

VOLUME XXII, NUMBER 2, SPRING 2022

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A Journal of Political Thought and Statesmanship

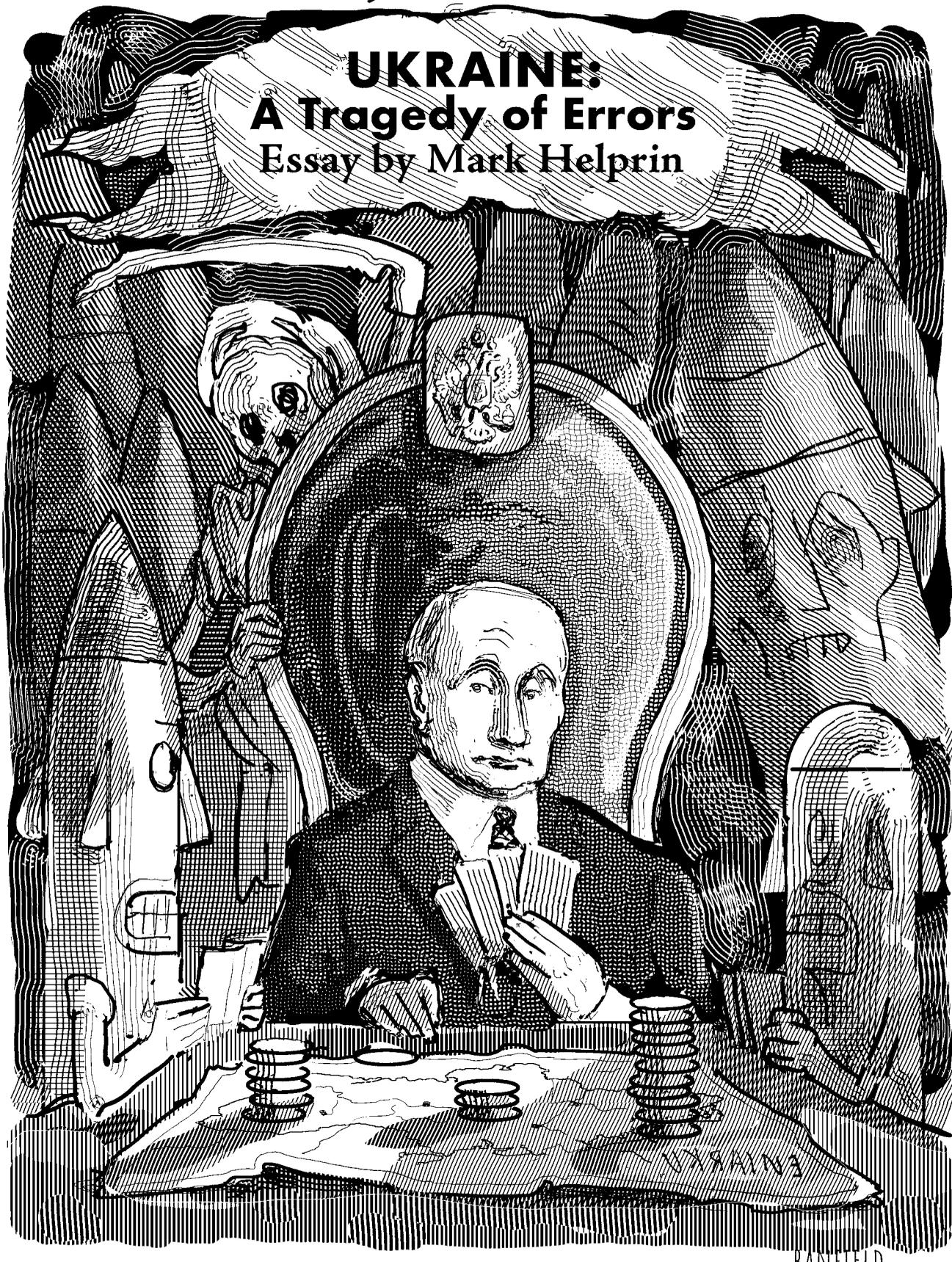
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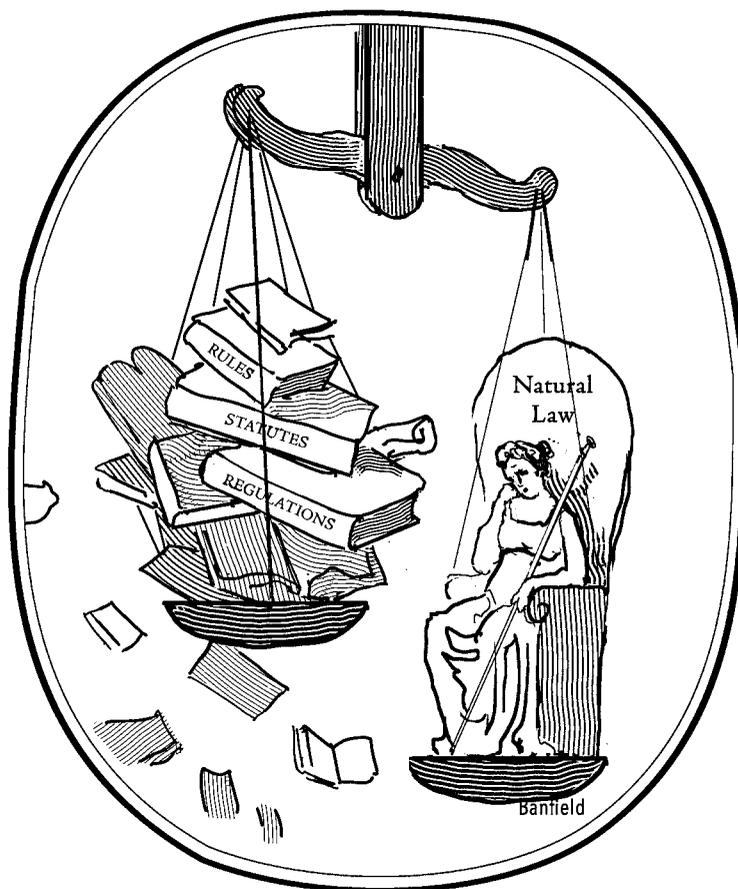
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DEEP-STATE CONSTITUTIONALISM

