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Vermeule, his Critics, and the Crisis of Originalism

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More than abstraction is at stake.

Can this be believed? Adrian Vermeule dares to stake out some positions critical of the orthodoxy of Originalism; he throws into the mix some terms about the "common good," lofting high in abstraction, distant for the moment from any account of the human persons or rights that he would protect under that banner. Add also some veiled references to an "Integralism" that none of the critics seems to understand.

And yet all of this is enough to induce otherwise sober and accomplished writers to do their version of Claude Raines

in *Casablanca*, professing to be "shocked—shocked!" What seems to shock them, though, is not Vermeule's willingness to say a good word or two for the Administrative State but his willingness to invoke principles that were central to the American Founders.

Unwritten Axioms

Vermeule's critics write as though any move beyond the text of the Constitution simply propels judges and legislators into a domain of utter subjectivity, bereft of any real truths to test and anchor our judgments. But Vermeule followed the path of the most notable among the founders, for he had the gall to say that there were principles in existence before the text of the Constitution was drafted—the principles that the Founders had drawn upon in shaping the Constitution. And he evidently thinks those principles are as true now as they were when the founders drew upon them.

John Quincy Adams would later say in that vein that the right to petition the government was simply implicit in the very logic of republican government. It would be there even if it hadn't been mentioned in the First Amendment. It would be there even if there were no First Amendment; and indeed it would there even if there were no Constitution.

Alexander Hamilton showed in *Federalist* #33 that the "Necessary and Proper" clause and the Supremacy Clause were simply embedded in the logic of the Constitution, and they would be there, commanding the judgments of judges and legislators, *even if they weren't in the text of the Constitution*.

This is what I took Vermeule to mean when he wrote that the jurisprudence he is offering "is not tethered to particular written instruments of civil law or the will of the legislators who created them." Instead, he said that he would draw—as indeed the founders drew—upon a tradition that is informed not only by the "positive law" but

also by such "sources as the *ius gentium*—the law of nations or the 'general law' common to all civilized legal systems and principles of objective morality"—aka *the natural law*.

This is what Hamilton and Marshall meant when they appealed to certain "axioms," as Marshall said, or certain "first principles," as Hamilton said, "upon which all subsequent reasonings must depend."

First among these anchoring truths was the proposition that James Wilson, following Thomas Reid, regarded as the first principle of moral and legal judgment: that it makes no sense to cast judgments of blame or praise on people who lack the active powers to cause their own acts to happen. We don't hold people blameworthy or responsible for acts they were powerless to affect. As Reid observed "no axiom of Euclid appears more evident than this." That proposition threads through so many parts of our law, from the wrong of racial discrimination to the insanity defense, and yet it's not set down in the text of the Constitution any more than the premise of "presumed innocent until proven guilty."

The genius of lawyers such as Hamilton, Marshall and Wilson was that they had a knack for tracing their judgments back to those same anchoring principles that held true as a matter of necessity.

Declaration Principles

And yet Vermeule's appeal to an understanding shared by the founders was treated by his critics with derision, as a venture quite beyond any notion of "law" we take seriously.

Dan McLaughlin, a writer I count as a friend, remarked that Vermeule offered a jurisprudence that "is neither really constitutional nor law." And so McLaughlin sees Vermeule's heresy at work in appealing to "a body of philosophy that could substitute for written law."

Constitution was the opening line, "We the People…do ordain and establish this Constitution." But that is where he falls into a familiar mistake, where Lincoln would have saved him. Surely, the mere fact of asserting the right of the people, or anyone else, to rule cannot be enough to establish the rightness or legitimacy of that rule. As Rousseau warned, the fact that some people seize power and proclaim their right to rule cannot itself establish the rightness of that rule.

Lincoln showed, in his *First Inaugural*, how the rule of a majority under constitutional restraints is the only operational form of government by the consent of the governed. But the rightness of those procedures depended on the principle that had to be there—and true—before the procedures were enacted.

That principle was found for Lincoln in that "proposition," as he called it, that "all men are created equal": that no man is by nature the ruler of other men, and the only rightful governance over human beings must depend on the consent of the governed. That principle came with the Declaration of Independence and, as Lincoln well knew, it *preceded the Constitution* both logically and in time.

My late friend Antonin Scalia insisted that the Declaration had no standing in our law because it was never enacted. But in that curious view he missed entirely the logic that John Locke had unfolded with his train of three quick questions:

What is the source of the law? Answer: the legislature.

But what is the source of the legislature? The Constitution, which tells us whether we have a legislature (or how many chambers it may have).

But then what is the source of the Constitution? It had to be, as Locke said, a source "antecedent to all positive laws," and that authority was "depending wholly on the people," on