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GENDERING THE COMMON GOOD? THE STATE, CARE, AND THE GOVERNANCE OF VULNERABILITY IN COMMON GOOD CONSTITUTIONALISM

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Abstract

This paper employs Common Good Constitutionalism (CGC) as its analytical framework to reconsider the problem of the “gendered state”: how, in the pursuit of the common good, the state produces, allocates, and hierarchizes vulnerability through law, administration, and governance. In contrast to liberal constitutionalism, which tends to treat the state as a neutral arbiter, CGC emphasizes the state’s substantive purposiveness and public authority (Vermeule, 2022). The paper argues that it is precisely within this purposive mode of governance that state power becomes deeply gendered—through normative imaginaries of bodies, families, labour, and dependency that define what counts as the “common good” and who is worthy of protection or sacrifice. Drawing on Crenshaw’s (1989, 1991) intersectional framework and Fraser’s (2003) concept of participatory parity, the paper shows how the state simultaneously mobilizes two rationalities—care and discipline—across labour regulation, care regimes, and border governance, rendering feminized, racialized, and mobile workers structurally precarious. The paper argues that CGC must incorporate feminist and intersectional perspectives to attain greater normative coherence and justificatory force.

Keywords: Common Good Constitutionalism, gendered state, vulnerability governance, care rationalities, intersectional feminism

Introduction: The Gender Blindspot of Common Good Constitutionalism

The resurgence of Common Good Constitutionalism (CGC) in contemporary legal theory marks a significant departure from the dominant liberal-proceduralist paradigm. Associated most prominently with the scholarship of Adrian Vermeule, CGC insists that the constitutional order is not a neutral framework for aggregating private preferences but a purposive architecture oriented toward substantive human flourishing (Vermeule, 2022, p. 7).

Drawing upon a rich tradition of classical natural law—running from Aristotle and Aquinas (1948) through to modern theorists such as John Finnis and Alasdair MacIntyre—CGC calls upon courts and administrative actors alike to interpret law in light of the common good, understood as an objective ordering of human welfare that transcends individual interest (Finnis, 2011, p. 155).

Yet, for all its normative ambition, CGC has remained strikingly silent on one of the most persistent features of modern governance: the structural gendering of state power. From MacKinnon's (1989) critique of formal equality to Fineman's (2008) vulnerability theory and Crenshaw's (1989, 1991) intersectional framework, feminist legal scholars have long demonstrated that apparently neutral legal categories—family, labour, dependency, welfare—are in practice deeply gendered. They distribute vulnerability unequally, and they do so through the very institutional mechanisms that CGC proposes to rehabilitate: administrative discretion, expert governance, and purposive state intervention.

This paper argues that the silence of CGC on gender is not merely an oversight but a structural feature of its theoretical commitments. By anchoring the common good in a tradition of natural law that historically construed the family as a hierarchically ordered unit and women's civic participation as derivative rather than constitutive, CGC risks reproducing, under the guise of substantive purposiveness, the same asymmetries it seeks to transcend. The paper does not, however, rest at critique. It develops a constructive argument: that CGC can be extended and corrected through feminist and intersectional theory, and that such extension is not merely a concession to contemporary sensibility but is required by CGC's own internal logic of normative coherence.

Two conceptual dimensions are central to this corrective project and receive sustained attention throughout the paper. The first is the intersectional dimension—the recognition, drawn from Crenshaw's (1989, 1991) foundational work, that vulnerability is not produced by gender alone but through the convergence of gender, race, class, migrant status, and bodily capacity. The second is the participatory dimension—the claim that the common good cannot be authoritatively defined and administered from above by expert institutions alone, but requires the democratic inclusion of those whose vulnerability is at stake, most especially women, racialized workers, and care-dependent populations who have historically been excluded from deliberative fora that define public purposes (Fraser, 2003, pp. 36–40).