Common Good Constitutionalism, by Adrian Vermeule.
Polity Books, 270 pages, \$59.95 (cloth), \$19.95 (paper)



TO APPRECIATE WHY ADRIAN VERMEULE'S *Common Good Constitutionalism* is important, it is necessary to evaluate not only his proposed approach to constitutional law but also the book's political context.

In 2016, many Republican primary voters were deeply dissatisfied with the Republican "establishment." To their mind, GOP officeholders made campaign promises to enact conservative policies, then failed to deliver. Even worse, they seemed to prefer approval from progressive media and intelligentsia to that of their own constituents. As a result, promised conservative policies seemed never to be adopted. All the while the Left was succeeding in its long march through elite media, education, and corporate institutions. Conservative Republicans—dubbed "Conservative Inc." or "Big Con"—were the hapless Washington Generals to the progressives' Harlem Globetrotters.

These voters wanted someone who would eschew political correctness. Someone who would fight! When they surveyed the 17

candidates on the presidential debate stage, these voters saw only one who was irreverent enough, fearless enough—and possibly crazy enough—to do what he promised and stand up for them. They viewed the rest as the same old posers. And so Donald J. Trump, who had never been a "movement" conservative, or a conservative of any stripe, and who was barely a Republican, secured the Republican nomination. To most everyone's amazement, he proceeded to win the presidency.

A SIMILAR DYNAMIC IS NOW PLAYING out within the conservative legal movement. For years, members of the conservative legal establishment—in association with the Federalist Society network—assured voters they were vetting prospective judicial nominees for fealty to conservative legal principles. To growing numbers of those voters, subsequent judicial results have been disappointing.

The galvanizing decision was the 2020 case of *Bostock v. Clayton County*. Not a con-

stitutional case, *Bostock* concerned the proper interpretation of Title VII of the U.S. Code, which makes it "unlawful...for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's race, color, religion, sex, or national origin" (emphasis added here and throughout unless otherwise noted). The textual question in *Bostock* was whether discriminating against someone because of "sexual orientation" was discrimination "because" of "sex."

In a widely criticized decision, a six-to-three majority answered yes. Writing the opinion for the majority was none other than the Trump-nominated, conservative originalist Justice Neil Gorsuch. To many on the Right—but especially to social conservatives—this seemed like a betrayal of everything they had been promised. Never mind that Gorsuch was joined by the four progressive justices and Chief Justice John Roberts, while the remaining three conservatives, including Justice Brett Kavanaugh, dissented. Never mind that



originalist-textualist commentators (like me) widely criticized Gorsuch's reasoning. This legal incident appeared yet another instance of Lucy snatching the ball away from Charlie Brown. Or how the progressives would never be denied. Or how conservative "principles" seemed never to lead to conservative *results*.

In response to *Bostock*, some conservatives began to question the agenda of the conservative legal movement. They began to reject originalism as a method of constitutional interpretation in favor of an explicitly results-oriented approach. Some of these discontents have now found their avatar, their Donald Trump, in Harvard Law professor Adrian Vermeule.

VERMEULE HAS HAD A LONG, DISTINGUISHED career as an administrative law scholar. Although highly respected in his field, he was generally unknown outside of academia. He was neither a constitutional law theorist, nor an originalist, nor even a political conservative. He was a mild-mannered member of the law professoriate elite. In 2020, he and his Harvard colleague Cass Sunstein, the Obama Administration's regulatory "czar," co-authored a book with the revealing title, *Law and Leviathan: Redeeming the Administrative State*. Vermeule was thoroughly establishment, and hardly a bomb-thrower.

But something happened to Adrian Vermeule. He underwent a (now-public) conversion to Roman Catholicism and has since associated himself with Catholic integralism, which embraces the principle that the Catholic faith should be the basis of public law and public policy within civil society. I will not dwell on Catholic integralism and what Vermeule has written about it because his new book is entirely secular in its reasoning and should be evaluated without concern for any underlying religious agenda.

I mention the Catholic influence in passing because some have wrongly assumed that Vermeule's arguments are religiously based. And because it helps explain why some social conservatives, especially younger ones, have embraced Vermeule as a champion of what he calls a "rightly ordered" society. He seems to be one of them, the real deal. Someone who makes the conservative legal establishment tremble in fear. Someone with a constitutional approach that, if supported, will deliver *results*.

