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Rights, Common Good, and the Separation of Powers

Michael Foran*

Common good constitutionalism seeks to ground and legitimate choices of constitutional design and interpretation in a manner committed to pursuing the flourishing of all members of the community. This raises important questions relating to the separation of powers and fundamental rights protection. This paper seeks to advance and defend an account of rights-based judicial review from within a common good constitutional framework. It will argue that rights and the common good are co-constitutive: a genuinely common good will ensure the protection of fundamental rights and genuinely fundamental rights will help constitute and further the common good. With this in mind, a conception of the separation of powers will be advanced wherein different organs of state act collaboratively to ensure both that fundamental rights are protected and that the state can pursue goals which help to further the common good.

INTRODUCTION

[A]n interest in the common good is the ground of political society, in the sense that without it no body of people would recognise any authority as having a claim on their common obedience.¹

The classical natural law tradition has seen yet another revival in recent years. Constitutional scholars have expressed renewed interest in reassessing core questions relating to the justification of constitutional authority and the relationship between that authority and the community over which it seeks to assert itself. The role of general jurisprudence within constitutional theory is increasingly central to new debates, their character and scope reviving older debates concerning the purpose of law in so doing. In the United States of America, this has manifested in a reappraisal of originalism, liberalism, and positivism as foundational principles of constitutional interpretation.² A new approach to

*Lecturer in Law, University of Glasgow. My thanks to Adrian Vermeule, Conor Casey, Richard Ekins, Erika Bachiochi and Stefan Teil for their helpful comments on previous drafts of this paper.

- 1 T.H. Green, *Lectures on the Principles of Political Obligation* (London: Longman, Green and Co, 1950) 109.
- 2 See Conor Casey, 'Common-Good Constitutionalism and the New Battle over Constitutional Interpretation in the United States' [2021] PL 765.

constitutionalism, grounded within a natural law framework and focused on ensuring the flourishing of all members of the community, has begun to emerge.

Much of the recent surge in interest in the common good stems from legitimate frustration that many have with current forms of constitutionalism. Most existing theories of constitutionalism do not see questions relating to the flourishing of individuals or of what constitutes a good life as central or even important to constitutional theory. Where notions of the good arise, they often do so incidentally and contingently within rights analysis or they are relegated to questions of institutional design where the issue concerns who gets the ultimate say on the good. On this account, the good, where it is relevant for constitutional theory, is either whatever a given individual says it is for them, or it is whatever a democratic institution determines it to be. What the good actually consists in is thus abandoned as unworthy or even problematic for a constitutional theorist to consider, the liberal ideal of neutrality holding sway.³

Thus, while some forms of liberalism may have envisaged an important role of the good life within one's private morality, liberal *constitutionalism* is often characterised by the neutrality principle, what Dworkin described as the requirement 'that governments must be neutral on what might be called questions of the good life ... that political decisions must be, so far as is possible, independent of any particular conception of the good life or of what gives value to life ... liberalism takes [this] as its constitutive political morality'.⁴ Dworkin argued that this neutrality is what distinguishes liberalism from rival left-wing and right-wing doctrines which all embrace non-neutral conceptions of the good life and attempt to mobilise state power to establish a virtuous, flourishing society.⁵ This is evidently in contrast with certain liberal thinkers, particularly John Stuart Mill, who argued that the goal of maximising human good, understood in a utilitarian sense, can only be achieved through tight limits upon the state's power to interfere with individual liberty.⁶ Mill's utilitarianism is an example of a non-neutral liberal constitutionalism because it is openly grounded in a particular – utilitarian – conception of the good life; it does not purport to be neutral. But most contemporary liberal constitutionalists are not utilitarian. Modern liberal constitutionalism is far more likely in practice to reflect the neutrality principle embraced by Dworkin, defending a priority of the right over the good.

This neutrality has failed. It has failed both because liberal constitutionalism has not, in fact, remained neutral on the good life and because its attempts to remain neutral have frustrated the development of a constitutionalism which consciously and unequivocally pursues the flourishing of all members of a political community. The inability to address, in constitutional terms, concerns

3 See Ronald Dworkin, 'Liberalism' in S. Hampshire (ed), *Public and Private Morality* (Cambridge: Cambridge University Press, 1978); cf Patrick Neal, 'Liberalism & Neutrality' (1985) 17 *Polity* 664; Richard J. Arneson, 'Liberal Neutrality on the Good: An Autopsy' in Steven Wall and George Klosko (eds), *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman & Littlefield, 2003).

4 Dworkin, *ibid*, 127.

5 *ibid*, 128.

6 John Stuart Mill, *On Liberty* (New York, NY: Cosimo, 2005), originally (Liberal Arts Press, 1859).

relating to economic inequality, climate change, and the flourishing of communities, families, and individuals has resulted in an increasing rejection of liberal constitutionalism in favour of one more conducive of the common good.⁷ On this view, the state is under a constitutional – not merely political – obligation to pursue the common good. If it wishes to govern through law, informed by the natural law tradition, it must produce legal ordinances and interpret legal rules and principles in a manner reasonably directed towards the common good of all.⁸ Some liberal theorists can defend their constitutionalism by reference to some notion of the common good, itself conveniently identical to liberalism. But that is not a necessary feature of liberal constitutionalism. What defines liberal constitutionalism is liberalism. A commitment to the common good is contingent, if it is there at all, upon a conception of the common good which is compatible with the true purpose of liberal constitutionalism which is liberalism. Common Good Constitutionalism is distinguished by placing the common good as the central, necessary, end of constitutional theory.

Yet, if the only concern here was with the ends that a political system might be put to, there would be little that we could associate with a theory of constitutionalism. Questions relating to constitutional structure, institutional design, legal interpretation, and so on are essential to distinguish a constitutional from a political project. Without a theory of institutional design, common-good constitutionalism collapses into a collection of political ends, to compete with other political ends in the constitutional arena of the day. Thus, while this movement is entirely correct to focus on the substantive ends of politics, rejecting any attempt to advance purely procedural or formal theories,⁹ it is also essential to answer second-order juridical questions relating to how we concretise these new principles of constitutionalism within a contemporary social, political, and legal context.

Current exegesis of Common Good Constitutionalism tends to operate at one of two levels. Either attention is paid to the justificatory aspect of the theory or it is applied to specific jurisdictional contexts such as US or Canadian constitutional law and history.¹⁰ At the justificatory level, law generally and

7 The leading contemporary voice for this dissatisfaction is Adrian Vermeule. See Adrian Vermeule, *Common Good Constitutionalism* (Cambridge: Polity Press, 2022).

8 Thomas Aquinas, *Summa Theologiae* (ST), I-II, q 90, art 4, (trans Ralph McInerney), *Thomas Aquinas: Selected Writings* (London: Penguin Classics, 1988).

9 Substantive theories of the rule of law have been a long-standing aspect of constitutional theory. See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law' [1997] PL 467; John Gardner, 'The Supposed Formality of the Rule of Law' in *Law as a Leap of Faith: Essays on Law in General* (Oxford: OUP, 2012); Michael Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78 CLJ 570. What distinguishes common-good constitutionalism is the shift to identifying specific ends that ought to be pursued as opposed to theories of the rule of law which merely imply restrictions on the ends that might be pursued by the state.

10 On the US debates, see Vermeule, n 7 above; Randy E. Barnett, 'Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution' *The Atlantic* 3 April 2020 at <https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/> (last visited 25 February 2022); Randy E. Barnett, 'Deep-State Constitutionalism' (2022) 22 *Claremont Review of Books* 33; Casey, n 2 above. On the Canadian debates, see Stéphane Sérafin, Kerry Sun, and Xavier Focroulle Menard, 'Notwithstanding Judicial Specification: The Notwithstanding Clause within a Juridical Order' *LexusNexus Supreme Court Law Review* (forthcoming).

constitutional law specifically can be explained by reference to several competing accounts of what their purpose is. Liberal constitutional theory generally grounds both of these in a desire to restrain the power of the state through the enforcement and protection of individual liberties. With this in mind, competing accounts of how best to achieve this purpose can be advanced from within a shared framework. Thus, we can see legal and political constitutionalists disagree strongly about how best to design a constitutional order and how best to separate constitutional powers, but all using the same justificatory lens of analysis. The disagreement is usually at the intermediary level where there is agreement about the purpose of constitutionalism but quite trenchant disagreement about how best to achieve it. Liberal constitutional theorists may disagree strongly about which institution is most legitimate and best placed to secure individual rights or to check the abuse of state power, but they tend to agree that this is the grounding justification of constitutionalism with no higher purpose or end from which these purposes are derived.

Proponents of Common Good Constitutionalism have been critical of this framing, seeing the restraint of state power and the protection of rights as derived from a more foundational commitment to the common good which gives meaning to and justification for these subsidiary aims. This general framework of justification is then applied to concrete jurisdictional examples. The result is that prominent theorists such as Vermeule and Casey can advance powerful critiques of the foundational assumptions of liberal constitutionalism in general as well as their more determinate instantiation within a given jurisdiction while remaining purposively agnostic on questions of institutional design.¹¹ They can rightly say that Common Good Constitutionalism, taken as a justificatory lens, is in principle compatible with a wide arrange of institutional arrangements. This is equally true for liberal constitutionalism. The difference is that Vermeule and Casey have generally confined their analysis to the abstract justificatory level and the specific jurisdictional level, with little attention paid to intermediary approaches which can set out generally desirable institutional arrangements, defended as prudent means of achieving the purposes of this form of constitutionalism. Part of this may stem from a commitment to subsidiarity such that it is simply not possible to advance theory at this intermediary level. I tend to disagree with this explanation and suspect the same is true of both Vermeule and Casey who may be less focused on this aspect of common good constitutionalism precisely because they don't wish to be too prescriptive in areas where they recognise room for reasonable disagreement from within a shared framework.

