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I. Introduction

A concept fundamental to philosophy—virtue—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 the major philosophical traditions. On the other hand, however, this is not surprising given the sociological makeup of the legal academy. The legal academy—again, with notable exceptions—is dominated by scholars at home in modern American liberalism. The most important exception is Professor Lawrence Solum.

* Professor Law, University of Toledo College of Law. Thank you to the participants at 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. I would also like to gratefully acknowledge the research support for this Article provided by the University of Toledo College of Law.

1 Saint Thomas Aquinas’ famous definition of virtue is: “virtue is a habit by which we work well.” I-II St. Thomas Aquinas, Summa Theologica, Q. 56, a. 3 (English Dominican trans., Benziger Bros. ed., 1946); 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.


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 (2005) (arguing that the American legal academy is “liberal” as that term is understood in modern political discourse). For a critical response see Michael Vitelio, 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 , at 3-7 (introducing the sole book-length treatment of law and virtue ethics).
in the consequentialist and deontological traditions. 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” originalism is the most normatively attractive form of originalism because it leads to the greatest protection for natural rights. Others, such as Professors John McGinnis and Michael Rappaport, have defended originalism based on the good consequences its adoption would produce. To date, no originalists have articulated what role, if any, virtue ethics’ concepts should play in a fully developed originalism.

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. The second common perception is that originalism operates primarily through legal rules

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5 This is exemplified by the fact that legal scholars routinely utilize concepts at home in the consequentialist and deontological traditions, but rarely utilize concepts from the Aristotelian tradition. See Farrelly & Solum, supra note, 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 Andrew Spiropolous, Rights Done Right: A Critique of Libertarian Originalism, 78 UMKC L. Rev. 661 (2010); Steven G. Calabresi, The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett, 103 MICH. L. Rev. 1081 (2005).


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. Lawrence B. Solum, Natural Justice, 51 AM. J. JURIS. 65, 76-92 (2006); Lawrence B. Solum, The Aretaic Turn in Constitutional Theory, 70 BROOK. L. Rev. 475, 491-520 (2005); Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centered Theory of Judging, 34 METAPHILOSOPHY 178 (2003). He has also briefly noted how virtue ethics may impact “constitutional formalism.” Solum, supra note, at 520-22.

10 See, e.g., HURSTHOUSE, supra note, at 35-42 (identifying and responding to this view).
derived from the Constitution’s original meaning.\textsuperscript{11} 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.\textsuperscript{12} 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.\textsuperscript{13} 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. I touched on aspects of a theory of judicial virtue in my previous writings,\textsuperscript{14} and in this Article I more-fully articulate an originalist theory of judicial virtue.

\textsuperscript{11} The primary source of this view appears to be Justice Scalia who, in his scholarly writings, Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175 (1989), and his judicial opinions, \textit{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 are outliers (on this issue).

\textsuperscript{12} See \textit{e.g.}, Suzanna Sherry, \textit{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, \textit{The Four Pillars of Constitutional Doctrine}, 32 CARDOZO L. REV. 969, 971-74 (2011) (focusing more on judicial craftsmanship). For the classic explanation of judicial craftsmanship see Karl L. Llewellyn, \textit{The Common Law Tradition: Deciding Appeals} 3-4, 214, 224-25 (1960).

\textsuperscript{13} Originalism’s acknowledgment of judicial discretion comes primarily in its embrace of constitutional construction and the preservation of some nonoriginalist precedent.

Similarly, incorporating virtue ethics will make originalism better 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\textsuperscript{15} nor those that are underdeterminate\textsuperscript{16}—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,\textsuperscript{17} this preserves originalism’s core insights, while enabling originalism’s transformation.

*Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism* 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 this 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 in 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.\textsuperscript{18}

Part II 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 have their roots in the Aristotelian tradition. This situation parallels that of ethics when Elizabeth Anscombe’s famous *Modern Moral Philosophy* appeared,\textsuperscript{19} precipitating the move toward recovering virtue ethics.


\textsuperscript{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).


In Part III, I describe virtue ethics. 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 IV, I turn to the heart of the Article: virtue ethics’ contributions to originalism. I show that though, at least at first blush, the two appear incompatible, originalism can incorporate virtue ethics’ insights. 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 long-term and one more immediate. The immediate goal of this Article is to respond to a recent spate of criticism of originalism. For example, Professors Thomas Colby and Peter Smith, in a series of papers, have argued that originalism is fatally compromised by its admission of judicial discretion. As Professor Colby explained, “[j]udicial constraint was [originalism’s] heart and soul—its raison d’etre,” which originalists have sacrificed by transforming originalism. I argue below that, by utilizing the conceptual tools provided by virtue ethics, this transformed originalism is able to retain its core insights—to retain 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 taking the insights of the Aristotelian philosophical tradition and applying them to the United States Constitution. Virtue ethics is a key part of that tradition. Therefore, this Article explores how virtue ethics contributes to understanding constitutional interpretation.

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20 As co-authors and individually.
21 Colby, supra note , at 713; Smith, supra note , at 707; Colby & Smith, supra note , at 239.
22 Colby, supra note , at 714-15.
23 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) (providing the first major piece of this project).
II. Originalism’s Rise and Transformation

A. Originalism’s First Generation

Originalism began as a scholarly movement in the 1970s whose aim was to criticize the perceived excesses of the Warren Court.\(^\text{24}\) 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.\(^\text{25}\) Only by tying judges’ constitutional interpretations to the meaning intended by the Framers and Ratifiers, argued then-Justice Rehnquist in 1976, will judges remain in their proper—limited—role.\(^\text{26}\)

The first major originalists scholars were Robert Bork and Raoul Berger.\(^\text{27}\) 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\(^\text{28}\)—argued that the Supreme Court’s task is to preserve the “Madisonian” compromise embodied in the Constitution.\(^\text{29}\) When the Supreme Court performs this function, it acts legitimately and, when it fails to do so, the Court “violates the postulates of the Madisonian model that alone justifies its power.”\(^\text{30}\)

Bork argued that to 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.”\(^\text{31}\) Instead, the


\(^\text{25}\) See Paul Brest, *The Misconceived Quest for 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”).


\(^\text{27}\) Then-Justice Rehnquist also wrote an early and much cited originalist article. *Id.*

\(^\text{28}\) Bork, *supra* note 7, at 1.

\(^\text{29}\) *Id.* at 3.

\(^\text{30}\) *Id.*

\(^\text{31}\) *Id.* at 5.
Constitution’s originally intended meaning would restrain the Court. “The judge must stick close to the text and the history, and their fair implication.”

Raoul Berger’s 1977 Government by Judiciary, raised the stakes by arguing that much of the Warren and Burger Courts’ constitutional edifice was illegitimate. Berger contended that Supreme Court judicial review was legitimate only when limited to enforcing the Constitution. Effectuating this limited form of judicial review required the Supreme Court to follow the Constitution’s original intent. The Warren Court, whose case law greatly deviated from the Fourteenth Amendment’s original intent, exceeded its proper constitutional role and therefore was undemocratic. “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.’”

Central to originalism’s ability to cabin judicial discretion, its advocates claimed, was that originalism would lead to legal norms of relatively concrete breadth. This resulted from the focus, described further below, on the constitutional provision’s framers’ concrete intentions. Bork’s 1971 discussion of the Fourteenth Amendment’s meaning, for instance, focused on whether the “history . . . reveal[ed] detailed choices” by the Framers.

