43</sup> The latter claim, though, is clearly exaggerated.<sup>44</sup>

In fact, the idea of a common good, particularly at the constitutional level, is of much current interest, and is frequently endorsed from a range of political perspectives.<sup>45</sup> The basic problem, though, as we shall now begin to consider, is two-fold. First, we have nothing approaching a meaningful consensus on the very meaning of the idea of a common good—whether at the constitutional or any other level. The very concept itself is thus contested and equivocal. And second, even if we could agree on the analysis of a constitutional or other common good, we would still have only a multiplicity of scattered and diverging views on what, at even a general policy level, a constitutional or other common good would substantively require. Ultimately, any attempt to pursue these differences of basic policy substance would largely track, if perhaps even more irreconcilably, the familiar political contestations of the day.

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<sup>38</sup> George Duke, *The Common Good*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* 369, 369 (George Duke & Robert P. George eds., 2017).

<sup>39</sup> *See id.*

<sup>40</sup> *See Pettit, supra* note 34, at 152 (“Is it plausible, then, that among the sets of practices and policies that a state might put in place, there is one that is in the avowable net interest of each? I think not.”). For a historical anticipation, see FRANCES HUTCHESON, *AN ESSAY ON THE NATURE AND CONDUCT OF THE PASSIONS AND AFFECTIONS, WITH ILLUSTRATIONS ON THE MORAL SENSE* 78 (Aaron Garrett ed., 2002) (referring to inevitable “different Opinions of *publick Good*, and of the *Means* of promoting it”).

<sup>41</sup> HANS SLUGA, *POLITICS AND THE SEARCH FOR THE COMMON GOOD* 4 (2014).

<sup>42</sup> *See id.*

<sup>43</sup> Thomas W. Smith, *Aristotle on the Conditions for and Limits of the Common Good*, 93 *AM. POL. SCI. REV.* 625, 625 (1999). Professor Smith, however, immediately cites a number of twentieth century exponents of a robust sense of the political common good. *See id.*

<sup>44</sup> *See supra* Part I and *infra* Parts II–III.

<sup>45</sup> *See supra* Part I and *infra* Parts II–III.



## II. WHAT IS THE MEANING OF THE COMMON GOOD?

The idea of the common good, particularly in constitutional contexts, begins to unravel, and to lose its apparent importance, when we investigate the very meaning of the concept. The abstract analytical framework of the idea of the public interest might seem uncontroversial. Consider the four-part typology offered by Professor Felix Oppenheim with respect to the public interest.<sup>46</sup> On this typology, one might claim that “it is in the interest of public P that government G enact policy [X] in situation S.”<sup>47</sup> Whether we choose to distinguish the common good from the public interest or not, we might hold, in parallel, that the common good—or the constitutional common good in particular—could take the form of a government, or some private actor, enacting or otherwise adopting policy X in situation S.<sup>48</sup> The idea of a policy might here be construed broadly, perhaps encompassing anything from a specific contextualized choice to a universally broad basic principle. And correspondingly, the “situation” referred to might range from specific, unrepeatable circumstances to the broad human condition itself. Each of these options would then be subject to debate.

Even the term “common good” itself is analytically divisible, and itself open to dispute. As we shall see, the sense in which the good is thought to be “common” is importantly controversial.<sup>49</sup> And the sense or senses in which the common good is “good” is also subject to important dispute, well before we reach the level of even the most basic policy choices.<sup>50</sup> Thus, what counts as common,<sup>51</sup> and what counts as good,<sup>52</sup> already begin to unravel and undermine the usefulness of the concept.

Among the most immediate problems is that of deciding whether the common good must be genuinely common, in the sense of being somehow good for everyone—or, perhaps, just

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<sup>46</sup> See Felix E. Oppenheim, *Self-Interest and Public Interest*, 3 POL. THEORY 259, 260 (1975).

<sup>47</sup> *Id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *infra* Part II.

<sup>50</sup> See *id.*

<sup>51</sup> See Leslie Green, *Law, Co-ordination, and the Common Good*, 3 OXFORD J. LEGAL STUD. 299, 303 (1983).

<sup>52</sup> See *id.*

nearly everyone—or whether a policy that promotes the genuine common good can have distinct winners and substantial losers.<sup>53</sup>

If the common good is genuinely common, it makes logical sense to conclude that something is in the common good, or “a public interest . . . if (and only if) it is an interest of everyone.”<sup>54</sup> But it is equally arguable that theories of the common good, and of the public interest, should recognize the possibility of real conflicts between public and individual or group interests.<sup>55</sup> The idea of balancing the common good against the rights and interests of individuals seems natural to some.<sup>56</sup>

More concretely, cases such as reliance on fair but competitive examinations for desirable positions,<sup>57</sup> and the practice of the acceptance and rejection of suitors,<sup>58</sup> have been raised. At a constitutional level, could the common good require, say, severe and disproportionate sacrifice of identifiable groups in time of war? More so, could the common good, at a constitutional level, require substantial redistributive transfers of wealth and opportunities among identifiable groups?

In his brief treatment of the idea of a common good, John Rawls refers to “certain general conditions that are in an appropriate sense equally to everyone’s advantage.”<sup>59</sup> Perhaps some would wish to preserve the idea that the common good is indeed common to all by distinguishing between the common good as an abstract, general policy, and the common good as it is actually pursued or implemented, in some specific context, with

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<sup>53</sup> See, e.g., JONATHAN CROWE, *NATURAL LAW AND THE NATURE OF LAW* 88 (2019) [hereinafter CROWE, *NATURAL LAW*] (referring to “all members” of the community); Duke, *supra* note 38, at 376 (referring to the flourishing of “each individual” (emphasis omitted)). This distinction assumes that the uncompensated substantial losers are at all times recognized as members of the relevant public, or of the community, rather than being classified, and marginalized, as outsiders.

<sup>54</sup> Theodore M. Benditt, *The Public Interest*, 2 PHIL. & PUB. AFFS. 291, 299 (1973). Professor Benditt then goes on, controversially, to specify that the public interest cannot be something that can be fulfilled or realized by one’s own efforts, or by the efforts of one or more groups, apart from the relevant government. *See id.*

<sup>55</sup> See VIRGINIA HELD, *THE PUBLIC INTEREST AND INDIVIDUAL INTERESTS* vii–viii (1970).

<sup>56</sup> See Amitai Etzioni, *Common Good*, in *THE ENCYCLOPEDIA OF POL. THOUGHT* 1, 3 (Michael T. Gibbons ed. 2015). Etzioni treats the common good and the public interest as synonymous. *See id.* At the constitutional level, see the reference to the “general Welfare” in U.S. CONST. art. 1, § 8, cl. 1.

<sup>57</sup> See F. Rosamond Shields, *The Notion of a Common Good*, in 14 *PROC. ARISTOTELIAN SOC’Y* 274, 286 (1914).

<sup>58</sup> *See id.*

<sup>59</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 217 (rev. ed. 1999).

distinct winners and losers.<sup>60</sup> Whether we would wish to say that it is in the interest of a particular person to be drafted into the infantry and sent into ferocious battle, even in a “just” war, may still remain subject to contest.

Then there is the further basic problem of what we might call the independent constituent elements of the common good. This problem is especially acute at the constitutional level. That is, typically, the common good is not a matter of homogeneous, interchangeable units of pure goodness, or of any other constituent. Rather, the common good is constituted by some sort of combination of distinguishable components. The common good seems to have a number of interacting elements.

What these particular components of the common good are thought to be often varies. The political common good, for Thomas Aquinas, is thought to comprise justice, peace, and well-orderedness.<sup>61</sup> For Jacques Maritain, the common good requires, or presupposes, not just preservation, but justice<sup>62</sup> and “moral goodness” itself.<sup>63</sup> Professor Alexander Tsesis finds equality of rights, or liberal equality, to be constitutive of the common good at the constitutional level.<sup>64</sup>

The listing of essential components of the common good could then be expanded to include “peace, order, prosperity, justice, and community.”<sup>65</sup> Even more elaborately, the common good could be said to depend upon the interacting elements “of justice, of freedom, security, order, morality, happiness, individual well-being, prosperity, progress, and what have you.”<sup>66</sup> Or one might identify the common good with the “flourishing”<sup>67</sup> of both the

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<sup>60</sup> See *id.*; Brian M. Barry, *The Use and Abuse of “The Public Interest”*, in 5 NOMOS: THE PUBLIC INTEREST 191, 203–04 (Carl J. Friedrich ed., 1962).