The paper proceeds as follows. Part II situates CGC's treatment of the state, family, and care within its natural law inheritance, identifying the points at which gender-neutral language conceals gendered normative assumptions. Part III introduces the analytical framework of vulnerability governance, drawing on Fineman's (2008) vulnerability theory and Pettit's (1997) republicanism to theorize how the state simultaneously mobilizes care and discipline as rationalities of governance. Part IV examines three institutional sites—labour regulation, the care regime, and border governance—through an intersectional lens, demonstrating how the common good is operationalized as a gendered order in each domain. Part V develops the participatory critique, arguing that CGC's administrative institutionalism, without democratic anchoring, risks devolving into expert paternalism. Part VI proposes a feminist reconstruction of CGC that integrates intersectional analysis and participatory legitimacy as constitutive rather than supplementary elements of the common good.

Common Good Constitutionalism and Its Natural Law Inheritance: Family, Care, and the Gendered Subject

CGC's foundational claim is that law and governance must be oriented toward the common good, understood not as the aggregation of individual preferences but as an objective ordering of conditions for human flourishing. Vermeule's (2022) constitutional theory draws heavily upon the Thomistic tradition, in which the common good is a teleological concept: the state exists to secure the conditions under which individuals and communities can achieve their proper ends (p. 17). This purposive account of public authority has considerable attractions: it resists the attenuation of state capacity that liberal neutrality tends to produce, and it grounds constitutional interpretation in substantive rather than merely procedural values (Vermeule, 2022, pp. 32–35).

Yet the Thomistic tradition from which CGC draws carries within it a normative anthropology that is far from gender-neutral. Aquinas's account of the natural order of the family assigned women a subordinate role in governance and deliberation, a role derived from a reading of Aristotle that associated rational governance with the masculine and bodily reproduction and care with the feminine (Aquinas, 1948, I-II, q. 92, art. 1). While modern natural law theorists such as Finnis (2011) have attempted to reconstruct this tradition in terms compatible with equal dignity, the reconstruction remains incomplete. Finnis's account of the basic goods—life, knowledge, friendship, practical reasonableness, religion, play, and the good

of marriage and family—continues to privilege a biologically grounded account of the family as a basic institutional unit (Finnis, 2011, p. 86), and assigns care for children and dependents primarily to the domestic sphere without adequately theorizing who bears the structural burden of that care.

MacIntyre's (1999) contribution in "Dependent Rational Animals" is instructive here. MacIntyre acknowledges, more candidly than most natural law theorists, that human beings are constitutively dependent creatures whose animal vulnerability is the condition of all rational achievement. He argues that the virtues of acknowledged dependence—giving and receiving care with grace—are as central to human flourishing as the virtues of independent rational agency (MacIntyre, 1999, pp. 119–121). This concession is significant: it ruptures the clean association of rationality with masculine autonomy that runs through the earlier Aristotelian tradition. Yet even MacIntyre's account reproduces a structural problem. When he situates the practice of care within "communities of giving and receiving," he has in mind thick, locally embedded communities—paradigmatically the family and the local parish—that are governed by norms of virtue rather than by legal entitlement or political accountability (MacIntyre, 1999, pp. 130–132). The effect is to privatize care once again, locating it in the pre-political sphere of community rather than in the domain of constitutional governance. A CGC that follows MacIntyre in this regard will invoke the importance of care without subjecting the gendered distribution of care labour to constitutional scrutiny.

The consequences for CGC's account of state governance are significant. When the state is authorized, under CGC, to pursue the common good through administrative action—through welfare programmes, family law, immigration control, and healthcare regulation—it inevitably must operationalize these categories. The "family" it regulates, the "care" it provides or withholds, the "dependency" it manages: each of these is a site at which gendered power is inscribed into legal and administrative form (MacKinnon, 1989, pp. 162–165). The problem is not merely that CGC's architects have failed to notice gender; it is that the tradition of purposive governance they rehabilitate has historically relied upon gendered labour—uncompensated, feminized, and rendered invisible by the public/private distinction—to sustain the very social order it celebrates as the common good.

The Invisible Infrastructure of Care

Tronto's (1993) influential account identifies care as a political practice, not merely a

private virtue (p. 111). The allocation of care—who gives it, who receives it, who is expected to bear its costs—is a distributional question of the first political order. Liberal constitutionalism has largely evaded this question by consigning care to the private sphere, beyond the reach of constitutional analysis. CGC, by contrast, explicitly claims jurisdiction over the conditions of human flourishing, including the family and welfare institutions (Vermeule, 2022, p. 55). This makes CGC’s evasion of the care question not merely an oversight but a theoretical inconsistency.

