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The Constitution Must Control Judges, Not Vice Versa

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KEY TAKEAWAYS

The Constitution cannot control judges if they control what the Constitution means; originalism focuses on what Americans meant when establishing the Constitution.

Professor Adrian Vermeule wants to abandon originalism so that judges can reinterpret the Constitution to change government and society in particular ways.

Our liberty requires sticking to how America's Founders designed the judiciary to function rather than letting judges control the supreme law of the land.

Many Americans know precious little about our system of government; the judicial branch is especially mysterious. In a recent article published in *The Atlantic*,[1] Harvard Law School professor Adrian Vermeule deepens that confusion by advocating a powerful new role for judges that is radically at odds with how America's Founders designed the judiciary.

U.S. Supreme Court Justice Clarence Thomas wrote last year that the "judicial task is modest: we interpret and apply written law to the facts of particular cases."[2] This job description has two important elements. First, federal judges decide "particular cases." That is, they settle individual legal disputes. Second, federal judges use written law to decide those cases. The late Justice Antonin Scalia has explained that "[e]very issue of law I resolve as a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[3] From our nation's

founding, the debate about the judiciary has focused on the method judges should use to interpret written law as they decide cases.

Vermeule urges government officials, including judges, to abandon one method, originalism, in favor of another that he calls "common-good constitutionalism." Judges should "read into" the Constitution certain principles that Vermeule says will facilitate "strong [government] rule in the interest of attaining the common good."

The "common good," however, is hardly self-defining. One article in the *Stanford Encyclopedia of Philosophy*, for example, examines conceptions of the common good favored by a line of philosophers stretching back 2,400 years.[4] What Vermeule really wants is for judges to interpret the Constitution in a way that promotes *his* version of the "common good" and leads to *his* version of what government and society should be.

He shares that vision in his article. In general, Vermeule writes, the "ruler has the power needed to rule well," and the "law is parental, a wise teacher and an inculcator of good habits." Vermeule refers to you and me as "subjects" who will "come to thank the ruler" for encouraging us to "form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being."

More specifically, Vermeule wants judicial manipulation of the Constitution to produce a "just state" with "ample authority to protect the vulnerable from the ravages of pandemics, natural disasters, and climate change, and from the underlying structures of corporate power that contribute to these events." The state, he writes "is to be entrusted with the authority to protect the populace from the vagaries and injustices of market forces, from employers who would exploit them as atomized individuals, and from corporate exploitation and destruction of the natural environment."

To do this, Vermeule writes, judges should read into the Constitution principles that he calls authority, hierarchy, solidarity, and subsidiarity. These can be used to fill the "sweeping generalities and famous ambiguities of our Constitution" with "substantive moral readings that promote peace, justice, abundance, health, and safety." Vermeule would even allow judges to incorporate "the law of nations or the 'general law' common to all civilized legal systems" if that is what it takes.

This role for the judiciary is very different from the one that America's Founders designed. They wrote in the Declaration of independence that the purpose of government is to secure "unalienable Rights" such as "Life, Liberty, and the pursuit of Happiness." Government needs enough power, they argued, not to shape our desires, habits, and beliefs, but to secure our rights. And they designed a system of government, based on certain principles and with powers deliberately structured, to serve that end.

Violating the Founders' Design

Vermeule's proposal is at odds with the Founders' design first in endorsing the idea that judges are free to choose and to change how they interpret the Constitution at any given time. His proposal brings to mind the famous statement by Governor (later Associate Justice and then Chief Justice) Charles Evans Hughes that while "we are under a Constitution, the Constitution is what the judges say it is."[5] This may be an observation about how things currently work from time to time; for Vermeule, it describes how things *should* work.

The conflict between this view and the system of government that America's Founders designed cannot be overstated. This is a republic in which, as Founder James Wilson explained, the people are "masters of the government."[6] The people assert that mastery directly through a written Constitution that sets rules for government. As the Supreme Court recognized in *Marbury v. Madison*, "courts, as well as other departments, are bound by that instrument."[7] It should not need saying, but judges cannot be bound by an instrument whose meaning they control.

In a 1795 decision, the Supreme Court asked "What is a Constitution?" The answer, the Court said, is that the Constitution is "fixed and certain; it contains the permanent will of the people, and is the supreme law of the land." As such, the Constitution "can be revoked or altered only by the authority that made it."[8] Altering the Constitution by changing its meaning—what Justice George Sutherland would later call "amendment under the guise of interpretation"[9]—violates this principle.

A year later, in his Farewell Address, President George Washington explained that the basis of our system of government is "the right of the people to make and to alter their constitutions of government. But the Constitution, which at any time exists till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."[10] As a written document, the Constitution is the meaning of its words. If Washington was correct, then courts must be bound not only by the words that the people put in the Constitution, but by their meaning as well.

