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In Defense of Judicial Prudence

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In Defense of Judicial Prudence
What the Cardinal Virtues can teach us about Constitutional Interpretation
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“...our Constitution is too complex a document to lie still for any pat characterization.”
John Hart Ely, Democracy and Distrust

“The prudent man does not expect certainty where it cannot exist, nor...does he deceive himself by false certainties.”
Josef Pieper, The Four Cardinal Virtues

I. Introduction
The idea for this essay emerged when we noticed intriguing connections between three major approaches to constitutional interpretation in hard cases – majoritarianism, originalism, and perfectionism – and three of the cardinal virtues developed in the thought of Thomas Aquinas – temperance, fortitude, and justice.¹ Advocates of majoritarianism, a constitutional philosophy that envisions a limited role for the judiciary and encourages judges to defer to the elected branches of government, emphasize the cardinal virtue of temperance; they believe a good judge is a temperate or restrained judge. Advocates of originalism, a constitutional philosophy that envisions a judiciary that is active in defense of the original meaning of the Constitution and passive when the Constitution is silent, emphasize the cardinal virtue of fortitude; they believe a good judge is a judge who has the courage to remain faithful to the rule of law even when there

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¹ This typology of judicial philosophies is taken from Cass Sunstein, Radicals in Robes, (New York: Basic Books, 2005). The only difference is that Sunstein calls originalism “fundamentalism” in his text. We chose to utilize Thomas Aquinas as our spokesman of the cardinal virtues, but it should be noted that he is part of a long tradition of cardinal virtue theorists that includes Plato and Aristotle. It is important to note that our argument is not that the judicial philosophies we discuss can be traced back to the ideas of Aquinas nor are we trying to argue that Aquinas’ ideas have any special authority in our constitutional deliberations. Instead, we are suggesting that the cardinal virtues he describes seem to emerge in contemporary debates over judicial review and that the sort of “isomorphic” analysis we are constructing here may provide useful insights into those debates.
is political and moral pressure to do otherwise. Advocates of perfectionism, a constitutional philosophy that envisions a judiciary that actively pursues an agenda guided by a desire to perfect the American political system, emphasize the cardinal virtue of justice; a good judge is a judge who makes decisions that are in accord with what *morality* requires.

In this essay we contend that advocates of each of these constitutional philosophies prize these respective virtues because they believe it is only through their exercise that judges can play a legitimate role in the American political order. Majoritarians value temperance because they believe it promotes popular sovereignty, which they take to be the primary source of legitimacy in the American polity. Originalists value fortitude because they believe it is necessary to safeguard the rule of law, which they take to be the ideal at the core of American constitutionalism. Perfectionists value justice because they believe judges (along with all other actors within the system) have an obligation to do all that they can to achieve the “more perfect union” promised by the Constitution’s preamble.

In what follows, we develop more detailed accounts of each of these connections before making the case that the fourth cardinal virtue – prudence – may direct us to a promising way forward in the debate over the proper approach to constitutional interpretation in hard cases. In Aquinas’ formulation of the cardinal virtues, prudence is “the first” of the virtues and we believe that prudence should also be thought of as the virtue at the foundation of sound constitutional interpretation in hard cases. Prudence is

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2 While we know we are not the first to recommend prudence as a judicial virtue, we believe this essay offers an important contribution to the literature by utilizing the framework of the cardinal virtues provided by Aquinas to inform our discussion of constitutional interpretation in hard cases. For a classic defense of the importance of prudence in constitutional interpretation, see Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Indianapolis: Bobbs-Merril, 1962), 235-243.
the supreme virtue in classical doctrine because it integrates all of the other virtues – the prudent man is the man who is able to be temperate, courageous, and just in the right way and at the right times. According to Aquinas’ version of the doctrine, prudence is the supreme virtue because it is “needed if man is to carry through his impulses and instincts for right acting, if he is to purify his naturally good predispositions and make them into real virtue…”³ In other words, the virtue of prudence is what guides human beings as they attempt to translate their moral commitments into action in the real world.

According to the theologian Josef Pieper, perhaps the most astute 20th century scholar of the cardinal virtues, there are two key parts of prudence: cognition and judgment.⁴ The first step toward prudent behavior, he contends, is the “objective cognition of reality.”⁵ Only when we have reached a sound understanding of the reality of a situation can we decide how to act appropriately. In the particular situation of constitutional interpretation in hard cases, we contend that the cognitive step in the prudential process should lead judges to appreciate that our constitutional tradition has at its core simultaneous commitments to democracy, the rule of law and the higher law of moral principle.⁶ We contend that a good judge, therefore, is one who recognizes the importance of democracy, the rule of law, and higher law in the American Constitution and has the prudence necessary to keep all of these commitments in mind when deciding hard constitutional cases. In short, a prudential approach to judicial decision-making requires an appreciation of constitutional complexity and it recognizes that judgment is inescapable in hard cases.