Fineman’s (2008) vulnerability theory provides a more adequate starting point. For Fineman, vulnerability is universal and constant—all human beings are vulnerable to dependency, illness, and misfortune across the life course—but it is also derivative and manufactured: social institutions, including law, distribute vulnerability unevenly, concentrating its costs on women, racialized populations, migrants, and the poor (Fineman, 2008, pp. 8–10). A state genuinely oriented toward the common good must, on this account, attend not only to the provision of care institutions but to the structural conditions under which care labour is extracted and invisibilized.

A concrete illustration of this dynamic is provided by comparing two cases at opposite ends of the spectrum of state action. In the United States, the Supreme Court’s 2022 decision in “Dobbs v. Jackson Women’s Health Organization” drew explicitly on natural law reasoning, with Justice Alito’s majority opinion citing the tradition of common good reasoning to justify the withdrawal of abortion rights. The decision did not merely leave the care burden of unwanted pregnancy to individual women; it actively redistributed reproductive vulnerability onto women, particularly those in low-income and racialized communities who lack the resources to travel to permissive jurisdictions (Roberts, 1997, p. 203). This is a paradigm case of what this paper calls care rationality—the common good of foetal life—producing discipline rationality upon female bodies, with the distributional costs falling most heavily at the intersections of gender, race, and class. In Taiwan, by contrast, the state’s Dedicated Physician for Young Children programme (walled-off (幼兒專責醫師制度)) invokes the common good of children’s health to justify expanded state involvement in pediatric care. Yet the programme’s design assumes that mothers will function as the primary coordinators and transporters of children’s care, invisibilizing the labour of coordination that sustains the programme’s operation. The common good of child health is secured through the unacknowledged labour of women.

Vulnerability Governance: Care and Discipline as Dual Rationalities

Contemporary states do not govern vulnerability through a single, unified rationality. This paper proposes that vulnerability governance is organized through two analytically distinct but institutionally interwoven rationalities: care rationality, which deploys the language of protection, welfare, and human flourishing to justify state intervention; and discipline rationality, which deploys administrative discretion, surveillance, expert knowledge, and conditionality to regulate, monitor, and where necessary exclude those who are the ostensible objects of care.

The concept of dual rationalities draws upon, but extends, Foucauldian accounts of governmentality. The feminist contribution to this framework, developed by scholars such as Brown (1995) and Roberts (1997), demonstrates that these two rationalities are not applied uniformly across populations: they are racialized and gendered. Women, especially racialized and migrant women, are disproportionately subject to the disciplinary face of governance while simultaneously excluded from the protective entitlements that care rationality promises (Brown, 1995, pp. 17–19; Roberts, 1997, pp. 8–10).

Pettit's (1997) republican concept of domination provides a useful theoretical bridge between the feminist critique of dual rationalities and the constitutional language of CGC. For Pettit, domination consists not merely in the actual exercise of arbitrary power over another, but in the structural condition of being "subject to the arbitrary will" of another—the condition of unfreedom that persists even when the dominant party happens not to exercise their power (Pettit, 1997, pp. 52–55). This concept maps precisely onto the situation of the migrant domestic worker who is formally "protected" by employment law but whose practical situation—dependent on her employer for housing, legal status, and income—means that she is subject to domination regardless of whether the employer currently exercises their power arbitrarily. The republican frame reveals what a purely formal analysis of legal protection misses: that the structure of the regulatory regime, not merely its explicit terms, determines the distribution of vulnerability. A CGC informed by republican political theory would recognize that the common good cannot be realized under conditions of structural domination, and would therefore require the elimination of the legal conditions that make domination possible, not merely the prohibition of its most egregious manifestations.

The Intersectional Structure of Vulnerability

A central methodological commitment of this paper is that vulnerability is not a single-axis phenomenon. The concept of intersectionality, developed by Crenshaw (1989) in her foundational analysis of employment discrimination and deepened in Crenshaw (1991) in the context of violence against women of color, captures the crucial insight that systems of domination—racism, sexism, class hierarchy, ableism, and xenophobia—do not operate independently but interact to produce distinctive forms of disadvantage that are irreducible to any single axis (Crenshaw, 1991, p. 1245). A migrant woman working as a domestic caregiver in Taiwan is not simply disadvantaged by her gender, or simply by her migrant status, or simply by her class position: the specific form of her vulnerability—including her legal status under the Employment Services Act, her confinement to the domestic sphere, her exclusion from labour protections available to national workers, and her exposure to deportation—is produced by the intersection of all these axes simultaneously (Crenshaw, 1991, pp. 1249–1250).