In fairness, Vermeule has located a genuine deficiency in the conservative legal movement that I have criticized for as long as I have been a part of it. For a variety of reasons, constitutional conservatives—for want of a bet-

ter label—tend to focus almost exclusively on the proper reading of the "positive law." They shy away from any systematic consideration of justice or morality, deeming these topics to be outside the proper province of the judiciary. As a result, many conservative legal academics and jurists dismiss the relevance of natural law, natural rights, and even the Declaration of Independence to their theories of law and legal interpretation.

FOR EXAMPLE, HERE IS HOW JUSTICE Amy Coney Barrett responded to a question by Senator Ben Sasse about the role of the Declaration during her confirmation hearing:

The Declaration of Independence is an expression of our ideals, expression of our desire to be free from England. It's not law, however.... [T]he Constitution is our foundational law and our governing document. And, while the Declaration of Independence tells us a lot about history and about the roots of our Republic, it isn't binding law.

My point is not to single out Justice Barrett for special criticism. I quote her because this instinctive diminution of the Declaration as our founding document is such a fixture of thought for some conservatives that it rolled smoothly and eloquently off her tongue.

The case of *Troxel v. Granville* (2000) provides another example. In this case, the Court considered whether parents have a constitutional right to raise their own children. If there is such a right, it's not because it is in the text of the Constitution. Conservatives have long been skeptical, if not hostile, to any claims about unenumerated rights, notwithstanding the 9th Amendment's instruction that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage *others* retained by the people." In his failed 1987 nomination to the Supreme Court, then-Judge Robert Bork characterized the 9th Amendment as an "ink blot" that judges cannot read. Bork was and remains a Federalist Society hero and martyr.

In *Troxel*, however, a 6-3 majority—which included Justice Clarence Thomas—recognized such a parental right. They upheld the constitutional right of a mother to deny visitation privileges sought by the parents of her estranged husband, her children's grandparents. Justice Antonin Scalia—for whom Justice Barrett clerked—dissented.

In his opinion, Scalia conceded that this right was one to which both the Declaration

and 9th Amendment refer. He wrote: "In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men...are endowed by their Creator.'" And "in my view that right is also among the 'othe[r] [rights] retained by the people' which the 9th Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'" But, he continued, "[t]he Declaration of Independence, however, is not a *legal* prescription conferring powers upon the courts; and the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."

THIS DE-EMPHASIS OF JUSTICE AND NATURAL rights stems from a preoccupation with the portion of the Federalist Society mission statement that says "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." This preoccupation, however, comes at the expense of that part of the mission statement which insists that "the state exists to preserve freedom." This singular focus on the proper role of *judges* at the expense of a conception of *justice* based on the natural rights that define freedom or liberty is analogous to advocates of the free market who focus entirely on its "efficiency" rather than its justice.

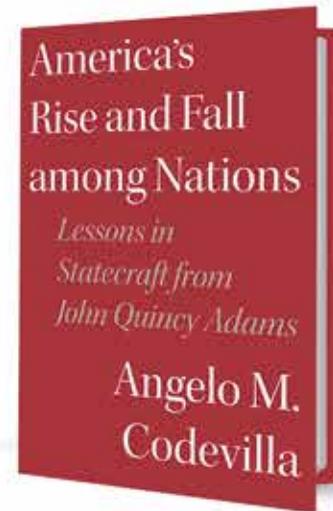
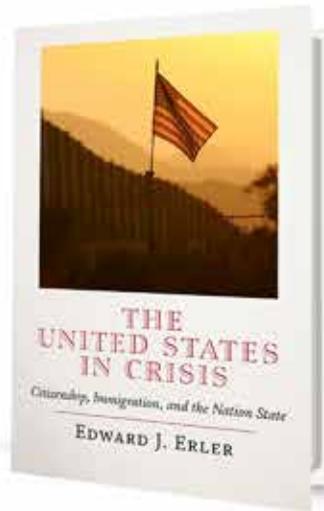
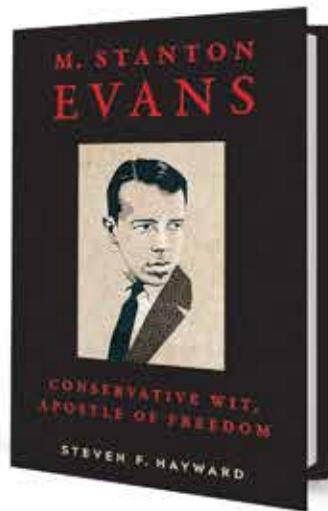
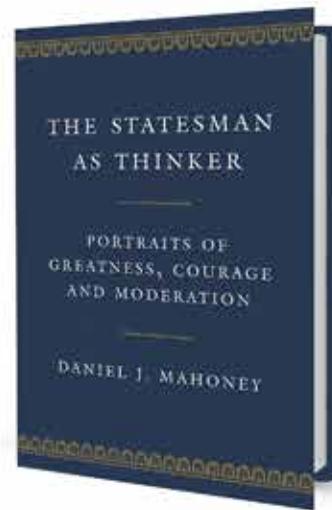
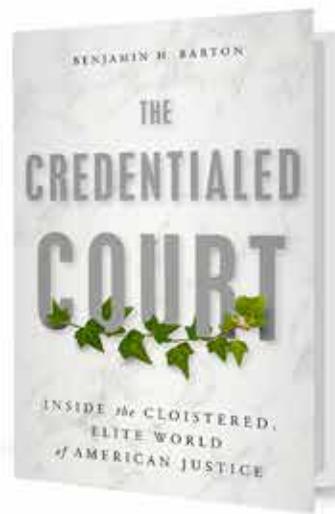
Now we are witnessing an insurgency in the conservative legal movement by those who advocate what they call a "common good conservatism" that is highly critical of what they disparagingly label as individualism or "liberalism." They also criticize or diminish the importance of the individual natural-rights foundation of the American theory of government. A few of these advocates have even turned on the Federalist Society's commitment to promoting adherence to the original meaning of the Constitution. In all this, their intellectual guru is Adrian Vermeule.

