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Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution

This wolf comes as a wolf.

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Here are three of the most common criticisms of originalism made by non-originalists:

(1) Originalism does not provide a determinate answer to contested questions—anything beyond, say, how many senators a state gets, or how old a person must be to be president.

(2) Originalism typically produces bad answers to such contested questions.

(3) Originalism is just a cover for conservative judges to reach the results they like.

Note that No. 1 is in tension with No. 2. How can a method that fails to produce *any* answers to contested questions produce *bad* ones? As for No. 3, originalism, like any other method or theory, is not self-enforcing. Instead, it provides a basis to criticize judges who fail to adhere to original meaning when it really matters.

Garrett Epps: Originalism is dead

I like to tweak progressive non-originalists (or "living constitutionalists," as they are sometimes called) by asking them to consider what will happen if they win the argument and persuade conservative judges to abandon their professed commitment to originalism. How will you feel, I ask, when they start using *your* preferred approach to reach the conservative results that they like?

Well, if conservative judges adopt the approach recommended by the Harvard law professor Adrian Vermeule, progressive living constitutionalists will be able to find out exactly how they feel. In a lengthy article for *The Atlantic*, "Beyond Originalism," Vermeule urges conservative scholars and judges to abandon originalism, and, in its place, to develop what he calls *common-good constitutionalism*. "Such an approach," he writes, "should be based on the principles that government helps direct persons, associations, and society generally toward the common good, and that strong rule in the interest of attaining the common good is entirely legitimate." He adds that this approach will give the government "ample power to cope with large-scale crises of public health and well-being—reading 'health' in many senses, *not only literal and physical but also metaphorical and social*" (emphasis mine).

The metaphorical and social "health" to which he refers is moral. Common-good constitutionalism "should take as its starting point *substantive moral principles* that conduce to the common good," which, Vermeule believes, can be "read into the majestic generalities and ambiguities of the written Constitution." Above all, common-good constitutionalism requires "a candid willingness to 'legislate morality'—indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority."

Vermeule would like for government to have an expansive role in promoting this morality, via legislation or other bureaucratic means, even "against subjects' own perception of what is best for them." The bureaucracy, he says, "will be seen not as an enemy, but as the strong hand of legitimate rule." Somewhat chillingly, he adds: "Subjects will come to thank the ruler whose legal strictures, possibly experienced at first as coercive, encourage subjects to form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being."

Vermeule views originalism, with its focus on the original meaning of the text of the written Constitution, to be an obstacle to this agenda. "It is now possible," he observes, "to imagine a substantive moral constitutionalism that [is] not enslaved to the original meaning of the Constitution." Indeed, Vermeule rejects textualism altogether: "Common-good constitutionalism is not legal positivism, meaning that it is not tethered to particular written instruments of civil law or the will of the legislators who created them."

This is nothing but conservative living constitutionalism. While the article is long on narrative, critique, and assertion, it is short on original theory and specifics. Instead, for his theory, Vermeule relies on "Ronald Dworkin, the legal scholar and philosopher" (and my jurisprudence professor when he visited Harvard Law School), who "used to urge 'moral readings of the Constitution.' Common-good constitutionalism is methodologically Dworkinian, but advocates a very different set

of substantive moral commitments and priorities from Dworkin's, which were of a conventionally left-liberal bent."

While he does not discuss it, we can expect Vermeule to want judges to defer to the moral opinions of legislators. One sign of this preference is the swipe he takes at the Supreme Court's protection of the constitutional right to keep and bear arms. "[T]he difference with originalism is clear, because originalism is sometimes revolutionary; consider the Court's originalist opinion declaring a constitutional right to own guns, a startling break with the Court's long-standing precedents."

The idea of "judicial self-restraint" was famously advocated by another Harvard law professor, James Bradley Thayer. In his 1893 *Harvard Law Review* article, Thayer proposed that judges should almost always defer to the judgment of legislators. Three years later, the Supreme Court followed his approach in *Plessy v. Ferguson*:

> There must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and *the preservation of the public peace and good order*. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable *[emphasis mine]*.

Jim Crow was, above all things, a regulation of morality with a vengeance. The minority will just have to wait for the enlightenment of the majority. (Oh, wait—Vermeule may think the Enlightenment bad, too.)

Adam Serwer: The Supreme Court is headed back into the 19th century

Progressives are already seizing on Vermeule's article to claim that conservatives' commitment to originalism was always insincere and opportunistic. According to one

Twitter wag, the piece "is an outright statement by a conservative law professor that originalism was just a rhetorical strategy which, now that conservatives hold power in the courts, can be abandoned and replaced with straightforward reactionary politics."

