



# RESURRECTING THE *FÜHRERPRINZIP*

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In his most recent book, [\*Common Good Constitutionalism\*](#), Harvard Law School professor [Adrian Vermeule](#) presents two big ideas. The first idea is a very good one. Unfortunately, this good idea depends entirely upon the success of idea number two. Idea number two is one of the worst ideas I have ever heard. Taken together, the good idea crashes and burns because of the bad idea.

Professor Vermeule calls his two-idea combo "[common good constitutionalism](#)." But common good constitutionalism, as Professor Vermeule explicates it, will bring about [uncommonly bad](#) constitutionalism. And a lot worse besides. Although of course Vermeule doesn't say so, and surely would be repulsed by the idea, what he is asking for is the [Führerprinzip](#), a leader strong enough to steamroll all opposition. Vermeule [doesn't like liberalism](#). Fair enough. But he would have the state overcome liberalism's various contradictions. This is not constitutionalism, but its opposite.



First, however, Vermeule's good idea. That idea is the title of the book. Professor Vermeule argues that the United States should return to the pursuit of the [common good](#) in the life of the law, and that this pursuit will help us all leave behind the [fruitless debate](#) between progressivists and originalists over the interpretation of the United States Constitution. (Vermeule was once a clerk for the [original originalist](#), the late Antonin Scalia (1936-2016).) The classical legal tradition in the West, the *ius commune*, Vermeule writes—"the classical European synthesis of Roman law, canon law, and local civil law"—can help Americans recover the distinction between *lex* and *ius*. This distinction, and the moral jurisprudence that can flow from properly making it, can be, Vermeule hopes, common good constitutionalism. In other words, let's stop fighting over what the laws do and don't really say, and let's start pursuing justice for all, a better America freed from the stale constitutional battles of the previous century. This is, indeed, a good idea.

*Lex* and *ius* may not be familiar terms, however, so let us clarify. *Lex* is not the villain from Superman, but, Vermeule writes, "enacted positive law," that is, the law on the books, the law which legislators and (to foreshadow the bad idea) administrators promulgate and which judges interpret and executives enforce. *Ius* is "the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice." If you use *ius* to guide *lex*, and if *ius* is morally sound, then, Vermeule is saying, you may get something much better than the originalist-progressivist muddle we have now. You may get a legal dynamic that effects real social good in the land.

The recovery of *ius*, Vermeule argues, will entail a return, in part, to the [natural law](#). Vermeule also wants to "draw... upon the classical tradition," as well as, "in limited ways... the parts of Dworkin's jurisprudence that are consistent with the classical view of law and that explain and illuminate the latter's commitments." [Why Dworkin?](#) Vermeule wants to use him "in the negative, invoking him as the unsurpassed modern critic of positivism and originalism in Anglophone legal theory." In many ways, Vermeule's common good constitutionalism is a creative extension of Dworkin's "[law as integrity](#)" insights. Vermeule takes Dworkin's arguments about the centrality of legal principles and buttresses those arguments with a deep history of law in the West as moral touchstone.

So far so good. I agree completely with Vermeule that the rediscovery of the natural law, of *ius* both more generally and more narrowly, will pave a royal road between originalism and progressivism, that is, between obsessing over the *lex* of the United States Constitution from, respectively, the political right and left. It would be a fine thing were the United States to return—and Vermeule says it is not

really so long, approximately the middle of the twentieth century, since we left it—to the sincere pursuit of the common good.

But there's a catch. Vermeule thinks the way to do this is by reclaiming the "*ragion di stato*" tradition in early modern Europe, which articulates the central goods at which constitutionalism should aim." "*Ragion di stato*" is a Continental idea from the 1500s and after which calls for a strong monarch (Vermeule translates this into a strong chief executive/administrative state for the American milieu) to act decisively for moral ends. I understand Vermeule to be explicating *ragion di stato* as the police power with a social justice teleology. Uh oh. It is on this very point, right at the pivot of the argument, that Vermeule's good idea swings around and smashes headlong into his bad one. At the moment of Vermeule's triumph, on my reading, he fails.

Let us look closer to see what's gone wrong. What are the "central goods" of the *ragion di stato* tradition? Classically, Vermeule writes, they are three: "*peace, justice, and abundance*." (Emphases here and elsewhere in the original.) Very nice. Let us certainly have as much of all three as we can get.

