

# COMMON GOOD GUN RIGHTS

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## INTRODUCTION

With *Common Good Constitutionalism*, Professor Adrian Vermeule has done what I didn't think possible in our polarized age. He's written a book that both progressives and conservatives hate. Conservatives detest his take-down of originalism, including an oblique swipe at *District of Columbia v. Heller*<sup>1</sup>—the golden child of that interpretive method. Progressives rankle at his contempt for living constitutionalism, and his unmitigated disdain for that movement's triumph, *Obergefell v. Hodges*.<sup>2</sup> Progressives and conservatives both hate *Common Good Constitutionalism*, which is a testament to a project as uncompromising in its intellectual honesty as this one.

Vermeule's object with *Common Good Constitutionalism* is to invigorate debates in public law that, for many, have become tedious and predictable. His book is unsparing in its hostility to the shibboleths of the left and the right and has invited some pointed rebukes.<sup>3</sup>

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1. 554 U.S. 570 (2008); see ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 93 (2022) (citing *Heller*, 554 U.S. at 570).

2. 576 U.S. 644 (2015).

3. See, e.g., William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, 136 HARV. L. REV. 861 (2023); Brian Leiter, *Politics by Other Means: The Jurisprudence of "Common Good Constitutionalism,"* 90 U. CHI. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4318904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4318904) [https://perma.cc/Y73V-AVDQ];

For all the twitter *Common Good Constitutionalism* has generated, its ingredients—excepting the Thomist twist—are hardly exotic. Burkeans have maintained for decades that institutions have both intrinsic and instrumental value.<sup>4</sup> It's in there. Crits, and before them, the Legal Realists, wrote volumes insisting that private coercion can be as menacing as public coercion.<sup>5</sup> That's in there too. Indeed, one can thumb through the major insights of both conservative and liberal legal scholars over the last century, and close to all of them are recognizable in Vermeule's critique of our existing constitutional order. This is not to say that *Common Good Constitutionalism's* combination isn't fresh. It's just to say that, in large part, it's a fusion of different schools that have been talking past each other for the last twenty years, heavily marinated in Catholic legal thought.

But one can appreciate the brio of Vermeule's book, cheer its Mercurian disdain for the left and right, and still be concerned about its substance. Vermeule offers common good constitutionalism as more than a rejoinder to originalism and progressive

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Linda C. McClain, *Reasons to Doubt Whether "the Best Way Forward Is To Look Backward": Commentary on Adrian Vermeule, Common Good Constitutionalism*, BALKINIZATION (July 12, 2022), <https://balkin.blogspot.com/2022/07/reasons-to-doubt-whether-best-way.html> [https://perma.cc/3ZNH-CDYV]; William H. Pryor, *Against Living Common Goodism*, <https://fedsoc.org/commentary/publications/against-living-common-goodism> [https://perma.cc/AM3J-EQ48]; Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (April 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/> [https://perma.cc/8BMU-LTY7]. For a defense of common good constitutionalism against charges of authoritarianism, see generally Conor Casey, "Common Good Constitutionalism" and the New Battle of Constitutional Interpretation in the United States, 4 PUB. L. 765 (2021).

4. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 649 (1994) ("[I]nstitutional arrangements reflect the accumulated wisdom of centuries of political decisions.").

5. See Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, L. & CONTEMP. PROBS. 37, 38 (2009) ("Legal Realists pointed out long ago, there is no such thing as a 'free market' without the backstop of state coercion to enforce private promises.").

constitutionalism; it is supposed to supply, in the Dworkinian sense,<sup>6</sup> the “right” answer to legal questions. Perhaps not in the sense of specifying a precise numerical value for the minimum wage,<sup>7</sup> but certainly in the sense of articulating the conditions under which a specific interpretation of a minimum wage law can be deemed correct.<sup>8</sup>

Rising to the challenge, I offer a thought experiment to test how common good constitutionalism works as a theory: common good gun rights.<sup>9</sup> I choose gun rights as an area to apply Vermeule’s approach because Second Amendment theory is still inchoate, its precedent thin, and it’s an area with which I have some familiarity. Imagining a common good constitutionalist’s answers to the welter of unanswered questions in Second Amendment doctrine is a perfect beta test for how well common good constitutionalism can prescribe as much as criticize. I conclude that common good constitutionalism does provide a method for deciding whether a Second Amendment opinion is correct, albeit in a way that does not neatly map onto current ideological arrangements.

The rest of this Article proceeds as follows: Part I outlines four contentions of common good constitutionalism—its critique of the private-public distinction; its understanding of institutions; its conception of rights; and its belief in law’s inherent normativity—and connects them to some familiar theoretical disputes about law. Part II applies these four aspects of common good constitutionalism, in roughly reverse order, to pending issues of Second Amendment

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6. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 336 (1997).

7. VERMEULE, *supra* note 1, at 35.

8. *Id.*

9. I take no position whether this is the “right” approach to deciding Second Amendment cases in all applications. I merely explore what such an approach to Second Amendment cases *could* look like. Common good constitutionalism, like any theory of constitutional interpretation, cannot supply its own normative justification. *Cf.* Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 38 (2014) (“As careful originalists acknowledge, originalism cannot establish its own validity.”).

doctrine after *New York State Rifle & Pistol Ass'n v. Bruen*.<sup>10</sup> The last part offers some concluding remarks.