The normative attractiveness of originalism’s ability to cabin judicial discretion was tied to a second, related claim: judges limited by originalism respected democracy. In originalism’s infancy, its critical stance meant that it focused on the Warren and

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32 Id. at 8.
33 BERGER, supra.
34 Id. at 4
35 Id; see also id. at 402 (defining original intent as “the meaning attached by the Framers to the words they employed in the Constitution”).
36 See id. at 3 (“The Fourteenth Amendment is the case study par excellence of . . . the Supreme Court’s ‘exercise of the amendment 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.”).
37 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 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 chosen by the consent of the governed”).
38 Id. at 314.
39 Whittington, supra note , at 603.
40 Bork, supra note , at 13; see also BERGER, supra note , at 17-18 (describing the original intent of Section 1 of the Fourteenth Amendment in concrete terms); id. at 410 (describing the Equal Protection Clause in rule-like terms).
41 Rehnquist, supra note , at 696-97.
Burger Court’s most controversial cases, which involved the Court striking down state and federal laws that purportedly infringed on individual rights.\textsuperscript{42} \textit{Griswold v. Connecticut},\textsuperscript{43} and later \textit{Roe v. Wade},\textsuperscript{44} were the most prominent examples of this because of the Court’s use of unenumerated rights,\textsuperscript{45} though the Court’s expansive interpretations of more textually-rooted criminal procedure rights, such as in \textit{Miranda v. Arizona},\textsuperscript{46} received significant criticism as well.\textsuperscript{47} 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.\textsuperscript{48} According to Robert Bork, “[c]ourts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”\textsuperscript{49}

A third characteristic of this early conception of originalism was its focus on original intent.\textsuperscript{50} The original intent of a constitutional provision is the meaning the provision’s framers intended it to mean.\textsuperscript{51} This facet of originalism was relatively unconsciously adopted. It does not appear that early originalists explored the reasons for and implications of adopting an intentionalist focus.\textsuperscript{52} For instance, in an early discussion of \textit{Brown v. Board of Education}, Robert Bork referred to the “framers’ intent” and the Fourteenth Amendment’s “legislative history” without explaining why that was the authoritative source of constitutional meaning.\textsuperscript{53} The tentativeness of this commitment to

\textsuperscript{42} See Whittington, \textit{supra} note , at 601-03 (providing a typically excellent review of the characteristics of early originalism).
\textsuperscript{43} See Bork, \textit{supra} note , at 7 (“\textit{Griswold v. Connecticut} [is] in many ways a typical decision of the Warren Court.”); BERGER, \textit{supra} note , at 286-87 (using \textit{Griswold} as an example of unconstrained judging).
\textsuperscript{44} Whittington, \textit{supra} note , at 603.
\textsuperscript{45} See Bork, \textit{supra} note , at 11 (criticizing the Supreme Court’s substantive due process and “substantive equal protection” case law).
\textsuperscript{47} 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.
\textsuperscript{48} See Bork, \textit{supra} note , at 6 (“[A] Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”).
\textsuperscript{49} \textit{Id.} at 10-11.
\textsuperscript{50} Whittington, \textit{supra} note , at 603; BERGER, \textit{supra} note , at 402.
\textsuperscript{51} BERGER, \textit{supra} note , at 402.
\textsuperscript{52} 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).
\textsuperscript{53} Bork, \textit{supra} note , at 13, 14.
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.\(^{54}\)

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

1. *Nonoriginalist Criticisms*

Nonoriginalists raised a host of criticisms.\(^{55}\) The most powerful, given originalism’s critical stance of 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 such criticisms.

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\(^{56}\); or, if possible, it was practically difficult such that the endeavor would regularly fail.\(^{57}\) 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.”\(^{58}\)

Second, nonoriginalists argued that, even when one could reliably ascertain the Constitution’s original intent, it frequently

\(^{54}\) A second reason 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. Whittington, supra note , at 603-04.


\(^{57}\) *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. *Id.* at 477-82.
“ran out.”

This occurs, nonoriginalists argued, when societal circumstances have changed to such a degree that the original intent’s application is underdeterminate. The original intent also “ran out” when, due to its high level of generality, it did not determine the outcome of concrete cases. 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 inconsistent with existing legal practice. Originalism’s dramatic inconsistency raised the specter of legal instability.

Fourth, nonoriginalists charged that originalism was unacceptable because of the bad consequences to which its adoption would lead. 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.”

2. Originalism’s Transformation: The Second Generation

In response to these criticisms, originalists reformulated originalism. For purposes of this Article, the most fundamental way in which originalism changed in response to nonoriginalist

59 See Brest, supra note , at 222 (arguing that the “interpreter’s understanding of the original understanding may be so underdeterminate 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]”) (internal quotes omitted).
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 Brest, supra note , 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 . . . , by our notions of morals”).
65 Brest, supra note , at 221.
criticism was that most originalists acknowledged that judges have discretion in some situations. 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.”

Relatedly, as originalists explored the process of originalist interpretation and adjudication, they emphasized the crucial role 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. Original meaning is the conventional meaning of the Constitution’s text at the time of adoption. Although the subjective 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.

Original meaning originalism, with its more limited interpretative resources from which to draw, results in relatively more cases where the Constitution’s meanings “runs out.” Original meaning originalism opens up the likelihood of underdeterminacy because it limits the “data” upon which interpretation relies. Original meaning originalism relies on language conventions. Conventions of language usage are positive human artifacts without hard edges and frequently lacking in richness. Using the classic, “no vehicles in the park”

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67 Whittington, supra note , at 609.
68 See Whittington, supra note , at 609 (“[T]he new originalism is focused less on the concrete intentions of the individual drafters of the constitutional text than on the public meaning of the text that was adopted.”).
69 See Barnett, supra note , at 89 (defining the original meaning as “the meaning the Constitution’s words had at the time they were enacted”); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 35 (1999) (defining the original meaning as “the meaning understood at the time of the law’s enactment”) (quotations omitted).
70 Whittington, supra note , at 609-10.
71 See Solum, supra note , at 473 (defining underdeterminacy).
72 By “data,” I mean the pertinent evidence utilized by the respective originalist camps to articulate the Constitution’s meaning.
73 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 (2009) (articulating and advocating use of these conventions).
74 See Plato, The Statesman 294b-c (Robin Waterfield trans., 1995) (“[L]aw is like a stubborn, stupid person who refused to allow the slightest deviation
example, 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 would preclude an ambulance on a life-saving mission.

By contrast, original intent originalism’s “data set” is richer. In addition to language conventions, an interpreter has access to information that can both provide more definition to a language contention’s boundaries and a greater thickness within those boundaries. Most importantly, original intent originalism included within its interpretative data the framers’ originally expected applications and their purposes or goals.

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 add thickness to the meaning of “vehicles” and excludes 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’ embrace of the concepts of vagueness and ambiguity to describe the sources of this underdeterminacy.

In practice, and for many situations, original meaning and original intent originalism will arrive at the same conclusion. However, there are many constitutional terms and phrases for which original intent originalism will provide more evidence from which to draw. Professor Richard Kay has likewise concluded that “public meaning originalism will generate more cases of

from or questioning of its own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.”)