⁴ Ibid., 11-12.
⁵ Ibid., 15.
⁶ By “constitutional tradition,” we mean to include not only the Constitution itself, but also precedent.
Our argument proceeds as follows. In Part II, we describe the constitutional philosophy of majoritarianism and we make the case that majoritarians emphasize the cardinal virtue of temperance because they believe judges should be deferential to the will of democratic majorities. In Part III, we describe the constitutional philosophy of originalism and make the case that originalists are committed to the cardinal virtue of fortitude because they believe it is necessary for a judge to be faithful to the rule of law. In Part IV, we describe the constitutional philosophy of perfectionism and we make the case that perfectionists are committed to the cardinal virtue of justice because they believe judges should be animated by a desire to close the gap between moral ideals and the realities of political practice. In Part V, we conclude by contending that the virtue of prudence invites the appreciation of complexity and dynamism that is necessary for judges to balance the simultaneous commitments to democracy, the rule of law, and justice that are at the heart of the American constitutional order.

II. Majoritarianism and the Virtue of Temperance

Advocates of majoritarianism embrace a modest approach to constitutional interpretation in hard cases. The restrained view of the judiciary accepted by majoritarians is rooted in their belief that the primary commitment of the American constitutional order is to popular sovereignty. Legislative majorities, they contend, ought to be given a great amount of leeway in the governance of political communities. According to the majoritarian way of thinking, judges ought to conceive of their role in the constitutional system as facilitators of, not impediments to, democratic action.
What does the majoritarian constitutional philosophy have to do with the virtue of temperance? In order to answer this question we must come up with a working definition of temperance and say something about what it might mean in the context of judicial review. Temperance, simply stated, is the virtue of self-control. A temperate person is someone who is not in the habit of being ruled by his many desires. When he does give in to his desires, he does so in a moderate, measured way. According to Aquinas, “temperance, which denotes a kind of moderation, is chiefly concerned with” restraining “those passions that tend towards sensible goods, viz. desire and pleasure, and consequently with the sorrows that arise from the absence of those pleasures.”

In the context of a discussion of constitutional interpretation in hard cases, the relevant desire is the urge to exercise the power of the judicial office. A temperate judge is able to resist the temptation to abuse this immense power. According to this view, a good judge will have the self-control to abstain from exercising his power when it is inappropriate and to exercise his power with moderation when it is appropriate. In the words of Robert H. Bork, who might justly be called a majoritarian in originalist clothing, it is because the “orthodoxy of our civil religion…holds that we govern ourselves democratically” that “abstinence” is of “inestimable value” as a judicial virtue.

We can identify many advocates of majoritarianism throughout the history of American politics and see that the virtue of temperance emerges as central to their philosophy. The classic nineteenth century expression of majoritarianism is found in James Bradley Thayer’s *The Origin and Scope of the American Doctrine of*

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Constitutional Law.9 “The judicial function,” Thayer argues, “is merely that of fixing the outside border of reasonable legislative action” and the greatest sin a judge can commit is to attempt to “step into the shoes of the law-maker.”10 Our constitutional system provides “our courts a great and stately jurisdiction,” but it is incumbent upon judges to refrain from abusing their immense powers.11

Not long after Thayer published his important tract, Justice Oliver Wendell Holmes penned his famous majoritarian dissent in *Lochner v. New York.*12 According to constitutional scholar Howard Gillman, Holmes’ jurisprudence “emphasized the need for judges to get out of the habit of imposing anachronistic constraints on contemporary officeholders, and embracing instead an ethic of judicial restraint and a tolerance for political adaptation through legislative innovation.”13 In *Lochner*, the Court was confronted with the question of whether or not a New York maximum hour labor law violated the liberty protection of the 14th Amendment’s Due Process Clause. The Court answered this question in the affirmative, with the majority declaring that the maximum hour law was “unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract.” Holmes authored a dissent in which he argued the Court’s decision was rooted in “an economic theory” and it is not the province of the judiciary to decide upon the wisdom of economic legislation: “I do not conceive it to be my duty [to make up my mind about the wisdom of this economic theory]...because I

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11 Ibidity., 26.
strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.” The Constitution, Holmes declared, “is made for people of fundamentally differing views” and it is illegitimate for judges to impose their own opinions of legislation on the democratic majorities of various political communities.

Armed with abstract constitutional text and confronted with what they took to be an unwise economic regulation, the *Lochner* majority decided to exercise its power to overturn the law. From Holmes’ perspective, this decision demonstrated a lack of judicial self-control. According the majoritarian theory of judicial review, it is precisely when judges are confronted with laws that they believe are unwise that their virtue is put to the test. Judges can step in and overturn what they believe to be unwise legislation, but majoritarians contend they should have the humility to respect the opinions of democratic majorities. According to Gillman, Holmes’ judicial philosophy was “almost anti-constitutional in its commitment to legislative supremacy and the sovereignty of elected officials.”

Even when a judge objects to a law, he must appreciate the fact that on most matters “men reasonably might differ” and in a democratic system it is illegitimate for a small handful of elites to impose their views on legislators who are, according to this view, closer to the will of the people.

The disagreement between Holmes and the *Lochner* majority was carried on by progressives and conservatives for several decades. While conservatives appealed to originalism as a basis for striking down some regulatory and social welfare legislation, progressives embraced majoritarianism. On the Supreme Court, the philosophy of

Holmes was carried on by Justice Felix Frankfurter and his allies. Prior to his ascent to the Court, Frankfurter’s majoritarianism was on display in a short essay entitled “The Present Approach to Constitutional Decisions on the Bill of Rights.” In the essay, he singled out Thayer and Holmes for praise and argued that it is “a fundamental of American constitutional law” that “the wisdom or justice of legislative policy is entirely outside the judicial province” before lamenting that this “rule has not always been honored” in judicial practice. Frankfurter concludes the essay on an emphatically majoritarian note: the “responsibility for mischievous or inadequate legislation” should be “brought home where it belongs” – “to the legislature and to the people themselves.”

