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Why Originalism Is Consistent with Natural Law: A Reply to Critics

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By **J. JOEL ALICEA**
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> Some critics of originalism fault it on natural-law grounds. Their critiques are wanting.

CONSTITUTIONAL theorists on the right are engaged in a debate about the moral foundations of originalism, the theory that government officials, including judges, are bound by the original meaning of the Constitution. I recently offered a defense of originalism's moral authority grounded in the natural-law tradition. Harvard law professor Adrian Vermeule and his sometime co-author, University of Liverpool law professor Conor Casey, recently responded to my draft article, as did another supporter of Vermeule's theory, lawyer and blogger Pat Smith. In the interest of furthering this important discussion about the moral foundations of originalism, I respectfully offer this reply.

* * *

The background of this controversy can be briefly stated. Originalism has been the reigning constitutional theory of legal conservatives since the election of Ronald Reagan, but in a March 2020 essay in the *Atlantic*, Vermeule called on legal conservatives to "abandon[] the defensive crouch of originalism" and embrace "a substantive moral constitutionalism that [is] not enslaved to the original meaning of the Constitution." This alternative theory, which Vermeule called "common good constitutionalism," would "read into the majestic generalities and ambiguities of the written Constitution" "substantive moral principles that conduce to the common good." Vermeule elaborated on his theory in his new book, *Common Good Constitutionalism*, in which he attempted to ground his theory in the natural-law tradition.

Shortly after Vermeule published his book, I posted online a draft article (forthcoming in the *Notre Dame Law Review*) that provides a natural-law justification for originalism and argues that Vermeule's theory misunderstands the implications of the natural-law tradition for American constitutionalism. I argue that, under well-established natural-law principles, political authority — that is, the power to make and enforce laws and resolve legal disputes — is essential to secure those conditions that allow for human beings to flourish, conditions that we might call "the common good." In the natural-law tradition, ultimate political authority is vested in the people of a society, and part of that authority is the power to constitute a government. Within the broad parameters of the natural law, the people have discretion in allocating authority within a regime to secure the common good, which the American people did by ratifying the Constitution.

Because each of us has a moral obligation to pursue our own (and our community's) flourishing, each of us has a moral obligation to seek the common good, which means each of us has a moral obligation to preserve the people's legitimate political authority that is essential to securing the common good. Assuming that the Constitution is, at least as a general matter (though perhaps not in all its applications), consistent with the substance of the natural law, our obligation to preserve the people's legitimate authority means respecting the decisions the people have made in allocating power and constituting their government. In the American context, the only way to preserve the people's legitimate authority is to understand the Constitution *as they understood it* when they ratified it. To allow present-day officials to depart from the original meaning of the Constitution is to allow them to undermine the decisions made by the people in the exercise of their legitimate authority, and undermining the people's legitimate authority harms the common good. Thus, when Vermeule argues that judges ought to depart from the original meaning of the Constitution in the name of the common good, he commits a serious error, since judicial departure from the original meaning of the Constitution *necessarily harms the common good*. There is, therefore, a moral obligation to obey the original meaning of the Constitution.

* * *

As noted above, Vermeule and Casey responded in a blog post. The first and most significant thing to notice about their response is that they do not dispute *anything* I said in my article. Rather, they argue that "Alicea has said nothing that is even *prima facie* in tension with our interpretive arguments." Vermeule and Casey's response, then, is not that I am wrong; it is that the conclusions I reach are unimportant (in Vermeule and Casey's words, my conclusions "are banalities, truisms"). In their view, my arguments are fully reconcilable with common-good constitutionalism. As Vermeule and Casey elaborated in a subsequent article responding to Judge William Pryor's criticism of common-good constitutionalism: "Common good constitutionalism does not alter the semantic meaning of concepts and principles," and it does not "take the semantic meaning to be entirely open to any and all changing applications and moral novelties that current generations may dream up."[i] Common-good constitutionalism, according to Vermeule and Casey, does not oppose what they call "'thin' originalism," "the bare commitment to the claim that the meaning of a fixed text remains constant over time."[ii]

This is genuine progress in the debate. In his *Atlantic* essay two years ago, Vermeule stated that the "common core" of originalist theories "is the view that constitutional meaning was fixed at the time of the Constitution's enactment," and it was *that* "core" of *all* originalist theories that Vermeule said "has now outlived its utility" and should be discarded. Today, Vermeule agrees that "the meaning of a fixed text" — including the Constitution — "remains constant over time," and he has clarified that he rejects only *certain kinds* of originalism. That is consistent with his earlier retreat from a broad condemnation of *all* originalist theories in his *Atlantic* essay to a recognition that "no global condemnation of 'textualism' is adequate." Vermeule concedes that some forms of textualism/originalism are based on the natural-law tradition, and his "disagreement with" *those* forms of originalism is, he has said, "ultimately one of contingent judgement rather than of principle." These clarifications represent a welcome narrowing of the scope of Vermeule's critique of originalism,[iii] since they make his claims more precise and, therefore, allow for a more fruitful exchange.

