Law, Liberty and the Pursuit of the Common Good

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I. Introduction

There is a lively debate afoot in legal circles, both in the United States and now in Canada, on the "common good". It began with Adrian Vermeule's call for a "common good constitutionalism", in which vague provisions would be infused with values drawn from the Catholic natural law tradition. Many others have now adopted the "common good" moniker, though it is clear there are differing conceptions about what this term actually means.

In a 2021 article on the *Double Aspect* blog, Leonid Sirota and Mark Mancini describe the common good as an "illiberal strain of legal thought that has arisen on the right", akin to the results-oriented reasoning common in progressive legal circles.[1] Sirota and Mancini put forward an impassioned and persuasive defence of law's inherent value and the traditional judicial function — "to seek out the moral and policy choices that are embedded in the law as they find it" by "making the law's text the object of interpretation".[2] Proponents of the "common good", however, much like those of the "living tree", seek to "reverse-engineer the meaning of laws in accordance with their preferences".[3]

In response to Sirota and Mancini, Stéphane Sérafin, Kerry Sun and Xavier Foccroulle Ménard ("SSM") published an eloquent defence of the "common good" on the *Advocates for the Rule of Law* blog and subsequently in *Constitutional*

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1 Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law" (February 22, 2021), online: *Double Aspect* (blog) <https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/>.

2 Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law" (February 22, 2021), online: *Double Aspect* (blog) <https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/>.

3 Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law" (February 22, 2021), online: *Double Aspect* (blog) <https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/>.

Forum, in which they deny the charges levelled against this methodology.[4] Interestingly, they distinguish Vermeule's "common good constitutionalism" from Josh Hammer's "common good originalism" and adopt the latter.[5] Whereas Vermeule seeks to interpret legal text in accordance with extraneous natural law principles, Hammer sources certain "common good" values in the text of the U.S. Constitution itself, and therefore argues for a common good reading simply as a matter of proper textual interpretation. Hammer sees his brand of "common good originalism" as the heir to the originalism of Alexander Hamilton and Chief Justice John Marshall.[6]

SSM, while subscribing to Hammer's position, also defend Vermeule. Vermeule is not, in their view, arguing for pre-determined outcomes, but is rather seeking to discern law's authentic meaning like the rest of us. When he speaks of reaching "determinations consistent with the common good", he is arguing not for a preordained outcome, but for a concretization of natural principles into positive law.[7]

With respect, this strikes me as an intellectual smokescreen. Natural law values are not "things" that Vermeule happened upon and must now transform into positive law. They are, at base, social values. He can certainly take the position they are not merely his own preferences — that they are universal values, derived from the word of God or nature itself. He may be right. But in that sense, he is no different from anyone else who claims the mantle of objective moral truth. Moreover, Vermeule has made it clear that he is not looking to expound the meaning of positive law but rather subordinate it to his conception of natural law. He has written, for example, that common good constitutionalism is "not tethered to particular written instru-

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[4] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

[5] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 40 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

[6] Josh Hammer, "Toward a New Jurisprudential Consensus: Common Good Originalism" (February 18, 2021), online: *Public Discourse* <https://www.thepublicdiscourse.com/2021/02/74146/>.

[7] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 47-48 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

ments of civil law or the will of the legislators who created them".[8]

To say, then, that Vermuele is seeking to "concretize" natural law as opposed to reaching a preordained outcome is to make a distinction without a difference. His philosophy is indistinguishable, in principle, from those who seek to "concretize" social justice principles into the law, which are also held up as objective moral truths. But unlike progressives who are prepared to sacrifice the rule of law for a utopian mirage, Vermeule's common good constitutionalism is reactionary, yearning for a distant past its supporters never had the misfortune of experiencing, and so have the luxury of romanticizing.

SSM's discussion of Hammer's "common good originalism", on the other hand, is much more interesting and practically relevant. Whereas Vermeule's common good constitutionalism would collapse positive law into morality, Hammer seems to offer a more nuanced view in which natural law serves positive law. This appears to be where the authors are staking their claim, which is promising.