<sup>61</sup> See Duke, *supra* note 38, at 374.

<sup>62</sup> See Jacques Maritain, *The Person and the Common Good*, 8 REV. POL. 419, 438 (1946).

<sup>63</sup> See *id.*

<sup>64</sup> See Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1612–13 (2013).

<sup>65</sup> Bruce Douglass, *The Common Good and the Public Interest*, 8 POL. THEORY 103, 104 (1980) (referring to the classical natural law tradition). Professor Douglass seeks to distinguish the common good from the public interest, for his particular purposes, while acknowledging that the two concepts can be treated as synonyms. See *id.* at 103.

<sup>66</sup> SLUGA, *supra* note 41, at 2.

<sup>67</sup> Duke, *supra* note 38, at 376 (emphasis omitted).

relevant community as an entity,<sup>68</sup> and of each individual member of that community.<sup>69</sup>

On all of these approaches, the government is not to ascertain and promote the common good in the expectation that qualities such as justice, well-orderedness, happiness, morality, and flourishing will follow therefrom, as results. These goods—including justice, progress, morality, flourishing, and the like—are not merely the results of implementing some separate and independent common good. Rather, these various goods make up, or constitute, the common good. They are the elements of any common good. There is not some interesting common good that preexists these various listed goods.

But this means that most of the work, most of the real controversy, and most of the real interest value must already be exhausted before the government chooses to do anything based on, or in the name of, the common good. Before we have a common good to promote, or to guide our policy choices, we must, for example, have already settled upon what justice broadly requires.<sup>70</sup> But if we have already resolved what justice broadly requires, for purposes of constituting a common good, the basic problems of law and politics, in this context, have already been largely solved. If we have indeed generally agreed, for example, on what justice at the constitutional level requires, then there is surprisingly little of consequence left for the idea of the common good to actually do. And if we cannot agree on what constitutional justice generally requires,<sup>71</sup> we cannot possibly agree on a common good of which justice is a crucial element. The idea of the common good thus depends upon the prior general resolution of the major

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<sup>68</sup> See *id.*

<sup>69</sup> See *id.*; see also Jonathan Crowe, *Intelligibility, Practical Reason, and the Common Good*, in RESEARCH HANDBOOK ON NATURAL THEORY 296, 296 (Jonathan Crowe & Constance Youngwon Lee eds., 2019) [hereinafter Crowe, *Intelligibility*] (referring to “a wide and generally accessible array of modes of human flourishing”); George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44, 45 (2013) (discussing Finnis on the “flourishing of the citizens of a political community”); John M. Finnis, *What Is the Common Good, and Why Does It Concern the Client’s Lawyer?*, 40 S. TEX. L. REV. 41, 42–43 (1999) (discussing the flourishing and the common good). Classically, Leibniz identifies the public good with “the advancement toward perfection of men,” while also equating the common good with contributing “to the glory of God.” GOTTFRIED WILHELM LEIBNIZ, POLITICAL WRITINGS 105 (Patrick Riley ed. & trans. 2d ed. 1988) (c. 1695).

<sup>70</sup> See, e.g., *supra* notes 61–62, 65–66 and accompanying text.

<sup>71</sup> See *infra* Part III (discussing the proposed constitutional revisions).

constitutional issues, and is largely a mere expression of that resolution.

Much the same thing could be said of any other plausible constituent element of the common good. The idea of flourishing—as individuals, or in some collective sense—may indeed also help to constitute the common good.<sup>72</sup> But what flourishing in this sense requires is as contested and as controversial as what justice requires.<sup>73</sup> Similarly, of course, for constituents such as morality,<sup>74</sup> progress,<sup>75</sup> happiness,<sup>76</sup> or equality.<sup>77</sup> Any agreement on what these latter elements require would itself be the crucially meaningful achievement. Redescribing that agreement in terms of a common good would then be of little independent significance.

One might argue, though, that there is still a useful role for the concept of the common good to play. The various goods such as justice, peace, progress, flourishing, and equality, however we may expand or contract such a list, is likely to remain plural in character. More than one element will thus likely comprise the overall common good, at the constitutional or any other level. And these various goods could presumably come into important conflict with one another. Perhaps in a given situation we might believe that the goods of, say, peace and progress are in unavoidable conflict. Or that the good of morality conflicts with the good of happiness. Even if we cannot actually commensurate such conflicting goods,<sup>78</sup> we must somehow adjudicate such basic value conflicts. Perhaps we could somehow then say that attempting to reconcile and accommodate the conflicts among the constituent elements of the common good is, however paradoxically, itself the task of identifying and pursuing the common good.

The problem here, though, is that the idea of a common good, apart from its constituent elements, cannot possibly bring much in the way of useful resources for resolving such conflicts among its own constituent goods. The idea of the common good itself

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<sup>72</sup> See *supra* notes 67–69 and accompanying text.

<sup>73</sup> For merely one prominent, but inescapably controversial, such approach to flourishing, see MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 32–34 (2011).

<sup>74</sup> See *supra* note 66 and accompanying text.

<sup>75</sup> See *supra* note 66 and accompanying text.

<sup>76</sup> See *supra* note 66 and accompanying text.

<sup>77</sup> See *supra* note 64 and accompanying text. For a sense of the multidimensional disputes over what distributional and constitutional equality require, see generally R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1 (2016).

<sup>78</sup> See generally John Finnis *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 8–10 (1990).

simply does not meaningfully answer questions of such constituent value conflicts.<sup>79</sup>

Ironically, though, one or more of the constituent elements of the common good may itself take on a broader role in adjudicating potential conflicts among all such elements. Consider, as possible candidates for such an adjudicatory role, the concept of justice, or of morality. In a higher and broader sense, justice might well be thought to potentially adjudicate among conflicts over goods. How it would properly do so is of course itself contested.<sup>80</sup> But it would clearly seem entirely inappropriate, particularly at the constitutional level, for a government to announce that in light of particular tradeoffs among goods, the government has chosen a path that is, overall, admittedly unjust. Similarly, it would be entirely odd to defend any such choice as the best value conflict resolution that is, in a broad sense, overall morally indefensible. Any such admission would be a disqualifier. Of course, there are no uncontroversial routes to properly—or, one might say “justly”—adjudicating among conflicts among the components of the common good.<sup>81</sup> But the idea of the common good, apart from its components, clearly cannot resolve any such conflicts.

The nature of the common good is fundamentally contested in a further respect. The leading exponents of the idea of a common good have been unable to establish the basic relation between

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<sup>79</sup> Consider, in this context, “[t]he Buck-Passing Account of the Common Good” offered by Professors Beerbohm and Davis, according to which the common good merely “consists in the fact that there are [unspecified] reasons to act together to bring it about.” Eric Beerbohm & Ryan W. Davis, *The Common Good: A Buck-Passing Account*, 25 J. POL. PHIL. e60, e64 (2017) (emphasis omitted). Note that Beerbohm and Davis treat the ideas of justice and the common good as distinct concepts, with both serving as guides to political decision making. *See id.* at e60–e61.

<sup>80</sup> Contrast, respectively, the largely contractualist justice of RAWLS, *supra* note 59, at xi–ii, xciii; the libertarian justice of ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–52 (1974); the communitarian justice of MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THINGS TO DO? 6 (2009); the socialism of G.A. COHEN, RESCUING JUSTICE AND EQUALITY 1–2 (2008); and the natural law approach to justice in JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 198–225 (2d ed. 2011). For the argument that for Rawls, the common good of citizens itself requires limits on any public policy recourse to “comprehensive” religious and other metaphysically grounded moral beliefs, see Samuel Freeman, *Democracy, Religion & Public Reason*, 149 DAEDALUS 37, 37, 40, 44 (2020).

