

# WHEN MORAL PRINCIPLES MEET THE NORMATIVE OR DELIBERATIVE STANCE OF JUDGES: THE LAYERS OF COMMON GOOD CONSTITUTIONALISM

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## INTRODUCTION

The way in which human beings engage with the world is radically different from how nonhuman animals engage with the world. Nonhuman animals do what they do without trying to “make sense” of what they are doing. By contrast, human institutions and practices such as law, family, states, art, literature and so on depend on our “making sense” of them.<sup>1</sup> They cannot be built, changed and sustained unless we answer the basic question of what is their point or meaning. But the way we try to give meaning or “make them intelligible” is very peculiar and particular. When we are engaging with any human practice or institution, for example following a statute or legal directive, we are trying to settle an answer to the question “What shall I do?” in order to answer the question what the law is or what “this” or “that”

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1. CHARLES TAYLOR, *What is Human Agency?*, in HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS, VOLUME I, 15– 44 (Cambridge Univ. Press, 1985).

institution is.<sup>2</sup> Similarly, when we engage with short-, medium- or long-term ends, such as writing a poem or forming a family, we are trying to settle an answer to the question “What shall I do?”

Professor Adrian Vermeule’s *Common Good Constitutionalism*<sup>3</sup> is a lucid defense of this platitude, that is, in engaging with any human practice or institution, we are effectively in pursuit of an answer to the “What shall I do?” question, located at the heart of the classical legal tradition. Adrian Vermeule aims to show that the common good is non-aggregative<sup>4</sup> and that values or ends that aim at the flourishing of citizens are embedded in the law, including institutional and government arrangements. The idea of law governed by reason towards the common good<sup>5</sup> is the guiding theme that runs through the American and European classical legal traditions and is the way that citizens of these states give meaning to, “make sense of,” or “give intelligibility” to the decisions of courts and the activities of judges<sup>6</sup> and legal institutions.

Vermeule’s theory of constitutional thought is in stark opposition to the two predominant constitutional theories, that is, originalism and progressivism. The former relies, Vermeule tells us, on the illusion of fixed semantic content. This semantic content is determined by either the expected results from the enacted

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2. The primacy of this question has an ancient pedigree in ancient and medieval legal philosophy. It is also the centre of the new natural law theory. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); John Finnis, “The Thing I Am”: *Personal Identity in Aquinas and Shakespeare*, 22 *SOC. PHIL. & POL’Y* 250 (2005); Germain G. Grisez, *First Principle of Practical Reason: A Commentary on the Summa Theologiae*, 1–2, *Question 94, Article 2, Note*, *NAT. L.F.* 168 (1965).

3. Adrian Vermeule, *Common Good Constitutionalism* (2022).

4. *Id.* at 7. “Non-aggregative means that the plurality of values or goods that constitute the “common good” cannot form a whole or unity.”

5. *Id.* at 1–4; see also THOMAS AQUINAS, *SUMMA THEOLOGICA*, ST II-I, q. 90 a4 (Thomas Gilby ed., Cambridge Univ. Press 2006) (1485) “Law is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”

6. VERMEULE, *supra* note 3, argues that the vision of the common good extends to administrative organs of the state, but in this paper I will only focus on the activities of judges.

language of the relevant actors or abstract semantic content of the enacted words.<sup>7</sup> Consequently, the originalist position presupposes that a normative stance of essentially contested and normative substantive conceptions such as “liberty”, “right”, “legal obligation”, “duty”, “immunity” or “equality” and so on will not contaminate the meaning of the text.<sup>8</sup> This entails that originalists are under the illusion that a constitutional text is self-explanatory, and the text’s meanings have either fixed references across time or a “shareable” or public ordinary meaning.

On the other hand, progressivism portrays itself as a process of interpretation in continuous confrontation with and resistance against an imaginary oppressor to achieve liberty.<sup>9</sup> Thus, this conception of liberty is neither anchored in a substantive conception that gives “intelligibility” to court decisions, nor does it give any guidance to judges and citizens as it aims at liberty for its own sake as the only intrinsic value for human flourishing. This is a conception of liberty with no vision and no embodiment, so to speak, as it is not embodied in other values. This means that the conception of liberty of progressivism is empty, abstract and non-informative for citizens and judges.

Thus, the semantic theory advocated by both old and new originalists is implausible as it overlooks how meaning, both textual and publicly shareable, is essentially normative or value-laden. The conception of liberty advocated by progressivists is blind and cannot guide us. This would be a tragic tale of pessimism if no third position could be found. Let me explain. In terms of constitutional theory we are forced to choose on one hand between

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7. VERMEULE, *supra* note 3, at 94. See, e.g., Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, B.U. L. REV., 1953 (2021). Solum defends originalism as “ordinary meaning”; the problem with this approach is that it is also subject to the objection that there is no shareable meaning in interpreting normative contestable concepts.

8. Vermeule argues, rightly so, that there are not two stages, i.e., “interpretation” and “construction.” See VERMEULE, *supra* note 3, at 94.

9. *Id.* at 117.

the illusory and the implausible and, on the other, blindness and an unintelligible conception of political community.<sup>10</sup> However, there is a third way, Vermeule tells us, and the possibility of stability arises if we are able to retrace the historical and jurisprudential roots of the classical legal tradition.

In this paper I would like to explore the underlying assumption of Vermeule's architectonic argumentation, which strongly overlaps with Dworkin's theory regarding the nature of law and constitutions. I will also argue, however, that despite the overlaps there are profound differences, which concern matters beyond the conception of right, and that if the retracing of the classical legal tradition is to be successful, we need to examine more closely these differences. Moreover the idea that principles can guide the legal decisions of judges can be misleading if we do not scrutinize closely the way practical reason in the classical legal tradition is conceived and the way principles are generated by judges' engagement with practical reasoning.