Over the course of the last several decades, socially conservative judges have often appealed to majoritarianism as the basis for judicial deference to the will of legislative majorities in the moral realm. In Lawrence v. Texas, for example, the Court was confronted with the question of whether or not a Texas “Homosexual Conduct” law that forbade “deviant sexual intercourse with an individual of the same sex” violated the liberty protection of the Fourteenth Amendment’s Due Process Clause. The Court’s majority declared that it did. In the majority opinion, Justice Anthony Kennedy argued that the Due Process Clause protected individuals from excessive state interference with consensual, intimate, non-commercial conduct. In dissent, Justice Scalia defended a majoritarian role for the Court. Scalia argued that the long-standing laws against bigamy, bestiality, fornication, obscenity, and incest are evidence that the “promotion of majoritarian sexual morality” is well within legitimate state police powers: “What Texas has chosen to do is well within the range of traditional democratic action, and its hand

should not be stayed through the invention of a brand-new constitutional right by a court that is impatient of democratic change.” Rather than using the Due Process Clause as a basis for interference with the sexual morality of democratic majorities, Scalia contended that members of the Court should have adopted a deferential stance: “the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.”

Justice Thomas concurred with Scalia and also offered a brief dissent of his own. A brief mention of Thomas’ dissent is worthwhile here because his words draw a sharp contrast between the majoritarian view of the judiciary and the perfectionist view. Thomas wrote separately in order to declare that he thought Texas’ law was “uncommonly silly” and that, if he were a member of the legislature, he would vote to repeal it. Although he disapproved of the law, he believed it was imperative that he resist the temptation to strike it down because such an action would not be in keeping with the deference to democracy that is required of judges in the American political system.

To sum up, majoritarians believe judges must exhibit the virtue of temperance because self-control is necessary for judges to resist interfering with the legitimate processes of democratic governance. Throughout the history of American constitutional law, majoritarianism has been advocated by both liberals and conservatives with the former tending to embrace deference to legislative majorities in the economic realm and the latter tending to embrace deference to legislative majorities in the realm of sexual morality. In both instances, the defense of restraint was rooted in the contention that a commitment to popular sovereignty lies at the heart of the American constitutional order.

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18 Ibid.
III. Originalism and the Virtue of Fortitude

Advocates of originalism believe the best judge is the one who has the fortitude to remain faithful to the rule of law even in the face of political pressure to do otherwise.\(^{19}\) Fortitude, according to Aquinas, is “a disposition whereby the soul is strengthened for that which is in accord with reason, against any assaults of the emotions, or the toil involved by any operations.”\(^{20}\) Originalism can be defined as strict adherence to the text of the Constitution and when the meaning of the text is not clear to the public understanding of the text in question at the time of its adoption. In the words of political scientist Keith Whittington, “Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”\(^{21}\) Unlike majoritarianism, Whittington notes, “originalism is less likely to emphasize a primary commitment to judicial restraint” because originalists believe the doctrine “may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.”\(^{22}\)

What is the connection between fortitude and originalism? According to advocates of originalism, fidelity to the original understanding of the Constitution requires fortitude because judges are often under political and moral pressure to make decisions that are inconsistent with this understanding. Furthermore, judges are often tempted to abandon the original understanding when following such an interpretation.

\(^{19}\) It is worth noting here that we are focusing on the virtues that are part of the self-conception of advocates of these particular judicial philosophies. As you will see, originalists think of themselves as fortitudinous individuals. Many of their critics, though, see their jurisprudence as far from courageous. This particular debate about the merits of originalism, though incredibly important, is beyond our scope.


would be, in the words of Justice Antonin Scalia, like taking “medicine that seems too strong to swallow.” It is for this reason that Scalia admits to being only a “faint-hearted originalist” since he sometimes lacks the fortitude to follow originalist interpretations to their logical conclusion. Indeed, Scalia’s trepidation has led originalist legal scholar Randy Barnett to offer a sharp rebuke of the Justice’s jurisprudence in an essay entitled “Scalia’s Infidelity: A Critique of Faint-Hearted Originalism.” According to Barnett, although Scalia seems “lion-hearted,” he is not sufficiently courageous to adopt the sort of fearlessness originalism requires. Barnett concludes his critique of Scalia with words that reveal the links between fortitude and originalism: “a fearless commitment to originalism might avoid rather than reach the horrible results that cause even so fearless a jurist of originalism to become faint of heart. Because Justice Scalia places a higher priority on other considerations – such as majoritarianism and judicial restraint – I doubt this defense will change his mind. But perhaps it will embolden others to venture where Justice Scalia fears to tread.” For Barnett, the model of fearless originalism has been Justice Clarence Thomas in federalism cases. According to Barnett’s reading of Raich v. Gonzalez, while Justice Scalia abandoned originalism when faced with a federal law with which he agreed (the Controlled Substances Act), Justice Thomas stayed true to his originalist reading of the commerce clause. In Barnett’s words, Thomas’ Raich “opinion now establishes that there are not two principled originalist justices on the Court today, but one. To me, this means that when it comes to enumerated federal powers, there

is only one justice who is clearly willing to put the mandate of the Constitution above his or her own views of either policy or what would make a better constitution than the one enacted.”27