Nonsense. Vermeule was never an originalist. For him, originalism was never a "rhetorical strategy." Rather, he is a Catholic integralist, which makes him a very particular and scarce kind of "conservative law professor." Integralists believe, as the priest Edmund Waldstein put it, "since man's temporal end is subordinated to his eternal end, the temporal power must be subordinated to the spiritual power." In case the meaning is lost: This is an argument for the temporal power *of the state* to be subordinated to the spiritual power *of the Church*.

A moral-readings approach like Vermeule's raises some obvious questions:

- What qualifies state legislators to make spiritual choices that will be imposed on nonconsenting citizens? What will legislative debates about morality look like? Who will be called as witnesses in legislative hearings? The inevitable answer is that legislators will just vote their own morality and the legislative majority will prevail. In the legislature, might will make right. (The state-sanctioned segregation upheld in *Plessy* is a good example of this.)
- Assuming there is any judicial review left, what in judges' training qualifies them to assess these competing moral claims on which legislation is to be solely based? Answer: Nothing.
- Above all, what happens to social peace as the government starts incarcerating the dissenting minority for failing to adhere to their moral duties? Religious war, anyone?

What does Vermeule have to say about these and other obvious questions? Well, nothing. He does not even acknowledge that such questions exist. Presumably, all will be revealed to us in the fullness of time. As the (non-originalist) George Mason University law professor David Bernstein observed—in response to Vermeule's piece—on Facebook, "It must be nice to be a Harvard professor. You can write a short, silly essay on constitutional law that addresses none of the obvious objections to your

thesis, and still get a tremendous response as if you've written a serious piece of scholarship."

Why now? Vermeule is quite naked in his political calculation: "The hostile environment that made originalism a useful rhetorical and political expedient is now gone. Outside the legal academy, at least, legal conservatism is no longer besieged." (Yes, Vermeule calls originalism a "rhetorical and political expedient"—but what do you expect from a living constitutionalist?)

In this, Vermeule is consciously mirroring the views of his Harvard Law School colleague Mark Tushnet. During the run-up to the 2016 election, with Hillary Clinton's victory (all but) assured, Tushnet wrote a blog post (to which Vermeule links) that urged his fellow progressives to "[Abandon] Defensive Crouch Liberal Constitutionalism." Tushnet's views are too lengthy to summarize, but one passage gives a sense of his premature triumphalism: After eight years of Obama appointees, "more than half of the judges sitting on the courts of appeals were appointed by Democratic presidents, and … the same appears to be true of the district courts." With Clinton set to pick Justice Antonin Scalia's successor, "those judges no longer have to be worried about reversal by the Supreme Court if they take aggressively liberal positions."

Oops. Now it's Vermeule's turn to crow, advocating an "ambitious" approach that "abandons the defensive crouch of originalism and that refuses any longer to play within the terms set by legal liberalism." He writes,

> If President Donald Trump is reelected, some version of legal conservatism will become the law's animating spirit for a generation or more; and even if he is not, the reconstruction of the judiciary has proceeded far enough that legal conservatism will remain a potent force, not a beleaguered and eccentric view. Assured of this, conservatives ought to turn their attention to developing new and more robust alternatives to both originalism and left-liberal constitutionalism.

There seems to be something authoritarian in the water of Harvard Law School.

While methodological disagreement among originalists is healthy and will persist, I seriously doubt there will be many defections to common-good constitutionalism. Originalist scholars and judges are all too familiar with the pitfalls of living constitutionalism.

But there will be some. In particular, I have sensed a disturbance in the originalist force by a few, mostly younger, socially conservative scholars and activists. They are disappointed in the results they are getting from a "conservative" judiciary—never mind that there are not yet five consistently originalist justices. Some attribute this failing to originalism's having been hijacked by libertarians. Some have been drawn to the new "national conservatism" initiative, which makes bashing libertarians a major theme. These now-marginalized scholars and activists will be delighted to fall in behind the Templar flag of a Harvard Law professor like Vermeule.

Vermeule's article should put both conservatives and progressives on notice that the conservative living-constitutionalism virus has been loosed upon the body politic. But there's time to take protective measures.

Progressives: Do you still want conservative judges to abandon their originalism for living constitutionalism? If not, "Originalism for thee but not for me" won't cut it. To be taken seriously by them, you will need to bite the bullet and join the Originalist League. We have several teams you can play for.

Conservatives: After years of fending off attacks from your left flank, get ready to defend originalism from your right flank as well. Be prepared for conservative pushback against originalism. But rest assured that the underlying theory being asserted by Vermeule is nothing new. Until he presents an improved version, well-established criticisms continue to apply.

Read: Constitutional originalism: now for liberals too

We can all be grateful to Vermeule for firing so visible a shot across the originalist bow. Forewarned is forearmed. Recall this passage from Justice Scalia's dissenting opinion in *Morrison v. Olson*: "Frequently an issue … will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."

There is nothing subtle or surreptitious about the challenge common-good constitutionalism poses to originalism. This wolf comes as a wolf.