<sup>81</sup> Consider, in this regard, the conclusion of Professor Michael Sandel, a leading contemporary champion of pursuing the common good, to the effect that “the common good is inescapably contestable.” MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT’S BECOME OF THE COMMON GOOD? 214 (2020). *See generally* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 167–69 (1956); WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 10 (3d ed. 1993).

individual persons and the common good. It is possible to start in on this problem by observing that the common good, as promoted by our governing institutions, helps to make us who we are, and in that sense contributes to the forming of our very identities as persons.<sup>82</sup> While this is undoubtedly true, it is also true that any regime—whether traditionalist, liberal, radical, unserious, or purely decadent—can equally contribute to the very identity of its constituent members.<sup>83</sup> A regime that seeks, or promotes, the common good does not seem in this respect at all distinctive.

More broadly, the relationship between individual persons or groups and the common good has long been contested. At the most basic level, there are various sorts of individualists,<sup>84</sup> and various sorts of collectivists,<sup>85</sup> with respect to a common good.<sup>86</sup> On one formulation, it is said that “[w]hereas individualists argue that the common good can always be reduced to the goods of individuals, collectivists maintain that some common goods are ‘irreducibly social.’”<sup>87</sup> We do seem to experience harms and benefits as individuals. But there is also a sense that, say, the victory of a sports team is shared by all of the teammates, and perhaps even by the team’s fans, as a common, and in some sense deeply shared, victory.<sup>88</sup>

The basic controversies as to the very nature of the common good in this respect have been further developed in differing ways by the leading contemporary natural law theorists; in particular, by John Finnis,<sup>89</sup> Mark Murphy,<sup>90</sup> and Jonathan Crowe.<sup>91</sup>

<sup>82</sup> See C.C. Pecknold, *False Notions of the Common Good*, FIRST THINGS (Apr. 23, 2020), <https://www.firstthings.com/web-exclusives/2020/04/false-notions-of-the-common-good> [https://perma.cc/6WWE-JS5X].

<sup>83</sup> See, e.g., PLATO, *THE REPUBLIC OF PLATO* bks. VIII–IX, at 270–318 (John Llewlyn Davies & David James Vaughan trans., MacMillan and Co. Press 1935) (c. 360 B.C.E.).

<sup>84</sup> See William Rehg, *Solidarity and the Common Good: An Analytical Framework*, 38 J. SOC. PHIL. 7, 9, 12–13 (2007).

<sup>85</sup> See *id.* at 7.

<sup>86</sup> See *id.*

<sup>87</sup> *Id.* (footnote omitted).

<sup>88</sup> See Benjamin L. Smith, *The Meaning and Importance of Common Goods*, 80 THE THOMIST: SPECULATIVE Q. REV. 583, 587 (2016) (“The victory of the army is shared by all its parts . . .”).

<sup>89</sup> See generally JOHN FINNIS, *supra* note 80, at 154–56, 459.

<sup>90</sup> See generally MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* 61–90 (2006); Mark C. Murphy, *The Common Good*, 59 REV. METAPHYSICS 133 (2005) [hereinafter Murphy, *The Common Good*]. See generally George Duke, *The Distinctive Common Good*, 78 REV. POL. 227, 227–44 (2016).

<sup>91</sup> See generally CROWE, *NATURAL LAW*, *supra* note 53, at 85–91; Crowe, *Intelligibility*, *supra* note 69, at 300–03.

Professor Murphy, specifically, has classified natural law approaches to the common good as, by their nature, either instrumental or aggregative, or else as focused on what is called a “distinctive [common] good.”<sup>92</sup>

On this typology, instrumental theories of the common good focus on the conditions that are the means by which community members can promote their own chosen goals.<sup>93</sup> Those individual goals may certainly take into account, altruistically, the well-being of other persons. On the aggregative view, the focus is on the actual realization of the goods of persons, perhaps, but not necessarily, by adding up gains and losses in fulfillment under alternative public policies.<sup>94</sup> On the final, or “distinctive” common good approach, the focus is instead on some genuinely shared, holistic, indivisible good of the community as an entity—above and beyond the aggregated goods of individuals.<sup>95</sup> And it is possible to attempt to combine two or more of these approaches.<sup>96</sup>

The arguments for and against each of these approaches unfortunately establish the continually contested nature of the common good. How the government is to best aggregate or otherwise accommodate variously overlapping and conflicting goods, particularly when community members may care for one another’s good in various ways, remains unresolved. The underlying idea of persons “sharing” an interest remains murky and ambiguous.<sup>97</sup> And whether there really is a perhaps supremely valuable common good that transcends the interests of the community members also remains disputed.<sup>98</sup>

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<sup>92</sup> See Murphy, *The Common Good*, *supra* note 90, at 136.

<sup>93</sup> See *id.*; CROWE, NATURAL LAW, *supra* note 53, at 88–90; Crowe, *Intelligibility*, *supra* note 69, at 300–01.

<sup>94</sup> See *supra* notes 92–93.

<sup>95</sup> See *supra* notes 92–93.

<sup>96</sup> See CROWE, *supra* note 53, at 90. John Finnis attempts to combine an emphasis on an instrumental approach to the common good with a concern for the intrinsic value of mutual assistance, and “the common good that consists in the all-inclusive and intrinsically desirable flourishing of [the] community.” FINNIS, *supra* note 80, at 459. For a contrasting methodological individualism, see Richard A. Epstein, *The Problem with “Common Good Constitutionalism”*, HOOVER INST. (Apr. 6, 2020), <https://www.hoover.org/research/problem-common-good-constitutionalism> [<https://perma.cc/6EU2-U8DM>].

<sup>97</sup> Note, for example, that persons who never interact can still share an interest in say, craft beer brewing. Fans who never interact can share an interest in a favorite team’s success, and then in some sense join in its official celebration. Persons can, presumably in a different and stronger sense, share an interest in the common good of their friendship. And the common good of a marriage may be yet further distinctive.

<sup>98</sup> See *supra* note 96.



Each of these fundamental conceptual issues presents alternative branching paths for the identification and the pursuit of the common good. But the most dramatic problems for any attempt to rely on the idea of a common good, particularly at the constitutional level, actually lie elsewhere. As we shall now see, any attempt to identify and promote a substantive constitutional level good merely restates, rather than resolves, the already existing lines of sustained and deep contention in the constitutional arena.

### III. SUBSTANTIVE CONSTITUTIONAL DISPUTES AND THE IDEA OF A COMMON GOOD

Particularly under the circumstances of our last half-century or so,<sup>99</sup> the existence, recognition, and pursuit of a substantive constitutional common good has come to seem dubious, if not futile. At any reasonably broad level of principle and policy, further investing in the idea of a constitutional common good evidently avails little.

As a convenient illustration, consider the results of the recent constitutional drafting project held by the National Constitution Center.<sup>100</sup> In a revealing metaphor, “three teams”<sup>101</sup> of recognized experts were invited to draft what were designated in advance to be, respectively, conservative,<sup>102</sup> libertarian,<sup>103</sup> and progressive<sup>104</sup> rewrites of the current Constitution. The project thus excluded, at a minimum, those who are disinclined to see major constitutional problems and values as matters of preexisting schools of political thought, or matters of text, as distinct from, say, how any given constitutional text is to be interpreted.

The conservative, libertarian, and progressive rewrites of the Constitution jointly illustrate the absence of anything like common ground as to a meaningful, basic common good at the constitutional level. This is not surprising, given the gradually increasing political fragmentation of the last several decades.<sup>105</sup>

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<sup>99</sup> See *supra* Part I.

<sup>100</sup> See *The Constitution Drafting Project*, NAT'L CONST. CTR., <https://constitutioncenter.org/debate/special-projects/constitution-drafting-project> [<https://perma.cc/NQF7-KP7V>] (last visited Sept. 16, 2022).

<sup>101</sup> *Id.* The project is characterized in terms of a debate. See *id.*

<sup>102</sup> See ROBERT P. GEORGE ET AL., *THE CONSERVATIVE CONSTITUTION* (2020).

<sup>103</sup> See ILYA SHAPIRO ET AL., *THE LIBERTARIAN CONSTITUTION* (2020).

<sup>104</sup> See CAROLINE FREDERICKSON ET AL., *THE PROGRESSIVE CONSTITUTION* (2020).

<sup>105</sup> See *supra* Part I.

But there are substantial constitutional level disputes even within each of the three designated schools as well.