For CGC, this intersectional insight has direct normative implications. If the common good is to function as a genuinely inclusive telos—a standard of flourishing that encompasses all members of the political community—its definition and administration must be sensitive to the ways in which the current distribution of vulnerability is not a natural baseline but the product of intersecting legal and institutional arrangements. The common good cannot be adequately specified by attending only to the average citizen or the standard family; it must be specified in relation to those whose vulnerability is most acute and most structurally produced (Fineman, 2008, p. 15).

Three methodological commitments follow from this intersectional orientation. First, legal analysis must attend to the cumulative rather than additive effects of overlapping categories of disadvantage: the question is not how much disability results from gender, plus how much from race, but how gender and race together produce a specific legal and social position (Crenshaw, 1989, pp. 149–151). Second, the identification of vulnerability must be grounded in the testimony and experience of affected populations, not merely inferred from structural analysis—this is the link between intersectionality and the participatory dimension developed in Part V (Fricker, 2007, p. 7). Third, legal reform must be evaluated not only by its formal effects but by its distributional consequences across the full matrix of intersecting identities (Crenshaw, 1991, pp. 1281–1282).

Three Institutional Sites of Gendered Vulnerability

Labour Regulation and the Feminization of Precarity

Taiwan's labour regulatory framework exemplifies the dual rationality of care and discipline operating in gendered and racialized ways. The Labour Standards Act has progressively expanded its coverage, and the Act of Gender Equality in Employment provides formal protections against discrimination. Yet the substantive effect of these protections is radically unequal across the workforce. Domestic workers—predominantly migrant women from Southeast Asia—remain excluded from the full protections of the Labour Standards Act, subject instead to a distinct regulatory regime under the Employment Services Act that combines a rhetoric of protection with mechanisms of control: tied visas, employer-controlled housing, restricted mobility, and the constant threat of deportation.

The intersectional analysis of this arrangement reveals a triple exclusion (Crenshaw, 1989, p. 145). These workers are excluded from full labour citizenship by their migrant status; from full market participation by the domestic sphere to which their work is confined; and from full legal personhood by a regulatory regime that subordinates their individual rights to the preferences of their employers and the administrative discretion of the state. The invocation of the common good—securing the welfare of Taiwan's ageing population through the provision of affordable care—is precisely what legitimizes this arrangement. The common good of care recipients is secured at the cost of the rights and vulnerability of care providers.

Crenshaw's (1989) original analysis of "General Motors v. Emma DeGraffenreid" provides a useful analytical template. In that case, Black women were excluded from both the seniority-based protections available to Black men (who worked in industrial departments) and the gender-based protections available to White women (who held secretarial positions). The court's failure to recognize their compound exclusion followed from a legal architecture that could only perceive single-axis discrimination. The analogous structure in Taiwan's migrant domestic labour regime is striking. Migrant domestic workers are excluded from the Labour Standards Act on grounds that appear facially neutral—the Act does not cover "household work"—but in practice the exclusion maps precisely onto the intersection of femininity (care work is women's work), migration (the workers who perform it are foreign nationals), and domestic space (the workplace is the private home, beyond the normal reach of labour inspection). Each exclusion appears independently justified; together, they produce a class of workers who are uniquely unprotected precisely because their work embodies all three axes of

exclusion simultaneously.

The Care Regime and the Invisible Worker

Taiwan's Long-Term Care Policy 2.0 represents a significant expansion of state-provided care infrastructure, and its ambitions are genuinely oriented toward human welfare. Yet the policy's institutional design reproduces a familiar gendered logic: it assumes the availability of unpaid family caregivers—primarily female relatives—as the backstop for formal care provision, while directing public resources primarily toward medical and professional care services rather than toward the compensation or recognition of informal care labour (Tronto, 1993, pp. 113–116).

