CULTURE

Too Good to Be True: The Virtues and Vices of Common-Good Constitutionalism

REVIEW: Adrian Vermeule's 'Common Good Constitutionalism'

Peter Berkowitz • March 20, 2022 5:00 am

In 1785, James Madison argued in his "Memorial and Remonstrance Against Religious Assessments" that the bill before the Virginia General Assembly to provide financial support "for teachers of the Christian religion" represented "a dangerous abuse of power." Madison—who two years later took the lead in drafting the United States Constitution—urged unstinting vigilance in limiting government to secure freedom. "It is proper to take alarm at the first experiment on our liberties," he wrote. "We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution."

Government responsibility for legislating a comprehensive conception of the common good imperiled the toleration and liberty without which "Religion or the duty which we owe to our Creator" could not flourish. "Who does not see," Madison asked, "that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

The principle that government power must be formally circumscribed to enable free and equal citizens to decide for themselves how to pursue happiness and to discharge their highest duties is a leading element of the political morality that undergirds the

American Constitution. That political morality has long been under attack by constitutional law scholars on the left, who argue that limited government is a relic of a bygone era that should not be allowed to thwart government action that promotes the common good as progressives understand it. Recently, some conservative scholars have turned on Madisonian constitutionalism as well. They agree with the left that many restrictions on Congress, the president, and the courts create illegitimate obstacles to worthy and even obligatory government efforts directed at the common good, if in the name of a very different notion of the laws under which all Americans should live.

Adrian Vermeule is among the foremost scholarly proponents of emancipating the U.S. government to enable it to promote the true, the right, and the good. That, he contends in *Common Good Constitutionalism,* would be wise and just. It would also return the American constitutional order, he remarkably asserts, to its roots in the belief—commonly associated with premodern political philosophy and modern dictatorship—that government is rightly invested with the awesome responsibility and expansive power to direct citizens toward the supreme good for human beings. Vermeule's thesis has the perverse result of rendering Madisonian constitutionalism an alien presence within the American constitutional tradition.

Nevertheless, Vermeule maintains that American constitutional government arose within, and owes its best features to, "the classical legal tradition." That tradition encompasses Aristotle, Ulpian, and Thomas Aquinas, and synthesizes Roman law, canon law, and local civil law. It views law as not merely in service to justice but "ordered to the common good," which "represents the highest felicity or happiness of the whole political community, which is also the highest good of the individuals comprising that community." And, according to Vermeule—in what will come as quite a surprise to many scholars of both natural law and of the Constitution—the classical legal tradition forms the authoritative dimension of "the original understanding" of the

U.S. Constitution and, until recently, drove much of constitutional law.

That original understanding, Vermeule asserts, conceives of "the highest authority, the federal government" as ultimately unlimited by any consideration other than justice, which consists of, as he puts it in deceptively anodyne terms, "the constant aim of giving every man his due." Vermeule does not mention that that principle is the same one that justifies the authoritarian rule of benevolent philosopher kings in Plato's *Republic* and which governs the centralized and comprehensive allocation of entitlements in Marx's dystopian communist utopia. Nor does Vermeule consider that there are some goods that are due us—courtesy from our coworkers, loyalty from our friends, love from our family—that governments are ill-equipped to supply or supervise.

A constitutional law professor at Harvard Law School and a leading scholar of the administrative state, Vermeule tenderly uncovers and dusts off lost treasures of our jurisprudential inheritance while scornfully burying other precious jewels and gems of our constitutional tradition. He illuminates the dependence of the American political order on principles of justice nowhere explicitly laid out in the Constitution but clarified in classical works of political philosophy, jurisprudence, and theology. All the while, however, he obfuscates the modern tradition of freedom, which decisively shapes the political morality that gave birth to and sustains the Constitution. It is one thing to argue that we have diminished our moral resources by abandoning America's classical and biblical heritage. It is quite another to banish to the shadows of the American tradition the political morality of limited government and its cornerstone conviction that human beings are by nature free and equal—a distinctive interpretation of the dignity inherent in our humanity linked to, but not asserted by, the classical philosophers or the Bible.