A. *The Conservative Constitution*

Consider, to begin with, a number of themes from the proposed conservative version of the Constitution. The basic conservative assumption is that “[a] sound constitution will serve justice and the common good.”<sup>106</sup> This view of course assumes the existence, sufficient ascertainability, and promotability of a constitutional common good at a meaningful policy level.

More specifically, this view appears to assume, contrary to some leading theorists of the common good,<sup>107</sup> that justice and the common good are somehow separate and distinct, and that justice is not itself an essential element of the common good.<sup>108</sup> Intriguingly, in an era of minimal and declining political and institutional trust,<sup>109</sup> the conservative approach also views “the Constitution [as] a pact of social trust.”<sup>110</sup> This may be meant aspirationally. The conservative Constitution is, as well, thought to embody an agreement that is itself limited by a higher, objective, natural law.<sup>111</sup> Relying upon any natural law theory, though, inevitably introduces further controversy at a basic level.<sup>112</sup> This inescapable basic controversy persists whether any given natural law theory is ultimately correct or not.

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<sup>106</sup> GEORGE ET AL., *supra* note 102, at 1.

<sup>107</sup> *See supra* notes 61–71 and accompanying text.

<sup>108</sup> *See supra* notes 61–71 and accompanying text.

<sup>109</sup> *See* R. George Wright, *Trust and Distrust Across Constitutional Law*, 36 NOTRE DAME J.L., ETHICS & PUB. POL’Y 39, 39 (2022).

<sup>110</sup> GEORGE ET AL., *supra* note 102, at 2.

<sup>111</sup> *See id.*

<sup>112</sup> *See, e.g., Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., concurring in the judgment and concurring in part) (“The ideas of natural justice are regulated by no fixed standard . . . .”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 50 (1980) (“[Y]ou can invoke natural law to support anything you want.”); Daniel A. Farber, *The Originalism Debate: A Guide For the Perplexed*, 49 OHIO ST. L.J. 1085, 1103 (1989); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 49 (1992); Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 106 (2014). For a classical perspective, see MICHEL DE MONTAIGNE, *AN APOLOGY FOR RAYMOND SEBOND* 161–62 (M.A. Screech ed., trans., 1987) (1576). Montaigne intriguingly observes that “[i]t is quite believable that natural laws exist . . . . But we have lost them; that fine human reason of ours is always interfering, seeking dominance and mastery, distorting and confounding the face of everything according to its own vanity and inconsistency.” *Id.* To similar effect, see BLAISE PASCAL, *Pensées*, in *PENSÉES AND OTHER WRITINGS* 24 (Honor Levi ed., trans., 1995)

To start, at the level of policy, the proposed conservative Constitution—controversially among conservatives—endorses congressional term limits.<sup>113</sup> As well, the endorsed conservative call for a balanced budget amendment<sup>114</sup> would have the Supreme Court judging inherently speculative estimates as to tax receipt and ill-defined expenditure relationships in a given year, along with embracing the need for Supreme Court judgments regarding emergency exceptions.<sup>115</sup> It is unclear how comfortable conservatives should be with any such process. And the practice, endorsed in the proposed conservative Constitution, of a voluntary, or else a mandatory, presidential line-item veto<sup>116</sup> also raises separation of powers issues that are controversial among conservatives.<sup>117</sup>

Further, a proposed conservative Constitution endorsing anything like a legislative veto of administration regulations,<sup>118</sup> thereby overruling the conservative Chief Justice Burger's majority opinion in *INS v. Chadha*,<sup>119</sup> raises similar policy conflicts and concerns among fellow conservatives.<sup>120</sup> And relatedly, what

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(1670); JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 69–70 (Maurice Cranston trans., 1984) (1755). Whether reason itself is the problem, however, is doubtful.

<sup>113</sup> See GEORGE ET AL., *supra* note 102, at 4. For a discussion at the state level, see U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995). A conservative argument against constitutional term limits for legislators would presumably focus on the value of electoral democracy and of accumulating legislative seniority through lived legislative experience.

<sup>114</sup> See GEORGE ET AL., *supra* note 102, at 6–7. The closest case under our present unamended Constitution is *Bowsher v. Synar*, 478 U.S. 714, 717–18 (1986).

<sup>115</sup> The advisability of anything like a fifty percent of GDP limitation is of course itself controversial on the merits. See, e.g., Jason Furman & Lawrence Summers, *A Reconsideration of Fiscal Policy in the Era of Low Interest Rates* 11 (Nov. 30, 2020) (unpublished manuscript), <https://www.brookings.edu/wp-content/uploads/2020/11/furman-summers-fiscal-reconsideration-discussion-draft.pdf> [<https://perma.cc/5UAG-5GHQ>]. To the extent that the economics of federal budget deficits and national indebtedness is increasingly controversial, there is a constitutionally conservative case not only for caution and prudence, but for avoiding the inscription of inevitably shifting empirical assessments into the text of the Constitution.

<sup>116</sup> See GEORGE ET AL., *supra* note 102, at 6–7.

<sup>117</sup> In the closest case analogue under the current Constitution, the conservative Chief Justice Rehnquist joined the majority opinion of Justice Stevens, which held that the 1996 Line Item Veto Act violated the Presentment Clause. See *Clinton v. City of New York*, 524 U.S. 417, 420, 421 (1998).

<sup>118</sup> See GEORGE ET AL., *supra* note 102, at 8.

<sup>119</sup> 462 U.S. 919, 959 (1983).

<sup>120</sup> A methodological conservative might, for example, require the exhaustion of all means of properly asserting congressional legislative authority that have lesser implications for basic separation of powers relationships among the branches.

amounts to the effective overruling of the authorization of administrative adjudicatory power<sup>121</sup> in cases of private rights would also be controversial from a conservative standpoint. There is, after all, always a conservative interest in relatively narrow solutions,<sup>122</sup> where feasible.

Finally, the proposed conservative Constitution seeks to reframe the scope of constitutional rights. If anything in this regard is clear, it is that the scope of such rights will be fundamentally controversial, whether among conservatives, or much more broadly, across the political spectrum. The proposed conservative draft Constitution seeks, prominently, to prohibit judicial substantive due process,<sup>123</sup> understood as the judicial invention of novel fundamental rights.<sup>124</sup> Thus, the courts are to possess no “general power to create new rights or to adjudge . . . the reasonableness or wisdom of laws enacted by the representatives of the people.”<sup>125</sup>

Here, for conservatives, there is a latent controversy in prohibiting substantive due process, or the judicial invention of new fundamental rights more generally, regardless of the constitutional clause or theory that is invoked. Some conservatives will be sympathetic to the idea that as new sorts of threats to basic individual and broader family relationships emerge, it may be appropriate to judicially defend the basic interests at stake in the absence of, or contrary to, statutory law.

The point here is that it will be essentially contestable, among conservatives and more generally, how any such judicial efforts should be characterized. For some, such efforts may involve applying the text of the Constitution, as motivated and informed

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Insulating, or not insulating, particular sorts of administrative actors from presidential removal should also not be viewed as a question that has a distinctive single conservative answer. See GEORGE ET AL., *supra* note 102, at 8. See generally *Morrison v. Olson*, 487 U.S. 654, 686–93 (1988), along with rapidly accumulating subsequent case law.

<sup>121</sup> See *Crowell v. Benson*, 285 U.S. 22, 53–55 (1932); see also ADRIAN VERMEULE, *LAW’S ABNEGATION* 25–26 (2016).

<sup>122</sup> See, e.g., ROBERT A. DAHL & CHARLES E. LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 82 (2d ed. 2000).

<sup>123</sup> See GEORGE ET AL., *supra* note 102, at 13.

<sup>124</sup> See *id.*

<sup>125</sup> *Id.* Consider Justice Hugo Black’s famous dictum, quoting Judge Learned Hand, to the effect that “it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them.” *Griswold v. Connecticut*, 381 U.S. 479, 526–27 (1965) (Black, J., dissenting) (quoting LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958)).

by natural law principles,<sup>126</sup> to novel circumstances. For others, though, such judicial efforts may involve instead the benign exercise of what admittedly amounts, in effect, to substantive due process.<sup>127</sup> Whether a significant new extension of a right amounts to merely recognizing, or else to creating, a new right is inherently contestable. And creating, in effect, new rights by judicial appeal to some other constitutional provision hardly resolves this basic controversy.