## I. THE FAMILIAR INGREDIENTS OF COMMON GOOD CONSTITUTIONALISM

The composition of Vermeule's *Common Good Constitutionalism* is new, but it hits notes that have been the stock of public law commentary for a century. I focus on four: skepticism of the public-private distinction; understanding of institutions in their own right, and not solely as preference aggregates; hostility to the "rights as trumps" frame of constitutional law; and the belief that law is ineluctably normative, which requires constitutional actors to confront moral claims about the Constitution.

### A. *Skepticism of the Public-Private Distinction*

Vermeule appears skeptical of the jurisprudential foundations of modern state action doctrine and its normative desirability. Consider this passage:

[C]onstitutional theory often takes a libertarian form that becomes obsessed with the risks of abuse of power created by state organs in particular, while overlooking the risks of abuse of power that public authorities prevent through vigorous government. . . . The state, narrowly understood as the official organs of government, is hardly the only source of abuses. Actors empowered directly or indirectly by law—including the property entitlements of corporate law and common law—may abuse their power throughout the society and economy.<sup>11</sup>

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10. 142 S. Ct. 2111 (2022).

11. VERMEULE, *supra* note 1, at 50.

A passage like this could have been written a century ago by legal realists such as Morris Cohen,<sup>12</sup> Robert Hale,<sup>13</sup> or Louis Jaffe,<sup>14</sup> to name just a few. Indeed, Vermeule acknowledges his intellectual debt to Hale and the Realists in the text.<sup>15</sup>

Yet, one need not go back one hundred years to Columbia or Harvard Law School to find such sentiments. Mavens of critical legal studies, including feminist and critical race approaches, have been making similar observations about this distinction since the late twentieth century.<sup>16</sup> In the 1980s, Professor Duncan Kennedy pronounced an inability “to take the public/private distinction seriously as a description, as an explanation, or as a justification of anything.”<sup>17</sup> Professor Frances Olsen in 1993 castigated how “society draws distinctions between public and private [that] perpetuate[] the subordination of women.”<sup>18</sup> And again, more recently, Professor Emily Houh has remarked how “critical race realism seeks to deconstruct explicitly the public/private distinction where that distinction masks and enables conditions of subordination.”<sup>19</sup>

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12. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 29 (1927) (“There can be no doubt that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.”).

13. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474–75 (1923).

14. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 220 (1937) (“[T]he great complexes of property and contract . . . the monopolistic associations of capital, labor, and the professions which operate it, exert under the forms and sanctions of law enormous powers of determining the substance of economic and social arrangement . . . irrespective of the will of particular individuals.”).

15. VERMEULE, *supra* note 1, at 14 (citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923)).

16. Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 235 (1996) (“Attacks on the public/private distinction have been a common component of critical race, feminist and civic republican literature for many years.”).

17. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982).

18. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 327 (1993).

19. Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 491 (2005); *see*

Vermeule writes that “[i]t is a mistake to focus myopically on direct abuses of power by officials themselves, as opposed to indirect abuses of power made possible by the law.”<sup>20</sup> Again, this is a species of the public-private dichotomy, framed as the action-inaction distinction. And again, this kind of observation is very familiar to those in the critical legal studies tradition.<sup>21</sup> It appears that in some select areas—especially dealing with information platforms and social media—otherwise committed conservatives and professed originalists have made common cause with liberals and progressives for this kind of approach.<sup>22</sup>

Vermeule’s common good constitutionalist approach provides a classical legal underpinning as to why the boundaries between the public and private spheres should be more permeable than they’ve developed over the past century of American constitutional law.

### B. *Institutions Matter*

Vermeule insists that institutions—in the broadest sense of that term—have value and cannot be reduced to the aggregated preferences of institutional stakeholders. This is another feature that

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also Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079, 1098 (1989) (“The [public/private] distinction is no longer viewed as somehow natural or inevitable.”).

20. VERMEULE, *supra* note 1, at 14.

21. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2279 (1990) (“[T]he distinction between action and inaction is far too arbitrary and simplistic to describe the complex web of acts and omissions through which government conducts its business.”); Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890*, 77 FORDHAM L. REV. 1479, 1508 (2009) (describing early arguments that “state inaction had the result of denying inherent political and civil rights on account of race just as profoundly as might acts of state action” as harbingers of critical legal and critical race critiques of this distinction).

22. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) (“Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.”). *But see* *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (“We hold that it is substantially likely that social-media companies—even the biggest ones—are ‘private actors’ whose rights the First Amendment protects . . .”).

common good constitutionalism shares with prior critiques of American constitutional jurisprudence.

Consider how Vermeule describes marriage: “Marriage is not (merely) a civil convention, a mere corporate form created by the civil authority to allocate some package of legal benefits. It is a natural and moral and legal reality simultaneously.”<sup>23</sup> Or how he understands federalism: “The values attributed to federalism are, in many cases, really values of subsidiarity and civil society: they are benefits of local or city government, of professional groups and trade associations, and of other civil society corporations. . . .”<sup>24</sup> Even the Constitution itself is subject to this institutional lens. The common good constitution in Vermeule’s model is not a meager assemblage of a little over seven thousand words, but “a concrete set of real, extratextual, political institutions, arrangements and ever-changing norms, unwritten in crucial respects.”<sup>25</sup>

This seems descriptively correct, even if his conclusion about *Obergefell* strikes me as morally blinkered. We don’t usually think of marriage just as a set of arms-length transactions that can be replicated through contractual agreements;<sup>26</sup> this is why giving to same sex couples the dignity of the name *marriage* is essential.<sup>27</sup> In a similar vein, we don’t typically think of a university or a synagogue as just a nexus of contracts.<sup>28</sup> And there are all types of written and

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23. VERMEULE, *supra* note 1, at 131.