In Section I, I abstract the most important lesson from Vermeule's insightful analysis on the classical legal tradition and show the overlap with Dworkin's constructive interpretative theory of law and constitutions.<sup>11</sup> In Section II, I advance what I think is a plausible and powerful view of the classical legal tradition based on an Aristotelian-inspired conception of immersive and aspirational deliberation and practical reason, and show how this is applicable in the context of the law.<sup>12</sup> In Section III, I provide some final reflections on the consequences of adopting the Aristotelian-inspired conception of deliberation to defend the classical legal tradition, and demonstrate what I call "the plight of the inexorability of a normative stance" which lies at the core of our legal reasoning and interpretation of what the law is.

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10. This theoretical dichotomy on constitutional interpretation has a profound impact on everyday political and legal discourse. Consequently, the population is deeply polarized regarding the legitimacy of constitutional law.

11. *See infra* Section II.

12. *See infra* Section III.

I. VERMEULE'S CLASSICAL LEGAL TRADITION AND DWORKIN'S  
CONSTRUCTIVE INTERPRETATION:  
THE LIMITS OF AN UNHOLY ALLIANCE

Vermeule's and Dworkin's theories of constitutional interpretation and adjudication<sup>13</sup> aim to undermine originalism in its different forms. Vermeule aims to show that originalism cannot be a stable position.<sup>14</sup> He says that if originalism adheres to textual meaning at the time of creation of the text, it is impossible to trace the meaning as it is impossible to trace the original intention.<sup>15</sup> If originalism is semantic, then the problem that arises is how meaning should be determined. If meaning is based on expectations, it faces the difficulty of, for example, how we should ascertain the expectations of framers and ratifiers of the U.S. Constitution. If meaning is based on public or shareable meaning, then to disambiguate meaning, the originalist needs to resort to normative premises and is forced to rely on *nonoriginalist* premises precisely because it is impossible to determine "public meaning" due to its ambiguity. "Public meaning" is based on either expected applications or the principles embodied in semantic content. Consequently, originalism cannot choose between these two different conceptions of "public meaning" within the theoretical

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13. Some authors argue that we need to separate the question of what the law is from theories of adjudication. See Michael Berman and K. Toh, *On What Distinguished New Originalism from Old: A Jurisprudence Take*, *FORDHAM L. REV.*, 545 (2013). However, this argument in favor of the distinction artificially suppresses the important point advanced by authors like Dworkin which is that at the core of the nature of law is an inexorably normative and interpretative stance because adjudication cannot be separated from the question of what the law is.

14. There is much in common here with Finnis's criticism of Hart's internal point of view and the instability that emerges when we do not closely analyze the central or paradigmatic case of the law and engage with practical reason, or misunderstand the way practical reasoning works. See Veronica Rodriguez-Blanco, *Tracing Finnis's Criticism of Hart's Internal Point of View: Instability and the "Point" of Human Action in Law*, in *CAMBRIDGE COMPANION TO LEGAL POSITIVISM* 695 (Torben Spaak and Patricia Mindus eds., Cambridge University Press 2021).

15. VERMEULE, *supra* note 3, at 92, 95–97.

resources provided by the originalist theory.<sup>16</sup> In a similar vein, Dworkin<sup>17</sup> has argued that semantic theories of law and, arguably, originalism as a paradigmatic example of a semantic theory of law and meaning, cannot explain the “genuine” theoretical disagreements that judges and legal practitioners have.<sup>18</sup> The reason why semantic theories cannot explain genuine disagreements on what the law is, is because the law depends on varying conceptions of the “point” or “value” of our social practices and institutions, including constitutions. Genuine disagreements inexorably arise because the different parties to a legal dispute have different *normative* or *deliberative* stances. Genuine disagreements concern the best possible interpretation of what the law is in a particular case and since judges need to advance a justification for state coercion, they need to advance an answer to the question of what the law is in its best light. For Dworkin, originalism fails to notice that the *normative* aspect of the law is inexorable, and is the only feasible lens for grasping and “making intelligible” legal and social practices.<sup>19</sup> Vermeule and Dworkin recognize that a normative or deliberative stance on the side of legal participants, judges, lawyers, administrative officials, and citizens, is inescapable. I will call this the “*plight of the inexorability of a normative stance.*”<sup>20</sup>

For Dworkin this normative or deliberative stance is inexorable because we need to attribute meaning or intelligibility to our social practices, institutions and legal texts.<sup>21</sup> Similarly, for Vermeule the

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16. *Id.* at 95.

17. Ronald Dworkin, *Law’s Empire* 1– 86 (1986).

18. See *id.*

19. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve*, 65 *FORDHAM L. REV.*, 1249, 1249 – 50, 1254– 55 (1997).

20. I think this plight is endorsed by Vermeule. See *supra* note 3, at 14 (“In the end, every legitimate act of government works with some conception or other of the common good; that is inescapable.”). This view is also revealed in other passages. See *e.g., id.* at 16 (arguing that “no law can operate without some implicit or explicit vision of the good to which law is ordered[.]”).

21. See DWORKIN, *supra* note 17.

normative stance emerges as the result of “judges” and “legal participants” engaging with reasoning towards the common good, which includes the instrumental values to achieve objective goods and the flourishing lives that citizens have in the state.<sup>22</sup> Furthermore, because we are engaged with human activities and institutions, ends need to be intelligible to us as rational creatures, and therefore these ends are necessarily normatively laden and constitutive of our activities and institutions, including legal institutions and court decisions. Judges and legal practitioners inexorably engage with practical judgements to answer the question “What shall I do?” But, arguably, the answer to the question of what the law is depends on the answer to the question “What shall I do?” I defend this point in Section II.

