

The Forms still rule us from their graves—notes on *Common Good Constitutionalism*¹

Two of the “powerful elements of classical jurisprudence”² discussed in the book caught my interest, and the two – call them *eidōs* and *determinatio* – are related in the way intimated by those names themselves. The following remarks contrast that ancient pair’s ontology with the more recently articulated phenomenon of historical ontology³ and the mode of its articulation, genealogy—clavicle-in-the-cat jurisprudence, if you like.⁴

Eidōs first. Under Vermeule’s proposed recovery, “The [Supreme] Court’s jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable.” For instance the claim “from the notorious joint opinion in *Planned Parenthood v. Casey*, that each individual may ‘define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’

should be not only rejected but stamped as abominable, beyond the realm of the acceptable forever after.”⁵

Let it be anathema, so to speak. Sharp words, especially when compared to the mildness of Justice Scalia’s comment on the same matter. To read him is to know that Scalia could peel hide when he wanted to, but all he said in *Casey* was “The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the ‘concept of existence, of meaning, of the universe, and of the mystery of human life.’ Rather, I reach it, etc.”⁶

Vermeule’s retrieval effort might have been subtitled *The Lost Law*, addressed as it is to “the intelligent observer of the law, whether or not a lawyer, who intuits that something has gone

¹ Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity Press 2022). “The forms of action we have buried, but they still rule us from their graves.” F. W. Maitland, *The Forms of Action at Common Law* (1909) Lecture 1: <https://sourcebooks.fordham.edu/basis/maitland-formsofaction.asp>.

² CGC 179.

³ Not until we reach the work of the humanists do we “stand on the threshold of modern historical consciousness.” J. G. A. Pocock, *The Ancient Constitution and The Feudal Law: A Study of English Historical Thought in the Seventeenth Century* ([1957] reissue with retrospect 1987) 4. ‘Historical ontology’ is Ian Hacking’s phrase.

⁴ See O. W. Holmes, Jr., *The Common Law* (1881) 35:

<https://babel.hathitrust.org/cgi/pt?id=mdp.39015066031447&view=1up&seq=55&q1=clavicle>.

⁵ CGC 41-42. Presumptively abominable: “[Human being] is itself a self-interpreting, self-articulating entity.” Martin Heidegger, *History of the Concept of Time: Prolegomena* (tr. Theodore Kisiel 1985) 302; *Gesamtausgabe Band 20*: 418: <https://www.beyng.com/gaapp/recordband/21>.

⁶ <https://www.law.cornell.edu/supremecourt/text/505/833>.

very wrong with our law and our legal academy, but isn't sure exactly how or why."⁷ What went wrong? "[T]he classical law ['common good law'] was central to our legal world (not exclusive, but central) during the founding era and through the nineteenth century. . . . A change happened around the end of the nineteenth and beginning of the twentieth centuries – well after not only adoption of the Constitution itself, but the adoption of its most important amendments, such as the Reconstruction Amendments."⁸

That change was *innovatio, cupiditas novarum rerum*—modernism. “In a conjunction of interest based on opposite motives, progressives and libertarians tend to portray that world [the constitutional world of *Lochner v. New York*, 1937] as highly restrictive of governmental authority – progressives because they want to emphasize the need to break with the past, libertarians because they want to disguise as originalist and traditional their attempt to sharply restrict the ruling power of the state, an approach that is in fact innovative and modernist.”⁹

Vermeule's common good constitutionalism rejects the throughline of modernism, *viz.*: “the progressives' overarching sacramental narrative, the relentless expansion of individualistic autonomy;” a narrative which treats “constitutional law as an engine of continual liberation, or of equalization;” a program in pursuit of “liberating individuals from the unchosen bonds of tradition, family, religion, economic circumstances, and even biology.” That is to say a “Whiggish ‘living constitutionalism’ that promotes individualism, radical autonomy, and identitarian egalitarianism – the aims of the progressive movement in the Anglophone world.”¹⁰

For Vermeule individualistic, egalitarian, radical autonomy is not the true Jacob, the authentic for-the-sake-of-which, the *Worumwillen* proper to human being; rather, the proper *telos* is the common good:

⁷ *Id.* 25. Heidegger discusses the disclosive power of breakdown as a kind of insight at *Being and Time* I.3 ¶ 16.