24. *Id.* at 159.

25. *Id.* at 87.

26. *Lieberman v. Lieberman*, 154 Misc.2d 749, 753 (N.Y. Sup. Ct. 1992) (“Thus New York courts traditionally have recognized that premarital and other marital agreements must be viewed differently from other types of contracts in which the parties are strangers to each other . . . and the rules appropriate to commercial agreements cannot strictly be applied to the marital situation.”).

27. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (“[Marriage] is an institution of transcendent historical, cultural and social significance, whereas the [civil union] most surely is not.”).

28. Jill Horwitz, *Nonprofits and Narrative: Piers Plowman, Anthony Trollope, and Charities Law*, 2009 MICH. ST. L. REV. 989, 993 (2009) (“If we thought of nonprofits as merely a nexus of contracts and their behavior as instrumental, there would not be so much worry about the tarnishing of the nonprofit halo.”).

unwritten norms, conventions, and customs that glue these and other political and social institutions together and give them a character that goes far beyond just a “sum of [their] parts.”<sup>29</sup>

Here again, Vermeule marches lock-step with thinkers on both the left and the right, both old and new. Burkeans for decades have extolled the virtues of well-established institutions.<sup>30</sup> The entire literature on corporate personhood is constantly reckoning with the sociological reality that corporations are hard to understand only as aggregations of innumerable arms-length transactions.<sup>31</sup> Dean Heather Gerken has written about “federalism all the way down” — the intermediary and *intermediating* organizations that have value and purpose in their own right.<sup>32</sup> And arch-Realist Karl Llewellyn offered similar arguments in his article *The Constitution as an Institution* when he described our Constitution as not only a text but

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29. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 968 (2018) (“According to [religious institutionalist thought], religious institutions have intrinsic as well as instrumental value and prove uniquely able to protect individual conscience through their independent and autonomous existence. Their autonomy proves distinguishable from the rights of the individuals who constitute the whole.”).

30. David. A. Strauss, *Legitimacy, “Constitutional Patriotism,” and the Common Law Constitution*, 126 HARV. L. REV. F. 50, 54 (2012) (“A central Burkean idea is that institutions and practices that have survived for a long time are likely to embody a latent wisdom, even if those institutions and practices cannot be easily justified in abstract terms.”); Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 590 (2018) (“Burke thought the French Revolution was deeply misguided because it was based on abstract ideals and ignored established traditions and institutions that reflect an embedded wisdom which cannot be reduced to any simple formula.”); Young, *supra* note 4, at 697–98.

31. Carla L. Reyes, *Autonomous Corporate Personhood*, 96 WASH. L. REV. 1453, 1491 (2021) (“Under the real entity theory, the corporation ‘is an independent reality that exists as an objective fact and has a real presence in society.’”); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994) (“Real entity theories . . . all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components.”).

32. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010). While Dean Gerken is concerned primarily with sub-state units of government, others have discussed the institutional importance of other kinds of associations and organizations. See, e.g., Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 237–38 (2003).



also a set of practices, customs, attitudes, and assumptions that are loosely coordinated to the written document.<sup>33</sup>

### C. *Rights Are Not Trumps*

Another critique common good constitutionalism shares with previous theories is doubt that the “rights as trumps” frame is normatively desirable or descriptively accurate. The rights as trumps terminology entered the constitutional lexicon with Ronald Dworkin a quarter-century ago,<sup>34</sup> and has dominated the discourse ever since. The typical approach to constitutional rights within this frame is that of judicial displacement: the metes and bounds of the right occupy the field, and considerations of politics or general welfare are simply irrelevant to the legality of the regulation.<sup>35</sup>

This framing for constitutional rights has been under sustained criticism for decades, and Vermeule has joined the skeptics. As Vermeule writes: “rights exist to serve, and are delimited by, a conception of justice that is itself ordered to the common good.”<sup>36</sup> It’s not that there’s no rights; it’s that rights are not designed to “maximize the autonomy of each person” but are, instead, “component parts of the common good and contributors to it.”<sup>37</sup>

In this sense, Vermeule sounds very much like his rough contemporary, Professor Richard Pildes, who challenged the rights as trumps framing over two decades ago. As Pildes wrote, rights are not trumps so much as they are means of “construct[ing] . . . a

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33. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934).

34. Some doubt whether this frame is, in fact, an accurate reading of Dworkin’s model. See generally Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301 (2000) (casting doubt on the conventional description of Dworkin’s concept of rights as trumps).

35. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1978) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do . . .”).

36. VERMEULE, *supra* note 1, at 24.

37. *Id.*

political culture with a specific kind of character.”<sup>38</sup> Rights “realiz[e] certain collective interests; [and] their content is necessarily defined with reference to those interests. . . .”<sup>39</sup> In sum, “the justification for many constitutional rights cannot be reduced to the atomistic interest of the right holder alone.”<sup>40</sup> Rights have a function of “realizing various common goods through the work they do to protect the integrity of distinct common goods, such as democratic self-governance, public education, religion, and other domains.”<sup>41</sup> To which, Vermeule might add, “health, safety, and economic security.”<sup>42</sup>

In the more recent past, Professors Jamal Greene and Jud Campbell have sounded similar themes, from different perspectives: Greene as a matter of jurisprudence; Campbell as a matter of history.

