

ABA JOURNAL

‘Common good originalism’ is neither originalist nor a good way to judge, essay says

Debra Cassens Weiss

July 27, 2021

Some conservatives are backing a more activist brand of judging that reads moral values into the Constitution as a counter to liberals’ push to read the Constitution as a living document that changes with the times.

The new theory is dubbed “common good originalism” or “common good constitutionalism,” but it doesn’t subscribe to the originalist values that look to the Constitution’s meaning at the time of enactment, according to a [Wall Street Journal commentary](#) noted by [How Appealing](#).

Nor does it subscribe to textualism, which applies an originalist approach to statutory interpretation, the commentary said.

The theory is “no different from the raw-power judicial activism conservatives have railed against for decades as unaccountable, unwise and dangerous,” according to the Wall Street Journal writers: David B. Rivkin Jr., who served in the Reagan and George H.W. Bush administrations, and Andrew M. Grossman, an adjunct scholar at the Cato Institute.

The article pointed to two essays that make the pitch for common-good judging.

In one essay published last year [in the Atlantic](#), Adrian Vermeule, a professor at Harvard Law School, argued that originalism has “outlived its utility.”

According to Vermeule, the idea that the Constitution’s meaning was fixed at the time of enactment is “an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation.”

Vermeule instead backs an approach that begins with moral principles that should be read into the ambiguities of the Constitution. He backs “a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.”

According to the Wall Street Journal commentary, Vermeule “is best known for his advocacy of unchecked presidential and administrative supremacy and for the incorporation of Catholicism into civil law, which he calls integralism and critics call theocracy.”

A few populist conservatives—Hadley Arkes, Josh Hammer, Matthew Peterson and Garrett Snedeker—back common-good originalism but avoid sectarianism in a March essay published in the American Mind, a publication of the Claremont Institute, according to the Wall Street Journal writers.

The American Mind essay sees the failure of the originalist approach in U.S. Supreme Court Justice Neil M. Gorsuch’s *Bostock v. Clayton County* decision holding that the ban on sex discrimination in Title VII of the Civil Rights Act protects gay and transgender workers. The decision, the American Mind writers said, “evinces the folly of a morally neutered, overtly positivist approach to interpreting legal texts.”

The American Mind writers also criticized the dissenters in *Roe v. Wade* for focusing on the decision’s removal of the abortion question from the political realm.

“The designated ‘victims’ were shifted from the babies killed in these surgeries, to the voters deprived of the chance to vote on this question,” they wrote.

Similarly, they wrote, Justice Antonin Scalia’s dissent in the same-sex marriage *Obergefell v. Hodges* decision focused on the Supreme Court, rather than voters deciding the issue. What was missing, according to the American Mind essay, was “a substantive defense of marriage as it had been sustained in the laws: the legal commitment of one man and one woman.”

The Wall Street Journal writers countered that *Obergefell* is an example of “doing textualism badly.” They warned that conservative divisions threaten judicial approaches that serve as a check on the left.

“And originalism delivers results,” according to the Wall Street Journal writers. “In the past several months, self-consciously originalist decisions have fortified property rights, limited unaccountable bureaucracy, strengthened protections for freedom of association, recognized young adults’ Second Amendment rights, and expanded the freedom of religious practice. What is to be gained from abandoning originalism now, at the apex (at least to date) of its influence?”