The intersectional effects of this design are compounded for women who occupy multiple positions of disadvantage simultaneously (Crenshaw, 1991, p. 1251). A middle-aged woman caring for an elderly parent while also in paid employment and managing her own household faces a specific configuration of vulnerability—what has been called the “sandwich generation” phenomenon—that is produced by the intersection of gender norms, labour market structure, and the design of the care regime (Fineman, 2008, p. 10). The common good invoked by Long-Term Care 2.0 is real and important; but it is achieved, in significant part, through the extraction of care labour from women who receive neither compensation nor recognition within the framework of the common good it claims to realize.

Comparative constitutional experience illuminates what a more adequate response would require. Germany's Pflegezeitgesetz (Care Leave Act) and the subsequent Familienpflegezeitgesetz (Family Care Leave Act) represent a legislative attempt to make visible the care labour that sustains the social order, by creating employment-protected leave entitlements for workers who provide informal care to family members. The German Federal Constitutional Court's jurisprudence on Article 6 of the Basic Law—which protects marriage and family and imposes on the state a duty of active support for families—has been interpreted to require not merely formal neutrality between caregiving and non-caregiving workers, but substantive accommodation of care responsibilities (BVerfG, 2 BvL 6/11, 2012). South Korea's Long-Term Care Insurance Act similarly constructs the provision of elder care as a social insurance right rather than a family obligation, partially decoupling care provision from the unpaid labour of female family members. Neither system is complete, and neither has fully escaped the gendered assumptions that structure care policy more broadly; but both represent

institutional responses to the problem of invisible care labour that CGC's account of the common good cannot generate from within its own resources, without feminist supplementation.

Border Governance and the Precarious Body

The governance of migration is perhaps the domain in which the dual rationality of care and discipline is most starkly visible. States routinely invoke the common good—security, public health, economic welfare—to justify extensive powers of exclusion and control over mobile populations (Pettit, 1997, pp. 52–55). The gendered dimensions of border governance are multiple. Women migrants are subject to specific forms of risk—trafficking, domestic violence, employer abuse—that the state claims to address through protective regulations; yet the same regulatory framework that promises protection also creates the conditions of precarity that make these harms possible, through tied visa systems, limited labour market access, and the threat of deportation that silences complaints (Roberts, 1997, p. 12).

Applying an intersectional analysis to border governance reveals that vulnerability is produced at the intersection of gender, nationality, class, and legal status (Crenshaw, 1991, pp. 1268–1270). A migrant domestic worker's exposure to abuse is not simply the product of her gender; it is produced by the specific legal architecture that ties her residence status to her employer, denies her access to public services available to citizens, and subjects her to administrative discretion rather than justiciable rights (Pettit, 1997, p. 57). The common good invoked by the immigration control regime—protecting the integrity of the labour market, securing public order—does not merely fail to include her interests; it is realized in part through the production of her precarity.

The European Court of Human Rights' judgment in "Hirsi Jamaa and Others v. Italy" (2012) provides a comparative illustration of how the language of border security—the protection of the national common good—can be deployed to justify practices that produce systematic vulnerability for mobile populations. The Court found that Italy's push-back operations in the Mediterranean, which intercepted vessels carrying migrants and asylum seekers and returned them to Libya without individual assessment, violated Article 3's prohibition of inhuman treatment. What is significant for present purposes is not merely the legal outcome but the structure of the reasoning: the Italian government had invoked the common good of border security and migration management to justify a practice whose costs

were borne almost entirely by the most vulnerable individuals in the relevant population—including women fleeing gender-based persecution. The case illustrates how the aggregative logic of common good reasoning—security for the many—can, without an intersectional check, distribute its costs onto the most intersectionally precarious.

The Participatory Dimension: Democratic Inclusion and the Definition of the Common Good

The foregoing analysis raises a question that is not merely empirical but normative: who has the authority to define the common good? CGC in Vermeule's (2022) formulation tends toward an institutionalist and technocratic model: administrative agencies staffed by experts and guided by a substantive constitutional tradition are well-placed to pursue the common good more effectively than the vicissitudes of electoral politics or the atomistic preferences of individual litigants (p. 98). This model has genuine virtues—it takes seriously the importance of institutional competence and resists the reduction of governance to preference-aggregation. But viewed through a feminist and intersectional lens, it also carries significant risks: there is a structural gap between the knowledge held by administrative experts and the knowledge held by the vulnerable populations they govern, and this gap is itself normatively significant (Fricker, 2007, pp. 147–151).