In “Judicial Cincinnati: The Humble Heroism of Originalist Justices,” Daniel R. Suhr contends originalists understand that the judicial role does not entitle the judge to implement his own vision of justice. In resisting this temptation, Suhr argues, the originalist judge is demonstrating a kind of humble heroism.28 “A humble hero on the bench knows” his role does not include the power to impose his own view of justice and instead he “seeks to serve the country by enforcing the rule of law.”29 If we accept that the judicial role is to safeguard the rule of law, Suhr continues, “justices who consistently and authentically follow an originalist theory of interpretation practice this virtue of humble heroism.”30

Why do originalists emphasize the courage to be faithful to the Constitution as the primary judicial virtue? Like the majoritarian view, the originalist answer to this question has something to do with how they understand the core commitments of the American constitutional order. For some originalists, like Keith Whittington, the obligation of fidelity is rooted in the idea that there is a foundational commitment in American politics to fundamental law that has been legitimated by popular consent. In Constitutional Interpretation, Whittington contends that the authority of the Constitution is rooted in the fact that it was created by an act of popular sovereignty. The process by which the Constitution was created and has been amended has by no means been perfect, he admits,

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29 Ibid.
30 Ibid.
but it is still binding on contemporary interpreters. “By accepting the authority of the Constitution,” Whittington writes, “we accept our own authority to remake it. The existing Constitution is a placeholder for our own future expression of popular sovereignty. As such it performs an important function. It is not simply a vacancy but an instrument that maintains a political space. We can replicate the fundamental political act of the founders only if we are willing to recognize the reality of their act. Stripping them of their right to constitute a government would likewise strip us of our own.”³¹ Although Whittington shares the majoritarian belief that popular sovereignty is at the core of the American constitutional order he rejects their conclusion that this should lead to a deferential view of the judicial role. Instead, Whittington concludes that activism can sometimes be justified precisely because the Constitution is a product of popular sovereignty.

For other originalists, like Randy Barnett, the commitment to originalism and the belief that judges must be courageous enough to follow its dictates is rooted in something other than popular sovereignty. According to Barnett, our obligation to be faithful to the original understanding of the Constitution cannot be maintained through popular sovereignty because none of us were given the opportunity to choose whether or not we consented to the Constitution. For a libertarian like Barnett, this is unacceptable. “What legitimates a constitution,” Barnett writes, “is the merits of the lawmaking process it establishes.”³² More specifically, Barnett says “the legitimacy of a constitutional regime” should “be assessed by how well it protects individual rights.”³³ When Barnett reads the

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³¹ Keith Whittington, *Constitutional Interpretation*, (Lawrence: University of Kansas Press, 1999), 133.
Constitution he sees a document that, if followed according to its original meaning, would yield a better society than if we ignored it. Barnett is willing to admit that a return to the original meaning of the Constitution would bring about radical changes in American society, but he believes those changes would be well worth making. If Barnett’s originalism was enforced by the Supreme Court, the size and scope of the federal government would be reduced dramatically and the constitutionality of many state and federal laws would be called into question. This may seem like a daunting proposal, but Barnett thinks judges should have the courage take these steps if the original understanding of the Constitution requires it.

IV. Perfectionism & the Virtue of Justice

Perfectionism is a constitutional philosophy that is less deferential to democratic majorities or the original understanding of constitutional text than it is devoted to the idea that judges have an important role to play in perfecting the American polity. Perfectionists read the Constitution and find commitments to abstract concepts such as liberty, equality, and human dignity. Rather than leaving the meaning of these concepts to democratic majorities or attempting to decipher the meaning of these concepts for those who adopted the text, perfectionists propose that judges have a special role to play in giving these concepts meaning. Legal scholar Henry Monaghan puts the matter succinctly when he says that the “distinctive and controversial premise” of perfectionism is that “the ‘outputs’ of even a fairly structured political process must satisfy some core substantive notions of political morality.”

It is important to note that perfectionism is not a philosophy that is necessarily wedded to one side of the political spectrum. On the liberal side, the legal philosopher Ronald Dworkin calls this constitutional philosophy “the moral reading.” The Constitution, Dworkin contends, is full of “very broad and abstract language” and the “moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.”\(^{35}\) In so doing, Dworkin continues, interpreters “must decide how an abstract principle is best understood.”\(^{36}\) While thinkers like Dworkin articulate philosophies of liberal perfectionism in order to defend such positions as the unconstitutionality of the death penalty and the constitutional right to have an abortion, there is a tradition of conservative perfectionism as well. Perhaps the most prominent academic defender of conservative perfectionism is the political philosopher Hadley Arkes. According to Arkes and his fellow conservative perfectionists, the Constitution cannot be understood without the light provided by the absolute moral principles expressed in the Declaration of Independence. In Arkes’ words, we “will persistently find a need to appeal to those moral understandings lying behind the text; the understandings never written down in the Constitution, but which must be grasped again if we are to preserve – and perfect – the character of a constitutional government.”\(^{37}\)