Interestingly, some of the most important emerging constitutional issues cut across ideological and methodological lines. Among such important cross-cutting issues is that of the basic environmental rights of future generations, where recognizing such rights would require substantial personal sacrifice by all those persons who are currently well-off.<sup>128</sup> Such a constitutional right could be controversial, to varying degrees, along various political and jurisprudential axes.<sup>129</sup>

In any event, it seems clear that the proposed conservative Constitution must inevitably be controversial at basic levels not only with the many sorts of non-conservatives, but with many persons who would qualify as conservative in the relevant sense. These basic controversies jointly mean that the proposed conservative Constitution cannot consistently identify—let alone consistently promote—any reasonably determinate constitutional level common good. Any judgments thereby at the constitutional level will inevitably be fundamentally contested by fellow conservatives, and not merely by many non-conservatives.

Broadly parallel results obtain for the proposed libertarian and the progressive revisions of the Constitution as well. Below are merely brief illustrations of the ways in which the libertarian and progressive revisions inevitably fail to triangulate, even very generally, on a practically useful understanding of the constitutional common good.

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<sup>126</sup> See GEORGE ET AL., *supra* note 102, at 2, 14.

<sup>127</sup> For the classic groundwork, of course without reference to substantive due process terminology, see *Calder v. Bull*, 3 U.S. 386, 392–95 (1789).

<sup>128</sup> That is, where fulfilling the rights of future cohorts requires more than modest, tokenistic, or symbolic sacrifices by the currently reasonably well off.

<sup>129</sup> See generally SAMUEL SCHEFFLER, WHY WORRY ABOUT FUTURE GENERATIONS? (2018); Tim Mulgan, *Ethics for Possible Futures*, 114 PROC. ARISTOTELIAN SOC'Y 57 (2014); Tim Mulgan, *Answering to Future People*, 35 J. APPLIED PHIL. 532 (2018).

B. *The Libertarian Constitution*

The proposed libertarian Constitution, admittedly, overlaps in some respects with the conservative Constitution. This certainly opens the possibility of a degree of commonality. But these areas of conceptual overlap do not suffice to establish, even in those particular areas, the existence of a broadly persuasive constitutional common good.

Thus the proposed libertarian Constitution, like the conservative version, would, merely for example, call for a balanced federal budget, emergency circumstances aside.<sup>130</sup> More controversial, even among libertarians more generally, is the libertarian draft's general emphasis on "negative" as distinct from "positive" rights,<sup>131</sup> including any purported positive constitutional rights to education<sup>132</sup> or health care.<sup>133</sup> One basic problem here is that being a libertarian does not itself establish the extent to which one should recognize the positive external effects of various forms of education and of health care, as provided to many persons who could not otherwise afford such services.<sup>134</sup>

The proposed libertarian Constitution then seeks to emphasize that the general welfare, for constitutional purposes, should indeed be general, "as opposed to [merely some] parochial or specific welfare."<sup>135</sup> Here, the basic problem is the large indeterminacy—if not the sheer practical emptiness—of this distinction. Verbal distinctions in a constitutional text between something as nebulous as the general welfare—as distinct from a factional or large interest group welfare—simply restates, broadly, the problem of identifying a genuine common good or a genuine

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<sup>130</sup> See SHAPIRO ET AL., *supra* note 103, at 2, 7; *supra* notes 102, 114, 115 and accompanying text. The libertarian Constitution, however, unlike the conservative Constitution, ultimately rejects term limits generally. See SHAPIRO ET AL., *supra* note 103, at 3. *But see supra* notes 102, 113 and accompanying text.

<sup>131</sup> See SHAPIRO ET AL., *supra* note 103, at 2–3. See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). This approach is controversially supported in the famously divided case of *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 195–96 (1989).

<sup>132</sup> See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85–107 (1962). Friedman's classic defense of some positive educational rights, largely on grounds of the positive externalities generated by such rights. *Id.*

<sup>133</sup> Of course, important positive externalities are generated by a wide range of vaccinations and by the provision of other health goods, including child nutrition, to persons who could not otherwise afford such goods. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 31–35 (1905).

<sup>134</sup> See *supra* notes 132–133. Correspondingly, the existence of a negative externality does not begin to tell us how it should be legally addressed.

<sup>135</sup> SHAPIRO ET AL., *supra* note 103, at 5.

public interest.<sup>136</sup> One person's majority or numerical minority faction can be another's general interest.

Similarly, the proposed libertarian Constitution seeks to rely on the rather technical and indeed murky idea of coercion in limiting the ability of Congress to induce the states to legislate in accordance with congressional preferences.<sup>137</sup> The problem here is that while many writers grant that it is possible to coerce a state by offering or withholding federal funds on a conditional basis, neither the idea of coercion, nor of coercive offers, is sufficiently clear to offer reasonably determinate guidance in particular cases. The classic case law provides merely conclusory announcements of the supposed presence, or absence, of any illegitimate coercion.<sup>138</sup> This indeterminacy is inevitable, given the murkiness, equivocality, and contestedness of the very idea of coercion and coercive offers.<sup>139</sup>

In the realm of individual rights, the proposed libertarian Constitution would then protect both a right to the "fruits of one's labors"<sup>140</sup> and a "right to live a peaceful life of one's choosing."<sup>141</sup> Such purported rights, however, raise familiar broad questions,

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<sup>136</sup> For a sense of the shifting fashions, compare the characterizations of the victimized groups of homeowners, compare *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413–14 (1922) (insufficient genuinely public interest at stake) with *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491–93 (1987) (more sympathetic to finding the presence of a sufficiently public interest). Compare *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434–35 (1934) (the similarly broadly minded majority opinion), with *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 240–51 (1978), (in the Contracts Clause area).

<sup>137</sup> See SHAPIRO ET AL., *supra* note 103, at 5.

<sup>138</sup> Compare *United States v. Butler*, 297 U.S. 1, 71 (1936) (finding coercion, or perhaps undue coercion, in the congressional Spending Clause area), with *Steward Machine Co. v. Davis*, 301 U.S. 548, 592–93 (1937) (finding the absence of coercion).

<sup>139</sup> For detailed discussion in the Religion Clause context, see R. George Wright, *Why a Coercion Test Is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2010). Some minimal sense of the conceptual-level indeterminacy is provided by, for example, the various contrasting approaches in J. ROLAND PENNOCK & JOHN W. CHAPMAN, *COERCION* (Routledge rep. ed. 2017). See generally ALAN WERTHEIMER, *COERCION* (1990).

<sup>140</sup> SHAPIRO ET AL., *supra* note 103, at 10. This opens up the contested relationship between expropriation and various forms and levels of taxation.

<sup>141</sup> *Id.*

respectively, of the scope of individual desert,<sup>142</sup> and of the recognition and the proper role of consent and responsibility.<sup>143</sup>

And finally, the proposed libertarian<sup>144</sup> Constitution is in some key respects insensitive, if not antithetical, to the libertarian school that would refer to itself as “left-libertarianism.”<sup>145</sup> The proposed libertarian Constitution is more clearly oriented toward self-ownership and individual autonomy than to left-libertarian concerns, such as the various forms of social responsibility, compensation, and equality in the realm of property.<sup>146</sup>

### C. *The Progressive Constitution*

The third and last of the draft revisions is of a progressive Constitution.<sup>147</sup> Structurally similar, and therefore at this point unnecessary, observations might be made of a number of the progressive draft’s proposed revisions. Let us focus briefly on the indeterminacy of merely one interesting proposal. Consider, in particular, language from the draft progressive Constitution itself,<sup>148</sup> in the form of a revised First Amendment.<sup>149</sup> This revised First Amendment, in a sense, expands the traditionally recognized scope of individual rights thereunder by declaring that “everyone shall have the right to freedom of thought, conscience and

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<sup>142</sup> For example, consider the classic debate between RAWLS, *supra* note 59, at 310 and NOZICK, *supra* note 80, at 217. See generally GEORGE SHER, DESERT (1987); James Sterba, *Justice as Desert*, 3 SOC. THEORY & PRAC. 101 (1974); Robert Young, *Egalitarianism and Personal Desert*, 102 ETHICS 319 (1992).