For a time, Vermeule led his followers with caustic tweets and the occasional online essay. As a result, it was not uncommon for his critics to attribute to him the authoritarian views we might expect from a Catholic integralist. But now, at last, we have *Common Good Constitutionalism*, by which we can understand and assess his approach.

Before getting granular about Vermeule's theory, let me begin with one of my conclusions that some readers may find surprising. Although I take issue with his particular conception of the common good—which he

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repeatedly asserts but does not defend—I otherwise generally agree with the common-good, natural-law superstructure that Vermeule spends the first two chapters describing. This is because I am not only a natural-rights theorist, which aligns me both with the founders and with the Republicans who gave us the Reconstruction amendments. I am also an adherent to the Aristotelian-Thomist conception of natural law, of the sort explicated by my teacher and mentor, Henry B. Veatch.

PROPERLY CONCEIVED, THIS COMMON-good, natural-law superstructure is a useful corrective to the conservative legal movement’s exclusive focus on the positive law, which leads to Justice Barrett’s marginalization of the Declaration and Justice Scalia’s marginalization of the 9th Amendment. But subsequently, Vermeule makes a few theoretical moves whose significance readers may not notice.

None of these moves is original, and most are made by claiming the authority of the scholars who made them—especially Ronald Dworkin (with whom I studied)—rather than defending them with arguments. Indeed, Vermeule affirms as much: “I draw on jurisprudential ideas as necessary, I have nothing

original to say in that regard.” It is somehow fitting that Vermeule’s argument is largely an appeal to authority.

For those expecting him to defend a social conservative platform, however, these moves lead to some unexpected—and decidedly progressive—results. For one thing, Vermeule rejects the U.S. system of federalism based on dual sovereignty in favor of a European concept of “subsidiarity.” This approach purports to leave to local authorities what is within their competence, while governing at a higher level only when necessary. But the decision of how to allocate power lies solely with the higher authorities.

With federalism, dual sovereignty creates a realm of state authority that is properly outside the jurisdiction of the national government, whatever its preferences may be. We have recently witnessed the importance of dual sovereignty during COVID, when the federal government’s power to impose nationwide health measures on localities was thankfully limited. State governors had the power to frame a diversity of policies, which enabled us to compare more effective with less effective measures. States like Florida were free to adopt a more open approach than lockdown states like New York. And crucially, Americans were able to vote with their feet by mov-

ing to the jurisdictions which, in their view, had better public policy. Vermeule’s European approach would deprive us of this freedom, and the public health benefits that have resulted.

AS VERMEULE WROTE ELSEWHERE, “I see no objection in principle to the President’s vaccine mandate, as a matter of political morality.” These principles of political morality

should be brought to bear in the interpretation of executive authority. The relevant legal materials are capacious and, in places, vague. They can and should be interpreted to allow the President and his agents broad leeway to act, and to act swiftly.

As this stance exemplifies, Vermeule endorses the administrative state as the institution best charged with implementing the natural law. This should come as no surprise to anyone familiar with his work as an administrative law scholar but may well surprise those conservatives who view him as their champion. Vermeule does not (with one odd exception) propose that judges impose the common good. Instead, he favors a radical deference to

New and Noteworthy Books from AEI Scholars

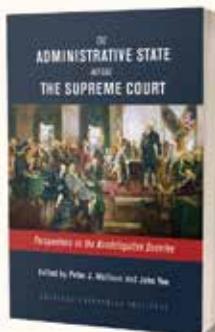
The Administrative State Before the Supreme Court

Perspectives on the Nondelegation Doctrine

Edited by Peter J. Wallison and John Yoo

March 2022
Publisher: AEI Press
ISBN: 978-0-8447-5042-2

The Administrative State Before the Supreme Court presents arguments from leading legal scholars on how the nondelegation doctrine can be revived. Each author analyzes a unique facet on the applicability of this doctrine and the role it can play in restoring balance to the American constitutional system.