This paper proceeds from the claim that certain constitutional structures or designs are more conducive to the common good than others.¹² This

11 See Conor Casey and Adrian Vermeule, 'Myths of Common Good Constitutionalism' (2022) 45 *Harv J Law Public Policy* 103.

12 Most notably, theories of constitutionalism and the common good have a strong affinity with the classic natural law tradition. See for example John Finnis, *Natural Law and Natural Rights* (Oxford: OUP, 1980); R.H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015); Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (Indianapolis, IN: Liberty Fund, Thomas Hanley tr, 1998).

is true even though the classical legal tradition is sufficiently capacious to encompass a wide range of divergent theoretical perspectives on this issue.¹³ It is nonetheless worth asking whether certain arrangements, even within this range of reasonable disagreement, might be more conducive to this task than others. This paper will explore one aspect of constitutional design that can help us to flesh out our understanding of the common good and perhaps dispel some recurring misconceptions about its nature at the same time. In particular, it will focus on the place that natural or fundamental rights have within a theory of the common good and, relatedly, the role that an impartial judiciary might play within a common-good constitutional order.

Vermeule and others have stressed that the protection of rights is necessary for Common Good Constitutionalism, but is subordinate to the higher aim of advancing the common good.¹⁴ While this is generally true, there is a danger that the important place of fundamental rights as a constitutive aspect of the common good may be obscured.¹⁵ This paper is an attempt to provide a defence from first principles of rights-based judicial review of executive action within a common-good constitutional framework. In so doing, it will suggest a rethinking of the precise character and scope of rights and their relationship to the common good. Vermeule's treatment of rights is relatively concise, focusing primarily on their manifestation within US constitutional law through the use of illustrative examples.¹⁶ This is expressly stated as being sketched 'with a very light hand', and deliberately so.¹⁷ There is thus room for a more sustained analysis of the place of rights within Common Good Constitutionalism at both the most general level and the intermediary level where adjudication is concerned.

At the general level, the connection between rights and the good warrants careful examination. That is the task of the first two substantive sections of this paper. It is important first to establish that a constitutionalism committed to the common good does not adopt a consequentialist or purely teleological approach to rights questions. Fundamental rights are a constitutive part of the common good: the common good cannot be genuinely common or genuinely good if it does not include such rights protection. But rights cannot be understood as abstract, individualistic entitlements which are divorced from substantive notions of the good.

From here, work can be done at the intermediary level to advance general arrangements of institutional design and the separation of powers which can then explain how this might manifest within particular jurisdictional contexts. Such a project cannot begin without first establishing how fundamental rights relate to the common good and why the common good necessitates an interpretation of both statute and the limits of executive power in a manner reflective of this connection. The final section of this paper takes up the first of these tasks: drawing on the general claims made about the relationship be-

13 Vermeule, n 7 above, 20.

14 *ibid*, 166; Casey and Vermeule, n 11 above, 136–137.

15 A point stressed by Barnett in his review of Vermeule's book; Barnett, 'Deep-State Constitutionalism' n 10 above, 37–38.

16 Vermeule, n 7 above, 164–178.

17 *ibid*, 165.

tween rights and the common good and marrying them to arguments about the specific role–morality of separate institutions in the modern state. On this view, the judiciary has an important role to play in the interpretation and enforcement of rights which, although respectful of the collaborative role that the executive and legislature must play in identifying the scope and content of rights, is defined primarily by the obligation to set the outermost limits on executive and legislative power, fixed by reference to duties under justice. This is but one conception of how a constitutional order might be arranged to best pursue the common good. There will be other conceptions advanced within this framework which fall within the scope of reasonable disagreement. Just as with liberal constitutionalism, what matters is that disagreements about these second order questions proceed on the basis of shared understanding of the point and purpose of constitutionalism more generally.

It is thus wrong to presume that Common Good Constitutionalism is, by definition, geared towards increased executive power, or increased judicial power, or increased legislative power, whichever is your boogiemaster of choice. In response to Common Good Constitutionalism, we have seen liberal constitutionalists decrying it for promoting executive dictatorship,¹⁸ originalists decrying it for promoting judicial dictatorship,¹⁹ and we are sure to see others decrying it for promoting legislative dictatorship at some point. These critics can agree that Common Good Constitutionalism is a thin veneer for tyranny, they just can't decide which kind. This is a particularly egregious move given that such insults are rarely hurled against constitutional theorists who genuinely do argue for increased executive power (for example Griffith),²⁰ or increased judicial power (for example Dworkin)²¹ or increased legislative power (for example Waldron).²²

On these questions, Common Good Constitutionalism is a justificatory lens of analysis, demanding that one ground and defend choices of institutional design by reference to their capacity to further the common good, rather than the maximisation of liberty or equality or stability, for example. It leaves room for reasoned disagreement about which constitutional structures best achieve the purposes of constitutionalism, just as other theories do.²³ Waldron and Dworkin disagree on questions of institutional design, but their disagreement is a reasonable dispute with a shared overarching commitment to respect political equality. It would be uncharitable to conclude from this that a commitment to political equality is either too capacious to mean anything or that it inevitably puts us on the dangerous road to judicial/legislative dictatorship (delete as appropriate). Reorienting constitutional theory with the common good as a central focus will mean that choices of institutional design must be grounded within an

18 David Dyzenhaus, 'The Snake Charmers' *Verfassungsblog* 7 March 2022 at <https://verfassungsblog.de/os5-snake-charmers/> (last visited 25 March 2022).

19 Barnett, 'Common-Good Constitutionalism' n 10 above.

20 J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1.

21 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

22 Jeremy Waldron, *Law and Disagreement* (Oxford: OUP, 1999).

23 Indeed, the conception of the separation of powers defended in this paper is different from that embraced by Adrian Vermeule in his recent book, which takes the US context as its primary focus; Vermeule, n 7 above.

account of how they help to foster the flourishing of all members of a political community rather than the maximisation of liberty or some other value, but this doesn't mean that proponents of common-good constitutionalism envisage absolute or unchecked power on any organ of state.²⁴ Indeed, this paper will defend a conception of the separation of powers on the exact basis that the common good demands respect for fundamental rights and that no one organ of state can pursue the common good on its own. Collaboration is essential, not just to achieve important ends but also to prevent abuse of power that would breach fundamental rights and so undermine the common good.

THE RIGHT AND THE GOOD: TO RESPECT AND PROMOTE

The common good should not be equated with some kind of majoritarianism or utilitarianism.²⁵ It is not simply another term for the public interest; it is a specific conception of the public interest with specific presumptions about the proper ends of politics and principles guiding the means of achieving those ends. Properly understood, the common good is the set of conditions necessary for each and every member of the community to flourish. It cannot collapse into an aggregative or majoritarian conception of the public interest which sees the role of politics as finding the most acceptable compromise between competing interests.²⁶ Misconceptions surrounding the nature of the common good and its relationship to rights are compounded by modern proportionality doctrine which has a tendency to avoid difficult questions relating to the scope of rights, preferring instead to view virtually any interference with a claimed interest as an infringement that stands in need of legal justification.²⁷ The result is a collapse of the right/interest distinction and a subsumption of almost all questions of political morality into an ostensible conflict between individual and public interest, the latter understood as either the interests of the majority or the outcome of their expressed will, at the expense of the minority. When this happens, questions relating to that which is in the common interest of all are side-lined or altogether abandoned.²⁸ It becomes increasingly difficult to

24 Indeed, Vermeule and Casey explicitly deny this; *ibid*, 43; Casey and Vermeule, n 11 above, 132–136.

25 Grégoire C.N. Webber and Paul Yowell, 'Securing Human Rights through Legislation' in Grégoire C.N. Webber and others (eds), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018) 4–5.

26 For example, Griffith argues that the clash between the individual and society is the essence of politics; Griffith, n 20 above. Similarly, utilitarian conceptions of the 'greater' good rely on a similar tension. See John Stuart Mill, 'Utilitarianism' in John M. Robson (ed), *The Collected Works of John Stuart Mill, Vol X, Essays on Ethics, Religion and Society* (Toronto: University of Toronto Press, 1969); Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 2nd ed, 1993); Richard Hare, *Moral Thinking: Its Levels, Method, and Point* (Oxford: Clarendon Press, 1981); cf David Brink, 'The Separateness of Persons, Distributive Norms, and Moral Theory' in R.G. Frey and Christopher Morris (eds), *Value, Welfare, and Morality* (Cambridge: Cambridge University Press, 1993).

27 N.E. Simmonds, 'Constitutional Rights, Civility and Artifice' (2019) 78 CLJ 175; John Tasioulas, 'Saving Human Rights from Human Rights Law' (2021) 52 *Vanderbilt Law Review* 1167.

28 Thus, liberal arguments in favour of the primacy of the right over the good presuppose a tension between them such that individual rights act as 'trumps' against the common good. See Ronald

conceive of a genuinely common good that is to the collective benefit of each and every member of our community, including those not yet born. When the public is set up conceptually in tension with the individual, rights become the last great defence of the individual against an encroaching state demanding their sacrifice for the benefit of the rest of society.²⁹ Common-good constitutionalism challenges this framing, preferring instead to first ensure that what purports to be in the public interest is genuinely in the interest of all.