<sup>143</sup> For a view of the range of the different approaches taken, see generally THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin G. Miller & Alan Wertheimer eds., 2010); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT (2004). Consider also the possibility that “the multiplication of innumerable particular rights can erode any sense of community and the common good.” BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 346 (1997).

<sup>144</sup> See generally JOHN HOSPERS, LIBERTARIANISM (1971); JAN NARVESON, THE LIBERTARIAN IDEA (3d ed. 2008); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982).

<sup>145</sup> See generally LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000); James P. Sterba, *Reconciling Liberty and Equality, or Why Libertarians Must Be Socialists*, in LIBERTY, EQUALITY, AND PLURALITY 38 (Larry May et al. eds., 1997); Peter Vallentyne et al., *Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried*, 33 PHIL. & PUB. AFF. 201 (2005).

<sup>146</sup> See *supra* note 145.

<sup>147</sup> See FREDERICKSON ET AL., *supra* note 104.

<sup>148</sup> See *id.*

<sup>149</sup> See *id.* at 17–18.



religion.”<sup>150</sup> This proposed language suggests a sort of constitutional equal protection for secular and religious conscience. To the extent that the free exercise of religion is accommodated, so, evidently, would be the exercise of non-religiously based conscience.<sup>151</sup> There is certainly much of interest in any such proposal.

Special attention should be paid, however, to what one might then call the attending “breadth versus depth problem.” As writers as politically distinct as Ronald Dworkin<sup>152</sup> and Justice Scalia<sup>153</sup> have recognized, extension of a constitutional right in this area, for the sake of equality, tends in practice to reduce the degree of stringency of overall constitutional protection for the right in question.<sup>154</sup> Rights of conscience, in general, might then come to hold only modest traction against democratically enacted good faith legislative measures. Consider, in contrast, the overwhelming initial endorsement of the Religious Freedom Restoration Act,<sup>155</sup> and the Religious Land Use and Rights of Institutionalized Persons Act<sup>156</sup> despite, if not because of, their relatively stringent protections. But protection of everyone’s conscience, in contrast, might well quickly become both a mile wide and an inch deep. Whether this resulting minimization of conscience protection would be desirable could well be controversial even among progressives.

Of course, the particular draft conservative, libertarian, and progressive constitutions do not exhaust the scope of basic-level approaches to constitutional controversies and conflicts. As merely one additional approach among others, though, consider a separate further approach that is explicitly aimed at ascertaining, and promoting, the common good.<sup>157</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *See id.* at 6.

<sup>152</sup> *See, e.g.,* Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1984); RONALD DWORKIN, RELIGION WITHOUT GOD 130, 133 (2013).

<sup>153</sup> *See* Emp. Div. v. Smith, 494 U.S. 872, 888–89 (1990) (adopting a generally relaxed Free Exercise test for neutral rules of general applicability).

<sup>154</sup> *See supra* notes 152–153.

<sup>155</sup> 42 U.S.C. § 2000bb.

<sup>156</sup> 42 U.S.C. §§ 2000cc. et seq.

<sup>157</sup> *See, e.g.,* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (Polity Press 2022); Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/G86V-S9BP>] [hereinafter Vermeule, *Beyond Originalism*];

The leading contemporary explicit common good constitutionalist, Professor Adrian Vermeule, has endorsed “the principles that government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate.”<sup>158</sup> What is widely termed the legislation of morality is, on this natural law-constrained approach, inevitable and desirable.<sup>159</sup> Neither “maximiz[ing] individual autonomy” nor “minimiz[ing] the abuse of [government authority]” is a primary goal of this common good oriented government, even assuming that these are coherent possible aims of any government.<sup>160</sup>

On this view, duties of justice and prudence require rulers to promote individual liberties, where appropriate, and where such liberties are rightly understood as expressions of “the natural human capacity to act in accordance with reasoned morality.”<sup>161</sup> A form of the classic distinction between negative liberty and

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Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), <https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/> [<https://perma.cc/XZ6M-2JHM>]; Adrian Vermeule, *Deference and the Common Good*, MIRROR OF JUST. BLOG (May 8, 2020), <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/a-confusion-about-deference.html> [<https://perma.cc/GP5E-ZX5X>]; Adrian Vermeule, *Supreme Court Justices Have Forgotten What the Law Is For*, N.Y. TIMES (Feb. 3, 2022), <https://www.nytimes.com/2022/02/03/opinion/us-supreme-court-nomination.html> [<https://perma.cc/CC9N-DXK7>] (previewing the author’s forthcoming book entitled, COMMON GOOD CONSTITUTIONALISM) (hereinafter, Vermeule, *Supreme Court Justices*); Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, IUS & IUSTITIUM (Sept. 9, 2021), <https://iusetiustitium.com/myths-of-common-good-constitutionalism/> [<https://perma.cc/3TJN-LJ2Z>]; see also *The Common Good Project*, UNIV. OXFORD FAC. L., <https://www.law.ox.ac.uk/research/common-good-project> [<https://perma.cc/TX7L-7LR6>] (last visited Sept. 14, 2022). For a brief summary of how government actors in general might work from broad principle down to more concrete and particular rules, see Adrian Vermeule, *Deference and Determination*, IUS & IUSTITIUM (Dec. 2, 2020), <https://iusetiustitium.com/deference-and-determination/> [<https://perma.cc/2SM7-5L3F>] [hereinafter Vermeule, *Deference and Determination*]. For broad critique of Professor Vermeule’s common good constitutional project, see, for example, Sotirios Barber et al., *The Constitution, the Common Good, and the Ambition of Adrian Vermeule*, CONSTITUTIONALIST (Jan. 26, 2021), <https://theconstitutionalist.org/2021/01/26/the-constitution-the-common-good-and-the-ambition-of-adrian-vermeule-by-sotirios-barber-stephen-macedo-and-james-fleming/> [<https://perma.cc/H7DC-T6ZF>]; Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, ATLANTIC (Apr. 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> [<https://perma.cc/FX4L-64LL>].

<sup>158</sup> Vermeule, *Beyond Originalism*, *supra* note 157.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

positive liberty, reflecting authentic desires,<sup>162</sup> is therefore of central relevance.<sup>163</sup> Professor Vermeule's explicit common good understanding of positive liberty is thus focused on authentic flourishing, as the embodiment and expression of the common good, rather than, say, on autonomy<sup>164</sup> in the sense of mere absence of constraint.

The fundamental goal of this explicit common good constitutionalism is to "promote peace, justice, abundance, health, and safety, by means of just authority, hierarchy, solidarity, and subsidiarity."<sup>165</sup> The role of families and other intermediary association is emphasized,<sup>166</sup> along with the correction of the injustices that result from the play of market forces.<sup>167</sup>

Professor Vermeule well appreciates that these broad values do not logically imply any particular substantive statutory provisions, administrative regulations, or judicial decisions.<sup>168</sup> The need to somehow transition from broad values to multiple levels of increasingly specific legal provisions is clearly recognized as inescapable. For our purposes, though, the crucial question is whether Professor Vermeule's understanding of the common good, in itself, provides appropriately meaningful guidance and can be sufficiently broadly appealing in terms of democratic, popular support.

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<sup>162</sup> See generally Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 169 (Henry Hardy ed., 2d ed. 2002). For discussion of liberty as self-actualization according to Rousseau, see John Plamenatz, "Ce Qui Ne Signifie Autre Chose Sinon Qu'on Le Forcera d'Être Libre", in HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS 318 (Maurice Cranston & Richard S. Peters eds., 1972). For the related Marx-Engels conception of false consciousness, see W. G. Runciman, "False Consciousness", 44 PHIL. 303, 303 (1969). For the loosely related broader idea of non-autonomous adaptive preferences, see JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 22 (2016 ed.).

<sup>163</sup> See Vermeule, *Beyond Originalism*, *supra* note 157.

<sup>164</sup> See generally JEROME B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1997).

<sup>165</sup> See Vermeule, *Beyond Originalism*, *supra* note 157; see also Vermeule, *Supreme Court Justices*, *supra* note 157 ("The aim of constitutional government . . . should be to promote the classical ideals of peace, justice and abundance.").