Greene writes that rights should be subject to proportionality analysis, which “sharpens the government’s ends and means to those that are necessary to vindicate its interests and are respectful of the impact on individuals.”<sup>43</sup> Constitutional law, under this view, “does not treat rights as trumps, but neither does it simply subject them to utilitarian balancing. Its aim is to take individual rights, the government’s reasons, and the government’s methods for no more and no less than they are worth.”<sup>44</sup>

Vermeule seems to agree when he says the correct way to think about rights “is *not* that the individual’s rights are ‘overridden’ by collective interests. It is that rights are always already grounded in and justified by what is due to each person and to the community.”<sup>45</sup> Making them proportional—“adjusting them” in

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38. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 731 (1998).

39. *Id.*

40. *Id.*

41. *Id.*

42. VERMEULE, *supra* note 1, at 7.

43. Jamal Greene, *Foreword: Rights As Trumps?*, 132 HARV. L. REV. 28, 70 (2018).

44. *Id.*

45. VERMEULE, *supra* note 1, at 127.

Vermeule's terminology—"is to unfold their true nature . . . not to compromise or overpower them."<sup>46</sup>

Jud Campbell, whom Vermeule cites with approval, has come to a similar conclusion, drawing upon the understanding of natural rights at the Founding. Rights were not trumps, in the modern sense of "determinate legal privileges or immunities." Instead, natural rights were a "*mode of reasoning*", the ambition of which was "to create a representative government that best served the public good."<sup>47</sup> In this way, "Founding-Era natural rights were not really 'rights' at all, in the modern sense. They were the philosophical pillars of republican government."<sup>48</sup>

Common good constitutionalism is the latest entrant in a multi-generational effort by those on the left and the right to recover a more subtle, and accurate, understanding of rights in the American legal tradition, and to rescue our constitutional vocabulary from its incessant lapse into "rights talk."<sup>49</sup>

#### D. *Law is Normative*

Finally, Vermeule, like Dworkin, like Martin Luther King,<sup>50</sup> and like natural law theorists before them, is dubious that law can be separated from morality. As Vermeule writes, "[c]ommon good constitutionalism shares the view that the positive provisions of the *ius civile*, including at the constitutional level, can only be interpreted in light of principles of political morality that are themselves part of the law."<sup>51</sup> Vermeule follows Dworkin in this regard, and

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46. *Id.*

47. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016)).

48. *Id.* at 112.

49. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

50. Martin Luther King, Jr., *Letter from a Birmingham Jail* (1963) ("I would agree with St. Augustine that 'an unjust law is no law at all.'").

51. VERMEULE, *supra* note 1, at 6.

it's this proposition that has generated the most hostility from positivists on both the left and the right.<sup>52</sup>

However, even this divergence between Vermeule's theory of law's normativity and those of other thinkers may appear wider than it actually is. Consider what Lawrence Lessig wrote many decades ago in response to Justice Robert Jackson's oft-quoted line in *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."<sup>53</sup> Nonsense, says Lessig,

[I]t has never been the case that "officials," whether high or petty, have been forbidden from prescribing "what shall be orthodox" in politics, nationalism, and other matters of opinion: Think of the government's view of unsafe sex, or abortion, or family values. . . . Government has always and everywhere advanced the orthodox by rewarding the believers and by segregating or punishing the heretics. The permissible means for advancing such orthodoxy may be limited, and the instances may be few, but the end has always been the place of government.<sup>54</sup>

It's not that positivist accounts of law cannot include normativity—it's that positivists reject the notion that law originates in, or depends on, some objective theory of morality.<sup>55</sup> Vermeule, Lessig, Raz, and Dworkin do not disagree that law dictates what is orthodox and what is not; the grounds of disagreement are whether there are moral grounds *from within law* to challenge the imposition of any dictate as unlawful. Vermeule's viewpoint is that there are first-

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52. See Baude & Sachs, *supra* note 3, at 867; Leiter, *supra* note 3, at 6–8.

53. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

54. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 945–46 (1995).

55. See Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 54 (2011) ("[I]nclusive legal positivism rejects the idea that normative or moral facts cannot contribute to the law's content, but it does not endorse thereby the claim that law and morality are necessarily connected. It holds that they can be connected: that there is nothing in positivism that precludes law and morality being connected.").

order rules—grounded in the classical legal tradition—by which one can decide whether second-order rules count as “law.”

Positivists blanch at this maneuver. Some, the inclusive positivists, try to make peace with it by assuming that moral considerations can become part of the law as a descriptive reality.<sup>56</sup> Others, the exclusive positivists, reject this proposition entirely.<sup>57</sup> Fellow natural law theorists, like Dworkin, agree that law must ineluctably include moral propositions; but then disagree with Vermeule about the source of those moral propositions.<sup>58</sup>

Vermeule would have the “ought” in law come from classical and Catholic legal thought; Dworkin would have it come from principles of political morality and fit.<sup>59</sup> The inclusive positivists would find the source of moral claims in law from sociological facts.<sup>60</sup> The Austinians reduce the “ought” of the law to nothing more than the command of the sovereign.<sup>61</sup> But none of these approaches would say that law, to be law, can be agnostic as to orthodoxy.

