Introduction

We the People of the United States, in Order to . . . promote the general Welfare . . . do ordain and establish this Constitution for the United States of America.

Constitution of the United States[1]

The Constitution of the United States is Americans' most important civic document. It is a source of national identity, substituting for the religious, linguistic, cultural, or ethnic bonds that hold together many other countries. It is the pinnacle of our legal system, and from its perch it decides many of the most important issues of today, not to mention those in the past.[2] The Constitution is our nation's legal and – to only a slightly lesser degree – cultural "trump card" on these important issues. And yet, Americans disagree about its meaning and how to arrive at its meaning.

I argue in the following pages that the correct way to interpret the U.S. Constitution is originalism. Originalism is the theory of constitutional interpretation that identifies the Constitution's original meaning as its authoritative meaning. This meaning is the text's public meaning when that text was ratified. Judges especially, but all federal and state officers – and all of us, as American citizens – should utilize originalism to interpret our Constitution.

I tie originalism's promise to my conception of originalism, which is structured and justified by law's purpose: to secure the United States' national common good

[1] U.S. Const. pmbl.

[2] The Constitution directly decides the substance of many important issues. For instance, it protects Americans' political speech from significant governmental regulation. U.S. Const. amend. I; *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 734 (2011). It also indirectly decides many other important issues by identifying the authoritative decision-maker for such issues. For example, the Constitution identifies states as the primary decision-makers for whether and how to provide education. U.S. Const. amend. X; *United States* v. *Lopez*, 514 U.S. 549, 564 (1995).

and to enable individual Americans to achieve their own human flourishing. Hence, my conception of originalism is Aristotelian and aretaic. Aretaic is from the Greek word for excellence or virtue – *arete* – which is the idea that humans live best when we live full, happy, flourishing lives. Law in general, and our Constitution in particular, are key mechanisms to help make that possible for Americans, on both society-wide and individual levels.

Originalism's promise is to make sense of our constitutional practice while, at the same time, painting it in its best light. Originalism promises that the Framing, Ratification, and subsequent following of the Constitution was a rational process, one that then and today gives Americans sound reasons to follow. Originalism promises that the important and widespread facets of our existing constitutional practice, like precedent, are healthy and good and should continue to flourish. It also promises that utilizing originalism will identify and support the background conditions through which Americans today – both as a community and as individuals – can best pursue the common good and human flourishing, respectively.

The first part of this book, A *Description of Originalism*, begins in Chapter 1 by briefly describing originalism's history. Though originalism has been with us since the Republic's beginning, it was eclipsed in the early twentieth century. Originalism revived in its modern form beginning in the 1970s and has become increasingly sophisticated since the late 1990s.

Chapter 2 details my conception of originalism: the Constitutional Communication Model. This model of originalism views the Constitution as a reasoned act of intentional lawmaking, the purpose of which was to change the law and recoordinate Americans to secure the common good. I seek to reconcile the major forms of originalism through conceiving of the Constitution's original meaning as the primary mechanism of communication between and among the Framers, Ratifiers, government officers, and all Americans. The Framers and Ratifiers reasonably responded to existing coordination problems and placed solutions to them in the Constitution in the form of legal directives to Americans. The Constitution's original meaning contains the Constitution's reasons that Americans should employ in their practical deliberations as exclusionary reasons, and which coordinate Americans to secure the common good. Chapter 2 also identifies a modest role for constitutional construction – the Deference Conception of Construction – and it describes robust roles for precedent and the judicial virtues. This conception of originalism draws on the Aristotelian philosophical tradition's resources, especially its conceptions of law, legal authority, and virtue.

The second part of this book, beginning with Chapter 3, contains my positive arguments for originalism. My case for originalism has two components. First, I show that originalism is better able to account for the important and the widespread facets of our constitutional practice than other theories of interpretation. This argument runs contrary to a common and potentially powerful argument against originalism: that it cannot fit our constitutional practice, and that adopting

originalism would lead to massive and harmful disruption to our legal and social order. For example, Professor Richard Fallon spoke for many critics when he pointed to a number of facets of our constitutional practice that, he claimed, showed that originalism is inconsistent with current constitutional practice:[3]

> If the Constitution's status as ultimate law depends on practices of acceptance, then the claim that the written Constitution is the only valid source of constitutional norms loses all pretense of self-evident validity. As originalists candidly admit, originalist principles cannot explain or justify much of contemporary constitutional law. Important lines of precedent diverge from original understandings. Judges frequently take other considerations into account. Moreover, the public generally accepts the courts' non-originalist pronouncements as legitimate—not merely as final, but as properly rendered. In urging that existing judicial practices should be altered, originalists are not pure positivists, who insist that the "rule of recognition" prevailing in the United States reflects originalist principles. Rather, originalists, like all other participants in constitutional theoretical debates, carry a burden of normative justification. They must attempt to establish that the constitutional regime would be a better one—as measured by relevant criteria—if constitutional practice were exclusively text-based and if originalist precepts were consistently followed.[4]