⁸ CGC 58. The change was consolidated after World War II. *Id.* 2, 24, 167, 172, 180,

⁹ *Id.* 67. He goes on, “The progressive and the libertarian are twins, mirror images of one another, despite their mutual enmity. They are, in fact, on the same side of the fault line that separates the constitutional common good from modernism. Hence their shared tendency to panicky, bewildered outrage at the thought that government might be charged with care for the morals and welfare of the community. In contrast to these twin modernist approaches, the police power framework has firm roots in the classical legal tradition.” *Ibid.* A contemporary Catholic lawyer's attack on modernism likely gets some of its impetus from Pius X's execration of the phenomenon's impact on the faithful; i.e. as calculated to deceive souls, impeding the progress of souls, blinding the soul and leading it into error, the ruin of souls, the great danger to souls: <https://www.papalencyclicals.net/pius10/p10pasce.htm> ; ¶ 26: “practically their [Modernists'] principal doctrine, namely, evolution.” *Tonner contre.*

¹⁰ CGC 36, 22, 37. Vermeule's retelling of the “sacramental narrative” at 119 has the structure of the dragon-slayer myth; the judge as Indra, smashing Vrtra, the Blocker, with the *vajra* of progthink to release the pent-up waters of autonomy. See Calvert Watkins, *How to Kill a Dragon: Aspects of Indo-European Poetics* (1995). New dope, old bong.

“In brief, the common good is, for the purposes of the constitutional lawyer, the flourishing of a well-ordered political community. The common good is unitary and indivisible, not an aggregation of individual utilities. In its temporal aspect it represents the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community. . . Rights, properly understood, are always ordered to the common good and that common good is the highest individual interest.”¹¹

Again, “the common good . . . is the good proper to, and attainable only by, the community. . . the common good is also a good for individuals, indeed their highest good, but the common good is not produced by the summation of individual goods.” Holmes was mistaken to be skeptical that “**there exists an objective common good that transcends human will;**” because “law has **a real nature, an objective integrity that transcends** the particulars of any given constitutional order.”¹² (my emphasis)

Maybe now it’s clear why the term *eidos* fits this element. The real, objective, transcendent common good is ontologically prior to individual human beings: “human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities (including ruling authorities) within which humans are always born, found, and embedded;”¹³ and ontologically prior to any particular avatar of itself: “The common good in its capacity as the fundamental end of temporal government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity.”¹⁴

On this view individuals are like *sterēsis-in-hulē* pinin’ for the fjorms.¹⁵ Moreover, because the common good is the highest good for each person persons are in that respect homogeneous and fungible; and to hold that persons may determine for themselves an idiosyncratic highest good or interest is in derogation of **the** common good; therefore ‘abominable, beyond the realm of the acceptable forever.’ Yet though it transcends human will and individual lives the objective common good does not, unlike metaphysical *eidos*, transcend nature, the order of finitude. Vermeule limits his account “to the secondary ends of the political community: its temporal

¹¹ *Id.* 7, 167.

¹² *Id.* 26, 70, 122.

¹³ *Id.* 29.

¹⁴ *Id.* 10.