## II. COMMON GOOD GUN RIGHTS

Assuming that common good constitutionalism does as well in delivering answers as in raising questions, how might a common

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56. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1166 (2015) (“[I]nclusive legal positivists . . . hold that moral facts might play a part in determining the content of the law, but only if the relevant social practices assign them that role.” (emphasis deleted)).

57. *Id.* (“According to exclusive legal positivists, the content of the law is determined solely by social facts.”).

58. Lloyd L. Weinreb, *Law’s Quest for Objectivity*, 55 CATH. U. L. REV. 711, 728 – 29 (2006) (“Natural law affirms that the natural order is a moral order, that the normative imperatives of human conduct are not superimposed but are immanent—‘real,’ if you like that word.”); *see also id.* (identifying Ronald Dworkin as a natural law theorist).

59. R. Lea Brilmayer & James W. Nickel, *Book Review of Ronald Dworkin’s Taking Rights Seriously*, 77 COLUM. L. REV. 818 (1977).

60. Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1093 (2008) (defining “inclusive positivism” is that approach that “allow[s] moral considerations as grounds of law so long as there is some social fact that warrants this . . .”).

61. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 93 (Campbell ed., 1885) (“It is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil, that duties are sanctioned or enforced.”).

good constitutionalist examine gun rights and regulation post-*Bruen*? This next section lays out the doctrinal landscape post-*Bruen*, the questions *Bruen* left unresolved about text, analogy, and levels of generality, and then articulates a potential common good constitutionalist approach to these issues.

A. *The Second Amendment after Bruen*

Less than six months after Vermeule published *Common Good Constitutionalism*, the Supreme Court of the United States upended over a decade of lower-court precedent on the Second Amendment. In *New York State Rifle & Pistol Ass'n v. Bruen*,<sup>62</sup> the Supreme Court, in a 6-3 opinion authored by Justice Clarence Thomas, jettisoned the prevailing two-part framework that lower courts had employed to evaluate Second Amendment challenges since the watershed *District of Columbia v. Heller*<sup>63</sup> decision, in favor of an approach that focuses intensely on history and tradition.

*Heller* was the first Supreme Court case to hold that the right to keep and bear arms protected a right to possess arms unrelated to the participation or maintenance of a well-regulated, organized militia. In the wake of *Heller*, lower courts had scrambled to patch together some kind of workable doctrine from *Heller's* often-enigmatic passages. The two-part framework they assembled took the form of a conventional mix of categoricalism and balancing.<sup>64</sup> A court first asked whether the conduct or regulation even implicated the Second Amendment.<sup>65</sup> Assuming it did, the court then proceeded to a conventional tiers-of-scrutiny analysis, which often, but not exclusively, took the form of intermediate scrutiny.<sup>66</sup>

*Bruen* dispensed with this approach. “Despite the popularity of this two-step approach,” Justice Thomas wrote, “it is one step too

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62. 142 S. Ct. 2111 (2022).

63. 554 U.S. 570 (2008).

64. See generally Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009).

65. *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017).

66. *United States v. Chovan*, 735 F.3d 1127, 1137–38 (9th Cir. 2013); *United States v. Marzarella*, 614 F.3d 85, 93–99 (3d Cir. 2010).

many.”<sup>67</sup> Step one, according to the Court, was “broadly consistent with *Heller*, which demands a test rooted in the Second Amendment’s text, as informed by history.”<sup>68</sup> But the second step’s reliance on conventional “means-end scrutiny” was unwarranted.<sup>69</sup>

In its place, the Court articulated its own two-step approach: At step one, a court asks if “the Second Amendment’s plain text covers an individual’s conduct,”<sup>70</sup> if it does, “the Constitution presumptively protects that conduct.”<sup>71</sup> The government is then obliged, at step two, to “not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.”<sup>72</sup> Historical regulations that form part of this tradition need not be a “twin” or “dead ringer”;<sup>73</sup> courts are allowed to search for historical analogs, but these analogs must be “representative” and “*relevantly*” similar.<sup>74</sup>

*Bruen* shattered the lower court settlement on doctrine at a moment when the theory of the right to keep and bear arms was, and has remained, tender. Although the Supreme Court minted an enforceable Second Amendment right just over a decade ago, Second Amendment theory has remained in a state of relative adolescence. Other than a largely unhelpful proposition that the Second Amendment is related in some way to “self-defense,” there has been very little in the way of rigorous and sustained attempts to articulate a

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67. *Bruen*, 142 S. Ct. at 2127.

68. *Id.*

69. *Id.*

70. *Id.* at 2126.

71. *Id.*

72. *Id.*

73. *Id.* at 2133.

74. *Id.* at 2132 (emphasis added) (“Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are ‘*relevantly similar*.’” (quoting Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993))).

comprehensive theory of the Second Amendment.<sup>75</sup> Nothing like the tomes of theorizing about the Equal Protection Clause, or Due Process, or the First Amendment right to free expression exists for the Second Amendment. And certainly, there is nothing at the federal level comparable to the piles of precedential cases adjudicating disputes under these other constitutional provisions. Without a theory of the Second Amendment and its goals, the textual and historical analysis in gun cases tends to careen into unguided casuistry.<sup>76</sup>

Because the Second Amendment's theoretical development is slender and its binding precedent thin, it provides a fairly clear field to test whether common good constitutionalism can work as a method of constitutional jurisprudence.

