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Up From Originalism

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In 1772, a group of enslaved Native Americans asked the General Court of Virginia to declare that their owners had illegally deprived them of their liberty. Their lawyer argued that a 1682 law permitting the enslavement of Native Americans was contrary to natural law. "The laws of nature are the laws of God," he argued, "whose authority can be superseded by no power on earth." Since "all acts of legislature apparently contrary to natural right and justice" are void, he argued, his clients should be deemed free.

In rebuttal, the slaveowners' lawyer argued that even if the 1682 statute violated God's law, "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words" as to make its meaning clear.

The lawyer for the Native Americans was George Mason, who would author the Bill of Rights a decade later. The court reporter was Thomas Jefferson. You would not recognize the name of the slaveholders' lawyer.

As this case makes clear, the American legal tradition was not created *ex nihilo* with the ratification of the Constitution. Rather, it is one tributary of an ancient river with many sources. From its very origins, American law contemplated recourse to those sources when the legitimacy of government action, including legislation, was called into controversy.

This is the subject of *Common Good Constitutionalism*, Adrian Vermeule's new book on the nature of American law. With it, he aims not so much at setting forth a new theory of constitutional interpretation but at lifting the lid on our modern paradigm to give us a glimpse at the way law was understood in an earlier age.

Vermeule's foundational premise is that America's founding generation understood law—law as a concept, not in the sense of a particular rule—as it was understood by countless generations before them: as "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community." From Aquinas to Blackstone, law was understood to be rooted in God's good will for mankind and to have the good of the polity as its purpose. Vermeule wants to restore this understanding of the law and find its application to our contemporary circumstances.

Needless to say, his project is deeply at odds with the two reigning legal philosophies of our day, living constitutionalism and originalism. In the classical view, the common good is indivisible, and its content includes goods such as peace, justice, and abundance. This sounds dangerous to living constitutionalists, for whom the greatest good, and therefore the aim of the law, is the liberation of the individual from all constraints on self-definition and self-creation. In this view, the public interest comprises the aggregation of individual interests, maximum autonomy for the greatest number of people. In this light, the "common good" in classical terms seems to imply sacrificing individual interests to the collective.

Common good constitutionalism also sounds dangerous to originalists. It implies reference to abstract truths such as the purpose of the law and natural law principles to interpret the law. To read a statute or constitutional provision in light of such principles, they argue, would be to open the door for judges to substitute their value preferences for that of the legislature.

Vermeule easily demonstrates that originalism is deeply flawed. For one thing, originalism as an interpretive philosophy is a recent invention. The Native American slavery case I cited, *Robin v. Hardaway*, demonstrates that the founders themselves used interpretive methods that originalism rejects. While appeals to the "express words" of legislation were deployed to interpret the law, so were appeals to the higher laws which that legislation was supposed to embody.

More gravely, Vermeule demonstrates originalism's theoretical weakness in failing to accomplish its central stated aim: restraining judges from reading the Constitution in light of moral principles. How are we to understand, for example, the Eighth Amendment's prohibition on "cruel and unusual punishment"? The drafters of that amendment had a vastly different notion of what sorts of punishment were constitutionally permitted than we do today. An originalist judge interpreting the Eighth Amendment is forced to make a moral choice between contemporary and 18th-century understandings of what punishments are "cruel and unusual."

Many of Vermeule's arguments are not novel, and they are mostly sound. It is beyond serious debate that American law was rooted in classical jurisprudence and continued to be well into its existence. And the flaws of originalism, at least in some of its forms, were explored years ago by conservatives like Harry Jaffa and liberals such as Ronald Dworkin, whom Vermeule draws on extensively, among many others.

So far, Vermeuele's call for a return to a classical view of the law has generated far more outrage among conservative devotees of originalism than among living constitutionalists. This is understandable, given that his project is a direct attack on originalism, and given the extraordinary investment of time, intellect, and resources by conservative institutions and individuals into establishing originalism as the only legitimate method of interpreting the Constitution.

Originalism arose as a response by conservatives to the increasingly strident liberal jurisprudence of the Warren and Burger courts. The story is familiar. Through a series of cases, from *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973) to *Obergefell v. Hodges* (2015), liberal justices have developed a constitutional theory of liberty with individual autonomy at its core. The

rulings articulated in these cases not only tracked the increasing liberalism of much of American society, they also helped to drive it.

The liberals on the Court were interpreting the Constitution in light of their understanding of the purpose of law and the necessary conditions for human flourishing. Conservatives, on their heels in the face of these developments, needed a strategy. For whatever reason, they were unwilling or unable to articulate a philosophy of constitutional interpretation grounded in the classical view of the law and man, a philosophy that would present an alternative to the liberal vision.

Instead, as a defensive gambit, conservatives embraced a version of legal positivism, the view that there is no law "out there" beyond the written text. Any attempt to read the Constitution through principles not found in the text was merely injecting one's own value preferences into the meaning of the text. "The judge can have nothing to do with any absolute set of truths existing independently and depending upon God," wrote Robert Bork, one of originalism's founders. "Truth is what the majority thinks it is at any given moment precisely because the majority is permitted to govern and to redefine its values constantly."

The notion that all moral claims are mere value posits rather than objective truths dissolves not only the falsehood of *Obergefell* but also the truth of the classical tradition of which the Constitution is an expression. It dissolves *all* truth. It leads to decisions like *Bostock v. Clayton County*, in which an originalist justice, proclaiming that "only the words on the page constitute the law," deconstructed Title VII of the 1964 Civil Rights Act to find that what that law's authors thought they were saying was totally irrelevant. For Vermeule, *Bostock* represents originalism taken to its logical conclusion.

Vermeule seeks to differentiate common good constitutionalism from living constitutionalism by accusing progressives of instrumentalizing the law to implement their moral vision, as opposed to the classical view in which the aim of law is the common good.

I think this is unfair. There is no reason to doubt that living constitutionalists sincerely believe that radical individual autonomy is, at a high level of abstraction, the fundamental goal of the moral system of the Constitution. Read again Justice Kennedy's famous rhapsody, in *Planned Parenthood v. Casey*, on ending the life of an unborn child:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

What Vermeule misses in his critique of living constitutionalism or legal progressivism is that it is in fact closely related to the classical paradigm, or rather, it is a derailment of it. It is a strand of Western thought in which the concept of the dignity of the human being has been exaggerated and transformed. The aim of the law has changed, from the good of the political community to the autonomy of the individual, and the aim of government is now the protection of the individual's "zone of privacy" within which he may exercise that autonomy and with which it

may not interfere. The source of this moral order is not clear, but it is no longer God. As Kennedy's language suggests, this view retains the classical notion of the Constitution as being the positive expression of a higher law in which it is embedded.

The American polity is fractured along many fault lines, and among the deepest and apparently most intractable is precisely the question of wherein the good of the individual consists: his total liberation from obsolete institutions, customs, and beliefs, or in taking his place in a community that conduces to virtue, the source of happiness in this life and the next.

One of the obstacles towards a joint and public inquiry into which of these visions of the human good is true is the failure of those who believe in the classical order to articulate their vision in a way that captures the public imagination. The real value of Vermeule's book may lie in its capacity to animate this inquiry.

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