However, the overlapping features between Dworkin’s and Vermeule’s constitutional thoughts stop here. Dworkin is a constructivist and principles are at the core of his views, but in the classical legal tradition *principles are the result of practical deliberation* and, therefore, practical reason towards the common good.<sup>23</sup> This is a subtle difference but an important one that I would like to emphasize. Let me explain.

For Dworkin, principles are the starting point for judges and legal participants to construct legal materials in their best light. Herculean judges, Dworkin tells us, look at the pre-interpretative practice and legal material and *impose* meaning through the underlying principles in the text to advance the best possible answer to the question of what the law is in the particular legal case.<sup>24</sup> By contrast, for the classical legal tradition, principles are the

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22. I will not discuss the nature of the common good. For detailed conceptions in the context of the law, see MARK C. MURPHY, *NATURAL LAW IN JURISPRUDENCE AND POLITICS* (2006); George Duke, *The Distinctive Common Good*, 78 REV. POL. 227 (2016).

23. Vermeule argues that the law of the civil law maker is contained within the “larger objective order of legal principles and can only be interpreted in accordance with those principles.” VERMEULE, *supra* note 3, at 2. At other key passages he states that the rational order of the common good is, “embedded in a broader framework of legal principles.” *Id.*

24. DWORKIN, *supra* note 17, at 245.

general and abstract formulation of engagements and understandings of values at the particular level.<sup>25</sup> They are at the *end of a process* of practical reasoning and deliberation, and can be taken as the starting point of further decisions *only because* we have previously engaged with their content at the particular level.<sup>26</sup> Tradition, historical context and previous cases provide a thick web of understandings of values at the particular level towards the common good of the specific political community.

Thus, for the classical legal tradition, to answer the question of what the point or meaning of our institutions or practices is, judges and legal practitioners do not engage in an abstract exercise of moral justification *à la* Dworkin where principles of political morality guide them in constructive interpretation. The Dworkinian conception of constructive interpretation misses the character of practical reason and therefore the richness and complexity of human deliberation, and its “making sense” or “intelligibility” *becomes abstract rather than particular*. At the core of the classical legal tradition is human deliberation and practical reason which starts with the particular.<sup>27</sup> This is why historicity *qua* evaluation and the grasping of values within a particular historical tradition is key for the classical legal tradition.

Dworkinian-type constructive interpretation is not the best guide for understanding the classical legal tradition of *ius naturale* and *ius gentium*. True, like in the classical legal tradition, for Dworkin the text is a constraint on any interpretative exercise that relies on principles of political morality.<sup>28</sup> However, this way of thinking overlooks the way that *legal practice, and legal texts together with the law have emerged* which is the result of practical deliberation and engagement with values at both the immersive and

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25. Veronica Rodriguez-Blanco, *Ways of Inhabiting the Deliberative-Aspirational Point of View: Practical Reason and Objective Goods*, 67 AM. J. JURIS. 293(2022).

26. *Id.*

27. ARISTOTLE, VI NICOMACHEAN ETHICS, 1141 b14 – 25 (H. Rackham trans., Harvard University Press 1999).

28. See DWORKIN, *supra* note 17.



aspirational levels through the history of a particular political community.

Legal texts together with the law and legal practices are constituted by reasonings and deliberations, and specific ways of *describing and re-describing values*, or so I will argue. For Dworkin, by contrast, the text or the practice are “given” and constructive interpretation imposes a *new meaning* on them.<sup>29</sup> Arguably, for Dworkin, principles provide the “ends” or values, the “making sense” of the institution or text. For example, according to Dworkin’s interpretation of *McLoughlin*<sup>30</sup> the principle of compensation for nervous shock or psychiatric injury that arises in cases of harm that is foreseeable is the result of the “imposed” meaning on past legal materials in the law of negligence.

Dworkin’s understanding of principles undermines and confuses the role of practical reason in the classical legal tradition. Thus, the judge or jurist in the classical legal tradition starts with the view that legal texts together with the law are the result of *ways of perceiving* and describing values, and she aims to use this understanding to move herself forward, so to speak, to settle an answer to the practical question “What shall I do?” in order to determine *what the law is*.

In this paper I will not concentrate on a criticism of Dworkin’s idea of legal principles and how they operate so that we can impose meaning on our legal practices as I have engaged with this task elsewhere,<sup>31</sup> but will proceed *via positiva* by advancing an Aristotelian-inspired conception of practical reason in the context of legal reasoning. The contrast with principles and the Dworkinian-type of constructive interpretation will become apparent.

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29. See DWORKIN, *supra* note 17; see also Veronica Rodriguez-Blanco, *Action in Law’s Empire: Judging in the Deliberative Mode*, 29 CAN. J. L. & JURIS. 431 (2016).

30. *McLoughlin v O’Brian* [1983] 1 AC 410; see DWORKIN, *supra* note 17 (discussing this English case as an application of his constructive interpretation).

31. See Rodriguez-Blanco, *supra* note 29.

I think that this way of understanding the classical legal tradition offers a better ground of what Vermeule's insightful analysis in *Common Good Constitutionalism* aims to demonstrate, namely that originalism and progressivism rely either on illusion or blindness. The illusion is that practical reason is not constitutive of human practices and institutions. The blindness is that we can move forward building and shaping institutions and social practices without a vision or trying to articulate a conception of the common good and flourishing lives.