More fundamentally, both sides now agree that the moral imperative to secure the common good means preserving the people's legitimate authority, and both sides now agree that preserving the people's legitimate authority means understanding the Constitution as the people understood it when they ratified it. Our continuing disagreement, then, is about the *implications* of those premises. Vermeule thinks those premises pose no difficulties for his theory; I think they do.

The principal (though not exclusive) focus of Vermeule's theory is on how judges should decide cases, and our shared premises have significant implications for the judicial role. If the moral imperative to secure the common good means understanding the Constitution as the people understood it when they ratified it, then the scope of judicial authority under the Constitution becomes a distinctively legal form of *historical* inquiry, since it is through such an inquiry that we can recover how the people authoritatively allocated the power to resolve legal disputes within the American constitutional system. Yet if there is one thing that Vermeule has been crystal-clear about, it is that "officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution" "substantive moral principles"[iv] *regardless* of whether judges were historically understood to have the authority to do so under Article III of the Constitution. In Vermeule's words: "I certainly do not advocate a revival of the classical law because it is the original understanding."[v] He disclaims as "an ersatz form of respect for the natural law" the argument that judges may resort to the natural law in adjudicating cases "only insofar as it happens to be picked up by an originalist command (a form of soft positivism), not because it has binding force as natural law in its own right."[vi] Thus, Vermeule simultaneously

endorses two propositions: (1) the common good requires that we understand the scope of judicial power as the people understood it when the Constitution was ratified, and (2) the scope of judicial power includes the power to apply substantive moral principles in deciding cases *regardless* of whether the people understood the judicial power that way when the Constitution was ratified.

This means that one of two things is true about Vermeule's position. Either he has fallen into a flat contradiction, or he believes that the natural law *requires* that judges *must* have the authority to resort to substantive moral principles in adjudicating constitutional disputes, regardless of whether the people may have decided otherwise. If the latter position were true, historical inquiry would indeed be irrelevant; it would not matter what the people had decided about the scope of judicial power, since the people could not legitimately decide something contrary to the natural law. The problem with this latter view is that Vermeule *never offers an argument in its favor*. It is simply assumed throughout his book, blog posts, and other writings on this subject, even though many natural-law theorists, such as Professor Robert P. George, have argued against it.[vii] It is also undermined by his repeated acknowledgement in his book that "the precise allocation of law-interpreting power between courts and other public bodies is itself a question for determination,"[viii] where "determination" is a process in which decisions are, by definition, *not* dictated by the natural law. I point all of this out in my *Notre Dame Law Review* article,[ix] and it demonstrates that Vermeule's theory is either self-contradictory or rests on an undefended premise that he himself gives us reason to reject. Yet Vermeule does not respond to these arguments.

Instead, Vermeule argues in his response that the real debate is "about the limited determinacy of the positive law," that is, "what to do in hard cases, where the putatively fixed meaning is vague, ambiguous, or conflicts with other equally legitimate sources of law, such that interpreters are necessarily left with interpretive discretion at the point of application." In Vermeule's view, it is "impossible to avoid interpretation that rests on controversial normative judgments at the point of application, especially in hard cases."[x] About this issue, his response asserts that I "say[] almost nothing."

I do, in fact, expressly address in my article Vermeule's argument that moral principles must be brought to bear in cases of under-determined text, and what I say is based on the foregoing analysis: resolving under-determinacy is primarily a historical inquiry.[xi] The key point, again, is that we are trying to recover the people's original understanding of the Constitution. If, at the time of ratification, the people would not have understood the Constitution in light of the kinds of substantive moral principles Vermeule would have judges employ, then he would not be trying to understand the Constitution as *they* did; he would be substituting *his* understanding for theirs. And because that undermines the people's legitimate authority, it imperils the common good. Thus, my argument shows that, with respect to under-determined texts, Vermeule's resort to substantive moral principles *irrespective* of their historical grounding is mistaken.