*B. Post-Bruen Puzzles and the Common Good Approach*

One of the most urgent and perplexing problems *Bruen* loosed upon lower courts is also one of the most familiar: at what level of generality are we to understand the right to keep and bear arms?<sup>77</sup> Choosing the "right" level of generality has been a recurrent problem of jurisprudence, for which scholars have offered various

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75. *But see* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131 (2008); *see also* JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION AND THE FUTURE OF HELLER* (2018).

76. I mean this term in both its senses. *See* Aziz Z. Huq, *What We Ask of Law*, 132 YALE L.J. 487, 516 (2022) (casuistry is "deduction from general principles, and the related application of analogical reasoning."); *see also* OXFORD DICTIONARY OF ENGLISH 272 (3d ed. 2010) (casuistry is "the use of clever, but unsound reasoning").

77. This is a central challenge Vermeule, following Dworkin, says that originalism has no answer to. VERMEULE, *supra* note 1, at 29, 95–96.



solutions.<sup>78</sup> Almost always, it is presupposed that the choice of a level of generality involves a value judgment.<sup>79</sup>

Vermeule's answer is that the level of generality should be the one that promotes the "flourishing of a well-ordered political community."<sup>80</sup> Specifically, constitutional decisions should be calibrated to ensure that public authority is capable of providing the "common goods" of the classical legal tradition—"peace, justice and abundance"—which he extrapolates to include "various forms of health, safety and economic security."<sup>81</sup>

Common good constitutionalists could use this metric to guide both prongs of the *Bruen* test: interpretation of text and the relevance of historical analogs. In this sense, the text of the Second Amendment must be understood in light of the classical legal tradition of which—Vermeule says—it is a part. The words "people," "keep," "bear," and "arms" in the Second Amendment are not to be understood at the broadest level of linguistic meaning; nor are they to be understood in a narrow, technical sense; they are to be applied at the level of generality that ensures that government is able to provide the common goods of the classical legal tradition. As to the second prong of the *Bruen* test, the evaluation of analogs and tradition, the common good approach would consider a historical and modern regulation *relevantly* similar when they both can be understood as designed to promote the common goods that a well-ordered political community in the classical tradition is empowered to provide.

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78. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1107 (1990) ("We must justify the choice extratextually, but we may and should then implement it in ways that draw as much guidance as possible from the text itself."); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 380 (1992) ("You must search for a level of generality simultaneously suited to the Constitution and to the judicial role. One that will be neither broad nor narrow all of the time, neither pro- nor con- state power. We must demand not that it conform to the reader's political theory, but that it be law.").

79. Tribe & Dorf, *supra* note 78, at 1087.

80. VERMEULE, *supra* note 1, at 7.

81. *Id.*

Vermeule's presumption about the purpose of constitutional rights and the lawfulness of regulations has significant Second Amendment implications. As explained below, it broadens the scope of what the Second Amendment is "for" beyond just personal self-defense, to something more like safety; it forces us to rethink the gun-rights-as-trumps framing of Second Amendment challenges; it obliges us to be more sensitive to the institutional contexts in which the right to keep and bear arms occurs; and it calls into question the typical public-private distinction both as to gun regulations and gun rights.

### 1. The Purpose of Gun Rights

Ask what the Second Amendment is "for" and you'll usually get some kind of response that it's "for" self-defense. But this purpose—at this level of generality—is clearly not born out in either the existing doctrine or in logic. As I've mentioned elsewhere, there are numerous people who may have rights to self-defense but no rights to armed self-defense.<sup>82</sup> Minor children, the incarcerated, the severely mentally ill—while all of these persons have rights to defend themselves, none, it is usually thought, have a right to keep and bear arms for that purpose.

Similarly, the proposition that there are some "sensitive places" into which firearms may not be brought<sup>83</sup> belies the notion that the Second Amendment is solely "for" self-defense. If, as Professor Eugene Volokh wrote "[s]elf-defense . . . is something you must engage in where and when the need arises,"<sup>84</sup> then the need is insensitive to location. One can anticipate the "need" for self-defense arising just as easily at a presidential address, on board a passenger plane, in a judge's courtroom, or in a legislative chamber.

The Second Amendment is and must be "for" something far more nuanced than just self-preservation. It must be about providing

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82. BLOCHER & MILLER, *supra* note 75, at 152–54.

83. N.Y. State Rifle & Pistol Ass'n, 142 S.Ct. 2111, 2133 (2022); District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

84. Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 STAN. L. REV. 199, 232 (2009).

*safety*.<sup>85</sup> And not just safety in the atomized sense of personal physical safety, but safety for society. Moreover, this safety is not limited to safety in the sense of physical safety, but safety in the sense of the “flourishing of a well-ordered political community” capable of supplying the classical common goods of “peace, justice and abundance.”<sup>86</sup>

Hence, rather than focus on whether a particular regulation or practice promotes or inhibits individual self-defense, or whether some undirected aggregation of individuals with the right to bear arms contributes to the physical well-being of the community; the common good constitutionalist would ask whether the particular construction of the right promotes or inhibits the public provision of safety, broadly understood according to the terms of the classical tradition.