My proposal in terms of an Aristotelian-inspired conception of practical reason aligns well with the idea that "goodness" and therefore the "goodness" of the common good cannot be seen as a property or predicative adjective that can be aggregated or maximised. On the contrary, the goodness of the common good is an attributive adjective like, for example, small, tall, big and so on. There is no "plain goodness" of the common good as there is no plain smallness of a table. However, unlike the possibility of determining whether a table is bigger or smaller in regard to another table, which can be done by measuring the surface area of the two tables, judges cannot measure the good-making characteristic of a legal decision in comparison to the good-making characteristic of an alternative choice. This means, therefore, that inevitably we need to engage with valuing to determine ways in which the good-making characteristics of a legal decision advanced by a judge towards the common good and the flourishing of "citizens" lives in a specific political community. The common good serves then as "*an indispensable directive element in the practical thinking by which one deliberates towards choice and rational action.*"<sup>32</sup>

Thus, the common good of the community is an ongoing affair of practical reason, not a *final state of affairs* that can be "perceived" or "theorized." The common good is an achievement of our engagement and effort exercising practical reason and this is why

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32. John Finnis, *What is the Common Good, Why Does It Concern the Client's Lawyer?*, 40 S. TEX. L. R., 41, 44 (1999).

it is closely connected to the virtuous life of each member of the political community, including legal officials and the judiciary. Thus, there are many types of political and legal arrangements and institutions that can satisfy a rational life-plan for their citizens.<sup>33</sup> Consequently, if we do not correctly understand the operations of practical reason, we are either condemned to believe that we need to be attached to the fixed meanings or “shareable” or public ordinary meaning of constitutions or legal texts. In these circumstances, inevitably, either the ugly head of anxiety resulting from uncertain and unstable texts appears, or we are condemned to constantly and arbitrarily inventing and reinventing new meanings and new values that are not anchored in our rationality and the way rationality emerges as result of who we are, that is, historical beings located in social practices and particular circumstances.

Dworkin’s constructive interpretative theory seems attractive because he combines two key features of the classical legal tradition, albeit adumbrating them in a mistaken way. These key features are: a) the importance of principles underlying the law and b) the need for legal judgments to fit the text or practice to be interpreted.<sup>34</sup> Dworkinian order and understanding in terms of constructive interpretation are mistaken because principles are neither the bridges nor the underpinning layer that makes intelligible a text. Neither is it sound to argue that principles enable us to “impose” meaning on a text. On the contrary, principles are *the “formal” and abstract formulation* of the results of a long and complex engagement with deliberation and therefore with values in a narrow and aspirational form. I will argue that we cannot understand principles unless we have previously understood the complex deliberations from which they emanate. Legal principles

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33. I will not engage here with the discussion of whether the common good should be instrumental as defended by Finnis, *see supra* note 2, at 176– 224, or distinctive and non-instrumental as interpreted by Duke, *see supra* note 22. In my judgement, Finnis’s view on the common good is more nuanced and it should not be interpreted as merely “instrumental.”

34. *See* DWORKIN, *supra* note 17.

extracted from previous cases can only play a role because there has been a previous effort and engagement with *the values that are the content of such principles*.

## II. ARISTOTELIAN-INSPIRED DELIBERATION: NARROW AND ASPIRATIONAL PERSPECTIVES

In this Section I will briefly defend an Aristotelian conception of practical reason to shed light on the process of "*determinatio*" in terms of descriptions of values and our vision of the common good within a political community. I think that this conception is more fruitful and psychologically realistic in terms of how legal judges and practitioners engage with what is good and valuable in our lives. I will use an example of a legal decision in tort law to show the differences and establish a contrast between the proposed view of the classical legal tradition and the use of principles by Dworkin.

My arguments start with the thought that the internal logic of law is not reducible to narrow juridical relational thinking, but rather is a continuum with ethical and moral thinking and experience where values and common ends of the political community play a key role. Like the values of love or friendship, the values of law have an internal logic, but this internal logic is inescapably expansive and includes underlying moral and ethical values as learned and grasped in both legal and ethical experience.

I will use the "love" and "friendship" analogy to undermine the narrow notion of an "internal" logic of law and justice reducible to rights and duties. Thus, for example, if I am asked why I love my friend, I would say that I love her because she is "kind," "gracious" and "intelligent." I have learned to describe and re-describe these features, and later attribute them to my friend because of all the experiences that we have shared. More precisely, and following the Aristotelian-inspired model, my friend possesses these three features for me as a result of a development of my thinking together with what I have learned from our shared experiences, that is, as a result of my own struggles in determining the correct descriptions

and re-descriptions of our shared experiences, my actions and her actions. My response is, so to speak, according to the internal logic of the value of friendship. This means that I do not resort to descriptions that are scientific or empirical, I refer to the *experience* of love and friendship itself, and to the concepts related or close to friendship, such as love, or kindness.

But my appreciation of the love of my friend has a *temporality and historicity*. I learned to grasp this set of values by engaging in both narrow and aspirational deliberation and, therefore, by engaging in practical reasoning. Thus, when I act and advance decisions, I aim to answer the question “What shall I do?” and in the context of the friend/love analogy, it aims to address deliberation and action in relation to my actions towards my friend. This means that I need to settle an answer to this question. For Aristotle, deliberation and the exercise of practical reasoning is a seeking as opposed to the contemporary conception in which deliberation is seen as “the balancing” of reasons, motives, desires, rights or interests.<sup>35</sup>

Aristotle presents us with a uniquely innovative model that is different from the Socratic idea of deliberation as the science of measurement in which deliberation is reducible to a skill or craft, and also very different from the contemporary model of “balancing.”<sup>36</sup> According to the “balancing” model, beliefs and desires are “given” and the only task for the deliberator is to weigh or measure beliefs against beliefs, or beliefs against desires or desires against desires.<sup>37</sup> Aristotle aims to show that deliberation and its

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35. The “balancing” approach is present in both legal philosophy and moral philosophy. See Rodriguez-Blanco, *supra* note 25, at 8–9.