77 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).
78 Solum, supra note , at 17-19.
80 Solum, supra note , at 19.
constitutional underdeterminacy than will the originalism of original intentions.\textsuperscript{81}

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 correct answer.\textsuperscript{82} In those situations, the closer rule will instruct the interpreter to chose one of the plausible (but not uniquely correct) candidate interpretations.\textsuperscript{83}

For example, one of the interpretative rules explicitly embraced by the Constitution’s Ninth and Tenth Amendments is that Congress’ powers should be narrowly interpreted.\textsuperscript{84} This means that, if there are two plausible competing interpretations of, for instance, Congress’ 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,\textsuperscript{85} New York v. United States\textsuperscript{86} and Printz v. United States.\textsuperscript{87}

Professors John McGinnis and Michael Rappaport’s approach, labeled original methods originalism, explicitly embraces closure rules.\textsuperscript{88} They argue that to uncover the Constitution’s meaning,\textsuperscript{89} originalists must utilize the interpretative rules in place when the Constitution’s text was ratified.\textsuperscript{90} Original methods originalism’s embrace of closure rules is best exemplified by Professors McGinnis’ and Rappaport’s contention that it limits or eliminates the need to

\textsuperscript{81} Kay, \textit{supra} note , at 721.
\textsuperscript{82} 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. \textit{See} McGinnis & Rappaport, \textit{supra} note , at 774 (describing some possible closure rules in relation to vagueness).
\textsuperscript{83} 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.
\textsuperscript{85} \textit{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.”).
\textsuperscript{87} Printz v. United States, 521 U.S. 898, 919 (1997).
\textsuperscript{88} McGinnis & Rappaport, \textit{supra} note , at 751.
\textsuperscript{89} Both the original meaning and intent versions of originalism. \textit{Id.} at 751.
\textsuperscript{90} \textit{Id.} at 751.
resort to constitutional construction. Instead of resorting to construction when the Constitution’s meaning is vague or ambiguous, they propose that the original interpretative methods resolve underdeterminacy.

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, conceded that the Constitution’s originally intended meaning “runs out.”

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

91 Id. at 752.
92 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 , at 721 n.75.
93 Larry Alexander, Telepathic Law, 27 CONST. COMM. 139, 142-43 (2010) (stating that “originalists should concede” that there is “some range of underdeterminacy or uncertainty”).
94 As noted earlier, McGinnis and Rappaport argue that utilization of interpretative closure rules eliminates all (or almost all) underdeterminacy. McGinnis & Rappaport, supra note , at 752.
95 All of the most prominent original meaning originalists have incorporated construction into their understandings of originalism. BARNETT, supra note , at 118-30; WHITTINGTON, supra note , at 7-13; Solum, supra note , at 16; 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).
96 WHITTINGTON, supra note , at 7.
97 Solum, supra note , at 16.
98 Compare WHITTINGTON, supra note , at 7, 9, 11 (arguing that construction is a political and hence non-judicial enterprise); with BARNETT, supra note , at 122 (“I do not share Whittington’s characterization of the process of construction as ‘political.’”); see also Keith E. Whittington, Constructing a New American Constitution, 27 CONST. COMM. 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”).
originalists agree that construction involves the exercise of relatively unbounded choice. 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. This intermediate position—intermediate between “get rid of it all” and “keep it all” positions—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. Applying these factors will frequently be challenging, and judges will frequently have discretion in

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99 That is, relative to the activity of constitutional interpretation.
100 BARNETT, supra note 4, at 122; WHITTINGTON, supra note 5, at 7.

Professor Lawrence Solum has recently provided a more thorough articulation his conception of constitutional construction. Lawrence B. Solum, The Interpretation-Construction Distinction, 27 CONST. COMM. 95 (2010). There, Professor Solum argued that constitutional interpretation is the articulation of the Constitution’s linguistic meaning, and construction is giving legal effect to constitutional text. Id. at 95-96. Professor Solum’s understanding of construction appears to differ from my description in the text 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.

101 There is a fairly even split among originalists on whether, and to what extent originalism preserves at least some nonoriginalist precedent. Here are some originalists who argue in favor of preservation: Kurt T. Lash, Originalism, Popular Sovereignty, and Reverse Stare Decisis, 93 VA. L. REV. 1437 (2007); John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 NW. U.L. REV. 803 (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 (2006); Strang, supra note 8, at 419.

102 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).

103 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 8, at 472.
doing so, especially if the factors point in different directions and possess different weights.\textsuperscript{104}

Take, for example, Katzenbach \textit{v.} McClung,\textsuperscript{105} which involved the question of the scope of Congress’ Commerce Clause authority. The Supreme Court relied on the substantial effects test, most prominently described in the nonoriginalist precedent Wickard \textit{v.} Filburn,\textsuperscript{106} to uphold Title II of the 1964 Civil Rights Act.\textsuperscript{107} This, in turn, makes McClung a nonoriginalist precedent.\textsuperscript{108}

If a case arose today in which McClung was challenged, an originalist judge would have to utilize the three factors I laid out above. 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,” permits space for an originalist judge to retain nonoriginalist precedents to protect the “claims made by particular persons made in reliance on mistaken precedent.”\textsuperscript{109} 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 of the Constitution’s original meaning; and originalist precedent.

\textsuperscript{104} See id. 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 precedent.”).
\textsuperscript{105} Katzenbach \textit{v.} McClung, 379 U.S. 294 (1964).
\textsuperscript{106} Wickard \textit{v.} Filburn, 317 U.S. 111 (1942).
\textsuperscript{107} McClung, 379 U.S. at 302-04.
\textsuperscript{108} Assuming that there is not another originalist basis for the decision.
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 application of that meaning.\(^{110}\) Second, and relatedly, originalists have argued that originalist precedent plays a central role in originalism.\(^{111}\) Both 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 original meaning.

C. Impasse in Normative Justifications for Originalism

Originalists have offered a stunning variety of normative justifications for originalism.\(^{112}\) However, no one has yet offered a normative foundation in virtue ethics. Instead, two camps of originalists state their claims which, in turn, are premised on conflicting philosophical traditions. One group grounds originalism in the deontological tradition,\(^{113}\) and the other utilizes a consequentialist foundation.\(^{114}\) 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 Randy 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 attributed to them by

\(^{110}\) Solum, \textit{supra} note \textcolor{red}{3} , at 96; Strang, \textit{supra} note \textcolor{red}{3} , at 1767.

\(^{111}\) Solum, \textit{supra} note \textcolor{red}{3} , at 185; Strang, \textit{supra} note \textcolor{red}{3} , at 1766-88.

\(^{112}\) \textit{BARNETT, supra} note \textcolor{red}{3} , at 54-68, 109-13 (arguing that originalism best protects natural rights); \textit{WHITTINGTON, supra} note \textcolor{red}{3} , at 110–59 (grounding originalism in popular sovereignty); McGinnis & Rappaport, \textit{supra} note \textcolor{red}{3} , at 802–05 (arguing that originalism is justified because it protects the good consequences that arise from the Constitution’s supermajority requirements); Strang, \textit{supra} note \textcolor{red}{3} , at 983–97 (arguing that originalism best secures human flourishing). Lawrence Solum has also argued that one version of originalism, what he calls Semantic Originalism, is compatible with most normative justifications for originalism. Lawrence B. Solum, \textit{Semantic Originalism}, at 128–34, \textit{available} at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

\(^{113}\) \textit{BARNETT, supra} note \textcolor{red}{3} , at 54-68.