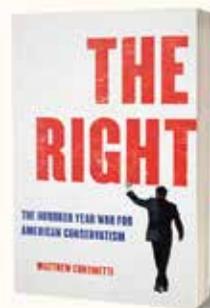
The Right

The Hundred-Year War for American Conservatism

Matthew Continetti

April 19, 2022
Publisher: Basic Books
ISBN: 978-1-5416-0052-2

In *The Right*, Matthew Continetti gives a sweeping account of modern conservatism’s evolution, from the Progressive Era through the present. He tells the story of how conservatism began as networks of intellectuals, developing and institutionalizing a vision that grew over time, until they began to buckle under new pressures, resembling national populist movements. Drawing out the tensions between the desire for mainstream acceptance and the pull of extremism, Continetti argues that the more one studies conservatism’s past, the more one becomes convinced of its future.



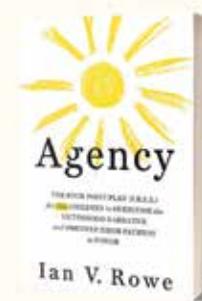
Agency

The Four Point Plan (F.R.E.E.) for ALL Children to Overcome the Victimhood Narrative and Discover Their Pathway to Power

Ian Rowe

May 16, 2022
Publisher: Templeton Press
ISBN: 978-1-5994-7583-7

Agency describes four pillars that can uplift every young person as they make the passage into adulthood: Family, Religion, Education, and Entrepreneurship (the FREE framework). Together, these pillars embody the true meaning of freedom, wherein people are motivated to embrace the ennobling responsibilities of building healthy social structures and shaping the outcomes of their own lives.



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administrative state expertise to pursue the common good. In other words, post-conversion Vermeule has adopted a political-moral superstructure in service of the same legal agenda that pre-conversion Vermeule favored on utilitarian or pragmatic grounds.

The exception to his reliance on judicial deference is his urging the Supreme Court to modify its doctrines governing who has “standing” to sue the government in order “to promote environmental goods through law—including through litigation.” More broadly, “standing” should “be reshaped precisely to encourage plaintiffs representing the public interest rather than litigating private grievances.” Why the judicial deference he claims to be a part of “the classical law” is inappropriate here, as it is elsewhere, is not explained.

Of course, Vermeule’s biggest splash has been his rejection of “originalism.” But he rejects a straw man version of it that virtually no originalist has accepted for the past 20 years or more. When responding to critics, however, it becomes clear that he actually *embraces* originalism to guard against characterizations of his approach as a version of living constitutionalism.

IN COMMON GOOD CONSTITUTIONALISM, Vermeule spends much of the book describing features of what he calls the “classical law” that he thinks should be restored. On the first page, he appears to define “the classical legal tradition” as “the *ius commune*, the classical European synthesis of Roman law, canon law, and local civil law.” The *ius commune*, he says, “was heavily influential in England, in a somewhat variant form; both English and continental streams influenced Americans right from the beginning, throughout the nineteenth century and well into the twentieth.”

He then tells us that the classical tradition “openly embraces the view that law is ordered to the common good, explains why it is law’s nature to be so ordered, and claims that the positive law based on the will of the civil lawmaker, while worthy of great respect in its sphere, is contained within a larger objective order of legal principles and can only be interpreted in accordance with those principles.”

Vermeule identifies what he says should be “the master principle of our public law”: “that all officials have a duty, and corresponding authority, to promote the common good—albeit in a manner consistent with the requirements of their particular roles.” There is nothing objectionable here, though this last qualification plays an important role to which I will return. Under the “classical law,” the “ruling authority always act[s] through reasoned ordinances

conducting to the common good, to public rather than private interest.” So far, so good.

Vermeule does not deny the existence, and presumptively binding nature, of positive law—what he also calls “posited” law. Positive law, he says, “represents a legitimate specification by the public authority of general principles of legal morality that need concrete embodiment, the specification of local rules that take account of local conditions.” Vermeule labels this process “determination” or *determinatio*: “the process of giving content to a general principle drawn from a higher source of law, making it concrete in application to particular local circumstances or problems.”

THE NEED FOR DETERMINATION “ARISES when principles of justice are general and thus do not specifically dictate particular legal rules, or when those principles seem to conflict and must be mutually accommodated or balanced.” For Vermeule, the common good

is a type of *justification* for public action. It does not, by itself, prescribe any particular legal institutions or rules. Leaving aside cases of intrinsic evils, which place deontological side constraints on all public and private action, the common good must be applied to a set of particular circumstances by means of the faculty of prudential judgment (emphasis in original).

Here again, I am with him.

In *The Structure of Liberty: Justice and the Rule of Law* (1998), I made exactly the same claim about the need for the rule of law to devise doctrines to implement the abstract requirements of justice. These legal precepts—consisting of both specific rules and more abstract principles à la Dworkin who famously drew this distinction—are not logically deducible from abstract principles of justice. They are adopted by agreement or “convention.” The most commonly invoked example of this is determining on which side of the road traffic will flow—when the natural law dictates only that it must be on one side or the other.

Still, to be binding in conscience, I maintain, such rules of law should not conflict with abstract principles of justice, which are essential to achieving the common good. As I wrote, “To render abstract principles specific enough to govern conduct requires some process of arriving at a conventional choice of precepts. Although such precepts may not be deduced from abstract principles, they can run afoul of these principles” and be “inconsistent with

the requirements of justice or the rule of law.” In sum, “[a]bstract natural rights and rule of law principles exclude wrong answers rather than definitively establish right ones.” Or, as Vermeule puts it, “The common good in its capacity as the fundamental end of temporal government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity.”