The nature of the differences between perfectionism and the judicial philosophies explored above can be elucidated by a consideration of a couple of perfectionist judicial opinions. Justice William Brennan’s concurring opinion in *Furman v. Georgia* (1972), a case dealing with the constitutionality of capital punishment, stands out as an example of


\(^{36}\) Ibid.

liberal perfectionism. In his opinion, Justice Brennan contends that “the duty” of judges is to decipher the “values and ideals” embodied in the Constitution. When reading abstract text like the Eight Amendment’s prohibition of “cruel and unusual punishments,” judges must recognize that the Clause “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” When Justice Brennan read the Eighth Amendment in this way, he determined that the judicial task was to ensure that the “State, even as it punishes,” treats “its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual, therefore, if it does not comport with human dignity.’” It is worth noting that Justice Brennan’s reading of the Eighth Amendment, while not uninterested in democratic and historical considerations, is primarily philosophical in nature. He waxes eloquent on the meaning of human dignity as a philosophical concept and concludes not only that the practice of capital punishment in the United States in 1972 fails to meet the requirements of the Eighth Amendment, but that the practice of capital punishment is prima facie inconsistent with this clause.

It is worth noting the ways in which Brennan’s approach in this case differs from the majoritarian and originalist approaches to this issue. Majoritarians would shudder at much of what they would find in Brennan’s opinion, but they would be especially appalled by this line: “Legislative authorization, of course, does not establish acceptance” of any particular punishment. For the majoritarian, when there is no explicit constitutional condemnation of a particular practice, legislative authorization carries an enormous amount of weight. In the case of capital punishment, the majoritarian would say that this is precisely the kind of issue judges should leave to the elected branches of

government. There is no clear constitutional basis for striking down this practice, the
majoritarian would say, so the judge should get out of the way.

The originalist approach to the Eighth Amendment would not be all that much
different from the majoritarian approach. In the words of originalist thinker Michael
McConnell: “There is no serious argument that the framers of either the Eighth or the
Fourteenth Amendment deemed death, in all cases, a cruel and unusual punishment;
indeed, the very language of the constitutional text belies this. Nor is there any serious
argument that the tradition of the nation has judged capital punishment to be immoral.”39
For the originalist, the question of whether or not capital punishment is consistent with
the Eighth Amendment is a historical question and judges must have the courage to
remain faithful to the historical meaning they find.

In addition to finding conservative perfectionism in the works of theorists like
Arkes, we can find examples in Supreme Court decision-making. Perhaps the most
obvious example of conservative perfectionism is Justice Clarence Thomas’
jurisprudence in affirmative action cases. In these cases, the Court is confronted with the
question of whether or not the government can make distinctions on the basis of race
without running afoul of the Equal Protection Clause of the Fourteenth Amendment.
Again, we can imagine a variety of paths available to a judge who must respond to this
question. First, an originalist judge might seek to determine whether or not the racial
distinctions in the law are consistent with the original understanding of the clause. This
judge would engage in the historical exercise of seeking to determine whether race-based
public policies were consistent with the principles and practices of the generation that

39 Michael McConnell, “The Importance of Humility in Judicial Review: A Comment Ronald Dworkin’s
adopted the Fourteenth Amendment. Due to his desire to be faithful to the rule of law, the outcome of this historical investigation would direct the originalist judge to the proper conclusion. Although there has been much scholarly debate on this issue, the dominant view is that an originalist judge would be forced to conclude that racial distinctions in the law were fully consistent with the original understanding of the Equal Protection Clause and that there would be no legitimate constitutional basis for him to strike down affirmative action programs.\textsuperscript{40}

A majoritarian judge would care less about being faithful to the original understanding of the Fourteenth Amendment than he would about being deferential to the will of the relevant political community. In the case of, say, an affirmative action program at a state university in Iowa, the majoritarian judge would feel a sense of deference to the state legislature in Iowa. According to majoritarian reasoning, it would be essential that the judge check his own views of affirmative action at the door and respect the will of the elected branches, which more closely represent the will of the people who will be governed by the law. Given the polarized debate over the legitimacy of affirmative action and the ambiguity of the constitutional text at issue, the majoritarian judge would argue that the judicial obligation is to resist the temptation to intercede and allow the controversy to be resolved by democratic mechanisms.

The perfectionist judge would ask himself about the meaning of “equality” as an ideal of political morality and then he would ask himself whether or not the program in question promoted or undermined that ideal. Given the level of abstraction invited by perfectionism, one can imagine a judge going in either direction on the question of

affirmative action. A liberal perfectionist might say that true equality requires
government to make benevolent racial distinctions when making social policy in the
present because malignant racial distinctions were such an important part of the
American past.

We can see in Justice Thomas’ concurring opinion in Adarand Constructors v. Pena (1995) that perfectionism can cut in the other direction as well. Adarand was a case in which the Supreme Court was confronted with the constitutionality of a Department of Transportation practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by “socially and economically disadvantaged individuals.” The Court concluded that this practice was unconstitutional and in his concurring opinion, Justice Thomas contended that “there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some notion of equality.” Even though he is the most committed defender of originalism on the Supreme Court, Thomas’ justification for this conclusion is light on history and heavy on moral philosophy. Affirmative action programs, he writes, “undermine the moral basis of the equal protection principle” because they are “at war with the principle of equality that underlies and infuses our Constitution.” In order to defend this claim, Thomas cites the famous “All men are created equal…” language of the Declaration of Independence. Here is the vital paragraph in Thomas’ opinion:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is

concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

Thomas believes that authentic equality requires government to be colorblind. Whatever the merits of this view, it is clear that he could only reach this conclusion by viewing the affirmative action program through a perfectionist, not an originalist, lens. At the time when the Fourteenth Amendment was ratified, most Americans did not believe it required the government to abstain from making laws that made distinctions on the basis of race. In order to reach this conclusion, then, Thomas had to import the principle of colorblindness into his judicial analysis. In this case, he was not moved by a desire to be faithful to the rule of law, but rather by a desire to do what he believed to be just.