\(^{114}\) McGinnis & Rappaport, \textit{supra} note \textcolor{red}{3} , at 802-05.
Barnett.115 Barnett, with his characteristic insight, then argued that his defense of originalism can incorporate such scholars because it can maximize ultimate values other than natural rights, such as good consequences.116

This situation parallels that in ethics when Elizabeth Anscombe published her path breaking piece, *Modern Moral Philosophy*,117 in 1958.118 There, Anscombe argued that ethics had been locked in an ever-more-intricate, though still interminable, debate, between consequentialists and deontologists.119 She suggested that a return to virtue ethics might redirect the debate and possibly even overcome the impasse.120

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 made better 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, this 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?121 And, why do the burdens placed on judges’ judgment and capacities not undercut originalism’s contribution thesis?122 In Part IV, I show that virtue ethics provides answers to these

115 BARNETT, supra note , at 3-4.

116 Id.

117 Anscombe, supra note , at 1.

118 A similar claim is made and expanded upon in Farrelly & Solum, supra note , at 3-6.

119 Anscombe, supra note , at 9, 13-14.

120 Id. at 18.

121 For the most thorough discussion of the source and contributions theses in print see Solum, supra note , at 954; see also Solum, supra note , at 29-32 (describing the theses); Barnett, supra note , at 66 (providing a slightly different statement of originalism’s core propositions).

122 See sources cited id. (discussing the contribution thesis).
questions. Virtue ethics has the conceptual “tool kit” to explain how the transformed originalism maintains its core commitments.

III. 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.\(^{123}\) It has its origin in Greek thought, particularly Aristotle, Plato, and Socrates.\(^{124}\) After the fall of the Western Empire\(^{125}\) and, particularly in the High Middle Ages,\(^{126}\) St. Thomas Aquinas began the synthesis of Aristotle’s thought with the Christian philosophical inheritance, especially from St. Augustine.\(^{127}\) The Aristotelian tradition flourished until the onset of the Reformation when, due to many factors,\(^{128}\) other philosophical traditions eclipsed it in many areas of Europe and the West more generally.\(^{129}\)

The alacrity and comprehensiveness of this move away from the Aristotelian tradition varied based on many factors. 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\(^{130}\)

\(^{123}\) See GEORGE, supra note , at 5 (describing the Aristotelian tradition in this manner).

\(^{124}\) See ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 89-90 (1988) (“It is Plato’s project which Aristotle vindicates and . . . completes.”).


\(^{128}\) These factors included the Reformers perception that their religious doctrines were at odds with Aristotle’s philosophical claims. ALASDAIR MACINTYRE, AFTER VIRTUE 165 (2d ed. 1984). The Reformers also perceived in Aristotle a too-close ally of the Catholic Church. 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. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 113 (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.

\(^{129}\) MACINTYRE, supra note , at 209-13.

\(^{130}\) GORDLEY, supra note , at 69-71.
and the rise of capitalism.\textsuperscript{131} By the late-nineteenth century—outside of subcultures such as Catholic institutions—the Aristotelian tradition was swept from the field in the West.\textsuperscript{132}

A world-wide natural law revival occurred in the late-nineteenth and early-twentieth centuries.\textsuperscript{133} Focus on Aristotle’s and especially St. Thomas Aquinas’ thought characterized what is commonly labeled the Neo-Scholastic or Neo-Thomistic revival.\textsuperscript{134} This revival was, to a large but not complete degree,\textsuperscript{135} limited to the Catholic intellectual world. The revival, however, fragmented in the late-1950s and early-1960s.\textsuperscript{136}

In the past thirty years, a more broad-based natural law revival occurred. The commonly cited\textsuperscript{137} initiation of today’s revival is the publication of John Finnis’ \textit{Natural Law and Natural Rights} in 1980.\textsuperscript{138} Contemporaneous with this natural law revival, has been the modern revival of interest virtue ethics, which I discuss below.\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{131} MACINTYRE, \textit{supra} note , at 211.
\item \textsuperscript{132} See GORDLEY, \textit{supra} note , at 161 (“[T]he authority of Aristotle collapsed in the seventeenth and eighteenth centuries.”).
\item \textsuperscript{133} GERALD MCCOOL, S.J., \textit{THE NEO-THOMISTS} 31-46 (1994); MACINTYRE, \textit{supra} note , at 72-77.
\item \textsuperscript{134} MCCOOL, \textit{supra} note , at 9-46; GERALD MCCOOL, S.J., \textit{FROM UNITY TO PLURALISM: THE INTERNAL EVOLUTION OF THOMISM} 29-32 (1989).
\item \textsuperscript{135} For instance, Mortimer Adler, a prominent mid-twentieth century philosopher, was a well-known Thomist. See William Grimes, Mortimer Adler, 98 \textit{Dies; Helped Create Study of Classics}, N.Y. TIMES, June 29, 2001 (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. JULIE KERNAN, \textit{OUR FRIEND, JACQUES MARITAIN} (1975).
\item \textsuperscript{136} MCCOOL, \textit{supra} note , at 34-35, 224-30.
\item \textsuperscript{138} JOHN FINNIS, \textit{NATURAL LAW AND NATURAL RIGHTS} (1980).
\item \textsuperscript{139} The revival of interest in virtue ethics is frequently tied to Elizabeth Anscombe’s 1958 piece, \textit{Modern Moral Philosophy}. 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. \textit{See}, \textit{e.g.}, ROMANUS CESSARIO, O.P., \textit{INTRODUCTION TO MORAL THEOLOGY} 129-30, 241-42 (2001) (making this claim).
\end{itemize}
B. Relationship Between the Broader Aristotelian Tradition and Virtue Ethics

The Aristotelian tradition has many facets. It makes robust theoretical and practical claims.140 In this Article, I focus on one concept at home in the tradition: virtue.141

Philosophy is traditionally divided into theoretical (also known as speculative)142 and practical subdisciplines.143 Theoretical philosophy’s goal is truth about reality,144 such as metaphysics which deals with the subject of being.145 Practical philosophy’s goal is to guide human action, such as ethics, the subject matter of which includes the licitness of human actions.146 Virtue ethics falls into the category of practical philosophy.147

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 are148: rational animals.149 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.

140 See e.g., ST. THOMAS, supra note , at I-I, Q. 46, a. 1 (arguing, against Aristotle, that the universe was created by an eternal God); id. I-I, Q. 94, a. 2 (describing the first principle of natural law and three primary principles of natural law: self-preservation, procreation, and practical reasonableness).
141 For St. Thomas’ most wide-ranging discussion of virtue see his Treatise on Habits. Id. at I-II, QQ. 49-89.
143 See id. at 21 (describing the four orders of science which include two practical orders and two non-practical orders).
146 MCIERNELY, supra note , at 23-25.
147 ST. THOMAS, supra note , at I-II, Q. 55, a.1.
148 See id. at I-II, Q. 50, a. 2 (tying the virtues to the soul).
149 See id. at I-I, Q. 76, a. 1 (stating that man has a rational soul that is united with his body).
C. Virtue Ethics, Natural Law, and the Return to Virtue Ethics

Virtue ethics is one of the three prominent ethical traditions in the West. Its most wide-spread form is Aristotelian. The two other competing ethical traditions are deontology and consequentialism. I will first describe virtue ethics and its relationship to the broader Aristotelian philosophical tradition, paying particular attention to 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. In answer to what is usually taken as the fundamental ethical question of “which course of conduct is the correct one,” a virtue theorist answers, “the course of conduct that a virtuous person would characteristically take.” However, virtue ethics pushes back against the question itself. In virtue ethics, the fundamental ethical issue is not action, it is character. Virtue theorists argue that the focus of ethical inquiry should be the instantiation and exercise of virtue, not an algorithm of right action.