Vermeule also acknowledges the importance of putting these conventional rules in writing. The “right and duty of the public authority to determine or specify the content of the positive law imply that the judges or other officials who determine the meaning of law at the point of application are duty-bound to follow a kind of textualism, at least presumptively.” In the *Summa Theologiae*, Thomas Aquinas maintains that the “human law” is known not by reason, but by promulgation. Later, we will see how this “duty” to “follow a kind of textualism” leads Vermeule to embrace originalism, while adamantly purporting to reject it.

HOW THEN DOES VERMEULE DEFINE “the common good”? His first definition is unobjectionable: “the common good is well-ordered peace, justice, and abundance in political community.” Moreover, he also stipulates that the “end of the community is ultimately to promote the good of individuals.” But, at the same time, he insists that “the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the polis.” He then denies “that ‘private’ happiness, or even the happiness of family life, is the real aim” and that the common good “is merely what supplies the lawful peace, justice, and stability needed to guarantee that private happiness.” Instead, “the highest felicity in the temporal sphere is itself the common life of the well-ordered community, which includes those other foundational goods but transcends them as well.”

Space does not allow me to take issue with this formulation of the common good and, truth be told, it does little work in leading to Vermeule’s conclusions. I will confine myself to observing that Vermeule fails to appreciate the role that individual natural rights play in assuring that what is claimed to be the “common good” is genuinely *common* to all. The protection of natural rights is essential to the achievement of the common good, not only because the good of individuals is an end in itself, but because such rights constrain the age-old sacrifice of the individual for the greater good. How best to identify and protect these rights is a separate matter.



Vermeule is right to reject a conception of the common good as “the summation of a number of private goods, no matter how great that number or how intense the preference for those goods may be.” Or “maximizing individual autonomy or minimizing the abuse of power.” Or “strictly aggregative-utilitarian arrangements.” Or “maximizing aggregate utility.”

BUT WHEN ALL THESE FORMULATIONS are rightly rejected, there is still the small matter of ensuring that the common good is truly common. That individual flourishing will not be sacrificed on the altar of the supposed “flourishing” of the group. Aquinas himself saw the need for some restrictions on state power when he affirmed that the human law ought “not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain.” And he came close to acknowledging what later came to be viewed as natural rights when he said the vices human law ought to forbid are “chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus, human law prohibits murder, theft and such like.”

Moreover, Vermeule fails to acknowledge the degree to which, although human flourishing requires virtue, such virtue does not consist in merely obeying the commands of an authority mandating right conduct. Virtue must be internalized or *habituated* so it becomes, as it were, one’s second nature. Because of this, a realm of individual choice or freedom is essential to the achievement of the virtue that leads to what Aristotle called *eudaimonia*, human flourishing or the good life.

A full treatment of his conception of the common good and human flourishing would require a deeper dive than I can attempt now. But on this issue, as on others, Vermeule is content to stipulate his conception of the common good, rather than provide a substantive defense of it or respond to alternative conceptions of the common good within what he calls the “classical” tradition.

Vermeule does acknowledge the need for some constraint on the state’s power to coerce in the name of the common good. “In America, the classical tradition held that so long as determinations are made within the jurisdictional competence of public bodies, *for legitimate ends*, and *on rational grounds*, they are a matter for the public authority, not the courts.” He repeatedly asserts that courts should oversee lawmakers, to see, first, “whether the authority has acted within its sphere of competence”; second, “whether it has pursued a rea-

sonable public purpose”; and third, “whether the means it has chosen are rational.”

I AGREE WITH HIM THAT THIS WAS THE traditional approach, and it is the one I favor as well. But Vermeule fails to note that this approach was abandoned by the Warren Court in the 1955 case of *Williamson v. Lee Optical*. There, the Court adopted the toothless standard known as “rational basis” scrutiny. The label “rational basis” suggests that this approach is staying within the “classical” or traditional requirement that laws not be irrational, arbitrary, or discriminatory. But this is illusory.

The standard adopted in *Lee Optical* required only that there be a *conceivable* basis that legislators and regulators *might* have had for enacting a law. These reasons can be made up by the government after the fact, and judges are *obliged* to make up a conceivable basis for the law if the government doesn’t. All constitutional lawyers know that legislation will *always* satisfy such review.

Vermeule fails to appreciate the role that individual natural rights play in assuring that what is claimed to be the “common good” is genuinely common to all.

One of Vermeule’s key moves is to defend against the charge of granting dictatorial powers to the administrative state by repeatedly invoking the traditional or “classical” approach to judges policing arbitrary laws. But he then quietly adopts the toothless “conceivable basis” approach to escape from any such constraint. As he puts it, if “the determinations of authority exceed public jurisdiction, are aimed at no *reasonably conceivable* public benefit, or adopt *plainly* arbitrary means, then judges should invalidate them.” Or again, “if the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control.” Readers may easily miss this deflection of the classical standard. Without it, he and I would again be in basic accord.