Dissenting in *Dred Scott v. Sandford*, Justice Benjamin Curtis explained that:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men who, for the time being, have power to declare what the Constitution is according to their views of what it ought to mean.[11]

Making the Constitution mean what they think it ought to mean, however, is precisely the power judges must have to do what Vermeule advocates. A more fundamental and complete reversal of the very premises of our system of government is difficult to fathom.

Vermeule's proposal is troubling not only for what he advocates, but also for what he rejects. He defines the interpretive approach called "originalism" as "the view that constitutional meaning was fixed at the time of the Constitution's enactment." This method, he claims, "was developed in the 1970s and 80s" because "it helped legal conservatives survive and even flourish in a hostile environment." It was this "hostile environment that made originalism a useful rhetorical and political expedient." But "circumstances have now changed," he writes; the intellectual coast is clear, and "conservatives ought to turn their attention to developing new and more robust alternatives" to interpreting the Constitution.

In this explanation of originalism, Vermeule is wrong on all counts. The label may be of rather recent vintage, but the theory is as old as America itself. Moreover, rather than originalism being a reaction to a hostile environment, the hostile environment grew as a reaction to originalism.

America's Founders explicitly directed that what we call originalism is in fact a defining element of how judges should exercise the "judicial power" that the Constitution gives to the judiciary. James Madison insisted that the proper guide for "expounding" the Constitution is "the sense in which the Constitution was accepted and ratified by the nation."[12] The "legitimate meaning" of the Constitution, according to Madison, "must be derived from the text itself; or if a key is to be sought elsewhere, it must be...in the sense attached to it by the people in their respective [ratifying] conventions where it received all the authority which it possesses."[13]

Thomas Jefferson had a similar view. "On every question of construction," he wrote, we must "carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed."[14] Otherwise, Jefferson warned, the Constitution would become "a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[15]

The Founders' design for the judiciary needs no interpretation. In the republic they established, the people have authority to determine both what the Constitution says and what it means. They are the "authority that made" the Constitution and, in interpreting it, judges must seek to figure out what the people meant by what they wrote. That is why Justice Scalia, in a 2005

lecture, referred to originalism as constitutional interpretation "the old fashioned way." It begins "with the text, and [gives] that text the meaning that it bore when it was adopted by the people."[16]

The Founders' design is originalism in all but name, and it is compelled by both the principles and the structure of our system of government and the specific prescription of that system's designers. The late Judge Robert Bork, in an article titled "The Case Against Political Judging," wrote:

> Even if evidence of what the Founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the constitution's words.... The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the U.S. Constitution.[17]

Vermeule gives no hint of any of this in his article. Originalism is far more than a theory invented in the past 40 years as a way to deal with a hostile intellectual environment. Originalism is normative, not convenient. It is mandatory, not optional.

Vermeule's Common-Good Constitutionalism

Vermeule's "common-good constitutionalism" is hardly the first suggested replacement for originalism. Each of its detractors sees the Constitution, as the people ordained and established it, as an impediment to achieving a political agenda or a different society. Each does exactly what Jefferson warned against: squeezing or inventing new meaning that the inventor prefers to the Constitution we have.

During President Franklin D. Roosevelt's first term, for example, the Supreme Court held that the Constitution, as originally understood, did not give the federal government as much power as Roosevelt wanted. In May 1935, four days after the Supreme Court unanimously struck down the National Industrial Recovery Act,[18] Roosevelt held a press conference in which he endorsed using "interpretation" to "enlarge" federal power. Such "court-approved power," he said, would allow the federal government to achieve its political and policy objectives.[19]

Justice Stanley Reed once wrote that a "rule of law should not be drawn from a figure of speech."[20] Neither should interpretive approaches be built on cliches. Law professors, however, do it anyway. One scholar recommended interpreting the Constitution based on "the well-being of our society,"[21] while another suggested the lodestar of "distinctive public

morality."[22] Then there is interpreting the Constitution based on the "evolving norms and traditions of society,"[23] the "settled weight of responsible opinion,"[24] or "deeply embedded social values."[25]

None of these (and there are many more) is any better or worse than the other because each is a way of fashioning a constitution different from the one "ordain[ed] and establish[ed]" by the American people. These cliches or phrases may sound philosophical or intellectual, even judicial, but each is like a cloaking device to shield from view the fact that judges are simply, in Jefferson's words, twisting the Constitution into another shape altogether.

Vermeule's approach is suitable, if at all, for courts that use the common law, not written or civil law, to decide their cases. When he delivered the 1995 Tanner Lecture at Princeton University, Justice Scalia chose the title "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws."[26] Common-law courts, Scalia explained, are a system of "making law by judicial opinions" and apply "law developed by judges." That approach, Scalia asserted, is not appropriate for a civil law system in which judges interpret and apply written law. Scalia could have been discussing Vermeule's article.