The connection between perfectionism and the virtue of justice is perhaps more obvious than any of the other connections we are attempting to make in this essay. At the most abstract level, to do justice to another human being is to give him his due. In Summa Theologica, Aquinas writes, “Justice, properly so called, is one special virtue, whose object is the perfect due” and later in the text he describes justice as the moral virtue that

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44 For an extended discussion of Justice Thomas’ jurisprudence in this area, see Cass Sunstein, Radicals in Robes, 133-143.
is “directed to good, which involves the notion of right and due….” Aquinas’ understanding of justice is enormously complex. For the purposes of this essay, it is enough to say that as a cardinal virtue, justice is concerned with acting in a way that is consistent with the dictates of morality.

The meaning of justice in particular circumstances is, of course, a matter of unending debate, but we need not enter into that debate to extract what is relevant to our purpose. When we speak of justice as a virtue, we usually have in mind the disposition of an individual to do the right thing. In “hard cases,” perfectionists want judges to exhibit the virtue of justice. When confronted with a difficult question of constitutional interpretation, perfectionists contend judges should be animated by a desire to do what is right. This differs from majoritarianism in the sense that perfectionists believe the disposition to do what is right should often trump the deference the judge feels to the will of a democratic majority. This differs from originalism because perfectionists do not believe respect for the rule of law should be an invitation to ignore the demands of political morality.

To sum up, perfectionists believe that in hard cases judges must be animated by the virtue of justice; that is, they must be moved by the desire to do what is right. For perfectionists like those cited above (Dworkin, Arkes, Brennan, and Thomas) this commitment emerges out of a belief that American constitutionalism cannot be understood without an appreciation of the ideals of political morality at its core. Although their conclusions differ dramatically, Dworkin, Brennan, Arkes, and Thomas all agree that the commitments to universal human equality and liberty expressed in the

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Saint Thomas Aquinas, *Summa Theologica*, Question 60, Article 4 and Question 61, Article 4. Italics added to emphasize the linking of justice with perfection.
Declaration of Independence are the first principles of the American political order and judges should keep these principles at the front of their mind when they are deciding hard cases.

V. In Defense of Judicial Prudence

We have thus far discussed three major constitutional philosophies – majoritarianism, originalism and perfectionism – and argued that some connections can be made between these theories and three of the classical cardinal virtues – temperance, fortitude, and justice. We contend that those who embrace these constitutional philosophies and the corresponding virtues do so because they believe these commitments are required by something at the core of the American constitutional order. Majoritarians believe the American political system is rooted in a fundamental commitment to democracy. Therefore, they say, the chief judicial virtue must be temperance; judges must restrain themselves when confronted with opportunities to exercise their power. Originalists emphasize the centrality of the rule of law in the American system of government. According to this view, the lodestar of the American regime is the written constitution itself, which establishes clear parameters for what government should and should not do. Judges must have the fortitude to serve as guardians of this fundamental law even (perhaps especially) when doing so goes against what the majority wants and/or when doing so goes against the judge’s own sense of what justice requires. Perfectionists look at the abstract clauses of the Constitution and to the natural rights philosophy of the Declaration of Independence to argue that the American political system is rooted in principles higher than the whims of democratic
majorities. There is, perfectionists contend, a “higher law” and it is the province of judges to seek out this higher law in order to ensure that judicial decisions give each man his due.

We believe that each of the philosophies discussed captures something vital to the American constitutional design and that each virtue is essential to good judicial character. However, it is precisely because each of these approaches captures part of the truth about the political morality of the American system that no one of these approaches captures the whole truth. In other words, against the claims of majoritarians, originalists and perfectionists, we argue that what is needed is a constitutional philosophy that appreciates judging takes place in a system where commitments to democracy, the rule of law, and justice exist in a state of dynamic tension. What is needed in such a system is a judge who is guided by the cardinal virtue that theologian Josef Pieper calls the “cause, root, mother, measure, precept, guide and prototype of all ethical virtues”: the virtue of prudence.

As noted in the introduction, according to classical doctrine, there are two parts of prudence: cognition and judgment. The cognitive step in prudential action is the determination of what principles ought to animate an individual in a particular situation. Once an individual has a sense of the proper principles, she must exercise judgment about how best to translate those principles into action in the real world. In the context of judicial review in the American political system, we believe a prudent judge would be one who recognizes that democracy, the rule of law, and justice are all central to the constitutional order and is able to exercise the judgment necessary to safeguard these values in the right way. As such, when interpreting the Constitution in hard cases, a

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47 Josef Pieper, The Four Cardinal Virtues, 8.
prudent judge will keep this in mind. In this section, we offer a more detailed definition of prudence and say a bit more about its meaning in the judicial context before making the case that prudentialism is the best approach to judicial review in hard constitutional cases in the American political system.