It is not within the scope of this paper to advance or defend a substantive theory of the good. The concern of this paper is the conceptual connection between individual rights and the common good, regardless of the specific rights that we have or goods that we ought to pursue as a polity.³⁰ One thing that is necessary, however, is a rejection of any account of the common good which is premised on this tension between individual good and public good. It is a central tenet of the common good that there is no conflict between the good of the majority and the good of the minority, once both are properly understood. This is because the good of an individual cannot be separate from the good of the community: my life is better when my friends' lives are better.³¹ My membership within a civic community grounds the bonds of a civic friendship that connects all members of a polity.³² It is in our shared common interest that all members of our community be capable of leading flourishing lives and that they be treated with dignity and respect.³³ To diminish the flourishing of others, to disrespect their dignity, in the name of the common good, is to fundamentally misunderstand what makes the common good common. It also fundamentally misunderstands what it means to pursue a good life, of which membership within a flourishing political community of equals is essential.³⁴

This already has implications for the kinds of principles that can properly be associated with any theory of constitutionalism informed by a commitment to the common good. The connection between natural law theory and common good theory manifests in a fusion of deontic and telic commitments. The common good is achieved through adherence to a body of principles which demand the pursuit of human flourishing through right action. Right action thus contributes to the common good both in how it helps to *achieve* human flourishing and in how it *constitutes* human flourishing through the expression

Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). But this conception of both rights and the common good is mistaken. Properly understood, rights and the common good do not conflict. This can only be fully understood once one breaks from the mistaken belief that the common good is some utilitarian aggregative concept. cf Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *AJL* 93.

29 Even certain communitarian thinkers set things up like this, proposing that the needs of society should justify breach of individual rights in some cases. See for example Amitai Etzioni, 'The Common Good and Rights: A Neo-Communitarian Approach' (2009) 10 *Georgetown Journal of International Affairs* 113, 115–117.

30 An illustrative example, however, is the work of John Finnis; see n 12 above.

31 *ibid* 4, 6.

32 See Jacques Maritain, *The Person and the Common Good* (Notre Dame, IN: University of Notre Dame Press, 1966) ch 4.

33 Aquinas, *ST* n 8 above, II-II, q 64, art 4; II-II, q 65, art 1; II-II q 61, art 1; I-II, q 96, art 4.

34 See Finnis, n 12 above, ch 6.

and fostering of virtue.³⁵ A hypothetical example may serve to illustrate this. Given space constraints, let's stipulate that torture is morally unacceptable and that a political system oriented towards the good would adopt a commitment against torture. There are (at least) two ways that a legal system might operationalise a commitment to anti-torture. The first would be to attempt to reduce the amount of torture that occurs within the community. This would manifest in a consequentialist principle that we could call normative teleology which focuses on identifying certain goals or ends that ought to be pursued. Consequentialists believe that a morally right action is one which produces good consequences overall.³⁶ Normative teleology focuses on identifying goals that must be pursued and measuring the morality of actions by reference to how they facilitate or frustrate the pursuit of those goals. It is concerned with the purpose or end of, for example, politics or law as forms of social ordering which have purposes or ends as essential aspects of their nature.

If teleology were the only guide to determining right action, we could assess the morality of certain acts entirely by reference to how they contribute to the achievement or frustration of that end.³⁷ Of course, this is not the only guide to moral action and so this commitment may need to be balanced against other moral ends. Thus, while banning the use and sale of all tools which might be used to torture would certainly make it more difficult to torture someone, and might plausibly result in a reduction of torture overall, it would also frustrate the pursuit of other valuable social ends such that it would be an imprudent means of achieving the common good.

This commitment to reducing torture may also be constrained by reference not to the pursuit of other legitimate ends but to another kind of anti-torture principle. The above principle is one that *promotes* anti-torture. This other principle is one which *respects* anti-torture. It is what we might call a deontic principle that instantiates a prohibition on the act of torture, regardless of its consequence.³⁸ This captures an important deontic view that some acts like rape or torture should always be avoided or prohibited, even where good consequences such as the gathering of intelligence might arise from them. Thus, a pure consequentialist could argue that the goal of promoting a common good of safety outweighs any discomfort we might have with torturing suspected terrorists.³⁹ It should come as no surprise, then, to learn that these theories can be summarised by the maxim that 'the ends can justify the means'. This doesn't mean

35 Thus St Thomas Aquinas notes that 'in order for the things commanded to have the character of law, will must be regulated by reason'. Aquinas, *ST* n 8 above, I-II, q 90, art 1, ad 3.

36 Philip Pettit, 'Consequentialism' in Peter Singer (ed), *A Companion to Ethics* (Oxford: Basil Blackwell, 1993).

37 There is some support for this perspective in the writings of Aquinas: 'human actions ... have the character of goodness from the end on which they depend, over and above the absolute goodness which exists in them'; Aquinas, *ST* n 8 above, I-II, q 18, art 4. However, a fuller picture is provided below.

38 See N. Davis, 'Contemporary Deontology' in Peter Singer (ed), *A Companion to Ethics* (Oxford: Basil Blackwell, 1993). Dworkin similarly distinguishes between goal-based and duty-based theories; Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1986) 336-338.

39 See Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable Is Permissible* (New York, NY: State University of New York Press, 2007); cf Jean Maria Arrigo, 'A Utilitarian Argument against Torture Interrogation of Terrorists' (2004) 10 *Science and Engineering Ethics* 543.

that the ends will always justify the means or that a consequentialist couldn't present an argument, grounded in consequences, for why a blanket ban on torture is prudent and desirable. But they would not be doing so by reference to the intrinsic wrongfulness of the act of torture itself and so it is always open for the consequentialist reasons mitigating in favour of a blanket ban to be outweighed by other consequentialist considerations which can then justify torture.

Common Good Constitutionalism involves quite a lot of teleological thinking, both in terms of the identification of the proper ends of politics and in terms of the normative attempt to pursue or promote those ends. But the pursuit of the common good must be guided by principles of proper action that demand respect as much as the good demands promotion. Indeed, the central point is that a good that does not respect principles of right action is no true or genuine good at all.⁴⁰ It is in light of this that we see a cornerstone of Natural Law thinking encapsulated in the Pauline directive that we must not do evil that good may come.⁴¹

It is here where rights enter the picture. Principles of right action impose obligations on moral and political actors to respect certain duties to refrain from certain forms of conduct. Where those duties pertain to fellow members of our civic community, they entail rights that those members are entitled to the protection of. As Finnis, drawing upon Aquinas, notes, '... the object of the virtue of justice, and thus the source of the justness of just acts and arrangements, is that people all get what is theirs by right. Which is to say: that (to the extent measured by one's duties of justice) each person's *rights* are respected and promoted.'⁴²

Not all duties or principles of right action are directed towards identified others, however. Some principles impose obligations which pertain to the duty-bearer primarily or exclusively with regards to their own conduct in isolation from a specified right-bearer. For example, administrative law principles that one direct oneself properly in law or that one act only where there is lawful authority to do so are not directed duties and so do not give rise to correlatively entailed rights except contingently.⁴³

Principles which can never be overridden such as the prohibition on rape or torture are fundamental and the rights that they entail are too. These rights are

40 See Aquinas, *ST* n 8 above, I-II, q 20, art 5: 'The subsequent outcome does not make a good act evil nor a bad one good. If someone should give alms to a poor man, who uses it to sin, nothing is taken away from the one who gave alms, and similarly if someone patiently bears an injustice done to him, he who commits it is not for that reason excused. Therefore, the subsequent outcome does not add to the goodness or badness of the act.' cf *ibid*, I-II, q 20, art 2, ad 2: 'It should be said that not only does one sin through the will by willing an evil end, but also by willing a bad act'.

41 *New International Version of The Bible* Rom 3.8. In modern manifestation, this directive is expressed in the language of inviolable fundamental rights and reaffirmed as applying to government and those holding public office; John Paul II, Encyclical *Veritatis Splendor* 'Regarding Certain Fundamental Questions of the Church's Moral Teaching' 6 August 1993, ss 80, 95–101.

42 John Finnis, *Human Rights and Common Good: Collected Essays: Volume III* (Oxford: OUP, 2011) 2 (emphasis in the original). See also Aquinas, *ST* n 8 above, II-II, q 58 art 1; Finnis, n 12 above, 220–221.

43 On the entailment of rights and duties, see Wesley Hohfeld, *Fundamental Legal Conceptions* (New Haven, CT: Yale University Press, 1919).

not subordinate to or in conflict with the common good, properly understood. It is therefore a mistake to view the common good as something removed from the fundamental rights of individuals such that it might act upon or supersede them. Rather, it is better to conceive of the common good and the natural law (including fundamental rights) as co-constitutive; the common good sets boundaries on and helps to define the limits of rights, but the common good is itself defined partly by reference to the natural rights of individual members of a civic community. You cannot torture your way to the common good. A common good constitution will therefore be geared towards the pursuit of certain valuable ends that are conducive to the flourishing of persons, but it will also necessarily entail respect for fundamental rights such that the means chosen to achieve those ends are reasonable and just. It is thus a mistake to see the common good as simply a state of affairs to be pursued or a collection of ends to be promoted. It is also a collection of principles that ought to be respected. It is both deontic and teleological, and equally so. In classic theory, law is an ordinance of *reason* directed towards the common good and so unreasonable or wicked ordinances that breach the rights of subjects are not conducive to the common good.⁴⁴

SUBJECTIVE RIGHTS AND THE COMMON GOOD

The above conclusion may be open to challenge from within the natural law tradition itself. In particular, the idea of subjective rights – things that we possess and can use to ground claims against others – has been critiqued for eliding the idea of objective right(s) – principles by which we judge something to be right or wrong. While many view this development positively, forming the foundations of modern notions of human rights, others take issue with what they see as a corruption of classical theories and the gradual erosion of any meaningful boundaries between principles of right action and other important concepts such as interests, goods or the common good.⁴⁵

It should be clear that the denial of a subjective right not to be tortured, in favour of a lens which focuses on principles of objective right action, does not mean that torture is now morally permissible. Should a principle of right action determine that acts of torture are objectively wrong, a moral (and usually legal) claim can be brought by the victim against the torturer. The difference here would be that what grounds this claim is not something which the victim possesses – a right – but the failure of the torturer to act appropriately – right(ly). We should not be too quick to assume that this is therefore a distinction without a difference, however. Two important critiques can be levied against this move from objective right to subjective rights.