Perhaps the people *did* understand the Constitution against a backdrop of the kinds of substantive moral principles to which Vermeule appeals. Vermeule points to an ostensible history of the Founders relying on natural-law arguments in interpreting the Constitution (even while Vermeule disclaims the necessity of that history to his theory).[xii] But the point is that whether those moral principles are part of the people's original understanding is a *historical* question, not one dictated by the natural law.

There are, after all, *other* ways to resolve under-determinacy without directly applying substantive moral principles. There are numerous principles of interpretation that were well-established at the Founding and that help resolve ambiguity or vagueness when it arises, such as many of those that Justice Scalia and Bryan Garner

surveyed in their book *Reading Law: The Interpretation of Legal Texts*. Those principles, along with historical analysis, will resolve a great deal of *apparent* under-determinacy. It is erroneous to simply *assume* that a text that looks under-determined is, in fact, incapable of clarification through further historical analysis and application of traditional interpretive principles. Vermeule, for instance, cites in his response "the equal protection of the laws" as an example of under-determined texts, but this ignores the impressive scholarship of Professors John Harrison and Christopher Green arguing that the "protection of the laws" was actually a fairly well-understood phrase in 1868, not some amorphous, abstract guarantee of equality that always calls for moral analysis at the point of application to a particular case.[xiii] As Professors John McGinnis and Michael Rappaport have argued, skipping straight from seemingly abstract language to the conclusion that the language is under-determined is to commit the "abstract meaning fallacy." Certainly, nothing in the natural-law tradition requires committing that fallacy, and Vermeule offers no argument otherwise.

The abstract-meaning error is related to another fallacy: the fallacy of the excluded middle. In his book, Vermeule, relying on the work of the important non-originalist theorist, Ronald Dworkin, sets up a choice between two different ostensibly originalist approaches. Under the first approach, the original meaning refers only to "the principles embodied in semantic content," such that those living today (such as judges) would apply "the abstract principle" of cruelty embodied in the Cruel & Unusual Punishment Clause based on their best understanding of what that principle objectively requires.[xiv] Under the second approach, "[original] meaning is based on expected applications," such that the clause refers *not* to some abstract principle but to "a particular set of punishments" that those who ratified the Eighth Amendment would have regarded as "cruel."[xv] Vermeule, following Dworkin, thinks that there is no principled way for originalists to decide between these two alternatives, which exacerbates the under-determinacy problem.[xvi]

But as Professor Lawrence Solum has argued at length, Dworkin's (and, therefore, Vermeule's) argument presents a false choice that excludes an intermediate position that is, in fact, the position held by the majority of originalists — and that follows from the natural-law argument for originalism. The choice is not between applying *our* understanding of an abstract principle or *denying* that the text embodies an abstract principle at all. Rather, if we ought faithfully to obey the commands of those who ratified the text (and Vermeule appears to agree with me that we should), then the correct approach is to determine, based on historical analysis, *whether* the people understood the text to embody an abstract principle and, if so, what version of that principle *the people themselves* understood the text to embody. Perhaps the Cruel & Unusual Punishment Clause was a term of art that was not understood to embody an abstract principle, or perhaps it was understood to embody an abstract principle, but the people understood it to embody *a specific conception* of that abstract principle that may differ from our own, an interpretation supported by Professor John Stinneford's exhaustive historical scholarship. As Solum argues, only historical analysis can tell us for sure. McGinnis and Rappaport have made a similar argument in responding to the work of Professor Jack Balkin, on which Vermeule also relies for his argument.[xvii] Remarkably, even though Vermeule relies on Dworkin and Balkin for these points, his book never cites — let alone addresses — the responses to Dworkin and Balkin offered by Solum, McGinnis, and Rappaport, which predate Vermeule's book by several years.

In any event, where historical analysis and the traditional principles of interpretation are unable to clarify under-determinacy sufficiently to permit resolution of a specific constitutional dispute, it is simply not true that the only remaining possibility — at least in the judicial context — is applying substantive moral principles. For example, McGinnis — consistent with arguments made by Professors Gary Lawson and Michael Stokes Paulsen — has made a compelling argument that, at the Founding, there was a "judicial obligation of clarity" that was "a

constituent of judicial duty — and thus judicial power — " and that "defined the standard by which judges displaced applicable law with law of higher obligation."[xviii] "Those who framed the Constitution and rendered justice in the early Republic did understand judicial duty as requiring a clear incompatibility between the Constitution and a statute before displacing the latter by the former."[xix] If that is true, then the proper judicial response in the face of under-determinacy that cannot be resolved through further historical analysis and ordinary principles of interpretation would be to sustain the constitutionality of the statute, not to go beyond the scope of the judicial power as originally understood by applying substantive moral principles.