In this article, I argue that this latter version of the common good is perfectly consistent with Sirota and Mancini's defence of positive law and that the debate is really a much narrower one about the utilization of "purpose" in statutory interpretation. I further argue that the "common good" moniker is unhelpful as it obscures more that it clarifies, in that it suggests an opposition to positive law and liberty, and needlessly sets itself apart from traditional textualism. The wiser approach, in my view, would simply be to argue against literalism and for a more robust contextual analysis in individual cases, which may include natural law where the text, context and purpose deem it appropriate. In other words, not for a "common good originalism", but simply for originalism done right.

II. THE PRIMACY OF THE TEXT

There appears to be fundamental agreement between SSM and Sirota/Mancini regarding the legal primacy of text. SSM argue that natural law principles emanate from the text itself, and that "it is only upon this text, and these rules and doctrines, that natural law can have any juridical force whatsoever".[9] The issue therefore is not whether statutory interpretation should be grounded in the text, but more specifically how the text should be interpreted.

SSM distinguish their own methodology from the "insipid literalism" that only looks to the words themselves; the issue is "not what the legislature *said*, but what

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[8] Adrian Vermeule, "Beyond Originalism" (March 31, 2020), online: *The Atlantic* <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>.

[9] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 47 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

it *did*."[10] This, with respect, is a straw-man argument. For the reasons that Kavanaugh J. outlined in his dissenting judgment in *Bostock v. Clayton County*, it is rarely proper to interpret a text based on its plain meaning.[11] Rather, a judge must typically look to the *ordinary* meaning of the words — the way in which they would be understood in common parlance — in their full statutory context.[12]

In Antonin Scalia and Bryan Garner's seminal text, *Reading Law*, the authors discuss the various canons of construction.[13] Notably, these include 14 contextual canons, seven expected meaning canons, three government-structuring canons, four private-right canons, and six stabilizing canons. Thus, out of total of 57 canons, a clear majority (34) deal with something other than the literal meaning of words.[14] A number of the non-literal canons further presuppose certain values, including what could be fairly characterized as natural law.

The rule of lenity, for example, construes any ambiguity in a criminal statute in the defendant's favour.[15] The *mens rea* canon requires that offences imposing substantial punishment be presumed to require at least awareness of committing the act.[16] The presumption against implied right of action holds that the creation of any private right of action must be express.[17] Similarly, a statute only derogates from a common law right or changes its meaning when that disposition is clear.[18] Finally, a statute is presumed to have no retroactive application.[19] None of these canons are a matter of mere grammar or syntax. They all rely upon pre-existing normative

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[10] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 50 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

[11] *Bostock v. Clayton County*, 590 U.S. ___ (2020), at 26.

[12] *Bostock v. Clayton County*, 590 U.S. ___ (2020), at 25.

[13] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012).

[14] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at xi-xvi.

[15] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 296.

[16] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 303.

[17] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 313.

[18] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 318.

[19] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 261.

commitments, namely, to liberty and order. But, by the same token, they can be applied in a largely neutral and consistent fashion.

Likewise, the canons presume what SSM would likely call a "rational lawgiver". There is a presumption that the legislature uses words consistently;[20] there is a presumption that the legislature does not employ superfluous language;[21] there is a presumption that the legislature would not contradict itself;[22] there is a presumption that the legislature would not enact an absurdity;[23] and there is a presumption that the legislature attempts to keep its enactments within the bounds of the Constitution.[24] Once again, there is no purely linguistic reason to employ these canons; they reflect foundational assumptions about our democratic institutions. The principles themselves are not neutral, but they are generally capable of being *neutrally applied* in a particular case.

To be sure, there is disagreement among textualists regarding the appropriateness of certain canons. I would, for example, take a somewhat more relaxed view than Scalia and Garner with respect to the "clues" one may examine to discern textual meaning.[25] I would describe myself as a more "inclusive" textualist, in that I have no fundamental objection to looking at objective surrounding circumstances at the time of the statute's enactment, historical context, and even legislative history, provided these sources are reviewed cautiously, only to resolve true ambiguities, and always in the service of discerning textual meaning. But it should be emphasized that even stricter textualist approaches rely on a significant number of non-literal and morally infused principles.

Justice Huscroft's dissent in *R. v. Jarvis*, which SSM cite in their article, should therefore be understood as a proper application of the principles of statutory interpretation.[26] Whereas the majority interpreted the term "privacy" based on its

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[20] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 170.

[21] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 174.

[22] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 180, 183, 252.

[23] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 234.

[24] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 247.

