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# Originalism's Promise, and Its Limits - Symposium: History and Meaning of the Constitution

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## Recommended Citation

Lee J. Strang, *Originalism's Promise, and Its Limits - Symposium: History and Meaning of the Constitution*, 63 Clev. St. L. Rev. 81 (2014)  
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# ORIGINALISM’S PROMISE, AND ITS LIMITS

LEE J. STRANG\*

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[R]ationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata.<sup>1</sup>

## I. INTRODUCTION

The Constitution is the focus of sustained academic, political, and public debate. This is due, in large measure, to its central place in American public life. The Constitution is a—if not the<sup>2</sup>—major source of America’s identity<sup>3</sup>; it is the ultimate

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<sup>1</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 90, a. 4 (Leoninum Romae 1892).

<sup>2</sup> The Declaration of Independence is the other potential primary source of American identity. This position has a wide following. *See, e.g.*, SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 22 (1992) (providing the best defense of this view); Scott Douglas Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. (forthcoming Nov. 2014).

<sup>3</sup> *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 11 (1988) (“‘Veneration’ of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition.”).

arbiter of many of the nation's most pressing legal and social issues; it is the trump card in political debates. The viewpoint, argument, or perspective that has the Constitution as its ally, wins.<sup>4</sup>

The Constitution's centrality makes correctly ascertaining its meaning crucially important. Hence, it is no surprise that constitutional interpretation has taken center stage throughout American history. The Supreme Court's interpretation of the Constitution has been, from the Republic's dawn, continuously subject to praise and criticism.<sup>5</sup> And outside the courts, Americans from the beginning have harnessed different constitutional interpretations to support their respective positions.<sup>6</sup> Constitutional interpretation has been especially contentious in American law and politics since the Progressive Era,<sup>7</sup> and has remained so to today.

Broadly speaking, and for a host of reasons,<sup>8</sup> since the Warren Court, two camps of constitutional interpretation have emerged: originalists and nonoriginalists.<sup>9</sup> Nonoriginalism includes a diverse collection of scholars who argue that factors other

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<sup>4</sup> From a popular constitutionalist perspective, this claim is tautologically true because, so long as a popular constitutional movement is successful, its constitutional interpretation is/becomes the Constitution. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1752 (2007); see also JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) (arguing that popular constitutionalism occurs within the context of constitutional construction).

<sup>5</sup> An early example of this is the issue of state immunity from suit, or the lack thereof, in Article III. This issue quickly reached the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and, after the Court's ruling, swiftly resulted in the Eleventh Amendment in 1795.

<sup>6</sup> See, e.g., THE KENTUCKY AND VIRGINIA RESOLUTIONS OF 1798 (1798), reprinted in DOCUMENTS OF AMERICAN HISTORY 178 (Henry Steele Commager ed., 7th ed. 1963) (arguing that the Alien and Sedition Acts violated the principle of limited and enumerated powers and the First Amendment); REPUBLICAN PARTY PLATFORM (1860), reprinted in DOCUMENTS OF AMERICAN HISTORY 363-64 (rejecting the *Dred Scott* Court's interpretation of the Constitution).

<sup>7</sup> See, e.g., JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 28-39 (2005) (describing the intellectual ferment during the Progressive and New Deal periods that spilled over into jurisprudence and resulted in the rejection of originalism); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 205-40 (rev. ed. 1994) (arguing that modern judicial review arose during the Progressive Era).

<sup>8</sup> See Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 279-91 (2011) (providing three such reasons); see also Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2496 (2014) (book review) ("In the late twentieth century, an alternative jurisprudential gestalt began to emerge. The alternative gestalt embraced the rule of law as a central value and questioned both the desirability and inevitability of instrumentalist approaches to judging. Originalism emerged as a rival to living constitutionalism.").

<sup>9</sup> See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 241 (2009) ("For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as 'originalists' and those who do not."). Nonoriginalists also frequently receive the label living constitutionalists. See, e.g., Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007) (contrasting with originalism, living constitutionalism).

than, or in addition to, the Constitution's original meaning should govern constitutional interpretation.<sup>10</sup> Most legal academics are nonoriginalists.<sup>11</sup>

Originalists, especially since the mid-1980s,<sup>12</sup> have elaborated an elegant theory<sup>13</sup> of interpretation that focuses on the Constitution's original meaning. Originalism has, over the past two decades, gained many prominent proponents on the bench and in the academy, and originalists have provided a variety of powerful justifications for originalism ranging across the philosophical spectrum.<sup>14</sup> For instance, Professor Randy Barnett argued that originalism best protects individual natural rights in his well-received *Restoring the Lost Constitution: The Presumption of Liberty*.<sup>15</sup>

Along the way, originalism has matured in response to robust criticism. For example, originalism shifted focus from originally intended meaning to original public meaning, in order to overcome criticism that the Framers' and Ratifiers' intentions either did not exist or were inaccessible.<sup>16</sup>

Being new to the debates over constitutional interpretation, I came with "fresh eyes" to the subject of constitutional interpretation.<sup>17</sup> I found that many criticisms of originalism contained significant truth. Consequently, my own scholarship has frequently been devoted to elaborating an originalism that responds to these reasonable criticisms. This scholarly trajectory has led me to identify some of originalism's limits.

A good example is my article, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*.<sup>18</sup> There, I incorporated the insight of nonoriginalist critics that originalism should not lead to the overruling of all

<sup>10</sup> See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991) (providing the seminal list of six modalities of constitutional interpretation); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 11 (1996) (arguing that constitutional interpretation includes a justification facet that requires use of non-legal reasoning).

<sup>11</sup> Strang, *Originalism as Popular Constitutionalism?*, *supra* note 8, at 287-88.

<sup>12</sup> See Lawrence B. Solum, *What is Originalism?: The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 13-27 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing originalism's intellectual history).

<sup>13</sup> Or family of theories. See *id.* at 32-38 (describing the fixation and contribution theses).

<sup>14</sup> Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2013-14 (2012).

<sup>15</sup> RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 4-5 (2004).

<sup>16</sup> See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214-18 (1980) (providing the seminal articulation of this criticism); see also Solum, *supra* note 12, at 16-27 (describing some of originalism's changes).

<sup>17</sup> Though I possessed philosophical and religious commitments that provided input and boundaries to my permissible conceptions of constitutional interpretation. For instance, both my religious and philosophical loyalties committed me to (a conception of) natural law.