Virtue is a habit—an entrenched disposition of character—to perform a human function well. For example, the virtue of fortitude enables one to ascertain what courage requires in

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150 Hursthouse, supra note , at 1-3.
151 See id. at 8 (articulating a “neo-Aristotelian” virtue ethics); McNerny, supra note , at 12-25 (describing Aristotle’s ethics and how it formed the basis for Thomistic ethics); St. Thomas, supra note , at I-II, Q. 55, a. 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.

152 Hursthouse, supra note , at 1-3.
153 Id. at 1.
154 Id. at 26.
155 Id. at 28.
156 Id. at 29.
157 Id. at 2-3.
158 See St. Thomas, supra note , at I-II, Q. 56, a.3 (“[V]irtue is a habit by which we work well.”).
159 Hursthouse, supra note , at 10-12.
concrete situations and to—willingly—act accordingly.\textsuperscript{160} A person who possesses fortitude will know what courage requires in particular situations, have the intellectual disposition to act courageously when called upon, be emotionally disposed to act courageously, and will reliably act courageously.\textsuperscript{161} “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.”\textsuperscript{162}

Virtues are conventionally divided into two categories\textsuperscript{163}: intellectual virtues and moral virtues.\textsuperscript{164} The intellectual virtues perfect our reasoning faculties. Those intellectual virtues located in the speculative intellect are understanding, science, and theoretical wisdom\textsuperscript{165}; and the intellectual virtues in the practical intellect are practical wisdom or prudence, and art.\textsuperscript{166} The moral virtues perfect our appetites and most prominently include justice, temperance, and fortitude.\textsuperscript{167}

Later, in Part IV, I will 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.\textsuperscript{168} Professor Lawrence Solum identified and described the primary virtues required for judging,\textsuperscript{169} and my discussion will parallel his excellent scholarship.

\textsuperscript{160} See \textsc{Josef Pieper}, \textit{The Four Cardinal Virtues} 115-41 (1966) (describing the virtue of fortitude). Being virtuous, including being courageous, requires the assistance of practical wisdom. \textsc{Hursthouse}, \textit{supra} note 1, at 12.

\textsuperscript{161} See \textsc{Hursthouse}, \textit{supra} note 1, at 10-12 (making a similar claim regarding honesty).

\textsuperscript{162} \textit{Id.} at 13.

\textsuperscript{163} 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. \textsc{St. Thomas}, \textit{supra} note 1, at I-II, Q. 56, a. 3, while moral virtues are facets of the irrational, sensitive portion of the soul. \textit{Id.} at I-II, Q. 56, a. 4.

\textsuperscript{164} \textit{Id.} at I-II, Q. 56, aa. 3-4.

\textsuperscript{165} \textit{Id.} at I-II, Q. 57, a. 2.

\textsuperscript{166} See \textsc{McInerny}, \textit{supra} note 1, at 96 (giving this description).

\textsuperscript{167} \textit{Id.} at 97-98.

\textsuperscript{168} The virtues correspond to vices. For instance, the virtue of theoretical wisdom corresponds to the vice of stupidity. See \textsc{Hursthouse}, \textit{supra} note 1, at 36 (describing how virtue theorists may articulate rules of conduct from virtues and their corresponding vices).

\textsuperscript{169} Professor Solum has written on this subject in many fora. \textsc{Farrelly} \& \textsc{Solum}, \textit{supra} note 1, at 1-23, 142-92; \textsc{Lawrence B. Solum}, \textit{Virtue Jurisprudence: A Virtue-Centered Theory of Judging}, 34 \textsc{Metaphilosophy} 178 (2003); \textsc{Lawrence B. Solum}, \textit{The Aretiac Turn in Constitutional Theory}, 70
The principal judicial virtues include: theoretical wisdom; practical wisdom; justice-as-lawfulness; temperance\textsuperscript{170}; and fortitude. Next, I will describe each of these virtues in more detail.

A judge is an excellent judge 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,\textsuperscript{171} 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.\textsuperscript{172}

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.\textsuperscript{173} 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 the judge gathers in the context of a particular case.\textsuperscript{174} Building on this knowledge of the legal data, the judge must then uncover the relationship of the pertinent legal materials; which of the legal data structures the other pieces of data and how the data is structured.\textsuperscript{175} Theoretical wisdom permits the judge to arrive at the structure of legal norms governing a case.\textsuperscript{176}

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, along with any authoritative practices under the Clause.\textsuperscript{177} Then, the judge would

\textsuperscript{170} Professor Solum identified the additional virtue of judicial temperament. Solum, \textit{supra} note , at 191.

\textsuperscript{171} \textsc{ronald dworkin}, \textit{taking rights seriously} 81-130 (1977).

\textsuperscript{172} See Solum, \textit{supra} note , at 182-83 (making this point regarding Ronald Dworkin’s theory of law as integrity).

\textsuperscript{173} See \textsc{steven j. burton}, \textit{judging in good faith} 51-54 (1992) (describing the reasons that judges incorporate into their analysis).

\textsuperscript{174} See Solum, \textit{supra} note , at 191 (describing how a judge’s pre-existing mastery of law is pertinent to but not a manifestation of theoretical wisdom).

\textsuperscript{175} \textsc{burton}, \textit{supra} note , at 54-59; \textsc{strang}, \textit{supra} note , at 66-67.

\textsuperscript{176} As Professor Solum has pointed out, theoretical wisdom is also important because its gives judges “the ability to grasp the facts of disputes that may involve particular disciplines.” Solum, \textit{supra} note , at 191.

\textsuperscript{177} See \textit{Kelo v. new london, connecticut}, 545 U.S. 469, 506-14 (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 \textit{county of wayne v. hathcock}, 684
synthesize this data into a coherent legal structure. Most frequently, this takes the form of the legal rules, standards, or principles tailored to the factual context presented by the case. 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 moral 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 the identified goods. Practical wisdom, in the context of judging, is primarily concerned with the second task. Practical wisdom provides the capacity to articulate legal doctrine that mediates legal meaning and the facts presented in cases.

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 Supreme Court created a series of doctrines, such as the original packages doctrine and the

N.W. 2d 765, 779-83 (Mich. 2004) (surveying the Michigan Constitution’s text and original understanding of that text).

See Kelo, 545 U.S. at 514 (“[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.”).

ST. THOMAS, supra note , at I-II, Q. 57, a. 5; Solum, supra note , at 192.

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 infra Part IV.C.3.

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 , at 486 (describing the relatively free-ranging role practical wisdom will play in the context of nonoriginalist precedent).

See Brown v. Maryland, 25 U.S. 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
instrumentalities of commerce doctrine, to do just that. These legal doctrines bridged the analytical space between the Clause’s original meaning and the recurring factual situations presented by the cases in which the Court articulated those doctrines.