Let us begin by making clear what we do not mean by prudence. In the parlance of our times, prudence is usually used as a synonym for cautiousness. In American political discourse, the term was a favorite of President George H.W. Bush, who used the term in just this way.\(^48\) President Bush said that “prudence” would be a guiding principle in his administration, explaining that we must “review our policies carefully, and proceed with caution.”\(^49\) While caution may indeed be a part of prudence, it is not the whole of it.\(^50\) When we return to the classic formulation of the idea in the work of Aquinas, we find a much more complex and interesting concept.

In the *Summa Theologica*, Aquinas defines prudence as “wisdom concerning human affairs” or “right reason with respect to action.”\(^51\) Following Aristotle, Aquinas contends that the virtue of prudence is what provides human beings with the ability to put moral principles into practice. In other words, prudence is what is required for human beings to actually do good things in the world. As noted in the introduction, theologian Josef Pieper, in his detailed interpretation of Aquinas’ doctrine of cardinal virtues, argues that for Aquinas, prudence is “what is needed if man is to carry through his impulses and instincts for right acting, if he is to purify his naturally good predispositions and make


\(^{50}\) In the words of philosopher André Comte-Sponville, the “ancient concept of prudence goes far beyond mere avoidance of danger, which is more or less what it has come to mean to us,” in *A Small Treatise on the Great Virtues*, (New York: Holt, 2001), 34.

\(^{51}\) Thomas Aquinas, *Summa Theologica*, (IiIiae, 47.2) and (IiIiae47.4).
them into real virtue, that is, into the truly human mode of ‘perfected ability’.” For Aquinas, then, prudence is an “instrumental” virtue. By this, we mean that prudence is a means by which some other good or goods can be realized. In other words, prudence is important precisely because it is about one’s ability to transform principle into practice in the real world. What prudence requires, therefore, will depend on the principles that one accepts as true. In Pieper’s words, “the virtue of prudence resides in this: that the objective cognition of reality shall determine action; that the truth of real things shall become determinative.” Once we determine what moral principles ought to guide us, then prudence is the virtue that helps us to figure out what those principles require in the specific situations. Prudence, in Pieper’s felicitous phrase, is “situation conscience.”

The first step toward prudent action, then, is “the objective cognition of [the] reality” of the situation. Once we have a sense of the reality of the situation, then we can move onto the next step of determining how to act. In Aquinas’s system, for example, prudence was the means by which human beings could translate the principles of natural law into practical action. Once one has a hold of fundamental principles, then she can take the second step of exercising her judgment about how best to act in the world.

So what does prudence mean within the context of the debate over constitutional interpretation in hard cases? In order to understand what prudence requires for a judge confronted with these kinds of cases, one must first understand the fundamental principles of political morality that are supposed to animate actors within the American political system as well as the institutional frameworks within which those principles are supposed to be realized. If we are right that majoritarians, originalists, and perfectionists

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53 Ibid., 15.  
54 Ibid., 11.
all capture part of the truth about the fundamental principles of the American constitutional order and the role judges are supposed to play is safeguarding those principles, then prudence dictates an approach to judicial review that appreciates this complexity.\textsuperscript{55} Indeed, much recent scholarship on American political thought indicates that we are right to say that the constitutional tradition contains this complexity.\textsuperscript{56} There is a growing consensus among scholars that the history of American political ideas is best described as a “rich tapestry” of “multiple traditions” (including traditions that emphasize majority rule, constitutionalism, and natural rights).\textsuperscript{57}

Once a judge has taken the cognitive step of appreciating the dynamic tensions that lie at the heart of the American constitutional order, then she must exercise judgment about how best to act in her capacity as a judge. Although it is clear from what we have said so far that a judge in a hard constitutional case should approach her task with an appreciation that she is operating in a system that is rooted in commitments to democracy, the rule of law, and justice, it is less than clear what kinds of outcomes might be dictated by this approach. Reflection about what prudential judgment might look like in hard cases could fill an entire volume, but we must say something about it here.

First, it is worth pointing out that we are concerning ourselves here with constitutional philosophy, which is just one level of philosophical analysis that must be part of a comprehensive theory of judicial review. Once judges have taken the cognitive step of appreciating the complexity of the American constitutional order, good judgment

\textsuperscript{55} We realize that we have not provided much of a defense for the claim that commitments to democracy, the rule of law, and justice are central to the American constitutional design. Needless to say, to defend each of these claims would constitute a considerably longer project. We think, though, that the secondary literature in constitutional theory provides ample evidence for this claim.


\textsuperscript{57} Ibid.
will depend, at least in part, on the judge’s sense of her institutional role within this order. In other words, even a prudential judge who recognizes the complexity of the commitments at the core of American constitutionalism might still decide that the institutional design of the system requires her to give more weight so certain values in hard cases. More specifically, a strong argument can be made – without denying the importance of popular sovereignty in the American order – that the relative insulation of judges from popular pressure provides them with the institutional protection necessary to give a more weight to the rule of law and justice than to democracy in hard cases.\textsuperscript{58}

It should also be noted that what has been said so far about prudence invites a kind of judicial moderation. In the context of the complexities of the American constitutional order, the prudential view holds that judges would do well to avoid the extremes invited by pure majoritarianism, originalism or perfectionism. Indeed, moderate justices such as Lewis Powell and Sandra Day O’Connor, who have often been accused of being “unprincipled” because they fail to adhere to the clear strictures of one of these constitutional philosophies, might be demonstrating a deeper commitment to constitutional principle than their colleagues who have been animated by a misleadingly simple understandings of the Constitution and the judicial role.

