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## Originalism and the Aristotelian Tradition: Virtue's Home in Originalism

Lee J. Strang

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## ORIGINALISM AND THE ARISTOTELIAN TRADITION: VIRTUE'S HOME IN ORIGINALISM

*Lee J. Strang\**

*A concept fundamental to philosophy—virtue—is, with a few notable exceptions, absent from scholarship on constitutional interpretation generally, and on originalism in particular. Furthermore, common perceptions of both virtue ethics and originalism have prevented exploration of how incorporating virtue ethics' insights may make originalism a better theory of constitutional interpretation. This Article fills that void by explaining the many ways in which concepts from virtue ethics are compatible with an originalist theory of constitutional interpretation. More importantly, I show that originalism is more normatively attractive and descriptively accurate when it incorporates virtue ethics' insights.*

*Originalism must articulate virtue's role in constitutional interpretation for a number of reasons. First, incorporating the concept of virtue into originalism will give it greater explanatory power. For example, adding the concept of virtue to the mix helps originalism embrace ideals such as judicial craftsmanship.*

*Second, incorporating the concept of virtue into originalism makes originalism more normatively attractive. Over the past thirty years, originalism has come to acknowledge judicial discretion in constitutional adjudication. An originalism that incorporates the lessons of virtue ethics is able to preserve originalism as a viable theory of constitutional interpretation while, at the same time, continuing to acknowledge judicial discretion. An originalism that incorporates virtue ethics' insights gives the Constitution's original meaning its due. Simultaneously, it also gives other factors—such as the practical workability of legal doctrine—their due, all in their proper proportion.*

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\* Professor of Law, University of Toledo College of Law. Thank you to the participants at the Loyola Constitutional Law Colloquium, the Midwest Political Science Association panel on Originalism, Originalists, and Natural Law, the Law and Society Association panel on Constitutional Law and Constitutionalism, the Ohio Legal Scholarship Workshop, especially John Plecnik, the Northern Kentucky University Chase College of Law workshop, the Indiana University School of Law–Indianapolis workshop, and the University of Toledo College of Law workshop for their comments and suggestions. In particular, I wish to thank Lou Mulligan for his typically thoughtful comments, and Greg Gilchrist and Aaron Potter for their suggestions. I would also like to gratefully acknowledge the research support for this Article provided by the University of Toledo College of Law.

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## INTRODUCTION

A concept fundamental to philosophy—virtue<sup>1</sup>—is, with a few notable exceptions, absent from scholarship on constitutional interpretation generally, and originalism in particular. On the one hand, this is surprising because virtue is central to the Aristotelian philosophical tradition, one of

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1. Saint Thomas Aquinas’s famous definition of virtue is “a habit by which we work well.” ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I–II, Q. 56, art. 3 (Fathers of the English Dominican Province trans., Benziger Bros. 1947); see also ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 13 (1999) (“[V]irtue is . . . something that makes its possessor good; a virtuous person is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should—she gets things right.”). I describe the concept of virtue, and related concepts, below.

the major philosophical traditions.<sup>2</sup> On the other hand, however, this is not surprising given the sociological makeup of the legal academy.<sup>3</sup> The legal academy—again, with notable exceptions<sup>4</sup>—is dominated by scholars at home in the consequentialist and deontological traditions.<sup>5</sup> Originalist scholarship is no exception.

For instance, originalists' normative arguments for originalism come from the deontological and consequentialists traditions. Professor Randy Barnett is representative of the former. Barnett claims that his "libertarian"<sup>6</sup> originalism is the most normatively attractive form of originalism because it leads to the greatest protection for natural rights.<sup>7</sup> Others, such as Professors John McGinnis and Michael Rappaport, have defended originalism based on the good consequences its adoption would produce.<sup>8</sup> To date, no originalists have articulated what role, if any, virtue ethics' concepts should play in a fully developed originalism.<sup>9</sup>

2. See, e.g., ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 5 (1993) (describing the Aristotelian tradition as the "central tradition of Western thought about morality and politics"); JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 7–31 (2006) (describing the origins and content of the respective philosophical traditions).

3. See Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in VIRTUE JURISPRUDENCE 3–7 (Farrelly & Solum eds., 2008) (noting the paucity of virtue ethics in legal scholarship); see also John O. McGinnis, Matthew A. Schwartz & Benjamin Tisdell, *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1195 (2005) (arguing that the American legal academy is "liberal" as that term is understood in modern political discourse); Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 254 (2011) (describing the legal academy's legal and political commitments). For a critical response, see Michael Vitiello, *Liberal Bias in the Legal Academy: Overstated and Undervalued*, 77 MISS. L.J. 507 (2007). My assumption in making this claim is that persons at home in modern American liberalism are less likely to follow the Aristotelian tradition.

4. The most important exception is Professor Lawrence Solum. See, e.g., Farrelly & Solum, *supra* note 3, at 3–7 (introducing the sole book-length treatment of law and virtue ethics).

5. This is exemplified by the fact that legal scholars routinely utilize concepts associated with the consequentialist and deontological traditions, but rarely utilize concepts from the Aristotelian tradition. See *id.* at 3–7 (describing the move toward virtue ethics in philosophy and proposing a similar move in law).

6. For critiques of Professor Barnett's libertarian originalism, see Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005); Andrew C. Spiropoulos, *Rights Done Right: A Critique of Libertarian Originalism*, 78 UMKC L. REV. 661 (2010).

7. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 108–09 (2004). See generally RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998) (detailing the contours and justifications for Barnett's conception of natural rights).

8. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1695 (2010) (arguing that originalism is justified because it protects the good consequences that arise from the Constitution's supermajority requirements); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 802–05 (2002) (same).

9. Professor Lawrence Solum has written extensively on how virtue ethics, applied to law and legal institutions generally—such as judging—is descriptively accurate and normatively attractive. See Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 491–520 (2005); Lawrence B. Solum, *Natural Justice*, 51 AM. J.

Furthermore, common perceptions of both virtue ethics and originalism have prevented exploration of how incorporating virtue ethics' insights may make originalism a better theory of constitutional interpretation. The first common perception is that virtue ethics—unlike, for example, deontological ethics—generally does not utilize normative rules and instead focuses on more amorphous concepts, such as character.<sup>10</sup> The second common perception is that originalism operates primarily through legal rules derived from the Constitution's original meaning.<sup>11</sup> An ethical theory that rejects normative rules cannot offer much to a legal theory that deals primarily in legal rules.

This Article fills that void by explaining the many ways in which concepts from virtue ethics are, contrary to popular perception, compatible with an originalist theory of constitutional interpretation. More importantly, I show that originalism is more normatively attractive and descriptively accurate when it takes on board virtue ethics' insights.

Originalism must articulate virtue's role in constitutional interpretation for a number of reasons. First, incorporating the concept of virtue into originalism will give it greater explanatory power. For example, adding the concept of virtue to the mix helps originalism embrace ideals such as judicial craftsmanship.<sup>12</sup> Originalism can, for instance, strive for the judge who is excellent at his craft.

Second, incorporating the concept of virtue into originalism makes originalism more normatively attractive. Originalism has transformed over the past thirty years in response to legal-realist-type criticisms. Most importantly, originalism has come to acknowledge judicial discretion in constitutional adjudication.<sup>13</sup> An originalism that incorporates the lessons of virtue ethics, however, is able to simultaneously preserve originalism as a viable theory of constitutional interpretation while, at the same time, continuing to acknowledge judicial discretion. Virtue ethics enables

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JURIS. 65, 76–92 (2006); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). Solum has also briefly noted how virtue ethics may impact “constitutional formalism.” See Solum, *The Aretaic Turn in Constitutional Theory*, *supra*, at 520–22.

10. See, e.g., HURSTHOUSE, *supra* note 1, at 35–42 (identifying and responding to this view).

11. The primary source of this view appears to be Justice Antonin Scalia, who, in his scholarly writings, see, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), and his judicial opinions, see, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989), has argued that implementing originalism would lead to a “ruleification” of constitutional law. I explain below that Justice Scalia's claims on this issue are outliers.

12. See, e.g., Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003) (providing a comprehensive account of judicial character that includes the capacity for judicial craftsmanship); see also Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 972–74 (2011) (focusing more on judicial craftsmanship). For the classic explanation of judicial craftsmanship, see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 3–4, 214, 224–25 (1960).

13. Originalism's acknowledgment of judicial discretion comes primarily in its embrace of constitutional construction and the preservation of some nonoriginalist precedent. See *infra* Part I.B.2.

originalist judges to effectively interpret and put into practice the Constitution's original meaning despite and, in part, *because of* this judicial discretion. I touched on aspects of a theory of judicial virtue in my previous writings<sup>14</sup> and, in this Article, I more fully articulate an originalist theory of judicial virtue.

Similarly, incorporating virtue ethics will make originalism better in those contexts where, even though the original meaning provides a determinate answer, a case places significant burdens on the judge's judgment. In this class of cases—neither the easy cases<sup>15</sup> nor those that are underdeterminate<sup>16</sup>—virtue ethics provides the means to explain how judges can best decide.

An originalism that incorporates virtue ethics' insights will give the Constitution's original meaning its due. At the same time, it also gives other factors—such as the practical workability of legal doctrine—their due, all in their proper proportion. For originalists, and for nonoriginalists who value the Constitution's original meaning,<sup>17</sup> this preserves originalism's core insights, while enabling originalism's transformation.

This Article begins by describing originalism and, in particular, the transformation originalism experienced over the past thirty years. Originalism's modern incarnation began in the 1970s and, at that point in its development, originalists primarily argued that originalism was superior to nonoriginalist methodologies because originalism cabined judicial discretion and therefore better respected democracy. Nonoriginalists strongly criticized this claim and, in response, originalists transformed originalism in a number of ways that had, as one effect, the creation of analytical space for judicial discretion within originalism. At this point, however, originalists have yet to explain how acknowledging this judicial discretion has not undermined originalism as a theory of interpretation. Indeed, a recent spate of criticism has utilized this line of attack.<sup>18</sup>

Part I also shows the impasse that currently exists regarding the normative foundation for originalism. Originalists have offered a stunning variety of normative defenses of originalism. However, none has its roots in the Aristotelian tradition. This situation parallels that of ethics when

14. Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 484–86 (2006).

15. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

16. Underdeterminacy is when the pertinent legal materials narrow the range of possible legal answers but do not determine one, uniquely correct answer. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

17. See Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187 (distinguishing between “exclusive originalism” and other modes of constitutional interpretation that utilize history).

18. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009); Peter J. Smith, *How Different Are Originalism and Non-originalism?*, 62 HASTINGS L.J. 707 (2011).

Elizabeth Anscombe's famous *Modern Moral Philosophy* appeared,<sup>19</sup> precipitating the move toward recovering virtue ethics.

In Part II, I first describe virtue ethics, and I also explain the relationship between virtue ethics and the broader Aristotelian philosophical tradition, including the concepts of human flourishing and natural law. Then, I recount virtue ethics' recent revival. Lastly, I describe the limited impact virtue ethics has had on legal scholarship generally, and constitutional interpretation in particular.

In Part III, I turn to the heart of the Article: virtue ethics' contributions to originalism. I show that originalism *can* incorporate virtue ethics' insights even though the two appear incompatible at first blush. Then, I argue that originalism *should* incorporate virtue ethics' insights, and for two reasons: first, doing so will make originalism more descriptively accurate; and second, originalism will be more normatively attractive once it incorporates virtue ethics' concepts. In particular, I detail four contexts where originalism becomes better: (1) nonoriginalist precedent; (2) constitutional construction; (3) articulating and applying the original meaning; and (4) originalist precedent.

This Article has two goals: one more immediate and one long-term. The immediate goal of this Article is to respond to recent criticism of originalism. For example, Professors Thomas Colby and Peter Smith have argued in a series of papers that originalism is fatally compromised by its admission of judicial discretion.<sup>20</sup> As Professor Colby explained, "Judicial constraint was [originalism's] heart and soul—its *raison d'être*," which originalists have sacrificed by transforming it.<sup>21</sup> I argue below that, by utilizing the conceptual tools provided by virtue ethics, this transformed originalism is able to retain its core insights—retaining what makes originalism valuable in the first place—while still accommodating judicial discretion.

My second goal in writing this Article is to further my long-term scholarly project of applying the insights of the Aristotelian philosophical tradition to the United States Constitution.<sup>22</sup> Virtue ethics is a key part of that tradition. Therefore, this Article explores how virtue ethics contributes to an originalist understanding of constitutional interpretation. By showing that virtue ethics fits well with originalism, this Article builds one more bridge between the Aristotelian tradition and originalism.

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19. G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958).

20. See Colby, *supra* note 18, at 714; Colby & Smith, *supra* note 18, at 288–92; Smith, *supra* note 18, at 709.

21. Colby, *supra* note 18, at 714–15.

22. See, e.g., 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 (2005) (the first major piece of this project).

## I. ORIGINALISM'S RISE AND TRANSFORMATION

## A. Originalism's First Generation

Originalism began as a scholarly movement in the 1970s, the aim of which was to criticize the Warren Court's perceived excesses.<sup>23</sup> Since it was a critical stance, originalism's characteristics met that need. In particular, originalists claimed that originalism was superior to nonoriginalist methodologies because it cabined judicial discretion.<sup>24</sup> Only by tying judges' constitutional interpretations to the meaning intended by the Framers and Ratifiers, argued then-Justice Rehnquist in 1976, would judges remain in their proper—limited—role.<sup>25</sup>

The first major originalists scholars were Robert Bork and Raoul Berger.<sup>26</sup> Both lauded originalism for its ability to constrain judges. In his seminal piece, *Neutral Principles and Some First Amendment Problems*, Bork—consciously acting in the Warren Court's shadow<sup>27</sup>—argued that the Supreme Court's task was to preserve the “Madisonian” compromise embodied in the Constitution.<sup>28</sup> When the Supreme Court performed this function, it acted legitimately and, when it failed to do so, “the Court violate[d] the postulates of the Madisonian model that alone justify[d] its power.”<sup>29</sup>

Bork argued that the Constitution's originally intended meaning was the sole proper source of Supreme Court authority. An originalist Supreme Court that followed this meaning, Bork argued, “need make no fundamental value choices.”<sup>30</sup> Instead, the Constitution's originally intended meaning would restrain the Court: “The judge must stick close to the text and the history, and their fair implications.”<sup>31</sup>

Raoul Berger's 1977 *Government by Judiciary* raised the stakes by arguing that much of the Warren and Burger Courts' constitutional edifice

23. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 307–09 (2d ed. 1997) (describing his book as a challenge to “the ‘revolutionary’ changes wrought by the Warren Court”); JONATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* 66–67, 92–110 (2005) (describing originalism in this way); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 1 (1971) (stating that “the Warren Court posed the issue [of the Supreme Court's proper role] in acute form”); Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599, 601–03 (2004) (concluding that “originalism was a reactive theory motivated by substantial disagreement with . . . the Warren and Burger Courts”).

24. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 204 (1980) (noting that one of the arguments made in favor of originalism is that it “constrains the discretion of decisionmakers”).

25. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 696–97 (1976).

26. Then-Justice Rehnquist also wrote an early and much cited originalist article. *Id.*

27. Bork, *supra* note 23, at 1–2.

28. *Id.* at 3.

29. *Id.*

30. *Id.* at 5.

31. *Id.* at 8.

was illegitimate.<sup>32</sup> Berger contended that Supreme Court judicial review was legitimate only when limited to enforcing the Constitution.<sup>33</sup> Effectuating this limited form of judicial review required the Supreme Court to follow the Constitution's original intent.<sup>34</sup> The Warren Court, whose case law greatly deviated from the Fourteenth Amendment's original intent,<sup>35</sup> exceeded its proper constitutional role and therefore was undemocratic<sup>36</sup>: "The Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them, 'not [to] construct new rights.'"<sup>37</sup>

Originalism's advocates claimed that originalism would cabin judicial discretion by advancing legal norms of relatively concrete breadth. This resulted from the focus, described further below, on the constitutional provisions' framers' concrete intentions.<sup>38</sup> Bork's 1971 discussion of the Fourteenth Amendment's meaning, for instance, focused on whether the "history . . . reveal[ed] detailed choices" by the Framers.<sup>39</sup>

The normative attractiveness of originalism's ability to cabin judicial discretion was tied to a second, related claim: judges limited by originalism respected democracy.<sup>40</sup> In originalism's infancy, its critical stance meant that it focused on the Warren and Burger Courts' most controversial cases, which involved the Court striking down state and federal laws that purportedly infringed on individual rights.<sup>41</sup> *Griswold v. Connecticut*,<sup>42</sup> and *Roe v. Wade*,<sup>43</sup> were the most prominent examples of this because of the Court's use of unenumerated rights,<sup>44</sup> though the Court's expansive

32. BERGER, *supra* note 23.

33. *See id.* at 4.

34. *See id.*; *see also id.* at 402 (defining original intent as "the meaning attached by the Framers to the words they employed in the Constitution").

35. *See id.* at 3 ("The Fourteenth Amendment is the case study par excellence of . . . the Supreme Court's 'exercise of the amending power,' its continuing revision of the Constitution under the guise of interpretation."); *id.* at 458 ("The Court . . . has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design.").

36. *See id.* at 308 (stating that, if the Warren Court's cases had been "authorized by the Constitution," it would not have been subject to the charge of being "antidemocratic"); *id.* at 460 (arguing that courts failing to respect their constitutional limits violate the "essence of a democratic society"); *see also id.* at 22–23 (arguing that "the Justices' substitution of their own meaning for that of the Founders displaces the choices made by the people . . . and it violates the basic principle of government by consent of the governed").

37. *Id.* at 314.

38. *See* Whittington, *supra* note 23, at 603.

39. Bork, *supra* note 23, at 13; *see also* BERGER, *supra* note 23, at 17–18 (describing the original intent of Section 1 of the Fourteenth Amendment in concrete terms); *id.* at 409–10 (describing the Equal Protection Clause in rule-like terms).

40. *See* Rehnquist, *supra* note 25, at 696–97.

41. *See* Whittington, *supra* note 23, at 601–03 (providing a typically excellent review of the characteristics of early originalism).

42. 381 U.S. 479 (1965); *see* Bork, *supra* note 23, at 7 (describing *Griswold v. Connecticut* as "in many ways a typical decision of the Warren Court"); *see also* BERGER, *supra* note 23, at 286–87 (using *Griswold* as an example of unconstrained judging).

43. 410 U.S. 113 (1973); *see* Whittington, *supra* note 23, at 603.

44. *See* Bork, *supra* note 23, at 11 (criticizing the Supreme Court's substantive due process and "substantive equal protection" case law).

interpretations of more textually rooted criminal procedure rights, such as in *Miranda v. Arizona*,<sup>45</sup> received significant criticism as well.<sup>46</sup> Originalists contended that the Supreme Court acted undemocratically and hence illegitimately when it overturned acts of the elected branches without a clear warrant in the Constitution's text or history.<sup>47</sup> According to Bork, "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."<sup>48</sup>

A third characteristic of this early conception of originalism was its focus on original intent.<sup>49</sup> The original intent of a constitutional provision was the meaning that the provision's framers intended it to mean.<sup>50</sup> This facet of originalism was likely unconsciously adopted. It does not appear that early originalists explored the reasons for and implications of adopting an intentionalist focus.<sup>51</sup> For instance, in an early discussion of *Brown v. Board of Education*,<sup>52</sup> Bork referred to the "framers' intent" and the Fourteenth Amendment's "legislative history" without explaining why that was the authoritative source of constitutional meaning.<sup>53</sup> The tentativeness of this early commitment to intentionalism is shown by the quick move to original meaning originalism in the late 1980s and early 1990s, described below.

Busied with defending originalism in a hostile legal academy, originalists focused their attention on the basics: a normative justification for originalism, and how originalism was legitimate in a way the Warren and Burger Courts' approach was not. Originalists did not initially address subtler issues, such as originalism's response to nonoriginalist precedent. Those discussions began in earnest following nonoriginalist criticism.<sup>54</sup>

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45. 384 U.S. 436 (1966).

46. Raoul Berger's challenges to the Warren and Burger Courts ranged across doctrinal categories including voting rights and reapportionment, segregation, Section 5, equal protection doctrine, the incorporation doctrine, and a host of clauses in the Bill of Rights. See generally BERGER, *supra* note 23.

47. See Bork, *supra* note 23, at 6 ("[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.").

48. *Id.* at 10–11.

49. See BERGER, *supra* note 23, at 402; Whittington, *supra* note 23, at 603.

50. See BERGER, *supra* note 23, at 402.

51. My tentative hypothesis is that originalists adopted an intentionalist stance for two related reasons: (1) American legal practice has and continues to be largely intentionalist; and (2) intentionalism is the best means of ascertaining law's meaning (at least for enacted texts).

52. 347 U.S. 483 (1954).

53. See Bork, *supra* note 23, at 13–14.

54. A second impetus for greater originalist attention to originalism's subtler implications was the Rehnquist Court, which did not pose as good a target for criticism and instead needed a more-fully fleshed-out theory to support at least some aspects of its jurisprudence. See Whittington, *supra* note 23, at 603–04.

*B. Originalism's Transformation in Response  
to Legal-Realist-Type Critiques*

1. Nonoriginalist Criticisms

Nonoriginalists raised a host of criticisms.<sup>55</sup> The most powerful, given originalism's critical stance regarding perceived Warren Court activism, was that originalism did not limit judicial discretion. Nonoriginalists utilized a variety of arguments to support this criticism; I will focus on four.

First, nonoriginalists argued that it was either impossible in principle to ascertain the original intent of a multi-member body, such as the Philadelphia Convention or state ratification conventions;<sup>56</sup> or, if possible, it was practically difficult such that the endeavor would regularly fail.<sup>57</sup> Ronald Dworkin, for instance, echoed others when he claimed that "there is no such thing as the intention of the Framers waiting to be discovered, even in principle."<sup>58</sup>

Second, nonoriginalists argued that, even when one could reliably ascertain the Constitution's original intent, it frequently "ran out."<sup>59</sup> This occurs, nonoriginalists argued, when societal circumstances have changed to such a degree that the original intent's application is underdeterminate.<sup>60</sup> The original intent also "ran out" when, due to its high level of generality, it did not determine the outcome of concrete cases.<sup>61</sup> These sources of underdeterminacy left judges adrift and their decisions unmoored from the Constitution, thus fatally undermining originalism.

Nonoriginalists further claimed that originalism was fatally flawed because of its commitment to overrule all or almost all nonoriginalist precedent. This was a flaw because it showed that originalism was deeply

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55. See Lawrence B. Solum, *What Is Originalism?: The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 17–19 (Grant Huscroft & Bradley W. Miller eds., 2011) (detailing two influential sources of criticism); Whittington, *supra* note 23, at 605–07 (describing nonoriginalist criticisms).

56. See Brest, *supra* note 24, at 214–15, 221–22.

57. See *id.* at 214, 220.

58. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981). Dworkin argued that, instead, there are different, plausible, and competing conceptions of constitutional intention, and a judge's choice of which conception to follow is founded on substantive political morality, not a neutral fact of the world, as originalists appeared to assume. See *id.* at 477–82.

59. See Brest, *supra* note 24, at 222 (arguing that the "interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism").

60. See *id.* at 220 (describing the challenge to originalism posed by the requirement to "translate the adopters' intentions into the present").

61. See *id.* at 216–17 (arguing that, regarding some texts, the Framers intended to delegate interpretative discretion to future interpreters to apply general "concept[s]").

inconsistent with existing legal practice.<sup>62</sup> Originalism's dramatic inconsistency raised the specter of legal instability.<sup>63</sup>

Fourth, nonoriginalists charged that originalism was unacceptable because of the bad consequences to which its adoption would lead.<sup>64</sup> Nonoriginalists questioned whether even the most committed originalist would push originalism so far. As Professor Paul Brest commented, originalism "would produce results that even a strict intentionalist would likely reject."<sup>65</sup>

## 2. Originalism's Transformation: The Second Generation

In response to these criticisms, originalists reformulated originalism.<sup>66</sup> For purposes of this Article, the most fundamental way in which originalism changed in response to nonoriginalist criticism was that most originalists acknowledged that judges have discretion in some situations.<sup>67</sup> Professor Keith Whittington summarized this transformation: "By the 1990s, originalists . . . were no longer working so clearly in the shadow of the Legal Realists and the fear of judicial freedom."<sup>68</sup> Relatedly, as originalists explored the process of originalist interpretation and adjudication, they emphasized the crucial role that judges—and especially their capacities such as judgment—play in legal practice.

The originalist concession of judicial interpretative discretion was the result of three moves made by (most) originalists. First, originalists moved away from original intent by adopting an original meaning focus for originalism.<sup>69</sup> Original meaning is the conventional meaning of the Constitution's text at the time of adoption.<sup>70</sup> Although the subjective

62. *See id.* at 223 ("Strict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment, or the virtually plenary scope of congressional power under the commerce clause.")

63. *See id.* at 231 (arguing that "strict intentionalism produces a highly unstable constitutional order" because the "settled constitutional understanding," embodied in precedent, "is in perpetual jeopardy" of being altered by changes in historical scholarship).

64. *See id.* at 221, 229 n.96, 230; *see also* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) (arguing that the Constitution's meaning is more normatively attractive if it is "fill[ed] . . . by our notions of meaning . . . [and] by our notions of morals").

65. Brest, *supra* note 24, at 221.

66. For an early and powerful response, from an original intent perspective, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

67. *See* Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97, 145 (2009) (book review) ("[N]o purportedly comprehensive theory of constitutional . . . interpretation can so perfectly constrain the judge as to render the gravity of the moral choices entailed in judging inconsequential.")

68. Whittington, *supra* note 23, at 609.

69. *See id.* at 609 ("[T]he new originalism is focused less on the concrete intentions of the individual drafters of constitutional text than on the public meaning of the text that was adopted.")

70. *See* BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 89 (defining the original meaning as "the meaning [the Constitution's words] had at the time they were enacted"); KEITH E. WHITTINGTON, CONSTITUTIONAL

intentions of the Constitution's Framers and Ratifiers are evidence of the Constitution's original meaning, they are not the focus of original meaning inquiry.<sup>71</sup>

Original meaning originalism, with its more limited interpretative resources, results in relatively more cases where the Constitution's meaning "runs out." Original meaning originalism opens up the likelihood of underdeterminacy<sup>72</sup> because it limits the data<sup>73</sup> upon which interpretation relies.<sup>74</sup> Original meaning originalism relies on language conventions. Conventions of language usage are positive human artifacts often without hard edges and frequently lacking in richness.<sup>75</sup> Using the classic "no vehicles in the park" example,<sup>76</sup> the language convention for "vehicles" lacks both hard edges (it alone cannot determine whether a motorized scooter counts as a "vehicle") and depth (it alone might preclude an ambulance on a life-saving mission).<sup>77</sup>

By contrast, original intent originalism's "data set" is richer.<sup>78</sup> In addition to language conventions, an interpreter has access to information that can provide both more definition to a language convention's boundaries and a greater thickness within those boundaries. Most important, original intent originalism included within its interpretative data the framers' originally expected applications, and their purposes or goals.<sup>79</sup>

Returning to the "no vehicles in the park" hypothetical, a judge interpreting the term "vehicles" would know, from the ordinance's legislative history, that the city council that passed the ordinance debated whether the ordinance would apply to scooters, and concluded that it did not. This information would harden "vehicles" scope to exclude scooters. Similarly, a judge would have access to the fact that the city council's purpose in passing the ordinance was to prevent teenagers from driving their cars on the park grounds and terrorizing park patrons. This fact would

INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 35 (1999) (same) (citation omitted).

71. See Whittington, *supra* note 23, at 609–10.

72. See Solum, *supra* note 16, at 473 (defining underdeterminacy).

73. By "data," I mean the pertinent evidence utilized by the respective originalist camps to articulate the Constitution's meaning.

74. This claim assumes that interpreters cannot draw upon the interpretative conventions in place when the Constitution's text received authority. See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) (articulating and advocating use of these conventions).

75. Cf. PLATO, STATESMAN 294b–c (Robin Waterfield trans., 1995) ("[Law] is like a stubborn, stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.").

76. See H.L.A. HART, THE CONCEPT OF LAW 125–26 (1961) (using this example).

77. See Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48, 51–52 (2005) (making a similar argument).

78. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 720 (2009) (arguing that there are more interpretative "sources" and "information" available to original intent originalists).