36. For an emphasis on the difference between the contemporary model and the Aristotelian model. See Agnes Callard, *Aristotle on Deliberation*, in *THE ROUTLEDGE HANDBOOK OF PRACTICAL REASON* 126–40 (Ruth Chang and Kurt Sylvan eds., Taylor and Francis 2021); see also Karen Margrethe Nielsen, *Deliberation as Inquiry: Aristotle’s Alternative to the Presumption of Open Alternatives*, 120 *PHIL. REV.* 383, 386 (2011).

37. See Rodriguez-Blanco, *supra* note 25.

outcome, a rational decision (*prohairesis*)<sup>38</sup> is not a skill or craft but has important elements that overlap with what we understand as a craft or skill. At the same time Aristotle shows that there is an important overlap between theoretical reasoning<sup>39</sup> and deliberation. However, deliberation has a proper way of functioning and, consequently, Aristotle's explanation navigates between the Scylla of being a craft or skill and the Charybdis of theoretical reasoning,<sup>40</sup> aiming to show that deliberation is neither reducible to craft nor to theoretical thinking.

We see also that a plausible interpretation of practical reason involves rejecting the "grand end" view of practical deliberation in the context of the political community. This is the idea that we already have an *a priori* knowledge of the "the grand end" of our flourishing lives or "living well" within the political community, and our engagement with practical deliberation is simply an exercise in determining the means to achieve larger and medium ends that can be subsumed under the "grand end" of the political community. As opposed to this position, we might defend the "upward journey towards the specification of the *what*."<sup>41</sup> Thus, there is no need to recognize or validate the procedure towards correctness, and there is no anxiety about the instability or arbitrariness of practical judgement.

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38. There is a variety of translations of the Aristotelian term *prohairesis*. *Prohairesis* or rational decision can be interpreted as the end of deliberation. Hardie advances a good analysis of the word as "efficient cause." W. F. R. HARDIE, *ARISTOTLE'S ETHICAL THEORY* 162 (2d ed. 1980). It is not an intellectual opinion, rather after choosing and acting we show our character. Hardie, 165 (2004, originally printed in 1968). We show, within our model, the key element of becoming or transformation. See also Rodriguez-Blanco, *supra* note 25. According to Segvic, *prohairesis* is used only once by Plato, in the *Parmenides*. Heda Segvic, *FROM PROTAGORAS TO ARISTOTLE* 162 n.25 (Miles Burnyeat ed., 2008). See also ARISTOTLE, *supra* note 27, at 1139 a30 (1999). *Prohairesis* combines cognitive and emotional elements as a result of deliberation. Aristotle, *supra* note 27, at 1113.

39. See Hardie *supra* note 38, 225–228.

40. There is a tendency to collapse theoretical and practical reasoning. This leads to a mistake about the role of practical syllogism.

41. See Rodriguez-Blanco, *supra* note 25.

This is still very cryptic but perhaps the simile of Neurath's boat<sup>42</sup> can help us to explain the Aristotelian type of deliberation. If we are at sea in a boat that must be repaired we need to repair the boat plank by plank, because if we try to reconstruct the boat from the bottom up, we will certainly sink. As sailors we are engaged in the activity of sailing, we are at sea and there is no choice but to repair the boat. Similarly, in the Aristotelian model of deliberation we are in the world of acting and we need to deliberate about *what* we should do.<sup>43</sup> However, our vision of the *what* is indeterminate and key aspects of the substantive *what* are unknown to us. This is a corollary of one key feature of deliberation, that is, that it concerns only what is contingent and, therefore, particular and circumstantial.<sup>44</sup> Consequently, we need to hold the vague and indeterminate *what* at the same time as we hold the other planks of Neurath's boat and focus only on one plank at a time. Each plank is a set of particular circumstances that supports the *how*. Thus the focus of deliberation is the *how*. The *how* gives us more clarity on the *what* and in the process we can revise the *how* in light of what we have learned from the *what*. Furthermore, this process goes backwards and forwards, that is, we revise the *what* in light of what we have learnt from the *how*, and reconsider the *how* in light of what we have learnt from the way the *what* is now presented to us, at this new stage of the deliberation. This continues until we reach a point of insight, that is, we have brought the *what*, or what is now "*the end*", to ourselves. The means impregnates and illuminates the end and *vice versa*. The cycle will continue with further "*what*" and

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42. See Otto Neurath, *Anti-Spengler*, in *EMPIRICISM AND SOCIOLOGY* 158, 199 (Marie Neurath & Robert S. Cohen eds., 1973).

43. This is also central to Finnis's explanation of practical reason, see John Finnis, "*The Thing I Am*": *Personal Identity in Aquinas and Shakespeare*, 22 *SOC. PHIL. & POL'Y* 250 (2005); see also JOHN FINNIS, *Practical Reasons's Foundations*, in *REASON IN ACTION, COLLECTED ESSAYS: VOLUME I*, 19–40 (2011).

44. See ARISTOTLE, *supra* note 27, at 1141 b14–25.

“how” questions in light of our deliberations and performed actions.<sup>45</sup>

We aim to defend the following view. *Deliberation is the shaping of the What on the basis of the How and vice versa.* This position presupposes the following:

- a) The *what* of deliberation is indeterminate.
- b) Deliberation is an inquiry into the *what* to make it more specific and determinate.
- c) At the first stage an inquiry into the *how* illuminates the *what*.
- d) The *what* is presented under a new light and, more specified, we can then proceed to revise the *how*.
- e) This process can be repeated a number of times, including at moments when we are performing the action.