<sup>18</sup> Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 419 (2006).

nonoriginalist precedent.<sup>19</sup> I argued that originalism required federal judges to give “significant respect” to constitutional precedent, including nonoriginalist precedent.<sup>20</sup> In this same vein, much of my scholarship has explained how originalism meets the various criticisms that have been leveled against it and, in doing so, how originalism itself is made better.<sup>21</sup>

At the same time, I believe, originalism’s promise remains. Originalism’s promise is three-fold. First, originalism promises that it can paint constitutional interpretation in the most normatively attractive light. Not ideal results. Instead—on balance and systemically—normatively more attractive results than its competitors. Second, originalism promises that constitutional interpretation can fit the key facets of our Constitution. These key facets include, for example, the Constitution’s writtenness and its particular origins, facets that originalism better fits than alternative methods of constitutional interpretation. Third, originalism promises that constitutional interpretation can respect judges’ capacities. Judges’ pivotal role necessitates that interpretative methodologies work with their capacities, which originalism does, better than nonoriginalism.

In this Symposium Essay, I summarize originalism’s promise and limits. Part II succinctly explains originalism’s promise. Part III briefly describes originalism’s limits. Part IV then suggests that originalism’s limits contribute to its promise.

## II. ORIGINALISM’S PROMISES

### A. Introduction

Originalism makes three promises that, together, make originalism attractive, or at least more attractive than alternatives. These promises together constitute originalism’s claim that constitutional interpretation is most legitimate when it is performed via originalism.

### B. *Originalism Promises to Paint Constitutional Interpretation in a More Normatively Attractive Light*

#### 1. Introduction

First, consistently used, originalism promises to paint constitutional interpretation in the most normatively attractive light possible or, at least, that originalism leads to more normatively attractive results than alternative methods.

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<sup>19</sup> This was one of Brest’s criticisms. Brest, *supra* note 16, at 223-24, 230-31. It was also pervasive in the literature critical of originalism. Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 430-31.

<sup>20</sup> Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 447.

<sup>21</sup> See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 1997 (arguing that originalism’s theoretical transformation did not undermine it because originalism can incorporate virtue ethics); Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1731 (2010) (arguing that originalism holds a robust place for the practice of precedent and therefore adequately fits existing American legal practice); Lee J. Strang, *Originalism and the “Challenge of Change”*: *Abducted-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 927-29 (2009) (arguing that originalism can meet the challenge of changed societal conditions).

Since the publication of Professor Keith Whittington's *Constitutional Interpretation*,<sup>22</sup> in 1999, originalists have proposed normative justifications for originalism that cover the figurative waterfront. In other words, originalists have provided arguments from the major possible justificatory perspectives. These normative groundings fall into two main categories: internal and external justifications.<sup>23</sup> I describe each, in turn.

## 2. Internal Justifications

Internal justifications take the widely-accepted facets of American constitutional practice for granted and argue that originalism matches those practices better than alternative interpretative methodologies. Internal justifications do not attempt to justify the key practices of American constitutional interpretation; instead, the practices are "given." The goal of internal justifications is to make originalism relatively more attractive by showing its close fit to those practices.

For instance, Whittington argued that the fact that the Constitution is written suggests that originalism is the proper means of constitutional interpretation while, at the same time, excluding other modes of interpretation.<sup>24</sup> Whittington's argument was similar to Barnett's contention that the Constitution's "writtleness" serves four functions: evidentiary, cautionary, channeling, and clarifying.<sup>25</sup> Only originalism, Barnett contended, could facilitate these four functions.<sup>26</sup> Therefore, the Constitution's writtleness warrants originalism.

Professor Lawrence Solum utilized Gricean philosophy of language to conclude that the Constitution's text's meaning is its semantic meaning, which, in turn, is its original meaning.<sup>27</sup> According to Solum, the fact that the Constitution is a written communication to the public selects originalism as the appropriate interpretative methodology.<sup>28</sup>

Professors McGinnis and Rappaport recently tied originalism to the structural mechanism of the Constitution's original adoption and adoption of subsequent amendments via supermajoritarian means.<sup>29</sup> Their argument was anchored to the

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<sup>22</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW* 110 (1999); *see also* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9, 17, 46 (1997) (identifying democracy, the Rule of Law, and negative consequences, as reasons to reject nonoriginalism).

<sup>23</sup> WHITTINGTON, *supra* note 22, at 110; *see also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 106-07 (1977) (articulating the analogous categories of fit and justification).

<sup>24</sup> WHITTINGTON, *supra* note 22, at 50.

<sup>25</sup> BARNETT, *supra* note 15, at 100-03.

<sup>26</sup> *Id.* at 103-09.

<sup>27</sup> *See* Lawrence B. Solum, *Semantic Originalism*, at 34 (Nov. 22, 2008), *available at* <http://papers.ssrn.com/abstract=1120244> [hereinafter Solum, *Semantic Originalism*] (relying on PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989)); *see also* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479, 489 (2013) (same).

<sup>28</sup> Solum, *Semantic Originalism*, *supra* note 27, at 5, 50-57.

<sup>29</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 62-80 (2013). McGinnis and Rappaport also provided an external justification

Constitution's key adoption provisions, Articles VII and V, which require two-thirds and three-fourths of states, respectively, to adopt and amend the constitution.<sup>30</sup>

Perhaps most focused on a taken-for-granted facet of our constitutional practice is Professor Christopher Green's claim that the Constitution's text itself identified originalism as the proper interpretative methodology.<sup>31</sup> Green argued that the Constitution's repeated use of indexicals—for example, references to itself such as “this Constitution”—shows that the referenced Constitution is a text whose meaning was fixed at the time of ratification.<sup>32</sup> Green then coupled this move with the Supremacy Clause, to argue that the Constitution's original meaning the “supreme Law of the Land.”<sup>33</sup>

### 3. External Justifications

External justifications argue that originalism will lead to a good state of affairs, or a better state of affairs than other interpretative methods.<sup>34</sup> Here, originalists have offered a broad array of arguments.

Professor Barnett, for instance, contended that originalism best protects natural rights. It does so through two steps. First, the Constitution's original meaning is rights protective. This follows, according to Barnett, from the federal government's limited and enumerated powers, coupled with the rule of construction—a “presumption of liberty”—against rights-infringement located in the Ninth Amendment (and the Privileges or Immunities Clause).<sup>35</sup> However, if judges were free to depart from this rights-protective original meaning, then the Constitution's protection of natural rights would falter. Therefore, Barnett argued that originalism is necessary to “lock-in” the Constitution's rights-protectiveness.<sup>36</sup>

Whittington argued that originalism best facilitates popular sovereignty.<sup>37</sup> It does so in two primary ways: first, originalism facilitates popular sovereignty by protecting the constitutional judgments of the American people, embodied in the Constitution, from judicial abrogation<sup>38</sup>; and, second, originalism incentivizes the

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for originalism. *See id.* at 81-99 (arguing that originalism is normatively attractive because it creates the best interpretative consequences).