My argument that originalism best fits the Constitution and our constitutional practice proceeds in two parts in Chapter 3. First, I rebut claims, like those made by Professor Fallon, and show that originalism does, in fact, substantially fit our constitutional practice, and does so better than competing theories. Originalism best fits both the important and the widespread facets of our constitutional practice. For example, I describe how originalism better fits the most important facet of our practice: our written Constitution's text. Second, I acknowledge that some facets of our practice are in tension with originalism, and that those contrary practices should be limited or rejected, as mistakes. In some situations, this is a cause for regret, because of the unsettlement doing so may cause but, in many situations, it will be a cause for celebration because our actual Constitution is saved from the mistakes falsely attributed to it.

Second, in Chapter 4, I lay out the law-as-coordination account of originalism. I argue that originalism is the most normatively attractive theory of constitutional interpretation because it is the one most likely to secure the common good of American society and individual Americans' human flourishing. This argument proceeds in four parts. First, I explain that the end of human beings is flourishing – what the Greeks called *eudaimonia*, often translated as happiness. Human flourishing occurs when we pursue the basic human goods, such as life, friendship, and knowledge, and do so excellently – virtuously.

[3] Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 545–48 (1999).
[4] *Id.* at 548.

Second, I show that individual human beings can only achieve human flourishing in community with others – in a society that effectively pursues the common good through legal authority. No person is an island, and every person, at all stages of life, needs fellow human beings to effectively pursue happiness. Only a society can provide the organization necessary to produce the goods (broadly conceived to include material, emotional, and spiritual goods) and provide the conditions (*e.g.*, peace, structures for the expression of individual personality, and structures for social cooperation) conducive to individual human flourishing.

Third, I describe how every society of more-than-modest complexity must and does utilize legal authority to coordinate its members. Every society faces a unique combination of circumstances, and within each set of circumstances there are typically a variety of mutually exclusive and yet reasonable means of ordering a society's pursuit of the common good. For this reason, human societies designate authoritative persons and institutions, and give to them the task of authoritatively determining how that society will pursue the common good for its members, through law. These legal authorities characteristically coordinate members of their societies through (1) authoritative, (2) prudential, (3) coordinating decisions, (4) embodied in positive law.

Fourth, I apply this law-as-coordination account to the United States Constitution and show how the Constitution contains American society's foundational authoritative, prudential, coordinating decisions. Americans, at the time of the Founding as well as today, point to the state ratification conventions as having the authority to adopt the Constitution for our society. The Constitution's decisions on how to order American society are prudential: they are all-things-considered judgments made by the Framers and Ratifiers. The Constitution's authoritative, prudential decisions coordinated – and continue to coordinate – Americans' lives toward the common good and individual human flourishing. The Constitution did so by using its original meaning to communicate the Constitution's reasons to Americans who would, in turn, employ those reasons in their practical deliberations and thereby coordinate their activities. Americans in 1789, and Americans today, access the Constitution's decisions – and thereby effectively secure the common good and pursue their individual goods – by utilizing originalism. This gives judges and other interpreters sound reasons to follow the original meaning.

My two-pronged argument for originalism in Part II first takes an "internal" perspective. It argues that our constitutional practice itself commits us to originalism. Then, my argument takes an "external" perspective and maintains that our practice's commitment to originalism is worthwhile because it advances the common good of the United States and facilitates individual Americans' human flourishing.

These two claims naturally complement each other because the jurisprudential foundation for both of my claims is the Aristotelian philosophical tradition. This tradition provides both the description of law and legal systems, and the justification

for law and legal authority, that I employ to analyze the United States Constitution. This legal theory is relatively uncommon in the American legal academy, so I introduce readers to its key concepts as my argument proceeds.

Many assume that a natural law account of the American Constitution must result in the judicial power to invalidate federal and state law through the use of unenumerated natural law or rights.[5] As John Hart Ely famously (and critically) described this general perspective, "[t]he invitation to judges seems clear: seek constitutional values in—that is, overrule political officials on the basis of—the writings of good contemporary moral philosophers."[6] My argument in Chapter 4 shows that, at least in the context of the United States, that assumption is misplaced. Instead, the Aristotelian philosophical tradition's account of our Constitution requires federal judges to utilize originalism.

[5] For a recent counter-example see Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 Geo. L.J. 97 (2016).

[6] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 58 (1980).