44 See Aquinas, *ST* n 8 above, q 90, art 4.

45 See Erika Bachiochi, 'Rights, Duties and the Common Good: Reviving the Finnis/Fortin Debate' [2022] *American Journal of Jurisprudence* (forthcoming). cf Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, NY: The Free Press 1991); Simmonds, n 27 above.

Firstly, it can be argued that the advent of subjective rights began a path towards the rejection of robust public debate about the good.⁴⁶ A central feature of the natural law tradition, stretching back to the Greeks and Romans, was the understanding that the purpose of political institutions is to ensure the flourishing of human lives.⁴⁷ On this view, law plays an important role in the fostering of excellent lives by inculcating habits of virtue, protecting the vulnerable from the predations of bad actors and helping to maintain and sustain other social institutions such as the family or the local community that also serve this function.⁴⁸ Law was also seen to serve an important social function by providing a framework of rules and principles which allowed people to plan their lives, secure in the confidence that the binding agreement they enter into will generally be upheld and the wrongs they suffer will be adequately rectified.⁴⁹ But this was always supplemented by a virtue-oriented political arena actively seeking the good, with the help of other social institutions such as the local community and the family that reduced the need for coercive law.⁵⁰

In the early modern period, this way of conceptualising law and politics began to be replaced by an emerging commitment to liberal neutrality. On this view, we cannot decide on what the good life consists in, and it would thus be wrong to rely on ideas of the good to ground political and legal decision-making.⁵¹ Because we can reasonably disagree about the good, this view holds, it would be improper to impose a conception of the good upon those who disagree. Thankfully, we can all apparently agree on what rights we have, and as such it would be acceptable, indeed incumbent upon us, to impose a conception of those rights upon those who (paradoxically and unreasonably) disagree. It should be clear that the capacity to reasonably disagree about a concept should not be a reason to remove it from constitutional deliberation. Objections that the inclusion of the good life within legal or constitutional theory should be resisted because it will define an individual's good in terms of a conception of the good that they may not share are facile. All constitutional and legal analysis will come to conclusions about people's rights, entitlements, duties, and goods which some may not share. It is no objection to the law imposing or enforcing a duty upon an individual that this cannot be allowed because someone may claim to have a right that the law does not recognise or to be free from a duty that the law imposes upon them or even to claim that they should not have a right that the law takes to be theirs. Someone wishing to work at below the minimum wage to undercut competitors or to make the creation of a new position affordable for a potential employer is not free to do so. Even if they argue that they don't have a right to a minimum wage, they do. Whether they agree with it or not, this is a right afforded to them. Similarly, the law regularly reg-

46 On the impoverishment of our moral language, see Alasdair MacIntyre, *After Virtue* (London: Bloomsbury, Reprint ed, 2013) ch 1.

47 See Rommen, n 12 above, ch 1.

48 Simmonds, n 27 above, 175.

49 On the social function of law, see Lon Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller* Kenneth Winston (ed) (Oxford: Hart Publishing, revised ed, 2001); Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, revised ed, 1969).

50 Etzioni, n 29 above, 115.

51 Arneson, n 3 above.

ulates 'vices' such as drug use, alcohol consumption, pornography viewing and so on. Law sets objective standards. Disagreement about what those standards ought to be cannot be fatal to their general imposition and this is just as true for rights and duties as it is for the good. The only way to consistently apply this critique is to adopt a libertarianism which is not reflected in any legal order and would be bordering on anarchism.

What's more, this rights-focused account of constitutionalism has not itself remained neutral over the good, be that in the heightened protection of certain life choices such as bearing a child or in the promotion of valuable social ends such as the alleviation of poverty through the expansion of socio-economic and welfare rights. The issue here, from the perspective of the classical natural lawyer, is the attempt to shoehorn questions of the good into conceptions of rights which expand the concept to near breaking point while also failing to seriously engage with the good on its own terms.

An illustrative example of this is the issue of prostitution and pornography. While radical feminists are unlikely to accept that there is an affinity between their theory and classical natural law, each critiques liberalism's refusal to take seriously the question of good lives. To radical feminists, liberalism (including liberal feminism) masks oppression and exploitation in the veneer of freedom. As MacKinnon puts it: 'if prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?'⁵² In addition to the critique of liberal neutrality, however, radical feminism attacks the presumption that this liberty is an adequate balm for the genuine concern that social structures force vulnerable women into leading bad lives. The debates which tore second-wave feminism apart were as much about the good life and its connection to the proper purpose of feminism as they were about sex. Indeed, a prominent line of critique within feminist literature argues that the equalisation of rights is inadequate when removed from greater social transformation.⁵³ To radical feminists, and certain strands of later feminist theory, the goal of feminism is not to remove barriers to women's choices, taking no stand on their quality or consequences; it was to make women's lives better. That cannot be done if feminism remains neutral on the good life.⁵⁴ This is true even if most feminist theorists would not utilise the language of good lives and would instead focus on oppression and exploitation. But what is a life of oppression if not a bad one? As such, we see a prominent critique of prostitution grounding itself in the idea that it is bad for women: 'In prostitution, no woman stays whole. It is impossible to use a human body in the way women's bodies are used in prostitution and to have a whole human being at the end of it, or in the middle

52 Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, MA: Harvard University Press, 2007) 159. See also Andrea Dworkin, *Pornography: Men Possessing Women* (New York, NY: Putnam, 1981); Julie Bindel, *The Pimping of Prostitution: Abolishing the Sex Work Myth* (London: Palgrave Macmillan, 2017).

53 See Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 Int J Const Law 712; cf Catharine A. MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14 Int J Const Law 739.

54 Similar arguments can be seen in feminist scholarship which is much more explicitly grounded within the classic legal tradition. See Erika Bachiochi, *The Rights of Women: Reclaiming a Lost Vision* (Notre Dame, IN: University of Notre Dame Press, 2021).

of it, or close to the beginning of it. It's impossible. And no woman gets whole again later, after.⁵⁵

Whether one agrees with this critique is irrelevant. What matters is that framing this debate in the language of liberal rights misses something central to the conflict itself. Political, moral, and legal analysis of prostitution or pornography will always take a stand on the good life, whether explicitly or by implication. The concern here is not just that liberal approaches to rights protection fail to recognise that they promote good lives when they do, it's that they do not reckon with the fact that they also protect and promote structures and systems which lead to many vulnerable persons leading bad lives. This concern is echoed in the critical legal studies focus on the ways that social and legal structures oppress the marginalised and vulnerable, including workers. A life of alienation and exploitation is a bad one. Any approach to legal theory which sets itself against these ills is committed to a jurisprudence focused on creating the social and legal conditions necessary for people to live good lives and avoid bad ones.

It is thus a serious failure for apex courts to adopt contentious perspectives on the scope of rights without any serious engagement with the idea of the good life. For example, in *Belfast City Council v Miss Behavin' Ltd*, the House of Lords was 'prepared to assume, without deciding, that freedom of expression includes the right to use particular premises to distribute pornographic books, videos and other articles'.⁵⁶ Similarly, in *R v Sharpe*,⁵⁷ the Canadian Supreme Court held that a provision of the Criminal Code which banned child pornography, infringed the freedom of expression rights of Mr Sharpe. The infringement was ultimately determined to be proportionate on consequentialist grounds but no serious analysis was given to explain why expression rights extend to include a right of access to child pornography in the first place. Further still, in *Stübing v Germany*, the ECtHR held that the applicant's criminal conviction for incest 'possibly' fell within the scope of his Article 8 right to respect for private and family life, as he 'was forbidden to have sexual intercourse with [his sister] the mother of his four children'.⁵⁸ The issue here is not that these courts concluded that rights are infringed (even if not breached) in these contexts, it is that they never seriously engaged with questions of scope, precisely because to do so may require them to cast judgement on pornography or paedophilia or incest. Yet, in choosing to include these claims within the scope of rights, courts are granting them heightened protection, through proportionality analysis that would otherwise be unavailable. What might at first glance be a neutral position on the good is quickly revealed to be anything but, given the legal consequences for finding that a human right has been infringed. Again, the issue here is not primarily that courts choose to do this; it is that they are doing so without any

55 Andrea Dworkin, 'Prostitution and Male Supremacy' University of Michigan Law School, 1992 at <http://www.nostatusquo.com/ACLU/dworkin/MichLawJour1.html> (last visited 15 December 2021).

56 [2007] UKHL 19 at [10].

57 1 SCR 45 (Can 2001).

58 (2012) 55 EHRR 24 at [55].

reasoned justification because they are presenting this increased protection as a neutral position when it isn't.⁵⁹

What's more, obvious goods such as a clean environment or a healthy and safe community are described not as common goods but as fundamental human rights, further collapsing any distinction between rights and goods while clearly taking a stand on the good life. On these frameworks, religious life is worthy of increased protection over mere liberty claims, family life is deserving of special protection, education is valuable, private property is valuable. One must ask why these general values that we now call rights are afforded increased protection if not because they are deemed to be important for the fulfilment of good lives?