<sup>30</sup> U.S. CONST. art. V; *id.* art. VII.

<sup>31</sup> Christopher R. Green, “*This Constitution*”: *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1607-14 (2009).

<sup>32</sup> *Id.* at 1614.

<sup>33</sup> *Id.* at 1610-12, 1614.

<sup>34</sup> *See* Cass R. Sunstein, *There is Nothing that Interpretation Just Is*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2489088](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489088) (last visited Oct. 2, 2014) (arguing that “[a]ny approach [to constitutional interpretation] must be defended on normative grounds”).

<sup>35</sup> BARNETT, *supra* note 15, at 253-69, 274-77.

<sup>36</sup> *Id.* at 105-06.

<sup>37</sup> WHITTINGTON, *supra* note 22, at 111.

<sup>38</sup> *Id.*

American people to exercise popular sovereignty by preserving a space for their constitutionally-embodied constitutional judgments.<sup>39</sup>

Most recently, Professors McGinnis and Rappaport provided a third major argument: that originalism provides for the best consequences.<sup>40</sup> McGinnis and Rappaport argued that, on balance, constitutional decisions made by supermajority are generally superior to judgments made through other decision processes, in particular majority vote.<sup>41</sup> Supermajorities adopted and amended the Constitution, and these supermajorities of Americans understood the meaning of the texts they ratified using originalism.<sup>42</sup> Therefore, originalism is necessary to preserve the meaning that emerged from these valuable supermajority processes.

#### 4. Originalism Facilitates Human Flourishing

My own justification for originalism follows a similar two-pronged path: Originalism best fits the widely-accepted facets of our constitutional practice, and it also leads to a the best set of conditions for human flourishing for Americans today. My conception of originalism is drawn from the Aristotelian philosophical tradition.<sup>43</sup> My conception assumes that the Aristotelian philosophical tradition's description of reality—in particular, its description of human beings, law, and society—is accurate, and applies its concepts to the United States Constitution.

Three fundamental components of the Aristotelian philosophical tradition are needed for purposes of this brief Essay: human flourishing, virtue, and law. Human flourishing is when a human possesses deep, abiding, happiness.<sup>44</sup> One flourishes when one reasonably participates in the basic human goods, such as life, knowledge,

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<sup>39</sup> *Id.*

<sup>40</sup> MCGINNIS & RAPPAPORT, *supra* note 29, at 19-20.

<sup>41</sup> *Id.* at 33-61.

<sup>42</sup> *Id.* at 62-80.

<sup>43</sup> The Aristotelian philosophical tradition is the tradition of philosophical inquiry that includes Aristotle and St. Thomas Aquinas as the central figures. *See* Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 2015-16 (briefly summarizing the tradition); Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 916-28 (2005) (providing a first-cut explanation of the pertinent facets of the tradition); *see also* ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION* (2009) (describing a tradition that includes the Aristotelian tradition, but which is broader).

<sup>44</sup> *See* ARISTOTLE, *NICOMACHEAN ETHICS* 1098a, (D.P. Chase, trans., 1947) (“[T]he Good of Man comes to be ‘a working of the Soul in the way of Excellence,’ . . . in the way of the best and most perfect Excellence.”); ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, at Q. 5, a. 5 (Fathers of the English Dominican Province trans., Benziger Bros., 1947) (“Imperfect happiness that can be had in this life, can be acquired by man by his natural powers, in the same way as virtue, in whose operation it consists.”); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 103 (1980) (describing happiness as the reasonable participation in the basic human goods).



and friendship.<sup>45</sup> One's life will be less rich, less full, for instance, if one does not engage in friendships.<sup>46</sup>

Virtue is both constitutive of human flourishing and a mechanism to pursue flourishing.<sup>47</sup> Virtue is part-and-parcel of human flourishing because the good life includes virtuous activity. For instance, the good life does not include timidity or rashness; instead, to be happy, one must take (only) reasonable risks.<sup>48</sup> Virtue is also a means to secure flourishing, because the virtues hone one's capacities to identify the basic human goods and to reasonably pursue those goods. For example, temperance enables one to reasonably pursue money and to not let desire for any one (created) good unreasonably dominate one's life.<sup>49</sup>

Law is one of the key mechanisms that humans utilize to achieve human flourishing. For a host of reasons,<sup>50</sup> humans must utilize law to set the background conditions—the common good—that make it possible for humans to flourish.<sup>51</sup> To take an example from the first-year law school curriculum: private property is (generally) necessary for human flourishing,<sup>52</sup> but there is no one-size-fits-all private property law scheme.<sup>53</sup> Therefore, human societies utilize law to construct a reasonable set of property law doctrines.<sup>54</sup>

Turning to the United States Constitution, my account of originalism fits a number of the Constitution's facets. For instance, the Constitution set out its purpose in the Preamble.<sup>55</sup> The Preamble identified the Constitution's purposes in terms of

<sup>45</sup> See JOHN FINNIS, AQUINAS 107-08 (1998) (describing St. Thomas' explanation of happiness).

<sup>46</sup> See JANE AUSTEN, MANSFIELD PARK 101, 104 (1906) (describing Fanny Price being left "all alone" on the Sotherton estate as a metaphor for her loneliness caused by lack of friendships); VICTOR HUGO, LES MISÉRABLES (1862) (describing Javert's life as one of "privations, isolation, self-denial, and chastity— never any amusement").

<sup>47</sup> See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 2022-24 (describing this relationship).

<sup>48</sup> See HUGO, *supra* note 46 (describing Jean Valjean's courageous pursuit of redemption); SIGRID UNDSSET, KRISTIN LAVRANDATTER 1920-22 (2005) (describing Kristin's rash romance with and marriage to Erlend Nikulausson, and its negative effects).

<sup>49</sup> See CHARLES DICKENS, A CHRISTMAS CAROL 2 (2009) ("Scrooge! a squeezing, wrenching, grasping, scraping, clutching, covetous, old sinner!").

<sup>50</sup> YVES SIMON, A GENERAL THEORY OF AUTHORITY 47 (1962); YVES R. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 59 (1951); see also SCOTT SHAPIRO, LEGALITY 131-34, 161-63 (2011) (describing reasons for humans' resort to legality).

<sup>51</sup> FINNIS, *supra* note 45, at 155.

<sup>52</sup> ST. THOMAS, *supra* note 1, at I-II, Q. 66, a. 2.

<sup>53</sup> See *id.* ("[T]he division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law.")

<sup>54</sup> This creative use of positive law is what St. Thomas labeled "determinatio." *Id.* at I-II, Q. 91, a. 3.

<sup>55</sup> U.S. CONST. pmbl; see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 218-19 (reprint ed. 1987) (1833) (describing the Preamble as the "key to open the mind of the makers").

the American People's common good, a concept at home in the Aristotelian philosophical tradition,<sup>56</sup> but harder to square with other conceptions of originalism.<sup>57</sup>

My conception of originalism also offers a normatively attractive external justification for originalism. Originalism, on my account, provides two complimentary arguments, one "thin" and one "thick."<sup>58</sup> The thin argument is relatively independent of controversial claims regarding the Good, while the thicker argument relies on the Aristotelian tradition's conception of human flourishing.

The thin account argues that the creation of positive law, in a republic like ours, paradigmatically proceeds by legislators positing legal norms that are: (1) authoritative—because they originated from the elected legislature; (2) prudential—because the legislators utilized their prudential judgment to solve a societal problem; and (3) social-ordering—because the laws order the governed's lives.<sup>59</sup> For the purposes of this Essay, this conception of the lawmaking process has three attractive facets: first, it portrays a reasoned process; second, it emphasizes the legislators' political wisdom; and third, it draws on the legislature's legitimacy.<sup>60</sup> This thin account contends that originalism is the best interpretative methodology because it best facilitates these three facets in the context of constitutional interpretation. Originalism does so by identifying the communication, embodied in law, from the authoritative lawmaker, to the public.<sup>61</sup>

My conception of originalism analogizes this picture of positive law's creation with the Framing and Ratification that produced the Constitution. The Framing and Ratification produced the "supreme Law of the Land."<sup>62</sup> It was the result of prudential judgment.<sup>63</sup> From the requisite ninth state's ratification, the Constitution ordered—and continues to order—Americans' lives.<sup>64</sup>

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<sup>56</sup> Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation*, *supra* note 43, at 959.

<sup>57</sup> See Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 455-56 (arguing that my conception of originalism better fits the Preamble than did a natural rights conception of originalism).

<sup>58</sup> Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 212-54 (1993) (distinguishing between public and nonpublic reasons).

<sup>59</sup> Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation*, *supra* note 43, at 983-92, 998-1001.

<sup>60</sup> See Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 117 (1989) ("The originalist assigns responsibility primarily to *legislators*, who ordinarily make and express their decisions in the form of statutes.").

<sup>61</sup> See Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 12, at 90 ("An intended meaning of an utterance is the uptake the speaker intends in his audience."). Cf. Solum, *Semantic Originalism*, *supra* note 27, at 50-59 (arguing that Gricean "sentence meaning," appropriately modified, is the best conception of the Constitution's original meaning).

<sup>62</sup> U.S. CONST. art. VI, cl. 2.

<sup>63</sup> See JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (1840) (providing a first-hand account of the give-and-take of debate in the Philadelphia Convention); *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA*

Originalism leverages the three facets I identified earlier—a reasoned process, legislative wisdom, and democratic legitimacy—by adhering to the Constitution’s determinate original meaning. Therefore, regardless of one’s conception of the Good, originalism is more likely to produce the conditions necessary for Americans to flourish than the alternative, judicial updating.<sup>65</sup>

The thicker argument tracks the thin argument, and adds the more-robust substantive claim that the Constitution’s original meaning ensures the background conditions appropriate to human flourishing. This substantive claim is supportable both indirectly and directly.

First, indirectly, numerous facets of the Constitution’s history, meaning, and structure, suggest that the Constitution’s original meaning facilitates human flourishing. As noted above, the process of Framing and Ratification utilized the Framers’ and Ratifiers’ wisdom to construct a governmental structure that would facilitate human flourishing.<sup>66</sup> Also, the supermajoritarian processes by which the Constitution was ratified utilized the American People’s wisdom—and self-interest—to approve only those governmental structures that would be conducive to their and their descendants’ flourishing.<sup>67</sup> Third, the Constitution’s writtenness itself both facilitated the creation of a better constitution and preserves that substantively good constitutional meaning.<sup>68</sup>

Second, and more directly, the Constitution’s original meaning provides the conditions for human flourishing because it preserves a robust sphere for ordered individual freedom vis-à-vis the federal government,<sup>69</sup> and it does so in multiple ways. First, the Constitution’s original meaning protects natural rights.<sup>70</sup> Second, the Constitution’s original meaning preserves individual freedom via limits on federal power through the constitutional principles of limited and enumerated powers, separation of powers, check and balances, and federalism.<sup>71</sup> Third, the Constitution’s

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IN 1787 (Jonathan Elliot ed., 2d ed., 1836) (summarizing ratification debates on the Constitution).

<sup>64</sup> See Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001) (concluding that some of the Constitution became law at different times, but for the most part during the Summer of 1788); see also *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 421-23 (1820) (ruling that the Constitution began “operat[ion]” on March 4, 1789).

<sup>65</sup> Smith, *supra* note 60, at 117-18.

<sup>66</sup> See *supra* notes 68-70.

<sup>67</sup> U.S. CONST. art. VII, cl. 1.

<sup>68</sup> See BARNETT, *supra* note 15, at 101 (identifying the four functions of writtenness).

<sup>69</sup> See *id.* at 53-60, 72-86, 153-90, 224-73 (arguing that the federal government is authorized to protect and is limited by natural rights); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 189-227 (1993) (articulating a “pluralist perfectionist” conception of human freedom); Lee J. Strang, *Originalism and Legitimacy*, 11 KAN. J.L. & PUB. POL’Y 657 (2002) (arguing that the federal government is a minimalist state).

<sup>70</sup> BARNETT, *supra* note 15, at 253-69, 274-77.

<sup>71</sup> See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 326-34 (1993)

original meaning creates a wide space for democratic processes to operate, both on the federal and state levels.<sup>72</sup> The wide berth originalism provides free human activity, which is constitutive of human flourishing, is central to its case for normative attractiveness.