Finally, there is Vermeule’s now well known “rejection” of originalism, which turns out to be an endorsement of originalism in everything but name. Following

Dworkin, he insists that originalism must take one of two forms: “Is the ‘meaning’ the *specific applications* the relevant actors *expected* would result from the enacted language... or instead the *abstract semantic content* of the words they enacted?” He labels the first “specific expectations originalism” and the second “abstract originalism.” He then claims that “originalism has no internal theoretical resources with which to pin down the choice between these two.” Here he commits the fallacy of the excluded middle—that there are two and only these two options—something any Aristotelian-Thomist who is sensitive to the mean between extremes should strive to avoid.

THIS DWORKINIAN BINARY DOES NOT reflect how linguistic meaning works. First, the “specific expectations” originalism that Vermeule rejects is the one first constructed by Dworkin in a review of Robert Bork’s *The Tempting of America* (1990). Although it was a distortion of Bork’s approach, in fairness, specific-applications originalism did reflect the precursor of originalism found in Raoul Berger’s 1977 book, *Government by Judiciary*. But regardless of whether it fit Bork, Dworkin’s reconstruction bears no relation to the modern originalism of the past 30 or more years since Dworkin wrote.

Whatever their internal disagreements, all modern originalists reject “original expected applications” as the *meaning* of the text—though they allow that expected applications may be *evidence* of that meaning. Those who draft constitutions or statutes tend to use words whose public meaning will accomplish their specific ends. But the meaning of their words is not reduceable to those ends. This would be akin to reducing the meaning of the text of *Common Good Constitutionalism* to the religious and moral results Vermeule hoped to achieve by writing it.

Second, with respect to “abstract originalism,” all modern originalists recognize that the public meaning of words depends upon the social context in which they are uttered. How abstract or particular that meaning is in context cannot merely be asserted or assumed; it must be shown by evidence. This is what originalist scholarship has been doing for three decades.

In truth, Vermeule’s strident rejection of originalism is more polemical than real. To his credit, he acknowledges the two fundamental premises that all genuinely originalist theories share in common: first, “that constitutional meaning was *fixed* at the time of the Constitution’s enactment (or that of relevant



amendments),” and second, “that this fixed meaning ought to *constrain* constitutional practice by judges and other officials.” The two major tenets of the family of theories known as modern originalism are the “fixation thesis” that the language of the Constitution had a fixed meaning when used, and the “constraint principle” that this meaning ought to constrain constitutional actors. These two tenets are what distinguish an originalist from a living constitutionalist approach.

YET THIS IS EXACTLY THE POSITION Vermeule asserts in response to the claim that he is a living constitutionalist, albeit of a peculiar sort—that he adheres to what Judge William Pryor called “living common-goodism.” In an essay written with Conor Casey in the Spring 2022 issue of the *Harvard Journal of Law & Public Policy: Per Curiam*, “Argument by Slogan,” Vermeule responds that common good constitutionalism “does not alter the semantic meaning of concepts and principles...nor does it take the semantic meaning to be entirely open to any and all changing applications and moral novelties that current generations may dream up.” Living constitutionalists like the University of Chicago Law School’s David Strauss deny both these claims. They assert

that the meaning of the text *evolves* or changes over time. They then claim that, when this happens, it is not the original meaning but the evolved meaning that is binding on constitutional actors.

Having accepted the two basic tenets of originalism in order to deny he is a living constitutionalist, however, Vermeule then makes a Dworkinian move to escape the constraint that originalism imposes. He claims that this fixed meaning is so abstract or “thin” that it provides no barrier to judges and others employing what he has elsewhere referred to as its “majestic generalities” to pursue their conception of the common good. But the claim that the text’s original meaning is this “abstract” or “thin” must be established with evidence, not merely stipulated.

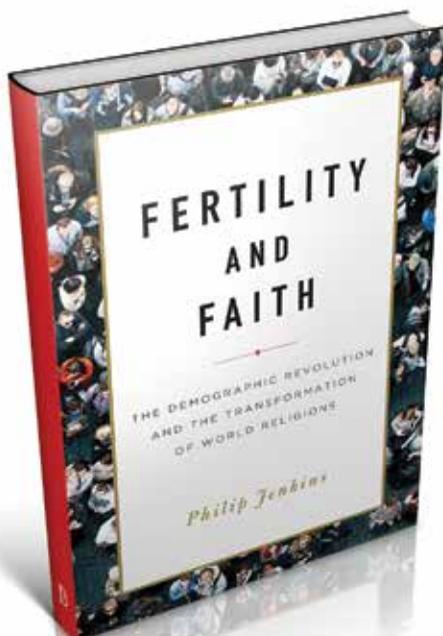
Like most non-originalist law professors, however, Vermeule is an armchair originalist who simply asserts, rather than proves, that this fixed constitutional meaning was highly abstract. The favorite examples of such allegedly abstract terms are “cruel and unusual punishment” in the 8th Amendment, “due process” in the 5th and 14th Amendments, and “equal protection” in the 14th. This then enables armchair originalists to forgo the text and pursue their agendas, whatever they may be. In Vermeule’s case, the agenda is the

direct pursuit of the common good as he defines it.