McGinnis's argument might or might not be sound; that is a historical question. But, again, the key point is that, if one accepts my argument that the natural-law tradition requires us to adhere to the people's understanding of the scope of judicial power at the Founding, then we resolve under-determinacy in the judicial context primarily through historical inquiry.

One final point. In the article, I draw out the implications of my argument for Vermeule's theory in the context of asking what a judge should do when the original meaning contradicts what the natural law might require in a given instance. In his response, Vermeule asserts that this is "a sideshow" to the real issue of under-determinacy. This is a strange response from Vermeule, given that he has explicitly, and at length, argued that "the critical question" in assessing the relationship between originalism and the natural law is: "What happens if and when the original understanding and the common good diverge?" I offer a response to that "critical question" that differs from his.

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Lawyer and blogger Pat Smith, who is supportive of Vermeule's theory, has also responded to my article, and it is worth replying to his critique because, whereas Vermeule and Casey find the arguments in my article uncontroversial, Smith finds the arguments suffer from "serious problems." The core of Smith's objection is that "there is no room in [Alicea's] analysis for the people to express their reserved sovereignty through custom." He points out that Aquinas held, in line with other theorists, that "that the people have a reserved power to make, abolish, and interpret law through custom," and he asserts that "subsequent amendments, abolitions, and interpretations via custom are the end of originalism." Customary lawmaking, according to Smith, would allow for something like Balkin's theory, in which "the Constitution must be interpreted according to the people's changing understanding of the Constitution," since these changing understandings could be seen as a manifestation of the people's lawmaking power through custom. Smith asserts that I "fail[] to engage with" the issue of customary law.

I must say I find this critique odd. As Smith acknowledges, I cite Aquinas's discussion of customary law in my article, and precisely because the role of customary law could be thought to support a version of originalism like Balkin's, I — in Smith's words — am "at pains to rebut Professor Jack Balkin." So it is strange to say that the article "fails to engage" with the question of customary law: that is why the section on Balkin is there, as Smith himself seems to understand.

Smith's real objection is that he does not *agree* with how I address the potential implications of the people's ability to make law through custom. In the natural-law tradition, the people are vested with at least two kinds of political authority: the authority to constitute their government and the authority to govern day-to-day affairs.

They transmit at least some of their day-to-day governing power to a government when they exercise their constitution-making power, but they do not and cannot fully divest themselves of the authority to constitute the regime, since (as I elaborate in the article, relying on Aquinas) they have ultimate responsibility for securing the common good.

As relevant here, the issue of customary lawmaking comes in when we think about *how* the people manifest their exercise of constitution-making authority. In Balkin's theory, the people engage in an ongoing exercise of their constitution-making authority through ordinary politics (e.g., elections), so the people can (in his view) also legitimately change how the Constitution is understood through ordinary politics. A natural-law theorist could argue (as I understand Smith to do) that Balkin is right to suppose that the people can manifest their constitution-making power through ordinary politics, which is a reflection of their customary lawmaking authority.

In the article, I argue that the problem with Balkin's theory is that it effectively collapses the distinction between ordinary politics (things like elections) and constitutional politics (the formal process of ratifying or amending the Constitution). That matters because, in the context of the American constitutional system, the people made the authoritative decision to *separate* ordinary from constitutional politics by including the Article V amendment process in the Constitution. That separation was no accident. Rather, it was designed to better secure the common good by (1) preventing sudden, unwise, and impassioned changes in the allocation of constitutional authority through ordinary politics, which could undermine the common good, and (2) by allowing for genuine, enforceable limits on governmental power by taking out of the hands of government officials the ability to interpret ordinary elections as granting themselves additional power.

To accept Balkin's (and Smith's) argument, one would have to say that, post-1788, the people have overridden Article V through instances of customary lawmaking manifested in ordinary politics. But that would mean interpreting the people to have *sub silentio* worked a fundamental change in our regime, since (as just explained) the separation of ordinary from higher politics is at the foundation of our Constitution. Indeed, as *Marbury v. Madison* makes clear, it is the justification for judicial review: If the people may change the Constitution through ordinary politics (such as the enactment of a statute), the judiciary would have no basis for setting aside a statute that conflicts with the Constitution. Balkin's argument conflicts with core aspects of our constitutional system, which makes it an implausible interpretation of our regime. The better view — the view that accords with those core aspects of our constitutional system — is that the people have authoritatively said that they will *not* manifest their constitution-making power through custom; they will only do so through the Article V amendment process.