¹⁵ “But since there is something divine and good and sovereign [τίνοϋ θείου καὶ ἀγαθοῦ καὶ ἐφετοῦ], we say that there is something opposite to it [lack of divinity, goodness, and sovereignty], and something else [material that lacks] which inherently yearns for and stretches out toward it by its own nature [τὸ δὲ ὁ πέφυκεν ἐφίεσθαι καὶ ὀρέγεσθαι αὐτοῦ κατὰ τὴν αὐτοῦ φύσιν]. . . . it is the material that does this [yearning and stretching] . . . That, then, there are starting points [*archai*], and what they are [the contraries *sterēsis-in-hulē* and *eidos*], and how many in number [three-in-two], let it have been marked out in this way for us.” Joe Sachs, *Aristotle’s Physics: A Guided Study* (1995) 45, 46. *Physics* 192a, b.

felicity, the order of nature rather than the order of grace.” He says accordingly, “I neither need advance, nor do advance, any particular account of ultimate ends, and nothing in my claims depends on such an account.”¹⁶

On to *determinatio*. How to actualize, operationalize, effectuate—how hale a transcendent something *here*, for *use*? “Legislators and executive agents as well as judges ought to interpret constitutional principles in light of the common good;” i.e., “ascertain the content of the common good,” engage in “reasonable specifications of legal principles – what the classical tradition calls *determinationes* or determinations.”¹⁷ Determination is “the process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.”¹⁸ To illustrate the method of *determinatio* Vermeule invokes Aquinas on the two ways in which positive law might be derived from natural law. In his quotation of *Summa Theologica* Vermeule emphasizes with italics the second way:

“*The second way* [“a specific application of that which is expressed in general terms;” sicut determinationes quaedam aliquorum communium] *is like that by which, in the arts, general ideas are made particular as to details* [formae communes determinantur ad aliquid speciale]: *for example, the craftsman needs to turn the general idea of a house into the shape of this or that house* [sicut artifex formam communem domus necesse est quod determinet ad hanc vel illam domus figuram].”¹⁹

Heidegger calls that way ‘productive comportment,’ *herstellendes Verhalten*; and claims that “the basic ontological determinations [*Grundbestimmungen*] of a being grow universally out of this horizon,” that is, “the horizon of understanding . . . the Dasein [human existence] as productive [*her-stellende*].”²⁰ Heidegger claimed to prove, in outline at least, that “the chief

¹⁶ *Id.* 29.

¹⁷ *CGC* 9. “In a sense . . . it is inaccurate to say that rights were ‘defeasible’ in the classical structure. Rather more accurate would be to say that rights were *determinable*. That is, rights (as *ius*) are intrinsically ordered to the common good, but the common good is not given in a fixed, identical form for all polities at all times; instead it subsumes a range of general principles we have discussed under the heading of *ragion di stato*, principles that as always have dimensions of scope and weight, and that may in some cases conflict with one another. The common good, then, is itself subject to public *determinatio* or concretization, as are the rights that flow from the common good.” *Id.* 168.

¹⁸ *Id.* 9.

¹⁹ *Id.* 44-45, quoting *Summa Theologica*; bilingual version here:

https://www.logicmuseum.com/wiki/Authors/Thomas_Aquinas/Summa_Theologiae/Part_Ila/Q95 at q. 95 a. 2. co.

²⁰ Martin Heidegger, *The Basic Problems of Phenomenology* (tr. Albert Hofstadter rev. ed. 1988) 105; GA 24: 147-148. <https://www.beyng.com/gaapp/recordband/25>.

ancient determinations [*antiken Hauptbestimmungen*] for the thingness or reality of a being originate in productive activity, the comprehension of being by way of production.”²¹

“What is formed is, as we can also say, a shaped product. The potter forms a vase out of clay. All forming of shaped products is effected by using an image [*eines Bildes*], in the sense of a model [*des Vorbildes*], as guide and standard. The thing is produced by looking to the anticipated look [*vorweggenommene Aussehen*] of what is to be produced by shaping, forming. It is this anticipated look of the thing, sighted beforehand [*vorweggenommene und zuvor gesichtete Aussehen*], that the Greeks mean ontologically by *eidōs*, *idea*.”²²

But where does this apparition itself come from? Heidegger reconstructs the Greek account: “We will now attempt to reflect on the Aristotelian-Platonic determination of the essentiality of the essence [*Bestimmung der Wesenheit des Wesens*].”²³

—Stop for a moment. Is this really necessary? Can’t we skip Greek ontology and return to Con Law? No, not if we want to see the point of divergence between the classical understanding of *eidōs/determinatio* (which is Vermeule’s—and Langdell’s and Blackstone’s and Coke’s) and the notion of descent of the present, historical ontology. So, *con permiso*, back to Heidegger.