The result of failures to explicitly address the good life on its own terms is an impoverished account of the good that is itself often denied within rights discourse, coupled with a bloated concept of rights, with certain valuable goods being treated as rights merely because 'rights talk' carries political and rhetorical weight. Rights are taken simultaneously to constitute a specific *kind* of claim that carries with it preemptory force and also the label that we attach to particularly *weighty* claims. As Simmonds notes

[T]he language of rights can come to colonise every aspect of the moral discourse. To refuse to express a moral concern as a matter of 'rights' is now regarded as failing to take that moral concern seriously ... when all moral concerns are expressed as involving 'rights', we lose any sense of the precise way in which rights possess a special moral force. Rights come to be thought of as simply important interests that are to be balanced against other interests.⁶⁰

The good ought not to be collapsed into institutional questions concerning who gets to decide on it, nor should it only incidentally be addressed where it happens to correspond with rights questions. Nor, indeed, should the concept of rights be artificially expanded to include certain goods and interests. The good is worthy of substantive constitutional theorising in its own right; just as constitutional rights may be theorised both in terms of what they are and in terms of who ultimately decides on their final content.

Having said all this, it should not necessarily follow that, in our quest to reclaim an important way of thinking about constitutional theory, we should abandon another. Although many think that these two traditions are oppositional,⁶¹ they are not. Subjective rights are a useful concept that can add to our existing constitutional lexicon. These are mutually enriching strands of thought.

It is debatable whether there is even a sharp analytic distinction between objective and subjective right, except for the perspective from which one views the relationship. To act according to the demands of justice – *ius* – is to render to another what they are due.⁶² This is what is captured by the idea of objec-

59 The implications of taking the scope of rights seriously will be explored in the next part of this article.

60 Simmonds, n 27 above, 186.

61 See Ernest Fortin, 'The New Rights Theory and the Natural Law' (1982) 44 *The Review of Politics* 590. See also Erika Bachiochi, n 45 above. cf John Finnis, 'Grounding Human Rights in Natural Law' (2015) 60 *AJL* 199.

62 Aquinas, *ST* n 8 above, II-II, q 58.

tive right; principles of right action to guide ones conduct towards justice and the common good. Yet, we can, without contradiction, reformulate Aquinas's account from a different perspective. As Legge notes, 'it is entirely possible to speak about this objective *ius* from the perspective of the person *to whom* it is owed, and even to suggest that a person can make a claim for what is due to him – he has a "right" to it. This is simply to regard the objective *ius* from the point of view of the person to whom it is due. The objective "due" thus becomes a subjective claim or right'.⁶³

Where one's general duty to act according to principles of right action manifests a particular duty that is directed towards another, there is a necessary entailment of a right, breach of which gives rise to a 'rights' claim.⁶⁴ While the above concerns should be taken seriously, they do not necessarily mean that we should abandon the idea or use of the concept of individual rights. Rather this critique calls us to be more precise in our utilisation of concepts and to expand our theoretical and doctrinal repertoire to include important moral and constitutional standards in a manner which does not collapse everything into rights claims.

A second critique of subjective rights is that their advent has led to an individualisation of principles of right action and a severing of their social and communal aspects. The danger here is that we will presume that the only principles of right action that matter for constitutionalism are those which derive from subjective rights claims. The concern here is that subjective rights err in presuming that what is due to someone is the product of an inviolable power that they possess to demand it.⁶⁵ In contrast, it is stressed that rights do not ground duties, duties imply rights.⁶⁶ Where duties that bind constitutional actors are predominantly expressed in terms of correlatively entailed rights, undirected duties become difficult to comprehend. The common law of judicial review is a good example of why we ought not to collapse all principles of right action into subjective rights claims: most instances of unlawful abuse of discretion do not neatly attach themselves to corresponding rights claims and are instead grounded in breach of principles of right action such as the duty to direct oneself properly in law or to act reasonably and fairly. A public authority can act contrary to the rule of law without infringing any individual rights.⁶⁷

63 Dominic Legge, 'Do Thomists Have Rights?' (2019) 17 *Nova et vetera* 127, 132. See also John Finnis, 'Aquinas on Ius and Hart on Rights: A Response to Tierney' (2002) 64 *Review of Politics* 407; Jean Porter, 'Justice, Equality, and Natural Rights Claims: A Reconsideration of Aquinas's Conception of Natural Right' (2015) 30 *J Law Relig* 446. cf Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law* (Newcastle: Scholars Press, 1997) 257–260.

64 See Hohfeld, n 43 above. Whether rights manifest in three-term relations between two persons and an act of a certain type or two-term relations between persons and a subject-matter is ancillary to this argument. What matters here is whether rights should be understood primarily in terms of principles of duty and right action, or as much broader bundles of entitlements united around a particular value such as family or privacy. See Finnis, n 12 above, 198–205.

65 Henri Grenier, *Thomistic Philosophy* vol III (Charlottetown: St Dunstan's University, JPE O'Hanley tr, 1949) 180.

66 *ibid.* cf Joseph Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194.

67 See *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46 at [169] per Lord Reed.

When subjective rights become the starting point from which duties to act rightly derive, there is a danger of compartmentalisation. Rights may begin to be conceived as bundles of entitlement which can be understood entirely in abstraction from a wider corpus of principles of right action directed towards justice and the common good.⁶⁸ On this view, rights do most of the conceptual work and duties to act appropriately are merely parasitic on the right in question; rights ground duties.⁶⁹ Further, they become limits on the pursuit of the common good, setting boundaries without being informed by plausible conceptions of the good.

This understanding has prompted pushback from classical natural lawyers who insist that the scope and character of rights must always be determined by reference to the common good.⁷⁰ This is entirely correct, so long as it is understood that the common good is itself informed by principles of right action. The ordering of subjective rights to the common good is a recognition of the relevance of a wide corpus of moral and political principles to the correct interpretation of rights questions. For example, the scope and character of property rights is always subject to their correct ordering towards the common good of all; what is often dubbed the ‘social’ element of property rights.⁷¹ To Aquinas, right is the object of justice; a rational ordering of social behaviour, directing us in our relations with fellow members of our community.⁷² Individual rights must derive from this ordering if they are to be a coherent and defensible manifestation of the requirements of justice.

In the final analysis, it is a mistake to think that rights can be fully understood in abstraction from the good and it would be wrong to think that rights take priority over the common good. But it is also a mistake to think that the common good can be fully understood in abstraction from principles of right action, nor the rights that arise when such principles manifest directed duties. It is similarly a mistake to think that the common good takes priority over fundamental rights; as Finnis notes, ‘we should not say that human rights, or their exercise, are subject to the common good; for the maintenance of human rights is a fundamental component of the common good’.⁷³ The common good can only be achieved when rights are respected but, equally, the scope and character of rights themselves are subject to or limited by each other and other aspects of

68 Grenier, n 65 above, 180–181.

69 Raz, n 66 above, 199–200.

70 See Legge, n 38 above, 138, ‘justice, law and *ius* all depend on, and are facets of, a *wise and reasoned ordering of individuals to the good*’. Similarly McGowan argues that ‘it would be problematic if legal rights were confused with or took any substantive precedence over the common good’. Jamie McGowan, ‘On the Tyranny of Rights’ *Ius & Iustitium* 20 September 2021 at <https://iustitium.com/on-the-tyranny-of-rights/> (last visited 2 November 2021). See also Grenier, n 65 above, 180–181.

71 See Rachael Walsh, ‘Property and the Common Good: Reviving Old Debates’ *Ius & Iustitium* 14 September 2021 at <https://iustitium.com/property-and-the-common-good-reviving-old-debates/> (last visited 2 November 2021); Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge: Cambridge University Press, 2021). This insight is sometimes missed, even by those who grasp the central point, see Etzioni, n 29 above, 118. The scope of property rights is determined by the common good; it is a mistake to say that the common good justifies their breach because they never extended so far to begin with.

72 Aquinas, *ST* n 8 above, pt II-II, q 57 art 1.

73 Finnis, n 12 above, 218.

the common good.⁷⁴ Once each is properly understood to conceptually imply the other, it becomes clear that the correct interpretation of their scope and interaction depends upon a process akin to reflective equilibrium. The real issue here is that an exclusive focus on only one side of this relationship can lead us to forget that this is a relationship at all, and that its boundary and scope is determined not by one side or the other, but by both.⁷⁵ This does not mean that all questions in this arena are resolved by compromise. Sometimes there is only one answer open to a constitutional decision-maker. No state is justified in torturing its subjects. But crucially, this principle does not set limits on the common good, for no plausible conception of the common good could countenance such acts in its pursuit.

The critique of subjective rights stems from a legitimate concern that, in focusing so heavily on rights, we have banished an important aspect of political and constitutional morality to the realm of history and philosophy.⁷⁶ What is worse, our reasons for abandoning the idea of the good could just as easily be applied to the concepts we replaced it with. Ultimately it will always be possible for people to reasonably disagree about what rights we have, what counts as a good life, what is in the interest of the community as a whole, or even what constitutes harm or wrongdoing. The possibility of disagreement about the nature of an important constitutional concept cannot justify its abandonment. Nor does it mean that there is no right answer when attempting to resolve such disagreement. Constitutionalism is largely concerned with deciding who is best placed to make these kinds of decisions under conditions of uncertainty. The fact that we can reasonably disagree is the premise, it cannot be used to preemptively preclude certain considerations or lines of inquiry, lest we abandon the project altogether. That being said, there are strong reasons to believe that certain institutions are better placed to resolve disputes about different aspects of the common good than others.

THE SEPARATION OF POWERS

While the lens of Common Good Constitutionalism is sufficiently capacious to accommodate divergent views on institutional design, what is shared is a commitment to assessing these questions through the rubric of the common good. In this paper, I suggest that the account given of the relationship between rights and the common good will have implications for the separation of powers. In what follows, a version of the separation of powers will be advanced and defended on the basis that it is conducive to the common good, not that it will maximise liberty or constrain state power as an end in itself.

⁷⁴ *ibid.*

⁷⁵ Parallels can be drawn here to the Roman concept of *obligatio* which connotes the entirety of the relationship between right-holder and duty-bearer not merely oriented towards one party. See Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: OUP, 1996) ch 1.