<sup>166</sup> See Vermeule, *Beyond Originalism*, *supra* note 157.

<sup>167</sup> See *id.*

<sup>168</sup> See generally *Deference and Determination*, *supra* note 157 (the discussion of the types of more, and less, rigorous Thomistic "determination" in Vermeule). See generally JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 266-68 (1988); MONTAIGNE, *supra* note 112.

There is here a basic problem. A focus on “peace, justice, abundance, health, and safety”<sup>169</sup> as constituents of the common good is of starkly limited help if our disputes over what, say, justice, or genuine abundance, requires are roughly as broad and fundamental as our disputes over the meaning of the common good itself. One might well imagine that disputes over what justice requires, at whatever level, would largely take the place of, or simply rehash, our familiar contests over what the common good requires. We cannot settle upon what the common good requires and then move on to consider what justice requires. Most of the real work, in any such case, would then be done in resolving what justice itself requires. The idea of the common good itself would again contribute little of interest.

Those sympathetic to any natural law-based approach to justice also recognize that there must be constraints—based in practical wisdom<sup>170</sup> and epistemic humility<sup>171</sup>—on legally applying and enforcing even the most fundamental values. But there remains, as well, what we have seen to be the classic problem

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<sup>169</sup> Vermeule, *Beyond Originalism*, *supra* note 157. *But cf.* Joseph de Maistre, *Considerations on France*, in *THE WORKS OF JOSEPH DE MAISTRE* 47, 63 (Jack Lively trans., 1965) (c. 1796) (“[T]he true fruits of human nature—the arts, sciences, great enterprises, noble ideas, manly virtues—spring above all from the state of war.”); JUAN DONOSO CORTES, *ESSAYS ON CATHOLICISM, LIBERALISM, AND SOCIALISM* 236 (William McDonald trans., 1879) (1851) (“In pain there is something fortifying, manly, and profound, which is the origin of all heroism and of all greatness . . .”). It has also been suggested that general population policy can importantly contribute to, or detract from, the common good. *See* MOZI, *BASIC WRITINGS* 66–67 (Burton Watson trans., 2003) (c. 400 B.C.E.). But few matters are as intractably contested today, at the constitutional level and elsewhere, as population policy and the public well-being.

<sup>170</sup> *See, e.g.*, J. BUDZISZEWSKI, *COMMENTARY ON THOMAS AQUINAS’S TREATISE ON LAW* 364–75 (2014) (discussing *Summa Theologica* Part I-II, Question 96, Art. 2 on the prudential and moral limits on legal restrictions of immoral activities). Thus, take, merely as one random example, the lack of any natural law guidance with respect to legally addressing the fact that there are more civilian firearms in the United States than there are adults and children. *See* Christopher Ingraham, *There Are More Guns than People in the United States*, *WASH. POST* (June 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/> [https://perma.cc/PNW8-ZZ2U].

<sup>171</sup> *See* Sheryl Overmyer, *Exalting the Meek Virtue of Humility in Aquinas*, 56 *HEYTHROP J.* 650, 650 (2015) (noting that despite Aquinas’s minimal explicit attention, “[h]umility appears an anti-modern virtue that can help us address the problems of the post-modern age”).

noted by Justice Iredell<sup>172</sup> and by John Hart Ely,<sup>173</sup> respectively. Virtually any reasonably popular, or otherwise appealing, public policy can be said to accord with natural law, natural justice, reasoned morality, or the common good. What typically results, given the fundamental indeterminacies, is an argumentative impasse, rather than meaningful dialogic progress. The result would obtain whether Professor Vermeule's approach is, ultimately, entirely correct or not.

In the end, then, it is fair to conclude that no current school of thought offers much hope of a serviceable theory of a constitutional level common good. Perhaps an understanding of the common good must indeed be central to a legitimate and viable constitutional regime. But, as a practical matter, we in any case currently lack any such idea of even a basic level—as opposed to an elaborated, detailed, or specific level—of a constitutional common good.

#### IV. IS THERE A USEFUL ROLE FOR THE BASIC VIRTUES IN IDENTIFYING AND PROMOTING A CONSTITUTIONAL COMMON GOOD?

Traditional theories of the common good have often held that promoting, or even merely seeking, the common good can have the favorable consequence of encouraging the development of basic virtues of character.<sup>174</sup> On such theories, for example, a soldier who promotes the community's common good may thereby develop the cardinal virtue of courage.<sup>175</sup> The problem, however, at least from our perspective, is clear: if we cannot agree upon any meaningful understanding of the common good, at any level, we can hardly rely on pursuing the common good to then catalyze the development of the basic virtues.

Perhaps, though, the line of causation in this context can be run in the other direction. Perhaps we can, instead, reasonably well identify the most basic virtues of character, cultivate those virtues, and then, from that standpoint, better identify and

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<sup>172</sup> See *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., concurring in the judgment and concurring in part) (“The ideas of natural justice are regulated by no fixed standard . . .”).

<sup>173</sup> See ELY, *supra* note 112 (“[Y]ou can invoke natural law to support anything you want.”).

<sup>174</sup> See Duke, *supra* note 38 at 376 (discussing Aristotle and Aquinas in this regard).

<sup>175</sup> See *id.*

promote the common good. This turns out, ultimately, to indeed be a promising line of inquiry.

The basic character virtues are often assumed, cross-culturally, to include prudential wisdom or practical judgment; courage and fortitude; temperance as reasonable self-restraint; and justice, understood as the disposition to give everyone what they are due.<sup>176</sup> A constitutional regime that emphasizes individual liberty and autonomy cannot, beyond a certain point, distinctively promote the exercise of individual virtue. But it is also widely thought that the basic cardinal virtues, despite their conceptual generality, are socially, politically, and even judicially, necessary.<sup>177</sup>

Thus, it is said that “the viability of liberal society depends on its ability to engender a virtuous citizenry.”<sup>178</sup> And, more particularly, that “we need to restore the virtue of prudence to its rightful place alongside justice as an element of political-moral decision making.”<sup>179</sup> At the level of constitutional decision making itself, a regime need not require, or even permit, important officials to freely second-guess the practical wisdom of other government actors.<sup>180</sup> The federal courts in particular often disclaim any such authority.<sup>181</sup> The basic virtues hardly preclude responsible deference to other official authorities, or to judgments

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<sup>176</sup> See generally JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE* (Richard Winston et al. trans., Univ. of Notre Dame Press 2003); ANDRE COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES* (Catherine Temerson trans. 2002); *VIRTUES AND THEIR VICES* (Kevin Timpe & Craig A. Boyd eds., 2014). For a more psychologically-oriented approach, see CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* (2004).

<sup>177</sup> See, e.g., Lyle A. Downing & Robert B. Thigpen, *Virtue and the Common Good in Liberal Theory*, 55 J. POL. 1046, 1046 (1993); Robert W. McElroy et al., *Civic Virtue and the Common Good: Forming A Catholic Political Imagination*, COMMONWEAL (May 25, 2018), <https://www.commonwealmagazine.org/civic-virtue-common-good> [<https://perma.cc/GVW4-LV4R>]; Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 192 (2003) (“[T]he good judge must possess practical wisdom in her selection of the proper legal ends and means.”); see also JOHN OF SALISBURY, *POLICRATICUS* 175 (Cary J. Nederman ed., 1990) (c. 1159) (“[N]othing except virtue is more glorious than liberty, if however liberty is ever properly separated from virtue.”).

<sup>178</sup> Downing & Thigpen, *supra* note 177 (quoting the political scientist William Galston). This seems also likely true of non-liberal societies as well.

<sup>179</sup> McElroy et al., *supra* note 177.

<sup>180</sup> See, e.g., Vermeule, *Deference and Determination*, *supra* note 157 (regarding administrative decisions requiring agency expertise in particular).