One may object at this point that the prudential approach might invite too much judicial discretion in deciding hard constitutional cases. After all, does not the acknowledgement that democracy, the rule of law and the higher law of moral principle are all at the core of American constitutionalism invite the conclusion that a judge has substantial flexibility to reach his or her desired outcomes? The short answer to this

\textsuperscript{58} For some discussion of this kind of argument, see e.g., Rebecca Brown, “Accountability, Liberty, and the Constitution,” 98 Columbia Law Review 531, (1998).
question is yes, but this should not be considered a mark against prudentialism. Indeed, judges already have this flexibility, but prudentialism asks them to admit it rather than hiding behind the false certainties of other judicial philosophies. Consider, for example, Justice Clarence Thomas. You may have noticed that Thomas appears above in our discussions of majoritarianism, originalism, and perfectionism. So does this mean that Thomas is a model of prudentialism? The short answer is no. What is striking about the examples cited above is that in each of the cases, Thomas pretended that his decisions were dictated by the commands of majoritarianism (in *Lawrence*), originalism (in *Raich*) and perfectionism (in *Adarand*). In fact, he was exercising judicial discretion. At best, we can call this “bad faith prudentialism.” Indeed, the existentialist notion of “bad faith” seems to capture precisely what is happening here because Thomas is denying the freedom of his choices and, as such, is choosing to behave without authenticity. What true prudentialism requires is the acceptance that hard cases require the exercise of judgment and, as such, rather than hiding behind the dogmas of majoritarianism, originalism, or perfectionism, the judge ought to acknowledge he is making a judgment and offer a sustained argument in defense of the judgment he is making in a particular case. When Justice Thomas decided, for example, that the moral imperative of color-blindness should trump the original understanding of the Constitution in *Adarand*, he should have developed an argument for why we ought to accept that view. Instead, Justice Thomas merely asserted that the moral principle at issue was indeed embodied in the original understanding of the Constitution and claimed that this fact dictated his decision. The only problem, of course, is that this claim is far from factual.
Given what we have said so far, it might be tempting to conclude that we are offering a defense of judicial pragmatism. While there may be some areas of agreement between prudentialism and pragmatism, we believe there are significant differences as well. First, for the pragmatist, the “quest for constitutional foundations” is misguided and judges should feel no strong obligation to be faithful to these indeterminate foundations.\(^5^9\)

We do not think the “quest for constitutional foundations” is “misguided.” Instead, we believe that majoritarians, originalists, and perfectionists have erred in their contentions that this quest leads to a simple commitment to democracy, the rule of law, or higher law. The complexity of constitutional foundations is not, in our view, cause to dismiss them and the judicial virtues they encourage. Instead, we believe judges should feel obliged to respect these foundations, tangled though they may be.

Second, we view many forms of pragmatism as versions of perfectionism. Instead of proposing that judges be guided by abstract moral principles, pragmatists suggest judges be guided by, in the words of judicial pragmatist Richard Posner, “the best results for the future.”\(^6^0\) For pragmatists like Posner, “prudence” is reduced to “interest balancing” when deciding a particular case.\(^6^1\) In a sense, the pragmatist’s conception of prudence is uprooted from the sorts of constitutional foundations we have discussed in this essay. We might gain a deeper understanding of the difference between the pragmatic understanding of prudence and the conception we are defending here by comparing the difference between Aquinas’ conception of prudence with Niccolò Machiavelli’s use of


the idea in *The Prince*. According to Machiavelli, “prudence...consists in knowing how to distinguish degrees of disadvantage, and in accepting a less evil as a good.” For the prince, prudence in politics is a matter of calculation that is largely, if not entirely, independent of concern for moral principle. For Aquinas, though, prudence is inseparable from moral principle. Our understanding of prudentialism is closer to Aquinas. We believe that democracy, the rule of law, and justice are essential parts of a good political system and that we will be better off if judges feel a sense of obligation to (at the very least) keep these values in mind when deciding hard cases.

We admit there may be something less than satisfying about this call for judicial prudentialism. While majoritarianism, originalism, and perfectionism seem to provide fairly clear directives to judges, the prudential approach asks judges to accept that the task of constitutional interpretation in hard cases is complex. While it is certainly true that our account provides a more nuanced approach to constitutional interpretation, we do not think this is cause for dismissing it. If we are right to say that the American constitutional tradition contains within it commitments to democracy, the rule of law, and a belief in the “higher law” of moral principle, then the approach we recommend might be more faithful to the spirit of that tradition. In his treatise on the cardinal virtues, Josef Pieper writes, “The prudent man does not expect certainty where it cannot exist, nor...does he deceive himself by false certainties.” These wise words capture the essence of our message in this essay: a prudent judge should not expect certainty when interpreting a document as complex as the American Constitution, nor should he deceive himself with the false certainties of an overly-simplistic constitutional philosophy.

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62 Thanks to Sean Patrick Eudaily for this comparison.