“The ‘essence’ [*»Wesen«*] of a thing, so it is said, is one and universal and applies to the many particular instances. . . . The essence is that from which a particular thing, and indeed *what* it is, has its origin, whence it derives. Therefore the essence of a thing, of any particular whatever, can be conceived as that which the thing itself already in a certain sense ‘was’ before it became the singular thing it ‘is.’ For if there were not already – no matter how – something like table in general [*Tisch überhaupt; cf. forma communis domus*] then never could any particular table be fabricated; what the particular table is supposed to be as a table would be altogether lacking. Therefore Aristotle also conceived the essence as the Being (*εἶναι*) of the particular being, what it – the particular – already was (*τί ἦν*) before it became this particular. The essence was thus expressed accordingly: *τὸ τί ἦν εἶναι*.”²⁴

²¹ *Id.* 105; GA 24: 148.

²² *Id.* 106; GA 24: 150.

²³ Martin Heidegger, *Basic Questions of Philosophy: Selected “Problems” of “Logic,”* (tr. Richard Rojcewicz and André Schuwer 1994) 53; GA 45: 58. <https://www.beyng.com/gaapp/recordband/44>.

²⁴ *Id.* 54; GA 45: 58-59. *Cf.* “According to Blackstone somewhere there existed a general principle of law, which was the perfect form of any rule. This perfect form was merely exemplified and imperfectly reflected in any particular legal system. . . . The essences distilled by the ‘noble alchemy’ of the law possessed a purity and perfection that were immeasurable. That man could sometimes not discover the rationale of a law was evidence not of any vagueness in the rationale itself but of the crudeness of man’s instrument of analysis. One of the first efforts of the student of law should be, then, to avoid preoccupation with the confusions and perversions which had been the work of men, and instead to devote himself to the search for the pure essences which were properly the substance

Recapitulating, “An individual house is not first [*ist nicht erst*] a house as an individual thing, but what it is as this individual thing, namely ‘house,’ was already [*war schon*].”

Now here comes the point of divergence: “And that was, **not because there were already other individual houses before this one** [my emphasis], but because, in order for this or that house to become and be what it is, something like ‘house in general’ [»*Haus überhaupt*«] must exist and be given,”²⁵ ‘House in general’ is ontologically prior to houses; a history of houses might be attempted but ‘house in general’ has no history, it always already was, it pre-exists houses. One might well ask,

“How could the essence ‘table,’ what a table is, be determined and set forth at all if we did not encounter in advance at least one single real table, on the basis of which – by means of so-called ‘abstraction’ – we draw out and read off the general essence ‘table’ and disregard the particularities of any individual table? But then again, we have to ask, where would this one single table – as table – come from if the idea of what a table is in general were not already guiding its very fabrication and realization? Must the idea ‘table’ not be brought forth in advance even for the first of all tables to be crafted? Or do both of these go hand in hand? In any case, is the grasping of the essence not of such a kind that, as grasping, in a certain sense it first ‘brings forth’ the essence and does not somehow patch it together [*zusammenflickt*] subsequently, out of already present at hand single cases [*aus denschon vorhandenen Einzelfällen*].”²⁶

So how does the grasping of the essence, *Erfassung des Wesens*, take place?²⁷ We see it in our ‘mind’s eye.’

“The anticipated look, the proto-typical image, shows the thing as what it is before the production and how it is supposed to look as a product. The anticipated look has not yet been externalized as something formed, actual, but is the image of imag-ination, of fantasy, phantasia, as the Greeks say—that which forming brings freely to sight, that which is sighted. . . . Here it may already be

of his study.” Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries* (1941) 41-42, 28.