<sup>181</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019); *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003); *Clinton v. New York*, 524 U.S. 417, 447 (1998); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

of private actors.<sup>182</sup> But to the extent that it may be compatible with constitutional regime ideology, governments can encourage the development and exercise of basic virtues among the public in general, perhaps thereby indirectly promoting whatever understandings of the common good may result from such a virtue-infused deliberative processes. As persons develop and exercise the basic character virtues, perhaps the overall sense of what the common good, rightly understood, requires may then be catalyzed, and evolve. Crucially, to the extent that any of the basic virtues, especially practical wisdom, involve a disposition to seek and promote the common good, whatever the common good may substantively turn out to be, that disposition, paradoxically, itself helps to constitute the common good.

The problem here is that the process of encouraging what are assumed to be basic virtues among members of the public would have to take place under our actual contemporary circumstances of broad distrust, mutual alienation, unusual polarization, fragmentation, and animating hostility.<sup>183</sup> Virtues such as practical wisdom, courage, reasonable self-restraint, and justice as a disposition of character do not come unmistakably labeled as such. We may be currently disposed to refuse to recognize, or to publicly acknowledge, even the largely descriptive<sup>184</sup> qualities of wisdom, courage, reasonable self-restraint, or justice in persons we politically disdain or even detest.<sup>185</sup> Under our contemporary circumstances, it may well be exceptionally difficult to disentangle ardent political opposition from the broadly beneficial process of recognition, admiration, endorsing, and emulation of the basic virtues.

But the basic virtues, reasonably understood, tend helpfully, and indeed inevitably, to bob recurringly to the cultural surface.

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<sup>182</sup> Consider, for example, the dissenting opinion of Chief Justice Burger in *Plyler v. Doe*, in which the State of Texas refused to offer free public school education to undocumented immigrant children. See *Plyler v. Doe*, 457 U.S. 202, 242–43 (1982) (Burger, C.J., dissenting). Chief Justice Burger recognized the foolishness and immorality of Texas' exclusionary policy. See *id.* But the constitutional structure did not, on Chief Justice Burger's view, authorize the Court to pass judgment on the wisdom, as distinct from the constitutionality, of the state policy in question. See *id.* at 243.

<sup>183</sup> See *supra* Introduction–Part I.

<sup>184</sup> See generally Pekka Vayrynen, *Thick Ethical Concepts*, STAN. ENCYCLOPEDIA PHIL. (rev. ed. Feb. 9, 2021), <https://plato.stanford.edu/entries/thick-ethical-concepts/> [<https://perma.cc/WN9A-AY88>].

<sup>185</sup> Imagine fervent mutual opponents saying of one another, without equivocation or qualification, that they display admirable wisdom, courage, or fortitude.

The cultivation of genuine virtue normally tends to strengthen the persons and groups directly affected—conferring on such groups a certain cultural- evolutionary survival advantage. And then, crucially, cultivation of basic virtues by some groups or persons also has important favorable “spill-over” effects for other groups. As one or more groups cultivate basic virtues, they thereby increasingly emphasize—initially among themselves—thoughtful, reflective decision making; reasonable self-restraint, as distinct from both self-indulgence and self-sabotage; courage as the avoidance of both irrational recklessness and timidity; and a desire to accord to all persons and groups what they are thought to be due. All of these virtues then tend, in general though not in all instances, to confer external benefits on society as a whole and to upgrade the quality of overall deliberation and collective decisions. The search for, and implementation of, a common good is promoted when the basic virtues are first narrower, and then generally, more prominent. The cultivation of basic virtues—initially even among limited groups—can thus eventually generate a “virtuous circle.”

It might seem that the cultivation of genuine basic virtues by one’s political antagonists would tend simply to make them more formidable opponents. But if one’s antagonists had greater practical wisdom, would they not tend to moderate their own supposed extremism? Would we not instead prefer, in our political antagonists, greater responsibility and sobriety? And an enhanced sense of appropriate epistemic humility and self-discipline? Or a lesser inclination to exhibit inappropriate panic-responses, the various cognitive biases in judgment, and general self-indulgence?

We might well not prefer genuinely more courageous opponents. We might prefer that they be timid, feckless, distractable, and irresolute. But even these latter qualities pose broad public risks. And the absence of genuine courage in our political opponents may equally take the form of rashness or impulsiveness, to a broad public cost. And would we not then, in general, view such persons and groups as more promising partners in constitutional level dialogue and debate? A society that is increasingly reflective of the basic virtues should tend to promote progress toward some sensible collective understanding of the common good.

Consider, more concretely, a hypothetical political convention held by a party that one strongly disfavors. The distinctive thing



about this convention, though, lies in the basic character of its delegates. The delegates to this hypothetical convention of one's antagonists are widely recognized, all else equal and despite their repugnant political views, as among the most prudent, intellectually careful and responsible, reasonably self-restrained, genuinely courageous, and personally just persons. Bearing in mind one's general opposition to the party's ideology, and all else again equal, would it really be reasonable to have expectations for the outcome of this convention that are no more favorable than one would entertain in the case of more typical, and distinctly less virtuous, convention attendees?

#### CONCLUSION

American constitutional law has long assumed both the coherence and the importance of some idea of a common good. Consider just a few instances. On Justice Thomas' accounting, "[t]he Framers believed that a proper government promoted the common good."<sup>186</sup> In the well-known public interest regulatory case *Munn v. Illinois*,<sup>187</sup> the Court defined the body politic itself in terms of a covenant to respect and uphold the common good.<sup>188</sup> The use right at stake in *Munn* was said to be limited by the statutory pursuit of the common good.<sup>189</sup> The classic "mandatory" vaccination case of *Jacobson v. Massachusetts*<sup>190</sup> was, as well, premised on the legitimacy of a state's pursuit of the common good.<sup>191</sup> Even in the *Lochner* case,<sup>192</sup> the importance of promoting the common good was recognized in dissent by Justice Harlan.<sup>193</sup>

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<sup>186</sup> *Evenwel v. Abbott*, 578 U.S. 54, 84 (2016) (Thomas, J., concurring in the judgment) (citing Alexander Hamilton on the public good and the community's genuine interests). On Justice Thomas' approach, promoting the common good requires government identification of, and protection of, fundamental rights, with majority sentiment perhaps set aside. *See id.*

<sup>187</sup> 94 U.S. 113, 125–26 (1876).

<sup>188</sup> *See id.* at 124.

<sup>189</sup> *See Mugler v. Kansas*, 123 U.S. 623, 660–63 (1887).

<sup>190</sup> 197 U.S. 11 (1905).

<sup>191</sup> *See id.* at 26, 27.

<sup>192</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>193</sup> *See id.* at 65, 67 (Harlan, J., dissenting) ("There are manifold restraints to which every person is necessarily subject for the common good.") (quoting *Jacobson*, 197 U.S. at 26).

The language of pursuing the constitutional common good maintains its judicial presence today.<sup>194</sup>

In a deeply and increasingly divided society, however,<sup>195</sup> a meaningful constitutional-level common good may well be both increasingly important,<sup>196</sup> and increasingly elusive.<sup>197</sup> This paradox has been explored above. There seems no obvious escape from this paradox at the level of constitutional theory, doctrine, or ideology. There may, however, be a path to daylight through an eventually broad-based cultivation of the widely recognized basic virtues of character. To the extent that contending groups and factions cultivate, even initially within themselves, the basic virtues, they inevitably tend, intentionally or not, to strengthen the likelihood that progress can be made among groups in recognizing and promoting, at the constitutional level, the common good.

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<sup>194</sup> See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (regulatory taking for the perceived common good); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (compensable taking for the sake of the public good); *Big Tyme Invs., L.L.C., v. Edwards*, 985 F.3d 456, 466 (5th Cir. 2021) (COVID-19 pandemic public health regulation discussing the *Jacobson* case); *Mather v. Vill. of Mundelein*, 864 F.2d 1291, 1297 (7th Cir. 1989) (Coffey, J., concurring) (stating, in the context of free exercise of religion, that “[i]t is a central tenet of democracy that a majority of the people can act for the common good, while, at the same time, respecting and not infringing upon the rights of the minority.”).

<sup>195</sup> See *supra* Introduction–Part I.

<sup>196</sup> See, e.g., Maximillian Jaede, *The Concept of the Common Good* 1 (Pol. Settlements Rsch. Programme, Working Paper No. 8, 2017) (“[I]n deeply divided societies, there is a need to construct a shared notion of the ‘common good’ . . .”).

<sup>197</sup> See *supra* Parts II–III.