

Common-Good Constitutionalism Interview (English Translation)

By Adrian Vermeule

Here is the English translation of my interview with *Le Grand Continent*, the French journal of ideas, on “Common-Good Constitutionalism.” Thanks to Gerardo Munoz and the journal editors for their good offices.

An interview with Adrian Vermeule

Gerardo Muñoz

*Adrian Vermeule is the Ralph S. Tyler Professor of Constitutional Law at Harvard University, and one of the most important constitutional scholars in the United States. He has written on a wide range of topics that extend from the legitimacy of administrative law to theories of constitutionalism and constitutional design to the nature and development of executive power in the American legal tradition. He is the author, among other books, of *The Executive unbound: After the Madisonian Republic* (2010) co-written with Eric Posner; *The Constitution of rRsk* (2014); *Law's Abnegation: from law's empire to the administrative state* (2016), and the forthcoming *Law and Leviathan; redeeming the administrative state*, (2020) co-written with Cass Sunstein. As a public intellectual, Professor Vermeule is also one of the leading Catholic thinkers in the United States, spearheading a programmatic transformation of the very relation between legality and politics in the wake of the crisis of legal liberalism. In his recent piece “Beyond Originalism,” published in *The Atlantic*, and which has generated a vital debate, Prof. Vermeule draws a program for a new social and legal design that could impact the heart of American institutions and our understanding of public law itself in the West. In the following exclusive interview for *Le Grand Continent* we talk about some elements of his program of an “illiberal legalism”.*

1. Your piece, “Beyond originalism,” tries to move beyond the most important interpretative approach in American law, “originalism.” At a point, you allude to Justice Elena Kagan’s famous “we are all originalists now.” In your opinion, why has originalism triumphed, at least since Robert Bork’s launching of this concept for the conservative legal movement in the 1980s?

The real title of the piece is “Common-Good Constitutionalism”; *The Atlantic* magazine just used the phrase “Beyond Originalism” as one of their headings. Originalism became popular among American legal conservatives as a means of appealing over the head of the very left-liberal Warren Court to the supposed “true meaning” of the written Constitution itself. By embracing this *sola scriptura* tactic, however, American lawyers cut themselves off from the classical legal tradition of the *ius commune* and the *ius publicum Europaeum*, in both its common-law and civil-law variants. That tradition influenced the decisions of American courts until quite recently, in historical perspective, but has now been lost to view. The result has been an intellectually and morally impoverished version of positivism, one that has increasingly been hijacked by radical libertarians such as David French, who have exploited the lack of substantive moral content in the new method. My piece is an attempt to dispel this self-induced amnesia and to renew the older tradition.

2. The core of your argument in the piece is to defend what you call a “common-good constitutionalism.” Obviously, this resonates with a recent endorsement of this idea in order to meet the challenges of

globalization and the rise of China. Do you conceive the principle of the ‘common-good’ as a hermeneutic strategy for lawyers and judges, or as a ground for public officials regardless of their partisan commitments?

The common good is a concept with deep roots in the *ius publicum Europaeum*, canon law, political and moral theology, and — my major inspiration for the piece — the *ragion di stato* tradition in early modern European political theory. The famous trinity of the aims of government identified by the *ragion di stato* was “peace, justice and abundance.” I believe we can develop this tradition in all fidelity, in the age of the coronavirus, by adding “health and safety,” including a well-ordered relationship to the environment and the natural world (as articulated in the majestic document *Laudato Si*). These aims transcend partisan divides and cut across the usual political divisions.

3. You note that the great Liberal constitutional scholar Ronald Dworkin famously defended a “moral reading of the constitution,” and throughout the last two centuries Liberalism has been systematically criticized for its intrinsic arbitrary morality. How does a “common-good morality” differ, and how could it transform our understanding of public law?

In my view liberalism is in essence an elite anti-morality of rebellion, the relentless celebration of a perverse sacrament of liberation from all constraints of morality, nature and just authority. In this way liberalism destabilizes its own subject communities and provokes backlash, eventually undermining its own claim to rule; we see the consequences all around us today. Against this backdrop, Dworkin’s main intellectual value in my view is negative; he exposes originalism as necessarily based on suppressed normative arguments that originalism wishes to deny. His own affirmative normative views, however, are hopelessly inadequate and impoverished, for the same reason that originalism is impoverished — both are cut off from the common good. The answer to Dworkin’s liberalism is not originalist pseudo-neutrality, but the genuine impartiality and public-spiritedness that comes with the moral objectivity of the common good.

4. As one of the foremost scholars of administrative law in the United States, how relevant is the role of the administrative state in carrying forward and providing legitimacy to “common-good constitutionalism,” and how does a ‘strong executive’ fit in this picture? (The administrative state, to remind our French readers, has been even called “unlawful” by libertarian constitutionalists). And secondly, why is the Catholic tradition fundamental to transform the American ideals?

I am cautiously optimistic about the possibilities for a genuinely Catholic-inspired, solidaristic economics in the United States today — not as a final end goal, but as an interim situation that is better than the status quo ante of relentless, bipartisan neoliberalism. The main institutional locale for this program will have to be the administrative state, if only *faute de mieux*. We tend to forget that the New Deal, during which much of the current U.S. administrative state was cemented into place, was partly inspired by the principles of Catholic social teaching; in an important campaign speech in 1932, Franklin Roosevelt quoted from Pius XI’s *Quadregesimo Anno* and called it “one of the most important documents of modern times ... it is as radical as I am.” Recently, leaders such as Senator Marco Rubio have begun to articulate a humane economics, oriented towards the common good, explicitly drawing upon Catholic social teaching. It remains to be seen whether that development will continue in the right directions, but it is an encouraging start. This could very well commence under a series of conditions: (1) under a constitutional principle of solidarity; (2) subject to reasonable administrative discretion (the *determinatio*); (3) and the understanding that whether and to what extent the principle is judicially enforceable is a separate institutional question.

5. One last question: we know that part of the success of originalism has been their competence in creating organizations for elite reproduction, such as the Federalist Society. Do you imagine something similar to this organization in order to form a new intellectual and judicial elite committed to the principles of the “common-good”?

The Federalist Society contains a number of members, including students, lawyers and judges, who are deeply dissatisfied with originalism and are searching for alternatives (although some feel constrained from saying so publicly; you should see my emails). Hence I think it could easily be “integrated from within.” But don’t tell them I said so!

Thank you for your thoughtful responses, Professor Vermeule.

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