79. See Solum, *supra* note 55, at 24–27.

add thickness to the meaning of “vehicles” and exclude ambulances on life-saving missions from its purview. My claim here—that original meaning originalism results in greater underdeterminacy—is bolstered by original meaning originalists’ quick and explicit embrace of the concepts of vagueness and ambiguity to describe the sources of this underdeterminacy.<sup>80</sup>

In practice, and for many situations, original meaning and original intent originalism will arrive at the same conclusion.<sup>81</sup> However, there are constitutional terms and phrases for which original intent originalism will provide more evidence from which to draw. Prominent original intent originalist, Professor Richard Kay, has likewise concluded that “public meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions.”<sup>82</sup>

Relatedly, the shift to original meaning originalism away from original intent foreclosed access to closure rules. This, in turn, increased the likelihood and frequency of underdeterminacy. Closure rules apply when an interpreter has reached a point when the interpretive data does not provide a right answer.<sup>83</sup> In those situations, the closure rule will instruct the interpreter to choose one of the plausible (but not uniquely correct) candidate interpretations.<sup>84</sup>

For example, one of the interpretative rules explicitly embraced by the Constitution’s Ninth and Tenth Amendments is that Congress’s powers should be narrowly interpreted.<sup>85</sup> This means that, if there are two plausible competing interpretations of, for instance, Congress’s Commerce Clause authority, the Supreme Court should utilize the more narrow interpretation. The Supreme Court utilized this rule of construction in its recent anti-commandeering cases,<sup>86</sup> *New York v. United States*<sup>87</sup> and *Printz v. United States*.<sup>88</sup>

80. See Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 631–37 (2009).

81. See Solum, *supra* note 55, at 27.

82. Kay, *supra* note 78, at 721.

83. The point at which a closure rule applies could vary, and scholars have not settled on one standard. One possible position is that a closure rule applies when two plausible interpretations are in equipoise. Another plausible position is that the rule applies only when there is not a clearly correct interpretation. Undoubtedly, there are others as well. See McGinnis & Rappaport, *supra* note 74, at 774–75 (describing some possible closure rules in relation to vagueness).

84. Closure rules can possess varying degrees of weight. A closure rule can dictate an outcome, or it could have less weight and suggest an outcome.

85. See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1954 (2008) (concluding that the Tenth Amendment articulates a rule of limited construction of federal power).

86. See *id.* at 1896 (“[A]n originalist reading of the Tenth Amendment which tracks Madison’s reading of the clause would place the contemporary Court’s federalism jurisprudence on firmer ground, both in terms of the Constitution’s text and historical understanding.”).

87. 505 U.S. 144, 157 (1992).

88. 521 U.S. 898, 919 (1997).

Professors John McGinnis and Michael Rappaport's approach, labeled original methods originalism, explicitly embraces closure rules.<sup>89</sup> They argue that, to uncover the Constitution's meaning,<sup>90</sup> originalists must utilize the interpretative rules in place when the Constitution's text was ratified.<sup>91</sup> Original methods originalism's embrace of closure rules is best exemplified by Professors McGinnis and Rappaport's contention that originalism limits or eliminates the need to resort to constitutional construction.<sup>92</sup> Instead of resorting to construction when the Constitution's meaning is vague or ambiguous, they propose that the original interpretative methods prevent underdeterminacy.<sup>93</sup>

Of course, there remain many originalists who have continued to advocate for original intent originalism. Most of these originalists too, following the early nonoriginalist criticism described above, have conceded that the Constitution's originally intended meaning "runs out."<sup>94</sup>

The second move made by originalists,<sup>95</sup> as a result of originalism's concession of judicial discretion, is their embrace of the concept of constitutional construction.<sup>96</sup> Constitutional construction is the idea that, in at least some cases, the Constitution's original meaning does not determine a case's outcome.<sup>97</sup> The original meaning may limit the range of possible outcomes, but judges are left with discretion.<sup>98</sup> Although originalists differ on which government officials have authority to construct constitutional

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89. See McGinnis & Rappaport, *supra* note 74, at 752.

90. This applies to both the original meaning and original intent versions of originalism. See *id.* at 751.

91. See *id.*

92. See *id.* at 752.

93. See *id.* While original intent originalism is open to closure rules in a way that original meaning originalism is not, few original intent originalists have argued as aggressively as Professors McGinnis and Rappaport that closure rules eliminate all or nearly all underdeterminacy. The notable exception is Richard Kay, who invoked the closure rule that "there will be a better answer to every litigated question of constitutional interpretation." Kay, *supra* note 78, at 721 n.75.

94. See Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 142–43 (2010) (stating that "originalists should concede" that there is "some range of indeterminacy or uncertainty").

One may ask why, if the move to original meaning caused an increase in originalism's underdeterminacy, originalists made this move. The shift was prompted by nonoriginalist criticism that the original intent did not exist and/or was not practically accessible. Original meaning originalism either defeats or blunts these criticisms. However, it also opens originalism to the charge that it leaves the original meaning underdetermined. In sum, original meaning originalism preserves a determinate core of constitutional meaning while conceding an area of underdeterminacy.

95. As noted earlier, McGinnis and Rappaport argue that utilization of interpretative closure rules eliminates all (or almost all) underdeterminacy. See McGinnis & Rappaport, *supra* note 74, at 752.

96. All of the most prominent original meaning originalists have incorporated construction into their understandings of originalism. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 118–30; WHITTINGTON, *supra* note 70, at 7–14; Solum, *supra* note 55, at 24; see also Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 566–75 (2009) (describing the important role played by construction in Balkin's version of originalism).

97. See WHITTINGTON, *supra* note 70, at 7.

98. See Solum, *supra* note 55, at 34.

meaning when the Constitution's original meaning is underdeterminate,<sup>99</sup> all originalists agree that construction involves the exercise of relatively<sup>100</sup> unbounded choice.<sup>101</sup>

The third manifestation of originalism's acknowledgment of discretion is its retention of some nonoriginalist precedent. Originalists have argued that originalism preserves a place for some nonoriginalist precedent.<sup>102</sup> This intermediate position—between “get rid of it all” and “keep it all”<sup>103</sup>—required originalists to draw a line between those nonoriginalist precedents a judge should overrule, and those he should retain. For example, I argued elsewhere that a judge should utilize three factors to determine whether to overrule a nonoriginalist precedent.<sup>104</sup> Applying these factors will

99. Compare WHITTINGTON, *supra* note 70, at 7, 9, 11 (arguing that construction is a political and hence non-judicial enterprise), with BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 122 (“I do not share Whittington’s characterization of the process of construction as ‘political.’”). But see Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 125–29 (2010) (modifying his previous position and concluding that, “[s]o long as judges are acting as faithful agents to provisionally maintain constitutional understandings widely shared by other political actors, then their role in articulating constitutional constructions may not be objectionable”).

100. That is, relative to the activity of constitutional interpretation.

101. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 122; WHITTINGTON, *supra* note 70, at 7.

Professor Solum has recently provided a more thorough articulation of his conception of constitutional construction. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). There, Professor Solum argues that constitutional interpretation is the articulation of the Constitution’s linguistic meaning, and construction is giving legal effect to constitutional text. See *id.* at 95–96. Professor Solum’s understanding of construction appears to differ from my description because, in Professor Solum’s view, construction occurs even when the Constitution’s original meaning determines the outcome of a case. See *id.* at 107–08 (describing how construction operates both when “the legal content of constitutional doctrine is equivalent to the semantic content of the text,” and when “the semantic content of the text constrains but does not fully specify the legal content of constitutional doctrine”). Professor Solum’s conception of construction, even if different, fits my core point: most originalists today agree that constitutional construction exists and, at least in a significant percentage of cases in the “construction zone,” “involve[] judgment or choice.” *Id.* at 108.

102. There is a fairly even split among originalists on whether, and to what extent, originalism preserves at least some nonoriginalist precedent. Originalists scholarship that argues in favor of preservation includes Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1441–42 (2007); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803–04 (2009); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 155–59 (2006); and Strang, *supra* note 14, at 419–20.

103. I am not aware of any originalists who have advocated keeping all nonoriginalist precedent. There are many scholars who argue for a position similar to this, but they are not originalists. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 511 (1996) (describing the role that precedent would play in a Burkean approach to constitutional interpretation).

104. The three factors are: (1) how far does the nonoriginalist precedent deviate from the Constitution’s original meaning?; (2) how much, if at all, would overruling the precedent harm Rule of Law values?; and (3) does the precedent instantiate fairness? Strang, *supra* note 14, at 472. I describe my approach to nonoriginalist precedent, and these three factors, in greater detail in Part III.C.3.b, *infra*.

frequently be challenging, and judges will frequently have discretion in doing so, especially if the factors point in different directions and possess different weights.<sup>105</sup>

Take, for example, *Katzenbach v. McClung*,<sup>106</sup> which involved the question of the scope of Congress's Commerce Clause authority. The Supreme Court relied on the substantial effects test, most prominently described in the nonoriginalist precedent *Wickard v. Filburn*,<sup>107</sup> to uphold Title II of the 1964 Civil Rights Act.<sup>108</sup> This, in turn, makes *McClung* a nonoriginalist precedent.<sup>109</sup>

If a case arose today in which *McClung* was challenged, an originalist judge would have to utilize three factors (that I articulated in previous scholarship). Very briefly, the judge would likely conclude: (1) that *McClung* was a significant deviation from the Commerce Clause's original meaning; (2) overruling *McClung* would have some adverse impact on Rule of Law values; and (3) *McClung* did create fair relationships on the important axis of race. These factors point in different directions and they point in their respective directions with varying degrees of weight. The hypothetical judge would have a choice in how to rule.

Even those originalists who argue for the overruling of all or nearly all nonoriginalist precedent retain a place for judicial discretion. Professor Randy Barnett, for instance, who has concluded that "the doctrine of precedent is inconsistent with originalism," acknowledges space for an originalist judge to retain nonoriginalist precedent to protect the "claims made by particular persons made in reliance on mistaken precedent."<sup>110</sup> Judges following Professor Barnett's prescription will exercise discretion to determine, among other things, whether the reliance was sufficiently directed to the mistaken precedent and whether it was sufficiently weighty.

In addition to acknowledging judicial discretion in the three contexts I identified, originalists also explained that, even in cases where judges do not have discretion, they must still utilize judgment, along with other human capacities. This move by originalists took many forms, but two characteristics in particular are important for my purposes: the process of articulating and applying the Constitution's original meaning, and originalist precedent.

First, originalists have begun to explain in more detail the analytical process judges utilize. This process has many features including, importantly, the articulation of the Constitution's original meaning and

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105. Strang, *supra* note 14, at 484 ("The originalist theory of precedent I have been discussing provides that judges will often have broad discretion to determine how to react to nonoriginalist constitutional precedent.").

106. 379 U.S. 294 (1964).

107. 317 U.S. 111 (1942).

108. See *McClung*, 379 U.S. at 302–04.

109. Assuming that there is not another originalist basis for the decision.

110. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 259, 266 (2005).

application of that meaning.<sup>111</sup> Second, and relatedly, originalists have argued that originalist precedent plays a central role in originalism.<sup>112</sup> Both characteristics frequently place tremendous burdens on judges' judgment and their other faculties.

Today's transformed originalism has opened a space for judicial discretion and a place for the exercise of judicial judgment. Originalism today explicitly acknowledges judicial discretion in the contexts of constitutional construction and nonoriginalist precedent. Further, originalism has also embraced the fact that judges exercise judgment, constrained though it may be, and other human capacities in the contexts of originalist precedent and in the paradigmatic work of articulating and applying the Constitution's original meaning.

### C. *Impasse in Normative Justifications for Originalism*

Originalists have offered a stunning variety of normative justifications for originalism.<sup>113</sup> However, no one has yet offered a normative foundation in virtue ethics. Instead, two camps of originalists state claims that are premised on conflicting philosophical traditions. One group grounds originalism in the deontological tradition,<sup>114</sup> and the other utilizes a consequentialist foundation.<sup>115</sup> While the respective camps have presented powerful and nuanced statements for their positions, the ultimate incompatibility of the camps' respective philosophical commitments has impeded consensus.

Professor Barnett, for example, acknowledged that his natural rights-based justification for originalism may not persuade those who either do not believe that natural rights exist or do not believe they play the significant role that he attributes to them.<sup>116</sup> Barnett, with his characteristic insight, then argues that his defense of originalism can incorporate such conflicting

111. See Solum, *supra* note 102, at 96; Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1767.

112. See Solum, *supra* note 102, at 185; Strang, *supra* note 111, at 1766–88.

113. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 54–68, 109–13 (arguing that originalism best protects natural rights); WHITTINGTON, *supra* note 70, at 110–59 (grounding originalism in popular sovereignty); McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 8, at 802–05 (arguing that originalism is justified because it protects the good consequences that arise from the Constitution's supermajority requirements); Strang, *supra* note 22, at 983–97 (arguing that originalism best secures human flourishing). Solum has also argued that one version of originalism, what he calls “Semantic Originalism,” is compatible with most normative justifications for originalism. See Lawrence B. Solum, *Semantic Originalism* 128–34 (Illinois Pub. L. and Legal Theory Research Papers Series, No. 07-24, Nov. 22, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244).

114. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 54–68.

115. See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 8, at 802–05.

116. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 3–4.

views because it can maximize ultimate values other than natural rights, such as good consequences.<sup>117</sup>

This situation parallels the one in ethics when Elizabeth Anscombe published her path-breaking piece, *Modern Moral Philosophy*,<sup>118</sup> in 1958.<sup>119</sup> There, Anscombe argued that ethics had been locked in an ever-more-intricate, though still interminable, debate between consequentialists and deontologists.<sup>120</sup> She suggested that a return to virtue ethics might redirect the debate and possibly even overcome the impasse.<sup>121</sup>

This Article takes the first step toward making a similar move in the context of constitutional interpretation. By explaining how one of the major theories of constitutional interpretation is improved when informed by virtue ethics, I set the stage for a later piece that will explicitly ground originalism in virtue ethics and the related concept of human flourishing.

#### D. Conclusion

My goal thus far has been to describe originalism's rise, the criticism to which it has been subject, and originalism's transformation in response to that criticism. The key point of this transformation is that most conceptions of originalism today acknowledge that judicial discretion is an indelible part of judging. Relatedly, as originalists explored originalism's contours, the transformed originalism has acknowledged the sometimes great burdens on judges' judgment and other capacities.

At this point, however, no originalists have explained how these modifications—judicial discretion and burdens on judges' capacities—do not undermine originalism's core insights. Why does significant discretion not undermine originalism's source thesis?<sup>122</sup> And, why do the burdens placed on judges' judgment and capacities not undercut originalism's contribution thesis?<sup>123</sup> In Part III, I show that virtue ethics provides answers to these questions. Virtue ethics has the conceptual "tool kit" to explain how the transformed originalism maintains its core commitments.

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117. *See id.*

118. Anscombe, *supra* note 19.

119. A similar claim is made and expanded upon in Farrelly & Solum, *supra* note 3, at 3–6.

120. *See* Anscombe, *supra* note 19, at 9, 13–14.

121. *See id.* at 18.

122. For the most thorough discussion of the source and contributions theses in print, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 953–54 (2009). *See also* Solum, *supra* note 55, at 29–32 (describing the theses); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (providing a slightly different statement of originalism's core propositions).

123. *See supra* note 122 (discussing the contribution thesis).

## II. THE ARISTOTELIAN PHILOSOPHICAL TRADITION AND THE RETURN TO VIRTUE ETHICS

### A. The Aristotelian Philosophical Tradition: Background

The Aristotelian philosophical tradition is the central Western philosophical tradition.<sup>124</sup> It has its origin in Greek thought, particularly Aristotle, Plato, and Socrates.<sup>125</sup> In the High Middle Ages,<sup>126</sup> after the fall of the Western Roman Empire,<sup>127</sup> St. Thomas Aquinas began the synthesis of Aristotle's thought with the Christian philosophical inheritance, especially from St. Augustine.<sup>128</sup> The Aristotelian tradition flourished until the onset of the Reformation when, due to many factors,<sup>129</sup> other philosophical traditions eclipsed it in many areas of Europe and the West more generally.<sup>130</sup>

The alacrity and comprehensiveness of this move away from the Aristotelian tradition varied. For instance, in Catholic Spain, the tradition experienced a Silver Age in the sixteenth century, when a number of scholars turned with renewed interest to apply Aristotelian philosophical concepts to new circumstances, such as the discovery of American Indians<sup>131</sup> and the rise of capitalism.<sup>132</sup> By the late nineteenth century—outside of subcultures such as Catholic institutions—the Aristotelian tradition was swept from the field in the West.<sup>133</sup>

124. See GEORGE, *supra* note 2, at 5 (describing the Aristotelian tradition in this manner).

125. See ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 89–90 (1988) (“It is Plato’s project which Aristotle vindicates and . . . completes . . .”).

126. See CHRISTOPHER DAWSON, RELIGION AND THE RISE OF WESTERN CULTURE 140–217 (1991) (describing various facets of the High Middle Ages).

127. The key bridge figure between ancient philosophy and Scholasticism was Boethius. For a brief biography of Boethius, see W. Turner, *Anicius Manlius Severinus Boethius*, in THE CATHOLIC ENCYCLOPEDIA (1907), available at <http://www.newadvent.org/cathen/02610b.htm> (last visited Mar. 23, 2012).

128. See ALASDAIR MACINTYRE, THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION 120, 123–24 (1990) (describing St. Thomas’s synthesis).

129. These factors included the Reformers perception that their religious doctrines were at odds with Aristotle’s philosophical claims. See ALASDAIR MACINTYRE, AFTER VIRTUE 165 (2d ed. 1984). The Reformers also perceived in Aristotle a too-close ally of the Catholic Church. See *id.* Another factor was the rise of modern science, which explained natural phenomena without resort to the heretofore central Aristotelian concepts of essential form and final cause. See JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 112–13 (1991). A corresponding philosophical move to eliminate the concepts of essential form and final end was made by many philosophers in the seventeenth and eighteenth centuries. *Id.* at 113–21.

130. See MACINTYRE, *supra* note 125, at 209–13.

131. See, e.g., FRANCISCO DE VITORIA, O.P., DE INDIS ET DE IVRE BELLI RELECTIONES (1532) (J.P. Bate trans., Carnegie Inst. of Wash. 1917) (utilizing the Aristotelian tradition’s concepts to argue for protections of American Indians); see also GORDLEY, *supra* note 129, at 69–71 (describing the broader Thomistic revival).

132. See MACINTYRE, *supra* note 125, at 211.

133. See GORDLEY, *supra* note 129, at 161 (“[T]he authority of Aristotle collapsed in the seventeenth and eighteenth centuries.”).

A worldwide natural law revival occurred in the late nineteenth and early twentieth centuries.<sup>134</sup> Focus on Aristotle's and especially St. Thomas Aquinas's thought characterized what is commonly labeled the Neo-Scholastic or Neo-Thomistic revival.<sup>135</sup> This revival was, to a large but not complete degree,<sup>136</sup> limited to the Catholic intellectual world. However, it fragmented in the late 1950s and early 1960s.<sup>137</sup>

In the past thirty years, a more broad-based natural law revival has occurred. The commonly cited<sup>138</sup> initiation of today's revival is the publication of John Finnis's *Natural Law and Natural Rights* in 1980.<sup>139</sup> Contemporaneous with this natural law revival has been the modern revival of interest in virtue ethics, which I discuss below.<sup>140</sup>

### *B. Relationship Between the Broader Aristotelian Tradition and Virtue Ethics*

The Aristotelian tradition has many facets. It makes robust theoretical and practical claims.<sup>141</sup> In this Article, I focus on one concept at home in the tradition: virtue.<sup>142</sup>

Philosophy is traditionally divided into theoretical (also known as speculative)<sup>143</sup> and practical subdisciplines.<sup>144</sup> Theoretical philosophy's goal is truth about reality,<sup>145</sup> such as in metaphysics, which deals with the

134. See MACINTYRE, *supra* note 128, at 72–77; GERALD A. MCCOOL, S.J., THE NEO-THOMISTS 25–40 (1994).

135. See MCCOOL, *supra* note 134, at 1–42; GERALD A. MCCOOL, S.J., FROM UNITY TO PLURALISM: THE INTERNAL EVOLUTION OF THOMISM 29–32 (1989).

136. For instance, Mortimer Adler, a prominent mid-twentieth century philosopher, was a well-known Thomist. See William Grimes, *Mortimer Adler, 98, Dies; Helped Create Study of Classics*, N.Y. TIMES, June 29, 2001, at B8 (describing Adler as “championing” the ideas of Aristotle and St. Thomas Aquinas). Another example of the penetration of the Neo-Scholastic revival was Jacques Maritain's involvement in drafting the U.N. Declaration on Human Rights. See generally JULIE KERNAN, OUR FRIEND, JACQUES MARITAIN (1975).

137. See MCCOOL, *supra* note 135, at 34–35, 224–30.

138. See Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 105 (Robert P. George ed., 1992).

139. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

140. The revival of interest in virtue ethics is frequently tied to Elizabeth Anscombe's 1958 piece, *Modern Moral Philosophy*. See *supra* note 19. In Catholic circles, the Second Vatican Council's call for a renewal of moral theology is frequently cited as the cause for renewed interest in virtue ethics. See, e.g., ROMANUS CESSARIO, O.P., INTRODUCTION TO MORAL THEOLOGY 129–30, 241–42 (2001) (making this claim).

141. See, e.g., ST. THOMAS, *supra* note 1, at I–I, Q. 46, art. 1 (arguing, against Aristotle, that the universe was created by an eternal God); *id.* at I–II, Q. 94, art. 2 (describing the first principle of natural law and three primary principles of natural law: self-preservation, procreation, and practical reasonableness).

142. For St. Thomas's most wide-ranging discussion of virtue, see his *Treatise on Habits*, *id.* at I–II, QQ. 49–89.

143. See JOHN FINNIS, AQUINAS 38 (1998) (explaining the challenges of translating St. Thomas's “speculativa”).

144. See *id.* at 21 (describing the four orders of science, which include two practical orders and two non-practical orders).

145. See RALPH MCINERNEY, ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS 24–25 (1997) (giving this description).

subject of being.<sup>146</sup> Practical philosophy's goal is guiding human action, such as in ethics, the subject matter of which includes the licitness of human actions.<sup>147</sup> Virtue ethics falls into the category of practical philosophy.<sup>148</sup>

In the Aristotelian philosophical tradition as, for example, in the deontological tradition, there are significant relationships between theoretical and practical propositions. One instance of this is the relationship between the metaphysical understanding of human beings as having a form (essence, or soul), and the practical proposition that human acts are good when they conform to the type of being humans are<sup>149</sup>: rational animals.<sup>150</sup> This Article, by focusing on the practical philosophical concept of virtue, puts to one side most concepts from theoretical philosophy, and much of practical philosophy as well.

### C. *Virtue Ethics, Natural Law, and the Return to Virtue Ethics*

Virtue ethics is one of the three prominent ethical traditions in the West.<sup>151</sup> Its most widespread form is Aristotelian.<sup>152</sup> The two other competing ethical traditions are deontology and consequentialism.<sup>153</sup> I first describe virtue ethics and its relationship to the broader Aristotelian philosophical tradition, emphasizing what makes virtue ethics distinct from other ethical traditions.

#### 1. Virtue Ethics

Virtue ethics is primarily characterized by its focus on the concept of virtue in the ethical life.<sup>154</sup> In answer to what is usually taken as the fundamental ethical question of “what sorts of action should I do?,”<sup>155</sup> a virtue theorist answers, “what a virtuous agent would characteristically . . . do in the circumstances.”<sup>156</sup> However, virtue ethics

146. For an accessible modern statement, see W. NORRIS CLARK, S.J., *THE ONE AND THE MANY: A CONTEMPORARY THOMISTIC METAPHYSICS* (2001).

147. See MCINERNEY, *supra* note 145, at 23–25.

148. See ST. THOMAS, *supra* note 1, at I–II, Q. 55, art. 1.

149. See *id.* at I–II, Q. 50, art. 2 (tying the virtues to the soul).

150. See *id.* at I–I, Q. 76, art. 1 (stating that man has a rational soul that is united with his body).

151. See HURSTHOUSE, *supra* note 1, at 1–3.

152. See *id.* at 8 (articulating a “neo-Aristotelian” virtue ethics); MCINERNEY, *supra* note 145, at 12–25 (describing Aristotle’s ethics and how it formed the basis for Thomistic ethics); ST. THOMAS, *supra* note 1, at I–II, Q. 55, art. 1 (relying on “[t]he Philosopher” to define virtue).

I describe below that virtue theorists tend to fall into two distinct but related camps. 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, and later philosophers, including the Spanish Scholastics. See *infra* Part II.C.3.

153. See HURSTHOUSE, *supra* note 1, at 1–3.

154. See *id.* at 1.

155. *Id.* at 26.

156. *Id.* at 28.

pushes back against the question itself. In virtue ethics, the fundamental issue is not action: it is character.<sup>157</sup> Virtue theorists argue that the focus of ethical inquiry should be the instantiation and exercise of virtue, not an algorithm of right action.<sup>158</sup>

Virtue is a habit<sup>159</sup>—an entrenched disposition of character<sup>160</sup>—to perform a human function well. For example, the virtue of fortitude enables one to ascertain what courage requires in concrete situations and to—willingly—act accordingly.<sup>161</sup> A person who possesses fortitude will know what courage requires in particular situations, have the intellectual disposition to act courageously when called to do so, be emotionally disposed to act courageously, and will reliably act courageously.<sup>162</sup> “The concept of a virtue is the concept of something that makes its possessor good; a virtuous person is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should—she gets things right.”<sup>163</sup>

Virtues are conventionally divided into two categories<sup>164</sup>: intellectual virtues and moral virtues.<sup>165</sup> The intellectual virtues perfect our reasoning faculties. Those intellectual virtues located in the speculative intellect are understanding, science, and theoretical wisdom;<sup>166</sup> the intellectual virtues in the practical intellect are practical wisdom or prudence, and art.<sup>167</sup> The moral virtues perfect our appetites and most prominently include justice, temperance, and fortitude.<sup>168</sup>

Later, in Part III, I use examples to detail how these various virtues operate in originalist constitutional interpretation. At this point, however, let me briefly describe the foundational set of virtues that operate in the context of judging. Judging, as a general activity—in other words, not confined to constitutional interpretation—requires a number of virtues for its successful execution.<sup>169</sup> Professor Lawrence Solum identified and

157. *See id.* at 29.

158. *See id.* at 2–3.

159. *See* ST. THOMAS, *supra* note 1, at I–II, Q. 56, art. 3 (“[V]irtue is a habit by which we work well.”).

160. *See* HURSTHOUSE, *supra* note 1, at 10–12.

161. *See* JOSEF PIEPER, THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE 115–41 (1965) (describing the virtue of fortitude). Being virtuous, including being courageous, requires the assistance of practical wisdom. *See* HURSTHOUSE, *supra* note 1, at 12.

162. *See* HURSTHOUSE, *supra* note 1, at 10–12 (making a similar claim regarding honesty).

163. *Id.* at 13.

164. This distinction was traditionally based on the portion of the soul in which the virtue operated. Intellectual virtues are facets of the soul’s rational part, *see* ST. THOMAS, *supra* note 1, at I–II, Q. 56, art. 3, while moral virtues are facets of the sensitive portion of the irrational soul, *see id.* at I–II, Q. 56, art. 4.

165. *See id.* at I–II, Q. 56, arts. 3–4.

166. *See id.* at I–II, Q. 57, art. 2.

167. *See* MCINERNEY, *supra* note 145, at 96 (giving this description).

168. *See id.* at 97–98.

169. The virtues correspond to vices. For instance, the virtue of theoretical wisdom corresponds to the vice of stupidity. *See* HURSTHOUSE, *supra* note 1, at 36 (describing how virtue theorists may articulate rules of conduct from virtues and their corresponding vices).

described the primary virtues required for judging,<sup>170</sup> and my discussion parallels his excellent scholarship.

The principal judicial virtues include: theoretical wisdom, practical wisdom, justice-as-lawfulness, temperance,<sup>171</sup> and fortitude. Next, I describe each of these virtues in more detail.

A judge is excellent only if he has the theoretical wisdom—the intellectual “firepower,” we might say—to perform the relatively abstract legal tasks necessary to judging. Judges must possess this capacity in order to know and understand the law that bears on a given case. In some cases, especially hard cases,<sup>172</sup> this task places tremendous burdens on the judge’s faculties and, depending on one’s theory of adjudication, judges may have to utilize theoretical wisdom on a regular basis.<sup>173</sup>

Theoretical wisdom first enables the judge to master the law’s “data”: the cases, statutes, regulations, legal principles, and legal practices that are pertinent to the case before the judge.<sup>174</sup> This mastery has two components: the judge’s pre-existing knowledge of the law in the judge’s jurisdiction, and the knowledge of the law that the judge gathers in the context of a particular case.<sup>175</sup> Building on this knowledge of the legal data, the judge must then uncover the relationship between the pertinent legal materials—which of the legal data structures the other pieces, and how the data is structured.<sup>176</sup> Theoretical wisdom permits the judge to arrive at the structure of legal norms governing a case.<sup>177</sup>

For instance, to understand how the Fifth Amendment’s Public Use Clause governs a particular case, a judge would have to grasp the Clause’s original meaning, read and understand originalist precedent applying the Clause, and ascertain any authoritative practices under the Clause.<sup>178</sup> Then, the judge would synthesize this data into a coherent legal structure. Most frequently, this takes the form of the legal rules, standards, or principles

170. Professor Solum has written on this subject in many fora. *See supra* note 9 (listing several works by Professor Solum); *see also* FARRELLY & SOLUM, *supra* note 3, at 1–23, 142–92. For a balanced critique of Professor Solum’s virtue jurisprudence thesis, *see* R.A. Duff, *The Limits of Virtue Jurisprudence*, 34 *METAPHILOSOPHY* 214 (2003).