The participatory critique of CGC is not a return to liberal proceduralism. It does not claim that the common good is simply whatever majorities prefer, nor that democratic participation is valuable only as a mechanism for preference-aggregation. The argument is rather that the content of the common good—particularly its implications for those who are most vulnerable—cannot be adequately specified without the democratic inclusion of the voices and perspectives of those whose vulnerability is at stake (Fraser, 2003, p. 36). This is an epistemic claim as well as a normative one: the knowledge required to understand how law produces and distributes vulnerability is not fully available to administrative experts precisely because it is embedded in the lived experience of those who bear its costs (Harding, 1986, p. 26).

Participatory Parity and the Common Good

Fraser's (2003) concept of participatory parity provides a useful normative standard for this argument. Fraser holds that social justice requires arrangements that permit all members

of society to participate as peers in social life, and that participatory parity is undermined not only by economic maldistribution but by cultural misrecognition and political misrepresentation (Fraser, 2003, pp. 36–40). Applied to CGC, this standard suggests that a governance framework genuinely oriented toward the common good must actively work to include in its deliberative processes those who have historically been excluded: women, racialized minorities, migrants, persons with disabilities, and care-dependent populations (Fraser, 2003, p. 43).

This participatory standard has concrete institutional implications. It is not satisfied merely by the formal enfranchisement of affected populations, nor by the administrative duty to consider stakeholder interests in policy design (Fraser, 2003, pp. 45–46). It requires structural changes to the processes through which the common good is defined and pursued: the creation of institutionalized channels for the voice of care workers in labour policy deliberation; the inclusion of migrant worker organizations in the design of immigration control regimes; the recognition of informal caregivers as bearers of expertise in the governance of the care regime.

Taiwan's experience with migrant worker organizations offers an instructive case study in both the potential and the limits of participatory inclusion. Organizations such as the Serve the People Association and the Taiwan International Workers' Association have for many years advocated for the extension of full labour protections to domestic and care workers, producing detailed documentation of the conditions under which these workers labour and the specific legal reforms required to address their vulnerability. Their advocacy has generated significant public knowledge about the conditions of migrant domestic labour that was simply unavailable within the administrative system. Yet their formal access to policymaking processes has remained limited: they are consulted on an ad hoc basis, their proposals are filtered through administrative discretion, and their institutional standing is contingent on political goodwill rather than secured by constitutional right. The gap between the epistemic contribution of these organizations—the situated knowledge they bring to the policy process—and their formal institutional power illustrates precisely the hermeneutical injustice that Fricker (2007) describes: the knowledge is there, but the interpretive authority to translate it into policy change is not.

The Epistemic Case for Participation

The participatory argument is not only a demand for fairness; it is also an argument about the quality and accuracy of governance. From Harding's (1986) standpoint epistemology to Fricker's (2007) account of epistemic injustice, feminist epistemologists have argued that social positions of marginality generate distinctive epistemic resources: those who experience the operation of power from below have access to knowledge about its effects that is unavailable to those who exercise it from above (Harding, 1986, p. 26). The knowledge that a domestic worker has about the conditions under which care is delivered—the informal arrangements, the power asymmetries, the gaps in legal protection—is not captured by administrative statistics or legal text. It is a form of situated knowledge that is systematically excluded from the deliberative processes through which the common good is institutionally defined.

Fricker's (2007) concept of epistemic injustice is particularly apt here. Fricker distinguishes between testimonial injustice—the wrong done to a speaker when a hearer gives her less credibility than she deserves due to prejudice (p. 20)—and hermeneutical injustice—the harm done when a gap in collective interpretive resources puts someone at an unfair disadvantage in making sense of her own social experience (Fricker, 2007, p. 148). Both forms of epistemic injustice are operative in the governance of vulnerability. The accounts given by care workers of their conditions of employment are systematically discounted by administrative actors; and the conceptual resources available in legal and policy discourse—labour law, migration law, welfare law—are structured in ways that make it difficult for the specific form of vulnerability they experience to be named, articulated, and addressed (Fricker, 2007, pp. 151–152).