Third, and most directly—and most controversially—the original meaning is also substantively protective of human flourishing because it protects activities necessary to human flourishing and does not protect activities not conducive to flourishing.<sup>73</sup> For instance, the Constitution protects the freedom of speech,<sup>74</sup> but it does not protect abortion from government restriction.<sup>75</sup> To make a persuasive case for this claim would require a detailed “cashing-out” of the Constitution’s original meaning, which is beyond the scope of this Essay.<sup>76</sup>

### C. Key Characteristics

Originalism also promises that, unlike alternative interpretative methods, it makes sense of the Constitution’s key features. I discussed some of those features, such as the Constitution’s writtenness, above, in Parts I and II.B.2. Here, I have in mind *the* key facet of American constitutional law: the centrality of one particular written document that originated at one particular time.<sup>77</sup> This fact is so deeply entrenched that, even when it is implausible, the Supreme Court claims that it is doing the Constitution’s bidding, not the Court’s.<sup>78</sup>

The document that begins “We the People of the United States,”<sup>79</sup> currently located in Rotunda for the Charters of Freedom in the National Archives,<sup>80</sup> and

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(summarizing the Necessary and Proper Clause’s role in maintaining the Constitution’s structural principles).

<sup>72</sup> See Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation*, *supra* note 43, at 981-83 (summarizing the robust role for democratic processes within originalism).

<sup>73</sup> See Strang, *Originalism as Popular Constitutionalism?*, *supra* note 8, at 285-87 (“Originalism, applied to the American Constitution, regularly results in conservative outputs.”).

<sup>74</sup> U.S. CONST., amend. I.

<sup>75</sup> See Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 482-83 (summarizing the literature).

<sup>76</sup> See Strang, *Originalism as Popular Constitutionalism?*, *supra* note 8, at 279-87 (suggesting that the alignment of liberal legal academics and nonoriginalism and conservative-libertarian legal academics and originalism is evidence that originalism leads to conservative results).

<sup>77</sup> See Richard S. Kay, *American Constitutionalism*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 31 (Larry Alexander ed. 1998) (“What commands obedience is not a mere set of words, but the expression of an intentional historical-political act.”); Green, *supra* note 31, at 1614 (concluding that “this Constitution” refers to “historically situated Constitution that . . . receives meaning at the time of the Founding”).

<sup>78</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (“*Miranda* is constitutionally based”); *id.* at 444 (“*Miranda* announced a constitutional rule”).

<sup>79</sup> U.S. CONST. pmb1.

commonly known as the Constitution of the United States, is the ultimate source of American constitutional law.<sup>81</sup> This particular document possesses a unique provenance:<sup>82</sup> it arrived in the Archives' Rotunda because it is the only document that went through the Framing and Ratification process.<sup>83</sup>

The Framing and Ratification process was Americans' response to the problems presented by the Articles of Confederation.<sup>84</sup> The process drew on Americans' wisdom, resolved and compromised contentious issues, and provided the framework for American society.<sup>85</sup> The Constitution bears the marks—both good<sup>86</sup> and ill<sup>87</sup>—of that process.

Originalism places this specific document at the heart of the interpretative enterprise. All conceptions of originalism share the fundamental disposition to treat the document's original meaning as the sole source of determinate constitutional meaning.<sup>88</sup> Originalism's attitude of faithfulness of the United States Constitution shows in many ways. To take a counter-intuitive piece of evidence, nonoriginalists frequently criticize originalism for its failure to reach normatively acceptable results.<sup>89</sup> I think this criticism is overblown<sup>90</sup> but, accepting its cogency for purposes

<sup>80</sup> National Archives, *Rotunda for the Charters of Freedom*, available at <http://www.archives.gov/museum/visit/rotunda.html> (last visited July 28, 2014).

<sup>81</sup> See also Donald Drakeman, *What's the Point of Originalism?*, 37 HARV. J.L. & PUB. POL'Y 1123, 1125 (2014) (describing the results of a survey that indicated that 90% of Americans believe that the Constitution's original meaning should play a role in Supreme Court interpretations, and two-thirds citing the Framers' intent as the most important source of that meaning).

<sup>82</sup> See Joseph Raz, *On the Authority and Interpretations of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 77, at 158 (“[T]he identity of the lawmaker is material to the validity of the law, at least in the case of enacted law.”).

<sup>83</sup> National Archives, *The Constitution of the United States: A History*, available at [http://www.archives.gov/exhibits/charters/constitution\\_history.html](http://www.archives.gov/exhibits/charters/constitution_history.html) (last visited Aug. 20, 2014).

<sup>84</sup> Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation*, *supra* note 43, at 951-57 (summarizing this process).

<sup>85</sup> FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790*, at 259-371 (2d ed. 1979).

<sup>86</sup> See, e.g., U.S. CONST. art. I, § 1, cl. 1 (“All legislative Powers herein granted . . . .”) (anchoring the principle of limited and enumerated powers).

<sup>87</sup> See, e.g., U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behaviour . . . .”) (providing the basis for presumptive life tenure of federal judges).

<sup>88</sup> See Solum, *Semantic Originalism*, *supra* note 27, at 2-4 (describing the fixation thesis).

<sup>89</sup> William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1251-52 (2011); see also Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 376 n.22 (2013) (listing sources making this claim).

<sup>90</sup> Cf. Strang, *Originalism and the “Challenge of Change,” supra* note 21, at 992 (arguing that, based on originalism's demonstrated ability to change operative constitutional doctrine in

of this argument, originalists should “bite the bullet” and agree with the criticism: originalism cannot deliver “Our Perfect Constitution.”<sup>91</sup> Instead, originalism’s inability to always deliver normatively attractive results shows that originalism is wedded to our actual written—and fallible—Constitution. For instance, Article III requires presumptive lifetime tenure for federal judges, and this is normatively unattractive.<sup>92</sup> Similarly, the Due Process Clauses’ do not protect the right to life of unborn human beings,<sup>93</sup> and this injustice should be rectified through constitutional amendment.<sup>94</sup>

Of course, we should expect that a human artifact, such as the Constitution—especially a constitution!—is<sup>95</sup> imperfect.<sup>96</sup> Originalism fits this fact. Originalism’s fidelity to our historically-conditioned Constitution is in stark contrast to the core nonoriginalist claim: the Constitution’s original meaning is one argument among many, and that other “modalities” of constitutional argumentation, including baldly normative ones, may limit or displace the Constitution’s determinate original meaning.<sup>97</sup> For instance, Professor Mitchell Berman recently argued that current popular constitutional judgments on the Natural Born Citizenship Clause undermine originalism.<sup>98</sup>

Originalism’s pride-of-place for written Constitution also enables originalism to emphasize many of the Constitution’s other key characteristics. For example, Article V provides a mechanism to amend the Constitution. Article III authorizes federal judges to exercise “judicial Power,” the power to decide cases and controversies.<sup>99</sup>

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response to societal change, originalism’s critics bear the burden of showing where originalism failed to meet the challenge of change, and that its failure to do so counts it out as a viable method of constitutional interpretation).