Vermeule's approach leaves virtually everything in the eye of the judicial beholder. He writes, for example, that his common-good constitutionalism would make vulnerable the Supreme Court's jurisprudence in such areas as free speech and abortion, replaced by interpretations that emphasize "the general welfare and human dignity." But Justice William Brennan, when he was publicly debating originalism with then-Attorney General Edwin Meese in the 1980s, called the Constitution a "sparkling vision of the supremacy of the human dignity of every individual,"[27] yet was unmatched in defending the Court's free speech and abortion jurisprudence. While some of originalism's critics say that it remains somewhat subjective, at least originalist judges know what they are looking for and where to find it. Common-good constitutionalism makes originalism look closer to rock-hard science.

Finally, Vermeule leaves huge questions unanswered. America's Founders knew that the approach they prescribed for interpreting a written Constitution also applied to other forms of written law such as statutes. Wilson wrote, for example, that the "first and foremost governing maxim in the interpretation of a statute is to discover the meaning of those who made it."[28] If judges may detach from the Constitution's original meaning in favor of something else, may they do the same with statutes? If so, it would appear to undermine the entire enterprise of representative democracy by effectively shifting the power of making law from elected representatives to unelected federal judges.

Conclusion

Adrian Vermeule's proposed system would take control of the Constitution away from the people and give it to public officials, reversing the central element of republican government. He rejects the interpretive method that America's Founders designed as integral to our system of government, proposing instead a method that, like many others, empowers judges to make up the law as they go along. In 1953, Justice Robert Jackson noted the "widely held" belief that the Supreme Court "no longer respects impersonal rules of law, but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices."[29] Shifting to something like common-good constitutionalism would make that belief universal.

Alexander Hamilton wrote in *The Federalist* No. 78 that the judiciary was designed to be the "weakest" and "least dangerous" branch. Vermeule's proposal, however, is nothing less than a prescription for what Justice Scalia once called "power-judging."[30]

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Endnotes

1. Adrian Vermeule, *Beyond Originalism*, The Atlantic (March 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.
2. Gamble v. United States, 139 S.Ct. 1960 (2019).
3. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 13 (Princeton University Press, 1997).
4. Hussain, Waheed, *The Common Good*, *in* The Stanford Encyclopedia of Philosophy (Spring 2018 Edition), https://plato.stanford.edu/archives/spr2018/entries/common-good/.
5. Charles Evans Hughes, Lecture*, Speech Before the Elmira Chamber of Commerce*, *in* Addresses and Papers of Charles Evans Hughes 133–39 (Fuller & Richardson eds. 1908).
6. 1 The Works of James Wilson, 384 (James DeWitt Andrews ed., Callaghan & Co., 1896).
7. Marbury v. Madison, 5 U.S. 137, 180 (1803).
8. VanHorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).
9. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).
10. President George Washington, Farewell Address (Sept., 1796) (available at https://avalon.law.yale.edu/18th_century/washing.asp).
11. Dred Scott v. Sandford, 60 U.S. 393, 621 (1856) (Curtis, J., dissenting).
12. Letter from James Madison to H. Lee (June 25, 1824), *in* 2 Letters and Other Writings of James Madison, 441–42 (J.B. Lippincott 1867).
13. 9 The Writings of James Madison 191 (Hunt ed., G.P. Putnam's Sons 1910).
14. The Jefferson Cyclopedia, p. 193 (John P. Foley ed., Funk & Wagnalls Co. 1900).
15. Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), *in* The Jefferson Cyclopedia, *supra* note 14 at 190.
16. Justice Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars in Washington: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005) (available at https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).
17. Robert H. Bork, A Time to Speak: Selected Writings and Arguments (Intercollegiate Studies Institute, 2008), 276.
18. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).
19. Press Conference with President Franklin Delano Roosevelt (May 31, 1935) (available athttps://www.presidency.ucsb.edu/documents/press-conference-23).
20. McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).
21. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. Rev. 204, 226 (1980).
22. Owen M. Fiss, *The Supreme Court 1878 Term - Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 11 (1979).
23. Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, Keeping Faith with the Constitution, 2 (American Constitution Society, 2009)
24. Mark Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 Sup. Ct. Rev. 261, 79 (1975).
25. Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1040 (1979).
26. Antonin Scalia, Tanner Lecture on Human Values at Princeton University : Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws (Mar. 8–9, 1995) (available at https://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf).
27. William J. Brennan, Address to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in The Great Debate: Interpreting Our Written Constitution 18 (Federalist Society, 1986), available at https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985.
28. Works of James Wilson, *supra* note 6, at 11.
29. Brown v. Allen, 344 U.S. 443 (1953) (Jackson, J., concurring in the result).
30. Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting).