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6-7-2012

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Recommended Citation
Brennan, Patrick McKinley, "Two Cheers for the Constitution of the United States: A Response to Professor Lee J. Strang" (2012). *Res Gestae*. Paper 10.
http://ir.lawnet.fordham.edu/res_gestae/10

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# TWO CHEERS FOR THE CONSTITUTION OF THE UNITED STATES: A RESPONSE TO PROFESSOR LEE J. STRANG

*Patrick McKinley Brennan**

## INTRODUCTION

On January 1, 2012, a new constitution took effect in Hungary. That document, known as the country's "Fundamental Law," establishes that "[t]he provisions of the Fundamental Law shall be interpreted in accordance with . . . the Fundamental Law's National Avowal of Faith."[1] This language means that, as a matter of law, Hungary's constitution is to be interpreted according to the principles of Christianity. The Constitution of the United States lacks any comparable interpretive commitment, of course. Indeed, as John Witte, Jr. has observed: "A reference to 'the Year of our Lord' sneaks into the dating of the instrument. But nothing more. The 'Godless Constitution' has been both celebrated and lamented ever since."[2] One hears no lamentation from Lee Strang about the U.S. Constitution, neither in his previous writings on the subject nor in his recent piece published in the *Fordham Law Review*.[3] Indeed, Strang is among the many who celebrate that document. Elsewhere, Strang has defended the Constitution, and specifically its original public meaning, on the ground that it leads to "human flourishing."[4] Some other constitutions do that as well, we must assume. Some lead even higher.

Not only is the U.S. Constitution silent about God and His place in the document's interpretation, it maintains a complete silence on the question of how it is to be interpreted, with the exception of the purposes set out in the Preamble, now long neglected. More than two hundred years of constitutional argument have established that text, constitutional structure, purposes, original intent, original meaning, judicial precedent, settled

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1. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY], *available at* http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft.constitution.pdf.

2. JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 76 (2005).

3. Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997 (2012).

4. *See* 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, 917 (2005).

expectations, the developing traditions of the American people, and even contemporary morality are among the legitimate bases of such argument.[5] Over the last several decades, however, some Americans—most of them self-styled conservatives—have engaged in an aggressive march drastically to shorten the list of legitimate modalities of constitutional interpretation. Strang is among those who prefer the family of theories known as "originalism," to the exclusion of others.

This argument to reduce the list of legitimate modalities is itself a legitimate form of constitutional argument.[6] But, as H. Jefferson Powell has argued, such argument "ought to be recognized for what it is, a proposal for radical reform."[7] One need not be conservative by temperament or conviction to demand good and sufficient reasons for proposals for radical reform.

As noted above, Strang has pressed for such reform on the ground that originalism[8] best facilitates human flourishing.[9] To that argument Strang now adds another: virtue, which facilitates human flourishing, also facilitates originalism.[10] Common sense alone probably suggests that a virtuous originalist interpreter will do originalism better than an originalist who lacks virtue (that is, is vicious). But is virtue so parsimonious or partisan as to lead uniquely, strongly, or even much at all in the direction of originalism? Surely virtue facilitates, and in turn is facilitated by, at least some other modalities of constitutional interpretation as well.[11] What I will argue here is that those who share Strang's commitments to the account of law received from what he refers to as the "central Western tradition,"[12] above all in the learning of St. Thomas Aquinas and his faithful expositors, should (1) reject original public meaning originalism, (2) embrace some version of original intent originalism,[13] but (3) defend the original intent meaning of the Constitution only with important reservations and on certain

5. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 208 (2002).

6. *Id.* at 209.

7. *Id.*; *see also* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13–25 (2001) (arguing that originalism fails as a theory of constitutional interpretation because it does not remotely approximate current practice); *cf.* Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 59 (2011) ("Originalists don't argue that the linguistic meaning *should be* the original public meaning; they argue that the original public meaning *is* the linguistic meaning—the use of the word *should* in this context would be misleading or wrong.").

8. From this point on, all references to "originalism" are to original public meaning originalism unless another form of originalism is indicated.

9. *See* Strang, *supra* note 4, at 917.

10. *See* Strang, *supra* note 3.

11. *See* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 99–109 (2008).

12. Strang, *supra* note 4, at 916, 936.

13. I say "some version" because my argument does not require me to defend one version in particular, and space limitations do not allow me to compare the merits of the different versions. *Cf.* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 17–65 (1992) (comparing different forms of originalism).

conditions. I remain, for all that, a genuine but qualified supporter of our Constitution. Two cheers, but not three.

## I. THE CORRUPTING INFLUENCE OF ORIGINALISM

Strang is correct in pointing out that theorists of law have been slow to absorb the insights of the virtue-theoretic work that has enjoyed a revival since Elizabeth Anscombe published her bombshell essay *Modern Moral Philosophy* in 1958 and, even more, since Alasdair MacIntyre published *After Virtue* in 1981.[14] *Arete* is the Greek word for virtue, and Strang is in good and growing company when he insists that it is time (to borrow a phrase from Larry Solum and Colin Farrelly) to take an "aretaic turn" in jurisprudence.[15] Even if one remains unconvinced by some of the claims advanced by the virtue theorists, there is much to be grateful for in any number of their insights. Virtues are habitual states of character, and it would be silly not to draw the implications of the fact that a person's character conditions what he is capable of doing or forbearing, including in law. It would be difficult, therefore, to disagree with Strang's claim that "virtue . . . facilitates originalism"[16]—unless, of course, the original public meaning of the Constitution is committed to practices or states of affairs that are inconsistent with, or inadequate to, the goods of human flourishing to which true virtues lead. If the latter consequence were actual, virtue would be obligated to criticize originalism.

Strang asks whether virtue facilitates originalism. A more hopeful question is this: To which interpretive modality or modalities does a comprehensive appreciation of virtue lead? Or to put a slightly different point, Strang seems to have his *ordo operationum* backwards. He starts with originalism as his bulwark and then asks originalism to "incorporate[] virtue ethics' insights."[17] One understands why he does so, but does it not make better sense to ask what virtue—or, better, *a fully adequate account of human morality*—counsels in terms of law and interpretive methods? The answer might be originalism, or it might not be.

To be sure, as mentioned above, Strang has elsewhere made the case for originalism from the ground up. My current point is that the and-the-kitchen-sink-too advocacy of a designedly countercultural interpretation of the Constitution merits remark. "[W]hen literate cultures are in crisis," as many conservatives believe ours to be, "the crisis is most evident in the question of what they do with their exemplary written texts."[18] Attempting to make the original public meaning of the Constitution the last word is one strategy in the culture wars as they bleed into and colonize law, and I concede that the attempt is not without at least *some* appeal. The Framers

14. *See* Strang, *supra* note 3, at 2002, 2015 n.129.

15. Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, *in* VIRTUE JURISPRUDENCE 1, 3 (Colin Farrelly & Lawrence B. Solum eds., 2008).

16. Strang, *supra* note 3, at 2028.

17. *Id.* at 2031.

18. DAVID TRACY, PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE 11 (1987).

and Ratifiers mercifully did not profess "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[19] Dependent rational animals, which is what we are given to be, do not invent themselves.[20]

The point I wish to press, however, is that originalism—whatever its assistance to social conservatives locked in culture wars—exacts an impossible price by corrupting and falsifying our thinking about the deep metaphysical question of what it is to make and live by law. If this worry about where Strang's and others' original public meaning originalism leads should strike the reader as exaggerated, consider the implications of a claim Strang makes quite innocently.

Before introducing that claim, a little background is needed. As Strang points out, contemporary virtue theory is not all of one piece. Instead, "[v]irtue theorists tend to fall into two distinct but related camps,"[21] he explains. "One group is composed of Neo-Aristotelians who focus on Aristotle to the not-complete exclusion of later, religious interpreters of Aristotle, such as St. Thomas Aquinas. The other group of scholars attempts to utilize Aristotle and his (primarily) Christian followers, especially St. Thomas Aquinas."[22] Strang counts himself in the latter school of thought. According to that school, all humans are under a divinely given natural law, the first precept of which is that " good is to be done and pursued, and evil is to be avoided."[23] Humans, then, are under a divine mandate to pursue the goods that constitute human flourishing, and, on this account, the virtues turn out to be instrumental states of character that facilitate the identification and instantiation of those goods. And it is in this context that Strang makes the claim to which I have just provided the background:

> The moral virtues ensure that one's appetites for goods are properly ordered by one's reason. . . . [B]oth virtue and natural law are tools that facilitate one's pursuit of happiness.
>
> This Article explains how originalism and the judicial virtues have an analogous relationship . . . . *The Constitution's original meaning plays a role parallel to natural law* because it contains the external positive norms that direct judges toward our society's common good.[24]

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19. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

20. *See generally* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999).

21. Strang, *supra* note 3, at 2017 n.152.

22. *Id.*

23. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, I–II, Q. 94, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947). On the tension between the subjects of natural law and virtue, see Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purposes*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 42 (Robert P. George ed., 1992).

24. Strang, *supra* note 3, at 2024 (emphasis added).

A first response to the italicized assertion is that "[e]very tribe needs its totem and its fetish, and the Constitution is ours."[25]

A second response begins by appreciating that the natural law, unlike even the best human law, is inexhaustible: the natural law is, as Strang himself stipulates (quoting St. Thomas Aquinas), "the rational creature's participation of the eternal law."[26] The natural law, in other words, is exactly the Divine Mind sweetly disposing all things to their ends. On the account Strang adopts, the natural law is nothing less than a sharing in the Divine Mind. In light of this, I will be so bold as to assert that the Constitution, whatever that document's merits, is not profitably compared to a sharing in the Divine Mind. The natural law is binding because God imposes it upon us. The Constitution binds, however, only insofar as its contents are derived from the natural law.[27] The verb that Strang uses to liken the Constitution to the natural law, "parallels," obscures the essential question: does the Constitution give effect to the natural law such that the Constitution is valid law? Strang begs the necessary question. One can imagine many a document bearing the label "constitution" that is not worthy of enforcement because it does not meet the conditions of what it is to be *law*.

One of the usual (and understandable) boasts on behalf of our Constitution concerns the modesty of its ambitions. There are endless issues on which our Constitution has "very few ideas to contribute."[28] Not so the Divine Mind. Our Constitution, moreover, says very little, even on a generous estimate, about the contents of "our society's common good." The Constitution *mostly* confines itself to the allocation of powers, to the specification of procedures, and to the conferral of certain rights, above all those mentioned in the first eight Amendments. When the Constitution's authoritative interpreters cause it to accomplish more, they tend to do so abashedly, usually under the apparent oxymoron "substantive due process." The natural law, by contrast, is unabashedly all about substance (which of course includes proper procedure, including government under law). It is devoutly to be hoped that legislators, judges, and citizens will make their respective contributions to our society's common good. What *exactly* in our Constitution "direct[s] judges toward our society's common good"[29] is not, however, a question Strang answers. The central Western tradition holds that the common good of any polity includes distributive justice, but I believe that the Constitution remains silent on that question.[30] Justice is

25. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294 (1937), *quoted in* Henry Paul Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 353 (1981).

26. Strang, *supra* note 3, at 2023 n.219.

27. "[E]very human law has just so much of the nature of law, as it is derived from the law of nature." AQUINAS, *supra* note 23, at I–II, Q. 95, art. 2.

28. Gerhard Casper, *Guardians of the Constitution*, 53 S. CAL. L. REV. 773, 779 (1980), *quoted in* Monaghan, *supra* note 25, at 396.

29. Strang, *supra* note 3, at 2024.

30. On the cardinal virtue of justice, see JOSEF PIEPER, THE FOUR CARDINAL VIRTUES 43–113 (1966). Addressing the demands of achieving distributive justice, Pieper writes: "If

one of the four cardinal virtues, yet the Constitution says not a word about it. And that is not the greatest of the Constitution's omissions, a point to which I shall return in Part III.

## II. ORIGINALISM'S ORIGINAL SIN: THE SUPPRESSION OF THE LAWGIVER

Attempting to fortify originalism with insights culled from the central Western tradition remains one possibility. Another is to ask what that tradition teaches about the very conditions of law, lawmaking, and the civil authority's role in ordaining the people to their common good. The answers to the latter lines of inquiry lend support to some of the boasts on behalf of the originalism for which Strang presses, but not to others. The differences, I suggest, should be dispositive.

In our contemporary culture, law and lawmaking are saddled with regrettably degraded connotations and associations. I dare say that the arbitrariness with which some have blatantly concocted one version of "originalism" after another in order to score points in the culture wars would be among many contributing causes. In this respect, at least, Strang's attempt to root originalism in something larger than itself and more enduring than a battle station in cultural cross-fighting is a welcome development. But law deserves better, and not just because I say so: it is a matter of the metaphysics of the thing.

The same culture that suspects the Supreme Court of committing politics veiled only by a gossamer mantilla of law nourishes an even deeper reservation, one that goes to the very possibility of law *as such*. To be under law at all *is to be ruled and measured*, yet what *Lawrence v. Texas*[31] declares in derogation from that truth is that what we *are* is "plastic and revisable selves."[32] *Lawrence* here is both cause and, even more, consequence of the culture that denies that there is a stable human nature on which government and law can act. Selves that are supposedly malleable without limit cannot coherently suffer any serious notion of law that orders to the (common) *good* exactly by being *ruled and measured* by a higher law. Such "selves" as *Lawrence* imagines enjoy ample license to deny that the state can possibly legislate for them (apart from deterring or punishing crude violations of the Millean harm principle, a limit the arbitrariness of which is ignored).

An alternative view, and the one associated with the natural law tradition, is that lawmaking—the authoritative ordering of a multitude to the common good—is almost as good as it gets. Only "almost" because love precedes law, generates law, and surpasses law. But that love that precedes and surpasses law does indeed lead to law, as the divine exemplar demonstrates. The God who loved us into being also then legislated for us, and He would

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political life is to regain its dignity, a proper appreciation of the eminence of the ruler's task and of the lofty human qualities required for it must be revived in the mind of the public." *Id.* at 92.

31. 539 U.S. 558 (2003).

32. Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 492 (1990).

not have had it any other way. When He gave us the keys to the car, He also gave us obligatory directions (and further noted the calamitous consequences that befall those who ignore the directions). He authoritatively ordered a multitude (us) to their (our) common good. Thus God. But not only God: humans who do as much—that is, authoritatively order a multitude to its common good—make law. What is being claimed should not sail by unnoticed: "Legislation is the epitome of participation in the eternal law, for it is in issuing the ordering-judgment that we are most imitative of God, who spoke such a word to his creation."[33]

The Constitution is not legislation, of course, at least not in the sense we ordinarily speak of legislation. It is, nonetheless, "an ordering-judgment" authoritatively addressed to the entire body politic. But does it, in fact, order to the "common good?" The answer depends, in part, on how that document gets interpreted. My point is that the question of how to interpret that ordering-judgment necessarily raises, even if the issue is not usually articulated quite this way, the question of how to treat this particular human artifact *such that it can potentially rise to the level of law in imitation of the divine ordering-judgment to the common good of this particular multitude.* Not everything that calls itself law is in fact law. Claiming that the Constitution "parallels" the natural law hardly helps here. There will be lots of rejects and pretenders in the contest to be law, and it is at least *conceivable* that the Constitution would be among those that do not make the grade. When a court concludes that there was no rational basis for a statute, it is in effect concluding that what emerged from bicameralism and presentment is not truly a law. Law is a thing of reason, and a statute's not having a basis in reason renders it non-law. Similarly, rolling dice would not settle, say, the contents of "due process of law." Chance is not a potentially legitimate modality of constitutional interpretation.

But what, then, about the *original public meaning* of the Constitution? I am not convinced that it delivers what the central Western tradition means by law for a number of reasons. I have space enough to mention only three (two of which also afflict, in differing degrees, the original intent meaning of the Constitution).

I can get at the first with the help of one of Larry Solum's arguments defending original public meaning originalism against those other originalists who would insist instead on the authors' intentions.[34] Solum makes the case for original public meaning by likening it to "a message in a bottle."[35] He explains:

> We get "messages in a bottle" all the time. Almost every day, we read scraps of text that are detached from their authors. You see a flyer on the bulletin board of a coffeehouse. You read a memo from someone you

33. RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD 100 (2003).

34. Solum, *supra* note 7, at 13–16.

35. *Id.* at 14.

> don't know who does a job that you've never heard of. You read a quotation from a post on a blog that you've never read before.[36]

And from these examples he draws the following conclusion: "When you read texts like these, your ability to comprehend their meaning depends on the conventional semantic meanings (the public meanings) of the words and phrases (the units of meaning) and the regularities of usage that we describe as the rules of syntax and grammar of English."[37] I do not disagree, but I do deny that what Solum says next is *necessarily* true: "Writing a constitution is like putting a message in a bottle."[38] It could be, as demonstrated by the fact that courts look to and give legal effect to the original public meaning of the Constitution all the time. The fact proves the possibility.

What this account submerges, however, is something that is central to the account of natural law to which Strang, like me, claims fealty. To be under law is to be ruled and measured. To read and comprehend scraps of texts, flyers, and memos is not to be ruled and measured; it is, perhaps, to be informed. To be ruled and measured by law is more than to be informed; it is, as noted above, to be ordered toward the common good, and specifically by the one who has authoritative care of the community.[39] Treating the Constitution like a message in a bottle eviscerates the ruling authority's ability to rule through law.[40]

The point I am defending can be summarized this way: there is no law without a lawgiver. To be sure, there is an account of natural law that denies this proposition, and it has been ably defended by John Finnis and Robert George, among others.[41] Strang, however, explicitly claims to "utilize the understanding of natural law as posited by God,"[42] and on that account the eternal law, of which (as noted above) the natural law is our

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36. *Id.* at 15.
37. *Id.*
38. *Id.*
39. *See* Ronald A. Parsons, That Which Governs: *An Essay on the Nature of Law and Its Relation to Justice*, 43 S.D. L. REV. 172, 173 (1998) ("What, then, does law do? Law governs. It necessarily binds . . . ."); *see also* Russell Hittinger, *Aquinas and the Rule of Law*, *in* THE EVER-ILLUMINATING WISDOM OF ST. THOMAS AQUINAS 99, 108 (1999) ("No human being makes rules or laws from scratch, because no human mind is a rule or law unto itself. For God, nature and law are the same; but for the creature, there is no such thing, strictly speaking, as autonomy.").
40. *See* Russell Hittinger, *A Response to Commentators*, *in* ETHICS WITHOUT GOD?: THE DIVINE IN CONTEMPORARY MORAL AND POLITICAL THOUGHT 136, 139 (Fulvio Di Blasi et al. eds., 2008) ("Thomas [Aquinas] finally adopts Augustine's position that there are only two [kinds of law]: laws which proceed from the divine mind, and temporal laws which proceed from the human mind. This comports with his position that the proper definition of a law is drawn from the active principle, which is a mind actively conceiving, judging, promulgating. Since Thomas rules out angels as sources of legislation, there can only be two—divine and human. Incidentally, this is why Thomas has a very strong jurisprudential doctrine of 'original intent.'"). On the positivity of law in Aquinas (and some of the problems it causes Aquinas's account), see JAMES BERNARD MURPHY, THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE 48–116 (2005) and PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 23–25 (2008).
41. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2011).
42. Strang, *supra* note 3, at 2024 n.227.

participation, gives us the very definition of law: "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[43] In the case of the Constitution, those who had care of the community were the Framers and Ratifiers, as Strang himself acknowledges.[44] What justification can Strang provide, then, for systematically ignoring what they intended? I fail to see how our forebears could bind themselves or those who would come later to a message in a bottle that merely floats through time.[45] Law is mind ruling and measuring other mind.

This brings me to a second objection to the originalism Strang defends, and here I shall be brief because this point is prelude to the objection to which I turn in Part III. Strang has recently argued, with the obligatory citation to Russell Kirk's *The Conservative Constitution*, that "conservative legal thought" leads to originalism "because both have the purpose to preserve and instantiate traditional—social and legal—norms."[46] Strang continues in this vein: "The America that created the Constitution is *the* standard of what is 'traditional' in the United States."[47] Among the morally relevant facts that this *ipse dixit* overlooks is the radical and revolutionary quality of the Constitution, both the ideas that led to it and what it in turn embodies. Limitations of space allow no more than another obligatory citation, this one to Gordon Wood's *The Radicalism of the American Revolution*.[48] My question is this: What basis is there for allowing the Constitution to sever in perpetuity a people's ties to the authentic and dynamic tradition of reflection on the natural law and the divine positive law? Cut flowers wither and die.