171. Professor Solum identified the additional virtue of judicial temperament. *See* Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 191.

172. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1977).

173. *See* Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 182–83 (making this point regarding Ronald Dworkin’s theory of law as integrity).

174. *See* STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 51–54 (1992) (describing the reasons that judges incorporate into their analysis).

175. *See* Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 191–92 (describing how a judge’s pre-existing mastery of law is pertinent to, but not a manifestation of, theoretical wisdom).

176. *See* BURTON, *supra* note 174, at 54–59; Strang, *supra* note 77, at 66–67.

177. As Professor Solum has pointed out, theoretical wisdom is also important because it gives judges “the ability to grasp the facts of disputes that may involve particular disciplines.” Solum, *Virtue Jurisprudence*, *supra* note 9, at 191.

178. *See* *Kelo v. City of New London*, 545 U.S. 469, 505–14 (2005) (Thomas, J., dissenting) (synthesizing the Public Use Clause’s original meaning from the Clause’s text, the text and structure of the rest of the Constitution, and early American state practice); *see also* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 779–83 (Mich. 2004) (surveying the Michigan Constitution’s text and original understanding of that text).

tailored to the factual context presented by the case.<sup>179</sup> At each step, without significant intellectual capabilities, the judge will perform poorly. Consequently, judges need theoretical wisdom to perform these tasks well.

Practical wisdom is the intellectual virtue that enables its possessor to perform two tasks well: first, identify those goods that are valuable and therefore worth pursuing; and second, perceive the means most conducive to pursuing those identified goods.<sup>180</sup> Practical wisdom, in the context of judging, is primarily concerned with the second task.<sup>181</sup> Practical wisdom provides the capacity to articulate legal doctrine that mediates legal meaning and the facts presented in cases.<sup>182</sup>

Using the Commerce Clause as an example, once a judge has mastered the Clause's operative legal meaning, the judge must still apply that meaning in a case. In doing so, the judge will articulate legal doctrines that connect the meaning to the facts. In the Commerce Clause context, the pre-New Deal Supreme Court created a series of doctrines, such as the original packages doctrine<sup>183</sup> and the instrumentalities of commerce doctrine,<sup>184</sup> among others,<sup>185</sup> to do just that. These legal doctrines bridged the

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179. See *Kelo*, 545 U.S. at 514 (Thomas, J., dissenting) (“[T]he Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.”); see also *Hathcock*, 684 N.W.2d at 783 (“[T]he transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where public necessity of the extreme sort requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of facts of independent public significance, rather than the interests of the private entity to which the property is eventually transferred.” (internal quotation marks omitted)).

180. See ST. THOMAS, *supra* note 1, at I–II, Q. 57, art. 5; Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 192.

181. Practical wisdom in the context of judging is primarily concerned with the second task because the judge's ends are, in the focal case of judging, set for the judge by the pertinent law. As I describe below, however, practical wisdom, in situations when judges exercise discretion, also plays the first role of identifying goods worth pursuing. This occurs, for instance, in the contexts of nonoriginalist precedent and constitutional construction discussed in Part III.C.3, *infra*.

182. See Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 767–71 (1989) (describing how legal doctrine impacts citizens' practical deliberations); see also Strang, *supra* note 14, at 486 (describing the relatively free-ranging role practical wisdom will play in the context of nonoriginalist precedent).

183. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441–42 (1827) (“It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.”).

184. See *Shreveport Rate Cases*, 234 U.S. 342, 351 (1914) (articulating the instrumentalities of commerce doctrine).

185. See *Swift & Co. v. United States*, 196 U.S. 375, 399 (1905) (“[W]hen this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.”); *Stafford v. Wallace*, 258 U.S. 495, 517 (1922) (reaffirming and applying the holding of *Swift*).

analytical space between the Clause's original meaning and the recurring factual situations presented by the cases in which the Court articulated those doctrines.<sup>186</sup>

Justice-as-lawfulness is the virtue of giving one's society's laws their due.<sup>187</sup> Justice-as-lawfulness is, in many ways, *the* excellence that defines a good judge qua judge.<sup>188</sup> Saint Thomas Aquinas recognized this when he described the etymology of "judge."<sup>189</sup> Without the virtue of justice, a judge's incredible intellect, stout courage, and measured temperament would only make the judge worse.<sup>190</sup>

A just judge is one who exercises judgment<sup>191</sup> "according to the written law."<sup>192</sup> The judge who possesses the virtue of justice-as-lawfulness has the "habit . . . [of] render[ing] to each one his due by a constant and perpetual will."<sup>193</sup> Saint Thomas's linking of justice-as-lawfulness to a society's positive law flows from the essential role positive law plays in securing a society's common good.<sup>194</sup> In this, St. Thomas followed Aristotle.<sup>195</sup>

The virtue of justice-as-lawfulness has the most "bite" when a judge faces a law that the judge does not think—at least in that instance—advances the common good.<sup>196</sup> For example, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court denied Joshua DeShaney's claim of a violation of the Fourteenth Amendment's Due Process Clause for the county's failure to protect him from his wicked father's abuse.<sup>197</sup> The Court acknowledged that it was moved with "natural sympathy . . . to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them."<sup>198</sup> The Court's

186. See Strang, *supra* note 111, at 1767–78 (describing this phenomenon in the context of originalist precedent).

187. See ARISTOTLE, *NICOMACHEAN ETHICS* 1095a (Terence Irwin trans., 2d ed. 1999); RICHARD KRAUT, *ARISTOTLE: POLITICAL PHILOSOPHY* 102–03, 106 (2002).

188. See Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 194 (stating that justice is central to our concept of a good judge).

189. ST. THOMAS, *supra* note 1, at II–II, Q. 60, art. 1.

190. See Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 194 (describing such a judge as "an especially bad judge").

191. ST. THOMAS, *supra* note 1, at II–II, Q. 60, art. 1.

192. *Id.* at II–II, Q. 60, art. 5. For St. Thomas, since the written law is fully law only insofar as it instantiates the natural law, *see id.* at II–II, Q. 60, art. 5, a judge's duty to follow positive law is contingent on its relationship, or lack thereof, to the natural law (with some qualifications). *Cf.* Horwitz, *supra* note 67, at 154–55 (arguing that a virtuous judge is not necessarily a formalist judge).

193. ST. THOMAS, *supra* note 1, at II–II, Q. 58, art. 1.

194. *See id.* at I–II, Q. 96, art. 4.

195. See KRAUT, *supra* note 187, at 102–11 (describing justice-as-lawfulness as the virtue of giving the community's laws their due regard because they provide the framework within which the common good is possible).

196. For example, if the law is not the product of practical wisdom and is instead "special interest legislation," it violates distributive justice. See ST. THOMAS, *supra* note 1, at I–II, Q. 96, art. 4.

197. 489 U.S. 189 (1989).

198. *Id.* at 202–03.

faithfulness to the Constitution—its refusal to improperly expand the Due Process Clause’s scope<sup>199</sup>—exemplified justice-as-lawfulness.<sup>200</sup>

Temperance and fortitude describe two facets of judicial character that a judge must possess to rule according to the law.<sup>201</sup> A temperate judge will hold in check his sensual appetites.<sup>202</sup> A temperate judge will be resistant to the allure of, for instance, the “good life” that a bribe could buy.<sup>203</sup> Courage is the firmness of mind that enables one to react appropriately to danger,<sup>204</sup> and a courageous judge will rule according to the law even in the face of potential harm to his reputation, career, or even family and life.<sup>205</sup>

## 2. Virtue, Human Flourishing, and the Natural Law

Important to fully understanding the concept of virtue in the Aristotelian tradition is a related concept: human flourishing.<sup>206</sup> Virtue ethics is teleological because the goal towards which the virtues enable their possessor to move is human flourishing.<sup>207</sup> Virtue is both constitutive of human flourishing and instrumental to securing it.

Human flourishing is the state of being most fully human which, in the Aristotelian tradition, means acting rationally excellently.<sup>208</sup> Humans are distinct from other animals by having the capacity to reason.<sup>209</sup> As a result, a human will be most fully human when he exercises his reason—both theoretical and practical—excellently.<sup>210</sup> A person’s excellent utilization of

199. There is an at least plausible argument that a claim such as *DeShaney*’s should be viable under the Equal Protection Clause. See ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 9–44* (1994) (arguing that the abolitionists understood the language of the Fourteenth Amendment to require government protection from private violence).

200. See *DeShaney*, 489 U.S. at 203.

201. See Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, *supra* note 9, at 189–91 (describing these virtues).

202. See ST. THOMAS, *supra* note 1, at II–II, Q. 141, art. 1–2.

203. See *United States v. Nixon*, 816 F.2d 1022, 1023 (5th Cir. 1987) (describing how Judge Nixon, who was later impeached for perjury arising out of the investigation of bribery charges, had “been dissatisfied with his modest judicial salary, and had looked for means of augmenting it”).

204. ST. THOMAS, *supra* note 1, at II–II, Q. 123, art. 1–2.

205. See generally J.W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1971) (describing the challenges faced by federal judges enforcing desegregation in the South).

206. Aristotle used the term *eudaimonia* to describe the end goal of human action. This term was traditionally translated as “happiness.” See ARISTOTLE, *supra* note 187, at 1095a. Saint Thomas used the term *beatitudo*, which likewise was translated as “happiness.” See ST. THOMAS, *supra* note 1, at I–II, Q. 1, art. 7 (“[A]ll men agree in desiring the last end, which is happiness.”).

207. See HURSTHOUSE, *supra* note 1, at 29 (stating that the virtues enable their possessor to achieve “*eudaimonia*, to flourish or live well”).

208. See ARISTOTLE, *supra* note 187, at 1098a; see also ST. THOMAS, *supra* note 1, at I–II, Q. 3, art. 5 (following Aristotle’s position).

209. ST. THOMAS, *supra* note 1, at I–II, Q. 1, art. 1; see also ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 11–51* (1999) (reviewing the extent to which nonhuman animals possess characteristically human capacities such as reason).

210. ST. THOMAS, *supra* note 1, at I–II, Q. 3, art. 5.

his intellectual faculties is acting virtuously.<sup>211</sup> Therefore, human flourishing is partially constituted by virtue.

Virtue also equips humans to achieve human flourishing.<sup>212</sup> The virtues are those habits of character that perfect the portion of their possessor to which they obtain.<sup>213</sup> For example, a human does not flourish if he is not temperate. A person who characteristically eats excessively has the vice of intemperance.<sup>214</sup> That person has difficulty controlling his pursuit of physical goods, like food and drink.<sup>215</sup> The desire for food controls the person so that the person acts, not in accord with his practical reason, but instead by dictate of his passion. This person, because of his lack of virtue, is prevented from flourishing. To flourish, the intemperate person must acquire the means to do so—a temperate disposition.

Virtue ethics is distinct from, but related to, natural law. Saint Thomas Aquinas described the relationship between virtue and natural law as two complementary mechanisms that direct humans toward human flourishing.<sup>216</sup> Virtues are internal guides to flourishing, while natural law provides external guidance.<sup>217</sup>

Natural law is the body of norms that identifies which actions are, and which are not, conducive to human flourishing.<sup>218</sup> Natural law norms are natural because they are tied to human nature: they identify which actions are right and wrong by reference to a being with human characteristics.<sup>219</sup> Natural law precepts are tied to human nature via the goods that natural law norms direct humans to instantiate.<sup>220</sup> Primary among the characteristics of

211. *Id.* at I–II, Q. 3, art. 2.

212. *See id.* at I–II, Q. 49, introduction (describing virtue as an “intrinsic principle” of human action); *id.* at I–II, Q. 55, art. 1 (describing virtue as the “perfection of a power,” which in humans is rational).

213. *See id.* at I–II, Q. 55, art. 1 (describing virtue as the “perfection of a power”).

214. *See id.* at II–II, Q. 148, art. 1 (describing gluttony as the “inordinate desire” for “eating and drinking”).

215. *Id.*

216. *See* CESSARIO, *supra* note 140, at 94–95 (describing the relationship between virtue and natural law). For an extended discussion of the relationship between natural law and virtue in St. Thomas’s thought, see Thomas Stewart Hibbs, *The Pedagogy of Law and Virtue in the Summa Theologiae* (1987) (unpublished Ph.D. dissertation, Notre Dame University) (on file with the Fordham Law Review); Michel Therrien, *Law, Liberty & Virtue: A Thomistic Defense for the Pedagogical Character of Law* (2007) (unpublished Th.D. dissertation, University of Fribourg) (on file with the Fordham Law Review).

217. *See* ST. THOMAS, *supra* note 1, at I–II, Q. 49, introduction (describing virtue as the “intrinsic principle” of human action while natural law is the “extrinsic principle[.]”).

218. *See id.* at I–II, Q. 90, art. 2 (“[T]he law must needs regard principally the relationship to happiness.”).

219. *See id.* at I–II, Q. 91, art. 2 (describing natural law as “the rational creature’s participation of the eternal law”); *id.* at I–II, Q. 94, art. 4 (“[T]he natural law belongs [to] those things to which a man is inclined naturally: and among these it is proper to man to be inclined to act according to reason.”); *see also* FINNIS, *supra* note 139, at 34 (“The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have.”).