<sup>91</sup> See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (describing the aspiration of nonoriginalist legal academics to create “Our Perfect Constitution” through creative judicial updating).

<sup>92</sup> See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 771 (2006) (“We believe the American constitutional rule granting life tenure to Supreme Court Justices is fundamentally flawed.”).

<sup>93</sup> See U.S. CONST. amend. XIV § 1 (“All persons *born* or naturalized . . .”) (emphasis added); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979, 980 (1992) (Scalia, J., dissenting) (“[T]he Constitution says absolutely nothing about it.”).

<sup>94</sup> See Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 483-84 (describing *Roe* and the abortions it licenses as unjust).

<sup>95</sup> Or may become so, in light of changed conditions. Kay, *supra* note 77, at 34.

<sup>96</sup> See *id.* at 32 (“[T]hose rules do not represent the optimum arrangements that might be imagined . . .”).

<sup>97</sup> See BOBBITT, *supra* note 10, at 11-22 (providing a list of six modalities of constitutional interpretation).

<sup>98</sup> Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION*, *supra* note 12, at 261-77.

<sup>99</sup> See Saikrishna Prakash & John Yoo, *Against Interpretative Supremacy*, 103 MICH. L. REV. 1539, 1541 (2005) (book review) (“Judicial review is merely the means by which federal

The thin text of Article III does not indicate a power to update the Constitution using nonoriginalist modalities. This compliments Article V<sup>100</sup> by preserving the attendant benefits of the amendment process, which are otherwise undermined by judicial updating via nonoriginalist precedent.<sup>101</sup>

#### *D. Judicial Capacity*

Third, originalism promises to fit judges' competences. Federal judges are at the center of American constitutional interpretation.<sup>102</sup> A plausible theory of constitutional interpretation must both play to the strengths of these judges and respect their limited capacities.

Originalism respects federal judges' capacities. Originalism asks federal judges to ascertain and to apply the Constitution's original meaning and originalist precedent.<sup>103</sup> Both tasks are within federal judges' competency.

Starting with the latter first, federal judges, like all lawyers, are trained to be adept at working with precedent. Indeed, this proposition is so uncontroversial that a school of constitutional interpretation has emerged called common law constitutionalism.<sup>104</sup> Originalism similarly prescribes that precedent should dominate judges' decision-making processes in our mature legal system.<sup>105</sup> Originalist judges' initial inclination is to find the relevant precedent and apply it.<sup>106</sup>

Federal judges also possess the capacity to ascertain and apply the Constitution's original meaning.<sup>107</sup> Originalism's focal case asks judges to ascertain and apply the Constitution's original meaning. This requires judges to ascertain the text's conventional meaning, when it was ratified. This is a task that lawyers are trained to do in a host of areas including statutory and administrative law. This is a task federal judges have the resources to do well. They have access to the pertinent constitutional text, structure, Framing and Ratification debates, and larger societal debates, to

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judges implement the Constitution's higher authority in the course of deciding cases or controversies.").

<sup>100</sup> See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY 2* (2008) (arguing that judicial power is the authority "to decide in accord with the law of the land").

<sup>101</sup> See MCGINNIS & RAPPAPORT, *supra* note 29, at 85-94 (cataloguing the negative consequences of judicial updating).

<sup>102</sup> See DWORKIN, *supra* note 10, at 12 ("[P]ractice has now settled that courts do have a responsibility to declare and act on their best understanding of what the Constitution forbids.").

<sup>103</sup> See Strang, *The Privileged Place of Originalist Precedent*, *supra* note 21 at, 1729, 1731 (describing the robust role of precedent in originalism).

<sup>104</sup> *E.g.*, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

<sup>105</sup> Strang, *The Privileged Place of Originalist Precedent*, *supra* note 21, at 1786-88.

<sup>106</sup> *Id.*

<sup>107</sup> Critics have questioned originalism's ability to deliver on these promises. *See, e.g.*, Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 331 (2013) ("[O]riginalism often cannot fulfill its promises of fixation and constraint."). In a future article, I hope to address these sorts of criticisms in depth.

ascertain the text's conventional meaning.<sup>108</sup> Also, judges' jobs are made easier from the wealth of originalist scholarship that has proliferated over the past three decades, and continues to be refined.<sup>109</sup> Furthermore, judges have access to computer-assisted research technologies to help them (and scholars) ascertain the Constitution's original meaning.<sup>110</sup>

This is unlike nonoriginalism, which asks lawyers to, for example: (1) choose the morally best ruling (Dworkin);<sup>111</sup> or (2) ascertain the "popular constitutional meaning" (Kramer);<sup>112</sup> or (3) choose the most economically efficient rule (Posner);<sup>113</sup> or (4) pick the legal scholar's favorite value(s) that judges should maximize.<sup>114</sup> For none of these tasks are federal judges especially trained or institutionally suited.

### III. ORIGINALISM'S LIMITS

#### A. Introduction

Originalism is subject to significant constraints; I describe three below. In the end, however, I briefly conclude that, despite—and, in part, because of—these constraints, originalism remains the best method of constitutional interpretation.

#### B. An Imperfect Constitution

First, originalism's promise that it provides a more normatively attractive picture of constitutional interpretation than other methods, though true, does not mean that originalism provides a "perfect" Constitution.<sup>115</sup> There are instances where, regardless of one's ethical commitments, the Constitution's original meaning is unjust or at least imprudent.<sup>116</sup> From my own perspective, the Constitution's failure to include unborn human beings within its protection from public and publicly-sanctioned violence is a grave defect. Similarly, the Constitution's conferral of

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<sup>108</sup> See, e.g., *Constitution Society*, [www.constitution.org](http://www.constitution.org) (last visited Aug. 20, 2014) (providing access to a plethora of relevant sources).

<sup>109</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 605-19 (2008) (reflecting heavy reliance on originalist scholarship).

<sup>110</sup> See, e.g., Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856-63 (2003) (utilizing computer-assisted research techniques to confirm the original meaning of "Commerce").

<sup>111</sup> DWORKIN, *supra* note 10, at 2.

<sup>112</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 149 (2005).

<sup>113</sup> E.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 240-64 (1999).

<sup>114</sup> See Monaghan, *supra* note 91.