⁷⁶ Or, indeed, lost our ability to utilise this aspect of moral thinking altogether. See MacIntyre, n 31 above.

The separation of powers has many potential justifications. Within classic liberal thinking, its primary purpose is to prevent the consolidation of power into the hands of one individual or body for fear that this will produce tyranny.⁷⁷ I do not wish to disagree substantially with that motivation; indeed, I will rely on something similar when stressing the importance of impartiality. However, it does seem to miss an important point about the value of building up or drawing upon particular expertise within certain institutions, quite apart from the safeguarding of liberty. Indeed, even if our focus was exclusively on the maximisation of liberty, it is unclear that a separation of powers designed to inhibit state action would actually achieve this. Such a contention is premised upon the belief that state power is the sole or at least primary threat to liberty. Yet, if we consider the myriad ways in which private actors may unjustly infringe upon the liberty of others, it is clear that state power may be (and often is) utilised to protect the vulnerable from such intrusions. Thus, an account of the separation of powers which is grounded in a concern for liberty will not necessarily adopt the most maximally inhibiting separation, designed to frustrate the state as much as possible. If we are to justify the separation of powers, we must have a better account of its point and purpose, beyond simply to make life difficult for state officials.

In this paper, I defend an account of the separation of powers which is grounded as much upon the effective collaboration of constitutional actors as it is upon their ‘checking and balancing’ function. Interpreting the contours of this principle must thus be done in light of its point and purpose, which is to achieve the common good. There are important functions that different institutions ought to fulfil, given their distinct role morality, which should not be overly restricted for fear that such restrictions will be thrown off altogether.⁷⁸ To use an analogy, under our traditional separation of powers, the legislature, being the institution with the greatest democratic legitimacy, steers the ship of state, providing general guidance as to the direction of travel as well as general rules and principles for how we ought to get there. The executive, with its expertise in the drafting and implementation of policy, instantiates the crew by following the direction of the legislature while exercising its own discretion when appropriate, including the proposal of relevant legislation before the legislature. Executive officers and civil servants are commonly chosen because of their technical abilities which are directed towards the achievement of the proper ends of state. Finally, the judiciary, chosen based on legal knowledge and skill, focus on the nuances of concrete cases to operate a course-correction function and ensure that the pursuit of legislative or governmental ends does breach fundamental principle or rights. It ensures that the means used to achieve the ends of human flourishing do not breach principles of right ac-

77 See Charles de Secondat, Montesquieu, *The Spirit of Laws* (New York, NY: Colonial Press, 1899). It should be noted, however, that Montesquieu based his model on the Constitution of the Roman Republic and so arguably has deeper roots within the civilian tradition itself. See Richard Myers, ‘Montesquieu on the Causes of Roman Greatness’ (1995) 16 *History of Political Thought* 37. cf Maurice Vile, *Constitutionalism and the Separation of Powers* (Carmel, IN: Liberty Fund, 2nd ed, 1998) ch 2.

78 Adrian Vermeule, ‘The Publius Paradox’ (2019) 82 *MLR* 1.

tion by upholding and enforcing legal rights. This correction will inevitably have an impact on general principle that will be derived from specific cases such that the injustice or error that prompted one case is not replicated in others.⁷⁹

It is at least questionable whether the libertarian defence of the separation of powers properly captures its institutional virtue, grounded in how a degree of separation might be more conducive to promoting different kinds of justice.⁸⁰ The distinct role moralities of the various organs of state correspond with what Laws describes as the distinct moralities of law and government.⁸¹ This is not simply a matter of separated functions but of distinct role moralities: each institution has a general affinity for particular forms of ethics. On his view, '[p]oliticians, governments, are by necessity utilitarians ... their primary focus is on outcomes'.⁸² In this, Laws has both captured an important insight about the political side of our constitution and grossly mischaracterised it. He is correct that governments and legislatures are primarily focused on the ends to which state power ought to be directed, but it is simply inaccurate to claim that legislatures are necessarily utilitarian. The misconception that legislatures or executives essentially exercise their functions in an aggregative consequentialist sense is widespread, particularly amongst those who, rightfully distrusting utilitarianism, seek to justify heightened forms of judicial review.⁸³ But governments and legislatures need not and should not be utilitarian, even if an essential aspect of their constitutional role is that they ought to pursue the proper ends of state. As such, 'the legislature is capable of reasoned deliberation to promote the common good, which has as its concern the wellbeing and rights of all persons in community'.⁸⁴ The legislature is not simply an aggregation of preferences, nor is it concerned necessarily with the aggregation of interests, prone to sacrificing the minority if it is not prevented from doing so by the judiciary. But equally, legislatures are not courts. The kind of reasoned deliberation that occurs within them and which influences the executive is usually goal-oriented in a manner which no court of law can legitimately be.

Yet, if the separation of powers is not justified by a checking and balancing function, or the ability of courts to act as counter-majoritarian trumps against a utilitarian or preference aggregative legislature, then what does justify it? The

79 See Frej Klem Thomsen, 'Concept, Principle, and Norm - Equality Before the Law Reconsidered' [2018] Leg Theory 1; Michael Foran, 'Equality Before the Law: A Substantive Constitutional Principle' [2020] PL 287.

80 On the libertarian defence of the separation of powers, see *Department of Transportation v Association of American Railroads* 135 S. Ct. 1225 (2015), 1245, where Thomas J argued that 'at the centre of the Framers' dedication to the separation of powers was individual liberty'. Similarly, in *City of Arlington v FCC* 569 U.S. 290 (2013), 315, Roberts CJ, in dissent, argued that the Framers divided governmental power for 'the purpose of safeguarding liberty'. While on the Court of Appeals Gorsuch J in *Gutierrez-Brizuela v Lynch* 834 F.3d 1142 (10th Cir. 2016), 1149, suggested that 'the founders considered the separation of powers a vital guard against governmental encroachment on the people's liberties, including all those later enumerated in the Bill of Rights'.

81 John Laws, *The Constitutional Balance* (Oxford: Hart Publishing, 2021).

82 *ibid.*, 41.

83 See for example Dworkin, n 28 above, 22, 90; cf Yowell, n 28 above; Webber and Yowell, n 25 above, 4-5.

84 Webber and Yowell, *ibid.*, 6.

discussion above about the interrelationship between rights and the common good contrasts the teleological, goal-oriented aspects of the common good with the deontic or duty-based principles which must be respected if the common good is to be genuinely common. A separation of powers, grounded in and defended by reference to the common good must recognise that different organs of state pursue different aspects of the common good in their operational functions. The government must actively pursue the good, true. But the judiciary must also police and enforce these principles of right action. Viewed in this way however, the understanding of rights and their proper exegesis at the hands of judges must be adequately reflective of the duty- or obligation-focused nature of rights.

Eschewing any reference to aggregative consequentialism, Fuller describes government as 'a highly formalised variety of organisation by common aims'.⁸⁵ By this he means that it constitutes a distinct form of social ordering, essential for the existence of a society, which pursues concrete aims. To supplement this goal-oriented pursuit, the judiciary adopt a deontic moral outlook because '[r]ights and duties are necessarily and honourably the moral language of justice and therefore law'.⁸⁶ Thus, while the terminology of utilitarianism used by Laws is imprecise and inaccurate, the central insight remains fruitful. It is reflective of Fuller's argument that adjudication is a distinct form of social ordering defined partially by the mode of participation by affected parties: the presentation of reasoned argument on the basis of principle.⁸⁷ As such, claims that are to be decided through adjudication must be presented and defended through claims of right and accusations of fault; the litigant must assert some principle of right action by which his arguments are sound and cannot simply assert that they should win their claim because it would produce good consequences for himself or for society.⁸⁸ The judiciary, properly concerned with principles of right action, consider consequences only when analysis of a duty to act properly entails some examination of consequences, as is the case where a duty not to murder entails analysis of both the act and the entailed consequence of death. It is not within the purview of a court of law under our system to decide for itself what policy goals ought to be pursued, even if it may rely on principles of right action to limit unreasonable or disproportionate policies.⁸⁹ Given what has been advanced above, it should be clear that these principles of right action ought themselves to be informed by notions of the common good and a conception of the legal subject as a dignified equal participant of a social order aimed towards the flourishing of all.

In contrast, the executive should be normatively teleological in the identification and pursuit of constitutionally appropriate ends directed towards the

85 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 HLR 353, 359.

86 Laws, n 81 above, 41.

87 Conor Casey, 'An Administrative State for the Common Good' *Ius & Iustitium*, 28 July 2022 at <https://iusetjustitium.com/an-administrative-state-for-the-common-good/> (last visited 2 August 2022). See also Fuller, n 85 above, 363.

88 Fuller, *ibid*, 369.

89 Dworkin views this as capturing a distinction between principle and policy. See Dworkin, n 38 above, ch 1.

common good.⁹⁰ This is not to say that the executive is exclusively instantiated or involved in issues of high policy, however. It is a central feature of modern executive power that it is concerned with both the general (budgeting, drafting and proposal of legislation, implementation of regulations etc) and the minutiae (implementing welfare and healthcare schemes, granting licenses, engaging in investigations and other administrative duties). But what distinguishes executive from judicial power is its scope and underlying purpose. Executive (and legislative) power is concerned with the drafting and implementation of general policies to pursue the proper ends of government. This will sometimes involve reasoned deliberation within the minutiae, but it is primarily a ‘top-down’ affair, demanding that decision-makers always have an eye towards the ends that government seeks to pursue. Claims of right or accusation of fault arise contingently within the process of executive decision-making, usually in anticipation of a legal challenge that seeks to impose legal constraints upon the outermost reaches of discretionary power. Legal rights and duties, identified and applied through the process of adjudication, help to set limits on the exercise of executive power, but they do not instantiate its essence which is the use of discretion to pursue the proper ends of government.