## 2. Gun Rights as Trumps

Understanding the Second Amendment as designed for something more nuanced than “self-defense” means rethinking the gun-rights-as-trumps framework. Currently, gun rights and regulation are thought of as antonyms—a “zero-sum game” between rights on the one hand and police power on the other.<sup>87</sup>

Common good constitutionalism would have us reevaluate this dynamic. It’s not that regulation “outweighs” gun rights; or that gun rights “trump” regulation. It’s that the very definition of the right to keep and bear arms is to be understood by reference to the classical legal tradition of what is owed to each individual and to the community as a whole.<sup>88</sup> Such a rethinking, according to

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85. For more on this point, see BLOCHER & MILLER, *supra* note 75, at 154–159.

86. VERMEULE, *supra* note 1, at 7; see also Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U.L. REV. 139, 141 (2021) (“Government has a compelling interest in regulating weapons, not only to deter injury, but also to promote the sense of security that enables community and the exercise of all citizens’ liberties, whether or not they are armed.”).

87. Geoffrey Thomas Sigalet, *American Rights Jurisprudence Through Canadian Eyes*, 23 U. PA. J. CONST. L. 125, 135 (2021) (using this terminology).

88. VERMEULE, *supra* note 1, at 127 (“[R]ights are always already grounded in and justified by what is due to each person and to the community.”).

Vermeule, would recover what Jud Campbell argues was the original understanding of natural rights at the Founding, which was the means to provide “good government, not necessarily less government.”<sup>89</sup>

As noted above, rethinking of the rights frame along the lines of the classical legal tradition would implicate both prongs of the *Bruen* test. Justice Thomas in *Bruen* says that the test for whether something implicates the Second Amendment is not just the strict grammatical meaning of the Second Amendment’s text, but its “text, as informed by history.”<sup>90</sup> That history, a common good constitutionalist might argue, includes the classical legal tradition.

Accordingly, in this common good constitutionalist vein, whenever a judge considers whether a particular activity is preemptively protected by the Second Amendment, the question is not whether the interpretation of the words “people,” “keep,” “bear,” or “arms” contributes to an atomized, individualistic expression of rights; instead, the level of generality of these terms are calibrated to whether they contribute to the natural law tradition of the Founding—the flourishing of the “well-ordered political community” and the provision of the public good of safety.

The same approach applies to the level of generality at which to examine historical regulations. Currently, post-*Bruen* litigants and judges go on quixotic searches for historical analogs to prohibitions of guns in the hands of domestic abusers,<sup>91</sup> or those under felony indictment,<sup>92</sup> or at summer camps.<sup>93</sup> Common good

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89. Campbell, *supra* note 47, at 87.

90. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (2022).

91. *United States v. Rahimi*, 59 F.4th 163, 179 (5th Cir. 2023) (striking down federal prohibition on guns in the hands of those under domestic violence restraining orders).

92. *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at \*10 (W.D. Tex. Sept. 19, 2022) (striking down federal regulation on guns received by those under felony indictment).

93. *Antonyuk v. Hochul*, No. 122 CV 0986 GTSCFH, 2022 WL 5239895, at \*17 (N.D.N.Y. Oct. 6, 2022) (“[T]he Court cannot find these historical statutes analogous to a prohibition on [concealed weapons at] ‘summer camps.’”). *But see id.*, 2022 WL 16744700, at \*22 n. 35 (N.D.N.Y. Nov. 7, 2022) (stating in dicta that “summer camps” for children are sensitive places).

constitutionalism would reject these efforts as a fool's errand. The level of generality to look for an analog is not something like an eighteenth-century summer camp, but whether the modern and historical regulation is designed to promote safety and abundance in the political community, broadly defined.

### 3. Institutional Gun Rights

On the common good constitutionalist view, institutions, oriented to the public good, are valuable in themselves. Such a view complicates the often-clumsy "rights versus regulation" posturing of gun rights litigation. Instead, every assertion of a gun right must be understood within the institutional context in which it is asserted. I'm on the record as saying that the Court is going to have to approach Second Amendment questions in a more institution-sensitive frame.<sup>94</sup> A common good approach is consonant with more solicitude for the institutions that both enable and constrain the right to keep and bear arms.

So, for example, a common good constitutionalist approach would understand that claims of a right to keep and bear arms are often intermixed and can conflict with other deeply rooted institutions with their own essential character that must also be preserved.<sup>95</sup> This changes, for example, how one may look at prohibitions on firearms in houses of worship. Such regulations are not just about maximizing the personal safety of the worshippers; nor are they simply a manifestation of a general police power. Instead, a common good constitutionalist approach would examine both the right and the regulation by reference to the traditions and customs

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94. Darrell A. H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 117 (2016).

95. VERMEULE, *supra* note 1, at 126 ("As economic and social relations become increasingly interdependent, it becomes ever more obvious that no rights are truly 'individual' and that one person's exercise of rights invariably affects others and society generally.").

of places of collective worship as institutions of a specific character in our constitutional culture.<sup>96</sup>

The same kind of analysis could apply when we think of other kinds of institutions, whether they be educational,<sup>97</sup> political,<sup>98</sup> or municipal.<sup>99</sup> A common good constitutionalist approach recognizes these institutions as something more than mere aggregations of individual rights-holders; and it recognizes these institutions' role in facilitating and constraining rights in a way that is more nuanced than the liberty-maximizing framework of classical liberalism.<sup>100</sup> Instead, a common good constitutionalist would recognize that these institutions—cities, churches, schools, clubs—have an independent identity and function that shapes the contours of the right to keep and bear arms and provides a way of guiding the level of generality at which to assess Second Amendment challenges.