Justice-as-lawfulness is the virtue of giving one’s society’s laws their due. Justice-as-lawfulness is, in many ways, the excellence that defines a good judge qua judge. Saint Thomas Aquinas recognized this when he described the etymology of “judge.” Without justice, a judge’s incredible intellect, stout courage, and temperate temperament would only make the judge worse.

A just judge is one who exercises judgment “according to the written law.” 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.” Saint Thomas’ 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. In this, St. Thomas followed Aristotle.

The virtue of justice-as-lawfulness has the most “bite” when a judge faces a law that does not—at least in that instance—
advance the common good.\footnote{For example, if the law is not the product of practical wisdom and is instead “special interest legislation” that violates distributive justice. ST. THOMAS, supra note , at I-II, Q. 96, a. 4.} For instance, 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.\footnote{DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989).} 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.”\footnote{Id. at 203.} The Court’s faithfulness to the Constitution—its refusal to improperly expand the Due Process Clause’s scope\footnote{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).}—exemplified justice-as-lawfulness.\footnote{DeShaney, 489 U.S. at 203.}

Temperance and fortitude describe two facets of judicial character that a judge must possess to rule according to the law.\footnote{See Solum, supra note , at 189-91 (describing these virtues).} A temperate judge will hold in check his sensual appetites.\footnote{ST. THOMAS, supra note , at II-II, Q. 141, a. 1-2.} A temperate judge will be resistant to the allure of, for instance, the “good life” that a bribe could buy.\footnote{See United States v. Nixon, 816 F.2d 1022, 1023 (1987) (describing how federal 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”).} Courage is the firmness of mind that enables one to react appropriately to danger,\footnote{ST. THOMAS, supra note , at II-II, Q. 123, a. 1-2.} 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.\footnote{See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1971) (describing the challenges faced by federal judges in the South enforcing desegregation).}

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.\footnote{Aristotle used the term eudaimonia to describe the end goal of human action. This term was traditionally translated “happiness.” See ARISTOTLE, NICOMACHEAN ETHICS 1095a (D.P. Chase trans., 1947) (translating as
Virtue ethics is teleological because the goal towards which the virtues enable their possessor to move is human flourishing. 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. Humans are distinct from other animals by having the capacity to reason. As a result, a human will be most fully human when he exercises his reason—both theoretical and practical—excellently. A person’s excellent utilization of their intellectual faculties is acting virtuously. Therefore, human flourishing is partially constituted by virtue.

Virtue also equips humans to achieve human flourishing. The virtues are those habits of character that perfect the portion of their possessor to which they obtain. For example, a human does not flourish if he is not temperate. A person who characteristically eats excessively has the vice intemperance. That person has difficulty controlling his pursuit of physical goods, like food and drink. 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 much 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 complimentary mechanisms that direct...
humans toward human flourishing.\textsuperscript{215} Virtues are internal guides to flourishing, while natural law provides external guidance.\textsuperscript{216}

Natural law is the body of norms that identifies which actions are, and which are not conducive to human flourishing.\textsuperscript{217} 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.\textsuperscript{218} Natural law precepts are tied to human nature via the goods that natural law norms direct humans to instantiate.\textsuperscript{219} Primary among the characteristics of humans is both a rational and animal nature.\textsuperscript{220} For instance, the first principles of practical reason identified by St. Thomas include the directions to act practically reasonably and to preserve oneself.\textsuperscript{221}

The virtues work hand-in-hand with natural law directives to facilitate pursuit of human flourishing. Most importantly, the virtue of practical wisdom imparts to one the capacity to correctly identify the principles of natural law via identification of the goods towards which natural law directs human actions.\textsuperscript{222} Practical wisdom also facilitates the choice of the best means to secure a


\textsuperscript{216} \textit{See} ST. THOMAS, supra note \textsuperscript{2}, at I-II, Q. 49, intro. (describing virtue as the “intrinsic principle” of human action while natural law is the “extrinsic principle[”]).

\textsuperscript{217} \textit{See id.} at I-II, Q. 90, a. 2 (“[T]he law must needs regard principally the relationship to happiness.”).

\textsuperscript{218} \textit{See id.} at I-II, Q. 91, a. 2 (describing natural law as “the rational creature’s participation of the eternal law”); \textit{id.} at I-II, Q. 97, a. 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.”); FINNIS, supra note \textsuperscript{1}, at 34 (“The basic forms of good grasped by practical understanding are what is good for human beings with the nature they have.”).

\textsuperscript{219} 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. \textit{See} G. GERMAIN GRIZEZ, \textit{The Way of the Lord Jesus: Christian Moral Principles}, ch. 5, Q. D, a. 11 (describing seven categories of basic human goods); FINNIS, supra note \textsuperscript{1}, at 59-126 (same).

\textsuperscript{220} Hence, virtues are divided into intellectual virtues and moral virtues.

\textsuperscript{221} ST. THOMAS, supra note \textsuperscript{2}, at I-II, Q. 94, a. 2.

\textsuperscript{222} \textit{See id.} at I-II, Q. 94, a. 1 (“Synderesis [practical wisdom] . . . is a habit containing the precepts of the natural law.”); FINNIS, supra note \textsuperscript{1}, 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.”).
basic human good. The moral virtues ensure that one’s appetites for goods are properly ordered by one’s reason. 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.

In sum, both virtue and natural law are tools that facilitate one’s pursuit of happiness. Below, I describe how an originalism that incorporates virtue ethics’ insights can similarly describe the relationship between the judicial virtues and the Constitution: both aim to secure the common good of the society, and the flourishing of the society’s members.

3. Return 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’ celebrated Natural Law and Natural Rights. Starting with a seminal article by Elizabeth Anscombe in 1958, Modern Moral Philosophy, virtue ethics experienced its modern revival. Since 1958—first as a trickle, and now as a strong current—virtue ethics has established a significant scholarly presence. Virtue ethics has grown dramatically in the last forty years to become a respected participant in moral philosophy.

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223 See Finnis, supra note , at 88 (describing this facet of practical reason).
224 See St. Thomas, supra note , at I-II, Q. 94, a. 4 (describing how one’s ability to know and abide by the natural law may be challenged “both as to rectitude and knowledge”); Finnis, supra note , at 88 (describing how practical reason can help “to bring one’s emotions and dispositions into the harmony of an inner peace of mind”).
225 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. St. Augustine, The Confessions, bx. II, chs. iv-viii. In his Confessions, 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. Saint 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.
226 Finnis, supra note .
227 Anscombe, supra note , at 1; see also Farrelly & Solum, supra note , at 3-4 (describing this story).
228 Hursthouse, supra note , at 1-4.
229 For a selection of recent and more prominent works see Julia Annas, The Morality of Happiness (1993); Cesareo, supra note ; How Should One Live? (Roger Crisp, ed., 1996); Farrelly & Solum, supra note ; Philippa Foot, Natural Goodness (2001); Philippa Foot, Virtues and Vices and Other Essays in Moral Philosophy (1978); Hursthouse, supra note ; MacIntyre, supra note ; Servais Pinckaers, O.P., The Sources of Christian Ethics (Sr. Mary Thomas Noble, O.P., trans., 1995); Michael
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. Some prominent scholars in the virtue ethics field are relatively distinct from the Thomistic tradition. This group of Neo-Aristotelians most prominently includes Philippa Foot and Rosalind Hursthouse. The other distinct set of scholars works within the Thomistic tradition.