[25] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan, Minnesota: Thomson/West, 2012), at 369-390.

[26] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 50-51, citing *R. v. Jarvis*, [2017] O.J. No. 5261, 2017 ONCA 778 (Ont. C.A.); (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-

literal dictionary definition, Huscroft J.A. looked at its ordinary meaning in common parlance. His statement that "Parliament can be taken to have made a reasoned choice for the common good" is merely a recognition that in interpreting the term "privacy", the court should not opt for a literal meaning but rather for the ordinarily understood meaning.[27] Indeed, the semantic choices in the provision itself suggest he was correct. Section 162(1) of the *Criminal Code*[28] states that a person's reasonable expectation of privacy will be breached where the person is in a place where they can reasonably be expected to be nude *or* where the observation or recording is done for a sexual purpose.[29] The express mention of "place" in section 162(1)(a) but not in section 162(1)(c) is a good indication that location is not the determinative, and perhaps not even a relevant, consideration where the perpetrator is making a recording for a sexual purpose.[30]

Where there may be some disagreement between SSM's approach and the traditional textualist method is in the role of purpose. SSM would appear to support a more purposive approach in which the role of the court "is to inquire about the reason the legislature chose the specific means, the specific *determinatio*, it adopted in pursuit of the ultimate common good".[31] Candidly, it is unclear what precisely they are arguing for here. They quote Côté and Brown JJ.'s statement that statutory interpretation entails discerning legislative intent by looking "to the words of the statute in their entire context" — in other words, a purely textual inquiry.[32] But then in the same breath, they speak of the "reason" animating the legislature, which suggests something beyond "the words of the statute in their entire context".[33]

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[27] *R. v. Jarvis*, [2017] O.J. No. 5261, 2017 ONCA 778, at para. 123 (Ont. C.A.).

[28] R.S.C. 1985, c. C-46.

[29] *Criminal Code*, R.S.C. 1985, c. C-46, s. 162(1).

[30] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 162(1)(a), (c). See *R. v. Jarvis*, [2017] O.J. No. 5261, 2017 ONCA 778, at para. 124 (Ont. C.A.).

[31] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 50 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

[32] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 50 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>, citing *Keatley Surveying Ltd. v. Teranet Inc.*, [2019] S.C.J. No. 43, 2019 SCC 43 at para. 95 (S.C.C.).

[33] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const.

To the extent SSM are endorsing Hammer's approach, it would appear to be at least somewhat extra-textual. Hammer approvingly quotes Robert Lowry Clinton's statement that "law cannot be read from the mere words of a legal text, *but only from the will, or intention, of the lawgiver*."[34] This appears, on its face, to be more than merely an attack on literalism; it is an attack on text as the sole source of positive legal meaning.

There is, of course, nothing new about this position. Purposivists have long advocated an approach that looks beyond the text to discern some extraneous legislative intent. This approach can arguably be traced back to the dominant approach to interpretation during the 15th and 16th centuries known as the "equity of the statute", in which courts would interpret laws based on their "spirit". As Australian judge Ashley Black notes, the broad discretion this interpretive approach afforded to judges eventually came to be seen as incompatible with parliamentary supremacy, and was thus largely abandoned by the 19th century.[35]

As I have written before, discerning an intent beyond the words themselves raises a host of philosophical and practical issues.[36] Permitting judges to look beyond the text endows them with the discretion to impose a *post-facto* purpose in accordance with their own preferences and in defiance of the ordinary meaning of the words. It will invariably produce exactly what SSM seek to avoid: judicial legislation that ignores legislative intent. And if history is any guide, it is far more likely to produce outcomes that broadly cohere with social justice ideology than with natural law. A more rigorous textual approach, admittedly, does not eliminate judicial legislating or produce perfect neutrality, but it does mitigate these concerns by more strictly delineating the borders of permissible disagreement, thereby fostering a greater degree of judicial accountability.

Forum const. 39, at 50 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>, citing *Keatley Surveying Ltd. v. Teranet Inc.*, [2019] S.C.J. No. 43, 2019 SCC 43 at para. 95 (S.C.C.).

[34] Josh Hammer, "Toward a New Jurisprudential Consensus: Common Good Originalism" (February 18, 2021), online: *Public Discourse* <https://www.thepublicdiscourse.com/2021/02/74146/> (emphasis added).