Of course, since the people retain ultimate constitution-making power, they could always abolish the Article V amendment process and adopt a new constitution that permits them to exercise constitution-making authority through custom. As I explicitly acknowledge in the article, nothing in the natural law forbids the people from adopting such an arrangement. But it is not the arrangement that *we* have adopted in the United States. Aquinas only addresses the abstract question of the people's authority to make customary law; he does not purport to analyze how that authority should be understood in the context of a specific constitutional order. Nothing that I say, therefore, contradicts Aquinas on this point.

Smith's error is that he analyzes the issue of customary lawmaking in the abstract, without reference to the specifics of *our* regime. This is the same type of error Vermeule commits when he asserts that judges have the power to apply substantive moral principles to resolve constitutional cases without taking into account the limits

on judicial power that *our* regime imposes. Thus, like Vermeule, Smith's argument must be that the natural law *requires* that the people retain the ability to manifest their constitution-making power through custom and *forbids* them to disclaim that ability in the context of a specific society. But as I point out in the article, there is simply *nothing* in the natural-law tradition that requires that result, which would, in effect, be an argument that Article V (and the separation of ordinary and constitutional politics on which our entire constitutional system is based) is contrary to the natural law.

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Perhaps Vermeule and Smith are of the view that the natural law does, in fact, forbid the constitutional arrangements adopted by the people through the Constitution. Vermeule has said before, in passing, that "a Constitution as morally compromised as our own" does not "always or even usually" "track the natural law," so perhaps he thinks the limitations on judicial power under Article III are one example of such moral compromises. Perhaps Smith thinks the same of Article V. But neither has made an argument in that regard, and if Article III and Article V are consistent with the natural law and are the result of the people's exercise of legitimate political authority, then the approach to constitutional adjudication that Vermeule advocates is contrary to the natural-law tradition and would do great harm to the common good.

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[i] Conor Casey and Adrian Vermeule, Argument By Slogan 17 (Apr. 27, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4081264.

[ii] *Id.* at 3.

[iii] I focus on Vermeule rather than Casey in this response because my article specifically takes on Vermeule's articulation of common-good constitutionalism and because Casey has yet to produce an extended treatment of the theory like Vermeule's book. In doing so, I do not mean to diminish Casey's significant contributions to this ongoing debate.

[iv] As I argue in my article, the limits on judicial authority under our Constitution are based on the natural law, so in that sense, adherence to originalism *is* the result of applying substantive moral principles to our constitutional system. But Vermeule would go further by, for example, interpreting the scope of Congress's power under the commerce clause based on the natural-law principle of subsidiarity, regardless of whether subsidiarity was originally understood to have been incorporated into any source of positive law. *See* Adrian Vermeule, Common Good Constitutionalism 162–64 (2022). This is the kind of application of moral principles that is in dispute.

[v] *Id.* at 2.

[vi] *Id.* at 214 n.290

[vii] Robert P. George, In Defense of Natural Law 110–11 (1999).

[viii] Vermeule, *supra*, at 12; *see also id.* at 10, 43–47.

[ix] *See* Section III.B.

[x] Vermeule, *supra*, at 16; *see also id.* at 22, 83.

[xi] *See* pages 53–55 and notes 395–96 of the current draft of my article.

[xii] Vermeule, *supra*, at 52–90.

[xiii] Whether Harrison and Greene are correct in their interpretation of the equal protection clause and whether, in light of more than a century of judicial precedent, courts ought to return to the original meaning of that clause are separate questions that I do not address here.

[xiv] *Id.* at 95–96.

[xv] *Id.* at 95.

[xvi] *Id.* at 96–97.

[xvii] *Id.* at 97–99. It is also worth noting, as discussed below, that I devote an entire section of my article to showing why Balkin's theory is incompatible with the natural-law tradition as applied to American constitutionalism, yet Vermeule—without responding to my arguments—states in his response that Balkin's theory "may fully satisfy Alicea's axioms."

[xviii] John O. McGinnis, *The Duty of Clarity*, 84 Geo. Wash. L. Rev. 843, 862 (2016).

[xix] *Id.* at 918.