<sup>115</sup> *Id.*

<sup>116</sup> One of the manifestations of this is the widespread claim by nonoriginalists that nonoriginalist precedent undermines originalism, which is partially premised on the proposition that the nonoriginalist precedents in question are just. See, e.g., DWORKIN, *supra* note 10, at 12-13 (pointing to *Brown* as an example).



presumptive life-tenure on federal judges may at one time have made sense, but does not make sense today, for a host of reasons.<sup>117</sup>

That being said, for many reasons I listed earlier—the Framing and Ratification process’s utilization of the Framers’ and Ratifiers’ prudential judgment, the supermajoritarian process by which the Constitution was adopted that harnessed the American People’s prudential judgment and self-interest, the democratic processes the Constitution fosters, *and* the substance of the original meaning itself—I believe that originalism creates a better state of affairs than the alternatives. Indeed, as I argued above, originalism’s failure to deliver a perfect constitution is one of its virtues.

### *C. No Answer for Some Constitutional Questions*

Second, though originalism paints the Constitution’s text in a positive light, the Constitution’s text is limited; it does not answer all constitutional questions. Originalists have described three major ways in which the original meaning’s force is limited.

First, many originalists have adopted the concept of constitutional construction.<sup>118</sup> Constitutional construction occurs when the Constitution’s original meaning does not answer a constitutional question; the original meaning may narrow the universe of possible answers, but it leaves the interpreter with choice.<sup>119</sup> These originalists have concluded that the Constitution’s original meaning is underdetermined in at least some situations<sup>120</sup>: it does not answer all interpretative questions.<sup>121</sup> That is because these originalists focus on the constitutional text’s original meaning—its conventional meaning, when it was ratified.<sup>122</sup>

This move toward original public meaning originalism has the benefit of avoiding the criticism that originalism is impossible in principle, or too difficult as a practical matter.<sup>123</sup> However, it also has the side-effect of narrowing the thickness and breadth of the Constitution’s meaning, with the result that the Constitution’s original meaning is more likely to be underdetermined.<sup>124</sup>

In these situations—when the Constitution’s original meaning is underdetermined—I have elsewhere argued that federal judges must defer to the

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<sup>117</sup> Calabresi & Lindgren, *supra* note 92, at 769.

<sup>118</sup> See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375, 403-04 (2013) (providing the current state of the scholarship on this point).

<sup>119</sup> See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) (providing the seminal discussion of construction).

<sup>120</sup> Strang, *Originalism as Popular Constitutionalism?*, *supra* note 8, at 272-74.

<sup>121</sup> *But see* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *NOTRE DAME L. REV.* 479, 483 (2013) (defining construction more broadly as “the determination of the legal content and legal effect produced by a legal text” even when the legal text determines the content and effect).

<sup>122</sup> *Id.* at 497-98.

<sup>123</sup> BARNETT, *supra* note 15, at 95-96.

<sup>124</sup> Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 2008-09.

elected branches' constitutional constructions.<sup>125</sup> This is likely a significant limit on originalism, depending on how many constitutional questions are interpretative or constructive. The relative quantity of construction is an empirical question that must be answered on a case-by-case, doctrine-by-doctrine basis, and there is little discussion among scholars on this point.<sup>126</sup> My tentative view is that many of the most important constitutional questions currently debated between originalists and nonoriginalists, are issues of interpretation, and not construction.<sup>127</sup>

Second, some originalists have argued that the Constitution requires nonoriginalist precedent to trump the Constitution's original meaning in some situations.<sup>128</sup> These originalists have found that the original meaning of "judicial Power" in Article III requires federal judges to give precedent—including nonoriginalist precedent—"significant respect."<sup>129</sup> I argued elsewhere that federal judges should utilize three factors to determine when to refrain from overruling nonoriginalist precedent.<sup>130</sup>

This has the potential to be a significant limit on originalism. My tentative view is that at least some of the most important nonoriginalist precedents should be preserved because such important cases will frequently implicate two of the three factors, reliance and "nonlegal justness." These precedents will implicate reliance because their importance was frequently "cashed out" in Americans' reliance on them. Also, the Supreme Court was frequently drawn toward a nonoriginalist result because of the perceived justness of the result. For example, in what is perhaps the most significant departure from the Constitution's original meaning,<sup>131</sup> the Supreme Court, in *Home Building and Loan Ass'n v. Blaisdell*,<sup>132</sup> narrowly interpreted the Contracts Clause because of the perceived justice of impairing the mortgage contracts in question.<sup>133</sup> *Blaisdell* has become one of the cornerstones of the modern

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<sup>125</sup> Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 70-72 (2005).

<sup>126</sup> *But see* Solum, *Communicative Content and Legal Content*, *supra* note 121, at 483 (describing the category of construction as relatively very large).

<sup>127</sup> Here, I have in mind debates such as those over the scope of Congress' Commerce Clause power, or whether the Due Process Clauses require the states and federal government to permit abortion, or whether the Establishment Clause prohibits public religious displays.

<sup>128</sup> MCGINNIS & RAPPAPORT, *supra* note 29, at 175-96; Kurt Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007); Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 419.

<sup>129</sup> Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 420.

<sup>130</sup> *Id.* at 472.

<sup>131</sup> *See* JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 67-68 (2005) (describing *Blaisdell* as counter to the paradigm case of what the Contracts Clause prohibited).

<sup>132</sup> *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

<sup>133</sup> *See* RUBENFELD, *supra* note 131, at 68 (identifying this argument).

regulatory state because it permits significant state regulation of private economic life.<sup>134</sup>

Third, originalism concerns only the Constitution's original meaning; therefore, it has nothing to say about other subjects. For instance, the original meaning does not tell us whether states had the power to secede from the Union (prior to the Civil War).<sup>135</sup> This was because the nature of the Constitution—was it a pact of states, or a covenant entered into by one national people?—is not answerable by the Constitution's original meaning. Therefore, outside of the Constitution's original meaning, originalism has no import.

#### *D. Pressuring Judges*

Originalism puts pressure on judicial competence in at least three areas: first, ascertaining the Constitution's original meaning; second, constructing constitutional meaning; and, third, determining whether to overrule or limit nonoriginalist precedent. Because of this pressure, originalism has to be prudent about its expectations of judges' ability to consistently produce accurate results

First, ascertaining the Constitution's original meaning exerts pressure on judicial competence. As my fellow Symposium Contributor, Mr. Charles, reminded us, judges are not historians<sup>136</sup>—though, luckily, originalism is not history. Judges must have the intelligence, time, access to resources and scholarship—and disposition—to investigate and articulate the Constitution's publicly understood meaning at the time of ratification. Not every judge will possess these characteristics, at least not sufficiently, to always “get it right.” Therefore, even assuming good faith, originalist judges will “get it wrong” on occasion.