## III. MEN OF HIGHEST PRINCIPLE WHO "FORGOT"

The big loser in the Constitution was—and remains—God. He can take care of Himself, one might be tempted to retort. The fact is, though, that He respectfully leaves it up to His rational creatures freely to seek and to find Him, or to defy Him and to lose Him. The exclusion of God from the Constitution is almost universally celebrated today, especially that exclusion's contribution to the much-vaunted "separation" between church

43. AQUINAS, *supra* note 23, at I–II, Q. 90, art. 4; *see also* Patrick McKinley Brennan, *Law in a Catholic Framework*, *in* TEACHING THE TRADITION: CATHOLIC THEMES IN ACADEMIC DISCIPLINES 437, 444–47 (John J. Piderit, S.J. & Melanie M. Morey eds., 2012).

44. Strang, *supra* note 4, at 957–81.

45. Being ruled and measured by divine or human authority and law does not amount to forming a contract (even a "social contract"), which is part of why the "objective" interpretations favored in contract law are inapposite. *See* KENT GREENAWALT, LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS 258–64 (2010).

46. Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 285 (2011). It bears mention that the great defenders of liberalism, Hobbes, Locke, Kant, and Mill, appreciated something of the place of virtue in making and sustaining states. *See* PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM (1999).

47. Strang, *supra* note 46, at 286.

48. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

and state. Since 1789, religious practice has flourished in this country in many and varied ways, but not in others. On balance, I count myself among the illiberal lamenters of the exclusion of God from the American plan of government. Why lament what has favored so much religious practice? To avoid the sin of defending—except as a remote second-best—a political regime that denies what is God's by right: the worship of the social body that is the state, not merely individual worship.

I will not pause here to defend what I have just asserted about the divine right to social worship: it was widely understood and frequently honored over much of the past two millennia, and indeed was anticipated by the best of Greek philosophy.[49] I postulate the traditional position here in order to focus the following question. What is one who holds the traditional position to do about the Constitution's exclusion of God and the possibility of worship by the state? Strang's thesis that virtue is on the side of an originalist understanding of the Godless Constitution invites this question. *Granted* that God demands social worship, what is the conscientious and honorable thing to do with respect to "our" Constitution that by deep design and on principle denies the divine right? In sum, can virtue be on the side that designedly—and on principle—slights God?

Larry Solum, who (like Strang) is on the side of both originalism and a virtue-driven approach to constitutional interpretation, is surely correct in what follows: "If you believe the words and phrases that make up the operative text of the Constitution of the United States are on the side of evil, then you should not be an originalist."[50] Not surprisingly, the evils Solum has in mind do not include the refusal to meet the divine right to social worship. How should people who favor not only virtue but also the divine right view or treat our Constitution? This is a question I have begun to answer elsewhere,[51] but here I leave it as a question for Professor Strang to consider.

When Alexander Hamilton was asked at the conclusion of the Constitutional Convention why the document contained no recognition of God or the Christian religion, he replied: "I declare, we forgot it!"[52] Not really. Two cheers nonetheless, but not three.

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49. *See* ARISTOTLE, POLITICS, BOOKS VII AND VIII 1333–35 (Richard Kraut trans., 1997) ("The same things are best both individually, and collectively."); *see also* HANS-GEORG GADAMER, THE IDEA OF THE GOOD IN PLATONIC-ARISTOTELIAN PHILOSOPHY 53 (1986); 2 JOSEPH HERGENRÖTHER, CATHOLIC CHURCH AND CHRISTIAN STATE: A SERIES OF ESSAYS ON THE RELATION OF THE CHURCH TO THE CIVIL POWER 354–57 (London, Burns and Oates 1876).

50. Solum, *supra* note 7, at 50.

51. Patrick McKinley Brennan, *The Mighty Work of Making Nations Happy: A Response to James Davison Hunter*, 39 PEPP. L. REV. (forthcoming Jan. 2013).

52. CHRISTOPHER A. FERRARA, LIBERTY, THE GOD THAT FAILED 510 (2012).