²⁵ *The Basic Qs of P.* 58; GA 45: 63. H. then connects Aristotle with Kant: “Consequently, ‘house’ is, with regard to the constructed individual house, what already was—τὸ τί ἦν εἶναι. With this determination is connected the one that became usual in the subsequent thinking of the West and received a special stamp in Kant’s philosophy: the essence as what is prior to the thing, deriving from what is earlier: the a priori.” *Ibid.*

²⁶ *Id.* 71; GA 45: 79-80.

²⁷ At CGC 80 Vermeule cites with approval the Digest of Justinian 1.3.17: “Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.” Scire leges non hoc est verba earum tenere, sed vim ac potestatem. <http://legalhistorysources.com/Law508/Roman%20Law/JustinianDigest.htm> .

seen that the phenomenon of sight which pertains to producing comes forward in characterizing the whatness of a thing as *eidos*. In the process of producing, that which the thing was is already sighted beforehand. Hence the pre-eminence of all these expressions in Greek ontology: *idea*, *eidos*, *theorein*. Plato and Aristotle speak of *omma tes psuches*, the soul's eye, which sees being."²⁸

This is a picture-theory of action. There arises – no matter how – an image in our thinking which we catch sight of and then operationalize, effectuate, concretize, make present, produce, etc. Waiving other grounds of objection to such a theory I want only to confront the doctrine of the essence, *Wesen*, *eidos*, 'the is that already was,' with the phenomenon of historical ontology through the testimony of its 'priests,' the genealogists.

Nietzsche says the essays in his genealogy book are dedicated to 'hypotheses of origin,' *Herkunfts-Hypothesen*.²⁹ The result of that work, as of any competent genealogist's work, is the discovery, as Foucault puts it, "that behind things there is an altogether other thing. Not at all their dateless, essential secret. But the secret that they have no essence; or that their essence [their 'is that already was'] was put together part by part from mutually alien images."³⁰ Mutually alien because each component image, itself an 'is that already was,' has its own history that can be traced back, as Geuss says, "through a series of ramifying ancestors, *never* encountering a single, natural, original, absolute starting point."³¹ Never encountering τὸ τί ἦν εἶναι *schlechthin*. It's heterogeneity all the way back.³²

An example – also from antiquity – of the historical descent of a mental picture bears the telling label 'Inherited Conglomerate':

"In the previous chapters of this book I have tried to illustrate within a particular field of belief the slow, age-long building up, out of the deposit left by successive religious movements, of what Gilbert Murray in a recently published lecture has called 'the Inherited Conglomerate.' The geological metaphor is apt, for religious growth is geological: its principle is, on the whole and with exceptions, *agglomeration*, not substitution. A new belief-pattern very seldom effaces

²⁸ *BPP* 107, 109; *GA* 24: 150, 154.

²⁹ Friedrich Nietzsche, *Zur Genealogie der Moral. Eine Streitschrift* (1887) *Vorrede* § 4: <http://www.nietzschesource.org/#eKGWB/GM>.

³⁰ "Que derrière les choses il y a «tout autre chose» : non point leur secret essentiel et sans date, mais le secret qu'elles sont sans essence, ou leur essence fut construite pièce à pièce à partir de figures qui lui étaient étrangères." Michel Foucault, "Nietzsche, La Généalogie, L'Histoire," in *Hommage à Jean Hyppolite* (ed. Suzanne Bachelard 1971) 148. English translation in *The Foucault Reader* (ed. Paul Rabinow 1984).

³¹ Raymond Geuss, Preface to the paperback ed. *Public Goods, Private Goods* ([2001] 2003) x (his emphasis).