Second, constructing constitutional meaning applies pressure on judicial competence.<sup>137</sup> When the Constitution's original meaning is underdetermined, judges must possess the requisite characteristics to know that the original meaning has in fact “run out.” They must also possess the characteristics to properly create constitutional doctrine that will advance the common good. These are challenging tasks. Therefore, even assuming good faith, originalist judges will “get it wrong” on occasion.

Third, determining whether to overrule or limit nonoriginalist precedent also pressures judicial competence. I argued elsewhere that the original meaning of “judicial Power” requires federal judges to give nonoriginalist precedent “significant respect,” and that this requires federal judges to utilize three factors to decide

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<sup>134</sup> Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 1 HAST. CONST. L.Q. 525, 544 (1987); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 735-38 (1984) (“Blaisdell . . . paved the way for massive government intervention.”).

<sup>135</sup> Lee J. Strang, *Originalism's Limits: Interposition, Nullification, and Secession*, in UNION AND STATES' RIGHTS: A HISTORY AND INTERPRETATION OF INTERPOSITION, NULLIFICATION, AND SECESSION 150 YEARS AFTER SUMTER 204, 214-15 (Neil H. Cogan, ed., 2014).

<sup>136</sup> Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. (forthcoming Nov. 2014).

<sup>137</sup> See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 2036-37 (describing this).

whether to overrule nonoriginalist precedent.<sup>138</sup> The three factors are: (1) to what extent does the nonoriginalist precedent deviate from the original meaning?; (2) to what extent, if any, would overruling the precedent harm Rule of Law values?; and (3) the nonlegal justness of the precedent.<sup>139</sup> Both the identification of which precedents are nonoriginalist, and determining whether the three factors council overruling a particular precedent, will require judges with the right character and capacities.<sup>140</sup> Not every judge will possess these characteristics, at least not sufficiently to always “get it right.” Therefore, even assuming good faith, originalist judges will “get it wrong” on occasion.

Elsewhere, I argued that, because of these pressures on judges, originalism must incorporate virtue ethics into its conception of judicial selection and judging.<sup>141</sup> For example, judges facing nonoriginalist precedent will need the virtue of justice-as-lawfulness so that they have the disposition to follow the law—the Constitution’s original meaning—and not succumb to the nonoriginalist precedent’s perceived normative attractiveness.<sup>142</sup> Incorporating virtue ethics into originalism will enable it to identify those people who are well-suited for judging, and help foster those characteristics necessary to originalist judging. Originalism, supplemented by virtue ethics, despite the pressures it places on judges’ capacities, has the ability to meet its goals, at least better than nonoriginalist alternatives.<sup>143</sup>

#### IV. ORIGINALISM RETAINS ITS PROMISE (IN PART) BECAUSE OF ITS LIMITS

Acknowledging these limits to originalism, its promises continue to hold true. Originalism promises: (1) normatively attractive results—though not perfection; (2) fit with key facets of the Constitution—though the Constitution’s original meaning is limited; and (3) respect for the competence of judges—though judges are likely to fail at the originalist enterprise, at least some of the time.

Each of the three limits to originalism’s promise described above share the characteristic that one should expect from a human enterprise, such as judges<sup>144</sup> interpreting the United States Constitution<sup>145</sup>: limitedness. The Constitution is

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<sup>138</sup> Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, *supra* note 18, at 452, 472.

<sup>139</sup> *Id.* at 472.

<sup>140</sup> See Strang, *Originalism and the Aristotelian Tradition*, *supra* note 14, at 2033-36 (describing this).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Tentatively, I believe that part of the reason for originalism’s superiority in this context is that the virtue of justice-as-lawfulness fits originalism better than nonoriginalism.

<sup>144</sup> See also ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 1* (1999) (“Some of the facts of human limitation and our consequent need of cooperation with others are more generally acknowledged, but for the most part only then to be put to one side.”).

<sup>145</sup> See Daniel A. Farber, *Our (Almost) Perfect Constitution*, 12 CONST. COMMENT. 163, 163 (1995) (“As with any human document, the answer [to whether the Constitution could have been improved] is undoubtedly ‘yes.’”); see also Monaghan, *supra* note 91, at 396 (“In

posited human law crafted by humans at particular times to achieve particular purposes,<sup>146</sup> and judges interpreting it are likewise limited humans.<sup>147</sup> Therefore, the Constitution and judicial interpretation are limited, and one should not expect it to achieve normative perfection,<sup>148</sup> or answer all legal questions, or authorize federal judges to utilize tremendous power.<sup>149</sup>

Originalism's promises, appropriately limited, fit the Constitution's positedness. It promises attainable normatively attractive results, faithfulness to the actual Constitution, and respect for judicial limits. These are modest promises. And, because they are modest, originalism is able to "deliver" on those promises. In sum, it is only through recognizing its limits that originalism is able to achieve its promise of legitimate interpretation.

#### V. CONCLUSION

In this brief Essay, I described what I take to be the three primary facets of originalism that make it a better interpretative methodology than alternatives. I argued that originalism promises relatively more normatively attractive constitutional interpretation, fit with the Constitution's key characteristics, and respect for judicial capacities. I also acknowledged that originalism labors under limits, including less-than-ideal constitutional interpretations, limited constitutional meaning, and occasional judicial failure. Lastly, I noted that originalism's limits argue in its favor because they reflect the limited nature of the Constitution and the humans who crafted and interpret it.

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short, perhaps the constitution guarantees only representative democracy, not perfect government."); Raz, *supra* note 82, at 167 ("They [most positive laws] are not timelessly valid because they were enacted by a fallible social institution or approved by a referendum.").

<sup>146</sup> See John Finnis, *The Truth in Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 195, 195 (Robert P. George, ed., 1996) (describing the concept of positive law in the Thomistic natural law tradition).

<sup>147</sup> THE FEDERALIST NO. 51, at 1 (James Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

<sup>148</sup> See also Michael Stokes Paulsen, *Our Perfect, Perfect Constitution*, 27 CONST. COMMENT. 531, 531 (2011) (suggesting, tongue-in-cheek, that he "now believe[s] that everything in the U.S. Constitution is perfect").

<sup>149</sup> See Finnis, *supra* note 146, at 195 ("Aquinas asserts and illustrates positive law's variability and relativity to time, place, and polity, its admixture of human error and immorality, [and] its radical dependence on human creativity . . .").