It is therefore quite unlikely that the executive or legislative role, focused as it is on the pursuit of general claims and policies, will be able to fully instantiate the common good. A common-good constitution must envisage principles of institutional design that are conducive to the flourishing of each member of our community. If the common good manifests in both general policy and respect for individual rights, then there must be some way to ensure that those policies that purport to be in the common good are genuinely in the good of each and every member of the community. To do that, there must be some institutional mechanism available to resolve disputes which arise when an individual claims that a general policy infringes upon their fundamental rights or where the executive pursuit of its policy does not conform to the limits set down by the legislature or implied by the principles of natural justice and the rule of law.⁹¹

The key point to be made in this context is that the skills needed to resolve disputes such as this are not the same as those skills needed to draft or implement general policy. This might seem like an exceptionally banal point but it has implications for how we might justify the separation of powers from within a common good framework. Vermeule seems to suggest that public authorities such as executive agencies are the best placed to pursue the common good and that the judiciary, if it is to be a separate body at all, is confined to enforcing standards of rationality or absurdity (although this standard is itself informed by notions of the common good).⁹² But if the common good includes both teleological goals and deontic rights, the skills needed to pursue one may not be the same as those needed to enforce the other, leading to the conclusion

90 The language of utilitarianism in Law’s framework is inapt here. Government is goal-oriented, but that goal need not be the maximisation of utility through an aggregative consequentialism that ignores important considerations such as the separateness of persons. See Brink, n 26 above.

91 T.R.S. Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry’ (2002) 61 CLJ 87.

92 See Vermeule, n 7 above, 62–63, 76–77.

that expertise in both is needed for the common good to obtain. Further, if rights, properly understood as principles of right action – deontic duties and obligations – are constitutive of the common good, the role of a court becomes that of guardian of these duties, ensuring that executive pursuit of its goals remains in harmony with the requirements of justice, itself a common good. That being the case, a separation of functions, such that each body can build up the expertise needed to ensure that the aspect of the common good they have been entrusted with will be afforded the attention and skill it deserves in complex societies such as ours is both prudent and desirable. Thus, we can begin to see a defence of the separation of powers grounded not in liberal checking and balancing or the maximisation of liberty, but in how such separation may be conducive to the flourishing of each and every member of a society, given the distinct role moralities of various organs of state and their affinity with discrete aspects of the common good.

Thus, while it is entirely correct and proper to stress that courts are not equipped to decide abstract questions of social policy,⁹³ it is precisely by virtue of their intimate engagement with individual claimants that they are uniquely situated to ensure that the contours of general policy apply to such cases in a just and fair manner. There is a central role for a court of law here and there are good reasons to think that this role ought to be exercised independently from other institutions. While separate functions are an important aspect of the separation of powers, it is the affinity that these functions have with distinct approaches to resolving moral and political issues that grounds the distinct moralities of law and government.⁹⁴ While the executive and legislature may be best placed to pursue general policies directed towards the common good, we should be careful not to *equate* those policies with the common good. Even policies pursued in good faith by political actors with democratic authority and longstanding expertise may nevertheless breach foundational principles of right action or infringe upon the fundamental rights of individuals. For these general policies to genuinely operate in furtherance of the common good, they must be appropriately respectful of the principles of right action that constitute and maintain a flourishing community of equals.

There is no reason to think that expertise in general policymaking is necessary for the judicial aspect of a common good constitution. Indeed, the *nemo iudex* principle and the need for an impartial assessment of these rights claims should lead us to conclude that a separation of powers is essential for the common good.⁹⁵ The body tasked with assessing the compatibility of these policies with the principles of natural justice should not be the same body who created the policy in question. This is to prevent abuse of power, but it is also necessary because analysis of the impact of generally desirable policies on individual claimants involves a kind of expertise that is quite distinct from that needed to create or pursue policy itself. The role of the court here is to ensure that

93 Jonathan Sumption, 'The Limits of Law' in N.W. Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016).

94 Laws, n 81 above, 42.

95 cf Adrian Vermeule, 'Contra Nemo Iudex in Sua Causa: The Limits of Impartiality' (2012) 122 YLJ 384.

the pursuit of ends associated with the common good is respectful of the principles of natural justice and the entailed fundamental rights of legal subjects. Branches of the executive or other political actors such as backbench parliamentarians or lobby groups such as charities may also play an important role in subjecting government policy to scrutiny. But this is distinct from the role of the court which is to enforce principles of right action, grounded in natural justice and fundamental right. This is a prime way to structure a constitutional order in a manner that is conducive to the flourishing of all members of our community.

Having said this, it does not necessarily follow that courts are therefore free to impose whatever conception of right action they wish. Principles of right action, just as much as subjective rights, cannot be conceived independently from an interpretative process which properly accounts for all the constitutional considerations in view, including the need to respect the distinct morality of government. It is for this reason that Laws suggests that ‘deference marks the courts’ recognition that as regards the merits of the use of discretionary power in any given instance, the public body to which the power has been delegated by Parliament is the primary decision-maker’.⁹⁶ Similarly, Kavanagh stresses the role of courts in a collaborative enterprise of governing, with each institution demonstrating appropriate respect for the proper functions of the other.⁹⁷ Yet this itself is only intelligible because and to the extent that the separation of powers is oriented towards the common good.

With this in mind, there are important implications for the separation of powers which must be drawn from the conception of rights set out above. On this view, moral and legal rights are fundamentally tied to obligations – to the principles of right action which derive from considerations of justice. This can be contrasted with modern proportionality doctrines which view rights essentially as interests.⁹⁸ But, as Tasioulas notes, moral rights are associated with obligations, which are their normative content:

In speaking about human rights, one is not simply appealing to a universal human interest, such as freedom from pain, or the interests in autonomy, knowledge, or friendship. Nor is one appealing to some other kind of deontic value, such as human dignity. Both universal human interests and human dignity are values that lie at the foundations of human rights; they are the underlying values that ground human rights claims. But they are not to be identified with human rights.⁹⁹

When rights are understood in this manner, by reference to the discrete duties which derive from general value commitments, rather than the values or inter-

⁹⁶ Laws, n 81 above, 90.

⁹⁷ See Aileen Kavanagh, ‘The Role of Courts in the Joint Enterprise of Governing’ in N.W. Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016); Aileen Kavanagh, ‘The Constitutional Separation of Powers’ in David Dyzenhaus and Malcolm Thoburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: OUP, 2016). cf Alison Young, *Democratic Dialogue and the Constitution* (Oxford: OUP, 2017).

⁹⁸ See Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131.

⁹⁹ Tasioulas, n 27 above, 1179. See also John Tasioulas, ‘On the Foundations of Human Rights’ in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: OUP, 2015).

ests themselves, there are important implications for the proper role of a court when it engages in rights adjudication. In particular, the doctrine of proportionality stands in need of re-examination. The doctrine, at least in its current manifestation, relies on an extremely broad conception of rights which equates them with ‘virtually any legally cognisable interest an individual may possess’.¹⁰⁰ With this expanded scope and content of rights, proportionality then has a tendency to attribute any plausible interference with these broad interests as an infringement standing in need of justification. This kind of analysis involves far more in the way of assessment of goal-oriented, teleological policy than courts are typically equipped to do.

For example, in *R v Cambridge Health Authority, ex parte B*, Laws J relied on this expansive understanding of rights to overturn the decision of a health authority not to sanction an expensive experimental course of treatment with a slim chance of success. He held that the authority had acted unreasonably because ‘where a public body enjoyed a discretion whose exercise might infringe a fundamental human right, such as the right to life, it should not be permitted to perpetrate any such infringement unless it could show substantial objective justification for doing so on public interest grounds’.¹⁰¹ It is entirely appropriate for courts to rely on the fundamental rights of persons to limit executive discretion, not as trumps against the common good but precisely so as to achieve the common good. But in this case Laws J confused a right with the interest that underpins it. The interest in life is clearly valuable and important, but it alone is so broad and could inform so many disparate principles that it cannot on its own be determinative of legality. The value or interest of life can give rise to telic commitments to establish a national health service or to prohibitions on the sale and consumption of dangerous substances, as well as deontic prohibitions on unjustified killing, infringements upon bodily integrity, gross negligence, and so on. For it to become legally cognisable, the value or underlying interest must be distilled into some identifiable duty, obligation, entitlement, or goal. Only some of these are appropriate for a court to decide upon or enforce. In this case, Laws J, by relying on the general interest in life, embraced a conception of the separation of powers which views the role of the court as a counter-majoritarian check; an arbiter of the justifiability of government policy broadly construed, with very little in the way of concrete duties or obligations to provide guidance.¹⁰²

In contrast, the right to life protected by the European Convention of Human Rights is absolute. As such, infringements are automatically unjustified and unlawful. Because of this, the scope of the right is central to adjudication in a way that it would not be for qualified rights, where proportionality reigns. This prompts much more detailed engagement with the obligations and duties which form the content of rights, properly understood. Once sufficient attention is paid to scope, the role of the court is confined to the enforcement of

100 Tasioulas, n 27 above, 1167. See also; Alexy, n 98 above, 135.

101 See R. James and D. Longley, ‘Judicial Review and Tragic Choices: Ex Parte B’ [1995] PL 367, 368.

102 This was then overturned on appeal, where the Court of Appeal made no reference to a general right to life of this kind; *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898.

duties and obligations rather than assessment of the justifiability of government policy broadly construed.

For example, in *R (WA) v Secretary of State for the Home Department* the court was faced with a claimant who demanded the production of an official Biometric Residence Permit with a date of birth that he was extremely emotionally attached to, but which fell outwith the plausible range of birth dates as determined by the Home Department.¹⁰³ WA was an asylum seeker whose birth date was unknown. Local authorities determined that his birth date could fall within a range of plausible dates and that his preferred date was far beyond that range. In response to the refusal of the Home Secretary to reissue documentation with his preferred date, he began to starve himself and claimed that continued refusal would violate his right to life.