The forgetting or suppression of the classical legal tradition, Vermeule contends, has

mangled constitutional understanding and deformed American politics, particularly through permissive interpretations of free speech, abortion, sexual liberties, and property rights. Estranged from their natural law inheritance, he further maintains, Americans have fallen prey to seeing the modern administrative state's massive bureaucracy "as an enemy" rather than "as the strong hand of legitimate rule" operating "with a view to promoting solidarity and subsidiarity." Vermeule's demotion of the public interest in freedom and his idealization of a federal bureaucracy that is increasingly dominated by partisan progressives masquerading as technocrats who are barely accountable to voters indicates that his aspiration to recover the American constitutional tradition is accompanied by a paradoxical ambition—more in common with the modernism and postmodernism he appears to loathe—to reinvent it.

To satisfy that ambition, Vermeule rewrites the past. In reconstructing the "fundamental matrix" of the Founders' thinking he somehow forgets or suppresses James Madison and such seminal intellectual influences on the Constitution's drafters as John Locke and Montesquieu, none of whom are so much as mentioned in his index. Meanwhile, Vermeule's exploration of a few Supreme Court cases "from disparate areas and eras of our laws," in which some justices invoke enduring principles of justice and the public good, hardly justifies the extravagant conclusion that the classical legal tradition represents the original and long-authoritative stratum of American constitutional law and deserves to be restored to its supposed position of sovereign preeminence.

Notwithstanding his formidable powers of precise expression and analytical acuity, Vermeule refrains from succinctly setting forth natural law's key assumptions and leading elements. Based on his extended argument, though, he seems to adopt the traditional view closely associated with Thomas Aquinas. According to Aquinas, natural law belongs to God's plan for the world; reflects human nature; is objectively knowable and universally binding; encompasses the basic principles of moral reasoning; guides human beings through its precepts toward their highest good; and depends for its realization on exercising the moral virtues as Aristotle sketches them and as Aquinas modifies them in his *Summa Theologica* and in his *Commentary on the Nicomachean Ethics.*

Vermeule does not identify, much less explore, the factors that over the last 300 years or so caused jurists in the United States—and, for that matter, throughout the West—to lose sight of the classical legal tradition and the natural law that is central to it. And he scarcely notes the myriad threshold difficulties confronting the revival of the conviction that the U.S. Constitution aims at securing the natural law.

Some of these difficulties arise from within natural-law thinking, starting with the lively internal debates about the origin, structure, and content of the natural law; the true hierarchy of human purposes; and the relation between the natural law and religious faith. Other difficulties spring from Enlightenment ideas and the experience of modernity, which call into question the very possibility of nature supplying authoritative ends for human life. Still other difficulties grow out of the modern tradition of freedom—to which both founding-era proponents and critics of the Constitution belonged—which, in line with the Declaration of Independence, regards securing fundamental rights as government's first and overriding purpose.

By sidestepping this host of theoretical perplexities, Vermeule fosters the false impression that the natural law stands above, or is impervious to, substantial criticism and poses no special problems as a political morality governing the exercise of power by a free, democratic, and modern nation-state. This encourages the conceit that the opposition to common-good constitutionalism as he reconstructs it can only stem from ignorance, obtuseness, or moral corruption.

Furthermore, Vermeule's incisive critique of the two leading contemporary schools of jurisprudence undercuts his argument for the uniqueness of what he labels common-good constitutionalism. Progressives, according to Vermeule, favor "living constitutionalism," which views general phrases such as the 14th Amendment's guarantees of "equal protection" and "due process of law" as authorizing judges to decide cases based on evolving standards of morality. Conservatives embrace a family of theories called "originalism." They maintain that the original public meaning of the Constitution's words authoritatively resolves controversies. Both living constitutionalism and originalism deny that constitutional adjudication relies on a universally knowable and applicable political morality.