[35] Ashley Black, "Development of Principles of Statutory Interpretation" (address delivered at the Francis Forbes Society for Australian Legal History Introduction to Australian Legal History Tutorial, October 1, 2013), at 7, online: <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Black/black_20131001%282%29.pdf>. See also Theodore Plucknett, *A Concise History of the Common Law*, 5th ed. (Indianapolis, Indiana: Liberty Fund Inc., 2010), at 328-41.

[36] See Asher Honickman, "Supreme Court Alters the Balance of Power Between Labour and Business" (July 1, 2014), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/supreme-court-alters-the-legislated-balance-of-power-between-labour-and-business/>. See also Asher Honickman, "The Perils of the Purposive Approach" (May 1, 2017), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/purposive-approach/>.

Moreover, our "lawgivers" are incorporeal entities that cannot, strictly speaking, exhibit "reason" beyond their enactments. This is especially evident in the context of Canada's *Constitution Act, 1867* (formerly the *BNA Act*).[37] Whose "intent" should be given effect and whose "reason" must be recognized? The Fathers of Confederation who drafted the Quebec Resolutions (the document upon which the *Constitution Act, 1867* is based)? The colonial legislatures that voted on them? The framers of the *Constitution Act, 1867*, many of whom remain unknown to this day? Or the British Parliament, which ultimately passed the *Constitution Act, 1867*? There were, in other words, *four* distinct groups who contributed to Canada's Constitution, with limited overlap between them. Strictly speaking, the ultimate "lawgiver" was the British Parliament, but we would likely all agree that its members possessed no intention beyond the establishment of a self-governing dominion and that, in any case, their "reason" should not be the focal point of the analysis.

The intent behind the *Constitution Act, 1867* must be gleaned from the words it employs, taken in their full statutory context, and with due regard for the objective surrounding circumstances at the time of enactment. Canada's constitution, like its American counterpart, was not the brainchild of one man, but was the product of a compromise between diverse interests and divergent preferences. Sir John A. Macdonald acknowledged as much in the Canadian Legislative Assembly on February 3, 1865:

> The resolutions on their face bore evidence of compromise; perhaps not one of the delegates from any of the provinces would have propounded this scheme as a whole, but being impressed with the conviction that it was highly desirable with a view to the maintenance of British power on this continent that there should be Confederation and a junction of all the provinces, the consideration of the details was entered upon in a spirit of compromise. Not one member of the Canadian government had his own views carried out in all details, and it was the same with the other delegates.[38]

In sum, we should certainly be wary of literalist interpretations, but we must remain firmly wedded to the text and rely primarily on the traditional canons of construction. Statutory interpretation will often be technically complex, but it should never be mechanical. Extra-textual evidence of purpose and underlying principles — whether natural law or otherwise — should be permitted, but they should be utilized with a great deal of care and humility, and solely to discern authentic textual meaning.

III. THE PROBLEM WITH "COMMON GOOD CONSTITUTIONALISM"

The common good movement, whether of the Vermeulian or Hammerian variety,

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[37] *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

[38] Janet Ajzenstat, *et al.*, eds., *Canada's Founding Debates* (Toronto: Stoddart, 1999), at 421-22.

appears on its face to be a reaction to a perceived excess of libertarian judicial reasoning and outcomes. This criticism is not entirely unfounded — at least in the United States. There is a tendency among some originalists in that country to see the founding in purely libertarian terms, and to ignore the influence of Alexander Hamilton and other more conservative founders; to interpret rights broadly and to construe state power narrowly. And in each case, the outcome is defended as the mere neutral application of interpretive principles, leading many on both the social justice left and the common good right to conclude that the whole thing is a libertarian political project disguised as positive law.

That said, the criticism is overstated and does not justify this rebranding. As Ilya Shapiro recently noted, the lightning rod for the entire movement is really just a single SCOTUS decision, *Bostock v. Clayton County*, which nearly all originalists agree was wrongly decided.[39] But the bigger problem, in my view, is that Hammerian "common good originalism" can easily slip into Vermeulian "common good constitutionalism" — or, at the very least, be plausibly conflated with that illiberal strand. Put bluntly, there is a legitimate concern that common good advocates diminish the value of liberty and positive law in favour of purely collective interests.