³² Never encountering 'the one.' "But they [who speak of forms, Platonists] hold the forms to be the is that already was of each of the other things, and the is that already was of the forms to be the one." ἀλλὰ τὸ τί ἦν εἶναι ἐκάστω τῶν ἄλλων τὰ εἶδη παρέχονται, τοῖς δ' εἶδеси τὸ ἓν. *Metaphysics* 988b 1.

completely the pattern that was there before: either the old lives on as an element in the new—sometimes an unconfessed and half-unconscious element—or else the two persist side by side, logically incompatible, but contemporaneously accepted by different individuals or even by the same individual. As an example of the first situation, we have seen how Homeric notions like *ate* were taken up into, and transformed by, the archaic guilt-culture. As an example of the second, we have seen how the Classical Age inherited a whole series of inconsistent pictures of the ‘soul’ or ‘self’—the living corpse in the grave, the shadowy image in Hades, the perishable breath that is spilt in the air or absorbed in the aether, the daemon that is reborn in other bodies. Though of varying age and derived from different culture-patterns, all these pictures persisted in the background of fifth-century thinking; you could take some of them seriously, or more than one, or even all, since there was no Established Church to assure you that this was true and the other false. On questions like these there was no ‘Greek view,’ but only a muddle of conflicting answers.”³³

If the common good is the soul of the polity, it may be like the soul of fifth-century thinking—ask what it is and you get a muddle of conflicting answers. Yet Vermeule’s project is Aristotle’s, a striving to isolate ‘what is common to every soul’ as a kinetic being-at-work-staying-itself; its *entelechy*, the activity of effecting something’s for-the-sake-of-which.³⁴ On this understanding insofar as the common good is the soul of the polity the law, its human agents, and its human subjects are the effectors, the organs which that *entelechy* procures for itself.³⁵

“Characteristically,” Geuss writes,

“a genealogy takes as the object of study some deeply entrenched contemporary item or phenomenon: a practice, institution, or identity—such as Christianity, democracy, the prison system, the ‘clinical’ system of organizing medical research and care—that presents itself as unitary and coherent in that all of its parts fit

³³ E. R. Dodds, *The Greeks and the Irrational* ([1951] 1966) 179-180. On Christianity as inherited conglomerate see Raymond Geuss, “Nietzsche and genealogy,” in Geuss, *Morality, Culture, and History: Essays on German Philosophy* (1999).

³⁴ “So, if one needs to say what is common to every soul, it would be that it is a being-at-work-staying-itself of the first kind of a natural, organized body.” *Aristotle’s On the Soul and On Memory and Recollection* (tr. Joe Sachs 2004) 82. εἰ δὴ τι κοινὸν ἐπὶ πάσης ψυχῆς δεῖ λέγειν, εἴη ἂν ἐντελέχεια ἢ πρώτη σώματος φυσικοῦ ὀργανικοῦ. *De anima* 412b.

³⁵ “The common good in its capacity as the fundamental end of temporal government shapes and constrains, etc.” *CGC* 10. “We cannot say that the organ has capacities, but must say that the capacity has organs. . . . The organ . . . is in a capacity’s possession. It is the capacity which possesses here rather than the organ. It is the capability which procures organs for itself, rather than organs coming to be equipped with capacities. . . . [Das Fähigkeitsein verschafft sich Organe, nicht werden Organe mit Fähigkeiten . . . ausgestattet].” Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* (tr. William McNeill and Nicholas Waker 1995) 221-222. GA 29/30: 324: <https://www.beyng.com/gaapp/recordband/30> . I have altered the translation slightly.

together smoothly and naturally. The item in question also presents itself as having a single, clear unitary rationale, on the basis of which one can come to a relatively straightforward evaluation of it.”³⁶

Or, as in Vermeule’s protreptic, resume deploying straightforwardly for legal decision-making. And people tend to assume, Guess continues, “that even if such phenomena have had a complex and eventful history, their essential defining features can be traced back continuously to a single unitary point of origination.”³⁷ Whereas in truth and in fact – so goes the traverse – each such phenomenon “results from a complicated historical process in which originally completely *distinct* elements . . . come to be conjoined. These elements in their original context often had completely different rationales.”³⁸ Geuss’s point is “precisely the *lack* of a single unitary intuition informing these various conceptions.”³⁹ Of the notion of public, common good he concludes that for the foreseeable future, “we will be stuck with a welter of various kinds of goods, some private, some public, with no clear principle for structuring them under a single conception of a unitary public good.”⁴⁰