Both schools, Vermeule nevertheless shows, take advantage of hard cases to incorporate into constitutional jurisprudence a political morality that they purport to do without. Hard cases arise in divisive matters such as abortion, affirmative action, same-sex marriage, and free speech in which constitutional text, structure, and

history generate ambiguity as well as in instances in which the law commands the promotion of "the general welfare," "the public interest," or similarly broad and vague goals. Where the legal materials are indeterminate, argues Vermeule, the left presses government into service on behalf of a liberationist project, nowhere to be found in the Constitution, that undertakes to free individuals from all inherited or unchosen constraints. The right exploits ambiguity in the law, he maintains, to champion libertarian restraints on government to protect the widest possible sphere for individual choice.

On Vermeule's account, then, both progressive constitutionalism and conservative constitutionalism represent unwitting forms of common-good constitutionalism. He is right, though his aversion to the modern tradition of freedom prevents him from grasping that the political morality to which conservatives have recourse much more closely approximates America's founding ethos.

It follows, moreover, that the crucial issue is not whether approaches to law and the Constitution rely upon a conception of political morality and the common good—all inevitably do—but rather the character of the political morality and common good to which rival jurisprudential schools inescapably make appeal. Vermeule's constitutionalism is distinguished by the comprehensiveness of his conception of the common good, a conception that is by no means the most compelling interpretation of the implications of the classical legal tradition for understanding American constitutional government. Indeed, the principal shortcoming of his welcome attention to the premodern dimensions of the American tradition is not that he takes too seriously the common good and the political morality inhering in American constitutional government but that he does not take them seriously enough.

The classical legal tradition is an offspring of Aristotelian political science. In the *Politics*, Aristotle explains the importance of the regime—the structure of the polity's

authoritative offices and the principles toward which it is ordered. Prudent politics depends on grasping not only the best regime and its supreme standards but also the defining features of the actual imperfect regimes under which most people live most of the time. The American regime—unknown to Aristotle as well as to Aquinas—is, as Lincoln affirmed at Gettysburg, "conceived in liberty, and dedicated to the proposition that all men are created equal." It is a regime for which the common good revolves around securing basic rights and which primarily relies on citizens, their families, and the voluntary associations they form in civil society to cultivate the virtues on which freedom depends. In contrast, in the regime that Vermeule contemplates—and toward the realization of which he labors—government, in light of the common good, commands through law the practice of virtue and, where advantageous, permits freedom.

Aristotelian political science directs attention to the political science characteristic of particular regimes. In Federalist 9, Hamilton explains to "enlightened friends to liberty" that the constitution proposed by the Philadelphia convention was based on a "science of politics" that "has received great improvement." This new political science both draws on the classical tradition and breaks with it. It protects freedom through a variety of structural innovations that check, balance, and refine the exercise of power. It provides, as Madison observes in Federalist 10, "a republican remedy for the diseases most incident to republican government." Not the least of the diseases is the propensity of elected and appointed officials to abuse the limited power the people grant them, both for selfish purposes and out of the righteous belief that government

must coerce citizens to be good.

By limiting the common *political* good in the name of the individual rights shared equally by all, Madisonian constitutionalism establishes a governing framework that enables those citizens dedicated to the natural law—and all other citizens—to raise families; build communities; develop their talents; pursue their personal ambitions; engage in democratic politics; and, consistent with a like freedom for others, strive to attain the highest *ethical* and *religious* good.

Common Good Constitutionalism
by Adrian Vermeule
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Peter Berkowitz is the Tad and Dianne Taube senior fellow at the Hoover Institution, Stanford University. From 2019 to 2021, he served as director of the Policy Planning Staff at the U.S. State Department. His writings are posted at PeterBerkowitz.com and he can be followed on Twitter @BerkowitzPeter.

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