The fact that we do not have a precise and determinate “grand end” does not deny that we cannot reflect upon and approximate objective goods. It rather means that we need to articulate a vision of values and good-making characteristics for the political community that is embedded in legal decisions. There is reflection on the *what* and the *how*. It does not operate externally but internally in terms of practical judgment and deliberation, however.

The “upward journey towards the specification of the *what*” admits that while we are exercising our capacity we are also perceiving, learning to perceive, acquiring insights and the quality of this learning depends on the quality of deliberation and rational decision (*prohairesis*).<sup>46</sup> Furthermore, the particulars of the action are

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45. For Broadie, Aristotle requires “continual re-evaluation in the light of means, means to means, and their consequences.” SARAH BROADIE, *ETHICS WITH ARISTOTLE* 245 (1991).

46. Reeve highlights perception in deliberation. C. Reeve, *ACTION, CONTEMPLATION AND HAPPINESS*, 181–82, 183 (2012); see also John M. Cooper, *REASON AND THE HUMAN GOOD IN ARISTOTLE*, 65 (1975).



the essence of the action as opposed to a product.<sup>47</sup> The particulars can only be seen from the deliberative perspective and what is “seen” can be improved through reflection. Similarly, desires are the work of intelligence which implies a process of thinking and transformation, and the concept of a virtuous life and virtuous political community becomes crucial. Within the Aristotelian-inspired model of deliberation our desires and character are transformed through thinking.<sup>48</sup>

Thus, the deliberative-aspirational perspective is key. We learn of the possibility of a deliberative-aspirational perspective through others. These “others” include not only family and friends, but also our political and legal institutions, the decisions of our courts that try to “make sense” or give “intelligibility” to our legal actions and legal practices, and our constitutions. Through engaging in immersed deliberation within a political community, we learn through legal decisions ways of inhabiting an aspirational perspective as citizens. In a nutshell, this means that the “making sense” of our legal actions and practices, including inhabiting a deliberative-aspirational perspective, is always a collective enterprise.

But judges also engage with the aspirational perspective of past legal decisions. Avoidance of an aspirational perspective might lead us to fantasy. Recognition is the way we inhabit the deliberative-aspirational perspective. Once judges recognize a particular feature of values, rooted in history, tradition, and past cases, in its specificity and context we can think about it and change their views on it but, at the same time, citizens and judges transform their emotions and desires when this recognition and thinking becomes part of their deliberations. Because the transformation includes the emotions and desires of citizens, officials, and judges,

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47. See BROADIE, *supra* note 45, at 205, 209. Broadie uses the appropriate expression “happiness is an act”. This means that our understanding and grasp of living well can only be achieved through deliberating and acting.

48. See Rodriguez-Blanco, *supra* note 25.

it has an impact on the development of our character as a political and legal community. But transformation does not occur *only* as a result of training our desires, emotions and character to recognize a particular feature of values in its specificity and context, but as the *consequence of taking a perspective*, that is, thinking about the subject matter and recognizing it, or avoiding it and not examining it.

But how does inhabiting this deliberative-aspirational perspective enable judges to engage with medium- and long-term goals and ends without losing the immersed or narrow deliberative perspective? Changing our perspectives through both thinking and experience does not involve contemplating our inner experiences and thoughts as if they were mere events or objects, and I reject the view that we can be impartial or detached from our experiences without losing something important. I reject the perception model of self-reflection and the objectification of self,<sup>49</sup> and advocate a model of transparent self-reflection where the agent tries to settle the question “*What shall I do?*”, and gives careful attention and thought to thinking about the features of the subject matter, that is, relationships and connections between values, what is good and what is right. The agent looks outward to the world and either finds or does not find that her interactions with others are lacking. This recognition or avoidance can be taken on as material for further narrow deliberations. This means that when we avoid the deliberative-aspirational perspective, there is an absence of any object for future rational deliberation. When we are confronted with others through relationships and experiences, through legal decisions and practices within the political community, we are invited to avoid or recognize. When we pay careful attention to the

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49. On perceptual reflection, see DAVID ARMSTRONG, MATERIALIST THEORY OF MIND (1968). Cf. Sydney Shoemaker, “*Self-Knowledge and the Inner Sense*,” 54 PHIL. & PHENOMENOLOGICAL RSCH. 249, 249– 314 (1994); RICHARD MORAN, AUTHORITY AND ESTRANGEMENT: AN ESSAY ON SELF-KNOWLEDGE (2001).

features of the world and our relationships, we become able to aspire to medium- and long-term goals and ends within the narrow or immersed deliberative perspective. The depth and richness of the latter enable us to better understand if or how our current position is lacking. Grasping these medium- and long-term ends is possible because there is a trajectory from the immersed perspective to inhabiting the deliberative-aspirational perspective. In this way, once we grasp these medium- and long-term ends, we can use these ends in further immersed or narrow deliberations. It is still within the confines of the immersed perspective, however. The medium- and long-term goals and ends are uncertain but they can form part of future immersed or narrow deliberations.

Returning to the question of why I love my friend, if someone asks me to summarize my experiences, I could say in a simple and abstract manner, "I love my friend because she is kind, gracious and intelligent." My description does not reflect the complexity of my deliberation, both narrow and aspirational, the transformations and changes in relation to my friendship, e.g., moments in which I lost patience with my friend and needed to reflect on her best qualities, moments in which her gracious attitude and intelligence manifested in unique ways, and so on. When I use the words "kind", "gracious" and "intelligent", I use the internal logic of love and friendship, but this does not mean that other elements, including other values and the changes in my emotions, are not key in my grasping and correctly describing the phenomena.