A CGC that is epistemically adequate must therefore create institutional conditions for what Fricker (2007) calls hermeneutical justice: the development of shared interpretive resources that allow the specific vulnerabilities of marginalized populations to be articulated, recognized, and incorporated into the definition of the common good (p. 169). This is not a demand that administrative governance be replaced by direct democracy; it is a demand that the expertise deployed in pursuit of the common good include the situated knowledge of those whose vulnerability is being governed.

Toward a Feminist Reconstruction of Common Good Constitutionalism

The foregoing analysis establishes a critical diagnosis: CGC, as currently formulated, carries within it a gendered structure that is not merely contingent but is connected to its deepest theoretical commitments. Yet the diagnosis is also constructive. The same features of CGC that make it susceptible to feminist critique—its commitment to substantive human flourishing, its rejection of liberal neutrality, its endorsement of active state governance in pursuit of the common good (Vermeule, 2022, pp. 7–10)—also make it capable, in principle, of incorporating feminist and intersectional insights more deeply than liberal constitutionalism ever could.

Integrating Intersectional Analysis as a Constitutional Requirement

The first element of feminist reconstruction is the incorporation of intersectional analysis as a constitutional and administrative requirement rather than a discretionary supplement. This means that governance actors pursuing the common good are constitutionally required to consider the differential effects of their actions across the matrix of intersecting identities that structure the distribution of vulnerability (Crenshaw, 1991, pp. 1281–1282). This requirement is not alien to CGC’s structure; it can be grounded in the Thomistic principle that justice requires rendering to each what is properly due—which, when applied to the distribution of vulnerability, requires attending to the specific situations of those who bear its greatest costs (Finnis, 2011, pp. 161–163).

Concretely, this intersectional constitutional requirement would mandate impact assessment in lawmaking and administrative rulemaking that examines not only average or aggregate effects but effects on the most intersectionally vulnerable populations. It would require that legal categories—dependency, family, care, worker—be examined for the hidden assumptions they carry about race, gender, and migrant status (MacKinnon, 1989, p. 165). And it would provide a constitutional basis for challenging legal arrangements that, while facially neutral or even protective in their orientation, produce systematic disadvantage at the intersections (Crenshaw, 1989, pp. 166–167).

The South African Constitutional Court’s jurisprudence on socio-economic rights offers a model of how courts can interpret constitutional obligations to attend to the most vulnerable without abandoning institutional deference to administrative governance. In “Government of the Republic of South Africa v. Grootboom” (2001), the Constitutional Court held that the state’s housing programme violated section 26 of the Constitution because it failed

to make reasonable provision for those in desperate need—those whose vulnerability was most acute. The Court did not prescribe a specific policy but required that the government’s programme be “reasonable” in the sense of attending to the needs of those in the most urgent situations. This jurisprudential approach—requiring substantive attention to the most vulnerable within a framework of institutional deference—is precisely the constitutional logic that an intersectionally informed CGC would produce: not the judicial micromanagement of welfare policy, but a constitutional requirement that the definition of the common good be responsive to those whose vulnerability is most structurally generated.

Participatory Legitimacy as a Constitutive Element of the Common Good

The second element of feminist reconstruction is the recognition of participatory legitimacy as constitutive of, rather than merely instrumental to, the common good. CGC in its current form tends to treat the legitimacy of governance as flowing from the substantive correctness of the ends pursued rather than from the process by which those ends are defined (Vermeule, 2022, p. 102). The feminist reconstruction proposed here argues that this separation cannot be maintained: the substantive correctness of a governance outcome cannot be adequately assessed without the inclusion of the perspectives of those who are governed (Fraser, 2003, pp. 43–44).

This argument draws on a convergence between feminist political theory and the participatory strand within the natural law tradition itself. Aquinas’s account of law required not only that law be directed toward the common good but that it be made by one who has care of the community (Aquinas, 1948, I-II, q. 90, art. 3); and the history of natural law includes persistent threads of argument that the legitimacy of governance depends upon the consent and participation of the governed. A CGC that takes this participatory dimension seriously will not be content with expert administration in pursuit of externally defined ends; it will create institutional channels through which those whose vulnerability is governed can participate in the definition of what governance purposes count as common goods (Fraser, 2003, p. 45).