220. The New Natural Law scholars, including, most prominently, Germain Grisez and John Finnis, have focused their arguments on describing the basic human goods that form the foundation for their conception of natural law. *See* 1 GERMAIN GRISEZ, *THE WAY OF THE*

humans is both a rational and animal nature.<sup>221</sup> For instance, the first principles of practical reason identified by St. Thomas include the directions to act practically reasonably, and to preserve oneself.<sup>222</sup>

The virtues work hand-in-hand with natural law directives to facilitate pursuit of human flourishing. Most important, the virtue of practical wisdom imparts the capacity to correctly identify the principles of natural law via identification of the goods towards which natural law directs human actions.<sup>223</sup> Practical wisdom also facilitates the choice of the best means to secure a basic human good.<sup>224</sup>

The moral virtues ensure that one's appetites for goods are properly ordered by one's reason.<sup>225</sup> This ensures that one's vision of what the natural law requires is not blurred, *and* that one's passions do not overawe one's (correct) judgment about what the natural law requires one to do.<sup>226</sup> In sum, both 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 to natural law and virtue. The Constitution's original meaning plays a role parallel to natural law because it contains the external positive<sup>227</sup> norms that direct judges toward our society's common good. The judicial virtues, like virtue more generally, are the internal habits of character that enable judges to know and faithfully apply the original meaning. Both the original meaning and judicial virtues aim to secure the common good of society; both natural law and virtue aim toward human flourishing.

### 3. Return to Virtue Ethics

The modern growth of interest in virtue ethics paralleled (and partially coincided with) that of natural law which, as I mentioned above, experienced a revival beginning with John Finnis's celebrated *Natural Law*

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LORD JESUS: CHRISTIAN MORAL PRINCIPLES, ch. 5, Q. D, art. 11 (describing seven categories of basic human goods); *see also* FINNIS, *supra* note 139, at 59–126 (same).

221. Hence, virtues are divided into intellectual virtues and moral virtues.

222. *See* ST. THOMAS, *supra* note 1, at I–II, Q. 94, art. 2.

223. *See id.* at I–II, Q. 94, art. 1 (“*Synderesis* [practical wisdom] . . . is a habit containing the precepts of the natural law . . .”); *see also* FINNIS, *supra* note 139, at 34 (“[B]y a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good . . .”).

224. *See* FINNIS, *supra* note 139, at 88 (describing this facet of practical reason).

225. *See* ST. THOMAS, *supra* note 1, at I–II, Q. 94, art. 4 (describing how one's ability to know and abide by the natural law may be challenged “both as to rectitude and as to knowledge”); *see also* FINNIS, *supra* note 139, at 88 (describing how practical reason can help “to bring one's emotions and dispositions into the harmony of an inner peace of mind”).

226. The most famous instance of a person's disordered appetite preventing that person from pursuing a known principle of natural law was St. Augustine's theft of pears. *See* ST. AUGUSTINE, THE CONFESSIONS, bk. II, chs. 4–8 (R.S. Pine-Coffin trans., 1961). In this, St. Augustine recounts how, as a youth, he stole pears from a neighbor's tree despite the fact that he was not hungry and that his parents' pear tree produced better fruit. *Id.* St. Augustine used this episode to exemplify the power of a disordered will—one not tamed by the moral virtues—and how it could push one to perform an act that one knows is wicked. *See id.*

227. Here, I utilize the understanding of natural law as posited by God.

and *Natural Rights*.<sup>228</sup> Starting with a seminal article by Elizabeth Anscombe in 1958, *Modern Moral Philosophy*,<sup>229</sup> virtue ethics experienced its modern revival.<sup>230</sup> Since 1958—first as a trickle, and now as a strong current—virtue ethics has established a significant scholarly presence.<sup>231</sup> Virtue ethics has grown dramatically in the last forty years to become a respected participant in moral philosophy.<sup>232</sup>

Today, though the most prominent proponents of virtue ethics have their home in the Aristotelian tradition, they are divided in their relationship (or lack thereof) to what is variously called the Thomistic or Natural Law tradition.<sup>233</sup> Some prominent scholars in the virtue ethics field are relatively distinct from the Thomistic tradition.<sup>234</sup> This group of Neo-Aristotelians most prominently includes Philippa Foot<sup>235</sup> and Rosalind Hursthouse.<sup>236</sup> The other distinct set of scholars works within the Thomistic tradition.<sup>237</sup>

These various schools of virtue ethics have much in common. In particular, and for purposes of this Article, they overlap significantly in their understanding of what counts as a virtue and the primary virtues.<sup>238</sup>

228. FINNIS, *supra* note 139.

229. Anscombe, *supra* note 19, at 1; *see also* FARRELLY & SOLUM, *supra* note 3, at 3–4.

230. *See* HURSTHOUSE, *supra* note 1, at 1–4.

231. For a selection of recent and more prominent works, *see* JULIA ANNAS, *THE MORALITY OF HAPPINESS* (1993); CESSARIO, *supra* note 140; FARRELLY & SOLUM, *supra* note 3; PHILIPPA FOOT, *NATURAL GOODNESS* (2001); PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* (1978); *HOW SHOULD ONE LIVE?* (Roger Crisp ed., 1996); HURSTHOUSE, *supra* note 1; MACINTYRE, *supra* note 129; SERVAIS PINCKAERS, O.P., *THE SOURCES OF CHRISTIAN ETHICS* (St. Mary Thomas Noble, O.P., trans., 1995); MICHAEL SLOTE, *FROM MORALITY TO VIRTUE* (1992); and CHRISTINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* (2003).

232. *See* HURSTHOUSE, *supra* note 1, at 2 (stating that virtue ethics “has acquired full status, recognized as a rival to deontological and utilitarian approaches”).

233. For a history of Thomism, *see* ROMANUS CESSARIO, O.P., *A SHORT HISTORY OF THOMISM* (2005). For a history of early to mid-twentieth century Neo-Thomism, *see* MCCOOL, *supra* note 134, and MCCOOL, *supra* note 135.

234. *See* HURSTHOUSE, *supra* note 1, at 3 (“The modern philosophers whom we think of as having put virtue ethics on the map . . . had all absorbed Plato and Aristotle, and in *some* cases also Aquinas.”) (emphasis added).

235. *See* HURSTHOUSE, *supra* note 1, at 3; *see also* FOOT, *NATURAL GOODNESS*, *supra* note 231, at 53, 72 (repeatedly citing Aristotle, but referencing St. Thomas three times). Though Foot passed away in late 2010, her work continues to have significant influence.

236. *See* HURSTHOUSE, *supra* note 1, at 8 (“The particular version of virtue ethics I detail and discuss . . . is of a more general kind known as ‘neo-Aristotelian.’”).

237. *See, e.g.*, CESSARIO, *supra* note 140, at xvii (stating that his work is deeply indebted to St. Thomas’s work); WILLIAM E. MAY, *AN INTRODUCTION TO MORAL THEOLOGY* (2d ed. 2003) (relying heavily on St. Thomas).

238. The most important distinction between them is that the Neo-Aristotelian virtue theorists focus on virtue ethics derived from human nature understood in contemporary biological terms, while the Thomists frequently present arguments grounded in a metaphysical teleology. Alasdair MacIntyre straddles both schools, especially in his *Dependent Rational Animals*, where MacIntyre changes the course of his scholarship and embraces the proposition that virtues are based on the “form of life . . . possible for beings who are biologically constituted as we are.” MACINTYRE, *supra* note 209, at x; *see also id.* at xi (describing his deep debt to St. Thomas’s thought).

#### D. *Virtue Ethics' Limited Impact on Legal Scholarship*

Despite flourishing in philosophical discourse, virtue ethics has only barely begun to penetrate legal scholarship. Professor Lawrence Solum has most prominently brought virtue ethics' lessons to bear on legal issues. Solum has written a series of articles, and co-edited a book, focusing on the intersection of law and virtue ethics.<sup>239</sup> A handful of scholars in specific fields of law have similarly begun applying virtue ethics' insights to particular areas of law.<sup>240</sup>

There is, as of yet, no work describing the role that virtue may and should play in originalism. This Article partially fills that gap by explaining the multifarious ways in which virtue is essential to a fully developed theory of originalism.

### III. ORIGINALISM IS BETTER BECAUSE IT HAS A HOME FOR VIRTUE

In this Part, I locate the important points in the process of originalist constitutional interpretation where virtue can and should play a role. What I describe is a human practice that requires participants with particular qualities if the practice is to flourish.

I begin by noting the common perception that originalism and virtue ethics are incompatible. In response, I argue that originalism can incorporate virtue ethics' insights. Then, and most importantly, I show that originalism should incorporate virtue ethics' insights because doing so will make originalism more descriptively accurate and normatively attractive.

#### A. *Originalism Is Not Immune to Virtue*

Originalism can learn from virtue ethics. There is nothing inherent in originalism—its core claims, its foundational premises, or its practical implementation—that precludes it from incorporating virtue ethics' insights. For example, originalism's core claims are described by the fixation and contribution theses.<sup>241</sup> The fixation thesis is that the

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239. See *supra* note 9 (listing Professor Solum's works on virtue ethics and law). Most important for purposes of this Article, Solum published an article titled *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, where he articulated a virtue-focused theory of judging. See *supra* note 9.

240. See, e.g., Chapin F. Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703 (2009) (contract law); R.A. Duff, *Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 BUFF. CRIM. L. REV. 147 (2002) (criminal law); Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000) (tort law); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996) (legal ethics); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995) (criminal law); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (property law); H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 379 (2006) (constitutional law); Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167 (criminal law); see also Horwitz, *supra* note 67, at 144–66 (applying virtue ethics to judging generally).

241. For the most thorough discussion of these theses in print, see Solum, *supra* note 122, at 944, 954. See also Solum, *supra* note 55, at 29–32 (describing the theses); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (providing a slightly different statement of originalism's core propositions).

Constitution's meaning was fixed when it was ratified.<sup>242</sup> This is the Constitution's original meaning. The contribution thesis is that the Constitution's original meaning contributes to the content of constitutional law.<sup>243</sup>

Virtue ethics' claims have little, if anything, to say regarding these theses because they address different subjects. Virtue ethics addresses human character and acts, while the fixation and contribution theses address the criteria for the truth of claims regarding constitutional meaning (within originalism). For example, fortitude, in the context of judging, bears on whether or not a judge has the courage to articulate the Constitution's original meaning, not whether or to what extent the Constitution's meaning was fixed at the point of ratification.<sup>244</sup>

Similarly, originalism's foundational premises are consistent with virtue ethics. For instance, originalism is premised on the proposition that the Constitution's original meaning is recoverable.<sup>245</sup> Virtue ethics has nothing to say directly to this originalist premise. Instead, virtue ethics can accept the premise and help describe how an interpreter can fulfill that premise.

Lastly, originalism's practical implementation via constitutional precedent,<sup>246</sup> among other mechanisms,<sup>247</sup> also poses no tension with virtue ethics. Indeed, the implementation of the Constitution's original meaning emphasizes that originalism is built on human practices, thereby giving originalism a porosity that enables it to absorb virtue ethics' concepts.

Originalism's consistency with virtue ethics is true for those versions of originalism that do not ground themselves in the Aristotelian philosophical tradition, as well as those that do. For example, Professor Randy Barnett has argued that originalism is the correct interpretative methodology because it leads to a government that gives adequate assurances of natural rights protection.<sup>248</sup> Barnett's normative justification for originalism sounds in the deontological philosophical tradition.<sup>249</sup> That tradition does not exclude the insights of virtue ethics, and the numerous writers in that tradition that have explicitly incorporated virtue ethics evidence this.<sup>250</sup>

242. See Solum, *supra* note 122, at 944, 954.

243. See *id.* Constitutional law is the label for the rules of law and legal doctrines articulated in Supreme Court constitutional precedent.

244. The virtue of justice-as-lawfulness, which requires a judge to abide by the laws of the judge's society, does not conflict with the fixation and contribution theses because the virtue does not identify what the law is to which the judge owes allegiance, while that identifying function is the theses' purpose.

245. Of course, originalists have defended this premise. See, e.g., BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 113–14; WHITTINGTON, *supra* note 70, at 162–63.

246. See Strang, *supra* note 111, at 1729.

247. Other mechanisms include long-standing practices and institutions like stare decisis and the presidential cabinet.

248. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY *supra* note 7, at 45–47.

249. See *id.* at 14–15, 301–08 (distinguishing between natural law and natural rights).

250. See HURSTHOUSE, *supra* note 1, at 3 (describing the increased utilization of virtue ethics' insights by utilitarians and deontologists); Onora O'Neill, *Kant's Virtues*, in HOW SHOULD ONE LIVE?, *supra* note 231, at 77 (providing an attempted reconciliation).

Originalists who are working outside of the Aristotelian tradition can incorporate the concept of virtue because every conception of originalism recognizes that humans play important roles in the practice of constitutional interpretation. The most central such actor is the judge. Judges and other participants in our interpretative practice can perform their roles well or poorly. Virtue helps explain how and why that is the case. It describes (part of) what makes, for instance, a good judge good, and a bad citizen bad.

Of course, versions of originalism, such as mine, that are explicitly grounded on the tenets of the Aristotelian tradition, provide a ready-made home for virtue ethics. In my previous writings, I argued that originalism is the correct interpretative methodology because it best enables members of our society to pursue human flourishing.<sup>251</sup> My argument relied on the Aristotelian tradition's core concept of human flourishing.<sup>252</sup> This Article adds a second strand tying originalism to the Aristotelian tradition by showing that virtue, which facilitates human flourishing, also facilitates originalism.

A common reason for the perceived incompatibility of originalism and virtue ethics is that originalism is purportedly a theory of rules, while virtue ethics eschews rules in favor of elastic concepts like character and virtue. Both of these perceptions reflect reality to some degree, but the conclusion that originalism is incompatible with virtue ethics does not.

The perception that originalism is primarily a methodology of rules likely gained currency from Justice Scalia, one of the earliest prominent originalists.<sup>253</sup> In his judicial<sup>254</sup> and scholarly writings,<sup>255</sup> Justice Scalia argued that originalism will regularly lead to rules as the operative legal norms. The best example of this is his article, *The Rule of Law as a Law of Rules*.<sup>256</sup> There, Justice Scalia argued that an originalism of rules will better advance the Rule of Law by, for instance, limiting judicial discretion.<sup>257</sup> Nonoriginalists have focused on this claim in their criticism of originalism,<sup>258</sup> and originalists too have criticized the tendency to equate

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251. See Strang, *supra* note 22, at 982–1000.

252. See *id.* I also previously identified situations where judges must use the judicial virtues to effectively perform their judicial duties. For example, when federal judges must decide whether to overrule a nonoriginalist precedent, I argued that they must utilize the virtues of justice-as-lawfulness and practical wisdom. Strang, *supra* note 14, at 484–86. Judges must employ those virtues because their decision requires them to apply three factors, *id.* at 472, a process that is not significantly law-bounded and places great demands on the judges' judgment.

253. Justice Scalia's appointment to the Supreme Court in 1986 provided an early and prominent platform for his advocacy of originalism that he utilized in both his opinions and scholarly writings.

254. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

255. See Scalia, *supra* note 11, at 1185.

256. *Id.*

257. See *id.*

258. See Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 341 (2009); Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL'Y 159, 170–73 (2009).

originalism with legal rules.<sup>259</sup> On the other hand, a frequent criticism lodged against virtue ethics is that its purported lack of normative rules disables it from offering sufficient ethical guidance.<sup>260</sup>

Both of these perceptions, though rooted in reality, are not wholly accurate. Originalists have moved away from Justice Scalia's claim that originalism primarily produces legal rules (if originalists ever embraced the proposition, which is not clear to me).<sup>261</sup> Instead, as Professor Keith Whittington has argued, the level of generality of operative legal norms is determined by the Constitution's original meaning itself.<sup>262</sup> On occasion, that meaning will be rule-like, while on other occasions, it will be abstract.<sup>263</sup> Likewise, virtue theorists, while acknowledging the fuzziness of some of virtue ethics' concepts, have argued that virtue ethics also prescribes rules of conduct. For instance, Rosalind Hursthouse has described the numerous "V-rules" that virtue ethics entails.<sup>264</sup>

Consequently, both originalism and virtue ethics produce (legal and ethical) rules *and* more abstract norms. This conclusion, coupled with originalism's new porosity to virtue ethics, discussed above,<sup>265</sup> sets the stage for my argument below, that originalism *should* incorporate virtue ethics.

### B. *Virtue's Home in Originalism*

In this section, I show some of the many ways in which concepts from virtue ethics contribute to a richer originalism. First, I show that an originalism that takes on virtue ethics' insights is more descriptively accurate. Second, I describe the virtues' roles at key steps in the interpretative process and show how virtue ethics makes originalism more normatively attractive. I end by summarizing virtue ethics' contribution to originalism: it preserves originalism's core insights, while facilitating its transformation.

#### 1. Greater Explanatory Power

Originalism's incorporation of virtue ethics will make originalism more descriptively accurate in at least four ways: (1) originalism will be more

259. See Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 11 (2006) (criticizing Justice Scalia's "ruleification" of originalism).

260. See, e.g., HURSTHOUSE, *supra* note 1, at 35–42 (identifying and responding to this view).

261. See, e.g., Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL'Y 45, 45–46 (2011) (arguing that, consistently applied, originalism would, in some significant number of cases, "lead[] away from bright-line rules").

262. See Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 214 (2000).

263. See WHITTINGTON, *supra* note 70, at 184–87.

264. See HURSTHOUSE, *supra* note 1, at 28–42.

265. See *supra* Part I.B.2 (describing a transformed originalism that, among other characteristics, acknowledges judicial discretion).

hospitable to and paint in a better light common practices; (2) originalism will be able to embrace the widespread and attractive conception of judging as a craft; (3) originalism will be able to emphasize the fact that constitutional interpretation is a human practice; and (4) originalism will better fit the Framers' and Ratifiers' plan of constitutional government which embraced their virtue-infused assumptions.

Fit is a powerful argument in law.<sup>266</sup> The more "data" of a legal practice that a purported "interpretation" of that practice can satisfactorily explain, the more powerful the theory. A proffered interpretation of a legal practice that accounts for only twenty percent of the practice's data does not fit and, therefore, cannot be an interpretation of that practice. However, the quantity of data fit by an interpretation is only one axis upon which to evaluate interpretations. Interpretations also vary on the axis of the quality of their fit. For instance, some interpretations are more elegant than others; they may fit the data more cleanly. The result is that one should prefer an interpretation that paints a practice in a better light even if that interpretation fits slightly less of the data than a competing interpretation.

Currently, originalism is in tension with major facets of American constitutional interpretative practice. Most prominently, critics have argued that originalism cannot account for the role nonoriginalist precedent plays in constitutional adjudication.<sup>267</sup> Constitutional adjudication undeniably continues to employ nonoriginalist precedent. This limits originalism's claim to adequately describe our practice of constitutional interpretation.

Virtue ethics helps originalism incorporate the practice of nonoriginalist precedent.<sup>268</sup> It does so by ensuring that judges who face nonoriginalist precedent will still regard themselves as bound by the Constitution's original meaning, and therefore nonoriginalist precedent will not erode the original meaning's pride-of-place. A judge with the virtue of justice-as-lawfulness will seek to give the Constitution's original meaning its full due. Therefore, a virtuous judge will refrain from overruling or limiting a nonoriginalist precedent only for good reasons.<sup>269</sup> Accepting the continued viability of some nonoriginalist precedent will not, therefore, undermine originalism, and originalism can more easily fit this facet of our legal practice.

More important, originalism's picture of practices, such as nonoriginalist precedent, will also be more attractive because it will have the tools to explain how to make judges engaging in the practices the best they can be. Judges' decisions on whether and to what extent to overrule or limit a nonoriginalist precedent will frequently be hard. Judges have to evaluate and weigh a number of factors, each of which has a hard-to-quantify

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266. See RONALD DWORKIN, *LAW'S EMPIRE* 230 (1986).

267. See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 15–17 (2001).

268. Although I focus my arguments on the practice of nonoriginalist precedent, my analysis applies as well to constitutional construction, originalist precedent, and the articulation and application of the original meaning.

269. See Strang, *supra* note 14, at 472 (describing the criteria a judge should consider, to refrain from overruling nonoriginalist precedent).

weight. An originalism that incorporates the lessons of virtue ethics can show how judges faced with those difficult choices can make the best determinations, all things considered. For example, a judge with practical wisdom will, by definition, have the best insight into the extent to which overruling a nonoriginalist precedent would harm Rule of Law values.

Relatedly, an originalism that incorporates concepts from virtue ethics will produce the judges most capable of accurately evaluating nonoriginalist precedent because originalism will have the tools to identify and/or educate judges best suited to the practice. For example, originalism will have the resources to suggest that potential judges “acquire judicial intelligence, integrity, and wisdom” from “train[ing] in the law [and] experience [in] legal practice.”<sup>270</sup> With its ability to identify, inculcate, and select for virtuous judges, originalism will produce better results.

Second, once originalism has incorporated virtue ethics’ insights, it will also fit the widespread judging-as-craft account of judging.<sup>271</sup> The core insight of this account is that judges are participants in a human practice with internal standards,<sup>272</sup> and that, to be excellent in the craft, a judge must master those standards. Hence, some judges, more than others, are excellent writers, construct elegant analyses of the law, powerfully articulate the law’s meaning and import, possess a judicial disposition, and so on.

Virtue ethics helps originalism incorporate this judging-as-craft account of judging. Originalism can emphasize, for instance, the theoretical wisdom a judge needs in order to fashion a persuasive presentation of the Constitution’s original meaning.

Third, giving virtue a place in originalism emphasizes, in a way that is often missed, the key fact that constitutional interpretation is a *human* practice.<sup>273</sup> Virtue helps originalism explain that law is a process, with human actors at each critical step in the process. Law begins when an authorized person or group of people identifies a problem they believe is susceptible to legal solution. These legislators craft a law, the goal of which is to re-order society to solve identified problems. The executive branch enforces the law. In some instances, enforcement requires judicial resolution on whether, to what extent, and how the law applies to discrete parties. Lastly, citizens governed by the law internalize the law and act according to its dictates.

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270. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1755 (1988).

271. Some of the more prominent judging-as-craft scholarship includes BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); and *THE ART AND CRAFT OF JUDGING: THE DECISIONS OF JUDGE LEARNED HAND* (Herschel Shanks ed., 1968).

272. Cf. MACINTYRE, *supra* note 129, at 187–91 (describing his earlier conception of virtues internal to human practices).

273. See Horwitz, *supra* note 67, at 106–07 (describing a return to the human-centeredness of legal practice).

At each step in the process of law, human actors will perform their roles more or less well depending upon whether they possess the requisite virtues. The virtues I described above are key to describing and evaluating the performance of these human participants. Below, I describe in detail the virtues required for judges to articulate the Constitution's original meaning and apply that meaning in cases.

Fourth, originalism, bolstered by virtue ethics, better fits the historical record surrounding the Framing and Ratification and therefore the Constitution itself. The Framers and Ratifiers believed in virtue ethics and relied on that belief when constructing the Constitution.<sup>274</sup> Historical and legal scholarship, though differing on the degree to which virtue ethics was part of the intellectual climate during the Framing and Ratification, generally agrees with my modest claim that, among other intellectual commitments, the Framers and Ratifiers believed in virtue ethics and relied on that belief when constructing the Constitution.<sup>275</sup>

Perhaps the clearest instance of this is James Madison's observation, in *Federalist 57*, that

[t]he aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust.<sup>276</sup>

This conception of representation, which was a premise of the Constitution's structure of representation,<sup>277</sup> incorporated virtue ethics.<sup>278</sup>

Originalism, once it has embraced virtue ethics, has a greater ability to appreciate this historical fact. Originalism can, for instance, acknowledge

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274. The literature on the Framers' and Ratifiers' intellectual commitments is vast and conflicted. See generally Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992) (describing the intellectual history of scholarly views on the Framing and Ratification period). The foundational sources for the proposition that a commitment to virtue ethics was at least one dominant current during the Framing and Ratification are BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); and GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969). These sources generated a "Republican Revival" in legal scholarship in the mid-1980s to early 1990s. See, e.g., Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

275. See, e.g., Sunstein, *supra* note 274, at 38-45 (describing the role of virtue in the Federalists' conception of representation and structures of representation).

276. THE FEDERALIST NO. 57, at 316 (James Madison) (George Stade, ed. 2006).

277. For instance, the President is elected by electors. U.S. CONST. art. II, § 1, cl. 2; see also THE FEDERALIST NO. 64, *supra* note 276, at 375, (John Jay) ("As the select assemblies for choosing the President . . . will, in general, be composed of the most enlightened and respectable citizens, there is reason to presume, that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue.").

278. THE FEDERALIST NO. 51, *supra* note 276, at 288 (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.").

and utilize the Framers' and Ratifiers' virtue-based concepts and assumptions when articulating the Constitution's original meaning.<sup>279</sup>

## 2. Virtue's Home in Originalism

For each of the following facets of originalist constitutional interpretation, I describe how virtue ethics provides the tools originalism needs to make originalism the best it can be. The virtues' roles fall into two categories: first, where judges exercise discretion; and second, where ascertaining and applying the Constitution's determinate original meaning places significant burdens on judges' faculties. The first category occurs primarily in the contexts of nonoriginalist precedent and constitutional construction, while the second takes place in the contexts of originalist precedent and articulating and applying the original meaning.

The key contribution virtue ethics makes in each instance is that the virtues enable judges to give the original meaning its due, while also giving other interpretative factors their due, all in their proper proportion. Virtue ethics facilitates originalism's transformation because the virtues preserve originalism as a viable interpretative methodology by preventing the transformative admission of judicial discretion from cannibalizing the rest of the theory. I explain this further at the end of this Article.

### *a. Virtue's Role when Judges Exercise Discretion: Nonoriginalist Precedent and Constitutional Construction*

In this section, I describe the various ways the judicial virtues operate when judges possess discretion. The two main instances of this are the contexts of nonoriginalist precedent and constitutional construction.

Nonoriginalist precedent is precedent that incorrectly articulated and/or applied the Constitution's original meaning.<sup>280</sup> Large swaths of American constitutional law are populated or, in some cases, dominated by nonoriginalist precedent.<sup>281</sup> Nonoriginalists have argued that originalism is fatally flawed by this fact because: either originalism will eliminate all nonoriginalist precedent, in which case originalism will be too destabilizing to Rule of Law values; or, originalism will overrule some but not all

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279. A possible example of this is the issue of nonoriginalist precedent. If the Framers and Ratifiers employed the concept of virtue when drafting and ratifying "judicial Power," then the original meaning of "judicial Power" is more likely to include a place for nonoriginalist precedent, than if they did not assume judges would utilize the judicial virtues. See THE FEDERALIST NO. 78, *supra* note 276, at 427 (Alexander Hamilton) (describing how Article III tenure protection was necessary to induce excellent lawyers to become federal judges because of the "very considerable bulk" of precedent such judges would have to master).

280. In a recent article, I described in detail the standard of "originalism in good faith" to distinguish originalist from nonoriginalist precedent. Strang, *supra* note 111, at 1739–52.

281. See Strang, *supra* note 14, at 430–31.

nonoriginalist precedent, which will then give judges tremendous discretion and similarly undermine Rule of Law values.<sup>282</sup>

Some originalists, including myself, have argued that federal judges are constitutionally required by Article III to give constitutional precedent, including nonoriginalist precedent, significant respect.<sup>283</sup> In particular, a judge must utilize three factors to decide whether to overrule a nonoriginalist precedent: (1) the extent of the precedent's deviation from the Constitution's original meaning; (2) the harm to Rule of Law values caused by overruling the precedent; and (3) the extent to which the precedent creates a just social ordering.<sup>284</sup> However, this opens originalism to the second nonoriginalist criticism: that originalism gives judges too much discretion. Virtue ethics enables originalism to adequately address this critique.

Originalists can argue that a judge with the judicial virtues will appropriately evaluate the three factors and come to the correct conclusion—the conclusion that gives the Constitution's original meaning its due regard while, at the same time, taking into account other important values, such as stability. First, the virtuous judge will possess the virtue of theoretical wisdom, which will enable the judge to accurately ascertain the Constitution's original meaning. For instance, when faced with a case that requires a judge to ascertain the Commerce Clause's meaning, this virtue will permit the judge to perform the necessary research into the historical data.<sup>285</sup> The judge will also review pertinent originalist precedent.<sup>286</sup> Then, the judge will synthesize those legal materials into the authoritative constitutional meaning. At the same time, the judge will ascertain the meaning of the nonoriginalist precedent in question.<sup>287</sup>

Second, a judge with the virtue of justice-as-lawfulness has the disposition to give the Constitution's original meaning, and binding originalist precedent, its due regard: to treat it as controlling. This means, among other things, that the virtuous judge will be inclined to overrule nonoriginalist precedent, especially precedent that deviates greatly from the Constitution's original meaning. For example, *Wickard v. Filburn* pronounced what has become known as the substantial effects test.<sup>288</sup> *Wickard* is a nonoriginalist precedent because it incorrectly articulated the

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282. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 132 (1991).

283. See McGinnis & Rappaport, *supra* note 102, at 806; Strang, *supra* note 14, at 420. Even originalists, like Professor Barnett, who advocate overruling all nonoriginalist precedent, seem to hedge on this point. See Barnett, *supra* note 110, at 266 (“[I]n my view, a commitment to original meaning over precedent does not entail a commitment to rejecting properly tailored reliance claims by individual citizens.”).