But wait. Vermeule does something remarkable—one is almost tempted to say foolhardy—to the three central goods of yesteryear. After listing peace, justice, and abundance, Vermeule adds: "which I extrapolate to modern conditions to include various forms of *health, safety, and economic security*. I also elicit from the tradition the key principles of *solidarity* and *subsidiarity*."

I thought I was reading a book about the recovery of *ius*, of the natural law, of a regard for the common good. But Vermeule, in seeming to argue for a return to the classical legal tradition, in fact dismantles that tradition, putting in its place a triad of justifications for the modern administrative state. "Health, safety, and economic security": in one sentence, perhaps the most important one in his book, Vermeule leaps from the classical legal tradition to the New Deal. The rest of *Common Good Constitutionalism* is an attempt to make that leap seem like a smooth transition, and to justify the enormous federal apparatus necessary to effect a permanent social transformation.

This is where the second idea, the bad one, comes in. It's like a Mack truck plowing at breakneck speed into a tulip garden. All the good stuff scatters and all that's left is pure aggression, with no concern for the consequences. Vermeule wants peace, justice, and abundance, as do I. But he wants the administrative state to ram those through, and to top it all off with health (shall I read here "forced vaccinations at the pleasure of a health bureaucracy in the pockets of Big Pharma"?), safety ("so long,

Second Amendment, and First"?), and economic security ("central planning"?). Elsewhere in *Common Good Constitutionalism*, Vermeule adds other items to his revision of the *ragion di stato*. For example, we later get "health, safety, and a right relationship to the natural environment." The Incorruptibles at the [EPA](#), too, apparently, are to lord it over us. This is all very, very concerning. Common decency would suggest that Vermeule's vision of common good constitutionalism be shunned.

A clear-eyed understanding of the nature of the state might have led Vermeule to suggest that the good things in human life come in direct and inverse proportion to the size of the government. What Vermeule presents instead is what others have termed, rightly I think, Vermeule's "[baptism of the state](#)" and "[Deep State constitutionalism](#)." Vermeule counters that "[abusus non tollit usum](#)." Yes, but "*abusus*" here implies a Dworkinian discernment, does it not? Grace completes nature, but how much grace does it take before any state will act humanely? This is to say that there are limits to how much a thing may be said to have been merely misused before one is forced to admit that the thing itself is harmful.

Ignoring his own calls for *ius* to trump *lex*, Vermeule twists the arm of sound logic to make it seem to support statism. Vermeule writes:

In a globalized world that relates to the natural and biological environment in a deeply disordered way, a just state is a state that has ample authority to protect the vulnerable from the ravages of pandemics, natural disasters, and climate change, and from the underlying structures of corporate power that contribute to these events.

Vermeule then rejects the notion that the "main aim of common good constitutionalism" is "the liberal goal of maximizing individual autonomy or minimizing the abuse of power." Instead, the main aim of common good constitutionalism "is to ensure that the ruler has the authority and the duty to rule well." *Abusus non tollit usum* be damned.

Once this logic is in place, and digested, readers should not be surprised to find Vermeule patiently building up to an homage to "a central statute, indeed a super-statute, that bears out Dworkin's view by embodying general statements of high principle: the Administrative Procedure Act (APA)." The [APA](#) was passed in 1946 to accommodate the federal bloat which [Franklin Delano Roosevelt's statism](#) had brought about. It is not even the elected statist who are to rule over us, Vermeule posits, but the unelected legion who answer to no one but themselves. If this is common good constitutionalism, I want no part of it at all, and I pray that no mortal ever suffer what Vermeule would unleash.

Now for something completely different. I should clarify here that, while I am adamantly against what Vermeule is expounding in *Common Good Constitutionalism*, I nevertheless highly recommend his book. Vermeule writes beautifully, and he knows much. The [history of the APA](#), the legal wrangling among those who fought against the ballooning of the administrative and those who fought for it (including, as Vermeule mentions, former Harvard jurist Roscoe Pound (1870-1964), who variously found himself on both sides), which Vermeule [lays out](#) is fascinating. It is well worth the price of *Common Good Constitutionalism* to witness a Harvard Law professor sort through the threads of intellectual influence which now make up the huge and sprawling patchwork of administrative law. As legal history, *Common Good Constitutionalism* is grand.