Analogically, I argue, in law, the internal logic of the law has the appearance of doctrinal concepts and underlying abstract moral concepts such as rights and duties and legal principles, including substantive and institutional principles. Rights and duties operate as the grounding reasons of my relationships and interactions with others.

If our Aristotelian-inspired model of deliberation is sound, then from the forward-looking standpoint the judge and the citizen cannot grasp the values of their actions, cannot determine the *what*

in terms of the *how* and cannot avoid or recognize an aspirational point *unless* they determine the basic components of their actions, (that is, features “a<sub>1</sub>” and “a<sub>2</sub>” as components of “a”, “b<sub>1</sub>” and “b<sub>2</sub>” as components of “b”, “a” and “b” to achieve “X”, and finally “X” in order to achieve the end “Y”).<sup>50</sup> The judge also needs to transform her emotions and desires in light of her descriptions and thoughts about the indeterminate aim or end of “living well”, the flourishing of the lives of members of the political community. Furthermore, there is also the recognition or avoidance of an aspirational point that is presented to the citizen and the judge. I argue that the forward-looking standpoint of the judge’s decision is not presented as an abstract principle.

However, this does not mean that it cannot be formulated as such, only that we must first answer the question “What shall I do?” to determine “What is the law in this particular case?” This means that there is an internal, but not reductive, logic within legal reasoning. The judge from the standpoint of the backward-looking perspective will consider values that can only be learned and grasped through the forward-looking perspective. This new grasp of values will enrich the doctrinal concepts and be applied in the backward-looking perspective. To illustrate this let us analyze a landmark case of negligence law, but this could be extended to constitutional law. Arguably, in both constitutional and tort law, the courts are trying to grasp the sound description of the values at stake. For example, in tort law, the value of physical integrity, and in constitutional law, the value of freedom of speech, within the law in the particular case and the internal logic of the law.

In the case *Donoghue v Stevenson*,<sup>51</sup> Mrs. May Donoghue went to a café where her friend ordered an ice-cream and a bottle of ginger beer.<sup>52</sup> They were supplied by the shopkeeper who poured the

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50. See Rodriguez-Blanco, *supra* note 25 for a detailed explanation of this Aristotelian-inspired model of deliberation.

51. *Donoghue v Stevenson* [1932] AC 562 (HL) (appeal taken from Scot.).

52. *Id.* at 601.

ginger beer over the ice-cream.<sup>53</sup> Mrs. Donoghue ate part of the ice-cream and as she finished pouring the rest of the ginger beer, a decomposed snail floated out.<sup>54</sup> As a result of consuming part of the liquid Mrs. Donoghue contracted a serious illness.<sup>55</sup> The bottle was made of dark glass so its content could not have been determined by inspection.<sup>56</sup> Mrs. Donoghue initiated an action for negligence against the manufacturer, David Stevenson, who had produced a drink for general consumption by the public.<sup>57</sup> The presence of the snail rendered the product dangerous and harmful, and the plaintiff alleged that it was the duty of the manufacturer to avoid producing harmful and dangerous products.<sup>58</sup>

The facts and circumstances of the case provide a concrete particularity to the value of physical integrity. The aim of the judge's reasoning is to determine the specific content of the plaintiff's rights, but she also has a forward-looking perspective.<sup>59</sup> If her decision is to guide citizens it needs to advance values manifested in particularities, and needs to provide appealing descriptions of values for the guidance of citizens' actions.

Lord Atkin in *Donoghue v Stevenson* stated:

But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—

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53. *Id.*

54. *Id.* at 566.

55. *Id.* at 601.

56. *Id.* at 602.

57. *Id.*

58. *Id.*

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>60</sup>

In these passages Lord Atkin states that there is a duty to avoid acts or omissions which would likely harm others, to the extent that “I ought reasonably to have them in contemplation.”<sup>61</sup> Lord Atkin establishes a general principle that “*you must not injure your neighbour*.”<sup>62</sup> This doctrinal duty is empty and abstract but it acquires special content in the particular circumstances and facts of the case and due to the descriptions and re-descriptions of the judge. The judge applies her knowledge and grasp of values. This means she is engaged in the question “What shall I do?” to determine “What is the law?” and in order to provide guidance to the citizen. But, simultaneously, the judge needs to look at the relational dimension of the case in order to determine whether the plaintiff’s right has been violated and whether the defendant had a duty which has been breached. These attributions are sound and possible only if the judge understands the values that are at stake and can grasp the complexity of such values *as if she acted* from the forward-looking perspective.

Lord Atkin redescribes the facts of the case and the values at stake.<sup>63</sup> It is an example that illustrates how the realizability of specific values is presented as a description of values by the judge as if she were taking the forward-looking perspective, which is the perspective of the citizen. The citizen who engages in the activity of manufacturing a drink is asked to consider the value of being attentive and *careful when producing an article of food*.<sup>64</sup> This is put as follows:

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60. *Donoghue v Stevenson* [1932] AC 562 at 580.

61. *Id.* at 582.