284. See Strang, *supra* note 14, at 472.

285. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 274–318 (engaging in this inquiry).

286. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1408–22 (1987) (evaluating pre-New Deal Commerce Clause case law).

287. See *id.* at 1443–54.

288. *Wickard v. Filburn*, 317 U.S. 111, 129 (1942).

Commerce Clause's original meaning.<sup>289</sup> Coming to this conclusion will incline the virtuous judge to overrule *Wickard*.

Third, the virtuous judge will utilize the virtue of practical wisdom to ascertain the extent of harm to Rule of Law values (if any) that the judge would cause if he overruled a precedent. This will frequently be a difficult task. For instance, in evaluating whether to overrule (or limit) *Wickard*, the judge faces the daunting challenge of calculating the reliance interests built on *Wickard*; for instance, in the form of numerous federal statutes premised on the substantial effects test.<sup>290</sup>

Additionally, practical wisdom empowers a judge to articulate legal doctrine that will accurately connect the Constitution's meaning to the facts presented by a case. In the context of nonoriginalist precedent, this will frequently be a challenging task if the judge determines not to overrule the precedent but, instead, to limit it. The judge will then have to modify existing (nonoriginalist) doctrine in a way that moves constitutional law toward the original meaning, while at the same time ensuring that the doctrine is as coherent as possible. The challenge to doctrinal coherence is caused by the dichotomous commitments made by the hypothetical doctrine: on the one hand, the nonoriginalist precedent remains viable, pulling the doctrine in one direction; and on the other hand, the original meaning pulls the doctrine in another direction. Practical wisdom gives a judge the ability to make the best of this difficult—though very common—situation.

This was arguably the situation faced by the Justices inclined to limit *Wickard* in *United States v. Lopez*.<sup>291</sup> *Wickard*'s substantial effects test, the majority acknowledged, could justify upholding the challenged law.<sup>292</sup> To preserve—and limit—*Wickard*, while at the same time moving the Court's Commerce Clause case law toward the original meaning, the majority articulated the commercial/noncommercial distinction as an added limit to *Wickard*'s reach.<sup>293</sup>

Fourth, in evaluating whether the nonoriginalist precedent in question creates a just ordering, a judge must utilize the virtue of justice-as-fairness.<sup>294</sup> While the virtue of justice-as-lawfulness inclines the judge

289. See BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, *supra* note 7, at 315 (criticizing *Wickard*'s departure from the original meaning).

290. See Strang, *supra* note 14, at 445–46.

291. 514 U.S. 549 (1995).

292. See *id.* at 563–68.

293. See *id.*

294. In addition to justice-as-lawfulness, described in the text, Aristotle also described a narrower manifestation of justice: justice as equality, or justice-as-fairness. See ARISTOTLE, *supra* note 187, at 1129b. Justice-as-fairness is giving each individual his due without giving the pertinent legal norm dispositive weight. Scholars often employ the label “general” justice for justice-as-lawfulness, and “particular” justice for justice-as-equality. See, e.g., FINNIS, *supra* note 143, AT 130 n.e (“‘General’ is the more convenient qualifier because Aquinas, following Aristotle, divides justice into ‘general’ (‘legal’) and ‘particular’ (or ‘special’).”); KRAUT, *supra* note 187, at 102 n.6 (“Many scholars call justice as lawfulness ‘universal’ or ‘general’ justice, and justice as equality ‘particular’ or ‘special’

toward overruling the nonoriginalist precedent—because of its illegality—the virtue of justice-as-fairness enables the judge to determine whether the precedent *otherwise*—that is, despite its inconsistency with the original meaning—properly orders relations.

Again, taking a constitutional challenge to *Wickard* as our example, the virtuous judge will decide whether the increased scope to Congress's Commerce Clause authority increases or decreases just relationships. One place where this inquiry has bite is the federal antidiscrimination laws that are premised on *Wickard's* expansive reading of the Commerce Clause. Would overruling *Wickard* cause the demise of the Civil Rights Act, which helped eliminate one form of unjust ordering?<sup>295</sup>

Each of the decisions made by a judge in the process of evaluating the continued vitality of a nonoriginalist precedent is augmented by a virtue. Having these virtues, by hypothesis, makes it more likely that these decisions are the best they can be. Therefore, although a judge has discretion, that discretion does not undermine the originalist project because the Constitution's original meaning is given pride-of-place, consistent with other values. Indeed, the virtuous judge's discretion provides the opportunity to arrive at the best (humanly possible) decision, all things considered. The virtuous judge will not be the perfect judge, however, and this is especially true when the burdens on the judge's capacities are at their highest; for instance, in determining harm to Rule of Law values.

Constitutional construction is another part of originalism that explicitly acknowledges judicial discretion. As with nonoriginalist precedent, originalism augmented by virtue ethics can incorporate the concept of construction without undermining originalism. This is because a judge who possesses the judicial virtues will, so far as possible, respect the Constitution's original meaning and, by hypothesis, construct the best constitutional meaning within the original meaning's parameters.

As I described above,<sup>296</sup> constitutional construction occurs when the Constitution's meaning is underdetermined. That is, using his best efforts, a judge is unable to conclude that the Constitution provides one right answer to a legal question.<sup>297</sup> In other words, the Constitution's meaning limits possible answers to a legal question, but it does not designate one answer as uniquely correct. Judges, in the context of constitutional

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justice."); *see also* Strang, *supra* note 14, at 477–78 (describing this concept in greater detail).

295. This determination, in turn, involves a significant number of subsidiary determinations that require practical wisdom for their proper resolution: Are there other plausible constitutional bases for the Act? Do state and local antidiscrimination laws adequately ensure just relationships in the absence of federal law? Are popular *mores* such that federal antidiscrimination laws are no longer necessary? Are federal antidiscrimination laws themselves sufficiently harmful in their collateral consequences that their elimination is, on balance, good?

296. *See supra* Part I.B.2.

297. In all situations of which I am aware, the Constitution has some meaning that bears on the point and therefore provides some guidance, so the original meaning is underdetermined and not indeterminate.

construction are, therefore, left with a choice. Judges must choose one of the answers that is consistent with, but not determined by, the Constitution.

As with nonoriginalist precedent, the judicial virtues of theoretical wisdom and justice-as-lawfulness will enable the virtuous judge to correctly decide what the original meaning is, allow the judge to recognize that the original meaning does not determine the outcome of the case, *and* give the judge the disposition to follow, so far as possible, that original meaning. These virtues prevent the judge from seeing underdeterminacy when the original meaning is determinate. This preserves the original meaning's primacy in constitutional interpretation.

Practical wisdom, unlike in the context of nonoriginalist precedent, performs on a significantly more "open field" here. In the nonoriginalist precedent context, the judge's practical wisdom is limited to the task of ascertaining whether and to what extent overruling would harm the Rule of Law. That is frequently a difficult task, though it is focused. By contrast here, within the known original meaning, the judge's task is to play the legislative role of constructing constitutional meaning that will best advance the common good. All of the variables that a legislator would take into account, the judge should also utilize. By contrast, constitutional interpretation, discussed below, does not place as significant a burden on judges' practical wisdom because the original meaning determines those cases' outcomes.

*b. Virtue's Place in Determinate Law: Constitutional Interpretation and Originalist Precedent*

In this section, I spell out how virtue ethics makes originalism a better theory even in those many situations where, unlike above, judicial decisions are constrained by the original meaning. The common theme here is that there are hard cases that place significant burdens on judges' faculties, and that to bear those burdens well, judges need the judicial virtues.

The core process of constitutional interpretation includes both articulating the Constitution's meaning and applying that meaning in the context of a case.<sup>298</sup> Constitutional interpretation differs from construction (and nonoriginalist precedent) because, unlike with construction, judges do not have discretion. Consequently, the virtues' roles are different, though still significant.

Constitutional interpretation occurs when the Constitution's determinate meaning is explicated. In originalism, constitutional meaning is the constitutional text's publicly understood meaning when that text was ratified. One identifies the Constitution's original meaning by looking at the text and structure of the Constitution in light of the historical, cultural, religious, and philosophical contexts in which the text was adopted. This is primarily an historical inquiry.

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298. Compare Strang, *supra* note 111, at 1767–78, with Solum, *supra* note 101, at 95, 100–08 (describing these two stages in a different manner).

A judge engaged in constitutional interpretation will need the intellectual virtue of theoretical wisdom. The need for theoretical wisdom will vary depending on, among other variables, how patent the text's original meaning is. In some situations, this is a difficult task. A possible example of this is the meaning of the Equal Protection Clause. Although there are extensive discussions of the Clause in the Reconstruction Congress, the Clause's original meaning is relatively difficult to reconstruct.<sup>299</sup>

As with other facets of originalism, judges will also need the moral virtue of justice-as-lawfulness. This ensures that the judges follow the original meaning.

A judge will utilize practical wisdom to bridge the distance between the Constitution's original meaning and the facts of a case. The larger the distance, the greater the burden practical wisdom must carry. For instance, in the late nineteenth century, the Supreme Court faced the challenge of articulating constitutional doctrine that, faithful to the Commerce Clause's original meaning, specified<sup>300</sup> how that meaning governed a changing economy and society. In particular, the challenge included properly mediating the Clause's application to new or newly common phenomena. The Court met this challenge by articulating a number of constitutional law doctrines.

The original packages doctrine is one such doctrinal move. In a series of cases, beginning in 1827 with *Brown v. Maryland*,<sup>301</sup> the Supreme Court fashioned the doctrine to mediate two constitutional commitments: (1) Congress's authority over interstate commerce; and (2) the states' reserved police power over in-state commercial transactions. The doctrine's function was to find a doctrinal line that accomplished this purpose *and* fit the facts of the world.

For example, in *Austin v. Tennessee*, the Supreme Court decided whether the doctrine applied to cigarettes imported from other states in relatively small packages.<sup>302</sup> To reach its conclusion, the Court reviewed the doctrine's seventy-year history, and how the doctrine advanced its purpose of mediating between the constitutional commitments identified above.<sup>303</sup>

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299. See, e.g., CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 140–41 (1986) (“There was clearly vagueness and some confusion in the minds of the framers about the actual language of the amendment and its relationship to the original Constitution.”); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 56 (2006) (“The record is less clear [than the 1866 Civil Rights Act] with regard to which substantive rights [were] encompassed in the broadly worded provisions of the Fourteenth Amendment.”); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1397 (1992) (“Indeed, I hesitate to attribute to most participants in the framing and ratification of the Fourteenth Amendment any precise notion of the meaning of Section 1.”); Earl M. Maltz, *The Concept of Equal Protection—A History of Inquiry*, 22 SAN DIEGO L. REV. 499, 540 (1985) (finding that the historical “evidence . . . is not entirely consistent” or is “simply ambiguous”).

300. See Strang, *supra* note 111, at 1767–78 (describing the process of specification).

301. See 25 U.S. (12 Wheat.) 419, 443 (1827).

302. See 179 U.S. 343, 350 (1900).

303. See *id.* at 351–63.

In many of the original packages doctrine cases, the Court engaged in similar line drawing. Practical wisdom facilitated this.

Originalist precedent is one—particularly important—facet of constitutional interpretation, where judges do not have discretion. To properly understand, synthesize, follow, and apply originalist precedent, a judge will need theoretical wisdom, justice-as-lawfulness, and practical wisdom.

Using the pre-New Deal Commerce Clause case law as an example, the Supreme Court had crafted a number of interrelated doctrines that formed a complex body of law. These included: the original packages doctrine,<sup>304</sup> mentioned above, the instrumentalities of commerce doctrine,<sup>305</sup> the streams of commerce doctrine,<sup>306</sup> the doctrinal distinction between commerce and manufacturing,<sup>307</sup> and the related doctrinal distinction between direct and indirect effects.<sup>308</sup> These doctrines represented the Court's attempt to follow the twin constitutional commitments to federal commerce power and state police power.<sup>309</sup> To master this intricate body of law, a judge would have needed theoretical wisdom, and to have followed it faithfully would have required justice-as-lawfulness.

### 3. Originalism Transformed into a Home for Virtue

Incorporating virtue ethics into originalism makes originalism's transformation possible. Originalists can embrace the discretion wielded by judges as a result of originalism's response to legal-realist-type criticism because virtue ethics provides the tools to show that originalism's core insights remain intact. The Constitution's original meaning retains its privileged position because of justice-as-lawfulness, which inclines judges to follow it, and theoretical wisdom helps judges accurately ascertain the original meaning.

In those situations where judges wield discretion, practical wisdom, and the moral virtues of temperance and fortitude, ensure that judges reach the humanly best result within the scope of the judge's discretion. When judges do not have discretion, the virtues ensure that judges construct the best legal doctrines.

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304. See *Brown*, 25 U.S. at 441–42; *supra* note 183 and accompanying text.

305. See *Shreveport Rate Cases*, 234 U.S. 342, 351–52 (1914); *supra* note 184 and accompanying text.

306. See *Swift & Co. v. United States*, 196 U.S. 375, 398–99 (1905); *supra* note 185 and accompanying text; see also *Stafford v. Wallace*, 258 U.S. 495, 515–16 (1922).

307. See *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

308. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–48 (1935).

309. See *E.C. Knight Co.*, 156 U.S. at 13 (“It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government.”).

## CONCLUSION

In this Article, I explained the many ways in which concepts from virtue ethics are, contrary to popular perception, compatible with an originalist theory of constitutional interpretation. More important, I showed that originalism is more normatively attractive and descriptively accurate when it takes on board virtue ethics' insights.

Originalism has transformed over the past thirty years in response to legal-realist-type criticisms. Most importantly, originalism has come to acknowledge judicial discretion in constitutional adjudication. An originalism that incorporates the lessons of virtue ethics, however, is able to simultaneously preserve originalism as a viable theory of constitutional interpretation while, at the same time, continuing to acknowledge judicial discretion. Virtue ethics enables originalist judges to effectively interpret and put into practice the Constitution's original meaning despite and, in part, because of this judicial discretion.

Similarly, incorporating virtue ethics will make originalism a stronger interpretive method in those contexts where, even though the original meaning provides a determinate answer, the case places significant burdens on the judge's judgment. In this class of cases—neither the easy cases nor those that are underdeterminate—virtue ethics provides the means to explain how judges can best decide.

An originalism that incorporates virtue ethics' insights will give the Constitution's original meaning its due. At the same time, it also gives other factors—such as the practical workability of legal doctrine—their due, all in their proper proportion. For originalists, and for nonoriginalists who value the Constitution's original meaning, this preserves originalism's core insights and value, while enabling originalism's transformation.