However, I am afraid I cannot join Vermeule in his view that the bureaucratic maneuvering and fiat rule-making—this is my caricature, of course, and not Vermeule's—in which [the administrative state](#) has indulged these past hundred and more years have been done in the spirit of "a jurisprudence of principles." Nor can I follow Vermeule even further afield when he says that "such principles are *ius*, in all but name."

On Vermeule's own terms the administrative state seems not to clear the bar which Vermeule sets for it. Recall that Vermeule threw subsidiarity and solidarity into his de novo interpretation of the *ragion di stato*. Solidarity and *ragion di stato* would appear to be *prima facie* contradictory, so I leave the solidarity business at that. A good definition for subsidiarity, in the Catholic context from which it emerged as a social principle, comes from The Acton Institute's David A. Bosnich, [who writes](#):

One of the key principles of Catholic social thought is known as the principle of subsidiarity. This tenet holds that nothing should be done by a larger and more complex organization which can be done as well by a smaller and simpler organization. In other words, any activity which can be performed by a more decentralized entity should be. This principle is a bulwark of limited government and personal freedom. It conflicts with the passion for centralization and bureaucracy characteristic of the Welfare State.

For good measure, Bosnich adds:

This is why Pope John Paul II took the "social assistance state" to task in his 1991 encyclical *Centesimus Annus*. The Pontiff wrote that the Welfare State was contradicting the principle of subsidiarity by intervening directly and depriving society of its responsibility. This "leads to a

loss of human energies and an inordinate increase of public agencies which are dominated more by bureaucratic ways of thinking than by concern for serving their clients and which are accompanied by an enormous increase in spending."

This would all seem to be bad news for Vermeule's vision for common good constitutionalism. Here we have a pope from Vermeule's lifetime, in an encyclical no less, dropping the hammer on statism. How does Vermeule deal with this contradiction? How does he justify a strong administrative state, on subsidiarity grounds, when subsidiarity would seem to necessitate a devolution of power away from the center and toward the lowest rungs on the social ladder?

Vermeule is not at all insensitive to the difficulty. He gets around it by inverting the definition of subsidiarity. "The core original meaning of *subsidium* is the military reserve that stands ready to enter battle if the front line faces a crisis," Vermeule writes, citing a Latin dictionary from 1879. Very well, but the above definition of subsidiarity above comes from 2010, and Pope John Paul II's encyclical is of course from 1991. Furthermore, "*centisimus annus*" refers to the hundredth anniversary of John Paul's inspiration for the document, Pope Leo XIII's (1810-1903) *Rerum Novarum*. To be fair, *Rerum Novarum* does not contain the word "subsidiarity" (although it does crack down hard on socialism, another stumbling block for Vermeule). The encyclical *Quadragesimo Anno*, which as the title suggests was issued in 1931 on the fortieth anniversary of *Rerum Novarum*, does have a nice discussion of subsidiarity, however. Vermeule is aware of all of this of course, and cites [research](#) highlighting "the neglected positive aspect of subsidiarity" in the Catholic tradition. I would counter that a plain reading of the Catechism of the Catholic Church [on subsidiarity](#) (which draws on some of the documents mentioned above) frustrates virtually all of what Vermeule calls for in *Common Good Constitutionalism*.

Rebuffed by Rome (with the notable exception of Vermeule's favorite encyclical, the 2015 ecostatist *Laudato Si'*), Vermeule seeks refuge with Catholic jurist Carl Schmitt's (1888-1985) 'state of exception' idea to buttress his argument that the *subsidium*, the reserve power of the administrative state, should intervene whenever lower-down orders of hierarchy come up against limits to their power. It would be unfair to bring up the *Führerprinzip* right after mentioning Schmitt and Vermeule in the same sentence, so I will leave that be. Note, however, that Vermeule (like your humble correspondent) is also a Catholic, a fairly recent convert. On this note, it is worth mentioning that Vermeule's book inadvertently calls into question something which passes for almost [a natural truth](#) in Catholic political philosophy, and one which Vermeule appears to endorse in *Common Good Constitutionalism* (see Vermeule's discussion of *epikeia*, e.g.), namely that the state is an organic outgrowth of the family and the polis. St.

Thomas Aquinas (1225—1274) argued this, we are told, as did his philosophical model, [Aristotle](#) (384—322 BC). Only, St. Thomas didn't do so [blindly](#). Aristotle, for his part, never met [Jeremy Bentham](#). And Catholics ought to remember their St. Augustine (354-430), whose understanding of government was [basically Rothbardian](#).