62. *Id.*

63. See *id.*

64. See *id.* at 580–583.

A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison.<sup>65</sup>

The issue is now not only between Mr. Stevenson, the manufacturer, and Mrs. Donoghue, but between *any* manufacturer and *any* consumer. The manufacturer is asked to consider the fact that the consumer is not able to inspect the bottle prior to purchasing it.<sup>66</sup> The right of the consumer and the duty of the manufacturer are the grounding of the attribution, but the engagement, realizability and determination of these abstract rights and duties are in terms of values and therefore demands sound deliberation and the exercise of the judge's and citizens' practical reasoning.<sup>67</sup>

### III. PRACTICAL REASONING IN SEARCH OF THE COMMON GOOD AND VERMUELE'S COMMON GOOD CONSTITUTIONALISM

We can now grasp the ancient philosophical platitude advanced by Bernard Williams<sup>68</sup> when he criticizes utilitarianism, which states that we cannot *pursue the good life directly*.<sup>69</sup> Can we pursue the common good *directly*? I have argued so far that we cannot. At first glance it might seem that principles can guide us to the common good and flourishing lives. However, I have tried to show that they cannot enter directly into the citizens', judges' or legal practitioners' practical reasoning. They are abstract and our actions cannot engage with abstraction *and* narrow or aspirational deliberation.

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65. See *id.*

66. See *id.*

67. See *id.* at 580–583.

68. Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 75, 112 (J. J. C. Smart & Bernard Williams, 1973).

69. *Id.*

The problem of determining an answer to the question “What is the law?” inexorably involves an answer to the question “What shall I do?” that judges pose to themselves. The judge poses this question from the forward-looking perspective *as if she were a citizen who ought to act upon it*. But the judge also needs to look back at the doctrinal conceptions and plethora of legal concepts and settled principles, whose content is particular and entails descriptions and redescriptions of values. The judge and legal practitioners need to carefully consider the particular case and the right description of values and ends to give an answer to the question of what the law is.

In *Eudemian Ethics*, book II, chapter 6, Aristotle<sup>70</sup> draws a parallel between mathematical principles and the man’s principles of his own acts.<sup>71</sup> The man needs to articulate the acts he performs as descriptions and redescriptions of values which can reach generality and abstraction and therefore a formulation as principles.<sup>72</sup> For example, the act of giving money to someone in need is different from the act of giving money to someone to whom I owe money.<sup>73</sup> The description of the respective underlying value changes the moral significance of giving money and the description of the values embedded in this action define the contours of practical judgements and the “making sense” of the action.<sup>74</sup> An act of “beneficence” is different from an act of “paying a debt.”<sup>75</sup>

Vermeule’s focus on principles in relation to the common good might give the impression that principles are the starting point of practical reasoning and deliberation. Arguably, for Vermeule, at some key passages, “*determinatio*” is presented as a deductive

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70. See ARISTOTLE, *EUDEMIAN ETHICS* bk. II, ch. 6, 1222b15–1223a20 (Brad Inwood & Raphael Woolf, trans., Cambridge University Press 2013).

71. *Id.*

72. See Rodriguez-Blanco, *supra* note 25.

73. *Id.*

74. *Id.*

75. *Id.*



process from principles to specificity,<sup>76</sup> from abstraction and generality to the particular case in searching for values and ends constitutive of the common good of the political community.<sup>77</sup> We have offered a model that starts from engagement with values and the respective description embedded in the law as if the judge were to act upon these values. But the judge needs also to have a backward-looking perspective and scrutinize the doctrines, settled principles and plethora of legal concepts and their embedded values to advance an answer of what the law is in the particular case. There is no direct access to the common good and the richness and complexity of ends and values of a political community. Abstract principles and general specifications can be formulated, but they are the result of a previous engagement with particular values and ends embedded in the law. They are the result of a historicity and ways of thinking about the subject matter from acts of beneficence in the context of moral thinking to constitutional liberties and immunities in the context of constitutions. To overlook the values embedded in this historicity and their respective description is to ignore the core of our exercise of practical reasoning within our political community and we do this at our peril. This is the way that I read Vermeule's *Common Good Constitutionalism*, which proposes an important view to escape the moral conundrum of constitutional interpretation.

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76. Vermeule seems to defend the view that the background principles enable us to engage in the practical reasoning of the legal texts, see VERMEULE, *supra* note 3, at 80, 83. Vermeule states *à propos* of a discussion of Curtiss-Wright: "For the classical tradition, the written law does not exhaust the law. Although written positive enactments (*lex*) are undoubtedly part of the law, the law in a broader sense as a body of general principles (*ius*) includes the *ius gentium*, the (often) unwritten customary law of nations -even when not adopted by positive enactments. See *id.* at 88. Those principles not only inform the interpretation of our written documents, but operate as sources of law in their own right." At 112, he states: "the relevant determinations must be interpreted ...in light of background principles of the *ius naturale* and the *ius gentium* , the ends of rightly ordered law, and the larger ends of temporal government." VERMEULE, *supra* note 3.

77. See *id.* at 83–84.

The proposed analysis of deliberation and practical reasoning gives a precise and plausible meaning to the idea that *law is an ordinance of practical reason and deliberation towards the common good*.

#### CONCLUSION

We have defended the ancient philosophical platitude that we cannot seek and reach the common good of a political community directly. We need to engage directly with values and their descriptions embedded in the law in the particular cases.

I show that the common presupposition shared by Vermeule's *Common Good Constitutionalism* and Dworkin's Theory of Law and Constitutions is the "*plight of the inexorability of the normative stance*." However, I have argued that principles are the result of abstract formulations of values and descriptions of values embedded in the law. They are the outcome of our engagement with "making sense" of and giving "intelligibility" to the law. Thus, *contra* Dworkin, we aim to demonstrate that principles are not the starting point of practical reasoning. The classical legal tradition advocates the plight of the inexorability of the normative stance but also presupposes a *strong historicity* and *temporality embedded in values*, and this means that judges and legal practitioners need to engage with the particular values embedded in past decisions, doctrinal views, legal concepts to advance an answer to the question "What shall I do?" as an answer to the question "What is the law?." Principles come *after* we have engaged and grasped particular values. They are the abstract formulation of these embodied values or so I have tried to argue.