#### 4. Gun Rights and the Private-Public Distinction

A common good constitutionalist approach to gun rights implicates private regulation of firearms, but also private use of firearms. Currently, there's no coherent theory of firearms and private law.<sup>101</sup> The traditional private-public/action-inaction distinction prevails in Second Amendment law, if not in Second Amendment politics. So, for example, it remains a category error to say that a coffee shop owner's prohibition on firearms raises any Second Amendment

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96. Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 467 (2019).

97. *Id.* at 471.

98. *Id.*

99. Dave Fagundes & Darrell A. H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 720 (2021) ("The city, among other things, is a self-defense institution.").

100. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

101. For some scholarship on this issue, see generally Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016); Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 586 (2022); Cody J. Jacobs, *Guns in the Private Square*, 2020 U. ILL. L. REV. 1097, 1102 (2020).

issue.<sup>102</sup> It's a similar mistake to argue that a private party's use of a firearm for self-defense in any way implicates state action.

Common good constitutionalism confounds this traditional demarcation. On the one hand, it would mean that nominally "private" institutions and decisions, left unchecked or unregulated by government, must be evaluated by reference to whether they promote or frustrate the public goods of safety, peace, justice, and abundance. The easiest application of this frame would be to disputes over whether public housing can impose rules against the keeping and bearing of arms.<sup>103</sup> But the implications of this approach are much broader and could frame the ability of private businesses to ban firearms from their parking lots, corporate choices to divest from the gun industry, and related issues.

By the same token, however, a common good constitutionalist would need to re-think both the practice and the effect of private arms bearing for self-defense. The predominant classical liberal conception of the Second Amendment contemplates a "marketplace of violence" where both the tools and the power to deploy violence are democratized as matter of right.<sup>104</sup> In this vision, there will be bad uses of guns and good uses of guns; but the invisible hand of the market will lead to a desirable equilibrium that benefits everyone.<sup>105</sup> To those that hold this classical liberal view, the answer to the bad uses of guns is more gun rights, not less.<sup>106</sup>

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102. See *Allstate Ins. Co. v. Barnett*, No. C-10-0077 EMC, 2011 WL 2415383, at \*2 (N.D. Cal. June 15, 2011) (no Second Amendment cause of action against private insurance company); Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 53 (2012) ("If private parties wish to ban guns in their homes, on their property, or otherwise in their 'possession,' the Second Amendment provides no recourse for those people who wish to carry guns there.").

103. See *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 529 (D. Del. 2012), *rev'd in part*, 568 F. App'x 128 (3d Cir. 2014).

104. BLOCHER & MILLER, *supra* note 75, at 352.

105. *Id.* at 353.

106. *Id.* at 352. The sentiment is summed up by the National Rifle Association's policy solution to the Sandy Hook massacre: "The only thing that stops a bad guy with a gun, is a good guy with a gun." Eric Lichtblau & Motoko Rich, *N.R.A. Envisions 'a Good Guy*

Common good constitutionalism is skeptical that this unregulated model is consonant with the classical tradition or that it is normatively desirable. The premise of constitutional rights, to the common good constitutionalist, is to calibrate the right through the lens of what is good both for the individual and for the community.

Therefore, regulations designed to mediate the good for the individual and the community—like training and proficiency requirements, or insurance mandates, or guarantees of capacity or virtue in order to carry firearms—would have to be viewed not by reference to whether they impinge upon individual self-defense, but whether they are geared towards making certain the private possession, carriage, and use of deadly weapons contribute to the common good.

#### CONCLUSION

I've offered a thought experiment about what a common good constitutionalist's approach to the Second Amendment may look like.<sup>107</sup> Neither time nor space permit a full accounting of every discrete Second Amendment issue still unresolved after *Bruen*. Following Vermeule's caution, I do not see common good constitutionalism as providing answers to specifics about how many hours of training for a concealed carry license is constitutional, or how many rounds must be available in a magazine under the Second Amendment, or how much private land must be available for individuals to carry a firearm. Instead, I understand Vermeule's common good constitutionalism as providing what Professor Stephen Sachs has

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*with a Gun' in Every School* (NY Times, Dec 21, 2012), [<http://perma.cc/XXE2-NKWF>] (quoting NRA Executive Vice President LaPierre).

107. Although I've applied elements of the foregoing analysis from sources prior to Vermeule writing his book, see e.g., Miller, *Institutions*, *supra* note 94, I'll reiterate that this essay is not intended to be prescriptive as much as evaluative; it's a way of putting common good constitutionalism through its paces to see if it's a functional theory of constitutional interpretation.



said is on offer with originalism—rules for deciding whether any given result is “right.”<sup>108</sup>

I know a little about the Second Amendment and firearms law. And thinking through a common good constitutionalist’s approach to that topic is useful, if only to reveal how it can potentially reshuffle some fairly entrenched ideological positions. How common good constitutionalism could guide decisions on other politically divisive issues like abortion, climate change, religious freedom, or executive power, I leave to others. My deep reservations about common good constitutionalism—given the potential for, and reality of, bad men—I must, for now, keep to myself.

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108. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 828 (2022) (originalism provides “rules for judging answers, rather than means of reaching them”).