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.

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. A handful of scholars in specific fields of law

SLOTE, FROM MORALITY TO VIRTUE (1992); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW (2003)

230 See HURSTHOUSE, supra note 3, at 2 (stating that virtue ethics “has acquired full status, recognized as a rival to deontological and utilitarian approaches”).

231 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; McCool, supra note.

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

233 HURSTHOUSE, supra note 3; see also FOOT, supra note 3, at 53, 72 (repeatedly citing Aristotle, but referencing St. Thomas three times).

234 See HURSTHOUSE, supra note 3, at 8 (“The particular version of virtue ethics I detail and discuss . . . is of a more general kind known as ‘neo-Aristotelian.’”).

235 See, e.g., CESSARIO, supra note 3, at xvii (stating that his work is deeply indebted to St. Thomas’ work); WILLIAM E. MAY, AN INTRODUCTION TO MORAL THEOLOGY (2d ed. 2003) (relying heavily on St. Thomas).

236 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 argument 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 3, at x; see also id. at xi (describing his deep debt to St. Thomas’ thought).

237 See supra note (listing Professor Solum’s works on virtue ethics and law). Most importantly for purposes of this Article, Solum published an article titled,
have similarly begun applying virtue ethics’ insights to particular areas of law.238

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

IV. Originalism is Better Because it Has a Home for Virtue

A. Introduction

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.

B. 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.239

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239 For the most thorough discussion of these theses in print see Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U. L. REV. 923, 944, 954 (2009); see also Solum, supra note  , at 29-32 (describing the theses); Randy E. Barnett, Interpretation and Construction, 34 HARV. J.L. & PUB. POL’Y
The fixation thesis is that the Constitution’s meaning was fixed when it was ratified. This is the Constitution’s original meaning. The contribution thesis is that the Constitution’s original meaning contributes to the content of constitutional law.

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.

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. 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, among other mechanisms, 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 ground originalism in philosophical traditions other than the Aristotelian 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. Barnett’s normative justification for

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65, 66 (2011) (providing a slightly different statement of originalism’s core propositions).

240 Solum, supra note , at 944, 954.

241 Id. Constitutional law is the label for the rules of law and legal doctrines articulated in Supreme Court constitutional precedent.

242 The virtue of justice-as-lawfulness—which requires a judge to abide by the judge’s society’s laws—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.

243 Of course, originalists have defended this premise. See, e.g., BARNETT, supra note , at 114-15; WHITTINGTON, supra note , at 162-63.

244 Strang, supra note , at 1729.

245 Other mechanisms includes long-standing practices and institutions like stare decisis and the presidential cabinet.

246 BARNETT, supra note , at 45.
originalism sounds in the deontological philosophical tradition.\textsuperscript{247} That, by itself, does not exclude the insights of virtue ethics, and this is evidenced by the numerous writers in that tradition explicitly incorporating virtue ethics.\textsuperscript{248}

Originalists who are working outside 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 have argued that originalism is the correct interpretative methodology because it best enables members of our society to pursue human flourishing.\textsuperscript{249} My argument relied on the Aristotelian tradition’s concepts of the common good, authority, and human flourishing.\textsuperscript{250}

I have also identified situations where judges must use the judicial virtues to effectively perform their judicial duties, and I also noted some of those virtues. 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.\textsuperscript{251} Judges must employ those virtues because their decision requires them to apply three factors,\textsuperscript{252} a process that is not significantly law-bounded and places great demands on the judges’ judgment.

A common reason for the perceived incompatibility of originalism and virtue ethics is that originalism is 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.

\textsuperscript{247} \textit{See} Barnett, \textit{supra} note \textsuperscript{,} at 14-15, 301-08 (distinguishing between natural law and natural rights).

\textsuperscript{248} \textit{See} Hursthouse, \textit{supra} note \textsuperscript{,} at 3 (describing the increased utilization of virtue ethics’ insights by utilitarians and deontologists); Onora O’Neill, \textit{Kant’s Virtues}, in \textit{How Should One Live?}, \textit{supra} note \textsuperscript{,} at 77 (providing an attempted reconciliation).

\textsuperscript{249} Strang, \textit{supra} note \textsuperscript{,} at 982-1000.

\textsuperscript{250} \textit{Id}.

\textsuperscript{251} Strang, \textit{supra} note \textsuperscript{,} at 484-86.

\textsuperscript{252} \textit{Id}. at 472.
The perception that originalism is primarily a methodology of rules likely gained currency from Justice Scalia, one of the earliest well-known and focused-on originalists.\textsuperscript{253} In his judicial\textsuperscript{254} and scholarly writings,\textsuperscript{255} Justice Scalia argued that originalism will regularly lead to rules as the operative legal norms. The best example of this is his article, \textit{The Rule of Law as a Law of Rules}.\textsuperscript{256} There, Justice Scalia argued that an originalism of rules will better advance the Rule of Law by, for instance, limiting judicial discretion.\textsuperscript{257} Nonoriginalists have focused on this claim in their criticism of originalism,\textsuperscript{258} and originalists too have criticized the tendency to equate originalism with legal rules.\textsuperscript{259} 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.\textsuperscript{260}

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).\textsuperscript{261} Instead, as Keith Whittington has argued, the level of generality of operative legal norms is determined by the Constitution’s original meaning itself.\textsuperscript{262} On occasion, that meaning will be rule-like, while on other occasions, it will be abstract.\textsuperscript{263} 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,

\textsuperscript{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.


\textsuperscript{255} Scalia, \textit{supra} note , at 1185.

\textsuperscript{256} Id.

\textsuperscript{257} Id.


\textsuperscript{260} See, e.g., HURSTHOUSE, \textit{supra} note , at 35-42 (identifying and responding to this view).

\textsuperscript{261} See, e.g., Stephanos Bibas, \textit{Two Cheers, Not Three, for Sixth Amendment Originalism}, 34 HARV. J.L. & PUB. POL’Y REV 45, 45-46 (2011) (arguing that, consistently applied, originalism would, in some significant number of cases, “lead[] away from bright-line rules”).

\textsuperscript{262} Keith E. Whittington, \textit{Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation}, 62 REV. POL. 197, 214 (2000).

\textsuperscript{263} WHITTINGTON, \textit{supra} note , at 184-87.
Rosalind Hursthouse has described the numerous “V-rules” that
virtue ethics entails. 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, sets the stage for my argument below, that originalism should incorporate virtue ethics.

C. Virtue’s Home in Originalism

1. Introduction

In this Part, 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 board 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.

2. Greater Explanatory Power

Originalism’s incorporation of virtue ethics will make originalism more descriptively accurate in at least three ways: (1) originalism will be more hospitable to and paint in a better light common practices; (2) originalism will be able to embrace the widespread conception of judging as a craft; and (3) originalism will be able to emphasize the fact that constitutional interpretation is a human practice.

Fit is a powerful argument in law. 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 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

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264 Hursthouse, supra note , at 28-42.
265 See Part II.B.2 (describing a transformed originalism that, among other characteristics, acknowledges judicial discretion).
266 Ronald Dworkin, Law’s Empire 230 (1986).
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.\textsuperscript{267} 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.\textsuperscript{268} 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.\textsuperscript{269} Accepting the continued viability of some nonoriginalist precedent will not, therefore, undermine originalism, and originalism can more easily fit this core facet of our legal practice.