Vulnerability as a Constitutional Category

The third and most fundamental element of feminist reconstruction is the proposal to treat vulnerability—in Fineman’s (2008) sense of universal, embodied, and institutionally produced dependency—as a constitutional category (pp. 8–9). This means that the constitutional framework does not merely prohibit discrimination against vulnerable

populations or require minimum standards of welfare provision; it recognizes vulnerability as a constitutive feature of human social life that the state has an affirmative obligation to respond to equitably and responsively (Fineman, 2008, p. 15).

This proposal has practical implications for how CGC approaches the three institutional sites examined in Part IV. In labour regulation, it means that the standard of the common good is not satisfied by formal protections that exclude domestic workers but requires affirmative attention to the specific vulnerability produced by the intersection of gender, migrant status, and domestic labour (Crenshaw, 1991, p. 1282). In the care regime, it means that the common good encompasses not only the welfare of care recipients but the recognition and compensation of care labour (Tronto, 1993, p. 178). In border governance, it means that the security and welfare functions of migration control must be assessed not only in terms of their aggregate effects on the national community but in terms of their specific effects on the most vulnerable migrants (Pettit, 1997, p. 80).

These three elements of feminist reconstruction—intersectional analysis as a constitutional requirement, participatory legitimacy as constitutive of the common good, and vulnerability as a constitutional category—are mutually reinforcing rather than merely additive. Intersectionality without participation risks becoming a form of expert knowledge production that identifies the vulnerability of marginalized populations without giving those populations authority over how their vulnerability is to be addressed. Participation without intersectionality risks producing deliberative processes that are formally inclusive but substantively dominated by the perspectives of those whose vulnerability is least acute. And vulnerability as a constitutional category without both intersectionality and participation risks devolving into a paternalistic responsiveness that attends to the needs of the vulnerable as objects of governance rather than as subjects of constitutional rights. The integration of all three elements is therefore not an optional supplement to CGC but the condition under which CGC can realize its own stated commitment to a constitutional order genuinely ordered toward the flourishing of all.

Conclusion: Toward a Common Good That Is Truly Common

This paper has argued that Common Good Constitutionalism, for all its normative ambition, carries within it a structural gender blindspot that is connected to its natural law

inheritance and its institutionalist model of governance (Vermeule, 2022). Through the lens of intersectional feminism and vulnerability theory, the paper has shown how the common good is operationalized, across the domains of labour regulation, care governance, and border control, as a gendered and racialized order that secures the welfare of some by extracting the vulnerability of others (Crenshaw, 1991; Fineman, 2008; Roberts, 1997).

The paper has proposed two corrective dimensions. The intersectional dimension requires that the definition and pursuit of the common good be attentive to the matrix of overlapping identities through which vulnerability is produced and distributed, and that legal and administrative action be evaluated by its effects on those whose vulnerability is most acute and most structurally determined (Crenshaw, 1989, 1991). The participatory dimension requires that the authority to define the common good be democratically grounded in the voices of those whose vulnerability is at stake, and that the epistemic resources required for adequate governance include the situated knowledge of marginalized populations (Fraser, 2003; Fricker, 2007; Harding, 1986).

These two dimensions are not external additions to CGC but extensions of its own deepest commitments. A constitutionalism genuinely oriented toward human flourishing cannot be indifferent to the structural conditions under which flourishing is denied to the most vulnerable (Finnis, 2011, p. 155). A governance framework that claims to pursue substantive justice cannot rest content with expert administration that systematically excludes the knowledge and voice of those who are governed (Fraser, 2003, p. 45). The cases examined in this paper—Taiwan’s migrant domestic labour regime, the gendered architecture of long-term care policy, the border governance practices illuminated by comparative constitutional experience—each illustrate in concrete institutional terms what the failure to integrate feminist and intersectional perspectives costs: it costs the common good its claim to be genuinely common. The feminist reconstruction of CGC proposed here is therefore not a departure from the common good but a demand, grounded in CGC’s own normative logic, that it be made genuinely common.

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