BUT GRANTING THAT THE ORIGINAL meaning of some terms in the Constitution is more abstract than others does not end the constraint imposed on constitutional actors by originalism. As Vermeule acknowledges, modern originalists have developed the distinction between constitutional “interpretation” and “construction” to address this issue. *Interpretation* is the activity of identifying the original communicated content of the text (in context). *Construction* is the activity of applying that meaning in particular cases. This activity often requires the adoption of constitutional doctrines that are consistent with, but not deducible from, the text’s original meaning. Astute readers will recognize the latter is an instance of what Vermeule calls *determinatio*.

Crucially, the size of the “construction zone” will depend on the thickness of the meaning discovered by interpretation. For example, John Stinneford of the University of Florida Levin College of Law has presented compelling evidence that the phrase “cruel and unusual” punishment referred to punishments that are *both* cruel and *novel*, thereby greatly defining and limiting its scope. A cruel pun-

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ishment is not unconstitutional unless it is also new. Since most punishments can be considered cruel, constitutionality turns on the much-easier-to-ascertain element of novelty.

And, as Evan Bernick and I show in *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* (2021), the meanings of “due process” and “equal protection” are far thicker than armchair originalists assert. For one thing, the text is itself more specific, referring to “the due process of law,” and “the equal protection of the laws.” For another, as Justice Clarence Thomas’s deep dive earlier this year in *U.S. v. Vaello Madero* into the original meaning of the privileges or immunities of “citizenship” illustrates, the public meaning of these phrases becomes thicker still when the context in which they were enacted is examined.

OF COURSE, STINNEFORD’S OR OUR historical-linguistic claim could be wrong. But refuting our claim requires an examination of the evidence we present. It cannot be refuted by asserting a false binary between a paper-thin abstract meaning on the one hand and original expected applications on the other. Those who have made the effort have almost uniformly found that the actual original meaning of phrases like “due process of law” is far thicker than that postulated by Adrian Vermeule from the ivory tower or Justice Anthony Kennedy from the bench.

Like progressive “living originalist” Yale Law School professor Jack Balkin, Vermeule assumes that whatever is happening in the construction zone is unconstrained by originalism, so legal authorities are free to adopt whatever common-good principles they think are morally best. In our 2018 article, “The Letter and the Spirit: A Unified Theory of Originalism,” published by the *Georgetown University Law Journal*, Evan Bernick and I propose that the construction zone is itself constrained by *original* ends, objects, purposes, principles, or functions of the provisions being applied. This is a teleological inquiry of the sort Vermeule says is inevitable, and he is

not wrong about this. But it is the teleology of “We the People” who adopted the original Constitution and later its amendments, not the teleology of their servants who are charged with faithfully applying it.

Being *faithful* to the fixed meaning of the *letter* of the text—which Vermeule says judges “are duty-bound to follow”—requires constitutional actors to put their own conception of the common good to one side in favor of the *spirit* in which the provisions they are applying were adopted. Like original public meaning, identifying this spirit is a historical, not a normative, inquiry. In our 14th Amendment book, we separately identify these *original* ends, objects, principles, and purposes, distinct from the text’s original meaning, and then give examples of their application.

What about the issue of “positivism”? For some 20 years, I have maintained that original meaning is to be followed to the extent that the positive law in our written Constitution is morally *legitimate*. By morally legitimate, I mean that the structure it establishes is “good enough” to produce laws the substance of which are—in the words of Aquinas—“binding in conscience” on the persons whose obedience is demanded.

And I have argued that constitutional actors are morally bound to adhere to the text’s original meaning—and to apply that meaning in a manner that is faithful to the original design—because they receive their powers only in return for their oath to faithfully uphold “this Constitution”—the one written on parchment and housed in the National Archives.

Vermeule dismisses arguments based on the oath as circular, assuming what must be shown about the meaning of the Constitution. But this doesn’t apply to my claim, which is premised on a theory of linguistic meaning—what meaning *is*—as well as a theory of how that meaning ought faithfully to be implemented.

THROUGHOUT THE BOOK, VERMEULE contrasts his approach to that of “libertarians” and “libertarian-originalists.” For example, he claims that “[l]ibertarian-

originalists have rather notoriously emphasized only the ‘blessings of liberty,’” which he then dismisses as “a false conception even of those ‘blessings.’” And yet there is no citation to any source. To whom might he be referring? How many “libertarian-originalists” are there?

Given my knowledge of the players in the realm of constitutional theory, I’m so vain I truly think this criticism is about me. But, to my knowledge, I have never relied on the “blessings of liberty” in the Preamble to interpret the original meaning of the text that follows. And as should be clear by now, I hold to a decidedly different view than that which he attributes to “libertarian-originalists.”

Indeed, I do now, and have always, believed in a genuinely common good. The hard questions then are how that common good is to be defined in theory and achieved in practice. Vermeule needs to show his how conception of the common good, and not some other normative ends, will actually be achieved by the administrative state he would empower to implement the natural law. But this is never even attempted in *Common Good Constitutionalism*.

A serious work of constitutional theory by a serious constitutional theorist should confront the strongest version of the theories to which he objects. In so many ways, Vermeule fails in this basic duty of a scholar. At virtually every opportunity, he makes things easy on himself. But Vermeule is not really operating as a scholar; he is operating at the level of constitutional polemics. In that realm, it is not clear that the kinds of objections I offer here will make any difference to his new followers. But these objections should make a difference to those who are serious about pursuing the common good.

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