There are, to be sure, no good reasons why liberty ought to be excluded from our conception of the common good. Put another way, natural law can and should incorporate at least some natural rights. The "common good" is invariably articulated in vague or indeterminate language and the reason is obvious: beyond certain foundational values, we will never agree on the precise scope of what it entails. And even where we can say with relative certainty that a social value is part of the common good, experience shows that enacting that good into law is often fraught with unintended consequences. Any realistic conception of the common good must therefore in practice leave a great deal to individual choice. Beyond that, a robust, though certainly not limitless, conception of liberty decreases human suffering and fosters the pursuit of happiness — surely a laudable goal for anyone claiming to care about the common good.

An over-emphasis on collective interests also ignores the reality that liberty, while not being the only principle underpinning Canada's legal order, is nonetheless an essential one. As noted above, many of the traditional principles of statutory interpretation are premised on individual liberty and autonomy, and the common law is infused with these values. SSM point to the test for granting an interlocutory injunction, but in the private law sphere at least, this is a curious place to stake out a claim for "collective interests".[40] Obtaining an interlocutory injunction against a

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[39] Ilya Shapiro, "Reimaging the Conservative Legal Movement" (February 23, 2021), online: *Pairagraph* <https://pairagraph.com/dialogue/e132dd04fe394133bfa19a8d2c3823ea/2>, citing *Bostock v. Clayton County*, 590 U.S. ___ (2020).

[40] See Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const.

private actor is extremely difficult for the very reason that it is an affront to personal autonomy. It is "an extraordinary remedy which involves restraining persons from doing that which they otherwise would be entitled to do, without first having the benefit of a trial to determine the facts and their rights".[41] As the Supreme Court of Canada has said more generally, "the common law is a jealous guardian of personal autonomy".[42]

Liberty and limited state power are also among the principles animating the *Constitution Act, 1867*. Power is separated between the executive, legislative and judicial branches, which any honest historical analysis will conclude was born of a desire to curb its abuses. Section 53 of the *Constitution Act, 1867* codifies the principle of no taxation without representation.[43] The provinces are not only excluded from passing criminal law, but are also precluded from interfering with interprovincial trade whether through tariffs, excise taxes or other regulations.[44] On the other hand, the provinces, being closer to the people, have the exclusive power to regulate most commercial matters.[45] The disallowance power enables the federal government to impose a check on the provincial legislatures — and was historically seen as a liberty-protecting measure.[46] Likewise, the Senate checks the potential excesses of the House of Commons — in theory, at least.

Today we are inclined to view the unelected Senate and the federal disallowance power as undemocratic anachronisms. But it was for this very reason that some of the Fathers of Confederation contrasted their system of "British liberty" with "American equality".[47] An excess of democracy was considered by many to be a danger to property rights and to liberty more broadly. Canada's founding thus incorporated a robust yet fundamentally Hamiltonian conception of liberty, in which liberty and order are viewed not as antagonists, but as mutually reinforcing concepts.

Forum const. 39, at 46, 50 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>.

[41] *Gretzky v. Ontario Minor Hockey Assn.*, [1975] O.J. No. 2540, 10 O.R. (2d) 759, at para. 8 (Ont. H.C.J.).

[42] *Childs v. Desormeaux*, [2006] S.C.J. No. 18, 2006 SCC 18, at para. 31 (S.C.C.).

[43] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 53.

[44] See *Constitution Act, 1867*, 30 & 31 Vict., c. 3, ss. 91, 121.

[45] See *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92.

[46] See R.C. Vipond, "Rights Talk in Canada in the Late Nineteenth Century: 'The Good Sense and Right Feeling of the People' " in G. Blaine Baker & Jim Phillips, eds., *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, 2006) 94, at 101-102.

[47] Janet Ajzenstat *et al.*, eds., *Canada's Founding Debates* (Toronto: Stoddart, 1999), at 18, 19, 43, 168-69, 190, 436-37.

SSM appear to acknowledge that liberty is an aspect of the natural law underpinning Canada's constitutional order, which is encouraging. They reference Rand J.'s invocation in *Saumur v. Quebec (City)* of the "original freedoms" that precede positive law.[48] I have read the quoted passage many times, and, candidly, I am still unsure whether Rand J. was correct that the provinces may not regulate fundamental freedoms such as religion since they are not *civil* rights.[49] But insofar as he was correct, it only underscores that liberty lies at the heart of Canada's legal order.