More importantly, 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 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 will 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,

\textsuperscript{267} E.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 15-17 (2001).
\textsuperscript{268} Though I focused 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.
\textsuperscript{269} See Strang, supra note , at 472 (describing the criteria a judge should take into account to refrain from overruling nonoriginalist precedent).
integrity, and wisdom” from “train[ing] in the law [and] experience [in] legal practice.”270 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.271 The core insight of this account is that judges are participants in a human practice that has standards internal to the practice272 and that, to be excellent in the craft, the 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. 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 persons identifies a problem they believe is susceptible to legal solution. The 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.

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 meaning and apply that meaning in cases.

270 Solum, supra note , at 1755.
272 Compare MACINTYRE, supra note , at 187-91 (describing his earlier conception of virtues internal to human practices).
3. Virtue’s Home in Originalism

a. Introduction

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 the Article.

b. The Virtues’ Role When Judges Exercise Discretion: Nonoriginalist Precedent and Constitutional Construction

In this subsection, 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.273 Large swaths of American constitutional law are populated or, in some cases, dominated by nonoriginalist precedent.274 Nonoriginalists have argued that originalism is fatally flawed by this because: either originalism will eliminate all nonoriginalist precedent, in which case, originalism is too destabilizing to Rule of Law values; or, originalism will overrule some, but not all.

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273 In a recent article, I described in detail the standard of “originalism in good faith” to distinguish originalist from nonoriginalist precedent. Strang, supra note  , at 1739-52.
274 Strang, supra note  , at 430-31.
nonoriginalist precedent, which then gives judges tremendous discretion and undermines Rule of Law values.\textsuperscript{275}

Some originalists, including myself, have argued that federal judges are constitutionally required by Article III to give constitutional precedent, including nonoriginalist precedent, significant respect.\textsuperscript{276} 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 and individual ordering.\textsuperscript{277} However, this opens originalism to the second nonoriginalist criticism: that originalism gives judges too much discretion. Virtue ethics enables originalism to adequately address that critique.

Originalists can argue that, given a judge with the judicial virtues, the judge 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.\textsuperscript{278} The judge will also review pertinent originalist precedent.\textsuperscript{279} 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.\textsuperscript{280}

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,

\textsuperscript{276} Strang, \textit{supra} note , at 420; McGinnis & Rappaport, \textit{supra} note , at 806.
\textsuperscript{277} Even originalists, like Professor Barnett, who advocate overruling all nonoriginalist precedent, seems to hedge on this point. See Barnett, \textit{supra} note , 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.”).
\textsuperscript{278} Strang, \textit{supra} note , at 472.
\textsuperscript{279} See \textit{Barnett, supra} note , at 274-313 (engaging in this inquiry).
\textsuperscript{280} \textit{Id.} at 1143-54.
especially one that deviates greatly from the Constitution’s original meaning. For example, *Wickard v. Filburn* pronounced what has become known as the substantial effects test. Wickard is a nonoriginalist precedent because it incorrectly articulated the Commerce Clause’s original meaning. 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.

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 coherent. 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*. Wickard’s substantial effects test, the majority acknowledged, could justify upholding the challenged law. 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.

Fourth, in evaluating whether the nonoriginalist precedent in question creates a just ordering, a judge must utilize the virtue of

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282 See Barnett, *supra* note , at 315 (criticizing Wickard’s departure from the original meaning).
285 *Id.* at 563-68.
286 *Id.*
justice-as-fairness. While the virtue of justice-as-lawfulness inclines the judge 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’ 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 helps eliminate one form of unjust ordering?

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, though the 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 the case 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

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287 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. ARISTOTLE, supra note , 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, AQUNAS 130 n.e (1998) (“‘General’ is the more convenient qualifier because Aquinas, following Aristotle, divides justice into ‘general’ (or ‘legal’) and ‘particular’ (or ‘special’).”); KRAUT, supra note , at 102 n.6 (“Many scholars call justice as lawfulness ‘universal’ or ‘general’ justice, and justice as equality ‘particular’ or ‘special’ justice.”); see also Strang, supra note , at 477-78 (describing this concept in greater detail).

288 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?
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, 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. In other words, the Constitution’s meaning limits possible answers to legal questions, but it does not designate one answer as uniquely correct. Judges, in the context of constitutional 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 legal wisdom and justice-as-lawfulness will enable the virtuous judge to correctly decide what the original meaning is, that it does not determine the outcome of the case, and give the judge the disposition to, so far as possible, follow 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.

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289 *Infra* Part II.B.2.
290 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 underdeterminate.
c. The Virtues’ Place in Determinate Law: Constitutional Interpretation and Originalist Precedent

In this subsection, 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.\textsuperscript{291} 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.

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. Though there are extensive discussions of the Clause in the Reconstruction Congress, the Clause’s original meaning is relatively difficult to reconstruct.\textsuperscript{292}

\textsuperscript{291} Strang, \textit{supra} note , at 1767-78; compare Solum, \textit{supra} note , at 95, 100-08 (describing these two stages in a different manner).

\textsuperscript{292} See, e.g., \textsc{Christopher Wolfe}, \textsc{The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law} 140–41 (rev. ed. 1994) (“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.”); \textsc{Rebecca E. Zietlow}, \textsc{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, \textsc{Reconstructing the Privileges or Immunities Clause}, 101 \textsc{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.”); \textsc{Earl M. Maltz}, \textsc{The Concept of Equal Protection—A History of Inquiry}, 22 \textsc{San
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 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 phenomenon. 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*, the Supreme Court fashioned the doctrine to mediate two constitutional commitments: (1) Congress' 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. 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. In many of the original packages doctrine cases, the Court engaged in similar line drawing. Practical wisdom facilitates 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 respectively.

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, mentioned above; the

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DIEGO L. REV. 499, 540 (1985) (finding that the historical “evidence . . . is not entirely consistent” or is “simply ambiguous”).

Strang, supra note, at 1767-78 (describing the process of specification).


Austin v. Tennessee, 179 U.S. 343, 350 (1900).

Id. at 351-62.

See Brown v. Maryland, 25 U.S. 419, 441-42 (1827) (“It is sufficient for the present to say, generally, that when the importer has so acted upon the thing
instrumentalities of commerce doctrine\textsuperscript{298}; the streams of commerce doctrine\textsuperscript{299}; the doctrinal distinction between commerce and manufacturing\textsuperscript{300}; and the related doctrinal distinction between direct and indirect effects.\textsuperscript{301} These doctrines represented the Court’s attempt to follow the twin constitutional commitments to federal commerce power and state police power.\textsuperscript{302} To master this intricate body of law, a judge would have needed theoretical wisdom, and to follow it faithfully would have required justice-as-lawfulness.

4. Originalism Transformed into a Home for Virtue

Incorporating virtue ethics into originalism makes its 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 humanely-best result within the scope of the judge’s freedom. When judges do not have discretion, the virtues ensure that judges construct the best legal doctrines.

\textsuperscript{298} See Shreveport Rate Cases, 234 U.S. 342, 351-52 (1914) (articulating the instrumentalities of commerce doctrine).

\textsuperscript{299} See Swift & Co. v. United States, 196 U.S. 375, 398-99 (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, 515-16 (1922) (same).

\textsuperscript{300} United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).


\textsuperscript{302} 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.”).
V. 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 importantly, 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 better in those context 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.