Why not? Short answer: heterogeneity all the way down. And this answer illuminates why Vermeule condemns in the strongest terms the claim that each individual may ‘define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’⁴¹ Geuss writes,

“One thing we know about the political and social world is that it is a large, unsurveyable, and extremely unwieldy object that seems sometimes to be hopelessly inert and at others surprisingly mercurial. We also know that it is composed of highly disparate parts that seem to operate very differently from one another, almost to stand under different laws. Finally, we know only too well

³⁶ *Public Goods, Private Goods* viii-ix.

³⁷ *Id.* ix. Cf. “I believe with equally firm faith that the Church, the guardian and teacher of the revealed word, was personally instituted by the real and historical Christ when he lived among us.” The Oath Against Modernism: <https://www.papalencyclicals.net/pius10/p10moath.htm> .

³⁸ *Public Goods, Private Goods* ix-xi (his emphasis). Gould calls this the Nietzsche-Darwin principle: “Current function cannot be equated with reasons for historical origin.” “[U]nder the Nietzsche-Darwin principle of quirky functional shift, the form of the current adaptation (feature) may have arisen by adaptation (process) for a very different role.” Stephen Jay Gould, *The Structure of Evolutionary Theory* (2002) 1223, 1230. For the key texts see *Genealogie der Moral, Zweite Abhandlung* §§ 12, 13; and Charles Darwin, *The Various Contrivances by Which Orchids Are Fertilised by Insects* (2nd ed. 1877) 282-284. Cf. “The notion of historical relativity—the suggestion that the law still in force might indeed have been made by a king in some high and far-off time, but in conditions so remote that neither ‘king’ nor ‘law’ meant what they meant at the present day, and that consequently no conclusion could be drawn as to current rights and liberties—was after all still virtually unknown [to the common lawyers of Coke’s time].” *The Ancient Constitution and the Feudal Law* 52.

³⁹ *Public Goods, Private Goods* 11 (his emphasis).

⁴⁰ *Id.* 104.

⁴¹ Futile anyway: *definierbar ist nur Das, was keine Geschichte hat. Genealogie der Moral, Zweite Abhandlung* § 13.

that we are grossly ignorant of how these laws actually operate and what mechanisms could be employed effectively to bring about particular desired results. . . . the central problem is not moral failing but the mere existence of an unstructured world with separate, epistemically mutually opaque centers of independent power and initiative, pursuing courses of action that are not unreasonable in the circumstances.”⁴²

Furthermore, at the level of individual human beings these centers of independent power and initiative are epistemically *self*-opaque because heterogeneous—“if no individual has a single unitary self-consciousness but we are all more or less gerry-rigged, multilayered collections of psychic systems moved by obscure and irreducibly contradictory impulses, why then should one expect any society to be self-transparent in its pursuit of completely unitary goals?”⁴³ On Vermeule’s view such an **irreducibly** dissonant congeries must be rejected as too fragmented and shaky to support the one highest good, unitary and knowable, in every person.

Vermeule implicitly denies the existence of an irreducibly heterogeneous social world. He makes sense of our present distress with the notion that we have lost sight of the real structure because of moral failing – willfulness and selfishness and vanity – and that we need to rescue the true vision. So Vermeule works to restore the common good as *archē* – origin and ordering⁴⁴ – of American law. This is, again, descended from Aristotle’s project: “The idea that there was a harmonious fit between social roles, the structure of the human mind, and nature . . . in its most complete and comforting form . . . was almost an Aristotelian speciality, one that was to prove immeasurably influential.”⁴⁵

More particularly, as suggested above, Vermeule’s project is “only continuing and developing a habit of mind as old as the common law itself.”⁴⁶ Even older. Pocock writes,

“The common law was by definition immemorial custom. For hundreds of years before Coke and [Sir John] Davies it had been accepted, by an assumption

⁴² *Public Goods, Private Goods* 101-102.