Vermeule nevertheless rejects what he calls "the libertarian sense of 'subsidiarity'" (he might just as easily have called it "Augustinian"), connoting

a negative limitation, according to which the public authority should not intervene if a given function is more appropriately carried out at a lower level. This view is not invalid; it is a corollary of the positive sense, a statement of the limitations inherent in the positive grant of power for certain purposes and under certain conditions.

"But the corollary should not be mistaken for the main theorem," Vermeule closes, accusing libertarians of doing precisely what he has just done.

Even more worrisome is that there are echoes of Plato's *Republic* in Vermeule's upending of subsidiarity and glorification of the state. Plato's ghost clings closest when Vermeule waves aside scruples about philosopher kings by appealing to the degrees on the wall of the person arguing in favor of them (or as one). For example, Vermeule quotes Catholic social philosopher and theologian [Johannes Messner](#) (1891—1984), who opined that:

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

"This sounds alarming, of course" Vermeule allows, in a way that, for me at least, serves only to compound my alarm,

but we should understand that Messner with his massive classical erudition is certainly best understood as speaking not at all of the modern strongman or junta, but rather within the tradition of the carefully cabined Roman model of dictatorship—a fundamentally legal and



constitutional authority, limited by term, granted for a certain purpose, and authorized by the Senate.

I certainly do not have Johannes Messner's, or Adrian Vermeule's, massive classical erudition. But I remember, hazily, somewhere between learning that Hannibal crossed the Alps and that Gaul is divided into three parts, that the [Roman Senate](#) was a one-stop-shop for bribery, warmongering, intrigue, and assassination. It was also more often than not cowed into silence, even fake adulation, by abuses of imperial power which shock the modern conscience even across a score of centuries. I hope I will be forgiven a rube's clarification, but, that Senate?

I will also mention, for what it's worth, that Anthony Fauci was also presented, by our own spotless political assembly, as having a massive erudition. Not in the classics (although Fauci's education was Jesuitical), but in the language of the administrative state. Adrian Vermeule wants that administrative state to force you to take the coronavirus "[vaccine](#)," the one which the massively erudite Anthony Fauci pushed (at great personal financial gain) upon a populace which had long been waiting in Lochnerian darkness for just such an administrator as he to save them. To be fair, however, and at the risk of getting sucked into another subsidiarity-like whirlpool of definitions, I am not sure whether Professor Vermeule still holds these views now that the data would seem to [confirm](#), in spades, the skepticism on the part of the hoi polloi about those fabulous serums. Or maybe *ragion di stato* means never having to say you're sorry.

At any rate, Vermeule, along with [his colleague](#) (and Obama-and-Biden-era Richelieu) [Cass Sunstein](#), has a good answer to this kind of nay-saying. He would categorize such talk as above as "[conspiracy theorizing](#)" and have the federal government put the kibosh on it.

Finally, there is abortion, an area where Vermeule and I largely agree. I am very much with him [in celebrating](#) the 2022 [Dobbs decision](#) ending the federal government's involvement in nearly fifty years of inhumanity. But that's just where Vermeule and I disagree, too, and doubly so. First, the administrative state has been [a champion](#) this past half century of the practice which it now, second, remands to the oversight of the several states. *Dobbs* did not end abortion in America. It simply shifted the onus for it from one capital to fifty-odd. The common good appears to have been lost somewhere among the bureaucratic hedgerows. I don't know how to square with "common good constitutionalism" *Roe*, *Dobbs*, and administrative state superstar [Kathleen Sebelius](#). Perhaps Vermeule can enlighten me.

These are details, however. As for the overall thrust of Vermeule's argument, which in nuce is that the administrative state can and should wring *ius* from *lex* and return us all to the straight and narrow of the natural law, I would like to refer readers to Ludwig von Mises Institute powerhouse [David Gordon's review](#) of an earlier Vermeule book, one with a very similar theme. Speaking of [The Executive Unbound: After the Madisonian Republic](#), which Vermeule co-authored with [Eric A. Posner](#), Gordon writes:

“The authors' defense of the *Führerprinzip* is repellent; but the book has at least the value of showing how the world looks to a cast of mind enamored with power.”

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[Featured](#): *Zwervers in de duinen (Vagrants in the Dunes)*, by Jan Toorop; painted in 1891.