Similarly, the common good should be able to incorporate the inherent value of positive law. As Sirota and Mancini note, law enables individuals to settle disagreements peacefully. It also allows them to conduct their affairs in a predictable fashion, which fosters both order and liberty. SSM appear to criticize the notion that positive law is inherently valuable, arguing that an "illiberal" legislature could promulgate laws that undermine the overall utility of the legal system. This is true in theory, but in practice law will retain its inherent value provided there is *a rule of law state*. The law is the only viable alternative to violence and coercion and so its value is lost where it commits the very violence that it exists to oppose, such as in Nazi Germany. But in a rule of law state like Canada where power is separated between the three branches of the state (two of which are accountable to the people), where legislative power is further divided between the central and provincial orders, and where state power is further constrained by a bill of rights and other constitutional limitations, it becomes increasingly unlikely that the law will succeed in being used as an instrument of violence.

The canons I describe are therefore valuable not only because they are premised on a regard for liberty, orderliness and democratic law-making (principles with which most people would agree); they are also valuable precisely because they are established, because they are capable of being predictably and consistently applied and, therefore, because people can order their lives with the knowledge of their existence and application. They are not "neutral" in the sense of being valueless, but their value is nonetheless inherent in a rule of law state.

Canadian proponents of the common good would therefore do well to affirm a commitment to ordered liberty and positive law. But even were they to do this, a strategic problem would remain, namely, that branding one's ideology as "common good" obscures more than it clarifies, and is likely to alienate potential intellectual allies. By signalling — perhaps unintentionally — an opposition to liberty and

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[48] Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum const. 39, at 52 (March 3, 2021), online: *Advocates for the Rule of Law* <http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/#_ftn53>, citing *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.).

[49] *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at 329 (S.C.C.).

positive law, the advocates of the "common good" appear to reject values most people support, including and especially those who would broadly consider themselves to be on the centre or moderate right of the political spectrum. The adoption of this Vermeulian label gives rise to a reasonable apprehension that common good proponents are, in fact, results-oriented integralists hostile to liberty and law — a charge that they will find themselves endlessly rebuffing if they do not abandon the moniker.

Moreover, the "common good" label is especially ill-suited in Canada, where there is a much weaker libertarian jurisprudential current. Canadian textualists and originalists tend to be more open to historical purposes, more accommodating of legislative choice, and more comfortable with a tradition of peace, order and good government — in sum, more Hamiltonian. Why set yourself apart, in other words, when the substance of your philosophy is essentially what textualists already endorse? The "common good" either advances something uncontroversial, in which case the label is unhelpful, or something reactionary and illiberal, in which case it should be vociferously opposed.

IV. CONCLUSION: THE POTENTIAL FOR FUSION

Some proponents of the common good may say that I am misrepresenting their position — that in fact they very much see a space for liberty and agree with the inherent value of positive law. But if I have misinterpreted them, it is because their position lacks precision, and their insistence on the "common good" moniker raises reasonable suspicions that there is something else going on here besides the mere interpretation of text. SSM have thankfully clarified some of that confusion, but questions still remain.

There is certainly potential for a fusion of the respective frameworks endorsed by Sirota/Mancini and SSM that would leave only the most ardent libertarians and integralists unsatisfied. Such a fusion would focus the debate far more narrowly on the role of purpose, and the guidance that the common good, and natural law more generally, can provide in specific cases. This, in my view, would be a far more fruitful inquiry than attempting to craft a new theory of common good originalism. We should be open to referencing the common good where warranted, just as Huscroft J.A. did in *Jarvis*, but it should be abandoned as the banner of a distinct approach to interpretation. Where natural law or the common good is invoked, it must never be the proverbial tail wagging the positivist dog.

The response to overly-literalist interpretations should not be "textualism is bad", but rather "this is bad textualism". This was fundamentally the message of Huscroft J.A.'s dissent in *Jarvis*, along with Justice Kavanaugh's dissent in *Bostock*. Qualifying originalism or textualism as "common good" diminishes its legalistic character and transforms it into a political project. Instead, we should discuss the many principles animating our law, and should do so, not from the perspective of an abstract philosophy, but in the context of real cases dealing with particular laws, each with its own unique text, context and purpose.