WA's argument ... is that if the cause of the patient's suicidal intentions is deep unhappiness ... with an administrative decision of another branch of the state, that branch is obliged, on learning of the effect of its decision on the patient, to take proportionate steps to change the decision so as to protect the patient's life. ... Indeed, the less significant the decision, the more proportionate it would be to reverse it to save the patient's life. The range of administrative decisions which might have to be reconsidered and reversed in this scenario is obviously wide: decisions as to benefit payments, taxation, housing and immigration status would be subject to review if they resulted in great distress and consequent threats (considered to be genuine) to commit suicide. When required to 'protect' a life, a small (but unjustified) increase in benefit payments or a small (but unjustified) tax rebate might be viewed as entirely proportionate.¹⁰⁴

If this claim was subject to proportionality analysis, it is hard to see how it would withstand scrutiny, given the importance of life and the triviality of the adjustment requested. However, because the right to life is absolute, proportionality analysis was not available to the court and so it engaged in careful analysis of its scope. The Court concluded that no obligation to publish inaccurate documentation arose.¹⁰⁵ Because this case required analysis of the actual duties and obligations which arise under the right in question, it was not possible for the right to entail such broad duties which could then be justifiably infringed in the public interest. When framed in this way it is clear why the right to life does not entail such obligations.

This different framing helps make sense of the different conceptions of rights at play here: on one view, the scope of rights is tied to the duties they give rise to or derive from; on the other, the scope of rights is tied to the underlying interest they seek to protect. Rather than engage in proportionality analysis, the court did what is demanded by the common good approach: it determined the scope and content of the duties themselves and came to a conclusion as to the nature of the claimants' rights as a result of that. This is the kind of reasoning that courts are generally adept at. It will involve recourse to moral judgement

103 [2021] EWCA Civ 12.

104 *ibid* at [61].

105 *ibid* at [61]–[62].

inevitably, but value operates in the background; the central focus is on duty and obligation.

Approaching adjudication in a manner consistent with the conception of rights advanced in this paper will also have implications for how infringement is assessed. Rights, properly understood, have pre-emptive force: they are robustly resistant to being overridden by countervailing considerations.¹⁰⁶ This does not mean that a right can never be justifiably infringed, but it does mean that infringement is expected to be rare and will usually demand apology or compensation for the breach, even if it is justified. For example, a custodial sentence is not a justified infringement upon a general right to liberty, the right not to be subject to false imprisonment simply does not extend so far as to create a duty not to imprison criminals. Where someone is imprisoned or detained or confined in a manner which does engage the right, it can be justified or unjustified. The situations where there will be a justified detainment or imprisonment will be few, but where they occur, it will be because it is in the interests of the common good for such an infringement to take place, including the good of the person who is detained. Prominent examples here will include detention in psychiatric facilities or confinement under quarantine during a dangerous pandemic. In such instances, the right has genuinely been engaged and justifiably infringed such that the residual normative force of the right will mitigate in favour of some form of compensation or, at a minimum, an apology in recognition of the infringement. This is the foundation of compensation afforded as a result of compulsory land acquisition in the public interest. Compensation is owed and the acquisition must be in the public interest. Compulsory purchase for private sale is justified only in the rare circumstances where it is in the common good to do so.¹⁰⁷ No criminal is owed an apology for their imprisonment except where they have been wrongly convicted and their rights have been unjustly infringed.

Proportionality analysis demands something quite different from courts by way of adjudication. By conflating rights with interests, it fails to adequately address the important role that duties or obligations play in identifying the scope of rights. The result is that proportionality analysis is 'too ready to find conflicts where there are none and, as a result, massively inflate[s] the category of infringements'.¹⁰⁸ This has the important consequence of centring interests without tying them to duties or obligations. As Tasioulas notes, 'this is inconsistent with the fact that the normative content of rights is given by their associated obligations and that it belongs to the very idea of such an obligation that it is robustly (if not absolutely) resistant to being overridden'.¹⁰⁹ The decoupling of rights from defined duties transforms them into interests which do not have the salient features of rights. The result is a severe imbalance in the separation of powers, at least as the principle would be understood within a common good framework, because it requires courts to pass judgment on the merits of gov-

106 John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 *Ethics* 647.

107 On the connection between property rights and the common good, see Walsh, n 71 above.

108 Tasioulas, n 27 above, 1189.

109 *ibid.*

ernment policy without an anchor in the principles of right action that they are more suited to interpreting and enforcing.

This being said, however, an overly rigid separation of functions can, in some instances, inhibit the proper functioning of the state. Thus, while the judiciary have neither the skills, nor the expertise to decide upon general policy, the legislature is perfectly capable of engaging in reasoned deliberation over rights questions, once situated at a suitable level of generality.¹¹⁰ This is often a core aspect of statute law, in addition to more goal-oriented features. Legislation will often create new duties or entitlements that were not previously recognised at common law. Statutes regularly protects rights that many would consider to be fundamental or human, even if not tied to those principles of the rule of law that are enforced within administrative law.¹¹¹ Indeed, many fundamental rights which are protected at common law find statutory expression in legislation such as the Habeas Corpus Acts. Further, rights or entitlements which we might see as falling within the realm of reasonable disagreement, where a political or democratic decision is needed to concretise general moral commitments to the common good, can only find recognition through statute. It is not for a court to set up a national health service, even if such a service manifestly would be in the interests of the common good. For this, we need legislatures to enshrine entitlements that would not otherwise be enforced at common law.

When legislatures choose to grant statutory entitlements in this manner however, they by necessity must do so at a sufficiently abstract level of generality. There nevertheless remains an inherent jurisdiction for courts to both interpret and enforce these entitlements in the cases which come before them. When they do so, they will (or at least should) rely on background principles of justice to ensure that such statutory rules are themselves conducive to the common good. As mentioned above, however, there remains an inherent jurisdiction which courts exercise, apart from the interpretation and enforcement of statutory entitlements. It is their role to enforce the fundamental principles of the rule of law, setting the outermost limits on the exercise of executive discretion and what counts as a plausible interpretation of statute: one which is a reasonable attempt at the common good. Courts may not be permitted to decide for themselves what the common good ultimately requires in all instances, but the principles of judicial review and administrative law, including principles of statutory interpretation, can ensure that outcomes or forms of treatment which are manifestly anathema to the common good are never given legal force. Democracy cannot be misused to undermine its own legitimacy.¹¹² Similarly, the exercise of judicial and executive functions is separated to ensure that power is not abused, but also to ensure that distinct role moralities, each necessary for

110 See Grégoire C.N. Webber and others (eds), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018).

111 For example, the Human Rights Act 1998 and the Equality Act 2010 arguably expand upon the fundamental protections provided by the common law. Although see T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 CLJ 671; Colm O'Conneide, 'Equality: A Core Common Law Principle, or "Mere" Rationality?' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Oxford: Hart Publishing, 2020); Jeffrey Jowell, 'Is Equality a Constitutional Principle?' (1994) 7 CLP 1; Foran, n 79 above.

112 John Laws, 'Law and Democracy' [1995] PL 72.

the common good, can act in furtherance of the common good.¹¹³ Constitutionalism, including principles of democracy, presuppose that the legislature is 'required to treat our fundamental norms and standards, not as an alien force, but as part of its own proper function'.¹¹⁴ As with the institution of private property rights, constitutional principles such as the separation of powers are defensible precisely because they serve the common good.

The limits and content of constitutional principle is always a matter of reflective interpretation directed towards justice and the common good. Separated functions are justified as plausible mechanisms designed to ensure that the good is pursued in accordance with principles of right action that prevent injustice to unconsidered, ignored, or marginal cases. Common-good constitutionalism thus offers a defence of the separation of powers but also a guide for how these separated powers ought to approach rights adjudication such that the principle of the separation of powers operates both to empower the pursuit of the common good and to constrain the illegitimate misuse of executive or judicial power.

CONCLUSION

Common Good Constitutionalism is a lens of analysis. It grounds a theory of constitutionalism, and thus the interpretation and legitimacy of constitutional principles and structures, in a manner which is conducive to the flourishing of all members of a given community. Its precise requirements are up for legitimate debate, depending on localised and contextualised conditions as much as on divergent theoretical perspectives. What unifies this as a distinctive approach to constitutional theory is the focus on the common good as the ultimate guiding ideal for legal and political institutions. It critiques but is not necessarily incompatible with other forms of constitutionalism, when taken at a sufficiently abstract level of analysis. The foundation of this critique is that questions relating to the flourishing of individuals, while paid lip-service, are rarely the subject of genuine critical analysis within mainstream constitutional theory. A focus on the common good does not abandon questions of institutional design or procedure but does indicate a concerted move to bring to the fore issues of the good that are essential for the legitimacy of any constitutional framework.

The upshot is that one can be a common good constitutionalist and maintain a strong support for either legal, political, or 'third-way' constitutionalism when it comes to questions of institutional design. Issues relating to who ultimately ought to have the final say on particular questions such as those concerning the scope and limits of rights fall within the range of reasonable disagreement. What common-good constitutionalism adds to this picture is a requirement to justify one's choice of institutional theory, not by reference to liberal notions of neu-

113 Such an approach corresponds with what can be described as 'green light' theories of administrative law. See Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (Oxford: OUP, 8th ed, 2016) ch 1.

114 Laws, n 81 above, 114.

trality, or interpretative theories of original legislative intent, but by reference to the common good. On this view, constitutional design and interpretative questions must always be justified because they help each and every member of our community to flourish.