⁴³ *Id.* 98. “The idea of technique implies that someone knows what they are doing. After the inventions of psychoanalysis, the idea of knowing what you are doing, the idea of a person as an agent of intentions that are transparent to himself, never quite makes sense.” Adam Phillips, Introduction to Sigmund Freud, *Wild Analysis* (tr. Alan Bance 2002) xv. Freud’s principal invention of course was the genealogical analysis of psychic structures; his work following on that of “the great Darwin,” greatest of genealogists.

⁴⁴ “The Greeks ordinarily hear two meanings in this word. On the one hand ἀρχή means that from which something has its origin and beginning; on the other hand it means that which, as this origin and beginning, likewise keeps rein over, i.e., restrains and therefore dominates, something else that emerges from it. Αρχή means, at one and the same time, beginning and control [*Anfang und Herrschaft*]. On a broader and therefore lower scale we can say: origin and ordering [*Ausgang und Verfügung*].” “On the Essence and Concept of Φύσις” 189; GA 9: 247.

⁴⁵ Bernard Williams, *Shame and Necessity* (1993) 126.

⁴⁶ *The Ancient Constitution and the Feudal Law* 39.

common in medieval thought, that English law was *jus non scriptum* and that the function of the courts was to declare the ancient custom of the realm. Even statutes could be so interpreted, and Coke eagerly takes at least the earliest of them to be declaratory judgments. Innumerable decisions were consequently on record as declaring that everything which they contained, down to the most minute and complex technicality, had formed part of the custom of England from time out of mind; or at least so the common lawyers read them to mean, and this fact is at the root of their interpretation of history. They took everything in the records of the common law to be immemorial, and they treated every piece of evidence in those records as a declaration of what was already immemorial . . .”⁴⁷

For Coke and Davies and their contemporaries the common law had always been exactly as they, from the abyss of time, had received it—the is that already was, τὸ τί ἦν εἶναι; their legal decisions having the status of non-innovating determinations of that *prius*.

What happened next was the discovery of feudalism; notably by the Scot Thomas Craig (1538-1608) and the Englishman Henry Spelman (1562-1641). In his writings Spelman more than once

“shows himself capable of distinguishing between the Germanic, civil, canon and feudal elements in common law and studying particular aspects of legal and juridical history in terms of their successive influences. . . . There was nothing in the common law which Spelman need regard as immemorial, and he had dissolved the notion of custom into a series of influences of diverse origin.”⁴⁸

So ‘ancient constitution’ and ‘feudal law’ can be taken as rubrics for two incompatible habits of legal minds; the former with roots in medieval thought, the latter developing no earlier than the seventeenth century. *Eidos/determinatio* and historical ontology can then be taken together as a scaled-up version of the same incompatibility; as a polarity⁴⁹ or a thema-antithema couple.⁵⁰ Two habits of thought competing for reinforcement, often within the same mind—that peculiar arrangement where “Beyond the dynamics of this competition itself, no one is in charge.”⁵¹

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⁴⁷ *Id.* 37-38. Cf. “I sincerely hold that the doctrine of faith was handed down to us from the apostles through the orthodox Fathers in exactly the same meaning and always in the same purport.” The Oath Against Modernism.

⁴⁸ *The Ancient Constitution and the Feudal Law* 104.

⁴⁹ G. E. R. Lloyd, *Polarity and Analogy: Two types of argumentation in early Greek thought* (1966).

⁵⁰ Gerald Holton, *Thematic Origins of Scientific Thought: Kepler to Einstein* (rev.ed. 1988).

⁵¹ Richard J. Herrnstein and Dražen Prelec, “Melioration: A Theory of Distributed Choice” in Herrnstein, *The Matching Law: Papers in Psychology and Economics* (ed. Howard Rachlin and David I. Laibson 1997) 292.